Neutral Citation Number: [2024] EWHC 2415 (KB)

Case No.: QB-2021-CDF-000010

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**CARDIFF DISTRICT REGISTRY**

Date: 24th September 2024

**Before**:
**MR JUSTICE RITCHIE**
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**BETWEEN**

**KIRSTY WILLIAMS-HENRY**
**(by her mother and litigation friend Christel Williams)**

**Claimant**

- and -

**ASSOCIATED BRITISH PORTS**

**Defendant/Applicant**

- and -

**HUGH JAMES (A FIRM)**

**Respondent**

**Roger Mallalieu KC** (instructed by **Hugh James**, Cardiff) for the **Respondent**
**Benjamin Williams KC** (instructed by **DWF**) for the **Defendant/Applicant**

Hearing date: 4th September 2024
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**APPROVED JUDGMENT**

This judgment was handed down remotely by circulation to the parties' representatives via email and released to The National Archives on the 24th September 2024.

**Mr Justice Ritchie:**

## The application

1. The Defendant applies for a wasted costs order (WCO) against the Respondent firm of solicitors who acted for the Claimant in a personal injury claim.

## The background

2. The Claimant suffered a moderately severe brain injury from a nasty fall off Aberavon Pier on 21 July 2018. She sued the Defendant who owned or occupied the pier. The Defendant admitted partial liability for the fall and then fought quantum and asserted fundamental dishonesty. After the trial in March 2024, I gave judgment in April: [2024] EWHC 806 (KB), holding that the Claimant had been fundamentally dishonest in relation to the claim and dismissing it with costs against the Claimant, unenforceable against the Claimant up to the level of the assessed "honest" damages of just under £600,000. I capped the Defendant's costs at a sum lower than the honest damages. The Defendant will recover no costs from the Claimant. The Claimant's lawyers will be paid nothing for all their work.

## Bundles

3. For the hearing I was provided with a digital bundle of evidence and documents; skeleton arguments; a bundle of authorities; a final witness statement from Mr Head and a statement of costs from the Respondent.

## Summary

4. The Defendant applies for a stage 1, notice to show cause, towards a WCO. The Defendant asserts that: (1) the Respondent failed to collect and analyse the relevant documents which were in the Claimant's possession custody or power and showed that the Claimant was being dishonest; and (2) the Respondent maintained the litigation because they were funding it on a conditional fee agreement (CFA) and failed to make reasonable attempts to settle it and failed to terminate the retainer when the pleaded case was "hopeless". Thus, it is alleged that the Respondent was either negligent or acted unreasonably and this caused the claim to go to trial and lead to the finding of fundamental dishonesty (FD) against the Claimant and the wasting of a huge amount of costs which should have been avoided by: (a) settlement of the claim or (b) the Respondent terminating the retainer with the Claimant and leaving her unrepresented before trial. The Defendant wishes the Court to order that the Respondent should pay the wasted costs caused by their failure to terminate their retainer, failure to advise her properly and/or their failure to settle the case at a low sum. The Claimant retains privilege over all advice she was given by the Respondent and her counsel and her decisions.

**The issues at trial**

5. The main issue at trial was whether the Claimant had been fundamentally dishonest within S.57 of the *Criminal Justice and Courts Act 2015* [S.57] in the action. The second issue was the correct assessment of the quantum of the claim on the evidence. The third issue was whether, if the Claimant had been fundamentally dishonest, dismissing the claim under S.57 would cause a substantial injustice to the Claimant.

**The Law on WCOs**

6. S.51 of the *Senior Courts Act 1981* gives this Court powers to make a WCO in S.51(6). I bear in mind that S.51(1) states that costs are in the discretion of the Court.

7. CPR rule 46.8 states:

> "**Personal liability of legal representative for costs – wasted costs orders**
> **46.8**
> (1) This rule applies where the Court is considering whether to make an order under section 51(6) of the Senior Courts Act 1981 (Court's power to disallow or (as the case may be) order a legal representative to meet, 'wasted costs').
> (2) The Court will give the legal representative a reasonable opportunity to make written submissions or, if the legal representative prefers, to attend a hearing before it makes such an order.
> (3) When the Court makes a wasted costs order, it will –
> (a) specify the amount to be disallowed or paid; or
> (b) direct a costs judge or a district judge to decide the amount of costs to be disallowed or paid.
> (4) The Court may direct that notice must be given to the legal representative's client, in such manner as the Court may direct –
> (a) of any proceedings under this rule; or
> (b) of any order made under it against his legal representative."

8. Practice Direction PD46 governs WCOs and, at paras. 5.1 – 5.9, provides as follows:

> "**Personal liability of legal representative for costs –** wasted costs orders: rule 46.8
> 5.1 A wasted costs order is an order –
> (a) that the legal representative pay a sum (either specified or to be assessed) in respect of costs to a party; or
> (b) for costs relating to a specified sum or items of work to be disallowed.

5.2 Rule 46.8 deals with wasted costs orders against legal representatives. Such orders can be made at any stage in the proceedings up to and including the detailed assessment proceedings. In general, applications for wasted costs are best left until after the end of the trial.

5.3 The Court may make a wasted costs order against a legal representative on its own initiative.

5.4 A party may apply for a wasted costs order –

(a) by filing an application notice in accordance with Part 23; or

(b) by making an application orally in the course of any hearing.

5.5 **It is appropriate for the Court to make a wasted costs order against a legal representative, only if –**

**(a) the legal representative has acted improperly, unreasonably or negligently;**

**(b) the legal representative's conduct has caused a party to incur unnecessary costs, or has meant that costs incurred by a party prior to the improper, unreasonable or negligent act or omission have been wasted;**

**(c) it is just in all the circumstances to order the legal representative to compensate that party for the whole or part of those costs.**

5.6 The Court will give directions about the procedure to be followed in each case in order to ensure that the issues are dealt with in a **way which is fair and as simple and summary as the circumstances permit.**

5.7 As a general rule the Court will consider whether to make a wasted costs order in two stages –

(a) at the first stage the Court must be satisfied –

(i) that it has before it evidence or other material which, if unanswered, would be likely to lead to a wasted costs order being made; and

(ii) the wasted costs proceedings are justified notwithstanding the likely costs involved;

(b) at the second stage, the Court will consider, after giving the legal representative an opportunity to make representations in writing or at a hearing, whether it is appropriate to make a wasted costs order in accordance with paragraph 5.5 above.

5.8 The Court may proceed to the second stage described in paragraph 5.7 without first adjourning the hearing if it is satisfied that the legal representative has already had a reasonable opportunity to make representations.

**5.9 On an application for a wasted costs order under Part 23 the application notice and any evidence in support must identify –**

**(a) what the legal representative is alleged to have done or failed to do; and**

> **(b) the costs that the legal representative may be ordered to pay or which are sought against the legal representative."** (my emboldening).

9. Therefore, in law, for the Applicant to succeed in obtaining a WCO against the Respondent the Applicant must prove one of the 3 grounds; then prove causation of specified wasted costs and then satisfy the Court that it is proportionate and just to order the Respondent lawyers to pay the costs. The 3 grounds are that the Respondent has acted Improperly, Unreasonably or Negligently (which I shall call IUN).

10. To start a WCO application the Applicant must apply in writing under under CPR Part 23 and the application notice and evidence in support must: (a) identify what the Respondent is alleged to have done or failed to do (the relevant IUN); and (b) state the costs which the Applicant wishes the Respondent to pay.

11. The procedure for such WCO applications is generally (but does not have to be) run in two stages. The first stage is a triage in which the Applicant must prove a prima facie case which gets over the threshold of the balance of probabilities, that one or more of the 3 IUN grounds arises; that the IUN caused specified wasted costs and that it would be just to make the Respondent pay and that it is proportionate in costs to pursue the WCO. This stage is generally accusatory, not defence focussed. If the Court is satisfied that, if unanswered, the Applicant's evidence is "likely" to lead to a WCO, then notice is given to the Respondent franchising it to put in evidence and answer the allegations. Then at stage 2 the Court considers whether it is appropriate to make the WCO on all the evidence and submissions. In this case because of the time lag, the Respondent had put in its evidence in response before the hearing but the parties agreed the hearing would still be a stage 1 hearing.

12. There is much more to WCOs than the Rules lay out. The case law has developed considerable guidance on WCOs.

**Case Law**

13. In *Myers v Elman* [1940] AC 282, Lord Wright described the Court's inherent jurisdiction (as it then was) as to wasted costs in this way at p 319:

> "The underlying principle is that the Court has a right and a duty to supervise the conduct of its solicitors, and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally . . . The jurisdiction is not merely punitive but compensatory. The order is for payment of costs thrown away or lost because of the conduct

> complained of. **It is frequently, as in this case, exercised in order to compensate the opposite party in the action**."

