Case No. 12629-2024

BEFORE THE SOLICITORS DISCIPLINARY TRIBUNAL

IN THE MATTER OF THE SOLICITORS ACT 1974

B E T W E E N:

SOLICITORS REGULATION AUTHORITY LIMITED

Applicant

-and-

CHRISTOPHER MARK HUTCHINGS

Respondent

RESPONDENT'S SKELETON ARGUMENT
For Substantive Hearing
commencing on 13th October 2025

THIS SKELETON ARGUMENT MAKES REFERENCE TO INFORMATION THAT WOULD ORDINARILY BE CONFIDENTIAL AND, IN PART, PRIVILEGED; SUCH INFORMATION IS INCLUDED ON THE BASIS OF THE ANONYMISATION PROTOCOL AGREED BETWEEN THE PARTIES AND ON THE PREMISE THAT SUCH PROTOCOL, AND ANY OTHER NECESSARY PROTECTIONS, WILL BE FOLLOWED AT THE SUBSTANTIVE HEARING.

Page references are to the Substantive Hearing Bundle on Case Lines. The Core Bundle at ***[T1-T516]*** *has been anonymised (by way of redaction) in accordance with the Anonymisation Schedule at* ***[A40-A44]****. In addition to the parties' skeleton arguments, the following is suggested by way of pre-reading, if possible (time est. 1 day): the statements of case* ***[T3-T126]*** *and the witness statements* ***[T130-T241]****. This skeleton argument applies the Anonymisation Schedule and the Respondent will refer to the Core Bundle, wherever possible, while the Substantive Hearing is in public session, to minimise the risk of jigsaw identification of either Client A or Client B.*

A Introduction

1 This skeleton argument is filed on behalf of the Respondent in advance of the Substantive Hearing.[1]

2 Each of the Allegations which fall to be determined at this Substantive Hearing concern what is alleged to have been said by the Respondent in a telephone call which took place almost exactly seven years ago, on 18 October 2018, between the Respondent and Solicitor G (the "**Call**").

3 The Respondent, a partner at Hamlins LLP ("**Hamlins**"), had represented Client A in proceedings for libel (and associated causes of action) brought against Client B. Those proceedings concerned various false and defamatory allegations which had been made against Client A, by Client B, in Publication 1.

4 Client A was and is a solicitor. The allegations made by Client B were of the most serious kind, to the effect that Client A had been heavily involved in fraud and other criminal conduct in relation to the Scandal.

5 The proceedings were ultimately settled by way of a Consent Order, in which Client B admitted that the allegations against Client A were false and defamatory, consented to judgment being entered in Client A's favour, and gave comprehensive undertakings to the Court accordingly. Solicitor G, then a senior associate at Company H, was part of the legal team which represented Client B in those proceedings.

6 After the substantive proceedings had been settled, there continued to be various issues regarding Client B's compliance with the terms of the Consent Order. One such issue involved Client B publishing further allegations, in Publication 2. This led to the Call which was arranged between the Respondent and Solicitor G, to discuss such matters on a without prejudice basis.

[1] The Respondent recognises that this skeleton argument is longer than may ordinarily be the case. However, given that: (i) the timetable for the Substantive Hearing is relatively tight; and (ii) the Respondent is unlikely to have the opportunity to make detailed written closing submissions, the Tribunal is likely to be assisted by having in a single document a detailed narrative of the underlying events (particularly for the purposes of proper consideration of the Respondent's defence to Allegation 1.2).

7 The following Allegations are made against the Respondent by the SRA.

8 **<u>Allegation 1.1</u>**: the SRA alleges that during the Call the Respondent made the following assertions which were false and/or misleading:

(a) That the Respondent had spoken to Counsel and that he had been told that his client had a strong case for bringing contempt proceedings, or words to that effect (**Allegation 1.1.1**); and/or

(b) That Client A had heard only yesterday about references to Client A in Publication 2, or words to that effect (**Allegation 1.1.2**)

and in doing so the Respondent breached any or all of Principles 2[2] and 6[3] of the SRA Principles 2011 (the "**Principles**") and failed to achieve Outcome 11.1 of the SRA Code of Conduct 2011 (the "**Code**").[4] Allegation 1.1 is also advanced on the basis that the Respondent's conduct was dishonest (albeit the SRA's case is that proof of dishonesty is not required to establish the Allegation or any of its particulars).[5]

9 **<u>Allegation 1.2</u>**: the SRA alleges that during the Call the Respondent also improperly made a threat of litigation, and in doing so breached any or all of Principles 1,[6] 2 and 6 of the Principles and failed to achieve Outcome 11.1 of the Code.[7]

10 Each of the Allegations are denied by the Respondent, for the reasons set out in detail in his Answer[8] and explained further below:

(a) **<u>Allegation 1.1</u>**: The Respondent did not make either of the assertions/statements alleged by the SRA, and in any event his conduct was not dishonest. The evidence relied upon by the SRA comes nowhere near establishing such serious

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[2] Principle 2: to "*act with integrity*".

[3] Principle 6: to "*behave in a way that maintains the trust the public places in you and in the provision of legal services*".

[4] Outcome 11.1: not to "*take unfair advantage of third parties in either your professional or personal capacity*".

[5] Rule 12, para. 1.1 **[T3-T4]**.

[6] Principle 1: to "*uphold the proper administration of justice*".

[7] Rule 12, para. 1.2 **[T4]**.

[8] **[T39-T116]**.

allegations, and is inconsistent with various other pieces of evidence which demonstrate that the Respondent did not make such assertions/statements;

(b) **Allegation 1.2**: The Respondent did not make any improper threat of litigation, as alleged by the SRA. The Respondent acted in accordance with his professional duties (and in his client's best interests) throughout.

11 The parties have agreed a timetable for the 5-day Substantive Hearing as follows:[9]

(a) Any housekeeping and the SRA's oral opening on the morning of **Day 1** (13 October 2025);

(b) The SRA's factual evidence on the afternoon of **Day 1** and on **Day 2** (14 October 2025);

(c) The Respondent's factual evidence on **Day 3** (15 October 2025) and **Day 4** (16 October 2025);

(d) The Respondent's oral closing on the morning of **Day 5** (17 October 2025); and

(e) The Tribunal to deliberate, announce its decision on the facts, and hear submissions on sanctions/costs and make a decision on such matters (if required) on the afternoon of **Day 5.**

B Witnesses

12 The SRA relies upon the evidence of two witnesses, each of whom will give oral evidence at the Substantive Hearing: (i) Client B;[10] and (ii) Solicitor G.[11]

13 The following witnesses will give oral evidence on behalf of the Respondent at the substantive hearing: (i) the Respondent himself;[12] (ii) Mr Callum Galbraith (formerly a

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[9] See **[G40-G44]** and **[G53-G57]**.

[10] Client B's WS dated 14 March 2024 is at **[T218-T221]**.

[11] Solicitor G's First WS dated 14 May 2024 is at **[T222-T232]** and Solicitor G's Second WS dated 11 April 2025 is at **[T235-T241]**.

[12] The Respondent's WS dated 7 January 2025 is at **[T130-T164]**.

partner at Hamlins, who also formed part of the team representing Client A);[13] and (iii) Counsel L (Counsel instructed by the Respondent to represent Client A in the underlying proceedings against Client B).[14]

14 The Respondent also relies upon a witness statement from Client A dated 14 December 2024.[15] That statement is relied upon as hearsay evidence, by way of a Civil Evidence Act Notice (which is not opposed by the SRA).[16] Client A will accordingly not be giving oral evidence at the Substantive Hearing.

15 Further, the Respondent relies upon witness statements from: (i) Mr Andrew Stephenson;[17] (ii) Mr Duncan Lamont;[18] (iii) Mr William Bennett KC.[19] Their evidence largely (though not exclusively) concerns matters going to the Respondent's character/propensity. The SRA has elected not to cross-examine such witnesses at the Substantive Hearing.

16 The anonymisation and privacy regime which has been agreed and/or ordered in this case is very extensive. This is because of the need, in addressing the Allegations, to make detailed reference to privileged material belonging to either or both of Client A and Client B. Further, the risk of jigsaw identification in this case is particularly acute, given that the underlying litigation between Client A and Client B was public, and the matters which that litigation concerned are themselves high-profile. Accordingly:

(a) There is a detailed and extensive Anonymisation Schedule which has been agreed between the parties, and which will be used whenever the Substantive Hearing is in public session.[20] This anonymises not merely the identities of various individuals and entities, but also a series of dates which would otherwise reveal precisely when the underlying litigation took place. The Core Bundle

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[13] Mr Galbraith's WS dated 17 December 2024 is at **[T165-T173]**.

[14] Counsel L's WS dated 19 December 2024 is at **[T187-T204]**.

[15] **[T174-T186]**.

[16] **[D66-D67]**.

[17] Mr Stephenson's WS dated 2 January 2025 is at **[T205-T208]**.

[18] Mr Lamont's WS dated 5 December 2024 is at **[T209-T212]**.

[19] Mr Bennett KC's WS dated 18 December 2024 is at **[T213-T217]**.

[20] **[A40-A44]**.

applies (by way of redaction) that Anonymisation Schedule to the statements of case, witness statements and certain key underlying documents;

(b) The Tribunal has previously ruled that the oral evidence of both Client B and Counsel L shall be heard wholly in private.[21] This is because each are public (or semi-public) figures who may well be recognised, and therefore identified, simply by virtue of giving their evidence in public;

(c) The Tribunal has also ruled that the oral evidence from <u>any</u> witness which relates to the underlying litigation between Client A and Client B is to be heard in private (by which it is meant any evidence relating to the events up to the Consent Order on Date 65).[22] That is likely to mean that the evidence of the other witnesses is heard partly in public and partly in private;

(d) The Tribunal has made a Rule 35(9) direction prohibiting the disclosure or publication of any matter likely to lead to the identification of any person, entity or other matter anonymised in the proceedings.[23]

C Factual Background

17 Client B is a campaigner and activist, who has reported extensively into the Scandal via Publication 1 (which Client B owns and operates). The Scandal itself is extremely high-profile. It concerned a very significant fraud, involving the theft of billions of dollars from the Fund, and it has spawned criminal and civil proceedings in jurisdictions around the world.

18 As part of that reporting, in Publication 1 Client B made various allegations against Client A personally in relation to their alleged involvement in the Scandal. Client A is a solicitor, who originally worked as an associate at Company F, before moving to become general counsel at Company E.

19 The allegations which Client B made against Client A were of the most serious kind. They did not merely associate Client A with the Scandal in passing; they stated that

[21] See **[F52]** and **[F53]**.

[22] See **[F52]**.

[23] See **[F54]**.

Client A had "*helped mastermind*", and was "*one of the co-conspirators*" in the Scandal, implying that Client A should be in prison but was "*currently… walking free*".[24] Many such allegations were also illustrated with Client A's stolen passport photograph.

20 There was no real evidential basis to make such allegations and, contrary to standard journalistic practices and not in accordance with responsible journalism, Client B had made no attempt to make enquiries of Client A for comment before publishing them. Client B was not writing pursuant to employment or commissioning by a reputable news organisation, with the editorial and legal oversight and fact-checking services that would involve. As set out below, it is notable that when challenged on the factual or evidential basis for such allegations by Hamlins, Client B made no real attempt to justify or substantiate them.

21 In one piece of Publication 1 Content published by Client B on Date 6, reference was made to a decision of the High Court handed down on Date 3, in which various adverse findings had been made about Client A's conduct. That decision was, at the time of publication, the subject of an appeal and, on Date 10, the Court of Appeal handed down its decision, which overturned the High Court's findings, and made express findings exonerating Client A's conduct, including that Client A's actions were "*not fraudulent in any sense*", that Client A was "*entitled*" to act as they had done, and that Client A "*was not dishonest*".[25] It was in this context that Client A first instructed Hamlins.

22 It is necessary to set out the events which concern the underlying proceedings between Client A and Client B in some considerable detail. Such events are largely ignored, or glossed over, by the SRA in its Rule 12 Statement. However, they are critical to understanding the flaw in the SRA's case, for the purposes of Allegation 1.2, that the copyright licence sought by Client A in October 2018 was some kind of improper collateral advantage. In fact, that licence represented one means of addressing what had always been Client A's overriding aim throughout their instruction of Hamlins and their dispute with Client B – i.e., seeking to limit the reputational harm which had been

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[24] See Counsel L WS, para. 34 **[T197]**.

[25] **[B45-B67]**. As set out below, and contrary to their evidence in these proceedings, Client B must have known of the Court of Appeal's decision since at least early in Date 4.

caused by very serious false and defamatory allegations originally put into the public domain by Client B including the ongoing republication of such allegations by third parties.

C.1 Events prior to issue of proceedings

23 On Date 7, Client A emailed the Respondent for the first time, making contact in respect of the Publication 1 Content. In this email, Client A sought Hamlins' assistance "*with respect to false and misleading allegations made by [Client B] and [Publication 1]*", seeking to discuss the matter "*as soon as possible*", owing to "*a Court of Appeal judgment that is due to be released this week and is directly relevant to certain of [Client B's] false and misleading allegations*".[26]

24 Following an initial call which took place between the Respondent and Client A on Date 8, the Respondent emailed Client A with his initial advice on Date 9. This email included the following advice:[27]

"*1. Libel*

The statements made about you personally are plainly defamatory, including serious allegations that you were connected with fraudulent actions in your capacity as general counsel for [Company E]. You have identified 19 [pieces of Publication 1 Content] of this nature, and it is clear from the content… that their author is determined to link you to allegations of corruption. These allegations are clearly highly damaging to you, particularly in your capacity as a solicitor…

…

4. Right to be forgotten

The information published about you is untrue and inaccurate, and on this basis you may apply to a search engine to remove links to [Publication 1's] web pages from a list of results displayed following a search against your name. However, there is no guarantee that this will result in removal of the links. We would apply to Google and

[26] **[B36]**.

[27] **[B42-B43]**.

in our experience this can be both slow and uncertain as there is no constructive engagement process with that third party."

25 Accordingly, right from the very outset, Client A was concerned not merely with the original publication of defamatory allegations on Publication 1 by Client B, but also with the republication of those same allegations by third parties.

26 A first draft of a Letter of Complaint to be sent to Client B was prepared by Hamlins and sent to Client A on Date 11.[28] This first draft made complaints in respect of 12 separate pieces of Publication 1 Content which mentioned, and made allegations against, Client A.

27 On Date 13, the Respondent emailed Counsel L with preliminary instructions to act for Client A. This email stated:[29]

"...

- *[Client A's] objective is to cause the publisher to engage and remove references to [Client A] from the articles which continue to be published, rather than removal. The draft letter of complaint adopts an approach seeking to encourage a sensible response, rather than threatening immediately to sue.*

- *[Client A] is also concerned to limit the prospects of [Client B] drawing [Client A] into a legal battle about [the Scandal], [Company E], [the Fund] or other directors. [Client A] does not want to pursue full-blown action if it were to give [Client B] a platform to do so.*"

28 In an initial call between Counsel L and the Respondent on Date 13, Counsel L advised that there was a "*strong case for the [Publication 1 Content of Date 6] to be taken down/clarified, in light of CoA judgment*".[30] An initial conference was then held between Hamlins, Client A and Counsel L on Date 14.[31]

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[28] **[B68-B76]**.

[29] **[B77-B78]**.

[30] **[B80]**.

[31] **[B81-B85]**.

29 On Date 16, the Supreme Court refused an application for permission to appeal against the Court of Appeal decision of Date 10, stating its opinion that the Court of Appeal "*reached what was plainly the correct result*".[32]

30 On Date 17, Counsel L provided a written Opinion to Client A in respect of Client B and Publication 1.[33] As set out in Counsel L's advice:

(a) Counsel L's view was that Client A's prospects of success in defamation proceedings against Client B were "*in principle, high*";

(b) However, success in such proceedings "*could come at a very high price, in particular owing to the publicity that such proceedings would attract and the increased public profile this would give to [Client B] and [Publication 1]*". Counsel L noted that litigation is "*rarely the ideal strategy for tackling a campaigning blogger… whose allegations the mainstream press would be excited to have any lawful excuse to repeat*";

(c) Counsel L also noted that "*a successful judgment rarely receives the degree of publicity that sensational accusations attract, even grossly erroneous accusations*". Further, there was a "*significant incentive for [Client B] to exploit rather than settle litigation, treating the case as a marketing opportunity for [Client B's] campaign and blog and thereby committing [Client A] to considerably more time, energy and expense than the matter ultimately warrants, notwithstanding [Client A's] high prospects of ultimately prevailing in the legal proceedings*";

(d) In particular, a defamation action, whatever its ultimate outcome, "*would provide [Client B] with a wider public platform [to] campaign and ventilate [Client B's] defamatory allegations against [Client A]*", and the proceedings and Client B's allegations "*could be (and very likely would be) widely reported and commented upon in the press and on other media and social media platforms in this country and elsewhere*";

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[32] **[B86-B88]**.

[33] **[B110-B123]**.

(e) Accordingly, such matters were "*powerful factors pointing to why the bringing of such proceedings could well prove counter-productive*" and, for those reasons and "*notwithstanding the high prospects of success*", a claim for defamation against Client B would "*be almost certainly very ill-advised*";

(f) Counsel L's advice concluded: "*There are no easy solutions for problems of this very difficult and fraught nature but I have no doubt at all that the safest course here by far is to avoid direct confrontation of [Client B] through legal proceedings*".

31 Discussions in relation to the draft Letter of Complaint continued between Hamlins, Client A and Counsel L during Date 4.

32 The Respondent also began taking preliminary action on Client A's behalf in respect of the republication of allegations on third party websites. On Date 20, the Respondent sent a request to Google that search results in relation to the Publication 1 Content of Date 6 be removed, on the basis that it was "*stale, inaccurate and highly misleading*". Google responded to this request on Date 21 stating that it had decided not to take action in respect of such results.[34]

33 On Date 23, the Respondent sent an email to Counsel L providing an update on the status of the matter, together with an updated draft of the Letter of Complaint.[35] The email stated:

"*... given Google's refusal to remove the link to the [Publication 1 Content] re the legal rulings relating directly to [Client A], [Client A] wants to change tack and to proceed with a reduced-scope complaint to [Publication 1]. [Client A] relayed to me an anecdote of a complainant [they have] learned of who made a complaint to [Client B] for defamation recently. [Client B] delayed response to the point the complainant was forced to issue proceedings. After being served with Particulars, I am informed that [Client B] capitulated and agreed to take down the offending article but on the basis there was some sort of confidentiality agreement.*"

[34] **[B124-B126]**.

[35] **[B135-B136]**.

34 On Date 24, Hamlins sent a formal Letter of Complaint to Client B on Client A's behalf.[36] In this Letter of Complaint:

(a) Hamlins stated that the continuing publication of the Publication 1 Content of Date 6 was "*out of date, inaccurate and highly misleading*" following the subsequent Court of Appeal decision. Further, Client B was in fact aware of that subsequent decision, as evidenced by two more recent pieces of Publication 1 Content concerning Company E. Continuing publication was not in the public interest;

(b) It was further noted that in the Publication 1 Content of Date 6 Client B had made use of a stolen passport photograph of Client A which Client B had no right to have in their possession or publish;

(c) Accordingly, Hamlins requested that, by close of business on Date 32, Client B would: (i) take down the Publication 1 Content of Date 6 (ii) publish a corrective statement; (iii) provide a written undertaking not to make these or any similar reference to Client A in future; (iv) remove Client A's stolen passport photo from all posts; (v) make proposals as to damages; and (vi) confirm they would provide an indemnity in respect of legal costs;

(d) Hamlins also drew attention to "*other false and highly defamatory statements*" about Client A published by Client B in other Publication 1 Content, stating: "*We will be writing to you about these separately in due course, but after you have responded to the requests in this letter to the complete satisfaction of [Client A]*";

(e) Hamlins concluded by emphasising that "*it is not the practice or style of [Client A] to issue threats of legal action*" but that, in the absence of Client B's agreement to take the requested steps by the stated deadline, Client A had instructed Hamlins "*necessarily to serve and then pursue legal proceedings in the High Court*" against Client B.

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[36] **[X154-X156]**.

35 Client B made two responses to the Letter of Complaint on the following day, Date 25:

(a) At 11:52, Client B sent an email to Hamlins stating: "*The last I looked at this matter I understood that the Court of Appeal Ruling had been forwarded to the Supreme Court. Having had my attention drawn to the matter I have now seen that subsequent to my original [Publication 1 Content] at the start of the year… the Supreme Court has declined the appeal. I am happy to make this rectification and clarification in any [Publication 1 Content] where I have referred to this matter. I will not take down the [Publication 1 Content] of [Date 6], because it was accurate at the time of writing – the Court of Appeal reversal was announced [Date 12] and it was immediately made known there would be an appeal… On the other hand, I will be happy to post a clarification and update on the [Publication 1 Content].* Thus, Client B refused to take down the Publication 1 Content of Date 6, on the purported basis that it was "*accurate at the time of writing*", as the "*Court of Appeal reversal was announced [Date 12]* (sic) *and it was immediately known there would be an appeal…*";[37]

(b) At 18:37, Client B sent a further email to Hamlins, informing them of having "*made reasonable clarifications to the [Publication 1 Content] complained of… in light of the subsequent information you drew my attention to, regarding the decision by the Supreme Court not to review the judgment of the Appeal Court…*".[38]

36 Hamlins wrote in response to Client B's emails on Date 26.[39] In this letter:

(a) Hamlins noted that the Publication 1 Content of Date 6, which Client B had declined to take down continued to contain material which was "*wrong and misleading*" in regard to Client A. It was therefore "*with considerable*

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[37] **[B142-B143]**. Client B's evidence in these proceedings is that they did not find out about the Court of Appeal's decision until first being approached by Hamlins on Date 22 – see Client B WS, para. 15 **[T219]**. That is transparently false: as this email makes clear, Client B must have been aware of the Court of Appeal decision since at least early in Date 4, as otherwise they could not have known that the matter "*had been forwarded to the Supreme Court*".

[38] **[B145]**.

[39] **[B148-B151]**.

reluctance" that Client A had now instructed Hamlins "*to commence the preparation of legal proceedings against you unless within the next 24 hours you have rectified matters to [Client A's] satisfaction*";

(b) Hamlins went on to set out the "*true position*" in relation to various Publication 1 Content.

37 On Date 27, Client B responded to Hamlins by letter.[40] Client B continued to refuse to take down the Publication 1 Content of Date 6, while also seeking to rely on s. 8 of the Defamation Act 8 of the Defamation Act in respect of various of the other Publication 1 Content which had been cited by Hamlins.

38 Hamlins wrote in response to this letter on Date 28, noting that it clearly demonstrated Client B's "*lack of appreciation for the significance and potential implications of making such serious and highly defamatory allegations pertaining to a professional lawyer living and working in this jurisdiction*". Hamlins further noted that, in the absence of Client B's agreement, without reservation, to take the outstanding steps requested by Date 31, they were "*instructed to proceed with the formal steps to pursue legal action*".[41]

39 On Date 31, Client B emailed Hamlins stating they would remove the Publication 1 Content of Date 6, but without any "*admission of liability whatsoever on [Client B's] part*". Client B also stated that they had "*extensive documentary evidence and also witnesses*" to confirm that a number of claims made on behalf of Client A were untrue, and reserved the right to publish "*extensively*" on the detail of Company E's ventures, at a time Client B believed to be appropriate, stating this to be the "*final position*" on Hamlins' demands.[42]

40 Hamlins responded to Client B by letter on Date 33 noting that Client B's response was "*not remotely satisfactory*" to Client A, who had "*thus instructed us to issue*

[40] **[B152-B154]** (this is a version which contains Client A's comments, correcting the various inaccuracies in Client B's letter).

[41] **[B168-B171]**.

[42] **[B172]**.

proceedings against you, which we anticipate doing tomorrow, [Date 34]".[43] The letter complained that the footnote now added by Client B "*instead of retracting your allegation that our client helped to mastermind the theft of money from [The Fund], you have compounded the injury to [their] reputation by publishing a fresh libel, falsely attributing to [them] the claim that [they] were only following instructions…*". It further stated:

"*[Client A] is now only prepared to desist from serving upon you legal proceedings in respect of the [Publication 1 Content] of [Date 6] if you now agree as a minimum:*

(a) *to remove to [Client A's] complete satisfaction <u>all</u> references to [Client A] in your postings;*

(b) *to remove [Client A's] stolen passport photograph from <u>all</u> postings where it appears;*

(c) *to give undertakings in writing in terms agreed with this firm not to repeat your defamatory references or republish [Client A's] photograph; and*

(d) *to indemnify our client for the legal costs… incurred in this matter.*"

41 Client B responded by email on Date 34 stating that the Publication 1 Content of Date 6 had now been removed. However, Client B concluded by stating they reserved their rights entirely on the matter and did "*not accept any liability whatsoever*".[44]

42 Also on Date 34, Hamlins issued a Claim Form against Client B on Client A's behalf. This Claim Form sought various remedies, including damages for libel and/or malicious falsehood in respect of the Publication 1 Content of Date 6, and an injunction to restrain Client B by themselves "*or through others or by any means whatsoever, from the continued publishing or causing or authorising the publication of the same or similar words defamatory of and concerning [Client A]*".[45]

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[43] **[B179-B181]**.

[44] **[B182]**.

[45] **[B189-B191]**.

43 The same day, Hamlins sent a letter to Client B which enclosed (but did not serve) the Claim Form.[46] In this letter:

(a) Hamlins welcomed the partial removal of the Publication 1 Content of Date 6, but noted that the link to this content and its meta description (including Client A's name) remained active and accessible on Google, and the "Comments" section of the Publication 1 Content of Date 6, which included express reference to Client A in defamatory terms, had also not been removed;

(b) Hamlins further noted that Client B had still not complied with any of the other requirements set out in their Date 33 letter and had failed to engage with them entirely, and that in these circumstances Client B had been "*compelled to issue proceedings today*" and had retained Counsel L.

44 Client B responded to this letter by email at 22:00 on Date 34, making various requests, including that Hamlins explain the legal basis on which all references to Client A could be removed from Publication 1, "*given many of the articles are time limited*".[47]

C.2 Events after issue of proceedings and prior to Consent Order

45 On Date 35, Client A emailed the Respondent noting that Client B had now "*updated the meta-tags in [Client B's] stories*" to add Client A in, such that a Google search for "Client A Company E" would now only return hits from Publication 1. Client A noted that: "*This wasn't like this before yesterday and is typically vindictive*".[48]

46 On Date 36, Client A sent a further email to the Respondent noting that Client B appeared to have taken down a second piece of Publication 1 Content which mentioned Client A, and that it was possible that Client B was "*seeking to minimise risk on all articles that are within the limitation period, then hide behind section 8 for the others*".[49]

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[46] **[B192]**.

[47] **[B187]**.

[48] **[B193]**.

