

Neutral Citation Number: [2024] EWHC 434 (KB)

Case No: QB-2021-002227

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 1 March 2024

**Before:**

**MS SARAH CLARKE KC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT**

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**Between:**

<b>MR VITALIJUS DZIUGYS</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>ERSAN AND CO SOLICITORS LTD</b>	<b><u>Defendant</u></b>

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**(The Claimant appeared in person)**  
**(Mr Jack Steer instructed by Kennedys Law LLP for the Defendant)**

Hearing dates: 5-7 February 2024  
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**JUDGMENT**

**Judgment Approved by the court for handing down**

**Ms Sarah Clarke KC Sitting as a Deputy Judge of the High Court:**

**Introduction**

1. This is a professional negligence claim brought by the Claimant Vitalijus Dziugys (“Mr Dziugys”) against the Defendant Ersan and Co Solicitors Ltd (“Ersan”). Ersan is a firm of Solicitors which was established in 2008 and routinely acts for claimants and defendants in personal injury claims, medical negligence claims and commercial disputes.
2. Ersan was retained by Mr Dziugys to represent him in his claim for personal injury (“the personal injury claim”) which arose out of a road traffic accident in which Mr Dziugys was involved on 27 January 2011. Ersan was instructed in the case at a very late stage (October 2014), because Mr Dziugys’ previous firm (Hafezi Solicitors (“Hafezi”)) who had previously had conduct of Mr Dziugys’ personal injury claim, ceased to trade in or around September 2014. The personal injury claim went to trial on liability only (“personal injury trial”), on 10 March 2015 at Central London County Court before Recorder Gallagher. Mr Dziugys was unsuccessful at trial, and his claim was dismissed. He was ordered to pay the costs of the defendant in the personal injury claim (“the underlying defendant”) on an indemnity basis, with the sum of £20,000 ordered to be paid as an interim payment.
3. Mr Dziugys alleges that Ersan was negligent in its conduct of his personal injury claim both prior to, and during, the personal injury trial and also after that trial concluded. He alleges that but for Ersan’s negligence:

- i) He would not have lost the personal injury trial and would therefore have been awarded damages for personal injury and other losses he sustained as a result of the road traffic accident; or
  - ii) He would have successfully appealed the personal injury judgment.
4. Ersan denies that it was negligent in its conduct of the personal injury claim at any stage and asserts that in any event, all the issues of which Mr Dziugys complains fail for lack of causation.
5. By order dated 23 May 2023, Master Eastman ordered that breach of duty and causation be tried as preliminary issues. This judgment therefore deals only with those issues.
6. The issues to be decided therefore are:
  - i) What duties of care did Ersan owe to Mr Dziugys?
  - ii) Did Ersan act in breach of those duties of care in the manner alleged by Mr Dziugys in his Particulars of Claim?
  - iii) If there was a breach of duty, then the issue of causation falls to be considered.

## **The applicable law**

### ***Duty of care***

7. A firm of solicitors is vicariously liable for breaches of duty committed by its own staff (*Heywood v Wellers* [1976] Q.B. 446).

8. A solicitor is required to exercise reasonable care and skill in respect of matters within the scope of his retainer. The test is what a reasonably competent solicitor would do having regard to the standards normally adopted in the profession in the areas in which the solicitor practises or holds himself out as having expertise. (See *Midland Bank Trust Co. Ltd and Another v Hett, Stubbs & Kemp (A Firm)* [1979] Ch 384 per Oliver J [402H]-[403B]):

*“Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practising a highly skilled and exacting profession, but I think that the court must beware of imposing upon solicitors—or upon professional men in other spheres—duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests, take it upon himself to pursue a line of inquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession, and cases such as *Duchess of Argyll v. Beuselinck* [1972] 2 Lloyd's Rep. 172; *Griffiths v. Evans* [1953] 1 W.L.R. 1424 and *Hall v. Meyrick* [1957] 2 Q.B. 455 demonstrate that the duty is directly related to the confines of the retainer.”*

9. In *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145. the House of Lords decided that a duty of care in tort was owed by Lloyd's managing agents to Names, and that the existence of the duty of care was not excluded by the relevant contractual regime. Similarly, a solicitor cannot exclude the existence of a tortious duty of care by reference to contractual provisions.
10. Jackson & Powell on Professional Liability 9<sup>th</sup> Edn Chapter 11-087 provides:

*“The question whether the defendant solicitor made a mistake in any given case is usually capable of a definite answer. The question whether a particular mistake was negligent is a matter upon which (in borderline cases) the mere citation of authority is unlikely to be decisive. The judge applies what he perceives to be the standard of “the reasonably competent solicitor”, a creature as mythical as the man on the Clapham omnibus.”*

11. It follows from this that the mere making of a mistake is not of itself sufficient to establish negligence. In *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at [220H]-[221A], Lord Diplock expressed it in this way:

*“If subsequently a barrister is sued by his own client for negligence on what he advised or did in the particular case, he has the protection that the judge before whom the action for negligence against him will be tried is well qualified, without any need of expert evidence, to make allowance for the circumstances in which the impugned decision fell to be made and to differentiate between an error that was so blatant as to amount to negligence and an exercise of judgment which, though in the event it turned out to have been mistaken, was not outside the range of possible courses of action that in the circumstances reasonably competent members of the profession might have chosen to take.”*

12. Although this point was made by reference to the advice / actions of a barrister, it plainly has equal application to solicitors.

13. The assessment of a solicitor’s conduct must take place without the use of hindsight – see *Duchess of Argyll v Beuselinck* [1972] 2 Lloyds Rep 172 at 185 Column 1:

*“In this world there are few things that could not have been better done if done with hindsight. The advantages of hindsight include the benefit of having a sufficient indication of which of the many factors present are important and which are unimportant. But hindsight is no touchstone of negligence. The standard of care to be expected from a professional man must be based on events as they occur, in prospect and not in retrospect.”*

14. As regards the conduct of litigation, Jackson and Powell on Professional Liability 9<sup>th</sup> Edn Chapter 11-184 summarises the position as follows:

*“The conduct of litigation is in part a matter of routine and in part it is an art. By exceptional ingenuity or foresight, the solicitor may secure advantages (sometimes decisive) for his client over the other party. The skilful use of a request for further information, or a timely application for specific disclosure, may bring the other party to its knees in civil litigation. Ingenious pre-trial research and preparation may lead to an acquittal (sometimes an unmeritorious acquittal) in criminal proceedings. However, the solicitor is not negligent if he fails to display exceptional ingenuity in matters of tactics or procedure. What is required of a*

*solicitor is reasonable competence and reasonable familiarity with the procedures of the courts in which he practices, including following local practice directions.”*

15. And at Chapter 11-191:

*“Decisions on matters of evidence frequently involve a high degree of judgment. Witnesses on the fringe of events or corroborative witnesses often turn out to do more harm than good (if, for example, they are shaken in cross-examination, or their evidence conflicts with that given by the primary witnesses). Errors of judgment made by solicitors in this regard are unlikely to be held negligent. For example, in *Roe v Robert McGregor and Sons Ltd*, [ (1968) 1W.L.R. 925 at 930G–930H and 934G–934H] the solicitors acted for contractors who erected a fence and were sued for negligence by plaintiffs who crashed into it. The Court of Appeal held that the solicitors were not at fault in failing to interview a passenger in the car who it was reasonable to suppose would be extremely unlikely to give evidence against his friend the driver and might himself bring an action.”*

### **Causation**

16. For a claim for professional negligence to succeed, in addition to establishing negligence, it is necessary for a claimant to show that the established negligence caused him loss and damage.
17. Mr Dziugys’ case is put on the basis that “*but for*” Ersan’s negligence, he would have won his personal injury trial, or he would have brought a successful appeal against the dismissal of his personal injury claim. That being so, the issue of causation falls to be determined on a “*loss of a chance*” evaluation. This is described in *Perry v Raleys* [2020] AC 352 at [20]-[24]:

*“20. For present purposes the courts have developed a clear and common-sense dividing line between those matters which the client must prove, and those which may better be assessed upon the basis of the evaluation of a lost chance. To the extent (if at all) that the question whether the client would have been better off depends upon what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of*

*probabilities. To the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation.*

*21. This sensible, fair and practicable dividing line was laid down by the Court of Appeal in Allied Maples Group Ltd v Simmons & Simmons [1995] 1 WLR 1602, a decision which received surprisingly little attention in either of the courts below (although, in fairness, the trial judge cited another authority to similar effect: namely Brown v KMR Services Ltd [1995] 4 All ER 598). Allied Maples had made a corporate takeover of assets and businesses within the Gillow group of companies, during which it was negligently advised by the defendant solicitors in relation to seeking protection against contingent liabilities of subsidiaries within the vendor's group. Allied Maples would have been better off, competently advised, if, but only if: (a) it had raised the matter with Gillow and sought improved warranties and (b) Gillow had responded by providing them. The Court of Appeal held that Allied Maples had to prove point (a) on a balance of probabilities, but that point (b) should be assessed upon the basis of loss of the chance that Gillow would have responded favourably. The Court of Appeal (Stuart-Smith, Hobhouse and Millett LJ) were unanimous in that statement of legal principle, although they differed as to the outcome of its application to the facts. It was later approved by the House of Lords in Gregg v Scott [2005] 2 AC 176, at para 11 by Lord Nicholls of Birkenhead and para 83 by Lord Hoffmann.*

*22. The Allied Maples case was about the loss, due to negligence, of the opportunity to achieve a more favourable outcome in a negotiated transaction, rather than about the loss of an opportunity to institute a legal claim. But there is no sensible basis in principle for distinguishing between the two, and none was suggested in argument. In both cases the taking of some positive step by the client, once in receipt of competent advice, is an essential (although not necessarily sufficient) element in the chain of causation. In both cases the client will be best placed to assist the court with the question whether he would have taken the requisite initiating steps. He will not by the defendant's breach of duty be unfairly inhibited in proving at a trial against his advisor that he would have done so, save perhaps where there is an unusual combination of passage of time and scarcity of other probative material, beyond his own unaided recollection.*

*23. Two important consequences flow from the application of this balance of probabilities test to the question what the client would have done, in receipt of competent advice. The first is that it gives rise to an all or nothing outcome, in the usual way. If he proves upon the narrowest balance that he would have brought the relevant claim within time, the client suffers no discount in the value of the claim by reason of the substantial possibility that he might not have done so: see Stuart-Smith LJ in the Allied Maples case [1995] 1 WLR 1602, 1610. By the same token,*

*if he fails, however narrowly, to prove that he would have taken the requisite initiating action, the client gets nothing on account of the less than 50% chance that he might have done so.*

*24. The second consequence flows directly from the first. Since success or failure in proving on the balance of probabilities that he would have taken the necessary initiating step is of such fundamental importance to the client's claim against his advisor, there is no reason in principle or in justice why either party to the negligence proceedings should be deprived of the full benefit of an adversarial trial of that issue. If it can be fairly tried (which this principle assumes) then it must be properly tried. And if (as in this case) the answer to the question whether the client would, properly advised, have taken the requisite initiating step may be illuminated by reference to facts which, if disputed, would have fallen to be investigated in the underlying claim, this cannot of itself be a good reason not to subject them to the forensic rigour of a trial. As will appear, this has an important bearing on the extent of the general rule that, for the purpose of evaluating the loss of a chance, the court does not undertake a trial within a trial.”*

18. When assessing the chance that Mr Dziugys contends that he has lost, he has the burden of proving that he had a real and substantial chance of obtaining the outcome he contends for, as opposed to a speculative chance (see *Allied Maples Group Ltd v Simmons and Simmons* [1995] 1 WLR 1602 at 1614D and F (“*Allied Maples*”)):

*“But, in my judgment, the plaintiff must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one. If he succeeds in doing so, the evaluation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other. I do not think that it is helpful to seek to lay down in percentage terms what the lower and upper ends of the bracket should be.”*

19. It follows that what counts as a “*speculative chance*” is for the court to assess in the exercise of its judgment.

***Burden and standard of proof***

20. It follows from the summary of the relevant legal principles that the burden of proof is on Mr Dziugys to prove both negligence and causation. The standard of proof is the civil standard – the balance of probabilities.

