Neutral Citation Number: [2022] EWHC 2275 (Ch)

PROFESSIONAL NEGLIGENCE *– Solicitors – Loss of opportunity to pursue claim to trial – Damages – Defendant's application to strike out and for summary judgment – Whether claimant's conduct putting fairness of trial in jeopardy – Contractual interpretation – Whether damages for breach of contract to be assessed on the counter-factual basis that the party in breach would have exercised a contractual right to terminate the contract when they had not done so – Waiver and forbearance – Whether provision for interest on overdue invoices at 2% every 14 days a penalty – Whether claim for interest on damages at judgment debt rate of 8% pa bad in law*

Case No: BL-2019-002077

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

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

Date: Thursday, 29 September 2022

Before :

His Honour Judge Hodge KC
Sitting as a Judge of the High Court

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Between :

Harrington Scott Limited

Claimant

- and –

Coupe Bradbury Solicitors Limited

Defendant

- -

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Ms Rebecca Page and **Ms Emily Gailey** (instructed by **RPC**) for the **Defendant/Applicant**
Mr Richard Bowles (instructed by **Acuity Law Limited**) for the **Claimant/Respondent**

The following authorities are referred to in this judgment:

Ahjua Investments Ltd v Victorygame Ltd [2021] EWHC 2382 (Ch)
Arrow Nominees Inc v Blackledge [2001] BCC 591
BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977) 52 ALJR 20
British Gas Trading v Shell UK Ltd [2020] EWCA 2349
Cavendish Square Holding BV v Makdessi [2015] UKSC 67, [2016] AC 1172
Collier v P & M J Wright (Holdings) Limited [2007] EWCA Civ 1329, [2008] 1 WLR 643
Crema v Cenkos Securities Plc [2010] EWCA Civ 1444, [2011] Bus LR 943
D & C Builders Ltd v Rees [1966] 2 QB
Durham Tees Valley Airport Ltd v BMI Baby Ltd [2010] EWCA Civ 485, [2011] All ER (Comm) 732
Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch)
E D & F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472
Gilbert v Shanahan [1988] 3 NZLR 528
Harris v Bolt Burdon [2000] C.P. Rep. 70
Harrison v Bloom Camillin (No 2) [2000] Lloyd's Rep PN 404
Holyoake v Candy [2017] EWHC 3397 (Ch)
Lavarack v Woods of Colchester [1967] 1 QB 278
Logicrose Ltd v Southend United Football Club Ltd (unrep., The Times 5 March 1988)
Long v Farrer [2004] EWHC 1774 (Ch)
Marks and Spencer Plc v BNP Paribas Securities Services Trust Company (Jersey) Limited [2015] UKSC 72, [2016] AC 742
Masood v Zahoor [2009] EWCA Civ 650, [2010] 1 WLR 746
Merricks v Mastercard Inc [2020] UKSC 51, [2021] Bus LR 25
Midland Bank v Hett, Stubbs & Kemp [1979] Ch 384
Navig8 Inc v South Vigour Shipping Inc [2015] EWHC 32 (Comm)
Pinnock v Wilkins & Sons The Times, 29 January 1990
Perry v Raleys Solicitors [2019] UKSC 5, [2020] AC 352, and [2017] EWCA Civ 314
Redbourn Group Ltd v Fairgate Developments Ltd [2018] EWHC 658 (TCC)
Reed Executive Plc v Reed Business Information Ltd [2004] EWCA Civ 887
Swain v Hillman [2001] 1 All ER 91
Vivienne Westwood Ltd v Conduit Street Development Ltd [2017] EWHC 350 (Ch)
Wards Solicitors v Hendawi [2018] EWHC 1907 (Ch)
Watts v Morrow [1991] 1 WLR 1421
Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] AC 1173
Re ZM v JM (Children) [2008] EWCA Civ 1261

Hearing dates: 13-15, 19 and 20 July 2022
Draft Judgment circulated: 5 September 2022
Further written submissions received: 8, 16 and 20 September 2022
Judgment formally handed down: 29 September 2022

This judgment will be handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on the National Archives caselaw website. The date and time for hand-down will be deemed to be 10.00 am on Thursday, 29 September 2022.

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

His Honour Judge Hodge KC:

1: Introduction

1. This is my reserved judgment on an application by the defendant solicitors, Coupe Bradbury Solicitors Limited, issued as long ago as 30 March 2021, to strike out (pursuant to CPR 3.4 (2) (a), (b) and/or (c) and/or the court's inherent jurisdiction), and/or for summary judgment (under CPR 24.2) on, all or part of a Part 7 claim issued by the claimant, Harrington Scott Limited, on 8 November 2019 seeking damages for professional negligence by the defendant whilst acting as the claimant's litigation solicitors. One of the bases for the strike out application is that it would be an affront to the court to allow this claim to proceed to trial. In addition to this overarching issue, however, there are no less than 11 individual (but, in some instances, related) issues which the court is required to consider.

2. The application is supported by a witness statement from the defendant's litigation solicitor, Ms Karen Morrish (of RPC), dated 30 March 2021 (and extending to some 94 pages). Evidence in answer to the application is provided by Mr Trevor Vickers in the form of a witness statement (of some 85 pages) dated 22 October 2021. Mr Vickers is the sole director of the claimant (Harrington Scott Limited) and also of a company registered in the British Virgin Islands (the **BVI company**) bearing a similar name (Harrington Scott Ltd) and apparently dissolved in November 2017, after having been struck off the register of companies for non-payment of registration fees. Mr Vickers variously describes himself as either the sole, or the majority, shareholder of both companies: contrast paragraph 1 with paragraphs 25 and 57 of Mr Vickers's first witness statement. Mr Vickers states that the only other person who has ever been a director of the claimant is Mr Mike Williams, who was a director until he resigned in October 2009 (although he is said to have continued working as the claimant's accountant until he sadly passed away in 2019). There is a short (13 page) witness statement in reply, dated 3 December 2021, from Mr Paul Lever who had the conduct of the claimant's litigation whilst employed by the defendant as an assistant solicitor. Mr Vickers has responded to this in a second witness statement (of some 8 pages) dated 10 December 2021. Mr Vickers was present in court throughout the five days of this application.

3. At paragraph 30 of his first witness statement, Mr Vickers explains that the claimant

> … is a small company. Essentially, it is just me. I used to have support from Mike [Williams] but he stopped being a director in 2009 and … he sadly passed away in 2019. Over the years when I have needed some more support to carry out large contracts, I have hired some short-term contractors.

At paragraph 37, Mr Vickers relates that although *"… other people have worked for [the claimant] over the years, essentially, I am [the claimant]."* At paragraph 39, he clearly states that he does all his work for the claimant from the UK.

4. This application was first listed for hearing before Deputy Master Arkush on 13 December 2021. The defendant (and applicant) was represented by Mr Thomas Grant QC, leading Ms Emily Gailey (of counsel). The claimant (and respondent) was represented by Mr Richard Bowles (of counsel). The Deputy Master took the view that the time allotted to the case (of 2 ½ days) was insufficient, and that the issues raised on the application were suitable to be heard by a High Court Judge. He therefore adjourned the application and transferred it for hearing by a High Court Judge, to be

relisted at the first available date, with a time estimate of 4 to 5 days, to include 1 day of judicial pre-reading, and with additional time of at least one day required for preparation of the judgment. The costs were reserved.

5. In the event, the matter was re-listed before me and was heard (after one day's pre-reading) at an attended hearing extending over some five days, on 13 to 15, and 19 and 20 July 2022. Ms Rebecca Page (of counsel) now appeared for the defendant (in place of Mr Grant QC), leading Ms Gailey. Mr Richard Bowles again appeared for the claimant. Counsel addressed me on an issue-by-issue basis (with certain related issues being addressed together). The hearing bundle extended to some 2,500 pages. This had been assembled by reproducing the contents of the original, and lengthy, exhibits to the witness statements, without any attempt to reduce these to any chronological order, so it was frequently necessary to traverse many hundreds of pages to follow a sequence of emails and related documents chronologically. This has made the task of counsel (and the court) unnecessarily complicated. The combined authorities bundle extended to almost 1,400 pages, and several additional authorities were placed before the court as the hearing progressed.

6. I have been considerably assisted by counsel's lengthy and detailed skeleton arguments (extending to some 66 pages for the defendant and 79 pages for the claimant), supplemented by their oral submissions. Both the written and the oral arguments focussed on the relevant issues and represent advocacy of a very high order. Ms Page wishes the court to acknowledge the part played by Mr Grant QC in co-authoring the defendant's skeleton argument prepared for last December's hearing, much of which she has adopted for the purposes of the present hearing. I am happy to do so.

7. Since these are applications for strike out and/or summary judgment, I do not propose to recount or address all of the many individual points raised, or submissions advanced, before me. Rather I will focus upon those points that are essential to my decision on each of the issues addressed by counsel. But that does not mean that I have overlooked any of the other submissions advanced before me.

8. After circulating this judgment in draft, and inviting counsel to submit a list of any typing corrections, or other obvious errors, in the usual way, Ms Page submitted a written note (by email dated 8 September 2022), at a time when I was not sitting. In addition to suggesting certain corrections and clarifications to the draft judgment, Ms Page advances the submission that no claim with any, or any real, prospect of success survives the findings in my draft judgment; and that the appropriate form of relief must be for the whole claim to be struck out and/or summarily dismissed (with costs). Ms Page does so pursuant to counsel's positive duty, as endorsed by the Court of Appeal (Sir Mark Potter P, Arden and Wall LJJ) in *Re ZM v JM (Children)* [2008] EWCA Civ 1261 at [38], to raise with the judge any alleged deficiency in their reasoning process, or any genuine query or ambiguity arising on their draft judgment. Ms Page followed this up with a further email, dated 13 September, inviting the court, should it accede to her submission, to re-consider its decision not to make any final findings on issue three in light of its decision that there is a triable issue on issue four. Having considered this written note, I thought it appropriate to give Mr Bowles an opportunity to respond by way of written representations. This he did by way of a written note dated 16 September. Having considered this document, I concluded that I should allow Ms Page a final opportunity to reply, which she did by way of a further note to the court dated 20 September 2022. In the interests of transparency, albeit possibly with some resulting loss of continuity and clarity, I will address these further

consequential submissions by way of postscript to this judgment in section 16 below. To the extent that there is any inconsistency between them, the contents of section 16 of this judgment supersede the provisional conclusions which I have set out at section 15.

9. This judgment is divided into 16 sections, as follows:

(1) Introduction

(2) Background to the applications

(3) The underlying claim

(4) The claim against the defendant

(5) The law governing these applications

(6) The parties to the SVP and ERR contracts

(7) Fee entitlement under the SVP and ERR contracts

(8) Early termination of the ERR contract

(9) The extent of the ERR underlying claim

(10) Waiver of the third tranche of fees under the SVP contract

(11) The further claim under the RVP contract

(12) Interest

(13) The Moscow office costs

(14) Whether the claim should be allowed to proceed to trial

(15) Provisional conclusions

(16) Postscript

2: Background

10. The claimant is a recruitment agency which contends that due to defaults on the part of the defendant, as its litigation solicitors, it lost the opportunity to pursue claims against two entities within the Kinross mining group (**Kinross**) for breaches of three recruitment contracts (the **underlying claim**). It now claims the full, undiscounted, value of the underlying claim, explicitly on the basis that this would have succeeded in full. The defendant denies both liability and quantum in their entirety.

11. This application is brought on no less than 11 grounds, in addition to an overarching strike-out ground founded upon the asserted impossibility of a fair trial. The defendant refers the court to a table summarising the various grounds at appendix A to Ms Morrish's witness statement, which sets out the amounts and proportions of the claim (by value) which would be disposed of if the defendant were to succeed on each of these grounds (apart from the overarching point concerning the impossibility of a fair

trial which, if successful, would result in the entire claim being struck out). Both the statements of case, and the witness statements filed in relation to this application are lengthy documents; but the touchstone of the defendant's case on this application is essentially very simple: it is said that the underlying claim had no value or, alternatively, that such value as it may have had has been hugely exaggerated, such that in reality, irrespective of any breach on the part of the defendant (which is denied), the claimant suffered either no loss, or materially less loss than is currently pleaded in the claim.

12. Aside from the overarching argument about the impossibility of the defendant obtaining a fair trial, there is no single ground for the striking out of, or summary judgment on, the whole of the claim. Instead, there are numerous different elements of the claim which the defendant says are susceptible to strike out and/or summary judgment which, collectively, account for the entirety of the claim. Importantly, however, even if (contrary to the defendant's primary position) the court were not to accede to this application in its entirety, the defendant maintains that it is still a proper use of court time to consider and (even if the defendant only succeeds in part) put the claim on a more realistic footing. Even partial success in the application will still materially reduce the pleaded value of the claim: for example, some US $3,749,096.24 is claimed by way of contractual interest as damages (up to 11 December 2015, after which interest is claimed under statute), at a rate which the defendant says is obviously penal. To put this into perspective, the claimant originally said that it had claims for fees and other sums due under the three Kinross contracts totalling only about $2,736,453.64; and since a claim for the costs of a non-existent Moscow office has now been abandoned (albeit only informally, and by way of concession in the claimant's skeleton argument), the current figure is about $1,948,424.64.

13. Moreover, the defendant relies upon the fact that this is a complicated dispute, where the claimant's case has continually evolved, and the current trial estimate is either some two weeks (on the claimant's case) or three weeks (on the defendant's). The parties' combined costs budgets up to trial are well over £2m. The defendant maintains that narrowing the scope, and the value, of the issues in dispute would be entirely in line with the overriding objective, by reducing the future burden on court time and the projected expenditure of legal costs.

3: The underlying claim

14. The claimant asserts that between 2008 and 2009 it entered into three contracts with two companies within the Kinross mining group, namely '**Kinross Gold**' (a Canadian company) and '**Kinross Far East**' (a Russian company), and that it has lost entitlements against Kinross under these three contracts. At the relevant time, the claimant provided international recruitment services and the three contracts related to the provision of such services to Kinross. These three contracts are:

(1) The '**RVP contract**', which was a written agreement dated 29 October 2008 by which Kinross Far East contracted for the claimant to search for and introduce candidates for a Regional Vice President role based in Russia.

(2) The '**SVP contract**', which was a written agreement dated 3 December 2008 by which Kinross Gold contracted with either the claimant or the BVI company to search for and introduce candidates for a Senior Vice President role in South America. (The identity of the contracting party is a matter of intense dispute in both the claim and this application.)

(3) The '**ERR contract'**, which is a written agreement bearing the date 3 March 2009 by which Kinross Far East engaged either the claimant or the BVI company (again, which entity was the contracting party is disputed and live on this application) to undertake an expatriate release recruitment exercise sourcing candidates for between 15 and 32 positions (the total number also being a matter of dispute in both the claim and this application) to replace existing non-Russian employees with Russian nationals.

15. The claimant asserts that it had claims against the relevant Kinross company under each of these three contracts for various differing reasons and for differing sums of money. Those claims are set out in the statements of case and the evidence, and it is unnecessary to rehearse them in any detail. The claimant instructed the defendant in November 2013 to prosecute certain of those claims on its behalf in relation to the non-payment of sums allegedly owing under each of the three contracts, interest on those sums, and, in relation to the ERR contract, the *'wasted costs'* of allegedly setting up an office in Moscow to perform the contract. At paragraph 7 of his first witness statement, Mr Vickers relates that:

> To my mind, [the claimant's] claims against Kinross arise from fairly fundamental breaches of [its] retained assignment recruitment contracts with Kinross (the Kinross Contracts), and invoices that Kinross failed to pay under those contracts. The events leading to [the claimant's] claims against Kinross all occurred 12 to 13 years ago. I went through all the events underlying the Kinross Claims with my solicitors, the defendant in these proceedings, Coupe Bradbury, when I was instructing them to pursue the claims against Kinross in around 2013 – 2016. At the time, the main solicitor I was dealing with at Coupe, Paul Lever, told me [the claimant] had good prospects of success on its claims against Kinross, and he was therefore willing to work on the claims on a 'no win no fee' basis. Mr Lever did not raise any of the points that [the defendant] now seek to rely on in their application against [the claimant], when [the defendant] was advising [the claimant] about its claims against Kinross.

16. The underlying claim was duly commenced, in the sole name of the claimant, in the Queen's Bench Division of the English High Court against Kinross Gold and Kinross Far East on 2 March 2015. By an order made without notice on 5 August 2015, Master Cook gave permission for service out of the jurisdiction on both Kinross Gold and Kinross Far East, and for service on Kinross Far East by the alternative means of service on Kinross Gold in Canada. He also extended the period for service of the claim form. As explained in Master Cook's later written judgment dated 27 May 2016, after service was effected on both Kinross Gold and Kinross Far East in Canada, those companies successfully applied for an order setting aside that part of the permission order which had extended the period for service, thereby invalidating the service that had been effected. There was a good deal of evidence served in respect of Kinross's application on both sides; and the bulk of the bundle which was before Master Cook is before this court. After the permission order was set aside, the claimant, the BVI company, and Mr Vickers ultimately entered into a compromise with Kinross Gold and Kinross Far East on about 11 October 2016 in full and final settlement of the underlying claim in consideration for Kinross's agreement not to enforce the costs order which they had obtained against the claimant.

4: The claim against the defendant

17. By this claim, the claimant (but not the BVI company) alleges that breaches of duty on the part of the defendant caused the permission order to be set aside and, consequently, caused the claimant to lose the opportunity to recover sums under the (allegedly valuable) Kinross contractual claims (which the claimant asserts had by then become statute-barred as a matter of English law). The dispute over whether any breach of duty on the part of the defendant resulted in the setting aside of the permission order does not arise on the present application. The defendant considered the particulars of claim (dated 6 March 2020) to be unclear and contradictory so, before serving its defence, the defendant served a detailed request for further information (on 6 April 2020), to which the claimant responded (on 18 May 2020). The defendant filed its defence to these proceedings (on 12 June 2020), denying all liability, and specifically denying any breach of duty on its part. Without prejudice to those denials, or to the other defences which it raises, the defendant denies liability on the further ground that, had the underlying claim proceeded to trial, the claimant would not have succeeded in recovering judgment from Kinross for any sum (or, alternatively, would have recovered judgment for much lower sums than are currently pleaded), so that any breach of duty by the defendant has caused no loss to the claimant or, alternatively, on the claimant's best case (which the defendant also denies), much less loss than is currently pleaded. On 28 August 2020 the claimant served a reply which has not materially changed the position between the parties.

5: The law governing these applications

18. There is no real dispute between counsel as to the applicable law which governs the present applications.

19. In relation to CPR 3.4 (2) (a) (statement of case discloses no reasonable grounds for bringing the claim), the defendant submits that the touchstone is that a statement of case which raises an unwinnable case is suitable for strike-out. As Sedley LJ noted in *Harris v Bolt Burdon* [2000] C.P. Rep. 70 (a case where it was similarly argued that the claimant had suffered no loss) at [24]:

> What does in my view make it wholly unfair to let the case go on — and unfair, I would add, not only to the defendants but to the complainant — is that it is a claim which cannot ultimately succeed. Without damage there is no actionable negligence. For the reasons I have set out nothing material was lost by Bolt Burdon's failure to serve the writ…

20. In relation to CPR 3. 4 (2) (b) (abuse of process), as set in PD 3A, para 1.5 *"A claim may fall within rule 3.4 (2) (b) where it is vexatious, scurrilous or obviously ill-founded."* This has been held to include occasions in which a party, by their conduct, has forfeited the right to take part in a trial, i.e. by a failure to comply with their disclosure obligations such that it is impossible to conduct a fair trial. In the case of *Logicrose Ltd v Southend United Football Club Ltd* (unrep., The Times 5 March 1988) Millett J had to rule on what he described as *"an application of an unprecedented kind"*. This was an application, made by the defendants during the trial of the action, and shortly before the conclusion of the plaintiffs' case, for an order that the action be dismissed, that the defence to the counterclaim be struck out, and that judgment on the counterclaim be entered for the defendants. The application was made under RSC Order 24, rule 16 on the ground that the plaintiffs had failed to comply with the requirements for discovery. At page 2 of the approved transcript, Millett J recognised that an order debarring a party from all further part in the proceedings, and giving judgment against him accordingly, might:

> … be an appropriate response to a failure to comply with the rules relating to discovery, even in the absence of a specific order of the Court, and so in the absence of any contempt, not because that conduct is deserving of punishment but because the failure has rendered it impossible to conduct a fair trial and would make any judgment in favour of the offender unsafe.
>
> In my view a litigant is not to be deprived of his right to a proper trial as a penalty for his contempt or his defiance of the Court, but only if his conduct has amounted to an abuse of the process of the Court which would render any further proceedings unsatisfactory and prevent the Court from doing justice. Before the Court takes that serious step, it needs to be satisfied that there is a real risk of this happening.

21. In the course of his oral submissions, Mr Bowles referred me to a passage in Millett J's judgment (at page 9 of the transcript) where he indicated that he would have refused to accede to the application once the missing document had been produced:

> The object of Order 24, Rule 16 is not to punish the offender for his conduct but to secure the fair trial of the action in accordance with the due process of the Court … The deliberate and successful suppression of a material document is a serious abuse of the process of the Court and may well merit the exclusion of the offender from all other participation in the trial. The reason is that it makes the fair trial of the action impossible to achieve and any judgment in favour of the offender unsafe. But if the threat of such exclusion produces the missing document, then the object of Order 24, Rule 16 is achieved. In my judgment an action ought to be dismissed or the defence struck out (as the case may be) only in the most exceptional circumstances once the missing document has been produced and then only if, despite its production, there remains a real risk that justice cannot be done.

22. The principle identified by Millett J was expanded upon by the Court of Appeal in *Arrow Nominees Inc v Blackledge* [2001] BCC 591 where Chadwick LJ stated (at [54-5]):

> … I adopt, as a general principle, the observations of Millett J in *Logicrose Ltd v Southend United Football Club Ltd* (The Times, 5 March 1988) that the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules - even if such disobedience amounts to contempt for or defiance of the court - if that object is ultimately secured, by (for example) the late production of a document which has been withheld. But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled, indeed, I would hold bound, to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise

> to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke.
>
> Further, in this context, a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court. The court does not do justice to the other parties to the proceedings in question if it allows its process to be abused so that the real point in issue becomes subordinated to an investigation into the effect which the admittedly fraudulent conduct of one party in connection with the process of litigation has had on the fairness of the trial itself.

In his concurring judgment, Ward LJ said this (at [70]):

> The trend of the authorities before the CPR was increasingly to support the notion that as the court became more pro-active, so greater importance was given to the need to emphasise and to protect the court's own interest in administering justice fairly not only as between the parties before the court but to all others using the court service. Access to the courts was open to all but the time of the courts was a precious resource which needed to be managed rigorously in order to be fair to all. The CPR is the apotheosis of those ideals.

23. This approach was endorsed by the Court of Appeal in ***Masood v Zahoor*** [2009] EWCA Civ 650, [2010] 1 WLR 746 where (at [71]) Mummery LJ, delivering the judgment of the Court, treated the ***Arrow Nominees*** case as *"... authority for the proposition that, where a claimant is guilty of misconduct in relation to proceedings which is so serious that it would be an affront to the court to permit him to continue to prosecute his claim, then the claim may be struck out for that reason."* At [73] Mummery LJ emphasised that: *"One of the objects to be achieved by striking out a claim is to stop the proceedings and prevent the further waste of precious resources on proceedings which the claimant has forfeited the right to have determined."* At [75] Mummery LJ also explained that since, on a defendant's application to have a claim struck out on the grounds of the claimant's misconduct, the sole question for the court was whether, by reason of that misconduct, the claimant had forfeited the right to have an adjudication of his claim, the fact that the defendant had himself been guilty of misconduct was irrelevant, and did not justify the judge refusing the application. There was no *"exercise of weighing the misconduct of the claimants against that of the defendants. The defendants did not start the proceedings. They did not seek relief from the court. They were merely defending the claims brought by the claimants."* Ms Page submits that Mr Vickers's evidence for the claimant is irremediably tainted by his own persistent dishonesty.

24. CPR 24.2 provides that the *"court may give summary judgment against a claimant … on the whole of a claim or on a particular issue if – (a) it considers that – (i) that claimant has no real prospect of succeeding on the claim or issue…"* The defendant emphasises that: (1) a realistic claim is one that carries some degree of conviction and is more than *"merely arguable"*; (2) it is open to the court to decide short points of law or construction if it has before it all the evidence necessary for a proper

determination, and it is satisfied that the parties have had an adequate opportunity to address the point in argument; and (3) the court should not allow a case to go forward to trial simply because there is a possibility of some further evidence arising. (I understand this latter proposition to relate to a case where the claim is irremediably bad in law: I recognise that in reaching its conclusion on an application for summary judgment, the court must take into account not only the evidence actually placed before it on the application, but also any further evidence that can reasonably be expected to be available at trial, provided the respondent has laid a sufficient evidential foundation for any submission that further evidence can reasonably be expected to be available at trial that would support a credible and legally sustainable claim.)

25. In her oral submissions, Ms Page reminded me of the following observations of Lord Woolf MR in *Swain v Hillman* [2001] 1 All ER 91 at 94 A-C:

> It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible.

26. Ms Page also referred me to observations of Potter LJ (with whom Peter Gibson LJ agreed) in *E D & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 at [10]:

> It is certainly the case that … where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini−trial ... However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable …

27. For the claimant, Mr Bowles emphasises that the court retains a discretion whether to strike out a statement of case pursuant to CPR 3.4 (2), although before the court can exercise that discretion it must be satisfied that one of the grounds set out in paragraphs (a) to (c) is made out. A claim will only be deemed to have no real prospect of success if it is *"fanciful"* or devoid of reality (as set out in further detail below). Strike out should not be ordered unless the court is certain that the claim is bound to fail, as where the pleadings disclose a case which is unwinnable, such that continuance would only waste all the parties' resources. Importantly, a court should not strike out a statement of case under CPR 3.4 (2) (a) where there is a serious live issue of fact which can only properly be determined by hearing oral evidence. Whilst, under CPR 3.4 (2) (b), the court has the power to strike out a statement of case where there has been an abuse of process, this sanction must be proportionate and must support the over-riding objective. Strike out should be a last resort, and any appropriate alternative options should be exercised first. There is no limitation on what

constitutes an abuse of process. CPR 3.4 (2) (c) gives the court an unqualified discretion to strike out a claim where a party has failed to comply with a rule, practice direction or court order. However, such a breach should only result in the striking out of a claim in circumstances where such a remedy is proportionate; and the court should consider whether there may be more appropriate and proportionate sanctions available to it.

28. Mr Bowles accepts that the court has a power under its inherent jurisdiction to strike out a claim where the claimant has been guilty of conduct which has put the fairness of any trial in jeopardy, or which is such as to render further proceedings unsatisfactory and prevent the court from doing justice. However, the court should only exercise its inherent jurisdiction to strike out a statement of case in circumstances where there has been an abuse of process which would be such as to render future proceedings unsatisfactory, and where any judgment in favour of the litigant would have to be regarded as unsafe. This is said to set a very high bar for an applicant for such relief to satisfy.

29. By CPR 24.2 the court may give summary judgment if it considers that the claimant has no real prospect of succeeding on the claim, and there is no other compelling reason why the case should be disposed of at trial. Mr Bowles submits that the courts have provided substantial guidance on how the court should approach the exercise of its discretion to grant summary judgment under CPR 24.2:

(1) The overall burden of proof on such an application rests with the applicant.

(2) The court must consider whether the defendant has a *"realistic"* as opposed to a *"fanciful"* prospect of success. For a claim to be realistic, it needs to be more than merely arguable, but it does not have to be shown that it will succeed at trial or on the balance of probabilities. This is said to set a low hurdle.

(3) The court must not reach its conclusion by conducting a mini-trial, and the court should not disbelieve written evidence before it without allowing cross-examination of the witness. This has been put in clear terms by HHJ Matthews in ***Wards Solicitors v Hendawi*** [2018] EWHC 1907 (Ch) at [3]:

> In the absence of cross-examination, the court is not entitled to reject any written evidence as being untrue, *unless* on the basis of all the evidence before the court it considers that that written evidence is simply incredible…

(4) However, a court is not precluded from analysing the evidence before it, and evidence can be rejected when such evidence is shown to be without any substance at all. This has been considered in the insolvency context to require the court to consider the evidence to be manifestly incredible: see ***Long v Farrer*** [2004] EWHC 1774 (Ch). This is especially likely to be the case where the evidence is contradicted by contemporaneous documents. But Mr Bowles emphasised what Rimer LJ had to say at [61]:

> In particular, paper evidence which is manifestly incredible can be disregarded or disbelieved. But it will require a fairly extreme case for untested paper evidence to be rejected on that basis.

(5) The court must proceed not only on the basis of the evidence before it on the application, but also the evidence that can reasonably be expected to be adduced at trial. Thus the court should hesitate to make a final decision on an application for summary judgment, even when the evidence is such that there is no obvious conflict of fact at the time of the application, but where such a conflict of fact may be found to exist following a fuller investigation on the facts available to a trial judge.

(6) Simply because the issue at trial may not be complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on a summary judgment application.

30. Although this particular authority was not cited to me, in determining the defendant's application for summary judgment I derive particular assistance from the principles identified by Lewison J in ***Easyair Ltd v Opal Telecom Ltd*** [2009] EWHC 339 (Ch) at [15] (as approved in later decisions of the Court of Appeal) and set out at paragraph 24.2.3 of the current (2022) edition of Volume 1 of ***Civil Procedure***:

(1) The court must consider whether the claimant has a *'realistic'* as opposed to a *'fanciful'* prospect of success …

(2) A *'realistic'* claim is one that carries some degree of conviction. This means a claim that is more than merely arguable …

(3) In reaching its conclusion the court must not conduct a *'mini-trial'* …

(4) This does not mean that the court must take at face value, and without analysis, everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents …

(5) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial …

(6) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case …

(7) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question, and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim, or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give

summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction …

31. I do not understand these principles to differ from any of those advanced before me by either counsel.

32. In a negligence case, such as the present, where the claimant seeks the value of an underlying claim which has allegedly been lost as a result of a solicitor's breach of duty, the court is required to apply a two-stage test. First, the claimant will have to prove, on the normal balance of probabilities: (1) that they would have brought the claim in time, and (2) that the claim would be an honest one. A dishonest claim naturally falls outside the category of lost claims for which damages may be claimed in negligence against professional advisors: see, in particular, the observations of Lord Briggs JSC in *Perry v Raleys Solicitors* [2019] UKSC 5, [2020] AC 352 at [25-27]. Secondly, if the claimant can surmount the first hurdle, then the value of the claim will be assessed on the basis of the loss of a chance. When the court is considering this question (i.e. the value of the lost chance), the court will first require the claimant to prove that the lost claim had a real and substantial, rather than a merely negligible, prospect of success (rather than conduct a trial within a trial of the underlying claim). Only where the claimant establishes this will the court then conduct an evaluation of the prospects of success.

33. Mr Bowles did not take issue with any of these propositions. Rather, it is his submission that the underlying claim did have a real, rather than a negligible, prospect of success. Mr Bowles began by emphasising that the court's role is to try to put the claimant back into the position it would have been in had the defendant solicitor not acted in breach of contract or its common law duty of care. At trial, the court will be confronted with the task of trying to determine what loss the claimant has suffered where the opportunity of pursuing a claim has been lost as a result of its solicitor's breach of duty, and how that loss can be compensated by an award of damages. In order to do this, the court will approach the matter as one of the loss of the opportunity of bringing the claim forward to trial or earlier settlement. In doing so, the court will not require the claimant to prove its underlying claim on the balance of probabilities (as it would have done had the underlying claim gone to trial). Rather, the court will decide whether the claimant has lost something of value, in the sense that its claim had a real and substantial, rather than merely a negligible, prospect of success. Mr Bowles submits that this does not set a high bar: the claimant merely needs to establish that it had a case which was more than fanciful, or negligible, in order to establish its claim for the loss of a chance.

34. Moreover, the Supreme Court has made it clear, in *Perry v Raleys Solicitors* (cited above), that in determining whether the underlying claim had real prospects of success, the court will not undertake a *"trial within a trial"*, or consider the underlying claim on the balance of probabilities (because to do so would be unfair to the claimant whose underlying claim has been lost). However, where the underlying claim turns on the construction of documents, then the court can undertake the process of construing those documents, as it would have done at trial. No prejudice is caused to the party whose claim has been lost by the court undertaking such an analysis. Importantly, in the context of the present case, where the defendant seeks to establish that any negligence on its part has not caused the claimant any loss, the evidential burden rests on the defendant to establish that the claimant has lost nothing,

35. Mr Bowles submits that since the defendant is not only the applicant but also seeks to assert that, even if it was negligent (which it denies), that negligence would not have caused the claimant any loss. Accordingly, the burden of proof on this application falls squarely on the defendant. It must therefore persuade the court that, in relation to each of the eleven identified issues, the claimant would have had no real prospect of successfully maintaining any claim against Kinross that would have cleared the low summary judgment hurdle. As a result, in order to dismiss this application, the court need only be satisfied that the claimant has a real prospect of demonstrating that its underlying claim would have satisfied the summary judgment criteria (being all that is required to establish a claim for loss of a chance). This is a low bar; and Mr Bowles submits that, in this case, this hurdle is cleared with ease. In doing so, the court must take the evidence of Mr Vickers at its highest. It is not entitled to disbelieve it, unless it finds it to be manifestly incredible.

36. Against this background, I turn to consider the individual issues before I then turn to address the defendant's overarching point. I will address them in the order they were argued before me (which differs slightly from the order in the skeleton arguments).

6: The parties to the SVP and ERR contracts

37. Issues three and four raise the questions whether the claimant was ever properly a party to either of the SVP and the ERR contracts and, if not, whether the defendant should have advised the claimant to assign those contracts to the claimant. As Mr Bowles points out, even if the court were to find in the defendant's favour on these two issues, this would only dispose of part of the claim (in so far as it relates to the claimant's potential to recover based on either of these two contracts) and would still leave the claimant in a position to pursue its claim for the losses it has suffered as a result of the failure to prosecute any breach of the RVP contract.

38. For the defendant, Ms Page points out that in the underlying claim the entirety of the sums claimed against Kinross under the ERR and SVP contracts was premised on the basis that the claimant was the contracting party to those two contracts. She submits that it is clear from the face of those contracts that the true contracting party was the BVI company, a separate corporate entity, which was not a claimant in the underlying claim and is not a party to the present claim. This fact is said to be fatal to the claimant's attempt to recover any sums flowing from those two contracts from the defendant. If the court agrees with the defendant that the BVI company was the true contracting party under the SVP and ERR contracts, then the natural party to bring any claims in relation to such contracts was that company, and not the claimant. It is the defendant's case that it was the BVI company, rather than the claimant, which suffered any loss by the failure to pursue Kinross. Further, the defendant never owed the BVI company any duty of care.

39. Ms Page acknowledges that, as Teare J explained in *Navig8 Inc v South Vigour Shipping Inc* [2015] EWHC 32 (Comm) at [94], the

> … identification of the parties to a contract is a question of fact. The terms in which a party is described in a contract are part of the factual evidence of the identity of the parties. Since the question is one of fact other evidence can be admitted to identify the party in question. But the exercise must remain an objective exercise. I do not consider that the subjective intentions of one party can be relevant save to the extent that such intentions are communicated to the other."

40. In summary the defendant's case is that:

(1) The terms of the ERR and SVP contracts, and the invoices raised pursuant to such contracts, lead to the clear conclusion, as a matter of fact and of law, that it was the BVI company, rather than the claimant, which was the contracting party.