[49] **[B196]**. This was a reference to s. 8 Defamation Act 2013 which, together with s. 4A Limitation Act 1980, has the effect that no action for libel or slander may be brought after the expiration of one year from the date of first publication.

47 On Date 37, the Respondent emailed Client A attaching the first draft of a response to be sent to Client B.[50] His email noted:

"*As discussed on a number of occasions, once proceedings are commenced, litigation can build momentum. Costs (including non-recoverable costs and [Client B's] solicitors costs, in the event [they] were to defend some or all of [their] pages) will continue to be accrued and will escalate once proceedings have commenced. Moreover, I know you're acutely aware of the risks in terms of disclosure and [Client B] broadening issues to include documents which would then risk being aired in public. Its therefore vital, per your views and ours, that we all understand these underlying risks and we continue to approach matters from a highly strategic perspective*".

48 The response to Client B was then sent by Hamlins on Date 38.[51] In this letter:

(a) Hamlins noted that the removal of two pieces of Publication 1 Content "*goes some small way towards mitigating the serious harm continuing to be caused to [Client A's] reputation*", but "*in no respect*" did the steps taken by Client B thus far provide Client A with "*the remedial actions necessary to resolve [Client A's] complaint in advance of service of the Claim*";

(b) Further, in response to Client B's suggestions that claims in respect of publications which pre-dated the Publication 1 Content of Date 6 were time-barred, Hamlins noted that if the Court were to uphold Client A's libel complaint in respect of the words complained of, Client A "*can expect to be granted an injunction against you against further repetition of the same or a similar defamatory allegation*", which would "*compel you to take down all postings that refer to our client in that way (so in effect all references to [Client A]) regardless of their dates of first publication*";

(c) Hamlins repeated again that in order to avoid service of the issued Claim Form, Client B would be required to: (i) remove all references to Client A in Client B's postings to Client A's complete satisfaction; and (ii) remove all postings of Client A's stolen passport photograph. Were Client B to carry out those

[50] **[B198-B204]**.

[51] **[B3846-B3853]**.

I125

requests, Client A was prepared to "*consider afresh at that point whether to press on against you for damages and costs in respect of those causes of action set out in the issued Claim Form*", but "*would of course expect you to offer a suitable undertaking to protect [Client A's] position in the future*";

(d) Hamlins also drew Client B's attention to their legal responsibility for the republication of Publication 1 Content by others, on third party websites (the "**Third Party Republications**"):

"*We should add that [Client A] is now aware of a number of websites and webpages, in English [and other foreign languages] (including on your own [Publication 1]), which have cloned substantial parts of the material you publish regarding [Client A]. This includes the highly defamatory material contained in the two [pieces of Publication 1 Content] that you have purported to remove from [Publication 1], which you should now take immediate steps to have taken down.*

As we point out below, the republications by others of your posting are also ***your*** *legal responsibility. Our client holds you responsible for all material of which you are the author wherever or by whomsoever it is re-published. Such republication of your defamatory allegations by other publishers is a foreseeable consequence of your own postings for which you can be made liable to pay our client in damages for the wider injury to [their] reputation. It is sometimes referred to as part of the 'grapevine' effect.*"

49 It should be noted that in many cases these Third Party Republications did not merely reproduce certain parts of the Publication 1 Content: they copied and reproduced them word-for-word, not only in terms of the text itself but also the headlines and images from the original Publication 1 Content.

50 Client B responded to Hamlins by email on Date 39, noting that they had "*been travelling the last few days*" but would "*come back to you by the start of next week*".[52] No substantive response having been received, Hamlins sent a letter to Client B on Date

[52] **[B205]**.

40 requiring such a response by Date 41.[53] On Date 42, Hamlins sent a further letter to Client B noting the lack of such a response and stating they would take steps to arrange service on Client B personally.[54]

51 At 11:26 on Date 42, Solicitor G sent an email to Hamlins noting that Company H had now been instructed by Client B and stating that they were currently preparing a response on Client B's behalf.[55] On Date 43, Hamlins agreed to Company H's request that such response be provided by Date 44.[56]

52 In the event, the response was not provided by Company H until Date 45. This letter did not set out a substantive defence to the majority of Hamlins' correspondence, instead alleging that Client A's complaints remained inadequately particularised.[57] As Counsel L noted, having reviewed Company H's response, it represented "*a complete failure to engage with the merits and the facts and nothing but tactics of prevarication and fishing*".[58]

53 Hamlins responded to Company H's letter on Date 47.[59] This letter concluded by observing that Client A had given Client B "*one opportunity after another to avoid legal proceedings against [them]*", and that Client A had "*no desire to litigate against [Client B] unnecessarily and no intent to interfere in [Client B's] investigative reporting beyond achieving the removal of all false, damaging and distressing references to him personally*". However, Company H's letter had "*brought it home fully to [Client A] that service of proceedings is unavoidable*". Company H's response to this letter of Date 48 simply stated they had "*noted its contents*"'.[60]

54 On Date 49, Hamlins wrote to Company H on a WPSC basis enclosing a draft Amended Claim Form and Particulars of Claim (settled by Counsel L and Counsel M, who had

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53 **[B207]**.

54 **[B223]**.

55 **[B221]**.

56 **[B227]**.

57 **[B236-B244]**.

58 **[B234]**.

59 **[B251-B254]**.

60 **[B255]**.

now been brought onto the case), noting that these were being provided in draft "*in order to afford [Client B] one final opportunity voluntarily to provide [Client A] with relief that would be acceptable to [Client A] and to which [Client A] is entitled, as described in our letter dated [Date 38], before proceedings are served*".[61]

55 This letter reiterated the steps which Client B was required to agree to, if service of proceedings were to be avoided. These were: (i) to "*remove from [Publication 1] all personal data of [Client A], that is to say all references to [Client A] on [Publication 1] (as particularised in detail in the draft Particulars of Claim), and all copies of [Client A's] stolen passport photo appearing there*"; and (ii) "*an undertaking… not further to publish personal data of [Client A], defame [Client A] or infringe [Client A's] copyright in the passport photo and deliver up or delete all copies in [Client B's] possession of that photo, whether electronic or print copy*". Were Client B to agree to those steps, Client A would forbear from serving proceedings and therefore not pursue any claim for damages against Client B, and also not insist upon payment of substantial legal costs.

56 The draft Amended Claim Form (which was issued the same day) contained various amendments to the Brief details of claim.[62] However, it maintained the claim against Client B which had been made in the Claim Form for an injunction in respect of the same or similar words about Client A.

57 The draft Particulars of Claim included:[63]

(a) A claim in libel in respect of the Publication 1 Content of Date 6:

(i) In paragraph 7, the defamatory meaning of the words complained of was set out;

(ii) In paragraph 9, it was stated that this had been widely published and that Client A would also rely on the grapevine effect;

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[61] **[B302-B303]**.

[62] **[B256-B259]**.

[63] **[B264-B301]**.

(iii) In paragraph 13, it was stated that Client A would rely on the Third Party Republications both: (i) in support of a claim for general damages; and (ii) as evidencing the grapevine effect, citing four such specific Third Party Republications of which Client A was aware;

(iv) In paragraph 14, it was alleged that Client B knew and could and/or did foresee that the Publication 1 Content of Date 6 would be repeated and republished by other publishers;

(b) A claim under the Data Protection Act 1998 in respect of 17 separate pieces of Publication 1 Content (including the Publication 1 Content of Date 6), which were listed in the Schedule to the draft PoC. Paragraph 22 set out 24 false assertions pertaining to Client A and contained in Publication 1, together with the true factual position; and

(c) A claim in copyright in respect of the use and publishing of Client A's passport photograph in six of those pieces of Publication 1 Content (including the Publication 1 Content of Date 6).

58 Company H responded to this WPSC correspondence on Date 50, stating: "*[Client B] is, in principle, minded to compromise [Client A's] complaint. Are you available tomorrow for a telephone call (on a WPSATC) basis to explore this before proceedings are served?*".[64]

59 Following a WPSC call which took place between Company H and an Associate solicitor at Hamlins on Date 51, Hamlins wrote a WPSC letter to Company H.[65] This letter referred to earlier discussions and stated:

"*We have conveyed to [Client A] [Client B's] proposal that the claim be compromised on the basis of removal of all references to [Client A] from [Client B's] website, along with an undertaking to the Court in favour of [Client A] but one which you have stated cannot inhibit [Client B] from reporting on matters not complained of, in the future.*

[64] **[B311-B312]**.

[65] **[B322-B323]**.

[Client A] welcomes this change of position on the part of [Client B], albeit at this very late stage, although the detail will have to be carefully worked out… [Client A] is in principle willing for us to engage in discussions with you with a view to settlement of [Client A's] claim, to be incorporated in an order of the court, including undertakings by [Client B] to the court, for which purpose it will, of course, be necessary for the proceedings to be served."

60 This letter noted that following service of proceedings Client A would be amenable to any reasonable proposal from Client B for a short stay of proceedings to allow for settlement terms to be fully agreed. Further, it was stated: "*In the meantime, we enclose a set of [Publication 1 Content], as discussed, marked up to indicate the sort of references to [Client A], whether explicit or implicit (by virtue, for example, of a reference to [Client A's] previous position at [Company F]) where wrongdoing is falsely imputed*".

61 It was stated in respect of this Publication 1 Content that Client B would be required as part of any settlement of the proceedings expressly to: (i) "*assume and discharge a general obligation to remove all other such references on [Publication 1], explicit and implicit, to [Client A]*"; and (ii) "*take all reasonable steps within [Client B's] power to procure the removal of all such references to [Client A] as appears on other websites appearing in [Publication 1 Content] authored, syndicated, authorised or participated in by [Client B]*".

62 Company H responded in a WPSC email to Hamlins later the same day, rejecting their characterisation of the conversation which had taken place and noting: "*Sadly, it does not appear likely that we will reach an agreement prior to service of proceedings*", but proposing "*that upon service of proceedings we agree to an indefinite stay for the purposes of ADR, terminable at 7 days' written notice*".[66]

63 The Amended Claim Form and Particulars of Claim were served on Company H on Date 52, in substantially the same form which had previously been shared in draft and on a WPSC basis on Date 49.[67]

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[66] **[B319]**.

[67] See **[B3232]**; **[T345-T348]** and **[T349-T388]**.

64 Also on Date 52, Hamlins wrote a WPSC letter to Company H noting that Client A would be prepared to agree a short stay of seven days following service of proceedings, but that this was conditional on Client B agreeing to: "*take down all references to [Client A] (explicit and implicit) on [Publication 1]*" and "*take all steps within [Client B's] power to procure the removal of all such references to [Client A] as appear on other websites appearing in [Publication 1 Content] authored, syndicated, authorised or participated in by [Client B]*".[68]

65 Company H responded to this letter with a WPSC email to Hamlins at 14:17 the same day, stating that the requirement for Client B to take all steps within their power was "*unreasonably onerous, and would place an open ended and unlimited obligation*" on Client B, and that Client B did "*not have control over any references to [Client A] appearing on any website other than [Publication 1]*". The email also stated that Client B considered Client A's demands to be "*matters in themselves that are of significant public interest*".[69]

66 At 16:46, the Respondent emailed Counsel L and Counsel M noting that Client A wanted to flag "*the issue of other sites publishing similar material and how we optimise the settlement with [Client B] to help with subsequent steps to remove similar material*".[70] His email went on to state:

> "*[Client A] has raised the option of asking [Client B] to agree a short "To whom it may concern" type of letter which we can deploy in asking other sites to take down references to [Client A]. In addition [Client A] wants to consider how the final Order/settlement can be most effectively framed to assist us in those steps, including asking Google to remove links*".

67 On Date 53, Hamlins sent a WPSC letter in response to Company H which noted that the request in respect of assisting Client A in the removal of other similar references on other websites in items authored, syndicated, authorised or participated in by Client B

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[68] **[B323]**.

[69] **[B326]**.

[70] **[B329]**.

was not a new request as had been suggested, but one that appeared in Hamlins' open letter to Client B of Date 38.[71] Further:

(a) The letter requested that Client B provide Client A with "*a full account of all articles currently being published on websites other than [Publication 1] (whether they are the same complained of in the Particulars of articles which contain similar allegations) which contain references to [Client A] (explicit or implicit), of which [Client B] is aware and over which [Client B] acknowledges [Client B] has some control, whether in the form of a power or an ability to take down or procure the take down of the relevant articles (or the relevant parts of such articles) from those sites, or to withdraw [Client B's] authority to continuing publication*"; and

(b) The letter stated: "*With respect to third party websites over which [Client B] does not exercise control or influence [Client A] will accept a 'for whom it may concern'-type written statement or letter from [Client B] which we would be able to send to such third party websites and, for that matter, search engine operators, to help bring about the desired result in the event that [Client B's] attempts to procure the removal of those articles directly*". It was requested that Company H propose "*some wording which will be suitable for this purpose*".

68 On Date 54, the parties agreed a consent order staying the claim for 14 days, so that they could "*continue to engage in without prejudice settlement discussions*".[72]

69 On Date 55, Company H emailed Hamlins on a WPSC basis, attaching a draft Tomlin Order setting out proposed terms to settle the proceedings.[73] All of the terms of settlement in this draft were contained in a "Confidential Schedule". Company H's covering email stated:

"*As for articles appearing on other websites, as we have said before, [Client B] does not have any control or responsibility over any articles published elsewhere other than*

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[71] **[B343-B345]**.

[72] **[B354]**.

[73] **[B368]**; **[B370-B498]**.

on [Publication 1]. Nothing therefore can, or will, be offered in respect of any other articles."

70 On Date 56, at 15:03, Client A emailed Hamlins with comments on Company H's proposals.[74] Client A noted that they were "*Constructive, but doing the absolute minimum*" and that Client B needed to be reminded that "*I have already made significant concessions (costs, damages and no correction) and am not prepared to concede more of my legal rights*". Client A's email further stated:

"*3.* ***Confidentiality****. [Client B] appears to have placed the entirety of the agreement inside a "Confidential Schedule". I don't know how these orders work and need to be advised here, but clearly this doesn't work for me. [Company H] has stated that [Client B] doesn't have any control over any third party website that has republished [Client B's] materials. As such, I need a basis for these matters to be removed, so at a minimum, the fact that [Client B] has removed any mention of me from [Client B's] [Publication 1] cannot be confidential. I will need to be able to contract* (sic)*: (a) those websites, … (c) search engines such as Google and Bing for the right to be forgotten…*

As we have explained already, the purpose of this exercise is restitution – I need to be put back in the position I would have been had [Client B] not published these false statements. Therefore, [Client B] cannot expect confidentiality beyond the specific text edits. In Court I would have public vindication. Here I expect the same.

The way [Client B] gets to mitigate this is: (i) not having to publish the court order; (ii) not having to publish a correction.

4. ***Third Party Websites***

(a) [Client B] has now stated that [Client B] has no control of any third party websites. I have no proof that [Client B] does, so we will need to accept this, backed by a warranty…

…

[74] **[B502-B505]**.

(c) The fact that [Client B] has now stated [Client B] doesn't have control over any website that has republished [the Publication 1 Content], provides the basis for (i) the order not being confidential; and (ii) getting a "To whom it may concern letter". We will need to draft the latter as they have ignored it…"

71 On Date 57, at 15:58, Counsel M emailed Hamlins attaching a revised draft Tomlin Order, which now contained the relevant terms in the body of the Order. [75] The second recital in the revised draft Tomlin Order stated: "***AND UPON*** *the Defendant agreeing to sign and permit the Claimant to send to any person whom [the Claimant] sees fit a letter in the form contained in Annex 3 to the Order*". Counsel M noted in the covering email: "*some further drafting / advice in respect of the 'To whom it may concern' letter will follow in due course*".

72 At 17:17, Counsel L emailed Hamlins a first draft of Annex 3 (i.e., the draft "*To whom it may concern*" letter) which Counsel L and Counsel M had drafted.[76] This draft letter was stated to be from Client B, on the basis that Client B had authorised Client A to send a copy to the recipient. It referred to the Order settling the proceedings and to a list of URLs enclosed with the letter, going on to state:

"*If you are currently a publisher of any of the listed [Publication 1 Content], whether in English or as translated into any other language, please note that, as the author and copyright owner of [the Publication 1 Content], I hereby withdraw my authority or consent to you continuing to publish the same*".

73 On Date 58, Counsel M circulated a revised draft of Annex 3 which included a further paragraph putting the recipient on notice that the relevant articles were based on personal data of Client A which were either significantly inaccurate or should never have been in Client B's possession.[77] Later that day:[78]

(a) Client A sent an email to the Respondent querying whether the "*To whom it may concern letter*" was to be sent by Client A or by Client B, noting: "*Wouldn't it*

[75] **[B511]**; **[B517-B527]**.

[76] **[B528]** and **[B535]**.

[77] **[B557-B564]**.

[78] **[B566]**.

make sense to be sent by me (i.e. Hamlins) as we would then control this process?";

(b) The Respondent replied stating: "*It was envisaged that the "to whom letter would be sent by [Client B], not us. I do understand your concern as to obtaining control of the process. Equally it would, in an ideal world, be a letter which – as envisaged – comes from [Client B's] address, as it will carry more weight. My opinion is that we stick with the starting position that [Client B] is under an obligation to send [the] "to whom" letter, but that on my call tomorrow with [Client B's] solicitor I then put forward the alternative of us taking control and sending out the letter. There is no "right" answer and as we've said and agreed, this is going to be a key aspect where [Client B] kicks back but we can use the starting point that [Client B] is responsible as leverage*".

74 On Date 59, Hamlins wrote a WPSC letter to Company H enclosing a copy of the revised draft Tomlin Order, together with drafts of Annexes 1 – 3.[79] The draft Annex 3 was substantially in the same form as circulated by Counsel M the previous day. Hamlins' letter stated:

"*So far as concerns Annex 3, given that [Client B] has failed to make any proposals, as requested, to assist our client to rectify the harm [Client B] has caused, and for which [Client B] is legally liable, via publication on third party websites, we have prepared a 'to whom it may concern' letter to be signed by [Client B] and sent by the Claimant to the publishers or operators of such third party sites and platforms in order to achieve this objective, which is of the utmost importance to our client*".

75 On Date 60, a WPSC call took place between the Respondent and Solicitor K of Company H.

76 At 18:37 the same day, the Respondent emailed Client A conveying the contents of that WPSC call and, having spoken with Counsel M, passing on Counsel M's comments on certain of the points made by Company H. This email stated:[80]

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[79] **[B750-B752]**; **[B575-B749]**; **[B753]**.

[80] **[B1002-B1004]**.

"*Terms of confidentiality:*

[Solicitor K] queried why we completely redrafted their order, and reframed not as a Tomlin order. We conveyed to [Solicitor K] your requirements re confidentiality, particularly if [Client B] was resistant on the "to whom" letter and [Solicitor K] stated [they] would take further instructions on this point.

…

'To whom it may concern letter' – paragraph 4 of recital to the Order:

[Solicitor K] confirmed in the call that [Client B] would not be prepared to sign off on this letter. We explained we included this paragraph and the letter as a compromise regarding [Client B's] concerns that [Client B] can't control what third party websites do. In response to this, [Solicitor K] said [Client B] isn't prepared to sign the letter but proposed this may potentially be addressed in respect of the confidentiality point.

We have raised this with [Counsel M], who considers we can push back on this point, explaining that this effectively grants the relief available pursuant to sections 13 of the Defamation Act, and 14(5) of the Data Protection Act. [Counsel M] is of the view that whilst this is relief that you are, at law, entitled to, it is questionable how, practically speaking, sending this letter to the sorts of third party websites we have already identified would practically achieve the objective we are seeking (i.e. taking the offending article down)."

77 Hamlins sent a WPSC email to Company H at 23:27 on Date 60 following up on the call and attaching a revised draft Order.[81] This email noted in respect of the "*To whom it may concern*" letter: "*This is something to which [Client A] is legally entitled; this addresses third party publications picking up on the information published by [Client B] concerning [Client A], for which [Client B] is the direct cause and for which [Client B] is legally liable. This request requires very little of your client – a mere signature – and [they] should have no difficulty in providing the same. It reflects the effects of s. 13 Defamation Act 2013 and s. 14(5) of the Data Protection Act 1998*". Further, in respect of confidentiality, it was stated: "*There is no basis for this settlement to be deemed*

[81] **[B1006-B1007]**; **[B1008-B1016]**.

confidential. It is [Client B] who chose to unilaterally put this matter into the public domain. [Client A] cannot be prevented from curing the resultant harm".

78 Company H did not provide a substantive response to this email until Date 61, when Solicitor J sent a WPSC email to Hamlins attaching a revised draft Tomlin Order.[82] The covering email stated:

"*3. 'To whom letter' / confidentiality*

I understand from [Solicitor K] that it is of significant importance to your client to have either the 'to whom it may concern' letter or no confidentiality.

[Client B] will not agree to the letter you propose. Your assertion that such a letter 'reflets the effects of s13 Defamation Act 2013 and s14(5) Data Protection Act 1998' is not accepted. The letter appears to be deliberately drafted to cause professional embarrassment to [Client B] and is not something that [Client B] would be prepared to have sent in [Client B's] name, as if [Client B] drafted it.

[Client B] is willing to have the settlement open, in order to settle this matter if that is truly important to your client. This would allow [Client A] to tell anyone [Client A] pleases about it. This is however on the condition that [Client A's] demands for any kind of letter signed by [Client B] is removed from [Client A's] demands."

79 At 15:42 the same day, the Respondent emailed Counsel L and Counsel M summarising a call he had had with Client A following receipt of the above proposals.[83] This email stated: "*Not writing to 3rd parties – [Client A] is happy to drop this requirement, providing the key aspects to Order are genuinely "open". [Client A] needs [Client B] either to write such a letter asserting [Client B's] copyright, or to agree to use of the phrase "Judgment" and for the Order to have on its face (rather than the confidential schedule) everything [Client A] would need in order to persuade 3rd parties as referred to above.*"

80 On Date 62, the Respondent emailed Client A noting he had had a "*positive call*" with Solicitor J, who had "*stated with clarity that if terms of settlement are agreed generally*

[82] **[B1029-B1033]**; **[B1040-B1211]**.

[83] **[B1212-B1213]**.

then, yes, the full details – the Schedule to the Order as well as the front of the Order – would be available to you to inform any 3rd party of the same".[84] The Respondent noted: "*This is a helpful clarification which ought to make matters somewhat more straightforward in terms of your primary objective of being able to rely on the terms of settlement to force 3rd parties such as Google, Bing and Hachette to play ball*".

81 On Date 63, Hamlins sent a WPSC letter to Company H enclosing revised drafts of the Tomlin Order and Annexes 1 and 2.[85] This letter noted that Client A's "*generous offer in respect of public vindication, monetary remedies and costs will not be repeated if this case beyond the service of a Defence*", and this was therefore Client B's "*last chance… to take advantage of these very valuable concessions*". The letter further referred to Annex 2, which set out the amendments to the Publication 1 Content to be made by Client B, and made the following "*general observations*":

"*(1) In writing about the law firm [Company F] and [Client A] in the way [Client B] has, and falsely and repeatedly ascribing to [Client A] leadership of the [Company F] team that was purportedly involved in planning the alleged '[Fund]' heist, [Client B] has created a situation whereby readers of [Publication 1] would regard our client as synonymous and interchangeable with [Company F]. The only context in which [Company F] is referred to in [Client B's] articles is as supposed accomplices in the '[Fund]' heist, and the only lawyer at [Company F] ever implicated by name in [Client B's] articles in this context is [Client A]. The false insinuation of [Client A's] culpability is reinforced by the erroneous references to him supposedly, immediately after the signing of the deal, having resigned to take up a directorship at [Company E].*

(2) These serious errors have been repeated on other websites and contaminated the body of information available about [Client A] online.

(3) The effect of this – and it is a difficulty entirely of [Client B's] own making – is that simply to remove from [Client B's] articles and the embedded emails the references to [Client A's] name, without more, does not solve the problem. Having regard to the information available on [Publication 1] and on other websites more broadly,

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[84] **[B1215]**.

[85] **[B1258-B1263]**; **[B1234-B1257]**.

references to wrongdoing by [Company F] will be understood by readers to be references to [Client A], as will mere deletions of [Client A's] name from embedded emails. Under the circumstances, a more nuanced approach is called for…"

82 Following a WP meeting which took place at Hamlins' offices on Date 64 and was attended by both Solicitor I and Solicitor G from Company H, the parties engaged in further discussions and eventually agreed the terms of the Consent Order and its Annexes. The Consent Order was sealed on Date 65, and provided:[86]

(a) Judgment was to be entered for Client A in the proceedings against Client B (paragraph 1). Client B accordingly admitted, on an open basis, that each of the allegations set out in the Particulars of Claim was made out;

(b) Client B was required to amend the Publication 1 Content identified in the Particulars of Claim which remained published on Publication 1 (namely those numbered 1-12, 15 and 17-22 in Annex 12) in accordance with the amendments set out in Annex 2 (or, where any articles were not in English, to make substantively the same amendments), such amendments to be made within 14 days of the date of the Consent Order, and Client B undertook to the Court to do so (paragraph 4);

(c) Client B was required not to repeat the original wording or any wording to the same or similar effect in the aforementioned Publication 1 Content once they had been amended, or permit or cause the original wording or any wording to the same or similar effect to be published anywhere else in any form, and undertook to the Court accordingly (paragraph 5);

(d) Client B was required not to publish, permit or cause to be published, and undertook to the Court not to publish, permit or cause to be published:

(i) Any of the allegations about Client A set out in paragraph 7 of the Particulars of Claim (all of which allegations were agreed to be false) or any allegations concerning Client A to the same or similar effect (paragraph 7.1); or

[86] The Consent Order together with its Schedule and Annexes is at **[B2720-B3049]**.

(ii) Any allegations otherwise imputing to Client A, whether by referring to Client A by name, description (<u>including by referring to Company F</u>), image or otherwise howsoever, that Client A has been engaged in fraudulent, dishonest, untrustworthy, unlawful or criminal misconduct of any kind (paragraph 7.2).

83 Notwithstanding the seriousness of the admissions made, and of the undertakings which had been given to the Court, it is apparent that Client B showed no contrition in respect of such matters. Indeed, Client B remained keen to republish the allegations they had made against Client A as soon as they were able. On Date 67, very shortly after the Consent Order had been agreed, Client B emailed two other individuals involved in Publication 1, in relation to the amendments to be made to the Publication 1 Content:[87]

"*It is about removing the stuff [Client A] has blackmailed me into doing on the basis of a tiny lever he got on another matter – [Client A] has no legal rights to get me to do it… I would just tell [Client A] to take me to court but my lawyers say it's a 'great deal' and as they are holding off my other bills I am complying to keep them happy…*

I am fully intended to put it all back up the day [Client A] gets sentenced and I will also use this gross blackmail example when I start campaigning on British libel law as well. Grrrrr"

84 The following day, Client B sent a further email to the same two individuals, in a similar vein. This email also demonstrates that Client B had, even at this stage, set their sights on pursuing not merely Client A but also Client A's legal team: "*Word press will keep the old versions handy if [Client A] gets banged up? Although I will have to somehow obliterate [Client A's] precious photo… Let's aim to get the dirty little weasel out of our hair for now and go after the lawyers for taking so much [Fund] cash to fight [Client A's] case when the time is right*".[88]

[87] **[E8]**.