14. So WCOs are primarily compensatory. At first blush one might think pursuing a hopeless case would be within that jurisdiction. However, in relation to lawyers representing parties who have hopeless claims or defences, Lord Pearce observed in *Rondel v Worsley* [1969] 1 AC 191, at page 275 that:

> 'It is easier, pleasanter and more advantageous professionally for barristers to advise, represent or defend those who are decent and reasonable and likely to succeed in their action or defence than those who are unpleasant, unreasonable, disreputable, and have an apparently hopeless case. Yet it would be tragic if our legal system came to provide no reputable defenders, representatives or advisers for the latter.'

15. In *Ridehalgh & Ors. v Horsefield & Ors.* [1994] CH 205, the Court of Appeal were considering WCO applications and orders made in various cases against lawyers. The WCOs made below were overturned and the Court gave guidance on the meaning of IUN. Sir Thomas Bingham MR ruled as follows:

At p224 he made observations on the need for lawyers in litigation:

> "Our legal system, developed over many centuries, rests on the principle that the interests of justice are on the whole best served if parties in dispute, each represented by solicitors and counsel, take cases incapable of compromise to Court for decision by an independent and neutral judge, before whom their relationship is essentially antagonistic: each is determined to win, and prepares and presents his case so as to defeat his opponent and achieve a favourable result. By the clash of competing evidence and argument, it is believed, the judge is best enabled to decide what happened, to formulate the relevant principles of law and to apply those principles to the facts of the case before him as he has found them. Experience has shown that certain safeguards are needed if this system is to function fairly and effectively in the interests of parties to litigation and of the public at large. None of these safeguards is entirely straightforward, and only some of them need to be mentioned here. (1) Parties must be free to unburden themselves to their legal advisers without fearing that what they say may provide ammunition for their opponent. To this end a cloak of confidence is thrown over communications between client and lawyer, usually removable only with the consent of the client. (2) The party who substantially loses

the case is ordinarily obliged to pay the legal costs necessarily incurred by the winner. Thus hopeless claims and defences are discouraged, a willingness to compromise is induced and the winner keeps most of the fruits of victory."

At p232 he defined IUN:

*""Improper, unreasonable or negligent" ...*

*"Improper"* means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.

*"Unreasonable"* also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.

The term *"negligent"* was the most controversial of the three. It was argued that the Act of 1990, in this context as in others, used "negligent" as a term of art involving the well known ingredients of duty, breach, causation and damage. Therefore, it was said, conduct cannot be regarded as negligent unless it involves an actionable breach of the legal representative's duty to his own client, to whom alone a duty is owed. We reject this approach. (1) As already noted, the predecessor of the present Ord. 62, r. 11 made reference to "reasonable competence." That expression "does not invoke technical concepts of the law of negligence. It seems to us inconceivable that by changing the language Parliament intended to make it harder, rather than easier, for courts to make orders. (2) Since the Applicant's right to a wasted costs order against a legal

representative depends on showing that the latter is in breach of his duty to the Court it makes no sense to superimpose a requirement under this head (but not in the case of impropriety or unreasonableness) that he is also in breach of his duty to his client."

At p233 he ruled on the principle that running hopeless cases did not give rise to WCOs per se:

"*Pursuing a hopeless case*

A legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he acts for a party who pursues a claim or a defence which is plainly doomed to fail. …

As is well known, barristers in independent practice are not permitted to pick and choose their clients. Paragraph 209 of their Code of Conduct provides:

"A barrister in independent practice must comply with the 'Cab-rank rule' and accordingly except only as otherwise provided in paragraphs 501 502 and 503 he must in any field in which he professes to practise in relation to work appropriate to his experience and seniority and irrespective of whether his client is paying privately or is legally aided or otherwise publicly funded: (a) accept any brief to appear before a Court in which he professes to practise; (b) accept any instructions; (c) act for any person on whose behalf he is briefed or instructed; and do so irrespective of (i) the party on whose behalf he is briefed or instructed (ii) the nature of the case and (iii) any belief or opinion which he may have formed as to the character reputation cause conduct guilt or innocence of that person."

As is also well known, solicitors are not subject to an equivalent cab-rank rule, but many solicitors would and do respect the public policy underlying it by affording representation to the unpopular and the unmeritorious. **Legal representatives will, of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject advice and insist that cases be litigated.** It is rarely if ever safe for a Court to assume that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is (as Samuel Johnson unforgettably pointed out) for the judge and not the lawyers to judge it. It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of the process of the Court. Whether instructed or not, a legal representative is not entitled to use litigious

> procedures for purposes for which they were not intended, as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest, nor is he entitled to evade rules intended to safeguard the interests of justice, as by knowingly failing to make full disclosure on ex parte application or knowingly conniving at incomplete disclosure of documents. It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it."

At p236 he ruled on the effects of privilege in WCO applications:

> "*Privilege*
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> Where an Applicant seeks a wasted costs order against the lawyers on the other side, legal professional privilege may be relevant both as between the Applicant and his lawyers and as between the Respondent lawyers and their client. In either case it is the client's privilege, which he alone can waive. The first of these situations can cause little difficulty. If the Applicant's privileged communications are germane to an issue in the application, to show what he would or would not have done had the other side not acted in the manner complained of, he can waive his privilege; if he declines to do so adverse inferences can be drawn. The Respondent lawyers are in a different position. The privilege is not theirs to waive. In the usual case where a waiver would not benefit their client they will be slow to advise the client to waive his privilege, and they may well feel bound to advise that the client should take independent advice before doing so. The client may be unwilling to do that, and may be unwilling to waive if he does. So the Respondent lawyers may find themselves at a grave disadvantage in defending their conduct of proceedings, unable to reveal what advice and warnings they gave, what instructions they received. In some cases this potential source of injustice may be mitigated by reference to the taxing master, where different rules apply, but only in a small minority of cases can this procedure be appropriate. Judges who are invited to make or contemplate making a wasted costs order must make full allowance for the inability of Respondent lawyers to tell the whole story. Where there is room for doubt, the Respondent lawyers are entitled to the benefit of it. It is again only when, with all allowances made, a lawyer's conduct of proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order."

At p237 he ruled on causation:

> "*Causation*
>
> … Demonstration of a causal link is essential. Where the conduct is proved but no waste of costs is shown to have resulted, the case may be one to be referred to the appropriate disciplinary body or the legal aid authorities, but it is not one for exercise of the wasted costs jurisdiction."

At p238 he gave guidance on procedure:

> *"Procedure*
>
> The procedure to be followed in determining applications for wasted costs must be laid down by courts so as to meet the requirements of the individual case before them. **The overriding requirements are that any procedure must be fair and that it must be as simple and summary as fairness permits.** Fairness requires that any Respondent lawyer should be very clearly told what he is said to have done wrong and what is claimed. But the requirement of simplicity and summariness means that elaborate pleadings should in general be avoided. No formal process of discovery will be appropriate. We cannot imagine circumstances in which the Applicant should be permitted to interrogate the Respondent lawyer, or vice versa. Hearings should be measured in hours, and not in days or weeks. Judges must not reject a weapon which Parliament has intended to be used for the protection of those injured by the unjustifiable conduct of the other side's lawyers, **but they must be astute to control what threatens to become a new and costly form of satellite litigation."**

At p239 he ruled on the Court's discretion:

> *"Discretion*
>
> It was submitted, in our view correctly, that the jurisdiction to make a wasted costs order is dependent at two stages on the discretion of the Court. The first is at the stage of initial application, when the Court is invited to give the legal representative an opportunity to show cause. This is not something to be done automatically or without careful appraisal of the relevant circumstances. The costs of the inquiry as compared with the costs claimed will always be one relevant consideration. This is a discretion, like any other, to be exercised judicially, but judges may not infrequently decide that further proceedings are not likely to be justified. The second discretion arises at the final stage. Even if the Court is satisfied that

> a legal representative has acted improperly, unreasonably or negligently and that such conduct has caused the other side to incur an identifiable sum of wasted costs, it is not bound to make an order, but in that situation it would of course have to give sustainable reasons for exercising its discretion against making an order." (My emboldening).

16. I make no apology for setting this guidance out in full. The Privy Council approved parts of *Ridehalgh* in *Harley v MacDonald* [2001] 2 AC 678, but did not disapprove of the other parts. Lord Hope ruled on the overarching summary nature of the process as follows, at para. 50:

> "As a general rule allegations of breach of duty relating to the conduct of the case by a barrister or solicitor with a view to the making of a costs order should be confined strictly to questions which are apt for summary disposal by the Court. Failures to appear, conduct which leads to an otherwise avoidable step in the proceedings or the prolongation of a hearing by gross repetition or extreme slowness in the presentation of evidence or argument are typical examples."

