



Neutral Citation Number: [2024] EWHC 2058 (Ch)

Case No: BL-2023-001335

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

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

Date: 07/08/2024

**Before :**

**MASTER KAYE**

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**Between :**

- (1) MR CAMRAN MIRZA**
- (2) MRS SAIRA MIRZA**
- (3) MR AMEER MIRZA**
- (4) TYDWELL LTD**
- (5) BOOMZONE LTD**
- (6) REDWIRE LTD**

**Claimants**

**- and -**

**CMS CAMERON MCKENNA NABARRO**  
**OLSWANG LLP**

**Defendant**

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**Mr Thomas Mason** (instructed by **CANDEY Limited**) for the **Claimants**  
**Mr Roger Mallalieu KC** (instructed by **Simmons & Simmons LLP**) for the **Defendant**

Hearing dates: 3 and 5 April 2024  
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**Approved Judgment**

This judgment was handed down remotely at 10 am on 7 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MASTER KAYE



**MASTER KAYE:**

1. This is a dispute between the claimants and their former solicitors (“**CMS**”) about the allocation and use of funds received by CMS on account in respect of criminal and civil proceedings.
2. The claim as issued sought declarations in respect of £50,000 paid to CMS in respect of counsels’ fees in criminal proceedings (“**the criminal trust monies**”). By an application dated 15 January 2024 the claimants seek permission to expand the claim to include a new claim for declarations in respect of £129,000 paid to CMS (“**the civil trust monies**”) which the claimants say were paid to CMS in respect of counsels’ fees in civil proceedings (“**the amendment application**”).
3. CMS issued an application to strike out the claim or for summary judgment on 19 January 2024 (“**the defendant’s application**”).
4. The claimants issued an application for summary judgment on 12 February 2024. That application proceeds on the basis that the amendment application has been determined in the claimants’ favour (“**the claimants’ application**”).
5. I shall refer to the amendment application, the defendant’s application and the claimants’ application as **the applications** when referring to them compendiously.
6. The claim was issued on 4 October 2023 but not served until 30 November 2023. No particulars of claim were ever served in relation to the claim as issued. Instead, the particulars of claim dated and served on 15 January 2024 (“**POC**”), were in a form that assumed that the amendment application would be successful. If the amendment application is not successful there are no existing particulars of claim to fall back on.
7. The original claim form sought a declaration that monies paid to CMS “*on account of counsel’s fees were held on trust for the claimants only for the purposes of paying counsel’s fees*”. These monies were defined in the original claim form as the Trust Monies but redefined as the criminal trust monies in the proposed amendments. The claimants further sought “*an order [declaration on the proposed amendment] that no lien can subsist over the [criminal trust monies]*” and finally it sought an order compelling payment of the criminal trust monies.
8. The proposed amended claim form expands the first declaration to cover both the criminal and civil trust monies and deletes the plea for an order compelling payment in light of the events that have occurred. The POC sought the following four declarations:
  - “(1) A declaration that the Defendant in breach of trust and in breach of fiduciary duty held part of the Civil Trust Monies on account for the purpose of paying its own outstanding fees where the Civil Trust Monies had been paid to the Defendant by the Fourth Claimant for the express purpose of paying counsel’s fees.
  - (2) A declaration that the Defendant in breach of trust and in breach of fiduciary duty held part of the Criminal Trust Monies

on account for the purpose of paying its own outstanding fees where the Criminal Trust Monies had been paid to the Defendant by the Fourth Claimant for the express purpose of paying counsel's fees.

(3) A declaration that the Defendant in breach of trust and in breach of fiduciary duty paid its own outstanding fees using part of the Civil Trust Monies, which had been paid to the Defendant by the Fourth Claimant for the express purpose of paying counsel's fees.

(4) A declaration that no lien can subsist over the Criminal Trust Monies in circumstances where they were transferred to the Defendant as trustee for the particular purpose of paying counsel's fees.”

9. Any judge considering making the declarations would have to be satisfied as to the precise terms of the declarations sought. These declarations are all overly narrative and do not clearly and concisely set out any useful declarations that the court could make, and it is unlikely any judge would consider making them in the terms sought by the claimants. Declarations (2) and (4) relate to the criminal trust monies and broadly reflect the relief sought in the claim form. Declarations (1) and (3) do not appear to clearly reflect the relief sought in the amended claim form. Neither the claim or proposed amendments seek any relief other than the declarations, there are no claims for loss or damages. The declarations sought all seek confirmation of a past state of affairs which, if there was any dispute at all about that state of affairs, have all been superseded by subsequent events. This raises the question of whether such declarations in the circumstances of these claims have any purpose or utility.
10. CMS acknowledged service on 19 January 2024 and at the same time issued the defendant's application, consequently CMS have not yet filed a defence.
11. I have had the benefit of oral and written submissions from Mr Mason for the claimants and Mr Mallalieu for the defendant which I have taken into account when reaching this decision even if I do not set out each and every point raised by them. I have also read and considered the evidence on which the parties rely and the underlying documents.
12. The claimants relied on the Second Witness Statement of Leo Rupert Nabarro dated 15 January 2024 (“Nabarro 1”); the first to third witness statements of Ashkhan Darius Candey dated 12 February 2024, 16 February 2024, and 26 March 2024 respectively (“Candey 1”, “Candey 2” and “Candey 3”).
13. The defendant relied on the first and second witness statements of James Allison Pollock dated 18 January 2024 and 13 March 2024 (“Pollock 1” and “Pollock 2”).
14. Although Mr Candey was able to provide some direct evidence of the events which occurred in October 2023, the witness statements largely sought to make legal submissions and argument, were repetitive and/or quoted extensively from parts of the contemporaneous documents. The witness evidence did exhibit the contemporaneous documents which underly the claim. The majority of the communications between

July 2023 and termination of the retainers with CMS took place between Mr Mirza and the relevant fee earners at CMS. After the retainers had been terminated the relevant communications also involved CANDEY Limited (“CANDEY”) and Simmons & Simmons LLP (“**Simmons**”). The relevant communications primarily took place by either by email or letter and/or the evidence relating to the applications is otherwise included in contemporaneous documents.

15. As will be apparent from this judgment the claimants’ witness statements, the claim, and the POC did not always accurately reflect the underlying contemporaneous documents.
16. The hearing was listed for one-day but overran and a further hearing was convened to allow counsel to complete their submissions. I am satisfied that both counsel had a full opportunity to make such submissions as they considered appropriate in relation to the applications.

### **Legal Principles**

17. The legal principles relating to the applications and even the general approach to declarations were not in dispute.
18. The applications are all ultimately an exercise of the court’s broad discretion. In exercising that discretion it is necessary to have regard to the overriding objective including the need to deal with cases justly, fairly, efficiently and proportionately including as to cost. This includes considering the balance of justice and prejudice between the parties all of which requires the court to consider all the circumstances. However, in considering all the circumstances the court will also consider wider aspects such as the appropriate management of court resources and the needs of, and impact on, other court users consistent with the broader overriding objective.
19. The test for determining an application for summary judgment remains that set out in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] as subsequently approved in numerous more recent authorities.
20. On an application to amend the amending party has to be able to demonstrate that the proposed amendment has a real prospect of success. *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at [18] emphasises the need for any proposed amendment to be arguable, carry a degree of conviction, be coherent, properly particularised and supported by evidence which establishes a factual basis for the allegation thereby drawing on the *Easyair* test applicable to the summary judgment applications.
21. Whilst pure strike out applications focus on the statements of case; summary judgment applications and amendment applications can involve a consideration of the evidence available or reasonably expected to become available at trial (see *Easyair* [15 (v)]). On an application for summary judgment or amendment where the amendment introduces a new claim as here, the question is therefore whether the claim or the new claim has a real as opposed to fanciful prospect of success where real means realistic.

22. *Pearce v East and North Hertfordshire NHS Trust* [2020] EWHC 1504 (QB) per Lambert J at [10] provides a recent statement of the factors to consider when considering whether and how to exercise discretion on an amendment application.
23. The claimants did not submit that a fuller investigation of the facts or further evidence was necessary to determine the claimants' application in their favour or to resist the defendant's application. The defendant says that if the defendant's application fails whether or not the amendments are allowed, their defence to the claim in relation to both the criminal trust monies and the civil trust monies has a real prospect of success but in any event the court will need to determine mixed questions of law and fact and discretionary matters including whether even if the claimants succeed on those factual and legal issues the court should exercise its discretionary powers to make the declarations sought. The defendant therefore submits that the claimants' application should not be granted in those circumstances and the claims should proceed to trial. However, their primary position is that the amendment application should be refused, and the defendant's application should be granted and for those they say that there is no need for the court to consider any evidence other than that available on the applications.
24. Having considered the evidence available and the parties' detailed submissions it appeared to me that this was a case in which the court could and should grasp the nettle and make a decision on a summary basis in accordance with the broad principles set out in *Easyair* always keeping in mind that irrespective of the parties' positions the court should not conduct a mini-trial or seek to determine disputed facts on a summary application. This of course does not mean that the court must take at face value and without analysis everything that is said by the claimant or defendant particularly where it may be clear, as here, from the contemporaneous documents on which the parties' themselves rely that there is no real substance to the factual assertions made. Whilst therefore as a general rule in applications such as these the facts as pleaded in the statements of case should be accepted that is only the case where they are not obviously wrong or contradictory.
25. As Cockerill J said in *King v Stiefel* [2021] EWHC 1045 (Comm) at [21]

“The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the Court will be entitled to draw a line and say that -even bearing well in mind all of those points – it would be contrary to principle for a case to proceed to trial.”
26. Where a claim is for declarations, there is a two-stage approach. The court does not automatically grant declarations just because rights, facts or principles have been established. There remains a second stage which requires the court to be satisfied that it should exercise its discretion to grant a declaration in the terms sought.

27. It is now well established, see for example *Abaidildinov and anor v Amin* [2020] EWHC 2129 (Ch), that on a summary judgment application if it were established that the defendant had no real prospect of mounting a successful defence it would be unlikely to be in accordance with the overriding objective to require a full trial in order to decide if the court should exercise its discretion to make the declarations sought. The same approach applies on a defendant's application and indeed when considering the proposed amendments where the only remedy sought is a declaration.
28. Where the only remedies sought are declarations the court is not precluded from refusing the amendments or allowing the defendant's application in the exercise of its discretion when considering at the second stage the utility and purpose of the declarations, even if at the first stage the court had been satisfied that there either was or was not a real prospect of success. I would still have to consider whether, and be satisfied, that there was a real prospect that the court would exercise its discretion to make the declarations in the terms sought. The question of the utility and purpose of those declarations, whether there is any real dispute over the nature and scope of the rights that the party asserted and or any public interest are at the heart of any consideration of the broader exercise of the court's discretion and the overriding objective when considering all the circumstances. If there were no purpose or utility to the only remedy sought, that would be a powerful factor in determining whether there is a real non fanciful prospect of success and in the exercise of that discretion.
29. When considering whether to grant a declaration the court should have in mind the test summarised by Neuberger J in *FSA v Rourke* [2001] EWHC 704 (Ch). This provides that the court should take into account the justice to the claimant, the justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why the court should or why it should not grant a declaration. Where a declaration would serve no purpose and is not utile it should be rejected.
30. The court would need to be satisfied that it was appropriate to grant the relief on the terms sought and that there was some reason for doing so and it was the most effective way of resolving the issues raised. It must do justice in the particular case which requires the court to be satisfied that it does justice for all parties. There must in general be a real and present dispute as to the existence or extent of a legal right and some real reason for granting the declaration sought grounded in concrete facts. As set out above it does not just follow from being successful on a particular claim generally but must be separately considered and justified on its own terms. That is why any lack of utility and purpose will be particularly significant when considering these applications.
31. In this case the utility and purpose of the declarations is the key issue. They relate to past alleged breaches of trust which the claimants accept have been remedied. The defendant either does not accept there was any breach at all or if there was a breach relies on the fact that the breaches were remedied and there is no further purpose to the declarations. This is not a case where the trusts are continuing or there is a risk of future damage. However, the claimants argue that the declarations sought continue to have a wider public interest or importance because they relate to the manner in which professionals behaved in respect of trust assets such that even if they relate to past events, the claimants have an entitlement to a declaration as to those past rights and, consequently, the declarations do have some continuing utility and purpose.