(2) The claimant's attempts to explain why the BVI company was involved in the contracting process at all have been shifting and contradictory, are entirely incoherent, and fail to explain or justify why, in fact, the BVI company was not the contracting party.

(3) The contemporaneous emails strongly suggest that the BVI company was the contracting party.

(4) The claimant's reliance on paragraphs 21 and 25.4 of the second witness statement of Dr Geoffrey Cowley (dated 21 April 2016) as to Kinross's understanding that the BVI company was merely a *'trading name'* of the claimant, which was the true contracting party, ignores the manifest contradictions between that evidence and his first witness statement (dated 27 January 2011) on this issue. Mr Vickers's evidence fails to recognise, or address, the fact that Dr Cowley had produced this first witness statement for the defendant over five years earlier – and so very much closer in time to the relevant events – recognising in terms (at paragraph 2) the separate corporate existence of the claimant and the BVI company and (at paragraph 17, and impliedly throughout) that the ERR contract was made between the BVI company and Kinross Far East. Ms Page points to the fact that the claimant had actually deployed Dr Cowley's first statement in the underlying claim in support of its application to serve out of the jurisdiction. Dr Cowley confirmed the truth of his first witness statement when he made the second; and there is no explanation for the contradictions between the two statements.

(5) Further, whilst the claimant's primary case is that it was the contracting party in relation to the ERR and SVP contracts, its alternative argument, that the BVI company was merely acting as its agent in relation to those contracts, is entirely incoherent, and liable to be struck out, or summarily determined, on that basis. Ms Page submits that such an argument cannot, as a matter of logic be run in the alternative: either the claimant had a contract of agency with the BVI company, and contracted through it, or it contracted directly; the claimant must know what its case is on this because it relates to things it (allegedly) did. Further, if the claimant were the true contracting party, it would make absolutely no sense for it to use a separate corporate vehicle to enter into the contracts as its disclosed agent. Only one of the claimant and the BVI company must have entered into each contract as Kinross's counter-party; and Mr Vickers elected to use the claimant for the RVP contract and the BVI company for the two later contracts. Moreover, there would simply have been no need for Mr Vickers to have manufactured the false assignment of the benefit of the Kinross contracts, and the underlying claim, from the BVI company to the claimant (which I address in section 14 below) if there was some kind of agency relationship between those two corporate entities.

(6) Crucially, Mr Vickers also simply fails to grapple with – or offer any form of coherent explanation for – the fact that the claimant's accounts for the relevant period (i.e. the year ending 28 February 2010), when the BVI company received substantial, and, in the context of the claimant's financial position, significant, sums from Kinross, allegedly as agent for the claimant, do not record any such receipt. These accounts

were signed by Mr Vickers, the claimant's sole director, as true. Ms Page submits that this fact, in and of itself, is fatal to the claimant's case: Plainly if the BVI company had received sums due to the claimant (under a contract to which the claimant was principal) as agent for the claimant, then that would have been receipt by the claimant; yet nothing is declared in the claimant's accounts which Mr Vickers approved and signed. Mr Vickers's explanation (at paragraphs 81 and 82 of his first witness statement) that Mr Williams's *"... advice was that it was better to get the debts collected from Kinross before transferring everything from [the BVI company to the claimant] and then declare the revenue when the debt was collected"* has no application to sums actually accounted for by Kinross to the BVI company. Nowhere in his witness statement does Mr Vickers acknowledge that the accounts were false or explain why this was the case. Given Mr Williams's death, no more evidence is likely to be available on this issue at any trial.

41. For these reasons, the defendant seeks, under CPR 3.4 (2) (a) and/or CPR 24.2, the striking out of, and/or summary judgment on, the claim insofar as it is premised upon the claimant having been a party to the SVP and the ERR contracts. This is on the basis that the claimant's case lacks the crucial elements of causation and loss as it had no, or no real, prospect of recovering from Kinross the sums that it says it would have recovered, such that even if any alleged breach of duty by the defendant is made out: (1) the particulars of claim disclose no reasonable grounds for bringing that part of the claim, or (2) the claimant has no, or no real, prospect of succeeding in showing that any alleged breaches caused that part of the claimed loss.

42. For the claimant, Mr Bowles does not dispute that both contracts were entered into on paper bearing the letterhead of the BVI company, and that certain payments were made to the Cypriot bank account maintained by the BVI company. Neither of these facts is in dispute. However, he submits that this is hardly the end of the matter, and that in fact the evidence (properly analysed) points strongly towards the SVP and ERR contracts having been entered into with the claimant, either directly or with the BVI company acting as its disclosed agent. He points out that the only evidence that the court has from the parties who were present at the time that these contracts were entered into is the evidence of Mr Vickers and Dr Cowley. Their evidence is clear: the contracts were entered into by the claimant and not the BVI company. Conversely, the defendant is basing its case solely on a retrospective view of the contractual documentation. Mr Vickers has, quite frankly, accepted that this documentation is not as clear or as uniform as it could have been. As such, it is not possible for the court to rely only upon this documentation without considering all the surrounding factors. In this case, those factors are said plainly to point to the claimant being the contracting party.

43. The claimant's case is that both the SVP and the ERR contracts were made with the claimant, and that to the extent that the BVI company had any role at all, it acted as the claimant's agent when signing the SVP and the ERR contracts, such that these contracts were entered into by the claimant as an identified and disclosed principal under those contracts. At all times, Kinross was aware that the principal under each contract was the claimant, and not the BVI company (a company with which it had never had any previous dealings). This has been acknowledged by Dr Cowley, the only person from Kinross to give any evidence in the underlying claim. As such, there can be no suggestion that the claimant was not the correct party to bring the claims against Kinross. The factual background plainly supports this position.

44. Mr Bowles submits that:

(1) The manner in which the SVP and ERR contracts were negotiated and agreed demonstrates that the contracting party was the claimant (as Kinross's preferred supplier) and not the BVI company; and this was plainly Kinross's understanding.

(2) The evidence from the contractual documentation demonstrates that the contracting party was the claimant, as it was the claimant which was raising invoices for the work done and providing its various progress reports.

(3) The evidence from Kinross's payments, all of which are addressed to the claimant and not the BVI company, plainly demonstrates that Kinross was aware that it had contracted with the claimant (either directly or through its agent, the BVI company) and that it was making payment to the claimant, even when payment was requested into the BVI company's bank account in Cyprus. When sums were received into the BVI company's bank account in Cyprus, these funds were not retained by the BVI company but rather were transferred (at least in part) to the claimant. Whilst the claimant has to accept that the receipt of these payments does not appear in the company's filed accounts for this period, this should not detract from the claimant's evidence of these payments, especially as Mr Vickers, in his witness statement, has explained that he is not aware of how, or why, the accounts were drawn up as they were, having relied upon his co-director, and then accountant, Mr Williams.

(4) Mr Vickers has explained why the BVI company was used as agent for the claimant, and there is no reason why the court should disregard these reasons without cross-examination. These reasons are not manifestly incredible, and they demonstrate a logical approach to using the BVI company as a signatory. For the defendant to succeed on this point, the court would have to disregard Mr Vickers's evidence, verified by statements of truth.

(5) The evidence demonstrates that Kinross was aware that, irrespective of the fact that the BVI company was the signatory to each of the ERR and SVP contracts, the true contracting party, i.e. the principal under the contract (in each case the identified and disclosed principal) was in fact the claimant. This is clear from the manner in which Kinross dealt with the claimant in relation to the contracts, and made all payments addressed to the claimant and not the BVI company.

(6) On 26 October 2010, when Kinross wrote to the claimant asserting that the ERR contract had been terminated, that letter was addressed to the claimant at its London office address, and not to the BVI company. As such, it is clear that Kinross knew that the ERR contract had been made with the claimant, as otherwise that letter would have been sent to the wrong party, and any notice of termination would have been given to the wrong party.

45. Mr Bowles points out that the claimant has never sought to deny the BVI company's involvement in the process of entering into the SVP and the ERR contracts. Rather, the claimant has pleaded, in terms, that where that company was involved in those contracts, it was only as a result of an oral agreement of agency between the two companies. Mr Bowles emphasises that the claimant need not go so far as to show that, on the balance of probabilities, it was the correct contracting party (although Mr Bowles submits that the evidence is plainly sufficient to go that far). Rather, all the claimant need show is that there is a substantial dispute of fact making the matter unsuitable for summary determination. Mr Bowles submits that this is plainly the case. There is plainly a dispute of fact which will require determination following cross-examination at trial.

46. In a further alternative to his primary case that the claimant was the directly contracting party to the SVP and ERR contracts, and his secondary case that the BVI company was contracting as the company's agent in relation to those contracts, Mr Bowles also contends that if the BVI company were indeed the contracting party, then, but for the defendant's negligence, it would have procured an assignment of the Kinross claims from the BVI company to the claimant.

47. In response to this latter contention, Ms Page contends that it was the claimant's positive case in the underlying claim that it, rather than the BVI company, was the true contracting party under the SVP and ERR contracts (a case which it maintains in the present claim). It cannot be right that the defendant could be negligent to the extent that its client's primary case, prosecuted on its client's instructions, turned out to be false. Moreover, it was not necessarily open to Mr Vickers to assign claims from one company controlled by him to another independent company which also happened to be controlled by him. It would not have been possible for the defendant to advise in such terms since: (1) Mr Vickers could not have properly have caused the BVI company to assign the claims at an undervalue (and, on the claimant's case, they are worth millions); (2) the defendant could not properly have advised in relation to such a breach of fiduciary duty, nor could the claimant properly have received any benefit from it; and (3) if the claims were to be transferred for the full value asserted by the claimant, then there is no evidence before the court that the claimant held sufficient funds to procure such assignment. Ms Page makes the forensic point that issue of any assignment of the underlying claim from the BVI company to the claimant is not addressed either in Mr Vickers's evidence or Mr Bowles's skeleton argument.

48. Accordingly, the defendant seeks, under CPR 3.4 (2) (a) and/or CPR 24.2, the striking out of, and/or summary judgment on, the claim insofar as it is premised upon the claimant's alleged loss of the opportunity to take an assignment of the underlying claim from the BVI company on the basis that: (1) the claimant cannot make out its allegation of breach of duty; and /or (2) the claimant's case against the defendant lacks the crucial elements of causation and loss as the claimant had no, or no real, prospect of securing such an assignment and thus of recovering from Kinross the sums that it says it would have recovered.

49. Were it necessary, and appropriate, for me to determine the issue of the identity of the true parties to the SVP and ERR contracts on the present application, I would be likely to find that the BVI company contracted as principal with Kinross. I find the arguments of Ms Page for the defendant far more compelling than those of Mr Bowles for the claimant. Although the identification of the parties to a contract is a question of fact, the exercise is an objective one, concerned not with undisclosed subjective intentions but with objective communications crossing the line. I find the deliberate change in the letterhead, after the first of the three contracts, to that of the BVI company utterly compelling. I can identify no satisfactory reason to explain this change beyond the fact that the BVI company was to be the contracting party under the SVP and ERR contracts. I can discern no satisfactory explanation for either Kinross or the BVI company entering into any contract with the claimant as the disclosed principal. Given the virtual identity of the names of the two companies – with the only difference being *'Limited'* and *'Ltd'* – I attach no importance to the addressee named in Kinross's letter of 26 October 2010 terminating the ERR contract. Given that the BVI company had no separate operational address of its own, I also attach no significance to the fact that this letter was sent to the address of the claimant's London office.

50. I attach no weight to the way in which invoices were drawn in view of the email dated 29 October 2008 (at page 1697), expressly relating to the RVP contract – which was undoubtedly entered into by the claimant – in which Mr Vickers confirmed *"... that with overseas candidates, we will invoice all fees via our offshore company (Harrington Scott BVI) without VAT"*. I can discern no logic, or pattern, behind, or any evidential value in, the way invoices were paid: see the tabloid summary at paragraph 98 of Mr Vickers's first witness statement.

51. However, I find the claimant's failure to account for the sum of US $194,197.66 invoiced by the BVI company for the first tranche of the fee due under the ERR contract (on 16 March 2009, at page 1871), and paid into the BVI company's Cyprus bank account on 7 April 2009 (at page 1648), in the claimant's accounts for the period ended 28 February 2010 (disclosing no turnover or costs of sales and an operating loss of £26,062, at page 1170), which Mr Vickers signed off on 14 February 2011 (at pages 1169 and 1172) and which were filed at Companies House on 17 February 2011 (at page 1176) utterly compelling. This point was not adequately answered in Mr Vickers's evidence or Mr Bowles's submissions; and in my judgment it is probably unanswerable.

52. Despite this, I am satisfied that it is neither necessary nor appropriate finally to resolve this issue because I am satisfied that, on the footing that the contracting party to the SVP and the ERR contracts was the BVI company and not the claimant, there is a triable issue, with real prospects of success, as to whether the defendant, as a reasonably competent solicitor, should have identified this fundamental obstacle in the way of the underlying claim and advised the claimant as to how it might be overcome. This could have been achieved by taking an assignment of the underlying claim from the BVI company (after any necessary restoration to the register of companies in the BVI). I accept Ms Page's submission that such assignment would have had to be for good consideration. But, in my experience, it is commonplace, in such situations, for an assignor to accept a proportion of any realised net fruits of the underlying litigation as the consideration for an assignment of any third party claim. Such an analysis would raise issues as to what the claimant and the BVI company would (or, in the case of the BVI company, possibly might) have done had the defendant advised that such an assignment should be taken; but these are matters for trial (after any necessary amendment of the claimant's statements of case) and not for summary determination on this application. Given that issue four has to go to trial, and because it is so closely bound up with the prior issue of the identification of the true parties to the SVP and ERR contracts, I do not consider that it would be a proper exercise of the court's discretion to circumscribe the freedom of any trial judge to determine that prior issue by purporting to make any final determination on issue three. However, the claimant would need to amend its particulars of claim so as to plead this issue properly.

7: Fee entitlement under the SVP and ERR contracts

53. Issue five is whether the SVP and ERR contracts were *'Retained Assignment'* contracts, such that the claimant would have been entitled to receive fees under those contracts in circumstances where a role was filled by a third party, and not the claimant. The claimant says that, in respect of both the SVP and ERR contracts, it was entitled to be paid further fees or damages (being the fees it claimed against Kinross in the underlying claim) in circumstances where a relevant role at (respectively) Kinross Gold or Kinross Far East was filled, even where the successful candidate was not sourced by the claimant. This is a question of interpretation of the contracts in question. On a correct interpretation of those contracts, the defendant says that the

claimant had no such entitlement, and has suffered no equivalent loss. Mr Bowles points out that even if the defendant were to succeed on this part of the application, this would only dispose of that part of the claim relating to the SVP and ERR contracts.

54. A fundamental aspect of the claimant's underlying claim, and consequently its claim against the defendant, is that the Kinross entities were under an obligation, under the SVP and ERR contracts, to only use the claimant's services to source candidates for the relevant jobs, such that if the relevant position was filled, by whatever means, the Kinross entity was obliged to pay the claimant's full fee under the relevant contract, even if the claimant had not introduced the relevant candidate. The claimant's case is that such an obligation was known as a recruitment agency being retained on a '*retained assignment'* basis.

55. It is the claimant's primary case that it was an express term of the SVP and ERR contracts that they were entered into on such a *'retained assignment'* basis, whereby Kinross had agreed to instruct the claimant exclusively for a period of 12 months to resource the roles under the SVP and ERR contracts. Alternatively, the claimant says that it was an implied term of each of these contracts that they would be entered into on a retained assignment basis, such term being implied by virtue of trade custom and usage (although, in submissions, Mr Bowles has sought to expand this aspect of the claim to assert that these contracts would lack commercial or practical coherence without the implication of such a term, which should therefore be implied so as to give the contracts business efficacy).

56. In summary, the defendant's case on this issue is that:

(1) This is a question of contractual interpretation, which can be decided by the court on the present application without reference to any extraneous factual material. It is a pure question of law.

(2) Contrary to what is pleaded in the particulars of claim at paragraph 20, this *'exclusivity term'* is plainly not an express term of the SVP and ERR contracts. The defendant had understood the claimant to have conceded this point in its reply but nevertheless it has been pursued by Mr Bowles.

(3) The claimant's alternative argument that the exclusivity term could have been implied into the contracts is hopeless as a matter of construction.

57. Ms Page submits that the argument that the exclusivity term is an express term of the Kinross contracts is simply untenable. It derives from an elaborate interpretation of sub-clause 5.1 of the relevant contracts which was raised for the first time in Mr Bowles's skeleton argument for the December hearing and is said to be in direct contradiction to the case on the alleged express term set out in the particulars of claim and the reply.

58. The starting point in construing a contract is that its words are to be given their ordinary and natural meaning, as viewed through the eyes of the reasonable reader; and the clearer the natural meaning, the more difficult it is to justify departing from it. Further, if a term of a contract is open to more than one interpretation, it is generally appropriate to adopt the interpretation which is most consistent with business common sense.

59. In this case, the text of the relevant part of clause 5 reads:

> "**Introductions:** The Client shall pay the Company fees resulting from any employment as set out in Clause 2 [i.e. where the claimant has introduced a successful applicant for a role] where,
>
> 5.1 An Applicant has been submitted to a Client and no initial employment results, but the Applicant is subsequently employed by the Client up to twelve months after the initial introduction date or the Applicant introduces further Applicants to the Client resulting in employment by the Client;"

The claimant's argument is that because this sub-clause does not include any specific reference to such applicants having originally been sourced by the claimant, it can somehow be the source of the broad exclusivity term on which the claimant relies. Ms Page submits that this is unsustainable as a matter of construction.

60. First, such an argument requires the court to ignore the phrase *"An Applicant has been submitted to a Client* ***and no initial employment results****"* (emphasis added by Ms Page). It is plain from this phrase that sub-clause 5.1 is intended to provide for a scenario where a candidate is put forward by the claimant, initially rejected by Kinross, and then subsequently hired by Kinross some months later. It is only possible for the claimant to suggest otherwise by ignoring this wording, and departing entirely from the natural wording of the provision. It requires an applicant simply to be *"submitted to"* Kinross.

61. Secondly, the analysis of sub-clause 5.1 for which the claimant contends makes no commercial sense. There can be no logical reason why the parties should have intended that the claimant should be paid a fee if a successful applicant was introduced by a different recruiter, but only in circumstances where *"no initial employment"* results. To take this point further, if the parties had intended sub-clause 5.1 to have the meaning for which the claimant now contends, they could have provided for it very simply. Clause 2 could have stated in terms that payment was due to the claimant on the employment by Kinross of any candidate, however sourced. They did not do this; and the clear inference is that it is not what they intended.

62. Thirdly, the definition of the term *'Applicant'* is extended by sub-clause 5.4 in both the SVP and ERR contracts (for the purposes of clause 5 only) to include *"any member of the Company's own staff"* (in both contracts) and also *"any candidate sourced by the Company via any and all other parties including recruitment agencies for a period of 12 months from the date of commencement of this search assignment"*. Ms Page submits that the clear inference from this is that in the absence of sub-clause 5.4, the term *'Applicant'* would not include any such individual, otherwise there is simply no reason for the inclusion of sub-clause 5.4. This is particularly obvious in the case of the ERR contract because sub-clause 5.4 expands the definition of *'Applicant'* to candidates sourced via other recruitment agencies. There is simply no reason for such a provision (which, at paragraph 295 of his first witness statement, Mr Vickers says he specifically drafted) if sub-clause 5.1 effectively renders the definition of *'Applicant'* universal in any event. Plainly, therefore, the definition of *'Applicant'* in the SVP and ERR contracts - except where specifically expanded in the ways referred to in clause 5.4 - is in fact the *'Applicant'* of sub-clause 2.1 (i.e. an Applicant sourced by the claimant). This is further underlined by the opening words of clause 5 (quoted above)

which state: *"The Client shall pay the Company fees resulting from any employment* ***as set out in Clause 2*** *where…"* (emphasis added by Ms Page).

63. As regards the claimant's case in support of an implied term, Ms Page reminds the court of the classic formulation of the test for the implication of a contractual term provided by Lord Simon of Glaisdale (speaking for the majority of the Privy Council, which included Viscount Dilhorne and Lord Keith of Kinkel) in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 52 ALJR 20 at 26:

> [F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

This orthodox re-statement was re-affirmed by the Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited* [2015] UKSC 72, [2016] AC 742 at [17-21 and 28], where it was also noted (by Lord Neuberger PSC, with whom Lords Sumption and Hodge expressly agreed) that: (1) *"a term can only be implied if, without the term, the contract would lack commercial or practical coherence"*; and (2) *"it is a cardinal rule that no term can be implied into a contract if it contradicts an express term"*.

64. Since the particulars of claim include (at paragraph 20) the plea that such a term could be *"implied by custom and industry usage, being a typical term in any recruitment contract of this nature"*, Ms Page also referred me to extracts from Vol 1 of *Chitty on Contracts* (34th edn) at paragraphs 16-035 and 16-036 as follows:

> If there is an invariable, certain and general usage or custom of any particular trade or place, the law will imply on the part of one who contracts or employs another to contract for him upon a matter to which such usage or custom has reference a promise for the benefit of the other party in conformity with such usage or custom; provided there is no inconsistency between the usage and the terms of the contract. To be binding, however, the usage must be notorious, certain and reasonable; and it must also be something more than a mere trade practice …
>
> Where the usage is one which merely applies to the mode of dealing of a particular firm, a party cannot be bound thereby, unless he is shown to have had notice of it. To establish such a usage it must be proved that a course of dealing has acquired such a notoriety, has been so well established and has become so universal in the particular trade, that it must be taken to be incorporated into any contract that is entered into by the parties dealing in this particular business.

65. In summary, Ms Page submits that consideration of these principles is fatal to the claimant's case as to the existence of the alleged implied term:

(1) The implication of such a term is plainly not necessary for business efficacy as the contracts function perfectly well without it: the scope of what the claimant is required to do is clear, as is the manner in which it will be remunerated. This is not a situation where the allegedly implied term goes to a clear gap in the drafting without which the

contract cannot function. In such circumstances, as Lord Simon noted in the extract from the ***BP Refinery*** case cited above: *"no term will be implied if the contract is effective without it"*.

(2) This is not a term which is *"so obvious that it goes without saying"*. The claimant received the first, one-third tranche of its fees up-front, enabling it to defray any initial expenses of the recruitment exercise. In any event, there is not a shred of evidence that the claimant ever incurred any upfront recruitment costs; and its filed accounts for the years ended 28 February 2009 and 2010 record the cost of sales as nil.

(3) The need for any implied term is to be assessed objectively. Notional reasonable people in the position of the parties at the time they were contracting would not have understood the exclusivity term to be either necessary for business efficacy or so obvious as to go without saying.

(4) The particulars of claim do no more than allege that the proposed implied term is *"a typical term in any recruitment contract of this nature"*. As a matter of law, that is not enough to establish that the alleged exclusivity term is a custom or usage of the recruitment trade. Something *"more than mere trade practice"* is required. In any event, Mr Vickers's evidence (unsupported by any expert evidence of trade practice), on which the claimant relies, relates to the UK recruitment market. Kinross was not based in the UK nor did it operate in the recruitment business: the Kinross entities were based in Russia and in Canada (and not the UK), and they operated in the mineral exploration and mining industries. Ms Page points to the fact that at paragraph 28 of her second witness statement, dated 6 May 2016 and filed in support of Kinross's application to set aside the permission order in the underlying claim, Ms Michelle George (of Kinross's solicitors, Chadbourne & Parke (London) LLP) noted that she had been told by Ms Jaana Harkonen, Kinross Gold's Vice-President for HR, that *"exclusivity is not standard for retained searches within the industry. This is especially the case for searches at Regional Vice President level and below"*. There is no reason to doubt that evidence, or to contemplate that any alternative evidence will be available at any trial of this claim.

(5) Even if (which cannot be the case) the court were to consider that the question whether or not the term was sufficiently *"notorious, certain and reasonable"* to have been implied into each of the contracts as a matter of industry usage was properly a question of mixed fact and law for trial, that question simply does not arise here. In the case of these contracts there is a clear inconsistency between the alleged usage and the express terms of the contract such that the implication of a term is impossible in any event. The court cannot imply a term to overcome the effect of an express term, even if such express term might be perceived as operating unfairly.

(6) The suggestion that the exclusivity term could be an implied term of the SVP and ERR contracts is contradicted by their express terms. The term *'Retained Assignment'* is given a contractual definition in those contracts which is quite different to the alleged exclusivity term. Instead, it is defined as:

> A search service whereby the Client [i.e. Kinross Gold or Kinross Far East] instructs the Company [i.e. the Executive Search Division of Harrington Scott Limited] to work exclusively on their behalf and will subject all possible candidates, including those identified by [Kinross], through its rigorous assessment and qualification process before presentation to [Kinross]. The fees are non-contingent and will be paid as

> outlined in The Fee Structure and Search Assignment Fees outlined below.

That definition obliges the Company to *'work exclusively'* on Kinross's behalf. Nothing in that definition suggests that Kinross also owed any reciprocal obligation of exclusivity. The implied term now argued for by the claimant therefore directly contradicts an express term of the relevant contracts.

(7) The implication of the exclusivity term is also contradicted by the express terms of the contracts as to when payment would be made: (1) Clause 5 provides for a complete list of the circumstances (outside the stereotypical case of the introduction of a candidate who is ultimately employed by Kinross) in which the claimant will still be entitled to payment; and (2) clause 3.2 provides for a unilateral termination clause in favour of Kinross whereby it can terminate the agreement by giving 30 days' written notice (thereby depriving the claimant of its full entitlement under the alleged exclusivity term in any event).

66. Accordingly, the defendant seeks, under CPR 3.4 (2) (a) and/or CPR 24.2, the striking out of, and/or summary judgment on, the claim insofar as it relates in any way to the SVP and ERR contracts, on the basis that the claimant had no, or no real, prospect of recovering from Kinross the sums that it says it would have recovered, such that even if any alleged breach of duty by the defendant is made out: (1) the particulars of claim disclose no reasonable grounds for bringing that part of the claim, or alternatively (2) the claimant has no, or no real, prospect of succeeding in showing that any alleged breaches caused that part of the claimed loss.

67. There is no real difference between the parties as to the applicable law. On the process of contractual interpretation, Mr Bowles referred me to a number of authorities, including the following statement of Lord Hodge JSC (with whom Lords Neuberger, Mance, Clarke and Sumption all agreed) in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 at [10]:

> The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.

68. Mr Bowles acknowledges that for a term to be implied into a contract by trade custom, it is necessary for there to be *"an invariable, certain and notorious usage"*: see *Crema v Cenkos Securities plc* [2010] EWCA Civ 1444, [2011] Bus LR 943 at [6] per Aikens LJ. Mr Bowles also accepts that such a term needs to be more than mere *"market practice"*, although he submits that such practice can be an important feature when considering the factual matrix against which the parties contracted, and also the information available to them at the time on which their contractual intentions were based. As Aikens LJ recognised (at [50]), any implied term *"... must be considered in the light of the expert evidence on 'market practice', so that the court can put itself in the position of the 'reasonable addressee of the contract'."* Mr Bowles also recognises that a term can only be implied into a contract by custom or usage if there is nothing in the express or implied terms of that specific contract that would prevent such

inclusion, and then only if it is not inconsistent with the contract as a whole. Mr Bowles also accepts that where the parties have entered into express obligations as regards a particular subject matter, and it is argued that a further term should be implied in relation to the same subject matter, it is well established that the court will be very reluctant to imply a further term even if it does not actually conflict with the express term.

69. Mr Bowles accepts that on the express terms of the contract, the claimant had no entitlement to receive any further fees under either of the more typical routes to payment, namely either of clauses 2.1 or 2.4 of the SVP and ERR contracts. However, he submits that the claimant would have been entitled to receive further payments under both the SVP and ERR contracts via clause 5.1, on the basis that the definition of *"Applicant"* does not tie that applicant to one sourced by the claimant. Rather, it extends to any individual introduced to Kinross. This sub-clause is said to give express contractual effect to the intention, reflected by the reference in the definition of *"Retained Assignment"*, to fees being *"non-contingent"*, as fees will be due to the claimant under clause 5.1 in circumstances where it did not source the candidate (as long as the candidate is sourced within 12 months).

70. Mr Bowles also supports this construction by the submission that the parties intended clause 2.4 to deal with a different situation to clause 5.1. Clause 2.4 requires the introduction to have been made by the claimant (being an applicant put forward as part of its candidate shortlist) while clause 5.1 does not include any such requirement. The court should find that these clauses deal with different scenarios.

71. Mr Bowles therefore contends that any applicant introduced to Kinross from whatever source (during the period of the contract), who was then employed by Kinross within 12 months, would trigger a fee due to the claimant under clause 5.1. This is said to be: (1) in line with the industry standard definition of retained assignment and (2), in the case of the ERR contract, this position is bolstered by the express wording of clause 5.4. Therefore, Kinross breached the express terms of each of the SVP and ERR contracts by using third-party recruiters to source candidates for the roles under those contracts but not then paying the sums contractually due under clause 5.1.

72. However, if the court is not with the claimant on the position in relation to the meaning of the express terms of, and the entitlement to receive fees under, the SVP and ERR contracts, Mr Bowles submits that the industry standard definition of retained assignment should be implied into those contracts to give effect to the parties' intentions objectively construed. The term *"Retained Assignment"* has a meaning which is invariable, certain and notorious, and should be implied into any contract made on the basis that recruitment should be conducted on a retained assignment, rather than a contingent, basis. To the extent that the defendant seeks to deny that the term is not well-known, invariable or notorious, this is another question of fact which would render the matter unsuitable for summary determination. The court is simply in no position to know, without the assistance of expert evidence, whether the term is sufficiently certain and notorious that it should be implied into the contract. Mr Vickers says that it is; and has produced a volume of evidence to support this position. The defendant has simply denied that it is, but it has failed to adduce any evidence to contradict this position (save for Ms Morrish's evidence, and she is not an expert). It would have been open to the defendant to seek to adduce expert evidence to oppose the claimant's pleaded contention that such a term should be implied but it has not elected to do so. Therefore, proceeding on the basis that such a term is notorious, well-known, and invariable, Mr Bowles submits that such a term should be implied into

both the SVP and ERR contracts (but only if the court is not with the claimant on the meaning of clause 5.1).

73. Mr Bowles submits that such a term does not contradict the express contractual wording. If clause 5.1 is not found to have the meaning for which the claimant contends, then there will simply be no contractual payment provision covering a situation where Kinross has chosen to employ another recruiter concurrently with the claimant, and a candidate introduced by that other recruiter is then engaged. The contract is silent on this eventuality (on the claimant's alternative case). As such, Mr Bowles submits that the term to be implied would neither contradict a particular express term, nor deal with subject matter covered by an express term. It would simply fill this gap.

74. Without such a term being implied, the SVP and ERR contracts would lack business efficacy as the claimant would be faced with a gap in its contractual protection, such that no recruiter could agree to enter into a contract where:-

(1) The effect of the express terms of the contract (absent the claimant's contention in relation to clause 5.1) is that the recruiter would be required to work exclusively for Kinross; and

(2) Such recruiter would need to invest significant sums upfront to perform its sole role as a recruiter in performing executive searches, whilst also being at risk of receiving only a third of the fees (being only the first tranche of fees due upon entering into the contract) in the event that another recruiter was engaged and sourced a candidate first.

75. Such a result is plainly one which would mean that "*the contract would lack commercial or practical coherence"*, as Lord Neuberger put it in ***Marks and Spencer***. Applying the remaining criteria identified by Lord Simon in the ***BP Refinery*** case (as glossed by Lord Neuberger in ***Marks and Spencer***):

(1) Such a clause plainly would be reasonable and equitable. Where Kinross has entered into a contract imposing terms on the claimant to act exclusively on its behalf, it is plainly reasonable for the claimant to require a similar level of protection. This is especially the case where the claimant is required to undertake a significant outlay (both financial and in terms of resources) in performing the contracts. Indeed, it would (in truth) be inequitable to allow the claimant to make such an outlay, and then deprive it of (potentially) all bar the most limited fees.

(2) In ***Marks and Spencer*** Lord Neuberger noted that in reality business efficacy and obviousness were really alternatives *"in the sense that only one of them needs to be satisfied"*. Business efficacy is plainly satisfied in this case; but Mr Bowles submits that when the obviousness test is considered, this also assists the claimant. If a reasonable person, with the same knowledge that the claimant and Kinross both had at the time they entered into the SVP and ERR contracts (including the relevant knowledge about the way that retained assignments operate in the recruitment market place), had been asked whether the these contracts were to be exclusively performed by the claimant, Mr Bowles submits that the question could have admitted of only one answer: Yes. The reason for this is simple: the reasonable person would not expect the claimant to perform this work with the risk of not being paid, and, as such, the term would be so obvious as to go without saying.

(3) The term is clearly capable of clear expression. It is merely a term requiring exclusivity, and payment in the event that a third-party recruiter is used in breach of this exclusivity obligation.

76. For these reasons, Mr Bowles submits that the SVP and ERR contracts entitled the claimant to receive payment in the event that Kinross engaged a third party recruitment firm to conduct the hires under those contracts (as the claimant alleges they did), either by virtue of right to receive payment under clause 5.1 of the contracts, or by virtue of a term to be implied to give business efficacy to the contracts (in the event that the court disagrees with the claimant's primary contention in relation to the effect of clause 5.1). Further, it is clear that in order properly to consider whether it can imply such a term, the court will require the assistance of expert evidence. It does not have that evidence presently before it; and, as such, the court is simply unable to deal with this point on this application. In his oral submissions, Mr Bowles accepted that his case on implied terms would require some amendments to the claimant's existing statements of case.

77. Those were the submissions on this aspect of the application. In my judgment, a preliminary issue of construction arises in relation to the definition of the term *"Applicant"* as *"Any person introduced to the Company [i.e. The Executive Search Division of Harrington Scott Limited], whether on a Retained search or other contingent search basis"*. It is common ground that something has gone wrong with this definition because applicants are introduced **to** *"the Client"* [i.e. Kinross] **by** *"the Company"* [i.e. the claimant]. Mr Bowles submits that this obvious error should be corrected by construing the phrase *"introduced to the **Company**"* as if it read *"introduced to the **Client**"*. I prefer Ms Page's alternative suggested correction, whereby the phrase *"introduced **to** the Company"* should be read as *"introduced **by** the Company"*. My reasons are: (1) that this does less violence to the language of the defined term, involving minimal re-writing; and (2) it is a better fit with both (a) the language of the SVP and ERR contracts in general, such as clause 1.7 (referring to *"Completion of the Assignment **by** the company"* and an *"Applicant resourced **by** the Company"*), and clause 2.4 (referring to a client hiring *"any additional Applicants submitted from within the Company's candidate shortlist"*) and (b) the intrinsic character, and commercial context and objective purpose, of a recruitment contract.