***Civil Procedure Rules and Practice Directions***

21. Mr Dziugys relies upon the following provision of the Civil Procedure Rules (“CPR”) and Practice Directions (“PD”):

***“CPR22***

***22.1***

*(1) The following documents must be verified by a statement of truth—*

*(a) a statement of case;*

*(b) a witness statement;”*

***“PD22***

*2.2 The form of the statement of truth verifying a witness statement should be as follows (and provided in the language of the witness statement):*

*‘I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.’*

*3.8 The individual who signs a statement of truth must print their full name clearly beneath their signature.”*

***“PD32***

*27.6 The originals of the documents contained in the trial bundle, together with copies of any other court orders should be available at the trial.”*

**Background facts**

22. On 27 January 2011, Mr Dziugys was involved in a road traffic accident whilst riding his motorcycle on the M4 motorway. He was working as a courier at the time. A Land Rover 4x4 motor vehicle (“the 4x4”) had suffered what appears to have been a tyre blow out, which caused the driver (Mr Gray) to lose control and the 4x4 to crash into the central reservation, partially blocking the outside lane.
23. Mr Dziugys was travelling in the outside lane and in an attempt to avoid the stationary 4x4, he moved to the left towards, or into, the middle lane, colliding with a lorry which was travelling in the middle lane. This lorry was owned and operated by the underlying defendant and driven by a Mr Hobbs. This collision caused Mr Dziugys to come off his motorcycle and his motorcycle then went underneath the lorry, was dragged down the road, and then burst into flames. Mr Dziugys suffered serious injuries as a result of the collision which have caused him ongoing issues. Mr Dziugys contended that this collision was caused by the negligence of the lorry driver.
24. In February 2011 Mr Dziugys appointed Hafezi to act for him in pursuing his claim for personal injury, under a Conditional Fee Agreement (“CFA”). Hafezi arranged After the Event (“ATE”) insurance with an insurer – ARAG, to cover Mr Dziugys for any adverse costs orders made against him in the personal injury claim. ARAG’s policy bound any new firm that replaced Hafezi, and Clause 9.3 provided that ARAG had the right to request the client file in order to negotiate costs in the event that the claim was unsuccessful.
25. During the period of its instruction (nearly 4 years), Hafezi investigated the circumstances of the accident, issued proceedings against the underlying defendant (the owner of the lorry) and took steps to progress the claim towards trial. The steps taken included:

- i)** Taking witness statements from three independent witnesses to the accident namely Mr Paul Helps, (“Mr Helps”), Mr Raymond Jenkins (“Mr Jenkins”) and Mr. James Powe (“Mr Powe”). Importantly, in the witness statements taken by Hafezi from these witnesses, none of them claim to have actually seen the collision between Mr Dziugys and the lorry and they were therefore unable to give evidence about this and how it had occurred.
- ii)** Drafting two witness statements on behalf of Mr Dziugys. The first one contained a date on the front page of 11 March 2011, but a signed statement of truth dated 10 March 2011 (“the 10 March 2011 witness statement”). This witness statement contained 56 paragraphs and dealt with Mr Dziugys’ evidence on liability, injuries, loss and damage. The second witness statement had a signed statement of truth dated 11 March 2011 (“the 11 March 2011 witness statement”) and contained 31 paragraphs and dealt mainly with liability only.
- iii)** Hafezi successfully defended an application for Summary Judgment brought by the underlying defendant in the personal injury action. Hafezi’s witness statement in respect of this application (from Mr Abdul Hafezi), referred in detail to the evidence of the three independent witnesses from whom statements had been taken. The witness statement provided by Hill Dickinson on behalf of the underlying defendant referred to extracts from, and exhibited, the 10 March 2011 witness statement. This means that that statement must have been disclosed by Hafezi to Hill Dickinson before the Summary Judgment application.

- iv) Hafezi obtained and served a medical report on Mr Dziugys' injuries, treatment and prognosis from Mr Richard Coombs ("Mr Coombs") (a Consultant Orthopaedic Surgeon) dated 3 December 2012. Within this report, Mr Coombs refers to an account of the accident given to him by Mr Dziugys and also refers to having seen a witness statement dated 10 March 2011 which appears to be a reference to the 10 March 2011 witness statement.
  - v) Hafezi dealt with disclosure, which included providing disclosure on behalf of Mr Dziugys and reviewing the disclosure provided by the underlying defendant.
  - vi) Hafezi drafted responses to the underlying defendant's requests for further information.
26. Once Hafezi ceased to trade, Mr Dziugys' case was initially transferred to Clarke Barnes Solicitors LLP ("Clarke Barnes") in September 2014. However very shortly thereafter, Mr Dziugys approached Ersan to take over conduct of his case. Ersan agreed to act for Mr Dziugys in respect of his personal injury claim and a client care letter was provided on 8 October 2014.
27. The client care letter set out the retainer between Mr Dziugys and Ersan which was described as acting on his behalf, "*in pursuing your claim for personal injury (and other losses) arising out of the RTA.*" Ersan's Terms and Conditions ("T&C's") attached to its client care letter provided (of relevance) that:

*"Instructions.*

*In appointing us to act on your behalf, you authorise us to take any necessary steps to protect your interests in that matter (unless you instruct us to the contrary). We cannot be held responsible for any failure*

*of ours to advise or comment on any matter which falls outside the scope of your instructions or any matters of which you fail to inform us.*

#### *Costs Orders*

*There will be situations where you may be responsible for another party's legal costs if your claim is unsuccessful or if you withdraw from the case.....these costs of another party may be covered by an existing insurance arrangement that you have or you may be able to purchase insurance to cover this potential liability. We can help you with this.*

#### *After the Event Insurance*

*We recommend that a policy of after-the-event insurance is purchased on your behalf. That insurance will protect you by paying the Defendant's legal costs and your disbursements if an Order for costs is made against you.*

#### *Confidentiality and Conflicts*

*Where we represent you on behalf of your funder or insurer, we may be required to discuss your case or disclose your file to the funder or insurer (insurance intermediary) for indemnity purposes. Before we do we will obtain your informed consent.*

#### *Storage of papers and documents*

*We will keep your file of papers (except for any of your papers which you ask to be returned to you) for 6 years and on the understanding that we have your authority to destroy your file of papers 6 years after sending you our final bill or when we notify you that the matter has been concluded. The firm's working papers, all correspondence between you and the firm and other papers prepared by us will remain our property. We will not destroy documents you have previously asked us to deposit in safe custody.*

#### *Client Care*

*We give you our assurance that the work which we will carry out on your behalf will be of the highest standard and we will report to you as appropriate throughout the matter.*

#### *Responsibilities*

*We will - REPRESENT your interests and keep your business confidential.”*

28. As part of the CFA, Ersan obtained the consent of ARAG to continue the ATE insurance policy with Ersan replacing Hafezi as Mr Dziugys' legal representative. The ATE insurance policy protected Mr Dziugys against being personally liable to pay an adverse costs order in the event that he lost the personal injury case. ARAG's Terms of Business contained provisions at paragraph 9(3) that in the event that the claim was lost:

*“You must send ARAG a copy of the Court order or opponent's schedule of costs within 7 days of receipt from the Court or opponent. Please also confirm whether they are VAT registered and when the opponent's solicitor was Instructed. If you have not already done so, please also confirm when proceedings were Issued/served.*

*You must not agree opponent's costs without ARAG's prior approval. ARAG may request the file to negotiate costs, or may ask you to do so. Alternatively ARAG may Instruct a Cost Draftsman.”*

29. Once Ersan was instructed, Mr Ercan Sami (“Mr Sami”), the trainee solicitor with conduct of Mr Dziugys' case, set about obtaining Mr Dziugys' client file from Clarke Barnes. Mr Sami also asked Mr Dziugys to provide him with any documents in his possession. Mr Sami understood that most of the substantive preparations for trial had already been completed by Hafezi. According to the Directions made by the County Court, the deadline for exchange of witness statements had either expired or was about to expire and therefore there was some urgency in dealing with this issue.
30. There is an attendance note dated 9 October 2014 made by Mr Sami which states that Mr Dziugys told him in a telephone call that as far as he was aware, Hafezi had already provided the witness statements to the underlying defendant. On the same day, Mr Sami sent an email to the underlying defendant's solicitor – Hill Dickinson, regarding exchange of witness statements and asking Hill Dickinson to agree to exchange taking place without the need for Ersan to apply for an extension of time.

31. On 9 October 2015, Mr Dziugys provided Mr Sami with a number of documents by attaching them to a number of emails. These included the Particulars of Claim, Part 18 Response dated 8 October 2015, the Thames Valley Police Collision Report, the witness statement of PC Hawes the Thames Valley police investigator, a draft witness statement from Mr Abdul Hafezi in respect of the Summary Judgment application, the record of Mr Hobbs' interview at the scene of the accident and the witness statements of the three independent witnesses.
32. A letter was sent by Ersan to Hill Dickinson on 9 October 2014, enclosing Mr Dziugys' Part 18 Response and asking Hill Dickinson to provide Ersan with all Court documents. Hill Dickinson replied by letter dated 14 October 2014 stating that it had already served its witness evidence and asking that Ersan serve its witness statements. Ersan served the witness statements on 16 October 2014. These were the 11 March 2011 witness statement and the statements from the three independent witnesses, Mr Helps, Mr Jenkins and Mr Powe.
33. Ersan received the claim file from Clarke Barnes on 18 October 2011. The documents received by Ersan did not contain the "*wet ink*" versions of the 10 or 11 March witness statements. The file also did not contain tachograph readings from the underlying defendant's lorry, and it appears that it also did not contain any statement from Mr Gray who was the driver of the 4x4.
34. On or about 31 December 2012, Ersan received a hearing notice from the County Court confirming that the personal injury trial had been listed for 10-11 March 2015. Ersan advised Mr Dziugys of this by letter dated 7 January 2015.
35. On 7 February 2015, Ersan sent a letter to Hill Dickinson enclosing a draft trial bundle index and asking for confirmation that this was agreed. Hill Dickinson

responded by email on 9 February 2015 asking for additional documents to be included in the trial bundle. One of these was, “*your client's witness statement of 11/3/2011 (which runs to 56 paragraphs).*”

36. The final version of the personal injury trial bundle is not in the trial bundle for this professional negligence action. The only document provided is an index which shows that the personal injury trial bundle contained (amongst other things):
- i)** All witness statements that had been exchanged on 16 October 2014 (including the 11 March 2011 witness statement).
  - ii)** The 10 March 2011 witness statement.
  - iii)** Photographs of the 4x4, two police accident reports and an accident report obtained by the underlying defendant.
37. On 9 February 2015, Ersan wrote to Hafezi, stating that whilst preparing the trial bundle, it had noticed several documents missing. The letter asked Hafezi to provide the Court Directions, the Claimant’s list of documents and Counsel’s opinion and notes following the underlying defendant’s application to strike out the personal injury claim. On 16 February 2015, Ersan wrote to Clarke Barnes requesting the same documents. A chaser letter was sent to Hafezi on 16 February 2015. There are no documents in the trial bundle that show whether there was any reply from either firm.
38. On 9 February 2015, Mr Dziugys spoke to Mr Sami and asked for a conference with the Barrister who would be representing him at the forthcoming personal injury trial.