32. The principles to be applied when considering a strike out application are also not in dispute. CPR 3.4(2) (a) to (c) provide that a claim may be struck out if it discloses no reasonable grounds for bringing the claim, is an abuse of the court's process or there has been a failure to comply with rules practice directions or a court order. Here the application to strike out is combined with the summary judgment application and in so far as the strike out application is based on CPR 3.4 (2) (a) it overlaps. Although it is possible to succeed on CPR 3.4 (2)(c) alone, where the breaches are particularly serious or numerous, generally such breaches will add to or support a strike out on grounds (a) or (b).
33. The court should use its power to strike out sparingly but will do so in an appropriate case consistent with the overriding objective and good case management. It will do so where a claim is obviously pointless or a waste of both the court's resources and the parties' resources. In this case, Mr Mallalieu argues that it is an abuse to use court proceedings in a way that is inconsistent with their ordinary or proper use (see *Cable v Liverpool Victoria Insurance Co Ltd* [2020] EWCA civ 75 at [42] to [48]). He argues that the failure of the claimants to properly engage in the Practice Direction – Pre-Action Conduct (“PDPAC”) was particularly egregious given the events that occurred whilst the claimants say that given the urgency of the situation their conduct was entirely justified.
34. CMS further argue that on the facts the benefit of the claim was always of such limited value that having regard to the overriding objective “*the game is not worth the candle*” (per Eady J in *Schellenberg v British Broadcasting Corp*n [2000] EMLR 296) and the costs of the litigation would be out of all proportion to the benefit to be achieved. To put that in context, the alleged breaches of trust on which the claimants rely were remedied either before or shortly after the issue of the claim in the circumstances set out below. At that stage, the claimants' legal costs were said to be in the region of £15,000, irrespective of any argument about the reasonableness or proportionality of that sum, their costs for the applications which include the costs of the claim are now said to exceed £105,000.
35. Consequently, CMS say that the claim is *Jameel* abusive and even if the claim had any purpose when issued it is no longer worth the wick let alone the candle and that the amended claim is no better because it also relies on alleged breaches of trust that were remedied months before the amendment application was made and the court should not commit its scarce resources to allowing the claimants to continue the claim.
36. In *Jameel v Dow Jones & Co* [2005] EWCA Civ 75, the claimant was seeking to recover damages for a very modest defamation claim and to vindicate his rights, but Lord Phillips determined this was abusive. He reviewed the authorities including *Schellenberg* at [48]-[61] and concluded at [69]- [71] with my emphasis in bold:

“69. If the claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said that he will have achieved vindication for the damage done to his reputation in this country, but both the damage and the vindication will be minimal. **The cost of the exercise will have been out of all proportion to what has been achieved. The**



**game will not merely not have been worth the candle, it will not have been worth the wick.**

70. ...but, subject to the effect of the claim for an injunction that we have yet to consider, we consider for precisely the same reason that it would not be right to permit this action to proceed. **It would be an abuse of process to continue to commit the resources of the English court, including substantial judge and possibly jury time, to an action where so little is now seen to be at stake.** Normally where a small claim is brought, it will be dealt with by a proportionate small claims procedure. Such a course is not available in an action for defamation where, although the claim is small, the issues are complex and subject to special procedure under the CPR.

71. Mr Price submitted that to dismiss this claim as an abuse of process would infringe Article 6 of the Convention. **We do not consider that this Article requires the provision of a fair and public hearing in relation to an alleged infringement of rights when the alleged infringement is shown not to be real or substantial.** Subject to the final issue, to which we now turn, and on the premise that there have only been the five individual publications within this jurisdiction, **we would dismiss this action as an abuse of process.”**

37. The claimants argue that their claim can be distinguished from and is not *Jameel* abusive relying on the decision of Nicklin J in *Alsaifi v Trinity Mirror PLC* [2018] EWHC 1954 QB. They submit that there is value and utility to the declarations which will enable them to obtain a vindication of their legal rights which includes confirmation that monies paid to legal professionals for a specific purpose can only be used for that purpose. They say they are entitled to have a fair resolution of their legal disputes.
38. In *Alsaifi*, the claimant had brought proceedings in defamation which concerned damage to his reputation. Nicklin J explained at [41] and [42] that the vindication of rights sought by the claimant could legitimately relate to both past damage (for the paragraphs in the publication to which the claim related) but also the risk of future reputational damage. Nicklin J was not persuaded that the claim was *Jameel* abusive concluding at [44]-[45]:

“44. At the heart of any assessment of whether a claim is *Jameel* abusive is an assessment of two things: (1) what is the value of what is legitimately sought to be obtained by the proceedings; and (2) what is the likely cost of achieving it?

45. But it is clear from *Sullivan* that this cannot be a mechanical assessment. The Court cannot strike out a claim for £50 debt simply because, assessed against the costs of the claim, it is not 'worth' pursuing. Inherent in the value of any legitimate claim is the right to have a legal wrong redressed. The value of vindicating legal rights – as part of the rule of law

– goes beyond the worth of the claim. The fair resolution of legal disputes benefits not only the individual litigants but society as a whole.”

39. Mr Mason argued that the declarations sought in this case were akin to the £50 debt example in *Alsaifi* because the value of the claim for the Mirzas was the importance of vindicating their rights. It was not therefore *Jameel* abusive. However, that appeared to me to be the wrong comparison given the nature of the declarations actually being sought and the basis for them. As Mr Mallalieu explained the analogy with the £50 debt claim is not apt in this case. The equivalent position here is one in which the claimant had asserted that they were owed £50 (here the assertion that monies were held on trust), the dispute about the £50 was compromised (if there was any breach it had been remedied and/or an agreement reached), but the claimants subsequently sought to use the court process to obtain a declaration that they had been right all along when they said they were owed £50.
40. One has to consider what the value of a declaration as to disputed past rights might be where in the £50 example the existence of the liability was not admitted but nonetheless the £50 had been repaid either before the claim was issued or before it was served and there was no obvious present or future risk to the £50. In that scenario what are the rights that are to be vindicated and what value would such a claim have against the costs of achieving it and the time and resource it would take to resolve it? This is not a claim where as in *Alsaifi* there was an ongoing risk of future reputational damage. If there was any breach of trust it had been remedied and there was no obvious present or future value to the declarations that the claimants had been right when they said the monies were held on trust and that there was a breach of trust.
41. Since the claim relates to monies paid on account to solicitors this inevitably engaged questions of the right to exercise a general lien. The right to do so and what it can be exercised over will not only engage consideration of the general common law position but would engage a consideration of professional regulatory obligations and rules, and any express contractual obligations or potentially implied terms which govern the relationship between solicitors and clients. CMS say that the combination of the general common law position and CMS's terms of business entitled CMS to apply any sums held on account against any outstanding invoices.
42. In general unless there is some other specific agreement a solicitor can exercise a lien over, for example their work product, and monies paid on account generally, pending payment of their fees and expenses. Here the main focus is on the payment of monies on account. Where monies are paid generally on account they can be used generally, and it is for the solicitor to determine how those monies are allocated subject to any regulatory restrictions. However, where money is paid on account for a specific purpose or by specific agreement (a simple example might be monies provided to pay an adverse costs order) that may override the solicitor's entitlement to use those specific monies generally. But if a dispute arises the question that will always need to be considered is whether the basis on which the money was paid is inconsistent with it having been paid generally on account (*Withers LLP v Langbar International Ltd* [2011]EWCA Civ 1419 at [19] to [22] and [51]). If in a particular case monies were usually paid on account for general purposes, then a change to the basis on which monies were subsequently provided would require the clearest evidence of that

change and may require agreement by both parties depending on the basis and terms of their contractual relationship.

43. The claimants say that the criminal and civil trust monies were paid for a specific purpose of paying specific elements of specific counsels' fees. Consequently, it is said that a specific purpose trust arose in each case in respect of those specific monies which overrode any entitlement to use those monies generally and in relation to which no lien could be exercised.
44. In the event that the applications were not to finally resolve the claim then it may be necessary for there to be a more detailed consideration of whether any specific purpose trust arose at all particularly in relation to the civil trust monies for the reasons set out below. However, that is not because the law is uncertain or there is a general issue of public interest or importance to be determined but because the court would need to determine on the facts of this case whether a specific purpose trust had arisen.
45. Despite Mr Mason's submissions that there was an issue of wider public importance or interest in this case which would support the making of the declarations I was not persuaded. There was no obvious wider public interest or importance. The law in relation to specific purpose trusts is not in issue. It is not said by CMS that there could never be a specific purpose trust simply that the combination of the common law and the specific contractual terms in this case mean that there was no such specific purpose trust on the facts. The question here would be whether on the facts a trust was or could have been created. A fact sensitive determination of whether there was a trust leading to a declaration that monies were held on trust when the legal principles are settled does not appear to me to have any wider public interest whether it involves a solicitor or any other professional.
46. The claimants' application assumes that the amendment application has been allowed and therefore falls to be considered after the amendment application and the defendant's application. However, the background for the applications and the submissions substantially overlap.

## **Background**

47. This claim arises out of the termination of the civil proceedings retainer between CMS and the claimants on 29 September 2023 and the subsequent termination of the criminal proceedings retainer on 2 October 2023.
48. At the time of terminations there were substantial outstanding and unpaid invoiced costs and disbursements due to CMS of in the region of £1.4m across the civil and criminal proceedings. The vast majority were CMS's own fees rather than general disbursements or counsels' fees.
49. The claimants have raised concerns about the level of the costs, the transparency of the costs information they received and other costs related issues. A Solicitors Act Assessment has been commenced in relation to the civil proceedings for which a first directions hearing is listed on 12 October 2024. Separately there was a Crown Court detailed assessment process in relation to some of the criminal proceedings costs (although this was not the defendant's fees). Where those matters are raised in the

correspondence, I have not addressed them unless necessary for context. They are matters to be addressed in other court processes or fora. Despite the claimants' submissions that this claim had some wider public importance it is in reality simply part of a wider dispute between the claimants and their former solicitors focussed on costs. Much of that will be determined as part of the Solicitors Act Assessment and/or can be resolved through a complaint to the SRA which was alluded to several times in correspondence. The fact that there is an ongoing Solicitors Act Assessment and that there are more appropriate fora for resolving many of the disputes articulated by the Mirzas in correspondence is a factor I take into account when considering the exercise of my discretion and whether this forum is the most effective way or any way to resolve the real underlying issues between the parties having regard to the overriding objective and the need to consider proportionality including as to costs.

50. Mr Mirza, the first claimant is a businessman involved in property acquisition and development. His wife and son are the second and third claimants. The fourth to sixth claimants are companies owned solely or partially by the first and second claimant and for whom the third claimant works. I shall refer to them as the **Mirzas** or the **claimants** and individually where necessary for context.
51. CMS were retained by the Mirzas in relation to a property dispute referred to as the **civil proceedings** and a related private prosecution and associated judicial review referred to as the **criminal proceedings** as well as related matters. The original CMS retainer was with Mr Mirza in 2021. The work for the Mirzas expanded. In about August 2022 a yet further expanded retainer was entered into which covered the civil proceedings and all the claimants. Both the criminal and civil proceedings were long running and hotly contested.
52. CMS continued to undertake work for the Mirzas in relation to both the criminal and civil proceedings and other matters throughout 2022 and 2023. From the ledgers and schedules in evidence, CMS appear to have raised invoices monthly whilst particular work streams were active and less frequently when they were not. Additional disbursement only invoices were raised from time to time. Initially substantial sums were paid by the Mirzas generally to meet those invoices on an ongoing basis. As time passed payments became more sporadic and the Mirzas' cashflow became an issue, for both the Mirzas and CMS as the level of unpaid invoices increased.
53. Mr Mirza was aware that the outstanding fees were increasing and sought an up to date statement of account in about September 2022. As of 29 September 2022 the total invoiced to the Mirzas including disbursements amounted to £1,495,292.49 of which £713,011 had been paid. Of the outstanding balance (£782,281.40) all but the 29 September 2022 invoices were outside CMS's payment terms. On 29 September 2022, Mr Corney, a partner at CMS, provided a spreadsheet of outstanding invoices, work in progress and an estimate of costs to the end of 2022 based on the then current work streams. This produced a total figure of £1,436,732.29. CMS proposed a payment plan which required the Mirzas to make an immediate lump sum payment of £750K followed by monthly payments of £150K to end February 2023, a total of £1.5m. The 29 September 2022 figures did not include all the then outstanding fee notes or costs due to legal advisers in other jurisdictions.
54. On 30 September 2022 Mr Mirza proposed regular monthly payments of £100K with a lump sum of £250K in January 2023 and a possible further £250K payment in the

future. He suggested that trimming the size of the teams working on the civil and criminal proceedings would be a way of reducing future costs. These discussions continued with Mr Mirza seeking to discuss and agree a budget, cap or limit on costs. Mr Candey says that the dispute in relation to fees and the provision of reliable costs information remained unresolved between October 2022 and July 2023. Nonetheless, the Mirzas continued to instruct CMS and incur further costs and CMS continued to represent them.

55. The evidence includes schedules which show payments being made throughout the period although not in a consistent amount. Those payments can be seen to have been used primarily to pay disbursements including counsels' fees from unpaid invoices. This was subsequently confirmed by Mr Corney in July 2023. It was not possible to establish from the schedules alone if there was intended to be any particular pattern to the payments, but the subsequent evidence explains that the amounts received were connected to the receipt of rental payments. It appears that the intention was that payments of £200,000 per month would be made towards the costs. However, the payments were not sufficient to substantially reduce the outstanding balance and pay ongoing costs.
56. By July 2023, the outstanding balances had increased rather than decreased despite the payments made. A critical point had been reached within CMS about the firm's willingness to essentially extend credit to the Mirzas. Indeed having prioritised payment of disbursements including counsels' fees, CMS's own outstanding fees and aged debt were substantial. The CMS finance team's concern about this and their desire to bring the account back within terms was hardly surprising and should have been obvious and understandable to an experienced businessman such as Mr Mirza who was himself having cashflow difficulties.
57. It is helpful to consider the emails and correspondence from July 2023 without the gloss or mischaracterisation applied to them in the statements of case and witness evidence. The emails use both the 24 hour clock and the 12 hour clock and on occasion there appears to be a time difference. I have used the time as represented on the emails.