78. On this basis, Mr Bowles's suggested construction of clause 5.1 would seem to me to fall to the ground.

79. Lest I am wrong about this, however, I accept Ms Page's submissions as to the true meaning and effect of clause 5.1 (as summarised above) in preference to those advanced by Mr Bowles. In my judgment, for the reasons that Ms Page has given, it is implicit (if it is not express) within clause 5.1, read in the context of the SVP and ERR contracts as a whole, that that sub-clause is only engaged where an applicant has been submitted to Kinross by *"the Company"* (meaning either the claimant or, as I would be inclined to think, the BVI company) and no initial employment results. Mr Bowles's submissions seem to me completely to ignore the ancillary nature of clause 5, as indicated by the heading **("Introductions")** and the express reference back to *"the fees resulting from any employment as set out in Clause 2"*. I can discern no relevant overlap between clause 5.1 (as so construed) and clause 2.4 because they are addressing different situations: First, clause 2.4 applies where Kinross hires any **additional** applicant submitted from within the claimant's candidate shortlist whereas clause 5.1 is addressing the situation where the claimant has submitted an applicant to Kinross and no initial employment results but the applicant is subsequently employed

by Kinross or introduces further applicants to Kinross resulting in employment by Kinross. Second, the timescales are different: for clause 2.4, it is within 12 months from the signed agreement between Kinross and the original candidate and for clause 5.1 it is up to 12 months after the initial introduction date. Third (as Mr Bowles acknowledges) by clause 5.4 the term *"Applicant"* bears an extended meaning in clause 5.1 than it does in clause 2.4.

80. I also accept Ms Page's reasons for rejecting the implication of any term along the lines proposed by Mr Bowles. There is not a shred of evidence that the claimant ever incurred any upfront recruitment costs; and its filed accounts for each of the years ended 28 February 2009 and 2010 record its cost of sales as nil. In any event, such costs are addressed by the initial up-front payment of the first one-third tranche of the search fee. In my judgment, there is no real prospect of the claimant establishing that notional reasonable persons in the position of the parties at the time they were contracting would have understood the exclusivity term as being either necessary for business efficacy or so obvious as to go without saying. Without it, the contract does not lack commercial or practical coherence. Apart from the self-serving evidence of Mr Vickers, there is no satisfactory evidence of any relevant invariable, certain, or notorious usage, such as to amount to a trade or market practice.

81. But even if there were any such evidence, or any other legal basis for the implication of a term into the contracts along the lines asserted by the claimant, in my judgment it is clear that the claimant's suggested implied term would be wholly inconsistent with the express terms of the relevant contracts. Mr Bowles recognises that where the parties have entered into express obligations as regards a particular subject matter, the court will be very reluctant to imply a further term even if it does not actually conflict with the express term. In my judgment, that is precisely the position in the present case. The SVP and ERR contracts make express, and, in my judgment, comprehensive, provision for the circumstances in which fees are to be payable under each of those two contracts; and in my judgment it is not open to this court effectively to re-write those contracts by adding to them. Mr Bowles's perceived *"gap"* is entirely the product of the claimant's own drafting of the contracts it elected to present to Kinross and then enter into. It is not for this court to improve upon that drafting under the guise of implying a new term. The SVP and ERR contracts provide, in terms, for the fees to *"be paid as outlined in The Fee Structure and Search Assignment Fees outlined"* later in the contracts. It is not a permissible exercise of the court's interpretative powers to add to the circumstances in which any fee is to be payable by any legitimate process of implication. If, as I find, the two contracts contain no contractual provision entitling the company (or the BVI company) to payment of any fee in the situation where Kinross has chosen to employ another recruiter concurrently with the claimant, and a candidate introduced by that other recruiter is then engaged, it would contradict the agreed fee structure for the court to imply a term obliging Kinross to pay a fee in this event. To do so would be to invent a fee entitlement where none already exists and not to *"fill a gap"* in the parties' agreed fee structure.

82. For these reasons, I accede to the defendant's application, under CPR 3.4 (2) (a) and/or CPR 24.2, to strike out, alternatively for summary judgment on, the claim, insofar as it concerns the issue whether the SVP and ERR contracts were *'retained assignment'* contracts entitling the claimant to receive fees under them in circumstances where a role was filled by a third party rather than the claimant. I do so on the basis that the claimant had no, or no real, prospect of recovering the sums that it says it would have recovered from Kinross, such that, even if any alleged breach of duty by the defendant were made out: (1) the particulars of claim disclose no reasonable grounds for bringing

that part of the claim and (2) the claimant has no, or no real, prospect of succeeding in showing that such breach caused that part of the claimed loss.

8: Early termination of the ERR contract

83. Clause 3.2 of the ERR contract provides that;

> The Client [Kinross] may terminate a Retained Assignment at any time by giving thirty days written notice to the Company [either the claimant or the BVI company]. In the event of such termination all prepaid resource fees are non refundable.

84. The existence of this clause gives rise to the sixth issue on this application: the defendant contends that the level of damages claimed for Kinross's breaches of the ERR contract fails to take account of the impact of the existence of this unilateral termination clause. Since the ERR contract gave Kinross an unfettered right to terminate without cause on 30 days' notice, if the defendant is wrong about the true construction of that contract, any compensation to which the claimant would otherwise be entitled must be calculated on the basis that Kinross would have performed the contract in the way which was least onerous to it, i.e. by terminating the contract before instructing any other recruitment agency. Thus the claimant would never have recovered from Kinross (and cannot now recover from the defendant) sums calculated on the basis that the contract would have subsisted for any longer than 30 days. Of course, this issue falls away if the court accepts (as it has) that the ERR contract contained no exclusivity term; and even if the defendant were to succeed on this issue, this will only dispose of part of the claim for losses arising under the ERR contract.

85. Ms Page relies upon the long-understood legal principle that where a defendant has the option of performing a contract in more than one way, damages for breach should be assessed on the assumption that it will perform it in the way most beneficial to its own, rather than the claimant's own, interests. It follows that where a defendant has the right to terminate a contract before the end of its contractual term, damages should only be awarded up to the end of the earliest point in time at which the defendant could have terminated the contract. Underlying this principle is the proposition that a defendant in an action for breach of contract is not liable for failing to do that which it is not required to do under the terms of the relevant contract.

86. Ms Page refers the court to observations of Patten LJ in ***Durham Tees Valley Airport Ltd v BMI Baby Ltd*** [2010] EWCA Civ 485, [2011] All ER (Comm) 732, describing (at [79]) the exercise to be undertaken by the court when assessing damages for breach of contract by reference to such principles:

> The court, in my view, has to conduct a factual inquiry as to how the contract would have been performed had it not been repudiated. On the basis of that premise, the court has to look at the relevant economic and other surrounding circumstances to decide on the level of performance which the defendant would have adopted. The judge conducting the assessment must assume that the defendant would not have acted outside the terms of the contract and would have performed it in his own interests having regard to the relevant factors prevailing at the time.

Ms Page points out that this was the exercise undertaken in ***Redbourn Group Ltd v Fairgate Developments Ltd*** [2018] EWHC 658 (TCC) (a case where, as here, the

defaulting party had a right to terminate the contract). Sitting as a deputy high court judge, Mr Andrew Bartlett QC concluded (at [69]:

> Applying the principle in *Durham Tees*, and by comparison with *Lavarack*, the first step in calculating damages is to consider what benefits [the claimant] would have received if the contract had continued until the first date when [the defendant] could lawfully have terminated it.

87. The reference to *Lavarack* is to the case of *Lavarack v Woods of Colchester* [1967] 1 QB 278. This involved a claim for wrongful dismissal where the first item in the calculation of damages was the sum that Mr Lavarack would have earned had his employment continued until the first date on which his employer could lawfully have terminated it. In *Redbourn* (at [67]), the deputy judge said that the application of the principle in the case of wrongful dismissal provided an instructive comparison to the case that was before him. In a case of wrongful dismissal, damages were usually limited to the benefits that the employee would have received during the period his employment would have continued had he been dismissed by lawful notice. In other words, in such a case the assumed performance is the lawful termination of the contract instead of an unlawful one.

88. In a foot-note to her skeleton argument, Ms Page makes reference to the case of *British Gas Trading v Shell UK Ltd* [2020] EWCA 2349 where, in the context of a claim based upon the defendant's alleged breaches (as seller) of a contract to supply natural gas from a North Sea reservoir at a specified rate, the Court of Appeal held that damages could not be assessed on the footing that the defendant had been obliged to serve notices of variation reducing the volumes of gas that the claimant had been required to take and pay for under the contract, or on the basis that such notices had been served when they had not. Ms Page submits that this decision is distinguishable from the present case on two bases: first, that it concerned a somewhat unusual provision entitling the defendant to serve notices unilaterally varying the contract rather than a notice of termination; and, secondly, that it would have been contrary to the defendant's own commercial interests to have served any notice varying the terms of the contract whereas here it would have been in Kinross's own best interests to have served an early notice of termination of the ERR contract.

89. Ms Page points to the fact that it is the claimant's case (as asserted at paragraph 314 of his first witness statement) that Mr Vickers first found out that Kinross had breached the ERR contract by hiring other recruitment agencies to fill the roles covered by that contract in around June 2009, when he was first told that someone else was advertising a role covered by that contract. Ms Page accordingly submits that in assessing damages under the ERR contract, it should be assumed that Kinross would have terminated the contract either: (1) before instructing any different recruitment company, or (2) at the point of breach (so that assuming, on the claimant's case, that this had taken place in or around June 2009, then the contract would have come to an end by the end of July 2009 at the latest). This was the step, within the terms of the ERR contract, which most accorded with Kinross's own commercial best interests as, on the claimant's case that the contract included an exclusivity term, it would otherwise have been exposing itself to a double liability for fees on any appointment. As a consequence, the ERR contract would no longer have been subsisting, and the claimant would have ceased to be entitled to any further payments under it, either at the time of breach in or round June or, at the latest, by the end of July 2009. This was particularly the case in circumstances where, on the claimant's own case, Kinross

claimed to be deriving no benefit from the claimant's services. On its best case scenario, the claimant (or the BVI company) could never have been entitled to any damages in relation to the appointment of at least 20 individuals all of whom were recruited by Kinross after July 2009.

90. Accordingly, the defendant seeks, under CPR 3.4 (2) (a) and/or CPR 24.2, the striking out of, and/or summary judgment on, the remaining parts of the claim insofar as it relates to the ERR contract being premised on more than 12 job roles (i.e. 32 less the 20 who were, on the claimant's own evidence before the court on this application, appointed after July 2009). This is on the basis that the claimant's case lacks the crucial elements of causation and loss as it had no, or no real, prospect of recovering from Kinross the sums that it says it would have recovered, such that even if any alleged breach of duty by the defendant is made out, the particulars of claim disclose no reasonable grounds for bringing this part of the claim, or alternatively that the claimant has no, or no real, prospect of succeeding in showing that any alleged breaches caused that part of the claimed loss.

91. Mr Bowles submits that the defendant's argument simply misses the point:

(1) Kinross could have terminated the contract at any time by giving 30 days' written notice, but it chose not to do so. The defendant cannot now seek to rely on a counter-factual that simply did not occur, when it was always in Kinross's gift to act in the manner the defendant now wishes it had.

(2) The evidence directly contradicts the defendant's position. It is clear that by October 2009 the position between the parties was difficult. However, despite this, it is clear that Kinross actively chose not to terminate the ERR contract (although it could have done at any time); rather, it was giving the claimant an opportunity to get matters back on track. On 9 November 2009 Mr Morley-Jepson (Kinross's Regional Vice-President for Russia) emailed Mr Vickers acknowledging that at a meeting in London on 6 October, Mr David Smith had *"instructed you to 'stop' all activities until the matter was straightened out.*" However, the email went on to record that: *"David finally advised you that there was very little evidence of what work had been done by Harrington-Scott to warrant the substantial payment and whilst his instruct was not to be considered a termination of the contract you were asked to stop all activities and spending until the two of you clarified the whole contract. David left the discussion understanding that you had agreed."* The email concluded: *"I am now giving you the opportunity to rectify the situation and provide the proposal as was requested and agreed between David and yourself. I urgently await your response failing which we will examine our available remedies to otherwise recover our position from Harrington- Scott."*

92. Mr Bowles submits that Kinross thereby affirmed the ERR contract; and the claimant cannot go behind this affirmation. Therefore, there is simply no reason for the limitation on the claim for damages which the defendant now seeks to impose.

93. In a subsequent letter, headed *'WITHOUT PREJUDICE'* and dated 26 October 2010, Mr Morley-Jepson wrote to Mr Vickers asserting that:

> On November 9, 2009, in response to an email from Mr. Vickers, I reminded him of Mr. Smith's previous instruction to perform no further work under the Contract and clearly re-affirmed our instruction to stop

> performance under the Contract entirely due to a failure to perform the Contract by HSL.
>
> Thus, the Contract is terminated by KFE in accordance with Clause 3.2 of the Contract on December 10, 2009.
>
> No response or other further communications were subsequently received from Mr. Vickers. No positions were ever filled with applicants resourced or recruited by, or otherwise with the assistance of, HSL.

However, the assertion that the ERR contract had been terminated on 10 December 2009 (which, in any event, is at odds with the defendant's submission that damages should be assessed on the basis of an assumed termination in July 2009) is in direct contradiction of the terms of the 9 November 2009 letter.

94. I accept Mr Bowles's submissions. On a true reading of the relevant correspondence, Kinross affirmed the ERR contract until 26 October 2010. The 9 November 2009 email never purported to terminate that contract. Rather, it recognised its continued existence. It would never have been open to Kinross to seek to defend any claim for damages for breach of the ERR contract by asserting, contrary to the facts, that it had terminated that contract by notice under clause 3.2. In my judgment, the legal principle invoked by Ms Page only applies where there is uncertainty about the extent of a claimant's loss, either because the defendant had a discretion as to how the relevant contract was to be performed, or where it could have been lawfully terminated by notice had it not previously been unlawfully determined. The principle is not engaged, and the counter-factual exercise that it involves has no application, in circumstances where the true facts are known.

95. The contract in the ***British Gas Trading*** case was unusual because it gave only one of the contracting parties the prerogative to set the parameters of an obligation that was binding upon both of them. As Peter Jackson LJ explained (at [109]) in truth it was *"a claim for damages for the Seller's failure to serve Variation Notices, something that they were under no obligation to do"*. Nevertheless, I consider that it is instructive. As Males LJ recognised (at [79]), damages could not be assessed as if the defendant had been under any obligation to serve a notice of variation because to do so would have been contrary to the terms of the parties' contract. But, relevantly to the present case, he went on to add *"Nor can damages be assessed on the basis that the Sellers would in fact have served a Variation Notice when in fact they did not."* The concurring judgment of Andrews LJ is even clearer (at [89)]:

> It would not be open to a party who has breached a contractual obligation over a period of, say, one year to contend that, had it appreciated that it was in breach of contract, after two months it would have exercised a contractual option which enabled it to perform the contract in another way, which would have put an end to the breach, and therefore the injured party is only entitled to recover two months of its losses. It is not possible to re-write history in that way for the purposes of assessing damages for a breach that has already occurred. The converse must also be true. The injured party can only claim such recoverable loss, if any, as flowed from the proven breach. Since the option to change what had to be done in order to fulfil the contractual obligation was never exercised, the approach to the assessment of damages is no different from the approach that would be taken if the option did not exist.

96. At [113-114] Peter Jackson LJ also agreed that

> … on a correct analysis the counter-factual exercise that was identified in *Durham Tees Valley Airport Ltd v Bmibaby Ltd* has no part to play in this case. As its treatment in *McGregor on Damages* 20th Ed. at 10-110 shows, the *Durham Tees* inquiry is appropriate in a case where there is uncertainty about the extent of the claimant's loss in circumstances where the defendant has a discretion as to how a contract can be performed. A contract of this kind was considered by this court in *Abrahams v Herbert Reiach Ltd* [1922] 1 KB 477. Publishers undertook to republish the claimant's magazine articles in book form, paying a royalty on each copy sold. The form, price, publication date and number of copies to be printed was left to their discretion. They then refused to publish the book and the issue was what would have amounted to sufficient publication to constitute performance of the contract.

Peter Jackson LJ explained that the *British Gas Trading* case was different. Once the relevant contractual obligation had been identified, and the breach established, the only remaining question was what, if any, loss had flowed from that breach. There was no uncertainty about defining the loss, although its quantification might be complex, depending on the circumstances.

97. In the present case, there is no uncertainty, and no need for speculation, or to resort to any counter-factual analysis: it is known that, although contrary to its own factual interests, Kinross elected not to exercise its contractual right under clause 3.2 to terminate the ERR contract before 26 October 2010. It is not open to Ms Page to seek to re-write history retrospectively for the purposes of reducing the damages payable for any breach of contract that had already occurred prior to that time. For these reasons, had it been necessary to do so, I would have determined issue six in favour of the claimant.

9: The extent of the ERR underlying claim

98. The remuneration payable under the ERR contract (and thus the value of the underlying claim) was referable to the number of positions for which the claimant (or the BVI company) was contractually engaged to introduce applicants to Kinross. Issues seven and eight concern the number of candidates who were to be recruited under the ERR contract and how the defendant should have advised on that aspect of the underlying claim. Issue seven is whether the defendant should have advised the claimant to seek to quantify its claim for loss of income in the underlying claim on the basis that there were 32 positions to be filled under the ERR contract rather than only claiming for the 21 positions for which the claimant had actually invoiced Kinross. This ground for summary disposal is not founded upon issues of causation or loss; rather, the defendant maintains that the claimant's allegation that it acted in breach of duty by failing to advise the claimant to invoice and/or claim in respect of 32 positions is unsustainable on the evidence. A related issue is whether (as the claimant contends) the ERR contract ever actually required the claimant (or the BVI company) to source candidates for as many as 32 positions. The defendant does not invite the court finally to determine the total number of positions to which the ERR contract applied; but it does invite the court to decide that this number did not exceed 24. Again, Mr Bowles points out that were the defendant to succeed on either of these issues, this would merely limit the losses referrable to the ERR contract and would not dispose of the whole claim under that contract.

99. Although this was not the order in which the defendant chose to address these two, related issues, logically it seems to me that the first issue for the court to address is the true scope of the ERR contract, in terms of the number of candidates to be recruited under that contract, since this is relevant to the advice that the defendant should have tendered to the claimant. In order to understand this aspect of the defendant's application, it is convenient to begin by considering the basis upon which the claimant puts its case.

100. Mr Bowles submits that the claimant's case in the instant litigation has always been that Kinross engaged it to recruit 32 individuals. He draws a distinction between positions (or roles, with their associated job profiles), some of which required more than one employee, and the number of individuals required to fill those positions. Mr Bowles contends that at the time of contracting, both the claimant and Kinross were aware that the purpose of the ERR contract was to enable Kinross to replace all of its expatriate employees with Russian nationals in order to meet the requirements of Russian legislation. At paragraph 279 of his first witness statement, Mr Vickers explains that Kinross needed to find suitable Russian nationals for 21 *'job profiles'* but, because of differing working patterns, Kinross actually needed to find at least 32 people to fill those 21 roles. Mr Bowles submits that this was reflected in the negotiations between the parties and the form of the documents setting out the roles that needed replacing:

(1) On 26 January 2009 (at pages 1831-2) Dr Cowley emailed Mr Vickers with a document called *'Kupol Expat Release List (By Oct 2010)'*. This contained the names of 37 expatriate candidates who needed to be replaced (plus one candidate referred to as *'TBD'*). These names were spread across 24 positions.

(2) Many of the positions had more than one name in the Expat Release List. These were the current incumbents of the roles that required replacing as of January 2009. As such, it was it was clear to Mr Vickers that it was necessary to replace each of the individuals, and that at times this would require replacing more than one person for each position. The Excel version of the Expat Release List contained job descriptions for 21 of the 24 positions.

(3) By email dated 3 March 2009 Dr Cowley then provided initial salary details for 24 of the employees named in the Expat Release List. This document did not limit the roles to be sought to 24, and the email chain referred explicitly to this being information provided in relation to the *"first wave"* of hires (making it clear that there would be further information and hires provided in respect of other candidates).

(4) Around 6 March 2009, Mr Vickers created two documents to be appended to the ERR contract. Confusingly, each is marked *'Appendix 1'*; but one is headed: *'Appendix 1: Kinross Russia Job Requirements'* and the other is headed: *'Appendix 1: Twenty-One Job Profiles for Kinross, Russia'*. The second of these two documents can be found at pages 531-4; but there are two versions of the first document: one (with no salary information) is at page 531, whilst the other (containing salary information for each candidate) is at page 1858. Ms Page notes that until it received the claimant's skeleton argument for the December 2021 hearing, the defendant had understood there to be no dispute as to the final version of the ERR contract, and that this had included the version of the first Appendix 1 without any salary information. However, in that skeleton (and contrary to the claimant's position in both the underlying claim and its pre-action protocol letter in this claim), the claimant now asserts that the ERR contract included the version of the first Appendix 1 which included the salary information. I

agree with Ms Page that, for the purposes of the present application, nothing material turns on which of these two versions of the first Appendix 1 formed part of the ERR contract; although Ms Page relies on this as a further example of what she describes as the claimant's *"continually changing case on the execution of the ERR contract"* (as more fully related in the appendix to her skeleton argument).

(5) These two Appendix 1 documents formed part of the ERR contract. However, Mr Bowles contends that they could only be understood in the context of the previous Expat Release List, which formed a relevant part of the factual matrix at the time the parties entered into the ERR contract. This was explicitly discussed between Mr Vickers and Dr Cowley at a meeting at the Institute of Directors on 6 March 2009 when (according to paragraphs 285.16 and 302 of Mr Vickers's first witness statement) they:

> … agreed that employees covered by the ERR contract were the ones named in the Expat Release List for each of the 21 job titles that were listed in the Appendix 1 document *'Appendix 1: Twenty-One Job Profiles for Kinross in Russia'*. That was 32 employees … Dr Cowley and I specifically discussed and agreed at the 6 March 2009 meetings that in order to ascertain how many people were needed for each of the 21 job profiles, you had to look at the Expat Release List.

(6) In that context, Mr Bowles contends that Kinross clearly engaged the claimant to source the number of individuals necessary to fill the 21 job profiles contained in the document headed *'Appendix 1: Twenty-One Job Profiles for Kinross Russia'*. To replace these 21 job profiles, the claimant had to replace 32 of the 37 (or 38) individuals named (or to be disclosed) in the Expat Release List; and this was what the claimant was engaged to do under the terms of the ERR contract.

101. Mr Bowles submits that it is clear that the number of individuals which Kinross engaged the claimant to replace was 32. To the extent that the defendant now seeks to challenge this assertion, this plainly raises a question of fact between the parties. Ultimately, this is a question as to the terms on which the parties intended to contract:

(1) The claimant contends that it was engaged to replace all the personnel needed to fill the 21 job profiles contained in the Appendix 1 documentation; and that given both parties' understanding of the background facts, including the position in Russia and the fact that many of these roles were manned by multiple expatriate employees, this was to be 32 individuals; whereas, and conversely,

(2) The defendant contends that the number was limited to 15 (or 21 or 24) individuals, and asserts that the Expat Release List should have little or no bearing on any analysis of the parties' contractual intentions and the scope of the assignment for which the parties contracted. However, Mr Bowles submits that this position is unsustainable in the context of Mr Vickers's clear evidence to the contrary (which, on this application, must be taken at its highest).

102. As such, the resolution of this dispute will require the court to identify the relevant factual matrix at the time the parties contracted, and how that factual matrix operated on the parties' minds. This is not something which is suitable for summary determination; it will require live evidence and cross-examination at trial. Although Mr Bowles acknowledged that the court can construe contractual documentation in the course of a summary judgment application, this was not an appropriate case to do so.

Mr Vickers was effectively being cross-examined on his witness evidence without being given any opportunity to respond to the allegations of dishonesty being levelled against him, or to explain the true position to the court.

103. Moving to the defendant's alleged failure to give appropriate advice, Mr Bowles submits that it is also clear that the defendant failed to take any steps properly to advise Mr Vickers to plead a claim against Kinross in respect of the 32 individuals who were subsequently hired under the ERR contract. The defendant now denies that it owed any such duty and has suggested that the contemporaneous documentation demonstrates that Mr Vickers only instructed the defendant to being claims under the ERR contract against Kinross on the footing that it had only lost the fees for 21 hires. However, Mr Bowles submits that, when properly analysed, the contractual documentation was such that it should have been obvious to the defendant that there were more than merely 21 individuals to replace, and that simply by comparing the Expat Release List and the Appendix 1 documentation, it would have been clear that 32 individuals would be required to fill these 21 roles (as previously explained). That was the correct measure of the claimant's losses, and this should have been the basis on which the defendant brought the underlying claim against Kinross.

104. Mr Bowles accepts that a solicitor is not obliged to travel outside his instructions or to undertake investigations which are not expressly or impliedly requested by the client. Rather, the general principle as to the scope of a solicitor's duty was formulated by Oliver J in *Midland Bank v Hett, Stubbs & Kemp* [1979] Ch 384 at 403 A-C in the following terms:

> … the court must beware of imposing upon solicitors … duties which go beyond the scope of what they are requested and undertake to do … the duty is directly related to the confines of the retainer.

105. Similarly, in *Gilbert v Shanahan* [1988] 3 NZLR 528 at 537, Tipping J (speaking for the New Zealand Court of Appeal) set out the principle that:

> Solicitors' duties are governed by the scope of their retainer, but it would be unreasonable and artificial to define that scope by reference only to the client's express instructions. Matters which fairly and reasonably arise in the course of carrying out those instructions must be regarded as coming within the scope of the retainer. It was within the scope of Ms de Bemardo's retainer to act for Mr Gilbert personally in the transaction, to familiarise herself with any preliminary agreement there might be, to identify her client's legal position and to advise him accordingly.

Mr Bowles notes that this passage has been cited with approval by the editors of *Jackson & Powell on Professional Liability* (8th edn), who observe (at foot-note 802 to paragraph 11-166) that this is consistent with the *"general principle"* formulated by Oliver J. In deciding what would be fair and reasonable, the precise scope of the duty to advise will depend, amongst other things, upon the extent to which the client appears to need advice.

106. Mr Bowles submits that in this case the claimant engaged the defendant to: (1) advise on the claims available to the claimant against Kinross, and (2) once the defendant had decided that these were claims which had good prospects of success (such that it was content to bring them on the basis of a conditional fee agreement), to pursue those claims. In those circumstances, Mr Bowles further submits that the defendant owed a

duty to the claimant to advise on the quantum of any claim on which it was acting. That is not a controversial proposition. In this case, that would involve considering the correct number of individuals that the claimant had been engaged to recruit (and which it lost the chance of recruiting as a result of Kinross's breach of contract). Such advice, or the duty to provide such advice, would have arisen *"fairly and reasonably"* from the scope of the defendant's retainer.

107. In relation to the defendant's attempts to rely upon the contractual documentation supplied by the claimant, Mr Bowles submits that:

(1) These documents were created containing erroneous numbers and were always intended to be corrected at a later date. Mr Vickers has explained this in detail in his first witness statement at paragraphs 323 and 324. Accordingly, at no time should these numbers ever have been relied upon by the defendant (and had they asked Mr Vickers about them he would have explained this to the defendant); and

(2) It is not sufficient for the defendant to seek to rely upon instructions from its client as to the effect of the contractual documentation when (as the claimant's lawyers) the defendant had conducted its own review of the contractual documentation in order specifically to advise on the potential claims. Rather, in conducting a review of the contractual documentation, it should have been clear to the defendant that the number of hires was greater than that invoiced by the claimant; and it should have advised accordingly. The defendant had failed to do so.

108. Mr Bowles frankly acknowledged that mistakes had been made in the course of preparing the invoices and other documentation. He accepted that these had not been brilliant; but he contends that the defendant should have drilled down properly into the underlying documentation. The defendant had treated the underlying claim as a simple debt collection exercise when it should have properly analysed the true contractual position. Mr Bowles points to the defendant's admission (at paragraph 75 of the defence) of the duty (pleaded at paragraph 70 of the particulars of claim) that it had been instructed to advise the claimant in respect of the contractual claims. The defendant had failed to bring the claim in the correct sum: it should have claimed for an additional 11 hires.

109. At paragraph 225 of his skeleton argument Mr Bowles had originally relied upon evidence from Mr Vickers (at paragraph 332 of his first witness statement) that he had

> … told Mr Lever that the ERR contract covered 32 people on at least one occasion. When Mr Lever sent me his draft second witness statement on 28 April 2016, I replied with a list of corrections including '*32 was the number of people to be placed'*.

In those circumstances, Mr Bowles originally submitted that it was even clearer that the defendant had failed properly to investigate the correct number of individuals whom the claimant had lost the opportunity of recruiting (having been expressly told of this number). Mr Bowles commented that the defendant had filed a responsive witness statement from Mr Lever, but that he had taken no issue with the fact that Mr Vickers had expressly informed him of the fact that 32 had been the number of people to be placed. Mr Bowles originally submitted that it was extremely difficult to see how the defendant could suggest that it had owed no duty to follow, or at least to investigate, those instructions, and then to bring a claim based upon them (once it had established the correct quantum of any claim).

110. Unfortunately for Mr Bowles this submission was comprehensively holed below the waterline and sank during the course of Ms Page's oral submissions. She took the court first to the email from which Mr Vickers had been quoting (at page 1883) and then to the paragraph (125, at page 1320) of Mr Lever's second witness statement upon which Mr Vickers had been commenting at a time when it was still in draft form. This clearly related, not to the ERR contract with Kinross, but rather to an earlier contract with a different Russian entity called *'Basic Element'*. The full text of Mr Vickers's correction had read: *"125 NOT 32 searches...sorry....it was 12 (32 was the number of people to be placed)"*. As so corrected, paragraph 125 of Mr Lever's 2nd witness statement read: *"I am advised by TV [Mr Vickers] that the Basic Element Group instructed the Claimant to do 12 searches for 32 positions in 2007-2008."* The reference to placing 32 people was not to the ERR contract at all, but rather to a wholly different contract. It was Ms Page's submission that by asserting (in paragraph 332 of his first witness statement) that he had *"... told Mr Lever that the ERR contract covered 32 people on at least one occasion"*, Mr Vickers had been misleading the court: the only specific occasion cited by Mr Vickers had had nothing at all to do with the ERR contract. Mr Lever had not needed to refute the assertion that he had been told that the ERR contract covered 32 people because this was demonstrably false on the unchallenged documents. Recognising the force of Ms Page's analysis, when he came to present his oral submissions to the court on issues seven and eight, Mr Bowles acknowledged that the claimant had produced no evidence that Mr Vickers had ever told the defendant that the ERR contract covered 32 people. Apart from his false assertion in paragraph 332, there was no evidence to this effect at paragraph 330 of Mr Vickers's first witness statement (or anywhere else in his voluminous evidence).

111. In my judgment, Mr Bowles's concession that Mr Vickers's evidence at paragraph 332 of his first witness statement in these proceedings was wrong has implications for the reliability, and the credibility, of the remainder of Mr Vickers's extensive evidence. At best (for the claimant), it demonstrates that his recollection of events (even when verified by a statement of truth) is inaccurate, opportunistic, and unreliable; and that his evidence is slapdash. At worst (and I find much more likely), his evidence is deliberately dishonest. On either view, Mr Vickers's evidence must clearly be approached with great caution.

112. Mr Bowles nevertheless submits that the defendant was under a duty to advise the claimant to bring, and then to prosecute, the underlying claim on the basis that the true quantum of the claim should have been based on 32 lost hires. He emphasises, however, that on the present application the claimant has no need to establish that claim on the balance of probabilities. Rather, it only needs to establish that it has a real prospect of success on its claim that the defendant owed such duties to it; and that, in failing to bring the underlying claim correctly, the defendant breached such duties. This is a low bar; and since Mr Bowles claims that this has been established on the facts outlined in the claimant's statements of case, and by Mr Vickers in his witness statement, there is plainly a triable issue. It would not be appropriate to dispose of this issue summarily, and without a full investigation by the court into: (1) the information provided by Mr Vickers to the defendant, and (2) the advice given by the defendant to the claimant.

113. Ms Page emphasises that neither the claimant, nor the BVI company, ever raised any invoice under the ERR contract for any number of jobs greater than 21; hence the description in the particulars of claim of the 11 disputed jobs as those *"for which no invoices were raised"*. In accordance with clause 10 of the ERR contract, it was only once an invoice had been raised that Kinross ever fell under any obligation to make

payment so, in the absence of any such invoice, neither the claimant, or the BVI company, ever had any claim for any additional sum from Kinross; and no such sum was ever included in the underlying claim. Prima facie, therefore, neither the claimant or the BVI company have suffered any loss which they can now seek to recover from the defendant by way of this part of the claim. It follows (so Ms Page submits) that if the claimant is to be entitled to recover any sums from the defendant in relation to the 11 uninvoiced jobs, it can only do so on the basis that the defendant acted in breach of a duty to take reasonable skill and care in not advising the claimant that either it, or the BVI company, had such a claim.

114. Ms Page submits that it is entirely unsustainable that there could ever have been any such breach of duty by the defendant:

(1) There is no hint in the contractual documentation relating to the ERR contract that it related to 32 jobs; rather a close analysis of the documentation, and indeed the contemporaneous correspondence, strongly demonstrates the opposite. It is notable that Mr Vickers has now put forward (at paragraphs 298-304 of his first witness statement) a detailed explanation as to why he asserts that the ERR contract should be construed so as to refer to 32 jobs. It is only possible to reach the construction contended for by Mr Vickers by appreciating the content of (entirely unevidenced) pre-contract conversations between Mr Vickers and Dr Cowley which allegedly took place on 6 March 2009 and which have never been referred to before in these proceedings or, indeed, in the underlying claim. Mr Vickers does not say that he ever informed the defendant of the content of such alleged conversations. Moreover, the claimant's (unpleaded) case has to be that somehow these conversations altered the terms of the written ERR contract. The claimant makes no effort to explain what legal process would permit that conclusion.

(2) In fact, it appears that neither the claimant nor the BVI company ever appreciated at the time that they had any right to claim to recover such sums. This is why the BVI company raised an invoice on 16 March 2009 (at page 1871) for the first tranche of fees *"for resourcing candidates"* (number unspecified) in the sum of US $194,197.66. Mr Vickers explains that this was calculated on the basis of taking the top 15 salaries that the claimant had been told about at that point. Mr Vickers now accepts (at paragraph 324) that: *"In hindsight, we could and probably should have invoiced for more than 15 hires at this point."* He now acknowledges that this was a mistake; and he blames the (now deceased) Mr Williams, who (he says) prepared the invoice: *"At the time however I did not drill down into how Mike had calculated this invoice, I just wanted to get on with doing the work. We also knew that there would be a reconciliation exercise at the end of the project, so it was not at that point paramount to get the first invoice to cover the maximum fees it could have covered."* Ms Page points out that the amount invoiced - a little over $194,000 - was, by some margin, the largest sum ever invoiced by the claimant and the BVI company: by comparison, the claimant's total turnover for the whole of the year ending 28 February 2009 was only £93,364, and for year before it was only £43,670. The BVI company proceeded to raise three further invoices: on 29 September 2010 (at page 1881) for US $835,638.50 and on 11 November 2010 (at page 1882) for US $288,354.11, representing the balance of the fees due under the ERR contract (less the deposit previously paid); and then on 3 February 2011 (at page 1092) in the sum of US $185,017,42 for penalty interest payable on the overdue fees. The first two of these further invoices were expressly referrable to only *"21 Positions"* and *"21 hires"*. Had the claimant (or the BVI company) thought it was entitled to invoice for 32 hires, Ms Page submits that these invoices would have been in far larger sums. Mr Vickers explains these invoices

(at paragraph 329 of his first witness statement) in terms which Ms Page submits that this court might find *"astonishing"*:

> Mike prepared this invoice, and invoices generally. Mike was less familiar with the ins and outs of the numbers of people covered by the ERR Contract. I should have checked the invoice against the number of people actually covered by the ERR Contract, by reference to the Expat Release List but unfortunately I did not do so. I relied on Mike for the invoices.

