

JERSEY / JUDGMENT

MacFirbhisigh and Ching -v- CI Trustees and Others [2017] JRC 130A (14 August 2017)

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judgment

the commissioner: 1. By a summons dated 4 July 2017 the First Costs Defendants ("Sinels") applied to strike out certain paragraphs of the Grounds for seeking wasted costs against the Costs Defendants ("the Grounds") served by the Costs Plaintiffs (respectively "CITE" and "Mr Killmister"). I heard the summons on 10 July 2017. Sinels were represented by Advocate Gleeson of Dickinson Gleeson; the Costs Plaintiffs were represented by Advocate Scholefield of Viberts; and Carey Olsen, the Second Costs Defendants, were represented by Advocate Journeaux of the same firm. In circumstances which I will explain later in this judgment, Sinels subsequently amended their Summons to claim summary judgment against the Cost Plaintiffs in respect of the same paragraphs of the Grounds. At the conclusion of the hearing I reserved my decision. The procedural background 2. The procedural history is set out in detail in my judgments giving the reasons for my decision of 13 January 2017 (as revised), and for my decision of 23 March 2017, and I do not repeat it in this judgment. Instead I confine myself to that part of the history which bears directly on Sinels' applications. 3. Following a hearing on 12 January 2017, I gave the Costs Plaintiffs leave to convene the Costs Defendants for the purposes of applying for wasted costs orders. On 3 March Sinels issued an amended summons seeking, inter alia, to set aside the leave which I had granted at the January hearing. I dismissed that part of Sinels' summons following a hearing on 23 March. 4. On 31 March the Costs Plaintiffs served the Grounds. The claim against Sinels includes the following paragraph: "7. The cost of [Sinels'] claims against CITE The matters aforesaid caused [CITE] to incur costs, namely the whole of the costs incurred in defending the substantive claims referred to above, being £426,279.47, and further yet unquantified costs incurred in relation to the issues of costs, which can be broken down as follows: (a) Between 19 December 2010 being the time that CITE transferred the trust assets to Mr MacFirbhisigh and August 2013 when Sinels were removed as representatives of the Plaintiffs, fees of £60,938.50, disbursements of £714.29 and counsel fees of £9,000 were incurred; (b) Between September 2013 when Carey Olsen were appointed as representatives of the Plaintiffs and August [2015] when the trial concluded fees of £302,365.29, disbursements of £2,595.63, travel costs of £5,264.97 (to attend trial), counsel costs of £16,775 and £28,625.79 in respect of the appointed expert of the Digger

shares were incurred. [CITE] maintains that, but for the conduct of Sinels complained of above, none of its costs of the claim would have been incurred." Para.10 is in the same terms, mutatis mutandis, in respect of Mr Killmister's costs. Finally, para.12 of the Grounds reads: "The ambit of [Sinels'] responsibility For the avoidance of doubt, the [Costs Plaintiffs] include within the sums claimed from Sinels costs incurred while Carey Olsen were acting for the Plaintiffs on the basis that, but for the conduct of Sinels complained of, the Plaintiffs would not have had claims in which instructions could have been transferred to Carey Olsen and any criticisable conduct of Carey Olsen does not break the chain of causation." 5. Sinels served their Reply to the Grounds on 12 May 2017. Their response to the paragraphs of the Grounds set out in the preceding paragraph above is as follows: "30. As to paragraph 7: 30.1 The alleged causative link between the criticisms made of Sinels and the entirety of [CITE's] costs incurred in defending the claims brought against it is denied. 30.2 It is denied that the "but-for" test of causation applied in the final sentence of paragraph 7 is the, or an, appropriate approach to causation in this context. The jurisdiction to make a wasted costs order can only arise where the improper, unreasonable or negligent conduct complained of has caused a waste of costs and only to the extent of such wasted costs. In any event it is denied that but-for the conduct of Sinels complained of, none of [CITE's] costs of the claim would have been incurred. 30.4 Without prejudice to the foregoing, [CITE's] attempt to render Sinels liable for costs incurred by [CITE] during the currency of Carey Olsen's instructions is fundamentally flawed for at least the following reasons: 30.4.1 Carey Olsen replaced Sinels as advocates for the Plaintiffs in or around September 2013. 30.4.2 Thereafter the conduct of this litigation lay with Carey Olsen and not with Sinels. 30.4.3 Master Thompson afforded Carey Olsen the opportunity to consider the case afresh and, in effect, to start again by re-pleading the case to be advanced against the Defendants. Carey Olsen did so and by Order dated 5 February 2014 Master Thompson permitted that re-pleaded case to proceed to trial. Sinels had no involvement whatsoever in the re-pleading of the Plaintiffs' case nor in any other matter pertaining to these proceedings thereafter. 30.5 If, which is denied, any causative link commences with Sinels' conduct of the case during their instruction, that causative relationship is interrupted or impeded by any of a number of novus actus interveniens. Sinels will aver that at least the following events constituted novus actus interveniens breaking any causal relationship thereafter: 30.5.1 The instruction of Carey Olsen in place of Sinels; 30.5.2 Carey Olsen's election to re-plead the case advanced on behalf of the Plaintiffs thereafter; 30.5.3 Carey Olsen's decision to introduce a pleaded case in negligent misstatement and breach of fiduciary duty against [Mr Killmister] in respect of the advice to set up the trust; 30.5.4 Master Thompson's decision to permit the amendments reflected in Carey Olsen's re-pleaded case; 30.5.5 Carey Olsen's rejection of a drop hands settlement in May 2015; and/or 30.5.6 Carey Olsen's approach to and conduct of the trial of this matter. 30.5.7 The hearing of live witness evidence and resolution of issues of fact at the trial of this matter, and in particular the substantial rejection of [Mrs Ching's] evidence at trial. 30.6 Without prejudice to the foregoing, if and insofar as [the Costs Plaintiffs] demonstrate any improper, unreasonable or negligent conduct on the part of Carey Olsen, Sinels will aver that any such conduct necessarily breaks any chain of causation commencing with Sinels' conduct of the case. 33. As to paragraph 10: 33.1 Paragraph [30] above is repeated mutatis mutandis. 33.2 In any event, paragraph 10(a) cannot possibly accurately particularise the costs of Sinels' claims against

