Neutral Citation Number: [2021] EWCA Civ 1663

Case No: C1/2021/0286

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Mr Justice Saini
[2020] EWHC 3744 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/11/2021

Before:

LORD JUSTICE NEWEY
LORD JUSTICE ARNOLD
and
LORD JUSTICE WARBY

- -

Between:

JOHN HUNT	**Claimant**
- and -	
(3) ANNOLIGHT LIMITED	**Defendants/**
(5) DOUBLE T GLASS LIMITED	**Respondents**
(6) PARAGON TRADE FRAMES LIMITED	
- and -	
(7) WALKER PRESTONS SOLICITORS LIMITED	**Defendant/ Appellant**

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Robert Marven QC (instructed by **Walker Prestons Solicitors Limited**) for the **Appellant**
Nikhil Arora (instructed by **DAC Beachcroft Claims Limited**) for **Annolight Limited**
Douglas Denton (instructed by **BLM LLP**) for **Paragon Trade Frames Limited**
Double T Glass Limited did not appear and was not represented

Hearing date: 19 October 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website.
The date and time for hand-down is deemed to be Wednesday 10 November 2021 at 10:30am

Lord Justice Newey:

1. Three of the defendants to a claim by Mr John Hunt have applied for wasted costs orders to be made against his solicitors, Walker Prestons Solicitors Limited ("Walker Prestons"). The present appeal, by Walker Prestons against the dismissal by Saini J of their appeal against an order made by Judge Godsmark QC, raises issues as to when, if ever, it is appropriate to order the cross-examination of a lawyer facing a wasted costs application.

Basic facts

2. In 2016, Mr Hunt issued County Court proceedings for damages for hearing loss that he was alleged to have suffered as a result of exposure to noise at work. The defendants included Annolight Limited ("Annolight"), Double T Glass Limited ("Double T Glass") and Paragon Trade Frames Limited ("Paragon"), for each of which Mr Hunt was said to have worked during one or more periods between about 1990 and 2007. Mr Hunt was represented by Walker Prestons.

3. In a request for further information under CPR Part 18 dated 29 January 2019, Annolight asked Mr Hunt whether he was the "Mr John Hunt" named as having been a director of the company at Companies House. On 5 May, Walker Prestons sent Annolight's solicitors, DAC Beachcroft Claims Limited ("DAC"), a letter enclosing draft replies with the assurance that a signed version would be served as soon as it was to hand. Shortly afterwards, Walker Prestons provided a copy of the document apparently signed by Mr Hunt on 9 May. In response to the question as to whether Mr Hunt had been a director of Annolight, the replies stated:

> "No – I accept that I was born in March 1946, but I have never been a Director of Annolight Limited."

4. A question of potential significance in relation to Mr Hunt's claim against Paragon was whether he had been supplied with hearing protection. The particulars of claim alleged that Paragon had not provided Mr Hunt with any hearing protection, but he appears to have said in response to a Part 18 request that ear plugs had been introduced and in his first report Mr Hunt's medical expert, Mr Zeitoun, proceeded on the basis that ear protection had been furnished. In a second report, however, Mr Zeitoun indicated that Mr Hunt had not been given any hearing protection and, when he was asked about the inconsistency, Mr Zeitoun said that he had been advised by Walker Prestons that his previous understanding had been inaccurate.

5. The case came on for trial before Judge Godsmark QC in the County Court at Lincoln on 12 December 2019. No one from Walker Prestons was present, but Mr Hunt was represented by counsel who told the Court that Mr Hunt had said that he had not signed the Part 18 response in which it was denied that he had been a director of Annolight. The Court was also informed that Mr Hunt was discontinuing his claim in its entirety. Annolight, Double T Glass and Paragon indicated that they wished to apply for qualified one-way costs shifting (or "QOCS") to be disapplied as regards Mr Hunt (as is possible if a claim was "fundamentally dishonest" – see CPR 44.16(1)) and/or for wasted costs orders against Walker Prestons.

6. Judge Godsmark QC's order provided for Mr Hunt to pay the defendants' costs and for the "determination of whether [the costs order] should be enforceable against the Claimant, and/or should be paid by the Claimant's Solicitors" to be made at a further hearing. Judge Godsmark QC stipulated that any application for the costs order to be enforceable against Mr Hunt or Walker Prestons was to be initiated by 10 January 2020 and gave the following further direction:

> "… any response or responses to that Application Notice are to be made by way of Witness Statements with a statement of Truth to be filed by 4:00pm on 24 January 2020. Any Witness Statement from Walker Prestons must be made by the supervising Partner with conduct of this claim."