[88] **[E5]**. The reference to WordPress also shows that, even at this stage, Client B was fully cognisant of the existence of Third Party Republications hosted on that platform.

C.3 Events after Consent Order and prior to Date 76

85 After the Consent Order had been agreed, the parties continued to engage in discussions regarding the precise form of Annex 2, which set out the amendments to be made to Publication 1 Content.

86 On Date 66, Ms Stephanie Osborn, an Associate solicitor at Hamlins, emailed Client A providing updates on various matters, and attaching:[89]

(a) A "*Draft Takedown Request*" to be sent to Google and Bing, in respect of both Publication 1's metadata and Third Party Republications;

(b) An updated list of Third Party Republications (i.e., Publication 1 Content which continued to appear on third party websites).

87 On Date 67, at 15:04, Hamlins sought advice on behalf of Client A from an American law firm, in respect of various matters, including "*advice in relation to the coverage of a Google / Bing takedown request made in the UK, and its impact in the US*".[90] Earlier, at 12:25, the Respondent had noted in an email to Client A that they would be seeking advice "*as to Google.com and whether the UK judgment in your favour can be used to seek take down in the US*", stating his view that "*potentially the fact much more of your case relates to Data Protection, rather than libel (where the US takes a very different position and is hostile to UK libel judgments), could be relied on to improve prospects*".[91]

88 On Date 68, Ms Osborn emailed Client A providing further updates on various matters, including: "*Google / Bing takedown requests: We have not heard anything from Google or Bing as yet in relation to our takedown requests*".[92] Client A responded the same day noting that they would leave it to Hamlins to follow up on.[93]

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[89] **[B3854]**; **[B3859]**.

[90] **[B3243]**.

[91] **[B3241-B3242]**.

[92] **[B3245-B3246]**.

[93] **[B3259]**.

89 On Date 69, Client B served a Witness Statement on Client A, purportedly in order to confirm compliance with paragraphs 3, 9 and 10 of the Consent Order (as required of Client B under paragraph 10 of that Order).[94]

90 That same day, Hamlins wrote to Company H drawing attention to various breaches of paragraphs 3 and 4 of the Consent Order, notwithstanding the Witness Statement which Client B had served.[95] In particular, having conducted a review of Publication 1, it was noted that a number of the English pages had concealed links to the foreign language iterations of those pages. Further, foreign language links in relation to 8 of the pieces of Publication 1 Content listed in Annex 1 were unamended in accordance with paragraphs 3 and 4. The letter noted that Client B was in breach of the Order and required Client B to confirm that they would now comply with their obligations.

91 On Date 71, Company H responded by email stating that the foreign language versions of the Publication 1 Content were removed "*yesterday*", that this was within 14 days of the Consent Order, and there had "*therefore not been any breach*".[96]

92 During Date 70, Hamlins continued to take steps to seek to effect the removal of the Third Party Republications, including by making direct contact with WordPress, a US-based platform which provides a Content Management System for over 550 million websites worldwide. On Date 72, WordPress responded to such a request. The request was rejected on the basis that WordPress required "*a U.S. court order, or a foreign order that has been recognized by a California state or federal court, for our review before removing content*" – i.e., a UK judgment order based on libel/data protection was expressly stated <u>not</u> to be sufficient for the purposes of removing such Third Party Republications.[97]

93 On Date 73, Mr Tom Forshaw of Hamlins emailed Client A stating that Hamlins had been "*working on seeking removal of [Publication 1 Content] copies and references on Google, Bing, Blogger and Wordpress*". Mr Forshaw provided an update in respect of each internet service provider and, after noting the above response from WordPress and

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[94] **[B3279-B3284]**.

[95] **[B3297-B3299]**.

[96] **[B3301]**.

[97] **[B3309-B3310]**.

similar responses received from other internet service providers, stated: "*[the Respondent] emphasises that these resistant/non-engaging responses are, regrettably, par for the course and all US platforms are notorious for placing hurdles in the way when asked to take action pursuant to UK media-law related Court Orders. We will, as stated, need to consider further strategies if we are met with ongoing failure to engage*".[98]

94 On Date 74, at 15:03, Mr Forshaw emailed the Respondent and Mr Galbraith stating: "*The [Client B] [Publication 2] on [the Scandal] is coming out on [Date 79]*".[99] This was a reference to Client B's new Publication 2, through which Client B intended to report further on largely the same matters which had appeared in Publication 1. No reference had been made, or notice given, by Client B or their representatives as to the intended new Publication 2 during the course of the protracted negotiations to settle the underlying proceedings, which had concluded only on Date 65. The following day, Hamlins wrote to Company H noting that it had come to Client A's attention that Client B had written Publication 2 and that it would be made available through Publication 1.[100] The letter stated: "*We trust it is not necessary to go into detail but we expect you to have advised your client as to [their] obligations pursuant to the Order and of the consequences of [their] breaching the same*".

C.4 Events from Date 76

95 On Date 77:

(a) At 13:43, Mr Forshaw emailed the Respondent and Mr Galbraith noting that one piece of Publication 1 Content still contained Client A's email address, which was "*clearly against the Order*", and the reason it was not showing up on the searches which Hamlins had been undertaking was that it was "*part of the picture, and therefore can't be read*";[101]

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98 **[B3306]**.

99 **[B3860]**.

100 **[B3641]**.

101 **[B3642]**.

(b) At 16:07, Mr Forshaw emailed Client A (copying the Respondent and Mr Galbraith) stating: "*As an update on the take-down requests, we are continuing to contact Google regarding removal of content relating to the [Publication 1 Content].*" This email also attached a draft letter to Company H in relation to the breach of the Order which Mr Forshaw had identified earlier that day.[102]

96 On Date 78, at 13:03, Mr Forshaw emailed Mr Galbraith stating: "*I have left a copy of the Order on your desk with the sections I was thinking about highlighted. I'd say that there is a reasonable chance that we may be able to convince [Client B] to licence us the copyright for removal purposes only, with the benefit that [Client B] will therefore not have to expand the temporal and financial effort in removing the copies*".[103]

97 Publication 2 was published by Client B on or around Date 80. On Date 81, Client A emailed Mr Galbraith noting that Publication 2 had been released.[104]

98 On 12 September 2018, Mr Forshaw emailed Client A (copying the Respondent and Mr Galbraith) noting that:[105]

(a) He had "*pre-ordered a copy*" of Publication 2 which was due to arrive "*on or before Thursday*";

(b) One piece of Publication 1 Content still contained the embedded email showing Client A's name; and

(c) Chasers had been sent to Blogger and Google in respect of take downs including a separate right to be forgotten request to Google.

99 On 17 September 2018, at 11:23, Mr Forshaw emailed Mr Galbraith (copying the Respondent) stating:[106]

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[102] **[B3644-B3655]**.

[103] **[T397]**.

[104] **[B3660]**.

[105] **[B3664]**.

[106] **[X386]**.

"*I have left a copy of [Publication 2] on your desk. I have read as far as the tab, and the only possible reference I could find was on the dog-eared page where there is a reference to "another person", ie someone who [Client B] wanted to include but can't.*"

100 The same day, at 12:37, Mr Galbraith emailed Client A (copying the Respondent and Mr Forshaw) stating:[107]

"*In my view, the reference to "permit" arguably gives you the right to require [Client B] to procure the removal of the content from third party sites. I do not however that that this is a strong argument since if the intention was to require [Client B] to arrange for content to be taken down [themselves] they would have expected to see explicit reference to this in the Order …*

In any event, I think that the way to deal with this is to seek an exclusive licence of the copyright in the unedited text from [Client B] solely for the purposes of you arranging for the content to be taken down from other sites and on the basis that this will save [Client B] needing to do so".

101 On 18 September 2018, Mr Galbraith emailed Client A (copying the Respondent and Mr Forshaw) stating:[108]

"*4. [Client B] – I've discussed this [with the Respondent]. His view, which you intimated might be the case, is that [Client B] will not accept that the reference to the word "permit" required/requires [Client B] to do anything. I therefore think that seeking a copyright license relying on this, alongside the breach, is likely to fail. As such, if there are further breaches of the Order then we can revisit this, the letter as drafted should be sent once approved. There's no point putting forward a legal argument that's not strong in circumstances where we already know it will be resisted.*"

102 On 24 September 2018:

(a) At 17:24, Mr Galbraith emailed Client A (copying the Respondent and Mr Forshaw) attaching a draft letter to Company H, setting out the position that the

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[107] **[T400]**.

[108] **[T402]**.

I145

continued inclusion of Client A's name and email address in certain Publication 1 Content constituted a breach of the Consent Order;[109]

(b) At 18:38, Client A responded to this email stating: "*This doesn't refer to the granting of a licence in the copyright in any way…*";[110]

(c) At 18:38, Mr Galbraith responded to Client A by forwarding his email of 18 September 2018, and highlighting his point 4 (cited above);[111]

(d) At 18:43, Client A replied stating: "*That covers the point derived from the word "permit", but not your original point about using the breaches as leverage to compel the granting of a licence (assuming you feel there is a sufficiently strong legal basis for this). That point is what I was expecting to see (unless you no longer feel it has merit).*"[112]

103 On 26 September 2018, Mr Galbraith emailed Client A (copying the Respondent and Mr Forshaw) stating: "*… my general view is that we should not seek a copyright licence given [Client B's] position in the prior negotiations, I.e. that [Client B] did not wish to have anything to do with third party takedowns… I would advise you against demanding something when the legal basis is weak and likely to be rejected in any event.*"[113]

104 On 27 September 2018, at 14:05, the Respondent emailed Mr Forshaw asking him to "*please prioritise completing review of [Publication 2]*".[114] Later that day, at 16:49, Mr Forshaw emailed Client A (copying the Respondent and Mr Galbraith) noting that he was continuing to read Publication 2, had found no direct references to Client A, but would "*continue reading and update you as soon as I find any direct references, or in any case when I have finished*".[115] This email also provided updates on the requests made to Google and Bing, and stated:

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[109] **[B3686]**.

[110] **[B3691]**.

[111] **[T401-T402]**.

[112] **[T401]**.

[113] **[T401]**.

[114] **[B3703]**.

[115] **[B3720]**.

"*[Publication 1 Content] with your name in the imbedded* (sic) *picture… As discussed, we are unlikely to be granted a license to the copyright in the Source [Publication 1 Content], and requesting it at this stage may not be productive. We should however discuss paying for a license which we could utilise for takedowns.*"

105 On 28 September 2018, a call took place between the Respondent, Mr Galbraith, Mr Forshaw and Client A. Mr Galbraith's manuscript note of the call records that they discussed whether "*references in [Publication 2]*" were "*in violation of the Annexes*" to the Consent Order.[116]

106 On 1 October 2018, Mr Forshaw emailed Client A (copying the Respondent and Mr Galbraith) having now finished his review of Publication 2. The email stated:[117]

"*[Publication 2] – pages 167 to 169 of [Publication 2] refer to an incident, reference to which was <u>removed</u> from one of the [Publication 1 Content] in Annex 2, which can be found at pages 187 – 188 of the Order. Whilst these pages do not mention you specifically, they do reference a section that was removed from the [Publication 1 Content] following the Order. The section states that there was a meeting on 23 September involving [Company F] and [Company E] at the [Company F] offices, because the [Company E] offices were cramped and unsuitable. It also mentions… "and a trio of junior partners at [Company F]". I will scan and send you the pages in a following email.*

I have concluded reviewing [Publication 2] and wanted to do so before reporting as to the above but confirm I have found no other actionable material otherwise.

Clearly this is something for careful consideration and potentially raising with [Company H] and your instruction to hold off sending our letter pending review of [Publication 2] appears to have been prudent."

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116 **[B3718-B3719]**.

117 **[T403]**. Mr Forshaw then forwarded to Client A scanned copies of the pages in Publication 2 referred to in his previous email at 18:26.

107 On 2 October 2018, at 19:15, the Respondent emailed Client A (copying Mr Galbraith and Mr Forshaw) stating:[118]

"*There is an argument that, in resurrecting certain deleted aspects of Annex 2, [Client B] has added to a series of potential breaches. Consequently, we will seek to rely on section 5 of the Court Order, and the argument that [Client B] has permitted wording 'of the same or similar effect' to be published, against the undertaking in the same clause that [Client B] would not do so.*

I would advise at this stage that, should we litigate based on these breaches and in particular the most recent re [Publication 2], a Court may not be entirely sympathetic, or provide the outcome we are looking for (a license to the copyright in the [Publication 1 Content] to speed up their removal). This is because the wording of the Order by [Counsel L] and [Counsel M] was intentionally wide-reaching and as [Counsel M] repeatedly advised at the time, the terms of the Order are far broader than a Court would have provided. Further, the passages in this section of [Publication 2] are loosely associated with assertions relating to you, and therefore a Court may not consider that you are adversely impacted from a defamation or data protection perspective.

I propose a strategy of writing to [Company H] in as strong as possible terms, threatening [Client B] with contempt of court and requiring a response, without raising the offer of [Client B] providing a license to avoid contempt proceedings. Separately and shortly thereafter, we would raise the WP offer that [Client B] could provide us with the copyright license in return for us not bringing the claim to Court. It is unlikely that [Client B] will willingly provide us with the license, so we would need to take [Counsel M's] advice as to whether the strategy should be tested, with the potential to be taken before a Court. At this stage, I propose discussing with [Counsel M] whether he agreed with this position given [Counsel M] is the architect and author of the Order.

Let me know if you agree to our putting this to [Counsel M] on the basis we will commend the aggressive strategy in an effort to compel [Client B] to cooperate on broader issues…"

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[118] **[T406-T407]**.

108 Client A responded at 19:04 the same day, stating: "*I'm happy for you to run this past [Counsel M]. There is no point litigating this, so the question is whether the threat is sufficiently credible and the threat sufficiently real, for [Company H] to advise offering up the licence to make it go away*". At 20:01, the Respondent replied stating: "*Thanks for coming back… we'll get [Counsel M's] input and I will get answers as to your position*".[119]

109 On 3 October 2018, the Respondent emailed Counsel M seeking advice in respect of such matters.[120] Counsel M was provided with documentation including sections of Publication 2 but was not provided with any of the Third Party Republications. The Respondent's email stated:

"*[Client A's] underlying objective is to put [Client B] under sufficient pressure so as to obtain a license to copyright in [Client B's] [Publication 1 Content], which would facilitate our take down requests for online content providers, albeit [Client A] appreciates this is going to be hard to achieve…*

Our proposed strategy of relying on these breaches to seek a copyright licence would be to first write in the strongest terms to [Client B] through [Client B's] lawyers referring to the breaches in the Order by [Client B] … without raising the offer of [Client B] providing a license to avoid contempt of court proceedings. Separately and subsequently, we would write again with a Without Prejudice offer that [Client B] could provide a license to the copyright to us in exchange for our client not bringing the matter before the Court"

110 Counsel M responded to this email later the same day, noting that it was "*disappointing to learn that [Client B] has not apparently been keeping [their] end of the bargain*".[121]

111 On 4 October 2018, the Respondent emailed Counsel M, attaching the existing draft of the letter to Company H in respect of the breach of the Consent Order constituted by

[119] **[T406]**.

[120] **[T410-T411]**.

[121] **[B3748]**.

certain Publication 1 Content, noting that this "*was prepared prior to identification of the potential breach in [Publication 2]*".[122]

112 Later that day, in the course of a long conference call, Counsel M provided advice to the Respondent and Mr Forshaw in respect of the potential breach of the Consent Order identified in Publication 2. That advice was recorded in a document entitled "*Potential breaches of Order by [Client B] – Advice from [Counsel M]*" which Mr Forshaw prepared and which the Respondent then sent to Client A at 17:49 on 4 October 2018.[123] This document stated:

"***Basis for legal analysis***

- *We need to construe the Order objectively, as the Courts would do…*
- *To commit [Client B] prison for contempt, on basis of [their breaches] of the Order, needs to meet the criminal standard – beyond all reasonable doubt. [Client B] will be given benefit of the doubt if there is any ambiguity.*
- *This would be applying for the most serious sanction that the civil courts have to deal with.*

…

Second possible breach: Publication 2

…

- *[Counsel M] preliminary analysis is that the deal itself is portrayed as criminal and/or dishonest, and therefore so is the portrayal of the people involved in it. Therefore, if we can use the material in [Publication 2] to link you to the deal, then [Client B] would be in breach of the Order, as [they] would have said that you are criminal and/or dishonest.*
- *[Counsel M] main focus is on the allegations made on p.170 of Publication 2…*

[122] **[T413]**; **[T415-T416]**.

[123] **[T420-T422]**. An earlier draft of this document entitled "*Internal Note – call with [Counsel M] 4.10.2018*" (which was not sent to Client A) is at **[T423-T426]**.

- *P.170 mentions a "trio of junior partners at [Company F]", followed with "The [Company F] team", who worked on the document, even re-naming it and including more "close legal language". The implication is that those individuals were acting deceitfully.*
- *[Counsel M] main issue is if this can be related to the Order, paragraph 7.2. To pursue action, we need to be able to argue in Court that any ordinary reasonable reader would read this passage of [Publication 2] and know that it relates to you (special knowledge).*
- *To do this, we would have to plead the original [Publication 1 Content] as they appeared on [Publication 1] prior to the Order, which link you to [Company F] or that particular part of the deal. These sections would be considered as "facts" (though they clearly do not have to be true) that the ordinary and reasonable reader knew having read the original [Publication 1 Content], causing them to therefore associate [Company F] with you.*
- *As there are large overlaps between the readers of the [Publication 1 Content] and the readers of [Publication 2], only the latter is only available via [Publication 1], [Counsel M] advises that it appears a strong argument in your favour as to synonymity with [Company F].*

…

<u>Proposed next steps</u>

…

- *[Counsel M] advises, at this stage, that you have an arguable case, whether or not you pursue a case to commit [Client B]. [Counsel M] noted that publication of [Publication 2] was deeply questionable, and that if we were found to be right in our case, [Publication 2] would be pulped.*
- *However, [Counsel M] reiterated three things that we need to be cautious about:*

  1. Determination would be to a criminal standard, and so we need to prove our point beyond reasonable doubt.

  2. References to you are not overly blatant – they are by inference only, and therefore we will have to persuade the judge that they relate to you.

3. We are starting to overlap with Article 10 of ECHR – the right to free speech…

<u>Important Advice on bringing an action</u>

- *In bringing an action, we would be asking the Court to perform a criminal function – there therefore needs to be a public interest in doing so.*
- *Any inference at all that we are doing this as a way to get some sort of collateral gain would not be taken kindly by the Court. This relates especially to our ability to try to get a copyright license out of these proceedings, which [Counsel M] strongly suspects is not going to happen. [Counsel M] states that if your objective is to get the copyright, this is not a recommended option.*
- *The outcome if successful would be punishment for [Client B], with possible collateral that [Publication 2] would be pulped or republished without the offending content.*
- *[Counsel M] asks you to question whether you consider the outcome – potentially pulping of [Publication 2] – merits the potentially significant expenditure of time and legal fees.*"

113 The Respondent's covering email to Client A noted that he had had "*a very long conversation with Counsel M today*", stating that the "*attached summarises the key aspects of [Counsel M's] considered advice as to the potential breaches of the Order by [Client B]*":[124]

"*In a nutshell, Counsel M does consider you have the basis to bring a complaint and seek further Order for Contempt of Court but… questions whether the potential outcome of the Publication 2 being pulped justifies the cost and time needed. You'll see [Counsel M] flags that we cannot be seen to be seeking a copyright licence as an alternative to such an outcome, although Callum and I are both of the view that if [Client B] seeks to negotiate, that would be a legitimate offer for us to make in order for [Client B] to avoid a finding of contempt.*"

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[124] **[T417-T418]**.

114 The Respondent's covering email also noted that Counsel M had requested "*certain information*" in order to "*refine strategy and pursue such a course*". This included: "*An analysis of [Publication 1] prior to us achieving the Consent Order with [Client B] to establish that the numerous references to [Company F] and yourself have effectively made the two synonymous, which we can prepare*".

115 The Respondent's time recording for 4 October 2018 records that on that day he had a "*Long call*" with Client A, in order to "*Discuss [Counsel M's] advice*" in respect of Publication 2, and that he had also discussed the matter with Mr Galbraith.[125]

116 On 8 October 2018:

(a) At 09:55, the Respondent emailed Client A noting that Hamlins would shortly provide a draft letter to Company H in respect of Client B's breaches of the Consent Order, "*albeit it will be on the basis that we are aiming to set out a "credible threat" as you have rightly put it, to forcefully apply pressure on [Client B] to take steps to assist you more broadly, and you have no intention to pursue a full legal complaint for the potential contempt*". The email also noted that the draft letter would be sent to Counsel M, who had suggested Hamlins "*prepare a draft for him to review*";[126]

(b) At 14:56, Mr Forshaw emailed the Respondent and Mr Galbraith attaching a draft letter to Company H, stating: "*I have tried to include all of [Counsel M's] points in the letter, whilst being as forceful as possible given that [Client A] does not actually want to go to court*";[127]

(c) At 21:17, the Respondent emailed Client A (copying Mr Galbraith and Mr Forshaw attaching a "*draft of the letter we would send to [Company H] regarding the breaches of the Order*". This email noted: "*This has not yet been reviewed by [Counsel M] but if you agree, I will instruct [Counsel M] to do so. [Counsel M's] position was that to give final advice and provide a green light to threatening action for contempt of court, [Counsel M] would require various*

[125] **[X70]**.

[126] **[X51]**.

[127] **[X52]**.

I153

additional information. Clearly we're not going to provide that at this stage and I will stress that the strategy is to put forward a plausible threat with a view to then engaging in discussions with [Company H] to seek an agreed remedy";[128]

(d) At 21:55, Client A responded stating: "*Please do get [Counsel M's] input*".[129]

117 On 9 October 2018, the Respondent emailed Client A (copying Mr Galbraith and Mr Forshaw) stating: "*[Counsel M] has confirmed that [they] should be able to review the draft letter tomorrow… It is important of course that it is as compelling as it can be, to exert maximum pressure on [Client B]*".[130]

118 Counsel M then provided further advice to the Respondent by telephone on 10 October 2018. The Respondent's note of that call records:[131]

"*Counsel M wanted to emphasise 2 things:*

1. The initial premise needs to have already been taken regarding Contempt of Court before any letter is sent to [Company H]:

- *[Client A] does not want to litigate for contempt – but if there is any prospect at all of [Client A] doing this, it is not something to decide at a later date.*
- *The letter cannot be seen to be offering a ticket out – there can be no possibility at all of it appearing as blackmail, or contempt proceedings will be thrown out. Further, there is no collateral gain, only [Client B] being imprisoned.*
- *CH to get the position from [Client A]. We should be able to start the letter with a clear view.*
- *If our position is just that we want to get [Publication 2] pulped, then we are in an easier position; we do not need to have 100% certainty as in criminal proceedings or pre-action protocol.*

[128] **[T437]**; **[T439-T442]**.

[129] **[T443]**.

[130] **[T453]**.

[131] **[T457]**.

2. To ground the initial position, we need to be crystal clear on exactly what [Client A] wants out of any possible correspondence.

[Counsel M] also noted that there would be no harm in writing the shorter letter to [Company H] regarding the offending content remaining in [the Publication 1 Content]…"

119 At 15:00 on 10 October 2018, the Respondent emailed Client A noting that he had just spoken with Counsel M, who had "*raised two critical points on which your instructions are requested in order to progress the contempt of court issue and getting a letter finalised*". These were: "*1. Are you prepared to litigate in Court regarding these breaches of the Order, on the grounds of Contempt of Court? 2. What outcomes are you seeking?*".[132] The Respondent's email went on:

"*We informed [Counsel M] that you do not want to go to Court on this matter, but [Counsel M] needs to know, for purpose of strategy and construction of the complaint, if you will* <u>under no circumstances</u> *go to Court, whatever [Client B] does or doesn't do, or whether you might be prepared to litigate if you do not obtain your objective. If you are prepared if we don't get a satisfactory outcome to go to Court, then [Counsel M's] advice is that the complaint will need to be very precise, due to the nature of the Civil Procedure Rules regarding contempt. If you are not at all willing, then [Counsel M's] letter will not have to encompass how a court will perceive matters, and will therefore take less time, but also exert less pressure on [Client B].*

With these points made, [Counsel M] has said that we should separately write to [Company H] regarding the less significant breach on [Publication 1 Content], as this would not detract from any future letter but – [Counsel M] advises significantly – will force [Company H] to confirm whether they are still instructed by [Client B]. [Counsel M] does not want the more significant letter addressing the more serious breach in [Publication 2] to go to [Company H] if it should correctly be directed to [Client B]. I re-attach the earlier draft dealing only with the less significant breach for ease of reference and we intend to send this subject to your confirmation.

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[132] **[T454-T455]**.

[Counsel M] did reiterate that [Client B] has breached the Order by virtue of the passages identified and contained in [Publication 2] and is liable for us to pursue a Contempt complaint but reminded us that the references to you are indirect and therefore this requires careful analysis and explanation.

Let me know your position re the above and we can proceed, including I advise sending the more straightforward letter to Company H."

120 Client A responded to this email at 16:00, stating:[133]

"*The intention of the letter that [Counsel M] is looking at is to exert maximum pressure on [Client B] so as to have [Client B] feel that a contempt of court finding is a genuine risk and to look for an alternate resolution, that resolution being a copyright licence in articles that refer to me for the sole purpose of assisting the removal of that material, on the basis that your advice is that this licence will be of material benefit in procuring removal from stubborn websites. However, I am concerned as to the breadth of the 'explanation' required for the Court. I don't want to push [Client B] to publish the letter and give [Client B] an enticing narrative to print. I believe therefore that this requires further discussion with you.*"

121 On 11 October 2018, the Respondent emailed Client A (copying Mr Galbraith and Mr Forshaw) stating:[134]

"*In terms of strategy and objective, [Counsel M] was insistent that we could not proceed with any intention of using pressure to bring about a corollary objective, eg a licence of copyright. I do feel that this merits a 3-way conversation (call or in person) with you, us and [Counsel M] due to the seriousness of what we would be alleging.*"

122 Later on 11 October 2018, Hamlins sent a letter to Company H in respect of the continuing presence of Client A's name and email address in certain Publication 1 Content, notwithstanding Client B having undertaken to remove it.[135] The letter stated: "*Clearly, the content that remains on [Publication 1] is not acceptable to our client,*

[133] **[T454]**.

[134] **[T458]**.