#### **10 July 2023 to 12 January 2024:**

##### **What are the civil trust monies?**

58. On 10 July 2023 @ 2.23pm Mr Corney emailed Mr Mirza following an earlier call. Mr Corney confirmed that the outstanding invoiced amounts as at 10 July 2023 were £1.3m and that when the outstanding WIP and disbursements were added the total increased to £1.423m. If the future brief and refresher fees for the November CMC in the civil proceedings were added the total increased further to £1.566m. He explained that (i) he was being pushed to bring counsels' fees up to date, (ii) the majority of recent payments had been allocated to prioritise payment of disbursements and, (iii) perhaps understandably, that he was getting a lot of heat from the CMS finance team.
59. He sought an urgent payment of £316,201.72 to cover the June invoices in the civil and criminal matters (£135,932.84 and £6,568.88 respectively), the November CMC brief fees and refreshers of £143,700 for the civil proceedings and an on account payment of £30,000 to enable Mr Darbishire KC to start reading in on the criminal

proceedings. In addition he sought various confirmations including a payment plan to bring the account to zero as soon as possible.

60. On 11 July 2023 @ 2.51pm Mr Corney chased for a response. Mr Mirza replied by email @ 16.50 saying he would come back with exact figures the following day. Mr Corney in acknowledging receipt in an email @ 17.33 reminded Mr Mirza that he would need the confirmations he had sought and explained that he had been asked to obtain an undertaking from Mr Mirza.
61. On 12 July 2023 @ 11.34 am Mr Corney again chased Mr Mirza who responded @ 11.36 am saying that he was arranging for monies to be sent later that day but was confused by the required confirmation. He confirmed that he would accept any legitimate bills that were due. Mr Corney responded @ 14.01 making it clear that the purpose of the confirmation sought was to avoid a later negotiation about how much was to be paid. He asked Mr Mirza to confirm that the invoices issued to date were legitimate. He highlighted that if there were any concerns on Mr Mirza's part about the "legitimacy" of the outstanding invoices that "will obviously set hares running".
62. Mr Mirza emailed Mr Corney @ 19.05. Attached to that email was a payment confirmation that a sum of £129,000 had been paid. Mr Mirza's email said:

"Hi Steve, I attach payment confirmation that I have made this evening for £129,000 which covers the fees for both David Scorey KC and Peter Head. I will sort out the other payments in due course. I will be at court tomorrow at 10am. Kind Regards Camran Mirza".
63. The Mirzas submit that this email can and should be read in isolation and that it created a special purpose trust in respect of the £129,000 paid to CMS which overrode any general entitlement or contractual entitlement entitling CMS to use the monies generally on account. They say that the £129,000 could only now be used by CMS for the specific purpose for which it had been transferred which was to pay £129,000 to Mr Scorey KC and Mr Head (both civil counsel for the Mirzas). Mr Mason argues that the terms of the 12 July 2023 email were sufficient to meet the requirements for a trust including certainty of subject and object. This £129,000 is what is referred to as the civil trust monies.
64. The email refers to only £129,000 having been sent to CMS not the total sum sought for counsels' brief fees and refreshers on 10 July 2023 and refers to sorting out other payments in due course. Mr Mirza provided none of the confirmations sought on 10 July 2023. The 12 July 2023 email forms part of a chain of emails the rest of which are referred to below and it is not at all obvious to me that it can or should be read in isolation or could or did change the characterisation of the £129,000 as a general payment on account or that it could override any contractual terms. I note that it appears that the civil trust monies were remitted to CMS prior to Mr Mirza's email of 12 July 2023 (which could not otherwise have attached the payment confirmation) which it is said imposed the specific purpose trust on those monies which potentially complicates any trust analysis further. The POC pleads at [15] that Mr Mirza emailed on the same day to make the purpose of the payment clear which is consistent with the payment having been made before the email was sent.

65. On 14 July 2023 @ 3.42 pm Mr Corney chased Mr Mirza saying
- “... the Finance Team have contacted me again today for an answer on the payment of the £316,201.72, which they are continuing to press for this week, and the two numbered points in my email. If you could come back to me on those I’d be grateful.”
66. Mr Mirza responded @ 15.45 saying:
- “We have paid £129,000 against this amount. I will look at the balance later on.”
67. This email is inconsistent with the creation of a specific purpose trust on 12 July 2023 and more consistent with the £129,000 being a part payment on account generally of the sum sought on 10 July 2023.
68. On 18 July 2023 @ 9.17am Mr Corney emailed Mr Mirza as follows:
- “Please can you come back to me on this? I have just had a mauling about the level of debt from management and we desperately need (i) confirmation of when you will be making the remainder of the payment of the £316,201.72, (ii) confirmation of point (i) [see above] and (iii) details of a payment plan that we can take to the finance team/snr management here.”
69. Mr Mirza responded @ 10.31 saying:
- “As per my notification I have sent you already £129,000 thus leaving £187,210.72 per your note.”
70. This email also seems to be entirely inconsistent with the special purpose trust and entirely consistent with it being part payment generally of the sums sought on 10 July 2023.
71. The balance of the email explains that Mr Mirza was looking to arrange a further payment that week but was not in a position to provide a payment plan. He asked Mr Corney and the management team to bear with him. It was clear that there was pressure on Mr Corney to resolve the fees position with the Mirzas and that Mr Mirza knew this.
72. The emails between 10 July 2023 and 18 July 2023 and in particular Mr Mirza’s emails of 14 July 2023 and 18 July 2023 appear to me to significantly undermine the claimants’ position as to the effect of the 12 July 2023 email. Mr Mason submits that the 12 July 2023 email is clear and explicit and can and should be read in isolation. He submits that the surrounding emails do not change its effect. Although he accepts that CMS had sought a sum on account, the payment to cover counsels’ fees was clear and unambiguous.
73. CMS argue that the 12 July 2023 email cannot be read in isolation but must be read in context. They say that it is clear that in context the payment of the £129,000 was a

part payment of the sums requested on 10 July 2023. They submit that the terms of the email were insufficient to displace the prior arrangements to pay sums on account generally allowing CMS to decide how to allocate them. Mr Mallalieu points to the general rule as set out in *Withers* and the need for there to be real clarity if there was to be a change to that general position. Although he accepts that the phrasing of the email refers to the £129,000 being to cover the fees of counsel, he points to the balance of the email which refers to other payments.

74. As I note above it must also be the claimants' case that the email unilaterally overrode any prior contractual terms or the general common law position without the need for any agreement from CMS.
75. The contemporaneous documents and the timeline raise considerable doubts about whether the 12 July 2023 email could or did in fact create a specific purpose trust in relation to the £129,000. If the £129,000 was remitted to CMS before the Mirzas had notified CMS of their intention to pay it on a different basis it is not clear how a trust could have arisen without CMS agreeing to the change of status of the monies received. Even if the timing issue does not create a difficulty, when considered in its proper context it is not at all clear that the 12 July 2023 email could have or indeed was intended to create a specific purpose trust or that it could or did override CMS's entitlement to treat the monies received generally on account and by way of part payment (as referred to by Mr Mirza in his own emails) without prior agreement whether as a matter of general principles or as a result of the specific terms of the CMS retainer.
76. It seems to me that the need to determine this issue is the complete answer to the claimants' application so far as it relates to the civil trust monies. Should the amendment application be successful and the defendant's application be unsuccessful it cannot be said that there is no real prospect of the defendant being able to successfully defend the claim on the basis that there was no civil trust and until the answer to that question is determined, which will involve questions of both fact and law which will have to be determined at trial, the claimants' claim in relation to the civil trust monies cannot be resolved and the court will not be able to assess whether it should exercise its discretion to grant the declarations sought. However, that does not preclude a determination of either the amendment application or the defendant's application which consider the position from the other end of the telescope.
77. The amendment application starts from the assumption that the 12 July 2023 email can be read in isolation and creates a specific purpose trust, the relative merits of that part of the amendment are part of the overall assessment of whether the amendment has a real prospect of success which is more than merely fanciful. However, as set out above if the only remedies sought are declarations when considering whether to permit the amendments in the exercise of its discretion the court also needs to be satisfied that there is any real prospect of the court exercising its discretion to make the declarations on the terms sought.
78. CMS utilised the civil trust monies to part pay the civil proceedings invoice of 28 June 2023, that invoice included £29,650 plus VAT of counsels' fees for Mr Head a total of £35,580, and to pay the criminal proceedings invoice of 30 June 2023, that invoice included £2641.67 plus VAT of counsels' fees a total of £3,170, both of which had accompanied the 10 July 2023 email and were included in the £316K. In



total £122,431.12 was allocated against the civil proceedings invoice and the criminal proceedings invoice of £6,568.88 was paid in full. Of those amounts over £38K was therefore used to pay counsels' outstanding fees generally. The transfers appear to have been made around 17 July 2023. The Mirzas do not appear to have been told that or how the civil trust monies were allocated.

79. The claimants say that the use of the civil trust monies to part pay the June invoices was a breach of trust and a breach of fiduciary duty. The terms of the 12 July 2023 email did not specify which of Mr Scorey KC and Mr Head's fees the civil trust monies should be allocated to, if it is to be read in isolation, then £35,580 was used to pay Mr Head's fees and in fact only £93,420 was paid in breach of trust.
80. However, the POC plead that only £74,550.66 was paid in breach of trust appearing to plead that any payments made to counsel were a proper use of the civil trust monies. This plea which forms part of the amendment is inconsistent with the terms of the civil trust relied on and it raises questions about the nature of the claimants' case and what the precise terms of any declaration would be. It highlights the fluid nature of the purpose of the civil trust and raises further doubts about the utility and purpose of the declarations sought. The Mirzas' position seemed to become that any monies received by CMS were to be used for the purpose of paying counsels' fees in priority to any CMS fees whether or not it was said to be held on trust. Mr Mason submitted that CMS were seeking to have their cake and eat it when they argued that once any alleged breach of trust was remedied there was no further purpose to the declarations. But it appeared to me that it was the Mirzas who were seeking to have their cake and eat it by finding different ways of saying the CMS had to pay all the outstanding counsels' fees in priority to their own even when it was clear there was no proper basis for doing so.
81. Mr Corney chased Mr Mirza by email on 31 July 2023 prompted no doubt by the emails which suggested that the deal to which Mr Mirza had referred on 18 July 2023 was progressing. Mr Mirza emailed Mr Corney on 31 July 2023 @ 23.01. He asked CMS to undertake the work to document the proposed deal and suggested that £200,000 plus would be sent to CMS by the counter party to be held which could be released to CMS on completion of the deal.
82. On 1 August 2023 @ 10.06 am Mr Corney responded as follows:
- “I am still going to need you to come back to me on my email of yesterday re funds this week as these [funds] are not going to cut it as they are not enough and will not be here this week. We need an urgent and significant payment these week...”
83. Mr Mirza responded @ 10.36:
- “... The way I see it is that I have been honouring our arrangements for many months paying over £200k per month and over £300k on occasions. I have said repeatedly that the £200/£300 is the max I can do. You keep threatening me which is not helpful as we know Timeline paying into the CMS account has caused me a short term cashflow issue which can be resolved this week or next...”

Moreover, once settlement has been reached there will be a substantial contribution to clear most of the fees, if not all of it subject to the amounts.

I don't understand why all of a sudden all the pressure is being placed on me, when surely you can see the path to fees being paid where you should not need to wait too long. I need you to work with me not against me."

84. Mr Corney responded @ 10.49:

"The agreement to pay £200K a month was superceded [sic] when the level of fees/costs kept growing. The exposure is way beyond what the firm is willing to bear and needs to be brought down urgently. I have been saying that for months. The Timeline money will not be enough to allow us to continue to work, the exposure is too great.

I have also been asking you for some time for confirmation that you will pay the outstanding invoiced costs and explained why we need that. There is no room for negotiation on the outstanding fees/cost and finance team are concerned that your refusal to provide the confirmation they have asked for means you are intending to try to negotiate the outstanding fee level in the future. We need to address that now..."

85. The monthly invoices raised in respect of the civil proceedings dated 31 August 2023 included £107,000 plus VAT a total of £129,000 in respect of Mr Scorey KC and Mr Head's brief fees for the November CMC. It would have been apparent from those invoices that counsels' fees for the CMC were outstanding.

86. Between 25 July 2023 and 1 September 2023 CMS received a total of £651,323.05 from third parties which was held pending completion of the deal Mr Mirza had referred to and then released for use generally towards CMS outstanding invoices in early September.

**What are the criminal trust monies?**

87. Mr O'Shea, the CMS partner dealing with the criminal proceedings and related matters emailed Mr and Mrs Mirza and their son about outstanding and future costs in relation to those proceedings on 17 August 2023.

88. Consistent with the position reached in the civil proceedings, Mr O'Shea said:

"...However, the situation as regards arrears of costs on the criminal matter has become critical. The fact is that we must now reconcile outstanding fees on the criminal matter and ensure that we are in funds to pay counsel for their work in preparation.

... The current amount owing on the criminal file is £370,778 (not including work in progress to be invoiced at the end of the

month at £18,375). We estimate that CMS fees for the JR to 7 November will be £361,757 (all ex VAT).

In order to continue to represent you at the JR, we will need to reach an **agreement by 1 September** as to the management of the criminal matter fees going forward.