[Mr Killmister] since, by [Mr Killmister's] own admission in paragraph 9(a), no claim was advanced against [Mr Killmister] until the Amended Order of Justice dated 30 November 2011.

33.3 It is unacceptable, and illustrative of the [Costs Plaintiffs'] broad stroke approach to the pleading of [their] Grounds, that [Mr Killmister] has simply pleaded the entirety of the costs incurred by all defendants from 19 December 2010 until September 2013, notwithstanding that no claim was advanced against [Mr Killmister] until 30 November 2011. 35. Paragraph 12 is denied and paragraph 30 above repeated." 6. Sinels also sought Further and Better Particulars of the Grounds. The relevant Request under para.7 of the Grounds, and the Costs Plaintiffs' reply, are as follows: "Of "The matters aforesaid caused [CITE] to incur costs, namely the whole of the costs incurred in defending the substantive claims referred to above, being £426,279.47, and further yet unquantified costs incurred in relation to the issues of costs..." (emphasis added)

REQUEST 16. Please state with full particularity the basis upon which it is alleged that the claims pleaded against CITE during the currency of [Sinels'] instructions can possibly be causative of the "whole of the costs incurred defending the substantive claims", notwithstanding that the claims pursued against the Defendants were abandoned and replaced following the instruction of Carey Olsen. RESPONSE The [Costs Plaintiffs'] case is that no claims should have been pursued against [CITE] after 19 December 2010. In those circumstances, but for Sinels' conduct, none of [CITE's] costs after that date would have been incurred. Further it is fair and just that Sinels should contribute to costs incurred after the instruction of Carey Olsen. Of "[CITE] maintains that, but for the conduct of Sinels complained of above none of its costs of the claim would have been incurred." REQUEST 19. Please state with full particularity how [CITE] reconciles this averment with the facts that: (i) following the instruction of Carey Olsen in place of Sinels the Plaintiffs were afforded the opportunity to, and did in fact, "start again", and (ii) having "started again" the reworked claims against [CITE] were pursued to trial without any further involvement of Sinels whatsoever. RESPONSE The Plaintiffs did not entirely start again after the instruction of Carey Olsen. Carey Olsen maintained the flawed allegation of breach of trust against [CITE] which Sinels had introduced. Otherwise, see response 16 above." Turning to para.10 of the Grounds against Mr Killmister, Request 24 is in the the same terms, mutatis mutandis, as Request 16. The Costs Plaintiffs answered as follows: "The [Costs Plaintiffs'] case is that no claims should have been pursued against [Mr Killmister] at all. In those circumstances, but for Sinels' conduct, none of [Mr Killmister's] costs would have been incurred. Further it is fair and just that Sinels should contribute to costs incurred after the instruction of Carey Olsen." The Further and Better Particulars continue: "REQUEST 25. Please state further the basis upon which it is alleged that the claims pleaded against Mr Killmister, as opposed to those pleaded against the other Defendants, can possibly be causative of the "whole of the costs incurred defending the substantive claims" in circumstances where the latter costs include those incurred in respect of the claims against CITE. RESPONSE [Mr Killmister] only seeks to recover his own costs as a consequence of the matters complained of in respect of [Mr Killmister]. Of "[Mr Killmister] maintains that, but for the conduct of Sinels complained of above, none of his costs of the claim would have been incurred." REQUEST 26. Please state with full particularity how [Mr Killmister] reconciles this averment with the facts that: (i) following the instruction of Carey Olsen in place of Sinels the Plaintiffs were afforded the opportunity to, and did in fact, "start again", and (ii) having "started again" the