[135] **[X372-X373]**.

and represents a breach of the Consent Order, and therefore appears to be in Contempt of Court. We require your client to remove the above without delay". This was therefore the more "*straightforward letter*" to which the Respondent had referred the previous day, and which did not make any reference to Publication 2.

123 Company H responded to this letter at 17:01 on 12 October 2018, stating: "*This has been done. Two comments which referred to your client beneath the article have been removed*".[136] The Respondent forwarded Company H's response to Client A at 17:04, stating: "*I'll speak with Callum re effectiveness of a copyright licence and I'll catch you before COB on Monday.*"[137]

124 The Respondent's time recording for 12 October 2018 also records that, on that day, he had two "*long calls*" with Client A, to "*discuss strategy*" in respect of Publication 2. The entry also records: "*Agree as to best approach of making a phone call first and then following up if necessary*".[138]

125 On 16 October 2018, the Respondent emailed Client A stating: "*I've had a meeting with Callum to discuss the copyright licence point and have now had a meeting with Callum and Tom to discuss web issues. I'm going to plan an outline for the call with [Company H] this afternoon. Would you be free for me to call you… today?*"[139]

126 On 17 October 2018, the Respondent prepared a manuscript note entitled "*[Client A] – Plan for Call to [Company H]*".[140] This note recorded:

"*Without Prejudice*

[Publication 2]

Significant passages directly in breach of Annex 2 to Order

Consulted counsel; advised

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[136] **[X374]**.

[137] **[T463]**.

[138] **[X71-X72]**.

[139] **[T464]**.

[140] **[T466]**.

Contempt of Court"

127 On 18 October 2018, the Respondent prepared a detailed script for his intended call to Company H (the "**Script**"). The Script went through various drafts before being finalised, as summarised in the Respondent's time recording for that day: "*1. Script for [Company H] call. Work on. Send to [Client A]. 2. Emails with [Client A]. 3. Discuss with CG. 4. Long call with [Client A]. Discuss script. [Client A] approves largely but some amends re structure for call. 5. Amend script. 6. Calls out to [Solicitor G] at [Company H]*".[141]

128 The first draft of the Script was sent by the Respondent to Client A at 08:17 on 18 October 2018.[142] The covering email stated: "*In advance of my calling you around 09:30, here's a short summary of the points I intend to make on the call with [Company H] which itself I will aim to make this afternoon*".[143]

129 The second draft of the Script was sent by the Respondent to Client A at 09:31.[144] This incorporated certain amendments made following a discussion between the Respondent and Mr Galbraith, and the covering email stated: "*Calling you in a couple of minutes but I've spoken again with Callum this time re the planned call and the attached incorporates some amends in track change*".[145]

130 The third and final draft of the Script was finalised by the Respondent after his call with Client A. It is therefore the content of this version of the Script which was specifically commented upon and approved by Client A, and which reflects his specific instructions to the Respondent as to what should be said on the Call with Company H. The Script was a detailed document which set out clearly what the Respondent intended to say on the Call. It is therefore worth citing in full:[146]

[141] **[X72]**.

[142] **[T467]**.

[143] **[T468]**.

[144] **[T469]**.

[145] **[T470]**.

[146] **[T471-T472]**.

"***Script for call with [Company H]***

Re: [Publication 2] – Contempt

1. ***"Without Prejudice"****.*

2. ***2 problems caused by your client:***

3. ***First*** *– [Publication 2] – a new issue has been drawn to our client's attention.*

4. ***2 previous breaches*** *of Order – this, most serious, follows our having to complain of 2 earlier breaches happened upon.*

5. ***Order, paragraph*** *7.2 forbids allegations being published about our client "referring to [them] by name, description (including by referring to [Company F]), image or otherwise howsoever*".

6. Your client has, in contravention of the Order, set out extensive references to [Client A] over several pages, particularly p. 170 of [Publication 2] published since the Order was made. Very similar passages were explicitly removed from [Publication 1] in compliance with Order.

7. None of the references are express; all are in direct contravention of the Order using prohibited language and held to reference our client.

8. ***[Publication 2] was promoted*** *on [Publication 1] and only available until recently through [Publication 1]. Readers and purchasers will have the special knowledge of [Client B's] previous and unacceptable interplay between our client and [Company F].*

9. ***Contempt of Court*** *– we have gone to counsel as to bringing committal proceedings and our client has been advised in clear terms that the serious breach amounts to basis to bring contempt proceedings. Your client should treat this seriously.*

10. ***Our client is furious*** *and now has to contend with this, having spent over a year to rectify the position.*

10. ***Our client has acted in absolute good faith****- [Client A] has in accordance with our agreement not taken any steps whatsoever to misuse the Order.*

*11. **Second problem caused by your client – Updating [Publication 1 Content]** – Client A] is facing problems with a few platforms in terms of updating, whilst most have complied.*

*12. **Willingness to issue** proceedings for contempt.*

*13. **Way out** – If your client will give an exclusive licence of copyright in the original unedited [Publication 1 Content] solely for the purpose of allowing [Client A] to have passages taken down by resistant platforms [Client A] may be prepared to forgo [their] right to go back to Court.*

*14. If option one is not accepted, left with **only alternative**, which [Client A] instructs me [Client A] will pursue, to bring contempt proceedings, get [Publication 2] **pulped** and use that to bring further pressure on others.*"

131 It was this version of the Script which the Respondent then printed out to be used on the Call. Following an exchange of emails between the Respondent and Solicitor G between 16:02 and 16:24, the Call then took place at around 17:00 on 18 October 2018.[147] The Respondent made the Call from his office at Hamlins, on speakerphone, with Mr Galbraith also present in the room. The Respondent began the Call by reading out the matters set out in the Script.[148] Mr Galbraith took a manuscript note of the Call, which he explains in his evidence picks up from the point at which the Respondent had finished delivering the Script, in order to record the limited further dialogue between Solicitor G and the Respondent.[149]

132 The Respondent's time recording for 18 October 2018 records, in respect of the Call: "*Progress re putting forward our strategy*". It also records that the Respondent called Client A after the Call to report back.[150]

133 Solicitor G had, at 16:28, emailed Client B noting he was due to speak with the Respondent and would "*report back when I've heard what he has to say*".[151] On the

[147] See **[X375-X377]**.

[148] See Respondent WS, para. 112 **[T155-T156]**.

[149] See **[T473]** and Galbraith WS, para. 29 **[T170]**.

[150] **[X72]**.

[151] **[T260]**.

evening of 18 October 2018, Client B was said to be on a plane, but apparently still had internet access. Client B sent WhatsApp messages to Solicitor G at 18:02, and a further email to Solicitor G at 18:16, requesting "*updates*" as to what had been said on the Call.[152]

134 Documents produced in the course of these proceedings then show that, throughout the evening of 18 October 2018, Client B and Solicitor G engaged in extensive discussions regarding the Call, focusing in particular on their proposed strategy and response to Hamlins. In particular, these documents establish that in the aftermath of the Call, and well before Solicitor G had prepared his purported attendance note of that Call, he and Client B were giving detailed consideration as to: (i) how to leverage what had been said on the Call to be used to Client B's own advantage; (ii) seeking to challenge the status of the Call as not being subject to without prejudice privilege and (iii) whether to report the Respondent to the SRA.

135 Solicitor G first sent a series of WhatsApp messages to Client B at 18:22, stating as follows: "*Yes quite an unusual one… First of all he raised concerns with [Publication 2], saying that it is in breach of the consent order… And saying that they have counsel's advice that you are in contempt… Then he went on to say they are having trouble taking down copies of [Publication 1 Content] naming [Client A] from American websites… Wordpress is apparently refusing to ignore any English defamation order… They say they are calling before they start sending six page letters asking for [Publication 2] to be pulped to see if a deal can be done… Essentially that [Client A] will overlook the indirect references to [them] and [Company F] in [Publication 2] if you help with removing copies of [Publication 1 Content] from US websites… I've never heard of anything like it before… They want you to use your copyright in the work to get the [Publication 1 Content] down… If you help with that, they will go away… I wonder whether we can use it all to guarantee you more free reign to discuss [Company F] in future… Which is all [Publication 2] does to my recollection*".[153]

136 Client B responded with a series of WhatsApp messages at 21:49, stating as follows: "*If [Client A] takes me to court can [Client A] win?... I am fed up with this bullying.*

[152] **[T262-T263]**.

[153] **[T263-T264]**.

I161

Basically they are trying g to use this bloody agreement to keep encroaching on my rights and to blackmail me into attacking freedom of a US jurisdiction… There is definitely a book in this!... [Publication 2] mentions role of [Company F]. So no breach of any order. Should I not just call their bluff. After all the case would publicise the fact [Client A] has gagged me and that [Client A] sought to blackmail me to get round us freedom of the press. You give these types an inch and they take a mile… I am sending you the three references I make to [Company F]. Their council (sic) *can stuff it. There is no way I breech* (sic) *the agreement not refer to [Client A] or that justifies [Publication 2] being pulped. These people should be chucked out of the profession…*"[154]

137 At 22:03, Client B sent an email to Solicitor G and Solicitor I with the subject line "*give an inch*", attaching extracts from Publication 2.[155] The email stated: "*I have gone through my pdf of [Publication 2] searching [Company F]. Their counsel must be a real mental gymnast to be able to say it breeches* (sic) *an agreement not to identify [Client A]. Call their bluff.*"

138 In a further WhatsApp message at 22:05, Client B made clear that, far from viewing the Third Party Republications as a problem of Client B's making which required resolution, from their perspective they were to be actively celebrated: "*Do you mean wordpress are refusing to recognise a UK defamation order? That's brilliant. Maybe I should get in touch with them and link hands on this?*"[156]

139 Solicitor G responded to Client A's WhatsApp messages at 22:13, stating: "*Yes Wordpress won't acknowledge UK libel judgments… US has the Federal SPEECH act which protects US entities against foreign libel suits… If Wordpress were sued in England successfully the US court would automatically give them a judgment for the same amount against the claimant… They are of course trying to scare you with contempt of court – which is criminal*".[157] The basis for Solicitor G's purported

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[154] **[T264-T265]**.

[155] **[T266]**.

[156] **[T265]**; **[T267]**. This view was expressed notwithstanding that such Third Party Republications had copied and reproduced Client B's original material word-for-word, without their express permission, and would ordinarily be thought a flagrant breach of Client B's copyright in their own reporting and output.

[157] **[T267]**.

understanding of the position a US Court would take is unclear. It is also apparent that Solicitor G was operating under the mistaken understanding that the contempt proceedings referred to in the Call, and any sanctions arising from them, were criminal in nature. They were not: as explained further below, they were civil proceedings, which would have attracted civil sanctions.

140 At 22:33, Client B first made reference to a report to the SRA, stating in a WhatsApp message to Solicitor G: "*Can I report them to the SRA? I am sick of these junkies (which is what I think they are)*". In a further message sent at 22:34, Client B asked: "*I wonder which sites in the US they have gone after?*"[158]

141 At 22:36, responding to this latter message, Solicitor G stated: "*Sounds like some websites that copies and pastes [Publication 1]… So hardly reputable… But glad someone did it!... I was quite astounded by the suggestion on the phone… Gobsmacked – so brazen*".[159]

142 Between 22:52 and 22:56, Client B and Solicitor G then exchanged further WhatsApp messages as follows:[160]

"*<u>Client B:</u> Can he say it was privileged?*

<u>Solicitor G</u>: It is a fine line

<u>Client B</u>: Can I bring s complaint? I will reach out to Wordpress.

<u>Solicitor G</u>: I will send you a report on it

<u>Client B</u>: So when I get the 6page letter it won't mention the blackmail line? Well you had to tell me the proposed deal and I am surely not barred from complaining.

<u>Solicitor G</u>: Threatening criminal repercussions to gain advantage is very risky

[158] **[T267]**.

[159] **[T267]**.

[160] **[T268]**.

Client B: Good. I have always felt done over by [Client A] and Hamlyn (sic). *They should go the way of [redacted].*[161] *I am cleaning up your profession for you [face with tears of laughter emoji].*

Solicitor G: Just sent the note over… You are indeed. You seem to attract the very worst elements of it!"

143 Shortly afterwards, at 22:57, Solicitor G emailed Client B attaching an analysis of *Ferster v Ferster* [2016] EWCA Civ 717 (but not the decision itself) stating: "*Here is a note by another law firm on when people threatened criminal repercussion to take advantage in civil settlement discussions. In that case, the person threatened successfully argued the improper threat meant privilege was lost.*"[162]

144 Between 22:57 and 23:09, Client B and Solicitor G exchanged further WhatsApp messages as follows:[163]

"*Client B: Hmmm. I was beginning to assume it was run of the mill.*

Solicitor G: Chris Hutchings knew he was skating on thin ice and was careful how he connected the dots.

Client B: Disgusting.

Solicitor G: So if we are going to tell them to get lost we have to think carefully about referring to the deal they offered and how we do that…

Client B: Indeed. Maybe lure him out a little further by letting him think we are biddable to he spells it out further and lays the terms more clearly then gotcha?...

Solicitor G: Hmm – I am not sure that can be done, as it will look like entrapment. With this sort of thing we need to be whiter than white… Let me think about it… We could just write now on a WP basis and say their offer is rejected, spelling out what the offer was and they would be pretty darn brazen to pursue a contempt application all the

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[161] This was a reference to one of Client B's former solicitors, with whom they were apparently dissatisfied – see Solicitor G Second WS, para. 13 **[T239]**. Their name has been redacted to avoid jigsaw identification.

[162] **[T269-T271]**.

[163] **[T272-T273]**.

same… I have no doubt [Counsel M] can put together an argument that you breached the order by reference and tie you up in costs but I wonder whether they really have the stomach to make a committal application… To commit you for naming [Company F's] role in a major fraud – it beggars belief

Client B: Well the best way to scotch it is to make the element of blackmail clear in the reply. I guess. Then they would have to be really Brazen to carry on… But I need to complain about this."

145 Client B then sent a text message to Solicitor G at 22:43 stating: "*This without prejudice thing is a way of allowing lawyers to blackmail people something the rest of us would got to jail over. No wonder [Client A] and this Hamlyn* (sic) *fellow think they are above the law and I should not mess with them.*"[164]

146 Finally, at 23:48, Client B emailed Solicitor G responding to his email of 22:57 and the article on *Ferster*, and stating:[165]

"*Very useful. Although he may say it was a phone call and it was his word against yours? However, without his threat how would you know what they were after ie using this to solve their problem in the US to blackmail me into using copyright law?*

And the difference between me and Jonathan F is that I have not even done anything wrong!"

147 On the morning of 19 October 2018, at 10:05, an employee of Company H sent to Solicitor G a Westlaw summary of the decision in *Ferster v Ferster* entitled "*When "without prejudice" won't offer protection*".[166]

148 Client B emailed Solicitor G at 12:36 stating: "*It occurs to me I should complain to the SRA now anyway about thsi improper threat. So it doesnt look like I am complaining after the event if [Client A] does sue. It shows why I resisted and opens up to all the*

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[164] **[T274]**.

[165] **[T275]**.

[166] **[T276-T281]**.

I165

other behaviouR What do you think?". Solicitor G responded at 12:37 stating: "*I think fine to do so. Let me just check [Solicitor I] agrees*".[167]

149 It was only after all these exchanges, at 14:52, that, according to the document properties, Solicitor G first began preparation of what became his telephone attendance note of the Call (the "**TAN**").[168] The TAN is a document on which the SRA places very significant reliance. The circumstances in which Solicitor G came to produce it are explored further in Section E below. However, it is Solicitor G's evidence that: (i) he did not have assistance from anyone else in preparing the TAN; and (ii) he did not base the TAN on any earlier note which he had taken of the Call (whether manuscript or otherwise).[169]

150 The document properties show that Solicitor G completed work on the TAN at 17:35.[170] However, it is apparent that this was not his sole focus during that period. At 15:27, he sent a separate email to Client B, with a link to one of the Third Party Republications, stating: "*I think this must be what [Client A] wants removed*".[171] The link was to the website of a campaigning organisation from Country C, hosted on WordPress, which (as Solicitor G had put it in his message the previous evening) simply "copied and pasted" Publication 1 Content, reproducing it *verbatim*. This Third Party Republication, which Solicitor G had apparently been able to locate with relative ease, demonstrates the ongoing impact of Client B's false and defamatory allegations against Client A, notwithstanding the removal of the original Publication 1 Content. It also demonstrates why Client B was fully entitled to assert copyright in the original Publication 1 Content against such websites, which had not even attempted to disguise the wholesale reproduction of Client B's own material.[172]

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[167] **[T282-T283]**.

[168] **[T243]**.

[169] Solicitor G Second WS, paras. 5.a-c **[T236]**.

[170] **[T243]**.

[171] **[T284-T314]**. It is unclear how Solicitor G located this particular Third Party Republication, but the likeliest scenario is that he simply searched online for Client A's name together with "Publication 1", the "Scandal" or some other identifying term. That in itself demonstrates the difficulty Client A was facing in addressing the consequences of Client B's original publication of false and defamatory allegations.

[172] Solicitor G himself described such websites as "*hardly reputable*" **[T267]**.

I166

151 Solicitor G emailed the TAN to Client B, together with a draft of a proposed response to be sent to Hamlins, at 17:52.[173] His email stated: "*[Solicitor I] has not seen this yet, so may have comments, including on the proposed approach. I would suggest it may be better to wait until Monday before sending this, in the hope they may think slightly more rationally about what to do next…*"

152 Client B responded at 19:50, stating:[174]

"*This seems very effective. I do not hold out much hope that they will not again issue a writ, because CH is clearly willing to do whatever it takes to bully on behalf of his client who is likewise obsessed.*

On the other hand, it took [Client A] three years to bite the bullet and complain about what I had written about [them], so he is also a coward. [Client A] knows that if [Client A] goes to court it will undo everything [Client A] has sought on the issue of keeping this private and their case is pretty terrible, now they have attempted to blatantly blackmail me…

… [Client A's] demand could be a point of media interest."

153 At 20:10, Client B then sent a further email to Solicitor G in respect of a potential report to the SRA, stating: "*If I do can I use your reply and notes of attendance as my evidence to the SRA? I just think it will put me in the right place when they launch proceedings, because the clear intent will be to pressure me on costs into giving in to their demand for copyright powers.*"[175]

154 Client B then exchanged emails with Client B's Spouse as follows:[176]

(a) At 20:12, Client B's Spouse emailed stating: "*Doesn't your very good point about media attention and the risks of going to court need to be spelt out to them? They may think that any such action will pass by unnoticed. They need to know it would be a major own goal*";

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[173] **[T482-T483]**.

[174] **[T319]**.

[175] **[T320]**.

[176] **[X406-X407]**.

(b) At 20:42, Client B replied stating: "*I don't think we can threaten them openly. [Client A] will be worried about that without me saying anything…*";

(c) At 20:51, Client B's Spouse responded stating: "*Not threatening them but highlight that they would then make the issue a very public one*".

155 At 21:13, Solicitor G emailed Client B in respect of a potential report to the SRA:[177]

"*The SRA are a regulatory authority so the way they operate and what they will consider when dealing with complaints will be set out in their statutory powers and I expect their own internal rules. 'Without Prejudice' privilege protects communications held for the genuine purpose of settling litigation from being disclosed to the judge hearing the litigation, which is different from the SRA. Moreover, we are arguing that WP privilege falls away in any event because of the improper threat made. In the circumstances I can't see why the SRA would refuse to consider either my attendance note or the follow up email (once sent).*

Broadly I believe your complaint will need to be framed around a breach of the solicitor's code of conduct…

[Solicitor I] has been working from home today and I would like [their] input before we press the button and possibly throw you into another round of litigation with [Client A]. Let's see what [Solicitor I] says on Monday about the SRA complaint and draft email to Hamlins and take things from there."

156 Client B responded to Solicitor G at 23:05, stating: "*That is helpful and yes, no hurry. Presume on the other hand the SRA doesnt involve litigation as such… Just me as a member of the public*".[178]

157 On 22 October 2018, at 16:00, Solicitor G emailed Client B stating: "*I have just spoken to [Solicitor I]. [Solicitor I] is happy with the draft response below. Hamlins will no doubt reply denying everything but with some luck they won't issue committal proceedings knowing they made this improper threat at the start. [Solicitor I] has suggested you hold off from reporting Hamlins to the SRA until we have seen what they*

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177 **[T321]**.

178 **[T322]**.

have to say in response."[179] Client B responded at 16:07 stating: "*Yes please send it – I was within second of sending my complaint to the SRA, but yes will hold*".[180]

158 Company H's formal response to Hamlins was then sent by Solicitor G at 17:46.[181] This response reflected the draft which had been sent to Client B on 19 October 2018. It stated in respect of the Call:

"*You said that (1) your client has a strong basis for bringing committal proceedings against our client for contempt of court over certain passages of [Publication 2], which you say breach the consent order dated 17 July 2018 and undertakings our client gave to the court in that order; but (2) that your client would be amenable not to pursuing those committal proceedings if our client agrees to help your client with removal content from certain US websites, reproduced from [Publication 1], by granting your client a carefully confined copying licence over certain passages of [Client B's] work. This would allow your client to bring copyright proceedings against US websites to remove content which your client has been unable to remove with the consent order.*

Our client cannot agree to this proposal for three reasons:

1. It is improper to use the threat of committal proceedings to compel our client into agreeing a copyright licence. The threat of criminal sanction cannot be used to extract an ancillary or unwarranted benefit, however deftly that demand is made.

2. There has been no breach of the consent order …

3. Our client will not allow [themselves] to be a party to an attempt to circumvent US speech laws…"

159 At 19:43, Client B emailed Solicitor G in respect of this response stating: "*If this guy was reasonable I would assume it would shut him up. But, I do not think he is. If he issues proceedings I will be compelled to report him*".[182]

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[179] **[T323]**.

[180] **[T324]**.

[181] **[T325-T326]**.

[182] **[T327]**.

160 On 23 October 2018, at 17:41, the Respondent forwarded Company H's response to Client A, stating:[183]

"*The issue we have is that understandably you don't want to pursue a full-blown contempt application all for good reason. Such a step would be both costly and not certain in terms of outcome. We have in particular to establish the point as to 'reference'… If you were successful it might as we've discussed, result practically speaking in pulping of unsold copies of [Publication 2]. That's not an outcome you consider worth the risk and cost and I am again sympathetic with that view.*

Their email will need a careful response, marked WP, stating that the call they refer to was on that basis and making clear key points made on the call, to the effect that we have taken advice of counsel and that the passages in [Publication 2] are in breach and that the call and proposal was a practical alternative to avoid further litigation. It is important regardless of whether you take any further action in respect of [Publication 2], to be seen to respond and not accept their position."

161 Client A responded at 19:13 stating:[184]

"*My thoughts are:*

- *Reconfirm that the discussion was WP*

- *Deny that there was any improper use of committal order. The simple point is that [Client B] has breached the order and all sanctions are available to me. Counsel has confirmed this. We have put [Client B] on notice of this. The threat of sanction is based on the breach of the Order by their client*

- *We would accept pulping of [Publication 2] as an appropriate remedy. This would remove the offending content and would demonstrate to any would be third party publishes that the content of [Publication 2] is unsafe.*

- *Without an acceptable proposal on their part we will be forced to commence proceedings*"

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[183] **[T487]**.

[184] **[T488]**.

162 The Respondent replied to this email at 20:01, stating: "*Agreed regarding the inappropriate cover under which their email was sent and this point will be made up front in response. We'll discuss approach given the sensitive nature of contempt applications when we speak, which [Counsel M] was at pains to make.*"[185]

163 On 24 October 2018, a call took place between the Respondent and Client A to discuss a potential response to Company H.[186]

164 On 25 October 2018, at 18:12, Mr Galbraith emailed Client A and the Respondent with a proposed draft response to Company H, stating: "*I think that this strikes the correct balance between appearing reasonable, dispelling the inaccurate assertions in their last letter and threatening to take action (when you are unlikely not to do so)*".[187] The Respondent's time recording for 25 October 2018 makes clear that he both reviewed the draft and discussed it with Mr Galbraith.[188]

165 On 26 October 2018, the response was sent to Company H. While this was sent from Mr Galbraith's email address, it was headed: "*SENT ON BEHALF OF CHRISTOPHER HUTCHINGS*". It was also marked "*Without prejudice*". The response stated:[189]

"*I refer to your email of 22nd October 2018. Your email is not marked without prejudice but, given it refers to my call of 18th October 2018 on that basis, I am treating it as such.*

It is regrettable that your letter misrepresents the substance of my call and therefore my client's position. Further, your response is erroneous as a matter of fact and law.

For the avoidance of any doubt, my client very reasonably sought, once again, to afford your client an opportunity to avoid committal proceedings which you acknowledge carries "criminal sanctions" by offering [them] the chance to remedy [their] breaches of the Order.

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185 **[T488]**.

186 **[B3794]**.

187 **[B3795]**.

188 **[X73]**.

189 **[T493-T494]**.

I171

You indicated on our call that you appreciated this approach, not least given the costs of litigation, but you now seek to resile from that position to improperly (and unfairly) criticise my client's pragmatic approach. This is disappointing in circumstances where I have made plain to you that my client has already engaged Counsel in respect of the proposed Committal Application and I contacted you having already received advice as to the strength of my client's position in this regard. In any event, your client's position will not assist the resolution of matters and my client will proceed accordingly.

So as to assist your client to reconsider [their] position and to properly understand my client's :-

1. Paragraph 7.2 of the Order clearly prohibits your client from "referring to [our client] by name, description (including by referring to [Company F]), image or otherwise howsoever". It is apparent therefore that your client is not permitted to refer to my client in any way, whether explicitly or implicitly. In such circumstances, it is wrong of you and your client to simply seek to dismiss my client's complaints as you do…

Your client published very extensive references to our client on [Publication 1] which culminated in the legal proceedings and the Order. As such, given that [Publication 2] was heavily advertised through [Publication 1] and originally sold through it, the readership of [Publication 2] and [Publication 1] are likely to be the same. Therefore, any reasonable reader would associate my client with the allegations, irrespective of the fact that my client is not explicitly named. It was for this reason that the Order was framed as it was and your client is unarguably in breach of the same.

2. Your email suggests that my client has raised the spectre of Committal proceedings so as to improperly extract a collateral benefit. This is not correct and, in any event, my client seeks removal of the offending references to [them] within [Publication 2], as was made clear on the call. Your client has failed to address this (no doubt tactically).

3. As to your comments concerning the copyright licence, I do not agree with your analysis and consider the request to be in line with the spirit of the Order in any event. Your client's position is noted, albeit not accepted.

...

In conclusion, I urge your client to reconsider [their] position and my client is prepared to offer [them] a further seven days in which to do so. I hope it will not be necessary but, out of an abundance of caution, I reserve my client's rights and remedies without limitation and, for the avoidance of doubt, my client will rely on the breaches of the Order [they are] aware of and to which you have alluded in any proceedings [they need] to commence."