7. Between 3 and 10 January 2020, Annolight, Double T Glass and Paragon all issued application notices asking that the costs order be enforceable against Mr Hunt on the basis that he had been "fundamentally dishonest" and for a wasted costs order against Walker Prestons. None of the application notices itself expanded on the grounds on which a wasted costs order was said to be appropriate, but each application was supported by a witness statement. That relating to Annolight's application was made by Mr Jonathan Mitchell of DAC, who explained in paragraph 8 of his statement:

> "It is the Defendants' position that the Claimant's solicitor failed to obtain proper instructions on the issue of the Claimant previously being a Director of the Third Defendant company. It is contended that if proper instructions had been obtained, it would have been apparent that the Claimant had no claim against the Third Defendant and should discontinue. Further, if the case had been properly conducted, the Claimant's Solicitor would have advised the Claimant of the same and the claim would not have been pursued or would have been discontinued at an early stage so that the costs incurred by the Defendants in meeting the claim would have been avoided."

Mr Mitchell went on to refer to "concerns" about the signature on the 9 May 2019 Part 18 response, continuing:

> "I await evidence from Walker Prestons in this regard, but if the replies were signed without the Claimant's knowledge then unnecessary time and costs have been incurred in this claim which is the fault of whoever signed the replies without knowledge of the Claimant, if that is indeed the case. If Walker Prestons did not sign the replies and these were signed by the Claimant, then the Claimant has been dishonest as documents show that he was a Director of the Third Defendant company."

8. The witness statement in support of Paragon's application was made by Mr Andrew West, a partner in its solicitors, BLM LLP ("BLM"). Having noted that there was an "issue of whether [Mr Hunt] instructed his solicitors to sign the Part 18 replies on his behalf", Mr West said that he sought "to adopt those parts of [Mr Mitchell's] evidence which are relevant to the issue and the application made by [Paragon]". Mr West went on to say that the "other grounds on which [Paragon] seeks to enforce the costs of its

defence against Walker Prestons in terms of their conduct arises by virtue of the following facts and matters in relation to the issue of whether [Mr Hunt] was or was not provided with hearing protection when employed by [Paragon]", proceeding to detail inconsistencies in what had been said on that subject. Mr West also explained that the trial bundle which Walker Prestons had prepared for the December 2019 trial date had not included Mr Zeitoun's first report while the report had been put into the bundle which had been prepared in advance of an earlier (in the event, aborted) trial date.

9. On 24 January 2020, Mr Abid Sarwar of Walker Prestons made a witness statement. He explained that he was the supervising partner and director at the firm and that Mr Hunt's claim had been conducted by other fee earners in the firm under his overall supervision. He further said that his statement was limited to dealing with Annolight's application for a wasted costs order, that Walker Prestons were "necessarily limited in addressing matters which are clearly privileged" and that there "is no evidence as to whether this Firm did, or did not, take instructions from [Mr Hunt] as to whether he held a directorship at [Annolight]". Mr Sarwar also said that it was "categorically" not the case that Walker Prestons had been involved in forging Mr Hunt's signature on the 9 May 2019 Part 18 replies. The replies, Mr Sarwar stated, "were signed by [Mr Hunt] electronically, pursuant to CPR r.5.3 and PD 5A(1)". Mr Sarwar exhibited an electronic signature and a final audit report by way of evidence.

10. The defendants' applications came before Judge Godsmark QC at a telephone hearing on 22 April 2020. In the course of that, Judge Godsmark QC asked whether it was anticipated that Mr Sarwar would be required for cross-examination. Mr Nikhil Arora, who was appearing for Annolight, responded that he thought he "would be prepared to deal with this without [Mr Sarwar] being present", but added that he thought that Mr Douglas Denton, who was appearing for Paragon, had "stronger points" to put in that connection. For her part, counsel for Double T Glass said that she did not require the presence of Mr Sarwar, but Mr Denton confirmed that he did. Mr Denton said:

> "You will note [Paragon's] application, which appears at page 89 in the bundle, and whilst we adopt the position taken by [Annolight], there is an issue concerning the medical report of Mr Zeitoun and you will note, your Honour, that whilst [Mr Hunt's] solicitor, Mr Sarwar, has produced a witness statement dealing with [Annolight's] application, the witness statement is silent as regards the points made in [Paragon's] application."