reworked claims against [Mr Killmister] were pursued to trial without any further involvement of Sinels whatsoever. RESPONSE Please see response 24 above." 7. Finally, on 20 June 2017 the Costs Plaintiffs served their Response to Sinels' Reply. The relevant parts read as follows: "Costs claimed by [CITE] 41. As to paragraph 30 of the Reply: (a) It would not be proportionate for [CITE] to identify at this stage the costs attributable to each separate allegation against Sinels. [CITE's] primary case is that all of its costs were incurred in defence of the claims which should not have been brought against it. If the Court upholds [CITE's] application in part, then the resulting wasted costs will be identified in [CITE's] bill for taxation and Sinels will have the opportunity to challenge the attributability of those costs on taxation. (b) It is denied that any actions taken by Carey Olsen constitute a break in the chain of causation. If it is Sinels' case that Carey Olsen's conduct was so grossly improper, unreasonable or negligent as to amount to a novus actus interveniens, then Sinels are invited to plead full particulars of the same. (c) Further and in any event, Carey Olsen did not completely replead the claim against [CITE]. The allegation of breach of trust in relation to the AIG bond and the Digger shares was introduced by Sinels in the Amended Order of Justice and preserved by Carey Olsen. 47. As to paragraph 33 of the Reply, paragraphs 41 above are repeated mutatis mutandis." The original summons 8. By their summons as originally issued, Sinels applied to strike out paras.7, 10 and 12 (or more accurately 7(b), 10(b) and 12) of the Grounds pursuant to Rule 6/13(1) of the Royal Court Rules 2004 (as amended) ("the Rules"), alternatively pursuant to the Court's inherent jurisdiction, on the basis that: (a) they disclose no reasonable cause of action; (b) they are scandalous, frivolous and vexatious; (c) they are otherwise an abuse of the process of the Court. In effect, therefore, Sinels sought to strike out those parts of the Grounds which claim wasted costs against them from September 2013, after they had been replaced by Carey Olsen ("the later claim"); the costs (which, as I was informed, are currently being taxed) claimed in respect of this period amount to some £355,626.68. They did not seek to strike out the Costs Plaintiffs' claim against them in respect of the earlier period from December 2010 to August 2013 ("the earlier claim"), in respect of which the untaxed costs amount to some £70,652.79. 9. Not surprisingly, there was no real dispute between the parties as to the test to be applied under Rule 6/13(1)(a). Thus in *In re Esteem Settlement*

[2000] JLR 119, the Deputy Bailiff summarised the position as follows (at p.127): "Many cases were cited to me but, in my judgment, the principles upon which the Royal Court should proceed in considering an application to strike out on the grounds that the pleading does not contain any reasonable cause of action are clear. The Royal Court has said on a number of occasions that, in such matters, it will apply the same principles as have been adopted by the English courts. It is only where it is plain and obvious that the case cannot succeed that recourse should be had to the summary jurisdiction to strike out. To quote from para.18/19/10 of 1 The Supreme Court Practice 1999, at 349: 'As long as the statement of claim or the particulars disclose some cause of action, or raise some questions fit to be decided by a Judge or jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out.'" In other words, in order to be struck out, the claim must be obviously unsustainable (*Poole v. Poole* [1987-88 JLR Notes-5a]). The parties' submissions 10. In summary, Advocate Gleeson's primary submission was

that the later claim against Sinels was bound to fail on the ground of causation. Although Advocate Gleeson relied on both subparas.(a) and (b) in this context, in reality his argument under subpara.(b), namely that a "claim is frivolous or vexatious if it is obviously unsustainable" took him no further than subpara.(a). Accordingly I say no more about subpara.(b). It also follows that the prohibition in Rule 6/13(2) on adducing evidence applies, in my view, to Sinels' primary submission; for this reason I disregard that part of Advocate Gleeson's argument which sought to rely on evidence of what happened in the course of the original proceedings. Advocate Gleeson's alternative submission was that the later claim represented an abuse of process within subpara.(c) because it amounted to an attempt to recover from Sinels by "the back door". I add for the sake of completeness that in his skeleton argument Advocate Gleeson added a submission that the later claim was "clearly hopeless or speculative" and that as such it should be struck out pursuant to the Court's inherent jurisdiction. Again, however, this contention adds nothing, in my view, to his reliance on subpara.(a) of Rule 6/13(1), so I say no more about it. 11. In addition to resisting Sinels' submissions, Advocate Scholefield argued that the application should be dismissed on the ground that it was procedurally inappropriate. 12. At the hearing in July Advocate Journeaux adopted a neutral position in relation to the summons. The amended summons 13. In the course of the hearing I pointed out to Advocate Gleeson (on the basis of information given to me by Master Thompson) that the Royal Court Rules had recently been amended so as to include provision for what is commonly described in England, and which I propose to describe, as reverse summary judgment. I therefore gave Advocate Gleeson 24 hours within which to reach a decision as to whether he wished to amend his clients' summons so as to include an application for reverse summary judgment. Advocate Gleeson did so indicate and Sinels duly served an amended summons on 12 July 2017 seeking such relief in respect of the same paragraphs of the Grounds, on the basis that (a) the Costs Plaintiffs had no real prospect of succeeding on the issues raised by those paragraphs; and (b) there was no other compelling reason why such issues should be disposed of at trial. Advocate Scholefield sensibly did not object to the proposed amendment and I therefore granted Sinels the necessary leave to amend their Summons. 14. It was agreed between the parties that, subject to the right of any party to request a further oral hearing, I should determine the outcome of the amended application on the basis of written submissions in addition to the oral submissions presented on 10 July. To that end Advocate Gleeson served a supplemental skeleton argument, together with an Affidavit of Mr Philip Sinel (albeit at that stage in an unsworn draft, later replaced with a sworn version) on 18 July. The Affidavit did no more than confirm the veracity of the factual averments made in Advocate Gleeson's original and supplemental skeleton arguments. Advocate Scholefield responded with written submissions on 24 July. Advocate Gleeson served reply submissions on 27 July, and on the same day there was a further exchange of emails between the parties. Again Advocate Journeaux adopted a neutral position in the sense that he made no submissions in relation to Sinels' amended Summons. 15. Part 7 of the Rules, as amended with effect from 1 June 2017, now reads as follows (insofar as relevant to the present case): "7/1 Grounds for summary judgment (1)