And at para 57 he gave guidance on the principle behind the WCO process:

> "The essential point is that it is not errors of judgment that attract the exercise of the jurisdiction, but errors of a duty owed to the Court."

17. Neuberger J considered causation in the WCO jurisdiction in *Brown v Bennett* [2002] 1 WLR 713, and ruled at para. 22 that:

> "22 … in order to succeed in an application for wasted costs against a legal representative, an Applicant must show that he has incurred wasted costs "as a result of any improper unreasonable or negligent act or omission" on the part of the legal representative, that it is unreasonable that he should pay those costs, and that the Court should order the legal representative to meet those costs. Procedurally speaking paragraph 53.6 indicates that there will normally be two hearings before a wasted costs order is made. At the first hearing, the Court must, on the basis of the evidence and arguments put before it, decide whether it is "likely" that the Court will make a wasted costs order in favour of an Applicant against a legal representative, and additionally whether proceeding to the second stage is justified. If it is not satisfied as to both requirements,

> then the application should be dismissed; if it is so satisfied, then the application proceeds to the second stage, namely an examination as to whether a wasted costs order should be made in favour of an Applicant against the legal representative, and, if so, in what amount."

And at para. 54:

> "54. However, I consider that that is not the appropriate approach to take in wasted costs applications, and that the Court should ask itself whether, on the balance of probabilities, the Applicant would have incurred the costs which he claims from the legal representatives if they had not acted or advised as they did."

18. WCOs were considered by the House of Lords in *Medcalf v Mardell* [2002] UKHL 27. The factual issues included whether counsel when pleading had no reasonably credible material on which to draft the allegations of fraud. Bingham LJ's judgment in *Ridehalgh* was approved (by himself) and privilege was considered. Lord Bingham of Cornhill gave the lead judgment at para. 23:

> " … I do not for my part consider this passage to be inaccurate or misleading, and counsel did not criticise it. Read literally and applied with extreme care, it ought to offer appropriate protection to a practitioner against whom a wasted costs order is sought in these circumstances. But with the benefit of experience over the intervening years it seems clear that the passage should be strengthened by emphasising two matters in particular. First, in a situation in which the practitioner is of necessity precluded (in the absence of a waiver by the client) from giving his account of the instructions he received and the material before him at the time of settling the impugned document, the Court must be very slow to conclude that a practitioner could have had no sufficient material. **Speculation is one thing, the drawing of inferences sufficiently strong to support orders potentially very damaging to the practitioner concerned is another.** The point was well put by Mr George Laurence QC sitting as a deputy High Court judge in Drums and *Packaging Ltd v Freeman* (unreported) 6 August 1999 when he said, at para 43:
>
> "As it happens, privilege having been waived, the whole story has been told. I cannot help wondering whether I would have arrived at the same conclusion had privilege not been waived. It would not have been particularly easy, in that event, to make the necessary full allowance for the firm's inability to tell the whole

> story. On the facts known to D3 at the time it launched this application, D3 might very well have concluded that the firm would not be able to avoid a wasted costs order, even on the 'every allowance' basis recommended by Sir Thomas Bingham MR."
>
> Only rarely will the Court be able to make "full allowance" for the inability of the practitioner to tell the whole story or to conclude that there is no room for doubt in a situation in which, of necessity, the Court is deprived of access to the full facts on which, in the ordinary way, any sound judicial decision must be based. The second qualification is no less important. **The Court should not make an order against a practitioner precluded by legal professional privilege from advancing his full answer to the complaint made against him without satisfying itself that it is in all the circumstances fair to do so.** This reflects the old rule, applicable in civil and criminal proceedings alike, that a party should not be condemned without an adequate opportunity to be heard. Even if the Court were able properly to be sure that the practitioner could have no answer to the substantive complaint, it could not fairly make an order unless satisfied that nothing could be said to influence the exercise of its discretion. Only exceptionally could these exacting conditions be satisfied. Where a wasted costs order is sought against a practitioner precluded by legal professional privilege from giving his full answer to the application, the Court should not make an order unless, proceeding with extreme care, it is (a) satisfied that there is nothing the practitioner could say, if unconstrained, to resist the order and (b) that it is in all the circumstances fair to make the order."

And at para. 25:

> " …The question is whether, at that stage, the barristers had material of any kind before them which justified the making of the allegations. This is something which the Court does not know and cannot be told. Hunch and suspicion are not enough. Like Wilson J, and for the reasons given in his persuasive judgment, I remain in doubt, and the barristers must have the benefit of that doubt. In a case of this complexity, I would moreover think it unfair and contrary to the appearance of justice to condemn them unheard. …"

Lord Hobhouse ruled as follows at para 62:

> "Once the lawyer is given the benefit of any doubt, any element of unfairness is removed. It must depend upon the circumstances of each particular case. For example, a lawyer who has to ask for an

> extension of time or an adjournment because, say, he has forgotten about a time-limit or has accidentally left his papers at home, would not be able to say that any privileged material could possibly excuse his incompetent mistake. To make a wasted costs order against him would not (absent some additional factor) be inappropriate or unfair. In other situations privileged material may have a possible relevance and therefore require assumptions favourable to the lawyer to be made. Thus, in the present case it is assumed that in all respects the appellant barristers were acting on the express instructions of their lay clients although a finding of fact to that effect could only be made after the consideration of privileged material. The assumption removes the unfairness which might otherwise, in this respect, exist.
> 63. Therefore, for myself, I would not qualify what was said in *Ridehalgh v Horsefield*. But I agree that it may be salutary to remind parties that each case must depend upon its own facts and that the power to make an order is discretionary and material which could affect the exercise of that discretion is also relevant. I agree with my noble and learned friend, Lord Bingham of Cornhill, that the Court must be satisfied before it makes the wasted costs order that there is nothing that the lawyer could say, if unconstrained, to resist the order and that it is in all the circumstances fair to make the order." (My emboldening).

19. The level of detail needed to prove IUN and the need for "obviousness" of the IUN was considered by the Court of Appeal in *Dempsey v Johnson* [2003] EWCA Civ. 1134; Costs LR 41, in which Latham LJ ruled thus at p53 on lawyers acting in hopeless cases:

> "**Pursuing a hopeless case**
> A legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he acts for a party who pursues a claim or a defence which is plainly doomed to fail. … As is also well-known solicitors are not subject to an equivalent cab-rank rule, but many solicitors would and do respect the public policy underlying it by affording representation to the unpopular and the unmeritorious. Legal representatives will, of course, whether barristers or solicitors advise clients of the perceived weakness of their case and the risk of failure. Clients are free to reject the advice and insist that cases be litigated. It is rarely if ever safe for a Court to assume a hopeless case has been litigated on the advice of the lawyers who are involved. They are there to present the case; it is (as Samuel Johnson unforgettably pointed out) for the judge and not the lawyers to judge it. It is, however, one thing for a legal

representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of the process of the Court. Whether instructed or not, a legal representative is not entitled to use litigious procedures for purposes for which they are not intended, as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest, nor is he entitled to evade rules intended to safeguard the interests of justice, as by knowingly failing to make full disclosure on ex parte application or knowingly conniving at incomplete disclosure of documents. **It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it."**

And at para. 30:

" …**The question he should have asked was whether or not no reasonably competent legal advisor would have evaluated the chance of success in such an argument as being such as to justify continuing with the proceedings**.

31. In determining that question, it seems to me that the judge could only come to a conclusion adverse to the appellants if he had the opportunity of seeing the privileged material. It is suggested on behalf of the Respondent that it is an inevitable inference from the fact that counsel's advice of 19 February 2002 resulted in the extension of legal aid for the purpose of the trial that counsel, and also inferentially the appellants, were asserting that there were good prospects of success, and that that was a judgment no reasonably competent legal advisor could have made. I do not consider that that is a permissible inference to draw on the facts of this case. *Medcalf v Mardell* makes it plain that the Court should only come to such a conclusion if it is satisfied that there was nothing that the legal advisors could have said by reference to the privileged material which could counter that inference. That cannot be the position here. All that the Court could properly infer is that Legal Aid was extended as a result of the advice. We cannot know in what terms the advice was couched, because we do not know what motivated the Legal Services Commission to extend the certificate on the facts of this case."

That ruling raises the prospect of judges having to find the paper-thin line between a hopeless case and one which no reasonable lawyer would pursue and balances it against the Applicant.