So, yet again, Ms Page submits that Mr Vickers takes refuge in the *"I did not read the document"* line. These were invoices issued months after the termination of the ERR contract. They were plainly very carefully considered documents seeking huge sums of money: to put them into perspective, the claimant's turnover for the previous year (ending 28 February 2010) had been nil and it had made a loss of £20,591. Assuming the reference to *"this invoice"* is to invoice number 01012 (i.e. the first of the three further invoices in the sum of $835,638.50), Mr Vickers does not even bother to offer an explanation for the latter two invoices.

115. Ms Page also invites the court to note that:

(1) The fact (if it is a fact, which, on the face of it, seems impossible) that Mr Williams, the company accountant and its chief financial officer, who must have been intimately familiar with the claimant's business (such that its only bank account was in his name), did not appreciate from the face of the documentation that such sums were properly owing is a powerful indication that the defendant (which was at one step removed) should not have appreciated that this was the case.

(2) Mr Vickers's supposed failure to consider these invoices is rendered even more implausible in circumstances where, at paragraph 53 of his first witness statement, Mr Vickers asserts that: *"HSL has had good years and bad years financially. 2010 was a difficult year because Kinross had breached their three contracts with HSL and were refusing to pay. The Kinross Contracts were the main sources of income for HSL in those years".* If, in 2010, the reality was that non-payment by Kinross was threatening the financial health of the claimant's business, it is inconceivable that Mr Vickers would not have been intimately involved in the invoicing process, or at least have subsequently reviewed the invoices raised. The issuing of these invoices was a momentous event in the life of his companies. In her oral submissions, Ms Page pointed out that it was Mr Vickers himself who sent the invoice for the first tranche of the search fee to Dr Cowley (by email on 18 March 2009, at pages 1875-6), and that he had explained the basis of the invoice and raised a number of questions for Kinross. This is hardly consistent with Mr Vickers's evidence that this invoice was a genuine mistake.

(3) The circumstances in which the invoices were raised make it inherently unlikely that such an error could possibly have been overlooked for the reasons Ms Morrish gives at paragraphs 221-224 of her witness statement. As with so much else in her evidence, Mr Vickers simply ignores this evidence.

(4) Numerous communications and documents which came into existence during the course of the defendant's retainer refer to 21 expatriate replacements (or similar expressions). These include paragraphs 19 *("the proposed 21 expatriate replacements"*), 30 *("the 21 positions to be filled"*), 36 (*"the 21 ERR roles"*) and 73

(*"the 21 candidates"*) of the particulars in the underlying claim (which Mr Vickers verified by a statement of truth) and paragraph 73 of Mr Vickers's own witness statement dated 28 April 2016 (*"the sourcing of the 21 Russian nationals … for the 21 positions"*). Even Dr Cowley, in his witness statement dated 27 January 2011, drafted at Mr Vickers's request by Mishcon de Reya LLP, referred (at paragraph 2) to introducing *"candidates to be appointed as personnel for 21 specific roles"*; and (at paragraph 8) to *"candidates to be hired for the 21 positions identified in the Agreement"*, and also to Kinross filling "*any of these 21 positions"*. Ms Page submits that all of this evidence is resolutely ignored by Mr Vickers, who offers literally no explanation for any of these statements. She suggests that the reason is *"pellucid"*: Mr Vickers understood throughout that the claimant (or the BVI company) had an entitlement to receive payment for, at most, 21 jobs. If he had understood something different, then the narrative at paragraphs 225-232 of Ms Morrish's witness statement would make no sense.

(5) In her oral submissions, Ms Page pointed to an email from Mr Williams to Kinross dated 29 September 2010 (at page 989), attaching the second invoice, in which he noted that: *"We now understand that the candidates for all of the original 21 positions we were instructed to recruit for by Kinross, have now been satisfactorily filled."* This was included within an email string which Mr Vickers forwarded to Mr Lever of the defendant (with a copy to the claimant's barrister, Mr Charles Apthorp) on 22 June 2015 (at page 759) without any suggestion that that the reference to 21 positions was wrong. Ms Page also refers to, and relies upon, a letter of claim to Kinross dated 27 April 2012 (at page 1218) from a solicitor and legal manager at Euler Hermes Collections, a debt collection agency retained by the claimant, referring to, and seeking payment of, the three outstanding invoices under the ERR contract, with no suggestion that these in any way understated the debt due to the claimant from Kinross. At paragraph 337, Mr Vickers states that this letter (which also refers to a Moscow office) *"… was sent out without me seeing it in draft first. At that stage we were simply trying to make a debt collection from Kinross and to describe what it was for."* Ms Page characterises this evidence as *"incredible"*: Mr Williams had ceased to be a director in 2009 and, according to Mr Vickers (at paragraph 30 of his first witness statement), the claimant was *"essentially … just me"*. It is therefore inconceivable that he should have instructed a debt collection company to recover a debt, and provided it with the relevant invoices, when these understated the true debt by many hundreds of thousands of dollars. The same applies to the defendant's original letter before action to Kinross dated 12 May 2014 (at pages 653-663) which relies upon the same outstanding invoices, and twice asserts that the claimant was instructed *"to hire 21 candidates"* and once *"to hire 21 people"*. This letter had been in the course of preparation since at least 11 December 2013 (see page 704) and was amended and approved by Mr Vickers (see page 693) at an early stage.

(6) Against the overwhelming weight of this evidence, in her written skeleton argument Ms Page had pointed to the fact that Mr Vickers had been able to identify just one instance (in paragraph 332 of his first witness statement) where he claimed to have informed the defendant – at a very late stage in its retainer (on 28 April 2016 and so just before the second hearing before Master Cook) – that there had in fact been 32 jobs purportedly referrable to the ERR contract. As I have already explained when addressing Mr Bowles's submissions, in the course of her oral submissions Ms Page convincingly explained that this email of 28 April 2016, upon which Mr Vickers had relied, in fact related to a completely different contract. This forced Mr Bowles to concede that there is no evidence of Mr Vickers having ever told the defendant that the ERR contract related to 32 people. Ms Page further points to the fact that this email (at

page 1883) clearly demonstrates that Mr Vickers had carefully considered the terms of Mr Lever's second witness statement in the underlying claim, yet he took no issue with his two references (at paragraphs 76 a and d) to *"the 21 roles"* identified under the ERR contract. This is consistent with Mr Vickers's treatment of Mr Lever's first witness statement in the underlying claim, dated 24 July 2015, which included references to sourcing and supplying *"21 candidates for a range of positions"* (paragraph 2), instructions *"to hire 21 people"* (paragraph 31), and sourcing *"the 21 candidates for the ERR roles"* (paragraph 44). Again, Mr Vickers had enjoyed every opportunity to comment on this witness statement (and earlier drafts); indeed, according to his email dated 28 May 2015 (at page 789) *"… we decided to trawl over everything in minute detail because as you put it we only get one shot!"*

(7) Ms Page points to paragraph 305 of Mr Vickers's first witness statement in these proceedings, where he states in terms that: *"At the time Dr Cowley and I agreed the ERR contract, we were agreed that the number of people required to fill these roles was set out in the Expat Release List. That number was 32."* She submits that it is simply inconceivable - in circumstances where, on Mr Vickers's account, he at every stage understood that the ERR contract properly referred to 32 roles – that he should have neglected to mention the point to the defendant at any time. The inevitable conclusion is that the contention that there were 32 roles to be filled under the ERR contract is, in fact, a relatively recent concoction on the part of Mr Vickers, and that this aspect of the claim is also dishonest. It is clear on the evidence that Mr Vickers understood that the ERR contract covered only 21, rather than 32, places to be filled; and his evidence to the contrary, at paragraph 329 and elsewhere in his first witness statement, is simply incredible and untrue. He plainly did check the four invoices which were raised under the ERR contract, and he had found nothing wrong with them.

(8) Ms Page characterises the distinction sought to be drawn by the claimant between the number of positions, and the individuals required to fill them, as a pretty fine one. In the course of her reply submissions, she produced a schedule of references in the evidence to the numbers to be recruited under the ERR contract. Properly analysed, she submitted that all of them referred, or were more likely to refer, to 21 individuals rather than to 21 job profiles, which could be filled by more than one individual. She submits that all of the documents in the underlying claim are founded upon the unpaid invoices, which all related to the salaries (and bonuses) of 21 individuals.

(9) Ms Page notes that at paragraph 224 of his skeleton argument, Mr Bowles makes no attempt to address, or to explain, the bulk of the documentation upon which she relies on this aspect of the defendant's case. She submits that this is simply another attempt by Mr Vickers to bring a dishonest claim before this court.

116. Ms Page points out that the claimant's case on this aspect of the defendant's supposed negligence is confined to four short paragraphs (330-334) of Mr Vickers's witness statement (which might be said to be *"at the outer reaches of exiguousness"*), together with a compendious paragraph (125 (8) (c)) in the particulars of claim: *"Coupe [the defendant] failed to advise HSL [the claimant] properly or at all in relation to the quantification of the claim under the ERR Contract in that Coupe failed to advise HSL to invoice and/or claim for the fees of all 32 roles covered by that contract and due to HSL under the terms of the ERR Contract"*.

117. Ms Page submits that the contention that the defendant should somehow have appreciated, contrary to the documentary record, and to the evidence and the

instructions of its own client, and its main supporting witness, that the ERR contract was properly referrable to 32 jobs is simply unarguable. Therefore, even if the court were to agree with the claimant as to the true construction of the ERR contract, there is no basis on which it can sensibly be maintained that the defendant acted in breach of any duty owed to the claimant in failing to advise that it (or the BVI company) had any claim in relation to the 11 *'uninvoiced'* jobs. No reasonably competent solicitor would have undertaken the task of trawling back through the pre-contractual documentation to verify whether their client had misunderstood the fundamentals of the contract they had negotiated, and which had informed the way in which they had drafted and submitted their invoices. To do so would be to impose upon the solicitor *"duties which go beyond the scope of what they are requested and undertake to do"*.

118. Further, since, according to paragraph 305 of his first witness statement, Mr Vickers claims to have known, since the time he agreed the ERR contract with Dr Cowley, that the number of people required to fill the expatriate roles was 32, essentially this aspect of the claim comes down to a complaint that the defendant failed to advise him of something he already knew, but had done nothing about. Therefore, there is also a lack of causation. If Mr Vickers already knew that the *"true"* number of recruits was 32, but had done nothing about it, what difference would it have made had the defendant reiterated that fact? Ms Page points to a document headed *"Explanation"*, which Mr Vickers had drafted and attached to an email he sent to Mr Lever (of the defendant), with a copy to his counsel (Mr Apthorp), on 22 June 2015. This refers expressly to Kinross having instructed the claimant *"… to recruit for them to replace 21 expatriate employees in Kupol Russia with specific names"* . Ms Page submits that the claimant is effectively inviting the court to hold that it has a claim, with a real prospect of success, that the defendant should have worked out that these instructions were incorrect, and that its client had been misleading it. That is said to be an astonishing basis upon which to bring a claim in professional negligence.

119. For all these reasons, the defendant seeks, under CPR 3.4 (2) (a) and/or CPR 24.2, the striking out of, and/or summary judgment on, the claim insofar as it is premised upon the defendant having acted in breach of duty in relation to the 11 *'uninvoiced'* jobs, and all sums claimed in reliance thereon, on the basis that the claimant cannot make out its allegation of breach of duty, and the particulars of claim disclose no reasonable grounds for bringing this part of the claim, or, alternatively, that the claimant has no, or no real, prospect of success on this part of its claim.

120. Ms Page submits that as the underlying claim proceeded on the basis of invoices which were only ever expressly referable to *'21 Positions'* and *'21 hires'*, and there was no negligence on the part of the defendant in failing to identify that the ERR contract covered recruitment to any additional positions, the claimant has no conceivable, or realistic, basis for seeking to recover the uninvoiced sums from the defendant. On this footing, the claim against the defendant is limited to the 21 positions for which it raised invoices against Kinross; and the question whether, on its true construction, the ERR contract related to 32, or only to 24, positions to be filled simply falls away. However, Ms Page submits that the ERR contract did not relate to 32 positions, and that no reasonable reader of the contract could ever have concluded that it did. The defendant's case is that, properly construed, the ERR contract refers to only 15 positions to be filled; but on the present application it asks the court only to conclude, as a matter of construction, that the ERR contract obliged the claimant (or the BVI company) to introduce candidates for no more than 24 jobs. More than $1m turns on this question of construction.

121. On the claimant's case, the figure of 32 jobs is derived from the Expat Release List provided to Mr Vickers by Dr Cowley by email dated 26 January 2009 (identifying 37 employees (with one *'TBD'*). The covering email states:

> Attached is the first hit list of expatriates which I shall be replacing. As you can see there are three categories. The top category of *'Must Have'* are to remain. The rest can be replaced. The brief job descriptions are attached in the note boxes on each cell.
>
> Is this sufficient to get started? Needless to say this list is dynamite.

Ms Page submits that this email makes it clear that it was not the entirety of the Expat Release List, but only two categories of it, which were to be the subject of the ERR contract. Apart from the names of the people who were *"to remain"* (under the heading *"Must Have"*), there were 24 names. From this list, Mr Vickers appears to have extracted those 24 names, and appended them to the ERR contract in the document described as *'Appendix 1: Kinross Russia Job Requirements'*. Ms Page submits that it follows from this that the earlier document, the Expat Release List, was consequently superseded in any event, and that it has no contractual force.

122. Ms Page therefore submits that the highest number of jobs for which the claimant could ever have brought any claim is 24, being the number of individuals which Mr Vickers extracted into from the Expat Release List and inserted into *'Appendix 1: Kinross Russia Job Requirements'*, which was then appended to the ERR contract itself. It is simply unsustainable, as a matter of logic, to suggest that the ERR contract could bear any higher construction as to the number of jobs.

123. Ms Page says that Mr Vickers now seeks to rely on a construction of Dr Cowley's 26 January 2009 email to suggest that there were to be two waves of recruitment, with the second wave of jobs (the more senior positions) not to be replaced until after the first wave had been resolved, but which nevertheless remained the subject of the ERR contract. She submits that this is implausible, emphasising that Dr Cowley provided the list with the direct instruction that: *"The top category of 'Must Have' are to remain"*. His email can bear the meaning suggested by Mr Vickers only by reference to the content of alleged discussions with Dr Cowley which are entirely unevidenced and have never previously been articulated before in these proceedings until they surfaced at paragraph 285.2 of Mr Vickers's first witness statement. Moreover, even assuming this is the correct understanding of the structure of the recruitment exercise itself, there is nothing to suggest that this second wave of recruitment was actually to form part of the subject matter of the ERR contract. In fact, it seems clear from Dr Cowley's email that the second wave (if there was to be one) was to be explicitly excluded from the ERR contract; and this is the logical rationale for why *'Appendix 1: Kinross Russia Job Requirements'*, on its face, refers to only 24 individuals. This document describes the *'Kinross Russia Job Requirements'* by reference to the specific individuals who were to be replaced. The analysis for which the claimant now contends is that the number of jobs which formed the subject of the ERR contract could only be ascertained by cross-referring: (1) the content of discussions between Mr Vickers and Dr Cowley (which are entirely unevidenced in the documents), and (2) the Expat Release List (which was not even appended to the ERR contract and had been superseded by the first Appendix 1 document). There is no suggestion, from its face, that this was intended only to be a *'placeholder document'*, as Mr Vickers now suggests. In any event, it was a contractual document, and was relied on as such by the claimant in the underlying claim (in paragraphs 31-32 of Mr Lever's first witness

statement and its accompanying exhibit) and in the particulars of claim in this litigation. Moreover, as previously outlined, there is nothing in the contemporaneous documentary record to suggest that either Dr Cowley or Mr Vickers (at least before April 2016) ever thought that the claimant was entitled to be compensated for more than 21 jobs.

124. Accordingly, and if necessary, the defendant seeks, under CPR 3.4 (2) (a) and/or CPR 24.2, the striking out of, and/or summary judgment on, the claim insofar as it is premised upon the claim under the ERR contract being in relation to more than 24 jobs, and all sums claimed to the extent that they are referable to any greater number than 24 jobs, on the basis that the case against the defendant lacks the crucial elements of causation and loss as the claimant had no, or no real, prospect of recovering from Kinross the sums that it says it would have recovered, such that, even if any alleged breach of duty is made out: (1) the particulars of claim disclose no reasonable grounds for bringing the claim (or those parts of the claim); alternatively, (2) the claimant has no, or no real, prospect of succeeding in showing that any alleged breaches of duty caused the relevant parts of the claimed loss; alternatively, (3) the losses which flow from the alleged breaches are much lower than currently pleaded.

125. I have set out Ms Page's submissions at such considerable length because I consider them to be entirely unanswerable. I find her analysis of the evidence to be clear and convincing and her reasoning to be utterly compelling and thoroughly persuasive. I accept all of her submissions, notwithstanding Mr Bowles's strenuous efforts to argue the contrary.

126. I warn myself against conducting any form of mini-trial. However, I am satisfied that the claimant's case on both issues seven and eight is entirely fanciful; and I find that it is so devoid of any element of reality that it is completely unsustainable, and is bound to fail at trial.

127. I am entirely satisfied, as a matter of its true construction, that there is absolutely no substance whatsoever in the claimant's case that the ERR contract extended to the recruitment of 32 individuals. This is entirely dependent upon evidence of pre-contractual negotiations and declarations of subjective intention which are inadmissible in evidence on issues of construction. It also relies upon a document (the Expat Release List) which was clearly superseded by the two Appendix 1 documents which Mr Vickers himself drafted, and which were incorporated within the ERR contract. Looked at objectively, they formed the subject-matter of the ERR contract. The second Appendix 1 document contained 21 job profiles; but the first Appendix 1 document identified only 15 of those positions as falling within the *'Kinross Russia Job Requirements'*, with up to 24 named individuals requiring to be replaced. Further, as explained below, Mr Vickers's evidence about the scope of the claimant's retainer under the ERR contract is so wholly inconsistent with, and contradicted by, the reliable contemporaneous documentary evidence as to be entirely lacking in credibility and incapable of belief. As a matter of construction, the true scope of the ERR contract was limited to (at most) 24 named individuals and (more likely) the 21 positions for which the claimant invoiced Kinross.

128. I am also entirely satisfied that, even if I am wrong about the true scope of the ERR contract, as a matter of construction, there is no substance in the claimant's case that the defendant acted in breach of any duty it owed to the claimant as a reasonably competent solicitor in failing to pursue the underlying claim on the basis that the claimant was entitled to fees calculated by reference to any more than the 21

individuals for whom invoices had previously been submitted to Kinross. For the reasons Ms Page has given, I am entirely satisfied that there is no truth or substance in Mr Vickers's evidence that he ever considered that the ERR contract extended to any more than the 21 individuals for whom the claimant invoiced Kinross, or that Mr Vickers ever considered that the claimant might have any entitlement to any greater fee. Mr Vickers's evidence is entirely inconsistent with, and indeed is contradicted by, all of the reliable contemporaneous documentation. It is impossible to read through the contemporary emails and other documents, to which I have been taken at great (some might even say, tedious) length, and in considerable detail, over the five days of this application, without arriving at a clear appreciation of the keen interest, and attention to detail, shown by Mr Vickers in and about the claimant's pursuit of the recovery of its unpaid fees from Kinross. Yet at no point throughout this narrative history did Mr Vickers ever for one moment take any issue with the basis – 21 individual roles – on which the claimant's own invoices had been prepared and presented to Kinross and which formed the foundation of the underlying claim, and the basis of its instructions to the defendant.

129. For the purposes of the present application, I am prepared to accept Mr Vickers's evidence, which is supported by his covering email to Dr Cowley of 18 March 2009 (and his later email of 3 April 2009 to Ekaterina Dolganova, which was copied to Dr Cowley and Mr Williams), that the first invoice under the ERR contract was essentially of an interim nature, to be the subject of a final fees reconciliation at the end of the entire search process, once all the candidates had been hired. I am prepared to accept, in the rush to submit this invoice for a still considerable sum, that the 15 roles which it covered were taken from the 15 positions identified in the first Appendix 1 document, and that it mistakenly ignored the additional names identified in the numbered columns 2 and 3. However, I find it utterly incredible, and entirely incapable of any rational acceptance, that Mr Vickers should have approved, submitted, or relied upon any of the second, third or fourth invoices in circumstances where (as he now claims) they had been prepared on the basis of a fundamental (and costly) misstatement as to the number of relevant candidates for whom search fees were due and owing to the claimant from Kinross under the ERR contract. I find it even more incredible, and utterly unbelievable, that Mr Vickers should have persisted in any such mistake throughout the debt collection process, and the hotly contested litigation of the underlying claim which followed.

130. Mr Vickers has had over six months following the service of Ms Morrish's witness statement to come up with satisfactory explanations for the consistent, and persistent, errors in the many documents that have come into existence since the entry into the ERR contract (many, if not all, of which were endorsed and approved by Mr Vickers, and some of which he actually verified by statements of truth) yet he has failed to do so. Since his first witness statement was produced, Mr Vickers has made a second witness statement. Since then, he has then had many more months to provide a satisfactory explanation, if one was available, for his past mistakes, and to instruct counsel appropriately; but, yet again, no such explanation has been forthcoming. Particularly in light of the death of Mr Williams in 2019, there is no real prospect that any further evidence will become available at any trial of this claim which might support Mr Vickers's evidence and the claimant's case. Even though this involves a finding of dishonesty on the part of Mr Vickers, I am entirely satisfied that this is one of those very rare, and elusive, cases where it is possible for the court to disbelieve, on the papers, and without cross-examination, Mr Vickers's evidence as to the true scope of the ERR contract because it is so utterly irreconcilable with the reliable

contemporary documentary evidence as to be incapable of all rational explanation or belief.

131. Further, I find the proposition that any reasonably competent solicitor would have undertaken the task of trawling back through the pre-contractual documentation to verify whether their client had misunderstood the fundamentals of the contract that its principal director had negotiated for it, and which had informed the content of the invoices it had proceeded to draft and submit to its customer, to be fanciful, and wholly devoid of any appearance of reality, particularly where it was that director who was the source of the solicitor's instructions. To do so would, in my judgment, be to impose upon the solicitor *"duties which go beyond the scope of what they are requested and undertake to do"*. It may be that a particularly meticulous and conscientious solicitor would have taken it upon himself to have pursued a line of inquiry beyond the strict limits comprehended by their instructions and inquired why: (1) only 15 of the 21 job profiles identified in the second Appendix 1 document had featured in the positions column in the first Appendix 1 document, and/or (2) the invoices submitted to Kinross were posited on the recruitment of 21 candidates when 24 names had been identified in the first Appendix 1 document. But, as Oliver J observed in *Midland Bank v Hett Stubbs & Kemp* (cited above) at page 403 A-C, that is not the test. The test is what the reasonably competent practitioner would have done, having regard to the standards normally adopted in their profession; and that duty is directly related to the confines of the solicitor's retainer. In my judgment, this did not require the defendant to question the accuracy of the claimant's own invoices. And even if the defendant should have done so, I am entirely satisfied, in the light of Mr Vickers's consistent confirmation that the basis of the claimant's fee entitlement under the ERR contract was that *"Kinross had instructed [the claimant] to recruit for them to replace 21 expatriate employees in Kupol Russia with specific names"* (as Mr Vickers expressly instructed Mr Lever on 22 June 2015, at pages 771-2, when drafting Mr Lever's first witness statement for permission to serve the underlying claim out of the jurisdiction, and for the period for service of the claim form to be extended), that this would not have led Mr Vickers to instruct the defendant to revise the basis of its claim for loss of fee income against Kinross by seeking to advance any claim for any more positions than the 21 for which the claimant had actually invoiced Kinross. I am also satisfied that had Mr Vickers given any such instruction to the defendant, that claim would not have been an honest one; and it is clear that a dishonest claim falls outside the category of lost claims for which a claim in negligence properly lies against solicitors.

132. As Ms Page submits, if one were to accept Mr Vickers's evidence and case (which I do not since it is wholly inconsistent with, and contradicted by, all of the reliable contemporary documentary evidence), ultimately this aspect of the claim for breach of duty against the defendant comes down to complaints that the defendant: (1) should have worked out that its instructions from Mr Vickers were incorrect, and that he had been misleading it; and (2) failed to advise Mr Vickers of something he already knew, but had done nothing about. As Ms Page points out, that is an astonishing basis upon which to pursue a claim in professional negligence.

133. For these reasons, and for the further reasons advanced by Ms Page (all of which I accept and will not repeat), insofar as this claim proceeds on the footing: (1) that the claimant had a valid underlying claim to recover fees under the ERR contract in excess of those for the 21 positions for which it had actually invoiced Kinross, and (2) that the defendant was in breach of duty in failing to advise the claimant that it had any such claim, I am entirely satisfied that it is fanciful, lacking in any reality, without any

substance, and bound to fail. This aspect of the claim should either be struck out or summarily dismissed.

10: Waiver of the third tranche of fees under the SVP contract

134. Issue nine is whether, by an exchange of emails, the claimant expressly and irrevocably waived any right to receive any payment for the third tranche of fees under the SVP contract. This issue represents a relatively small proportion of the total damages but, if the defendant is successful, it will dispose of the whole of the claim as it relates to the SVP contract and so narrow the issues between the parties.

135. As part of the underlying claim (and consequently this claim) the claimant sought to recover (and now seeks compensation for the non-payment of) the third tranche of the fee to which it says it was entitled under the SVP contract following the recruitment by Kinross Gold of Mr Sam Coetzer (a candidate introduced by a third party recruitment agency and not the claimant) for the SVP position in South America. The claimant and the BVI company issued two invoices under the SVP contract, both in the sum of US $71,874. The first, dated 3 December 2008 and bearing invoice number 00826, was paid on 8 December 2008. The second, dated 16 January 2009 and bearing number 00857, was not paid until 11 June 2009. The claimant never issued a third invoice, representing the third tranche of the fee potentially payable; nor was any claim to recover this fee included within the Euler Hermes letter of demand dated 27 April 2012.

136. The defendant's case is that the claimant waived any right to issue a third invoice, and to receive payment of the third tranche of any fee that might otherwise be due under the SVP contract, in May 2009. This is said to be the irresistible inference from the contemporaneous material referred to at paragraph 246 of Miss Morrish's first witness statement. In summary, Kinross disputed any liability to pay the second invoice. Mr Vickers then agreed to forgo any asserted right to present a third invoice in exchange for payment of the second invoice, which Kinross paid on 11 June 2009. In an email to Jaana Harkonen, Vice-President of Human Resources for Kinross Gold, dated 8 May 2009 (at pages 749 and 1751), Mr Vickers wrote:

> Just following on from our conversation yesterday, I have discussed the Kinross SVP search with our Managing Partner and have attached some correspondence in this regard.
>
> As discussed with you yesterday, Harrington Scott will not bill Kinross for the third tranche of fees with regard to this retained search as Mr Coetzer was not one of our candidates nor as I understand it an existing employee of Kinross
>
> I would very much appreciate your kindly reviewing our second invoice # 00857 with Tim Baker, with regard to :
>
> 1. Authorising payment of this invoice
>
> 2. Confirming the final SVP Salary is as stated in our invoice # 00857.

137. In reliance on that forbearance, Ms Harkonen responded by email (on 15 May at page 1750) stating:

> I will be processing the invoice. In the meantime can you please get started on the search for RVP Russia. I will be back the week of May 25th (I am out of the country on vacation this week) and will touch base with you on the search then.

Kinross duly paid the second invoice on 11 June 2009.

138. The basis of the dispute as to the presentation of the second invoice is to be found in an email to Mr Vickers from Ms Harkonen, dated 24 April 2009 (at page 1823), which states:

> Trevor – we have an offer out to one of the 3 finalists. We do not wish to interview Jeff or Ludivico.
>
> I advised you on April 5 to stop all search activity so we were surprised to hear that your firm had recently reached out to Igor Gonzalez. As I read below your firm continued the search and are bumping into Korn Ferry who is running another confidential search for us. Heidrich was retained in January to do the RVP USA search and in March after great frustration with the lack of quality SVP candidates, I asked them to put forward any SVP candidates. Within 3 days they produced two outstanding candidates who became finalists. They stopped their search at that time.
>
> At this point in time we are happy with the finalists we have and hope to have an accepted offer on Monday.
>
> Jaana

Mr Vickers's immediate response had been to ask for *"a telephone call regarding this subject"*. This led to the conversation referenced in Mr Vickers's email of 8 May.

139. Ms Page contends that this email shows that Kinross had complained about the standard of performance provided by the claimant under the SVP contract, and about the claimant continuing to search after Kinross had exercised its contractual right to terminate the contract; and also that Kinross did not accept that the SVP contract was subject to any exclusivity term. This is supported by the fact that whilst the first invoice had been paid within five days of presentation, by late April/early May 2009 the second invoice remained unpaid, more than three months after it had been rendered.

140. Ms Page submits that the legal effect of the claimant waiving its right to the third tranche of any fee payable under the SVP contract was to create a contractually binding variation of that contract, supported by good consideration, such that the claimant could not resile from it. She characterises aspects of the evidence of Mr Vickers on this issue (at paragraphs 268-276 of his first witness statement) as *"incredible"*; but even if this evidence is taken at face value, she submits that it it is clear that there was a contractual waiver of any right to invoice for, and receive payment of, the third tranche of the SVP fee, in return for Kinross agreeing to pay the outstanding invoice for the second tranche of that fee, and in the hope that this would secure the future of the very important ERR contract. At paragraph 271 of his first witness statement, Mr Vickers states that Ms Harkonen *"said she did not feel obliged to pay HSL the whole amount"* he was claiming under the SVP contract. At paragraph

272, Mr Vickers refers to *"the disagreement about HSL's third tranche of fees for the appointment of Sam Coetzer"*. Mr Vickers concedes there that he *"had a decision to make"*. The outcome was that he agreed to *"capitulate"* on the third tranche of fees under the SVP contract:

> Because of the importance of the ERR contract to [the claimant], and my understanding from my call with Jaana that the ERR contract would be under threat if I did not capitulate on the third tranche of fees under the SVP contract, I agreed with Jaana that I would not bill the third tranche of [the claimant's]'s fees under the SVP contract. She asked me to confirm in email to her that [the claimant] would not be charging its third tranche of fees for the appointment of Sam Coetzer, because Sam Coetzer was not one of our candidates.
>
> Following that call, and as requested by Jaana, I sent Jaana an email saying that [the claimant] would not bill Kinross for the third tranche of fees under the SVP contract because Sam Coetzer was not one of [the claimant's] candidates, nor an existing employee of Kinross. I asked her to review our outstanding invoice for the second tranche of fees under the SVP contract.
>
> Jaana replied to say that she would process our outstanding invoice. This invoice (for the second tranche of fees under the SVP contract, in the sum of USD $71,874) was then paid by transfer into the Bank of Cyprus Account on 11 June 2009.

This variation took effect on 8 May 2009 when, by his email of that date (and in accordance with clause 12 of the SVP contract), Mr Vickers confirmed in writing that *"Harrington Scott will not bill Kinross for the third tranche of fees"*. In return, Kinross paid the second invoice on 11 June 2009.

141. To the extent that, in agreeing to such a waiver, Mr Vickers and the claimant were motivated by the continuation of the ERR contract, and the hope that it could be a springboard to the claimant then being appointed to recruit the 1,000 or so people who would be needed when the Kupol mine was commissioned, Ms Page submits that this merely underlines the further benefit (itself constituting good consideration) accruing to the claimant by reason of the waiver. In circumstances where the ERR contract could, under clause 3.2, be unilaterally terminated by Kinross on the provision of 30 days' written notice, preserving a good commercial relationship with Kinross was potentially very valuable to the claimant; as Mr Vickers himself notes: *"It was therefore very important to me to keep the ERR contract on track and not to jeopardise it at all".* Ms Page acknowledges that part payment of an undisputed debt is not good consideration; but here Kinross was already disputing its liability under the second invoice. It supplied good consideration by giving up its right to continue to dispute that invoice; and, in addition, it withdrew any immediate threat to terminate the ERR contract, thereby supplying additional valuable consideration. As discussed in section 8 of this judgment, the ERR contract remained on foot until 26 October 2010. The claimant does not seek to allege any illegitimate or improper commercial duress on the part of Kinross, and for good reason; that is because Kinross had a contractual entitlement to terminate the ERR contract at any time on 30 days' written notice pursuant to clause 3.2. Further, Ms Page points to the fact that the claimant (or, more precisely, the BVI company) had only recently (on 7 April 2009) received US $194,197 from Kinross by way of payment of the first invoice rendered under the ERR

contract. In terms of the claimant's recorded turnover, this was a significant sum, so it could not be said to have been under any real financial pressure in May 2009.

142. This analysis of the waiver is further borne out by the fact that the claimant never raised (and has failed to provide any good explanation for its failure to raise) any invoice in relation to this third tranche of fees. The obvious inference from this is that the claimant knew that it was not entitled to such sums. If the position were simply that Mr Vickers decided not to press the third tranche of its fee, so as to preserve goodwill, then, once it became clear later in the year that the relationship with Kinross had broken down, there was – on that analysis – nothing to stop the claimant (or the BVI company) from issuing an invoice for the third tranche; yet it never did so. That omission is consistent only with the ostensible right to the third tranche of its fee having been contractually, and irrevocably, foregone. This point was made clearly and fairly in Ms Morrish's witness statement; yet Mr Vickers simply ignores it. Ms Page submits that this is conclusive of the issue against the claimant because there is simply no answer to it: the proof, she says, is in the pudding. There was a contractually binding variation of the SVP contract, or an accord and satisfaction.

143. Should the court find that the waiver agreement was not contractually binding, however, then it should find that the claimant was nevertheless estopped from resiling from the waiver pursuant to the principles of estoppel: there was both forbearance by the claimant and a resulting alteration in Kinross's position. Both Ms Page and Mr Bowles referred me to the principles relating to waiver as set out by the editors of *Chitty on Contracts* (34th edn) at paragraphs 25-042, 25-044, and 25-046 as follows:

> Where one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract, the court may hold that he has *waived* his right to require that the contract be performed in this respect according to its original tenor. Waiver (in the sense of *'waiver by estoppel'* rather than *'waiver by election'*) may also be held to have occurred if, without any request, one party represents to the other that he will forbear to enforce or rely on a term of the contract to be performed or observed by the other party, and the other party acts in reliance on that representation ...
>
> The party who forbears will be bound by the waiver and cannot set up the original terms of the agreement. If, by words or conduct, he has agreed or led the other party to believe that he will accept performance at a later date than or in a different manner from that provided in the contract, he will not be able to refuse that performance when tendered and, if the varied performance is made and accepted, damages cannot be claimed on the ground that performance did not take place in accordance with the terms of the original agreement ...
>
> … Although consideration need not be proved, certain other requirements must be satisfied for such an estoppel to be effective: first, it must be clear and unequivocal; secondly, the other party must have altered his position in reliance on it, or at least acted on it.

144. As to these requirements, Ms Page submits that:

(1) The form of the forbearance in this case was clearly and unequivocally set out by Mr Vickers in his email dated 8 May 2009 when he stated that, as discussed with Ms

Harkonen the previous day: *"Harrington Scott will not bill Kinross for the third tranche of fees"*.

(2) It is plain that Kinross altered its position in reliance on this assurance in that: (a) in his email dated 8 May 2009 Mr Vickers requested that Ms Harkonen *"review…our second invoice # 00857 with Tim Baker with regard to (1) Authorising payment of this invoice…"*, (b) Ms Harkonen replied on 15 May saying that she would process the second invoice, and (c) this invoice was duly paid on 11 June as requested.