11. That led Judge Godsmark QC to say:

> "So the position is that even if Mr Hunt himself decides to play no further part in this matter, we're going to require some live evidence in any event. If Mr Hunt does participate in this, there's perhaps going to be a little more live evidence than would otherwise be the case and questions of waiver of privilege …. So the direction must be, I think, that what I need to do today is give directions that will ensure the opportunity for Mr Hunt to become engaged and look for a hearing date at which parties can attend to give evidence perhaps a little time in the future. That's

> my view of the landscape, Mr Trevelyan, do you have anything to say about that?"

12. "Mr Trevelyan", who was the counsel then appearing for Walker Prestons, responded:

> "Your Honour, only that I agree with your Honour's proposed way forward. I could say that I did have some concerns reading [Annolight's] application and I hear, of course, what my learned friend for [Annolight] now says. But [Annolight's] application in turn would always have been for a trial on fundamental dishonesty and at which at least Mr Hunt, it seems to me, or possibly Mr Sarwar as well, would have been required to give oral evidence in any event. So I did have some concerns about whether this was a matter which could be conducted today anyway, but I hear what your Honour says of course."

13. The order drawn up following the 22 April 2020 hearing added Walker Prestons as the seventh defendants to the claim for costs purposes only, extended the time within which Mr Hunt could file and serve a witness statement and set a date by which Walker Prestons were to file and serve any witness statement in response to one from Mr Hunt. The order also provided as follows:

> "The hearing of the three applications is adjourned to the next available date in September 2020 before HHJ Godsmark QC when oral evidence will be heard. Time estimate 1 day."

14. Judge Godsmark QC's order was understood by the parties to mean that Mr Sarwar was obliged to attend the hearing of the wasted costs applications for the purpose of cross-examination. Walker Prestons appealed against that.

15. While the appeal was pending, Mr Hunt filed a letter suggesting that his case had been badly handled and that Walker Prestons had been "negligible". In the course of the letter, Mr Hunt said this:

> "Walker Prestons have always been privy to all documents and information relating to my previous employment and have never given me reason to believe that there are were any discrepancies within any of it. Ian Meachan of Walker Prestons had drawn my attention, a signature that was on a document. He questioned its validity and told me that he thought that it was a forgery, because it didn't match my signature. The document was one that I had allegedly signed, which made me a director of the firm, National Glass. At the time the document had been signed, I had lost both my parents and sister to cancer, my marriage was breaking down and I was [faced] with the prospect that I would be possibly losing my home and residency of my child. I was suffering extreme stress and cannot recall signing any such document, and have never stated anything to the contrary. Never was this document or my signature on it, an issue to Walker Prestons with regards to how successful they thought my claim would be."

16. It is to be noted that the document which Mr Hunt did not recall signing would appear to have been one recording his appointment as a director of Annolight. So far as I can see, there is no reason to suppose that Mr Hunt was here disputing that he had signed the 9 May 2019 Part 18 replies.

17. Walker Prestons' appeal came before Saini J who, on 18 December 2020, dismissed it. Saini J rejected a submission on behalf of Walker Prestons that there was no power to require the attendance of a legal representative in the context of a wasted costs application and then addressed a second issue: whether Judge Godsmark QC had been right as a matter of discretion to require Mr Sarwar to attend.

18. Saini J noted in paragraph 42 of his judgment "the odd feature that the judge's exercise of discretion is being impugned on the basis of arguments which were not only not put to the judge, but are in fact diametrically opposed to the arguments put to him". He nonetheless went on to consider the matter "essentially de novo" and concluded in paragraph 45 that he had "no doubt that it is a proper exercise of discretion to require Mr Sarwar's attendance". He explained in paragraph 46:

> "A number of matters are particularly relevant. First, the Firm is no longer acting for Mr Hunt. Second, it appears to be the case that privilege has been waived and there is no restriction on the Firm giving a full account of the position between itself and Mr Hunt. Third, it is clear to me on even a brief perusal of the witness statements that there are radically different accounts given by Mr Sarwar (the Firm) and Mr Hunt as to the facts which are central to certain of the issues to be determined by the judge on the hearing of the defendants' applications. It may well be that it is rare to require the attendance of a representative to be cross-examined on an application of this type but in my judgment it is difficult to see how these issues could be resolved in a fair and proportionate way without oral evidence from Mr Sarwar. Fourth, I am confident that the nature of these issues is that they can be managed in accordance with the Overriding Objective, so as to avoid the hearing of the applications becoming a substantial piece of satellite litigation. That is one of the concerns which motivated Sir Thomas Bingham MR in his cautionary observations in the *Ridehalgh* case."