1. As to counsel's fees, you will remember that we informed you on 30 June that in order to instruct Adrian Darbishire in the JR, we would need to be paid £30,000 in advance to cover his initial work (not his brief fee / refresher payment for the hearing). That remains the case and this needs to be paid immediately and, in any event, by **1 September**. Further, we would ask for a similar payment of £20,000 on account for the initial work of Tom Doble on the JR by **1 September**. We cannot expose CMS to the credit risk of instructing counsel without funds on account and if these payments cannot be made then it will not be possible to continue to instruct Adrian and Tom.
2. As regards CMS's fees, CMS is now highly exposed and the arrears are attracting negative attention from our finance function. We have discussed this at a high level internally. We wish to continue to represent you in the JR but can only do so if the following schedule of payments can be agreed:
  - (a) the outstanding arrears of £370,778 is paid **by 1 September**;
  - (b) £180,800 (c.50% of the projected cost of the JR) is paid on account by **9 September**;
  - (c) All subsequent invoices which are paid in full within 14 days of issue will attract a 20% discount and no interest will be payable; where payment is made between 14 and 30 days there will be no discount on the fees and the full rate will apply, although no interest will be charged. If payment is made after 30 days there will be no discount and we will add interest at the rate specified in our terms and conditions on the full invoice, that interest will accrue until payment in full is made.

We hope that you will understand the position we are in. We want to continue to fight this case for you. At this stage we expect the JR to go ahead, as Pradeep will likely feel he has too much to lose in losing the hearing date, notwithstanding the settlement. Doing this will require work to start in early September.

If we can agree a way forward on fees, we would suggest that we arrange a conference in the judicial review as soon as

possible, and no later than the first week of September, so that Adrian and Tom are well prepared to prepare skeleton arguments to be finalised in October.

At present, very regrettably, the situation on fees is such that we cannot continue to work on the case or instruct counsel until agreement is reached.”

89. This email set out the timings for further payments and the consequences of them not being made. It made clear that no further work would be undertaken until agreement was reached. The sum of £30,000 sought on account for Mr Darbishire KC, was the same sum as that referred to in Mr Corney’s email of 10 July 2023. It remained unpaid on 17 August 2023.

90. The Mirzas did not respond to Mr O’Shea. In the context of the subsequent explanation of the urgency to issue the claim because of the Mirzas’ critical concern to maintain counsel for the criminal proceedings hearing in November 2023 these delays and non-engagement, in relation to, at least, counsels’ fees for the criminal proceedings, put that later reaction into perspective.

91. On 30 August 2023 Mr O’Shea emailed the Mirzas again @ 4.36pm.

“Just a reminder of my email of 17 August as regards the costs of the criminal matter. It is attached below and I ask that you re-read it. You will note that we proposed agreement by 1 September, which is this Friday.

On the subject of arrears, I understand that the topic of the overall arrears and paying this off is being discussed in detail with Andy and Steve.

The subject of counsel’s fees and money on account remains extremely important for the criminal matter. Sorting this out is essential to ensure we can do our work. Can you please confirm that we will this week receive £50,000 to cover initial counsel’s fees.

Can you also confirm that by Monday 11 September we will receive £180,800 to represent 50% of the estimated costs of the JR application”

92. The effect of the email was to give the Mirzas more time to pay the CMS on account fees but not counsel. On 1 September 2023, the Mirzas made an on account payment of £50,000 to CMS to enable counsel to read in as referred to in the 17 August 2023 email. This £50,000 is the criminal trust monies.

93. The receipt of the criminal trust monies was acknowledged by Mr O’Shea in his email to the Mirzas of 5 September 2023 @ 15.52 in which he explained:

“Thank you for making the transfer of £50,000. This will be used to pay £14,017.32 (incl VAT) of outstanding counsel’s fees and to defray counsel’s work on the judicial review. Note

that counsel's overall fee estimate for the JR comes to just under £110,000, plus VAT. We are likely to require further advance payments of those fees as noted in previous emails"

94. The email also provided a revised reduced estimate for future CMS costs for the criminal proceedings. Again, despite the urgency relied on by the Mirzas when issuing the claim and their fear for their liberty they did not pay any further sums towards the outstanding invoices or put CMS in funds on account in relation to the future costs by the dates set by Mr O'Shea or at all and no further monies were paid on account for counsels' fees, or indeed requested prior to termination of the criminal proceedings retainer on the evening of 2 October 2023. Mr Mirza, at least, will have known this was the position prior to the termination of the retainer. By the time the criminal proceedings retainer was terminated the balance of the criminal trust monies held on account was £35,982.68 (representing the £50,000 - £14,017.42) from which further counsels' fees would need to be paid.
95. The Mirzas knew from 5 September 2023 the likely quantum of the brief fees and that they would have to find the money to pay those fees in advance of the November hearing. They knew from the August emails that the intention was that counsel would be working on the skeletons in October. In fact, as recorded in subsequent correspondence and consistent with the advice they were given by CMS skeletons were to be filed 11 days before the November hearing. Fee notes for the brief fees were subsequently raised to CANDEY on 4 October 2023 again consistent with the timeline provided by Mr O'Shea. It can have come as no surprise to the Mirzas that they were being asked to pay the brief fees in October and they had had at least a month to get their funds in place. Given this the suggestion that the Mirzas thought that the brief fees had fallen due for payment in September and had not been paid by CMS was simply not explained.

### **September 2023:**

96. Following the release of the £651,323 to CMS for general use in early September, it was anticipated that a further £213,000 would be paid monthly by a third party until November 2023 with the Mirzas paying an additional £100,000 per month. Those payments together with the £651,323 would have substantially reduced the outstanding balances due to CMS in respect of the civil proceedings but would not have cleared them and would not have provided any monies towards future costs including counsels' fees.
97. Mr Taplin's email of 12 September 2023 @ 15.42 to Mr Mirza copied to Mr Corney, Mrs Mirza and Ameer Mirza addressed concerns that had been raised by Mr Mirza in relation to budgets, estimates and team size and Mr Mirza's perception that the other party to the civil proceedings were doing well. The Mirzas were already proposing to instruct a costs lawyer and take advice in relation to the costs and had already proposed a Solicitors' Act Assessment. Mr Taplin highlighted the potential consequences of a dispute with CMS and its ability to then continue to act for the Mirzas. The relationship between CMS and the Mirzas was clearly deteriorating quickly.
98. Mr Taplin's email attached various spreadsheets of invoices for outstanding and paid costs showing how the monies received to date had been apportioned against the

invoices. The email highlighted the following with my emphasis in bold:

**“2. Money on account**

We hold the following monies on account:

1. For Project Leaf: £18k and £5,989.20. Payments on account for undertakings given to GC.
2. Timeline issues: £651,323.05. Monies from Timeline to be used against our outstanding fees.
3. Criminal proceedings: **£35,982.68** held against future fees and being part of your **£50k payment used to settle counsel’s invoices**.
4. Civil proceedings: £756.00 being used to discharge a transcription charge.

**3. Concerns regarding fees**

There has been plenty of time to consider every invoice and we have always offered to discuss them with you.

It was only once the significant arrears accrued into this year, that you have started to say you haven’t reviewed invoices and / or want to.

**The £651k in our account will now be transferred across to settle oldest bills first. The exception is in relation to brief fees (the £129k you refer to). In relation to those:**

- 1. I have checked the fee note we receive from Chambers, DSKC has charged the agreed brief and refresher for the CMC £85k plus £8,500 respectively.**
- 2. The other amounts are for time on work not covered by the brief and refresher.**

**We will use the £129k to pay down the briefs and refreshers; at present we have it set against older bills to help with finance here. What we will do is use part of the new £651k to pay the briefs and refreshers as that works out the same.**

Eoin will respond separately on the estimate in the criminal proceedings.” **(my emphasis)**

99. CMS had part paid a number of invoices earlier in 2023 prioritising counsels’ fees, disbursements and VAT. Consequently, the vast majority of the balances on the outstanding invoices were CMS’s own fees. The 12 September 2023 email explained that CMS had allocated the £651,323 and the civil trust monies against invoices and

counsel's fees. Mr Corney explained that the civil trust monies received in July were used to pay down CMS's invoices but that £129,000 of the £651,323 would be allocated to now pay the brief fees for the November CMC. It appears from the email that Mr Mirza had referred to the civil trust monies causing Mr Taplin to check the fee notes and explain the figures in section 3 of the email. This raises a further question about what Mr Mirza knew and when. As noted above a CMS invoice including those brief fees had been raised on 31 August 2023. The email made clear what funds were held on account including in relation to the criminal trust monies identifying the balance of £35,982.38. It would have been clear to the Mirzas that no monies were held on account to pay counsel's brief fees in relation to the criminal proceedings which they knew because they had not provided any funds on account since the £50,000 on 1 September 2023.

100. Even if the Mirzas say that the email was unclear about what had happened to the civil trust monies in July 2023, it was clear that the November CMC brief fees and refreshers were now being paid. Had the Mirzas looked at the schedules they would be able to identify that the June invoices referred to in the 10 July 2023 email had been part paid prior to any transfer of funds relating to the £651,323 and that counsel's fees were unpaid and included in the August invoices. The POC rely on Mr Taplin's acknowledgment that the civil trust monies had been paid for the purpose of paying counsel's brief fees as evidence both of the existence of the trust and its breach. I emphasise that this email was not just sent to Mr Mirza but to Mrs Mirza and their son.
101. On 29 September 2023, the brief fees for the November CMC included in the 31 August 2023 invoice were paid to Mr Scorey KC and Mr Head consistent with the 12 September 2023 email. At a minimum Mr Scorey KC and Mr Head had now been paid both the civil trust monies and in addition Mr Head had been paid £35,580 by reason of the civil proceedings June invoice having been part paid. If there was a civil trust it had come to an end.
102. The oldest outstanding invoices were cleared first, as Mr Mirza had been told they would be, with the balances of the January to April 2023 civil proceedings invoices cleared so far as possible. One of the April 2023 civil proceedings invoices was part paid prioritising counsel's fees. This quite obviously left very substantial sums outstanding in relation to invoices that were outside terms which included £65,000 plus VAT of outstanding counsel's fees. Subject to the Solicitors Accounts Rules, CMS were entitled to use any general monies received from the Mirzas to pay the outstanding invoices in whatever order they considered appropriate.

#### **Termination and beyond:**

103. Money is fungible and if a special purpose trust was created by the email of 12 July 2023 any breach of that trust was remedied and the civil trust came to an end when £129,000 was paid to Mr Scorey KC and Mr Head, before the retainer was terminated. This is because if using either the full £129,000 or only £93,420 in part payment of the June invoices amounted to a breach of trust, the steps taken by CMS in September 2023 reconstituted the trust fund, used the civil trust monies for the purpose for which the trust was created and consequently remedied any breach of trust. The reconstitution of the fund using a different £129,000 to pay counsel was sufficient, it did not need to be the same £129,000. In so far as there had ever been a

civil trust and in so far as that civil trust had ever been breached – to use the language of the parties – that breach had been “cured” and/or CMS had “made amends”. No loss or damage is claimed in relation to the alleged breach of trust.

104. The only remedy sought by the amendments are two declarations that the civil trust monies were held on trust but wrongly and in breach of trust used to part pay CMS. Whilst there might be a dispute about whether a trust was created at all, and therefore whether the payment of the June invoices was a breach, by 29 September 2023 any breach was remedied, and the civil trust had come to an end. Is there therefore any utility, purpose or value to the declarations sought and can the costs and resources of continuing proceedings be justified to obtain those declarations if they are not utile?
105. Mr Mason submits that the claim for a declaration in respect of a past act was the only remedy available to the Mirzas to enable them to vindicate their legal rights. He said it was important to the Mirzas to have their rights acknowledged. Even if the breach of trust had been remedied there had been a breach of trust and an acknowledgment of that by a declaration to vindicate the Mirzas’ rights was something that had a purpose and utility. I was not persuaded that in the absence of any other purpose a declaration that confirmed that the Mirzas had been right about something that had happened in the past, been remedied had any present or future value, utility or purpose and certainly not such as to justify the time, costs and resources of a fully contested trial about whether there was a civil trust at all and then if the Mirzas were successful whether in 18 months to 2 years a consideration of whether there would still be any purpose or utility to the declarations being sought. One might say the game was not worth the candle.
106. By end of September 2023 the Mirzas considered that the relationship with CMS had become untenable due to what they considered to be CMS’s refusal to compromise on fees or have a sensible discussion about the imposition of fee caps. The Mirzas were already in discussions with at least CANDEY. As set out above the real issues between the claimants and CMS related to costs issues in the broadest sense.
107. Mr Taplin’s email of 29 September 2023 @ 3.30pm highlighted the following:
  - i) Following discussions on 18 September 2023, CMS made a proposal to resolve the fee issues on 19 September 2023. There was no substantive response or counter proposal before the retainer was terminated. An offer to discuss fixed fees had not been taken up. Mr Mirza was not responding to phone calls or emails.
  - ii) No further payments had been made and no agreement had been reached about how or when the outstanding fees or future fees would be paid which included outstanding counsels’ fees. Mr Taplin noted that counsel could not undertake significant work without payment.
  - iii) CMS knew that the Mirzas were in discussions/correspondence with at least CANDEY by 28 September 2023.
  - iv) On instructions, no substantive work had been undertaken in recent weeks. An email dated 25 September 2023 had summarised the work necessary to progress the civil proceedings and associated matters. The email then



highlighted the more urgent matters on which the Mirzas were not providing instructions including (i) the work necessary to meet a deadline on 6 October 2023, (ii) preparation for the November CMC and (iii) disclosure due on 20 December 2023.