166 On 29 October 2018, at 14:30, Solicitor G emailed Client B with his comments on the above email, noting: "*Whether or not you have breached the order is irrelevant to the question of whether [Client A's] threat constitutes blackmail, but it will be what they are weighing up in considering whether to deny the threat and pursue the contempt/civil enforcement action.*"[190]

167 Client B responded with two emails to Solicitor G that afternoon:[191]

(a) At 17:49, Client B emailed stating: "*I also think I should approach the SRA now, because their letter as you say denies but at the same time confirms and compounds the nature of their threats and they need to understand I mean business. Unfortunately, the court case if it happens will now only focus on whether I have referred to [Client A] pejoratively, rather than whether [Client A] deserves to be referred to pejoratively, which means that it is no longer so off-putting a prospect for him.*";

(b) At 17:56, Client B sent a further email stating: "*I do think you have them cornered with the demand that they withdraw their improper request. If they don't then the tactical issue of issuing a writ will become plain*".

168 Client B also exchanged emails with Client B's Spouse as follows:[192]

(a) At 17:52, Client B emailed stating: "*I ought never to have blinked on [Client A]…*";

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[190] **[T328-T329]**.

[191] **[X417]**.

[192] **[X417-X418]**.

(b) At 18:05, Client B's Spouse responded stating: "*Awful! Need to send email to SRA ASAP*";

(c) At 18:17, Client B replied stating: "*I agree. Although, I think [Solicitor G] has them cornered with is demand that they immediately withdraw their request on copyright to prove they are not trying to blackmail me with the writ. If they do not withdraw it then we know where we are.*"

169 On 30 October 2018, Client B emailed Solicitor G stating:[193]

"*I have to say all of this correspondence hardens my view that I ought to have called [Client A's] bluff… from day one. By putting up a flag that says I am poor and willing to be bullied I have encouraged these people who are not reasonable people, but hardened criminals who have stolen hundreds of millions.*

…

I think your letter is a good reply but I also think I should approach the SRA now, because their letter as you say denies but at the same time confirms and compounds the nature of their threats and they need to understand I mean business.

Unfortunately, the court case if it happens will now only focus on whether I have referred to [Client A] pejoratively, rather than whether [Client A] deserves to be referred to pejoratively, which means that it is no longer so off-putting for [Client A]."

170 On 31 October 2018, Solicitor G sent a response to the Respondent's email of 26 October 2018.[194] This email stated:

"*We refrained from stating in our last email what we feel necessary to say now explicitly. The proposal you made by telephone and appear to be repeating now come across to us as blackmail. Your email below suggests I have misrepresented your client's 'pragmatic approach' but then a) does not say what your client's proposal was; and b) goes on to acknowledge the constituent elements of blackmail: the threat of a contempt application (including the threat of serious criminal sanction), an additional*

[193] **[T331]**.

[194] **[T506]**.

threat to have [Publication 2] pulped, both used as leverage for your 'request' for a copyright licence, which you acknowledge your client is not legally entitled to.

Did you take a contemporaneous attendance note of the call? If so, we suggest you send it to us now so we can see what you say your client's proposal was and how, if at all, it differs from my account. In any event, you seem to be continuing to pursue the copyright licence against the threat of contempt and civil proceedings, even in spite of our first email, as you ask your client to 'reconsider [their] position without altering or withdrawing your client's proposal.

… Please now withdraw your client's demand that our client agree to an assignment of the copyright in the articles complained of to your client. In the absence of your <u>*express*</u> *withdrawal, our client will have to assume you continue to hold the threat of criminal and civil proceedings over [them] against this demand, and will be seeking to extract that licence as a term of settlement of any proceedings. In the meantime, our client's position is reserved.*"

171 Solicitor G's time recording for 31 October 2018 also indicates that on that day he considered "*abusive strike-out applications under CPR 81, various case law*" and discussed "*next steps*" with Solicitor I.[195]

172 On 1 November 2018, Solicitor G forwarded the above response to Client B, noting: "*I will keep you posted when we have a response. I am sure they will continue to deny all and threaten proceedings, but as matters stand this does seem to me to be a riskier claim for [Client A], particularly in light of them starting the action off with the copyright demand and the risk my attendance note and these emails are admissible in any proceedings.*"[196]

173 On 2 November 2018, Mr Galbraith emailed Client A (copying the Respondent and Mr Forshaw) in respect of Solicitor G's email of 31 October 2018, stating:[197]

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[195] **[T256]**.

[196] **[T333]**.

[197] **[T498-T499]**.

"*As you know, [Counsel M's] advice was not to seek the license alongside threatening a committal application. We will need to involve [Counsel M] if the matter proceeds but [Counsel M] will certainly reiterate [their] earlier advice.*

That said, we have not, despite what has been said, improperly threatened criminal sanctions so as to extract an unwarranted benefit:

…

We can therefore go back with good arguments to undermine [Company H's] assertions.

…

We therefore need to discuss where we are ultimately going and whether public committal proceedings are sensible from your perspective given the lengths gone to get content removed from the internet etc."

174 On 8 November 2018, the Respondent sent Solicitor G a response (marked "*WITHOUT PREJUDICE*") to his email of 31 October 2018.[198] This stated:

"*Your correspondence is an unarguably opportunistic attempt to deflect from your client's flagrant and numerous breaches of the Order of the Court.*

It is telling in this regard that you:

a) ignore that the purpose of our correspondence was to offer your client an opportunity to resolve matters without recourse to further litigation;

b) acknowledge that you characterised our client's position in our call of 18th October as being "constructive" and pragmatic but now assert it is improper such as to amount to "unambiguous impropriety"; and

c) ignore the evidential and legal importance of [Publication 1] in regard to the knowledge readers of [Publication 2] would have in terms of implicit references to our client.

[198] **[T505]**.

For the avoidance of any doubt, our client does not seek any copyright licence as referred to in your earlier correspondence but this is not because we consider that your legal arguments have merit, we do not. In particular, note :-

a) no improper threat has been made: Counsel has already been instructed to advise and, further, one outcome from the proposed proceedings is that the Court may order that [Publication 2] be pulped;

b) it is simply not feasible to suggest that this situation fits within the relevant exception to the without prejudice rule which, understandably, requires extreme conduct which is outside of the norm and, in any event, the impropriety must be "unambiguous" which it quite clearly isn't as confirmed by your own positive assessment of our approach on our call; and

c) you assert in your letter that it "was not a communication for the purposes of settlement" but conclude by suggesting that our client was "seeking to extract [a] licence as a term of settlement" and "a term of settlement" sought cannot be construed to amount to blackmail.

It is regrettable that your client has, once again, sought to attack our client rather than engage with [their] legitimate complaints. [Their] rights and remedies are therefore reserved and you can expect to hear from us further in due course."

175 Solicitor G forwarded this response to Client B the same day, stating: "*See below from Hamlins. They have now withdrawn the copyright licence demand, while continuing to threaten proceedings… I don't know whether or not the threat to pursue a claim is real or this is a face-saving retreat*".[199]

176 On 23 November 2018, Mr Galbraith emailed Client A (copying the Respondent and Mr Forshaw) and attaching an "*updated… schedule of 3rd party websites*".[200] The attached schedule set out details of Third Party Republications hosting, with one exception, all 22 pieces of Publication 1 Content listed in Annex 1 to the Consent Order. Mr Galbraith also noted that he would begin researching steps to personally serve a committal application on Client B.

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[199] **[X422]**.

[200] **[T509]**. The schedule is at **[B3804-B3816]**.

I177

177 On 27 November 2018, Mr Forshaw emailed Mr Galbraith (copying the Respondent) attaching the results of research he had undertaken into the procedure for bringing proceedings for contempt of court.[201] Mr Galbraith then passed on the results of that research to Client A on 5 December 2018.[202]

178 The circumstances in which Client A decided, ultimately, not to take any further steps to pursue contempt proceedings are explained in detail in paragraphs 32 – 37 of their witness statement.[203] In summary, Client A was heavily engaged (as the instructing client) in separate arbitration proceedings throughout December 2018, and then spent Christmas with their family. At the same time, Hamlins was continuing its work on removing the Third Party Republications. In January 2019, upon turning their mind to the issue once again, Client A formed the view that enough time had passed since the publication of Publication 2 that commencing proceedings would be of little practical benefit to the overarching aim of repairing the reputational damage done by Client B.

D Law

D.1 Recollection

179 The Allegations each concern what is alleged to have been said by the Respondent on the Call, which took place almost exactly seven years ago. In those circumstances, it is particularly important for the Tribunal to bear in mind, when assessing the oral testimony of the factual witnesses, the well-known guidance given by Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2020] 1 CLC 428 at [22]:

"*... the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the*

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201 **[T511-T512]**.

202 **[T514-T514]**.

203 **[T182-T183]**.

I178

personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

180 That guidance was given further elucidation by Cockerill J in *Jaffe v Greybull Capital LLP* [2024] EWHC 2534 (Comm) at [195] – [202]. That case concerned an alleged fraudulent representation made orally in the course of a meeting which, by the time of trial, had taken place almost eight years ago. In those circumstances, and particularly given that this case involves allegations of the most serious kind against the Respondent (for which cogent evidence is required), the Tribunal should place particular emphasis on: (i) the (genuinely) contemporaneous documents; and (ii) the inherent probabilities.

181 The Tribunal will also appreciate that this is a case where there has now been very substantial delay, first in the Allegations being made against the Respondent, and then in those Allegations being heard and determined. In particular:

(a) While there is evidence that Client B intended to report the Respondent to the SRA immediately after the Call had been made in October 2018, they did not in fact do so until 20 January 2023 – i.e., over four years later.[204] The reason for that very lengthy delay remains unclear;

(b) Following the report made by Client B, the SRA waited over a year before issuing its Referral Notice on 15 March 2024.[205] That Referral Notice also contained no reference at all to what is now Allegation 1.1.2, which was instead made, for the first time, by the SRA in its Rule 12 Statement dated 27 June 2024;

(c) The Substantive Hearing was originally listed to take place in February 2025, but was then adjourned to October 2025 upon the SRA's application (which was vigorously opposed by the Respondent).[206]

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204 **[T127-T128]**.

205 **[X6-X28]**.

206 See **[F20-F34]**.

182 None of the above delays can be attributed to any conduct on the part of the Respondent. Accordingly, and even if the cumulative effect of such delays does not itself render the proceedings abusive and/or prevent a fair trial, any and all issues of doubt as to the precise events on 18 October 2018 should, in fairness, be resolved in favour of the Respondent.[207]

D.2 Dishonesty and lack of integrity

183 The test for establishing dishonesty was set out by Lord Hughes in *Ivey Genting Casinos UK Ltd* [2018] AC 391 at [74] as follows:

> "*When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.*"

184 Accordingly, *Ivey* requires the Tribunal to apply a two-stage test:

(a) First, it is necessary to ascertain subjectively the actual state of the Respondent's knowledge or belief as to the facts at the relevant time; and

(b) Second, once that knowledge or belief has been ascertained, the Tribunal must determine – by applying the objective standards of ordinary decent people – whether his conduct in question was honest or dishonest.

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[207] See Answer, para. 18 **[T44]**. In any event the SRA bears the burden of proof of establishing the Allegations and, to the extent that such delays mean that it cannot now establish its case (whether because of the fading of recollections or otherwise), that is a matter entirely for its own account.

185 The standard of proof for an allegation of dishonesty remains the balance of probabilities. However, as explained by Lord Hughes in _Re H (Minors)_ [1996] AC 564 at 568E-G (**emphasis** added):

"*The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not.* ***When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.*** *Fraud is usually less likely than negligence… Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.*

Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that ***the inherent probability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established****. Ungoed-Thomas J expressed this neatly in _Re Dellow's Trusts_ [1964] 1 WLR 451, 455:* ***"The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it"****."

186 Those observations apply with particular force in this case, given that the Allegations have been made against the Respondent, who is not merely a professional person but a senior partner with an unblemished record over more than 30 years of practice as a solicitor, both before and since the events complained of. It is therefore inherently unlikely that he would have acted dishonestly and the Tribunal would require highly cogent evidence to overcome that inherent unlikelihood and establish that he did in fact do so.[208]

[208] Answer, para. 140(a) **[T87]**.

187 In *Wingate v SRA* [2018] 1 WLR 3969, Jackson LJ set out the following principles in relation to integrity in the context of disciplinary proceedings:

(a) As a matter of common parlance and as a matter of law, integrity is a broader concept than honesty (at [95]);

(b) Integrity is a more nebulous concept than honesty, and hence it is less easy to define (at [96]);

(c) In professional codes of conduct, the term "integrity" is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members. The underlying rationale is that the professions have a privileged and trusted role in society. In return they are required to live up to their own professional standards (at [97]);

(d) It is not possible to formulate an all-purpose, comprehensive definition of integrity (at [98]);

(e) Integrity connotes adherence to the ethical standards of one's own profession. That involves more than mere honesty. A professional person is expected to be even more scrupulous about accuracy than a member of the general public in daily disclosure (at [100]); and

(f) Neither courts nor professional tribunals must set unrealistically high standards. The duty of integrity does not require professional people to be paragons of virtue. In every instance, professional integrity is linked to the manner in which that particular profession professes to serve the public (at [101]).

D.3 Contempt proceedings

188 Notwithstanding certain statements to the contrary made by the SRA and its witnesses, it is important to emphasise that the threatened contempt proceedings with which this case is concerned were not criminal proceedings, and nor would they have attracted

criminal sanctions.[209] Rather, they were civil proceedings. Such civil contempt proceedings do still require the allegations to be proved to the criminal standard, and are subject to various other strict procedural requirements. However, they remain civil proceedings, which would have attracted civil sanctions (including, potentially, committal to prison).[210]

189 The distinction between civil and criminal contempt proceedings is reflected in Part 81 of the Civil Procedure Rules, and was clearly elucidated and explained by Carr LJ (as she then was) in *Navigator Equities Ltd v Deripaska* [2022] 1 WLR 3656 at [79] – [81]. Proceedings for civil contempt can be brought as of right, and are normally commenced by the party aggrieved. By contrast, a committal application in respect of a criminal contempt can only be made with the permission of the Court, and may be commenced by the Court of its own motion or by the Attorney General. As part of the application for permission, the Court considers (amongst other things) whether the applicant is a proper person to bring the application. While such proceedings are sometimes described as "quasi-criminal", and are classified as criminal proceedings for the purpose of Article 6 of the ECHR, that does not mean that, as a matter of English law, they are anything other than civil proceedings.

190 Accordingly, civil contempt proceedings are not to be equated with private prosecutorial proceedings. An application for committal for civil contempt may well have more than one purpose, including the protection of the applicant's own interests, and applicants are not required to act as wholly disinterested parties (see *Navigator Equities* at [137]).

191 At [82], Carr LJ set out the following well-established "*general propositions of law*" in relation to civil contempt proceedings:

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[209] See, for example: Reply, para. 24 which refers to the "*criminal sanction of committal for contempt*" **[T126]**; Client B's original report to the SRA in January 2023, which refers to "*threats of criminal proceedings*" **[T127]**; and Solicitor G Second WS, para. 5.d which refers to Client B facing "*criminal contempt proceedings*" **[T236]**.

[210] The power of the Court to impose an order of committal (i.e., a period of imprisonment) is contained in Rule 81.9(1) of the Civil Procedural Rules. A respondent may appeal against such an order as of right, and such appeals from the High Court are heard by the Civil Division of the Court of Appeal (CPR 52.3(a)(i)).

(a) "*The bringing of a committal application is an appropriate and legitimate means, not only of seeking enforcement of an order or undertaking, but also (or alternatively) of drawing to the court's attention a serious (rather than purely technical) contempt. Thus a committal application can properly be brought in respect of past (and irremediable) breaches*";

(b) "*A committal application must be proportionate (by reference to the gravity of the conduct alleged) and brought for legitimate ends. It must not be pursued for improper collateral purpose*";

(c) "*Breach of an undertaking to the court will be a contempt: an undertaking to the court represents a solemn commitment to the court and may be enforced by an order for committal. Breach of a court undertaking is always serious, because it undermines the administration of justice*";

(d) "*The meaning and effect of an undertaking are to be construed strictly, as with an injunction. It is appropriate to have regard to the background available to both parties at the time of the undertaking when construing its terms. There is a need to pay regard to the mischief sought to be prevented by the order or undertaking*";

(e) "*It is generally no defence that the order disobeyed (or the undertaking breached) should not have been made or accepted*";

(f) "*Orders and undertakings must be complied with even if compliance is burdensome, inconvenient and expensive. If there is any obstacle to compliance, the proper course is to apply to have the order or undertaking set aside or varied*";

(g) "*In order to establish contempt, it need not be demonstrated that the contemnor intended to breach an order or undertaking and/or believed that the conduct in question constituted a breach. Rather it must be shown that the contemnor deliberately intended to commit the act or omission in question. Motive is irrelevant*";

(h) "*Contempt proceedings are not intended as a means of securing civil compensation*";

(i) "*For a breach of order or undertaking to be established, it must be shown that the terms of the order or undertaking are clear and unambiguous; that the respondent had proper notice; and that the breach is clear (by reference to the terms of the order or undertaking)*".

192 Carr LJ concluded, at [110], that where a civil contempt application: (i) is made in accordance with the relevant procedural requirements; (ii) is properly arguable on the merits; and (iii) has the effect of drawing to the attention of the Court an allegedly serious contempt, then the fact that applicant is motivated, whether predominantly or even exclusively, by a personal desire for revenge is not a good reason for striking out the application as an abuse of process.

193 In *Integral Petroleum SA v Petrogat FZE* [2020] EWHC 558 (Comm), the respondents to a contempt application sought to strike it out as an abuse of process, on the basis that the threat of committal had been used by the applicant improperly as a lever to obtain a more favourable settlement agreement. Foxton J dismissed the application, holding that the applicant's conduct did not go beyond that which was permissible in attempting to settle hard-fought commercial litigation. He noted at [42]:

"*… There is no doubt that committal proceedings are a far more frequent feature of commercial litigation now than previously… Once a committal application has been issued, any settlement of the overall commercial dispute is necessarily going to have to address the position of the committal application, with most respondents being understandably concerned to ensure that the settlement ties up all matters including the contempt, and most claimants themselves wanting to draw a line under the litigation in terms of further costs and management time (in circumstances in which the continuation of the committal application will inevitably involve the claimants in the further expenditure of both). It can never be proper to seek to use a committal application as a lever to bully a respondent into a settlement. However, the practical consideration that resolving an outstanding committal application will in most cases be necessary to achieve a settlement of the commercial dispute means that the court should not jump too readily to the conclusion that references in the settlement* *communications to the disposal of the committal proceedings or the timing of the committal proceedings evidence an improper purpose on the claimant's part, or involve the use of the committal proceedings as some form of improper threat.*"

194 In a similar vein, in Cardiff City Football Club Ltd v McKay [2025] EWHC 1439 (Comm), Nicklin J noted at [51]:

"*There is often a tension underlying the prosecution of a contempt application. A party who has obtained an injunction from the Court has an immediate and legitimate, private, interest in securing compliance with its terms, by contempt proceedings if required. S/he is also likely to have a direct interest in purely historic breaches of the Court's order. There is a corresponding public interest – in upholding the rule of law – in ensuring that Court injunctions are obeyed (and disobedience punished, when necessary). But the litigant to whom the injunction has been granted is also likely to have a private interest in securing the best settlement s/he can achieve of the overall litigation.*"

D.4 Abuse of process and collateral advantage

195 The following "*general rule*", in relation to proceedings which are pursued by a party for some impermissible collateral advantage, was set out by Lord Evershed MR in *In re Majory* [1955] Ch 600 at 623 – 624:

"*… court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty for abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he has abused.*"

196 The meaning of "*collateral advantage*" in the context of that general rule was given further consideration in Goldsmith v Sperrings [1977] 1 WLR 478. Bridge LJ noted at 503D-H (**emphasis** added):

"*For the purpose of Lord Evershed's general rule, what is meant by a "collateral advantage"? **The phrase manifestly cannot embrace every advantage sought or***

obtained by a litigant which it is beyond the court's power to grant him. Actions are settled quite properly every day on terms which a court could not itself impose upon an unwilling defendant*. An apology in libel, an agreement to adhere to a contract of which the court could not order specific performance, an agreement after obstruction of an existing right of way to grant an alternative right of way over the defendant's land – these are a few obvious examples of such proper settlements.* ***In my judgment, one can certainly go so far as to say that when a litigant sues to redress a grievance no object which he may seek to obtain can be condemned as some form of collateral advantage if it is reasonably related to the provision of some form of redress for that grievance.*** *On the other hand, if it can be shown that a litigant is pursuing an ulterior purpose* ***unrelated to the subject matter of the litigation*** *and that, but for his ulterior purpose, he would not have commenced proceedings at all, that is an abuse of process. These two cases are plain; but* ***there is, I think, a difficult area in between. What if a litigant with a genuine cause of action, which he would wish to pursue in any event, can be shown also to have an ulterior purpose in view as a desired byproduct of the litigation? Can he on that ground be debarred from proceeding? I very much doubt it****…*"

197 The specific facts in Goldsmith also merit close attention. The plaintiff alleged that he was the victim of a sustained, libellous campaign against him by *Private Eye* magazine. As well as bringing actions for both civil and criminal libel against the publishers, editor and main distributor of the magazine, he also brought civil actions against various secondary wholesale and retail distributors, seeking damages and an injunction. Certain of those distributors reached settlements with the plaintiff on terms that the actions would be discontinued and no damages or costs paid, provided that they ceased to distribute *Private Eye* altogether. That was a remedy which went further than any which could have been granted to the plaintiff by the Court, had the actions continued to judgment. The remaining distributors, who had not settled, sought to have the actions against them stayed or dismissed as an abuse of process. This was on the basis that the settlements which had been reached with the other distributors revealed that the plaintiff's true purpose in bringing the actions was not to protect his reputation, but rather the collateral purpose of destroying the magazine by cutting off its retail outlets.

198 The majority of the Court of Appeal (Scarman and Bridge LJJ) held that the actions had not been brought for a collateral purpose and there was therefore no abuse. The purpose of all the actions which had been brought against the distributors was to vindicate the plaintiff's reputation and prevent further anticipated attacks upon it, and such a purpose could not therefore constitute an abuse of process.

199 In reaching such a conclusion, Scarman LJ stated (at 499H-500B) (**emphasis** added):

> "***Men go to law to redress a grievance***. *They may not know or understand the limits of the remedies provided by law… But, equally,* ***a man, while pursuing the remedies offered by law, may negotiate to secure, by arrangement with the parties sued, terms more favourable than, or different from, what he would get in the absence of agreement. Such a negotiation, undertaken by properly advised parties, each of whom may have a legitimate interest in avoiding litigation and may be prepared to concede more than the law requires of them to achieve that end, does not necessarily mean that the plaintiff by his litigation is reaching out to secure a collateral advantage***. *In the context of libel, he may reasonably see in settlement a more effective way of protecting his reputation than by action; and,* ***whether he pursues his litigation to judgment, or settles it, he may in either case be seeking no more than the way he thinks best in the circumstances to protect his reputation. Since that is the object of the law of libel… it would, in my judgment, need strong evidence that the plaintiff was seeking something beyond the protection and vindication of his reputation before the court could stay his action as an abuse of process***."

200 Bridge LJ held, similarly, that it was "*perfectly plain that the plaintiff's concern in these negotiations was to protect his reputation from further attacks upon it which he had good reason to anticipate in future issues of "Private Eye"*", and that the "*terms of settlement were directly related to the redress of the grievance which caused him to sue, namely, the dissemination of a publication which he believed to be carrying on a defamatory campaign against him*" (506A-E).

D.5 Unambiguous impropriety

201 It is well-established that one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations, if the exclusion of such evidence would

act as a cloak for some "*unambiguous impropriety*" – *Unilever Plc v Procter & Gamble* [2000] 1 WLR 2436 per Walker LJ at 2444.

202 In *Ferster v Ferster* [2016] EWCA Civ 717, the petitioner in an unfair prejudice petition (Jonathan Ferster) sought to rely on the unambiguous impropriety exception to without prejudice privilege, in order to cite in his petition alleged threats which had been made to him by the respondents in the course of a mediation. The alleged threats involved Jonathan paying increased sums to purchase respondent's shares, failing which committal proceedings would be issued and criminal charges brought against Jonathan, his reputation and credibility would be destroyed, there would be various other adverse consequences for him and his family.

203 The unambiguous impropriety exception was found to be applicable to such threats, both at first instance and on appeal. As explained by Floyd LJ at [23], the threats unambiguously exceeded what was proper and permissible in settlement of hard fought commercial litigation. This was for the following reasons:

"*… Firstly, the threats went far beyond what was reasonable in pursuit of civil proceedings, by making the threat of criminal action, (not limited to civil contempt proceedings). Secondly, the threats were said to have serious implications for Jonathan's family because of Jonathan's wrongdoings. Thirdly, the threats were of immediate publicity being given to the allegations… Fourthly, the purpose of the threats was to obtain for the brothers an immediate financial advantage arising out of circumstances which should accrue, if they had basis in fact, to the benefit of the company. Finally, there was no attempt to make any connection between the alleged wrong and the increased demand.*"

204 In the *Cardiff City* case (*supra*), the respondents to a contempt application also sought to rely on the unambiguous impropriety exception to without prejudice privilege.

205 The applicant had brought the contempt application on the basis that the respondents had failed to comply with an order requiring them to give disclosure of certain categories of documents. The respondents sought to rely on certain without prejudice communications, in order to argue that the contempt application had in fact been used improperly to pressurise them into disclosing separate documents, to which the applicant was not entitled, and was therefore an abuse of process.

206 Nicklin J held (at [54]) that the respondents had fallen "*well short*" of demonstrating any unambiguous impropriety, and that, viewed in their proper context, the negotiations were "*fairly typical of hard-fought commercial litigation*". Noting that a "*principal plank*" of the respondents' argument as to unambiguous impropriety was that the applicant had sought to use the contempt application to obtain disclosures to which they were not entitled, Nicklin J stated (at [53]) (**emphasis** added):

> "*...* ***it is important to understand that in legal settlements, it is common and acceptable for parties to negotiate for outcomes that go beyond what the Court could order if the case went to trial****. For example, in a defamation case, a claimant might ask for, and obtain, a public apology as part of a settlement – even though that is a remedy the Court cannot grant.*"

E Allegation 1.1

E.1 The TAN

207 Before turning to the detail of each of Allegation 1.1.1 and Allegation 1.1.2 in turn, it is important to address an issue which is common to both: the status of the TAN of the Call, which was prepared by Solicitor G.[211]

208 The TAN is a document upon which the SRA places very significant reliance for the purposes of Allegation 1.1. Allegations of dishonesty are advanced against the Respondent on the premise not merely that the TAN sets out, in general terms, the matters which were discussed between the Respondent and Solicitor G on the Call, but that it accurately and faithfully records the specific words and phrases used by the Respondent.