39. On 23 February 2015, a conference took place with Mr Ian Skeate (“Mr Skeate”), who was Counsel instructed to represent Mr Dziugys at trial. Mr Dziugys and Mr Sami attended this conference.
40. There is an attendance note dated 6 March 2015 in which Mr Sami records that Mr Dziugys telephoned and asked for “*a copy of his witness statement dated 10 March*”. Mr Sami emailed the 10 March 2011 witness statement to him the same day.
41. On 10 March 2015, the personal injury trial (on liability only), took place at Central London County Court before Mr Recorder Gallagher. At the outset of the trial, Mr Dziugys’ Counsel Mr Skeate made an oral application to amend the Particulars of Claim to include certain factual matters relating to the accident.
42. During the personal injury trial, when Mr Dziugys was called to give evidence, Mr Skeate took him to both the 10 and 11 March 2011 witness statements in the trial bundle and in the usual way, asked him to confirm that he had signed both statements and to confirm the truth of their contents. Mr Dziugys did so and raised no issue about either statement at this time. During cross-examination however, whilst being cross-examined about inconsistencies between the contents of the 10 March 2011 witness statement, his evidence at trial and other evidence given by him as recorded in other documents, Mr Dziugys stated for the first time that the signature on this witness statement was not in fact his, and that this was not his witness statement.
43. In an ex tempore judgment given at the conclusion of the trial, Recorder Gallagher dismissed Mr Dziugys’ claim and entered judgment for the underlying defendant. He also ordered Mr Dziugys to pay the underlying defendant’s costs on an indemnity basis and made an order for interim payment in the sum of £20,000.

44. On 27 March 2015, Mr Dziugys emailed Mr Sami attaching a signed opinion from a handwriting expert which stated that the signature on the 10 March 2011 witness statement was “*not a genuine signature of Vitalijus Dziugys but signed by someone else*”. The opinion is marked “*Provisional Professional Opinion Only – Not Intended for Legal Purposes*”. Mr Dziugys’ email expressed his view that this is a “*big crime, which did influence to [sic] my case*”. He also stated, “*there are more details which was very incorrect during the trial*”. He asked, “*is there a time limits [sic] for an appeal and do I receive a letter from the court with a judge [sic] decision?*”.
45. Mr Sami replied on 28 March 2015 stating, “*Unfortunately I do not think an appeal is worth pursuing regardless on whether the signature on the statement was not yours. The Judge simply did not believe the accident the way it happened*”. He suggested that Mr Dziugys should bring up the issue of the false signature with his previous solicitors and see what they have to say.
46. After the 21 day deadline to lodge an appeal had passed, ARAG requested the case file and Mr Sami sent it to ARAG on 16 April 2015, although it appears that not all documents were sent. He did not make a copy of the file before sending it to ARAG. Thereafter, Mr Dziugys made a number of requests for his case file from Ersan who himself made a number of requests to ARAG for the return of the file. ARAG refused these requests. Mr Dziugys made complaints to the Legal Ombudsman and the Solicitors Regulation Authority in relation to Ersan’s failure to provide him with a copy of his file. These complaints were all dismissed. The file was eventually returned by ARAG to Ersan on or about 14 June 2017 and Ersan then forwarded it to Anton Van Dellen of Goldsmith Chambers who was Mr Dziugys’ legal representative at that time.

### **The particular allegations of negligence**

47. In his Particulars of Claim, Mr Dziugys sets out a number of matters which he contends amount to breaches of the duty of care owed to him by Ersan. I will deal with these by summarising the evidence presented at this trial and setting out my factual findings in respect of each matter.

### ***Witnesses***

48. The following witnesses gave evidence at trial:

### ***Mr Dziugys***

49. Mr Dziugys conducted this trial as a litigant in person (“LiP”). I recognise that this was a stressful and difficult experience for him as it would be for any LiP. Although Mr Dziugys speaks excellent English, it is not his first language, and this added to his difficulties in conducting the proceedings. That said, although at times I had to seek clarification from him on his submissions, and at times during his evidence he did not understand a question or had to ask for it to be repeated, on the whole he was able to communicate what he wanted to say both in the conduct of the proceedings and during his evidence. His mastery of the documents in the trial bundle was particularly impressive and it was clear to me that he had done a great deal of preparation for this case.

50. As regards his evidence, when Mr Dziugys was recalling events that happened a number of years ago, his memory was not particularly good. However, in addition, Mr Dziugys is undoubtedly convinced of the merits of his case and also feels aggrieved that he lost his personal injury case and thus has received no compensation for the serious injuries that he suffered in a serious road traffic accident. This in my

view affected the nature and quality of his evidence and meant that he was not willing to make concessions where appropriate and he was also prone to not answering questions put to him in cross-examination and instead repeating what he regarded as the important parts of his case. At times during his evidence, Mr Dziugys added allegations and details that he had never raised before and gave evidence that was contradicted and undermined by contemporaneous evidence. The combination of these issues damages his credibility and mean that I regard Mr Dziugys as an inconsistent and unreliable witness in many respects. Where his evidence conflicts with the contemporaneous documents, I prefer the contents of the contemporaneous documents over Mr Dziugys' evidence. Similarly, where Mr Dziugys' evidence conflicts with evidence given by other witnesses, I prefer the evidence of those witnesses.

***Mr Ercan Sami***

51. Mr Sami is a practising solicitor who qualified in July 2015. At the time of the events in question he was a trainee solicitor at Ersan, nearing the end of his training contract. He handled mainly personal injury and medical negligence claims, acting for both claimants and defendants. He had conduct of Mr Dziugys' personal injury case from the point at which he became a client of Ersan in October 2014, until Mr Sami left Ersan in July 2015. At the time of the events in question, Mr Sami was known as "Ercan Yurun". For personal reasons he changed his name to Ercan Sami in 2015 and I therefore refer to him by his chosen name in this judgment.
52. I found Mr Sami to be an honest witness. His memory of events given the lapse of time was not good – a matter that he made clear in his witness statement and during his oral evidence in court. Where therefore his answer conflicted with a

contemporaneous document then I prefer the contents of the document. He clearly found it difficult being cross-examined by Mr Dziugys in person, given that Mr Dziugys was alleging that he had been professionally negligent. This meant that, particularly at the beginning of cross-examination, he was defensive and reluctant at times to answer fully the questions that were being asked. However, as the cross-examination proceeded, his defensiveness dissipated and I find that Mr Sami made concessions where appropriate and did his best to assist the court in his evidence.

***Mr Ian Skeate***

53. Mr Skeate is a practising Barrister having been called to the Bar in 2002. His practice mainly comprises claimant and defendant personal injury, professional discipline and regulation, property and commercial matters. Mr Skeate was trial Counsel instructed by Ersan to represent Mr Dziugys in his personal injury trial. Mr Skeate was instructed in February 2015 and attended a pre-trial conference on 23 February 2015 at which Mr Dziugys and Mr Sami were present. He represented Mr Dziugys at his personal injury trial on 10 March 2015. I found Mr Skeate to be an honest witness who did his best to assist the court. He was extremely courteous to Mr Dziugys and did his best to answer his questions and provide assistance and explanation as regards the events that were within his knowledge and recollection. He made it clear where due to the lapse of time he was unable to remember events.

***Mrs Serpil Ersan***

54. Mrs Serpil Ersan (“Mrs Ersan”) is a practising solicitor who qualified in 2001. She is the Managing Partner of Ersan and carried out that role at the time of the events in question. I found Mrs Ersan to be an honest witness. She also accepted when her memory of events was not good given the lapse of time. In addition, the evidence that

she could give was limited in scope given that she was not directly involved in most of the events with which this case is concerned.

***The period between Ersan’s instruction on 8 October 2014 - to the personal injury trial on 10 March 2015***

55. Mr Dziugys alleges that Ersan failed to take reasonable care and diligence to inspect and ensure that the file of Mr Dziugys’ original documents transferred from Hafezi to Ersan was full and in complete order and included all original documents. As to this, Mr Dziugys complains that:

- i)** Ersan failed to identify that the 10 March 2011 witness statement was not signed by him and that his signature had been forged.
- ii)** Ersan did not identify that the 10 and 11 March 2011 witness statements did not contain his printed name underneath his signature as required by Practice Direction 22 – paragraph 3.8.
- iii)** Ersan should have identified that the following documents were not in the case file and should have taken steps to obtain these documents:
  - a) The original “*wet ink*” versions of the 10 and 11 March witness statements.
  - b) Police photographs of the accident scene.
  - c) Tachograph readings from the underlying defendant’s lorry.
  - d) A witness statement from Mr Gray (the driver of the Land Rover 4x4).

56. Ersan asserts that it inherited the case from an ostensibly experienced firm with considerable experience of personal injury litigation. By the time Ersan was instructed, virtually all pre-trial steps had been completed, including evidence gathering, disclosure, preparation of witness statements and successfully defending an application for summary judgment. Ersan's position is that a reasonably competent solicitor in its position was entitled to consider that these steps had been undertaken properly.
57. Mr Dziugys agreed in evidence that Hafezi had substantially prepared the claim for trial and had complied with the majority of the directions. He understood that Hafezi had investigated the case and identified relevant documents. He was unsure whether disclosure had been done and pointed out that he was still recovering from, and having treatment for, the injuries he sustained in the accident.

***The 10 and 11 March 2011 witness statements***

58. Mr Dziugys alleges in summary that Ersan did not take reasonable care to check the 10 March 2011 witness statement and identify that the signature was a forgery and that it failed to notice that the signed statement of truth did not contain the printed name of the person signing. He also alleges that Ersan did not ensure that it had the originals of the 10 and 11 March 2011 witness statements on the case file. His position is that had it taken these steps, Ersan would have realised that the 10 March 2011 witness statement was not authored by Mr Dziugys and it would not therefore have been included in the trial bundle for the personal injury claim.
59. Ersan does not dispute that it appears that the signature on the declaration of truth on this witness statement may not be Mr Dziugys' signature but asserts that there was no reasonable basis for it to identify that the 10 March 2011 witness statement was

forged and / or otherwise did not represent Mr Dziugys' evidence. It accepts that the "wet ink" versions of these statements were not on the case file but asserts that it had no reason to believe that these statements were not authentic.

***The evidence***

60. Mr Sami's evidence was that he spoke to Mr Dziugys by telephone on 9 October 2014 regarding exchange of witness statements and that Mr Dziugys told him that he remembered his previous firm already providing the statements to the underlying defendant. This conversation is recorded by Mr Sami in a file note dated 9 October 2014. Mr Sami was unclear on whether exchange of witness statements had in fact taken place and therefore sought an extension of time for service from Hill Dickinson. At this point, Mr Sami had not received the case file from Clarke Barnes. As summarised at paragraph 31 above, on 9 October 2014, Mr Dziugys himself emailed Mr Sami a number of documents. Mr Sami was unable to recall how he obtained the 11 March 2011 witness statement but said in evidence that it may have been provided to him by Mr Dziugys during their initial meeting. On 16 October 2014, Mr Sami served on Hill Dickinson, the witness statements of Mr Helps, Mr Jenkins, Mr Powe and the 11 March 2011 witness statement. He did not serve the 10 March 2011 witness statement and it is not clear whether he had been provided with a copy of this witness statement at this time.

61. Mr Sami was unable to recall when he received the client file from Clarke Barnes, but an attendance note dated 17 October 2014 records that Mr Sami spoke to Mr Dziugys and told him that he had received the file and would review it the following day. Mr Sami drafted an attendance note dated 18 October 2014 relating to his review of the file. He noted amongst other things that there was ATE insurance in place with

ARAG and he therefore needed to contact them, the trial looked to be proceeding based on liability only, Court directions were not in the file and needed to be requested, and on file were “*two witness statements – one was dated before and longer*” – this appears to be a reference to the 10 and 11 March 2011 witness statements.