108. By 29 September 2023, the November hearings in both the criminal and civil proceedings were about 6 weeks away and yet the Mirzas had not been providing instructions in relation to either for some weeks and had not made any payments in relation to criminal counsels' brief fees. There was no agreed way forward in relation to the outstanding or future costs. There was no evidence of any recognition on the part of the Mirzas of the urgency and importance of resolving the position and progressing the proceedings in advance of November which the Mirzas would rely on to justify issuing this claim only a few days later.
109. Mr Taplin addressed the position in relation to CMS's civil retainer:

“Therefore, in light of all these issues, it is with great regret that I am giving you notice of our intention to cease acting for each of you; Tydwell Limited; Boomzone Limited; and Redwire DC Limited in respect of the High Court Proceedings, claim number: BL-2022-000781. We are required to give you reasonable notice of our ceasing to act and **we therefore intend to cease acting on 16 October 2023**. We will also cease acting on the other matters we have worked on for you on the same date (albeit those are presently inactive). **The exception is our work for you in the criminal proceedings where you have a separate agreement with the team dealing with that case covering work up to the judicial review hearing in November.**

If you provide us with instructions, we shall of course be happy to undertake the work required with you to meet the 6 October deadline.

We also became aware from the email that we received from Ameer on 28 September 2023 that you may be instructing Candey Limited (and are in correspondence with them). Candey are a well-established litigation boutique and very able to take over from us.

While we would of course prefer to keep working with you, we are very happy to hand over to Candey (or indeed anyone else that you may wish to instruct) at any point between now and 16 October. Depending on how advanced you are with them, it may make sense for them to undertake the work for the upcoming deadlines (including the one next Friday) and we are happy to accommodate that.

**We would like to resolve the fees issues with you as well which can be dealt with in parallel.**

... We will also be informing the counsel team (David Scorey KC, Peter Head and Barnaby Lowe) of this development and will let you know how they intend to proceed...

Please kindly acknowledge receipt of this email and we look forward to discussing transfer of the work and resolution in respect of outstanding fees.” (my emphasis)

110. CMS therefore terminated their retainer with the Mirzas and proposed an orderly handover over the course of two weeks including seeking to resolve the outstanding fee issues. They offered to undertake the work to meet the imminent deadline of 6 October 2023. This measured and proportionate approach would allow time for the Mirzas to instruct a new legal team in good time for the November CMC.

111. CANDEY were retained by the Mirzas and filed a notice of change in relation to the civil proceedings on 29 September 2023. The responsibility to meet any future deadlines including the 6 October 2023 deadline, prepare for the November CMC and pay any future brief fees, refreshers or any other counsel fees or disbursements now passed to the Mirzas directly and/or CANDEY subject to the terms of their own retainer and the contract terms with counsel. CMS were not in funds to pay any outstanding counsels’ fees that had accrued and were unpaid when the civil retainer was terminated, and the Mirzas knew this.

112. On 2 October 2023 (Monday) @ 3.39pm Mr O’Shea emailed the Mirzas in an email headed “Representation”:

“Adrian Darbishire has just called me. He said that a Sonia Bamford of Candey had called him to inform him that her firm has been instructed to act for you in the criminal proceedings. I have not heard from you about this – could you kindly confirm the position.”

113. The response to this email came from Mr Candey @ 7.41pm, copied to the Mirzas:

“We now act for your former clients... in the criminal proceedings...

Please could you now kindly pay counsel within 24 hours with the funds you hold for their brief fees for the hearing on 7 November 2023 confirming whether there is anything outstanding.

We wish to commence detailed assessment proceedings immediately. Please kindly confirm what stage your costs draftsman is at in respect of costs.”

114. But as the Mirzas knew, Mr O’Shea held no funds for the brief fees for the 7 November hearing (said to be just under £110K plus VAT (£132K) in the 5 September 2023 email). Other than the criminal trust monies, none of the monies requested in the 17 August 2023 email or the 5 September 2023 email had been paid in relation to outstanding or future costs. As with the civil proceedings, no

instructions had been provided and no work undertaken in preparation for the November hearing for some weeks. The Mirzas knew CMS were only holding the balance of the criminal trust monies, £35,982.68 on account in relation to the counsels' reading in fees (as confirmed by Mr Taplin on 12 September 2023). This email coupled with the email threatening to issue proceedings on 4 October 2023 (see below) are said in combination to have been sufficient pre-action correspondence given the urgency relied on by the claimants to justify issuing the claim without any further engagement with the PDPAC. I do not agree. But in any event, this email asked CMS to pay counsels' brief fees for which they were not in funds, and which was not the purpose of the criminal trust. Either there was a specific purpose trust or there was not.

115. Mr Mirza responded two hours later @ 9.34pm:

“CMS wrongfully terminated our retainer last Friday in the civil proceedings. I assume you are aware of this?

Because of a multiplicity of reasons, not least the total lack of transparency on fees across the entire firm, I have decided to go with CANDEY.

They are now representing us in all matters.

I would be grateful if you could provide them with a full copy of your file in the usual way.

I have copied them into this email.”

116. A Notice of Change was filed by CANDEY in the criminal proceedings on 3 October 2023. CANDEY and/or the Mirzas were now responsible for meeting any future deadlines, undertaking any work needed to prepare for the November hearing, paying the brief fees and other counsels' fees as they arose.

117. On 4 October 2023 @18.11 Mr O'Shea emailed Mr and Mrs Mirza and their son. He did not copy in Mr Candey. He was later to explain this was not deliberate but an oversight and error for which he apologised but it was nonetheless relied on in support of the claim issued later on 4 October. The email explained that £351,638 remained outstanding in relation to the criminal proceedings as at 20 September 2023. The reduction in the overall sums set out in the email of 17 August 2023 was the result of a payment of £70,000 in about August 2023 which was used to pay counsels' fees on older invoices dating back to December 2022. As with the civil proceedings CMS had prioritised payment of counsels' fees and disbursements and VAT.

118. This was all confirmed in the statement of account and schedule attached to the email which shows a zero balance for billed counsels' fees. All criminal counsels' fees that had been billed up to the end of August 2023 had been paid. The outstanding balance was made up entirely of CMS fees and VAT. This was clear from the schedule which was not extensive or complicated and capable of being easily understood by an experienced businessman such as Mr Mirza or CANDEY.

119. Mr O'Shea explained that there remained some unbilled counsels' fees for some of the reading in work undertaken in September 2023. He had raised a disbursements only invoice for Mr Darbshire KC's fees for September in the sum of £5,400 plus VAT a total of £6,400. He then made the following **proposal**:

“There are some funds on client account as regards the criminal matter. Once counsel fees for which we are liable to pay have been paid this lead to a balance of £29,695, which we propose to set off against outstanding CMS fees.”

120. I note that this email (i) confirms that the balance of the funds are held on client account, (ii) identifies the balance after payment of counsels' fees and implicitly seeks authorisation to pay those fees since the proposal relates only to the balance (iii) is couched in terms of a proposal to utilise the balance towards outstanding costs. It appears to me that it was an entirely reasonable proposal given the outstanding fees. The email did not contain any threat to take immediate action to transfer the balance in breach of trust or otherwise.

121. Mr Candey says that the Mirzas could not know how much would still be owed to criminal counsel given the terms of the email. He says that they did not know what would be left unpaid and were frightened about losing counsel for the hearing on 7 November. As set out above this evidence sits unhappily with the contemporaneous documents, the chronology and the state of, at least, Mr Mirza's knowledge about the position in relation to the criminal proceedings, costs, future costs and instructions and payments. In addition the statement of account contained a zero balance in relation to counsels' fees on the outstanding invoices. The evidence indicates that CANDEY had been in contact with counsel since 2 October 2023 and counsel had raised fee invoices to CANDEY/the Mirzas on 4 October 2023 which had no doubt clarified what sums were outstanding and what sums were due to be paid and by when.

122. Mr Candey responded to Mr O'Shea on behalf of the Mirzas @ 18.55. His email was headed “Breach of SRA Obligations”:

“Why are you writing secretly to my clients? Why are you hustling them behind my back?

You will transfer the monies to our client account tomorrow. They were paid on account of Counsel and held by you on trust as trustee.

One of my team will send bank details.

I trust we understand each other, and this will be the last communication on this point. You can decide whether to self-refer.

As regards costs these are fantasy. Please let us have all your costs estimates by return and your statute bill. They will all be assessed.”

123. This email was intemperate, unnecessarily combative and neither a reasonable nor proportionate response to Mr O'Shea's email. It does not engage with the proposal to pay counsels' fees from the balance on client account. Importantly for the events that unfolded later that evening one can draw from it an intention on the part of CANDEY to provide bank details to enable a transfer of the balance on client account the following day thus rejecting Mr O'Shea's proposal to set off the balance.
124. And there matters should have rested until the following day when CANDEY were to provide their client account bank details.
125. Mr O'Shea responded to Mr Candey in an email which is said to be timed @ 10.36pm:

“As I understand the legal principles, the balance of a funds held on a solicitor's client account are **potentially subject to a lien in favour of the solicitor in the event that there are arrears of fees or other charges due.** Regrettably, as far as our work on the criminal proceedings are concerned, there is a figure of £351,638 due as at 20 September. I attach an email to the Mirzas this evening which attaches a statement of account.

As to the detailed assessment process the team has made progress in preparing for detailed assessment.

**However, again, given the arrears, this firm's work product is, prima facie, subject to a lien.**

In the normal course, the fruits of the detailed assessment process and any costs orders would be payable to CMS. Are your clients and is your firm agreeable to your providing this firm with a solicitor's undertaking to hold any payments of costs arising out of the detailed assessment and the present costs orders to the order of CMS?

**I note your email of 18.55 this evening. I do apologise for omitting you from the email chain above. However, I think the term “hustling” was rather ill-chosen, perhaps you will consider whether you would like to withdraw it?” (my emphasis)**

126. This measured response includes an apology in respect of the omission of Mr Candey from the earlier email and attaches a copy of both the email and statement of account. Given the tone of Mr Candey's email @ 18.55 it appears he had already received

them. Whenever he received them, he ought to have been able to ascertain the position in relation to counsels' fees with or without the fee notes.

127. The terms of Mr O'Shea's email are important. He considered that there was a potential entitlement to exercise a lien in relation to the monies held on client account as a result of the outstanding fees, but he positively asserted CMS's entitlement to exercise a lien in relation to their work product. He had clearly distinguished between the positively asserted lien in relation to the work product and the potential lien in relation to the client monies. A difference that should have been clear to Mr Candey. In neither this email nor in the email @ 18.11 did Mr O'Shea give any indication that he intended to take any precipitous action, such as immediately transferring the balance of the criminal trust monies to office account, or indeed any action, overnight on 4 October 2023. There was no attempt to appropriate or dissipate the criminal trust monies on 4 October or at all as CANDEY would later accept.
128. Mr Candey responded @ 21.36, the email is clearly a response to Mr O'Shea's email despite the time difference. He rejected the suggestion by Mr O'Shea that CMS could assert a lien over the criminal trust monies but failed to approve the proposal to pay the outstanding counsels' fees from the criminal trust monies which were held for that purpose:

“You cannot exercise a lien over trust monies. That is unlawful. Check your SRA rules please. The purpose was specified as being for Counsel as you acknowledge.

**We will issue proceedings tonight for a High Court declaration compelling you to transfer the trust monies.**

I stopped myself from using the word hoodwinked Eoin. You owe me one on that front. It could be said that you intentionally sought to appropriate the money improperly. I'm not saying it constitutes a crime. It's a regulatory matter for the SRA and otherwise founded in equity, which is why we are now going to approach a judge.

We shall seek indemnity costs against CMS.”

**The claim:**

129. Despite Mr Candey's evidence and Mr Mason's further explanation on instructions this email appeared to me to be an unnecessary and inexplicable escalation of the breakdown of the relationship between the Mirzas and CMS. It was followed by a further escalation for which the evidence provides no rational explanation. Ms Bamford of CANDEY, emailed Mr O'Shea @ 23.13 on 4 October 2023. She purported to serve an unsealed copy of the claim form relating to the criminal trust monies as described above which had been submitted through CE-File at 11.07pm. Even if by that stage CMS had agreed to accept service by email, and they had not even been asked, service of an unsealed claim form by email would not have amounted to service.
130. The claim form set out the brief details of the claim as follows:

“The claimants seek a declaration that the monies paid to the Defendant on account of Counsel’s fees are held on trust for the Claimants only for the purpose of paying Counsel’s fees (the “Trust Monies”)[referred to as the criminal trust monies in this judgment]. The Claimants have requested the Defendant, acting as trustee, to return the Trust Monies. The Defendant, acting as trustee, has refused. The Defendant, in breach of trust, proposed to apply the Trust Monies against its own fees and did so in a manner which breaches the fundamental requirement that solicitors must correspond with a represented party’s solicitors and must not approach lay clients directly. The request was improper and improperly made.

The Defendant asserts a lien over the Trust Monies. The Claimants seek an order that no lien can subsist over such Trust Monies as no equitable charge can attach to the monies in specie.

