IN THE HIGH COURT OF JUSTICE **[2024] EWHC 2595 (KB)**

Claim No QB-2019-001414

KING'S BENCH DIVISION

MEDIA AND COMMUNICATIONS LIST

B E T W E E N:

CHARLES ELPHICKE

Claimant

-and-

TIMES MEDIA LIMITED

(formerly Times Newspapers Limited)

Keywords: ***collateral use of witness statements – failure to preserve evidence – costs on discontinuance – reporting restrictions – defamation – rape – transgender ideology – recusal - women – costs – mandatory alternative dispute resolution – detailed assessment – misconduct – costs judges – costs lawyers - Samuel Beckett***

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Simple language summary. This summary is written at average reading age and whilst it does not form part of the judgment it must be reproduced with it.

The Claimant was a former Member of Parliament. He sued the Defendant for damage to his reputation. He ended his case before there was a trial. The rules said that if a person ends his case early he has to pay the other side's legal costs.

The Claimant asked the court an order which changed that. He wanted not to pay the Defendant's costs. The Defendant disagreed and wanted all its costs and a payment towards them.

The Claimant said the Defendant broke rules about how a party in a court case must behave and that the Judge should punish the Defendant by reducing its legal costs.

The Judge considered whether she should step aside and not decide the case. This was because part of the case was about a woman who alleged she was a rape victim.

The Judge made four decisions:

She decided that she did not have to withdraw from the case because of being a transsexual woman and that the first and last duty of a judge is to decide a case. Neither party objected to her deciding it.

She decided that two breaches of rules justified reducing the costs of the Defendant by one fifth. Those were a failure to preserve evidence, and a breach of the rules about using documents in a court case for other things.

She ordered that the decisions about how much costs would be awarded and whether other wrong behaviour which the Claimant said had happened should be considered by the Costs Judge.

She ordered that the parties should not commence the process for assessing legal costs until they had a proper process of dispute resolution about them. She ordered that if they did do so they would have to be able to explain why.

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Representation:

The Claimant in person

The Defendant represented by Mr Ben Silverstone instructed by Reynolds Porter Chamberlain

Cases cited to the court (whether or not referred to in judgment)

Attorney General v Newspaper Publishing plc [1997] 1 WLR 926

Hollywood Realisations Trust v Lexington Insurance Co [2003] EWHC 996 (Comm)

Dunnett v Railtrack plc [2002] EWCA Civ 303

Halsey v Milton Keynes General NHS Trust [2004] 4 All ER 920

Re Walker Wingsail Systems PLC [2006] 1 WLR 2194

Finster v Arriva [2007] EWHC 90070 (Costs)

Lahey v Pirelli Tyres Ltd [2007] EWCA Civ 91

Widlake v BAA [2009] EWCA Civ 1256

Messih v MacMillan Williams [2010] EWCA Civ 844

Teasdale v HSBC Bank PLC [2010] EWHC 612 (QB)

Brookes v HSBC Bank [2011] EWCA Civ 354

Fox v Foundation Piling [2011] 6 Costs LR 961

Abbott v Long [2012] RTR 1

R (Guardian News and Media) v City of Westminster Magistrates' Court [2012] EWCA Civ 420

Nelson's Yard Management Co v Eziefula [2013] CP Rep 29

Pink v Victoria's Secret [2015] Costs LR 463

Excalibur Ventures LLC v Texas Keystone Inc [2015] EWHC 566 (Comm)

MacInnes v Gross [2017] 4 WLR 49

Blue v Ashley [2017] EWHC 1553 (Comm) *Ashany v Eco-Bat Technologies Ltd* [2018] 3 Costs LO 387

Gempride v Bamrah [2018] EWCA Civ 1367

Bank of St Petersburg v Arkhangelsky [2018] EWHC 2817 (Ch)

Autonomy v Lynch [2019] EWHC 249 (Ch)

Cape International Holdings v Dring [2019] UKSC 38

Global Assets v Grandlane Developments [2020] 1 WLR 128

Sheinberg v Abdon and others [2019] EWHC 3220 (Ch)

BXB v Watch Tower and Bible Tract Society of Pennsylvania [2020] EWHC 656 (QB)

DSN v Blackpool Football Club [2020] EWHC 670 (QB)

Wales v CBRE Managed Services Ltd [2020] EWHC 1050 (Comm)

Argus Media v Halim [2020] Costs LR 643*Hewson v Wells* [2020] EWHC 2722 (Ch)

Tenacity Marine Inc v Noc Swiss LLC [2020] EWHC 3214 (Comm)

Isbilen v turk [2021] EWHC 854 (Ch)

Sheeran v Chokri [2022] EWHC 1528 (Ch)

Ocado v McKeeve [2022] EWHC 2079 (Ch)

Churchill v Merthyr Tydfil BC [2023] EWCA Civ 1416

Worcester v Hopley [2024] EWHC 2181 (KB)

Jenkins v Thurrock Council [2024] EWHC 2248 (KB)

Rules and Practice Directions referred to:

CPR 31 PD 31B at para.7

CPR 32.12

CPR 38.5, 38,6

CPR 44.2

CPR 44.11

Statutory Instruments and other material

Civil Procedure (Amendment No.3) Rules 2024 (SI 2024 No. 839)

EU Parliamentary Assembly Resolution 2417 (2022)

EU Parliamentary report July 2021 (reference PE 653.644) "*Disinformation campaigns about LGBTI+ people in the EU and foreign influence*" by the Policy Department for External Relations of the European Parliament.

(Commissioned by the EU Special Committee on Foreign Interference in all Democratic Processes in the European Union, including Disinformation).

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JUDGMENT

1. This is my last judgment. It arises from my unaccountably long service as a judge after the equally unexpected reality that Her late Majesty saw fit to appoint me despite my flaws, declaring (as all Warrants appointing Masters do), that I was ‘right and trusty’.

2. I have been most grateful to both sides for the courtesy and competence of their representation and argument, in which Mr Elphicke represented himself in person very ably and the Defendants were represented by counsel Mr Silverstone, also very ably.

3. Those who know this judge will be aware that she is a long-time Samuel Beckett enthusiast, and one of his finest works is *Krapp’s Last Tape*, a self-referential, recursive work in which the eponymous Mr Krapp, who savours the word ‘spool’ greatly, reviews previous voice tapes in which he charted his life, hearing himself as he ages over the years and who retreats into recollection of his past. This is *my* ‘Last Tape’ though I suspect neither it nor I will ever aspire to the standard of Krapp.

4. I was assisted, not by spools, but by transcripts of digital recordings of the dates on which this court sat on these applications spread over some time, and so have had the benefit of re-reading the entirety of the hearings when writing this judgment.

5. **Points arising in this judgment.** This judgment concerns the discretion to disapply rule 38.6 (effect of discontinuance) and connected matters as well as principles relating to interim payments. The novel point arises as to reliance on misconduct by a party happening after the date of discontinuance as a ground for disapplying the ‘default’ costs rule that the

party who discontinues pays the other side's legal costs, and generally questions arise as to how to exercise discretion in this area.

6. Also of central relevance are two very important duties essential to the administration of justice which parties owe to the court and to each other. The first is the duty to preserve evidence when on notice of proceedings or likely proceedings (CPR 31 Practice Direction 31B) and the second is the at least equally important principle that there is an implied undertaking to the court not to use witness statements or affidavits served in proceedings for a collateral purpose (CPR 32.12).

7. Additionally at the end of this judgment I consider Dispute Resolution in the context of legal costs between the parties (under 'Costs' later in this judgment) following recent case law such as *Churchill v Merthyr Tydfil BC* [2023] EWCA Civ 1416 and my learned former brother judge Master Thornett in *Jenkins v Thurrock Council* [2024] EWHC 2248 (KB). I make observations on the role of ADR (or DR as the Master of the Rolls would prefer) in the context of legal costs. There I make an order which extends time for detailed assessment to enable ADR over costs. The expending of large sums on Detailed Assessment as a form of collateral litigation is a luxury few parties can, or wish, to make use of but of equal importance is the use of court resources at a time when courts are busy.
8. A final and somewhat unusual factor is my consideration of recusal of my own motion which I shall deal with shortly below.

The underlying case

9. The underlying case (the defamation claim to which this case relates and which was managed by me throughout over several years) included the Defendant's argument in its defence about the role of the Press in the public interest investigating rape allegations and publishing them in respect of a then sitting Conservative MP (Mr Elphicke). That point played some part in argument on these applications because it goes to the question of the manner in which the case was fought and the reasonableness of certain actions taken by those involved in the course of pre-action steps. For

example the Defendant refused to agree to settle the claim on the basis of a statement that the Claimant was innocent of rape, which the Defendant considered would be unethical, and the Claimant via lawyers made it plain there would be 'meticulous' cross examination of the complainant which would likely cause distress. The case was fought robustly on both sides on the basis of a defence both of truth and of publication in the public interest, and of innocence on the part of the Claimant.

Consideration of Recusal

10. Behind this case, as I have noted, we have a woman who alleged rape and whose centrality must not be diminished.

11. The position has been expressed publicly by current and former Ministers of the Crown and by some in the Law, during the currency of this case, that people who are transsexual are the embodiment and expression of a '*transgender ideology*' (sometimes '*gender ideology*'), or that steps must be taken to protect women from transsexual people by isolation or segregative legal measures in some contexts which have been canvassed in the UK for implementation. The essence of the belief is that people such as this judge make a choice to be transsexual, are biassed against women, deny their experience (or deny the existence of sex at all, or assert multiple sexes), are a threat to women and children if they share a space with them, and seek to gain access to positions of influence with manipulative intent, which is to say therefore also in bad faith.