62. The attendance note does not record that Mr Sami noticed anything untoward about the signed statements of truth on these witness statements, including that the signers name was not printed underneath the signature. Similarly, the note does not record that Mr Sami noticed that the 10 March 2011 witness statement contained information relating to events that postdate the supposed date of this witness statement and post-date the date of the signature on the Statement of Truth. This means that the 10 March 2011 could not have been made or signed on that date.
63. In his witness statement, Mr Sami stated that nothing stood out to him during his review of these witness statements other than that one was longer than the other. He certainly did not have any concern that the signature on the 10 March 2011 witness statement was not that of Mr Dziugys.
64. Mr Sami stated in evidence that he could not recall giving it much thought at the time, but looking at the statements now, given that the personal injury trial was to be on liability only, it made sense that the 11 March 2011 witness statement appears to be a pared down version of the 10 March 2011, in which passages dealing largely with quantum have been removed. Mr Sami made clear however that this view was expressed with the benefit of hindsight. Mr Sami does not recall Ersan ever receiving “*wet ink*” copies of the 10 or 11 March 2011 witness statements.

65. Mr Sami arranged for ARAG to continue its ATE cover and he also obtained a copy of Mr Hobbs the lorry driver's witness statement from Hill Dickinson. In an attendance note dated 7 November 2014, Mr Sami informed Mr Dziugys that the trial would be on liability only. This demonstrates that Mr Dziugys was aware of this.
66. On 7 January 2015, Mr Sami wrote to Mr Dziugys that his trial would take place on 10-11 March 2015. The letter informed him that, "*the best preparation for the hearing is to make sure that you are familiar with the documents in particular the medical evidence and your statement*".
67. In or around February 2015, Mr Sami began preparation of the trial bundle and the underlying claim. On 7 February 2015, Ersan sent a letter to Hill Dickinson enclosing a draft trial bundle index and asking for confirmation that this was agreed. As summarised at paragraph 35 above, Hill Dickinson responded by email on 9 February 2015 asking for additional documents to be included in the trial bundle. One of these was, "*your client's witness statement of 11/3/2011 (which runs to 56 paragraphs)*." This is clearly a reference to the 10 March 2011 witness statement which contains 56 paragraphs. Mr Sami's evidence was that although he cannot say definitively how this statement came to be in Hill Dickinson's possession, he notes from the claim file that the medical expert report from Mr Richard Coombs dated 3 December 2012, contains a reference to a statement dated 10 March 2011. The file also showed that Hill Dickinson requested a copy of this witness statement by letter dated 5 March 2014 and that this was supplied by Hafezi to Hill Dickinson on 19 March 2014. This 10 March 2011 witness statement was also referred to in the witness statement of Mr Lynch of Hill Dickinson which was prepared for the Summary Judgment application, because various paragraphs from this statement are referred to or quoted therein. I

find therefore that Hafezi did provide a copy of this witness statement to Hill Dickinson at some time prior to the Summary Judgment application.

68. As summarised at paragraph 36 above, only the index of the personal injury trial bundle has been provided to me. The final version of the personal injury trial bundle is not in the papers for this trial. The index shows that it contained both the 10 and 11 March 2011 witness statements.
69. Mr Sami said in evidence that he recalls being satisfied at the time that the trial bundle was complete and that there were no missing documents that were material to Mr Dziugys' case save for the Directions Order and the claimant's disclosure list – which he requested from Hill Dickinson, and the documents requested in his letter to Hafezi dated 9 February 2015 as set out at paragraph 37 above. The trial bundle was lodged at court on 28 February 2015.
70. On 23 February 2015, Mr Dziugys attended a conference with Counsel (Mr Skeate), which was also attended by Mr Sami. Following that conference, there is an attendance note drafted by Mr Sami stating that Mr Dziugys had telephoned him and asked for a copy of "*the Defendant's witness statement*".
71. As stated at paragraph 25(ii) above, the 10 March 2011 witness statement was significantly longer than the 11 March 2011 witness statement and dealt with liability, injuries, loss and damage whereas the 11 March 2011 witness statement dealt mainly with liability. The contents of these statements are not therefore identical, however they do contain in parts the same wording. Both witness statements describe the circumstances of the accident in broadly similar terms:

- i) In the 10 March 2011 witness statement, it states that Mr Dziugys moved to his left, he braked, tried to slow down and as he did so he heard a sound of brakes behind him being applied and he recalled lights at the back of him. As he did so, he heard the sound of another vehicle braking behind him. The next thing he recalled was sliding along the road surface.
- ii) In the 11 March 2011 witness statement, it states that when Mr Dziugys saw the 4x4, he tried to brake, slow down and move into the inside lane. He successfully moved into the inside lane and recalls at this time hearing the sound of another vehicle braking behind him. The next thing he recalls is lying on the ground.
- iii) Both statements state in identical terms, that he did not know the circumstances which gave rise to his injuries, but he blamed the owner of the 4x4 for the accident because if his vehicle had not been blocking the outside lane then he would not have had the accident.

72. As I have already observed, the 10 March 2011 witness statement refers in various paragraphs to events which postdate the date on which this statement purports to have been made and signed.

73. Mr Dziugys is adamant that the 10 March 2011 witness statement was not authored by him and that the signature on that witness statement is not his signature and is therefore a forgery. As summarised at paragraph 44 above, he has provided a “*Provisional Professional Opinion*” from a handwriting expert stating that the signature on the 10 March 2011 witness statement is not his signature.

74. Mr Dziugys said in evidence that he was not involved in the 10 March 2011 witness statement and that it is a “*fake statement*” and nobody knows who drafted this statement or when. This is despite the fact that it had been sent to Mr Coombs and to Hill Dickinson who referred to it in its witness statement for the Summary Judgment application (see paragraph 25(iii) above).
75. Mr Dziugys said in evidence at this trial that he did make a witness statement in March 2011, which he signed, and he confirmed that it was his signature on the statement of truth in the 11 March 2011 witness statement. He would not however confirm that the 11 March 2011 witness statement was the statement that he signed because the original is not available for him to inspect. This is at odds with the position he has taken up to now and in his Particulars of Claim in which he asserts at paragraph 15 that he prepared and signed the 11 March 2011 witness statement. He agreed however that the description of how the accident happened at paragraphs 10-12 of this witness statement accords with how he says the accident occurred. He also agreed that the description of how the accident occurred in paragraph 14 of the 10 March 2011 witness statement is similar to the account given in the 11 March 2011 witness statement. He said however, that neither witness statement records that he was hit from my behind and “*my case is I was hit from behind*”. He would not accept that the account of the accident in both witness statements is similar to his description of how the accident happened in both the personal injury trial or in this trial. I am afraid that I reject Mr Dziugys’ evidence and consider that it is a belated attempt to distance himself from the content of the 11 March 2011 witness statement for reasons that are not entirely clear. I find that, consistent with his case up until trial, Mr Dziugys did make the 11 March 2011 witness statement and he did sign the statement of truth it contains.

76. Mr Dziugys did not recall whether the 10 March 2011 witness statement was discussed at the conference with Counsel on 23 February 2011, however it seems likely that it was because there is an attendance note dated 6 March 2015 in which Mr Sami records that Mr Dziugys telephoned and asked for “*a copy of his witness statement dated 10 March*”. This attendance note does not record Mr Dziugys expressing any concerns about the 10 March 2011 witness statement. I consider that had he done so, this would have been recorded in Mr Sami’s attendance note as it would have been an important matter that would have required Mr Sami’s immediate action and attention. Mr Sami emailed the 10 March 2011 witness statement to Mr Dziugys the same day. Despite the contemporaneous evidence, Mr Dziugys repeatedly denied in cross-examination in this trial that he had telephoned Mr Sami on 6 March 2015 and denied that he had requested a copy of the 10 March 2011 witness statement. He denied that he had known about the existence of the 10 March 2011 witness statement at this time and stated that therefore he did not telephone Mr Sami and ask for it. I reject this evidence because it is flatly contradicted by Mr Sami’s contemporaneous attendance note and by subsequent events, and I find that it is an attempt by Mr Dziugys to distance himself from knowledge of, and involvement in, the 10 March 2011 witness statement.

77. In evidence, Mr Dziugys did accept that he received Mr Sami’s email of 6 March 2015 attaching the 10 March 2011 witness statement. He accepted that he did not raise any issues or concerns with Mr Sami about this witness statement. He also accepted that he knew the importance of preparing for trial by carefully reviewing the witness evidence and making sure he was familiar with the content of his witness evidence. He said however that the statement did not “*raise any suspicion for me*” and that he didn’t realise that it was a forgery until he was in the witness box during

the personal injury trial. I find that the only credible explanation for Mr Sami emailing the 10 March 2011 witness statement to Mr Dziugys is because he had telephoned him to ask for it. I also find, based on Mr Dziugys' evidence, that he must have reviewed this witness statement following receipt of it. The fact that it bears significant similarities to the 11 March 2011 witness statement in terms of identical wording in some paragraphs, and very similar descriptions of how the accident happened, cannot be a coincidence. The fact that the 10 March 2011 witness statement was provided to Mr Coombs and Hill Dickinson by Hafezi and was referred to in the Summary Judgment application, makes it even more unlikely that Mr Dziugys was unaware of its existence prior to 6 March 2015. The important point however is, that on receiving and reviewing this witness statement on 6 March 2015, he raised no concern to Mr Sami about it whatsoever. This is inconsistent with the case that he is now running because on that case, it is to be expected that on reviewing this witness statement, he would have immediately realised the issues with the statement that he is raising now and which he raised during cross-examination in the personal injury trial and he would have immediately reported these to Mr Sami. I find therefore that there was no reason for Mr Sami to believe that Mr Dziugys had any issue with this witness statement or its contents, and I find therefore that Mr Sami was entitled to believe that he did not have any such issues or concerns.

78. Mr Dziugys also complains that Mr Sami should have noticed that neither the 10 nor 11 March 2011 witness statements complied with PD 22- paragraph 3.8 and PD 32 – paragraph 27.6 (see paragraph 21 above).
79. Mr Sami said in evidence that when he received the 10 March 2011 witness statement from Hafezi, he reviewed it and he did notice that it did not have a printed name

underneath the signature. He did not do anything about this, or raise it with Mr Dziugys, because he had no reason to think that there was anything wrong with this statement. As stated at paragraph 62 above, his attendance note following review of the case file does not record any matters of concern with respect to either the 10 or 11 March 2011 statements, other than noting that one was dated before and was longer than the other.

80. Mr Sami said that at the time he believed that he had the original statements – in the sense that although he could not remember whether he had the “*wet ink*” versions, these witness statements had been provided with the documents in the case file and he had no reason to believe that the witness statements it contained were not true copies.
81. Mrs Ersan accepted in evidence that Ersan has a duty to comply with the CPR and associated PDs and also accepted that in accordance with PD 32, original documents should be available at trial. She accepted that Ersan had a duty to check the file received from Hafezi, however she did not have conduct of this case and therefore was unable to confirm if the original witness statements were in the file.
82. Mr Sami said that at the pre-trial conference with Counsel on 23 February 2015, Mr Skeate went through all the documents in the trial bundle with Mr Dziugys and he raised no issues about them.
83. Mr Skeate said that he could not recall whether he noticed that there was no printed name underneath the signatures on the 10 and 11 March 2011 witness statements. He considered it likely that he would have had both witness statements at the conference as they were part of the trial bundle. He has no recollection of noticing anything untoward about the 10 March 2011 witness statement, or anything being raised with him.