The Claimants further seek an order compelling payment of the Trust Monies, interest at 8% per annum and costs to be assessed on the indemnity basis.”

131. The brief details of claim are inconsistent with the chronology set out above and appear to me to be substantially inaccurate. At the point at which the claim form was issued there had been no refusal to do anything at all and no indication that CMS would unilaterally transfer the balance on client account against its outstanding fees. There had been no breach of trust, no lien had been positively asserted or exercised and there had been no refusal to transfer the criminal trust monies. CANDEY had yet to provide the bank details as proposed @ 18.55 to enable any payment to be made, nor had they approved payment of the outstanding counsels’ fees from the criminal trust monies. There was simply no satisfactory explanation for issuing a claim form on 4 October 2023. This high octane approach is entirely inconsistent with the overriding objective and the conduct that the court expects in particular from parties who are well represented by experienced litigators. If CANDEY considered that there was a real risk of dissipation of the criminal trust monies overnight such that they needed to be protected, and/or that an order compelling payment was required overnight, then they could have applied for an urgent injunction.
132. CMS say that this conduct was unreasonable and premature, and they rely on CANDEY’s failure to engage in any reasonable pre-action conduct as evidence of the abusive nature of the claim. CANDEY say that their email of 2 October 2023 coupled with the email of 4 October 2023 were sufficient to comply with the requirement to engage with the PDPAC given the urgency of the situation on 4 October 2023. I do not agree either that there was any urgency or that in any event these emails were sufficient to comply with the PDPAC and this factor that feeds into the overall consideration of the exercise of discretion in relation to the applications.
133. The explanation provided for the urgent need to issue the claim overnight can be found in Candey 2 at [17] to [20]. Mr Candey says that the request for payment by CMS of counsels’ brief fees on 2 October 2023 at 7.41pm before Mr Mirza had confirmed the termination of the retainer was made “*in highly urgent circumstances*”.

Mr Candey explains that the Mirzas were “*in the dark*” as to whether criminal counsel had been paid and so whether they would appear for the Mirzas at the November hearing.

134. I found this difficult to understand given the chronology above. It appeared to bear little resemblance to what the Mirzas knew about the funds they had provided to CMS in relation to the criminal proceedings or what funds they had been asked for. CMS had never asked for nor had they been put in funds to pay counsels’ brief fees for the November hearing. The Mirzas had not made any of the payments detailed in the emails in August and September other than payment of the criminal trust monies. CMS had no monies to pay the brief fees within 24 hours or at all. They held the balance of the criminal trust monies only in the amount that had been confirmed by Mr Corney on 12 September 2023 and was subsequently confirmed by Mr O’Shea on 4 October 2023 before the claim was issued.
135. Mr Candey further explained that he did not hear further from Mr O’Shea between 2 October 2023 and 4 October 2023 and that this had caused increased anxiety to the Mirzas because by that stage Mr Head, one of the counsel in the civil proceedings, had “*resigned on the grounds of non-payment of his outstanding fees*”. Mr Candey explains that the Mirzas became desperate because they were concerned that criminal counsel would resign for the same reason. This became a recurring theme in the correspondence, evidence and submissions to justify the issue of the claim form on 4 October.
136. Mr Mason’s instructions were that the loss of civil counsel for non-payment was raised as a possibility by Mr Head’s clerk on 3 October 2023 and then Mr Head resigned on 4 October 2023 . Despite the heavy reliance on this now it was not raised by Mr Candey at the time. It does not appear to me that issuing a claim in relation to the criminal trust monies was a reasonable or proportionate response consistent with the overriding objective or with any reasonable pre-action conduct. Mr Head was civil counsel not criminal counsel. CMS had confirmed that there were unpaid civil counsels’ fees in the outstanding civil invoices on 29 September 2023 which would in any event have been obvious from the schedules provided on 12 September 2023. Mr Mirza knew there were substantial unpaid criminal and civil invoices. Mr Head’s resignation had nothing to do with the criminal proceedings, Mr O’Shea or the criminal trust monies, nor indeed the civil trust monies.
137. Despite the months that have passed since the issue of the claim Mr Candey’s evidence does not identify any outstanding fees due to criminal counsel beyond those which Mr O’Shea was seeking to pay from the criminal trust monies. He has not said that the zero balance on the costs schedule provided on 20 September 2023 was incorrect. He has not provided any evidence that the brief fees for the criminal proceedings hearing in November had become due before termination of the criminal retainer. Even if he had been able to do so it would not have helped since he has also not identified any payment to CMS intended for that purpose. There is no evidence that any criminal counsel had threatened to resign, which would have been surprising since they had been paid up to date as at the end of August and Mr O’Shea was seeking authority to pay the September fees. And, of course, the purpose of the criminal trust monies had never been to pay the brief fees in any event.



138. Further, Mr Candey has not explained why or how Mr O'Shea or CMS were supposed to understand why the Mirzas considered there to be any urgency or indeed what was to be done about it at 18.55 on 4 October 2023. Mr Candey's contemporaneous emails say nothing about any of this. Having originally asked Mr O'Shea to pay counsels' brief fees on 2 October 2023 (for which CMS were not in funds), on 4 October 2023 he simply asked for the balance of the monies to be paid to CANDEY's client account on receipt of bank details (to be provided the following day) but did not then provide them until 10 October 2023. Any apparent urgency was clearly not so urgent that it could not wait until at least 5 October 2023 and as it turns out could wait until 10 October 2023.
139. There was simply no urgency in respect of the criminal trust monies. Mr Mirza cannot have been in the dark in light of the chronology above. The Mirzas knew they had not provided funds or instructions for weeks in relation to the criminal proceedings. Mrs Mirza had been copied into the emails. She should have had some understanding of what the position was. But in any event, Mr O'Shea had explained what monies he held on client account, and it was clearly not the brief fees. If the Mirzas were concerned about a potential loss of liberty (as was suggested in submissions) it does not appear to have galvanised them into taking action earlier in September to either pay CMS and provide instructions or transfer their file elsewhere in an orderly fashion which may have been a better option than providing neither instructions or funds for weeks, then terminating the retainer with CMS and panicking. However, frightened the Mirzas were said to be it was no explanation or justification for the approach taken in these proceedings and the consequent waste of court time and resources and the parties' costs.
140. Even if the Mirzas' logic was that they could use the balance of the criminal trust monies held by CMS, to part-pay the brief fees, which was neither the purpose of the criminal trust nor an explanation provided by either Mr Candey or Mr Mason, it would not have justified the approach taken by the Mirzas in failing to follow the PDPAC and issuing a claim form on the night of 4 October 2023.
141. Mr Mason's argument that there was such urgency to issue on 4 October 2023 that either it was not necessary to comply with the PDPAC at all or the combination of the 2 October 2023 email and the 4 October 2023 emails was sufficient was hopeless as will be clear from the chronology above.
142. Standing back, even if the Mirzas were concerned, in the dark, and frightened, I remained at a loss to understand on what rational basis issuing a claim at 11pm on 4 October 2023 was intended to help. I could not identify any urgency to justify it at all and/or that would have justified issuing without some attempt at compliance with the PDPAC. At a minimum I would have expected CANDEY to have (i) provided the bank details on 5 October 2023, as proposed on 4 October 2023, (ii) authorised payment of outstanding counsels' fees and (iii) have sought payment of the balance thereafter. Given the actual events between 4 October 2023 and 11 October 2023, the likelihood is that had there been any reasonable attempt to engage with CMS or the PDPAC that there would have been no need for any proceedings at all.
143. Mr Mason sought to argue that the issue of a claim form was the less nuclear option than seeking an urgent injunction. Whilst it may have been considered less onerous the old style approach of simply "issuing a writ" ceased with the introduction of the

Civil Procedure Rules in 1999 and is entirely inconsistent with the overriding objective.

144. The submission that the reason for issuing the claim was to stir CMS into action and that it was successful because Simmons were instructed also appears to me to be entirely inconsistent with the overriding objective and an inappropriate use of court proceedings. If this was any part of the reason for issuing the claim it suggests it was a deliberate decision and that puts into context Mr Mason's attempt to suggest the non-compliance with the PDPAC was a mere technical and minor infringement. Mr Mason submitted that it was the issue of the claim that caused the approach to the criminal trust monies to be looked at with fresh eyes resulting in the criminal trust monies being transferred a few days later. This conclusion relied on a number of speculative leaps, was not the explanation given in any evidence and did not appear to me to bear any relationship to the contemporaneous documents.
145. Of more concern this was precisely the type of conduct that might well be considered to be an abusive use of the court process for a purpose or in a way significantly different from the ordinary and proper use of the court process (*Cable @* [43]). It highlighted the Mirzas' difficulties in justifying the issue of the claim form on 4 October 2023. This was one of many examples of Mr Mason making submissions on instructions for which there was simply no evidence and/or which was contrary to the evidence there was. Mr Mallalieu relied on the inconsistencies between Candey 2, the contemporaneous documents and the current explanation about the urgency to further support his abuse argument.
146. I remain unpersuaded there was any justification for not engaging further with CMS in respect of the criminal trust monies before issuing the claim. And indeed the absence of any real urgency to justify it was borne out by the actions of CANDEY and the Mirzas over the next few days. Although these failings on the part of the claimants may not justify striking out the claim as abusive on their own, they are factors that weigh against the claimants when considering these applications and in particular the exercise of discretion.
147. Despite issuing a claim which included a claim for an order compelling payment, on 5 October 2023, CANDEY did not provide CMS with any client account details to enable them to transfer the balance of the criminal trust monies nor was the payment of criminal counsels' fees authorised. This appears at odds with the evidence of urgency and fear relied on in Candey 1 and Candey 2. Neither did the Mirzas apply for an urgent injunction to compel payment. Instead, Mr Candey emailed Andrew Taplin @ 7.38am in respect of the civil proceedings:
- “In a recent email you [CMS] stated that a recent substantial payment of £651,000 would be applied to discharge all Counsels' fees. Please confirm how much was actually applied? We are very concerned that this statement may have been untrue.”
148. This was a reference to the 12 September 2023 email the relevant parts of which are set out above. It is unclear to me how either Mr Candey, or the Mirzas could have misread the 12 September 2023 email to reach that understanding. It is simply not what it said. And the Mirzas knew that it was not the case in any event. It had been

most recently confirmed that there were outstanding counsels' fees in the outstanding invoices on 29 September 2023.

149. The email continued:

“Our client has repeatedly complained at the lack of transparency as to fees. Please immediately identify how recent payments were applied.

We are concerned that our clients were misled as junior Counsel Peter Head of Blackstone resigned yesterday on the basis of non-payment of his fees. He is not alone. He refused to even speak to us because of fees. This caused extreme upset to our clients as you can imagine.

CMS are liable to our clients for all damages incurred.

In the interim we shall be seeking to amend the Claim Form to refer to the entirety of monies paid by CMS to themselves in breach of trust and in breach of their contractual promise.”

150. Whilst the claimants continued to blame CMS for non-payment of Mr Head's fees, they were not fees captured by or included in the criminal trust monies and he had already received his part of the civil trust monies. The high point of this complaint was that monies which were not the civil or criminal trust monies, and which had been provided to CMS generally on account should have been used to prioritise payment of counsels' fees and had CMS done so Mr Head would not have resigned.
151. The email chain concluded @ 11.21 with a request for copies of the client ledgers, confirmation of which counsels' fees were outstanding and copies of fee notes. It included advising CMS of an intention to amend the claim form, to include a broader claim, only the day after it was issued. This emphasised the unnecessary haste in issuing on 4 October 2023. It also puts into perspective the amendment application which was not issued until 15 January 2024.
152. In separate correspondence on 5 October 2023 CANDEY said they were having difficulty obtaining information from counsels' clerks. Given the contact with Mr Head's clerk and criminal counsels' clerks on 2 October 2023, and the receipt of fee notes on 4 October 2023, it is not clear what the difficulties were. CANDEY said that they were still unclear about whether criminal counsel had been paid for the November hearing. This made no sense in light of the chronology. Based on the contemporaneous documents it is difficult to understand how the Mirzas and Mr Candey could have thought that CMS were putting the Mirzas' representation in the criminal proceedings at risk.
153. In that context CANDEY's threat in their letter of 5 October 2023 to apply for an urgent injunction on 6 October 2023 did not appear to be justified. The demands and/or injunction that would be sought were first that CMS “*transfers all monies paid on trust, to include monies which have recently been transferred to CMS, where it may be readily inferred that there was no specific consent and/or the firm exerted undue influence on Mr Mirza*”; and second that CMS “*provides all information in*

*relation to client monies and movements*”. Both of these appeared to be hopelessly unclear, ill-focussed and non-urgent.