The Court may in any proceedings give summary judgment against a plaintiff on the whole of a claim or on a particular issue in any pleading if B (a) it considers that B (i) the plaintiff has no real prospect of succeeding on the claim or issue, ...; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial. (2) A summary judgment hearing may be ordered by the Court of its own motion or on application made by either party in accordance with this Part. 7/2 Procedure (3) An application for summary judgment must be made by summons which must set out the claims or issues which it is proposed that the Court will decide at the hearing. (4) The application must be supported by an affidavit verifying the facts to which the application relates and stating that, in the deponent's belief, the other party has no real prospect of succeeding on the claim or issue or of defending the claim or issue set out in the application as the case may be. (5) Unless the Court otherwise directs, an affidavit for the purposes of this Rule may contain statements of information or belief with the sources and grounds thereof. 7/3 Evidence filed in response to a summary judgment application (1) If the respondent to an application for summary judgment wishes to rely on evidence at the hearing, he or she must B (a) file an affidavit containing or exhibiting the evidence to be relied upon; 7/4 Orders the Court may make (1) The orders the Court may make under this Part include B (b) the dismissal of the claim, answer or issue; (c) the dismissal of the application;" Because of the way in which the reverse summary judgment issue arose, I abridged the various time limits for the service of affidavit evidence without objection by the parties. 16. Since the wording of Rule 7/1(1)(a)(i) mirrors that of the English CPR Part 24.2(a)(i), it seems to me that the Royal Court should, when applying Rule 7/1(1)(a)(i), follow the principles which have been developed in the English courts in relation to Part 24.2(a)(i). This approach reflects that adopted by the Royal Court in *AG v. Contractors Plant Service Ltd.*

[1967] JJ 785 where the Deputy Bailiff said (at p.786): "The Solicitor General has drawn our attention to the fact that the provisions of the [Scaffolding (Jersey) Regulations, 1960] follow closely those of the Building (Safety, Health and Welfare) Regulations 1948, made under the Factories Act 1947, and other enactments of the Parliament of the United Kingdom, and he has therefore sought to support his case against the defendant company by quoting from judgments given in the English Courts on matters affecting the interpretation of those regulations. Although, as has often been said in this Court, the Courts of this Island are not bound by judgments of the English Courts, we feel that in this instance, we should have close regard to the judgments in question ..." Both Advocate Gleeson and Advocate Scholefield agreed with this approach. 17. In *Trilogy Management Ltd. v. Marcus Sinclair*

[2017] EWHC 1164 (Ch) , Rose J. said as follows (at para.32): "The principles to be applied are those set out by Lewison J in *Easyair Ltd v Opal Telecom Ltd*

- [2009] EWHC 339 (Ch) at paragraph 15. The correct approach on applications by defendants is as follows: "(i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91; ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel*
- [2003] EWCA Civ 472 at [8]; iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*; iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]; v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond* (No 5)
- [2001] EWCA Civ 550 ; vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd*
- [2007] FSR 63 ; vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case maybe. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd*
- [2007] EWCA Civ 725 ." 18. Since neither counsel had referred in their skeleton arguments to the *Easyair* or *Trilogy* cases, the Court notified all parties of my provisional view that the principles quoted above were those which I should follow in the present case, giving them

the opportunity to challenge my provisional view if they wished. Advocate Gleeson indicated his agreement with my intended approach. Advocate Scholefield likewise did not seek to challenge my provisional view but referred me to the judgment of Master Thompson in *Holmes v. Lingard*

