Neutral Citation Number: [2024] EWHC 287 (Ch)

Case No: BL-2022-000578

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (Ch.D)

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

Date: 23 February 2024

Before :

Elizabeth Jones K.C.

- -

Between :

Your Lawyers Limited	**Claimant**
- and -	
(1) Capital Interchange Limited	**Defendants**
(2) Therium Capital Management Limited	

- -
- -

Philip Ahlquist (instructed by **Your Lawyers Limited)** for the **Claimant**
Stuart Isaacs KC and Clara Hamer (instructed by **Cardium Law Limited) for the First Defendant**
Henry Warwick KC and Thomas Samuels (instructed by **Freeths LLP**) for the **Second Defendant**

Hearing dates: 13 and 14 December 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 23 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Elizabeth Jones K.C

Elizabeth Jones KC :

1. By a claim form dated 31 March 2022 the claimant, which I shall call YLL, started proceedings against the defendants, which I shall call CIL and Therium respectively. Therium applied on 10 March 2023 to strike out the claim or for summary judgment, and CIL applied on 3 April 2023 to strike out the claim or for summary judgment. Directions were given on 12 May 2023 ("**the Directions Order**") that the two strike out/summary judgment applications should be listed to be heard together. The Directions Order also ordered that the the strike out applications should be heard in private.

2. The reason for the privacy order is that these proceedings are related to earlier proceedings between YLL and Harcus Sinclair LLP and Harcus Sinclair UK Ltd. I shall refer to Harcus Sinclair LLP and Harcus Sinclair UK Ltd together as "**Harcus Sinclair"** unless it is necessary to distinguish between them. I shall call the earlier proceedings the "**HS Proceedings**". Judgment on liability ("**the HS Judgment**") was given in the HS Proceedings by Mr Edwin Johnson QC (as he then was) on 15 November 2017.

3. The HS Judgment was appealed, and the judgment on appeal ("**the CA Judgment**") was reported at [2019] 4 WLR 81. There was then a further appeal to the Supreme Court which is reported at [2022] AC 1271 ("**the Supreme Court Judgment**").

4. As recorded in paragraph 31 of the HS Judgment, the pre-trial hearings and the trial all considered a large amount of sensitive and in some cases privileged material. Accordingly, the pre-trial hearings and the trial of the HS Proceedings all took place in private, and a redacted judgment was handed down on 15 November 2017 with the citation [2017] EWHC 2900 (Ch)[1]. The hearing of the strike out applications in this action therefore proceeded in private[2].

Background

5. Therium is a well-known litigation funder. CIL acts as a broker of litigation funding and ATE insurance. On 6 January 2016 CIL entered into an Introduction and Confidentiality Agreement with Therium to introduce prospective litigants to Therium for the purpose of obtaining litigation funding ("**the CIL/Therium Agreement**").

6. As recorded in the HS Judgment at [46], "*In September 2015 what became known as the Volkswagen emissions scandal became public, when the US Environmental Protection Agency issued a Notice of Violations stating that Volkswagen had manufactured and installed defeat devices designed to manipulate the results produced when a vehicle underwent emissions testing.*" Mr Johal of YLL became aware of these events and YLL took a number of steps. It began extensive marketing efforts to recruit prospective claimants as clients; it sent an initial letter before action to Volkswagen Group United Kingdom Limited; a claim form on behalf of 5 representative claimants was issued in the Queen's Bench Division on 25 January 2016 against Volkswagen Group United Kingdom Limited; and by April 2016 the

[1] An order was made on 13 February 2023 in the HS Proceedings permitting use of the unredacted HS Judgment in these proceedings.
[2] An order was made on 7 December 2023 granting permission for Harcus Sinclair UK Limited, Mr Parker and others to be present at the hearing by their representatives. I have been informed that Harcus Sinclair LLP is in liquidation. It was not present at the hearing of these applications

Defendant had obtained instructions from approximately 4,000 potential claimants for a potential group claim.

7. On 17 February 2016 Mr Johal of YLL approached Mr Fairley of CIL with a view to arranging litigation funding for the proposed group claim. CIL and YLL entered into a non-disclosure agreement on 19 February 2016 (**"the CIL NDA"**).

8. On 22 February 2016 a meeting took place at YLL's offices at which Mr Fairley recommended two potential litigation funders, of which Therium was one. It is alleged in paragraph 14 of the Particulars of Claim that Mr Fairley assured YLL that CIL had confidentiality agreements with the proposed funders consistent with its obligations under the CIL NDA.

9. Paragraph 15 of the Particulars of Claim alleges that on 27 February 2016 Mr Fairley told YLL that Therium would be interested in funding the proposed group claim against VW and asked YLL to compile a *"pack for proposed funders containing details about the proposed claim and specifically including merits advice on the claim"*. This pack is defined in the Particulars of Claim as the **"Litigation Pack".** It is pleaded in paragraph 19 of the Particulars of Claim that:

   "Final versions of advices on liability and quantum, alongside a full litigation pack, were sent to Mr Fairley on 2 and 3 April 2016. [YLL] sent those documents, including privileged and confidential documents and which represented the product of substantial work analysing and preparing the claim, pursuant to the NDA and in the expectation that it would be provided to third parties only in circumstances permitted by clause 3 of the NDA".

10. On 4 April 2016 Mr Fairley suggested to YLL that it may wish to consider working alongside another firm such as Harcus Sinclair. YLL agreed to consider that option, and paragraph 21 of the Particulars of Claim alleges that YLL asked Mr Fairley to contact Mr Parker, a partner in Harcus Sinclair, in respect of the proposed claim, subject to Mr Parker being willing to sign a non-disclosure agreement in similar terms to the CIL NDA.

11. Paragraph 22 of the Particulars of Claim alleges that on 5 April 2016 Mr Fairley emailed the Litigation Pack to Therium, and that the documents comprising the Litigation Pack represented the work product of YLL's extensive preparation of the claim (including work done by junior counsel) as well as its confidential insight into and analysis of the viability and attractiveness of the emissions scandal as the subject of viable and profitable group litigation.

12. On 8 April 2016, and before any NDA was entered into between YLL and Harcus Sinclair, Mr Moore of Therium emailed the Litigation Pack to Mr Parker of Harcus Sinclair.

13. Mr Fairley and Mr Parker continued to correspond on the subject of a proposed collaboration between YLL and Harcus Sinclair, and on 11 April Mr Parker on behalf of Harcus Sinclair signed a non-disclosure agreement with YLL ("**the HS NDA**").

14. Clause 2 of the HS NDA provided as follows.

"*The recipient* [Harcus Sinclair] *undertakes not to use the confidential information for any purpose except the purpose, without first obtaining the written agreement of the discloser* [YLL]. *The recipient further undertakes not to accept instructions for or to act on behalf of any other group of claimants in the contemplated group action without the express permission of the discloser*."

15. The first sentence in this clause became known in the HS Proceedings as "Sentence 1", and the second sentence in this clause became known as "Sentence 2". I shall adopt the same terminology.

16. The purpose was set out in clause 1 of the HS NDA, in the following terms.

"*The discloser intends to disclose information ("the confidential information") to the recipient for the purpose of obtaining legal advice on behalf of claimants in a large group action ("the purpose").*

17. Following the signing of the HS NDA, Mr Fairley provided the Litigation Pack to Mr Parker.

18. Paragraph 31 of the Particulars of Claim alleges that between 12 April 2016 and 7 January 2017, YLL and Therium, together with Harcus Sinclair, discussed and negotiated the proposed terms of and approach to collaboration on the proposed group action, which negotiations were ultimately unsuccessful. It is further alleged that during the course of those discussions and negotiations YLL provided to HS and Therium further confidential information including insight into the proposed group action, insight and knowledge as regards effective marketing techniques for a proposed group action of this nature, and the product of legal analysis and case preparation undertaken by YLL or on its behalf by counsel, in reliance on the assurance provided by the CIL NDA and the HS NDA together with Mr Fairley's assurance that (in accordance with clause 3 of the CIL NDA) he had ensured that Therium, as a recipient of information via Mr Fairley, had obligations equivalent to those imposed on CIL in the CIL NDA.

19. On 28 October 2016 Harcus Sinclair filed an application for a group litigation order ("**GLO**") seeking that it be appointed as lead solicitors, and that application was issued on 18 November 2016 ("**the GLO Application**"). I shall call the group action which then ensued "**the Emissions Litigation**".

20. On 25 November 2016 Therium informed YLL that it would not fund litigation conducted by YLL. On 21 December 2016 Harcus Sinclair entered into a co-counsel agreement with Slater & Gordon, which was publicised on 9 January 2017. Therium agreed to fund the group represented by Harcus Sinclair and Slater & Gordon.

21. The GLO application came before the Senior Master on 30 January 2017 and was adjourned to the first available date after 9 October 2017. However, the GLO application came before Senior Master Fontaine for a further hearing on 8 June 2017, by which time the dispute between YLL and Harcus Sinclair had become an issue in the GLO Application. The substantive application of the GLO application was then listed for two days on 12 and 13 October 2017.

22. On 3 August 2017 Harcus Sinclair LLP and Harcus Sinclair UK Limited issued proceedings by a Part 8 Claim Form in the Chancery Division, seeking a declaration as to whether Sentence 2 was a personal undertaking or a solicitor's undertaking, and a declaration that the court should decline to invoke its inherent summary supervisory jurisdiction to enforce Sentence 2 if it was a solicitor's undertaking. Those proceedings are the HS Proceedings.

23. The HS Proceedings then came before Edwin Johnson QC on 24 August 2017, who ordered that all issues arising between Harcus Sinclair and YLL other than quantum/compensation should be resolved. For that purpose it was ordered that the matter should proceed as if commenced by part 7 claim with directions being given for an expedited trial. After an extremely truncated procedural timetable, and pre-trial hearings on 15 and 26 September 2017, the trial **("the YLL/HS trial**") took place on 27 September to 2 October 2017. By that time, Harcus Sinclair and Slater and Gordon were together acting for over 43,000 clients.

24. Judgment in the YLL/HS trial was given on 15 November 2017. The Judge held that the restriction contained in Sentence 2 prevented Harcus Sinclair LLP from acting for a period of 6 years for any group of claimants apart from YLL's group of clients in the Emissions Litigation without YLL's permission (and that Harcus Sinclair UK Ltd was prevented from doing so by an implied term ("**the Implied Term**")). Harcus Sinclair therefore withdrew from the Emissions Litigation, and Slater & Gordon continued to act, eventually for some 71,000 clients.

25. Harcus Sinclair LLP appealed, and YLL cross-appealed, to the Court of Appeal. The Court of Appeal upheld the Judge's construction of the HS NDA, but found that the restriction contained in Sentence 2 was an unreasonable restraint of trade and therefore unenforceable. YLL appealed to the Supreme Court on the question of whether the restriction created by Sentence 2 was an unreasonable restraint of trade, and other matters. The Supreme Court allowed the appeal, finding that the restriction created by Sentence 2 was not unenforceable as an unreasonable restraint of trade. It did not further consider the question of interpretation of the HS NDA.

26. The GLO Application was further adjourned, and on 11 May 2018 a Group Litigation Order was made. YLL subsequently entered into a co-operation agreement with Excello Law, and on 30 May 2019 YLL merged its group of claimants with a group of claimants recruited by Excello Law Limited.

27. The Emissions Litigation was settled on around 25 May 2022 with the claimants in the Emissions Litigation receiving compensation. The Particulars of Claim allege that the terms of that settlement will have led to substantial remuneration for the firms representing the claimants and for their funders.

28. YLL's claim against Harcus Sinclair remains stayed, with issues of causation and quantum of loss remaining to be determined. This was necessary because until it was known whether the Emissions Litigation would be successful, it could not be known what loss had been caused.

29. As set out above, these proceedings were commenced by a Claim Form which was issued on 31 March 2022 and served on 29 July 2022. The Particulars of Claim are dated 31 October 2022, and the time for service of defences has been extended to

dates in March 2023. However, as also set out above, applications to strike out the claim form and the particulars of claim have been issued by both CIL and Therium and so no defences have yet been filed or served.

30. As indicated above, permission has been obtained to use the unredacted judgment of 17 November 2017 in this action. However, no permission has been sought by YLL to use in this action documents which were disclosed in the HS Proceedings.

The grounds for the present applications

31. Both parties made applications under CPR 3.4(2) seeking an order striking out the Claim Form and the Particulars of Claim on the grounds that they (a) disclose no reasonable grounds for bringing the claim; and/or (b) are an abuse of the process of the court. Alternatively, both parties made applications for summary judgment under CPR 24.2.

32. CPR 3.4(2) provides *inter alia* that:

"*The court may strike out a statement of case if it appears to the court –*

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings;

…"

33. CPR 24.2(a) provides that the Court may give summary judgment against a claimant in any type of proceedings. CPR 24.3 provides that:

"*The court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if— (a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial*."

34. In relation to the applications to strike out, the following principles are relevant and can be found in the White Book at note 3.4.2:

"Statements of case which are suitable for striking out on ground (a) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides (Harris v Bolt Burdon [2000] C.P. Rep. 70; [2000] C.P.L.R. 9). A claim or defence may be struck out as not being a valid claim or defence as a matter of law (Price Meats Ltd v Barclays Bank Plc [2000] 2 All E.R. (Comm) 346, Ch D). However, it is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact (Farah v British Airways, The Times, 26 January 2000, CA referring to Barrett v Enfield BC [2001] 2 A.C. 550; [1989] 3 W.L.R. 79, HL). A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence (Bridgeman v McAlpine-Brown, 19 January 2000, unrep., CA). An application to strike out should not be granted unless

the court is certain that the claim is bound to fail (Hughes v Colin Richards & Co [2004] EWCA Civ 266; [2004] P.N.L.R. 35, CA (relevant area of law subject to some uncertainty and developing, and it was highly desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts)).

Where a statement of case is found to be defective, the court should consider whether that defect might be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend (In Soo Kim v Youg [2011] EWHC 1781 (QB)).”

35. As set out in the White Book at 24.2.3, the following principles applicable to applications for summary judgment were formulated by Lewison J in Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15] and approved by the Court of Appeal in AC Ward & Sons Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098; [2010] Lloyd’s Rep. I.R. 301 at [24]:

“*i) The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: Swain v Hillman [2001] 1 All E.R. 91;*

ii) A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];

iii) In reaching its conclusion the court must not conduct a “mini-trial”: Swain v Hillman;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No.5) [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] F.S.R. 3;

vii) On the other hand it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp

the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."

The application by CIL

36. CIL submitted that the present case falls within both the strike out and summary judgment provisions of the CPR, and that:

   i) For the purposes of CPR 3.4(2)(a), on the assumption that the facts pleaded in the Particulars of Claim are true, the case is bound to fail; and

   ii) For the purposes of CPR 24.2, YLL's case has no real prospect of success on the facts and is bound to fail.

37. The claim pleaded against CIL is as follows. Paragraph 12 of the Particulars of Claim sets out the terms of clauses 1-3 of the CIL NDA, as follows.

"12. The [CIL NDA] recited and provided that:

"*1. The Discloser* [YLL] *intends to disclose information (the Confidential Information) to the Recipient* [CIL] *for the purpose of obtaining litigation funding advice on behalf of Claimants in a large Group Action (the Purpose).*

2. The Recipient undertakes not to use the Confidential Information for any purpose except the Purpose, without first obtaining the written agreement of the Discloser. The Recipient further undertakes not to accept instructions for or to act on behalf of any other group of Claimants in the contemplated Group Action without the express permission of the Discloser.

3. The Recipient undertakes to keep the Confidential Information secure and not to disclose it to any third party except those who know they owe a duty of confidence to the Discloser and who are bound by obligations equivalent to those in clause 2 above and this clause 3.