12. The belief that there exists such an '*ideology*' is of uncertain source. Some argue that it originates from religious principles; others perceive it as a recent evolution of secular radical feminism. That is for the social historians: it need not be considered here and I express no settled view. An interested reader in search of a rabbit-hole may refer, as hopping-off points, to the texts of EU Parliamentary Assembly Resolution 2417 (2022)[1] at paragraph 5 and the EU

[1] https://pace.coe.int/en/files/29712/html accessed 13/10/24.

Parliamentary report of July 2021 (reference PE 653.644)[2] prepared for the *Special Committee on Foreign Interference in all Democratic Processes in the European Union, including Disinformation* (INGE).

13. The dilemma for the sole judge from the transsexual community is that all judges are appointed by the Crown, must bear the Crown's trust and confidence, and cannot remain if they lose that trust. This judgment is a 'hang over' from one of my final hearings prior to my (in the circumstances inevitable) departure from the Bench. It is that fact which means I must address recusal because of the facts of this particular case which I have already mentioned.

14. No objection was put to me by either side to my dealing with the case but in the circumstances I felt obliged to consider whether I should give a decision or withdraw, despite having concluded the hearings in the case.

15. In the event (see my judgment below) I have decided that the conduct of the litigation in the context and seriousness of the issues relating to the rape and assault complainant and how the robust positions on either side may or may not have been appropriate, is a matter for the Costs Judge under CPR rule 44.11. Therefore I have not had to weigh such sensitive aspects into my consideration further. Having excluded that aspect from my reasoning, in my judgment it is unlikely that a fair minded, reasonable member of the public would consider that there is a real risk of bias.

16. Weighing in my decision is that the parties rightly expect a decision, have incurred the time and cost of the case and have given me the privilege and duty of hearing it. To recuse myself would amount to a waste of court resources on a considerable scale.

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[2] https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/653644/EXPO_BRI(2021)653644_EN.pdf accessed 13/10/2024 to whit: "The Assembly condemns the highly prejudicial anti-gender, gender-critical and anti-trans narratives which reduce the struggle for the equality of LGBTI people to what these movements deliberately mis-characterise as "gender ideology" or "LGBTI ideology". Such narratives deny the very existence of LGBTI people, dehumanise them and often falsely portray their rights as being in conflict with women's and children's rights, or societal and family values in general. [..]"

17. There seems to me to be a difference between accepting that Ministers on behalf of the Crown may express a lack of confidence in a judge, necessitating her stepping down, by expressing a view that persons such as her are a risk or threat, versus tolerating Ministerial or external impact on a *specific* case or decision, on the other. Recognising the first is merely to recognise the misfortune of one's own accident of birth and the shifting sands of social tolerance, but to allow the second would be to betray the judicial oath, and I will not do that.

18. The first duty of a judge, and now my last, is to decide the case and to give reasons for her decision. That is what I shall do.

Background

19. This is my judgment in the following applications:

(i) The Defendant's application dated 30 June 2022 for an order for an interim payment on account of costs in the sum of £260,000 pursuant to the deemed costs order arising on discontinuance under CPR 38.6; and

(ii) Mr Elphicke's cross-application dated 6 January 2023 to depart from the usual effect of service of a Notice of Discontinuance of proceedings, and instead order that each side must bear its own costs of the claim.

20. In structuring my account of the parties' arguments I have to an extent rearranged the order in which they were presented, because the nature of the hearing occasionally involved a pre-empting of one side or the other's argument on certain points (sometimes due to my own questions) and it appears more likely to be cogently set out if it is presented in a more sequential manner. For that reason I have set out Mr Elphicke's points for the most part first, and those of the Defendant via Mr Silverstone, mostly second. It is of course for the applicant on each application to make out their case so the ordering of the account here does not reflect any change of any burden of persuading the court.

21. The underlying defamation proceedings related to three articles in *The Sunday Times* in 2018, in respect of the first of which a claim solely for misuse of private information was brought. The second two articles made reference to investigation of rape allegations alleged by the paper to have been made against the Claimant. The Claimant's stance in pre-litigation correspondence proposed a *Chase* level 1 meaning. The ultimate decision on meaning of the publications in respect of which the libel claim was pursued was that the allegation was at Chase level 2, ie that there were reasonable grounds to suspect that the Claimant was guilty of rape.

22. Pre-empting what is discussed below, one element of this case is an admitted breach of CPR 32.12 by the Defendant which accepts it wrongly made collateral use of witness statements in the proceedings for the purposes of various publications.

23. At the outset of the application Mr Elphicke canvassed whether some form of committal process ought to be commenced or put in place to ensure future compliance with the rule against collateral use, and possibilities were discussed in court at some length and included consideration of the relatively new provision in CPR 81.6 allowing the Court of its own initiative to consider whether to bring contempt proceedings against the Defendant. I need not set out the details of the reasons for the decision here which was *ex tempore* but I directed that, upon the Defendant having admitted breach of rule 32.1(2), a penal notice shall be attached my order, and the order shall be that the defendant must not commit further breaches or repeat its previous breach of rule 32.1(2). That was acceptable to both sides.

24. Mr Elphicke also sought that the proceedings be heard in private due to the fact that the contents of the evidence which had been misused would be disclosed in submissions and would risk defeating the purpose of the application.

25. I need not go into this at length save to apply rule 39.2 and the Human Rights Act 1998 Arts. 6 and 10 especially. In this instance I was satisfied that it was not appropriate to hear these applications in private because a less

exclusive order in the form of reporting restrictions would suffice to prevent the public hearing defeating the purpose of the hearing and avoid the consequences foreseen in CPR 39.2(3)(a). *R (Guardian News and Media) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420 and the Supreme Court in *Cape International Holdings v Dring* [2019] UKSC 38 (with which I have some familiarity as the first instance judge) were both cited as to principles of open justice.

26. I directed that identifying details of the maker of the statement which was wrongfully used for a collateral purpose must not be published (and this judgment does not discuss that) and that there shall be no public access to the statement on the court file without leave on an application made on notice. The Press were present at the making of that order and reserved their position as to a later challenge to that decision, because the member of the Press present was not in a position to argue the point fully having not been, I think, aware of the possibility of the request that I make such an order.

Whether to depart from the usual order on discontinuance (whether directly under CPR 38.5 or by way of sanctions, etc): Mr Elphicke's arguments

27. In outline, Mr Ephicke's central points were that

First, where there had been a species of contempt the court has power, as shown in cases like *Isbilen v Turk* [2021] EWHC 854 (Ch), to refuse orders where a party commits contempt or acts in what one might call a "contemptuous way"[3].

Second the court has power to refuse to grant an interim costs order as sought by the Defendant under the rules where there is "a good reason".

[3] The Defendant's position on this aspect was that contempt proceedings have very strict procedural and substantive requirements, and there had been no attempt to meet any of those requirements in these costs proceedings, and that it would be entirely inappropriate for the court to proceed on the basis that there had been a contempt. The Defendant accepted that there was a breach of CPR 32.12. It had apologised. It had withdrawn the articles. It had undertaken training and remediation, and it had offered to engage with the witness and indeed with the Claimant.

Third, the court could impose sanctions in the form of costs in relation to sanctions for serious rule breaches (see the well-known cases of *Denton* and indeed *Mitchell* with which this judge has some familiarity).

Fourth the court has power under the costs rules of CPR 44.2, which allow conduct to be taken into account in an order for costs.

Fifth, rule CPR 38.6 on discontinuance permits that the usual costs order should be disapplied in view of the nature of the defendant's misconduct and rule breaking.

The above summary comes from Mr Elphicke's submissions on day 3 of the hearing and omits an argument which was disposed of on the first day which was in relation to the court's powers in relation to misconduct under CPR 44.11 which I determined was plainly limited to assessment proceedings or summary assessment.

28. So that the reader has the rule about costs on discontinuance to the front of their mind: Rule 38.6 of the Civil Procedure Rules provides insofar as material that:

38.6 *(1) Unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom the claimant discontinues incurred on or before the date on which notice of discontinuance was served on the defendant.*

Collateral use of witness statements

29. The rule which relates to the collateral use of witness statements is CPR rule 32.12. It states:

Use of witness statements for other purposes

32.12

(1) Except as provided by this rule, a witness statement may be used only for the purpose of the proceedings in which it is served.

(2) Paragraph (1) does not apply if and to the extent that–

(a) the witness gives consent in writing to some other use of it;

(b) the court gives permission for some other use; or

(c) the witness statement has been put in evidence at a hearing held in public.

[…]

30. Mr Elphicke's first submission addressed the legal and policy reasons for the rule barring collateral use, ie Rule 32.12. It was absolute: there was no public interest, there was no freedom of expression issue, the rule is a rule of court. A party to a case and indeed all parties to a case were bound by it. *Autonomy v Lynch* [2019] EWHC 249 (Ch) was cited at para. 26 per Hildyard J: *"The duty is a duty owed to the court. It is not a duty owed to a party or a particular witness, it is to the court itself."*

And at the end of para.23, last sentence:

"*The exchange of witness statements alerts each party to what the opponent's witnesses are going to say at trial and thereby both promotes the prospect of informed settlement before trial and avoids unfair surprise at trial. Both thereby promote the overriding objective at the apex of the CPR.*"

31. I was also taken to the judgment of Colman J in *Hollywood Realisations* at para. 8: *"Such documents having been provided to the opposite parties to the litigation in order to facilitate the smooth and efficient running of the trial and to encourage settlement before trial by providing information as to the content of a witness's evidence, it is an abuse of their function for them to be used for any other purpose ..."* and to *Blue v Ashley* [2017] EWHC 1553 (Comm) at para. 15 per Leggatt J:

"When a witness statement forms part of the evidence given at a trial, the principle of open justice requires that a member of the public or press who wishes to do so should be able to read the statement – in just the same way as they would have been entitled to hear the evidence if it had been given

orally at a public hearing in court. That is the rationale for the right of a member of the public under CPR 32.13 to inspect a witness statement once it stands as evidence in chief during the trial, unless the court otherwise directs. But there is no corresponding right or reason why a member of the public or press should be entitled to obtain copies of witness statements before they have become evidence in the case."