19. Walker Prestons now challenge Saini J's decision in this Court. During the hearing before us, we were told by Mr Arora, who was once more appearing for Annolight, that on 27 August of this year Mr Hunt signed a document waiving privilege in communications with Walker Prestons. Annolight and Paragon also clarified in certain respects the allegations they advance against Walker Prestons. Mr Arora and Mr Denton, again appearing for Paragon, each accepted that there is insufficient evidence to warrant an allegation that the 9 May 2019 Part 18 replies were not signed by Mr Hunt but rather by Walker Prestons without his authority. Annolight's case is thus that encapsulated in paragraph 8 of Mr Mitchell's witness statement, quoted in paragraph 7 above. Mr Denton said that Paragon, too, relies on paragraph 8 of Mr Mitchell's statement; he accepted that the matters alleged there had not of themselves caused Paragon any loss, but maintained that they were inextricably linked to Paragon's other complaints. As I understood Mr Denton, however, the essence of what Paragon alleges

against Walker Prestons is that they knew or should have known that the "correction" which they asked Mr Zeitoun to make to his evidence was untrue. Mr Denton said that the trial bundle deficiencies of which Mr West spoke in his witness statement had not themselves caused Paragon loss.

Legal framework

20. Power to make a wasted costs order is nowadays conferred by section 51 of the Senior Courts Act 1981. That empowers the Court to order another party's lawyer to meet costs incurred by a party:

> "(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative; or
>
> (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay."

21. CPR 46.8 applies where the Court is considering whether to make a wasted costs order. By CPR 46.8(2), the Court must "give the legal representative a reasonable opportunity to make written submissions or, if the legal representative prefers, to attend a hearing before it makes such an order". Paragraph 5.9 of the Practice Direction supplementing CPR Part 46 provides that an application notice by which a wasted costs order is sought and any evidence in support:

> "must identify—
>
> (a) what the legal representative is alleged to have done or failed to do; and
>
> (b) the costs that the legal representative may be ordered to pay or which are sought against the legal representative."

22. Guidance as to how the wasted costs jurisdiction should be exercised is to be found in the decision of the Court of Appeal in *Ridehalgh v Horsefield* [1994] Ch 205, approved by the House of Lords in *Medcalf v Mardell* [2002] UKHL 27, [2003] 1 AC 120. Sir Thomas Bingham MR, giving the judgment of the Court, said at 231 that Courts should apply the following three-stage test when a wasted costs order is contemplated:

> "(1) Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently? (2) If so, did such conduct cause the applicant to incur unnecessary costs? (3) If so, is it in all the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?"

At 236-237, Sir Thomas Bingham MR addressed the implications of legal professional privilege in the context of a wasted costs application, saying:

> "Where an applicant seeks a wasted costs order against the lawyers on the other side, legal professional privilege may be relevant both as between the applicant and his lawyers and as between the respondent lawyers and their client. In either case it is the client's privilege, which he alone can waive.
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> The first of these situations can cause little difficulty. If the applicant's privileged communications are germane to an issue in the application, to show what he would or would not have done had the other side not acted in the manner complained of, he can waive his privilege; if he declines to do so adverse inferences can be drawn.
>
> The respondent lawyers are in a different position. The privilege is not theirs to waive. In the usual case where a waiver would not benefit their client they will be slow to advise the client to waive his privilege, and they may well feel bound to advise that the client should take independent advice before doing so. The client may be unwilling to do that, and may be unwilling to waive if he does. So the respondent lawyers may find themselves at a grave disadvantage in defending their conduct of proceedings, unable to reveal what advice and warnings they gave, what instructions they received. In some cases this potential source of injustice may be mitigated by reference to the taxing master, where different rules apply, but only in a small minority of cases can this procedure be appropriate. Judges who are invited to make or contemplate making a wasted costs order must make full allowance for the inability of respondent lawyers to tell the whole story. Where there is room for doubt, the respondent lawyers are entitled to the benefit of it. It is again only when, with all allowances made, a lawyer's conduct of proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order."