4. The undertakings in clauses 2 and 3 above apply to all of the information disclosed by the Discloser to the Recipient, regardless of the way or form in which it is disclosed or recorded but they do not apply to:

a) Any information which is or in future comes into the public domain (unless as a result of the breach of this Agreement); or

b) *Any information which is already known to the Recipient and which was not subject to any obligation of confidence before it was disclosed to the Recipient by the Discloser.*"

38. It will be noted that Confidential Information (capitalised) is defined in the CIL NDA as the information to be provided to CIL for the Purpose.

39. Paragraph 15 pleads that Mr Fairley:

*"requested that a 'pack' be put together for interested funders, containing details about the proposed claim and specifically including merits advice on the claim ("**the Litigation Pack**")".*

40. Paragraph 19 of the Particulars of Claim pleads that:

"*Final advices on liability and quantum, alongside a full litigation pack were sent to Mr Fairley on 2 and 3 April 2016. [YLL] sent those documents, including privileged and confidential documents and which represented the product of substantial work analysing and preparing the claim, pursuant to the NDA and in the expectation that it would be provided to third parties only in circumstances permitted by clause 3 of the NDA.*"

41. Paragraph 22 pleads that:

"*On 5 April 2016…..Mr Fairley emailed the Litigation Pack to Therium…the documents comprising the Litigation Pack represented the work product of the Claimant's extensive preparation of the claim (including the work done by junior counsel) as well as its confidential insight into and analysis of the viability and attractiveness of the Emissions Scandal as the subject of viable and profitable group litigation".*

42. Paragraphs 39-41 of the Particulars of Claim plead as follows:

"39. Pursuant to clause 3 of the [YLL/CIL] NDA, CIL undertook not to disclose the Confidential Information to any third parties except those who had undertaken obligations to CIL to the same effect, including in particular an obligation not to accept instructions to act on behalf of any other group of claimants in the proposed group action without [YLL's] express permission.

40. The agreement between CIL and Therium contained no such clause and did not prevent Therium from funding another group of claimants in the proposed group action without [YLL's] express permission, contrary to the assurances given to [YLL] by Mr Fairley.

41. Accordingly, CIL's disclosure of the Confidential Information was a breach of clause 3 of the [YLL/CIL] NDA."

43. Paragraphs 57-61 plead YLL's loss and damage. Paragraph 57 pleads that "*But for the matters complained of above, neither Therium nor Harcus Sinclair would have acted to form a rival group, with the result that the Claimant would have remained ahead of other firms and would have been (or would have been likely to be) the first to announce a group action, whether alongside Harcus Sinclair or otherwise.*".

Paragraphs 58 and 59 plead that YLL could have applied for a Group Litigation Order in which it would have *"secured the 'first mover' advantage, with the consequential increase in the size of its group, such that it would have acted for a group of claimants in excess of 70,000. The damage claimed is that the number of claimants in its group was substantially reduced, leading to a consequent reduction in fees (including success fees) that it was able to charge to its clients, as well as through an overall diminution in it role and prominence in the Emissions Litigation"*.

44. Paragraph 62 pleads that *"by reason of their breaches of confidence, CIL's breach of contract"* and other matters affecting Therium only, YLL is entitled to claim damages.

45. Mr Isaacs for CIL submitted that the only claim against CIL is for damages for breach of clause 3 of the CIL NDA. I agree. I cannot see in the Particulars of Claim a separate non-contractual claim for breach of confidence pleaded against CIL.

46. The submission made against YLL by CIL is that the claim is bound to fail. This submission had a number of aspects to it.

47. First, CIL argued that it was not sufficiently pleaded what the confidential information was which was provided in breach of clause 3 of the CIL NDA, and what the relevant disclosure was. I was initially concerned about this, but having set out the provisions of the pleading which relate to CIL, I think it is clear that the complaint is about the disclosure of the Litigation Pack by Mr Fairley to Therium on 5 April 2016 without having ensured that Therium was bound by appropriate restrictions. The Litigation Pack is I think sufficiently identified by the reference to the attachments to two emails on 5 April 2016 in paragraph 22 of the Particulars of Claim, read with the definition of Litigation Pack in paragraph 15 thereof. According to the CA Judgment at [22], the Litigation Pack comprised an overview note prepared by YLL, advice on liability and quantum provided by junior counsel, the letter before action dated 26 October 2015, the claim form in the January action, correspondence with Freshfields following the letter before action, transcripts from proceedings in the United States, and information extracted from Wikipedia.

48. Accordingly I would not strike out the Particulars of Claim on this ground.

49. The second point made by CIL is that the pleaded claim for breach of clause 3 of the CIL NDA raises issues already determined against YLL in the HS Proceedings.

50. This submission was founded on the assumption that the only breach of clause 3 which is alleged in paragraphs 39-41 is that CIL provided Confidential Information to Therium when the contractual arrangements between CIL and Therium did not prevent Therium from funding another group of claimants in the proposed group action without YLL's express permission. I will return below to whether that is correct.

51. CIL rely on the following passages from the CA Judgment, and in particular on the underlined passage:

"[66]……….. Ultimately, Mr Foxton's argument turned on his suggestion that clauses 1–4, and 7 read as a whole made it clear that the Restriction was limited to

actions brought, based on the disclosed confidential information. He reached that conclusion by arguing that, otherwise, neither clauses 3 nor 4 made sense, because they referred respectively to the "obligations" and "undertakings" in clause 2. Since the plurals were used, the references back in clauses 3 and 4 must be taken to refer to both the first sentence of clause 2 concerning confidential information and the Restriction inhibiting competition.

" 67.In our view this ingenious argument proves too much. It requires the addition to the Restriction of the words 'based on the confidential information disclosed' which are simply not present. The restriction does not say that [Harcus Sinclair] undertakes not to accept instructions for or to act on behalf of any other group of Claimants in a contemplated Group Action based on the confidential information disclosed. The last six words are not present, even though they could easily have been added. Moreover, the more obvious interpretation is to read clauses 3 and 4 of the NDA as if they are only referring back to the main provisions of the NDA concerning disclosure of confidential information. That does no violence to clause 3, where the words 'obligations equivalent to those in clause 2 above and this clause 3' can properly refer to the first sentence of clause 2 and the whole of clause 3 itself. It is true that the words 'The undertakings in clauses 2 and 3 above' in clause 4 do, on the judge's interpretation, need to be read as if they refer only to the undertakings in the first sentence of clause 2 and in clause 3. As it seems to us, however, that is a perfectly natural reading of an agreement that includes two types of obligation: those related to the disclosure and use of confidential information on the one hand, and a non-compete clause on the other hand. (underlining added)

68. We accept Mr Foxton's [counsel for Harcus Sinclair] point that the Restriction seems rather broad on the judge's construction. We accept that the Restriction is a single provision in an agreement that is otherwise wholly concerned with the protection of confidential information disclosed for the purposes of obtaining what is seemingly intended to be preliminary legal advice. But we find it impossible to escape the conclusion that the clear words of the Restriction mean what they say. We agree with the judge when he said at para 274 that the Restriction is not ambiguous. …"

52. The submission made on behalf of CIL is that the Court of Appeal has already decided, in the underlined passages, that the words "*The Recipient undertakes to keep the Confidential Information secure and not to disclose it to any third party except those who know they owe a duty of confidence to the Discloser and who are bound by obligations equivalent to those in clause 2 above and this clause 3"* in the materially identical words in the HS NDA do not prevent the party giving the undertaking from providing Confidential Information to a third party even though the third party has not undertaken not to accept instructions to act on behalf of any other group of claimants in the proposed group action without YLL's express permission. The submission is that either I am bound by the construction arrived at by the Court of Appeal, or that if I am not bound the decision is obviously right so that there is no prospect of the court reaching a different conclusion, and I should not do so.

53. I am not persuaded that I should strike out the claim against CIL on this basis, for the following reasons.

54. First, I was referred to a passage from The Interpretation of Contracts, 7th edition, at paragraphs 4.57 to 4.60. Paragraph 4.57 says as follows:

"Since the decision of the court on the meaning of a contract decides a question of law, the doctrine of stare decisis theoretically means that any inferior court is bound by the point of law decided. However any contract is a consensual arrangement between particular parties made against the background of particular circumstances. In those circumstances it has proved a relatively simple task for the court to distinguish a decision made in relation to a different contract when it so desires. Indeed some judges have asserted that the decision of a superior court on a question of interpretation of a written contract does not bind even an inferior court".

The question is therefore whether the decision in the HS Proceedings can be distinguished in the present proceedings.

55. Second, the issue which is raised on this application is not the issue which was before the Court of Appeal (or the judge at first instance) in the HS Proceedings. The issue before those courts was the breadth of the restriction in Sentence 2, or to put it another way, what Harcus Sinclair was prevented from doing itself. At first instance, the judge described the competing interpretations of the parties in the following way:

"[249] First, there is the question of what the words in sentence 2 mean. What is their effect? The defendant says that the meaning of sentence 2 is clear. It prohibits "Harcus Sinclair" from acting for any group of claimants in the "VW litigation" other than the defendant's group of claimants. In its skeleton argument for trial the expression "Harcus Sinclair" was used to identify both claimants, without distinction. The expression the "VW litigation" was not defined, but I take it to mean the same litigation in the Queen's Bench Division which I am referring to as the emissions litigation.

[250] The claimants say that sentence 2 had a much narrower meaning, which is helpfully summarised in paragraph 16 of the claimants' very helpful, and full note in closing. What is said in para 16 is as follows: "As set out in section D of Harcus Sinclair's skeleton argument, on its proper construction, sentence 2: (1) was confined to Harcus Sinclair llp, (2) was confined to the group action that was contemplated in the information in respect of which confidence was to be preserved, which Your Lawyers intended to disclose to Harcus Sinclair llp in anticipation of discussions between them about a possible collaboration; (3) did not preclude Harcus Sinclair llp from representing clients of their own; and (4) governed the position only until the parties agreed to collaborate."

56. In the CA Judgment the court explained the issues between the parties as follows:

"*[50] Against that background, this court has to decide whether the judge was right to decide that: (i) the Restriction should be interpreted broadly; (ii) the Restriction was not unenforceable as amounting to an unreasonable restraint of trade; (iii) the NDA was subject to an implied undertaking by HSLLP that it would ensure that HSUK would not do anything which would be a breach of the Restriction, and HSLLP was itself in breach of the Restriction by acting, through the staff it seconded to HSUK, for the HS Group; and (iv) YLL had not agreed that it would not enforce the Restriction, and YLL was not estopped by convention or by acquiescence from denying that HSLLP and/or HSUK were entitled, despite the Restriction, to act for claimants in the Emissions Litigation. (v) The other issues should be resolved as he did.*

………..

[51] HSLLP has advanced a number of arguments as to the correct interpretation of the Restriction. In the result, there were two main submissions. First, that the judge ought to have interpreted the phrase "contemplated group action" as meaning only the group action in contemplation at the time of the NDA, namely that against VWUK. Secondly, Mr David Foxton QC, leading counsel for HSLLP, placed reliance on clauses 3 and 4 of the NDA as demonstrating that the scope and purpose of the Restriction concerned group actions founded on the use of confidential information disclosed under clause 2 and nothing else. Mr Foxton also submitted that, on a close textual analysis, "the contemplated group action" could not mean "group actions", and the plural word "undertakings" used in clause 4 had to refer to both undertakings in clause 2, including the Restriction. This latter point focused the interpretation of the Restriction on the disclosure of the confidential information and made HSLLP's second interpretation, Mr Foxton submitted, the only possible meaning, or at least a possible meaning, of the words used in the whole of the NDA".

57. This is the context for the underlined words on which CIL relied. As I observed to Mr Isaacs in the course of submissions, they were a step in the reasoning to dismissing the "ingenious argument" of counsel for Harcus Sinclair as to what Harcus Sinclair were themselves required to do, and not a decision on an issue as to what Harcus Sinclair had to require a third party to do before Harcus Sinclair could disclose confidential information to the third party. Mr Isaacs fairly said that he had debated with himself whether the relevant passage was ratio or obiter.

58. I think it is certainly arguable that the particular words relied upon were obiter. It is certainly the case that neither the parties nor the Court of Appeal were applying their minds, and therefore argument was not directed, to the issue which arises in this action. I have found the passage from the CA judgment relied upon by CIL rather difficult to follow, without having read or heard the "ingenious argument" of counsel for Harcus Sinclair which is referred to. Indeed what the Court of Appeal said was the more obvious interpretation of clauses 3 and 4 of the HS NDA, namely that they are only referring back to the main provisions of the HS NDA concerning disclosure of confidential information, does not appear to me the more obvious interpretation of clauses 3 and 4, particularly in the light of the passage in the Supreme Court judgment at [84](iv) as follows:

"we think there is some force in Mr Coleman's submission that, even if one were just protecting confidential information, a non-compete undertaking may be needed. This is because it is often difficult to prove what is and what is not confidential information and, in particular, whether that information has been misused. A non-compete undertaking may be a useful means of ensuring that confidential information is protected without needing to prove, through protracted litigation, that the information has been misused".

59. Third, although the provisions of the HS NDA and the CIL NDA are very closely similar, they are not identical. The purpose of the one was to obtain "*legal advice on behalf of claimants in a large group action".* The purpose of the second was the *"purpose of obtaining litigation funding advice on behalf of claimants in a large group action".* Further, the factual matrix is different. Litigation funding advice and legal advice are different kinds of advice and those providing them operate in

different markets. An agreement not to act for other claimants will have a different meaning when applied to a solicitor's firm and a litigation funder. Further, such a restriction may be more or less important in a litigation funding context than in the context of the provision of services by solicitors, and there may well be different issues on restraint of trade. Thus, it seems to me again arguable that the decision of the Court of Appeal could be distinguished.

60. I would not therefore strike out the claim against CIL on this basis even if the only pleaded case was that CIL had disclosed confidential information to Therium in circumstances in which Therium was not prevented from funding another group of claimants in the proposed Emissions Litigation.

61. I therefore return to the question whether the claim is so limited. I have set out the terms of paragraphs 39-41 of the pleading above. Mr Ahlquist, who drafted the particulars, submitted that they were intended to and should be read on the basis that the complaint was that (a) no restriction as is required by clause 3 was included in the CIL/Therium agreement and (b) in particular, the CIL Therium Agreement did not prevent Therium from funding another group of claimants. I think that Mr Ahlquist is correct, and that such a case is open to CIL on the pleadings as they exist at present. Mr Isaacs pointed me to paragraph 53a, which he said refers only to the restriction on acting, and not to the obligations of confidentiality. However paragraph 53(a) does indeed seem to me to cover both potential limbs of clause 3 of the CIL NDA. It is necessary to look at both paragraph 52 and paragraph 53 which are as follows:

"[52] The Claimant's work on identifying, pursuing, formulating and developing the proposed group action arising out of the Emissions Scandal was undertaken at its own expense, including the instruction of junior and leading counsel, with whose opinions Therium was provided. Therium had the benefit of the access to that work, and to the benefit of the insight into the viability of the proposed claim as a profitable litigation project that it might wish to fund".

[53] The benefits were provided to Therium on either or both of the following bases:

> *(a) on the basis that Therium was subject to contractual duties of confidence equivalent to clause 3 of the NDA, such that Therium would not, following receipt of the confidential information (and thereby receipt of the Benefits) be able to fund any group of claimants in the proposed group action except the Claimant's own group save with its permission. As set out above CIL had failed to ensure that Therium was subject to such a duty". (*emphasis added*)*

62. I note that in fact there is express reference in paragraph 53(a) to a duty of confidence, not just reference to a non-compete clause, and that in fact the case which is run is that Therium should have been prevented from funding other claimants not only by the non-compete clause, but also by the clause which prevented them using confidential information for any purpose other than the purpose of funding YLL's claimants.

