Neutral Citation Number: [2024] EWCA Civ 1563

Case No: CA-2023-002503

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS AND PROPERTY COURTS IN MANCHESTER
CIRCUIT COMMERCIAL COURT (QBD)
HHJ Cadwaller sitting as a Judge of the High Court
[2021] EWHC 2590 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/12/2024

Before :

LORD JUSTICE LEWISON
LORD JUSTICE ARNOLD
and
LORD JUSTICE POPPLEWELL

- -

Between :

REFUELS LIMITED	**Appellant**
- and -	
(1) BIP CHEMICAL HOLDINGS LIMITED	
(2) MRS JEAN BLUNDELL	**Respondents**

- -

Thomas Grant KC and Stephen Hackett (instructed by **Furley Page LLP**) for the **Appellant**
The Respondents did not appear and were not represented.

Hearing date: 10/12/2024

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Approved Judgment

This judgment was handed down remotely at 2pm on 13/12/2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison:

1. This application for permission to appeal has at least two unusual features. First, it is made by a person who was not a party to the judgment under challenge. Second, the Appellant's Notice was filed more than two years after the judgment was given and entered the public domain. For those reasons it has been adjourned into court by Andrews LJ for hearing by a panel of three judges of this court.

2. The application arises out of a judgment given by HHJ Cadwaller sitting in the Circuit Commercial Court in the Business and Property Courts in Manchester on 9 September 2021.

3. The underlying claim was a claim for damages for breach of warranties contained in a share purchase agreement by which Mrs Blundell sold the whole of the issued share capital in Centec International Ltd to BIP Chemical Holdings Ltd. Centec's business was the refinement and treatment of chemicals, and in particular the recycling of mixed fuels, for example where a driver puts diesel into a petrol driven vehicle or vice versa.

4. The action was begun by a claim form, accompanied by Particulars of Claim, issued on 7 January 2020. Mrs Blundell was the only defendant. BIP alleged a number of breaches of warranty, but by the time of trial there were two main contentions. First, it was alleged that there had been material adverse changes to the business since the accounts date which had not been disclosed. Second, it was alleged that Centec carried on business other than in the normal and ordinary course. It is this second allegation with which we are concerned. The allegation, as pleaded in paragraph 3 (d) of the Particulars of Claim, was that:

> "Centec had been subject to a prolonged and systematic fraud perpetrated by a former director, Lucien Davies, in conspiracy with a customer Refuels Limited ("Refuels"). Refuels were in the practice of collecting mixed and contaminated fuels… It sold approximately 2 tankers worth a week to Centec… for c. £27,000 each by agreement by agreement with Mr Davies despite he and Refuels knowing the contents were worth no more than £20,000. Mr Davies and Refuels had an agreement to split the excess."

5. The Defence served in February 2020 did not admit paragraph 3 (d); denied that the facts alleged amounted to a breach of warranty; and complained that BIP had not provided any particulars of the alleged fraud or conspiracy between Mr Davies and Refuels.

6. Neither Mr Davies nor Refuels were a party to the action. Neither Mr Davies nor any witness from Refuels gave evidence at trial. Evidence in support of the allegation was given by Mr Bennett of BIP, which the judge set out at [90]. That evidence included an account of his meeting with Mr Taylor, the managing director of Refuels, who was accompanied by its commercial manager Mr Burke. Mr Bennett was barely cross-examined, if at all, about that evidence. The judge concluded at [92] that BIP had proved on the balance of probability that Refuels did defraud Centec in conspiracy with Mr Davies. He described Mr Bennett's evidence as detailed, plausible and

supported by documentation. He said that he placed no reliance on Refuels' denials in correspondence, which lacked details and had not been tested in cross-examination. He added that it was telling that Refuels had apparently decided to let sleeping dogs lie and had not themselves pursued outstanding invoices.

7. In the result, the judge awarded damages for breach of warranties, but because the agreement also contained a cap on liability, the judgment sum was less than it would have been absent the cap.