After stressing at 237 that "[d]emonstration of a causal link is essential", Sir Thomas Bingham MR turned at 238-239 to procedure, as to which he said:

> "The procedure to be followed in determining applications for wasted costs must be laid down by courts so as to meet the requirements of the individual case before them. The overriding requirements are that any procedure must be fair and that it must be as simple and summary as fairness permits. Fairness requires that any respondent lawyer should be very clearly told what he is said to have done wrong and what is claimed. But the requirement of simplicity and summariness means that elaborate pleadings should in general be avoided. No formal process of discovery will be appropriate. We cannot imagine circumstances in which the applicant should be permitted to interrogate the respondent lawyer, or vice versa. Hearings should be measured in hours, and not in days or weeks. Judges must not reject a weapon which Parliament has intended to be used for the

> protection of those injured by the unjustifiable conduct of the other side's lawyers, but they must be astute to control what threatens to become a new and costly form of satellite litigation."

23. In *Ratcliffe Duce and Gammer v Binns* UKEAT/100/08 (unreported, 23 April 2008) ("*Ratcliffe Duce and Gammer*"), an employment judge had mistakenly considered a wasted costs application by reference to the wrong rule. Allowing an appeal, Elias J, sitting as President of the Employment Appeal Tribunal, said in paragraph 14:

> "Nobody had their eye on the ball. As a consequence [the employment judge] … adopted the wrong procedure. She allowed the Respondent's solicitors to submit comments upon the Appellant's representations to her. That is not an appropriate procedure to adopt when a wasted costs order is made. The Tribunal should give the representative a reasonable opportunity to make oral or written submissions as to why the order should not be made (rule 48(7)). But whilst the other party may apply for an order - although the issue can exceptionally be raised by the Tribunal at its own initiative - it does not thereafter comment on the submissions, and it will never be appropriate for the receiving party to cross examine the representative against whom the order is being considered."

24. This passage could be read as indicating that there is a general rule that a person seeking a wasted costs order against another party's legal representative should not be permitted to comment on submissions from that representative. If that is what Elias J meant, I respectfully disagree. As CPR 46.8(2) confirms, a legal representative must, of course, be given an opportunity to advance reasons why a wasted costs order should not be made, but it seems to me that the person asking for it should normally be allowed to respond to whatever arguments and evidence the representative might put forward.

25. More important for present purposes is Elias J's comment that "it will never be appropriate for the receiving party to cross examine the representative against whom the order is being considered". Underhill J, sitting as President of the Employment Appeal Tribunal, had to consider this in *Godfrey Morgan Solicitors Ltd v Cobalt Systems Ltd* UKEAT/608/10, [2012] ICR 305 ("*Godfrey Morgan*"). He said at paragraphs 26-27:

> "26. … As for cross-examination of the representative against whom costs are sought, no doubt in most circumstances this will be inappropriate and/or unnecessary and/or disproportionate. But in a case like the present, where the representative is no longer acting for the party, where privilege has already been waived, where an oral hearing has been fixed and where the party and the representative have given different accounts of facts which may be central to the issue before the tribunal, cross-examination would seem a fair and proportionate way of helping it to get to the right result.
>
> 27. [Counsel for the solicitors] was not able to suggest a principled basis for any such absolute rule. He did, however,

> refer me to a passage in the judgment of the court in *Ridehalgh v Horsefield* [1994] Ch 205, 238–239, which reads:
>
> > '*Procedure* The procedure to be followed in determining applications for wasted costs must be laid down by courts so as to meet the requirements of the individual case before them. The overriding requirements are that any procedure must be fair and that it must be as simple and summary as fairness permits. Fairness requires that any respondent lawyer should be very clearly told what he is said to have done wrong and what is claimed. But the requirement of simplicity and summariness means that elaborate pleadings should in general be avoided. No formal process of discovery will be appropriate. We cannot imagine circumstances in which the applicant should be permitted to interrogate the respondent lawyer, or vice versa. Hearings should be measured in hours, and not in days or weeks. Judges must not reject a weapon which Parliament has intended to be used for the protection of those injured by the unjustifiable conduct of the other side's lawyers, but they must be astute to control what threatens to become a new and costly form of satellite litigation.'
>
> The specific points made in that passage do not assist. The Court of Appeal says nothing about the party seeking the order having no right to make submissions. Nor does it say anything about cross-examination: in context, the reference to 'interrogating' the representative is clearly to administering paper interrogatories. The real point being made is that the procedure should be as summary as is consistent with fairness; and in that context the court deprecates the deployment of elaborate procedures. It might on that basis have been open to one or more of the parties to submit to the judge that he should not hear oral evidence at all - from either the claimant or Mr Clegg - and simply have made a broad-brush assessment on the basis of their statements. I am not in fact sure that it would have been right for the judge to accede to such a submission in the circumstances of this case; but the real point is that it was not made, and that all parties proceeded on the basis that an oral hearing, with live evidence, was required. In those circumstances I can see nothing wrong in the evidence being tested in cross-examination."