20. In submissions the Defendant relied upon dicta in *Hedrich v Standard Bank* [2008] EWCA Civ. 905, in support of the assertion that the Respondent's approach to disclosure was negligent. In particular the following dicta of Ward LJ at para.14:

> "We did not have much argument addressed to us with regard to a solicitor's duty on disclosure. CPR 31.6 requires a party to disclose only the documents on which he relies and documents which adversely affect his own case. Adverse affect is normally assessed by reference to the pleadings but there may be no reason to restrict the concept that narrowly. A party is required by CPR 31.7 to make a reasonable search for those documents adversely affecting his case. It seemed to be common ground between the parties that the duties of solicitors was correctly stated in Ch.14 of the third edition of *Matthews and Malek on Disclosure*.
>
> ''14.02 A solicitor's duty is to investigate the position carefully and to ensure so far as is possible that full and proper disclosure of all relevant documents is made. [*Myers v Elman* [1940] A.C. 282.] This duty owed to the Court is ''one on which the administration of justice very greatly [depends], and there [is] no question on which solicitors, in the exercise of their duty to assist the Court, ought to search their consciences more'' [citing *Practice Note* [1944] W.N. 49 and the Solicitors' Practice Rules 1990 R.1 (F)].
>
> 14.03 The solicitor's duty extends to explaining to his client the existence and precise scope of the disclosure obligation and the need to preserve documents. . . .
>
> 14.07 The solicitor has an overall responsibility of careful investigation and supervision in the disclosure process and he cannot simply leave this task to his client [*Myers v Elman* [1940] A.C. 282, at 322, 325, 338.] The best way for the solicitor to fulfil his own duty and to ensure that his client's duty is fulfilled too is to take possession of all the original documents as early as possible. The client should not be allowed to decide relevance — or even potential relevance — for himself, so either the client must send all the files to the solicitor or the solicitor must visit the client to review the files or take the relevant documents into his possession. It is then for the solicitor to decide which documents are relevant and disclosable. . . . Again where the solicitor knows

> that his client has concealed relevant documents with a view to their not being disclosed, the solicitor must not act so as to suggest that full disclosure has been or will be given, and this may lead to his ceasing to act. . . .
>
> 14.09 Once the documents have been produced by the client, the solicitor should carefully go through the documents disclosed to make sure, so far as is possible, that no documents subject to the disclosure obligation are omitted from the list. . . . A solicitor must not necessarily be satisfied by the statement of his client that he has no documents or no more documents than he chooses to disclose. If he has reasonable grounds for suspecting that there are others, then he must investigate the matter further, but he need not go beyond taking reasonable steps to ascertain the truth. He is not the ultimate judge and if he has decided on reasonable grounds to believe his client, criticism cannot be directed at him. . .
>
> 14.10 If a solicitor is or becomes aware that the list of documents or any verifying affidavit or statement of truth is inadequate and omits relevant documents or is wrong or misleading, he is under a duty to put the matter right at the earliest opportunity and should not wait till a further order of the Court. His duty is to notify his client that he must inform the other side of the omitted documents, and if this course is not assented to he must cease to act for the client. If the client is not prepared give full disclosure, then the solicitor's duty to the Court is to withdraw from the case."

21. Recently, in *King v Stiefel* [2023] EWHC 453, Jacobs J summarised the general principles thus at para. 69:

> "*General Principles*
>
> 69. The leading decisions in this area of the law are *Ridehalgh v Horsefield* [1994] Ch 205 and *Medcalf v Mardell* [2002] UKHL 27. In *Lady Archer v Williams* [2003] EWHC 3048 , para [45] Jackson J helpfully summarised a number of matters which emerged from *Ridehalgh*, in which he had acted as counsel. They are as follows:
>
> i. The word "improper" connotes conduct which would be regarded as improper according to the consensus of professional opinion.
>
> ii. "Unreasonable" connotes conduct which is vexatious or designed to harass the other side, rather than advance the resolution of the case.
>
> iii. "Negligent" does not connote conduct in which all the ingredients of the tort of negligence are present. On the contrary,

the word "negligent" should be understood in an untechnical way, to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.

iv. The mere fact that lawyers have pursued a hopeless case or hopeless defence does not mean that their conduct was improper, unreasonable or negligent. It is often the duty of lawyers to put forward a hopeless claim or hopeless defence, if the client has rejected wise advice and insists upon that course of action.

v. Lawyers responding to a claim for wasted costs are put in a difficult position, if their client declines to waive privilege. Accordingly the judge must make full allowance for the inability of those lawyers to tell the whole story.

vi. It is essential for the claiming party to demonstrate a causal link between the improper, unreasonable or negligent conduct complained of and the wasted costs which are claimed.

vii. Wasted costs claims should not be permitted to develop into a costly form of satellite litigation. A wasted costs claim should not be allowed to go forward, if it cannot properly be dealt with by means of a simple and summary procedure and at a cost which is proportionate to the sum claimed.

70. There was no significant dispute as to these principles, except (vii). The import of Ms Addy's submissions was that whilst this might be the general approach, there may be cases which should be approached differently. She submitted that it was not necessary for every wasted costs claim to be capable of being addressed in a simple and summary procedure. Some cases, such as the present, call out for a remedy, even if there is a degree of complexity to the application, particularly bearing in mind the very significant amount of costs which her clients had incurred and in respect of which they have no real prospect of recovery from the Kings.

71. I do not accept this argument. There is a long line of consistent authority, summarised in more detail in Section F below, which fully accords with what Jackson J said as to simple and summary procedure and proportionate cost. Cases in the Commercial Court are no exception, even though the amounts spent by parties are often very high. Recently, Bryan J applied this line of authority in dismissing a wasted costs application at Stage 1 where a payment on account of costs in the sum of £1.44 million had been ordered: *Lakatamia Shipping Co and Others v Baker McKenzie LLP* [2021] EWHC 2072 (Comm).

> 72. In *Medcalf*, the House of Lords strengthened the guidance, previously given in *Ridehalgh*, in respect of cases where the client has refused to waive privilege…"

**Summary of the law in relation to WCOs.**

22. Having summarised the statute, the CP rules relating to WCOs and the case law on how those are interpreted, I will now summarise the approach I consider that I am required to take into 10 factors.

**Summary process**

(1) The WCO jurisdiction is a summary jurisdiction, generally but not always dealt with at the end of a case. It may arise of the Court's own motion or by application. It is not intended or allowed to become satellite litigation prolonging or overshadowing the pre-action conduct, trial or hearings to which it relates. It must be used and managed in a proportionate manner in relation to time and costs. It must be fair and simple.

**Two stages – accusation then defence**

(2) The jurisdiction usually has two stages: the initial accusatory stage in which the Applicant seeks to raise a prima facie case (show cause), which if unanswered would on the balance of probabilities lead to a WCO; then a secondary stage at which, after the Respondent has been given a fair opportunity to explain, defend and make submissions, the Court determines whether the relevant substantive and procedural thresholds have been satisfied by the Applicant such that the Court can go on to consider whether it is just to impose the WCO on the Respondent. The stages may, in appropriate cases, be rolled up together.

**Sufficient particularity**

(3) At stage 1 and stage 2 the Applicant is required to set out the allegations of IUN with sufficient particularity and to identify the alleged wasted costs which were allegedly caused by the IUN and the sums involved, at least in general terms.

**Improper conduct**

(4) *Improper conduct*: covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice for the Respondent or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct and conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion whether or not it violates the letter of a professional code.

**Unreasonable conduct**

(5) *"Unreasonable conduct"* covers conduct which is vexatious or designed to harass the other side rather than advance the resolution of the case and it makes no difference that the conduct is the product of excessive zeal or gross naivety. It probably does make a difference if it is the product of malice or improper

motivation. Conduct is not unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as reflecting poorly on a practitioner's judgment, but it is not unreasonable.

**Negligent conduct**

(6) *"Negligent conduct"* may involve duty, breach, causation and damage, so an actionable breach of the legal representative's duty to his own client, but goes wider than that. The Applicant's right to a wasted costs order against a legal representative depends on showing that the latter is in breach of his duty to the Court so negligent conduct is not limited to professional negligence in relation to the lawyer's client. Negligent conduct should be understood in an untechnical way, to denote failure to act with the competence reasonably to be expected of ordinary members of the profession, or put the other way around: acting in a way in which no reasonable body of the profession would act.