32. In essence Mr Ephicke's submission was that rule 32.12 is an important matter: it is to protect the right of privacy and confidentiality of a witness, to promote the possibility of settlement before trial, to facilitate the smooth and efficient running of a trial, and that the document may be seriously harmful if it is relied on for other purposes.
33. He addressed also the nature and degree of the breach in the case. In this judgment I shall take pains not to identify the witness in question but the draft will be subject to consultation between the court and parties as to what information to provide in the open judgment of which this is intended to be a draft and whether any passages should be restricted in the form of a judgment with certain confidential parts.
34. In essence, said Mr Elphicke, the Defendant made wrongful use of the disclosed evidence in hard copy and social media, which followed discontinuance of the case, based on the witness statement of a witness in this case, and the newspaper story included the statement that they were making a 'revelation' that that the witness in question had referred to a complainant in criminal proceedings against Mr Elphicke as being a liar, that the witness was 'defending' the Claimant, that the witness was 'maintaining his innocence', and calling into question the professional future of that witness given Mr Elphicke's subsequent conviction.
35. It was also to be noted, said Mr Elphicke, that the overriding objective is engaged in enforcing compliance with court rules, practice directions and orders, and the Defendant's collateral use by making public statements went beyond simply identifying the witness. From what was published, a reasonable person would consider that the public disclosure purported to set out information from, ie a summary of, or the content of, parts the witness statement in question whereas in fact the witness statement was purely a

statement of factual recollection and did not refer to the complainant as a liar, nor did the witness '*maintain his [Mr Elphicke's] innocence*' or '*support' him*. It merely recorded the witness' recollection. So not only was there a misuse of the statement, and a public disclosure of that statement, the disclosure itself materially misrepresented the statement.

36. The publications took two forms. One form was in the newspaper and the other was in the form of tweets by a journalist working for the newspaper. The Defendant took the point that the tweets were not something which the newspaper is responsible for and that they were the personal publications of the journalist in question. Mr Elphicke's submission was that that access was only gained to the witness statement by reason of their employment, so to then say it was arm's length was not tenable. (I note myself that the content of the tweets is in effect a summary of the gist of what was in the paper and that one tweet refers to "we" which may be an indication that the journalist was intending to be understood as speaking as a Times Journalist).

37. The Defendant accepted that its stance that the tweets were personal to the journalist put the court in the position of not knowing what its journalist would say about the tweets referencing the story if he were in court, in response to my raising the point that in principle the earlier committal arguments may have affected him personally.

Persistent denial of breach

38. A further aggravating factor was said to be that the Defendant maintained there had not been a breach of rule 32.12, and did so for around nine months. The position adopted was misconceived and wrong, only conceded late in the day. Furthermore the Defendant's solicitors were fully aware of the enduring nature of the rules and the orders of the court even after discontinuance as their own solicitors had written to the Claimant telling him as much. It had been open to the Defendant to correct the position but its denial of breach for nine months was said to show that the breach was not merely negligent but must be taken as "considered and deliberate". The journalist's final tweet was posted after the exchange of lawyers' letters about the breach, that journalist

had access to the witness statement through his employment, and on the Claimant's case it showed a neglect and a level of intention, and that intention should be attributable back to the Defendant.

Damage to administration of justice

39. It was argued that if witnesses are allowed to be named and have an inaccurate account of their evidence repeated in breach of the rule, and have their jobs put at risk for doing their duty to the court that was serious: Mr Ephicke described it as egregious. It then became all the more serious, he said because the contents of the witness statement were only available to the Defendant by reason of the it being a party to the proceedings. That then was compounded by the fact that other journalists relied on the publications of the Defendant and their servants or agents as being accurate and that led to repetitions of the effect of the publication. Such tended to undermine the Administration of Justice.
40. Mr Elphicke in his first witness statement mentioned a witness "H", who he said had critical evidence, case-changing evidence in terms of impact on the defamation case. That witness had been worried about being "named and shamed" and was not willing to help. Undermining the 'collateral use' rule could render key witnesses generally less willing to assist, which might indeed, said Mr Elphicke, have been part of the reason for the rule in the first place.

Failure to remedy

41. The Defendant had made deletions to online content but it was said that deletions without 'putting things right', did not correct the harm done such as by publicly making it clear that the published material was incorrect. It was said to be welcome that counsel for the Defendant had indicated at the hearing that the Defendant was open to discussing steps to take on that front, but of note in Mr Elphicke's view that it had only done that at this stage. Mr Wilson of RPC for the Defendant, in his statement opposing this application indicated at para.8 what the Defendant had done so far namely (in addition to asking for tweets to be removed by the journalist):

"*the Defendant is taking additional steps within its organisation to remind relevant individuals of the application and importance of CPR r.32.12 to ensure that similar issues will not arise again. These additional steps include: (1) the provision of training to Times Media's journalists on the relevant rules in respect of the use of material obtained from litigation; (2) a note of advice to journalists to identify this particular issue of collateral use of witness statements; and (3) a reminder to Times Media's journalists on the appropriate use of Twitter."*

This was said to be inadequate: much as with regulated banks, there were or ought to be internal 'lines of defence' or systems to protect against such breaches, not merely sending round a note to journalists or providing training absent an effective internal system.

Inadequate response to non-deleted breaches.

42. A further aggravating aspect was that after the ostensible deletion of articles online, even then there remained an uncorrected leading article, which referenced the contents of the statement. The Claimant brought this to the Defendant's attention indicating what he had found, and the response somewhat insinuated that the Claimant had omitted to tell them about the article until that point and the Claimant in response I think fairly pointed out that it was a matter of concern that there could be other articles of which he was not aware.
43. The Defendant's actions did nothing proactively to ensure the removal of other material online or correct the false perception that had been given (and understood by other journalists as a result). This was characterised as being *in pectore*, in other words keeping their own actions secret. Air brushing by erasing tweets and other material did not cure the perception given to journalists and the public. As Mr Elphicke correctly noted the *in pectore* process is a means by which Popes have appointed cardinals without naming them at the time, as a secret process aimed at for example preventing different Church factions from falling out or avoiding potential persecutions of groups within the Church.

Failure of proper pre-action conduct

44. Mr Elphicke alleged two species of misconduct or inappropriate behaviour in relation to the pre-action period. The first was that he alleged that the Defendant gave untruthful information in its pre-action responses. The purpose of the protocol was to encourage early communication of the claim, as well as the disclosure and exchange of information to enable each party to understand the other's case, providing a framework within which the parties could, acting in good faith, explore early resolution of that claim. A party failing to follow the protocol could incur cost penalties as set out in CPR 44.4(3), that the court will examine conduct before as well as during proceedings, and also the court will examine the efforts made, if any, before and during the proceedings to try and resolve the dispute.

45. It was alleged that the Defendant lied in pre-action correspondence written by the Defendant's employee, Ms Howarth by stating that there was confirmation by the Metropolitan Police of the allegations which the newspaper wished to publish to the effect that the police had confirmed on the record an allegation that he was being investigated and had been interviewed under caution by them over at least 2 rape allegations. The Metropolitan Police had pursued a production order against the Defendant and had stated:

"*Clearly the contents of this email were untrue because it suggested the MPS had confirmed to the Sunday Times that the claimant had been interviewed over at least two rape allegations, which was not the case. The contents of this email raise the possibility that Howarth and Pogrund were not being honest with the MPS or BCL, who acted for the claimant, about what information they had and from who."*

46. It was said that the court is entitled to make a finding on this point, citing *Ashany v Eco-Bat Technologies Ltd* [2018] 3 Costs LO 387 para.28:

"The defendant's third criticism is that the Master was not entitled to decide that the resolution of the Board on 9 October included the email, because there was no evidence about it and it was a disputed issue. I disagree: it was relevant to her decision to disapply the default rule, and the Master was

entitled, on the material before her, to conclude that the email was included in the resolution, and so should have been provided. That went to the defendant's conduct. It was a view to which she was entitled to come: for what it is worth, I consider that she was right."

47. The Defendant's position on this was that *Ashany v Eco-Bat* is distinguishable and was a case in which the claimant discontinued because the purpose of the proceedings had fallen away and the claimant had achieved the relief that they sought in the proceedings, with the result that there was nothing more to be gained in continuing, as a result of developments during the litigation. That contrasted with this case where the issues over lies and so forth remained squarely contested, and nothing had happened at the time of discontinuance which rendered the claim academic. It was not open to the court to determine an issue such as lying, which was pleaded in the claim. The court cannot determine whether or not Ms Howarth lied in the course of that correspondence in this application, it was a serious accusation and inappropriate for the Claimant to make that allegation in circumstances where he chose to abandon the claim at which that issue would have been determined.

48. The second form of misconduct in relation to the pre-action protocol period was said to be an alleged failure by the Defendant to cooperate by providing enough information to allow the Claimant to understand the allegations and hence did not facilitate early resolution of the dispute. It was said that the Defendant refused to tell the Claimant key details, including who the complainant was, which meant that the Claimant was unable to share information at an early stage, and that could have resolved the dispute. This was a matter which I was told the Claimant's solicitors repeatedly took up in correspondence with the Defendant. For example at bundle p.357:

"What are the facts alleged by 'the victim' and who is our client's 'victim'? You have given our client absolutely no idea from the outset of The Sunday Times's hostile and harassing treatment of him, which started as long ago as 13 April 2018. Even the TNL Legal Department, with its unqualified reference to 'the victim' has offensively prejudged our client's guilt."

49. The response of the newspaper was as follows:

"The Sunday Times is under no obligation to answer the questions you have raised. As you accept at the paragraph (b) at the end of your letter, the Pre-action Protocol does not require the disclosure of the information you request at this stage in the proceedings. Should your client pursue a claim against The Sunday Times then the rules governing disclosure will apply and information will be provided [within] that framework."