26. The last authority to which we were taken was *Stokoe Partnership Solicitors v Grayson* [2021] EWCA Civ 626, [2021] 4 WLR 87 ("*Stokoe*"). In that case, the Court of Appeal upheld the dismissal of an application for a defendant to be cross-examined on an affidavit he had sworn in compliance with an order for him to provide information by way of *Norwich Pharmacal* relief. Bean LJ, with whom Peter Jackson and Coulson LJJ agreed, noted that the judge below had given four reasons for his decision, but said in paragraph 7 that the "principal reason … was … that 'cross-examination on the affidavit would pre-empt cross-examination at trial' and that it cannot be just and convenient to order cross-examination on a *Norwich Pharmacal* affidavit sworn by a party to

substantive proceedings concerning overlapping issues". Bean LJ considered this reason "the most important by far" (paragraph 13) and "a sound one" (paragraph 33). The claimant, Bean LJ said in paragraph 33, "is not entitled to an order that he must attend for cross-examination prior to that trial and be liable to imprisonment for contempt if he refuses to comply".

27. Mr Robert Marven QC, who appeared for Walker Prestons, submitted that Elias J was right in *Ratcliffe Duce and Gammer* to consider that it will never be appropriate for a lawyer against whom a wasted costs order is sought to be cross-examined. He argued that Underhill J was mistaken in *Godfrey Morgan* when he took the reference in *Ridehalgh v Horsefield* to "interrogat[ing] the respondent lawyer" to have related to the administration of paper interrogatories. He further suggested that *Stokoe* lends support to the view that there should be no cross-examination.

28. Mr Marven did not go so far as to suggest that the Court has no jurisdiction to order a lawyer facing a wasted costs application to attend for cross-examination. He was right not to do so. CPR 32.7 provides:

> "Where, at a hearing other than the trial, evidence is given in writing, any party may apply to the court for permission to cross-examine the person giving the evidence."

Where, therefore, a lawyer against whom a wasted costs order is sought has filed a witness statement, the Court must have power to direct cross-examination.

29. Nor do I accept that it is a jurisdiction which should never be exercised in the context of a wasted costs application. Underhill J may well have been right that the Court of Appeal had paper interrogatories in mind when it said in *Ridehalgh v Horsefield* that it could not imagine circumstances in which an applicant should be permitted to interrogate a respondent lawyer. After all, the Court of Appeal had referred in its previous sentence to "discovery" and, under the Rules of the Supreme Court, interrogatories supplemented documentary disclosure; in fact, the heading to O.26 r.1 of the Rules of the Supreme Court was "Discovery by interrogatories". Be that as it may, however, I agree with Underhill J that there is no absolute rule barring cross-examination in a wasted costs case. *Stokoe* does not suggest otherwise, since the focus there was on the danger that "cross-examination on the affidavit would pre-empt cross-examination at trial". By the time a wasted costs application such as the present one is heard, there will be no future trial in prospect.

30. On the other hand, cross-examination must, I think, be very much the exception rather than the rule. In *Ridehalgh v Horsefield,* the Court of Appeal stressed that the procedure adopted in respect of a wasted costs application should be "as simple and summary as fairness permits" and warned against such applications becoming "a new and costly form of satellite litigation". The fact that the lawyer's client may not have waived legal professional privilege may well also militate against cross-examination. So too will the need to be fair to the lawyer. He will be accused of "improper, unreasonable or negligent" conduct. Were an allegation of comparable seriousness being made in an ordinary negligence claim, the issues should have been defined by pleadings, and relevant unprivileged documentation disclosed, in advance of the lawyer going into the witness box. The Court must beware of requiring a lawyer to be cross-examined in a

process lacking such safeguards. It can, in all the circumstances, only rarely be right to order cross-examination.