63. In this context, Mr Isaacs also referred me to paragraph 8.7 of Mr MacQueen's witness statement in support of CIL's application which says "*It is CIL's understanding that no issue is taken by YL as to the contents of the "confidentiality" terms in the CIL/Therium Agreement"*. However, that paragraph continues

"….However, should it be so taken then CIL will rely on the terms of clause 6…" and other matters. Thus even Mr MacQueen's witness statement recognises that CIL's asserted understanding that YLL are only relying on one limb of clause 3 and not the other might be mistaken.

64. Accordingly, I do not consider that the claim against CIL is limited to a complaint that CIL was in breach of clause 3 only because of a failure to procure that Therium enter into a non-compete clause.

65. For the reasons set out above I do not consider it appropriate to strike out the claim against CIL on this basis either.

66. The third basis for seeking to strike out is that there was no breach of clause 3 of the CIL NDA, because the non-compete obligations of Therium as the relevant third party were, by a two stage process, equivalent to those of CIL under the CIL NDA.

67. The skeleton argument for CIL said as follows:

"*47.First, under clause 5.2 of the CIL/Therium Agreement:*

"Where a case has been introduced first to the Company [Therium] by the Introducer [CIL], the Company agrees not to:

5.2.1 *accept the referral by any other introducer; or*

5.2.2 *treat the case as a direct referral*

and thereby circumvent the Introducer's involvement or its potential entitlement to Introducer's Commission (in accordance with clause 3 above)."

48. Also, clause 13 of the CIL/Therium Agreement provides that:

"Non Circumvention and Good Faith

13.1 Both parties agree that neither party shall circumvent the other party with regards to any transaction, opportunity, investment or relationship involved in or resulting from the disclosure of confidential information, pursuant to clause 6, from one party to the other party or the contents of such information.

13.2 The parties agree that they each owe the other a duty of good faith in relation to the performance of their respective obligations."

49. Those provisions have the effect of preventing Therium from accepting any referrals in the VW emissions litigation from anyone other than CIL following CIL's first introduction.

50. Second, since by virtue of the non-compete obligation in the second sentence of clause 2 of the YLL/CIL NDA, CIL itself required YLL's express permission to accept instructions for or to act on behalf of any group of claimants other than the YLL claimants, Therium could not itself act on behalf of any other group of claimants without YLL having given its express permission to CIL to enable that to occur."

68. I was wholly unable to follow how the contractual provisions relied on had the effect which it was said that they did, and it appears clear to me that they do not have the submitted effect. In oral submissions, Mr Isaacs was unable to explain to me why the provisions relied on had the effect set out in the skeleton. Moreover, it is Therium's case that they do not owe YLL the obligations which CIL says they owe under the contractual provisions relied on by CIL. I do not therefore consider that it is appropriate to strike out the claim against CIL on this basis.

69. The next basis on which it is said that the claim against CIL should be struck out is that any wrongful disclosure of the Confidential Information caused no loss. CIL relies on paragraphs [401]-[428] of the HS Judgment and in particular on the following passages:

"401. ... none of the information contained in the Confidential Documents has been used by [Harcus Sinclair LLP] in such a way as to breach the duty of confidence owed by [Harcus Sinclair LLP] in respect of the Confidential Documents. I find that the Confidential Documents have not acted as any kind of springboard in the formulation of the claim which is now being pursued on behalf of the HS Group.

402. ... It seems to me that the claim which is now being pursued on behalf of the HS Group derives from [Harcus Sinclair LLP's] own work and the work of [Harcus Sinclair LLP's] counsel, not from the Confidential Documents.

…

407. I therefore conclude that [Harcus Sinclair LLP] has not misused the information in the Confidential Documents, or any of that information in breach of its non-contractual duty of confidence to [YLL].

…

409. ... On the basis of the same reasoning I do not think that it can be said that [Harcus Sinclair LLP] has used, or is using the information in the Confidential Documents for a purpose not authorised by [the first sentence of clause 2 of the Harcus Sinclair NDA]. In my view there has been, and is no such use."

70. Leaving aside any issues about what findings of fact in the HS Judgment are binding or even admissible as against YLL in the present proceedings, the difficulty with this submission is again that what was being considered in the HS Judgment is a different use of confidential documents from that which is complained about in this case. What had been pleaded in the HS Proceedings, and what was being considered in paragraphs [401]-[428] of the HS Judgment, was that YLL's confidential information had been used in formulating the pleadings and other documents being used in the Emissions Litigation by Harcus Sinclair's group of claimants; see in particular paragraphs [398] and [399] of the HS Judgment. What is now being alleged in this action is that Therium used the benefit of the Insight, i.e. the insight into the commercial viability of the group action and other matters set out in paragraph 22 and 31 of the Particulars of Claim, to decide whether to invest in funding the proposed litigation, and that YLL was deprived of the first mover advantage. The passages from the HS Judgment which are relied upon by CIL simply do not deal with the claim which is made in these proceedings. As regards the Insight which is relied upon by

YLL, at [311] of the HS Judgment the judge found that Mr Parker had not initially thought a group claim was worth pursuing, and it was his contact with YLL and the details of YLL's proposed group claim, as set out in the Litigation Pack, which caused Mr Parker to think that there was potential for a viable claim; and that if Mr Parker had never engaged in the informal process of collaboration with YLL which occurred in 2016, Mr Parker's views on the merits of a group claim would have remained much as they stood in September 2015.

71. Accordingly, I do not think it appropriate to strike out the claim against CIL on this basis.

72. Mr Isaacs had an alternative submission, namely that the claim was an abuse of process in that it sought to go behind the construction of the HS NDA terms arrived at by the Court of Appeal, and in that it sought to go behind the factual findings set out in paragraphs 402 to 409 of the HS Judgment. I will return to this below after considering Therium's application.

The application made by Therium

73. YLL's claim against Therium is threefold:

i) A claim for damages in unlawful means conspiracy;

ii) A claim for damages or alternatively an account of profits arising from alleged breaches of duties of confidence;

iii) A claim for restitution of benefits conferred by YLL on Therium, namely YLL's insights into the viability of the proposed group action as a profitable litigation project and the benefit of the opinions of leading and junior counsel, by which Therium had been unjustly enriched.

74. Therium applied to strike out the Claim Form and the Particulars of Claim on the grounds that they disclose no reasonable grounds for bringing the claim and/or are an abuse of the Court, and also applied for summary judgment under CPR 24.4.

75. Although Mr Warwick KC started his submissions by considering abuse of process, I shall in this judgment first consider the applications for summary judgment. I do this because it is necessary for the purpose of the summary judgment application to consider in detail what is alleged; and that will make it easier to then deal with the abuse of process arguments.

The claim in breach of confidence and the claim in restitution

76. Paragraph 22 of the Particulars of Claim is set out above in paragraph [41] and deals with the provision of the Litigation Pack to Therium on 5 April 2016. Paragraph 23 alleges that "*As ….Therium [was] aware, those documents accordingly were or included confidential information, which ….Therium [was not] entitled to use for [its] own benefit or to disseminate to third parties, except insofar as they had [YLL's] consent ….to do so*".

77. Paragraph 31 of the Particulars of Claim pleads that during the period of informal collaboration between 12 April 2016 and 7 January 2017, YLL provided "*further*

confidential information, including insight into the proposed group action, insight and knowledge as regards effective marketing techniques for a proposed group action of this nature, and the produce of legal analysis and case preparation undertaken by it or in its behalf by counsel".

78. Paragraphs 42 to 44 of the Particulars of Claim allege as follows:

> "42. *On and after 4 April 2016 (including in particular on receipt of the Litigation Pack on 5 April 2016 and through the process of collaboration thereafter which Harcus Sinclair LLP, [YLL] and Therium were all involved in between April 2016 and November 2016), Therium received confidential information ("**the Confidential Information**") belonging to [YLL], including the work product of legal representatives conducting research, analysis and case preparation at the Claimant's expense, as well as valuable insight from the Claimant as to the viability and potential profitability of the proposed group action. The provision of confidential information continued throughout the Claimant's discussions with Therium on potential funding of the claim and its discussions with Harcus Sinclair.*
>
> *43. At all material times Therium knew or ought to have known that the information received by it from or on behalf of [YLL] was confidential and Therium was at all material times subject to a duty of confidence in respect of that information.*
>
> *44. Therium breached its duty of confidence to the Claimant in that it:*
>
> *a) Disclosed the existence of the proposed group action and details of its state of progression to Mr Parker and Harcus Sinclair through Mr Moore's conversation with Mr Parker on 7 April 2016.*
>
> *b) Disclosed the confidential information contained in the Litigation Pack to Mr Parker and Harcus Sinclair through Mr Moore's email to Mr Parker on 8 April 2016;*
>
> *c) Participated in discussions with Harcus Sinclair alone and/or with Slater and Gordon in which the confidential information as to the formulation of the claims and the Claimant's insight into the viability of the proposed group claim and marketing strategies (comprising both the information contained in the initial Litigation pack and the information disclosed during the subsequent informal collaboration and negotiations) were discussed.*
>
> d) *Utilised [YLL's] work product and its insight into the commercial viability of the proposed group action and marketing strategies in deciding whether to invest in the funding of the action"*.

79. The loss and damage claimed as a result of the alleged breaches of confidence are set out in paragraphs [57] to [61] of the Particulars of Claim and are set out in paragraph [43] above.

80. Mr Warwick's first submission in relation to the claim for breach of confidence was that it was insufficiently pleaded what confidential information had been provided to Therium and had been used by Therium in the breaches complained of in paragraph 44. I think that Therium has grounds for complaint here. It is clear that it is alleged that the information contained in the Litigation Pack was shared with Harcus Parker, and that the same information was utilised in participating in discussions with Harcus Sinclair and/or Slater & Gordon and/or in deciding whether to invest in the funding of the action; it is also clear that it is alleged that additional information which had been provided between April 2016 and November 2016 as to the formulation of the claims and YLL's insight into the viability of the proposed group claim was utilised in the discussions with Harcus Sinclair and Slater & Gordon and/or in deciding whether to invest in the funding of the action; but it is not clear what that additional information was, or how it was provided to Therium. I note that in the HS Proceedings, a schedule of confidential information relied upon was provided as part of YLL's closing submissions, but no such schedule has been offered here.

81. However, I do not think it appropriate to strike out, or give reverse summary judgment on, the claim for breach of confidence on this basis. I do however consider that YLL should properly particularise:

   i) What information in addition to the Litigation Pack it relies on in support of the allegations in paragraph 44 of the Particulars of Claim;

   ii) How and when it is alleged that that information was provided to Therium.

82. I will return to this at the end of the judgment.

83. Mr Warwick's next point is that there can be no loss to YLL as a result of the alleged breach of confidence.

84. First, he said that an account of profits is entirely disposed of by the HS Judgment at paragraphs [397] to [415], which set out the evidence which would be available from counsel who gave evidence at the HS/YLL trial and from Ms Young of Slater & Gordon. However, for the same reasons as I have already set out in relation to the application by CIL, I do not find this persuasive. The case being made in the HS Proceedings related to use of confidential information to produce statements of case for the Harcus Sinclair claimants, and that is not the case which YLL is making here.

85. Second, he said that there was extensive involvement of other lawyers just after the story broke; that YLL had been widely publicising the claim on its website; and that if the insight was that there was a possible group action which would be economically viable, that argument was dead in the water. However, I consider that it is not possible at this stage to conclude that there is no reasonable prospect of success in relation to establishing a loss arising from Therium's use of YLL's insight contained in the Litigation Pack. As recorded in paragraph [70] above, the Judge found in the HS Judgment that if Mr Parker had never been approached to help YLL, and had never informally collaborated with YLL, his views on the merits of a group claim would have remained negative. It is at least arguable that evidence which will be available at trial will establish that the state of mind of Therium, which sought Mr Parker's views on the viability of the litigation, would also have remained negative. I cannot possibly

determine at this stage whether the existence of publicly available information establishes that YLL was not caused any loss by Therium's use of YLL's insight.

86. Third it was said that Mr Moore's evidence established that Therium had no confidence in the YLL team with them at the helm of the proposed group litigation, and that Harcus Sinclair had to be brought in for their expertise; that when presented with a budget for £2m, Therium thought that was unrealistic; and that the claim was always going to be fundable by someone, so that there was no lightbulb moment for Therium. Again, I am not persuaded by this submission.

    i) It is clearly not appropriate at a summary judgment stage to conduct a mini-trial as to whether YLL were or were not competent, or whether the budget was realistic and what was the significance of that;

    ii) As set out in paragraph [85] above, if Mr Parker came to a view about the proposed group action as a result of the Litigation Pack which he would not have had without it, it is at least arguable at this stage that evidence which will be available at trial will establish that the state of mind of Therium, which sought Mr Parker's views on the viability of the litigation, would also have remained negative.

87. Fourth it was said that it was uncommercial for litigation funders to be constrained by the receipt of confidential information, and that anything which constrained them must be in writing and would be liable to be struck down as a restraint of trade. That is not an argument which appears to me to be suitable for summary judgment. Moreover, I observe that in the HS Judgment the judge held at [62] that Therium had no right to send the Litigation Pack to Mr Parker and that Mr Moore should have appreciated that he was being sent a pack of documents which included documents which were confidential and in some cases privileged. Of course there will be arguments available to Therium as to why the judge's reasoning was wrong, and the arguments put forward by Mr Warwick may prove to be successful at trial, but equally YLL may persuade the court in these proceedings that the judge's reasoning in the HS Proceedings in relation to Therium's duties in respect of at least the Litigation Pack is correct. Neither is it appropriate for me to enter into questions of restraint of trade at a summary judgment stage and without any relevant evidence.

88. Finally, Mr Warwick submitted that YLL's unjust enrichment claim must fail for the same reasons. Since I have found that the claim in breach of confidence is not one which will obviously fail so as to be suitable for summary judgment, it follows that the unjust enrichment claim is also not suitable for summary judgment.

The HS Judgment and its status

89. Before turning to the application for summary judgment in respect of the claim in conspiracy (and also before turning to the issue of abuse of process) it is necessary to say a bit more about the procedural background, some of the findings in the HS Judgment, and submissions made about the status of the HS Judgment in these proceedings.

90. As set out above, the HS Proceedings were issued by Harcus Sinclair LLP and Harcus Sinclair UK Ltd on 3 August 2017, seeking relatively limited relief and by way of

Part 8 Claim. The claim was supported by a witness statement. The matter came before Edwin Johnson QC on 24 August 2017 for directions. I take what then happened from the HS Judgment:

"For reasons which I explained in a judgment delivered [at the hearing on 24 August 2017] I took the view that the Claimants' approach would not work, and that all the issues arising between the parties in this dispute (save for the quantum of any damages/compensation to which the defendant might be entitled) needed to be resolved as swiftly as possible, so that the hearing of the GLO application could proceed without the interference of this dispute (in an unresolved state). I therefore made an order that the action should continue as if commenced by Part 7 claim form, and gave directions for an expedited trial. I ordered the details of claim attached to the claimants' claim form and the first witness statement of Mr Beresford to stand as the claimants' particulars of claim in the action".

91. I was not provided with a copy of the judgment of 24 August 2017. It was given in private and no public judgment was published. The parties to this application were content to proceed on the basis of what was said about the Judge's judgment of 24 August 2017 in the HS Judgment.

92. YLL then served a defence and counterclaim which was amended and re-amended during September. Mr Parker, a partner in Harcus Sinclair, was brought in as a part 20 Defendant.

93. The Judge recorded in paragraphs [28] – [29] of the HS Judgment as follows:

"28. At the hearing on 24 August 2017 it was agreed between the parties that standard disclosure should be dispensed with and that, in place of standard disclosure, there should be directions permitting each party to request specific disclosure of documents, with provision for application to court to be made in the event of documents being requested and not provided. In the event there were applications for specific disclosure made by each side, which I dealt with at a pre-trial review in the action, held on 15 September 2017, and in a pre-trial hearing, held on 26 September 2017.