84. Mr Skeate said that at the personal injury trial, he took Mr Dziugys to both witness statements and asked him to confirm the signatures and the truth of their contents which Mr Dziugys did. Mr Skeate pointed out that no one took issue with the lack of printed name on the witness statements, including the underlying defendant and Recorder Gallagher. I accept this evidence. I find that had Mr Skeate or Mr Sami been made aware of any issue regarding the 10 March 2011 witness statement (or for that matter the 11 March 2011 witness statement), they would have taken steps to investigate these issues prior to trial. I find that Mr Skeate would not have taken Mr Dziugys to the 10 March 2011 witness statement and asked him to confirm the signature and the truth of its contents if he had any reason to doubt the authenticity of this witness statement. To do so would have been a breach of his duty to the Court and to his client. I find that the reason Mr Skeate acted as he did was because Mr Dziugys had given neither him nor Mr Sami any reason to believe that the 10 March 2011 witness statement was not authored and signed by him. I also find that given that Mr Dziugys gave evidence under oath at trial, for him to have affirmed the signature and contents of the 11 March 2011 witness statement in circumstances where he knew that his affirmation was untrue, would be a serious matter and this would have been apparent to Mr Dziugys given that he had only just taken the Court oath. The fact that he did so therefore provides further evidence that neither Mr Skeate nor Mr Sami could have been expected to have any knowledge of any concerns from Mr Dziugys about this witness statement.
85. During cross-examination in this trial, it was put to Mr Dziugys that he only disavowed the 10 March 2011 witness statement at the personal injury trial because he was being cross-examined about inconsistencies between it and other evidence given by him. The suggestion being made was that Mr Dziugys in effect changed his

position as regards this witness statement when he realised that it was not helping his case. Mr Dziugys maintained that it was only during cross-examination that he realised that he had not signed this statement and that it was not made by him. Given all the matters that I have set out above, I reject this evidence and find that it is more likely that Mr Dziugys decided to disavow the 10 March 2011 witness statement when he realised in cross-examination that it was not helping him.

86. Mr Dziugys complains that at the personal injury trial, Recorder Gallagher used the 10 March 2011 witness statement to discredit his evidence. However, when Recorder Gallagher’s judgment is read as a whole, it is clear that there were numerous reasons why he did not accept Mr Dziugys’ evidence, of which the 10 March 2011 witness statement was only a small part. Recorder Gallagher referred at length to material differences in the accounts about the accident given by Mr Dziugys in the 11 March 2011 witness statement (which Mr Dziugys up until this trial appeared to accept was authored and signed by him), the account given by him to Mr Coombs, the account given by him to the police, the account given in his Part 18 Response and his account given in evidence at the personal injury trial, in respect of which Recorder Gallagher found at paragraph 21 of his judgment that Mr Dziugys “*came across as equivocal and unimpressive*”. At paragraph 26 of the judgment, Recorder Gallagher concluded that, “*the Claimant is a confused and unreliable witness; I stress that; not dishonest, but unreliable*”. At paragraph 47, he found that, “*The Claimant’s accounts as to how the collision occurred are all incorrect. For that reason alone the claim would fail, the Claimant being an utterly unreliable witness*”.
87. I find therefore that the 10 March 2011 witness statement was only a small part of Recorder Gallagher’s reasoning and that there were multiple other reasons why he did

not accept Mr Dziugys' evidence of how the accident happened.

***Police photographs of the accident scene***

88. Mr Dziugys alleges that Ersan was negligent in failing to present accident photographs to the court. These he claimed would have shown that the 4x4 was only partially blocking the outside lane of the M4 motorway. He argues that these photographs would have shown that Recorder Gallagher's conclusion that the 4x4 was blocking most of the fast lane was incorrect. Mr Dziugys has produced a large number of photographs which he states he obtained from the police, and which are contained in this trial's bundle. These include a number of photographs of the 4x4 in situ at the accident scene. These photographs do indeed show that the rear of the 4x4 was abutting at an angle into the offside lane but was not totally blocking it.
89. The index to the personal injury trial bundle records that some 18 photographs of the 4x4 were contained within it. Mr Dziugys asserts that these are the photographs contained in the trial bundle for this trial which show the 4x4 after it had been recovered from the scene of the accident and therefore do not show the position of the 4x4 in situ at the scene of the accident.
90. Mr Sami said in evidence that whatever photographs were in the claim file would have gone into the personal injury trial bundle. He was unable to recall what these were. Mr Skeate was unable to recall what photographs were in the trial bundle. He said that Mr Dziugys did not raise any issues about accident photographs with him during the conference or at trial.
91. It is therefore not at all clear what photographs of the 4x4 were in the personal injury trial bundle. Ersan submits that whatever photographs were in the personal injury

trial bundle were those that had been previously disclosed by both parties. Ersan submits that it was entitled to conclude that the photographs in the personal injury trial bundle represented those that were available and given that the personal injury trial bundle contained two police reports which dealt with the position of the 4x4, a reasonably competent solicitor was entitled to conclude that no further evidence was required.

92. It is clear that in addition to photographs, there was other evidence in the personal injury trial which dealt with the position of the 4x4. I note that the Thames Valley Police Report which was in the personal injury trial bundle, states that the position of the 4x4 was at an angle across the vibraline with its front half and rear offside buried in the concrete barrier of the central reservation and with its rear nearside protruding into the offside lane.
93. Recorder Gallagher’s judgment refers at paragraph 8 to a “*police plan*” which is not to scale but which shows that the Land Rover was “*blocking most of the fast lane but it did not obtrude into the middle lane. Indeed it was some feet away from so obtruding*”. This accords with the description in the Thames Valley Police Report. Recorder Gallagher was therefore aware of the position of the 4x4.
94. At paragraph 54 of the judgment, Recorder Gallagher found that the 4x4 was “*blocking the path of the motorcycle in the fast lane but not abutting at all, even inches, into the middle lane. The motorcyclist Claimant had no option, as his counsel says, other than to take avoiding action and tried to swerve around that vehicle. That was because he had failed to see the presence of the 4x4 until too late.*” This reflects Mr Dziugys’ case at the personal injury trial, which was that when he saw the 4x4 he moved to the left to avoid it. It is notable that in the 11 March 2011 witness

statement, it states at paragraph 38 that, “*if the fast lane was not blocked by the stationary 4 x 4 I would not have had the accident and that I would blame that owner for the loss and damage that I have suffered*”. The same statement is made in identical terms in the 10 March 2011 witness statement.

95. I find therefore that whether or not the photographs of the 4x4 in situ at the accident scene were available at the personal injury trial, Recorder Gallagher was well aware of the position of the 4x4 at the accident scene and the photographs would have made no difference to his findings or the outcome of that trial.

### ***Tachograph records***

96. It is common ground that the tachograph records were not in the personal injury trial bundle. In cross-examination in this trial, Mr Dziugys was asked about the tachograph records and it was pointed out that these were not included in the underlying defendant’s disclosure list. Mr Dziugys said that he was not involved in disclosure at the time. It was suggested to him that this meant that tachograph records were not available for disclosure. Mr Dziugys said that this did not eliminate a solicitor from acting in the best interests of a client by obtaining the tachograph records, by making an application and asking for disclosure. Mr Dziugys claimed that he asked Hafezi to obtain the tachograph records. He stated that there was a conversation with Hafezi about the importance of obtaining tachograph records. It was put to him that there is no documentary evidence to support this. Mr Dziugys replied that there was a conversation on email, but he could not show where it is. He asserted that there is definitely evidence on file that he was asking Hafezi about the tachograph records. I observe here that if such evidence is available then it is difficult to understand why Mr Dziugys has not produced it in this trial. There is in fact no

evidence in the documents that I have been provided with that corroborates Mr Dziugys' evidence on this issue and I therefore do not accept it.

97. It was put to him that he did not raise the issue of tachograph records with Ersan after it was instructed. Mr Dziugys said that he did not have access to the case file and therefore did not know what was on the file. Mr Dziugys said he could not remember whether he had raised the absence of tachograph records during the conference with Mr Skeate and Mr Sami on 23 February 2015. He agreed that he has not subsequently taken steps to try to obtain the tachograph records since the personal injury trial or in preparation for this trial. He cannot therefore say what the tachograph records may have shown.
98. Mr Sami's evidence was that he would generally consider tachograph records to be important in this type of case because they would show the speed of the underlying defendant's lorry and the braking distance. The tachograph records were not in the case file that he received from Clarke Barnes. This was a surprise but by the time Ersan received the file it was nearly 4 years after the accident which would make it harder to obtain these records as they may well no longer be available. He agreed however that this would not prevent an enquiry being made and that there were no documents which showed that he did make that enquiry. He said that he could not now remember why he did not, however when he was shown the underlying defendant's disclosure list and it was pointed out that the tachograph records were not listed therein, he said that the conclusion he would have drawn was that they were no longer available.
99. Mr Skeate said that given that he was instructed shortly before trial, he took the case and the evidence as he found it, however in his view, tachograph readings would not

have dislodged the weight of the evidence that Recorder Gallagher found in preferring the lorry driver's version of events to Mr Dziugys'.

100. Given that the tachograph records have not been provided, it is not possible now to say what they might have shown. The only evidence of this comes from the witness statement of Mr Hobbs the lorry driver which states at paragraph 44 that, "*The tachograph was removed. No blip on the reading was present to indicate a collision*". This evidence was accepted by Recorder Gallagher who regarded Mr Hobbs as a truthful witness. If that is right, then it is unlikely that the tachograph records would have assisted Mr Dziugys' case even if they had been available at the personal trial. Other than that, it is open to speculation what they might have shown and whether these records would have undermined or assisted Mr Dziugys' case.

***Witness evidence of Mr Gray***

101. In his witness statement for this trial at paragraph 13, Mr Dziugys asserts that "*Mr Grey [sic] testimony is withdrawn from the case file and not presented to the judge to consider, this proves again there was tampering with evidence.*" I find no evidence whatsoever that there was any tampering with evidence by Mr Sami or Ersan and nor do I find any evidence that Mr Gray's witness statement was removed from the case file. I specifically reject both allegations. These allegations are also inconsistent with Mr Dziugys' case that Ersan should have taken a statement from Mr Gray and called him as a witness at trial – which is an implicit assertion that no such statement had ever been taken.
102. It was pointed out to Mr Dziugys in cross-examination that he must have known that Hafezi had not taken a statement from Mr Gray because on 14 July 2014, he was emailed the draft witness statement of Abdul Hafezi made for the purposes of the

Summary Judgment application. This statement lists the witness evidence relied upon, and Mr Gray was not referred to therein. Mr Dziugys said that he did not know that Mr Gray was not referred to in this statement, (I note that this is despite him having been sent it by email). He then said that Mr Hafezi included in the statement what he considered important. He did then concede that he never saw a witness statement from Mr Gray taken by Hafezi, but then stated that, “*as a party involved in the accident it must have been obtained by Hafezi*”. I find Mr Dziugys’ evidence to be lacking in credibility here. Mr Dziugys was clearly sent a copy of Mr Hafezi’s draft statement. Had he been concerned about lack of evidence from Mr Gray he would have been expected to raise the matter with Hafezi when reading this statement. There is no evidence that he did so.

103. Furthermore, Mr Dziugys agreed that once Ersan was instructed, he and Mr Sami spoke about the state of the evidence. He agreed that after his telephone call with Mr Sami on 9 October 2014, he sent Mr Sami the witness statements he had, and that Mr Gray’s was not amongst them.
104. He appeared to agree that he did not at any stage say to Mr Sami that a statement should be taken from Mr Gray and that this was never raised as an issue. Mr Dziugys said that in September / October 2014 he had a serious medical operation, that he was not involved in obtaining evidence and that Ersan should have identified if there was any missing evidence. Whilst I accept that Mr Dziugys suffered serious injuries in the accident for which he had to undergo painful medical treatment, the fact that he was still able to communicate with Mr Sami and send him relevant documentation including witness statements, leads me to conclude that he would equally have been able to raise with Mr Sami any concerns he had about missing evidence, particularly

if he regarded such evidence as important. The fact that he did not do so, means that Mr Sami was not alerted to any issue regarding a lack of evidence from Mr Gray.

105. Mr Dziugys referred in evidence to a letter dated 27 November 2011 from Mr Gray's insurer to Hafezi. Mr Dziugys said that this letter confirms that there had been no contact between Mr Gray's 4x4 and Mr Dziugys' motorcycle. Mr Dziugys relied upon this letter to assert that evidence from Mr Gray at the personal injury trial would have been helpful to his case. However, in fact Mr Dziugys has misread this letter, and it does not in fact assist his case. What it in fact says is (emphasis added):

“We acknowledge the letter of claim you sent to our policy holder. We note that your letter confirms that there was no contact between our policy holder's vehicle and Mr Dziugys. As your client believed he would be unable to stop in time behind our client's vehicle he swerved to avoid a collision. Your client's actions led to his own accident and consequently we have no offers to make towards your client.”