209 It is therefore important to emphasise at the outset that the TAN is not a genuinely contemporaneous note of the Call. Rather, it was only prepared by Solicitor G on the afternoon of 19 October 2018 – i.e., the day after the Call had taken place.

210 Both the Rule 12 Statement and Solicitor G's first witness statement were silent as to whether Solicitor G had made any earlier manuscript note (or other note) on which the

[211] **[T317-T318]**.

TAN was then based. Remarkably, it would appear that the SRA had not even sought to make its own enquiries into this critical issue, prior to making its Allegations.[212]

211 It was only after the Respondent had raised such matters that it was belatedly confirmed that:

(a) The metadata of the native version of the TAN showed that it was first created at 14:52 on 19 October 2018, and last modified at 17:35 the same day;[213] and

(b) Solicitor G is confident that he did not prepare any handwritten note of the Call, nor any other note beyond the TAN itself.[214]

212 The Call itself took place at around 17:00 on 18 October 2018. Therefore, the reality is that Solicitor G sat down, for the first time, almost 24 hours later, and purported to record precisely what had been said by the Respondent on the Call (to an apparently granular level of detail), and did so without basing that record on any contemporaneous note which he had taken.

213 That is, to put it mildly, an unusual way for an experienced solicitor to prepare an attendance note. The circumstances in which Solicitor G decided to adopt that course will be a matter for cross-examination in due course. However, it should be obvious that it is inherently unlikely that Solicitor G (or indeed anyone else) could in those circumstances recall the contents of the Call to the level of detail which the TAN purports to record, across two full pages – including down to the specific words or phrases said to have been used by the Respondent.

214 Further, prior to commencing preparation of the TAN, Solicitor G had already engaged in extensive discussions with Client B on the evening of 18 October 2018 regarding the proposal made on the Call. Those discussions involved active consideration of: (i) how to leverage what had been said by the Respondent to be used to Client B's advantage in any ongoing dispute in relation to compliance with the Consent Order; (ii)

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[212] See Answer, para. 116 **[T79]**.

[213] **[T243]**.

[214] Solicitor G Second WS, para. 5.a **[T236]**. Accordingly, Client B's evidence that Solicitor G stated in the aftermath of the Call that he "*had taken an immediate note*" must be incorrect **[T220]**.

challenging the Respondent's designation of the Call as subject to without prejudice privilege; and (iii) whether Client B should report the Respondent to the SRA.

215 Solicitor G's billing narrative for 19 October 2018 also suggests that he was engaged in various other matters that day, prior to preparing the TAN. It is apparent that he must also have spoken with Client B at some point. The first entry records almost two hours in respect of: "*Review Ferster v Ferster case law; consider cloak of WP privilage (sic) and whether request is improper; telephone call with client to discuss next steps*". It is only the second time entry which goes on to record: "*Prepare attendance note of call with Hamlins; draft email to opponent; emails to client re advice on strategy and next steps*".[215] That chronology is also supported by the emails exchanged between Solicitor G and Client B on 19 October 2018 prior to the TAN being created, which are cited above.

216 Indeed, as the second time entry suggests, even during the c. three hour period over which the TAN was being created (and Solicitor G was apparently trying to recall precisely what had been said during the Call), the task of preparing the TAN was <u>not</u> Solicitor G's sole focus. At 15:27 on 19 October 2018, Solicitor G sent a link to one of the Third Party Republications to Client B, stating: "*I think this must be what he wants to removed*".[216] In addition, Solicitor G's email to Client B attaching the TAN was sent at 17:52 on 19 October 2018.[217] Solicitor G had (according to its metadata) only finished creating the TAN at 17:35 – i.e., 17 minutes earlier. However, that email also included a detailed draft of the proposed response to be sent to Hamlins, which made the allegation that the Respondent had improperly threatened committal proceedings on the Call, and which must have been drafted by Solicitor G at or around the same time as the TAN itself.

217 Accordingly, the TAN was not prepared simply as a neutral, contemporaneous record of what had been said during the Call. Rather, it was prepared when Solicitor G already had certain strategic purposes well in mind. For the avoidance of doubt, the Respondent

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[215] **[T255]**.

[216] **[T284]**. As set out above, the link was to a Third Party Republication hosted on WordPress, which had simply copied and pasted Publication 1 Content and reproduced it word-for-word.

[217] **[T482-T483]**.

does not need to allege or prove that the TAN was prepared by Solicitor G in a way that was deliberately intended to mislead. However, Solicitor G would in these circumstances (even if only subconsciously) have sought to present matters in a way which most assisted Client B's interests – particularly where he could not rely on any genuinely contemporaneous note of the Call, and was instead basing such matters entirely on his own recollection (or impression) of what had been said 24 hours earlier. The statements in *Gestmin* regarding the fallibility of recollection apply, with some force, to the preparation of the TAN itself in light of the strategy that had been researched and formulated before the TAN was produced.

218 The above matters are of particular importance in circumstances where the contents of the TAN on which the SRA relies for the purposes of Allegation 1.1 are contradicted by both: (i) other (genuinely) contemporaneous documents, most notably the Script and Mr Galbraith's manuscript note of the Call; and (ii) the inherent probabilities.

219 Indeed, the Respondent notes that the TAN attributes phrases to him (such as "*raising the temperature*" and "*none too pleased*") which he would not ordinarily use and which are not characteristic of how he interacts with others.[218] In the latter of those examples, the fact that Solicitor G was paraphrasing or misremembering precisely what had been said is obvious: what the Script in fact said was that Client A was "*furious*", and it would have made little sense for the Respondent suddenly to deviate from that and use more colloquial language when the Script had been specifically reviewed and approved by Client A and was intended to reflect Client A's instructions and position.[219]

220 In isolation, these may appear to be relatively minor matters. Indeed, given the circumstances in which the TAN was created, it is entirely unsurprising that it would contain a certain amount of paraphrasing and other inaccuracies, and would not be a *verbatim* record of what was said on the Call. However, the SRA's case proceeds on the premise that the TAN must accurately record the specific words and phrases used by the Respondent on the Call, in order to allege not merely that the Respondent must have used them, but that he must have done so dishonestly. That is a false premise. The TAN is simply not a reliable record of what was said by the Respondent during the Call,

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[218] Respondent WS, para. 115 **[T156-158]**.

[219] **[T471]**.

and certainly not to the level of detail required by the SRA in order to establish its Allegations. This is ultimately fatal to the SRA's case on Allegation 1.1, for the reasons set out below.

E.2 Allegation 1.1.1

221 The SRA's case is that the Respondent stated during the Call that he had spoken to Counsel and that he had been told that Client A "*had a strong case for bringing contempt proceedings*", and that this assertion was false and/or misleading.[220]

222 This Allegation is premised on two statements attributed to the Respondent in the TAN:[221]

(a) "*CH had gone to counsel on the issue, who had advanced that [Client A] was entitled to bring committal proceedings against [Client B] over the breach. Counsel has advised there was a strong contempt case*"; and

(b) "*CH's Counsel had now advised that [Client A] had a strong basis for bringing contempt proceedings against [Client B]*".

223 The SRA appears to assume, but does not state expressly, that these two statements amount to the same thing (and, in view of the way that the Allegation is framed, that each are different ways of saying that Counsel's advice was that Client A "*had a strong case for bringing contempt proceedings*").

224 That is an incorrect assumption. There is an important distinction, which the SRA ignores, between the basis for bringing contempt proceedings (i.e., the underlying breach of the Consent Order), and the strength of any contempt proceedings arising out of that breach, which would involve various other considerations (as set out at [82] of *Navigator Equities*, *supra*) and would need to be proved to the criminal standard.

225 That demonstrates the nuanced distinctions involved in such an assessment. It is inherently unlikely that Solicitor G would, some 24 hours later, have recalled precisely what was said by the Respondent in this regard (particularly as Solicitor G had not been

[220] Rule 12, para. 1.1.1 **[T3]**.

[221] **[T317]**.

considering the issue for anywhere near as long as the Respondent). The fact that the statements made in the TAN, on which the SRA relies, are not even necessarily consistent with one another, is highly material, for the reasons set out above. It raises the prospect (which the SRA simply ignores) that Solicitor G may well have misunderstood the distinction between the seriousness of the breach of the Consent Order (if established), and the consequent strength of any contempt proceedings relying on that breach, and that such misunderstanding was reflected in the preparation of the TAN. That was a distinction to which the Respondent paid careful attention, but Solicitor G (apparently) did not.[222]

226 In particular, the Respondent had carefully prepared the Script in advance of the Call. The Respondent's own evidence, and that of other witnesses, is that this was his general practice when preparing for important calls or meetings, and that having prepared such a Script, he would not then have deviated from it.[223] That is particularly so in this case, given that: (i) Client A was an exacting and very particular client, who wanted to ensure that what the Respondent said reflected his precise instructions and intentions; and (ii) the Script had gone through three iterations, and had been specifically reviewed and approved (subject to certain amendments) by Client A in advance of the Call.

227 The Script stated, in respect of Counsel's advice:[224]

"*9. **Contempt of Court** – we have gone to Counsel as to bringing committal proceedings and our client has been advised in clear terms that the serious breach amounts to basis to bring contempt proceedings. Your client should treat this seriously.*"

228 That was a statement which accurately reflected the advice received from Counsel M on 4 October and 10 October 2018 – i.e., that there was a basis to bring contempt proceedings against Client B, because the publication of the relevant passages of Publication 2 constituted a serious breach of the Consent Order. The statement was therefore neither untrue nor misleading. Having carefully drafted that statement in his

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[222] Indeed, as set out above, Solicitor G did not even properly appreciate the nature of the threatened proceedings, wrongly categorising them as criminal on various occasions.

[223] Respondent WS, paras. 102 – 103 **[T150-T151]**; 109 – 110 **[T155]**; Galbraith WS paras. 5 **[T166]**; 29 **[T170]**; Stephenson WS, paras. 6 – 7 **[T206-T207]**.

[224] **[T471]**.

Script, that is the statement which the Respondent would have made. There was no reason for him to deviate from it, and he did not do so.

229 It should be noted that this statement is in certain respects similar – but not identical – to one of the two formulations which is attributed to the Respondent in the TAN: "*CH's Counsel has now advised that [Client A] had a strong basis for bringing contempt proceedings against [Client B]*".

230 If one starts from the premise that the TAN was not prepared until the following day, and is therefore highly unlikely to be a *verbatim* record of the Call, it is wholly unsurprising that Solicitor G may well have misremembered or misrecorded precisely what the Respondent had said, or may not have picked up on the nuances of a particular point being made and/or may have presented the TAN in the way that best suited Client B's strategy. That does not suggest that the Respondent decided to abandon his Script; it merely shows that Solicitor G could not, 24 hours later, remember the precise words which the Respondent had used. However, the SRA has instead chosen to approach matters back to front. It assumes that the TAN must be accurate in all material respects, in order to advance a case on the basis that the Respondent must have chosen to make a statement which was not recorded anywhere in his Script. It is that approach which leads the SRA into error.

231 Other genuinely contemporaneous documents are also inconsistent with the statements attributed to the Respondent in the TAN:

(a) Mr Galbraith's manuscript note of the Call (which, unlike the TAN, was actually prepared during the Call itself) does not refer anywhere to the Respondent having stated that Counsel's advice was that there was a "*strong contempt case*".[225] Mr Galbraith's evidence is that the Respondent delivered his Script and would not have deviated from it, and that this manuscript note would therefore appear to pick up from the point where the Respondent has completed delivering the Script, and there was a dialogue between the Respondent and Solicitor G;[226]

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[225] **[T473]**.

[226] Galbraith WS, para. 29 **[T170]**.

(b) The Respondent's handwritten plan for the Call, which was prepared in advance of the Script, simply states: "*Significant passages directly in breach of Annex 2 to Order*" and "*Consulted counsel; advised*".[227] Those were each accurate statements, and neither made reference to the strength of Counsel's advice.

232 Further, the statements made by the Respondent in the aftermath of the Call are also inconsistent with his having made the statements attributed to him in the TAN. For example, in his email to Solicitor G on 8 November 2018, he simply stated: "*Counsel has already been instructed to advise*" in respect of the proposed contempt proceedings.[228] He again did not make any reference to Counsel's advice regarding the strength of those contempt proceedings.

233 In order to bolster its case, the SRA seeks to rely on various other matters which are said to support what is said in the TAN. In particular, the SRA relies on:

(a) Communications between Solicitor G and Client B in the immediate aftermath of the Call;

(b) Subsequent statements made by Client B in these proceedings, including in evidence;

(c) Solicitor G's email to the Respondent of 22 October 2018, which it is said the Respondent did not attempt to correct; and

(d) The Respondents' email to Solicitor G of 26 October 2018.

234 As to the communications between Solicitor G and Client B:

(a) The messages exchanged between Solicitor G and Client B on the evening of 18 October 2018 (i.e., in the immediate aftermath of the Call) do not support the SRA's case:

(i) Solicitor G's WhatsApp messages to Client B at 18:24 (sent shortly after the Call must have ended) stated that the Respondent "*raised concerns*

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[227] **[T466]**.

[228] **[T505]**.

with [Publication 2], saying that it is in breach of the order… And saying that they have counsel's advice that you are in contempt".[229] That is not identical to either of the statements which are attributed to the Respondent in the TAN. The fact that, immediately after the Call, Solicitor G had offered a yet further formulation of the Respondent's words casts further doubt on Solicitor G's ability accurately to recall such matters when preparing the TAN on 19 October 2018. It suggests that, even at this early stage, Solicitor G was paraphrasing such matters and/or putting his own interpretation on them, rather than faithfully recording the precise words used by the Respondent (albeit this at least appears to be a closer reflection of what was in the Script than either formulation in the TAN). Each of the different statements which Solicitor G has made regarding what was said about Counsel M's advice during the Call are set out in **Appendix 1** to this skeleton argument. It is notable that none of those statements precisely tracks any other with respect to the specific words alleged to have been used by the Respondent;

(ii) The statement also does not refer to the strength of any advice received, and in any event is not necessarily inconsistent with Counsel M's advice, as summarised in the Respondent's email of 10 October 2018 – i.e., that Client B "*has breached the order by virtue of the passages identified and contained in [Publication 2] and is liable for us to pursue a Contempt complaint*";[230]

(iii) At 22:03, Client B emailed Solicitor G attaching a page from Publication 2, and stating: "*Their counsel must be real mental gymnast to say it breeches (sic) an agreement not to identify Client A*".[231] That again reflects an understanding from Solicitor G that what had been specifically conveyed by the Respondent was Counsel's advice regarding the underlying breach of the Consent Order;

[229] **[T263]**.

[230] **[T455]**.

[231] **[T266]**.

(iv) At 23:04, Solicitor G sent a further WhatsApp message to Client B at 23:04, stating: "*I have no doubt [Counsel M] can put together an argument that you breached the order by reference…*".[232] That is again consistent with Solicitor G having been told that Counsel M's advice was directed towards the underlying breach of the Consent Order;

(b) The only subsequent communication between Solicitor G and Client B which mentions Counsel's advice is Solicitor G's email to Client B at 17:52 on 19 October 2018, containing a draft of what would become the response sent to the Respondent on 22 October 2018 and attaching the TAN.[233] Counsel's advice was not mentioned in the body of that email, consistent with the response which was eventually sent. The only such mention was in the attached TAN. Therefore, this takes matters no further beyond the TAN itself (which is unreliable, for the reasons set out above).

235 As to subsequent statements made by Client B in these proceedings:

(a) Paragraph 23 of Client B's witness statement states: "*I understood that Mr Hutchings had counsel's advice that [Publication 2] somehow defamed [Client A] in a contorted argument; not by me mentioning [Client A] but because someone could detect that I was referring to [them]*".[234] That makes no reference to Counsel M's advice regarding any contempt proceedings. It is also an accurate reflection of the advice received from Counsel M on 10 October 2018, which was that Client B had breached the terms of the Consent Order by virtue of the passages identified in Publication 2;

(b) It is notable that Client B's original complaint to the SRA in January 2023 made no reference at all to what was said about Counsel's advice (let alone to the strength of that advice).[235]

232 **[T273]**.

233 **[T482-T483]**.

234 **[T220]**.

235 **[T127-128]**.

I199

236 As to Solicitor G's email to the Respondent of 22 October 2018:[236]

(a) The relevant passage of this email stated: "*You said that (1) your client has a strong basis for bringing committal proceedings against our client for contempt of court over certain passages of [their] new [Publication 2]… which you say breach the consent order… and undertaking*";

(b) This statement made no reference <u>at all</u> to any advice received from Counsel, let alone to Counsel having advised that there was a strong basis for bringing contempt proceedings. That is a further inconsistency which, again, casts significant doubt on the accuracy of the TAN and of Solicitor G's recollection more generally. The statement here being attributed to the Respondent is one of legal opinion, not fact, and it forms no part of Allegation 1.1.1 that the Respondent somehow misrepresented his <u>own</u> views regarding the strength of any committal proceedings. Even if (which is denied) the Respondent did in fact use those words (as opposed to the words attributed to him in the TAN), Allegation 1.1.1 would fall to be dismissed in any event;

(c) Further, even if (which is denied) the statement attributed to the Respondent in this email was or was intended to be synonymous with what is attributed to him in the TAN, the email was first drafted at or around the same time as the TAN was prepared on 19 October 2018, and to the extent Solicitor G simply relied on what is said in the TAN, that is unreliable and inaccurate for the reasons set out above;

(d) The SRA's suggestion that no attempt was made to correct Solicitor G's statement in the Respondent's subsequent response of 26 October 2018 is therefore nothing to the point. In any event, it plainly wrong – that response began: "*It is regrettable that your letter misrepresents the substance of my call…*".[237]

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[236] **[T325-T326]**.

[237] **[T493]**.

237 As to the Respondent's email to Solicitor G of 26 October 2018:[238]

(a) The relevant passage of this email stated: "... *I have already made plain to you that my client has already engaged Counsel in respect of the proposed Committal Application and I contacted you having already received advice as to the strength of my client's position in this regard*";

(b) The SRA's position appears to rest on a conflation of the statement in fact made, which was that the Respondent had received Counsel's advice "*as to the strength*" of Client A' position, with an entirely different statement which was not made, to the effect that the Respondent had received Counsel's advice that Client A's position was strong;[239]

(c) As explained in the Respondent's Answer, those statements are clearly not synonymous with one another. Having received advice from a surveyor "*as to the strength*" of foundations of a house does not imply that the surveyor has advised that those foundations were strong. Similarly, having received advice from Counsel "*as to the merits*" of a claim does not amount to a statement that Counsel has advised that such claim had merit;[240]

(d) The statement which the Respondent in fact made on 26 October 2018 was both: (i) accurate in itself; and (ii) consistent with what he had already told Solicitor G during the Call. It does not provide any support for Allegation 1.1.1, and in fact directly undermines it;

(e) This email also broadly reflected the final draft of the Script (i.e., "*we have gone to counsel as to bringing committal proceedings*...").[241] It is a further example of the care over his words which the Respondent took when communicating such matters to Solicitor G. It is further evidence that, having prepared the

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[238] **[T493-T494]**.

[239] The same conflation is made by Solicitor G in his evidence – see Solicitor G First WS, para. 31: "*Hamlins 26 October 2018 email repeated that counsel had told them that committal proceedings against [Client B] had strong merits*..." **[T229]**. However, that is clearly not what the email says (and it does not even use the word "*merits*").

[240] Answer, para. 131(b) **[T84]**.

[241] **[T471]**.

I201

Script, the Respondent would not then have deviated from it during the Call, and that he did not in fact do so.

238 For the reasons set out above, the SRA simply has not adduced the cogent evidence required to establish that the Respondent in fact made any of the statements regarding Counsel's advice during the Call which are attributed to him by the SRA. To that extent, it is not strictly necessary to go on to consider the Respondent's purported motive in making such statements.

239 The SRA however relies upon the assertion that the Respondent was taking "*unfair advantage*" of Client B, by creating the impression that the potential contempt case was considered to be stronger than it in fact was.[242]

240 That assertion does not stand up to scrutiny. Client B was no stranger to defamation claims and the particular legal issues to which they give rise.[243] Client B also had the benefit of specialist legal representation. Solicitor G was an experienced media litigator, and Company H was a leading firm practising in the field. Solicitor G was also working under and reporting directly to Solicitor I, a highly experienced partner with experience equivalent to that of the Respondent. They, and Client B, no doubt could have formed their own view as to the merits of any contempt case (and the evidence shows that they in fact did so, very shortly after the Call had been made, as reflected in the response sent on 22 October 2018). If necessary, they could also have sought their own advice from Counsel. There was no sensible reason for the Respondent to overstate or misrepresent the nature of the advice which he had received from Counsel. Indeed, in the course of time such a course could well have backfired, if proceedings were pursued.

241 Accordingly, the Respondent's case is that he simply did not make the statements regarding Counsel's advice during the Call, which are attributed to him by the SRA. The statement which he in fact made was the one which is reflected in the final version

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[242] Rule 12, para. 63 **[T30-T31]**.

[243] On Date 34, several months before Company H were even instructed, Client B responded to Hamlins making reference to various statutory provisions include Article 10 of the ECHR, s. 32 of the Data Protection Act, s. 8 of the Defamation Act 2013 and ss. 14 and 15 of the Defamation Act 1996 **[B187]**.

of the Script. That statement was neither false nor misleading, and was consistent with the advice he had in fact received from Counsel M in October 2018.

242 Strictly in the alternative, even if (which is denied) the Respondent did in fact say during the Call that Counsel had advised that there was a "*strong case for bringing contempt proceedings*", or words to that effect:

(a) That would not necessarily have been inconsistent, in any event, with the tenor of Counsel M's advice given on 4 and 10 October 2018 (which was to the effect that there appeared to be a "*strong argument in [Client A's] favour as to synonymity with [Company F]*", that publication of Publication 2 was "*deeply questionable*", and that "*[Client B] has breached the Order by virtue of the passages identified and contained in [Publication 2] and is liable for us to pursue a Contempt complaint*").[244] In particular, that statement is not necessarily identical to the statement that Client A had a strong contempt case, in view of the nuanced distinctions which are referred to above, but with which the SRA has not engaged;

(b) Alternatively, that would have been no more than an example of the Respondent misspeaking (i.e., an innocent slip of the tongue as against the Script). That inherent probability, particularly in circumstances where the words complained of were spoken rather than written, has simply been ignored by the SRA in jumping to the serious conclusion that any such statement by the Respondent must have been dishonest.

243 The Respondent therefore denies that he acted in breach of Principles 2 or 6 or Outcome 11.1, or that his conduct was in any way dishonest.

E.3 Allegation 1.1.2

244 The SRA's case is that the Respondent stated during the Call that he had spoken to Counsel and that "*Client A had only heard yesterday about the references to him in Publication 2*", and that this assertion was false and/or misleading.[245]

[244] **[T421]**; **[T455]**.

[245] Rule 12, para. 1.1.2 **[T3]**.

245 This Allegation did not form part of the SRA's Referral Notice, in respect of which a case to answer was then certified by the Authorised Decision Maker in April 2024. Rather, and in breach of the SRA's own procedures, the Allegation appeared for the first time in the Rule 12 Statement in June 2024. The SRA's delay in bringing such a serious Allegations is therefore even more acute and, as set out above, any doubts as to precisely what was said during the Call should plainly be resolved in the Respondent's favour.

246 In any event, the Allegation is advanced on an inappropriately thin evidential basis and should not have been made.

247 With respect to this Allegation, the <u>only</u> piece of documentary evidence relied upon by the SRA is the specific word which is attributed to the Respondent in the TAN. There is no reference anywhere else in the documentary record to the Respondent having said that Client A only became aware of the references in Publication 2 "*yesterday*" (i.e., at some point during 17 October 2018). Therefore, all of the points made above regarding the reliability and accuracy of the TAN apply with particular force to this allegation.

248 Indeed, such points are of particular relevance in circumstances where, if the Respondent <u>had</u> made such a statement during the Call, then: (i) it would obviously have been untrue; (ii) it would obviously have been known by Solicitor G to be untrue; and (iii) it would not have strengthened any of the other points which the Respondent sought to make during the Call, and would in fact have undermined them.

249 The SRA simply fails to grapple with the inherent unlikelihood that the Respondent would ever have made such a statement. In the very same Call, the Respondent conveyed the fact that advice had been received from Counsel both in relation to whether the references in Publication 2 breached the terms of the Consent Order, and whether this provided a basis for bringing contempt proceedings against Client B. It would therefore have been simply incredible had the relevant passages of Publication 2 also only come to Client A's attention "*yesterday*". For that to be true, <u>all</u> of the following events would need to have taken place in the c. 24 hour period preceding the Call:

(a) Hamlins and/or Client A discovering and reading the offending passages of Publication 2, and forming the view that they referred to Client A;

(b) Hamlins and/or Client A forming the view that such passages may have been in breach of the Consent Order;

(c) A decision being taken to instruct Counsel regarding the issue, and Client A agreeing to that instruction;

(d) The preparation of instructions to Counsel (and any other supporting documents) to be sent to Counsel regarding the issue;

(e) Counsel agreeing to undertake the work within the very short timescale required, and (potentially) Counsel's clerks negotiating a fee for that purpose;

(f) Counsel reading instructions and the offending passages of Publication 2, together with any other supporting documents;

(g) Counsel forming their own view and communicating their advice to Hamlins and/or Client A;

(h) Hamlins then digesting the contents of that advice in order to convey it to Company H; and

(i) Hamlins reaching out to Company H to arrange the Call, and agreeing on a mutually acceptable time.

250 That sequence of events would have appeared scarcely believable, including to Solicitor G at the time the alleged statement was made. It would have made no sense for the Respondent to tell such an obvious (and bizarre) untruth. That is, in itself, good *prima facie* evidence that he did not do so – and that the TAN must therefore be inaccurate in at least this respect.

251 Solicitor G and Company H would themselves have known that it was inherently unlikely that Client A would only have become aware of the references in Publication 2 the previous day. The extensive correspondence from both before and after the Consent Order shows that both Hamlins and Client A were assiduously monitoring Client B's continued output for the purposes of preventing the dissemination of defamatory and inaccurate material about Client A. That included monitoring for the purposes of ensuring compliance with the obligations under the Consent Order. Indeed,

Hamlins specifically wrote to Company H on Date 75, noting that it had come to Client A's attention that Publication 2 would soon be published (and would be made available through Publication 1), and reminding Client B of the obligations imposed by the Consent Order.[246] At around the same time, Hamlins were also writing in respect of other breaches of the Consent Order by Client B, including the continuing presence of certain foreign language publications on Publication 1.

252 Publication 2 was then released on around Date 80. Given the terms of the letter sent on Date 75, Company H would surely have expected Client A and/or Hamlins to have obtained a copy of Publication 2 shortly thereafter (as in fact occurred), in order to review it and ensure that there were no further allegations made against Client A, and that Client B complied with the terms of the Consent Order. An assertion that it was not until <u>17 October 2018</u> that Client A first became aware of such matters would have lacked any credibility.