29 The action came on for trial on 27 September 2017. The expedited nature of the trial meant that a very large of amount of work had to be done, in a short space of time, in order to prepare for trial. I pay tribute to the legal teams on both sides for all their hard work in ensuring that the action was ready for trial on 27 September 2017, particularly given the large number of documents which eventually came to occupy the trial bundles. As a result of all this hard work, for which I am extremely grateful, I consider that I am in as good a position to determine the issues in this action as I would have been if the action had followed a conventional path to trial."

94. Paragraph [36] of the HS Judgment also records that the documents for trial expanded steadily, both before and during the trial.

95. Mr Parker and Mr Johal of YLL both gave evidence and were cross examined at the trial. Mr Fairley and Mr Moore also gave evidence and were cross examined. Evidence was also given by a number of other witnesses including Leading and junior

counsel instructed by Harcus Sinclair, and Ms Jacqueline Young who was a partner in Slater & Gordon.

96. One of the documents which has been relied on in this application is a witness statement of Mr Moore made in the HS Proceedings and which is dated 13 September 2017. Mr Moore was then an employee of Therium, but is no longer employed by Therium. Mr Moore has given permission for his witness statement to be used in this action.

97. The following paragraphs of the HS Judgment are also material:

"55. In his oral evidence Mr Moore accepted that he regarded these e-mails from Mr Fairley and their attachments as confidential (to the extent that the attached information was not available to the public), save for the Wikipedia information, and that he had no authority to send the confidential material attached thereto on to anyone else. Mr Moore did however qualify this. Mr Moore claimed that he was entitled, under his arrangement with Mr Fairley, to take legal advice from his advisers.

56. Mr Parker met Mr Moore at a lunch on 7 April 2016. Mr Moore mentioned the proposed Volkswagen group claim, and asked Mr Parker what he thought. On the evening of the same day (21.22) Mr Fairley e-mailed Mr Parker, seeking an initial conversation in respect of the proposed group claim, which Mr Fairley did not identify specifically. Mr Parker replied by e-mail the following day (14.28 on 8 April 2016) asking if he could see the opinions. Mr Parker did not identify what he meant by the reference to the opinions. Mr Parker did say that he would be happy to sign a non-disclosure agreement, and asked if he could ask Therium for the opinions. Mr Fairley e-mailed in reply (14.33) saying that he would get back to Mr Parker on that.

57. On 8th April 2016 Mr Moore emailed Mr Parker attaching the litigation pack and saying that he would be interested in the opinion of Mr Parker on the legal merits of the case. The email was marked private and confidential.

……

62. .....Mr Moore's evidence in cross examination was that he was seeking legal advice from Mr Parker, as his legal advisor, and that he was entitled to do that pursuant to his arrangement with Mr Fairley/CIL. I do not accept that in providing the Litigation pack to Mr Parker Mr Moore was exercising a legal right conferred on him by CLL or [YLL]. This begs the question of where, and in what terms this legal right existed. This also seems to be inconsistent with the circumstances in which Mr Moore met with Mr Parker and provided the Litigation Pack to Mr Parker. The Litigation Pack was provided to Mr Parker not because Mr Moore decided to seek advice from Therium' solicitors but because Mr Moore bumped into Mr Parker at a lunch and asked him for this thoughts on the proposed group claim. It seems to me that Mr Moore had no right to send the Litigation Pack to Mr Parker without the authority of [YLL]. It also seems to me that Mr Parker should have appreciated that he was being sent a pack of documents which included documents which were confidential, and in some cases, subject to legal privilege". It should be noted that the CIL/Therium agreement was not in evidence in the HS Proceedings.

….

65. … I do not regard Mr Parker as a devious person. That was not my impression of Mr Parker, either from Mr Parker's written evidence or his oral evidence. …..I think that in this instance and as part of his initial and informal assessment of the merits of the proposed group claim, Mr Parker paid less attention than he should have done to the legalities of the position, in terms of whether he had a right to see the Litigation Pack when it was sent to him by Mr Moore.

………

74. I make the following particular findings of fact in relation to the entry of the parties (the Defendant and the First Claimant into the NDA):

i) *Mr Parker signed the NDA Agreement without reading the NDA or giving it any thought…..*

……..

125. I make the following particular findings of fact in respect of the period May 2016 to September 2016.

(1) During this period the informal process of collaboration between [Harcus Sinclair and YLL] in respect of the proposed group claim continued, pending agreement on the terms of a binding collaboration agreement.

…..

(3) Negotiations over the terms of a binding collaboration agreement continued during this period, but without agreement being reached.

(4) By late August Mr Parker was aware that there was a diminishing prospect of Therium agreeing to fund the proposed group claim with [YLL] in a prominent role, and without [Harcus Sinclair] in a leading role. Mr Parker did not share this information with [YLL].

(5) There was no discussion between the parties as to what would happen if the parties failed to agree on the terms of a binding collaboration agreement. Mr Johal assumed that he would have the protection of the NDA in this event. Mr Parker, in continuing ignorance of the restrictions in the NDA, assumed that he and [Harcus Sinclair] would be free to act for their own group of claimants in the proposed group claim, if they so chose.

(7) By the end of September 2016 Mr Parker had begun to form, without the knowledge of [YLL], his own group of claimants, separate from [YLL's] group of claimants.

(8) As at the end of September 2016 Mr Parker had not given up on the prospect of collaboration with [YLL] and the informal process of collaboration was continuing.

137. On 20 October 2016 Mr Parker sent a lengthy email with attachments to Mr Johal setting out "what we….. have done". The email went on to list what Harcus Sinclair had done, which included the issuing of a claim form, the preparation of a draft witness statement in the name of Mr Parker, in support of an application for a GLO, the settling of draft generic Particulars of Claim, in support of an application for a GLO, the settling of draft generic Particulars of Claim by [counsel instructed by Harcus Sinclair], and Mr Parker contacting other firms, including Ms Young of [Slater & Gordon]."

98. At paragraph 138 of the HS Judgment the terms of the email of 20 October 2016 were set out. In addition to the matters already recorded in paragraph 137 of the HS Judgment, the said email said as follows:

"Therium put the case up to the investment committee the day before yesterday on the basis of just funding us unfortunately but have fortunately come away with an offer of £5m of funding. I do not think that is a disaster for future co-operation because it leaves open the issue of our collaborating with separate funding and it at least allows us to crack on and move more quickly than (say) Leigh Day…"

96. The following findings were also made in the HS Judgment:

"*159. I make the following particular findings of fact in respect of the period from October 2016 to November 2016.*

(1) Mr Parker was subjected to considerable criticism by Mr Coleman for concealing (to use Mr Coleman' expression) his dealings with Slater and Gordon from [YLL]. I find that those dealings were not disclosed to [YLL] by Mr Parker….I do not however find that this non-disclosure constituted deliberate deception on the part of Mr Parker. I find that the explanation for this non-disclosure was as follows. First, Mr Parker had not read the NDA and thus remained unaware of the restrictions in the NDA…..Second, in October and November 2016 the informal process of collaboration between [YLL] and Harcus Sinclair, while faltering, had not been treated as abandoned by either party….in the circumstances I can understand that Mr Parker as a matter of professional courtesy, felt some embarrassment in having to tell Mr Johal that he was in fact engaged in collaboration negotiation with another firm of solicitors. I find this was the second reason for Mr Parker's failure to disclose to [YLL] his dealings with Slater & Gordon."

99. The court then considered issues of breach of confidence and breach of contract, and I have set out in paragraph [69] above the conclusions reached by the Judge in relation to the use of confidential materials so far as it related to the development of the statements of case relied on by the Harcus Sinclair claimants. The Judge found that YLL were entitled to damages in respect of Harcus Sinclair's breaches of Sentence 2 and the Implied Term, but that the determination of the quantum of loss, if and insofar as loss could be proved, was for the quantum hearing.

The status of the HS Judgment

100. Mr Warwick sought to argue that issue estoppels arose as between YLL and Therium in respect of findings of fact made in the HS Judgment. I will return to this below.

101. Subject to that point there was a large degree of agreement between the parties as to the status of the HS Judgment and what it could and could not be relied upon for.

102. First, it was agreed that, if there was no issue estoppel, the HS Judgment would not be admissible evidence to prove facts in issue at the trial of the present action; see *Hollington v F Hewthorn Ltd* [1943] KB 58, as further explained in *Rogers v Hoyle* [2015] QB 265:

"As the judge rightly recognised the foundation on which the rule must now rest is that findings of fact made by another decision maker are not to be admitted in a subsequent trial because the decision at that trial is to be made by the judge appointed to hear it ("the trial judge"), and not another. The trial judge must decide the case for himself on the evidence that he receives, and in the light of the submissions on that evidence made to him. To admit evidence of the findings of fact of another person, however distinguished, and however thorough and competent his examination of the issues may have been, risks the decision being made, at least in part, on evidence other than that which the trial judge has heard and in reliance on the opinion of someone who is neither the relevant decision maker nor an expert in any relevant discipline, of which decision making is not one. The opinion of someone who is not the trial judge is, therefore, as a matter of law, irrelevant and not one to which he ought to have regard.'

103. The judgment of the Privy Council in *Calyon v Michaelidis* [2009] UKPC 34, another strike out case, said at [28] that:

"..Hollington continues to embody the common law as to the effect of previous decisions: "In principle the judgment, verdict or award of another tribunal `is not admissible evidence to prove a fact in issue or a fact relevant to the issue in other proceedings between different parties", Land Securities v Westminster City Council [1993] 1 WLR 286, 288E-F per Hoffman J.""

104. The Privy Council in *Calyon* also approved the reasoning of the Fifteenth Report of the Law Committee (1867, Cmnd 3391) as follows:

30. .....At para 38 of the Report, the Committee said this: "With the exceptions with which we have already dealt, an issue of fact in one civil action is seldom the same as an issue of fact in another civil action between different parties. In practice it is only likely to arise where a number of different persons are injured in the same accident by the same acts of negligence. Such cases are most conveniently dealt with by all the injured parties joining in the same action, by consolidation, or by agreeing to treat one action as a test action. It is, however, theoretically possible (and has occasionally happened) that separate actions brought by different passengers in the same vehicle have been tried at different times by different courts with different results. This is undesirable and should be avoided by one or other of the means referred to above. But we do not think that, where there are two civil actions between different plaintiffs against the same defendant or by the same plaintiff against different defendants which do raise the same issue of fact, the finding of the court should be admissible in the second action. As we have already pointed out, in civil proceedings the parties have complete liberty of choice as to how to conduct their respective cases and what material to place before the court. The thoroughness with which their case is prepared may depend upon the amount at stake in the action. We do not think it just

that a party to the second action who was not a party to the first should be prejudiced by the way the party to the first action conducted his own case, or that a party to both actions, whose case was inadequately prepared or presented in the first action, should not be allowed to avail himself of the opportunity to improve upon it in the second."

31. The Committee's reasoning develops the reasoning in the first of the passages which the Board has quoted from Lord Goddard's judgment in Hollington. Their Lordships find that reasoning compelling. What is more significant, perhaps, is that Parliament must have found the reasoning convincing since the Civil Evidence Act and its Scottish counterpart made no change to this aspect of the law."

105. It was however agreed between the parties, and I accept, that the HS Judgment could be referred to on this application for a number of other purposes:

a) The material (inadmissible at trial) can at an interlocutory stage assist in identifying the evidence which can reasonably be expected to be available at trial, to which a court is entitled to have regard at the interlocutory stage; see *Tulip Trading v Bitcoin Association for BSV* [2023] EWHC 2347 (Ch) at [40];

b) It is evidence of the procedural and factual background of the HS Proceedings to which it is necessary to have regard for the purpose of the arguments relating to re-litigation abuse and issue estoppel.

106. Because of the way in which the argument developed, it is sensible at this stage to deal with the question whether the HS Judgment creates any issue estoppel by which YLL is bound in this action.

107. Therium dealt with its case in its skeleton argument but did not further address issue estoppel in oral submissions. Its written submissions on the law as regards issue estoppel are set out as follows:

"This has long been recognised by the Court of Appeal, at least since Gleeson v J. Wippell & Co [1977] 1 WLR 510. From the authorities, the following principles emerge:

i) *One party need not be the "alter ego" of the other. But "having regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just" to permit to apply an issue estoppel: Gleeson, at p.515F.*

ii) *"[M]ere curiosity or concern" are not sufficient: Gleeson, at p.515C.*

iii) *The court asks (Resolution Chemicals Ltd v H. Lundbeck A/S [2014] RPC 5, §31-2):*

a) *Did the new party have "an interest in the subject matter of the previous action"?*

b) *To what extent can, in reality, the new party be said "to have been the party to the original proceedings" by reason of their relationship?*

c) *Against that background, is it "just that the new party should be bound by the outcome of the previous litigation?"*

iv) *The "ultimate question" is whether "it is just to allow the issue in question to be relitigated": Tyne and Wear Passenger Transport Executive (t/a Nexus) v National Union of Rail, Maritime and Transport Workers [2023] ICR 148, at §45.*

v) *The "process envisaged is one of evaluation rather than the application of hard-edged criteria…": Tyne and Wear, at §46.*

108. Therium sets out in its skeleton argument the findings of fact which it says are binding on YLL in the present action. They are as follows:

i) That Mr Parker had not read, and was therefore in ignorance of, the restrictions contained within the HS NDA, so that he believed that he and Harcus Sinclair were free to strike out on their own or in collaboration with other firms: **§91(3)** of the HS Judgment.

ii) Mr Parker's non-disclosure of his dealings with S&G was not a deliberate deception. It was because of his ignorance of the restrictions, and a degree of embarrassment arising from professional courtesy: **§159(1)** of the HS Judgment.

iii) Subject to confidentiality, the terms of the Harcus Sinclair NDA did not prevent Mr Parker from engaging in discussions with other firms: **§159(1)** of the HS Judgment.

iv) The period of informal collaboration only ended in January 2017: **§168(1)** of the HS Judgment.

v) Mr Parker did not seek YL's permission for "*Harcus Sinclair*" to act for its own clients because he was unaware of any requirement to that effect. He neither read nor gave any thought to the Harcus Sinclair NDA when he signed it: **§330** of the HS Judgment.

vi) None of the information in YL's confidential material provided to Harcus Sinclair was used by it in breach of its equitable duty of confidentiality: **§401** of the HS Judgment.

vii) That confidential material did not act as any kind of springboard in HSLLP's formulation of the Emissions Litigation: **§401** of the HS Judgment.

viii) The claim as ultimately pursued derived from HSLLP's own work and that of its Counsel, rather than any of YL's confidential materials: **§402** of the HS Judgment.

109. The submission of Therium is that since it would be abusive for YLL to seek to traverse findings of fact made in the NDA Proceedings in any fresh claim it chose to bring against Harcus Sinclair, it follows that it would be manifestly unfair for YLL to be permitted to so against Therium by pursuing sequential claims. It is then said there is "substantive identity of interest" because (i) the claim in conspiracy in this action

alleges as the unlawful means the same breach of the HS NDA as was found against Harcus Sinclair; and (ii) the same misuse of confidential information which was alleged against Harcus Sinclair is also alleged against Therium. I can deal with the latter point very shortly; the use of confidential information alleged against Therium in the Particulars of Claim is not the same use of confidential information which was alleged against Harcus Sinclair, as I have explained in paragraphs [69] to [70] above.

110. So does the fact that the same breach of the NDA which was found against Harcus Sinclair is relied upon by YLL as the unlawful means in the conspiracy lead to a conclusion that an issue estoppel arises such that the findings of fact made in the HS Judgment which are set out above are binding on YLL?