8. Refuels now seeks to challenge the judge's finding of fact that it defrauded Centec in conspiracy with Mr Davies. Its Appellant's Notice was filed on 15 December 2023 and issued on 8 January 2024, some two years and three months after the judge gave judgment. It is emphasised on behalf of Refuels that success in the appeal will not alter the judge's order or the judgment sum, because of the cap.

9. This court held in *George Wimpey UK Ltd v Tewkesbury Borough Council* [2008] EWCA Civ 12, [2008] 1 WLR 1649 that we have a discretion to permit a person who was not a party to the action below to bring an appeal. There is, therefore, no jurisdictional bar to the appeal. Nevertheless, CPR 52.12 (2) (b) provides that an appellant's notice must be filed at the appeal court within 21 days after the date of the decision of the lower court which the appellant wishes to appeal. Clearly, therefore, Refuels cannot appeal without an extension of time. At the conclusion of the hearing we announced that we would refuse the extension of time for reasons to be given in writing. These are my reasons for joining in that decision.

10. In order to evaluate the application, it is necessary to go into the chronology in some more detail. Mr Bennett's evidence was that he had a meeting with Mr Taylor on 28 March 2019 at which he said that he confronted Mr Taylor with the alleged fraud. Mr Taylor accepts that the meeting took place, but disputes Mr Bennett's account of it. In an email of 5 April 2019 from Ms Brown (BIP's solicitor) to Ms Biggs (Refuels' solicitor) Ms Brown asserted that "serious allegations of dishonesty" were being made against Refuels. In a letter of 8 April 2019, she asserted that "Lucien Davies and representatives of your client (for and on behalf of your client) have conspired in a prolonged and systematic fraud on our client". She went on to say:

> "… your client and Mr Davies … entered into the Agreement on highly preferential rates and arranged for the benefit gained by your client as a result to be shared between your client and Prosolve Distillates Limited…"

11. Ms Biggs replied on 15 April 2019. She denied the allegations of dishonesty, and went on to explain why Refuels contended that the terms of the agreement were not preferential. In a letter of 8 May 2019 Ms Brown maintained BIP's position.

12. As I have said the claim for breach of warranty was begun on 7 January 2020. By letter dated 15 March 2021 Mrs Blundell's solicitors made contact with Mr Taylor. There appears to have been a telephone call earlier in the day, but we have no account of it; and, unsurprisingly, in his second witness statement Mr Taylor says that he cannot remember it. The letter said that "as discussed" BIP had made a "warranty claim" against Mrs Blundell; and asked Mr Taylor to make himself available to spend an hour with the solicitor conducting the litigation "in order to provide relevant

information to enable us to complete a witness statement for yourself." Mr Taylor did not respond to this letter, and a chasing request in the same terms was sent by email on 18 March 2021. Mr Taylor did not respond to that either. On 19 March he was left a voice mail and yet another chasing email was sent. That email stated in terms that "we are coming up to expiry of our Court deadline". That elicited no response; so on 23 March Mrs Blundell's solicitors said that they would be able to serve a hearsay notice with any witness statement as that "would allow you to make a statement without having to attend Court to be cross-examined". There was no response to that proposal.

13. Mr Taylor says in his first witness statement in support of this application that in March 2021 he did not know that BIP had issued proceedings. That may well be so before he was contacted by Mrs Blundell's solicitors; but that contact told him that there were proceedings on foot; that the claim related to warranties and that his evidence was potentially relevant. He says that he spoke to Mr Davies who told him that the Blundells wanted him (i.e. Mr Davies) to admit to wrongdoing. Mr Taylor goes on to say:

> "I didn't have any trust in the Blundells given their treatment of Mr Davies. Further I did not have time as Refuels was at this time under extreme stress, having lost approximately 80% of turnover coming out of Covid and were fighting to save the business – it lost £380,000 that financial year. I thought my time was better spent within the business."