[2017] JRC 113 , delivered on 21 July 2017. 19. At para.160 of his judgment in *Holmes*, Master Thompson said as follows: "This is the first occasion upon which Rule 7 introduced by Royal Court (Amendment No.20) Rules 2017 has been considered. The wording of Rule 7 is based extensively on Rule 24 of the Civil Procedure Rules (ACPR)". As there is no material difference between the wording of Rule 7 of the Royal Court Rules and Rule 24 of the CPR, I have followed the relevant English jurisprudence as to how the power contained in Rule 7 should be interpreted and applied." His judgment does not refer to either *Easyair* or *Trilogy* but the principles which he deduced from Civil Procedure 2017 Vol.1 (the White Book) and from the authorities upon which he relied are, it seems to me, entirely consistent with those in *Easyair* , as approved in *Trilogy* , which I have quoted in para.17 above. Accordingly I propose to follow the principles in *Easyair* . 20. If Sinels can succeed on their reverse summary judgment application, they have no need of their application to strike out. Conversely, since the onus on a defendant in respect of a reverse summary judgment application under Rule 7/1(1)(a)(i) is less severe than that in respect of a strike out application under Rule 6/13(1), it follows that if Sinels cannot succeed on their reverse summary judgment application, they will not succeed on their strike out application either. I therefore turn immediately to the reverse summary judgment application. 21. Whereas evidence is, as I have already indicated, not admissible on Sinels' strike out application, it is in principle admissible on their reverse summary judgment application. In the context of the present proceedings, however, I bear in mind the following points. (i) Sinels were not a party to the original action, so the extent to which any factual findings in that action would be binding on them may be open to argument. (ii) Given the current uncertainty about the extent, if any, to which Sinels can rely on an opinion of Mr Joffe Q. C. which the Plaintiffs provided to the Court in 2011 in support of an application to amend the original proceedings, I consider that it would not be right for me to take any account of what that opinion may or may not have said. I therefore disregard Mr Joffe's opinion in its entirety for present purposes. (iii) The extent of the evidence adduced by the parties was in any event extremely limited and consisted, in effect, simply of references to various aspects of the conduct of the original proceedings and to passages in the Court's judgment of 17 November 2015 dismissing the Plaintiffs' claims. In reality the arguments adduced by Advocates Gleeson and Scholefield on the reverse summary judgment application were simply a re-run of those which they had deployed on the strike out application, largely based upon the allegations in the pleadings which I have set out earlier in this judgment. Discussion and conclusions 22. I take in turn the two limbs under Rule 7/1(1). Rule 7/1(1)(a) (i) 23. Advocate Gleeson made a preliminary point about the burden of proof. He accepted that ordinarily Sinels, as the applicants, would have borne the burden of establishing that the later claim had no real prospect of success. As Potter L. J. said in terms in the *ED&F*

Man case (at para.9): "the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospects of success..." But in the particular circumstances of the present case Advocate Gleeson submitted that it was the Costs Plaintiffs who bore the burden of showing that the later claim had a real prospect of success. He relied for this contention on the two stage process inherent in a wasted costs application, the first stage of which involves the applicant for a wasted costs order showing cause why he should be permitted to issue such an application. Advocate Gleeson submitted that it was only now that the Costs Plaintiffs had served the Grounds that the Court could properly exercise this first stage of its discretion and that Sinels' amended application should be treated as, in effect, challenging the Costs Plaintiffs to show cause. 24. Not surprisingly, Advocate Scholefield disagreed with this suggestion. In my judgment his objection was well founded. The first stage to which Advocate Gleeson referred came and went when I initially granted the Costs Plaintiffs leave in January of this year to convene the Costs Defendants, coupled with my dismissing in March Sinels' application to set that leave aside. Nor am I persuaded by the other points made by Advocate Gleeson on this issue. Accordingly I conclude that it is Sinels who, in the usual way, bear the burden of establishing on this application that the later claim lacks any real prospect of success. 25. Advocate Gleeson conveniently summarised Sinels' contentions at para.9 of his supplemental skeleton argument, as follows: "9.1 Firstly, there is no causative link between Sinels' alleged conduct and any costs said to be wasted following their ceasing to act for the Plaintiffs; and 9.2 Secondly, that the Costs Plaintiffs cannot show that but-for [sic] Sinels' alleged conduct the Plaintiffs would, on a balance of probabilities, have abandoned all claims against the Costs Plaintiffs and have taken the matter no further. On the contrary, as in fact happened, the Plaintiffs instructed Carey Olsen to devise and pursue further claims against the Costs Plaintiffs." Although the Advocates' written submissions in some respects cast their net wider than this issue of causation, I propose to confine myself to Sinels' case on causation, since their amended application stands or falls on that point. 26. Advocate Gleeson emphasised the importance of causation in the context of wasted costs applications, referring to para.22 of my judgment of 23 March 2017 *MacFirbhisigh and Ching-v-CI Trustees and Others*

[2017] JRC 057 where I said: "As Ridehalgh makes clear (at p.17), demonstration of a causal link between the conduct complained of and the alleged wasted costs is essential. It will be up to CITE and Mr Killmister to establish the necessary causal link in due course; if they fail to do so, their wasted costs application will fall at that hurdle." In addition, he relied upon the endorsement by the Court of Appeal in *Kilroy v. Kilroy*

[1997] P. N. L. R. 66 of the proposition that the impropriety, unreasonableness or negligence must have "directly caused" costs to be wasted. He also referred the Court to a number of other wasted costs cases, including *CMCS Common Market Commercial Services AVV v. Taylor*