(3) In circumstances where, as set out above, there was a dispute as to whether or not the second invoice was indeed payable, it is clear that Kinross acted to its detriment in compromising such dispute and paying the sum invoiced.

(4) Having secured payment of the second, disputed, tranche of the fees under the SVP contract in this manner, it would have been unconscionable for the claimant to have resiled from that promise, and to have issued any invoice for the third tranche or insisted upon its payment.

145. For these reasons, the defendant seeks the striking out of the claim in relation to the SVP contract under CPR 3.4 (2) (a) and / or CPR 24.2 on the basis that the claimant's case lacks the crucial elements of causation and loss as it had no, or no real, prospect of recovering from Kinross the sums that it says it would have recovered, such that even if any alleged breach of duty by the defendant is made out, the particulars of claim disclose no reasonable grounds for bringing the claim (or those parts of it).

146. Mr Bowles acknowledges that the claimant never issued a third invoice for the final tranche of fees under the SVP contract following communications with Ms Harkonen in which she: (1) indicated that the claimant's second invoice would only be paid if it did not continue to seek payment of the sums due under the third tranche, and (2) threatened that if the claimant continued to claim such sums, then the lucrative ERR contract would be lost. He emphasises that before forbearance can have any contractual effect, it must be supported by consideration. If it is not, then it can only operate to bind the parties in the event that it operates as a waiver by estoppel, with the necessary requirements being made out.

147. Mr Bowles contends that at trial the defendant will be unable to establish either waiver by estoppel or a contractual waiver on the facts. He submits:

(1) That the argument being run by the defendant is fact sensitive. In order properly to understand and consider the argument, the court will need to establish the true factual background in relation to the alleged waiver. This is not agreed by the parties, and is wholly inappropriate for determination on a summary basis, and especially in circumstances where the alleged waiver was agreed on the basis of a telephone call which, on the claimant's case, was not subsequently reflected accurately in the email now relied on by the defendant to establish the waiver. In this case there is a factual dispute as to what, if anything, was agreed, and the circumstances of such a waiver.

(2) Even if the court were minded to consider this point at all on a summary basis, then it can only proceed by taking Mr Vickers's evidence at its highest. On this basis, any argument that the claimant waived its entitlement to the third tranche of fees simply does not get off the ground, and plainly clears the low hurdle of demonstrating a real prospect of operating as a successful defence. Importantly, in agreeing not to enforce its right to the third tranche of fees, the claimant agreed to do so only on the basis that

Ms Harkonen would pay the sums due under the outstanding second invoice. As such, it was the payment of this sum from Kinross to the claimant which would have to operate either as: (1) the consideration under a contractual waiver, or (2) evidence of Kinross's reliance on the claimant in the context of a waiver by estoppel. The payment of these fees is insufficient to act either as consideration under a contractual waiver, or as evidence of reliance or change of position under a waiver by estoppel. The reason for this is simple: the payment of the second tranche of the fee was something to which (on the claimant's case on the contractual terms) it was already entitled under the terms of the SVP contract (once the triggering event had taken place pursuant to clause 10). Therefore, payment of the second tranche of fees could not act as good consideration for the parties' alleged new agreement that the claimant would forego its fees. In order to operate as good consideration, there would have needed to be some new benefit passing to the claimant from Kinross in consideration for the claimant giving up its existing contractual entitlement to the third-tranche of fees. It is well established that part payment of an existing debt (which is all that the payment of the second fee was) is not good consideration.

(3) When analysed in terms of waiver by estoppel, the suggestion that the claimant waived its right to the third-tranche of fees simply does not get off the ground: First, it is quite clear, from Mr Vickers's evidence, that the representation that the claimant would not seek the third tranche of its fee from Kinross was not freely given without request, nor was it unequivocal. Rather, the representation was made only in response to the *'implied threat'* from Ms Harkonen, and the claimant's very real fear that the ERR contract would be lost if it did not relent to the pressure imposed by Kinross. As such, the suggestion of waiver should fall at this hurdle. Second, Kinross simply did not rely upon the claimant's representation in any way, and certainly not in any way that would have amounted to a change of position capable of binding the parties. The only step Kinross took was to make a payment which it was contractually obliged to make in any event. This is not, and cannot be, a change of position capable of being evidence of any sort of reliance upon the representation (even if it had been freely made). In any event, the touchstone of the estoppel doctrine is unconscionability. For the waiver of any fee to be binding, it would have to be unconscionable for the claimant to try to go back on the representation it had made. However, in this case it was plainly not unconscionable for the claimant to try to rely upon its strict legal rights under the contract because: (1) it only agreed to forego the third tranche of its fee due to the commercial pressure that was placed upon it by Kinross, including the implied threat that it would terminate the ERR contract; and (2) whilst such pressure may not have amounted to duress, it would have a bearing on what would constitute unconscionable conduct on the part of the claimant.

148. Mr Bowles submits that the instant case is akin to the case of *D & C Builders Ltd v Rees* [1966] 2 QB, where the provision of part payment in circumstances where there had been threats made not to pay the full sum - a reduced sum had been offered with threats that nothing would be paid if that was not accepted - was deemed not to be sufficient consideration to bind the parties. Similarly, it would have failed to support any reliance in equity. Mr Bowles referred the court to the passage in the judgment of Lord Denning MR at page 625 A-G emphasising that:

> The creditor is only barred from his legal rights when it would be *inequitable* for him to insist upon them. Where there has been a *true accord*, under which the creditor voluntarily agrees to accept a lesser sum in satisfaction, and the debtor *acts upon* that accord by paying the lesser sum and the creditor accepts it, then it is inequitable for the creditor

> afterwards to insist on the balance. But he is not bound unless there has been truly an accord between them."

When I pointed out to Mr Bowles that in that case, unlike the present, the contractual relationship between the parties was at an end (subject to final payment by the defendant), because the plaintiff had completed the building works whereas the claimant here had been anxious to keep the ERR contract on foot, his response was to submit that where contracting parties were in unequal bargaining positions, it was unconscionable for one of them to use its stronger bargaining power to get out of its contractual obligations. However, that is to ignore two highly relevant considerations: (1) That Kinross had raised a genuine dispute as to the extent of its ongoing obligations under the SVP contract; and (2) that Kinross had an existing contractual entitlement to put an end to its ongoing obligations under the ERR contract.

149. Finally, Mr Bowles submits that any suggestion that the absence of an invoice for the third tranche of fees under the SVP contract would have disentitled the claimant to any payment is unsustainable. He contends that the right to payment under the ERR contract arose when a candidate was recruited to the SVP role, and the absence of an invoice cannot remove such an entitlement. This would seem to me to ignore the fact that under clause 10.3 of the SVP contract, the obligation on the part of Kinross to pay the claimant was only triggered by the issue of a third invoice, so the third tranche of any fee payable under the SVP contract was not then due and owing. In my judgment, however, this consideration is not determinative of this part of the defendant's application.

150. I accept Mr Bowles's submission that the court should approach this aspect of the claim by taking Mr Vickers's evidence at its highest because (unlike the position regarding the number of roles to be filled under the ERR contract), that evidence is not manifestly incredible and unsustainable. However, even on that basis, the claim under the SVP contract is utterly hopeless, and is doomed to failure because there is simply no conceivable or realistically arguable answer to the defence of waiver. For the reasons given by Ms Page, which I accept, this is a classic case of contractual waiver by accord and satisfaction, or, if not, of waiver by estoppel.

151. In my judgment, the case of *D & C Builders Ltd v Rees* is wholly different from the present case. In that case, there was no dispute as to the creditor's entitlement to payment. Rather, the debtor's wife had held the creditor to ransom, putting pressure upon it to accept a lesser sum than was undoubtedly due to it by threatening to break the contract (by paying nothing) in order to compel the creditor to do what it was unwilling to do; and she succeeded. In those circumstances, there was no true accord so as to found a defence of accord and satisfaction. There was also no equity in the debtor to warrant any departure from the due course of law. No person can insist on a settlement procured by intimidation. There was therefore no reason in law or in equity why the creditor should not enforce the full amount of the debt due to it.

152. Here the position is entirely different. In the instant case, even if one takes Mr Vickers's evidence at its highest, there was no intimidation on the part of Kinross, and no inequity in holding the claimant to its promise not to bill Kinross for the third tranche of the fee otherwise due to it under the SVP contract in return for the payment of the second invoice. This was not a case where Kinross took advantage of the claimant's desperate need for money. Kinross was disputing its liability under that invoice; and in order to secure its prompt payment, Mr Vickers agreed to forgo issuing a third invoice. He was also motivated to do so by his concern to avoid Kinross

implementing its threat, implicit if not express, to do that which it was contractually entitled to do, by serving notice to terminate the ERR contract in accordance with its terms. Kinross proceeded to pay the second invoice; and, as discussed in section 8 of this judgment, the ERR contract remained on foot until 26 October 2010. There was therefore a true accord and satisfaction, supported by good consideration. This was not a case where the claimant agreed to accept a lesser sum in satisfaction of an undisputed larger debt because that debt was disputed.

153. Alternatively, if that contractual analysis is wrong, there was clearly a binding waiver by estoppel. There is no inequity involved in holding the claimant to Mr Vickers's undertaking not to issue a third invoice. Rather, any inequity would exist in permitting the claimant (or the BVI company) to pursue payment of the third tranche of any fee due under the SVP contract once Kinross had paid the second invoice, particularly when it proceeded to allow the ERR contract to remain on foot after May 2009.

154. In the course of oral argument, I referred counsel to the decision of the Court of Appeal in *Collier v P & M J Wright (Holdings) Limited* [2007] EWCA Civ 1329, [2008] 1 WLR 643. Delivering the leading judgment, at [42] Arden LJ said this:

> The facts of this case demonstrate that, if (1) a debtor offers to pay part only of the amount he owes; (2) the creditor voluntarily accepts that offer, and (3) in reliance on the creditor's acceptance the debtor pays that part of the amount he owes in full, the creditor will, by virtue of the doctrine of promissory estoppel, be bound to accept that sum in full and final satisfaction of the whole debt. For him to resile will of itself be inequitable. In addition, in these circumstances, the promissory estoppel has the effect of extinguishing the creditor's right to the balance of the debt.

155. For these reasons, and for the further reasons advanced by Ms Page (all of which I accept and will not repeat), insofar as this claim proceeds on the footing that the claimant had a valid underlying claim to recover any further fee under the SVP contract, I am entirely satisfied that it is fanciful, lacking in any reality, without any substance, and bound to fail. This aspect of the claim should either be struck out or summarily dismissed.

11: The further claim under the RVP contract

156. Issue 10 is whether the claimant had any claim under the RVP contract (or any new or replacement RVP contract) when Dr Cowley left his role at Kinross with effect from 11 May 2009. This is a discrete issue which relates only to the lost claim allegedly arising under that contract. It involves consideration of the terms of clause 3.1 of that contract, which provides:

> Should the employment of any Applicant terminate (whether by expiry of notice or otherwise) within 12 months of the date of commencement of employment of the Applicant, then the Company shall endeavour to find a replacement, provided the termination is justified or the employee leaves of his/her own volition and not due to redundancy …

157. Despite having already received the sum of US $163,800 for sourcing Dr Cowley under the RVP contract, the claimant alleges that it is entitled to be paid the same sum again for complying with Kinross Gold's request to source a replacement Regional

Vice-President following the resignation of Dr Cowley in May 2009 (within 12 months of starting his employment). The claimant contends that it was entitled to this sum on three alternative bases, none of which the defendant considers are sustainable. Ms Page submits that these amount to:

(1) An unclear assertion that the claimant was not in fact obliged to source a replacement for Dr Cowley (although this was what the parties had agreed when this work was undertaken), such that the claimant was somehow contractually entitled to be paid for this search in full by reference to the terms of the RVP contract.

(2) An argument that a communication sent by Ms Harkonen on or about 26 May 2009 asking the claimant to search for a replacement for Dr Cowley, as required by the terms of the RVP contract, could somehow be treated as amounting to a new contract between the parties on the same terms as the old RVP contract, and that breach of that contract somehow entitled the claimant to further payment.

(3) An argument that Kinross was unjustly enriched by the claimant undertaking this supplemental search in the absence of a contractual basis requiring it to do so.

158. Ms Page submits that at the time it undertook the searches for Dr Cowley's replacement (apparently between May and October 2009), the claimant clearly understood that it was obliged to do so pursuant to clause 3.1 of the RVP contract (as its successful candidate had resigned within 12 months of starting employment). However the claimant now asserts: (1) that it subsequently discovered that Kinross had in fact made pre-contractual promises to Dr Cowley that he would shortly receive a promotion as an inducement to his entering into the employment contract with Kinross (notwithstanding that such promises are nowhere to be found in Dr Cowley's contract of employment or in any contemporaneous email); (2) that Kinross then resiled from those promises, leading Dr Cowley to resign; and (3) as a result of this behaviour, and contrary to the claimant's contemporaneous understanding, clause 3.1 of the RVP contract did not in fact require the claimant to undertake any searches for Dr Cowley's replacement.

159. Ms Page submits that the claim to recover any further sums under the RVP contract is fundamentally flawed for the following reasons:

(1) Dr Cowley's employment contract contained (in clause 21) an entire agreement and non-reliance clause, so that even if Kinross had made anything other than precatory, non-binding assurances to Dr Cowley before entry into that contract, they could have had no legal effect.

(2) There is in any event no evidence that any such assurance was made to Dr Cowley in anything other than precatory terms; and none of the pre-contractual correspondence adduced by Mr Vickers even remotely suggests that any such binding assurance was made (in fact quite the opposite). Mr Vickers tries to extract himself from this difficulty by asserting that the emails used *"light touch language"* – although quite why this should be so is opaque - and that he was in fact told by Dr Judy Hunter of Kinross *"in confidence"* that Dr Cowley had been promised a promotion to chief operating officer within 2 years. Clearly if such a promise had been given, and had been intended to have contractual effect, it would have been the subject of clear written articulation. In fact, the truth, as evidenced by Mr Vickers's own email to Dr Hunter of 30 October 2008 (at pages 800-801) is said to be that any understanding as

between Dr Cowley and Kinross would only ever have been precatory and optimistic, and not intended to have any legal force.

(3) Moreover: (a) It would be remarkable for a prospective employer to contractually bind itself to promote a prospective employee to a new position after a period of time, especially when the new position was apparently dependent on the retirement of the present incumbent (Mr Baker), who might decide for his own reasons not to retire; and further where the employer would need to assess how the employee had fared in their initial role. (b) In any event, if there had been such an assurance intended to have legally binding effect, then clearly it would have been the subject of clear articulation in the written contract of employment. By contrast, that contract says nothing about this. (c) Any such promise would, on any view, be devoid of contractual effect as being too uncertain: there is no suggestion that Dr Cowley's new salary (in his alleged new position) was agreed or that there was anything other than a vague understanding of when the existing incumbent would indeed retire. Any assurances that were given were patently precatory.

(4) In fact, the contemporaneous evidence, gathered at paragraphs 285, 288.3 and 288.4 of Ms Morrish's witness statement, demonstrates that Dr Cowley resigned for personal reasons. The only evidence to the contrary is to be found at paragraphs 28-31 of the second witness statement of Dr Cowley, dated 21 April 2016, where he states:

> When I resigned it was agreed that I would receive a severance payment of three months' salary on condition that my exit was seen as me resigning rather than being constructively dismissed. The true reason I resigned was that Tim Baker, the COO, had decided to continue as COO and there was no suitable role for me in Russia or Kinross Gold Canada: see email dated 28 May 2009 to Tim Baker.
>
> As set out above, the role in Russia was too junior for me and I had only taken it on the basis that I was promised the COO role within a one to two year period. I recall Kinross Gold accepted that I was too highly qualified for the role in Russia. Tim Baker contacted me in April 2009 and said *'sorry but he was staying for two years'*. I informed him that in those circumstances the terms of my employment contract had been breached and I intended to leave.
>
> I had been appointed RVP in Russia to ensure that they obtained economic completion of the Kupol Project before the end of April. In practice this was my only role there and once it was completed I had nothing further to do in Magadan.
>
> Lisa Colnett asked me not to inform Mr Vickers the true reason why I had decided to leave.

Ms Page points out that this second witness statement was prepared seven years after the events in question, and after Dr Cowley had made his first statement in 2011 saying nothing of the sort. The circumstances of the creation of Dr Cowley's second statement are peculiar, and Ms Page submits that the court should not accept it for the reasons set out at paragraph 288 of Ms Morrish's witness statement. Mr Vickers himself says (at paragraphs 205-6 of his first witness statement) that whilst *"a change of personal circumstances, predicating the need to return to live in the UK"* was

> … Dr Cowley's stated reason for resigning at the time, Dr Cowley has subsequently told me, and sworn in witness evidence, that Kinross (i) offered him a better package if he agreed to leave on the basis that he was resigning rather than being constructively dismissed, and (ii) asked him not to tell me the true reason why he had decided to leave. I can only conclude that Kinross's motivation in trying to keep this news from me was an attempt to get HSL to work on replacing Dr Cowley for free.

(5) Mr Vickers says the following, at paragraphs 210-212 of his first witness statement:

> As [the claimant] was being instructed on a new assignment, I attached an invoice for [the claimant's] first tranche of fees (invoice number 939). I also attached [its] standard form contract, that had been approved by Judy Hunter, to be the basis of this new instruction.
>
> However, Jaana then told me that because Dr Cowley had resigned of his own accord in the first 12 months of his employment, [the claimant] was required to find a replacement for Dr Cowley, at no extra cost to Kinross. I accepted this at face value.
>
> When Jaana told me this, I agreed to go ahead with finding a replacement for Dr Cowley at [the claimant's] own cost.

(6) Mr Vickers had submitted an invoice for the first tranche of the fee for the search for Dr Cowley's replacement by email dated 18 May 2009 at page 754). This concluded: *"I will accept a written or verbal confirmation from you regarding agreement to our Ts and Cs and invoice payment."* This provoked an immediate response from Ms Harkonen (by email dated 19 May at page 753): *"I don't understand why you are sending an invoice for the Russian RVP role. I thought that we have a guaranteed replacement at no charge?? Before we proceed any further I need to confirm this. Thank you."* The communication from Ms Harkonen to which Mr Vickers refers in his witness statement is a letter dated 27 May 2009 (at page 1760, over a thousand pages later in the trial bundle), which reads:

> As discussed today, please find attached Dr Geoffrey Cowley's resignation letter to Kinross dated May 19, 2009, outlining his reason for resignation *'due to a change of personal circumstances, predicating the need to return to live in the U.K.'* As such clause 3.1 of the agreement with Kinross is clearly valid and we are expecting that Harrington Scott will find us a replacement at no additional cost to Kinross.
>
> Please confirm this in writing.

Dr Cowley's attached resignation letter contained no suggestion that there was any other reason for his resignation.

(7) The email which Mr Vickers sent in response can be found at page 1762. It is dated 28 May 2009 and says in terms:

> Thank you very much for sending me Kinross letters confirming that Dr Cowley's termination as RVP Russia was within the terms of our search agreement.

> I am pleased to confirm that we are proceeding at our own expense with the search in Russia and internationally for RVP candidates to submit to Kinross as replacement candidates for Dr Cowley.

In that very same email, Mr Vickers recognises that the job profile for Dr Cowley's replacement would be likely to change; indeed Mr Vickers recounts (at paragraph 213 of his first witness statement) that he had known that the job to replace Dr Cowley *"... was in fact a very different role to the original role under the RVP contract that Dr Cowley had filled"*. At no stage thereafter did Mr Vickers seek to resile from the position he had made clear to Kinross in his 28 May 2009 email that the claimant would be proceedings at its own expense, even when he received the new RVP role profile from Ms Harkonen by email dated 20 July 2009 (at page 1766); and in his evidence Mr Vickers does not suggest otherwise. Mr Vickers never followed up on his earlier email request for confirmation of the claimant's terms and conditions; nor did he ever seek payment of his earlier invoice. It follows that at all times, Kinross understood that the claimant was working on the basis that it would charge no further fees; and, indeed, that it was bound by sub-clause 3.1 of the RVP contract to provide a replacement without charge.

160. In light of the above, Ms Page submits that the claimant's primary contention that it was entitled to $163,800 under the terms of the RVP contract is simply incoherent. It was expressly proceeding on the basis that it was required to find a replacement for Dr Cowley at its own expense by the terms of clause 3.1 of the RVP contract. Similarly, the claimant's alternative argument as to the existence of any *'new RVP contract'* is unsustainable as a matter of fact or of law. At paragraphs 213-217 of his first witness statement, Mr Vickers puts that case on the footing that*: "Kinross did not ask me to find a like-for-like replacement for Dr Cowley. Instead, they asked me to fill a new job title, that was substantively different to the old job description, and this was therefore a new assignment, on the same terms as the original approved RVP contract."* In light of Mr Vickers's own email of 28 May 2009, Ms Page characterises this argument as *"simply baffling"*. In any event, it is impossible to spell any new contract out of the exchanges between Ms Harkonen and Mr Vickers on 27 and 28 May: they were clearly proceeding on the basis that the claimant was proceeding to find a replacement for Dr Cowley at its own expense. The claimant's alternative argument as to unjust enrichment is made on an incorrect basis and could, in any event, amount only to the value of the work it actually performed in relation to the sourcing of the ultimately successful candidate. (Contrary to Ms Page's submission, it would appear, from paragraphs 218 to 225 of Mr Vickers's witness statement, that this involved rather more than only sourcing and reporting on three references, amounting, at most, to a couple of hours work).

161. For these reasons, the defendant seeks under CPR 3.4 (2) (a) and/or CPR 24.2 the striking out of, and/or summary judgment on, the claims in relation to the RVP contract, any new RVP contract and/or unjust enrichment, and all sums insofar as they are calculated by reference to those claims, on the basis that the case against the defendant lacks the crucial elements of causation and loss as it had no, or no real, prospect of recovering from Kinross the sums that it says it would have recovered, such that even if any alleged breach of duty by the defendant is made out: (1) the particulars of claim disclose no reasonable grounds for bringing the claim (or those parts of the claim), alternatively (2) the claimant has no, or no real, prospect of succeeding in showing that any alleged breaches caused the claimed loss (or the relevant parts of the claimed loss); or alternatively (3) that the losses which flow from the alleged breaches are much lower than currently pleaded.

162. Mr Bowles explains that the claims under the RVP contract are either:

(1) That Dr Cowley was constructively dismissed under the RVP contract as a result of a clear breach of his contract of employment and/or a collateral contract entered into between Kinross and Dr Cowley, and as such the claimant (a) was not obliged to find a replacement for him free of charge, pursuant to clause 3.1 of the RVP contract; and so (b) was entitled to charge fees for conducting a search for Dr Cowley's replacement, being the invoice raised under the RVP contract for the total sum of US $163,800; or

(2) That the replacement of Dr Cowley with Mr Morley-Jepson was a totally new retained search agreement which fell outside the scope of any replacement search under clause 3.1 by virtue of the fact that the claimant was being asked to conduct a search for a fundamentally different role and, therefore, candidate.

163. The defendant now seeks to deny that Dr Cowley was ever promised this role (whether as part of his employment contract or as a collateral contract). Mr Bowles submits that this gives rise to a clear factual dispute and so is unsuitable for summary determination. As Mr Vickers has made clear in his evidence, many of these conversations took place over the telephone, and so the promises made (which have been confirmed not only by Mr Vickers but also by Dr Cowley) were not recorded in contemporaneous documentation. As such, this evidence will only be capable of full exposition at trial; and to the extent that the defendant is denying this version of events, this will require cross-examination and the testing of live witnesses. This is plainly not suitable for summary determination.

164. Similarly, there is a significant dispute of fact about the manner in which Dr Cowley left Kinross. The defendant asserts that he did so due to a change in personal circumstances, and it relies upon a contemporaneous resignation letter that Dr Cowley sent to Kinross. However, the claimant contends (with the support of Dr Cowley) that the latter was actually constructively dismissed by Kinross; and that the contemporaneous emails were prepared on the instructions of Kinross to give the impression that Dr Cowley was leaving of his own volition, and for reasons other than Kinross's own breach of contract.

165. Mr Bowles submits that the manner of Dr Cowley's departure, and the conflict in the written evidence, plainly raise a substantial dispute of fact. As such, the court is simply unable to determine this issue at a summary hearing, and without hearing live evidence from Dr Cowley and any relevant actors at Kinross. If the court were minded to consider the matter on a summary basis, then it could only do so by taking the evidence of Mr Vickers and Dr Cowley at its highest, and finding an arguable case that Dr Cowley had been promised Mr Baker's role as chief operating officer, and that he had therefore been constructively dismissed. This is what the claimant's evidence amounts to. The evidence of Mr Vickers and Dr Cowley is neither incredible nor contradicted by the contemporary documents; and Dr Cowley has no vested interest in the outcome of this litigation.

166. In these circumstances, Mr Bowles submits that the application of clause 3.1 is clear: Kinross had no entitlement to receive a replacement for Dr Cowley without further fees being payable to the claimant since the termination of his employment was not *"justified"*, nor had he *"left of his… own volition"*, and these were pre-conditions for the claimant being contractually obliged to *"endeavour to find a replacement"*. In the absence of these conditions being fulfilled (which they were not), Kinross had no entitlement to receive a replacement free of charge.

167. If the court is not with the claimant in finding that Dr Cowley was constructively dismissed, Mr Bowles advances an alternative line of argument. He submits that it is quite clear from the evidence provided by Mr Vickers that the search for Dr Cowley's successor was not a search for a like-for-like replacement. Clause 3.1 of the RVP contract only makes commercial sense in circumstances where the role being replaced is the role covered by the initial search. Otherwise, Kinross could have sought to alter the provisions of the RVP contract, and impose un-bargained for burdens on the claimant, requiring it to conduct two searches for the price of one (rather than merely using the existing work performed, less than 12 months previously, to find a ready-made replacement). It is clear from Mr Vickers's evidence that this was not the case. The search for Mr Morley-Jepson was materially different from the search for Dr Cowley; in reality it was a search for a wholly different type of candidate, such that it could never have been caught by the narrow replacement provisions of clause 3.1. In particular, the evidence (which the court must take at face value on this application) is extremely clear: Mr Vickers sought confirmation from Ms Harkonen that the search for a replacement candidate should be conducted upon the basis of the same job description. Ms Harkonen's response was to stop the search and then to provide a new RVP role profile. This clearly demonstrates that the role sought, and the type of candidate (in terms of requisite experience and level), were materially different. The original, and the new, job descriptions are poles apart so this was not a like-for-like replacement caught by clause 3.1, enabling the claimant simply to re-use the previous list of candidates. This is clear from the fact that Mr Morley-Jepson was hired for the new role even though he would not have satisfied the search criteria under the initial RVP role profile.

168. In these circumstances, Mr Bowles submits that it is clear on the evidence that there was a new RVP contract, the subject-matter of which was materially different to the initial RVP contract. As such, the claimant was entitled to charge fees for this new work on the basis of a new RVP contract. Such contract would (by virtue of the fact that the claimant was a preferred supplier, with a standard form contract agreed with Kinross) have been on materially the same terms as the RVP contract, such that the claimant would have been entitled to receive fees on the same basis, and in the same order. This is reflected in the invoice raised, which claims the full fees due under all three tranches of the new RVP contract. It is also clear that the only reason for the delay in submitting this invoice was the fact that the claimant had mistakenly relied upon Ms Harkonen's assurances that a replacement for Dr Cowley should be provided free of charge when, in fact, Kinross had no contractual right to such a free service.

169. I accept Mr Bowles's submission that on the present application, the court must proceed by taking the evidence of Mr Vickers and Dr Cowley at its highest, and by finding that there is at least an arguable case, with a real prospect of success, that: (1) Kinross had promised Dr Cowley that he should succeed to Mr Baker's role as chief operating officer; and (2) it was Mr Baker's announcement that he intended to remain in that role that led Dr Cowley to resign his role as RVP, thereby creating the need to find a replacement RVP. However, even on this basis, I find that the claimant's claim to be entitled to receive any fee for resourcing a replacement candidate for that role is fanciful, entirely lacking in any reality, and has no real prospect of success. In my judgment, the true position is entirely clear on the incontrovertible documentary evidence, without the need for any oral evidence or cross-examination at trial.

170. Accepting, for the purposes of this application, that Dr Cowley's motivation for resigning was that he had been told that he would lose out on the role of Kinross's chief operating officer, and treating the claimant's evidence at its highest, the reality is

that Dr Cowley himself elected to terminate his employment as the RVP within 12 months of the date of the commencement of his employment with Kinross. On his own evidence, he chose to resign his position in order to achieve a severance package equivalent to three months' salary. That termination was *"justified"* because Dr Cowley elected to resign, and Kinross chose to accept his resignation. By submitting his resignation, Dr Cowley left *"of his own volition and not due to redundancy"*. In my judgment, it is not possible to characterise the failure to honour a promise of promotion to the position of chief operating officer as amounting to constructive dismissal from the separate, and different, position of RVP. But, in any event, Dr Cowley was never dismissed; rather he chose to resign. On the true construction of clause 3.1 of the ERR contract, in those circumstances the claimant (or the BVI company) was obliged *to "endeavour to find a replacement"* for no further fee. Having initially submitted an invoice for the first tranche of a further fee, Mr Vickers accepted, by his 28 May 2009 email, that no such fee was due to the claimant (or the BVI company) from Kinross.

171. At no stage thereafter did Mr Vickers ever seek to resile from the position he had made clear to Kinross in his 28 May 2009 email that the claimant (or the BVI company) would be proceeding at its own expense, even when he received the new RVP role profile from Ms Harkonen by email dated 20 July 2009; and in his evidence Mr Vickers does not suggest otherwise. Mr Vickers never followed up on his earlier email request for confirmation of the claimant's terms and conditions; nor did he ever seek payment of his earlier invoice, or raise any further invoice until 2013. It follows that at all times both Kinross and Mr Vickers understood that the claimant (or the BVI company) was working on the basis that it would be charging no further fee, on the footing that it was bound by sub-clause 3.1 of the RVP contract to provide a replacement without charge. The evidence is entirely inconsistent with the claimant's case that there was any new, or replacement, RVP contract: the search for a successor to Dr Cowley proceeded under clause 3.1 of the existing RVP contract. For the same reason, there can be no conceivable claim in unjust enrichment.

172. For these reasons, and for the further reasons advanced by Ms Page in relation to the analysis of clause 3.1 of the RVP contract, and the effect of the communications passing between Kinross and Mr Vickers following the departure of Dr Cowley (which I accept and will not repeat), I am entirely satisfied that the claimant's case that it had any valid underlying claim to recover any further fee under the RVP contract (or any suggested new or replacement RVP contract) for any work done to recruit Dr Cowley's replacement is wholly fanciful, lacking in any reality, without any substance, and bound to fail. This aspect of the claim should either be struck out or summarily dismissed.

12: Interest

173. Under clause 10 of each of the three contracts, Kinross was required to pay all invoices to the claimant (or the BVI company) in three tranches, with the first 33% of the estimated total fee (of 30% of each hired applicant's total first year guaranteed gross annual remuneration package) falling due when the claimant (or the BVI company) commenced the retained assignment, a further 33% becoming due upon the arrangement of a second interview or short list, and the final balance of 34% of the actual fee (after any adjustment for any differences between the estimated and actual remuneration package) falling due on completion of the assignment (meaning the formation of a signed contract between Kinross and the applicant). The first tranche was payable by Kinross within seven days of the date of the relevant invoice whilst the

second and third tranches were payable within 30 days of the date of each invoice. By clause 10.6: *"Interest will be payable by the Client on overdue invoices at a rate of 2.00% for each period of fourteen days' delayed payment."* It is common ground that any interest so payable was simple interest only, and did not fall to be compounded. Issue one is whether (as the defendant contends) this interest rate (equivalent to an annual rate of 52%) was a penal provision which could not be enforced against Kinross, and so cannot be claimed from the defendant. Paragraph 128 of the particulars of claim pleads a claim to interest pursuant to s.35A of the Senior Courts Act 1981 *"at such rate and for such period as the court deems fit"*. However, paragraphs 126 and 127 of the particulars of claim plead claims for interest at the rate of 8% per annum (which is the Judgment Act rate). The defendant asserts that it is obvious that no court would ever award interest at the rate of 8% pa, save in very exceptional circumstances, and that the claim for interest at this rate is brought oppressively and should be struck out. This is issue 11. Although this was not the order in which these two issues were argued, it is appropriate to take issue one first.

(a) Clause 10.6

174. The law on penalties was comprehensively reviewed and restated by the Supreme Court in *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67, [2016] AC 1172. There are three substantive judgments dealing with the general law on penalties, one by Lords Neuberger and Sumption (with whom Lord Carnwath agreed), a second by Lord Mance, and a third by Lord Hodge. Lord Toulson (who dissented in the result on one of the appeals) agreed with Lords Mance and Hodge on the general principles. Lord Clarke agreed with each of the three substantive judgments. These judgments were analysed and summarised by Nugee J in *Holyoake v Candy* [2017] EWHC 3397 (Ch) at [467] as follows (omitting references):

> On the principles relevant to the present case I do not detect any difference of substance between the three main judgments, but I have referred to each of them below. The relevant principles are as follows:
>
> (1) In English law the doctrine of penalties applies only to contractual provisions operating on a breach of contract; the penalty rule regulates only the remedies available for breach of a party's primary obligations, not the primary obligations themselves ...
>
> (2) The question whether a contractual provision is within the scope of the penalty rule depends on the substance of the term and not its form ... If the substance of the contractual arrangement is the imposition of punishment for breach of contract, the concept of a disguised penalty may enable a court to intervene …
>
> (3) Nevertheless the Court recognised that the fact that the rule is limited to provisions operating on breach means that in some cases the application of the rule may depend on how the relevant obligation is framed in the instrument. The application of the penalty rule can thus turn on questions of drafting, or somewhat formal distinctions … ; clever drafting may create apparent incongruities in some cases … ; the rule can be circumvented by careful drafting ...
>
> (4) Where the rule applies, the test for whether a contractual provision is a penalty is whether the impugned provision is a secondary obligation

> which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation … ; what is necessary in each case is to consider first whether (and if so what) legitimate business interest is served and protected by the clause, and second, whether, assuming such an interest to exist, the provision made for the interest is nevertheless in the circumstances extravagant, exorbitant or unconscionable … ; the correct test is whether the sum or remedy stipulated as a consequence of breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract ..."

175. Mr Bowles referred me to the further summary of the law contained in the judgment of Mr Timothy Fancourt QC (sitting as a Deputy Judge of the High Court) in ***Vivienne Westwood Ltd v Conduit Street Development Ltd*** [2017] EWHC 350 (Ch) at [38] where he made the additional points that:

> (v) The onus lies on the party alleging that a clause is a penalty to show that the secondary liability is exorbitant, extravagant or unconscionable …
>
> (vi) Since the penalty rule is an interference with freedom of contract, it is not lightly to be concluded that a term in a contract negotiated by properly advised parties of comparable bargaining power is a penalty …

176. Mr Bowles reminded me that this court had recently considered whether a provision for default interest on a secured loan should be characterised as penal in ***Ahjua Investments Ltd v Victorygame Ltd*** [2021] EWHC 2382 (Ch). There I proceeded to consider first the question whether the clause in question was a primary obligation or a secondary obligation, and then whether the obligation imposed was *"out of all proportion to any legitimate interest"* or otherwise *"exorbitant, extravagant or unconscionable"*. In that case it had been unsuccessfully asserted that the legitimate interest supposedly protected by the default interest rate was the fact that the borrower had a poor credit score. In her oral submissions, Ms Page took me to my observations at [144]:

> Whilst I would be prepared to accept, without supporting evidence, an increase of up to 200% in the applicable rate of interest on default to reflect the greater credit risk presented by a defaulting borrower, in my judgment, and as a rule of thumb, I would expect an evidential burden to pass to a lender to adduce evidence to justify any greater increase, at least where the lender enjoys additional personal and real security for its loan.