14. In other words, Mr Taylor did not want to spare the time from the business in order to make time to give a witness statement. Part of his reason for declining also seems to have been that he did not want to assist Mrs Blundell. He goes on to say in relation to his contact with Mrs Blundell's solicitors:

> "… after the first email there was no other explanation as to why I was asked to be a witness… I was not given any documents and did not know there was a court case in which Refuels was expressly accused on fraudulent activity."

15. Accepting that account at face value, it seems to me to demonstrate remarkable lack of curiosity given the persistence with which Mrs Blundell's solicitors pursued the question of a witness statement; and the fact that BIP had made serious allegations of dishonesty against Refuels two years earlier. At all events, despite those requests to give a witness statement, Mr Taylor did not give one, and so there was no evidence from him at trial.

16. On 2 November 2021 Mrs Blundell applied for permission to appeal. Ground 1 of the grounds asserted that the judge was wrong to find the fraud had been proved in circumstances where none of her witnesses were able to contradict the allegation; and where none of the other parties to the alleged fraud including Refuels and Mr Davies were before the court. Carr LJ refused permission on 21 December 2021. In her order she said that there was no prospect of an appellate court interfering with the judge's finding of fact. She also said that she could see no procedural unfairness.

17. Mr Taylor was not contacted again; and no one sent him a copy of the judgment. He discovered the existence of the judgment in October 2022. In the course of renewing credit insurance, insurers emailed him to say that they had uncovered a judgment which said that Refuels had defrauded Centec. Mr Taylor was given the case reference, so he looked it up on the internet. He must have read the judgment because he says in his first witness statement:

> "I could see it was a comment by the Judge that had no bearing on the outcome of the decision and I thought it was a non-issue."

18. Nevertheless, despite his denial of the allegations to insurers, they declined to renew cover. Refuels took no action at the time but found cover with different insurers.

19. In September 2023 Mr Taylor learned of a claim form issued by Mrs Blundell making claims against both Refuels and him personally. Shortly afterwards he was contacted by the AA Risk and Compliance team to be told that they were beginning an audit of their relationship. Mr Taylor thinks that that was prompted by their discovery of the judgment.

20. That seems to have prompted Refuels to instruct solicitors, which it did in October 2023. Junior counsel was instructed to advise on options in mid-November. Junior counsel advised the retainer of leading counsel; and that was duly done. That process culminated for the time being in the issue of the Appellant's Notice on 15 December 2023.

21. Mr Hackett (who argued this part of the application) accepts that in considering the application for an extension of time, the court must apply the three stage test in *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926 (see *R (Hysaj) v SSHD* [2014] EWCA Civ 1633, [2015] 1 WLR 2472). The first stage is to assess the seriousness and significance of the failure to comply with the rules. If the failure was neither serious nor significant, relief will ordinarily be granted. The second stage is to consider why the default occurred. The third stage is to consider all the circumstances of the case, including the answers reached at the first and second stages, which must be given particular weight at the third stage. At this stage the promptness of the application is also a relevant circumstance to be weighed in the balance along with all the other circumstances.

22. Mr Hackett argued that the failure was neither serious nor significant. Refuels was not a party to the action and because of the cap on damages, it does not seek to impugn the order that the judge actually made. So neither of the parties to the original litigation will be affected. I disagree. The context in which this question is posed is the context of a time limit of 21 days for filing an appellant's notice. CPR rule 52.15 (2) states in terms that the parties may not agree to extend time for appeal under the rules. In addition, CPR rule 3.9 encapsulates the need for litigation to be conducted efficiently and also the need to enforce compliance with rules. These are matters of public interest, which include the public interest in the finality of litigation. Mr Hackett said that the default was a failure to file an Appellant's Notice within 21 days after the judge's judgment. There was a good reason for Refuels failure to do so; namely that it did not know about the judgment. It may well be the case that Mr Taylor had no knowledge of the judgment within the primary time limit laid down by

the rules; but he had read it by October 2022, well over a year before the Appellant's Notice was eventually filed. He knew at that time of the serious finding that had been made against Refuels. As Andrews LJ observed when adjourning this application into court, Refuels would have been on stronger ground if the application had been made in October 2022. Even if time were to run from the time when it decided to instruct solicitors in October 2023, there is still a delay of two months or thereabouts.