106. Mr Sami said that he could not remember whether there was a statement from Mr Gray on the case file and he could not remember whether he had tried to make contact with Mr Gray. He said that at the time that Ersan was instructed, time was of the essence as the deadline for exchange of witness statements was imminent. However, Mr Sami said that given that by the time Ersan took over the case, Hafezi had already obtained witness statements from three independent witnesses and prepared the case for trial, it is likely that at the time he would have considered that Mr Gray was not available or was unable to help. In re-examination it was pointed out to him that in Mr Hobbs the lorry driver's witness statement at paragraph 33, it refers to Mr Gray, immediately following the accident, being delirious and not responding to basic questions. Mr Sami said that it is likely that he would have considered this at the time he reviewed the file as being relevant to whether Mr Gray would have been likely to be able to give any evidence about how the accident occurred. I place little weight on

this evidence at it seems to have been given with the benefit of hindsight as opposed to a recollection of his thought process at the time. I find that it is more likely that Mr Sami did not consider obtaining a statement from Mr Gray because he assumed that Hafezi had already investigated the issue of relevant witnesses and had obtained witness statements from those available.

107. Mr Skeate said that he could not speculate on whether Mr Gray could have given evidence that would have assisted Mr Dziugys' claim, "*it's possible but I don't know*". He said that he did not consider that the absence of evidence from Mr Gray was why the case was lost. Based on Recorder Gallagher's findings he did not consider that Mr Dziugys's case could have been won by further evidence unless it was objective evidence.
108. The evidence is that no statement was taken from Mr Gray by Hafezi nor Ersan. Nor since then, has Mr Dziugys attempted to take a statement from Mr Gray himself. It is therefore speculation whether Mr Gray would have been able to give a statement about what happened and if so, what it might have said.

## **Events at trial**

### ***Amendments to the personal injury trial's Particulars of Claim***

109. In his Particulars of Claim for this trial, Mr Dziugys alleges that Ersan amended the Particulars of Claim without authorisation and entered "*liability only*" and deleted his claim for damages. However, in his evidence in chief during this trial, he additionally alleged that at the personal injury trial, Mr Skeate made an oral application to amend the Particulars of Claim which was not on his instructions. I note that this latter allegation forms no part of the Particulars of Claim in this trial and was not referred to

in Mr Dziugys' witness statement for this trial. Furthermore, Mr Skeate is not a party to this claim. However, given the seriousness of this accusation I consider that it is appropriate to address it in this judgment.

110. I can deal with both issues shortly. At no time was the personal injury trial Particulars of Claim amended in the way pleaded by Mr Dziugys. The personal injury trial on 10 March 2015 was on liability only, with quantum to be decided at a later date if appropriate. This had been agreed between Hill Dickinson, Hafezi and the Court prior to Ersan being instructed. Mr Dziugys had been made aware of this by Ersan (see paragraph 65 above). No amendments were ever made that reflect what Mr Dziugys alleges in this trial's Particulars of Claim.
111. At the start of the personal injury trial, Recorder Gallagher allowed an oral application made by Mr Skeate to amend the Particulars of Claim to include that:
- i) The underlying defendant's lorry was travelling in the middle lane but had drifted to the right to encroach into the outside lane so that at the point of collision with Mr Dziugys' motorcycle the lorry was straddling the middle and outside lanes.
  - ii) After collision with the motorcycle, the lorry then struck the 4x4.
  - iii) It was also pleaded that the lorry was driving too fast.
112. Mr Dziugys' allegation that these amendments were made without his instructions was flatly contradicted by the evidence of Mr Sami and Mr Skeate. Mr Sami said that the proposed amendments were discussed with Mr Dziugys in conference and at trial and that Mr Dziugys was aware of, and consented to, the amendments.

113. Mr Skeate gave evidence that the reason for the amendments was due to discrepancies in Mr Dziugys' case in that he claimed to have been hit by the lorry from behind, whereas in fact his motorcycle ended up being dragged along at the back of the lorry. The mechanics of the accident could therefore only be explained if the lorry encroached into the outside lane and was ahead of Mr Dziugys and going faster than him when it came into contact with Mr Dziugys' motorcycle. Mr Skeate said that this was discussed with Mr Dziugys in conference on 23 February 2015 and at the personal injury trial on 10 March 2015. Mr Dziugys agreed and gave instructions that the amendments should be made. Mr Skeate set out the proposed amendments in a written document which is in the trial bundle, he said that he went through this with Mr Dziugys before the application was made.

114. Mr Skeate was clear that he would never act without the instructions of his client and I fully accept this. I conclude that Mr Sami and Mr Skeate both gave clear, honest and cogent evidence that Mr Dziugys was properly advised, and that this application was made with his knowledge and on his instructions. I therefore completely reject Mr Dziugys' allegation. I also find that the fact that it was made for the first time at this trial demonstrates a regrettable willingness to add to and/or embellish his allegations during his evidence. This reflects the concerns I have already expressed about Mr Dziugys' overall credibility.

***Failing to “step in” when Mr Dziugys was in the witness box during his personal injury trial***

115. Mr Dziugys alleges that Ersan failed to “step in” when he was being cross-examined during his personal injury trial, during which he gave evidence that the 10 March 2011 witness statement had not been signed by him and contained incorrect

information. He alleges that Recorder Gallagher therefore disregarded his testimony and took points from this witness statement which he contends was one of the reasons he lost the personal injury trial.

116. In my view, in reality, when this issue arose for the first time during cross-examination there was nothing that either Mr Skeate or Mr Sami could realistically do. They were not on notice that Mr Dziugys had any issue with the 10 March 2011 witness statement, and he had specifically affirmed the signature and the truth of its contents when called to give evidence in the personal injury trial. This is an allegation levelled at Ersan, not Mr Skeate, but it was Mr Skeate that had conduct of the trial, and Mr Sami was correct when he said that he did not take any action because he did not think it was his place to do so. For the avoidance of doubt, I consider that Mr Skeate was similarly correct in not intervening in the cross-examination because the issue having arisen without warning, and with Mr Skeate therefore having no instructions on the issue from Mr Dziugys, it would not have been appropriate for him to do so either.

***Ersan should have been aware that the above matters caused him to lose his case at trial***

117. Recorder Gallagher gave a lengthy and considered ex tempore judgment, the transcript of which extends to 13 pages. He details the key evidence and sets out his findings with care. As I have said, in summary he accepted the evidence of Mr Hobbs the lorry driver (which accorded with the findings of the police reports), and rejected the evidence of Mr Dziugys, describing in detail the conflicting evidence given by him in a number of different sources. He found that none of Mr Dziugys' independent witnesses actually saw the accident and therefore could not say how it happened. Recorder Gallagher therefore made findings of fact having carefully

assessed the witnesses and other evidence. As Mr Skeate put it, although he was disappointed in the outcome, he did not consider that there was any prospect of an appeal because it is virtually impossible to appeal findings of fact which have been carefully made and reasoned including in particular the assessment of witness evidence. Mr Skeate's view was that there was no realistic prospect of successfully appealing Recorder Gallagher's judgment and this remains his view. This is reflected in his "*Note of Trial*" dated 21 April 2015 that he provided at the request of ARAG.

## **Events post trial**

### ***Appealing the personal injury judgment***

118. Mr Dziugys alleges in his Particulars of Claim that Ersan refused Mr Dziugys' request for an appeal against the personal injury trial judgment. In his witness statement, Mr Dziugys alleges that on the day of trial, shortly after its conclusion, he requested an appeal but his legal representative disregarded his request. He also states that several weeks later he contacted Ersan and requested an appeal, but that he was advised against appealing which was unprofessional and incompetent advice.
119. It is clear that the view of both Mr Skeate and Mr Sami was (and is) that there was no reasonable prospect of successfully appealing Recorder Gallagher's judgment. That is the advice that both would have given to Mr Dziugys on the day of trial if the issue of an appeal had been discussed, though neither could recall it being discussed on the day of trial.
120. There is in fact no evidence that Mr Dziugys raised the subject of an appeal until he sent the email to Mr Sami on 27 March 2015 attaching the handwriting expert's opinion. As stated at paragraph 44 above, this email attached the signed opinion from

a handwriting expert that the signature on the 10 March 2011 witness statement was “*not a genuine signature of Vitalijus Dziugys but signed by someone else*”. The opinion is marked “*Provisional Professional Opinion Only – Not Intended for Legal Purposes*”. The email states, this is a “*big crime, which did influence to [sic] my case*” and “*there are more details which was very incorrect during the trial*”. He asked, “*is there a time limits [sic] for an appeal and do I receive a letter from the court with a judge [sic] decision?*”.

121. Mr Sami replied on 28 March 2015 stating, “*Unfortunately I do not think an appeal is worth pursuing regardless on whether the signature on the statement was not yours. The Judge simply did not believe the accident the way it happened*”. Mr Sami suggested that Mr Dziugys should raise the issue of the false signature with Hafezi.
122. Mr Sami frankly acknowledges that he should have addressed Mr Dziugys’ question regarding the time limit for lodging an appeal (the 21 day limit was due to expire within days). However, he did not do so because he did not consider that there was any prospect of mounting an appeal. I note though that a failure to advise of the time limit for an appeal is not an allegation pleaded by Mr Dziugys in this trial’s Particulars of Claim.
123. Mrs Ersan said that she recalled discussing with Mr Sami what had happened during the trial in respect of the 10 March 2011 witness statement and also recalled being shown the handwriting report sent to Mr Sami on 27 March 2015. She said that given that the issue had never been raised by Mr Dziugys prior to his cross-examination, and given the Judge’s findings, she and Mr Sami considered that the prospects of an appeal were very low.

124. I find that Mr Sami gave clear advice that an appeal could not be pursued despite the false signature issue and gave clear advice that this was because the Judge's findings of fact did not depend on this issue. For the reasons I have already set out at paragraph 117 above, this assessment was correct given the extensive findings of fact the Judge made having heard the witnesses give evidence and in particular having tested and rejected the various different versions given by Mr Dziugys of how the accident happened, when set against the other evidence in the case.

***The sending of the case file to the ATE insurer***

125. Mr Dziugys alleges that Ersan sent all or some of his case file to the ATE insurer (ARAG) and that by doing so, this destroyed Mr Dziugys' opportunity to appeal.

126. After the 21 day deadline to lodge an appeal had passed, ARAG requested the case file and Mr Sami sent it to ARAG on 16 April 2015, although it appears that not all documents were sent. He did not make a copy of the file before sending it to ARAG.