253 No doubt recognising the need to provide some explanation as to why the Respondent would ever have made such a statement, the SRA attempts to suggest in the Rule 12 Statement that he had some motivation for doing so. It is asserted that the Respondent sought to create a false impression "*to imply that the proposal being put forward… was a position that had been reached very quickly*", that this represented an attempt to obtain an unfair advantage by "*suggesting that this was a new issue for him too*", and that he attempted to imply to Solicitor G that "*Client A had less time to settle upon [their] strategy for dealing with this matter than was in fact the case*".[247]

254 With respect, those explanations are strained and mutually inconsistent, and do not come close to explaining why the Respondent would tell such an obvious untruth. Indeed, the alleged motives make no sense even on their own terms. Far from creating any unfair advantage, any statement by the Respondent that he, his client, his colleagues and Counsel had only become aware of the passages of Publication 2 "*yesterday*" would have had precisely the opposite effect. It would suggest that any view which they and Counsel had reached was, by its very nature, rushed and potentially ill-considered. Any statement made in respect of Counsel's view would only have been strengthened had it

[246] **[B3641]**.

[247] Rule 12, paras. 70 – 71 **[T32-T33]**.

reflected Counsel's carefully considered opinion, rather than one which they had been forced to reach in a matter of hours (and which doubtless would have been heavily caveated and provisional in nature).

255 The SRA also suggests that the Respondent may have been attempting to justify why the issue of Publication 2 was not raised in the 11 October 2018 letter sent to Company H.[248] That, too, makes no sense. That letter concerned a separate issue with Publication 1, which was plainly in breach of the terms of the Consent Order.[249] That was discrete point which did not need to be addressed at the same time as any issue with Publication 2. There was not, and would not have been, anything strange about that breach being addressed by the 11 October 2018 letter, with issues relating to Publication 2 being addressed separately thereafter. Further, and in any event, the Respondent had an obvious justification for not including mention of Publication 2 in that letter, given that Counsel M had provided advice the previous day, which obviously required consideration before making a decision as to how to progress matters. Indeed, given the seriousness of the issues, waiting to receive and properly consider Counsel's advice before communicating the matter to Company H would not have been a matter which required justification or explanation.

256 Once again, the fundamental problem with the SRA's case is that it starts from the premise that the TAN is an accurate and reliable record of precisely what was said by the Respondent during the Call (including the specific words used), and latches on to any perceived inconsistencies with the correct position in order to infer a dishonest motive on the Respondent's part.

257 That is entirely the wrong approach. The TAN is an inherently unreliable document, for the purposes of ascertaining the precise words used by the Respondent during the Call. Indeed, as with Allegation 1.1.1, the true position is that other (genuinely) contemporaneous documents provide far better evidence as to what the Respondent is likely to have said, and did say, during the Call:

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[248] Rule 12, para. 70 **[T32]**.

[249] See **[T461]**.

(a) The Script stated: "*[Publication 2] – a new issue has been drawn to our client's attention*".[250] That was an accurate statement. The issues with Publication 2 were "*new*" as compared with the two previous breaches of the Order, referred to in the next item of the Script, which were earlier in time and had already been the subject of correspondence between Hamlins and Company H. That the Respondent in fact described this point as a "*new issue*" (as opposed to one which Client A had only discovered "*yesterday*") is also given further support by:

(i) The earlier statement in the TAN, recording the Respondent having asked Solicitor G whether he knew about "*[Client B's] <u>new</u> [Publication 2]*";[251] and

(ii) Solicitor G's email to the Respondent of 22 October 2018, in which specific reference is made to "*certain passages of [Client B's] <u>new</u> [Publication 2]*";[252]

(b) Mr Galbraith's manuscript note states: "*contempt case: only aware recently*".[253] That was a similarly accurate statement. It would also have explained the circumstances in which the Call was being made, as Counsel's advice on the contempt case had only recently been received and digested by Client A and Hamlins.

258 The most obvious and logical explanation is that Solicitor G simply misremembered or misrecorded such matters when, almost 24 hours later, attempting recall the detail of the conversation despite not having taken any contemporaneous note, and that the TAN inaccurately attributes the word "*yesterday*" to the Respondent when he did not in fact use it. Indeed, in the circumstances in which the TAN was prepared, that would be

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[250] **[T471]**.

[251] **[T317]**.

[252] **[X63]**.

[253] **[T473]**. It is not entirely clear on the face of the note whether this statement is attributed to the Respondent or Solicitor G. It appears immediately below Solicitor G's initials, but is more likely to have been said by the Respondent, as Solicitor G would not himself have known when Client A and/or the Respondent became aware of the contempt case.

entirely understandable. That is far more likely than the SRA's assertion which is that, once again, having carefully prepared the Script which accurately reflected the position, the Respondent made a last-minute and inexplicable decision to deviate from that Script and tell an obvious untruth which served no useful purpose.

259 That the TAN contains such an obvious inaccuracy is plainly fatal to the SRA's case on Allegation 1.1.2. However, it also infects Allegation 1.1 more widely. In particular, it must render it the more likely that Solicitor G also misremembered or misrecorded other aspects of the Call and the specific words used by the Respondent when preparing the TAN, including precisely what was said by the Respondent regarding Counsel's advice for the purposes of Allegation 1.1.1.

260 Tellingly, and despite: (i) the above matters being set out some in detail in the Respondent's Answer in July 2024; and (ii) the SRA being granted a six-week extension to October 2024 to prepare its Reply, the Reply does not address such matters at all.

261 It is also noteworthy that there is no other suggestion or implication that the Respondent ever made such a statement: (i) anywhere in Client B's report to the SRA in January 2023; or (ii) anywhere in Client B's witness statement or Solicitor G's first witness statement, upon which the SRA relied when serving its Rule 12 Statement. Indeed, Solicitor G's first witness statement, which purported to set out his recollection of the Call, does not contain any evidence <u>at all</u> about the Respondent saying when Client A had first heard about the references in Publication 2.

262 It was only in Solicitor G's second witness statement, signed in April 2025 some 6 ½ years after the Call itself, that he gave evidence (for the first time) that his recollection apparently remains that the Respondent used the word "*yesterday*" during the Call.[254] That asserted recollection must be viewed with very considerable scepticism. In view of the matters set out above, and the guidance given in <u>*Gestmin*</u>, it is inherently unlikely that Solicitor G now genuinely recalls the use of a single, specific word by the Respondent during the Call in October 2018. Rather, that is far more likely to constitute his reconstruction of events based on what is in the TAN, which he has doubtless read

[254] Solicitor G Second WS, para. 5.e **[T237]**.

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on several occasions in the intervening period in order to refresh his memory. Indeed, Solicitor G's account of the Call in his first witness statement simply tracked what was in the TAN, which he had reviewed for the purposes of making that statement. That account was plainly not the product of any independent recollection on his part.

263 Accordingly, the Respondent's case is that he simply did not make the statements during the Call regarding when Client A heard about the references to him in Publication 2, which are attributed to him by the SRA. The evidence relied upon by the SRA comes nowhere near to establishing that he did so. The Allegation should not have been made.

264 Strictly in the alternative, even if (which is denied) the Respondent did in fact say during the Call that Client A had heard only yesterday about references to him in Publication 2, or words to that effect, that would have been no more than an example of the Respondent misspeaking (i.e., an innocent slip of the tongue). As with Allegation 1.1.1, that inherent probability has simply been ignored by the SRA in jumping to the serious conclusion that any such statement by the Respondent must have been dishonest – and, in doing so, in inventing a motive for the Respondent to act dishonestly when none existed. Indeed, that alternative explanation is all the more likely where, as here, such a statement would not have supported the Respondent's position or the other points he was making, and would in fact have undermined them.

265 The Respondent therefore denies that he acted in breach of Principles 2 or 6 or Outcome 11.1, or that his conduct was in any way dishonest.

F Allegation 1.2

266 The SRA's case is that, during the Call, the Respondent "*improperly made a threat of litigation*" against Client B.

267 The SRA relies on three specific matters in support of the Allegation that such a threat was improper:[255]

[255] Rule 12, paras. 76 – 77 **[T33-T34]**.

(a) The primary purpose of such a threat was to place pressure on Client B to transfer a copyright licence to Client A in respect of certain publications;

(b) Bringing such proceedings was "*not in fact genuinely contemplated*" by Client A; and

(c) The record of Counsel M's advice allegedly "*deprecates*" contempt proceedings being brought in order to achieve the obtaining of a copyright licence.

268 None of those matters provide the necessary support for such an Allegation.

269 As a preliminary matter, the SRA also relies upon on its guidance paper published in March 2015 and entitled "*Walking the line: The balancing of duties in litigation*" (the "**2015 Guidance**"), alleging that the Respondent's conduct reflected two examples given of a solicitor unduly prioritising their client's interest over their other duties.[256] However: (i) the SRA quotes only from the executive summary, rather than the body, of the 2015 Guidance; and (ii) the SRA also selectively (and inappropriately) quotes only part of certain passages, and in doing so omits critical context.

270 The full quotations from the executive summary of the 2015 Guidance (with those sections omitted by the SRA in its own quotations <u>underlined</u>) are as follows:[257]

"

- *predatory litigation against third parties, where the solicitor, in the interest of the client, uses the threat of litigation to obtain settlement<u>, often from several opponents, on cases that have no real merit, but where the cost of settlement is less than the financial, emotional or reputational cost of fighting the claim</u>*

- *abuse of the litigation process, where a solicitor uses the courts or general litigation process for purposes that are not directly connected to resolving a specific dispute<u>, for example by incurring unmanageable costs for a commercial rival of a client</u>*"

[256] See Rule 12, para. 81 **[T35]** and Reply, paras. 20 **[T123]**; 24 **[T125-T126]**.

[257] **[X433]**.

271 Each of those examples are then dealt with in more detail in the body of the 2015 Guidance (**emphasis** added):[258]

"***Predatory litigation against third parties***

This commonly involves the use of the threat of high legal costs, or public embarrassment, to induce opponents to settle cases that have no real merit. The payment sought may, or may not, be legally recoverable. There may be limited or no evidence that the opponent is indeed liable.

For example, a law firm may send letters of claim to large numbers of individuals alleging on limited evidence that they have breached the intellectual property of their client and seeking payment significantly lower than the potential cost of fighting the claim.

In some of these cases, there is little sign that there is an intention to bring the case to court. Although the opponents could fight the case in court, the costs of reaching that stage, and the fear of costs, often encourages settlement. ***There is often a large asymmetry of knowledge and legal understanding between the two parties, in favour of the solicitor's client.***

There have been cases where the letter of claim included the threat to reveal publicly embarrassing information if the opponent failed to settle. Such schemes have been described in the House of Lords as "blackmail".

Whether litigation has been predatory or the actions taken by a solicitor demonstrate misconduct would be strictly on the facts.

Abuse of the litigation process

This involves the use of litigation for reasons that are not connected to resolving genuine disputes or advancing legal rights*. Purposes can include harming commercial competitors, silencing criticism or stalling another process.* ***The aim is to use the threat of cost or delay to achieve an end unconnected to the litigation.***

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[258] **[X438-X439]**.

Unlike predatory litigation, approaches are not usually made to numerous persons and obtaining financial redress for the client is not necessarily the goal.

An example would be the pattern, noted by the administrative court, of solicitors making late, purportedly urgent applications for judicial review of deportation decisions after all appeals had been exhausted and without any merit, any new facts or any legitimate reason for either the urgency or the lateness. The court suspected these were being used as a stalling tactic to unjustifiably delay clients' deportations. The courts have emphasised that such conduct represents an abuse of process.

***Which side of the line a claim falls on is determined by the proportionality of the claimant's actions, and ultimately by the merits of their claim should it reach court**.*"

272 The following points must therefore be borne in mind when considering the 2015 Guidance:

(a) While each case will turn strictly on its own facts, the specific examples cited (such as unmeritorious and abusive claims for judicial review, brought at the last possible moment in order to delay deportations) are very far from the facts of this case;

(b) In both examples, there is an emphasis on the underlying merits of the threatened claim. This is not a case where it is alleged that the threatened contempt proceedings lacked any merit. Indeed, Counsel M had specifically advised that there was an arguable case, and indeed that Client A was entitled to pursue such proceedings;

(c) The targeted mischief is stated to be litigation for reasons that are not connected to resolving genuine disputes or advancing legal rights. That does not (as the SRA's selective quotation seeks to imply) mean that the reason must necessarily be attributable to the specific dispute in question;

(d) The 2015 Guidance also stresses that it is "*not always straightforward to navigate*" the line between potentially conflicting duties, and: "*There will* *always be complex situations where maintaining the correct balance between duties is not simple and all matters must of course be decided on the facts*".[259]

F.1 The copyright licence sought was sufficiently related to the breach of the Consent Order

273 The authorities on abuse of process, which are cited above, make clear that where litigation is brought or threatened to redress an underlying grievance, any object sought which is reasonably related to the provision of some form of redress for that grievance cannot possibly constitute a collateral advantage (per Bridge LJ in *Goldsmith*).

274 That test is met in this case. On any view, the copyright licence sought was reasonably related to Client B's breach of the Consent Order upon which any contempt proceedings would have been based and/or the Respondent was entitled to proceed on such a basis.

275 It is critical, at the outset, to be clear what exactly was being sought by Client A, and why it was being sought.

276 Client A was not, as has been suggested, seeking ownership of the copyright in Client B's publications.[260] Rather, Client A sought an exclusive copyright licence, over specific sections of the Publication 1 Content which Client B had agreed to remove from Publication 1 but which had appeared in the Third Party Republications, and which (as Client B had already admitted) contained false and defamatory allegations about Client A. Client B would still have retained all ownership rights in respect of such publications. That licence needed to have been "exclusive" for the purposes of enforcement in the USA, and the terms of any licence would, as a matter of law, need to have been agreed in writing.

277 Plainly, this was not a licence sought as an end in itself (or as an "*acquisition*", as the SRA misleadingly puts it).[261] It was purely a means to an end, and was for a very specific and limited purpose, as the Script itself makes clear: in order to assist with the

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[259] **[X433]** and **[X443]**.

[260] See, for example, Rule 12, para. 11 where it is stated that Client A wanted "*to obtain the copyright for Client B's [Publication 1 Content]*" **[T7]**. In fact, the very email of Date 78 which is cited by the SRA in that paragraph refers to convincing Client B "*to license us the copyright for removal purposes only*".

[261] Rule 12, para. 78 **[T34]**.

tortuous process of removing the specific sections of the Third Party Republications, including in the USA where legislative provisions meant that UK libel judgments would often carry little weight (but where requests for removal based on copyright were more likely to be adhered to).[262] The licence would have been expressly and strictly limited to the purpose of effecting such removal, of the specific sections in question. In accordance with its terms, Client A would not have been permitted to use such a licence for any other purpose, and in any event had no desire to do so.

278 It is in itself entirely unsurprising that Client A would continue to press for the removal of the Third Party Republications, given: (i) as set out above, they were specifically pleaded in Client A's original claim as an example of the "grapevine effect"; (ii) extensive consideration had been given when negotiating the terms of the Consent Order as to how best to address the issue of the Third Party Republications going forward; and (iii) they had the effect that Client B's admittedly false and defamatory allegations about Client A continued to be spread widely and across the world, and it did not matter to Client A, for that purpose, that they were no longer being specifically hosted on Publication 1.

279 As set out in the Respondent's Answer, and further explained in Mr Galbraith's evidence, it is commonplace for individuals in the position of Client A to utilise copyright not as a remedy in itself but as a means to an end, in order to bring about the removal of material which is in the public domain, even where the underlying complaint (and the basis for the removal) is not limited to the fact of copyright infringement:[263]

(a) In the Particulars of Claim, Client A advanced a claim in copyright against Client B in respect of a stolen passport photograph, appearing in six Publications on Publication 1. However, Client A also advanced claims under the Data Protection Act in respect of that same passport photograph;

(b) In other cases where sensitive or compromising photographs have been stolen from private devices and then put into the public domain, individuals will often

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[262] As set out in item 13 of the Script, this was an "*exclusive licence of copyright in the original unedited [Publication 1 content] solely for the purpose of allowing [Client A] to have passages taken down by resistant platforms*" **[T472]**.

[263] Answer, para. 174 **[T97]**; Galbraith WS, paras. 7 – 11 **[T166-T167]**.

assert their copyright in respect of such photographs as the simplest way to effect their removal (including in the USA), notwithstanding that the underlying and most pressing complaint will likely be the intrusion of privacy, rather than any copyright infringement;

(c) Even where (as here) the individuals do not actually own the copyright in respect of the offending material (e.g. in the case of photographs originally taken by the paparazzi), they will often seek a copyright licence from the original publisher/photographer in order to prevent publication and republication by third parties. There is nothing improper or sinister about such a course, which is ultimately aimed at addressing an underlying wrong.

280 Accordingly, this was not a case in which the remedy which was sought from Client B was any form of monetary gain. Indeed, it cannot sensibly be in dispute that Client A's sole purpose throughout the proceedings was mitigating the reputational harm which continued to be caused as a result of (admittedly) false and defamatory allegations, which had originally been put into the public domain by Client B. That was consistent with Client A's approach to the underlying litigation and to the terms agreed in the Consent Order, in which they agreed to forego any right to damages or costs notwithstanding that, in light of Client B's admitted conduct, they would undoubtedly have been substantial.

281 This case can therefore be appropriately contrasted with examples of collateral financial gain which have been deprecated in the authorities, such as:

(a) The classic instance in *Grainger v Hill* (1838) 4 Bing NC 212, which established the tort of abuse of process (cited by Simon Brown LJ in *Broxton v McClelland* [1995] 4 EMLR 485 at 497), and in which the complaint made "*had been designed quite improperly to secure for the claimants a ship's register to which they had no legitimate claim whatever*"; and

(b) *Ferster*, in which the purpose of the threats made was to obtain for the respondents to the petition an immediate financial advantage arising out of circumstances which, even if they had basis in fact, ought to have accrued to the benefit of the company.

282 The SRA also alleges that the threatened litigation should be viewed as "*improper*" in circumstances where the transfer of the copyright licence by Client B was "*an outcome unlikely to have been achieved by the actual bringing of the proceedings*".[264]

283 That is a wholly irrelevant consideration. As each of *Goldsmith* and (in the specific context of contempt proceedings) *Cardiff City* make clear, a remedy sought in negotiations is not an impermissible collateral advantage merely because it is not a remedy which the Court would or could grant. Indeed, the fact that such remedies may be granted is one of the main benefits of, and the reason why the Court encourages, ADR and without prejudice discussions. Bridge LJ in *Goldsmith* and Nicklin J in *Cardiff City* each cited the specific example of a published apology in a libel case. That is not a remedy which is in the Court's power to grant, but it is often of far more practical utility to a libel claimant in repairing the harm done to their reputation. The critical point is not whether the claimant seeks a remedy which the Court cannot grant, but whether he is "*seeking no more than the way he thinks best in the circumstances to protect his reputation*". That is consistent with the facts of this case.

284 The SRA alleges that Client A first expressed a desire to obtain a copyright licence in order to address the Third Party Republications on around Date 78, if not before.[265] However, this was just the latest of a series of attempts to deal with the ongoing harm caused by such Third Party Republications. This had not merely become Client A's concern at around the time of the Call. From the very outset of Client A's instruction of Hamlins, and long before the underlying proceedings had even been brought against Client A, they were of paramount importance to Client A. Nor was the idea of utilising copyright to effect the removal of such Third Party Republications in any way a novel one:

(a) The Respondent's initial advice to Client A as far back as Date 5 made clear that Client A was concerned not merely with publications on Publication 1 itself, but also links to those publications available on third party search engines such as Google;[266]

[264] Rule 12, para. 77 **[T34]**.

[265] Rule 12, para. 77 **[T34]**.

[266] **[B42-B43]**.

(b) In Date 19, prior to the issue of proceedings, a request was made to Google on the Respondent's behalf for the search results to an article on Publication 1 to be removed. Google rejected that request and, accordingly, Client A was left with no choice but to pursue a claim against Client B directly (as set out in the Respondent's email of Date 23);[267]

(c) In the Claim Form initially issued on Date 34, Client A sought an injunction to restrain not merely Client B alone but "*through others or by any means whatsoever*" from continuing to publish, or cause or authorise the publication of, the same or similar words as those defamatory statements complained of;[268]

(d) Hamlins first drew attention to the republication of defamatory material on third party websites – including in relation to Publication 1 Content which Client B had already taken steps to remove from Publication 1 – in its open letter to Client B of Date 38.[269] This letter made clear Client A's position that such republications were Client B's responsibility, as they were the foreseeable consequence of Client B's own postings. It also specifically cited the "grapevine effect";

(e) On Date 51, shortly after Company H had first indicated Client B's willingness to settle the proceedings, Hamlins' letter noted that as part of any settlement Client B would be required not merely to remove references to Client A on Publication 1, but also to "*take all reasonable steps within [Client B's] power to procure the removal of all such references to [Client A] as appears on other websites appearing in articles authored, syndicated, authorised or participated in by [Client B]*";[270]

(f) The Particulars of Claim, which were served on Date 52:[271]

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267 **[B135-B136]**.

268 **[B191]**.

269 **[B3846-B3853]**.

270 **[B322-B323]**.

271 **[T349-T388]**.

(i) Expressly relied upon the "grapevine" effect in relation to the Article (in paragraph 9); and

(ii) Expressly relied upon 4 republications of the Article of which Client was aware, both as evidencing the grapevine effect and in support of a claim for injury for feelings, on the basis that Client B knew and could and/or did foresee such republications, and which were the consequence of Client B publishing the Article on Publication 1 (in paragraphs 13 – 14);

(g) The potential for Client B to send a "*To whom it may concern letter*", specifically to address this issue as part of any settlement, was also first raised by Client A on around Date 52;[272]

(h) On Date 53, Hamlins sought from Client B a "*full account*" of all Publication 1 Content currently being published on websites other than Publication 1 which contained either explicit or implicit references to Client A, of which Client B was aware and over which Client B acknowledged they had some control (whether in the form of a power or an ability to take down or procure the take down of the relevant content from those sites or to withdraw authority to continuing publication). Further, the letter stated that, with respect to third party websites over which Client B exercised no control or influence, Client A would accept a "*To whom it may concern*" type letter or statement from Client B, to be sent to "*such third party websites and, for that matter, search engine operates, to help bring about the desired result*";[273]

(i) The first draft of the "*To whom it may concern letter*" was prepared, by Counsel, on Date 57.[274] It made express reference to Client B's status as the "*author and copyright owner*" of the relevant content. The importance of Client B's copyright in such content in effecting their removal was therefore made clear;

(j) On Date 59, Hamlins shared a revised draft Tomlin Order and the draft "*To whom it may concern letter*" with Company H, noting that this had been

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[272] **[B329]**.

[273] **[B343-B345]**.

[274] **[B535]**.

provided "*to assist our client to rectify the harm [Client B] has caused, and for which [Client B] is legally liable, via publication on third party websites*".[275] It further stated expressly that the objective of removal of such material from third party websites was "*of the utmost importance*" to Client A;

(k) The requirement for Client B to send such a letter was also a remedy to which Client A could have been entitled and which the Court could have ordered, had proceedings continued. As Counsel M noted in advice given on Date 60, it effectively granted the relief available under s. 13 of the Defamation Act and s. 14(5) of the Data Protection Act;[276]

(l) Following without prejudice discussions which had taken place on Date 60, it was made clear by Company H that, while Client B would not agree to sending such a letter, Client B was content for the settlement to be on an open (rather than confidential) basis, allowing Client A to "*tell anyone [they please] about it*";[277]

(m) On Date 61, the Respondent passed on to Counsel Client A's view that what was required was either for Client B to write a letter to third parties "*asserting… copyright*" or to "*agree to use the phrase "Judgment" and for the order to have on its face (rather than the confidential schedule)*" everything Client A would need "*in order to persuade 3rd parties*";[278]

(n) Accordingly, the Consent Order which was eventually agreed did not include any provision for the sending of a "*To whom it may concern letter*". However, in order to address Client A's stated concerns: (i) the terms of settlement were open and not contained in any confidential schedule; and (ii) judgment was entered against Client B in paragraph 1 of the Order. Further, paragraph 7 of the Order, to which Client B agreed, was drafted in wide terms, including that Client

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275 **[B750-B752]**.

276 **[B1003]**.

277 **[B1031]**.

278 **[B1212]**.

B would "*not publish, permit or cause to be published*" the allegations complained of;[279]

(o) Shortly after the Consent Order had been agreed, on Date 66, Ms Osborn of Hamlins sent to Client A "*Draft Takedown Request*", to be sent to Google and Bing.[280] Further, at this time Hamlins was actively monitoring, on Client A's behalf, third party websites which made reference to the Publication 1 Content from Publication 1 pleaded in the Particulars of Claim, and keeping a running list for that purpose;

(p) On Date 67, the Respondent informed Client A that Hamlins would be seeking US legal advice in respect of various matters, including "*whether the UK judgment in [Client A's] favour can be used to seek take down in the US*". He also stated "*potentially the fact much of your case relates to Data Protection, rather than libel (where the US takes a very different position and is hostile to UK libel judgments), could be relied on to improve prospects*";[281]

(q) On Date 69, in accordance with paragraph 10 of the Consent Order, Client B gave a witness statement which set out all other journalists to whom Client B had disclosed or made available any of Client A's personal data.[282] The same day, Hamlins wrote to Company H drawing attention to various instances of non-compliance by Client B with the Consent Order;[283]

(r) Hamlins continued to take steps to effect the removal of republications of Publication 1 Content from third party websites, including those hosted on the WordPress platform. On Date 72, WordPress responded to such a request made by Hamlins, refusing the request and stating that it required "*a U.S. court order, or a foreign order that has been recognized by a California state or federal court, for our review before removing content*";[284]

[279] **[T389-T395]**.

[280] **[B3854]**; **[B3859]**.

[281] **[B3241]**.

[282] **[B3279-B3284]**.

[283] **[B3297-B3299]**.

[284] **[B3309-B3310]**.

(s) On Date 73, following this refusal, Mr Forshaw emailed Client A noting that the Respondent had emphasised that "*these resistant/non-engaging responses are, regrettably, par for the course and all US platforms are notorious for placing hurdles in the way when asked to take action pursuant to UK media-law related Court Orders. We will, as stated, need to consider further strategies if we are met with ongoing failure to engage*";[285]

(t) On Date 77, Mr Forshaw provided a detailed update to Client A on the "*take-down requests*" which were being made, including that Hamlins was "*continuing to contact Google regarding removal of content relating to the [Publication 1 Content]*";[286]

(u) Efforts to remove content from the Third Party Republications continued even after the events of October 2018. On 22 November 2018, Mr Galbraith emailed Client A providing updates on various matters, including third party take-downs.[287] The following day, Mr Galbraith also sent to Client A an "*updated schedule of 3rd party websites*".[288] This evidenced third party republication of, with one exception, all 22 pieces of Publication 1 Content listed in Annex 1 to the Consent Order;

(v) Indeed, such efforts have still not been entirely successful, many years later. Even at the time of the Answer, Hamlins was aware of some eight instances of Publication 1 Content which continued to be republished on third party websites (including those hosted by WordPress), even where those web pages have been delisted from search engines.[289]

285 The copyright licence which was sought by Client A was not therefore "collateral" in any relevant sense. As set out in *Goldsmith*, the inquiry does not involve a narrow focus on the specific cause of action which is pursued, but rather the underlying grievance which the claimant is seeking to address in bringing an action.