23. The reason for the default, according to Mr Taylor's first witness statement, was that he thought the judge's finding was a "non-issue". Contrary to Mr Hackett's submission, that is nothing to do with Refuels' lack of knowledge about the availability of any legal recourse against the finding. There was no impediment to Refuels contacting solicitors if it had wanted to explore the possibility of taking some form of action. Moreover, Mr Taylor took the view that it was a non-issue despite the fact that it had already had a deleterious effect on Refuels' commercial relationship because it had caused (or apparently caused) one insurer to decline to renew insurance. That must, in my judgment, be taken as a conscious decision not to pursue the matter any further. Waiting to see whether any further adverse consequences might flow from a judgment is not generally a good reason for delay: *Kagalovsky v Balmore Invest Ltd* [2014] EWHC 108 QB, *Ghura v Dalal* [2015] EWHC 2385 (Ch).

24. I turn then to consider all the circumstances of the case. At this stage in the analysis the merits of the proposed appeal have little part to play. As Moore-Bick LJ explained in *Hysaj* at [46]:

> "In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them."

25. Males LJ considered this question in Bangs *v FM Conway Ltd* [2024] EWCA Civ 1461. He said:

> "[34] First, although the court will want to know what the case is about (the nature of the claim and any defences), the general rule is that the merits of the underlying claim are irrelevant when the court has to make a case management decision such as whether to grant relief from sanction. It follows that it is unnecessary for the parties to deploy extensive evidence designed to show that they have a strong case on the merits and they should not seek to do so. Such evidence is likely to be a distraction from what the court needs to decide and is positively unhelpful.
>
> [35] Second, there is an exception to this general rule if a party wishes to contend that its case is so strong that it would be able to obtain summary judgment in its favour. It is clear that in

> *Hysaj*, when Lord Justice Moore-Bick spoke of the grounds of appeal being very strong, he did not intend a less demanding test than would apply on an application for summary judgment. This is the only exception to the general rule which has so far been recognised. While I would not rule out the possibility that there may be others, if they do exist they will be genuinely exceptional.
>
> [36] Third, even when a party does wish to contend that it would be able to obtain summary judgment, the merits of the underlying claim should only be taken into account when this can be readily demonstrated, without detailed investigation. It is significant that Lord Justice Moore-Bick confined the exception to cases where 'the court can see *without much investigation* that the grounds of appeal are either very strong or very weak' (my emphasis)."

26. Nevertheless, Mr Grant KC (who argued this part of the application) addressed us at some length on the underlying merits of the appeal, in order to persuade us that the grounds of appeal were "very strong".

27. The first way in which the appeal is put is that Refuels' right to a fair trial under article 6 of the European Convention on Human Rights has been infringed. No other article was relied on. Mr Grant relied on *Re W (A Child) (Care Proceedings Non Party Appeal)* [2016] EWCA Civ 1140, [2017] 1 WLR 2415. In that case a judge conducting a fact-finding hearing in care proceedings made serious findings of misconduct against a social worker and a police officer, both of whom had given evidence. Those allegations were not part of the case, and had not been put to the witnesses. They came out of the blue in the judge's "bullet point" oral judgment (which had not entered the public domain at the time of the appeal). The social worker and the police officer sought permission to appeal relying on their right to a private life under article 8 of the Convention. The local authority (which had been a party to the action) also sought permission relying on its right to a fair trial under article 6. What all the appellants sought was "a remedy from this court to prevent the inclusion of these adverse and extraneous findings in the final judgment that has yet to be handed down formally and published as the judge intended it to be." There are three features of some importance to note at this stage. First, the findings were "extraneous;" that is to say that they were not part of the case as presented. At [91] McFarlane LJ said that it had been:

> "… demonstrated beyond doubt that the matters found by the judge were not current, even obliquely, within the hearing or wider process in any manner. None of the key findings that the judge went on to make were put by any of the parties, or the judge, to any of the witnesses and there is a very substantial gap between the cross examination, together with the parties' pleaded lists of findings sought, and the criticisms made by the judge. In this respect this is not a matter that is finely balanced; the ground for the criticisms that the judge came to make of SW, PO and the local authority, was simply not covered at all during the hearing."