- [2011] EWHC 324 (Ch) in which Briggs J. said as follows (at para.65): "The wasted costs jurisdiction is compensatory rather than punitive in nature. It is therefore necessary for an applicant to establish that, if the alleged breach of duty or improper, unreasonable or negligent act of the respondent solicitors had not occurred, then on the balance of probabilities the applicant would not have incurred the costs, or some part of those costs, in respect of which the application is made: see *Brown v Bennett* (No.2)
- [2002] 1 WLR 713 at 729 to 731. In particular, the loss of a chance to save the costs alleged to have been wasted is an insufficient basis for the application: see *Neuberger J* at para.54." 27. Advocate Gleeson placed particular reliance on two English cases in which the court had to consider the position where two firms of solicitors had been involved, the first being the decision of the Court of Appeal in *Byrne v. South Sefton (Merseyside) Health Authority*
- [2001] EWCA Civ 1904 and the second being the decision of *Neuberger J*. In *Radford & Co. v. Charles*
- [2003] EWHC 3180 (Ch). 28. In *Byrne*, solicitors had acted for the claimant in connection with allegations of clinical negligence by the defendant, but had ceased to act for the claimant before proceedings were issued. The claimant then instructed other solicitors in their place, who duly commenced proceedings. The claim was dismissed as being time barred. The defendant health authority sought an order for its wasted costs of defending the claim from the first solicitors, on the basis that their failure to bring proceedings within time caused the health authority to incur the costs of having the claim dismissed as being out of time. At first instance the judge made the order sought against the first solicitors under s.51(6) of the Supreme Court Act 1981 . On the appeal by the first solicitors, the health authority sought to uphold the judge's order on the alternative ground of the more general power conferred by s.51(3) of the same Act. 29. The Court of Appeal allowed the first solicitors' appeal against the order under s.51(6) on the basis that they had not exercised rights of audience or the right to conduct litigation on behalf of the claimant, and so were not persons against whom a wasted costs order could be made. Dismissing the health authority's alternative case based on s.51(3), *Chadwick L. J.* (with whom *Peter Gibson* and *Longmore LL. J.* agreed) said as follows: "35. Third, it cannot be right to make an order under section 51(3) of the 1981 Act unless the court is satisfied that the conduct of the person against whom the order is to be made has been causative of the costs which have been incurred by the person seeking the order. There must be a sufficient causal link between the person who is to pay the costs and the incurring of those costs. It is necessary to determine whether the conduct complained of is really an effective cause of the costs incurred. In the present case the costs of these proceedings were incurred because Mr *Byrne*, with the advice of *Carter Hodge* in 1998, decided to issue proceedings at a time when the primary limitation period was long since passed. *Carter Hodge* may have thought that it was worth taking the risk that the proceedings would be struck out or dismissed if the court could not be persuaded to exercise its powers under section 33 of the *Limitation Act 1980*. It may have been thought that that was a risk worth taking in

circumstances in which the action was to be publicly funded. If the risk failed, the costs would fall on the Legal Aid Board on the one side; and on the health authority on the other side. 36. It is that decision that led to the costs in this action being incurred. It has not been suggested that that decision was either improper, negligent or unreasonable; and Although I confess to finding the decision a surprising one CI make no such suggestion. Nor has it been suggested that the further prosecution of the proceedings by Mr Byrne and his new solicitors was improper, negligent or unreasonable. The real question is whether the action or inaction of Dooley & Co which enabled the health authority to obtain an order dismissing the proceedings on the grounds that there was a limitation defence can be said to have been causative in any real sense of the costs which the health authority incurred. To my mind the answer to that question is plainly "No". There is no difference, in principle, between the position of Dooley & Co, whose action enabled the action to be dismissed, and the position of the original assailant, whose conduct enabled the claim to arise in the first place." 30. Based on that decision, Advocate Gleeson's skeleton argument reads as follows (at para.59): "Thus the causal link demands a direct causal relationship between the conduct complained of and the costs said to have been wasted in consequence. The simple fact that, but for [sic] the defendant's conduct, no opportunity would have arisen for the events which then directly caused wasted costs is insufficient to demonstrate a causal relationship between the defendant's conduct and the costs said to have been wasted. Where a second firm of solicitors are instructed in place of the first and bring proceedings which fail, the first firm's conduct is not causative of the wasted costs of defending those proceedings, even where the first firm left no time in which to commence such proceedings before the expiration of limitation. The facts are starker still in the present case. Carey Olsen substantially re pleaded the case advanced against the Costs Plaintiffs and were permitted to do so by Master Thompson in the context of the strike out application. Far from Sinels' conduct creating a fatal flaw in those claims (as did the expiration of limitation in Byrne), Carey Olsen were given a chance to (and did in fact) re plead and advance a case of their own formulation to trial, the merits of which were unaffected by Sinels' conduct." (Emphasis as in the original.) 31. In Radford, the appellants were the claimant's former solicitors, who negligently failed to issue within the permitted time an appeal against the local authority's decision on the claimant's housing needs. The claimant transferred his instructions to other solicitors who made an application for permission to appeal out of time. The judge dismissed that application and made an order that the appellants should show cause why they should not pay the costs personally. On the full hearing, the judge concluded that the application for permission had been caused by the appellants' negligence, and ordered that they should pay the claimant's and the defendant's costs of the application for permission. 32. The appellants' appeal to Neuberger J. was successful. For present purposes the following are the relevant paragraphs from the judgment of Neuberger J: "65. However, I do not accept a third ground of appeal based on Byrne raised by Mr Charles Phipps, in his argument on behalf of Radfords In para.[36] of his judgment Chadwick L. J. held that there was not a "sufficient causal link" between the solicitors' negligence and the incurring of the costs