31. For the same reasons, a Judge minded to direct cross-examination should carefully consider its proper scope and whether and, if so, how the procedure can be kept both fair and relatively simple. If a respondent to a wasted costs application elects not to make a witness statement, CPR 32.7 will not apply and there can be no question of cross-examination. Where a respondent makes a statement, the extent of any cross-examination may be limited by its subject matter: it is unlikely to be appropriate to permit cross-examination on topics which the statement has not addressed. Again, a Court should beware of sanctioning a fishing expedition, where cross-examination would be directed at creating a case against the lawyer rather than supporting a pre-existing one. A linked point is that, before cross-examination is sanctioned, special care should be taken to ensure that the lawyer knows the case he has to meet. In *Ridehalgh v Horsefield*, the Court of Appeal said that the lawyer "should be very clearly told what he is said to have done wrong and what is claimed", a point reflected now in PD 46's requirement that the materials supporting a wasted costs application must identify "what the legal representative is alleged to have done or failed to do" and the costs which are sought. It is of particular importance that the lawyer should know precisely what is alleged if there is to be cross-examination. A Judge authorising cross-examination should also consider how any issues as to legal professional privilege are to be handled and whether cross-examination can take place satisfactorily without any disclosure of documents. The extent, if any, to which the lawyer is constrained in what he might say by privilege will probably be best settled before the effective hearing. As for disclosure, a hearing in which a witness refers in cross-examination to undisclosed documents and, perhaps, the cross-examiner then requests to see them is not likely to be satisfactory.

The present case

32. As Saini J noted, counsel then appearing for Walker Prestons did not attempt to dissuade Judge Godsmark QC from ordering cross-examination at the hearing on 22 April 2020. To the contrary, he spoke of "at least Mr Hunt, … or possibly Mr Sarwar as well," being "required to give oral evidence in any event". On the other hand, it could be that Walker Prestons' counsel was taken somewhat unawares and so, as Mr Marven suggested, was "really thinking aloud" and, while now contending for Mr Sarwar's cross-examination, Mr Arora was himself at that stage "prepared to deal with this without [Mr Sarwar] being present". In any case, Saini J addressed the question whether Mr Sarwar should be cross-examined on its merits, and no one has filed a respondent's notice seeking to uphold Saini J's decision on the alternative basis that Walker Prestons' counsel had not originally objected to such cross-examination. In the circumstances, it seems to me that we, too, must consider the merits of ordering Mr Sarwar's cross-examination.

33. There may be some doubt as to whether Judge Godsmark QC in truth intended that to be the effect of his order. The relevant order provides for "oral evidence", but it does not explicitly say that Mr Sarwar is obliged to attend for cross-examination, let alone specify the extent of any cross-examination. It would have been better if the parties had taken steps to clarify the order. However, the parties have taken it that Mr Sarwar was being required to attend for cross-examination, and that that was what was intended is borne out by the transcript of the hearing. It appears from the transcript that Judge

Godsmark QC was envisaging that Mr Sarwar would be asked about points raised by Paragon's application which he had not addressed in his witness statement.

34. Judge Godsmark QC was doubtless attempting to devise a way forward which would result in the issues raised by the defendants' applications being resolved efficiently and without disproportionate cost, and the fact that Walker Prestons' then counsel did not voice objections to Mr Sarwar's cross-examination of course makes it the more understandable that that should have been directed. However, it seems to me that it was not in fact appropriate for either Judge Godsmark QC or Saini J to order cross-examination.

35. In the first place, the allegations against Walker Prestons had not been adequately defined. It was not clear from their application notices and evidence whether the defendants were claiming that the 9 May 2019 Part 18 replies had been signed by Walker Prestons rather than Mr Hunt without his authority. Nor was it apparent which (if any) other parts of Mr Mitchell's witness statement Paragon was relying on, whether either the matters of which Mr Mitchell spoke or the trial bundle deficiency to which Mr West referred was said to have caused Paragon loss or even quite what criticism of Walker Prestons was advanced in respect of inconsistencies as to the provision of hearing protection.

36. That leads to a second point. Had the cases against Walker Prestons been properly spelled out, it would presumably have emerged that neither Annolight nor Paragon was making any complaint about the signature on the 9 May 2019 Part 18 replies. On that basis, there could have been no justification for cross-examination on that "issue".

37. Thirdly, Mr Sarwar's witness statement contains nothing else justifying his cross-examination in relation to Annolight's application for wasted costs. Mr Arora drew attention to paragraph 10 of the statement, in which Mr Sarwar said that there was "no evidence as to whether [Walker Prestons] did, or did not, take instructions from [Mr Hunt] as to whether he held a directorship at [Annolight]". However, that assertion is of no evidential significance. If and to the extent that at the final hearing there is evidence as to whether Walker Prestons took instructions from Mr Hunt on whether he was a director of Annolight, Annolight will be able to rely on it without cross-examining Mr Sarwar.