111. It is worth setting out in full the relevant passages from <u>*Gleeson v J. Wippell & Co Ltd*</u> [1977] 1 W.L.R. 510. In that case, the plaintiff had sued D Ltd, alleging that D Ltd had infringed her copyright by copying a shirt supplied to them by W Ltd. The plaintiff in the first claim had failed, the court holding that there was no infringement of the plaintiff's copyright. Employees of W Ltd had given evidence in the first trial. The plaintiff then sued W Ltd, and W Ltd sought to strike out the claim on the ground that since it had been held in the earlier action that W Ltd's shirt did not infringe the plaintiff's copyright, it was frivolous, vexatious and abuse of the process of the court for the plaintiff to seek to litigate that all over again. Megarry V-C declined to strike out the claim, holding that the trading relationship between D Ltd and W Ltd was not sufficient to find that there was privity of interest between D Ltd and W Ltd. At p 514 Megarry V-C set out the first two essential requirements for an issue estoppel to arise, namely a final judgment in the first proceedings and identity of subject matter, and then continued:

"It is the third requirement, that there should be identity of parties in the two sets of proceedings, that creates the difficulty. There was identity of plaintiffs in the two proceedings; the presence of the plaintiff company as a co-plaintiff in the Denne action plainly makes no difference for this purpose. But for the doctrine of issue estoppel to apply there must also be identity of defendants (which there plainly is not) or else the existence of privity between Denne, the defendant in the earlier action, and Wippell, the defendant in the present action. Such privity, said Mr. Skone James, does exist in the present case, whereas Mr. Jacob on behalf of the plaintiff said it did not. C The question, then, is the meaning of " privity " in this context.

The requisite privity is said to be a privity either of blood, of title, or of interest: see Zeiss No. 2, at p. 910, per Lord Reid. Plainly there is no question of blood or title in this case, and so only privity of interest can be in question. One difficulty about this is the protean nature of the word " interest," a term which at times seems almost capable of meaning ~ all things to all men. Another difficulty is that, as Lord Guest pointed out in Zeiss No. 2, at p. 936, " There is a dearth of authority in England upon the question of privies."

112. At p 515 of the report, the Vice-Chancellor continued:

"First, I do not think that in the phrase " privity of interest" the word " interest" can be used in the sense of mere curiosity or concern. Many matters that are litigated are of concern to many other persons than the parties to the litigation, in that the result of a case will at least suggest that the position of others in like case is as good or as bad

as, or better or worse than, they believed it to be. Furthermore, it is a commonplace for litigation to require decisions to be made about the propriety or otherwise of acts done by those who are not litigants. Many a witness feels aggrieved by a decision in a case to which he is no party without it being suggested that the decision is binding upon him. Second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase " privity of interest." Thus in relation to trust property I think there will normally be a sufficient privity between the trustees and their beneficiaries to make a decision that is binding on the trustees also binding on the beneficiaries, and vice versa. Third, in the present case, I think that the matter may be tested by a question that I put to Mr. Skone James in opening. Suppose that in the Denne action the plaintiff, Miss Gleeson, had succeeded, instead of failing. Would the decision in that action that Wippell had indirectly copied the Gleeson drawings be binding on Wippell, so that if sued by Miss Gleeson, Wippell would be estopped by the Denne decision from denying liability? Mr. Skone James felt constrained to answer Yes to A that question. I say " constrained " because it appears that for privity with a party to the proceedings to take effect, it must take effect whether that party wins or loses. As was said by Buckley J. in Zeiss No. 3 [1970] Ch. 506, 541 (where the question was rather different) "The relationship cannot be conditional upon the character of the decision." In such a case, Wippell would be unable to deny liability to Miss Gleeson by reason of a decision reached in a case to which Wippell was not a party, and in which Wippell had no voice. Such a result would clearly be most unjust. Any contention which leads to the conclusion that a person is liable to be condemned unheard is plainly open to the gravest of suspicions. A defendant ought to be able to put his own defence in his own way, and to call his own evidence. He ought not to be concluded by the failure of the defence and evidence adduced by another defendant C in other proceedings unless his standing in those other proceedings justifies the conclusion that a decision against the defendant in them ought fairly and truly to be said to be in substance a decision against him."

113. The only relationship apparently put forward in Gleeson v Wippell was that W Ltd had a trading relationship with D Ltd. The Vice-Chancellor had no hesitation in holding that this was not sufficient for W Ltd to be in a relationship of privity with D Ltd. The issue in the two actions was of course the same (identity of subject matter).

114. In House of Spring Gardens Ltd v Waite [1991] 1 Q.B. 241 the plaintiffs obtained judgment in an action in Ireland against three defendants for misuse of confidential information and breach of copyright. Two of the defendants, both called Mr Waite, brought a second action in Ireland to set aside the judgment on the basis it had been obtained by fraud, but failed. The third defendant, a Mr McLeod, did not participate in

the second action but knew that it was being brought. The plaintiff then brought an action in England against all three of the original defendants, and the judge held that in the absence of new evidence, all three defendants were estopped from alleging in the English proceedings that the original Irish judgment had been obtained by fraud. Having cited certain of the above passages from Gleeson v Wippell, Stuart Smith LJ pointed out on page 253 of the report that the defendants were joint tortfeasors, that the judgment against them was joint and several, and that if the action to set aside the original judgment had been successful, it was plain that in the English proceedings the plea of estoppel or abuse of process would have prevented the plaintiffs pursuing the claim on the original judgment against Mr McLeod. Further, Mr McLeod was well aware of the proceedings, and was

"content to sit back and leave others to fight his battle at no expense to himself. In my judgment that is sufficient to make him privy to the estoppel; it is "just to hold that he is bound" by the decision in the second Irish action."

115. Stuart-Smith LJ continued at p 254:

"*But there is a further point upon which Mr. Lightman relied, and it is the pleading in Mr. McLeod's defence which I have already quoted, referring to the Waites' proceedings to set aside the judgment. Mr. Lightman submitted that that was a plea of estoppel by Mr. McLeod and that since estoppels were mutual, it could be relied upon against Mr. McLeod. Mr. Lightman cited In re Defries; Norton v. Levy (1883) Q 48 L.T. 703, 704, where Pollock B. said: "But the defendants cannot be said to have waived the estoppel by not pleading this judgment, for it was not in existence when the pleadings closed. I think it will be found that there is an old decision that it is sufficient to plead pendency of another action in order to enable the party pleading to put the judgment in such action in evidence by way of estoppel." In my judgment, the plea in the defence was a plea of estoppel; and as I have already said, had the Waites succeeded it was a plea that would have availed Mr. McLeod. It is plain that he was asserting that although he was not a party to those proceedings, he was privy to them. He was right."*

116. In Resolution Chemicals Ltd v H Lundbeck A/S [2014] R.P.C. 5 the claimant, Resolution, sought to challenge a patent. The patent had previously been upheld in litigation to which another company, Arrow, in the same group and with the same eventual ownership had been party. The Court of Appeal said as follows at [29]-[32]:

29. It can be seen that Sir Robert Megarry's test: "having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two" embraces two concepts. The first is concerned with the interest which the subsequent litigant, C, has in the subject matter of the first action. In Gleeson, Wippell was very interested, in one sense, in the subject matter of the action against Denne, as its design of shirt was impugned in that action. But that was not a sufficient interest in circumstances where there was what Sir Robert Megarry described as "a trade relationship between the two, in the course of which Denne, at Wippell's request, copied a Wippell shirt: but that is all". The second concept concerns the identity of the parties. Thus in Carl Zeiss Stiftung v Rayner & Keeler Ltd [1967] 1 AC 853 at pp.911–12 Lord Reid suggested: "A party against whom a previous decision was pronounced may employ a servant or engage a third party to do something which infringes the right established in the earlier litigation and so raise the whole matter

again in his interest. Then, if the other party to the earlier litigation brings an action against the servant or agent, the real defendant could be said to be the employer, who alone has the real interest, and it might well be thought unjust if he could vex his opponent by relitigating the original question by means of the device of putting forward his servant."

30 In this example the new party has no interest in the previous litigation, but would be estopped because, in effect, he represents the party in the first action. That party has the identical interest in the previous action. In Gleeson, there was no identity of parties in this sense.

31 It is not necessary for the purposes of this appeal to seek to define precisely what interest in the subject matter of the previous litigation is required. The sort of interest dismissed by Sir Robert Megarry in Gleeson in his first principle is clearly inadequate. There are passages in the judgment of Aldous L.J. in Kirin-Amgen Inc v Boehringer Mannheim GmbH [1997] F.S.R. 289 which suggest that a legal interest may be necessary in the subject matter of the previous action as opposed to a commercial interest: see pp.307–309. I have not found that a particularly helpful criterion in the present case which is solely concerned with successive revocation actions. At one level Arrow and Resolution had the same legal interest in the revocation of the Patent, but that was a legal interest which they shared with all the world. If Resolution is to be bound, it must I think be possible to identify some more concrete consequence for its business which revocation of the Patent would have achieved. Unless that is so, although it can be said that Resolution could have joined the 2005 proceedings, there is no reason to hold that they should.

32 Drawing this together, in my judgment a court which has the task of assessing whether there is privity of interest between a new party and a party to previous proceedings needs to examine (a) the extent to which the new party had an interest in the subject matter of the previous action; (b) the extent to which the new party can be said to be, in reality, the party to the original proceedings by reason of his relationship with that party, and (c) against this background to ask whether it is just that the new party should be bound by the outcome of the previous litigation.

117. As set out above, Therium relied on a passage from the judgment of Underhill LJ in <u>Tyne and Wear PTE v RMT</u> [2023] ICR 148. However, the determinative judgments in that case are those of Males LJ and Newey LJ, and as Males LJ recorded at [143], the topic of privity of interest was touched on very lightly in argument in that case, and is not dealt with in the majority judgments. I do not therefore think that that case takes the matter further.

118. The final relevant point of principle is that estoppels are mutual. If there is no issue estoppel binding on Therium, then YLL cannot be bound either. That was one of the bases for the actual decision in <u>Gleeson v Wippell</u>; see the passage set out in paragraph [112] above, and the passage from <u>House of Spring Gardens v Waite</u> set out in paragraph [113] above.

119. In my view there is no issue estoppel here. Therium had a commercial relationship with Harcus Sinclair and one of Therium's then employees gave evidence. It was not prevented from funding the emissions litigation, and it continued to fund the Slater & Gordon claimants. It was not a party which was sitting back and permitting Harcus

Sinclair to fight its battles on its behalf. It appears to me to be in no different position from the defendant in Gleeson v Wippell, or the claimant in Resolution Chemicals.

120. Further, Mr Hartley's evidence in support of Therium's application contains an account of the facts which, as regards the effect of the evidence of Mr Moore, is inconsistent with the Judge's factual findings in the HS Judgment. When I raised with Mr Warwick the findings in the HS Judgment adverse to Therium which I have set out in paragraph [96] above, Mr Warwick's submission was that Therium is not bound by findings of fact made in the HS Judgment. Rather like Mr McLeod in House of Spring Gardens v Waite, Therium was thus submitting that it is not Harcus Sinclair's privy. To borrow from Stuart Smith LJ in that case, Therium is right. Issue estoppels must be mutual.

121. For all these reasons there is no issue estoppel as between YLL and Therium in relation to the findings of fact in the HS Judgment[3].

The application for summary judgment in relation to the claim in conspiracy

122. Against that background I turn next to the question of summary judgment in relation to the claim in conspiracy.

123. Therium sought to obtain summary judgment for the following reasons.

124. First it points out that four elements of the tort of conspiracy are (a) an agreement or combination (b) to use unlawful means (c) with an intention to injure the claimant by those unlawful means and (4) which cause the claimant to suffer loss or damage; see Lakatamia Shipping Corp v Nobu Su [2023] EWHC 1874 at [103] to [106].

125. It is worth setting out paragraphs [103] to [104] of Lakatamia in full:

103. In Digicel (St Lucia) Ltd v. Cable & Wireless Plc [2010] EWHC 774 (Ch) (Annex I), at [2] Morgan J identified the elements of the tort of unlawful means conspiracy as follows: "[t]he necessary ingredients of the conspiracy alleged are: (1) there must be a combination; (2) the combination must be to use unlawful means; (3) there must be an intention to injure a claimant by the use of those unlawful means; and (4) the use of the unlawful means must cause a claimant to suffer loss or damage as a result". See also in this regard Kuwait Oil Tanker v A Bader & ors [2000] 2 All ER (Comm) 271 at p. 312.

104. A useful summary of the key elements of the cause of action was set out in the judgment of Cockerill J in FM Capital Partners Ltd v Marino [2019] EWHC 768 (Comm) at [94];-

> *"The elements of the cause of action are as follows: i) A combination, arrangement or understanding between two or more people. It is not necessary for the conspirators all to join the conspiracy at the same time, but the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of: Kuwait Oil Tanker at [111]. ii) An intention to injure another individual or separate legal entity, albeit with no need for that to be the*

[3] CIL did not seek to argue that there was any issue estoppel as between YLL and CIL.

sole or predominant intention: Kuwait Oil Tanker at [108]. Moreover: a) The necessary intent can be inferred, and often will need to be inferred, from the primary facts – see Kuwait Oil Tanker at [120-121], citing Bourgoin SA v Minister of Agriculture [1986] 1 QB: "[i]f an act is done deliberately and with knowledge of the consequences, I do not think that the actor can say that he did not 'intend' the consequences or that the act was not 'aimed' at the person who, it is known, will suffer them". b) Where conspirators intentionally injure the claimant and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests: Lonrho Plc v Fayed [1992] 1 AC 448, 465-466 ; see also OBG v Allan [2008] 1 AC 1 at [164-165] . c) Foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention: OBG at [166]. iii) In some cases, there may be no specific intent but intention to injure results from the inevitability of loss: see Lord Nicholls at [167] in OBG v Allan , referring to cases where: "The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort." iv) Concerted action (in the sense of active participation) consequent upon the combination or understanding: McGrath at [7.57]. v) Use of unlawful means as part of the concerted action. There is no requirement that the unlawful means themselves are independently actionable: Revenue and Customs Commissioners v Total Network [2008] 1 AC 1174 at [104]." vi) Loss being caused to the target of the conspiracy."

126. Mr Warwick submitted that Therium was entitled to summary judgment in relation to the claim in conspiracy for three broad reasons:

  i) Neither Mr Parker nor Mr Moore were aware of the existence of the restriction created by Sentence 2 in the HS NDA;

  ii) There was no intention to injure YLL;

  iii) YLL cannot establish loss.

Mr Parker and Mr Moore not aware of the existence of the restriction

127. As set out above, in paragraph [91(3)] of the HS Judgment the judge found that Mr Parker had not read the HS NDA and was not therefore aware of the restriction contained in Sentence 2. Mr Moore's evidence in paragraph 4 of his witness statement was that he did not see the HS NDA until he was sent a copy by Mr Parker in January 2017. Paragraph 19 of his statement says that he was told by Mr Fairley on 11 April 2016 that there was an NDA in place, and he then discovered that the NDA was with Harcus Sinclair. Both Mr Moore and Mr Parker therefore knew of the existence of the HS NDA, but not of its contents (which became known to them in January 2017).

128. Mr Warwick also submitted that the pleading in paragraph 32 of the Particulars of Claim as to actions which were alleged to be carried out in secret, and in paragraph 48 which alleged that those actions were carried out without disclosing them to YLL so as to ensure that YLL remained unaware that Therium and Harcus Sinclair were

preparing an independent group action, were not consistent with the available evidence or the HS Judgment.

129. Mr Warwick relied on _Belmont Finance Corpn v Williams Furniture Ltd (No (2)_ [1980] 1 All E.R.393 at 404-5:

"If all the facts which make the transaction unlawful were known to the parties, as I think they were, ignorance of the law will not excuse them: see _Churchill v Walton_ [1967] 2 AC 224 at 237……If they had sincerely believed in a factual state of affairs which, if true, would have made their actions legal, this would have afforded a defence (_Kamara v Director of Public Prosecutions_ [1974] AC 104 at 119)."