50. The claimant argued that failure to provide sufficient details defeated the central purpose of the protocol, as the Claimant was not able to respond effectively. Insofar as the Defendant appeared to rely on the Sexual Offences (Amendment) Act 1992 that was misconceived since that effectively meant publication to the world at large, other than an indictment or other document prepared for use in particular legal proceedings and not inter partes correspondence or indeed other documents prepared for use in, in particular, legal proceedings. Furthermore, he said that if there had been any wider concern about a breach of confidentiality, the Defendant could have asked for undertakings, and those undertakings would have been given.

Breaches of duties to preserve disclosable material when on notice of claim

51. The Defendant was said also to have breached its duties under CPR 31 PD 31B at para.7 to preserve disclosable material. The need for this was raised early on by Carter Ruck then acting for the Claimant, specifically stating that they requested an undertaking from the Defendant as follows:

52. *"In light of the above, we require you to provide an undertaking by return that the Sunday Times will preserve all documents relevant to this matter including in relation to the police investigation into our client, including any communications between the Sunday Times and third parties unconnected to the investigation."*

To which the response came from the Defendant's own in-house solicitor Ms Howarth on 1 May 2018:

"Thank you for your letters. TNL is aware of its obligations as regards document retention."

53. In the management of the claim I had ordered standard disclosure on 27 January 2021. Yet the Claimant argued that the Defendant had lost or destroyed critical information after the Defendant's employee solicitor's undertaking had been given on 1 May 2018 to preserve material.

54. The most serious matter was said to be the loss or destruction of a journalist's electronic telephone information. The claimant submitted that the telephone was lost evidence, said to be critical first evidence, reaction-type evidence, in relation to the complainant's dealings with the Defendant and would shed light on for example whether the journalist put pressure on the complainant. There was a reference in disclosed material to 'more work' in relation to the complainant and the phone material would have clarified that and whether for example the complainant was being inconsistent or whether words were being put into her mouth or whether there was another motivating factor such as money, rejection, or pressure from anyone else. The loss of this evidence was prejudicial. The court could thereafter never see the WhatsApp messages and text messages and other similar material apparently lost in Washington DC on 8 October 2018 yet that was a loss some five months after the undertaking was given by the Defendant as to preservation. The Defendant's disclosure bundle indicated that the phone was lost on 8 October 2018 and it had been claimed there was no backup of it.

55. The telephone information should he said have been preserved immediately when the Defendant had stated it understood its obligations. There was a positive duty on the Defendant to preserve documents in the possession of its employees. The journalist was an employee. The phone should immediately have been copied or otherwise retained as evidence, the more so as the phone did not disappear in Washington DC until five months *after* the 1st of May date when the Defendant acknowledged that it knew its obligations to preserve evidence.

56. The Defendant had, it was said, had ample opportunity to preserve the electronic information concerned, and the Defendant's undertaking and the court's rules extended to electronic information on the Defendant's internal content management system, known as *Methode* (bundle p.375). The Claimant contended that the Defendant had a duty to put a litigation hold in place, but this information was wiped. The information should have been preserved, but the Defendant failed to hold the information. It was wholly inadequate that the Defendant's apparent accusation made on day 2 of this hearing was that destruction or loss of material could have been the subject of applications in the defamation claim before me but that Mr Elphicke had not done so and that it would be inappropriate to consider the matter now (p99A transcript of 14th June 2023 hearing).

57. I asked counsel for the Defendant on day three of the hearing about the allegations of non-preservation. Part of the exchange was as follows which accepts the non-preservation of the contents of the journalist's phone and contents of the Defendant's digital platform holding data about draft articles:

Master McCloud: Sorry to interrupt, but what about the point that was made by Mr Elphicke, about the duty to preserve documents that would kick in on notice of proceedings?

Counsel: *Yes, and it is accepted, and there was a-- as I understand it, a notice made clear that that should happen. And in fact apart from that loss of the iPhone and this issue about the defendant's Methode platform for draft articles, there is no suggestion that anything else was not maintained.*

But, as stated in the letter of 30 July on p.382: "A document hold notice was issued by our client's legal department to relevant employees on 24 May 2018 ..."

So that was done.

Master McCloud: Yes, and the loss of the phone was when?

Counsel: *That is in October.*

Master McCloud: Right, okay. But it is accepted those were not preserved?

Counsel: *Yes.*

In the remainder of the exchange counsel also submitted that the journalist's loss of his phone was inadvertent, that it was unclear that any relevant documents had been lost, that the Claimant had chosen not to pursue issues relating to the Defendant's disclosure before discontinuing his claim and that the Defendant's conduct in respect of disclosure had been inappropriate or in breach of its obligations under the CPR.

58. Rhetorically, Mr Elphicke asked what application could bring back a mobile phone that had been (I think metaphorically) "dropped" in a river in Washington DC. The Claimant argued that when a party to a litigation throws away, loses, deletes or otherwise destroys key evidence, no application to the court was going to bring that evidence back. But it could be dealt with here and now by the court as conduct matter with serious costs consequences.

Failure to engage in Dispute Resolution pre-action

59. Mr Elphicke also referred to alleged refusal of the Defendant to enter discussions on settlement or ADR. The Defendant had a duty to engage in settlement and ADR under the rules. There was no good reason for the Defendant refusing to do so. This was a breach of the order of this court and the overriding objective of CPR 1. The Claimant made repeated efforts to engage the Defendant in dispute resolution, first attempting to engage, as we heard, under the pre-act protocol, second, in seeking to settle the claim by way of settlement proposals and third, by ADR.

60. On 26th January it was noted that I made an order which said: *"At all stages the parties must consider whether the case is capable of resolution by ADR."*

61. On 1st April 2021, the Claimant wrote to the Defendant making a Part 36 settlement offer, and the defendant did not respond. On 13th December 2021, the Claimant again sought to settle The Defendant refused to enter any

settlement discussions and nor did they take part in ADR. I was urged to take those facts into account on the question before me as to costs.

62. Addressing points made by Mr Silverstone on day two, Mr Elphicke noted that the Defendant now gave different reasons for refusing ADR from those which it gave at the time. It did not reject ADR on the basis of the robustness of the tone of the Claimant's lawyers letters as appeared from counsel's submissions to be now argued. Mr Elphicke set out before me why he felt in any event that a robust tone was appropriate, namely that the Claimant had as far as he was concerned a strong case including messages and so forth inconsistent with the complainant's ostensible allegations being put forth in the newspaper and the apparent incorrect statement by the Defendant, contradicted by the police themselves, as to whether the police had evidence which could amount to a rape allegation (the production summons, referred to above contained the statement by the police at Paragraph 6, Page 22 that the Complainant's allegations "did not amount to any criminal offences"). Mr Silverstone had referred to for example a letter from Carter-Ruck stating:

"On the face of it, the complainant bears the very heavy burden of responsibility for having falsely told a national newspaper and caused it to be published to the world at large that she has made a complaint of rape against our client in a signed witness statement to the MPS, and by obvious implication from her use of the word 'assumed', that she had both intended and expected the MPS to investigate our client and no doubt caused him to be prosecuted for having raped her."

63. Rather than citing robustness of the Claimant's response the Defendant at the time of the ADR and related correspondence had written that ADR was not right because the Claimant had not made specific proposals in relation to the *nature* of the ADR, not a refusal on the basis that the Claimant was unreasonable or inflammatory or overly robust, as the Defendant now appeared to assert (Day two transcript at p86B onwards). Thereafter, the Defendant refused a without prejudice meeting on the basis that it was of no value until after witness statements had been exchanged. And after witness statements had been exchanged, the Defendant took no action at all. Yet a

Part 36 offer made by the Claimant had clearly been an invitation to treat, to initiate settlement talks. It was his submission that the Defendant's failure to engage was unacceptable, inappropriate and counter to the overriding objective of the CPR rules that encourages parties to get round a table and settle cases.

64. An example of what was said to be the Defendant's lack of proactive engagement in ADR was cited (p.71 of the bundle).

"You state that this matter is well capable of settlement and propose that the parties should engage in mediation. Pending any specific proposals from your client, we cannot comment on your view of the likelihood of a settlement but our client is of course conscious of its duty to consider any reasonable ADR proposals. We will therefore revert to you in due course at the appropriate stage at which any ADR process should take place once our client has proper opportunity to consider the question."

65. Then on 10 January 2022 I was given the example of a call between Carter-Ruck and RPC, at which the claimant's solicitor put the case for a without prejudice meeting, and at p.74 of the bundle a record that the Defendant's solicitor replied, saying:

"As I told you on the phone, we do not consider that a WP meeting before exchange of witness evidence will be of any real value."

66. In summary it was said to be clear that the Defendant should have agreed to attempt ADR based on factors drawn from *Halsey v Milton Keynes General Hospital Trust* for example namely the nature of the dispute was well suited for settlement discussions, and the court was right to order ADR be considered. The Claimant considered this was a case well capable of settlement by ADR, (and ADR had been budgeted for) and if the Defendant thought otherwise they should have at least attempted it and seen where it went. The Defendant refused to engage at every stage, and there was a pattern of constant delay that amounted to a refusal despite the court's order. (I drew the then relatively recent decision in *Churchill v Merthyr Tydfil* to Mr

Elphicke's attention in view of its reference to the Halsey case and its relevance).

67. On day three in reply counsel reiterated that the Defendant's position was that there was no attempt by the Claimant to offer or suggest terms that were remotely comparable to the ultimate outcome of the litigation. His Part 36 offer required a retraction and a statement of the claimant's innocence by the Defendant. It would have been ethically wrong for the Defendant to do so. As to the point that the Defendant had suggested ADR after exchange of witness statements, the Claimant had suddenly discontinued very shortly afterwards and hence the fact that such did not then take place should not lie at the Defendant's door.

Addressing whether the court has any powers to order any redress in respect of any breaches.