**Proof and privilege**

(7) *"Privilege"* when considering IUN, the Court will take into account that fact that lawyers will have their hands tied behind their backs when defending themselves against accusations if their clients do not waive privilege in the response to the Applicant's allegation of IUN. Therefore, the Court must take into account that disadvantage and give the lawyer the benefit of any doubt. If the client is dissatisfied with the advice given, having lost the case then, when the WCO application is made, the client may waive privilege and the allegedly bad advice given will be disclosed. If the client does not waive privilege, the Applicant's task in seeking to prove IUN in relation to the Respondent's handling of the action is likely to be far more difficult. WCO applications are not professional negligence actions and are not intended to be. The solicitors' file is not examined. It is not possible for the Applicant to prove on detailed analysis of the file that the Claimant's lawyers advised or represented him/her negligently. So, WCOs have often be characterised as applying to *obvious errors*: failing to turn up to a hearing; losing the papers; failing to know of the leading case which was against the client's pleaded case; missing Court deadlines; causing the case to be stuck out or missing limitation and so on. If privilege is not waived then the Court generally assumes that the lawyer acted on instructions and the advice given was not improperly, unreasonably or negligently so given. In any event it is not unreasonable or negligent to pursue a hopeless claim or hopeless defence for a client who wishes to do so.

**The hopeless case principle**

(8) The principle applied in WCO applications is that a lawyer is not to be held to have acted IUN simply because he acts for a party who pursues a claim or a defence which is plainly doomed to fail. In the past, before CFAs, this was the rule how so ever the action was funded, whether privately or on legal aid. The

identified historical reasons for this principle were threefold: (1) it is the judge not the lawyer who decides whether the defence or claim is valid; (2) parties need legal representation so their cases can be fully pleaded, advised upon and properly run before the Courts by someone who understand the law and the procedure; (3) it is the choice and the liability of the party, not the lawyer, whether the claim or defence continues. (However, in the application before me the Applicant asserts that the combination of CFA funding, which amounted to "maintenance" of the claim, and the hopelessness of the Claimant's position should displace this principle and lead to a WCO. I shall rule on this below.)

**Causation of wasted costs**

(9) The Applicant must identify the costs which it has incurred and prove on balance that the Respondent's IUN caused those costs such that they were "wasted" and so should never have been incurred.

**Is it just?**

(10) After all the other thresholds are satisfied the Court should stand back at both stages and determine in all the circumstances whether it is just to make a WCO against the lawyer. This is a matter upon which the Court is permitted a wide ranging judicial discretion, so long as all relevant matters are taken into account and all irrelevant matters are excluded.

## Evidence

23. In the 1st witness statement of Mr Head (his sixth in the claim) dated 17th March 2024 he set out a chronology of events. The key surveillance videos were served on the 28th of July 2023. The Defendant offered to settle the claim on the 18th of August 2023 for £152,246 including costs. This offer was made-up of an interim payment of £75,000 to the Claimant, a payment on account of costs of £50,000 and a payment to the CRU of £27,246. Permission was granted to the Defendants to rely on the video evidence on the 26th of September 2023 and on the 6th of November the Defendant restated the earlier offer. The Defendant suggested a joint settlement meeting after the Claimant rejected the offer. In mid-December the Defendant informed the Claimant that the Defendant would appeal the CLU certificate in the light of the allegations of FD and the Claimant complained that that was unfair pressure. In early January 2024 after the Claimant served its updated schedule the Claimant offered to settle for £1.85 million and the Defendant responded the parties were so far apart that a JSM would not assist. On the 26th of January 2024 the Defendant increased its global offer to £352,246. On the 9th of February 2024 the Claimant made a Part 36 offer of £1.5 million and in a phone call stated that the Claimant would not come down from that figure. The Claimant's lawyer asserted that the Claimant's team were confident that the FD argument would fail. Whether that was a negotiating tactic or actually what they had advised the Claimant is unknown. On the 22nd of February 2024 the Defendant repeated it offer of £352,246 all in and did so again after the first day of the trial on the 4th of March 2024.

24. Mr Head asserted that the Respondent made various errors in the witness statement number 5 of Miss Sowden-Taylor because she asserted that documents were served the previous year when they were not and the Claimant's lawyers' disclosure log was incorrect. More importantly Mr Head asserted that the Claimant's lawyers made mistakes in the preparation of the Claimant's witness statement dated October 2022, because she asserted she had *no nights out, no holidays and no social life* in that witness statement but the Claimant's lawyers knew that she had actually gone on holiday for a hen weekend to Benidorm and they failed to correct this error in the statement and thereafter for ten months. They also were aware of her treatment notes which disclosed that she had a social life and she the Claimant's solicitors should have corrected these errors. In the exhibits to Mr Head's witness statement it is apparent from the correspondence between the lawyers that the Claimant's solicitor stated that the August 2023 offer from the Defendant was not "of interest to the Claimant". Later the Claimant's lawyer misunderstood the January 2024 offer as being only for £200,000 including costs, when in fact it was for £352,246. The February 2024 offer was rejected on the basis that "the Claimant had no interest" in it. Mr Head also criticised Miss Sowden-Taylor for her 9th witness statement in which she had to correct paragraph 25 of her 8th witness statement stating that the offer made in January 2024 by the Defendants was valued at £200,000. I note that even that correction was wrong for the reasons set out above.

25. In the second witness statement relied upon by the Applicant, which is the 7th from Mr Head, made on the 20th of May 2024, he set out the Applicant's evidence on a much wider spread of the allegations made against the Respondent. He split the allegations into two general categories: (1) that the Respondent failed to collect and analyse documents and compare those two their instructions; (2) that the Respondent funded and maintained the litigation and failed to make reasonable ADR attempts after the Claimant's pleaded case became unsustainable and the Claimant herself wanted to settle. Mr Head asserted that had the Respondent acted properly the costs would have been reduced, there would have been no need for videos or further experts reports, no trial would have taken place and the settlement would have occurred in September 2023. Mr Head asserted that the Respondent managed the Claimant's case with a "lack of diligence". The Respondent should have corroborated what the Claimant told her lawyers by comparing that with the documents in their possession. The Respondent should have obtained the Claimant's social media in 2022, along with her medical records and her employment records, and should have known the Claimant had recovered better than she asserted. The Respondent should have drafted the Claimant's second witness statement better. Mr Head asserted that because the Respondent was funded on a CFA they had invested a lot in the claim and did not wish to settle it without having their costs recovered. Mr Head referred to the multidisciplinary team notes which were disclosed late during the trial when they should have been disclosed earlier.

He asserted the Respondent ignored the medical records and in particular the opinion of Doctor Fisher, provided on the 31st of January 2019, that the Claimant had made a "remarkable recovery". Mr Head asserted that the L&G insurance policy application form, that was disclosed just before the trial started, should have been disclosed with standard disclosure in August 2022. Mr Head asserted that due to the Claimant's lack of diligence the initial needs assessment by Mr Thomas in April 2022 was based on a failure to read the multidisciplinary team notes and employment records and therefore a blinkered opinion was provided and this should have been challenged by the Claimant's lawyers. Mr Head asserted that the Claimant's solicitors should have considered the Claimant's employment records, which were disclosed in May and September 2022, including her annual performance reviews, which if properly considered, showed a remarkable recovery and undermined the Claimant's case. Mr Head asserted that the Claimant's solicitors received the Claimant's DWP records, including her fraudulent PIP application forms, on the 23rd of October 2022, which should have put them on notice of her dishonesty and yet they drafted and allowed the Claimant to sign her witness statement on the 27th of October 2022 which contained dishonest assertions. Mr Head struggled to believe the solicitors would permit the Claimant to sign such a witness statement if they had read the DWP records and had read their own notes showing they knew she had been to Benidorm on the hen weekend a few months before. Mr Head complained that, despite the fact that the Claimant went to Venice in February 2023 and the Claimant solicitors knew this, in October 2023 they asserted that the Claimant did not go away to Venice. Two days later this was corrected by the Claimant's lawyers in correspondence. Mr Head raised the fact that the Claimant went to a family wedding in Spain in May 2023 and the Claimant's lawyers failed to disclose that, instead saying that she could not attend a medical examination because of "a wedding" but not mentioning that it was abroad. Mr Head raised that the Claimant's solicitors knew that the Claimant had mis-stated the date when she was informed the Court of the death of a relative in December 2023. As for the photos on the Claimant's mobile phone, Mr Head complained that initially the Claimant's solicitors accepted the Claimant's suggestion that she only had photos back to March 2020, but soon thereafter it was found that she had many earlier photographs.

26. Mr Head asserted that the Claimant's solicitors acted contrary to the Claimant's own wishes or interests in failing to advise her to accept the offers made in 2023 and 2024 despite the videos, social media, DWP and employment records. Mr Head suggested that the Claimant perhaps should have taken independent legal advice when she lost capacity in January 2024. He asserted that the Claimant's solicitors had exhausted their cost budget before trial and the Claimant was let down by them and the Claimant now faces a disbursements bill over £250,000 and solicitor's costs of over £250,000 from her own solicitors.