130. This passage was considered by the Court of Appeal in _Racing Partnership Ltd v Done Bros Ltd_ [2021] Ch 233. After reviewing a number of authorities, Arnold LJ said as follows at [139]

"139. Accordingly, the conclusion I draw from the authorities is that, having regard both to the general statements of the ingredients of the tort which do not include any requirement of knowledge of unlawfulness, and to the persuasive force, even if not binding status, of _Churchill v Walton_ and _Belmont v Williams_, knowledge of the unlawfulness of the means employed is not required for unlawful means conspiracy".

131. At [171], Phillips LJ, who agreed with Arnold LJ in relation to the conspiracy aspect of the judgment, said as follows:

"*171 As for TRP's appeal, I agree with Arnold LJ's conclusion at para 139, based on his analysis of the authorities, that knowledge of the unlawfulness of the means employed is not required for unlawful means conspiracy. The point was directly in issue and so decided by this court in Belmont Finance Corpn v Williams Furniture Ltd (No 2) [1980] 1 All ER 393, a decision that was not referred to by Toulson LJ in his obiter dictum in Meretz Investments NV v ACP Ltd [2008] Ch 244. The interplay between unlawful means conspiracy and inducing breach of contract (where knowledge of an unlawful breach of contract is an essential element) may merit further examination in a suitable case, but I am not convinced that many cases in which a defendant induces a breach of contract, but without knowing that he is doing so, would be capable of being reformulated as an unlawful means conspiracy".*

132. Arnold LJ returned to the question of a defence of belief of lawfulness at paragraph [145] – [146], which arose only if he was wrong on the issue of whether knowledge of unlawfulness was necessary. He said this:

"……I see intrinsic merit in the proposition that it should be a defence to a claim in unlawful means conspiracy for the defendant to prove that he believed that the means in question were lawful. Take the facts of Belmont v Williams [1980] 1 All ER 393: it seems quite harsh that the defendants were held liable even though they had obtained counsel's opinion that the transaction would not contravene section 54, although I acknowledge that they may have had a remedy in professional negligence. Accordingly, if it were open to this court to do so, I would hold that it is a defence to a claim in unlawful means conspiracy for the defendant to prove that they believed that the means were lawful. I would stress, however, that this would require the

defendant to establish a positive belief: it should not be sufficient, in my opinion, for the defendant merely to establish that they gave the matter no thought."

133. Both parties therefore accepted that, as a result of the decision in Racing Partnership, it is not necessary for a party to an alleged conspiracy to have knowledge that the unlawful means used are in fact unlawful; but Mr Warwick relied on the statement in Belmont that it would be a defence if the alleged conspirators had a sincere belief in a factual state of affairs which if true would have made their actions legal.

134. The evidence on which Mr Warwick seeks to rely is a finding by the trial judge in the HS Judgment that "*Mr Parker, in continuing ignorance of the restrictions in the NDA, assumed that he and the First Claimant and/or the Second Claimant would be free to act for their own group of claimants in the proposed group claim, in collaboration with S and G, if they so chose*", and Mr Moore's affidavit which says "*from my interactions with the parties there was nothing to suggest that Harcus Sinclair was prevented from acting for its own clients. My understanding was that both firms were seeking to work in collaboration on the Emissions Litigation and as the relationship between the firms developed they would each represent their own separate group of claimants. In fact I am surprised by any other suggestion: it runs entirely contrary to my experience of Harcus Sinclair's role in the arrangements*".

135. Can I safely conclude now, on the basis of that evidence, that Mr Parker and Mr Moore had a sincere belief in a factual state of affairs which, if true, would have made their actions lawful, such that I should give summary judgment for Therium on the claim in conspiracy? I am not persuaded that I should give summary judgment, for the following reasons, which I give as briefly as I may given that this matter will go to trial:

i) The evidence suggests that both Mr Moore and Mr Parker were aware of the existence of the NDA. Neither of them took the trouble to find out what it said.

ii) The effect of Belmont and Racing Partnership is that a sincerely held belief as to the lawfulness of the agreed course of action is not a defence to a claim in unlawful means conspiracy if the defendants knew all the relevant facts; but a sincerely held belief as to a particular state of facts which if true would render the conduct lawful is a defence. I do not consider that I can safely conclude at present that there was a sincerely held belief, sufficient to amount to a defence, that the HS NDA did not contain any restrictions on Harcus Sinclair acting for claimants other than YLL's claimants when neither Mr Parker nor Mr Moore investigated that position. Mr Moore's evidence seems to suggest assumption rather than positive belief. Similarly the passages from the HS Judgment at paragraphs [65], [91.3], and [159.4] on which Mr Warwick relied suggest that Mr Parker simply assumed that he was free to act without checking; and of course Mr Parker had signed an agreement, by which Harcus Sinclair would be bound, without having read it. Indeed, at [65] of the HS Judgment the judge found (in a different context) that Mr Parker had "*in this instance and as part of his initial and informal assessment of the merits of the proposed group claim, Mr Parker paid less attention than he should have done to the legalities of the position, in terms of whether he had a right to see the Litigation Pack when it was sent to him by Mr Moore."*

iii) The HS Judgment itself records that a number of the actions pleaded in paragraph 32 of the Particulars of Claim were not disclosed to or shared with YLL (for example in paragraphs [65], [125(4)], [127] and [149]) and that other actions were disclosed after the event and in circumstances where YLL understood those actions to be taking place for the purpose of the proposed collaboration between YLL and Harcus Sinclair (e.g. at [125(6)]. The 20 October 2016 email was the first occasion on which YLL learned that the steps set out in that email had been taken.

iv) This is a developing area of the law, and there are fine distinctions to be made. I cannot conduct a mini-trial, and it is apparent from the material which is before the court, including a number of the emails between Mr Parker and Mr Moore in August 2016, that there are questions for Mr Moore to answer which are relevant to his state of mind at the time. I consider that this is a case in which this difficult and developing area of law should be applied to the facts as found by the court after a full trial. I do not consider that this is an appropriate case for summary judgment.

No intention to injure YLL/no loss

136. The second and third grounds on which Therium sought summary judgment are that it was not possible to show an intention to injure YLL, and that YLL could not establish that they had suffered loss. Mr Warwick made the following submissions:

i) Mr Moore and Mr Parker were acting to further their own interests in the belief that they were lawfully entitled to do so;

ii) The documents show a continued willingness to collaborate;

iii) YLL had no right to a GLO or to profit costs; whether or not a GLO would be made was a matter for the court, and a GLO is not necessarily granted to the first applicant for such an order, and indeed making too early an application can lead to a GLO being refused;

iv) Therium funded Slater & Gordon and so it was not correct to say that neither Harcus Sinclair nor Therium would have acted but for the conspiracy;

v) There was not a zero-sum situation. YLL could have and did participate in the Emissions Litigation and obtained benefits therefrom;

vi) Mr Parker continued to try to negotiate a collaboration with YLL until January 2017;

vii) Therium would not have funded YLL which it did not regard as capable;

viii) Accordingly, there was no intention to cause loss.

137. I do not find these submissions persuasive. The case for YLL is that Therium and Harcus Sinclair acted as pleaded in order to ensure that their litigation group enjoyed the first mover advantage, with the necessary consequence, known to each of Therium and Harcus Sinclair, that YLL would be deprived of that advantage (despite having brought the potential claim to their attention) and accordingly would suffer losses

(paragraph 49 of the Particulars of Claim); and that Therium combined and conspired with Harcus Sinclair to seize the "first mover" advantage for themselves by use of unlawful means, knowing that so acting would necessarily cause YLL to suffer harm (paragraph 51 of the Particulars of Claim).

138. In *OBG v Allen* [2008] 1 AC 1 Lord Nicholls said at [167]:

"*I add one explanatory gloss to the above. Take a case where a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant. In other words, a case where loss to the claimant is the obverse side of the coin from gain to the defendant. The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort. This accords with the approach adopted by Lord Sumner in Sorrell v Smith [1925] AC 700 , 742: 'When the whole object of the defendants' action is to capture the plaintiff's business, their gain must be his loss. How stands the matter then? The difference disappears. The defendant's success is the plaintiff's extinction, and they cannot seek the one without ensuing the other.'*

139. The HS Judgment records the following at paragraph [106] – [107]:

"106 *Also on 17 August 2016 Mr Parker had an e-mail exchange with Mr Moore. Mr Moore was growing impatient with the delay in what Mr Moore referred to as Mr Johal getting "his ducks in a row". Mr Moore concluded his e-mail (16.42) in the following terms. "I want to kick on with this and the Fairley/Johal dream team are holding it up. Alternatively I can put it to the committee on the basis that HS alone is acting and Greg/Aman can fight over the 5% introducer fee when we win!"*

107 Mr Parker responded the same day in the following terms (16.44). "Like it. Would that I could bring myself to. Aman has just sent something through that he has spoken to me about but I have not read. Shall we discuss a response when you have seen it."

140. At paragraph [272] the HS Judgment says:

"*As this action demonstrates, group litigation is, or at least can be a competitive business between firms of solicitors. Sentence 2 was intended to ensure that the first claimant, having provided its advice on the claim made by [YLL's] group of claimants and having had the benefit of insight into that claim, could not then strike out on its own, or in collaboration with another firm, with its own rival group of claimants."*

141. At paragraph [307] the HS Judgment says:

"In cross examination, Mr Parker accepted that from a commercial perspective, lawyers contemplating bringing a group action do not want there to be other rival groups, and that lawyers contemplating group litigation want to be ahead so that they can obtain the GLO, be lead solicitor and conduct the common costs work. Mr Parker

accepted, albeit reluctantly and with some qualification, that the defendant had a legitimate interest in preventing Harcus Sinclair from setting up a rival group."

142. The judge also referred in paragraph [308] of the HS Judgment to certain emails, and in paragraph [309] again commented that the language of those emails *"demonstrated that the making of group claims could be a highly competitive business"*.

143. So there is ample evidence which is likely to be available at trial that the business in which Harcus Sinclair and YLL and Therium were engaged was highly competitive, and that YLL would have wanted to "*be ahead so that they can obtain the GLO, be lead solicitor and conduct the common costs work"*.

144. Further, as to the efforts to collaborate, paragraph [113] of the HS Judgment records the terms of an email in which Mr Moore set out the much more limited role for YLL which he had in mind as at the end of August 2016; paragraph [120] of the HS Judgment records that Mr Moore had anticipated that there would be push back from YLL as to the proposed terms of collaboration which were offered in mid-September 2016, and that the anticipation of push back from Mr Johal or YLL proved correct; paragraph [152] records that cracks were appearing in the informal collaboration process by November 2016; and in paragraph [159(2)] the judge found that:

"During [October and November 2016] the informal process of collaboration between the first claimant and the defendant in respect of the proposed group claim, pending agreement on the terms of a binding collaboration agreement, was faltering, but was not treated as abandoned by either party, in their dealings with each other, and had not finally been abandoned by either party. Nor had the parties, in their dealings with each other, formally given up on the prospect of collaboration. Mr Parker, by virtue of his dealings with S & G, would have known that this was a remote prospect, but he did not communicate that knowledge to the defendant."

145. Accordingly, it appears to me at this stage arguable that Therium and Harcus Sinclair wished to obtain the competitive advantage which YLL had, and that the inevitable result of Harcus Sinclair and Therium obtaining that competitive advantage was that YLL would not have it. The fact that YLL could and did have other involvement, and the fact that there was a continued attempt to collaborate on less advantageous terms, does not persuade me that I can find definitively at this stage that there was no intention to injure YLL. If party A deprives party B of a benefit C but offers it smaller benefits D and E, it does not mean that party B has not been deprived of benefit C. As I have already found in relation to the breach of confidence claim, it is plainly not appropriate on a summary basis to go into what the role which was open to YLL was worth, or into whether YLL were not capable of carrying out the role which they sought.

146. Accordingly I am not persuaded that I should give summary judgment on the conspiracy claim.

Abuse of process

147. I turn therefore to the question of abuse of process, dealing first with Therium's case and then returning to CIL's case.

The authorities on abuse of process

148. Mr Warwick for Therium relied on a number of cases.

149. First, he relied on *Aldi Stores Ltd v WSP Group plc* [2008] 1 WLR 748. The relevant principles are set out at [5]-[6] follows:

> "*[5] The principles applicable to an application to strike out a claim on the basis that it is an abuse of process to bring a claim that could and should have been brought in previous proceedings are set out in the speech of Lord Bingham of Cornhill in Johnson v Gore Wood & Co [2002] 2 AC 1. It is, in my view, generally neither necessary nor helpful to refer to the accretion of authority before that decision, as the decision clearly sets out the principles the courts are to apply. Lord Bingham summarised the main principles in these terms, at p 31:*
>
> > *"But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."*

6 It is, however, helpful to refer to the judgment of Clarke LJ in Dexter Ltd v Vlieland-Boddy [2003] EWCA Civ 14 at [49]—[53], where he summarised the principles to be derived from Johnson v Gore Wood & Co:

> *"49. . . . (i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process. (ii) A later action against B is much more likely to be held to be an abuse of process than a later action against C. (iii) The burden of establishing abuse of process is on B or C or as the case may be. (iv) It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. (v) The question in every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process. (vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C. "*
>
> *50. Proposition (ii) above seems to me to be of importance because it is one thing to say that A should bring all his claims against B in one action, whereas it is quite another thing to say that he should bring all his claims against B and C (let alone against B, C, D, E, F and G) in one action. There may be many entirely legitimate reasons for a claimant deciding to bring an action against B first and, only later (and if necessary) against others.*
>
> *51. Those reasons include, for example, the cost of proceeding against more than one defendant, especially where B is apparently solvent and the case against B seems stronger than against others. More defendants mean more lawyers, more time and more expense. This is especially so in large commercial disputes. It by no means follows that either the public interest in efficiency and economy in litigation or the interests of the parties, including in particular the interests of C, D and E, is or are best served by one action against them all.*
>
> *52. It seems to me that the courts should be astute to ensure that it is only in a case where C can establish oppression or an abuse of process that a later action against C should be struck out. I could not help wondering whether the defendants in this case would have given their lawyers the same instructions on the question whether they should have been sued in the first action if they had been asked before that action began as they have given now that a later action has been begun.*
>
> *53. It is clear from the speeches of both Lord Bingham and Lord Millett that all depends upon the circumstances of the particular case and that the court should adopt a broad merits based approach, but it is likely that the most important question in any case will be whether C, D, E or any other new defendant in a later action can persuade the court that the action against him is oppressive. It seems to me to be likely to be a rare case in which he will succeed in doing so."*

150. At paragraphs [29]-[31] of *Aldi* the Court of Appeal dealt with the problem of potentially successive actions arising from the same set of facts:

"29 I also wish to add a word as to the approach that should be adopted if a similar problem arises in the future. In circumstances such as those that arose in this case,

the proper course is to raise the issue with the court. Aldi did write to the court, as I have set out at para 2(xiii), but not in terms that made it clear what the court was being invited to do. WSP and Aspinwall knew of Aldi's position and were before the court on numerous occasions; they did nothing to raise it.

30 Parties are sometimes faced with the issue of wishing to pursue other proceedings whilst reserving a right in existing proceedings. Often, no problem arises; in this case, Aldi, WSP and Aspinwall each in truth knew at one time or another between August 2003 and the settlement of the original action in January 2004 that there was a potential problem, but it was never raised with the court. I have already expressed the view that it should have been. The court would, at the very least, have been able to express its view as to the proper use of its resources and on the efficient and economical conduct of the litigation. It may have seen if a way could have been found to determine the issues applicable to Aldi in a manner proportionate to the size of Aldi's claim and without the very large expenditure that would have been necessary if Aldi had to participate in the trial of the actions. It may be that the court would have said that it was for Aldi to elect whether it wished to pursue its claim in the proceedings, but if it did not, that would be the end of the matter. It might have inquired whether the action against excess underwriters could have been expedited. Whatever might have happened in this case is a matter of speculation.