68. Mr Elphicke pointed out that generally if litigation is on foot and there is a breach of rule 32.12 then there is scope for example for costs orders or other sanctions. Yet the Defendant was (in its argument which will be considered below) arguing that once a case had been discontinued then there could be no sanction in respect of costs because on its case CPR 44.2 only applied during the currency of a claim.

69. Mr Elphicke addressed argument (which he anticipated on this point as a result of the skeleton argument of the Defendants), namely that Mr Silverstone raised the point that CPR 38.5 states:

38.5

(1) Discontinuance against any defendant takes effect on the date when notice of discontinuance is served on them under rule 38.3(1).

(2) Subject to rule 38.4, claim is brought to an end as against that defendant on that date.

(3) However, this does not affect proceedings to deal with any question of costs.

63. Since the Defendant had not applied to set aside Discontinuance (a right which the Defendant alone has under CPR 38.4), the Defendant had raised the argument that this impacted the application of the rules of the CPR as to costs, in particular CPR 44.2(5)(a). That rule, listing relevant factors in the exercise of the court's discretion as to costs generally stated that:

(5) The conduct of the parties includes –
(a) ***conduct before, as well as during the proceedings****.*

64. This effectively was said to oust questions of conduct after proceedings have ended, which they have according to CPR 38.5(2). CPR 44.2(5)(a), relied on by the Claimant as part of his argument that the conduct is to be a factor in my decision was therefore said not to apply, by the Defendants.

65. In relation to CPR 44.2(5) I put to counsel that whilst the wording of sub para. 5(a) of that rule does refer only to conduct before as well or during proceedings yet is silent as to conduct after proceedings, it is still the case that rule 44.2 itself refers to the taking into account of 'all the circumstances of the case **including'** the matters listed. The provision might therefore be seen as an inclusive list but not as intending to rule out matters not listed, such as conduct after discontinuance. The Defendant's response to this was that the CPR had instead arranged that conduct after proceedings could be a matter taken into account at assessment, ie under CPR 44.11 so there was no gap in the costs provision.

66. Mr Elphicke's position was that it could not possibly be intended that there should be a lacuna in the costs powers of the court between the 'end of proceedings' and the start of detailed assessment when the court's misconduct powers on assessment begin, under CPR 44.11, and the rules ought to be interpreted purposively and against absurdity.

67. I note (but do not think this aspect was referred to precisely in the hearing) that in *Hewson v Wells* [2020] EWHC 2722 (Ch) cited to me on a different point, Master Clarke when deciding to disapply CPR 38.5 proceeded on the footing that CPR 44.2 applies, per the learned master at para.17:

“Also relevant is CPR 44.2 which sets out the considerations the court is to take into account when making an order about costs. CPR 44.2.4 provides that the court will have regard to all the circumstances, including the conduct of all the parties. The context for the court's consideration in all the circumstances under CPR 44.2 is the determination of whether there is good reason to depart from the presumption laid down by CPR 38.6: see Nelson's Yard Management Co Ltd & Ors v Eziefula [2016] EWCA Civ 235 at [15] by Moore-Bick LJ.”

68. There was moreover no requirement for a causative link between misconduct and incurred costs, rather the requirement was one of a proportionate sanction. *Abbot*, Per Arden LJ at p8 considering *Widlake v BAA* [2009] EWCA Civ 1256:

"If the court is going to deprive a party of costs on the grounds of misconduct which has not been causative of a waste of costs, it should be satisfied that the sanction is a proportionate sanction."

69. There was authority that dishonesty – in this instance the untruthful statement in published material should be punished: *Widlake,* per Ward LJ at para. 44 after stating the principle that sanctions should be proportionate, in a case where the effect of the r. 36.17 requiring a costs order to be made was disapplied on the basis allowed by the rule that doing so would be unjust:

"The claimant's dishonesty must be penalised. The claimant's failure to negotiate a claim which was clearly capable of being settled must also be recognised. When I balance those factors, and attempt to do justice to both parties and to be fair to them, I conclude that the right order in this case is that there be no order for costs

70. In any event as he said in closing, CPR 44.2(8) provided at least that the court could deny an ‘up front’ interim payment of costs: *“where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so.”* Which would have the effect that such could be refused pending consideration of amounts payable under CPR 44.11 (albeit not I note

in relation to departing from the substantive form of the deemed costs order itself).

Principles generally applicable under CPR 38.5

71. Mr Elphicke cited *Brookes v HSBC Bank* [2011] EWCA Civ, para.6 (cited initially by Mr Silverstone on day 2 and not a matter of contention as to its principles) which sets out a six-point statement of judicial approach. He especially referred to (5) and (6) in para.6 of *Brookes*, but I shall set out the entire statement since this was before me:

"(1) When a claimant discontinues the proceedings, there is a presumption by reason of CPR 38.6 that the defendant should recover his costs; the burden is on the claimant to show a good reason for departing from that position;

(2) the fact that the claimant would or might well have succeeded at trial is not itself a sufficient reason for doing so;

(3) however, if it is plain that the claim would have failed, that is an additional factor in favour of applying the presumption;

(4) the mere fact that the claimant's decision to discontinue may have been motivated by a practical, pragmatic, or financial reasons, as opposed to a lack of confidence in the merits of the case will not suffice to displace the presumption;

(5) if the claimant is to succeed in displacing the presumption, he would usually need to show a change of circumstances to which he himself has not contributed;

(6) however, no change in circumstances is likely to suffice unless it has been brought about by some form of unreasonable conduct on the part of the defendant which in all the circumstances provides a good reason for departing from the rule".

The court also I note observed in *Brookes* at para.10 that:

"[it] is clear therefore from the terms of the rule itself and from the authorities that a claimant who seeks to persuade the court to depart from the normal position must provide cogent reasons for doing so and is unlikely to satisfy that requirement save in unusual circumstances."

72. On the application of those principles he made the point that this case was unusual. The Defendant's alleged rule-breaking made this case so unusual that it was "exceptional to the point of unprecedented". The misconduct after discontinuance was in any event so serious that is amounted itself to a change in circumstances for the purposes of (5), and for the purposes of (6) the Defendant's rule breaking was so unreasonable that in all the circumstances it was a good reason to depart from the rule.

73. This was said to be similar to the case of *Hewson* where my former colleague Master Clark held that the unreasonableness of the defendant's conduct which had led to the late disclosure of a deed and which triggered discontinuance, met the threshold to depart from the default rule as to costs on discontinuance. Per Master Clarke at para. 39:

"The 6 point summary from Brookes was adopted and approved by the Court of Appeal in Nelson's Yard[4]. There, it was reiterated that it is not the function of the court considering costs to determine whether the claim would have succeeded, although the court is permitted to consider whether the unreasonableness of the defendant's conduct provides a good reason to depart from the default rule. The court may take account of matters relating to conduct where it does not have to resolve disputed questions as to the merits of the substantive claim."

Mr Elphicke's position if the court were to reject his application and determine the question of an interim payment

74. In the ordinary course of events where a court makes an order for costs there is a presumption that the court should consider making an interim order for payment of a sum of costs pending assessment. See CPR r.44.2(8):

[4] *Nelson's Yard Management Co Ltd & Ors v Eziefula [2016] EWCA Civ 235*

'Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so.'

75. In this instance there is a deemed costs order (CPR 44.9) which arises on discontinuance, but it is in my judgment correct that the court should on application consider an interim payment where there is a deemed order. What is sought is some £260,000 on a bill of roughly £500,000.

76. Mr Elphicke's submissions there were that:

(i) the issues of conduct already referred to at length amounted to factors to take into account in setting the amount of a payment or making one at all. I understand this to be effectively making the point that conduct and the financial impact of it can then be considered at least in terms of the level of costs, at assessment, with less or no risk that an interim payment may prove to have been greater than the sum ultimately awarded at assessment.

(ii) the starting point for any interim payment set out by the Defendant was in any event too high. For example ADR never happened, a budgeted PTR never happened, and so forth such that in effect Mr Elphicke was arguing that the costs were likely to be shown to be too high in total and possibly not incurred at all once assessment occurred and that ought to be for a Costs Judge.

(iii) Given the significant contested issues as to what the level of interim payment should be, as well as the alleged misconduct of the Defendant, Mr Elphicke said that it would be better for the entire matter to be remitted in to a Costs Master for detailed examination, such that no interim payment should be ordered at all. He contrasted that with saying "*Look, it is all shocking. No order as to costs*" but I suspect that he mis-spoke and do not take that as meaning he intended to abandon his primary case under rule 38.5 namely that I should indeed make no order for costs not least because of what I take it he would say was 'shocking' conduct.

(iv) His position was that if I did accede to an interim payment I then the starting point should be £200,000 with a reduction made to reflect alleged persistent rule breaking.

The Defendant's position through counsel on both applications

77. First, the Defendant reminded the court that Mr Elphicke had litigated his claim aggressively, making serious allegations against the Defendant and its journalists, its witness and the complainant who was an alleged rape victim. These included allegations of lies and threats of *'meticulous cross-examination'* (as the Claimant's own solicitors had put it in correspondence). The claim fought in that way caused the incurring of large legal costs, and raised the important issue about whether the Defendant had a defence to reporting the allegations, acting in the public interest, that a sitting MP had committed rape. He had taken the risks of litigation and his sudden discontinuance illustrated that the claim ought not to have been brought.

78. Second in applying rule 38.6 the court should proceed on the basis there was no "*change of circumstance amounting to unreasonable conduct by the Defendant*" as alleged by the Claimant, so as to provide any good reason for departing from the default rule that a party who discontinues pays the legal costs.