38. Fourthly, there was no sufficient basis for permitting Mr Sarwar to be cross-examined on matters raised only by Paragon's application. Mr Sarwar had stated in terms that his witness statement was limited to dealing with Annolight's application and he had said nothing about, for example, the provision of hearing protection by Paragon. Judge Godsmark QC appears to have seen Mr Sarwar's silence on such issues as a reason for ordering cross-examination, but to my mind it weighed heavily against permitting cross-examination on them. More than that, it seems to me that, as things stood (and stand), cross-examination related to things said in Mr West's witness statement would have been likely to represent a fishing expedition designed to find evidence for allegations against Walker Prestons rather than to support pre-existing allegations for which there was already evidence. Mr West did not sufficiently identify the particular respects in which Walker Prestons' conduct was said to have been "improper, unreasonable or negligent" and thereby caused Paragon to incur unnecessary costs.

39. Fifthly, issues as to legal professional privilege and what, if any, disclosure might be required remained to be addressed. Although Mr Hunt has apparently waived privilege on a blanket basis now, he had not done so when Judge Godsmark QC made his order and there was still room for argument as to how far, if at all, privilege had been waived when the matter was before Saini J. The extent to which Mr Sarwar could speak to communications between his firm and Mr Hunt remained unclear, therefore. Supposing, however, that he was entitled to speak of some or all of them, it could be anticipated that there would be documents relating to them to which Mr Sarwar might refer but which had not been disclosed before the hearing and which the cross-examiner might then want to see. In the absence of directions providing a mechanism for the resolution of privilege issues and, potentially, consideration of some disclosure, the hearing stood to be very unsatisfactory.

40. Sixthly, Saini J was, I think, mistaken in thinking that Mr Sarwar and Mr Hunt had given "radically different accounts … as to the facts which are central to certain of the issues to be determined by the judge on the hearing of the defendants' applications". Mr Sarwar's evidence was to the effect that Mr Hunt had signed the 9 May 2019 Part 18 replies and, as I have said, I do not understand Mr Hunt to have disagreed in his letter, albeit that at the 12 December 2019 hearing his counsel had understood him to have denied signing the replies. For his part, Mr Hunt referred in his letter to discussions as to whether (and, if so, in what circumstances) he signed a document recording his appointment as a director of Annolight, a subject about which Mr Sarwar has said nothing.

Conclusion

41. I would allow the appeal. In my view, Judge Godsmark QC and Saini J were not justified in directing that Mr Sarwar attend for cross-examination. For completeness, however, I should record that I am not intending to preclude the possibility of an order for such cross-examination becoming appropriate in the future, depending on the circumstances at the time.

42. I would add that Judge Godsmark QC's direction in his order of 12 November 2019 for Walker Prestons to file witness statements in response to the wasted costs applications by 24 January 2020 must be understood to have meant that any evidence on which Walker Prestons wished to rely was to be filed by the specified date. Judge Godsmark QC cannot have been intending to bar Walker Prestons from resisting the wasted costs applications on the strength of arguments for which no evidence was required. CPR 46.8(2) provides for a lawyer facing a wasted costs application to have "a reasonable opportunity to make written submissions or, if the legal representative prefers, to attend a hearing". Even where there is a hearing, the lawyer must be entitled to advance submissions which have not been foreshadowed in evidence and, in fact, to file no evidence at all.

Lord Justice Arnold:

43. I agree. I would only add that this case demonstrates the need for careful case management of wasted costs applications, which must start with identifying the issues raised by the application.

Lord Justice Warby:

44. I agree with both judgments. I have some sympathy with HHJ Godsmark. As I read it, he was attempting to fashion a procedural regime to allow the defendants' applications to be resolved without disproportionate cost. That said, this was an unusual, complex, and sensitive situation. The issues were ill-defined, the evidence incomplete, and the question of whether privilege had been or would be waived was unresolved. The circumstances plainly did not justify the exceptional course of directing a solicitor to attend for cross-examination. It was also wrong in principle, I would add, to do this in the informal way adopted here. Any requirement for a solicitor to attend for cross-examination about the conduct of a case should be formulated with precision and reduced to writing in a formal order of the court.