31 However, for the future, if a similar issue arises in complex commercial multi-party litigation, it must be referred to the court seised of the proceedings. It is plainly not only in the interest of the parties, but also in the public interest and in the interest of the efficient use of court resources that this is done. There can be no excuse for failure to do so in the future."

151. What was said in this passage has become known as the "Aldi guidelines". Mr Warwick also drew my attention to what is said about the Aldi guidelines in Gladman Commercial Properties v Fisher Hargreaves Procter [2014] P.N.L.R. 11. The facts of that case can be found in paragraphs [1]-[3] thereof:

"1. This is an appeal from the Order of Arnold J. made on 13 February 2013, by which he struck out the claim of the Appellant, Gladman Commercial Properties, for damages for fraudulent or negligent misrepresentation, in connection with its aborted purchase of two adjacent properties in Dunkirk, Nottingham ("the Properties"), from the Nottinghamshire and City of Nottingham Fire Authority ("the Fire Authority") and Nottingham City Council ("the Council"). For reasons which will become apparent, I will refer to this claim as "the Second Claim". It was issued in May 2012.

2 The defendants to the Second Claim (and Respondents to this appeal) are two firms of chartered surveyors and two individuals, who were partners in or directors of the two firms. They are alleged to have falsely stated that the Properties were, together, suitable for redevelopment as student accommodation, in letters to the Appellant dated 7 August 2006, and by that means to have induced the Appellant to enter into contracts to purchase them.

3 The basis upon which the Respondents sought to strike out the Second Claim derived almost entirely from circumstances arising from earlier proceedings by the Fire Authority against the Appellant, seeking specific performance of contracts for the purchase by the Appellant of the Properties. I will refer to those proceedings as

"the First Claim". The Appellant defended the First Claim, and counter-claimed against both the Fire Authority and the Council, relying on the same misrepresentations as are sued upon in the Second Claim, but alleging that the Fire Authority and the Council were liable for them, having been made by the surveyors on their behalf."

152. The First Claim was settled, and the Court of Appeal upheld the Judge's decision to strike out the Second Claim on the basis that the release of the Fire Authority and the Council by the settlement agreement released the defendants in the Second Claim because they were joint tortfeasors. The Court of Appeal were however persuaded to hear argument on the abuse of process point, and at [46]-[51] and [65]- [66] said as follows:

"46. The judge's conclusion that the bringing of the Second Claim amounted to an abuse was a result of his accepting two main submissions from the Respondents. The first was that the Second Claim involved essentially a re-litigation of the whole of the Appellant's case in the First Claim, at a further trial likely to last between 20 and 30 days, to expose Mr Hargreaves and Mr Bishop to a re-run of lengthy and hostile cross-examination alleging fraud, and threatening professional ruin for both of them, and to expose the Fire Authority and the Council to a re-litigation of the claim against them, if (as the judge thought likely) brought back in by the Respondents for contribution.

47 The second submission was that, ignoring this court's advice in both the Aldi Stores and the Stuart cases that a claimant wishing to preserve the opportunity to bring further claims against the same or other defendants should apply for directions at the earliest opportunity in the earlier proceedings, the Appellant had done nothing along those lines until the March 2011 Letters came to the attention of the trial judge in the First Claim, despite having concluded, on available materials, that the Respondents had been guilty of fraudulent misrepresentation, by the beginning of October 2010, six months before the date fixed for the trial.

………………..

49 This is, of course, not a case in which the allegedly abusive claim is being pursued against persons who were defendants to the earlier claim. It therefore falls within that category where the absence of overlap between defendants is a powerful factor against finding abuse, but not a bar: see per Thomas L.J. in the Aldi case at [6], [9] and [10]. Nonetheless, the judge plainly had these considerations in mind, since he cited the very passages in the Aldi case in which they are set out, at [151-2] of his judgment.

50 What plainly overrode this consideration in the judge's mind was the almost complete overlap between the issues in the First and Second Claims, the need for them to be litigated again over many weeks at a second trial (after fifteen days part-heard in the first trial) and, in particular, the consequential oppression of Mr Bishop and Mr Hargreaves in being required to defend their careers and professional reputations from the most serious allegations not once, but twice.

51 The judge was plainly aware that, merely because the claims against the Respondents could have been brought in the First Claim, it did not follow that they

should have been. His conclusion that, in fact, they should have been flowed from his perception that this would have saved enormous cost, avoided multiplicity of litigation about the same issues, and saved Mr Bishop and Mr Hargreaves from the double jeopardy of repeated hostile cross-examination.

………

65 *As has been repeatedly stated, the conduct of civil proceedings is a process in which the stakeholders include not merely the parties, but also other litigants waiting for their cases to be tried, and the public at large, who have an interest in the efficient and economic conduct of litigation. I consider that Arnold J was correct to treat a failure by the Appellant to follow guidelines laid down as mandatory future conduct in two successive reported decisions of this court as relevant matters pointing to a conclusion that the Second Claim constituted an abuse of the process of civil litigation.*

66 The shocking consequence of permitting the Second Claim to continue would be that precisely the same issues would fall to be litigated at two successive trials involving the waste of between four and six working weeks of court time and, no doubt, millions of pounds of wasted costs and lost management time, quite apart from the double jeopardy faced by Mr Bishop and Mr Hargreaves to which I have referred. The judge's conclusion was that compliance with what were by then mandatory guidelines could have entirely avoided that wasteful duplication of time, money and effort. I agree that the failure was, as described in the Aldi case, inexcusable. An inexcusable failure to do something which would have contributed so substantially to the economy and efficiency with which this dispute might have been resolved seems to me to be a primary candidate for identification as an abuse.

67 At one point in his submissions Mr Chaisty seemed to suggest that it was purely a matter for the parties to decide whether to pursue a dispute in one or more related sets of proceedings, regardless of its effect upon the burdens facing the court. If that was ever a legitimate view (and the Henderson case strongly suggests otherwise), civil litigants need to understand that it is not now".

153. Mr Ahlquist also referred me to a number of cases. First he referred me to Secretary of State for Trade & Industry v Bairstow [2004] Ch 1 where Sir Andrew Morritt V-C reviewed the authorities and then said this:

> *"In my view these cases establish the following propositions. (a) A collateral attack on an earlier decision of a court of competent jurisdiction may be but is not necessarily an abuse of the process of the court … (d) If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such relitigation would bring the administration of justice into disrepute".*

154. Morritt V-C also cited the following passage from the judgment of Lord Hobhouse in Arthur J S Hall & Co v Simons [2002] 1 AC 615 at 743:

The "collateral attack" point is a species (or "sub-set") of abuse of process. There is no general rule preventing a party inviting a court to arrive at a decision inconsistent with that arrived at in another case. The law of estoppel per rem judicatam (and issue estoppel) define when a party is entitled to do this. Generally there must be an identification of the parties in the instant case with those in the previous case and there are exceptions. So far as questions of law are concerned, absent a decision specifically binding upon the relevant litigant, the doctrine of precedent governs when an earlier legal decision may be challenged in a later case. A party is not in general bound by a previous decision unless he has been a party or privy to it or has been expressly or implicitly covered by some order for the marshalling of litigation (Ashmore v British Coal Corpn [1990] 2. QB 338). This overlaps with the concept of vexation where the same person is faced with successive actions making the same allegations which have already been fully investigated in a previous case in which the later claimant had an opportunity to take part. This reasoning does not apply to an action against a lawyer alleging that he has mishandled a previous case."

155. Next Mr Ahlquist referred me to Michael Wilson & Partners v Sinclair and Ors [2017] 1 WLR 2646. In that case the claimant brought proceedings against two defendants, and the first defendant was the managing director of and major shareholder in the second defendant. The claim was that the defendants had dishonestly assisted a Mr Emmott, who was previously a director and employee of the claimant, to acquire cash and shares in breach of his fiduciary duties to the claimant, and that the shares and cash constituted a bribe for which the defendants were liable. Previously the claimant had brought an arbitration against Mr Emmott, in which the first defendant had been invited to join as a party so that the issue of ownership of the shares could be determined. The first defendant had refused that invitation. The claim in the arbitration had failed, with the arbitrators finding that the shares had been received by Mr Emmott on behalf of the first defendant. The Court of Appeal allowed the claimant's appeal against the order of the judge at first instance striking out the claim. Having reviewed a number of authorities the court said as follows at [48]:

"The following themes emerge from these cases that are relevant to the present appeal:

(1) In cases where there is no res judicata or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated; see Lord Diplock in Hunter's case [1982] AC 529, Lord Hoffman in the Arthur J S Hall case [2002] 1 AC 615 and Lord Bingham in Johnson v Gore Wood [2002] 2 AC 529. . These interests reflect unfairness to a party on the one hand, and the risk of the administration of public justice being brought into disrepute on the other, see again Lord Diplock in Hunter's case. Both or either interest may be engaged.

(2) An abuse may occur where it is sought to bring new proceedings in relation to issues that have been decided in prior proceedings. However, there is no prima facie assumption that such proceedings amount to an abuse: see Bragg v Oceanus [1982]

2 Lloyds Rep 132; and the court's power is only used where justice and public policy demand it, see Lord Hoffmann in the Arthur J S Hall case.

(3) To determine whether proceedings are abusive the court must engage in a close 'merits based' analysis of the facts. This will take into account the private and public interests involved, and will focus on the crucial question: whether in all the circumstances a party is abusing or misusing the court's process, see Lord Bingham in Johnson v Gore Wood & Co and Buxton LJ in Laing v Taylor Walton [2008] PNLR 11.

(4) In carrying out this analysis, it will be necessary to have in mind that: (a) the fact that the parties may not have been the same in the two proceedings is not dispositive, since the circumstances may be such as to bring the case within 'the spirit of the rules', see Lord Hoffmann in the Arthur J S Hall case; thus (b) it may be an abuse of process, where the parties in the later civil proceedings were neither parties nor their privies in the earlier proceedings, if it would be manifestly unfair to a party in the later proceedings that the same issues should be relitigated, see Sir Andrew Morritt V-C in the Bairstow case [2004 Ch 1; or, as Lord Hobhouse put it in the Arthur J S Hall case, if there is an element of vexation in the use of litigation for an improper purpose.

(5) It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process, see Lord Hobhouse in In re Norris*."*

156. In relation to the Aldi guidelines Mr Ahlquist referred to *Otkritie Capital International Ltd v Threadneedle Asset Management Ltd* [2017 EWCA Civ 274. In that case Otkritie had brought proceedings successfully against a number of parties including an employee of Threadneedle. The employee was called Mr Gersamia. Otkritie then brought separate proceedings against Threadneedle on the basis that it was vicariously liable for Mr Gersamia's conduct. Threadneedle applied to strike out the action as an abuse. The judge at first instance found that if the Aldi guidelines had been followed, the court would not have required Threadneedle to be joined as a party to the action. The Court of Appeal held that:

i) The claimant could not but have known that it had a claim against Threadneedle too if the claim against Mr Gersamia succeeded. It should have made an application as soon as reasonably possible after Otkritie should have appreciated Threadneedle's potential liability.

ii) However the judge had been correct, in making a broad merits based judgment, to assess the seriousness of the breach and so to seek to determine what would have happened if the necessary application had been made.

iii) Similarly the measure of prejudice suffered by Threadneedle was a relevant circumstance which the judge was bound to consider, and a party needs to show more than generalised prejudice to obtain a strike out.

iv) Threadneedle knew all about the first action and could have intervened if it wanted to.

v) It is difficult for a party which has never been sued by the claimant to complain that the commencement of a new action against it is oppressive or unjust, though it was not the case that it could never happen.

vi) It was also a relevant factor against Threadneedle in any broad merits based assessment that if it successfully struck out the second action, it not only would obtain the windfall of never having to defend Otkritie's allegations but it would also prevent Otkritie from having any access to the court for the purpose of determining its claim against Threadneedle.

vii) Each case must turn on a broad merits-based assessment of the facts in that case.

157. Finally, I should refer to Tinkler v Ferguson [2021] 4 WLR 27, which was referred to by CIL. The proceedings arose from a dispute over the chairmanship of a company and an announcement published on the London Stock Exchange's regulatory news service. There were defamation proceedings, and also proceedings in the commercial court. The commercial court action went to trial, and Mr Tinkler was unsuccessful. He wished to proceed with the defamation claim, and the defendants in that claim sought to strike it out on the grounds that it was an abuse of process. To take a summary from the judgment of the judge at first instance, set out in paragraphs 21 and 22 of the Court of Appeal Judgment:

"So far as concerns publication of the Announcement, Mr Tinkler is complaining about precisely the same acts in the [defamation claim] as he did in the [commercial court claim]. The only difference is that in the [commercial court claim], the company was being held vicariously liable for the actions of the [directors] and in the [defamation claim] he seeks to establish personal liability of the [directors].

158. Having reviewed the authorities the Court of Appeal said at [35]:

"In summary, the power to strike out for abuse of process is a flexible power unconfined by narrow rules. It exists to uphold the private interest in finality of litigation and the public interest in the proper administration of justice, and can be deployed for either or both purposes. It is a serious thing to strike out a claim and the power must be used with care with a view to achieving substantial justice in a case where the court considers that its processes are being misused. It will be a rare case where the re-litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse, but where the court finds such a situation abusive, it must act."

159. The Court then held at [62] that the defamation action had been rightly struck out:

" It is the rump of the original defamation action and concerns just one element in a sequence of many interconnected elements, all of which (not least the RNS Announcement itself) were exhaustively examined in the [commercial court] Judgment, whose findings have been effectively recognised by both parties in their pleadings as binding. In both sets of proceedings Mr Tinkler is making the same essential complaint about the same individuals. On the specific facts of this case, that amounts to a collateral attack on the previous findings. These features bring the case

into the rare group where litigation is abusive although it is not formally between the same parties or their privies."

The parties' submissions

160. Mr Warwick submitted that YLL had made no attempt to comply with the Aldi guidelines at all.

i) He submitted that YLL should have told the court (1) that there was a possibility of a claim against Harcus Sinclair in conspiracy; (2) that accordingly there was the possibility of a claim against Therium as joint tortfeasor on the same facts; and (3) that the allegations to be made against Therium would also need to be made against Harcus Sinclair and Mr Parker. Mr Warwick pointed to a letter from YLL dated 21 April 2023 seeking permission to use documents from the HS Proceedings in which it was said that it was fortuitous that the claim against Therium was being brought in separate proceedings from the HS Proceedings, and that the claim could have been advanced by way of amendment to the HS Proceedings.

ii) He submitted that there was no excuse for the failure to comply with the Aldi guidelines and that if they had been complied with, the court could and would have made case management decisions which could have managed the case and how claims against other parties should be managed without imperilling the expedited timetable. There was already an order for a split trial and other issues could have been split off once the issues against Harcus Sinclair had been dealt with;

iii) All the claims should have been dealt with in a single trial; as in *Gladman* the matters were "crying out for a single trial". As regards the public interest, the same primary facts would be gone into a second time with great expense and court resource for the second trial, and involving the same witnesses and same documents.

iv) The court would have to form a view of the witnesses again, which might bring the administration of justice into disrepute. In particular, Mr Parker had been cross examined once and his credibility would be in issue again, now facing a claim for conspiracy.

v) The claim was also oppressive to Harcus Sinclair who were accused again by a sidewind; and there may be an issue of bringing in Harcus Sinclair again by a sidewind by way of a contribution claim.

vi) The claim is also oppressive to Mr Moore, a solicitor who would again be subjected to cross examination a second time on his conduct, but through a different lens.

vii) It was also submitted that counsel who had given evidence at the trial of the HS Proceedings would have to give evidence again.

viii) There has also been a not immaterial lapse of time, Mr Moore and Mr Mayer are no longer employed by Therium, and YLL has greater knowledge than

Therium as a result of having pursued the HS Proceedings in the interim period. There will be costs and uncertainty associated with seeking disclosure of material which is protected by orders under CPR 5.4C.

ix) There is a risk of irreconcilable judgments. In particular it is core to the conspiracy claim that there was secrecy or concealment about what was going on. Paragraph 48 of the Particulars of Claim allege that information was withheld from YLL by both Therium and Harcus Sinclair so as to ensure that the claimant was unaware that Therium and Harcus Sinclair were preparing an independent group action. That is said to be irreconcilable with the HS Judgment and in particular with paragraphs 125(8), 159(1) and (2) and 168 thereof (the effect of all of which are set out above).

x) Similarly the plea in relation to breach of confidence and misuse of confidential information was irreconcilable with paragraphs [401] and [402] of the HS Judgment.

xi) Thus it was submitted that the current claim is a collateral attack on the HS Judgment, which is a strong indicator of abuse, and that it would be inequitable and grossly unfair for YLL to escape the findings in the HS Judgment in favour of Harcus Sinclair when bringing a claim against an alleged co-conspirator, in which claim the same allegations are central.