79. Third the (admitted) breach of 32.12 in the form of the use of witness statements after discontinuance but for a collateral purpose did not provide a legal basis for departing from the default rule. It would be contrary to the purpose of rule 38.6(1) for conduct after the end of proceedings by way of discontinuance to be considered in making the decision as to whether to depart from the default rule. The case law supported the view that the 'change of circumstances' envisaged is one caused by the Defendant's conduct and which led to the discontinuance. Conduct after discontinuance could not in principle serve that purpose since ex ipso facto the discontinuance had been entirely up to the Claimant, and the 'conduct' relied on post-dated that. If I was against Mr Silverstone on that, it would be wrong in any case to depart from the default rule based on this post hoc conduct given the unreasonable pursuit

of the litigation and the lack of any connection or causal relationship between the legal costs incurred by the Defendant in defending the claim, and the later breach of the rule after the discontinuance of the claim.

80. Fourth (and again if I was against Mr Silverstone on whether post-discontinuance conduct can be taken into account) it would not be appropriate to depart from the default rule. Where an order for costs – here a deemed order – is made then a party is entitled to a reasonable sum on account[5]. The very fact that in his argument and evidence he was indicating he was impecunious pointed to the making of an interim payment to save the Defendant the further cost outlay and risk of the assessment process when facing risk of not recovering that cost or the full sums in the Bill due to inability to pay.

81. The purpose of the payment on account rule was to minimise prejudice caused to a successful party because of the possibly lengthy (and costly) process of detailed assessment. The sum of £260,000 was sought by applying reasoning that it represented:

(i) 50% of the incurred costs stated in the budget as at date of my costs management order, plus

(ii) either 90% of the budgeted costs for budgeted phases or 90% of the actual costs incurred by the Defendant for each budgeted phase if lower than 90% of the budgeted figure for that phase.

82. The 90% figures were derived for example from *Pink v Victoria's Secret [2015] Costs LR 463, MacInnes* (supra.) and *Sheeran v Chokri* [2022] EWHC 1528 (Ch). As to non-budgeted figures the lower percentages were put forward applying *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm) at paras. 23-24 per Christopher Clarke LJ in a decision made before the advent of costs budgeting:

"23. What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment

[5] unless there is good reason not to do so: CPR 44.2(8) *supra.*

and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad.

24. In determining whether to order any payment and its amount, account needs to be taken of all relevant factors including the likelihood (if it can be assessed) of the claimants being awarded the costs that they seek or a lesser and if so what proportion of them; the difficulty, if any, that may be faced in recovering those costs; the likelihood of a successful appeal; the means of the parties; the imminence of any assessment; any relevant delay and whether the paying party will have any difficulty in recovery in the case of any overpayment."

Manner of litigation

83. The Claimant had approached this case aggressively. He had accused a journalist of making knowingly false statements of a very gravely defamatory nature, dishonesty and that "*The Times* legal department made a palpably false and misleading claim to this firm.", he had threatened 'meticulous' cross-examination of the woman complaining of rape (see above). Collaterally Mr Justice Nicklin made an order on application by the Claimant for disclosure against the police, of material relating to the complainant.

84. The Claimant via his lawyers had sought, via correspondence to the Defendant's lawyers, to press the Defendant not to rely on the complainant victim's evidence: *"Your client should in no circumstances be subjecting the complainant to the embarrassment and awkwardness at best of having to testify on its behalf."* I shall not repeat here other passages from correspondence, not read aloud in court but the effect is that this was a very robust defence.

85. As to engaging or not engaging in ADR, the Defendant had not refused ADR: it had stated that *"You state that this matter is well capable of settlement, proposing the parties should engage in mediation. We will therefore write to you in due course as to the appropriate stage at which any ADR process should take place…"* and Carter Ruck had expressed no objection to ADR taking place after exchange of statements as Reynolds Porter Chamberlain for the Defendants had proposed. Far from it: Carter Ruck had responded: *"Witness statements have been served. We propose the parties go to mediation on a mutually convenient date."* To which the Defendant did not object, but the discontinuance of the claim came very soon thereafter (some seven working days later) at the initiation of, naturally, the Claimant.

86. The Defendant argued that it had been quite wrong of the Claimant by his lawyers then to say, when discontinuing, that *"Wherever the truth may lie, our client believes in circumstances where TML, an entity governed by commercial imperatives has simply refused to explore any kind of alternative resolution ..."*

87. The Defendant's application for a payment on account was opposed by the Claimant who, thereafter, following discussion between the parties, made his present application to disapply the usual rule in CPR 38.6 in order to depart from the default costs order.

88. Mr Silverstone cited and read the relevant passages from *Brookes* and *Nelson's Yard* already referred to in my summary of Mr Elphicke's arguments above, citing also the case of *Messih v MacMillan Williams* [2010] EWCA Civ 844: *"But the avoidance of the costs of a trial is the necessary consequence of any discontinuance and cannot, of itself, justify a departure from the normal rule .... There has to be something more than that to justify that departure."* –

and that was so even in instances (as referred to in *Nelson's Yard*) where a Claimant had in practical terms achieved all he might have got at trial, let alone (and *a fortiori* this case) where the Claimant had failed to achieve anything. Further, per Beatson LJ in *Nelson's Yard* at para.32:

"It is clear that once there is to be no trial, it is not the function of the court considering costs to decide whether or not the claim would have succeeded: see Re Walker Wingsail Systems PLC [2006] 1 WLR 2194*, per Chadwick LJ at para. 12, and HHJ Waksman's second principle in Teasdale v HSBC Bank PLC* [2010] EWHC 612 (QB), at para 7(2). *But it is also clear (see Moore-Bick LJ's sixth principle in [Brookes])) that it is the function of the court to consider whether the unreasonableness of a defendant's conduct provides a good reason for departing from the default rule."*

Proper basis for interim payment amount

89. Mr Silverstone referred to the judgment of Coulson J as he then was in *MacInnes v Gross* [2017] 4 WLR 49, at para. 26:

"One of the main benefits to be gained from the increased work for the parties (and the court) in undertaking the detailed costs management exercise at the outset of the case is the fact that, at its conclusion, there will be a large amount of certainty as to what the likely costs recovery will be. One consequence is that, for the purposes of calculating the interim payment on account of costs, the starting point will almost always be the payee's approved costs budget."

90. In that case the learned judge made a deduction of 10% from the budgeted costs when allowing an interim payment, and the approach of the Defendants in seeking £260,000 reflected that (see above). As regards un-budgeted costs the scope for uncertainty at detailed assessment would be greater and this was reflected in the proposed 50% reduction to that element for purposes of interim payment.

91. At conclusion of submissions by the Defendant I raised the point that the duty not to make collateral use of statements and disclosed documents remained in perpetuity and hence survived discontinuance, and that the wrongful use of them, albeit after discontinuance could be seen as a change of circumstances by breaching an extant duty, not merely one which ended at point of discontinuance. I asked whether therefore when deciding costs of the case, it would be open to a court to say in relation to part of the costs, those

would be disallowed for breach of that the ongoing duty not to make collateral use.

92. Counsel accepted that there was not any authority of great relevance on the interpretation of rule 38.6(1) on the question whether conduct after discontinuance can be considered, and could amount to a significant change of circumstances and enable disallowance of costs for breach.

93. As counsel put it his point about the rule under discontinuance was that when the court is applying rule 38.6(1) the change of circumstance should be an act or event, that occurred before the discontinuance. So the mere fact that the duty arises before the discontinuance does not mean that an act that takes place afterwards can be deemed to have impacted on the discontinuance, because it did not bear on the reasons for the discontinuance itself. The concept of 'change of circumstances' should be read as meaning only circumstances which impacted on the discontinuance.

94. Counsel accepted that CPR 44.11 (which allows a Costs Judge to disallow costs at a Detailed Assessment, as a result of misconduct) was available. The relevant rule states that it applies among other things where *"(b) it appears to the court that the conduct of a party or that party's legal representative, before or during the proceedings or in the assessment proceedings, was unreasonable or improper."* I note that in fact the rule omits to refer to conduct '*after the proceedings*'. I shall return to this later.

95. Turning to the application of CPR 44.2 more generally to the range of conduct cited by the Claimant, which I pressed counsel about, that rule indicates that conduct is a factor *"In deciding what order (if any) to make about costs",* by CPR 44.2(4)(a) and that conduct includes (but arguably impliedly is not limited to, I suggested) *"(a) conduct before, as well as during, the proceedings"*

96. Counsel accepted that provided the 'gateway' criterion of CPR 38.6 was satisfied such that a court determined that the change of circumstances justified a departure from the default costs rule, then at that stage it would be open to a court to consider conduct under CPR 44.2. Even then, *Fox v*

Foundation Piling [2011] 6 Costs LR 961 gave stern disapproval of disapplying the usual starting point that costs follow the event too readily, eg at para. 62:

"*There has been a growing and unwelcome tendency by first instance courts and, dare I say it, this court [the Court of Appeal] as well to depart from the starting point set out in rule 44.3 (2) (a) ...*" [ie that costs normally follow the event of the outcome of the case]

"*... too far and too often. Such an approach may strive for perfect justice in the individual case, but at huge additional cost to the parties and at huge costs to other litigants because of the uncertainty which such an approach generates ... numerous first instance hearings in which the only issue is costs and (b) a swarm of appeals to the Court of Appeal about costs, of which this case is an example.*"

97. In this case Mr Elphicke was seeking departure from the normal position under two rules (38.5 and 44.2) and such would (in my words interpreting his point) encourage, as the Court of Appeal put it, "swarms of applications".

98. Referring to *Abbott v Long,* per Arden LJ as she then was citing with approval dicta of Ward LJ at paras 14-16:

"... the court is entitled in an appropriate case to say that the misconduct is so egregious that a penalty should be imposed upon the offending party. One can, therefore, deprive a party of costs by way of punitive sanction. Given the judge's findings of dishonesty in this case, that may be appropriate here ..."

Yet even in serious cases where lies are told, there was a note of caution:

"... lies are told in litigation every day up and down the country and quite rightly do not lead to a penalty being imposed in respect of them."