28. Second, the impugned social worker and police officer had in fact given evidence, but the allegations were not put to them.

29. Third, the impugned findings had not entered the public domain. The applications of the social worker and the police officer were decided solely with reference to article 8, which is not relied on in this application. The only application decided under article 6 was that of the local authority which *was* a party to the proceedings. At [95] MacFarlane LJ said:

> " Where, during the course of a hearing, it becomes clear to the parties and/or the judge that adverse findings of significance outside the known parameters of the case may be made against a party or a witness consideration should be given to the following: (a) ensuring that the case in support of such adverse findings is adequately "put" to the relevant witness(es), if necessary by recalling them to give further evidence; (b) prior to the case being put in cross examination, providing disclosure of relevant court documents or other material to the witness and allowing sufficient time for the witness to reflect on the material; (c) investigating the need for, and if there is a need the provision of, adequate legal advice, support in court and/or representation for the witness."

30. In the present case, the allegations of fraud were within the "known parameters" of the case: they had been specifically pleaded. There was no witness to whom the allegations could have been put.

31. In *Re W* MacFarlane LJ also said at [100]:

> "The present case is, unfortunately, to be regarded as extreme in two different respects: firstly the degree by which the process adopted fell below the basic requirements of fairness and, secondly, the scale of the adverse findings that were made. This judgment is, therefore, certainly not a call for the development of "defensive judging"; on the contrary *judges should remain not only free to, but also under a duty to, make such findings as may be justified by the evidence on the issues that are raised in each case before them*." (Emphasis added)

32. Thus in the present case HHJ Cadwallader had a duty to make findings on the issues raised in the pleadings on the evidence called at trial.

33. *Popely v Ayton Ltd* [2022] EWHC 3217 (Ch), to which Mr Grant also referred, was another case in which serious findings were made against a person who had neither been a party to the proceedings, nor called as a witness. An appeal against those findings succeeded, again on the basis of a breach of article 8 of the ECHR. But that, too, was a case in which the impugned person had not been mentioned in the Particulars of Claim at all as Joanna Smith J emphasised at [4]. She recorded at [44] that it was common ground that the principles applied in *Re W* were applicable to the case before her, so it was not necessary for her to consider the principles any further. At [50] she said:

> "It is extremely unusual in a civil case for the court to make serious findings (with potential legal consequences) *on unpleaded matters against a non-party*. I am also very struck by the fact that the Judge appears to have concluded that Mr Popely was somehow responsible for not attending the trial ("conspicuous by his absence"), a conclusion which may very well have influenced his willingness to make such serious findings. The assumption that individuals who are not involved in a case *and have not been asked to appear to give evidence* should nevertheless be putting themselves forward voluntarily appears to me to be fundamentally misconceived and is an important part of the procedural unfairness that occurred in this case. The court may draw adverse inferences in respect of a party's case if a witness who might obviously have assisted with that case is not present, but that is very different from treating a third party against whom no pleaded allegation is made as being responsible for his own non-attendance at trial (*notwithstanding evidence to the effect that he was not even approached to give evidence*)." (Emphasis added)

34. In this case the issue of fraud did not come out of the blue, nor can it be said that it was extraneous; on the contrary it was a pleaded issue. I do not consider that the judge can be criticised for deciding a pleaded issue, save in exceptional circumstances. *Re W* so holds at [100]. In addition, Mr Taylor was asked to give evidence but did not, which distinguishes this case from *Popely*. It would be an extension of *Re W* to apply it to the facts of this case. In addition, the judgment has already entered the public domain. Indeed, that is how Mr Taylor found out about it. There is, therefore, no possibility of the judge's judgment being redacted or rewritten: see *Gray v Boreh* [2017] EWCA Civ 56 at [45].