27. The evidence in response from Miss Sowden-Taylor is in a witness statement made on the 13th of June 2024. Her firm ceased to act for the Claimant after the WCO application was made. In relation to the allegations about failing to settle, she informed the Court that the Claimant did not waive privilege. She set out the chronology of the offers and counter offers and also the chronology of the disclosure. The dates in her chronology of disclosure do not precisely match those in Mr Head's evidence but it is probably not going to be crucial to my decision to try and make findings of fact on clashes of dates in two witness statements without having heard either witness live or to descend into the minutiae of the 30 or so lever arch bundles which were the documentation for trial. Miss Sowden-Taylor could not inform the Court what advice she had given to the Claimant nor could she inform the Court what instructions the Claimant had given to her. She accepted that after the video was served the case changed substantially. She asserted that considerable pressure was put on the Claimant to provide wide-ranging disclosure. The Claimant's mental health deteriorated. The Respondent did review the documents obtained on disclosure. She denied that the Respondent firm continued the claim or maintained the claim just for their own profit. She said that the Claimant disputed the FD allegation and sought to prove quantum. She regarded Mr Head's criticisms of her as "reprehensible, nonsensical and insulting". She gave evidence that her firm and she did consider the video and the disclosure and acted in accordance with the Claimant's instructions. The multidisciplinary team considered the Claimant was genuine, the Claimant was supported by her medico-legal experts and the case was far from hopeless. She referred to and relied upon the opening and closing submissions of her senior junior and experienced counsel, Mr Marcus Grant. She stated that the issue of substantial injustice was finally balanced and that there was no evidence of impropriety or negligence. She stated that disclosure of a Claimant's social media would not have been part of standard disclosure and that District Judges and Masters, at cost case management hearings, would not allow such disclosure in cost budgets in personal injury claims unless there was a sound reason for doing so.

**Applicant's submissions**

28. After some discussion, both parties agreed this was a stage 1 hearing not a rolled up hearing and the Applicant pursued the application on the basis that the solicitor's conduct was unreasonable or negligent in failing to provide early disclosure of relevant documents; failing to read them and apply them properly to the Claimant's evidence; failing to realise that the Claimant's pleaded case was hopeless and failing properly to engage in ADR.

29. In submissions the Applicant accepted that no waiver of privilege had been granted by the Claimant and that this is relevant to whether the Court can find that the Claimant's solicitor has acted contrary to instructions. However, the Applicant submitted that the Claimant's solicitor had a duty to collect and analyse the Claimant's disclosure

documents, relying on *Hedrich* and submitted that it was clear that the Claimant's solicitors had overlooked, failed to read or failed to understand key evidence: of Doctor Fisher, the L&G policy proposal from March 2020; the INA from Mr Thomas; the employment records and the performance reviews; the DWP forms; and later, the videos, which were all in stark contrast to the Claimant's own evidence. The Applicant submitted that the Claimant's second witness statement was drafted and contained assertions that the Claimant's solicitors knew or ought to have known were inaccurate in relation to holidays abroad and other capabilities. In relation to the Claimant's third witness statement, in answer to the surveillance videos, the Defendant asserted that this was clearly drafted by a counsel. The Applicant asserted that the Respondent could not claim that it had properly reflected on the Claimant's evidence compared with the disclosure, but if it had, it could not properly maintain the pleaded case or assert that the Claimant had realistic prospects of success for her pleaded case.

30. The Applicant asserted in the skeleton argument that the Respondent's approach amounted to "impropriety" based on it being speculative, relying upon *Goodwood v Breen* [2006] 1 WLR 2723. This assertion was abandoned in submissions by leading counsel for the Applicant who made it clear that the Applicant pursued the WCO on the basis only of unreasonable conduct or negligent conduct, not improper conduct.

31. The Applicant asserted that the Respondent failed to negotiate properly after the videos were served and failed to respond properly to the "walk away" offers made by the Defendant or the increased offer made in January 2024 and that serving a schedule claiming £2.35 million and making a Part 36 offer eventually at £1.5 million, valued the claim at 64% of the value of the schedule, and this showed that the Claimant's solicitors were negligent. The Applicant asserted that the Respondent solicitors were negligent and unreasonable in pursuing a "speculative case on a CFA". In effect they were "maintaining and funding" the case because they were paying for the disbursements. In the skeleton the Applicant asserted that all of the Defendant's costs were at large. However, in submissions the costs claimed under the WCO were restricted to either: (a) costs after October 2022, or (b) costs after September or October 2023. No sum was ever put before the Court, even in general terms, to state what level of costs was being claimed from each date.

32. In his elegantly phrased verbal submissions Mr. Williams accepted that the Applicant faced substantial hurdles. It had to prove the solicitor was culpable, the case had to be clear, if there was an unclear allocation as to the responsibility for the decisions to go on with the claim between the Claimant's solicitors and the Claimant then the benefit of the doubt had to go to the Claimant's solicitors because privilege was not waived. The Applicant had to prove causation too.

33. Mr. Williams admitted that there was no previous decision which involved a mixture of CFA funding maintaining a Claimant's case together with Claimant's case being so "hopeless" but that it would be right for this Court to step away from the general principle that lawyers would not be subject to WCOs for running "hopeless" cases and grant a WCO, because of the effects that CFA funding have on litigation. It was submitted that the Court should find that there is a prima facie case, on the balance of probabilities and should order the case should be re listed for a full day for a stage 2 hearing, to examine the full detail of the allegations and the full quantum of the wasted costs.

34. When I enquired as to the time period for and the level of the costs claimed, a matter which was not in the skeleton or in evidence, the responses left the sums shrouded in obscurity. The Applicant claimed wasted costs from either the early Autumn of 2022 or 2023. What can be said, with some certainty, is that I capped the Defendant's costs at no more than £550,000 and that excluding all of the costs up until October 2022 or September 2023 is likely to cut off a quite substantial sum from the total bill. I still do not know what sums are claimed in wasted costs. In addition, in relation to proportionality, figures were given to the Court that the Defendant's costs of the application to date are around £50,000 and for stage 2 would come to approximately £100,000 in total and the Claimant's costs are £42,000 to date. Therefore, it would not be wholly unreasonable for me to proceed on the basis that the total costs of the WCO application, after any stage 2 hearing, might amount to around £200,000. Doing the best I can the estimated costs which the Applicant sought to recover might amount to around £250,000 to £300,000 at most. I note from the precedent H in the trial bundles that the Defendant's costs budget was approved at £452,400. I shall return to that set of figures when I deal with proportionality and justice below.

35. **The Respondent's submissions**, professionally and clearly made by Mr Mallalieu, were as follows: (1) the Applicant's allegations are imprecise and so wide-ranging that they fail to satisfy the criteria for a stage 1 WCO hearing; (2) the Applicant has failed to identify the costs which they assert are wasted in the skeleton and have only made last minute rough attempts to do so in submissions and even then have not even provided ballpark figures; (3) the core or the substance of the application is the asserted failure by the Claimant's solicitor to obtain and disclose documents earlier, to consider the documents against the evidence given by the Claimant, to understand the risks and to advise the Claimant properly on those risks; (4) the Applicant appears to assert that the Claimant's solicitors should have "dumped" the Claimant before trial, because of the risks: should have terminated their retainer, because they had the right to do so because the Claimant had lied to them and to the Court. It was the Respondent's submission, that it cannot be negligent for the Respondent to have continued to represent the Claimant, whether or not they had the right to terminate the CFA, because the Claimant needed representation at trial to be able to fight her case. It was submitted

that what the Applicant is really alleging is that no Claimant solicitor can continue to represent a Claimant after an insurer has alleged FD and has gained some powerful support for their assertions from disclosure or from a surveillance video. The Respondent submitted that continuing to represent a brain damaged Claimant to trial, who asserted that she had an honest claim, was neither unreasonable nor improper and certainly was not negligent. The Respondent submitted that the fact that it had CFA funding did not displace the general principle about running "hopeless" cases and, in any event, it denied that the Claimant's case was hopeless. Liability was admitted and she was entitled to have quantum assessed (which was in dispute). She was awarded £600,000 of honest damages. It was submitted that the questions of dishonesty and FD were arguable and, in any event, there was an issue over whether "substantial injustice" applied. It was submitted that social media disclosure does not occur as a standard practice in standard disclosure. In relation to the opinion of Doctor Fisher and the employment records, the Respondent submitted that the medico-legal experts who they instructed were given those documents and they reached supportive opinions. They advised that the Claimant was more substantially injured than Doctor Fisher had recorded. The Respondent refuted the allegation that Miss Sowden-Taylor and the firm had failed to supply relevant documents to the relevant experts and pointed out that there was no chart of allegations showing which experts had not been supplied with identified documents, so it was impossible to answer the generalised assertion. Overall, the Respondent asserted that there was no prima facie case for a WCO and that the way that the application was made and the lack of detail of it, made it wholly disproportionate. The Applicant was trying to raise a wide-ranging professional negligence case but was unable to get anywhere near proving it, let alone on the balance of probabilities, because of the effects of privilege.