177. Ms Page relied on this *"rule of thumb"*; and she emphasises that an annualised rate of slightly more than 52% is, on any analysis, an extraordinarily high amount. She points out that this claim for contractual interest makes up more than half the total damages claimed (amounting to US $3,709,096.24 up to 11 December 2015, the date of the particulars of claim in the underlying claim). This is said to dwarf the principal sums alleged to have been due and owing from Kinross under the three contracts.

178. Ms Page contends that clause 10.6 was clearly penal. As to this, she submits that:

(1) Such interest was explicitly described as "*Penalty Interest payable on overdue Executive search invoices"* and as *"Penalty Fees payable (as per contract)"* in the

BVI company's own final invoice (No 01053) for US $185,017.42 under the ERR contract dated 3 February 2011.

(2) Properly construed, payment of interest pursuant to clause 10.6 is plainly a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the claimant (or the BVI company) in the enforcement of the primary obligation. There is no suggestion in the evidence that 14 days' delay in paying an invoice might render Kinross an increased credit risk. Ms Page refers to Mr Vickers's belated justification for the high interest (at paragraph 177 of his first witness statement): *"... that, in common with competitor international recruitment companies, we would face significant problems with our business if we were not paid on time"* because the claimant *"... incurred [considerable expenses in sourcing candidates] upfront and needed to be reimbursed promptly in order to avoid serious cashflow issues"*. She submits that this is simply false. Not one invoice or bill has ever been provided in respect of these supposed expenses; and not one proof of payment is offered up. Indeed, the claimant's filed accounts, recording costs of sales in the years ending 28 February 2009 and 2010 as nil (*"0"*), contradict the existence of any such payments. (Although the 2009 accounts were signed by Mr Williams, the 2010 accounts were signed by Mr Vickers: contrast pages 1157 and 1160 with pages 1169 and 1172. After 2010 there were only abbreviated accounts.) It is simply untrue for Mr Vickers to say that the claimant *"incurred all these expenses upfront"*. In any event: (a) Cashflow difficulties due to the late payment of invoices are hardly a problem unique to the claimant, or indeed to recruitment work generally; and the risk of such difficulties can, and generally is, offset in other ways, particularly when at the time the contracts were entered into, at the end of 2008 and the beginning of 2009, the cost of access to credit was low. (b) Due to the nature of the payment terms in the Kinross contracts, the risk of such difficulties (even assuming they existed) was actually low because under clause 10.1 (i) of each of the contracts, 33% of the estimated total fee was payable within seven days of the commencement of the relevant assignment.

(3) Even if there was a legitimate business interest protected by clause 10.6, the nature of that interest was entirely out of proportion to the extravagance of the clause. This is not a situation where any default meant that Kinross was a materially increased credit risk (as might be argued if the interest rate was being charged due to a default under a loan). Instead, the claimant (or the BVI company) was dealing with a solvent counterparty and the clause was simply trying to ensure payment within the very short time period of fourteen days when it could have offset any cashflow difficulties caused by any delay by other means.

(4) There is no evidence that this clause was negotiated by sophisticated counterparties with the benefit of legal advice. Instead, these were five-page contracts, the form of which was seemingly negotiated (to the extent there was any meaningful negotiation) by Mr Vickers and Dr Judy Hunter, an HR representative for Kinross. At paragraphs 179-181 of his first witness Mr Vickers seeks, for the first time, to suggest that this clause, and the very high interest rate, were specifically brought to the attention of Kinross prior to the parties entering into the RVP contract by way of a phone call between himself and Dr Hunter. He asserts that Dr Hunter *"said she was happy to pay on time and agreed the interest rate"*. Mr Vickers adduces no evidence in support of this contention; and the claimant has previously declined to put forward any meaningful case in relation to this issue, either in the response to the defendant's request for further information or in the claimant's reply. Ms Page contends that the contemporaneous documentary record does not provide any evidence that Kinross

specifically engaged with the clause at all. The draft of the contract amended by Dr Hunter does not show any amendments to the interest provision. It seems entirely implausible, given the extraordinarily high interest rate, that this clause would have been agreed without comment if specifically drawn to Kinross's attention. But even if the interest provision was specifically considered and agreed, that is no impediment to the application of the law against penalties: self-evidently, any contractual provision for interest must have been the subject of some agreement; and even if an interest provision has been negotiated and agreed with the advice of solicitors, in an appropriate case, it may still constitute a penalty.

179. For these reasons, the defendant seeks, under CPR 3.4 (2) (a) and CPR 24.2, the striking out of and/or summary judgment on, the claim to contractual interest pursuant to clause 10.6 of the three Kinross contracts on the basis that this claim lacks the crucial elements of causation and loss: the claimant (and the BVI company) had no, or no real, prospect of recovering from Kinross the sums that it says it would have recovered, such that even if any alleged breach of duty by the defendant is made out: (1) the particulars of claim disclose no reasonable grounds for bringing that part of the claim, and / or (2) the claimant has no, or no real, prospect of succeeding in showing that any alleged breaches caused the relevant part of the claimed loss; or alternatively (3) the losses which flow from the alleged breaches are much lower than currently pleaded.

180. In his skeleton argument, Mr Bowles had submitted that clause 10.6, providing for interest on overdue invoices at a rate of 2% for every 14 days' delay in payment, was not an unenforceable penalty clause as it was in fact a conditional primary obligation. He had emphasised that whether a clause is a primary or a secondary obligation is a question of substance and not of form. In his oral submissions, however, Mr Bowles conceded that this was a secondary obligation. I have no doubt that he was right to do so.

181. Mr Bowles contends that even though clause 10.6 may be a *"penal"* clause, it was one that had been specifically agreed by a party with greater bargaining power than the claimant; and it protected a legitimate interest of the claimant. He submits that:

(1) Dr Hunter, on behalf of Kinross, specifically negotiated the interest provision with Mr Vickers, on behalf of the claimant; and it was expressly agreed following discussions between the parties. Mr Bowles emphasises the relative sizes of Kinross and the claimant, and their consequent unequal bargaining powers, with Kinross very much holding the upper hand. In *Cavendish Square* the Supreme Court had recognised (at [35]) that *"... the circumstances in which the contract was made are not entirely irrelevant. In a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach."*

(2) Dr Hunter made a specific alteration to another part of clause 10 of the RVP contract (which was the intended template for the other two contracts with Kinross) but she did not alter this provision and, as such, she had clearly accepted it. Kinross had very clearly engaged with the provisions in the initial RVP contract governing payment and interest.

(3) These negotiations sought to protect the claimant's legitimate interest, namely the need for the claimant to receive prompt payment, given its business and the way that

financing was necessary for the recruitment contracts. This requirement for prompt payment was also echoed in the reduction in the time for payment of the first tranche of the fee from 30 days to only seven days. Mr Bowles acknowledges that the claimant's filed accounts do not support its case; but he points out that these had been prepared by Mr Williams, and the 2009 accounts were signed by Mr Williams rather than Mr Vickers.

(4) This legitimate interest of the claimant had been protected by the inclusion of the same terms in other contracts with substantial clients, such as Deloitte and Basic Element.

182. Mr Bowles further submits that the term is not *"exorbitant, extravagant or unconscionable"*. Unlike the term in *Ahjua*, which provided for 12% per month compounded, this term is merely for 2% simple interest every 14 days. This is hardly extravagant or unconscionable, especially when considered in the light of the substantial upfront financial outlay that the claimant was required to make, and thus in the context of the legitimate interest that the clause was seeking to protect. Indeed, had such a term been exorbitant or unconscionable, there is simply no way that Dr Hunter could or would have agreed to it.

183. Mr Bowles submits that these are not matters which are capable of summary determination in advance of trial. He emphasises the points made by Mr Fancourt QC in the *Vivienne Westwood* case that: (1) the onus lies on the defendant to show that this interest provision is exorbitant, extravagant or unconscionable, and (2) the court should not readily conclude that a term in a contract negotiated by properly advised parties of comparable bargaining power is a penalty.

184. In response, Ms Page points out that there is no evidence that Kinross were in receipt of any legal advice. She submits that it is inherently unlikely that Dr Hunter would have agreed to a clause providing for interest to be paid on any overdue invoice at the rate of 2% every 14 days if she had noticed, and appreciated, the effect of this provision, particularly in the context of the agreed reduction in the period for the payment of the first tranche of the fee from 30 to only seven days. When I pointed out to Ms Page that Dr Hunter might simply have taken the view that there was no risk of Kinross not making payment within the timescale prescribed by the contract, her response was that agreement to a clause is no impediment to the application of the rule against penalties if, on an objective assessment, that is what the clause in question amounts to.

185. In addressing the issue whether clause 10.6 is a penal provision which was unenforceable against Kinross, I adopt the approach taken by Mr Fancourt QC in the *Vivienne Westwood* case (cited above) at [44]:

> The *Cavendish* case shows clearly that, in considering whether a contractual stipulation is or is not a penalty, one must address first the threshold issue — is the stipulation in substance a secondary obligation engaged upon breach of a primary contractual obligation; then identify the extent and nature of the legitimate interest of the promisee in having the primary obligation performed, and then determine whether or not, having regard to that legitimate interest, the secondary obligation is exorbitant or unconscionable in amount or in its effect.

As Mr Fancourt QC went on to observe (at [49]), whether a secondary obligation:

> … is a penalty depends on the legitimate interest of the lessor in having the claimant comply with its obligations in the lease and whether the burden of the secondary obligation is exorbitant or unconscionable compared with any loss likely to flow from breach. In other words, does the legitimate interest extend beyond pecuniary compensation for any loss caused by the particular breach, so as to justify the extent of the secondary obligation?

186. I have no doubt that Mr Bowles was right to concede that clause 10.6 is not a conditional primary obligation; rather, it is a secondary obligation providing a contractual alternative to common law damages. The distinction between the two is a matter of substance rather than form, and was explained in the joint judgment of Lord Neuberger and Lord Sumption (with which Lord Carnwath agreed) in the ***Cavendish Square*** case at [14]:

> … where a contract contains an obligation on one party to perform an act, and also provides that, if he does not perform it, he will pay the other party a specified sum of money, the obligation to pay the specified sum is a secondary obligation which is capable of being a penalty; but if the contract does not impose (expressly or impliedly) an obligation to perform the act, but simply provides that, if one party does not perform, he will pay the other party a specified sum, the obligation to pay the specified sum is a conditional primary obligation and cannot be a penalty.

Here the primary obligation is imposed by clauses 10.2 and 10.3, which require Kinross to make payment within either seven or 30 days of the date of the relevant invoice. If payment is delayed, there is a secondary obligation to pay interest at a rate of 2% for each period of 14 days' delayed payment; but this does not replace, but rather augments, the primary obligation to pay the full amount of the relevant invoice.

187. Clearly any supplier of goods or services has a legitimate interest in securing prompt and timely payment of any invoice rendered in accordance with the terms of the relevant contract. Apart from the detrimental effect on the supplier's own cash flow, and their consequent ability to service their own debts and business expenses in accordance with their own cash flow projections, the failure to receive payment on the due debt may indicate that the debtor is a credit risk. There can therefore be no objection in principle to a provision for interest to be paid if a debtor fails to make payment on, or within a prescribed time after, the due date. Such a provision acts as an incentive to the debtor to effect payment on time or, in the event of their failure do so, promptly to remedy that default. It also serves to compensate the supplier both for any interest charges incurred, or other losses sustained, as a result of the late payment, and for any administrative expenses or other inconvenience incurred in having to chase up the purchaser for late payment of the relevant invoice. The key question, therefore, is whether the charge for interest is *"exorbitant, extravagant or unconscionable"*, either in amount or in its effect.

188. In my judgment, previous court decisions on the propriety of increases in the applicable rate of interest in the event of any default in the repayment of instalments of interest or capital under a secured loan agreement afford an unreliable, and unhelpful, analogy when considering whether a particular rate of interest is exorbitant, extravagant or unconscionable as applied to an overdue invoice for payment for goods supplied or services rendered. Apart from the relevance of the existence of security for the indebtedness, and the cushion that should be afforded to a prudent lender by the

loan to value ratio applied as part of its initial due diligence, the nature and intended duration of the relationship between lender and borrower is inherently very different from that which applies as between the supplier and the purchaser of goods and services. The secured lender retains a realisable interest in the security taken for their advance. Retention of title clauses aside, a supplier of goods, and even more so of services, can look only to the purchaser for payment. A secured loan is typically of some duration, whilst the obligation to pay for goods and services is typically more short-lived. In my judgment, a four-fold increase in the primary rate of interest payable in the event of default on a secured loan, when combined with a provision for the monthly capitalisation of such interest, is qualitatively very different from a provision for interest on overdue invoices at a rate of 2% for each period of 14 days' delayed payment. At the time they entered into them, the parties to the Kinross contracts are unlikely to have envisaged that any invoice rendered thereunder would remain unpaid for any length of time after its due date.

189. I remind myself that this is not a mini-trial on the papers of the claim to interest on overdue invoices at a rate of 2% for each period of 14 days' delayed payment pursuant to clause 10.6 of each of the Kinross contracts. This is an application to strike out that claim, or for summary judgment thereon, on the basis that it is bad in law and that the claimant has no real prospect of succeeding on it. Whatever the position may turn out to be at any trial, I am not satisfied that the defendant, on which the burden lies, has demonstrated, for the purpose of the present application, that clause 10.6 is self-evidently, and indisputably, exorbitant, extravagant or unconscionable. I therefore dismiss this part of the defendant's application.

(b) 8% interest

190. At paragraphs 126 (1), 126 (2) and 127 the claimant pursues alternative claims for damages calculated by reference to its alleged value of the underlying claim in the sum of over £5 million *"plus interest on this sum at a rate of 8% per annum, being £1,700,133.38 to date"* (6 March 2020). By paragraph 128, the claimant further claims interest on *"the aforesaid loss and damage"* pursuant to s. 35A of the Senior Courts Act 1981 *"at such rate and for such period as the court thinks fit"*. On the pleadings, it is therefore necessary to consider two periods of time: (1) the period up to 6 March 2020, where interest is claimed at a rate of 8% pa and (2) the period thereafter, where the rate is left to the court's discretion. However, as recognised by Neuberger J in his judgment on interest in *Harrison v Bloom Camillin (No 2)* [2000] Lloyd's Rep PN 404 at 408 (col 2), strictly there are two lots of interest to consider: (1) the interest which would have been awarded by the notional trial judge when giving judgment for the claimant against Kinross on the underlying claim; and (2) the interest which has accrued since that date on that notional judgment.

191. Ms Page refers the court to paragraph 29-299 of *Chitty on Contracts* (34th edn), which (omitting foot-note references) reads:

> The court is empowered to award interest *'at different rates in respect of different periods'*. In business contexts, the rate of interest should reflect the current commercial rate. The approach of the Commercial Court is to award interest at a rate which broadly represents the rate at which the successful party would have had to borrow the amount recovered over the period in question. The Court of Appeal has upheld the practice of the Commercial Court to award interest at a borrower's rate of 1 per cent above the base rate prevailing from time to time, but this is only a

> presumption which can be displaced if its application would be unfair to either party. The Court of Appeal has recognised that the borrowing costs of small businesses are often higher than for first class borrowers for whom 1 per cent above base rate is appropriate: interest on damages at 3 per cent above base rate was awarded.

192. Ms Page submits that the suggestion that the claimant could ever recover interest at 8% prior to judgment is entirely implausible. 8% is, of course, the judgment rate under the Judgments Act 1838. It has no bearing on an award of interest under the 1981 Act up to judgment. In reality, the maximum amount of statutory interest the claimant would ever be awarded would be at a rate between 1-3% above base rate for the period in question. As the Bank of England base rate has not exceeded 1% since 5 February 2009, this will amount to considerably less than the 8% claimed. Ms Page proclaims that this is known by every practitioner in the Chancery Division. Mr Vickers has produced no evidence to justify an award of interest at 8% pa (such as evidence of the rate of interest at which the claimant has had to borrow money, or which it might have earned on any moneys invested by it). It is inconceivable that any judge hearing the underlying claim would have awarded interest at the rate of 8% at trial, or that any judge hearing the present claim would do so. Nor can the claimant seek to contend that it would have been entitled to interest at 8% after judgment in the underlying claim because the present claim proceeds on the footing that the claimant has lost something of value, and therefore on the basis that Kinross would have satisfied any judgment. She says that this plea is patently made in terrorem, with a view to generating an optically very large sum (added to the various other sums to create a huge overall number) in the hope that the defendant will settle by reference to it. It is yet another example of the claimant exaggerating the value if its claim; and it is conduct which this court should deprecate. Ms Page also points to the three year delay on the part of the claimant in bringing this claim since the underlying claim was struck out; and the further delay in pursuing this claim since the claim form was issued on 8 December 2019. However, I consider that this submission is more directly relevant to the period for which interest should be payable rather than the applicable rate of interest; and it also ignores the extent to which the delay in progressing these proceedings has resulted from the present application by the defendant.

193. For these reasons, Ms Page seeks the striking out and/or summary judgment under CPR 3.4 (2) (a) and/or CPR 24.2 of the claim to statutory interest at 8% pursuant to s.35A of the Senior Courts Act 1981 on the basis that: (1) the particulars of claim disclose no reasonable grounds for bringing that part of the claim; alternatively (2) the claimant has no, or no real, prospect of succeeding in showing that it has any entitlement to the relevant part of the claimed loss; or alternatively (3) the interest rate ultimately applied by the court would be much lower than that currently pleaded.

194. During the course of her oral submissions, Ms Page referred me to a number of authorities: The earliest (in point of time) was the decision of the Court of Appeal in *Pinnock v Wilkins & Sons*, The Times, 29 January 1990 where a majority of the Court of Appeal (Fox and Nicholls LJJ, Ralph Gibson LJ dissenting) upheld the decision of the trial judge (Sheen J) to award interest on damages for breach of duty by a solicitor in a personal injury case at the judgment debt rate. The next was *Watts v Morrow* [1991] 1 WLR 1421 where the Court of Appeal had to consider the contention that the award by the first instance judge of interest at the judgment debt rate was inappropriate in a surveyor's negligence case. In light of *Pinnock*, the Court of Appeal (Sir Stephen Brown P, Ralph Gibson and Bingham LJJ) unanimously rejected that

argument. These (and other) authorities were considered at length by Neuberger J in *Harrison* (cited above). At page 410 (col 1) he identified the following principles:

> First, the appropriate rate of interest is a matter of discretion, which obviously must be exercised judiciously and fairly. Secondly, the tendency has been to award the judgment debt rate. Thirdly, in appropriate cases there is much to be said for the judgment debt rate (see per Nicholls LJ in *Pinnock*). Fourthly, use of the judgment debt rate in some cases may not be appropriate, for the reasons given by Bingham LJ in *Watts* and by the editors of *Jackson and Powell*. Fifthly, the court has to select a rate which appears to reflect justice between the parties in the particular case.
>
> I have come to the conclusion, albeit with some hesitation because of the previous decisions and the observations, that in the present case, bearing in mind that [sic] the purpose of the interest in principle as described by Bingham LJ in the passage which I have quoted from *Watts*, that the short term investment rate is the right rate to select. It is more flexible and therefore, unlike the judgment debt rate, it better reflects changes in value of money and changes in interest rates more realistically. Furthermore, judgment debt rate tends to be high, for the reasons given by Bingham LJ and the editors of *Jackson and Powell*, and there is no reason to penalise the defendants in the present case. The fact that the period of time involved in the present case is long seems to me to cut both ways.

195. The next case was the decision of the Court of Appeal in *Reed Executive Plc v Reed Business Information Ltd* [2004] EWCA Civ 887. The issue there was the appropriate rate of interest to include in an order for the repayment of an interim payment of costs (in the sum of £350,000). At [7], Jacob LJ (with the agreement of Auld and Rix LJ) said this:

> I think the appropriate rate is the commercial rate. The judgment rate is purely artificial. I can see no reason for an artificial rate being imposed by the court save in those cases where it must, i.e. where there has been a judgment for a sum. Besides, a judgment debtor can avoid paying any interest by paying the debt so it is, in a sense, a voluntary rate of interest.

196. Finally, there is the decision of the Court of Appeal in *Perry v Raleys Solicitors* [2017] EWCA Civ 314. (Their substantive decision upholding the claim to damages for negligence was reversed on appeal to the Supreme Court so that Court had no need to consider the issue of the appropriate rate of interest.) Gloster LJ (with whom McFarlane and Tomlinson LJJ agreed) concluded that in the particular circumstances of the case, the appropriate rate for the whole period from 1 December 2006 to judgment on 28 April 2017 was the judgment debt rate of 8% pa rather than the special account rate. Her reasons for doing so (at [63-68]) were essentially that: (1) the judgment debt rate more adequately compensated the claimant for the fact that he had been kept out of his money for so long; (2) the conduct of the defendants (or their insurers) in their long drawn-out defence of the claim deserved appropriate sanction; and (3) there was no suggestion that the claimant (or his advisers) had been responsible for any delay in the resolution of the litigation.

197. Mr Bowles points out that s. 35A (1) of the Senior Courts Act 1981 provides that interest may be claimed at *"such rate as the court thinks fit or as rules of court may provide"*. He refers to the plea for interest under this section at paragraph 97 of the particulars of claim in the underlying claim. He submits that 8% may be appropriate in the circumstances of this case. In circumstances where: (1) the Court of Appeal has twice upheld the exercise of the lower court's discretion to award interest at the judgment debt rate when it was 15% pa, and has recently decided to award interest at the current judgment debt rate of 8% in a solicitor's negligence case; and (2) Neuberger J confessed to *"some hesitation"* in awarding interest at special account, rather than judgment debt, rate, Mr Bowles submits that the appropriate rate of interest must be a matter for the trial judge to decide after a full consideration of all the facts of the case, and in light of all the relevant factors and circumstances. He points to the fact that for over two years the defendant had achieved absolutely nothing in pursuit of the underlying claim. Mr Bowles also submits that due to the defendant's present application, and its request for an adjournment of the December 2021 hearing, the present claim has not yet even progressed to a costs and case management hearing. The claimant has been kept out of its money. The claim for 8% interest is not one that should be struck out at this stage, but should await a determination on the facts at trial. (Ms Page objects that it was not the defendant which had requested an adjournment of the December hearing: the proposal to adjourn came from the Deputy Master and, having taken instructions, leading counsel then appearing for the defendant agreed to this suggestion whereas the claimant objected to it.)

198. I accept Mr Bowles's submissions. In light of the Court of Appeal's refusal in both *Pinnock* and *Watts* to interfere with the exercise of the trial judge's discretion to award interest at judgment debt rates, in my judgment it cannot sensibly be maintained that the claim for an award of interest at 8% pa, whether in the underlying claim or in the present litigation, is bad in law, or that the claimant has no real prospect of succeeding on it. Certainly, so far as the position going forward is concerned, with inflation currently running at around 10% pa, and forecast to rise to ever dizzier heights, as a result of Putin's war in Ukraine and the consequent disruption to global energy and food supply chains, a rate of 8% pa may soon fall to be considered as modest. But even as regards the past, in my judgment the appropriate rate of interest is a matter to be considered at trial, in light of all relevant facts and circumstances. The reasons given by Gloster LJ for awarding interest at the judgment debt rate demonstrate the fact-sensitive nature of decisions as to the appropriate rate of interest. Indeed, I consider that there is something surreal, as well as novel, about this part of the defendant's application: it is commonplace for statements of case to include claims for interest at 8% pa yet I have never previously encountered an application to strike out such a claim as being bad in law and devoid of any prospect of success. I doubt whether the defendant would ever have pursued this part of its application as a stand-alone matter. Further, although I received no submissions on this point, I note that since 7 August 2002 the rate of interest prescribed under the Late Payment of Commercial Debts (Interest) Act 1998 has been 8% over the Bank of England's official dealing rate. For these reasons, I dismiss this part of the defendant's application.

13: The Moscow office costs

199. Issue two had been whether the claim for US $788,029 in respect of the costs of establishing a *'Moscow office'* was *"flawed and misleading"* (as asserted by the defendant). The claimant had maintained that it would have recovered this sum from Kinross in the form of *'wasted costs'* for its alleged breach of the ERR contract. The

defendant asserts that this sum would never have been recoverable from Kinross because: (1) it was claimed on a misleading and incoherent basis and, indeed, was never incurred at all; (2) in any event, it represents double recovery; and further (3) as a matter of law it was irrecoverable. The claimant no longer pursues this head of claim, and has not done so since shortly before the December hearing (although it has never formally been discontinued). Mr Bowles accepts that it should be struck out, or summary judgment entered in favour of the defendant. However, Ms Page addressed this head of claim both in her skeleton argument and in her oral submissions. She did so both for forensic reasons (because of the bad light it throws on the way the claimant and Mr Vickers have conducted themselves) and in support of her overarching submission that this claim should not be allowed to proceed to trial.

200. As part of the sums claimed from Kinross in the underlying claim, paragraph 94 of the particulars of claim had sought *"damages in respect of the costs incurred in setting up and managing an office in Moscow in the sum of $788,029.00 as of 30th November 2009"*. Mr Vickers had personally verified this claim by a statement of truth. Paragraph 60 (5) of the particulars of claim in these proceedings (also verified by a statement of truth signed by Mr Vickers) similarly alleged that the claimant had *"incurred wasted costs in the sum of US $788,029 in respect of the costs of setting up a satellite office in Moscow"*. At paragraph 54, the claimant pleaded: *"... approximately 30% of the work required to be performed by [the claimant] under the ERR contract, was conducted from [the claimant's] satellite office in Moscow which was set up specifically to perform the ERR contract (at a cost to [the claimant] of US $788,029). Further [the claimant] appointed Mr Diedrik Arnold ... (a Russian speaker) on or around 12 March 2019. Mr Arnold was relocated to Moscow in order to manage [the claimant's] performance of the ERR contract in Moscow."* These costs were claimed in relation to the ERR contract as costs allegedly incurred by the claimant in discharging its obligations under that contract. Such was the strength of the defendant's arguments on this issue, however, that the claimant conceded (in its skeleton argument before the December hearing), that it could not maintain any claim for such costs. Accordingly, Ms Page says that paragraph 60 (5) of the particulars of claim should be struck out (together with all other references in the claimant's statements of case to the claim to have set up a Moscow office and spent the Moscow office costs, and all sums claimed to the extent that they include such costs). This is now conceded by Mr Bowles.

201. Notwithstanding the claimant's concession, however, Ms Page submits that it is important that the court is aware of the manner in which the claimant advanced this claim. This is because this aspect of the claim is particularly relevant to the defendant's overarching argument that the underlying claim (and therefore this claim) is a dishonest claim. Moreover, Ms Page submits that the manner in which the claim for the Moscow office costs was conceded (in Mr Bowles's skeleton argument, filed a few days before the December hearing, and with the claimant having previously maintained the validity of such a claim in robust terms throughout the pleadings and witness evidence filed in response to this application) amounts to an abuse of process. Certainly, it is conduct outside the norm. The defendant has already incurred significant costs in responding to the claim for the Moscow office costs, both at the pleading stage and in preparing for this application; and it now transpires that such costs were incurred in responding to a claim which was unsustainable, and which should never have been brought. Ms Page invites the court to infer that the claim for the Moscow office costs was made in terrorem, with the intention of putting pressure, first on Kinross and then on the defendant, by advancing an artificially high sum for its claims.

202. In summary the defendant's case is that:

(1) The claim for wasted costs – even assuming that they were indeed incurred - would never have been recoverable from Kinross as it represented an attempt at double recovery (the primary claim being for non-payment of sums due under the contract); and despite numerous opportunities the claimant has never offered (either via its response to the request for further information, its reply, or Mr Vickers's evidence) any answer to this. Moreover, as costs allegedly incurred in discharging the claimant's contractual obligations it is not clear how they would have been recoverable against Kinross anyway.

(2) In any event, the claim for wasted costs was false, or at the least was grossly exaggerated, in that the claimant has subsequently admitted that: (1) there never was a Moscow office; (2) only a small part of the costs allegedly claimed had any connection to Moscow; and further (3) there is no evidence whatsoever that any such costs were actually incurred at all, whether in England or Russia or anywhere else. Thus, at responses 40 (1) and 41 (1) to the defendant's request for further information the claimant admitted that it *"did not open an office in Moscow"*, and that the only person actually working in Russia was a contractor, Mr Arnold, who was already employed in Moscow by a different recruitment agency, and who worked part-time either from the offices of that agency or from his apartment. No explanation was provided as to why a false statement had been made in the particulars of claim, nor was any attempt ever made to amend those particulars in light of this admission. Instead the claimant reaffirmed its new, and incoherent, case: (1) at paragraph 58 (2) of its reply, reiterating its denial that there ever was a Moscow office, and (2) at paragraph 335 of Mr Vickers's first witness statement, affirming that he had *"never meant to say that $788,029 was spent setting up a physical office in Moscow"*, but entirely ignoring the fact that that was his company's pleaded case (and remains its case even now).

203. Ms Page submits that this assertion by Mr Vickers that he *"never meant to say that $788,029 was spent setting up a physical office in Moscow"* is entirely implausible and simply not credible given (in particular) that:

(1) This is the second time this has happened: In the underlying claim, Mr Vickers had verified the statement of truth on the particulars of claim seeking (at paragraph 94) *"damages in respect of the costs incurred in setting up and managing an office in Moscow in the sum of $788,029.00"*; yet at paragraph 80 of his witness statement in the underlying claim (signed late in April 2016) he had admitted that *"... the setting up and use of these offices never came to fruition. There was, therefore, never any form of HSL offices in Russia."* Ms Page submits that whether a small business such as the claimant had ever opened an office in Moscow at a cost of hundreds of thousands of dollars is hardly a matter one can make a mistake about once, let alone twice. Even if it might have been possible to give Mr Vickers the benefit of the doubt over his mistake in the underlying claim, it is not possible to do so when he repeats the same mistake a second time around. There is no plausible explanation offered for this mistake. Mr Vickers cannot have had any honest belief in the statement that the claimant had *"incurred wasted costs in the sum of US $788,029 in respect of the costs of setting up a satellite office in Moscow"* and he has therefore rendered himself liable to proceedings for contempt of court under CPR 32.14. Mr Vickers has at no time apologised to the court or attempted to purge his contempt.

(2) Acting on Mr Vickers's instructions, the defendant had written a letter of claim to Kinross on 12 May 2014 asserting *"it is not in dispute that our client opened an office*

and hired a team in Moscow to service the contract with your firm at this time. It cannot now be a surprise that these elements form part of our client's claim"; and later that the claimant *"... specifically opened an office in Moscow and recruited a local Director plus a resourcing team and support team to manage the 'Kinross campaign' from Moscow. This became fully operational by March 12th 2009"*. Mr Vickers had edited and approved this letter before it was sent out: see pages 693 and following.

(3) Indeed, in the letter of claim sent on behalf of the claimant to the defendant on 18 April 2019, its then solicitors, Collyer Bristow LLP, went even further (and introduced yet further contradiction) by asserting that the BVI company (and not the claimant) had *"incurred costs of $846,939[sic] in setting up a satellite office in Moscow specifically for the purpose of fulfilling the ERR contract"*. This figure was apparently taken from the 12 months column of the document headed *"Russian Campaign Costs"* sent by Mr Vickers to Mr Lever and Mr Apthorp by email dated 30 July 2014 (at pages 667-8).

204. Ms Page submits that this was no mere error of communication: Mr Vickers plainly knew that there was no Moscow office, and yet he has subscribed his name to statements of truth in documents, including two sets of particulars of claim, which said (and in this claim continue to say) exactly the opposite. Mr Vickers instead seeks to skate over the point with the following words (at paragraph 334 of his first witness statement): *"Unfortunately, there seems to be quite a bit of confusion about what Ms Morrish has termed the 'Moscow Office Costs'"*, as if the matter were the product of some minor misunderstanding. Similarly, the level of costs claimed in relation to this office are entirely unsubstantiated and implausible such that the court should regard them as false.

205. Ms Page also submits that it is notable in this regard that Mr Vickers has sought (at paragraphs 337-341 of his first witness statement) to blame both the defendant and Euler Hermes, the debt collection agency he had previously instructed, for failing to appreciate that the $788,029 did not in fact relate to the setting up of an office in Moscow. (This is a criticism he does not apparently make of his present legal team in these proceedings, who made precisely the same alleged mistake in their letter of claim, and again in the particulars of claim). Moreover, Mr Vickers is faced with the further difficulty that Euler Hermes, who wrote an earlier letter of claim to Kinross on behalf of the claimant on 27 April 2012, had specifically referred to *"a dedicated office in Moscow"*, and the recruitment by the claimant of *"a local Director…and support team of 3 to manage the Kinross campaign …"* In light of Mr Vickers's later admissions, these statements were simply false. Ms Page argues that Mr Vickers resorts to a by now familiar excuse (at paragraph 337) that he did not read the letter. Even if that were true – and it is extraordinary – it does not explain where Euler Hermes got this information from. It can, of course, only have come from Mr Vickers. How else would Euler Hermes have known about the costs of establishing a Moscow office? Nowhere in his evidence does Mr Vickers suggest that anyone else had been instructing Euler Hermes.

206. Ms Page asserts that Mr Vickers's response (at paragraphs 341 and 343 of his first witness statement) to the defendant's objections to the wholly unsubstantiated nature of the Moscow office costs has simply been to rely on the work of Mr Williams: *"Mike is now no longer with us and I cannot ask him to take me through his calculations, nor can I look at his records"*; and *"I cannot add anything to this as the documents were prepared by Mike. As Mike is no longer alive, I cannot ask him to elaborate this in any more detail."*. Ms Page questions how such an assertion can

assist the claimant: if even Mr Vickers, its sole director, and the person charged with delivering the ERR contract, cannot explain, or suggest, how such costs may have been incurred (and presumably could not do so at the time the present claim was issued since this post-dated Mr Williams's death), then that simply underlines their unsupportable nature: Ms Page cannot understand how the claimant could ever have been in any position to ask the court to enter judgment in relation to such a sum. Indeed, it is notable that notwithstanding the very detailed evidence on this issue in Ms Morrish's witness statement, Mr Vickers's evidence in response – the sum total of which is paragraphs 334-343 – simply fails to engage with it. Putting aside the non-existence of the Moscow office, Mr Vickers is seemingly unable to offer any explanations at all as how or why these sums were paid, when, or to whom, or how they even related to the ERR contract or were ever claimable against Kinross. Ms Page invites the court to note that a considerable slice of the $788,029 (some $180,000) apparently related to renovations to Mr Vickers's own home, which she suggests may explain his reticence in this regard. Moreover $324,300 apparently related to *"staff remuneration"*: on the analysis contained at paragraph 83 of Ms Morrish's witness statement, and in circumstances where the only person even possibly paid by the claimant in Moscow was Mr Arnold, who only worked (on a moonlighting basis) for three months or so, this figure must simply be inconceivable. Moreover, Mr Vickers cannot explain how the claimant was ever able to pay for such costs given that its accounts (signed by Mr Vickers) for the relevant year (ending 28 February 2010) demonstrate that its cash position was nil both in 2009 and 2010. Moreover, those same accounts show that the cost of sales was nil. The costs incurred in performing a contract would plainly constitute a cost of sale; yet none were incurred. These points were fairly made in Ms Morrish's witness statement; and Mr Vickers has had months to consider them yet he has chosen to ignore them.