35. Article 6 relevantly provides:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ."

36. This article is concerned with procedural fairness relating to "civil rights". It cannot be used to create substantive rights. The European Court of Human Rights has held that it may not create by way of interpretation of Article 6 a substantive right which has no legal basis in the State concerned: see e.g. *Boulois v Luxembourg* (Application no. 37575/04) at [91]. As the Court has also held, article 6 does not itself guarantee any particular content of substantive law of the State concerned: see e.g. *Roche v United Kingdom* (Application no. 32555/96) at [119]. The Court has consistently held that for Article 6 in its "civil" limb to be applicable, there must be a "dispute" regarding a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 into play: see e.g. *Denisov v Ukraine* (Application no. 76639/11) at [44] citing previous authority to the same effect. In this respect the appeal faces two hurdles. Refuels has

not identified the substantive right under domestic law that it relies on. When pressed on this point Mr Grant formulated the right as the right not to have findings of dishonesty made against a person without that person having had the opportunity to make representations and defend himself against the allegations of dishonesty. But that is a circular argument. The right relied on is itself a procedural right rather than a substantive right.

37. Second, it is not easy to see how the judgment under challenge is directly decisive for the right in question. Not being party to the action, Refuels is not bound by the judgment; and the judgment cannot be relied on as probative of the facts found in any future proceedings brought against it: *Hollington v F Hewthorn & Co Ltd* [1943] KB 587.

38. Quite apart from that, the parties to the litigation (i.e. BIP and Mrs Blundell) have their own entitlement under article 6. They were entitled to the judge's determination on the substantive issues that they chose to put before the court. They were also entitled to finality in the litigation.

39. I must not be taken as saying that these hurdles cannot be surmounted; merely that this ground of appeal cannot be said to be "very strong".

40. The second way in which the appeal is put is that Refuels is entitled to rely on a common law entitlement to fairness. The starting point for Mr Grant's argument is the decision of this court in *Cie Noga d'Importation et d'Exportation SA v Australia and New Zealand Banking Group Ltd* [2003] EWCA Civ 1142, [2003] 1 WLR 307. As Mr Grant rightly says, the court held that a finding of fact could, in some circumstances, be challenged even if that finding was not recorded in a formal declaration or order of the court. It is, however, important to note what Waller LJ said at [27]:

> "A loser in relation to a "judgment" or "order" or "determination" has to be appealing if the court is to have any jurisdiction at all. Thus if the decision of the court on the issue it has to try (or the judgment or order of the court in relation to the issue it has to try) is one which a party does not wish to challenge in the result, it is not open to that party to challenge a finding of fact simply because it is not one he or she does not like."

41. The judgment of the court in the present case was simply judgment for the claimant for the sum of £875,000. That was the decision of the court on the issues it was asked to try. It is not sought to challenge that result, because of the existence of the cap. The decisiveness of the point in issue is also emphasised by Macur LJ in *M (Children)* [2013] EWCA Civ 1170 at [21]:

> "The principles of appellate jurisdiction to be derived from *Cie Noga* are identified in paragraphs 27 and 28 of the judgment as indicated above. They are clear. Findings of fact do <u>not</u> comprise determination, order or judgment unless they concern the issue upon which the determination of the whole

> case ultimately turns or are otherwise subject of a declaration within the order." (Original emphasis)

42. In *Cie Noga* at [28] Waller considered the earlier case of *In re B (A Minor) (Split Hearings: Jurisdiction)* [2000] 1 WLR 790 where this court entertained an appeal against findings of fact made at a fact-finding hearing in proceedings under the Children Act 1989, despite those finding not having been embodied in a formal order of the court. He adopted counsel's description of those findings being "pregnant with legal consequences" (because they would have influenced the court's disposal of the case at the welfare stage). The judge's findings in this case do not have any *legal* consequences as far as Refuels is concerned. The consequences, if any, are reputational. Reputational consequences are not enough: *Gray v Boreh* at [50].