154. It was unclear given the claim did not (and still does not) seek an account, why or how the Mirzas intended to apply on short service for an injunction for an order for an account and indeed why such a remedy was suitable for an urgent short notice injunction. Perhaps unsurprisingly this threat did not result in an injunction.
155. The third demand first raised on 5 October 2023 was essentially that CMS ask counsels’ clerks to co-operate with CANDEY and the Mirzas. On 6 October 2023 CMS confirmed that all counsels’ clerks had received confirmation that CMS had no objection to them liaising with CANDEY or the Mirzas. They reconfirmed the position in relation to (i) counsels’ fees in respect of the criminal proceedings, noting that in addition to Mr Darbishire KC’s fees for which the disbursement invoice had been issued there was an additional fee for Mr Boyce KC of £800 plus VAT and (ii) the civil proceedings; noting that counsels’ fee notes would have confirmed the various payments made up to 29 September 2023. CMS confirmed that Simmons had been instructed on their behalf.
156. CANDEY’s response appears to have been based on a continuing misapprehension about what monies had been received by CMS. The letter asserts that CMS had misapplied monies received from the Mirzas in relation to the criminal proceedings, but it was not clear on what basis, and they had not. The balance of the criminal trust monies remained on client account as Mr O’Shea had confirmed on 4 October 2023.
157. Mr Candey explained that his firm stopped work on an emergency injunction in light of the confirmation given by CMS in respect of counsels’ clerks. But the urgency relied on by CANDEY for the issue of proceedings related to Mr Head’s resignation. CANDEY had not raised any issue about counsels’ cooperation until 5 October 2023, after the issue of proceedings in relation to the criminal trust monies and the original threat of injunctive relief.
158. On 7 October 2023 Simmons confirmed they were instructed on behalf of CMS. As set out above this is now said to be another justification for issuing the claim on 4 October 2023.
159. On 9 October 2023 CANDEY wrote to CMS directly, and not Simmons, having quoted extensively from the emails set out above, they asked for the following in relation to the criminal trust monies:
  - “1. Confirm that this sum is still in your client account and has not been moved to your office account as threatened in the email of Mr O’Shea on 4 October. If it has been moved please restore it immediately.
  2. Confirm whether the sum of £14,017.32 (inc. VAT) was paid to counsel and provide the underlying invoice.
  3. Confirm whether the sum of £6,480 (inc. VAT) has been paid to counsel under invoice 1000-0148734 and provide a copy of counsel’s underlying invoice.

4. Pay the balance, being at least £29,695, to QEB Hollis Whiteman in part settlement of the enclosed invoice (ref 115079).
  5. Provide an account and explanation as to how client monies were applied and why you unlawfully sought to contact our clients instead of this firm and seek to persuade them to consent to the application of trust monies to CMS's fees.
160. Despite the unreasonable demand for a response by 6pm, further threatened interim relief, and the overall tone, the letter appeared to be a step in the right direction. Paragraph 5 was of course a hostage to fortune given CANDEY's letter was sent to CMS only and not Simmons. The urgency relied on to justify issuing the claim on 4 October 2023 had clearly dissipated completely.
  161. The second half of the letter focussed on the civil proceedings and the more general complaints about costs and transparency including a complaint about the failure to prioritise counsels' fees.
  162. Simmons responded @ 9.04 pm the same day. Having noted the letter was sent directly to CMS, (but not accusing Mr Candey of breach of SRA regulations) they reconfirmed the position in relation to the balance of the criminal trust monies and sought confirmation that CMS could pay counsels' fees and proposed that CMS pay the balance remaining on client account either to the Mirzas or at their direction.
  163. CANDEY's response on 10 October 2023 @ 16.11 conflates the position between the criminal proceedings and the civil proceedings and in relation to the different sums of money paid to CMS at different stages in the civil and criminal proceedings. The letter adopts a scattergun approach to the allegations it sought to make against CMS these included allegations of (i) breach of trust, (ii) failure to obtain informed consent, (iii) breaches of regulatory duties, (iv) undue pressure, (v) obligations to self-report, and (vi) the requirement to make amends. None of these were complaints in respect of the criminal proceedings or the criminal trust monies to which the claim related but about the wider dispute between the Mirzas and CMS.
  164. The real focus of the letter was to allege that there had been a breach of trust and/or a regulatory breach in relation to the application of the £651,323 which had been used to pay some of CMS's outstanding invoices. CANDEY said that their primary position was that in order to "make amends" for this alleged breach of trust and regulatory breaches CMS should apply monies already received from the Mirzas and allocated to pay CMS's invoices to pay any outstanding counsels' fees still included in any unpaid CMS invoices. CANDEY sought the client ledgers.
  165. It was unclear to me when or how this new civil trust was said to have arisen or what its terms were said to be. The legal basis as a matter of trust law for "making amends" was not explained. Despite describing this as their primary position these allegations had nothing to do with the criminal trust monies and form no part of the amendment application and are no part of the claim.
  166. The secondary position, the only part of the letter which related to either the claim or indeed the amendment application, took up one short paragraph which for no good

reason was headed “*Injunction*”. CANDEY accepted the proposal made by Simmons in respect of the criminal trust monies asking that the balance of the criminal trust monies be paid to CANDEY by midday 11 October 2023. On 12 October 2023 Simmons confirmed that the criminal trust monies had been transferred on 11 October 2023. At this point, the criminal trust also came to an end. One wonders whether this could have been achieved more quickly had the Mirzas and CANDEY reflected on the emails from Mr O’Shea and engaged in pre-action correspondence consistent with the overriding objective before issuing the claim. The Mirzas’ overall approach and conduct is a factor relevant to the exercise of the courts’ discretion.

167. Mr Mason sought to justify the Mirzas position in respect of the criminal trust monies on the basis that they were entitled to vindicate their rights and obtain the declarations they sought as there had been a breach of trust at the time of issue and the claim was not therefore abusive (*Alsaiifi*). He submitted that CMS had been entrusted with a significant sums to pay counsel and had not applied it in accordance with the criminal trust, and that curing the breach by transferring the balance of the criminal trust monies did not repair the breach. He submitted that had criminal counsel resigned the Mirzas would have been left high and dry.
168. For the reasons set out Mr Mason’s explanation and justification for the issue of the claim in relation to the criminal trust monies simply did not stand up to any scrutiny at all. There had been no breach of trust, and no lien had in fact been exercised over the criminal trust monies whether before or after the issue of the claim.
169. There was no misappropriation or dissipation of the criminal trust monies, there had been no threatened or actual breach of trust or fiduciary duty at the time the claim was issued or at all. The proposal in relation to the balance of the criminal trust monies was not a breach of trust or even a threatened breach of trust, it was a proposal to apply the balance of the criminal trust monies left once after they had been used for their specific purpose. No lien had in fact been asserted over the criminal trust monies. The balance of the criminal trust monies had been paid at Mr Mirza’s direction once the purpose of the trust had come to an end.
170. There had therefore never in fact been a dispute about any rights the Mirzas asserted in respect of the criminal trust monies. There could not therefore be any real or present dispute which might justify the making of any declaration in relation to the criminal trust monies. This seemed to me to present an insurmountable hurdle for the claimants however low the bar was in respect of the defendant’s application. The claimants had no real prospect of success in respect of the criminal trust monies claim whether in the original or amended form. And it followed that there was no real prospect of the court exercising its discretion to grant the declarations sought in respect of the criminal trust monies. Such declarations would be devoid of utility or purpose in circumstances. This puts into perspective the consequences of issuing the claim without complying with the PDPAC.
171. On 16 October 2023 Simmons responded substantively in relation to the civil proceedings explaining when and how Mr Mirza had agreed to CMS using the £651,323 against outstanding fees generally, that there had been no special purpose trust and no breach of trust. Simmons provided more detail about how the £651,323 had been allocated against the outstanding invoices. It specifically identified the payment of £129,000 to Mr Scorey KC and Mr Head by reference to their invoices.

This appeared to be consistent with the chronology set out above and appeared to significantly undermine the allegation that Mr Mirza had been put under pressure or unduly influenced as alleged.

172. Simmons explained, as CMS had done previously, that the unpaid invoices still included unpaid counsels' fees (including those of Mr Head) and in addition there was small balance of outstanding counsels' fees yet to be invoiced. The total of both inclusive of VAT was said to be £78,942.31. Whilst CMS did not consider they were under any obligation to do so, Simmons proposed that CMS would reverse out the payment of CMS's fees in the June invoices to the extent necessary to pay outstanding counsels' fees included in the other unpaid invoices. Simmons proposal would have the collateral benefit of leaving only CMS's fees unpaid for the purposes of the Solicitors Act Assessment. Simmons noted that CANDEY had proposed that CMS "make amends" and Simmons said that the payment of counsels' outstanding fees would "cure" the position in relation to any alleged breach of trust.
173. The effect of the reversal out of the June invoices to the extent necessary to pay counsels' fees from the earlier unpaid invoices was that in addition to the civil trust (any breach of which had been remedied by 29 September 2023), counsel also received £35,580 in June 2023 and a further £78,942.31 in October 2023 being a total of £243,322.31. It was and remains unclear why "making amends" should result in CMS having to do this. From a trust law perspective none of this makes any sense. It was certainly beneficial to the Mirzas and was a practical and pragmatic solution. The submission that any breach of trust in relation to the civil trust monies continued until this reversal exercise had been undertaken in October was an argument devoid of merit. There was no need at all for CMS to reverse out the payment of the June invoices having remedied any breach of trust by 29 September 2023. But it was of considerable benefit to the Mirzas who would otherwise have had to solve the problem of payment of outstanding counsels' fees. Quite rightly these allegations did not make the cut on the amendment application and no trust was alleged in relation to the £651K.
174. Simmons proposed that the unserved claim, which still only related to the criminal trust monies, should be discontinued. This proposal was repeated on 25 October 2023 saying that if the claim were not discontinued, they would give notice to compel service of the claim under CPR 7.7. CANDEY did neither. On 3 November 2023 Simmons provided a further deadline of 6 November 2023.
175. CANDEY's response on 4 November 2023 yet again conflates the concerns about Mr Head's resignation with the position in relation to the criminal trust monies and the purpose for which the criminal trust monies had been provided. There was no offer to discontinue the claim, but CANDEY did ask for payment of their costs of £15,305:

"3. CMS were acutely aware that the Trust Monies [the balance of the £50,000] were urgently required to pay counsel to prepare for two upcoming hearings, which meant our clients were not in a position to engage in protracted pre-action correspondence and was why we advised CMS that we would have no choice but to proceed to apply for an injunction to release the Trust Monies. Indeed, the situation led to Peter Head of Blackstone Chambers resigning at this critical juncture

as a result of non-payment of fees and even refused to speak to our firm because of fees.

4. Notwithstanding that CMS did not, in the event, dissipate or otherwise misappropriate the Trust Monies, its threat to do so and repeated assertions that it could exercise a lien over the Trust Monies flew so clearly in the face of established legal principles that they can only be described as a breach of CMS' regulatory duties."

176. This letter appears to bear little relationship to the emails and letters which passed between the parties, or the chronology as set out above. No urgent injunction was threatened or applied for on 4 October 2023. From any fair reading of Mr O'Shea's emails it would have been clear that there had been no threat of breach of trust and no repeated assertions of a lien. Perhaps most importantly CANDEY now acknowledged that there had been no misappropriation or dissipation of the criminal trust monies.
177. Simmons responded on 9 November 2023 refusing to pay the Mirzas, costs and arguing that if the Mirzas had engaged in any relevant pre-action correspondence the claim would not have been necessary at all. As set out above this seems to me to be a submission with considerable force. However, by this stage the claim had been issued and needed to be dealt with. Simmons noted that CANDEY had now accepted that CMS had not dissipated or otherwise misappropriated the criminal trust monies and that the balance had been paid on 11 October 2023. This important acknowledgment by CANDEY had further weakened any argument that the declarations still had any purpose or utility. It in effect acknowledged that there had never been a breach of trust of the type alleged.
178. In Pollock 1 CMS argue that had the Mirzas simply discontinued the original claim once the criminal trust monies were paid in October it would have avoided all the subsequent costs and the Mirzas could still have raised costs arguments about the basis of the discontinuance under CPR 38. Consequently they say that maintaining the claim after 11 October 2023 when it ceased to have any proper purpose was abusive.
179. Mr Mason submits that continuing the claim after 11 October 2023 whether for costs purposes only or to enable the Mirzas to vindicate their rights was not abusive and was not a reason to refuse the amendments or strike out or grant summary judgment to the defendant. He argued as set out above that the informal resolution achieved on 11 October 2023 did not resolve the breach of trust and a declaration was required both to vindicate the Mirzas' rights and because there was an important wider public interest to be considered but there was not. As set out above, the fundamental flaw in the entire criminal trust monies claim is that there had never been a breach of trust or fiduciary duty and no wrongful or repeated assertion or exercise of a lien over the criminal trust monies and no misappropriate or dissipation, whether before or after issue of the claim. There were no rights to be vindicated or any purpose to the declarations sought and never was.
180. This also put into perspective Mr Mason's submission that there was nothing fundamentally wrong with continuing a claim just to recover the costs of proceedings. I agree that continuing a claim when the substance of the claim has been resolved and the only outstanding issue is costs is not of itself abusive and does not automatically



mean that a claim should be struck out. But parties who do so take a risk. Ultimately the question of what costs order to make is an exercise of the court's broad discretion which includes considerations of justice, fairness, proportionality and the factors set out in CPR 44 which include the conduct of the parties. Just because a claim can be continued does not mean it should be nor that the outcome will be the one the party continuing the claim seeks. The claimants' themselves considered the only outstanding issue was costs as long ago as 4 November but continued the claim including making an application to amend to add in a new claim in relation to the civil trust monies after that date. None of that assists the claimants.