127. There is no evidence of any further questions from Mr Dziugys regarding an appeal following Mr Sami's email of 28 March 2015 and Mr Dziugys accepts that he did not raise the issue of an appeal again, because he was still badly injured and having operations and therefore it was not his main priority at the time. Nor did Mr Dziugys inform Mr Sami that he had sought, or was seeking, legal advice from other firms of solicitors. This emerged for the first time during the course of Mr Dziugys' cross-examination in this trial, during which he stated that he did not ask for his case file prior to it being sent to ARAG on 16 April 2015 because he was "*still getting advice on appeal*". It was pointed out to him however that during this time, he had obtained the opinion of a handwriting expert and had emailed Mr Sami regarding this and raising the issue of an appeal. He would therefore have been able to pursue the issue

of an appeal if he wanted to do so. Mr Dziugys said that he contacted several solicitors who advised him that there were points for an appeal, but that they wanted to see the case documents to understand the case in detail and provide advice. In response to a question from me, he said that he spoke to another solicitor's firm at the end of 2015, and he also spoke to 2 or 3 other firms and the Citizens Advice Bureau. He could not remember the dates when he did this. He accepted that he never told Ersan that he was taking advice elsewhere and he never told Ersan that he was considering an appeal after he sent his email of 27 March 2015. In response to further questions from defence counsel, he admitted that he had never said prior to giving evidence in this trial, that he had sought advice on appeal elsewhere, and agreed that he has provided no documents to substantiate this new evidence. He said that these were oral conversations and that because he did not have the case papers, he was therefore unable to identify grounds for appeal or pursue an appeal with another firm. Plainly this evidence is important to Mr Dziugys' case and he must be aware of this. Despite that, this evidence arose for the first time only whilst Mr Dziugys was being cross-examined. I do not accept that this evidence could not have been pleaded by Mr Dziugys or at least referred to in his witness statement for this trial. The fact that it was not causes me to view Mr Dziugys' evidence with considerable caution. I do not accept that Mr Dziugys had sought or obtained legal advice elsewhere prior to his file being sent to ARAG on 16 April 2015 because if he had done so, then I would have expected him to raise this matter with Ersan and to challenge Mr Sami's advice that there was no prospect of a successful appeal. The important point too is that on any view, at the time Mr Sami sent the case file to ARAG, Mr Sami had no reason to know or believe that Mr Dziugys was (or may have been), seeking advice elsewhere, nor that Mr Dziugys had any need for his case file.

128. I find in light of the evidence, that at the time Mr Sami provided the case file to ARAG he did not consider that the issue of an appeal was reasonably in prospect. Neither he nor Mr Skeate considered that there were any grounds to appeal given Recorder Gallagher's findings of fact and I have already stated that I agree with that assessment. The 21 day deadline for lodging an appeal had expired some two weeks before, and nothing further had been heard from Mr Dziugys following Mr Sami's reply to his email on 27/28 March 2015. At the time the case file was provided to ARAG, Mr Dziugys was the subject of an adverse costs order and a large interim payment order. There was therefore some urgency in providing ARAG with the documents it needed to assess the position and pay the costs order.
129. Mr Dziugys additionally alleges that sending the file to ARAG breached Ersan's T&C's. The relevant extracts are set out at paragraph 27 above and Mr Dziugys points in particular to the section which states that Ersan will keep client papers for 6 years. It is clear however, that the T&C's specifically inform Mr Dziugys that Ersan may be required to disclose his case file to his funder or insurer for indemnity purposes. However, the T&C's also state that before this is done, Ersan would obtain the client's "*informed consent*". Mr Sami accepted in evidence that Ersan's T&C's did require that he obtain Mr Dziugys' informed consent before sending his file to ARAG. However, Mr Sami said that he sent the file to ARAG in Mr Dziugys' best interests given that an indemnity costs order had been made against Mr Dziugys which he would have to pay if the insurer did not indemnify him. He said that Recorder Gallagher had also ordered Mr Dziugys to pay £20,000 as an interim payment and Mr Sami wrote in an email to the insurer dated 1 April 2015 that he estimated that costs would amount to £45,000 in total, therefore he knew that Mr Dziugys was facing a large and imminent costs liability. On 10 April 2015, ARAG

emailed Mr Sami that it would raise payment but that this was subject to a review of the file. It was clear therefore that no payment would be made by ARAG until they received and reviewed the file. Mr Sami said that he assumed therefore that Mr Dziugys would have allowed him to send the file to ARAG and pointed out that Mr Dziugys had not said to Mr Sami that he required the file.

130. Mr Sami accepted that he did not take a copy of the file before sending it to ARAG. He did not recall whether he considered doing so. The issue of the handwriting expert in respect of the signature on the 10 March 2011 witness statement did not cause him to consider whether he should take a copy of the file.
131. Mrs Ersan agreed that Ersan's T&C's stated that Mr Dziugys' informed consent should have been sought before the file was sent to ARAG. She accepted that this was her responsibility as she should have overseen and supervised Mr Sami. She said that she would normally expect a file handler to send a copy of the file to the insurer. She did not know why Mr Sami decided to send the file without taking a copy. She pointed out that Ersan's T&C's do not require a copy of the file to be made before it is sent to ARAG. She said that it would have been best practice to keep copies, but she could not see that Ersan had done anything wrong by sending original documents.
132. She considered that sending the file to ARAG was in Mr Dziugys' best interests and in accordance with Ersan's duty of care to him, given that ARAG was indemnifying him against a large costs order.
133. In considering this issue, I note that the Particulars of Claim does not plead that sending the file to ARAG was a breach of Ersan's T&C's. What is in fact pleaded is that Ersan breached its T&C's in "*refusing to return*" the file (an issue dealt with below). I note also that Ersan's T&C's contain a provision authorising it to "*take any*

*necessary steps to protect [Mr Dziugys'] interests...unless you instruct us to the contrary” (see paragraph 27 above).*

134. It undoubtedly was in Mr Dziugys’ interests for ARAG to be provided with the case file so that he would be indemnified in respect of a large costs order. Although Ersan acknowledges that Mr Dziugys’ consent should have been sought, I accept Mr Sami’s evidence as to the reasons why this did not happen and I regard it as an oversight, made in circumstances where Mr Sami had no reason to believe that Mr Dziugys required his case file, and no reason to believe that Mr Dziugys would refuse consent for the file to be passed to ARAG. Plainly it would have been better for a copy of the file to have been made but given the circumstances as Mr Sami reasonably believed them to be, the fact that this did not happen, I similarly regard as an oversight.

***Whether Ersan “misplaced or maybe destroyed the file of original docs when Mr Dziugys discovered that the 10 March 2011 witness statement was not signed by him.”***

135. This matter can be taken shortly. There is no evidence that Ersan misplaced or destroyed any original documents at any time. I accept entirely the evidence of Mr Sami that he did not misplace any original documents and he was not aware of any original documents being misplaced by Ersan while he was employed there (he left in July 2015). I also entirely accept his evidence that he did not destroy any original documents.
136. I also entirely accept the evidence of Mrs Ersan that documents are always sent to ARAG via a secure method of delivery and there is no reason to believe that ARAG would have lost documents, nor that Ersan would do so. I also accept her evidence that she had no knowledge of documents being destroyed and that none of her staff would do so.

137. Destruction of documents is a serious allegation to make against a firm of solicitors and cogent evidence is required to substantiate such an allegation. I find that there is no evidence at all to substantiate this serious allegation.

***Failure to return Mr Dziugys' case file***

138. Mr Dziugys alleges that Ersan refused to return his case file, thereby breaching Ersan's T&C's and that Ersan ignored his attempts to get copies or originals of his case file and maliciously provided misleading information regarding the file's location. He also alleges that Ersan failed to realise for several years that original documents had not been received from Hafezi.

139. There is extensive correspondence within the trial bundle which demonstrates that when Mr Dziugys made requests to Ersan for his case file, Ersan informed him that it had been sent to the ATE Insurer and that Ersan provided Mr Dziugys with the documents that it had retained and made a number of requests to ARAG for the case file to be returned. ARAG refused to return the file and Ersan informed Mr Dziugys of this. ARAG did not return the case file to Ersan until on or about 6 June 2017. On 14 June 2017, Ersan sent the file to Anton Van Dellen at Goldsmith Chambers – who was by then acting for Mr Dziugys.

140. I do not find that there was any failure by Ersan nor any breach of its T&C's. Ersan did what it could to request the case file back from ARAG but had no means to compel ARAG to return it when it refused to do so. There is no evidence that Ersan ignored Mr Dziugys' requests and certainly no evidence that Ersan maliciously (or otherwise), provided misleading information regarding the case file's location.

141. It is notable that during this time, ARAG was in direct communication with Mr Dziugys and in particular wrote to him on 31 March 2017 informing him that the case file had been kept so that a review could be undertaken regarding whether a professional negligence claim could be brought. It is clear from this email that Mr Dziugys had been informed about this and that he was in communication with ARAG and the solicitor conducting the review in 2015 and 2016. During this time, it does not appear that Mr Dziugys objected to ARAG keeping his file whilst the review was being undertaken as to whether there were grounds for a professional negligence claim. This undermines his evidence that he urgently required the return of his file.

### **Other matters**

142. Mr Dziugys also alleges in his Particulars of Claim that Ersan failed to provide him with the details of its Professional Indemnity Insurer when required. I do not consider that this is a matter that is capable of amounting to an allegation of professional negligence in respect of Ersan's retainer. I do not therefore intend to deal with this matter further and I dismiss this allegation.

### **Discussion**

#### **Issue 1 - What duties did Ersan owe to Mr Dziugys?**

143. Ersan admits that it had a duty to exercise reasonable care and skill in respect of matters within the scope of its retainer which was to pursue Mr Dziugys' claim for personal injury (and other losses) arising out of the road traffic accident.

144. At the time of the events with which this case is concerned, Ersan held itself out as experienced in personal injury litigation. Ersan is plainly vicariously liable for any breaches of duty committed by Mr Sami or any of its other staff.

145. In its Defence, Ersan states that it ceased to act for Mr Dziugys in March/April 2015, and therefore its retainer effectively ended at that time. However, this was not pursued at trial, and I consider that Ersan continued to owe a duty to act with reasonable care and skill in terms of its advice on the prospects of an appeal, and its subsequent handling of Mr Dziugys' case file. This is demonstrated by Ersan's T&C's which include obligations in respect of the handling of client files.

**Issue 2 - Did Ersan act in breach of those duties in the manner alleged by Mr Dziugys in his Particulars of Claim?**

146. Mr Dziugys has not satisfied me on the balance of probabilities that Ersan acted in breach of its duties in respect of any of the matters alleged by him.

***The 10 and 11 March 2011 witness statements***

147. I consider that in all the circumstances, it was reasonable for Ersan to consider that the pre-trial work undertaken by Hafezi, and which Ersan inherited, had been done to a reasonably competent standard. I find that Mr Sami conducted a reasonable review of the case file when he received it, and although the file did not contain "*wet ink*" versions of the 10 and 11 March 2011 witness statements, there was no reason for him to believe that the copies of these witness statements were not genuine. In particular, the 10 and 11 March 2011 witness statements had been prepared by an ostensibly legitimate, competent and honest firm of solicitors with duties to its client and the Court and with no apparent motivation for forging a signature or producing documents for the Court that did not properly reflect Mr Dziugys' evidence. Although the fact that the signatures on the statements of truth did not strictly comply with the PD in that the name was not printed underneath, might have led a particularly diligent firm to make enquiry, this on its own, in the absence of other factors, is in my

view insufficient to found a breach of duty given that the test is reasonable competence, rather than the making of a mere error. This is particularly so in circumstances where Ersan knew that the underlying defendant and Mr Coombs had previously been supplied with a copy of the 10 March 2011 witness statement and it had been referred to in the Summary Judgment application. There was nothing about these events to indicate that Mr Dziugys took issue with the 10 March 2011 witness statement, nor that any other concerns had been expressed about it. The fact that it contained entries which post-dated its date and signature similarly appears not to have been identified by any previous recipient, nor anyone else, until it was noticed during Mr Dziugys' cross-examination at the personal injury trial.

148. Mr Sami's focus at the time he received the case file from Hafezi was on the imminent exchange of witness statements and to this end, his focus was on the 11 March 2011 witness statement which was the one exchanged (and about which until this trial, Mr Dziugys took no issue). Given the urgency of exchange it was reasonable for this to be the focus of Mr Sami's efforts, rather than the content of the 10 March 2011 witness statement.
149. The 10 March 2011 witness statement was added to the personal injury trial bundle at the request of Hill Dickinson who was already in possession of it. The striking similarities between the 10 and 11 March 2011 witness statements, in particular in respect of the description of the accident and who was to blame, makes it in my view unlikely that Mr Dziugys genuinely had no knowledge of the 10 March 2011 witness statement as he now claims, as does the fact that it was disclosed to the underlying defendant and the medical expert Mr Coombs and it was referred to in the Summary Judgment application, which was an application about which Mr Dziugys must have

been aware. It is unclear from the documents precisely what Mr Dziugys was provided with in respect of that application, but it does appear that he was provided with Abdul Hafezi's draft statement in response to Hill Dickinson's witness statement (in which reference is made to parts of the 10 March 2011 witness statement). Given that Mr Hafezi's statement would make little sense without the statement to which it responds, it seems likely that he would have been supplied with Hill Dickinson's statement too. I also take into account Mr Dziugys attempts at this trial, to distance himself from the 11 March 2011 witness statement for the first time, despite his case being up until now that he was the author of this statement. This undermines his overall credibility on the issues of authorship of, and knowledge of, both statements.