43. It would, in my judgment, be an extension of the principle in *Cie Noga* to extend it to a case like this one. Mr Grant argued that *Re W* had extended the principle in a case involving breaches of Convention rights. He relied for that purpose on what MacFarlane LJ said at [111]:

> "In the light of the conclusion that I have now reached that the right to a fair trial under articles 6 or 8 of the European Convention of SW, PO and the local authority have been breached, the conclusion on the *Cie Noga* issue must be determined with full regard to the right to an "effective remedy" enshrined in article 13 of the European Convention and to sections 7 and 8 of the Human Rights Act 1998."

44. But that, of course depends on establishing that there had been a breach of a Convention right, which may be arguable in this case, but is not "very strong".

45. So far as the common law test of fairness is concerned, Mr Grant relied on *R v Davis* [2008] UKHL 36, [2008] 1 AC 1128 and *R v SSHD ex p Doody* [1994] 1 AC 531. In the former case Lord Bingham referred to the common law principle that a defendant in a criminal trial should be confronted by his accusers in order that he may cross-examine them and challenge their evidence. At [5] he quoted with approval an observation in *Duke of Dorset v Girdler* (1720) Prec Ch 531, 532 that:

> "the other side ought not to be deprived of the opportunity of confronting the witnesses, and examining them publicly, which has always been found the most effectual method of discovering of the truth."

46. In the latter case Lord Mustill said at 560:

> "My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in

> the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

47. It is principles (5) and (6) that are particularly pertinent in this case. As we have seen Mr Taylor was given the opportunity to make representations by being invited to make a witness statement; indeed, he was pressed to do so. But he declined. Although he may not have been informed in terms of the gist of the case against Refuels at the time he was asked to make the statement, he showed a lack of curiosity about finding out why he was being asked to make a witness statement in the light of the fact that he knew both that allegations of dishonesty had been made against Refuels and also the grounds for that allegation. If he had engaged with Mrs Blundell's solicitors he would surely have been told why his evidence would be important.

48. In addition, both those cases concern impugned decisions which had a direct effect on the appellant; in *Davis* a conviction for murder and in *Doody* the fixing of a minimum term of imprisonment. In the present case no relief was sought against Refuels, and it is not bound by the judgment.

49. There are two other cases on this part of the application to which I should refer. In *Vogon International Ltd v The Serious Fraud Office* [2004] EWCA Civ 104 the trial judge made a finding of dishonesty against two witnesses who had given evidence before him on behalf of Vogon. It had never been part of the SFO's case that Vogon were dishonest. There was no cross-examination to that effect; and the judge gave no indication of his thinking in that regard. It was in those circumstances that May LJ said at [29]:

> "But I also consider that the judge was entirely wrong in the circumstances of this case to make these unnecessary findings. It is, I regret to say, elementary common fairness that neither parties to litigation, their counsel, nor judges should make serious imputations or findings in any litigation when the person against whom such imputations or findings are made have not been given a proper opportunity of dealing with the imputations and defending themselves."

50. He went on to say that the findings were "not remotely necessary to the decisions that the judge had to make." In the present case HHJ Cadwallader's findings were necessary to the pleaded case.

51. The second case is the decision of the Divisional Court in *MRH Solicitors Ltd v Manchester County Court* [2015] EWHC 1795 (Admin). The case concerned a road traffic accident. The trial judge dismissed the claim on the ground that the accident had been staged; and that the claim was fraudulent. In the course of his judgment he also said that the claimant's solicitors were "elbows deep in a fraudulent claim". The Divisional Court in effect allowed an appeal by the solicitors (although it was presented as a claim for judicial review). It is of critical importance to note that fraud by MRH had not been pleaded; fraud on their part had been expressly disavowed in the Defence; and that position was confirmed by the defendant's solicitor when he gave evidence. The successful submission was that the judge's role "was to adjudicate on the issues raised by the pleadings, not to embark on an inquisitorial enterprise of his own". That is precisely what HHJ Cadwallader did in the present case.