161. Mr Ahlquist accepted that the court has to approach the question of abuse by considering all the relevant factors and making a broad merits based decision as to whether there is abuse.

162. Mr Ahlquist's submissions were as follows:

i) In relation to the points arising from the Aldi guidelines, Mr Ahlquist said that the essential background was the way in which the expedited trial came about. YLL had not in fact made a claim in conspiracy against Harcus Sinclair, which would obviously have been relevant to the relief sought if it had been made. It was wrong to say that there was some decision made by YLL not to plead conspiracy or not to tell the court that it thought it had a claim against Therium. The reality was that Harcus Sinclair and YLL were both doing their best to put all relevant matters before the court, but that was extremely difficult given the way in which the claim arose and the extremely truncated timetable; by way of example, the issue of restraint of trade arose only in closing submissions.

ii) In particular, Mr Ahlquist pointed out that disclosure was taking place not only up to but also during trial. Mr Moore's witness statement and indeed other witness evidence was served on 13 September 2017, disclosure took place (in the particular form set out in paragraph [28] of the HS Judgment and recorded in paragraph [93] above) from 16 September, with specific disclosure applications being determined on 15 and 26 September 2017, and the trial started on 27 September 2017. Mr Johal's evidence is that it was simply unfeasible for YLL even to consider claims against third parties during August/September 2017, let alone articulate those claims, and for this reason his evidence was that YLL had not acted tactically. The letter of 21 April 2023

referring to it being fortuitous that there were two claims, which was relied on by Therium, simply says that the claims could have been raised by way of amendment in the HS Proceedings (sc. in different circumstances), so that there is no issue of abusive collateral use; the letter does not say that YLL considered making such an application.

iii) Further, while the Judge had ordered, in the particular circumstance described in paragraphs [21]-[22] above, that all issues as between Harcus Sinclair and YLL must be decided, he did not make any directions as to any claims between YLL and other potential parties.

iv) Further, Mr Ahlquist submitted that even if it had been practicable to give an Aldi warning, the suggestion that there would have been a single trial was fanciful. The purpose of having the very truncated timetable during vacation was so that the GLO Application could be determined. If, once sufficient disclosure and witness evidence had been put forward, YLL had decided to bring a claim against Therium and had notified the judge, there was nothing that the judge could have done to bring about a single trial in the timetable required for the Emissions Litigation. Therium had not suggested what directions the court would have made. Further, if Therium's submission was that the judge would have put issues against Therium off to a further trial, then Therium has suffered no prejudice.

v) While accepting that the Aldi guidelines are mandatory, it was submitted that failure to comply with those guidelines is one facet of the broad merits based judgment which the court is required to carry out.

vi) Further, the HS Proceedings are still stayed, and there will still have to be a further trial of issues of causation and loss as against Harcus Sinclair. That was necessary because until the Emissions Litigation was finalised, it could not be known what the loss was.

vii) As regards witnesses:

a) Neither Mr Parker nor Harcus Sinclair are parties to the current proceedings, and it would be a matter for Mr Parker whether he wished to give evidence;

b) Mr Moore's witness statement in the HS Proceedings specifically stated that it was not a full account of his involvement, and the CIL/Therium agreement was not in evidence in the HS Proceedings; while it is accepted that there is some overlap between the areas on which Mr Moore was previously cross examined and the areas in which it will be necessary to cross examine him in these proceedings, it is not manifestly oppressive to him to cross examine him on the issues in these proceedings, and unlike *Gladman*, there is no question of a multi-week trial; the whole trial of the HS Proceedings took 4 days.

c) Counsel would not be required to give evidence because the current claim does not rely on the use of the advice and draft pleadings to produce the pleadings which were used by the HS or Slater & Gordon

claimants; it is the insight provided by the advice and pleadings which is relied on;

viii) The claim does not allege dishonesty, but that what was done was done without reference to, or notice to, YLL.

163. Carrying out the broad merits-based assessment which is necessary, and focusing as required on the crucial question whether in all the circumstances YLL is abusing or misusing the court's process, I have concluded that YLL is not abusing or misusing the court's process in bringing a claim against Therium, for the following reasons.

164. As regards the Aldi guidelines, the background is the very unusual circumstances in which the HS Proceedings came to trial. I have set these out in paragraphs [21] – [22] and [89] - [95] above, including the extremely truncated timetable, the evidence as to the timing of the disclosure process, which process itself was far from usual, and the timetable for witness evidence and trial. The evidence given by Mr Johal is that in those circumstances it was simply not practicable to consider, let alone articulate, claims against third parties, and that there had been no tactical decision by YLL to delay a claim against Therium. I asked Mr Warwick to identify when he said that YLL had realised that it had a claim against Therium, and what the evidence was for that contention, and he could only point to the letter of 21 April 2023 referring to it being fortuitous that the claim was brought in separate proceedings. In the very unusual circumstances of this case Mr Johal's evidence is credible, and I accept Mr Ahlquist's submission about the import of the letter of 21 April 2023. The starting point for criticism on the basis that no Aldi warning was given therefore appears to me to be lacking. I do not find that there is any culpability on the part of YLL in the events which have led to the present proceedings.

165. Further, I agree with Mr Ahlquist that, even if I am wrong and that YLL should have alerted the court to the possibility of a claim against Therium in conspiracy, in the very unusual circumstances which pertained, namely that the resolution of the dispute between YLL and Harcus Sinclair was necessary in order to allow the GLO Application to be decided, the court would not have ordered YLL to plead, and would not have attempted to try alongside the claim against Harcus Sinclair, a claim against Therium when the resolution of such a claim was not required in order for the GLO Application to be determined. The HS Judgment makes it plain what an extraordinary burden the legal teams for both Harcus Sinclair and YLL were carrying in order to facilitate the resolution of the GLO Application. Any attempt, by any party, to add to that burden would surely have been dismissed. Further, it would have been completely infeasible to give directions for disclosure by Therium in time. Nor is it easy to see what other directions would have been given which would advantage Therium now and Mr Warwick did not suggest any specific directions which would have been given. I am therefore unable to conclude that Therium has suffered any prejudice from the lack of an Aldi warning.

166. Were it not for the truncated timetable ordered by the court in order to facilitate the GLO Application which had been issued by Harcus Sinclair, there would have been leisure for YLL to consider all claims it had against all parties. The HS Proceedings took place in the way they did because Harcus Sinclair sought to act in the Emissions Litigation in the face of the contractual restriction, and issued proceedings designed to enable it to do that. I bear in mind that the effect of a strike out would be to debar

YLL from bringing arguable proceedings against Therium, thus giving Therium a potential windfall and denying YLL access to the courts; see *Otkritie,* supra.

167. I also bear in mind that it has been said on more than one occasion that where there is no issue estoppel, it is unlikely that a claim by party A against party C who has not previously been sued by A will be an abuse; see *Otkritie*, supra, at paragraph [53], *Aldi* at [6] (paragraph 49(ii) of the citation from *Dexter Ltd v Vieland-Boddy*). In circumstances where there is no issue estoppel, a claim by A against C, where A has previously brought proceedings against B, will only be an abuse if relitigation of the same issues would be manifestly unfair or would bring the administration of justice into disrepute; *Bairstow* at [38(d)].

168. One of the ways in which a second piece of litigation can bring the administration of justice into disrepute is if the second court is asked to make a different decision on the facts on the basis of the same evidence, so that there are inconsistent rulings. It was urged that the judge in the HS Proceedings had formed a view of Mr Parker's character, and had specifically made findings that he had not read the HS NDA and as to the reason for Mr Parker's non-disclosure of his dealings with Slater & Gordon, while the claim in conspiracy would necessarily seek to persuade the court to make a different finding. However, for two reasons I am not persuaded that the current action is abusive as being a collateral attack on the HS Judgment.

169. First, it is clear that the evidence before the court at a trial of the present action will be very different from the evidence at the trial of the HS Proceedings. Therium will be giving disclosure. It is possible that some but not all of the documents which were disclosed in the HS Proceedings will be available for use in this action. Mr Moore, if willing to give evidence for Therium, will be covering the whole of the relevant issues and not just the limited areas covered in his earlier witness statement. It does not bring the administration of justice into disrepute if different decisions are made by different courts on different evidence. As said in *Calyon* at [37]:

"*Relitigating the point [as to ownership] would neither be manifestly unfair to them, nor bring the administration of justice into disrepute. That would remain the position even if the Gibraltar court reached a different conclusion as to the ownership of the Collection at the relevant time; the interests of justice would be served, provided that the court's judgment was correct, having regard to the evidence adduced before it".*

170. Second, the overlap between the HS Judgment and the conspiracy claim (or the breach of confidence claim) in this action is not as extensive as Therium suggests. Although there are many facts which are common to both claims, those facts are mostly either the sending of documents or the existence of meetings and are largely uncontentious. The Judge did make a finding that Mr Parker had not read the NDA, and a finding about Mr Parker's character, and as indicated in the discussion of the summary judgment application, YLL is not in this action alleging that Mr Parker knew of the restriction contained in Sentence 2, or alleging that either party knew of the provisions of the HS NDA prior to January 2017. However, the Judge only considered the reasons for Mr Parker not disclosing his dealings with Slater & Gordon. He made no findings about Mr Parker's reasons for not disclosing his dealings with Therium and other matters complained of in paragraph 32 of the Particulars of Claim. He was considering different claims to which those reasons were not relevant. Indeed, the HS Judgment makes some findings which would be

positively helpful to YLL – but as Therium correctly submit, Therium is not bound by those findings and the findings are not evidence which can be used against Therium at trial. YLL is not suggesting that the HS Proceedings should have been decided differently – they were, on the whole, the successful party in that litigation. I note also that issues of causation and loss/damage are still to be tried in the HS Proceedings.

171. I do not therefore consider that these proceedings can be characterised as a collateral attack on the HS Judgment, or that they are an abuse of the process of the court on the grounds that they will bring the administration of justice into disrepute.

172. As regards oppression, I am unpersuaded that it is oppressive to Therium that these proceedings should be brought. The facts of this case are quite different from the facts of *Gladman*, and are closer to the facts of *Gleeson v Wippell* or *Resolution Chemicals*. I do not regard the fact that Mr Moore gave evidence in the earlier proceedings on two specific issues as meaning that Therium is being vexed twice, or that it would be oppressive for proceedings to be brought against Therium. I am also unpersuaded that the fact that it would clearly be abusive to bring a claim in conspiracy against Harcus Sinclair means that it would be abusive to bring proceedings against Therium; neither is it necessary to pursue all parties to a conspiracy if it is not desirable or possible to bring proceedings against one of them.

173. As regards oppression to Harcus Sinclair or Mr Parker, I am unpersuaded in the broad merits-based assessment that, even if oppression to a third party or a witness rather than the defendant in the second action would be sufficient in some cases to render the second action abusive, it is so in this case. On the relevant hypothesis, on the one hand YLL would be deprived of a good claim in conspiracy against Therium to which Harcus Sinclair, ex hypothesi, was party. On the other hand, Mr Parker signed a contract which he did not read, and Harcus Sinclair acted in breach of that contract (as found in the HS Proceedings) and insisted on continuing to act in the Emissions Litigation and bringing the HS Proceedings in order to permit it to continue to do so even when Harcus Sinclair and Mr Parker were well aware of the restriction contained in Sentence 2. YLL was therefore bounced into the HS Proceedings and the truncated timetable with the consequence that there was no time or capacity to consider claims against third parties. It was Harcus Sinclair's actions, not YLL's, which have led to the difficulties encountered.

174. Neither am I persuaded that the fact that these proceedings were not brought until March 2022 renders them oppressive. If it had not been for the issue of whether Harcus Sinclair could act for the HS Claimants, which needed to be resolved because of the GLO Application in the Emissions Litigation, it is highly unlikely that any litigation would have been brought until the Emissions Litigation had finished because until then it could not be known whether any loss had been suffered. There is no limitation issue, and Therium is in no different position from many litigants who are sued late in the limitation period (if indeed that is what has happened here).

175. For the reasons set out in paragraph [70] above, I am not persuaded by Mr Warwick's submissions based on a collateral attack on paragraphs [401] and [402] of the HS Judgment and oppression to counsel who had given evidence once and would have to do so again. Those submissions deal with a case which YLL is not running.

176. Accordingly, I do not consider that YLL's claim against Therium is an abuse of the process of the court, and therefore it should not be struck out.

CIL's abuse of process case.

177. As indicated in paragraph [72] above, CIL also sought to strike out the claim as an abuse of process on a much more limited basis. The submission was that the claim sought to go behind the construction of the HS NDA terms arrived at by the Court of Appeal, and in that it sought to go behind the factual findings set out in paragraphs 402 to 409 of the HS Judgment.

178. I have dealt with these two submissions in a different context in paragraphs [53]-[60] and [70] above. Considering the broad merits-based assessment which is required, I do not consider that the claim against CIL is an abuse of the process of the court. For the reasons set out in paragraphs [53]-[60] and [70] above I consider that YLL have an arguable case on those two points, and that the case now being run for YLL is not precluded by the decision in the earlier proceedings. There is no question of an issue estoppel arising. As explained above, if there is no issue estoppel, then a claim against a party which was not party to an earlier proceeding is only likely to be an abuse if relitigation of the same issues would be manifestly unfair or would bring the administration of justice into disrepute. In my view there is no collateral attack on the HS Judgment here for the reasons given in paragraphs [53] to [60] and [70] above, neither is there any oppression of CIL.

Conclusion

179. It follows that the applications made by each of Therium and CIL are dismissed.

180. The parties should consider and if possible agree the directions which should be made as a result of my determination in paragraph [81] above. If the parties cannot agree then I will hear counsel on the question of what directions should be made.

181. I invited submissions from those interested as to whether any part of this judgment should be redacted. Neither the parties nor Harcus Sinclair UK Limited nor Mr Parker has contended that this judgment should be redacted, and I consider that it is not necessary to redact it. I have considered the interests of the claimants in the Emissions Litigation, which has now settled, and consider that there is nothing in this judgment which is confidential or privileged to those claimants which the interests of justice require should be redacted. Accordingly, this judgment is to be published in unredacted form.

182. It is readily foreseeable that there may be overlapping issues relating to quantum and loss in these proceedings and in the balance of the Harcus Sinclair proceedings. The parties in both proceedings should therefore consider how best to manage those issues and seek directions accordingly.

183. I thank all counsel for their helpful submissions, which traversed a great deal of ground in a very short time.