**Analysis**

36. I shall now analyse the facts of the case by reference to the 10 factors identified above from the law and the authorities relating to WCOs.

**Summary process**

37. The Applicant's WCO application rests on a wide range of allegations of negligence and unreasonable behaviour (but not impropriety) encompassing: failure to produce proper standard disclosure; failure to read documents; failure to draft proper witness statements; failure to cross check what the Claimant told them against source documents; failure properly to advise the Claimant on the risk that she would be found FD; failure to engage in ADR properly; failure to terminate their own retainer and failure to act on instructions. Just stating that range is a firm indicator to this Court that the allegations are probably not within the summary jurisdiction covered by WCOs. Then, when descending into the detail of each allegation, they all each fall apart, save for one.

38. The failure to provide proper standard disclosure assertion centred on the Claimant's social media accounts. However, no adequate evidence was put before me that social media accounts are generally considered relevant for standard disclosure in moderately severe brain injury claims. What issue would they go to? Are solicitors to spend days trawling through hundreds of thousands of TikTok posts, texts, WhatsApp messages and Twitter feeds (aka X) to harvest them, arrange them, delete personal ones, then disclose them to insurers? Which issues would each post go to? Would Masters allow the huge costs of this in every case in costs budgets? Would insurers wish to pay such costs routinely? Until dishonesty is alleged, I do not see the relevance of these. One tell tale sign is that the Defendant did not ask for these after standard disclosure was completed. The rest of the complaints about disclosure do not stand up either. Each time the Defendant sought documents the Respondent faithfully and professionally sought and obtained them. The disclosure requests came thick and fast after the videos were served. I do not see how the L&G policy could have been in the mind of the Respondent at standard disclosure stage as relevant at that time. It become relevant when the Claimant's case began to unravel after the videos were served. I reject the assertion that the way the Respondent handled disclosure was clearly IUN.

39. The Defendant asserts that the Respondent was unreasonable or negligent in the way the firm handled the ADR. True it is that the Claimant failed to beat the offers made in August 2023 and January 2024, the latter of which was repeated in February. But there is no evidence before me that the Claimant and her mother, who was her litigation friend from January 2024, were negligently advised or that the rejections were made without instructions. No WCO is applied for against Mr Grant the Claimant's counsel. Is the Respondent to be assumed to have ignored his advice? True it is that the Claimant's part 36 offer of £1.85 million and her lower offer of £1.5 million were both far too high, but if that amounted to negligence or unreasonable conduct, then a large percentage of lawyers in personal injury work would be at risk of WCOs for their offers. Privilege could have been waived but has not been. The Claimant and the Respondent stand side by side. Taking into account the Respondent's inability to disclose what actually went on I assume that they acted on instructions and give them the benefit of any doubt. I have no doubt that in principle a lawyer is not liable to suffer WCOs for running a difficult case. The principle goes further and provides that a lawyer is not liable for a WCO for running a hopeless case on instruction. I do not consider that the evidence before me comes close to proving, on the balance of probabilities, that the Respondent negligently advised the Claimant on the risks. True it is that the Claimant faced stark challenges to her evidence arising inter alia from the videos, the employment performance reviews, her PIP applications, what she told the medical experts and the L&G insurance proposal she completed, however I accept that her case on the value of her honest damages in quantum was stronger than the Defendant's case. The Defendant argued for lower damages and lost that issue. The Claimant had a slim chance on FD but she had a real argument to run over substantial injustice. This was

not a "hopeless case" as Mr Williams described it, and even if it was, in principle, that is not enough to justify a WCO. More is required.

40. As for the Claimant's October 2022 witness statement, it is not suggested that the words used were not the Claimant's. The criticism is that the Respondent should not have let the Claimant put, what I found in my judgment to have been lies, in the statement because the firm had information in their possession which undermined what the Claimant was writing. I find this a difficult issue on which to give judgment. I take into account the guidance in *Hedrich.* The solicitor had a duty to check and a duty not to mislead the Court. For instance, the Respondent should have known and remembered that the Claimant had been to Benidorm in the summer of 2022. The Claimant asserted in the witness statement that she never went abroad. If the solicitor who drafted that statement knew that the sentence was a lie, that would have been a breach the solicitor's duty to the Court. I consider that would have been both improper and unreasonable. There is no evidence that when the statement was signed and served the solicitor who drafted it in the Respondent firm was aware of or alive to the conflict between that statement and the objective facts. Against that must be set the fact that the Claimant had asserted to many experts by that point that she had a wide range of disabilities preventing her from socialising, travelling, walking far, driving and drinking. To resolve this point on the balance of probabilities, privilege would need to be waived and the file would need to be considered in detail. It has not been. I take into account the assumption that the solicitor was acting on instructions when the statement was drafted, signed and served. I note that Miss Sowden-Taylor has not denied that the firm knew the Claimant had been to Benidorm before the statement was signed by the Claimant. I find that the Applicant has proven on balance, at stage 1, that it has a prima facie case on this assertion. However, I do not see how this potential IUN could have caused any wasted costs. Instead, it gave the Applicant a large stick with which to beat the Claimant and that stick was used professionally and effectively by Mr Blakesley KC. In addition, by the time the videos were disclosed this was all in the past. The FD issue was raised. When the DWP records were disclosed the issue was further highlighted. The Applicant has failed to establish on balance what costs the witness statement IUN caused. In any event, I consider that such matters are generally better dealt with in a professional negligence claim or in a regulatory disciplinary hearing than in an WCO application.

**Sufficient particularity**

41. At stage 1 I consider that the CPR require that the Applicant sets out the allegations of IUN with sufficient particularity and identifies the alleged wasted costs which were allegedly caused by the IUN and the sums involved, at least in general terms. The Applicant in this case has made the allegations wide ranging and has completely failed to be specific about which costs are claimed as wasted (until the hearing itself) and how much they are. That is an unsatisfactory way of making the application and I take it

into account in the decision I make below on the justice of the making of a stage 1 order leading to a WCO. Those allegations which had some particularity I have dealt with above and will deal with further below.

**Improper conduct**

42. The Applicant alleged improper conduct in the evidence and in the skeleton but abandoned this allegation at the hearing.

**Unreasonable conduct**

43. I have dealt with the disclosure allegations above. I do not consider that the Respondent's handling of disclosure was prima facie or arguably IUN.

44. The drafting of the Claimant's ultimately fatal October 2022 witness statement was conduct which lead in the event to an unsuccessful result for the Claimant, combined with her other lies in statements to experts and in documents. No malice is asserted. I am sure that more cautious legal representatives would have acted differently on the witness statement drafting and on whether to press on to trial and whether to accept the Defendant's offers, but that is not the test. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as reflecting poorly on a practitioner's judgment, but it is not unreasonable. No explanation has been given for the words in the October 2022 witness statement being left unchallenged by the Respondent. I consider that the drafting of the Claimant's witness statement in October 2022 was poor practice and prima facie unreasonable or negligent, despite being what the Claimant wanted to say.

45. Specific consideration needs to be given to one of the main submissions from the Applicant, that failing to "dump" the Claimant when it became clear that she had been dishonest, amounted to unreasonable conduct. When a personal injury case involving a moderately severe brain injury has been running for years; when liability has been admitted; when it is clear beyond argument that the Claimant suffered a very nasty injury (her skull was opened up and the top part of the bone sewn into her abdomen for weeks, to relieve the pressure in her injured brain); when the Claimant has needed rehabilitation and care and has lost earnings; how can it be said to be unreasonable or negligent to have continued to represent her to trial when she asserted she was seriously injured and she was? In addition, the Defendant was making offers to settle. The only real ground for termination was the Claimant's asserted FD and, of course, the CFA allowed the Respondent to terminate on that ground, but it did not require termination. In my judgment the decision whether to terminate or not to do so was a human and commercial one for the firm, not a matter of professional regulation or a matter for the Court or the Applicant to comment upon or criticise. If the retainer had been terminated the Claimant would probably have recovered nothing. She could not have paid her experts fees for the trial. It is wholly speculative to suggest that another firm would

have stepped in on a CFA and represented her. She would probably have had to repay her interim payment. I reject the Applicant's submission that there is any requirement in law, in justice, in reasonableness or in professional standards that the Respondent "should" have terminated the CFA with the Claimant. What they had to do was be very careful not to mislead the Court in the face of the very clear documentary evidence that the Claimant had contradicted herself many times. Certainly, the Claimant's counsel was very careful during the whole trial to tread a wholly professional line in representing her.