So even in the case of lies, of the sort alleged by the Claimant but denied in this case by the Defendants and not ruled on at any trial, it was argued that a court must be cautious in imposing a sanction where the lies have not resulted in the incurring of further costs (and here no costs had been shown to be

incurred by reason of the alleged untrue statements by the Defendants). Even if sanctions were imposed they must be proportionate.

99. In summary, the Defendant said that the 38.6 gateway was not satisfied, but even if it were, then a fair and proper order would retain an order for costs in favour of the Defendant, and recognise that to the extent that other allegations of misconduct were alleged, those had been dealt with, could be raised in assessment as appropriate in due course, and it was not appropriate at this stage to make orders of the sort sought.

Decision

100. The manner of presentation of argument was somewhat out of order, with no criticism of the Claimant who was acting in person and as noted at the start, my account has endeavoured to place Claimant's parts in one section of the decision (with occasional references where useful to what the Defendant responded) and the Defendant's arguments in a separate part. My decision will attempt to be logically structured.

101. The issues for me appear to be:

(1) Can CPR 38.6 apply in the case of conduct which takes place after the discontinuance of the claim or is it limited to conduct taking place before discontinuance. This affects the extent to which the wrongful collateral use of witness statements is a factor in applying that rule.

(2) Can CPR 44.2(4)(a) – the taking into account of conduct – apply to conduct taking place after the end of proceedings (again, the misuse of statements) or does CPR 44.2(5) have the effect that conduct during or before, but not after discontinuance, may be considered.

(3) Whether the availability of powers under CPR 44.2 arises only if the 'gateway' of CPR 38.6 is satisfied?

(4) CPR 44.11 was said to apply to enable conduct to be raised later, in assessment. However I must direct myself whether the wording of CPR 44.11 excludes conduct in the period after discontinuance, but before

commencement of assessment, in circumstances such as that here where an application after discontinuance was made both for an interim payment and for a disapplication of the default costs rule, under CPR 38.6. This is relevant because the absence of a potential 'conduct' remedy at assessment in relation to conduct after discontinuance is relevant to whether the rules were likely to have intended also to exclude a remedy for post discontinuance conduct under CPR 38.6 leaving the Claimant with no avenue for redress (a 'lacuna' as Mr Elphicke put it).

(5) In the light of my decisions as to the above, given the allegations and the material before me as to conduct and breaches of rules should I take any of the following steps or some other step or steps;

(i) Depart from the default costs order under CPR 38.5 and make a different substantive costs order such as 'no order for costs'?

(ii) Depart from the default costs order under CPR 38.5 and make an order which preserves the substantive nature of default costs order, ie that costs follow the event, but varies it to direct that there be a percentage or other reduction to reflect conduct?

(iii) Refuse to make an interim payment order, or make a reduced form of order in view of the allegations of misconduct (taking into account my decision under (4) above if a remedy for the misuse of the statements is excluded at assessment).

Issue 1: Can CPR 38.6 apply in the case of conduct which takes place after the discontinuance of the claim or is it limited to conduct taking place before discontinuance.

102. CPR 38.6(1) as noted earlier has the effect of making a deemed costs order that a party who discontinues must pay the costs of the discontinued claim. The presumption therefore is that of an order for standard basis costs to be assessed, but that is the case *"Unless the court orders otherwise".*

Applying *Brookes*, supra,

"(1) When a claimant discontinues the proceedings, there is a presumption by reason of CPR 38.6 that the defendant should recover his costs; the burden is on the claimant to show a good reason for departing from that position;

(2) the fact that the claimant would or might well have succeeded at trial is not itself a sufficient reason for doing so;

(3) however, if it is plain that the claim would have failed, that is an additional factor in favour of applying the presumption;

(4) the mere fact that the claimant's decision to discontinue may have been motivated by a practical, pragmatic, or financial reasons, as opposed to a lack of confidence in the merits of the case will not suffice to displace the presumption;

(5) if the claimant is to succeed in displacing the presumption, he would usually need to show a change of circumstances to which he himself has not contributed;

(6) however, no change in circumstances is likely to suffice unless it has been brought about by some form of unreasonable conduct on the part of the defendant which in all the circumstances provides a good reason for departing from the rule'.

And

"[it] is clear therefore from the terms of the rule itself and from the authorities that a claimant who seeks to persuade the court to depart from the normal position must provide cogent reasons for doing so and is unlikely to satisfy that requirement save in unusual circumstances."

103. I do not see anything in the wording of CPR 38.6 quoted earlier in this judgment or in the case law such as *Brookes* which fetters the court's discretion in principle to depart from the default costs order

104. It is certainly likely to be the case that the usual situation for application of CPR 38.6 is where some event took place (a change of circumstances) – such as very late production of a deed in the case of *Hewson v Wells* where the Claimant was caused to discontinue by reason of the event or conduct prior to discontinuance. But there is nothing in the rule to imply that conduct after discontinuance cannot be relevant and the Brookes decision does not require (but merely envisages that 'usually') a change of circumstances of that sort. Neither a change of circumstances nor a causal linkage are mandated by the rule or the authority even if those would be the norm (and Mr Elphicke's express position was that this case is very far from the norm, involving as it does misuse of statement for collateral purposes and, he says, other matters making this not a 'usual' case).

105. I do not accept that the reference in CPR 44.2(5) to conduct including 'conduct before or during' proceedings is sufficient to suggest that conduct whether for CPR 44.2 or CPR 38.6 cannot include conduct technically after proceedings have ended by discontinuance rather, whereas the effect of CPR 38.5 is to end proceedings that in my judgment must be read as subject to the right of a party to apply for an order departing from the default costs order, and where such an application is made then the proceedings cannot yet be said to be 'at an end': they are live for the purposes precisely of considering the costs question in the application and reopening the default costs order which arose on date of discontinuance.

106. The rules committee could have but did not include provision limiting the factors to be considered to the period prior to discontinuance. A reading in this form avoids any risk of a 'lacuna'. This is also strengthened by the position under CPR Part 44 that a costs judge conducts the assessment in accordance with the substantive form of costs order made. A narrow approach to CPR 38.6 would mean that there was no scope for a departure from the substantive form of the default costs order, since that would not be available at Detailed Assessment either.

107. At the risk of sounding like Mr Krapp to whom I referred at the outset looking back at his life, in one of my first judgments, as Deputy Master Victoria

Williams, in *Finster v Arriva* [2007] EWHC 90070 (Costs) I dealt with a case where a very low settlement (£10,000 plus standard basis costs) was reached in a claim pleaded, as I found exaggeratedly, at well over £1m. It was argued by Mr Sachdeva (now in silk) against Mr Hooper QC that the Defendant was the true ‘winner’.

108. My decision was that the claimant came to the assessment with an order for standard basis costs of the claim where a payment into court under Part 36 was later accepted out of time by consent, with standard basis costs and hence no powers of the court were sought to be exercised due to the late acceptance. My decision was that the question of who "won" was now irrelevant and that subject to the making of all deductions which may be properly made by a costs judge on the standard basis on an assessment, he was entitled to his costs.

109. I held that it would not reasonably be open to me to interfere with the terms of the order and decide, for example, that the Claimant had 'lost' and ought to be entitled to only some lesser substantive order as to costs (such as standard basis costs only up to a given date), solely and simply on the basis of a post-hoc assessment of where success lay.

110. The fact that argument at least as to taking into account conduct in relation to quantum of costs may be available at Detailed Assessment does not itself point away from a power also to consider that conduct under CPR 38.6 whether as to the substantive order or a reduction in quantum by a percentage or suchlike: it has long been the case that where conduct is concerned there is the potential for points to be raised at Assessment or in the proceedings and sometimes the Costs Judge is better placed in view of her access to all the documents not available to this judge.

111. I am therefore of the view that I can take into account for the purposes of CPR 38.6 conduct or events occurring after as well as before discontinuance. It was not in issue that pre-action conduct could be considered.

Issues 2 and 3: Can CPR 44.2(4)(a) – the taking into account of conduct – apply to conduct taking place after the end of proceedings or does CPR 44.2(5) have the effect that conduct during or before, but not after discontinuance, may be considered.

112. This is a short point. In my judgment the reference to conduct "including" conduct before as well as during proceedings is insufficient to mean that conduct after proceedings is excluded from consideration. However I agree with the Defendant that in a case where there has been discontinuance the provisions of CPR 38.6 are a 'gateway'.

113. Only if the court decides to depart from the default rule does the court gain its usual jurisdiction in terms of what orders to make and why, about costs. Costs are not at large unless the high standard of CPR 38.6 is met. Otherwise the 'swarms' of applications to make non-standard costs orders, not following the event, the buzzing and stings of which the Court of Appeal in *Fox v Foundation Piling* were keen to evade, would emerge. It would I think be contrary to the point of CPR 38.5 and 38.6 if costs were simply 'at large' and one could escape the strictures of CPR 38.6 by praying in aid CPR 44.2.

Issue 4: Whether the wording of CPR 44.11 <u>excludes</u> conduct in the period after discontinuance but before commencement of assessment

114. In my view CPR 44.11 is intended to deal with conduct at any stage in relation at least (or only) as to quantum of costs. The meaning of "during the proceedings" for the purposes of that rule must sensibly include proceedings after the conventional end of the case and the detailed assessment, for otherwise that rule would suffer from a lacuna and parties could behave as poorly as they wished during that period and be immune from the jurisdiction of the Costs Judge. Such would be a strange approach to rule-drafting. It is not necessary that I decide this point strictly since I have held that it is in any event open to me to do so if CPR 38.6 is satisfied and that the power extends to the substantive form of order as well as to possible reductions such as by deduction of a percentage.

Issue 5 and sub-issues

115. In the light of my decisions on those issues given the allegations and the material before me as to conduct and breaches of rules should I take any or all of the following steps:

(i) Depart from the default costs order under CPR 38.5 and make a different substantive costs order such as ‘no order for costs’?