which were claimed against them. In that case, the negligence, in letting the limitation period pass, cannot be said to have been a cause of the issue of the substantive proceedings which were eventually dismissed on the limitation ground. 66. Here I think that there was a sufficient causal link between the negligence in letting the limitation period pass and the making of an application to issue the appeal out of time. Indeed if that were wrong, a failure to meet a time limit imposed by the court or by the CPR could not lead to a wasted costs order, whereas it was accepted on all sides here that it could do so, quite rightly, in my view." 33. Mr Scholefield submitted at para.23 of his initial skeleton argument that if there was a sufficient causal link between the failure of Radford to issue an appeal within time and the unsuccessful application by their successors, so in the present case: "there can also be a sufficient causal link between Sinels' proceedings and Carey Olsen's proceedings which adopted similar themes and in which claims made by Sinels were maintained by Carey Olsen." Advocate Gleeson, on the other hand, contended the opposite. He submitted that on the authority of Radford all that the Costs Plaintiffs could recover from Sinels in respect of the later period would be the costs of Carey Olsen seeking to put right the assumed previous mistakes of Sinels, what he described as "mopping up costs". As soon, however, as Carey Olsen chose to do the exact opposite and pursue the case to trial, any causal link was necessarily broken. He added, for good measure, that it did not matter that the case as pursued to trial by Carey Olsen maintained some of the causes of action originally pleaded by Sinels, for example the claim in respect of the Digger shares, in addition to fresh causes of action introduced by Carey Olsen. He also contended that given the findings in the Court's judgment of November 2015, the Plaintiffs would undoubtedly have pursued their claims to trial irrespective of what Sinels had, or had not done, in the past, so that the costs incurred by the Costs Plaintiffs in relation to the later claim would have been incurred by them irrespective of Sinels' past conduct of the proceedings. 34. In support of his submissions that there was a causative link between Sinels' conduct of the case up until August 2013 and the later claim, Advocate Scholefield also relied upon two decisions of the Court of Appeal, namely *Rahman v. Arearose Ltd* .

[2001] QB 351 and Webb

v. Barclays Bank Plc

[2001] EWCA Civ 1141 , both involving loss occasioned by two parties in the context of medical negligence. Thus in *Rahman* , Laws L. J. (with whom the other members of the Court agreed) said as follows (at para.29): "On these materials it does not seem to me to be established as a rule of law that later negligence always extinguishes the causative potency of an earlier tort. Nor should it be. The law is that every tortfeasor should compensate the injured claimant in respect of that loss and damage for which he should justly be held responsible. To make that principle good, it is important that the elusive conception of causation should not be frozen into constricting rules." 35. Advocate Gleeson contended that these cases were simply irrelevant, for at least two reasons. Firstly, there is no

suggestion in any of the English authorities that the principles of causation in medical negligence cases have any application in the field of wasted costs. Second, liability in medical negligence cases depends upon the existence of a duty of care owed by the defendant to the claimant/plaintiff. But a lawyer for a party to litigation owes no duty of care to the opposing party (*Customs and Excise Commissioners v. Barclays Bank plc*

[2006] UKHL 28 , per Lord Rodger at para.47). Indeed, as Neuberger J. emphasised in *Radford* (at para.22), negligence to the client will not of itself suffice to make a lawyer liable for wasted costs: "There must also be some sort of breach of duty to the court." In my view there is considerable force in both of Advocate Gleeson's objections to the relevance of medical negligence decisions in the context of wasted costs cases. Finally, Advocate Scholefield sought in his further email of 27 July to rely on the discussion of causation and remoteness at para.175 of the Court's judgment of November 2015. Apart from this submission coming too late, I am not persuaded that that discussion assists him in any event. 36. I accept generally that for the reasons put forward by Advocate Gleeson the Costs Plaintiffs may face an uphill struggle to establish that his clients have any liability for wasted costs in respect of the later claim. That said, I echo Laws L. J.'s description of the concept of causation as elusive, particularly, as it seems to me, in the context of the present case. In those circumstances I am not persuaded by Advocate Gleeson that the Costs Plaintiffs have no real prospect of establishing a causative link between Sinel's alleged negligence and the later claim. I also think that there is force in Advocate Scholefield's submission that the Court is in effect being invited by Advocate Gleeson to conduct a mini-trial of the causation issue. Accordingly I conclude that Sinels have not discharged the burden of establishing that the Costs Plaintiffs have no real prospect of succeeding on the causation issues raised by paras.7(b), 10(b) and 12 of the Grounds. The causation issues raised by those paragraphs, not least the impact of Sinels' conduct of the claim prior to August 2013 on the Plaintiffs' approach to the litigation after Carey Olsen had taken over, should be the subject of full argument at the substantive hearing on the basis of all the materials which will be available to the Court at that stage. 37. I add one final comment. In his written submissions on the amended Summons, Mr Scholefield saw fit to refer to other cases in which when Mr Philip Sinel has been criticised by the Court. I make clear that in reaching my conclusion in the preceding paragraph I have entirely disregarded these criticisms for the simple reason that they are, as Advocate Gleeson rightly contended, wholly irrelevant to these wasted costs proceedings in general, and to Sinels' amended Summons in particular. I also agree with Advocate Gleeson that these criticisms should not have been raised by Advocate Scholefield in the first place. Rule 7/1(2) 38. I was referred to Zuckerman on Civil Procedure , para.9.48 of which reads as follows: "However, the fact that the summary judgment will not dispose of the whole of the case, may in certain situations lead the court to conclude that it would be better for the whole matter to go forward to trial. The appropriateness of summary judgment will depend in such situations on the extent to which it is likely to contribute to settlement of the remaining issues or to their expeditious and economical disposal." In *Iliffe v. Feltham*

Construction Ltd .