46. I am unpersuaded that any of the accusations made against the Respondent (save for the witness statement dated October 2022) are proven on a prima facie basis.

47. **Negligent conduct** I have carefully considered whether the Respondent's conduct, as alleged, was in breach of its duty to the Court or a failure to act with the competence reasonably to be expected of ordinary members of the profession, or put the other way around: acting in a way in which no reasonable body of the profession would act.

48. I do not consider that the Respondent can properly be criticised for their conduct in relation to disclosure. Quite the opposite. When asked, they worked really hard to provide all that was requested. As for the ADR, I do not consider that there is anything like sufficient evidence to raise a case that the Respondent was negligent in its approach to ADR. If the Claimant did not want to accept the offers made, then that was her decision. I do not know what advice she received from Hugh James or counsel. Nor am I entitled to guess at that. Hugh James are assumed to have acted on instructions and, without more, I am not entitled to go behind the principle that lawyers are permitted to fight difficult cases, even hopeless cases, if clients want to do so. The person carrying the liability is the client not the lawyer.

49. Specific consideration needs to be given to the main submission from the Applicant, that failing to "dump" the Claimant when it became clear that she was dishonest, amounted to negligence. For the reasons set out at para. 45 above I reject that submission.

**Proof and privilege**

50. I take into account that fact that the Respondent has its hands tied behind its back because the Claimant has not waived privilege in the response to the Applicant's allegations of IUN. I take into account the disadvantage which the Respondent carries and give the lawyers the benefit of any doubt. If the client had been dissatisfied with the advice given, having lost the case, then when the WCO application was made the Claimant could have waived privilege and the allegedly negligent advice given would have been disclosed to me. Instead, the Claimant has not waived privilege. The Applicant accepted that the task in seeking to prove IUN in relation to the Respondent's

handling of the action is far more difficult when privilege is not waived. This WCO application is not a professional negligence action and is not permitted to be. The Defendant has tried prove that the Claimant's lawyers advised or represented her negligently but in my judgment has wholly failed to do so. This WCO cannot be characterised as relying on obvious errors. I start from the assumption that the Respondent acted on instructions and the advice given was not improperly, unreasonably or negligently so given. In my judgment the Respondent's conduct has not been proven prima facie "negligent" in the sense used in the WCO jurisdiction. I consider that the Applicant has failed, at stage 1, to prove on balance that the Respondent's conduct was either unreasonable or negligent on the evidence save for the October 2022 witness statement.

**The hopeless case principle**

51. In my judgment the Respondent is not to be held to have acted IUN simply because it acted for a party who pursued a claim which failed and was probably doomed to fail. I do not consider that the funding by way of CFA makes any difference to this principle. The identified historical reasons for this principle apply equally in this case: (1) it is the judge not the lawyer who decides whether the defence or the claim is valid; (2) the Claimant needed legal representation so her case could be fully pleaded, advised upon and properly run before the Courts by someone who understood the law (as her experienced solicitors and counsel did) and the procedure; (3) it was the choice of the Claimant whether the claim continued, not the lawyer. I reject the assertion that the combination of CFA funding, which allegedly amounted to "maintenance" of the claim and the hopelessness of the Claimant's position on FD should displace this principle and lead to a WCO. In my judgment the opposite applies. CFA funding puts more pressure on solicitors to terminate retainers in FD claims. The fact that the Respondent was brave enough *not* to "dump" the Claimant speaks of the firm's humanity and bravery, not of their negligence or unreasonableness.

**Causation of wasted costs**

52. The Applicant has failed to identify the sum in wasted costs which it has incurred and has failed to prove, on balance that, the Respondent's alleged IUN caused those costs such that they were "wasted" or should never have been incurred. Initially the Applicant sought all of its costs. At the hearing this was reduced to only the costs after late 2022 or late 2023. The causation case was that the Respondent should have advised the Claimant to settle because she was going to be found to have been FD. It was submitted that, if they had not been IUN, she would have taken the advice and settled or they would have withdrawn so the case would never have gone to trial. I do not consider any of the allegations of unreasonableness or negligence are prima facie proven on balance save for the October 2022 witness statement. I have tried to understand the Applicant's case on what wasted costs that caused or what any of the accusations would have caused. I cannot speculate what would have happened if the

disclosure had come out earlier because the Defendant did not ask for it so it is difficult to see how anything the Respondent did on disclosure caused any costs to be wasted. As for the witness statement, as I have indicated above, this provided the Defendant with a stick with which to beat the Claimant. The Applicant has not proven what costs have been wasted as a result of the lies which were uncorrected and were in it. In addition, those lies were so scattered elsewhere throughout the conversations which the Claimant had with the medical experts and on DWP forms that it is not as if the witness statement lies stood alone and singular. As for the failure to settle, I set out in the substantive judgment how I considered it likely that if the Claimant had not been FD the claim would have settled in late 2023 without videos and extra medical evidence, but that was the Claimant's responsibility for her lies. I have rejected the accusation that there is prima facie evidence that the Respondent should have terminated the retainer and that there is any evidence that the Respondent failed to advise the Claimant properly. In all the circumstances I do not consider that the Applicant has discharged the burden of proof on causation.

**Is it just?**

53. I now stand back and determine in all the circumstances whether it is just to make a Stage 1 order which would lead potentially to a WCO against the Respondent lawyer.

54. Proportionality is relevant. The wasted costs sought are unspecified and the costs of seeking them are very substantial. Overall, I do not consider that the broad negligence allegations raised fit well within the summary WCO jurisdiction. I take into account: the lack of evidence to support the wide range of accusations; the abandonment of impropriety during the hearing; the privilege retained by the Claimant; the lack of particularity of allegations (save for the witness statement allegations); the lack of identification of the date range of wasted costs and the sums of those costs; the disproportionality of the costs of the WCO proceedings compared with the likely sums being claimed as wasted; the lack of any clear evidence of causation for any of the accusations and in particular the witness statement drafting accusation; my conclusion that the accusation that the Respondent should have terminated the retainer is not made out and does not constitute unreasonable or negligent behaviour and the fact that Hugh James have waived any right to recover their fees and disbursements from the Claimant.

55. I had the benefit of hearing submissions from two costs silks. But, in summary WCO proceedings, I question the proportionality of the application being handled by leading counsel who were not trial counsel. The preparation may have involved reading the transcripts of an 11 day trial, reading 30 lever arch files of trial bundles, assimilating the witness statements and a large number of reports from medical and other experts and then drafting the application and skeletons and appearing at the hearings. The costs became substantial. The making of the negligence allegations against the Claimant's lawyers gave rise to the risk of conflict of interest with the Claimant and the lawyers

needed to withdraw. They did withdraw. This left the Claimant unrepresented at the consequentials hearing which covered large sums of costs and QOCS matters. Such an approach needs very careful thought before it is taken.

56. I take into account all that is set out in my earlier judgment and what I have set out above. I take into account that the system for dealing with fundamental dishonesty in *S.57 of the Criminal Justice and Courts Act 2015* deals with costs penalties and punishes dishonest Claimants by depriving them of their damages. It punishes Claimant lawyers by depriving them of all of their costs and forcing them to pay disbursements, because LEI insurers will potentially avoid liability for those. I consider that, more generally, exposing Claimants' solicitors and barristers to expensive WCO proceedings for failing to terminate retainers after FD has been pleaded (and to an extent substantiated by video surveillance or disclosure or other evidence) may potentially fetter access to justice for Claimants who, whilst not wholly honest, have a good core claim and have at least some prospect of defeating the assertion of FD. In all of the circumstances I do not consider that a stage 1 order towards a WCO is evidentially supported, appropriate, proportionate or just.

**Decision**

57. Above I have ruled that the Applicant has not made out either unreasonable behaviour or negligence on a prima facie basis against the Respondent, save in relation to the October 2022 witness statement of the Claimant. In my judgment the Applicant has failed to comply with the procedural requirements for simple, clear allegations which do not require a detailed examination of the Respondent's files, documents and evidence. I consider that the privilege to which the Claimant is entitled provides a barrier to many of the Applicant's accusations. In my judgment the Applicant has failed to satisfy the requirement for clear identification of the allegedly wasted costs, has failed to identify the sums claimed and has not established the necessary causal link between the IUN accusations and any wasted costs. I also consider that proportionality and the justice of the case require the application to be dismissed.

END