207. Ms Page submits that it follows that:

(1) It is impossible, given the ever-changing manner in which Mr Vickers has sought to justify claiming for the Moscow office costs (both against Kinross and against the defendant), that all of the statements to which he has subscribed his name by a statement of truth in both this claim and the underlying claim can have been true;

(2) Instead, the overwhelming inference is that such costs (amounting to nearly $1 million) were sought on an exaggerated and dishonest basis; and

(3) There remains, moreover, a real question as to whether any reliance can be placed on the testimony of Mr Vickers, the sole director of the claimant company, and upon any documents verified by him.

208. In his skeleton argument, Mr Bowles briefly summarised the position in relation to the Moscow office costs as follows:

(1) Mr Vickers has clarified that he *"never meant to say that US $788,029 was spent setting up a physical office in Moscow"*.

(2) The use of the term *'Moscow office'* was used to impress Kinross during the course of negotiating the ERR contract, and was based on Mr Vickers's previous experience in the recruitment industry of referring to temporary or home offices of certain employees as a company's office in a certain location. He accepts that the only presence that the claimant actually had in Moscow was Mr Arnold.

(3) No reliance should be placed on any letter sent by Euler Hermes as Mr Vickers did not see it before it was sent.

(4) The sum of US $788,029 refers to the costs of setting up the *'Russian Campaign'*, and covered *"all the costs"* of carrying out the ERR contract.

(5) The document (at page 666) in fact only refers to US $62,700 being for a Russian office.

(6) There are two versions because Mr Williams produced an incomplete draft first, and then a later revised version. This document was prepared by Mr Williams; and at all times when the defendant was engaged by the claimant, Mr Williams was ready and available to explain this breakdown to the defendant.

(7) Some confusion may have arisen as a result of the manner in which the parties discussed the breakdown of costs between those incurred in Russia and those in the United Kingdom. The reality is that about 70% of the costs were incurred in the United Kingdom, with the other, roughly 30%, incurred in Russia.

In those circumstances, the claimant accepts that it cannot maintain a claim for US $788,029. However, the claimant does draw attention to the fact that the defendant had considered these sums to be claimable, and had initially included them in the pleading against Kinross.

209. I consider all of Ms Page's points to be well made. I do not consider that Mr Vickers has provided any satisfactory answer to them. As regards the document at page 660, on which Mr Bowles appeared to place considerable reliance, the total for the costs of *"Russian Office"* is in fact given as £528,919 (for 9 months). The covering email, dated 30 July 2014, from Mr Vickers to Mr Lever and counsel (Mr Apthorp) begins: *"This is the FOURTH email containing lists [sic] a summary of the costs incurred by HSL [the claimant] in first implementing, then running and resourcing recruitment* ***from Moscow*** *for Kinross candidates in 2009"* (emphasis supplied). The figures in that document do not support the suggested 70/30 split between the UK and Russia. But, in any event, none of this begins to explain how, or why, this claim was ever pursued against the defendant in the current proceedings when, at paragraph 80 of his witness statement in the underlying claim, Mr Vickers had already admitted that *"... the setting up and use of these offices never came to fruition. There was, therefore, never any form of HSL offices in Russia."* I am entirely satisfied that the only explanation is that this was a deliberately exaggerated claim, dishonestly advanced by Mr Vickers against the defendant after it had previously been advanced, and then abandoned, in the underlying claim. This is one of those very rare cases where it is possible for the court to discount any other explanation on the papers, and without cross-examination of Mr Vickers, because deliberate, and dishonest, exaggeration is the only explanation which is reconcilable with the reliable contemporary documentary evidence.

210. It is against this background that I come to consider the defendant's overarching argument that this is a fundamentally dishonest claim that should not be allowed to proceed to a full trial because it would be impossible to ensure a fair trial of this claim.

14: Whether the claim should be allowed to proceed to trial

211. The defendant seeks the striking out of the entire claim under CPR 3.4 (2) (b) (or the court's inherent jurisdiction) on the grounds that, as a result of the claimant's conduct, it would not be possible for there to be a fair trial of this case, and it would be an affront to the court to allow the claimant to continue with its claim. In summary, Ms Page submits that:

(1) The claimant has grossly and dishonestly exaggerated the values of both this claim and the underlying claim, and the supporting evidence of Mr Vickers cannot safely be relied upon.

(2) There are also difficulties over the disclosure of documents and every reason to doubt that proper disclosure can or ever will be given by the claimant.

212. Ms Page submits that no reliance can be placed on the testimony of Mr Vickers, the sole director of the claimant company, or upon any documents verified by him. She suggests that the court can properly conclude that Mr Vickers is simply not a man who can be trusted to tell the truth, and that any trial of this action would be at risk of leading to an unjust result because the claimant will abuse the court's processes in order to achieve a judgment in its favour. She submits that the underlying claim (and consequently this claim) is a dishonest claim the value of which has been purposely exaggerated by Mr Vickers. She relies upon the claimant's false and dishonest evidence and case in relation both to the Moscow office costs and the 11 uninvoiced placements (where Mr Vickers was compelled to resile from the evidence at paragraph 332 of his first witness statement that he *"told Mr Lever that the ERR contract covered 32 people on at least one occasion"*). This is said to show Mr Vickers's readiness to put misleading evidence before the court, and then to resile only if he is caught out, but without providing any proper explanation, asserting matters of privilege. Ms Page also relies upon the constant evolution of the claimant's case, with numerous instances of the claimant having had to resile from positions it had previously adopted throughout the course of both the underlying claim and this claim. Ms Page has produced a six-page table setting out key instances where the claimant has resiled from its case as pleaded, or as set out in witness statements, in relation to (1) the Moscow office costs; (2) the entry into the ERR contract; (3) the 11 uninvoiced positions; (4) the whereabouts of financial documents; (5) the role of Mr Williams; and (6) the performance of the ERR contract more generally. In short, Ms Page says that Mr Vickers's evidence cannot safely be relied upon; and that any judgment in favour of the claimant would therefore be unsafe because without Mr Vickers's evidence, it has no case.

213. Ms Page further relies on Mr Vickers's admission that he was involved in producing a false document for use in the underlying claim (albeit that he subsequently withdrew the document before it could be provided to Kinross), and in giving the defendant instructions in relation to the creation of that document which he now asserts were wholly untrue. Ms Page characterises Mr Vickers's evidence in relation to this incident as *"one of the more extraordinary accounts ever to have been presented to a judge of this Division"*. This all arose in the context of the case advanced by Ms George, the solicitor acting for Kinross, in support of its application to set aside the order permitting service out of the jurisdiction and an extension of time for such service, to the effect that the claim under the ERR contract had no real prospect of success because the claimant was not a party to that contract and the underlying claim must therefore fail. To meet this argument, it became evident that it would be of advantage to the claimant to be able to point to an assignment, by the BVI company to the

claimant, of the debts allegedly due under the Kinross contracts and associated causes of action.

214. On the evening of 21 April 2016 Mr Vickers says (at paragraph 355 of his first witness statement in this claim) that he met Mr Charles Apthorp, the barrister instructed in relation to the underlying claim, at the Carlton Club without any representative of the defendant being present. Mr Apthorp allegedly told him that a deed of assignment was *"absolutely necessary"* and, when Mr Vickers told him that there was no existing deed of assignment, Mr Apthorp *"indicated that this was not a problem as the deed of assignment could be backdated"*. Ms Page observes that such advice from a member of the Bar would be extraordinary. As a result of this curious indication, Mr Vickers asserts that he instructed the claimant's accountant (and former director), Mr Mike Williams, to create a backdated deed, ostensibly dated 30 October 2010. This document was then sent to Mr Lever on 28 April 2016. It is clear from the covering email (at page 1904) that that document was presented to Mr Lever as a genuine assignment from 2010: *"As I mentioned earlier .. , after [the claimant] made its assignment in 2010 (see attached) it then made a bad debt provision in the [the claimant's] accounts in the UK in 2012."* The same representation had previously been made to Mr Apthorp in Mr Vickers's email of 27 April (at page 1902), thereby contradicting Mr Vickers's evidence that it was Mr Apthorp who had advised him that the deed of assignment could be backdated. Mr Lever noted, in his email of 5 May 2016 (at page 1905), that the production of this document at such a late stage was going to generate an outraged reaction from Kinross*: "I suggest you all keep your heads down tomorrow as the proverbial is really going to hit the fan. I suspect we will have rarely seen a response of the like."* Ms Page notes that the terms of this email make it clear that, contrary to Mr Vickers's evidence, Mr Lever had not advised Mr Vickers to create a back-dated document, which (as she notes) would have been a remarkable thing to have advised. At this point, Mr Vickers seemingly lost his nerve*: "At this, I realised it had been a mistake to enter into the deed of assignment and backdate it even though I had been following Mr Lever and Mr Apthorp's guidance on this.*: see paragraph 360. Ms Page suggests that the obvious inference from this is that Mr Vickers was aware throughout that what he had done was illegitimate.

215. Mr Apthorp then seemingly drafted an email for Mr Vickers to send to Mr Lever withdrawing the purported deed of assignment. This evidence is given by Mr Vickers (and was raised for the first time in the reply) as if were perfectly normal for one's counsel to draft an email behind the back of their instructing solicitor for their client to send on to that solicitor. Mr Vickers received this draft email (at page 1910) on 6 May 2016 at 11:31. It begins:

> The Assignment letter was prepared in 2010 but was not signed in October 2010.
>
> The original of the unsigned document was found and **Mile** [sic] and I signed it last week on the 26 April 2016. Mike had advised me that it was permissible backdate it to 2010. However, we neglected to initial the assignment as being signed as of the April 21 2016, which is [sic] retrospect both Mike and I would have wished to." (Emphasis added)

Mr Apthorp invited Mr Vickers to *"cut and paste this into a new email and send the accounts"* to Mr Lever. Ms Page submits that this email again shows that the suggestion made by Mr Vickers that Mr Lever had advised him to backdate any assignment is patently false.

216. Mr Vickers then proceeded to send an email in these terms to Mr Lever 45 minutes later (at 12.16). Rather than simply cutting and pasting the text into the new email to Mr Lever (as Mr Apthorp had suggested), Mr Vickers actually corrected the typing error in Mr Williams's name (shown above in bold) by changing ***'Mile'*** (which is of course itself a word which would not be identified as an error in a spell-check) to ***'Mike'***: see page 1912. Mr Vickers now says that there was no such original assignment deed; and (at paragraph 363) that he *"simply copied and pasted the email that Mr Apthorp had drafted and sent it to Mr Lever unaware that it contained a reference to having an original assignment deed until after I had sent it"*. He also says (at paragraph 365) that the email was erroneous because it referred to Mr Williams having given him the advice that the assignment could be backdated. He explains himself (at paragraph 363) by saying that he did not read the email drafted for him by Mr Apthorp before he copied and pasted it into the email which he then sent on to Mr Lever. Ms Page submits that this is wholly implausible; but, in any event, in light of the correction by Mr Vickers of Mr Williams's name (from *'Mile'* in the Apthorp draft to *'Mike'* as sent to Mr Lever) what was implausible becomes obviously false evidence. Nor did Mr Vickers take any steps to correct or clarify the email thereafter. The clear inference, says Ms Page, is that either: (1) there was indeed an original assignment deed, and Mr Vickers is now seeking to conceal its existence (because it would tend to show that the claimant was not a party to the SVP and ERR contracts); or (2) the instructions given to Mr Lever that the deed of assignment was prepared in October 2010, but not signed until April 2016, were entirely untrue and Mr Vickers was aware of this fact at the time they were given. Ms Page submits that: (1) in 2016 Mr Vickers was clearly willing to procure the creation of a knowingly false document with the purpose and intention of using it in court proceedings (although, in the event, he lacked the courage to do the latter); and (2) Mr Vickers's account of relevant events in his witness statement made for this application is wholly inconsistent with the contemporary documents and should therefore be rejected as false.

217. Ms Page also relies on pervasive concerns about Mr Vickers's probity generally in relation to documents in this dispute:

(1) As noted at paragraphs 10-11 of Mr Lever's witness statement served in response to Mr Vickers's first witness statement, the inadequate and partial provision of documents by Mr Vickers was a feature of the defendant's retainer, generating numerous complaints from Mr Lever at the time of the underlying claim. Ms Page characterises as *"extraordinary"* Mr Vickers's suggestion that all relevant documents were in fact provided to Mr Lever, and that Mr Lever never told him that relevant documents were missing. The contemporaneous correspondence – which Mr Vickers does not contradict – is said to be absolutely clear about this.

(2) As set out in detail at paragraphs 108-111 of Ms Morrish's witness statement, Mr Vickers has been entirely opaque about what, if any, financial documents he now has access to. Reliance is placed on conflicting information provided in the defendant's response to the request for further information and in its reply. Ms Page also contends that Mr Vickers's account of the position as regards: (1) the sale of Mr Williams's property in the UK and his move to Eastern Europe early in 2009, (2) his subsequent sudden death, (3) the whereabouts of his copies of the financial records of the claimant and the BVI company, and (4) the limited steps taken to locate and recover these records are all extraordinary. Ms Page criticises the claimant for apparently taking no steps to contact Barclays Bank to see if (as the claimant's sole director) Mr Vickers might be provided with the claimant's historic bank statements in the absence of any grant of probate to Mr Williams's estate.

(3) Ms Page submits that, on any analysis, the claimant has demonstrably failed to comply with its obligations under PD 51U as to the preservation of documents. Preliminary enquiries undertaken by the defendant's solicitors indicate that Mr Williams's property was sold on 10 December 2018 (approximately six months before his alleged death) and the company's registered office was consequently changed from Mr Williams's property in Saltburn-by-the-Sea to Mr Vickers's own property in East Sussex on 16 January 2019. Ms Page contends that Mr Vickers must have been the instigator of this change (given that he was the claimant's sole director) and he must therefore have been aware that Mr Williams's house had been sold. In such circumstances, the suggestion that he took no steps to preserve the documents previously stored by Mr Williams is extraordinary, particularly in light of the fact that Collyer Bristow LLP's 17-page pre-action letter of claim was sent a mere three months later, on 18 April 2019. To allow key documents relevant to this claim, of which the claimant apparently had no copies, to remain in the hands of Mr Williams, who had by then sold his home, was a patent breach of paragraph 3.1 (1) of PD 51U. The apparent result is that the claimant is simply unable to answer numerous pertinent requests for further information which the defendant has raised. Self-evidently there will be no opportunity to remedy this defect by obtaining evidence from Mr Williams (on which he could be cross-examined at trial).

(4) The claimant has been unwilling to provide the defendant with another category of documents (which must be within Mr Vickers's possession or control) over the course of this dispute. On numerous occasions the defendant has sought disclosure, by letters from its solicitors (RPC) to the claimant's then solicitors (Collyer Bristow LLP), of Mr Vickers's correspondence with Mr Apthorp to which the defendant was not copied in or included. These requests were made on four separate occasions between 16 March 2020 and 23 November 2020. Notwithstanding this, all such requests have been refused, and Mr Vickers has instead chosen to disclose cherry-picked material by way of the exhibit to his first witness statement, notably the important email of 6 May 2016 timed at 11.31 from Mr Apthorp (at page 1910, and referenced above) which was only disclosed with the reply.

218. Ms Page submits that there is therefore a real question as to whether the claimant will give full disclosure of all relevant documents in its control, and even as to whether documents which the claimant may produce in future relating to the finances of itself and the BVI company are genuine (given the earlier denial that they are in Mr Vickers's possession, and his acknowledged previous willingness to create a false document). Even if (which the defendant disputes) those questions can be resolved in the claimant's favour, there is a further question as to whether, in the absence of the majority of the two companies' financial records, and in circumstances where the claimant has clearly breached its obligations under PD 51U, there can be any fair resolution of the very important issues which arise in this case if the claimant and Mr Vickers simply no longer have highly relevant documents.

219. Towards the end of Ms Page's oral submissions I referred to the deed of indemnity dated 6 December 2021 by which the claimant had provided security for the defendant's costs (in the sum of £260,000), and suggested that the court might require this to be supplemented by the provision of further security, in an amount equal to the defendant's approved budgeted costs to trial, as a condition of any order permitting this claim to proceed to trial. Ms Page indicated that any such order should also be conditional on appropriate amendments to the claimant's statement of case so that the claim might proceed to trial on an orderly footing. At no time during the course of his

oral submissions in response to Ms Page did Mr Bowles suggest that the claimant might be unable to comply with any such condition.

220. In his skeleton argument, Mr Bowles submitted that the defendant's suggestion that the court should simply strike out the claim because the claimant only has access to a limited number of its financial records is wholly misconceived. The court should only exercise this jurisdiction in circumstances where there is a real risk that any order made following a trial will be *"unsafe".* This case simply does not get close to that.

221. Rather, the court will be faced with the (admittedly unenviable) task of trying to ascertain, based on the evidence it has, whether the claimant can establish the losses it claims on the balance of probabilities. The absence of the underlying financial documents is hardly likely to render any decision made by the court at trial *"unsafe"* since:

(1) The financial documents do not answer the key issues in this case. In reality they go to only one point: who was the contracting entity. It appears that the defendant seeks to assert that the absence of evidence of transfers of funds from the BVI company to the claimant is sufficient to show that the former was in fact the contracting party.

(2) In any event, the court has a wealth of evidence, which will be supplemented by oral evidence at trial, in relation to who the true contracting parties were.

(3) The remaining important factual evidence: the contracts, the evidence of the performance of the recruitment searches, and the evidence of the defendant's breach of duty is in existence and can be considered by the court at trial. The court will only lack one small (and fairly tangential) piece of evidence, being the claimant's accounting documentation. This would not necessarily, or typically, be adduced on a simple breach of contract claim.

(4) The court also has some (albeit incomplete) evidence of the payments that were made, and some of the internal transfers between the BVI company and the claimant.

As such, the absence of these documents plainly will not make any trial unsafe. It will simply mean that the court will have to undertake the trial with the best evidence that the parties can put before it (albeit that this may be incomplete).

222. Moreover, the absence of documentation is unlikely to assist the claimant's position. To the extent that there any inferences that can be drawn based on the absence of documents, these will only assist the defendant, as the court will not allow the claimant's failure to produce documentation to enure for its benefit.

223. Finally, to the extent that the claimant suggests that the failure to maintain such documents should lead to a strike out of the whole of the claim under CPR 3.4 (2) as being a breach of the requirement to maintain potentially disclosable documents, Mr Bowles submits that such a remedy would be wholly disproportionate. This is especially so where the death of Mr Williams has left the claimant in an exceedingly difficult position.

224. It is clear that at the time he prepared his skeleton argument, Mr Bowles had not fully appreciated that the defendant's application was founded not simply upon the lack of available documentation, but on the wider principle that the claimant's conduct in these proceedings has put *"... the fairness of the trial in jeopardy, where it is such that*

any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice", to adopt the language of Chadwick LJ in *Arrow Nominees* (cited above).

225. In his oral submissions, Mr Bowles emphasised that this principle requires the court to be satisfied that a fair trial will be impossible, that any judgment in the claimant's favour would be unsafe, and that there is a real risk that justice will not be done if the case proceeds to trial. Any misconduct relied upon must be so serious that it would be an affront to the court to permit the claimant to continue to prosecute its claim to trial. That sets a very high bar: has the claimant so advanced its case that it has forfeited its right to have its claims considered, and determined, by the court. Whether viewed individually or taken together, none of the matters relied upon by the defendant gets anywhere near to surpassing this bar.

226. Mr Bowles emphasises that the Moscow office costs are no longer being claimed and they will not be in issue at trial. Essentially, the issue goes to Mr Vickers's credibility, and that is an issue for trial. Mr Bowles accepts that Mr Vickers's explanation is not as full as it should have been; but that is a matter for investigation at trial.

227. As to the claim in respect of the 11 uninvoiced positions, Mr Bowles submits that it was only after Mr Vickers had consulted new lawyers, who then undertook a full and proper examination of the true position, that he had come to appreciate that the claimant was not limited to claiming for the 21 invoiced positions. There is nothing dishonest about this part of the claim; and Mr Vickers should have an opportunity to explain his conduct at trial before any finding of dishonesty is made against him. It is not for the court to speculate on Mr Vickers's state of mind: he should be allowed to answer for himself. His case on the 11 uninvoiced positions in no way renders any trial unsafe.

228. Mr Bowles points to the substantial volumes of documents that were provided to the defendant in its prosecution of the underlying claims. It is Mr Vickers's evidence, and the claimant's case, that it was Mr Lever who was not in control of the documents he had received from the claimant; and that, when challenged, Mr Lever simply refused to acknowledge his errors but rather sought to conceal them. The criticisms of Mr Vickers concerning the lack of documents are very much in dispute. The claimant should be able to recover some further financial documents from its bankers, both in this country and in Cyprus. Any lack of relevant documentation will not make the trial unfair or unsafe. To the extent that any relevant documentation is missing, that will operate to the detriment of the claimant, which bears the burden of proof in this claim, rather than the defendant. The court will draw adverse inferences against the claimant from any lack of relevant documentation so the only party prejudiced by any missing documents will be the claimant. Mr Bowles referred me to the observation of Lord Briggs in ***Merricks v Mastercard In***c [2020] UKSC 51, [2021] Bus LR 25 at [74]: *"The incompleteness of data and the difficulties of interpreting what survives are frequent problems with which the civil courts and tribunals wrestle on a daily basis."* The underlying claims are contractual claims based on unpaid invoices. The court will not be required to investigate the manner of the claimant's operations. Any missing documents do not go to the heart of this case, which is in no way out of the ordinary.

229. As for the deed of assignment, Mr Bowles submits that Mr Vickers has provided a full explanation at paragraphs 334 to 367 of his witness statement. He referred me to an email from Mr Lever to Vickers (and copied to Mr Apthorp) dated 6 May 2016 and

timed at 10.33 am (at page 1909) which, he said, shows that Mr Apthorp had insisted to Mr Lever that Mr Vickers had acted innocently. The full text of that email reads:

> In accordance with your instructions we did not send the letter. That was against my better judgement but I could not reach Charles last night – we kept missing each other.
>
> Now I have spoken to Charles this morning and I understand the situation. I am content that that letter is not sent but the situation still seems to require some explanation. I am again disappointed that you have given us false instructions re the assignment but to be fair Charles insists you did so innocently and thought you were helping.
>
> I cannot emphasise enough and I will not emphasise again how you are obliged to be 100% open and transparent with us. I do appreciate that you were concerned about us *'telling you off'* again but we do not tell you off. We are obliged to say certain things to you at certain times. That is our job.
>
> So to recap.
>
> Your instructions now are that when you eventually located the original assignment it was not signed. You then signed it. I want to know exactly when this was. You then gave us a copy of the signed one and now Charles has or has seen the original. Therefore the assignment was invalid and we are fine. But there are 2 issues with this. Firstly you or Mike registered *something* with the accounts at company house which can be easily obtained by CP [Chadbourne Park, who were Kinross's solicitors]. What was that, when and why?
>
> Secondly you can *'assign by conduct'*. Charles is looking into this.
>
> You still need to explain the position and you need to urgently speak to Mike.
>
> If CP turn up next week waving whatever that something that was with the accounts was and if you haven't explained yourself the Master will roast you alive!
>
> Please can I have a plan for going forward from you both as I note that most of the conversations are directly instructed.

It was this email that provoked Mr Vickers to send his email to Mr Lever, timed at 12.16, and based on Mr Apthorp's draft, but with the word '*Mile'* corrected to *'Mike'*, in which Mr Vickers stated that the assignment letter had been prepared in 2010 but was not signed until the previous week (on 21 or 26 April 2016).

230. Mr Bowles submits that there are three possibilities: (1) Mr Vickers had been given very bad advice by his lawyers. (2) If their advice was appropriate, that Mr Vickers had misunderstood the advice they had given to him. (3) Mr Vickers was deliberately seeking to mislead Kinross and his lawyers. Of these three options, Mr Bowles submits that the third is the least likely because if that were the case, why should Mr Vickers have then instructed the defendant not to send the assignment to Kinross's solicitors?

231. In the course of her oral reply, Ms Page took me to observations of Ward LJ in his concurring judgment in *Arrow Nominees* (cited above). At [72], he criticised the lower court for viewing

> … the risk of a fair trial not being possible as the factor of crucial, even overriding, weight. It undoubtedly is a factor of very considerable weight. It may often be determinative. If the court is satisfied that the failure to disclose a document or the effect of a tampered document can no longer corrupt the course of the trial, then it would be a factor of much less and perhaps even little weight in considering a strike out. Where, in my judgment, Evans-Lombe J erred, was to treat the question of a fair trial as the only material factor. It was not: other matters have now to be put in the scales and weighed.

At [73] Ward LJ observed that: *"The attempted perversion of justice is the very antithesis of parties coming before the court on an equal footing."* In that case, the petitioners' conduct had added considerably to the time and costs of the trial; and it resulted in one of them "*forfeiting his right to continue to be heard"* (at [75]). Ms Page submits that the litmus test is not only whether a fair trial is still possible but whether the claimant has been guilty of misconduct to a such degree as to lead to it forfeiting its right to have its claim determined at trial.

232. Ms Page reiterates that Mr Vickers has provided no credible explanation for his false statements (verified by statements of truth) about the costs of setting up a non-existent Moscow office nor has he made any attempt to purge his consequent contempt of court. Mr Bowles has relied on Mr Vickers's lack of explanation as a reason for permitting him to be cross-examined at trial but what is this likely to achieve? There is no real prospect that he can retrieve his credibility at trial. It cannot be in furtherance of the overriding objective for Mr Vickers to be allowed to pursue this claim to trial. This is precisely the sort of case where he has forfeited the claimant's right to have its case brought to trial, and the court should put a stop to the case now. Mr Vickers's expressed concerns about the way his instructions have been misinterpreted is yet another attempt to muddy the waters. Ms Page took me to a further document, dated 9 May 2015 (at page 785), where Mr Vickers was clearly commenting upon, and explaining, the figures for the Moscow office costs and a letter from Mr Williams, who is (misleadingly) described as an *"independent accountant"*. This document reads:

> Spreadsheet from Williams confirming a reduced costs claim of US $780,229.00 for the period to 30 November 2009 ... and NOT $846,939.00 as entered in High Court claim
>
> Problem. HSL did not recover the original documents for expenses and wages from HSL Moscow when the offices were shut. The HSL [claimant's] Russian employees left with all of their computers and we understand that the filing cabinets were emptied and thrown away.
>
> However, Mr Williams was appointed to manage payments re the Moscow operations and to construct accounts .
>
> In addition there are payment transfers from HSL bank to Mike Williams business account during 2008 and 2009 showing large amounts that were

> paid by HSL to Williams business account for disbursement on behalf of HSL to run its Moscow operations.
>
> Mr Williams would also provide a statement concerning the Moscow costs and accounts

Ms Page submits that this shows the degree to which Mr Vickers has developed his deception, directed to his own former solicitor, Mr Lever. There never were any Russian employees or any filing cabinets. Where is there any scope for ambiguity, or for misapprehending Mr Vickers's clear instructions?

233. Mr Bowles had submitted that Mr Vickers had thought that he was limited to claiming only for those employees for whom invoices had been submitted. However, this does not bear serious scrutiny. Ms Page referred me to the document prepared by Mr Vickers and headed *'Explanation'* which he attached to his email to Mr Lever dated 22 June 2015 (and copied to Mr Apthorp) at pages 771-2 which concludes: *"It seems unlikely that anyone else other than Kinross Russia would have given this instruction to THR to recruit the same people as Kinross had instructed HSL to recruit for them to replace 21 expatriate employees in Kupol Russia with specific names."* That was a clear statement of fact to Mr Lever that the claimant had been instructed to replace 21 expatriate employees in Kupol Russia, with specific names. Those were his instructions to the defendant. Mr Vickers has had ample opportunity to explain these instructions in his witness statement; and Mr Bowles did not address this document in his submissions.

234. As for Mr Bowles's submission that it is only the claimant that will suffer any prejudice from the lack of relevant documentation, Ms Page responds that the defendant has not yet got the full picture from the documents and it is unlikely ever to do so. This is a case where the claimant has already advanced (for the second time) a false claim verified by a statement of truth from which it has had to resile when it was caught out, without any plausible explanation, or any excuse or apology. Mr Vickers (and the claimant) seem to regard such conduct as acceptable. In circumstances where the defendant does not have access to the full documents, it may never know whether other factual assertions made by the claimant are untrue. There must be a very real danger that the defendant will never find out if any part of the claim which the claimant may establish at trial would have been shown to be false had the full documents been available.

235. Ms Page submits that it is clear that not only did Mr Vickers create a false document with the intention, and expressly for the purpose, of placing it before the court in aid of the underlying claim, but that his account of this episode in his witness evidence for this application does not stand scrutiny against the underlying contemporary documents. This is said to be a further example of the unreliability of Mr Vickers's evidence generally. The date at paragraph 345 of Mr Vickers's first witness statement (*'around 14 May 2016'*) clearly cannot be correct because many of the relevant emails precede this date. The *"angry exchange"* between Mr Abhorp and Mr Vickers, which the latter relates at paragraph 360, is clearly inconsistent with Mr Apthorp's contemporary understanding, as expressed in the emails of 6 May at pages 1909 and 1910: Mr Apthorp apparently understood that Mr Vickers had located an unsigned assignment prepared in 2010; yet Mr Vickers's evidence is that Mr Apthorp had advised that he should create an assignment and backdate it, which Mr Vickers then proceeded to do using a template that Mr Williams had only found online on 17 April 2016. However, this is entirely inconsistent with Mr Vickers's email to Mr Lever of 28

April 2016 (at page 1904), which includes the following: *"Just in case, here is the assignment letter and 2012 accounts. As I mentioned earlier … , after [the claimant] made its assignment in 2010 (see attached) it then made a bad debt provision in the [claimant's] accounts in the UK in 2012."* At the very best (for the claimant), Mr Vickers was lying to his own solicitor about the date the assignment had been created (and signed); and if Mr Vickers's evidence is to be accepted, Mr Apthorp, a practising member of the Bar (called in 1983), must have been colluding in that deception. However, it is clear from the email that Mr Vickers sent to Mr Apthorp on 27 April 2006 (at page 1902), that Mr Apthorp was also being told that the claimant *"had made its assignment in 2010"*. Mr Apthorp, too, was a victim of Mr Vickers's deception.

236. For all these reasons, Ms Page submits that this is one of those rare cases where it is entirely appropriate for the court to strike out the claim for abuse of the court's process. These are exaggerated and dishonest claims which have no real prospect of success.

237. I accept Ms Page's submissions on this aspect of the case. I agree with her analysis and her reasoning.

238. I accept that the court has an inherent jurisdiction to strike out proceedings where the claimant's conduct, past and reasonably to be apprehended, puts the fairness of the trial in jeopardy; where it is such that any judgment in favour of the claimant would have to be regarded as unsafe; or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory, and to prevent the court from doing injustice to the defendant. If it were necessary to identify a source for this jurisdiction in the Civil Procedure Rules (which it is not, because the court has an inherent jurisdiction to act so as to preserve the integrity of the trial process), it is to be found in the duty imposed on the parties, by CPR 1.3, to help the court to further the overriding objective of enabling the court to deal with the case justly, thereby engaging (in addition to the inherent jurisdiction) the jurisdiction to strike out under CPR 3.4 (2) (c) for non-compliance with CPR 1.3. I note that at the end of his concurring judgment in *Arrow Nominees* (at [77]), Ward LJ explained that he had added his observations to the judgment of Chadwick LJ *"… simply to underline that the principles to apply are those in the new procedural code. They are encapsulated by the need to do justice, case by case. In this case it is no more than justice in that broad sense that the petitioners should be denied the relief which they sought to obtain by persistent cheating."* This is a separate, albeit a complementary, jurisdiction to that which falls to be considered in response to any failure of disclosure.

239. I accept Ms Page's submission that this is a case where the claimant (through its sole director, and principal and controlling shareholder, Mr Vickers) has grossly and knowingly exaggerated the values of both this claim and the underlying claim. I am entirely satisfied that Mr Vickers is neither a reliable nor a credible witness, whose evidence cannot safely be relied upon. I also accept that there are difficulties over the disclosure of documents, and genuine concerns about whether full and proper disclosure can or ever will be given by the claimant. On their own, these difficulties and concerns over disclosure would not have justified the court in striking out this claim, or in refusing to allow it to proceed to trial; but when they are allied to the unreliability and lack of credibility of Mr Vickers, the claimant's controlling mind and sole or principal witness of fact, they are matters of real concern because of the potential lack of availability of relevant documents to challenge his evidence and case.

240. By consent, paragraph 60 (5) of the particulars of claim, and all other claims in relation to the so-called Moscow office costs, should be struck out. This claim is, and always was, manifestly unsustainable, both in fact and in law, and it should never have been advanced. I am satisfied that this was a deliberately exaggerated claim, dishonestly advanced by Mr Vickers against the defendant after it had previously been advanced, and then abandoned, in the underlying claim. This is one of those very rare cases where it is possible for the court to discount any other explanation on the papers, and without cross-examination of Mr Vickers, because deliberate, and dishonest, exaggeration is the only explanation which is reconcilable with the reliable contemporary documentary evidence.

241. I accept Ms Page's analysis of the evidence (as summarised above), both generally and particularly concerning the production of the false deed of assignment. I find that the contemporary documentation is utterly compelling. One starts from a position where Mr Vickers has admitted that he was involved in producing a false deed of assignment from the BVI company to the claimant for use in the underlying claim (albeit that he subsequently withdrew the document before it was supplied to Kinross). I am satisfied from the contemporary documents that he lied to the defendant (as the claimant's solicitors) and to his retained counsel at the time, and now to this court about the circumstances in which he came to produce this document. I accept Ms Page's submission that: (1) in 2016 Mr Vickers was clearly willing to procure the creation of a knowingly false document with the purpose and intention of using it in court proceedings (although, in the event, he thought better and withdrew it); and (2) Mr Vickers's account of relevant events in his witness statement made for this application is wholly inconsistent with the contemporary documents and should be rejected as false. I am also satisfied that he lied to his solicitors and counsel about the creation of this false document at the time he fabricated it.

242. As I have already explained, I am satisfied that there is no truth or substance in Mr Vickers's evidence that he ever considered that the ERR contract extended to any more than the 21 individuals for whom the claimant invoiced Kinross, or that Mr Vickers ever considered that the claimant might have had any entitlement to any greater fee. Mr Vickers's evidence about the scope of the claimant's retainer under the ERR contract is so wholly inconsistent with, and contradicted by, the reliable contemporaneous documentary evidence as to be entirely lacking in credibility and incapable of belief.

243. Mr Vickers has been responsible for advancing claims that he must have appreciated were hopeless. The claim under the SVP contract was doomed to failure because there is simply no conceivable or realistically arguable answer to the defence of waiver. The claim to any further fee for any work done to resource or recruit a replacement candidate for Dr Cowley's role under the RVP contract (or any suggested new or replacement RVP contract) was wholly fanciful and bound to fail. In my judgment, the true position is entirely clear on the incontrovertible documentary evidence, without the need for any oral evidence or cross-examination at trial. At all times both Kinross and Mr Vickers understood that the claimant was working on the basis that it would be charging Kinross no further fee, on the footing that it was already bound by sub-clause 3.1 of the RVP contract to provide a replacement without charge.