(ii) Depart from the default costs order under CPR 38.5 and make an order which preserves the substantive nature of default costs order, ie that costs follow the event, but varies it to direct that there be a percentage or other reduction to reflect conduct?

(iii) Refuse to make an interim payment order, or make a reduced form of order in view of the allegations of misconduct (taking into account my decision under (4) above if a remedy for the misuse of the statements is excluded at assessment).

116. In my judgment the principles here are as follows. Any decision involving discretion must be proportionate to the conduct and the circumstances, and *Abbott v Long* and the dictum of Wall LJ quoted in it by Arden LJ as she then was are ample authority both that the court can be punitive in relation to costs to reflect misconduct and also that even lies do not necessarily require the complete deprivation of a party of its costs.

Which of the allegations of misconduct are ones on which in principle I could rule?

117. In my judgment the allegations which arose in and were pleaded and defended in the substantive claim, in relation to alleged lies told by the Defendants or its journalists or others are ‘out of bounds’. As reviewed above, this is not the venue or time for a court to determine what were contentious and live issues over behaviour, for trial and which were abandoned on discontinuance. To decide otherwise would be to re-litigate those points.

118. It is open to me to consider conduct in other respects if I am satisfied that the ‘gateway’ of rule 38.5 is opened.

Is the 'gateway' criterion satisfied, ie are the facts such as to enable me to depart from the default order, under the provision of CPR 38.6 stating "*unless the court orders otherwise*"?

119. Applying *Brookes* this was said to be "*usually"* that a change of circumstances is needed to be shown and that the change of circumstances was "*brought about by unreasonable conduct on the part of the defendant which in all the circumstances provides a good reason for departing from the rule"*

120. I do not think it can be said that there was a 'change of circumstances' of the sort envisaged by the court in *Brookes*. It seems to me as alluded to above the court there logically must have been referring to changes which could conceivably have affected the decision to discontinue and which were the result of some unreasonable conduct by the Defendant. I cannot say therefore that alleged failures of pre-action conduct, the breach of rule 32.12, alleged failures as to ADR and failures to preserve material were a 'change' which had any connection with discontinuance. There is no evidence of any linkage between any of those and the discontinuance.

121. I concluded above however that neither the rule nor *Brookes* or any authority in my judgment requires a causal relationship between some circumstance and the discontinuance, and I can consider whether non causative factors justify a departure from the default rule.

122. The importance of keeping departures from the default position to a minimum must be respected, it "*is the function of the court to consider whether the unreasonableness of a defendant's conduct provides a good reason for departing from the default rule"* per Beatson LJ in *Nelson's Yard* cited above and Moore-Bick LJ in *Brookes*: "*It is clear, therefore, from the terms of the rule itself and from the authorities that a claimant who seeks to persuade the court to depart from the normal position must provide cogent reasons for doing so and is unlikely to satisfy that requirement save in unusual circumstances.*"

123. In my judgment, failures of ADR and alleged failures of other pre-action conduct if established in this case would not reach the level of being cogent reasons for departing from the usual position in relation to the default costs rule. They are by contrast matters very apt to be considered either by a trial judge (in this case there was none) or by the Costs judge who will have the full opportunity to consider the material such as letters, attendance notes and so forth in detail and if necessary use her powers under CPR 44.11. Such matters arise commonly and especially in the case of failures of efforts at ADR (whether as part of pre or post issue conduct) are, rightly, being taken very seriously in the light of current case law (eg, *Churchill v Merthyr Tydfil BC* [2023] EWCA Civ 1416, Worcester v Hopley [2024] EWHC 2181 (KB), Jenkins v Thurrock Council [2024] EWHC 2248 (KB), Worcester v Hopley [2024] EWHC 2181 (KB)) but do not at least in this instance satisfy the gateway of CPR 38.6.

124. Failures to preserve evidence when on notice to do so, and wrongful collateral use of witness statements, neither of which appear to be meaningfully disputed in this case, on the other hand are not matters which require significant consideration of documents and attendance notes: they go to the heart of the fairness of proceedings and in the case of misuse of witness statements I accept can have implications for the wider administration of justice. They are, thankfully also unusual. It seems to me that the allegations made here are conduct by the Defendant which justifies me in determining that the gateway of CPR 38.6 is ‘open’ such that I may consider making an order departing from the default order.

Consideration of exercise of discretion.

125. Having taken the view that the failures to preserve evidence and the misuse of witness statements ‘open the gateway’ of CPR 38.6, there are two options open to me either of which would in my judgment be legitimate as long as not leading to ‘double jeopardy’ for the Defendant namely: (a) take into account all relevant conduct now that the gateway is open, or (b) take into account only that conduct which opened the gateway, namely the two factors above, leaving any other conduct to the Costs Judge to examine under CPR

44.11. In a case where the ‘other’ conduct was simple and not a matter of exploration of correspondence and attendance notes, then course (a) would be appropriate. In a case such as this where the ‘other’ conduct matters are, per my decision, left to the Costs judge it would be inappropriate for me to take them into account since to do so would require just the detailed consideration which I have already said is best left to the Costs Judge.

126. I shall therefore consider the significance of just the two items above (breach of CPR 32.12 and failure to preserve evidence) which opened the CPR 38.6 ‘gateway’.

Manner of exercise of discretion

127. In my judgment failures to preserve evidence especially when on notice to do so and where the evidence could reasonably be expected to be of real relevance, and misuse of statements for collateral purposes are both serious matters. In the latter case the fact of the very late acceptance that there was a breach is an aggravating factor.

128. The internal steps taken to seek to improve working methods are relevant and mitigating. There has not been a voluntary or other open statement to the public accepting that the material was wrongly used, or that the Times has taken steps to prevent it happening in future. The impact on potential witnesses in other cases of seeing witness material appearing in newspapers before it has been given in court, especially in a case where rape allegations were referred to, even if taken down from the internet afterwards is one which this court must take into account. There is also the basic necessity to abide by rules and court orders, and the duty of the court to ensure that litigants obey those rules and orders, and the placing at risk of the fairness of the trial had one taken place in this case.

129. Reminding myself of the need to be proportionate and of the indications in *Abbott v Long,* cited above, I consider that it is appropriate to mark the seriousness of the failures in this case, of which the misuse of statements is marginally the more significant, by way of a variation to the

default order such that the Claimant shall pay 80% of the Defendant's costs on the standard basis, to be assessed if not agreed.

130. In reaching that decision I have not made any variation for other alleged misconduct which is a matter for the Costs Judge under CPR 44.11.

Interim payment application

131. Turning to the application for an interim payment. There is a presumption that I should make one. I have dealt with the two appropriate misconduct matters above in relation to the CPR 38.5 aspects and should not 'double penalise'.

132. The question of quantum of any Interim payment in respect of the costs of the case remains open and directions will be given.

Costs and Costs ADR

133. It has always been the case that dispute resolution (or ADR, or DR) has been important as a means to avoid the use of court and parties resources. Since *Churchill* and decisions such as that of my learned former colleague Master Thornett in *Worcester* and in *Jenkins*, this has become all the more important. At time of finalising this judgment, amendments to the CPR came into force further promoting the court's powers and duties in relation to considering directing ADR, see Civil Procedure (Amendment No.3) Rules 2024 (SI 2024 No. 839).

134. Here there remains the prospect of long, expensive Detailed Assessment proceedings with counsel and costs lawyers occupying perhaps several days, at a cost comparable with that of many trials. In all cases where the claim is at an end, such as here, but significant costs are incurred and must be determined, in my judgment it would be remiss of a judge not to make use of the principles in cases such as *Churchill* and direct that, before a fresh set of proceedings is in effect commenced so as to lead to detailed assessment there must be proper dispute resolution. I fully expect such an order to (need

to) become the norm when a judge directs detailed assessment unless costs are agreed.

135. So often in the years when I sat as a Deputy Costs Judge of the Supreme (later Senior) Court I saw that bills of costs were listed for lengthy hearings yet once Costs Lawyers (and sometimes counsel) attended the hearing and discussed matters, or once I had ruled on points of principle in the bill very shortly, the matter was resolved pragmatically.

136. It is my judgment essential that courts do what they can in the present congested court system to bring forward that settlement process so that assessments of costs are not needlessly listed whether in our County Courts (busy as they are) or in the Senior Courts Office, only to 'go short' when – at last – some pragmatic discussion takes place between lawyers who know both the 'ropes' and the reality of how assessment proceeds. I do not doubt that consequences can and will result generally if parties in such cases come before the Taxing Master (Costs Judge) and have failed to do the court the courtesy of proper engagement in pre-assessment ADR.

Order for mandatory pre-detailed assessment ADR

137. I shall include a provision of my own motion that the parties must engage in alternative dispute resolution as to the costs claimed by the Defendant. Good reason will need to be shown if the form of that dispute resolution is at any less engaged a level than mediation via Costs Lawyers given that the Bill here more than justifies Costs Lawyer input. The time for commencing detailed assessment is to be extended until conclusion of any such mediation, or the point at which either party indicates it is not prepared to proceed and wishes to go to assessment. Any party which decides not to engage in ADR, as above or to 'call it off' must be in a position to justify that non-engagement to the Costs Judge and be alert to the provisions of CPR 44.11 and indeed the developing common law since *Churchill*.

Costs of application

138. The Defendant succeeded in defending its entitlement to costs save as to a 20% reduction and I shall order that the Claimant must pay 80% of the Defendant's standard basis costs of these applications to be assessed if not agreed. The question of quantum of any interim payment on account of costs of the applications remains open and directions will be given.

139. I shall hand down in the absence of the parties. Time for consequential applications such as for permission to appeal shall be extended until the amount of any interim payment is determined.

VICTORIA MCCLOUD

Handed down, Royal Courts of Justice, Michaelmas term 2024

14 October 2024