52. Mr Grant recognised that there was no "bright line" rule. In *MRH* at [24] the Divisional Court said:

> "… in our view the right course would be for the third party who believes they have been unfairly criticised in a judgment to apply to be joined as a party. We emphasise that we are not saying that a third party who is criticised will necessarily be entitled to be joined as a party. There are many cases heard in the civil courts (and also family and criminal courts) where the conduct of an absent person falls to be considered. For example, in a conspiracy case not all the alleged conspirators may be before the court as parties or witnesses. In complex commercial frauds it may well be part of the case that an absent person or institution was party to dishonest conduct somewhere in the chain. Everything will depend on the facts of the individual case."

53. Again, I am not to be taken as saying that these problems are insurmountable. Their relevance is, once again, to show that the merits of the appeal are not "very strong".

54. There are three other considerations to take into account at this stage. First, there is the order of Carr LJ refusing permission to appeal. This court will only allow an appeal if either the judge was wrong, or the decision was unjust because of a serious procedural or other irregularity in the lower court: CPR rule 52.21 (3). The application for permission to appeal was put on both bases; and Carr LJ rejected both. Any appeal by Refuels would directly contradict that evaluation, because the relief that Refuels seeks is a decision by this court that the judge's finding is invalidated by procedural unfairness and thus has no validity. Second, in the proceedings that Mrs Blundell has begun, the same allegations of fraudulent conspiracy are levelled against Refuels and Mr Taylor. For the reasons I have explained, Judge Cadwallader's findings of fact have no probative value in those proceedings. If, therefore, Refuels and Mr Taylor choose to defend the claim, they will have the opportunity to confront their accusers and challenge their evidence, and the chance to refute those allegations. It is open to Refuels to bring a counterclaim for a declaration which would survive

any discontinuance or to decline to settle except on the basis that a public statement was made withdrawing the allegation of fraud. It follows that they are in a very different position from the appellants in *Re W*. Mr Grant argued that those proceedings might be discontinued or might settle. That is true, but the opportunity for Refuels to clear its name is there. Third, neither BIP nor Mrs Blundell oppose the appeal. While this is undoubtedly a factor to bear in mind, it can only carry limited weight, given that CPR rule 52.15 (2) states in terms that the parties may not agree to extend time for appeal under the rules. Whether to extend time is thus principally a matter between the applicant and the court.

55. In addition, in considering the third stage it is necessary to ask whether the application has been made promptly. I do not consider that the application can be said to have been made promptly. It was made well over a year after Mr Taylor had read the judgment and Refuels had already suffered adverse commercial consequences; and some two months after Refuels had instructed solicitors. Having reached the conclusions that I have at stages one and two of the three-stage test, I do not consider that "all the circumstances of the case" warrant a different answer.

56. Gloster LJ (with whom Briggs LJ agreed), having considered *Re W*, said in *Gray v Boreh* at [50]:

> "Finally, although every case depends on its own facts, I express my concern that to permit a non-party witness in a commercial case of this type to exercise an independent right of appeal, in which he is free to challenge adverse factual findings made against him by a first instance judge, merely on the grounds that such findings have reputational consequences for him, has the potential to lead to highly undesirable satellite litigation. That in my judgment would be likely to waste court resources contrary to the interests of other litigants and to bring the administration of justice into disrepute."

57. Moreover, this court has recently held in *Aymes International Ltd v Nutrition4u BV* [2024] EWCA Civ 1259 at [40]:

> "Even if the Court has jurisdiction in the absence of the features of *Re W* discussed in the preceding paragraph to entertain an appeal against factual findings by a judge which have no legal consequences for the parties, it must be an exceptional jurisdiction which should only be exercised for compelling reasons."

58. Those were my reasons for joining in the decision to refuse the extension of time.

Lord Justice Arnold:

59. I agree.

Lord Justice Popplewell:

60. I also agree.