244. So, for all these reasons (and for the further reasons advanced by Ms Page, which I accept) this court would be amply justified in refusing to allow what remains of this claim to proceed to trial. However, I am conscious that this would be a most unusual, and draconian, course to take. The court should not do so if there is some other, less

drastic course open to it. In my judgment there is such a course. In the exercise of the court's powers of case management, it should allow any remaining claim to proceed, but only on strict conditions. First, the claimant's statement of case will require comprehensive re-casting and re-writing, to reduce both its length and complexity, and to confine it to what, following this judgment, now remains live and in issue: effectively any remaining claim for the loss of the opportunity (after taking any necessary assignment of the remaining underlying claim) to pursue a claim for fees for the 21 invoiced positions under the ERR contract alone. Secondly, since the proceedings thus far will be superseded by this new, and greatly reduced claim (in terms both of complexity and amount), the claimant will be required to pay either the whole, or a part, of the costs incurred by the defendant to date (with an interim payment on account). Thirdly, the claimant should be required to provide security for the defendant's budgeted costs if and when these are approved by the court. If whoever is funding the claimant has insufficient confidence in the outcome of this litigation to provide the further funding required for this, then it would seem to me to be just, and in accordance with the overriding objective, for this claim to be struck out.

15: Provisional conclusions

245. For the reasons set out above, I have concluded as follows:

(1) Were I to determine the issue as to the true identity of the parties to the SVP and ERR contracts on the present application, I would be likely to find that the BVI company contracted as principal with Kinross. However, I consider that it is neither necessary nor appropriate for me to resolve this issue because, on the footing that the contracting party to the SVP and the ERR contracts was the BVI company and not the claimant, I am satisfied that there is a triable issue, with real prospects of success, as to whether the defendant, as a reasonably competent solicitor, should have identified this fundamental obstacle in the way of the underlying claim and advised the claimant as to how it might be overcome. Given that issue four has to go to trial, and because it is so closely bound up with the prior issue of the identification of the true parties to the SVP and ERR contracts, I do not consider that it would be a proper exercise of the court's discretion to circumscribe the freedom of any trial judge to determine that prior issue by purporting to make any final determination on issue three. However, the claimant would need to amend its particulars of claim so as to plead this issue properly.

(2) Neither the SVP contract nor the ERR contract were *'retained assignment'* contracts entitling the claimant to receive any fees under them in circumstances where a third party, rather than the claimant, had recruited an applicant for a position under the ERR contract.

(3) It would never have been open to Kinross (and so it is not open to the defendant) to seek to defend any claim for damages for breach of the ERR contract by asserting, contrary to the facts, that it had terminated that contract by notice under clause 3.2.

(4) As a matter of its true construction, there is absolutely no substance whatsoever in the claimant's case that the ERR contract extended to the recruitment of 32 individuals and no reasonable reader of the contract would ever have concluded that it did. As a matter of construction, the true scope of the ERR contract was limited to (at most) 24 named individuals and (more likely) the 21 positions for which the claimant invoiced Kinross.

(5) Even if I am wrong about the true scope of the ERR contract as a matter of construction, there is no substance in the claimant's case that the defendant acted in breach of any duty it owed to the claimant, as a reasonably competent solicitor, in failing to identify that the ERR contract covered recruitment to any additional positions, or to pursue the underlying claim on the basis that the claimant was entitled to fees calculated by reference to any more than the 21 individuals for whom invoices had previously been submitted to Kinross. There is no truth or substance in Mr Vickers's evidence that he ever considered that the ERR contract extended to any more than the 21 individuals for whom the claimant had invoiced Kinross, or that Mr Vickers ever considered that the claimant might have had any entitlement to any greater fee. Mr Vickers's evidence about the scope of the claimant's retainer under the ERR contract is so wholly inconsistent with, and contradicted by, the reliable contemporaneous documentary evidence as to be entirely lacking in credibility and incapable of belief. The claimant has no conceivable, or realistic, basis for seeking to recover the uninvoiced sums from the defendant. The claim against the defendant is properly limited to the 21 positions for which the claimant had raised invoices against Kinross; and, on this basis, the question whether, on its true construction, the ERR contract related to 32, or only to 24, positions strictly falls away.

(6) The claim under the SVP contract is utterly hopeless, and is doomed to failure because there is simply no conceivable or realistically arguable answer to the defence of waiver. For the reasons given by Ms Page, which I accept, this is a classic case of contractual waiver by accord and satisfaction, or, if not, of waiver by estoppel.

(7) The claim to be entitled to receive any further fee for any work done to resource or recruit a replacement candidate for Dr Cowley's role under the RVP contract (or any suggested new or replacement RVP contract) is wholly fanciful, entirely lacking in any reality, without any substance, has no real prospects of success, and is bound to fail. In my judgment, the true position is entirely clear on the incontrovertible documentary evidence, without the need for any oral evidence or cross-examination at trial. At all times both Kinross and Mr Vickers understood that the claimant was working on the basis that it would be charging Kinross no further fee, on the footing that it was already bound by sub-clause 3.1 of the RVP contract to provide a replacement without charge. This aspect of the claim should either be struck out or summarily dismissed.

(8) Whatever the position may turn out to be at trial, I am not satisfied that the defendant, on which the burden lies, has demonstrated that the provision in clause 10.6 of each of the three contracts for interest to be payable on overdue invoices at a rate of 2% for each period of fourteen days' delayed payment is self-evidently, and indisputably, so exorbitant, extravagant or unconscionable as to constitute a penalty. I therefore dismiss this part of the defendant's application.

(9) It cannot sensibly be maintained that the claim for an award of interest at 8% pa, whether in the underlying claim or in the present litigation, is bad in law, or that the claimant has no real prospect of succeeding on it. I therefore dismiss this part of the defendant's application.

(10) Mr Bowles's entirely justified concession that Mr Vickers's evidence (at paragraph 332 of his first witness statement in these proceedings) that he had told Mr Lever (of the defendant) that the ERR contract covered 32 people on at least one occasion was inaccurate has implications for the reliability, and the credibility, of the remainder of Mr Vickers's extensive evidence. At best (for the claimant), it demonstrates that his recollection of events (even when verified by a statement of

truth) is inaccurate, opportunistic, and unreliable; and that his evidence is slapdash. At worst (and much more likely), his evidence at paragraph 332 was deliberately dishonest. On either view, Mr Vickers's evidence generally must clearly be approached with great caution.

(11) By consent, paragraph 60 (5) of the particulars of claim, and all other claims in relation to the so-called Moscow office costs, should be struck out. I am satisfied that this claim is, and always was, manifestly unsustainable, both in fact and in law, and it should never have been advanced. This was a deliberately exaggerated claim, dishonestly advanced by Mr Vickers against the defendant after it had previously been advanced, and then abandoned, in the underlying claim. This is one of those very rare cases where it is possible for the court to discount any other explanation on the papers, and without cross-examination of Mr Vickers, because deliberate, and dishonest, exaggeration is the only explanation which is reconcilable with the reliable contemporary documentary evidence.

(12) Mr Vickers has admitted that he was involved in producing a false deed of assignment from the BVI company to the claimant for use in the underlying claim (albeit that he subsequently withdrew the document before it was supplied to Kinross). I am satisfied from the contemporary documents that he lied to the defendant (as the claimant's solicitors), his retained counsel, and to this court about the circumstances in which he came to produce this document. I accept Ms Page's submission that: (1) in 2016 Mr Vickers was clearly willing to procure the creation of a knowingly false document with the purpose and intention of using it in court proceedings (although, in the event, he lacked the courage to do the latter); and (2) Mr Vickers's account of relevant events in his witness statement made for this application is wholly inconsistent with the contemporary documents and should be rejected as false.

(13) In the exercise of the court's powers of case management, the court should allow any remaining claim to proceed, but only on the strict conditions I have outlined above.

246. These conclusions are provisional only in the sense that they are subject to the contents of the following postscript to this judgment

16: Postscript

247. As explained at paragraph 8 above, the foregoing 15 sections of this judgment largely follow the terms of the draft judgment that was circulated to counsel on 5 September 2022 (subject to minor corrections and tidying-up). For the defendant, Ms Page submits that no claim with any, or any real, prospect of success survives the findings in my draft judgment, and that the appropriate form of relief must be for the whole claim to be struck out and/or summarily dismissed (with costs). Ms Page further invites the court, should it accede to that submission, to re-consider its decision not to make any final findings as to the identity of the parties to the SVP and ERR contracts (issue three) despite its decision that issue four raises a triable issue.

248. Given the amount of court and judicial time that has already been allotted to this protracted application to strike out and/or for summary judgment, I am satisfied that it is entirely in accordance with the overriding objective for the court to determine the consequences of my draft judgment for the future conduct and disposal of this claim on the basis of the helpful further written representations I have received from counsel (for which I thank them).

(a) Ms Page's further submissions

249. Ms Page points out that the court has found (on issue four) that there is a triable issue as to whether the defendant should have identified and advised the claimant as to the correct parties to the SVP and ERR contracts, and how this problem might have been overcome. The court has concluded that what effectively remains live (following the judgment) is a claim for the loss of the opportunity (after taking any necessary assignment of the remaining underlying claim) to pursue a claim for fees for the 21 invoiced positions under the ERR contract alone. However, Ms Page submits that the court has found (on issue five) that the claim in relation to the ERR contract, on which the claim for the 21 invoiced jobs depends, has no real prospect of success and/or should be struck out; and (at paragraph 82) *"… that the claimant had no, or no real, prospect of recovering the sums that it says it would have recovered from Kinross, such that, even if any alleged breach of duty by the defendant were made out: (1) the particulars of claim disclose no reasonable grounds for bringing that part of the claim and (2) the claimant has no, or no real, prospect of succeeding in showing that such breach caused that part of the claimed loss".* Citing paragraph 20 of the particulars of claim, Ms Page contends that the claim for unpaid fees allegedly due under the ERR contract was fundamentally premised on the claimant's contention that it was a *"retained assignment"* agreement. She submits that this contention cannot survive the court's rejection of the claimant's case that the ERR contract contained any express or implied term to that effect.

250. Ms Page points out that there is no issue of fact as to whether it was the claimant or third parties who introduced the candidates whom Kinross recruited for the ERR positions. The claimant does not contend that it introduced any of the candidates recruited by Kinross into those positions. On the contrary, the claimant's pleaded case (at paragraphs 56 and 57 of the particulars of claim, and confirmed at paragraphs 314 to 316 of Mr Vickers's first witness statement) is that the candidates were indeed introduced to Kinross by other recruitment agencies. Moreover, Ms Page notes that the last sentence of paragraph 53 of my judgment records that Mr Bowles accepted that if the defendant were to succeed on issue five, that would dispose of that part of the claim relating to the SVP and ERR contracts.

251. Ms Page submits that it follows from the court's findings on issue five that there is no claim for any loss of the opportunity to pursue a claim for any fees for the 21 invoiced positions under the ERR contract which has any real prospect of success. This is because even if (which is denied) any breach of duty were to be established, the claimant has no, or no real, prospect of showing that the breach caused any loss to the claimant in respect of the 21 invoiced roles. By reason of the court's findings on issues five (a retained assignment contract), nine (the SVP contract), and ten (the RVP contract), there are simply no claims in respect of the recovery of unpaid fees which survive. As the claims to interest are parasitic on those underlying claims, they too have no realistic prospect of success, and there is no other reason why they should go to trial: they simply fall away.

252. Ms Page therefore submits that no claim with any, or any real, prospect of success survives the findings in this judgment; and that the appropriate form of relief must be for the whole of the claim to be struck out and/or summarily dismissed (with costs).

(b) Mr Bowles's response

253. Mr Bowles does not dispute that, by reason of the court's findings on issues nine and ten, there are no surviving claims in respect of the recovery of unpaid fees relating to the RVP and SVP contracts; and that the sole remaining area of dispute is in relation to the ERR contract. He submits that unpaid fees are still recoverable in relation to that contract, irrespective of the court's findings on issue five (retained assignment).

254. Mr Bowles notes that the defendant's argument that the claimant has no claim for fees under the ERR contract is premised on the following:

(1) The undisputed fact that the defendant did not source any of the candidates for the 21 positions under the ERR contract.

(2) The court's finding that the ERR contract was not a retained assignment contract, so the claimant is unable to maintain any claim to be entitled to receive fees in circumstances where a role was filled by a third party rather than the claimant.

(3) The defendant's assertion that the claimant is not entitled to receive any fees under the ERR contract at all, as its claim was *"fundamentally premised"* on the ERR contract being a retained assignment agreement.

255. However, Mr Bowles submits that the defendant's analysis fails properly to appreciate: (1) the payment terms contained in the ERR contract, (2) the claimant's pleaded claim in relation to that contract, and (3) the true effect of the court's findings on issue five.

256. Mr Bowles contends that it is clear from the express terms of clauses 1 and 2 of the ERR contract that the first two tranches (each of 33% of a candidate's first year's gross annual remuneration) fall to be paid in the circumstances and at the times provided for by clause 2.3, namely (1) the first tranche is payable upon Kinross accepting the contract, and (2) the second tranche is payable upon the claimant presenting to Kinross a qualified set of short list candidates as approved by Kinross. Whether or not Kinross actually recruited those candidates is irrelevant for the purposes of determining whether any fees have become payable under those first two tranches. As such, Ms Bowles contends that the question of whether the ERR contract was a retained assignment contract was only relevant in relation to the third tranche of fees (as the claimant was claiming to be entitled to fees for the placement of candidates it had not presented to Kinross). Mr Bowles accepts that the claimant can no longer claim any sums in respect of the third tranche of fees by virtue of the court's finding that it would only have been entitled to receive the third tranche of fees when a candidate sourced by the claimant received a signed offer letter. Mr Bowles submits, however, that nothing in the court's conclusions on issue five would prevent the claimant claiming fees under the first and second tranches (as long as it can prove that the appropriate criteria are made out). He emphasises that it is important to appreciate the limited scope of the conclusion that the court has reached at paragraph 82 of its judgment, which relates solely to *"the issue whether the SVP and ERR contracts were 'retained assignment' contracts entitling the claimant to receive fees under them in circumstances where a role was filled by a third party rather than the claimant"*. Mr Bowles says that it is clear from this that the court only struck out, or entered summary judgment in relation to, the claims under the ERR contract in so far as they related to the third tranche of fees (as that was the only tranche which was concerned with the question whether the contracts were *"retained assignment"* contracts). Mr Bowles contends that this is not the entirety of the claims under the ERR contract.

257. In his note, Mr Bowles proceeds to address the way in which the claims in relation to the ERR contract are pleaded in the particulars of claim (at paragraphs 53 and following) and the evidence of Mr Vickers in his first witness statement (at paragraphs 321-329) as to the three invoices raised under that contract (on 16 March 2009, 29 September 2010, and 11 November 2010). The first invoice relates to the first tranche of fees and was raised in a sum less than the claimant was entitled to, with the intention of effecting a later reconciliation. The second invoice relates to the remaining fees due under the ERR contract, and was raised to cover: (1) the remainder of the first tranche (being the difference between the first invoice and the sum which should have been paid invoiced for 21 roles), (2) the fees due for the second tranche, and (3) the fees due for the third tranche. This invoice clearly represents the total fee due under all three tranches, based on assumed bonuses of 25%, less the sums already paid towards the first tranche. As such, it is clear that part of the second invoice relates to the first and second tranches and so remains a loss which the claimant may seek to recover from the defendant, having lost its chance to pursue it as part of the underlying claim. The third (and final) invoice reflects the 35% uplift due and payable for bonus fees that should have been applied to all sums invoiced, and is charged in respect of all three tranches. Mr Bowles submits that it is clear from these three invoices that they relate to the full fee entitlement that the claimant should have claimed under all three tranches of fees.

258. As a result of the findings at paragraph 82 of the judgment, the claimant accepts that the invoiced sums can only be claimed in respect of the first and second tranches of fees; and the claimant also accepts that it must give credit for the payment of the first invoice. In those circumstances Mr Bowles contends that the principal sum that the claimant can claim to have lost the chance to pursue by reason of the defendant's negligence is at least:

(1) US $1,318,190.27 (being the total sum due under all three invoices, without giving credit for the payment made) multiplied by 66% (to give the total sum due under the first and second, but not the third, tranches) being US $870,005.59; less

(2) US $194,197.66 (which has already been paid),

being US $675,807.93

259. In the light of the conclusions reached in the judgment on interest, this can then be claimed under clause 10.6 of the ERR contract (as against the sums outstanding), and then at a rate of 8% under s. 35A of the Senior Courts Act 1981. The contractual interest would be in the region of US $1,824,681.41 to the date of the particulars of claim in the underlying claim. That gives a remaining claim for the loss of a total sum of £2,500,489.34 under the ERR contract. This sum then attracts interest, being (1) up to 6 March 2020 (which is claimed at 8% under s. 35A of the Senior Courts Act 1981), in the sum of approximately US $903,738.52, and (2) thereafter, until judgment or final resolution, at such rate as the court deems fit. Mr Bowles reserves the claimant's right to engage an accountant to calculate this sum properly prior to any re-pleading of the claimant's case. The simple point, however, is that Mr Bowles contends that the claimant retains valuable claims for the loss of a chance.

260. Mr Bowles also addresses Ms Page's invitation to reconsider its decision not to make any findings on issue three (the identity of the parties to the SVP and ERR contracts) should the court accede to her submission that this claim should not go to trial. He submits that it is both unnecessary for the court to change its findings in relation issues

three and four and that it would be wrong in principle for the court to do so. The reason for this is simple: These issues would have been suitable for trial had there been any recoverable loss, and so the court should not (and does not need to) alter its individual conclusions on those issues. The defendant should not simply be saved from having to litigate these triable issues by the absence of any loss. That cannot alter the strength of the underlying point which is that, but for (on this hypothesis) the absence of any loss, the issues of the contracting parties, and the assignment of the remaining underlying claims, would have been suitable for trial.

261. For these reasons, Mr Bowles submits that the court should not alter the conclusions reached in its judgment but should now make orders which will allow the claimant's remaining valuable claim to proceed to trial, once it has been amended in line with the indications set out in the judgment.

(c) Ms Page's reply

262. In her further note to the court, Ms Page reiterates that it follows from the court's finding on issue five that there is no claim with any, or any real, prospects of success so the claim should be struck out in its entirety. She contends that in a last effort to rescue its claim, the claimant now asserts (for the first time) that unpaid fees were recoverable under the ERR contract irrespective of whether it was a retained assignment contract. Ms Page submits that the claimant attempts to do this by contending (wrongly) that the claim, as currently pleaded, includes claims for:

(1) First tranche fees which should have been included within the first invoice, essentially on the basis that the first invoice understated the correct amount then due because (a) it was calculated on the basis of 15 positions whereas, on the claimant's case, the ERR contract was for 21 jobs; and (b) it did not include any sum in respect of bonuses (said to be 60% of final salaries); and

(2) The second tranche of fees on the basis that this was payable by Kinross simply upon the presentation by the claimant of a shortlist of candidates, whether or not Kinross ultimately recruited those candidates.

263. Notwithstanding that the judgment records (at paragraph 53) Mr Bowles's acceptance that issue five would dispose of the claim relating to the SVP and ERR contracts, Ms Page points out that he is now submitting that issue five only pertained to the third tranche of fees. Ms Page contends that this is wrong for several reasons:

264. First, the claimant's pleading is explicitly on the basis that it was entitled to unpaid fees from Kinross because the ERR contract was a retained assignment contract. Ms Page points to paragraph 57 of the particulars of claim, which expressly, and unequivocally, pleads that*: "Upon the appointment of a candidate into a role contained in the ERR Contract, [the claimant] became entitled to receive payment of its fees under the ERR Contract, by virtue of the fact that the ERR Contract was made on a Retained Assignment basis, as set out in paragraph 31 (1) above."*

265. Second, as to the first tranche, nowhere in the particulars of claim is it pleaded that the first invoice was understated, or that there was any claim against Kinross for the balance of fees due in respect of the first tranche

266. Third, as to the second tranche, nowhere in the particulars of claim is it pleaded that: (a) the claimant was entitled to be paid upon the submission of a shortlist; (b) the

claimant submitted a shortlist which was approved by Kinross; or (c) Kinross was in breach of contract for failing to pay the second tranche upon the submission of a shortlist. To the contrary, paragraphs 31 (3) and (4) of the particulars of claim state in terms that the claimant's *"remuneration would be 33% of each of the successful candidate's guaranteed gross annual remuneration"*, with such fees being *"paid in three instalments, being 33% on commencing the Retained Assignment, 33% upon the arrangement of a second interview and/or shortlist of candidates and 34% upon the candidate entering into a signed contract"*.

267. Ms Page submits that this new case has never previously been advanced. Collyer Bristow's pre-action letter dated 18 April 2019 makes no such claim. Ms Page contends that this is yet another example of the claimant seeking to shift its case in a way highly prejudicial to the defendant, which is entitled to know the case against it, and has been forced into spending considerable sums defending the claim, and making this application, on the basis of the current pleadings. The claimant is seeking to advance a totally new case. Still worse, the claimant is not even frank or candid about this fact. Rather it seeks to pass off its new case as if it were contained within the existing pleadings. Mr Bowles highlights paragraph 82 of the judgment and in particular the phrase *"insofar as it concerns the issue whether the SVP and ERR contract were 'retained assignment' contracts"*, as if to suggest that, as pleaded, there was some other basis for a claim in relation to those contracts. But, as the claimant well knows, so far as the SVP and ERR contracts were concerned, the only basis upon which it has ever been contended – to Kinross, to the defendant and to the court (both in the underlying, and in the current, proceedings) – that the claimant was entitled to any further payment from Kinross was because they were retained assignment contracts and the positions in question had been filled (even if not by candidates sourced by the claimant).

268. Mr Bowles goes on to suggest that only the claim in respect of the third tranche of fees has been struck out but that *"that is not the entirety of the claimant's claims under the ERR contract"*. But again, as far as the pleadings, both in this and in the underlying claims are concerned, until now an entitlement to payment based on the plea that this was a retained assignment has been the entirety of the claim. The claimant should not be permitted to shift the basis of its claim. The whole purpose of a strike out or summary judgment application is that it is premised on whether the pleadings disclose any real prospect of success. The defendant has successfully established that the pleadings do not disclose any claim with any realistic prospect of success. It follows that the claim ought to be dismissed with costs. The claimant has had ample opportunity (since at least 30 March 2021, when the defendant's instant application was issued) to respond to this application by way of an application to amend but it has chosen not to do so. Ms Page submits that it is wholly unorthodox to wait until after the receipt of a draft judgment to imply the need to do so; and even more so given the absence of any draft amended pleading or any application to amend. This conduct is highly prejudicial to the defendant and should be deprecated by the court.

269. Ms Page further submits that the new claim for any alleged unpaid balance of the first tranche of the search fee has no real prospect of success, not least because:

(1) The obligation is limited to paying the *"estimated"* total fee: Clause 2.3 provides that the non-refundable resourcing fee is 33% *"of the total estimated gross search fee"*. This is reinforced by clause 10.1 (i) which provides that the first tranche is *"33% of the estimated total fee"*. There was no obligation on Kinross to pay any amount

over that which was estimated in respect of the first tranche. This is the case whether the alleged underbilling was in respect of the bonus or the number of positions.

(2) The claimant (or the BVI company) was only entitled to a reconciliation where a candidate they had introduced had been hired by Kinross. This is said to be clear from: (a) Clause 1.6: *"All outstanding Retained fees are payable upon Completion of the Assignment by the Company"* and clause 1.7 *"Completion of the Assignment by the company means the formation of a signed contract between the Client and Applicant resourced by the Company and commencement of work by the Applicant at the client's offices"*. (b) Clause 10.1 (iii) as to payment of the third tranche (which the claimant accepts is only payable where a candidate introduced by it had been recruited) which states: *"34% of actual fee (33%), (being adjusted for any differences between estimated and actual remuneration package) on completion of the Assignment, by the Company; (Completion meaning, for this purpose, the formation of a Signed contract between the Client and Applicant)."* (c) This is consistent with Mr Vickers's evidence (at paragraph 323 of his first witness statement) where he refers to the reconciliation being *"at a later date once we knew all the salary and bonus information"* and cites an email to Kinross referring to *"a final fees reconciliation at the end of the entire search process once all candidates have been hired"*. (d) It is also consistent with what Mr Vickers actually did as the first and second invoices were not raised until after he had been informed that the roles under the ERR contract had been filled via other recruitment agencies (albeit there was no entitlement to be paid because they were not retained assignment contracts, as contended by the claimant).

(3) In any event, the second and third invoices were not raised in respect of the non-refundable first tranche under clause 2.3 of the ERR contract at all. On the contrary, they are stated to be for *"resourcing and recruitment fees (as per clauses 1.5, 1.6, 5.4, 10.0 and 10.5) for resourcing and recruitment of candidates in accordance with Retained agreement between Harrington Scott"* and Kinross Gold. There is no mention of clause 2.3.

270. Ms Page further submits, more fundamentally still, that Mr Bowles's argument in relation to the second tranche of the search fee is hopeless as a matter of contractual construction and has no real prospect of success. Ms Bowles is said to be selective as to the wording of clause 2.3. When clause 2.3 of the ERR contract is read in full, and in the context of the remainder of the clause, the fallacy of the claimant's position is said to be clear.

271. Clause 2.1 makes it clear that the search fee is payable *"for the successful retained search, resourcing and introduction of an Applicant subsequently hired by the Client"*. Indeed clause 2 (including, in particular, clause 2.3, which was there expressly set out) was characterised by Mr Bowles (at paragraph 180 of his skeleton argument) as *"the First Way"* in which the claimant would be entitled to receive its fees: *"This, therefore, is the first way in which [the claimant] would be entitled to receive its fees. This is the 'normal' way that [the claimant] would be entitled to receive its fees in the event that the search and hiring process was successful"*. Moreover, Mr Bowles expressly abandoned any reliance on clause 2 and the *"First Way"* at paragraph 189 of his skeleton, where he stated in terms that: *"It is accepted that on the express terms of the contract that the Claimant would not be entitled to receive fees under either of the First or Second Ways (the more 'typical' routes to payment) in respect of either the SVP … or any of the ERR Contract roles"* Thus, Mr Bowles accepted that the claimant had no entitlement to fees under clause 2 (including clause 2.3) of the ERR contract. The claimant should not be permitted to resile from that.

272. Ms Page submits that this concession was rightly made, as it is clear from the express language and the context of clause 2.3 that it does not provide a free-standing entitlement to fees upon the submission of a shortlist. On the contrary:

(1) Clause 2.1 clearly states in unequivocal language that the search fees are only payable "*for the successful retained search, resourcing and introduction of an Applicant subsequently hired by the Client*".

(2) The opening words to clause 2.3 "*Where the Client and the Company agree in writing that an Assignment is to be a Retained Assignment*…." make it clear that clause 2.3 relates back to clause 2.1 and does not create a freestanding (or other *"Way"*) in which the claimant might be paid.

(3) This is consistent with clauses 1.6 and 1.7 which (read together) provide for all outstanding retained fees to be payable "*Upon Completion of the Assignment by the Company*" which *"means the formation of a signed contract between the Client and the Applicant resourced by the Company and commencement of work by the Applicant at the client's offices*".

(4) The claimant's contention, that a free-standing obligation to pay the second tranche, regardless of whether the Company introduced the successful applicant, should be read into clause 2.3 (wholly ignoring the surrounding wording and context), produces a result which is absurd because it is entirely at odds with the express terms of clauses 1.6, 1.7 and 2.1.

(5) Clause 2.3 sets out the *"practice"* of the Company as to its billing. A statement as to billing *'practice'* does not, on its proper construction, create a liability (let alone an unqualified liability) for payment of fees. It also does not accord with what actually happened, because the invoice in question was not raised on the submission of a shortlist (whether agreed or not) but only after the claimant had discovered that candidates had been appointed.

(6) The position can be contrasted with that in respect of the first tranche, which is clearly stated to be *"non-refundable"*. Conversely, the second tranche is not said to be *"non-refundable"*. Read in this context, the second tranche is more in the nature of a payment on account of any liability which does arise upon the hire of a candidate introduced by the Company (i.e. unlike the first tranche, it would be refundable if no liability for fees ultimately arose).

(7) Had the parties intended that the second tranche would be payable in any event upon the submission of a shortlist and/or that it would be non-refundable, it would have been easy to provide for this by the use of express language, but they did not do so.

(8) Even assuming, that the Company submitted a *"shortlist"* (as such), there is no pleading (or evidence) that any shortlist was ever approved by Kinross (i.e. that it was a "*qualified set of short list candidates as approved by The Client*" as required by clause 2.3). Thus, if (which Ms Page disputes) clause 2.3 did create a non-refundable liability for the fees, the condition precedent to the entitlement to any payment was not satisfied. It would not make commercial sense for Kinross to be placed under a non-refundable liability for fees simply upon the Company's unilateral submission of a shortlist.

273. Consistently with the above interpretation, in practice the claimant did not invoice a second tranche under the ERR contract separate from the third tranche at all: the fees for the second tranche were only included together with the third tranche fees in the second invoice (dated 29 September 2010); and according to Mr Vickers's evidence, they were only raised ***after*** he had been informed that the roles under the ERR contract had been filled via other recruitment agencies, which the claimant subsequently purported to top-up in respect of the higher (60%) bonus level by the third invoice (dated 11 November 2010).

274. Moreover, as previously noted, the second and third invoices were not raised pursuant to clause 2.3 at all. On the contrary, they are stated to be for "*resourcing and recruitment fees (as per clauses 1.5, 1.6, 5.4, 10.0 and 10.5) for resourcing and recruitment of candidates in accordance with Retained agreement between Harrington Scott"* and Kinross Gold. There is no mention of clause 2.3.

275. For all these reasons, Ms Page submits that the claim should be dismissed with costs. If the court were minded to permit the claimant an opportunity to rescue its case, however, Ms Page submits, in the alternative, that the court should maintain, and re-enforce, the conditions on the claimant proposed in section 14 of the judgment in order to address the prejudice caused to the defendant by the claimant's approach. Whilst costs and consequential orders will require further argument, in this event it is the defendant's position that:

(1) It should be recognised that the claim has only survived by reason of the claimant's intimation of an intention to amend and that, absent that, the claim falls to be dismissed based on the claimant's current pleadings.

(2) The claimant should be required to pay **all** of the defendant's costs of the claim and of this application to date (being costs thrown away to which the defendant would otherwise have been entitled but for the claimant's intimation of its intention to amend and its new case) as a condition of the opportunity to amend (as indicated at paragraph 244 of this judgment).

(3) It is imperative that the claimant is not given permission to amend *'at large'*. The claimant should only be permitted to apply to amend in respect of identified points: it must produce a draft pleading and make an application for permission to amend (if not agreed) in the usual way. It is vital that the proposed amendments are marshalled: (a) given the propensity for the claimant's case to shift around; (b) given the risk that the claimant may try and introduce a statute-barred claim by the backdoor; and (c) to avoid the claimant using the opportunity to expand its case in other ways. Any permission to amend should be on condition that the defendant is fully protected in terms of security for its costs of the claim (as indicated at paragraph 244 of this judgment).

276. Ms Page did not address any arguments in response to Mr Bowles's submissions that it is unnecessary for the court to change its findings in relation issues three and four, or that it would be wrong in principle for the court to do so.

(d) Determination

277. For the reasons given by Ms Page (which I accept), I am satisfied that no claim with any, or any real, prospect of success survives the findings in my draft judgment, and that the appropriate form of relief is for the whole claim of this claim to be struck out

and summarily dismissed (with costs). Had I rejected Ms Page's post-draft judgment submissions, I would have accepted her alternative submission recorded at paragraph 275 above. However, for the reasons advanced by Mr Bowles, I reject Ms Page's further invitation to reconsider my decision not to make any final findings as to the identity of the parties to the SVP and ERR contracts (issue three) in advance of any trial.

278. I am satisfied that Ms Page is correct that the basis upon which Mr Bowles now seeks to advance a claim to any entitlement to further fees under the ERR contract has never previously been advanced and is not presently pleaded. I agree with Ms Page that it would be both procedurally and substantively unfair and unjust to the defendant to permit the claimant to amend its particulars of claim to raise any such new case at this late stage in the long history of this application. In any event, I am satisfied, for the reasons that Ms Page gives, that the various ways in which Mr Bowles now seeks to reformulate the claim under the ERR contract have no, or no real, prospects of success. I adopt, without repeating, those reasons. I agree with Ms Page's submission that the court should give short shrift to Mr Bowles's last desperate effort to rescue his client's claim that unpaid fees were recoverable under the ERR contract irrespective of whether it was a retained assignment contract. Any new claim for any alleged unpaid balance of the first tranche of the search fee has no real prospect of success. Likewise, any new claim to the second tranche of the search fee is manifestly ill-founded as a matter of contractual construction and has no real prospect of success.

279. I accept Mr Bowles's submissions that it is unnecessary for the court to revisit its findings in relation issues three or four, and that it would be wrong in principle for the court to do so. For the reasons I have already given, these issues would have had to be resolved at trial had there been any recoverable loss, and so the court does not need to, and should not, alter its conclusions on those issues. The fact that the claimant has suffered no recoverable loss cannot alter the fact that, had there been any such loss, the issue concerning the assignment of any remaining underlying claims could only properly have been determined at trial; and, on that hypothesis, I have determined that the true identity of the parties to the SVP and the ERR contracts should be determined at the same time rather than on the papers. I see no good reason to revisit those conclusions.

280. At the request, and with the agreement, of both parties' counsel, this approved judgment is to be handed down without the need for any attendance by solicitors or counsel. It is to be treated as having been handed down at 10.00 am on Michaelmas Day 2022. It is clearly desirable for the hand down of this judgment to take place as soon as practicable without the parties having to wait for a convenient date to be found (with the judgment remaining under embargo in the meantime).

281. I order that the hearing of any consequential matters (including any applications for costs and for permission to appeal) is to be adjourned to a date to be fixed (by reference to counsel's dates to avoid and the convenience of the court). As the defendant is substantially the successful party, the defendant's counsel should act as the single point of contact with Chancery Listing, and should provide a list of available dates over the next six months (with an agreed time estimate) by no later than 4.00 pm on Friday 7 October. Both counsel are agreed that at least half a day of court time will be required; and an appropriate time should also be allowed for any necessary pre-reading and for judgment. I extend the time for all consequential written submissions (including submissions as to costs) until two clear days before the adjourned hearing date. The time for any application for permission to appeal (by either party) is

extended to the adjourned hearing (pursuant to PD52A paragraph 4.1(1)). There will be a corresponding extension of time for any appellant's notice until 21 days after the adjourned hearing (pursuant to CPR 52.12 (2) (a)). There will be a consequential extension of time for any respondent's notice.

282. I record that I have already relaxed the terms of the embargo upon its release to enable the defendant's professional indemnity insurers to be shown a copy of the draft judgment and the parties' submissions on the same. Since that insurer is funding the costs of the defence, the defendant's solicitors are required to keep it appraised of the work being undertaken on the matter. At Mr Bowles's request, I have granted a similar relaxation to the claimant to enable it to show the draft judgment to its own insurers and to its litigation funder (and, given I am told that the latter is in administration, the relevant insolvency practitioner). These relaxations will extend to the terms of this approved judgment before it is formally handed down.

283. I conclude this lengthy considered judgment by recognising and acknowledging the great assistance that I have derived from the work of all three counsel retained for this substantial five days strike out and summary judgment application. I recognise also the considerable additional work which both Ms Page and Mr Bowles have undertaken since the initial circulation of my draft judgment.