150. The 10 March 2011 witness statement would have been part of the trial bundle provided to Mr Skeate and used in the 23 February 2015 conference. It seems likely that Mr Skeate would have discussed both witness statements with Mr Dziugys during this conference given that both contained evidence regarding the circumstances of the accident. It is clear that Mr Dziugys raised no issue at this point or subsequently about either witness statement. Mr Dziugys was then provided with a copy of the 10 March 2011 witness statement by Mr Sami on 6 March 2015. I reject Mr Dziugys' evidence that he did not request that this statement be sent to him. He plainly did, as Mr Sami's attendance note shows. The fact that he now denies this undermines his credibility and appears to be another attempt by him to distance himself from knowledge of, or involvement in, the contents of the 10 March 2011 witness statement. Having requested this statement, it is inconceivable that he did not read it, and equally inconceivable that if he had concerns about its content or signature, that he would not have immediately raised these with Mr Sami. He did neither. That being so, I conclude that he did not have any such concerns, and moreover, it was

reasonable for Mr Sami to conclude that there were no concerns about the authenticity of this statement. I am fortified in this view by the fact that at trial, when Mr Skeate took Mr Dziugys to both witness statements to identify them and the signatures, he did so with no comment or complaint. It is inconceivable that he would have reacted in this way had he considered that either statement or signature were forgeries. Similarly, the fact that Mr Dziugys only sought to disavow the 10 March 2011 witness statement when under pressure during cross-examination, is indicative of this being the reason why he did so at this stage – because he had belatedly realised that the statement was not helping his case. I reject his evidence that it was only at this point that he realised that the statement was a forgery. I find that in circumstances where Mr Dziugys had raised no concerns until that point, it cannot be said that a reasonably competent firm in Ersan’s position ought nevertheless to have realised that there was a problem with the 10 March 2011 witness statement or the signatures on both statements.

***Police photographs of the accident scene***

151. The onus is on Mr Dziugys firstly to satisfy me on the balance of probabilities that the photographs of the 4x4 in situ were not in the trial bundle. I am unable to be so satisfied on the basis of the limited evidence before me.
  
152. I accept Ersan’s evidence that whatever photographs had been disclosed by either party would have gone into the personal injury trial bundle. In my view, a reasonably competent solicitor was entitled to conclude that these were the photographs that were available and similarly, given the extensive evidence on the position of the 4x4 that was available to Recorder Gallagher, that no further photograph evidence was required.

***Tachograph records***

153. Given the late stage at which Ersan was instructed, it was in my view reasonable for it to consider that Hafezi had already dealt with evidence gathering and disclosure issues. The fact that tachograph records had not been obtained by Hafezi would not (as Mr Sami accepted), have prevented him from making an inquiry himself, but this has to be set against the fact that the records were not listed on the underlying defendant's disclosure list, and that several years had expired since the accident occurred. It also appears that Mr Dziugys did not raise the issue with Mr Sami himself at any time. The test is reasonable competence rather than exceptional ingenuity, and in the circumstances, I find that a failure to follow up on the issue of tachograph records in these circumstances does not amount to a breach of duty to act with reasonable competence.

***Witness evidence of Mr Gray***

154. I find that in the circumstances, Mr Sami was entitled to rely on Hafezi having investigated the case and having gathered relevant evidence, particularly given that by the time Ersan was instructed the deadline for exchange of witness evidence had either expired or was due to do so imminently. The fact that Hafezi had obtained evidence from three independent witnesses demonstrates that it had taken steps to investigate the accident and obtain relevant witness evidence. Mr Dziugys at no point raised with Mr Sami the issue of Mr Gray being a witness and given Mr Gray's physical state after the accident, a reasonably competent solicitor was entitled to conclude that it was not at that late stage appropriate or necessary to pursue obtaining a statement from him.

## **Events at trial**

### ***Amendments to the personal injury trial's Particulars of Claim***

155. As I have made clear, the only allegation pleaded in the Particulars of Claim on this issue is that the Particulars of Claim was amended without authorisation by entering “*liability only*” and deleting the claim for damages. These amendments were never made, and I therefore find that this aspect of the claim fails. For completeness, I record here that I accept the evidence of Mr Skeate and Mr Sami that the amendments to the Particulars of Claim made at trial were made on Mr Dziugys’ instructions and with his knowledge. There are no breaches of any duty of care in respect of the trial amendments.

### ***Failing to “step in” when Mr Dziugys was in the witness box during his personal injury trial***

156. For the reasons given at paragraphs 115-116 above, I conclude that Mr Skeate and Mr Sami acted correctly in not intervening during cross-examination. No breaches of any duty of care took place in respect of this matter.

## **Events post trial**

### ***Appealing the personal injury judgment***

157. For the reasons given at paragraphs 119-124 above, I find that Mr Sami did not refuse a request for an appeal. He in fact gave clear and appropriate advice that an appeal had no prospects of success given Recorder Gallagher’s extensive findings of fact and his assessment of the witnesses’ evidence. There is no breach of duty in respect of the advice given. Mr Sami accepts that he should have replied to Mr Dziugys’ question

regarding when the time limit for an appeal expired, however this is not a matter pleaded in the Particulars of Claim and in any event is not a matter that I regard as being more than an error in circumstances where Mr Sami gave at the same time, clear and accurate advice on prospects of appeal.

***The sending of the case file to the ATE insurer***

158. The Particulars of Claim does not plead that sending the file to ARAG was a breach of Ersan's T&C's. What is in fact pleaded is that Ersan breached its T&C's in "refusing to return" the file. However, for completeness, I find that it was reasonable in the circumstances for Mr Sami to send Mr Dziugys' case file to ARAG on 16 April 2015 and that it was reasonable for him to consider that it was in Mr Dziugys' best interests for him to do so and therefore that he was authorised by the T&C's to take this necessary step to protect his interests. Mr Sami had no reason to believe that Mr Dziugys was taking legal advice elsewhere, or that he was intending to pursue an appeal, and meanwhile, Mr Dziugys was subject to a large costs order which ARAG would be entitled to refuse to meet without sight of the case file which it had requested. There was therefore some urgency to this. Although it was an oversight by Mr Sami that Mr Dziugys' informed consent was not sought first in accordance with Ersan's T&C's, this is not sufficient to amount to a breach of a duty to act with reasonable care given the context, which in my judgment meant that Mr Sami was entitled to believe that Mr Dziugys would consent to the file being provided to ARAG since the alternative would have been personal liability for a large costs order. Similarly, it would have been best practice to make a copy of the file before sending it, but this oversight too does not in my judgment amount to a breach of duty to act with reasonable competence in circumstances where there was no reason to believe

that the file would not be transported to, and retained securely by, ARAG. I note in any event that the failure to obtain informed consent, and the failure to copy the file, are not allegations pleaded in the Particulars of Claim.

***Whether Ersan “misplaced or maybe destroyed the file of original docs when Mr Dziugys discovered that the 10 March 2011 witness statement was not signed by him.”***

159. Given my findings at paragraphs 135-137 above, I conclude that there is no evidence to support this allegation and I make a positive finding that neither Mr Sami nor Ersan misplaced or destroyed any original documents from the case file. This aspect of the claim therefore fails in its entirety.

***Failure to return Mr Dziugys’ case file***

160. Given my findings at paragraphs 138-141 above, I do not consider that Ersan breached any duty of care with respect to this aspect of the case. Ersan did what it could to request the case file back from ARAG but had no means to compel its return when ARAG refused. There is no evidence that Ersan ignored Mr Dziugys’ requests and certainly no evidence that Ersan maliciously (or otherwise), provided misleading information regarding the case file’s location.

**Issue 3 - Causation**

161. Given that I have dismissed Mr Dziugys’ case in respect of each of the allegations of breach of duty of care, it is not strictly necessary to deal with the issue of causation. However, I will do so briefly for completeness.

162. I find that Mr Dziugys has failed to establish in respect of any of the matters pleaded, that “*but for*” those matters, he would have won his personal injury claim or that he

would have brought a successful appeal against the dismissal of his personal injury claim. He has the burden of proving that he had a real and substantial chance of obtaining the outcome he contends for, as opposed to a speculative chance.

163. In my judgment none of Mr Dziugys' pleaded matters would have made any difference to the outcome of the personal injury trial:

- i) The 10 March 2011 witness statement was only a small part of the numerous reasons why Recorder Gallagher dismissed the personal injury claim including the fact that he found Mr Dziugys to be an "*utterly unreliable witness*".
- ii) Even assuming that the 75 photographs of the 4x4 were not in the trial bundle, there was ample evidence before Recorder Gallagher of the position of the 4x4 in the offside lane and he made findings of fact which show that he was aware of this. The photographs would not have made a difference to his findings.
- iii) There is no evidence that the tachograph records, even if available, would have assisted Mr Dziugys' case. It is speculation as to what they might have shown, and such evidence as there is in fact indicates that they may have in fact undermined rather than assisted his case.
- iv) There is no evidence that a witness statement from Mr Gray would have made any difference to the outcome of the trial. Even if he had made a witness statement, it is not possible to speculate on what he might have said.
- v) The matters regarding amendments to the Particulars of Claim and the "*failure to step in*" are misconceived for the reasons given above and therefore it follows that no causation lies in respect of these matters.

**vi)** As set out above, Recorder Gallagher made lengthy and considered findings of fact in which he accepted the evidence of Mr Hobbs the lorry driver and rejected the evidence of Mr Dziugys. He found that the three independent witnesses did not see how the accident happened (this reflected the evidence in their witness statements). These were findings that he was entitled to make having heard the evidence, having considered the documentary evidence and having exercised his judgment and discretion. Although the outcome was disappointing for Mr Dziugys, it is in reality virtually impossible to appeal findings of fact such as this, that have been carefully made and reasoned. None of the matters that Mr Dziugys now relies upon would have made any difference to Recorder Gallagher's findings.

164. In terms of the post trial allegations, Mr Dziugys has failed to demonstrate that he would have brought a successful appeal against the dismissal of his personal injury claim. He has the burden of proving that he had a real and substantial chance of obtaining such an outcome. He has failed to discharge that burden for the following reasons:

- i)** Mr Sami gave Mr Dziugys manifestly correct advice regarding his prospects of success on appeal. Mr Dziugys did not challenge that advice.
- ii)** There is no evidence that Mr Dziugys would have in fact made an application for permission to appeal, and it is notable that he has never in fact made such an application at any point.
- iii)** Even if an application for permission to appeal had been made, Mr Dziugys has failed to establish on the balance of probabilities that there was a real and substantial chance that it would have been successful. In the unlikely event

that he succeeded in obtaining leave to appeal, he has not established that any substantive appeal would have been successful.

- iv) Sending the case file to ARAG was in Mr Dziugys' best interests at the relevant time. Ersan attempted to have the file returned when Mr Dziugys requested it. However, it is unclear why the absence of Mr Dziugys' case file prevented an application for permission to appeal from being lodged, nor why its absence would have prevented a successful appeal. Given that the burden is on Mr Dziugys to demonstrate these matters, then this aspect of the claim would similarly fail for lack of causation.

## **Conclusion**

165. For the reasons I have given, each aspect of Mr Dziugys' claim fails on both liability and causation. This claim is therefore dismissed.