[2015] EWCA Civ.715, the Court of Appeal allowed an appeal against the grant of summary judgment in favour of the claimant. Jackson L. J. (with whom the other two members of the court agreed) said as follows: "72. When I stand back from the detail and look at this case in the round, I conclude that as at 20 June/3 July 2014 the position as to causation of the fire was not so clear as to justify the grant of summary judgment on liability in favour of the claimants. Also I think it was inappropriate to do so when similar issues remained to be determined at a full trial as between the other parties. In the particular circumstances of this case that constitutes a "compelling reason" not to enter summary judgment within the meaning of CPR 24.2(b). A judge in multi-party litigation must aim to do justice as between all parties involved in the case. 73. A further significant feature is that summary judgment in this case achieves much less in terms of saving costs and court time than is normal. There is going to be a trial anyway at which extensive factual and expert evidence will be called in order to establish (a) what caused the fire, (b) who is responsible. The claimants will have to participate in the trial, because they need to prove the quantum of their damages." 39. As Advocate Scholefield rightly pointed out, irrespective of the outcome of the reverse summary judgment application: (i) Sinels will continue to be a party to the wasted costs proceedings in respect of the earlier claim and will therefore be a full participant at the substantive hearing; and (ii) liability for wasted costs in respect of the later claim will continue to be in issue, and therefore the subject of argument, between the Costs Plaintiffs and Carey Olsen. In short it seems to me that there would be little, if any, saving of cost to any of the parties if Sinels' reverse summary judgment application were to be granted. It may also be that in due course Carey Olsen seek to blame Sinels (or vice-versa) in respect of the later claim. In those circumstances I conclude that this is one of those unusual cases like *Iliffe* (albeit that the factual situation in that case was, I recognise, somewhat different) in which there is, irrespective of my conclusion in respect of Rule 7/1(1)(a)(i), a compelling reason within Rule 7/1(b) why the issues raised by paras.7(b), 10(b) and 12 of the Grounds should be disposed of at trial. For this reason also I decline to grant Sinels the relief which they seek. The strike out application 40. In the light of my conclusions thus far, I need say no more about the strike out application, save to deal with Advocate Gleeson's abuse of process argument as summarised in para.10 above. I recognise that in *Ridehalgh v. Horsfield*

[1994] Ch 205 Sir Thomas Bingham M. R., giving the judgment of the Court of Appeal, said (at p.478B) that: "wasted costs orders should not become a back-door means of recovering costs not otherwise recoverable against a legally-aided or impoverished litigant". But if the Costs Plaintiffs' claim in respect of the later period is properly arguable against Sinels, as I have found that it is, I see no reason why to allow such a claim to proceed to trial should be an abuse of process of the Court. Indeed, of course, in most instances the very reason for the successful party seeking wasted costs from the losing party's lawyers is that the losing party itself is unable to meet the costs which will already have been awarded against it. As Lord Hobhouse said in *Medcalf v. Mardel*

[2003] 1 AC 120 (at para.58): "The legitimate interest of an applicant for a wasted costs order is financial, a reduction in the costs he has to bear, but the application must be merits based and clearly made out; it must not raise a suspicion of being itself abusive." I am not persuaded by Advocate Gleeson that there is anything abusive about the later claim against Sinels.

Conclusion

41. For the reasons I have set out in this judgment, I decline to grant any of the relief sought in Sinels' amended Summons. 42. I ruled at the hearing in July that any application for leave to appeal against this judgment (if required) would be dealt with in writing. If Sinels wish to seek leave to appeal against my decision as set out in this judgment, they are to make their reasoned application to the Court by email by no later than 4 pm on Friday 25 August 2017. The Costs Plaintiffs are to lodge any response to such application by email to the Court by 4 pm on Thursday 31 August 2017. I will determine any such application on paper. 43. The proceedings are already subject to a temporary stay for the purposes of possible mediation. There will be no further or additional stay in the proceedings associated with any application for leave to appeal. 44. I reserve all issues as to the costs of the amended Summons. Authorities Royal Court Rules 2004. In re Esteem Settlement

[2000] JLR 119 . Poole

v. Poole [1987-88] JLR Notes-5a. AG v. Contractors Plant Service Ltd.

[1967] JJ 785 . Trilogy Management Ltd. v. Marcus Sinclair

[2017] EWHC 1164 (Ch) , Holmes

v. Lingard

[2017] JRC 113 . Civil Procedure 2017 Vol.1 (the White Book). MacFirbhisigh and Ching-v-CI Trustees and Others

[2017] JRC 057 . Kilroy v. Kilroy [1997] P. N. L. R. 66. CMCS Common Market Commercial Services AVV v. Taylor

[2011] EWHC 324 (Ch) . Byrne v. South Sefton (Merseyside) Health Authority

[2001] EWCA Civ 1904 . Radford & Co. v. Charles [2003] EWHC 3180 (Ch). Supreme Court Act 1981. Rahman v. Arearose Ltd .

[2001] QB 351 . Webb v. Barclays Bank Plc

[2001] EWCA Civ 1141 . Customs and Excise Commissioners v. Barclays Bank plc

[2006] UKHL 28 . Iliffe v. Feltham Construction Ltd.

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