181. On 16 November 2023 CANDEY confirmed that the letter of 4 November was intended to be an offer to discontinue on terms, but that the claimants would equally have agreed to an order to have their costs assessed on a standard basis. Even if the former could be inferred from the 4 November letter the later could not be and no application was made to discontinue on terms. Rather the claimants doubled down eventually making the amendment application.
182. Again there seemed to be a conflation of issues and a confusion. This time CANDEY conflated Mr O'Shea's proposal with a complaint that after termination of the retainer Mr O'Shea did not offer to pay an £80,000 brief fee contained in fee notes issued to CANDEY on 4 October 2023. Given the chronology it was unclear how or why Mr O'Shea should have done this. These points were obviously wrong and would have been known to be wrong by both the Mirzas and CANDEY by November.
183. CANDEY then requested the client ledgers but in doing so threatened to complain to the SRA if the ledgers demonstrated that the criminal trust monies had been transferred to office account. This was puzzling and unnecessary given (i) CANDEY's earlier acceptance that the criminal trust monies had not been misappropriated, (ii) the balance of the criminal trust monies had been paid to CANDEY on 11 October 2023 and (iii) by 4 November 2023 CANDEY considered that the only outstanding issue was the costs of the claim.

**Service and beyond:**

184. On 20 November 2023 Simmons gave notice under CPR 7.7 requiring CANDEY to serve the claim or discontinue and provided CMS's client ledger for the criminal proceedings. CANDEY served the claim form in its original form on 30 November 2023 despite having said they intended to amend on 5 October 2023, but at the same time indicated they would provide draft amendments by 5 December 2023.
185. The first draft amended claim form provided on 5 December 2023 was unchanged in relation to the criminal trust monies, save to change to a past tense and remove the order compelling payment. This left two proposed declarations (i) that the criminal trust monies were held on trust to pay counsels' fees and (ii) that CMS could not have asserted a lien over the criminal trust monies. In the events that had occurred as set out above, neither seemed to have any utility, purpose or value and appeared to be based on a misunderstanding or misreading of Mr O'Shea's emails. Simmons argued that the relief sought was redundant and the continuation of the claim was no more than a vehicle to raise costs arguments which they considered to be abusive.
186. The other proposed amendment was to add the following paragraph:

“The Claimants paid monies to the Defendant to pay to Peter Head and David Scorey KC of Counsel which monies were instead applied against their own fees, in breach of their duty to their client and without their clients’ informed consent.”

187. There was no “claim” identified in relation to these monies and no declaration or other remedy sought. This amendment was simply a hanging paragraph with no purpose.
188. CANDEY requested the client ledger in relation to the civil proceedings which was provided on 8 December 2023.
189. On 14 December 2023 CANDEY sought to justify the proposed amendments and the continuation of the claim on the basis that a declaration that made clear that law firms could not use client monies for a purpose other than that for which it had been transferred was a matter of public interest and also of importance to the Mirzas. Yet again CANDEY sought to rely on Mr Head’s resignation and an assertion that the Mirzas were in the dark to justify issuing the claim. For the reasons set out above there is simply no merit in these justifications which reinforces the lack of any utility or purpose to the declarations sought if there ever had been.
190. CANDEY and the Mirzas were not deterred and having reviewed the client account ledgers CANDEY sought the office account ledgers and an extension of time to serve the POC. Simmons refusal to agree the extension was understandable given the limited scope of the claim at this stage. By an Order dated 19 December 2023 CANDEY was granted an extension of time on paper.
191. CANDEY’s focus turned to the civil trust monies. Simmons reconfirmed that CMS had used it to pay the June invoices as set out above (which had included £29,650 plus VAT of Mr Head’s fees). This culminated in the formulation of the civil trust monies claim.
192. Nabarro 1 says that it was only when the office account ledgers were provided on 22 December 2023 that CANDEY were in a position to amend and particularise the claim. Neither the chronology above nor the contents of the POC support this, nothing pleaded was not known to CANDEY and the Mirzas by at latest 16 October 2023 even if the ledgers for the civil proceedings were not provided until December.
193. On 11 January 2024 CANDEY provided a second draft amended claim form and a first draft particulars of claim. The claim now redefined what had previously been called Trust Monies as the criminal trust monies and added a claim in relation to the civil trust monies. The claim in relation to the criminal trust monies added an allegation of breach of fiduciary duty but that did not change the fundamental difficulties with the criminal trust monies claim as set out above.
194. The new claim pleaded that the civil trust monies had been transferred to CMS by Mr Mirza for the specific purpose of paying counsels’ fees and that in breach of trust and in breach of fiduciary duty, the civil trust monies had then been used in part to pay some of CMS’s outstanding invoices instead. This plea was encompassed in an expanded version of the paragraph set out above. None of the events after 12 September 2023 (other than the termination itself) were pleaded. The claim also

sought to advance a claim for damages for the costs of instructing new counsel following Mr Head's resignation. It seemed to me that the claim for damages was particularly hopeless given that Mr Head's resignation was not related to the civil trust monies. Simmons explained why they considered the proposed amendments including the claim for damages to be hopeless.

195. The POC were served, and the amendment application issued on 15 January 2024, the claim for damages had been removed. The POC inaccurately recorded or paraphrased the contents of at least some of the emails it relied on and was misleading. The following examples from the POC are sufficient to highlight the caution which should be adopted in relation to the POC as against the contemporaneous documents:
- i) Paragraph 35: Mr O'Shea's email of 4 October 2023 @ 18.11 is paraphrased pleading that Mr O'Shea stated that he would use the balance of the criminal trust monies to settle CMS outstanding bills in contrast to the wording of that email.
  - ii) Paragraph 37: Mr Candey's email of 2 October 2023 @ 7.41pm is wrongly pleaded as 4 October 2023, which changes the timeline whilst the email of 4 October 2023 @ 18.55 is not pleaded at all which is the email which relates to the provision of bank details the following day.
  - iii) Paragraph 38: paraphrasing Mr O'Shea's email @ 22.36 rather than quoting it, pleaded that Mr O'Shea asserted a lien over the balance of the criminal trust monies in contrast to the wording of that email.
  - iv) Paragraph 41: pleads a refusal to pay criminal counsels' fees.
196. As set out above these are each inaccurate. In addition it might be said that the omission of any plea setting out the events in relation to the civil trust monies after 12 September 2023 including the remedying of the breach of trust were at a minimum misleading. The claimants say these are unintended drafting omissions or mistakes and not intentional.

### **Conclusions:**

197. I have already considered the arguments raised by the parties in this judgment and I have already considered many of the discretionary factors which the parties have advanced. I do not repeat them here but take them all into account. I am satisfied that it is consistent with the overriding objective and good case management to grasp the nettle in this case and that I am in a position to do so.
198. I have identified a number of factors that weigh against the Mirzas when considering the exercise of my discretion, including the overall conduct of the claim, and the non-compliance with the PDPAC. As set out above I do not consider there was any justification for the approach taken when the claim was issued and that is a factor of considerable weight given the consequences. Whilst I am not persuaded that on its own issuing the claim having failed to comply with the PDPAC would be sufficient to strike out the claim on the grounds of abuse, that conduct, and approach was indicative of the approach to this dispute as a whole that I take into account.

199. More generally the Mirzas' conduct included the repeated assertions of positions in correspondence that were obviously wrong or had been superseded. The nature of some of the unsupported allegations made in the correspondence generated more heat than light and will have caused both parties to expend unnecessary additional costs and time on this dispute. The submissions made by Mr Mason on instructions throughout the hearing only emphasised the fluidity and changing nature of the arguments advanced on behalf of the Mirzas.
200. I have considered the overall justice and proportionality of the claim and the declarations sought and their utility and purpose. I have considered the costs and resources of the court and the parties. I have taken into account that the Mirzas want to vindicate their rights but that the main thrust of their concerns were costs issues which will be ventilated in other fora such as the Solicitors Act Assessment and would not be considered in this forum whatever the outcome of these applications. It is a factor that weighs against the Mirzas.
201. I have to consider whether to exercise my discretion in relation to the applications and in doing so I have to consider whether the claim in relation to the criminal trust monies has any real prospect of success where real is realistic including in relation to the declarations sought, and whether the claim in relation to the civil trust monies has a real prospect of success that is real and more than merely fanciful such that the court should exercise its discretion to allow the amendments, and in doing so I also need to consider whether there is a real prospect that the court would exercise its discretion to grant the declarations as sought.
202. I also take into account when considering the amendment application that in context it was made very late. It was made over two months after the claimants had accepted that the only outstanding issue in relation to the criminal trust monies claim was costs. Continuing the criminal trust monies claim to provide a vehicle for a new claim does not appear to me to be an appropriate use of the criminal trust monies claim.
203. For the reasons set out in this judgment the criminal trust monies claim with or without the minor amendments proposed is one that I do not consider has a real prospect of success. There would therefore be no need to go on to consider the broader exercise of discretion in relation to the declarations that are sought at all.
204. However, even if there were some basis for the criminal trust monies claim that overcame the low bar of real prospect of success when issued the declarations sought were never needed and/or were entirely superseded by events and serve no useful purpose as set out above. When I consider the terms of the proposed declarations together with all the wider discretionary factors, including the overriding objective, costs, resources and conduct they all firmly weigh against there being any real prospect that the court would exercise its discretion to make the declarations sought. I would therefore refuse the amendments in relation to the criminal trust monies claim and grant the defendant's application. It seems to me that that adds a further consideration to the civil trust monies claim. If there were no criminal trust monies claim there would be no claim to amend.
205. Finally, in relation to the criminal trust monies if I am wrong and the defendant is not entitled to summary judgment, I would dismiss the claimants' application. For the reasons set out in this judgment even if the claimants were able to overcome the low

bar to enable the claim to continue CMS would have a real prospect of success in defending both the underlying criminal trust monies claim and the separate consideration of whether as a matter of discretion the court should exercise its discretion to grant the declarations sought.

206. As set out in this judgment it appears to me that the claim that there was a civil trust is one which would overcome the low bar for amendment. Whilst it appears to me to be a weak claim, it is one in respect of which it is not possible on the amendment application to say it is entirely fanciful. In order to finally determine the question of whether there was a civil trust at all the court would need to consider contested facts and law which cannot be discerned in their entirety from the contemporaneous documents. To reach a final conclusion would require the court to consider evidence and documents that are not currently available to it and to undertake a mini trial. If the civil trust argument has to be determined it will have to be determined at trial.
207. But there are wider discretionary factors to consider when considering whether to give permission to amend such as the lateness of the application in the context of the proceedings and the effect of allowing a new claim to be advanced if the existing claim is one on which the court grants summary judgment against the claimant. It seems to me that there has been no satisfactory explanation for the amendment application being advanced on 15 January 2024 as set out above. These are additional factors that appear to me to weigh against exercising my discretion to allow the amendment to include the civil trust monies claim.
208. But even assuming in the Mirzas' favour that the civil trust monies were trust monies and wrongly used by CMS in July 2023, the breach of trust was remedied by 29 September 2023. There is no damages claim. A declaration that in July 2023 CMS acted in breach of trust appears to me to have no ongoing purpose or utility. I could not discern any purpose or utility to a declaration that CMS had wrongly used the civil trust monies. The fact that such a declaration had no utility was only reinforced by the arguments advanced by the Mirzas.
209. Mr Mason did not identify any utility or purpose to these declarations other than a sweeping statement that the Mirzas were entitled to vindicate their rights. As set out above there is no obvious wider public interest or importance, the law in relation to specific purpose trusts is not in issue. If the Mirzas believe that CMS have not complied with the SRA code of conduct and/or any other regulations which govern the conduct of solicitors including the Solicitors Accounts Rules those are matters to be raised with the SRA and are not a basis for justifying nor do they give purpose or utility to the proposed declarations. Indeed, they provide an alternative, free and more effective way to resolve the issues that appear to be at the core of the Mirzas' complaints.
210. For the reasons set out in this judgment including the broader discretionary factors I do not consider that there is any real prospect of the court exercising its discretion to grant the declarations in the terms sought in relation to the civil trust monies. And to allow these proceedings to be amended and to continue to a trial to determine if there was a civil trust at all when there was no purpose or use to the declarations sought seemed to me to be the antithesis of overriding objective. It would be a waste of not only the parties' time and resources but also the court's valuable and limited resources.

211. I do not therefore consider it to be consistent with the overriding objective, to exercise my discretion to allow the amendments to include the new civil trust monies claim for the reasons set out in this judgment. The amendment application in relation to the civil trust monies claim is therefore refused and/or the defendant's application succeeds. For the reasons set out in the judgment even if I am wrong about that the claimants' application should be dismissed as the defendant would have a real prospect of successfully defending the civil trust monies claim at both stages.
212. Even with the caution with which the court should approach the evaluation of evidence on summary applications, this was precisely the type of case in which it would be contrary to principle for the claims in relation to either the criminal or civil trust monies to proceed to trial. Further and to paraphrase Lord Phillips in the context of *Jameel* abuse in relation to the claims by the time the applications were heard there was so little at stake and the declarations had so little, if any, utility or purpose that it seemed to me even if the claims were not abusive in a *Jameel* sense the game would not have been worth the candle.
213. For the reasons I have given and in the exercise of my discretion I therefore dismiss the amendment application, grant the defendant's application for summary judgment and dismiss the claimants' application.
214. I will hand this judgment down remotely by email. The parties are asked to seek to agree an order to reflect its terms. They should have regard to the Chancery Guide at paragraph 12.89 to 12.96 in relation to any consequential matters which should if possible be dealt with on paper.