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285 **[B3306]**.

286 **[B3644-B3645]**.

287 **[B3800]**.

288 **[B3802]**; **[B3804-B3816]**.

289 Answer, para. 176(v) **[T103]**.

286 The copyright licence was not sought for anything other than a purpose directly related to the very same underlying grievance for which Client A had consistently sought redress, both in the underlying proceedings and then in seeking to ensure Client B's compliance with the terms of the Consent Order. That grievance was the harm which had already been caused, and continued to be caused, to Client A's reputation, which resulted from the original defamatory and inaccurate publications complained of. The redress sought was the mitigation of that harm via the removal of such material from the public domain, by whatever means necessary. The was therefore commonality between the republication of such material which had originally been put into the public domain by Client B, either: (i) by Client B via Publication 2; or (ii) by third parties via the Third Party Republications. Client A was doing no more and no less than seeking to vindicate their reputation, and seeking a copyright licence from Client B cannot in those circumstances have been an improper collateral advantage.

287 The SRA's case also appears to proceed on the incorrect premise that the only breach of the Consent Order in respect of which contempt proceedings were potentially contemplated at the time of the Call was the publication of Publication 2 by Client B. However:

(a) There were other breaches of the Consent Order which had already been drawn to Company H's attention, including:

(i) The continuing presence of foreign language versions of certain Publication 1 Content (and unamended links to that Publication 1 Content) on Publication 1, highlighted on Date 69;[290] and

(ii) The continuing presence of Client A's name and email address in certain Publication 1 Content on Publication 1, highlighted on 11 October 2018. Hamlins' letter expressly stated that this "*represents a breach of the Consent Order, and therefore appears to be in Contempt of Court*";[291]

(b) Indeed, it was for this reason that the Script stated:[292]

290 **[B3297-B3299]**.

291 **[X372-X373]**.

292 **[T471]**.

"*2. **2 problems caused by your client:***

*3. **First – [Publication 2]** – a new issue has been drawn to our client's attention.*

*4. **2 previous breaches** of Order – this, most serious, follows our having to complain of 2 earlier breaches happened upon.*"

(c) The Respondent's email to Counsel M of 3 October 2018, seeking Counsel M's advice, also stated: "*Following the Order in July, there have been several breaches – of varying degrees of seriousness – on [Client B's] part*".[293] It was on this express basis that Client A had asked that Counsel M be instructed to provide advice on strategy;

(d) That these breaches were being considered together was also apparent from an earlier draft of the 11 October 2018 letter to Company H, which made references to "*Several breaches of the Order*", including: (i) the publication of the relevant passages of Publication 2; (ii) continued references to Client A on Publication 1; and (iii) foreign language versions of Publications on Publication 1 not complying with the Consent Order;[294]

(e) There was in fact an arguable case that the continued presence of the Third Party Republications was <u>itself</u> a breach of the Consent Order and of Client B's undertakings to the Court, on a proper construction of their terms. In particular, the wide wording contained in paragraphs 5 and 7 potentially meant that, in not asserting a right to the copyright in such Third Party Republications in order to effect their removal, Client B was "permitting" the original wording (or any wording to the same or similar effect) to be published "*anywhere else in any form*".[295] (Indeed, such an argument would have been bolstered by material which has now come to light, which shows Client B, and Solicitor G, seemingly privately celebrating the continued presence of the Third Party Republications, notwithstanding the serious admissions which had been made and the

[293] **[T410]**.

[294] **[T449-T452]**.

[295] **[T390-T391]**.

undertakings which had been given).[296] It cannot realistically be argued that the copyright licence would have been collateral to this breach, and where multiple breaches have been committed, there is nothing improper in a litigant being prepared to waive one breach in return for redress specifically addressing another breach.

288 Therefore, the substance of Client A's complaints in respect of each of: (i) the publication of Publication 2; (ii) other notified breaches of the Consent Order by Client B; and (iii) the continuing existence of the Third Party Republications was the same. In each case, they were directed at removing the defamatory and inaccurate material which Client B had originally put into the public domain and which continued to be republished in various forms.

289 The Respondent's statement in his email to Company H of 26 October 2018 was therefore entirely correct: the request made for the copyright licence was "*in line with the spirit of the Order*".[297] The SRA's case does not come close to meeting the test set out in the authorities (or indeed in the 2015 Guidance). The request made was not for an ulterior purpose unconnected to the litigation or to its subject matter, and nor did it seek a collateral advantage beyond Client A's overriding desire to protect his reputation from the significant and ongoing harm caused by Client B's admittedly unlawful allegations, and the further republication of those same allegations.

290 The Respondent's primary position is that this is sufficient to dispose of the SRA's case in this respect, and that no closer or more direct connection is required between, on the one hand, the breach of the Consent Order constituted by the publication of the offending passages of Publication 2 and, on the other hand, the request for a copyright licence in order to assist with the removal of the Third Party Republications.

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[296] On 18 October 2018, Client B said it was "*brilliant*" that WordPress was "*refusing to recognise a UK defamation order*", querying whether they should "*get in touch with them and link hands on this?*" **[T265]**. Later the same day, Solicitor G noted that the websites in question were "*hardly reputable*", but he was "*glad someone did it!*" **[T267]**. Client B not merely being aware of such Third Party Republications, but seeking to "*link hands*" with them, would plainly have constituted "permitting" the original Publication 1 Content to be republished, which was squarely in breach of the Consent Order.

[297] **[T494]**.

291 However, and even if a closer or more direct connection is required, then that test would also be met in this case.

292 The offending passages of Publication 2 did not make direct reference to Client A. However, the reason why Counsel M had nonetheless advised that they were in breach of the Consent Order was because they referred to Client A by implication, and via mention of Company F:

(a) As Hamlins had highlighted in its letter to Company H of Date 63, it was Client B's original Publication 1 Content which had "*created a situation where readers of [Publication 1] would regard [Client A] as synonymous and interchangeable with [Company F]*". Further, this letter expressly highlighted that such serious errors had been "*repeated on other websites and contaminated the body of information available about [Client A] online*". It was for this reason that, having regard to the information available both on Publication 1 and on other websites more broadly, "*references to wrongdoing by [Company F] will be understood by readers to be references to [Client A]*";[298]

(b) The Particulars of Claim also expressly pleaded reliance on various republications in order to evidence the grapevine effect;[299]

(c) The Consent Order was therefore agreed in terms whereby Client B expressly undertook not to publish, under paragraph 7.2, "*any allegations otherwise imputing to [Client A], whether by referring to him by name, description **(including by reference to [Company F])**, image or otherwise howsoever, that [Client A] has been engaged in fraudulent, dishonest, untrustworthy, unlawful or criminal misconduct of any kind*" (**emphasis** added);[300]

(d) The issue was also squarely addressed in Counsel M's advice on 4 October 2018 in respect of Publication 2. As Counsel M noted:[301]

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298 **[B1258-B1263]**.

299 **[T349-T388]**.

300 **[T390]**.

301 **[T421]**.

(i) Any argument that the Consent Order had been breached would rest on the contention that "*any ordinary reasonable readers would read this passage of [Publication 2] and know that it relates to [Client A] (special knowledge)*";

(ii) It would therefore be necessary to plead "*the original [Publication 1 Content] as they appeared on [Publication 1], which link [Client A] to [Company F] or that particular part of the deal. These sections would be considered as "facts" … that the ordinary and reasonable reader might know having read the original [Publication 1 Content], causing them to therefore associate [Client A] with [Company F]*";

(iii) Further, there was a "*large overlap between the readers of the [Publication 1 Content] and the readers of [Publication 2]*";

(e) This was precisely the point made in the draft letter to Company H prepared on around 9 October 2018. The draft letter contained a Schedule which set out 9 of the original pieces of Publication 1 Content, giving rise to the special knowledge which would allow the reasonable reader to identify Client A from the references to Company F in Publication 2;[302]

(f) That was also reflected in the drafting of the Script by the Respondent, which: (i) drew specific attention to paragraph 7.2 of the Consent Order; (ii) noted that while none of the references to Client A in Publication 2 were express, all were "*in direct contravention of the Order using prohibited language and held to reference our client*"; and (iii) stated that Publication 2 was promoted on "*[Publication 1] and only available until recently through [Publication 1]. Readers and purchasers will have the special knowledge of [Client B's] previous and unacceptable interplay between our client and [Company F]*".[303]

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[302] **[T449-T452]**.

[303] **[T471]**. While the point was specifically made in respect of the original Publication 1 Content, it plainly applied with equal (if not more) force to the Third Party Republications, given that in large part they simply reproduced that Publication 1 Content *verbatim*, <u>and</u> were still freely available online even after the date of the Consent Order.

293 Accordingly, the copyright licence would not merely have assisted Client A in removing the Third Party Republications. It would also, by necessary implication, have assisted Client A in directly addressing and/or mitigating the very harm which had been caused by Client B's breach of the Consent Order in publishing the offending passages of Publication 2.

294 That is because such Third Party Republications were not separate from, or unrelated to, Publication 2. The Third Party Republications continued to contain *verbatim* unamended material from the Publication 1 Content, which referred to Client A by name and expressly linked Client A with alleged wrongdoing by Company F. They therefore constituted some of the very material which continued to be published and which had, for the reasonable reader of Publication 2, made Client A synonymous with Company F, thereby allowing that reader to identify Client A simply from the reference to Company F. If such Third Party Republications could still be removed by Client A – whether by way of a copyright licence or otherwise – then that would at least go some way to mitigating the serious harm caused by Publication 2 and the breach of the Consent Order, as it would reduce the likelihood of any reader of Publication 2 identifying Client A simply by reference to Company F. (Indeed, this was a specific example of "jigsaw identification", a phenomenon with which the parties and the Tribunal have also had to grapple during these proceedings).

295 Mr Forshaw's email of 1 October 2018 highlighted that the allegations contained in the offending passages of Publication 2 were not new. In fact, they referred to an "*incident, reference to which was removed from one of the [Publication 1 Content] in Annex 2*" to the Consent Order.[304] This was the second piece of Publication 1 Content referred to in Annex 2 and, specifically, the reference therein to the alleged involvement of Client A and Company F in the Agreement between the Fund and Company E in Date 1 – i.e., the very same incident which is referred to in the offending passages of Publication 2.

296 In fact, while Mr Forshaw referred to a particular piece of Publication 1 Content in his email, various other pieces – which continued to be republished via the Third Party Republications – also contained references to that very same transaction in Date 1, including Client A's and Company F's alleged involvement in it. It was for this reason

[304] **[T403]**.

that the draft letter to Company H prepared on around 9 October 2018 stated that "*the average reasonable reader of Publication 2 will have special knowledge relating to the material, namely that [Client A] is intrinsically associated with [Company F]* ***particularly in connection with… the [Agreement]****. References to [Company F] in Publication 2 thereby associate our client with the [Agreement], which… act as serious allegations against our client, specifically prohibited by the Order*" (**emphasis** added).[305]

297 Therefore, the original material disseminated by Client B – which continued to be republished via the Third Party Republications – did not merely link Client A with Company F in general terms. It linked Client A with Company F <u>in the context of the very incident which is referred to in the offending passages of Publication 2</u>. Removing the republication of that material would, undoubtedly have gone some way towards mitigating the harm which publication of the offending passages of Publication 2 (and breach of the Consent Order) had caused. There was, therefore, nothing "*extraordinary*" in Client A being prepared to leave Publication 2 published an unamended, provided the Third Party Republications were removed (as alleged by the SRA).[306] For the reasons set out above, that was an entirely logical and pragmatic position to take.

298 The copyright licence which was requested was accordingly directly connected not merely to the subject matter of the litigation as a whole, but also to the very breach of the Consent Order upon which the threatened contempt proceedings were based. Indeed, it was aimed, in part, at addressing and/or mitigating the very harm which had been caused by that breach. The SRA's contention that the request for a copyright licence was collateral to the proceedings, and therefore abusive or improper, is not properly sustainable.

299 In its Reply, the SRA seeks to rely on six matters in order to rebut the contention that the copyright licence and the threatened litigation were related:[307]

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[305] **[T449]**.

[306] Reply, para. 22.3 **[T124]**.

[307] Reply, para. 22 **[T124-T125]**.

(a) First, the SRA refers to Counsel M's advice to the effect that the copyright licence would constitute a "*collateral gain*" in the eyes of the Court. But, as set out below, it is apparent that Counsel M was there referring to the open position and what could properly be sought by way of a remedy from the Court in any proceedings. Counsel M was not referring to the position in without prejudice negotiations;

(b) Second, reliance is placed upon the fact that, in the Script, Publication 2 was referred to as a "*new*" (and therefore separate) issue. That is hopeless: Publication 2 was only "*new*" in the sense that it came later in time than other, previously notified, breaches of the Consent Order;

(c) Third, the SRA cites passages from the TAN and the supposedly "*extraordinary*" position that Client A would be content to leave Publication 2 published unamended if the copyright licence were granted. But that position is entirely unsurprising, for the reasons set out above, in circumstances where removal of the Third Party Republications would reduce the chance that the reasonable reader of Publication 2 could then identify Client A simply from references to Company F, thereby associating Client A with very serious wrongdoing;

(d) Fourth, it is alleged that the suggestions made by Solicitor G in subsequent correspondence that there was a disconnection between the threat relating to Publication 2 and the copyright licence sought "*were not subsequently substantially disputed by the Respondent*". That is simply false. Indeed, one of the very emails which is relied upon the SRA in support of this allegation is that sent by the Respondent on 26 October 2018, in which he stated: "*Your email suggests that my client has raised the spectre of Committal proceedings so as to improperly extract a collateral benefit. This is not correct…*";[308]

(e) Fifth, the SRA relies upon the fact that when Solicitor G responded characterising the threat as blackmail, the Respondent replied in terms that withdrew the proposal but persisted with the threat of litigation. But, as

308 **[T493]**.

explained by Client A, that simply reflects the obvious point that there was no longer any point in pursuing the proposal once it had been rejected outright and it had become clear that Client B would under no circumstances grant the copyright licence sought;

(f) Sixth, the general allegation is made that the threat of litigation was a "*contrivance*", solely for the purpose of extracting the copyright licence, and without any intention of following through with litigation in connection with Publication 2. That is circular, and takes matters no further. Client A's intention to bring proceedings is addressed separately below.

300 In its Reply, the SRA also suggests that, even if the threatened litigation was not abusive on a proper application of the rules set out in *Goldsmith* and other authorities, it may still have been abusive for the purposes of the 2015 Guidance (and therefore constituted misconduct for the Respondent to have threatened that litigation on his client's behalf). In particular, while the SRA accepts that those rules reflect the obligation to balance duties in litigation set out in the 2015 Guidance, it alleges that they are not "*identical*", and that while the rules are "*indicative of the standards of conduct that are abusive and professionally improper in settlement discussions, the proper prism for viewing such conduct is the SRA principles and related guidance*".[309]

301 However, in making such an argument, the SRA relies upon its own selective quotation of the prohibition against using "*the courts or general litigation process for purposes that are not directly connected to resolving **a specific dispute***" (SRA's emphasis).[310] In so doing, it seeks to imply that the purpose must be directly connected to the specific dispute in question, and that being connected to another, related dispute (or to a dispute which shares the same common underlying grievance or cause) would not be sufficient.

302 But as the rest of the 2015 Guidance (e.g. "*the use of litigation for reasons that are not connected to resolving genuine disputes or advancing legal rights*") makes clear, that it is not the relevant test, and the 2015 Guidance certainly imposes no higher test than the rules set out in *Goldsmith*. Indeed, given the remarks by Bridge LJ in *Goldsmith*

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[309] Reply, paras. 20; 23 **[T123-T125]**

[310] Reply, para. 24 **[T125-T126]**.

about the difficulty which often arises in deciding precisely where the boundary falls, one would expect more leeway to be afforded to solicitors who threaten such actions on behalf of their clients, before they are themselves accused of professional misconduct.

303 The SRA makes the further point that the rules in *Goldsmith* "*do not directly apply to the context in question: the conduct of settlement discussions in relation to threatened, but not commenced, civil proceedings*", because they have "*no purchase on pre-litigation discussions, which are necessarily outwith the control of the court*".[311] However, that is an overly simplistic analysis:

(a) As the authorities set out in Section D above make clear, in order to sustain an argument that proceedings have themselves been brought for an improper purpose, it is common for defendants/respondents to seek to rely on the unambiguous impropriety exception to without prejudice privilege, in order to rely on statements made in the course of without prejudice settlement negotiations;

(b) In the *Cardiff City* decision, Nicklin J expressly held that the unambiguous impropriety exception was not engaged even where it was suggested the claimant had pursued a contempt application "*to obtain disclosures to which they are not entitled*", noting that in legal settlements it is "*common and acceptable for parties to negotiate for outcomes that go beyond what the Court could order if the case went to trial*". He specifically cited the example, also given by Bridge LJ in *Goldsmith*, of a public apology as part of any settlement in a defamation action;

(c) By contrast, the unambiguous impropriety exception was found to apply to threats made in the context of a mediation in *Ferster*. Following the Call, Solicitor G sought to argue that the facts of this case fell within the parameters of the decision in *Ferster*. It would appear that he did so having read only summaries or analysis of the decision, rather than the judgment itself. In any event, his argument was plainly misconceived. The facts of *Ferster* were

[311] Reply, para. 23 **[T125]**.

extreme, and very far from those of this case. As Floyd LJ noted at [23], they "*went far beyond what was reasonable in pursuit of civil proceedings, by making the threat of criminal action, (not limited to civil contempt proceedings)*", they were made in return for immediate financial gain to which the respondents were not entitled, and there was no attempt made to link the alleged wrong and the increased demand.

304 In those circumstances, and where the litigation threatened by Client A: (i) did not engage the unambiguous impropriety exception to without prejudice privilege; and (ii) if brought, would not have been liable to be struck out as an abuse of process following the rules in *Goldsmith*, it is not surprising that it would also not have been professionally improper, under the Code, for the Respondent to make that threat on Client A's behalf. Indeed, it would be very surprising if there were such a disjunction, given that the Respondent was also entitled (and indeed obliged) to act in accordance with Client A's interests and instructions. Whether or not the question is ultimately viewed through the prism of the SRA Guidance, the end result is the same.

F.2 Client A genuinely contemplated bringing proceedings

305 This element of the SRA's case relies on certain statements made by Client A, reflecting a reluctance to bring public proceedings against Client B, in order to sustain the argument that Client A in fact never intended to pursue such proceedings. That is an obvious *non sequitur* and is contradicted by the available evidence.

306 As the Tribunal will doubtless be aware, it is commonplace for individuals to be reluctant to litigate, given the costs and other risks involved. However, that reluctance is likely to be particularly acute in the case of defamation claimants. Individuals who are seeking to protect their reputation will undoubtedly be alive to the risk that, in ventilating defamatory allegations in open court and giving them wider publicity, they in fact increase awareness of such allegations.

307 That was a point highlighted by Counsel L in advice originally given to Client A as far back as Date 15, which noted that, notwithstanding Client A's high prospects of success in any proceedings, those proceedings could come at a "*very high price*" and could well prove "*counter-productive*", given the publicity they would undoubtedly attract,

together with the incentive for Client B to "*exploit*" those proceedings, treating the case as a marketing opportunity for Publication 1.[312]

308 That advice proved prescient. It is now apparent from documents disclosed in these proceedings that Client B remained well aware of such factors, and the potential leverage which they afforded in any litigation:

(a) On 18 October 2018, Client B sent a WhatsApp message to Solicitor G stating: "*Should I not just call their bluff. After all the case would publicise the fact [Client A] has gagged me and that [Client A] sought to blackmail me to get round us freedom of the press. You give these types an inch and they take a mile*";[313]

(b) On 19 October 2018, Client B emailed Solicitor G noting that Client A "*knows that if [Client A] goes to court it will undo everything [Client A] has sought on the issue of keeping this private… It will be a news story if [Client A] pursues [Client A's] attempt and if it doesnt get what [Client A] wants, which is the copyright removed in the states that will be less tempting… indeed [Client A's] demand could be a point of media interest*";[314]

(c) The same day, Client B's Spouse emailed Client B stating: "*Doesn't your very good point about media attention and the risks of going to court need to be spelt out to them ? … They may think that any such action will pass by unnoticed … They need to know it would be a major own goal*". Client B responded: "*I don't think we can threaten them openly. [Client A] will be worried about that without me saying anything…*". Client B's Spouse then sent a further email stating: "*Not threatening them but highlight that they would then make the issue a very public one…*".[315]

309 Client A's reluctance to engage in public litigation with Client B was also apparent from the approach which they took to the underlying proceedings:

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312 **[B110-B123]**.

313 **[T265]**.

314 **[X404]**.

315 **[X406-X407]**.

(a) As Hamlins repeatedly made clear to both Client B and Company H, Client A viewed proceedings as a last resort and sought to give Client B every opportunity to avoid such proceedings;

(b) That was reflected in Client A's conduct of the proceedings, including: (i) waiting until shortly before limitation expired in Date 30 to issue proceedings; (ii) waiting until shortly before the Claim Form had expired in Date 46 to serve proceedings; and (iii) agreeing to various stays and extensions of time in order for settlement discussions to take place and the Consent Order to be agreed;

(c) It was also reflected in the various concessions which Client A made to Client B in order to settle the proceedings, including forgoing any right to (significant) damages and costs.

310 However, and notwithstanding that obvious reluctance, Client A did, as a matter of fact, pursue the underlying proceedings at every stage at which it became necessary to do so. In particular, Client A instructed Hamlins to issue proceedings, to prepare the Amended Claim Form and Particulars of Claim, and then to serve proceedings. Accordingly, it cannot be inferred from any reluctance on the part of Client A to litigate the contempt proceedings that he would not, in fact, have done so had it been required.

311 Accordingly, references in the contemporaneous documents to Client A neither "wanting" nor "intending" to bring contempt proceedings must be read with this important context well in mind. The risks in respect of such public contempt proceedings would have been the same as with the underlying proceedings, not least as they would have given significant further publicity to Publication 2 (which had only recently been published), and they would also have resurrected the very issues about which Counsel L had warned, and which were behind Client A making significant concessions to Client B and agreeing to the Consent Order. Any such fears held by Client A were well-founded, given Client B's clear intention to use any such proceedings to generate further publicity for the allegations.

312 Indeed, it is unsurprising that Client A's preferred outcome was for the contempt proceedings never to be brought, and for Client B to provide the copyright licence as requested. However, that does not mean that Client A had ruled out bringing such

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proceedings in all circumstances. As explained in Client A's evidence, that was emphatically not the case. Indeed:

(a) Client A's email to the Respondent of 23 October 2018 (i.e., after the Call) had taken place, referred to the fact that all sanctions remained available, and to their being "*forced to commence proceedings*" if no acceptable proposal were made;[316]

(b) The SRA itself relies upon the fact that on 26 October 2018, the Respondent on behalf of Client A withdrew the proposal in respect of the copyright licence, but persisted with the threat of litigation.[317] The SRA does so in order to argue that there was a clear disconnection between the two matters. That is wrong, for the reasons set out above. But in any event, the SRA cannot have it both ways. The fact that Client A continued to make the threat of litigation, even <u>after</u> the request for a copyright licence was no longer pursued, demonstrates that the litigation was not a "*contrivance*" and that there was no settled intention not to pursue it at the time of the Call;

(c) Mr Galbraith's email to Client A of 2 November 2018 stated that there was a "*need to discuss… whether public committal proceedings are sensible from your perspective*".[318] Such a discussion would have served no purpose if it had always been understood that Client A would never in fact bring such committal proceedings;

(d) Indeed, as late as 5 December 2018 (more than six weeks after the Call), Mr Galbraith emailed Client A setting out the necessary steps required in order to personally serve contempt proceedings on Client B.[319] That email was the product of earlier research which Mr Forshaw had carried out on around 27 November 2018, which he had then passed on to Mr Galbraith.[320] That is simply not a task which Hamlins would have been instructed to undertake had it always

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[316] **[T488]**.

[317] Reply, para. 22.5 **[T125]**.

[318] **[T499]**.

[319] **[T514-T515]**.

[320] **[T511-T512]**.

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been Client A's intention simply to threaten such proceedings without ever issuing them. Had that been the case, internal research in relation to serving proceedings would have been entirely irrelevant to Client A.

313 The reason why such contempt proceedings were not, ultimately, pursued is explained in Client A's witness statement and set out above.[321] Client A's evidence is clear that they had not, by the time of the Call, ruled out bringing such proceedings in all circumstances.

314 Finally, even if (which is denied) Client A did not, in fact, have any genuine intention to pursue contempt proceedings at the time of the Call, the clear instructions which were given to the Respondent – in the form of the Script, which Client A specifically amended and/or approved – were that Client A <u>did</u> have such an intention. The Script stated: (i) at item 12: "***Willingness to issue*** *proceedings for contempt*"; and (ii) at item 14: "*If option one is not accepted, left with* ***only alternative****, which [Client A] instructs me [Client A] will pursue, to bring contempt proceedings*".[322]

315 Neither of these statements appeared in the previous two drafts of the Script.[323] They were added for the first time in the final version (which was the version prepared following the Respondent's call with Client A, and which reflected Client A's specific instructions to the Respondent as to what he should say on the Call). Client A's agreement to this statement being made in the Call therefore constituted instructions to the Respondent as to Client A's then intentions and state of mind.

316 There was simply no basis for the Respondent to second guess those instructions or intentions, and it cannot have been improper for him to threaten litigation on that basis. Nor has it been alleged that the Respondent knew that Client A's instructions were false or inaccurate (as would need to be the case for an allegation of misconduct to be advanced on such basis). Accordingly, the SRA's reliance on this argument is misconceived in any event.

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[321] Client A WS, paras. 32 – 37 **[T182-T183]**.

[322] **[T472]**.

[323] See **[T467]** and **[T469]**.

F.3 Counsel M did not "deprecate" seeking a copyright licence in without prejudice negotiations

317 The SRA relies upon certain advice given by Counsel M in order to support its case that the Respondent's conduct was improper. This includes the following statements recorded in the note of Counsel M's call with the Respondent on 4 October 2018:[324]

"***Important Advice on bringing an action***

…

- *Any inference at all that we are doing this as a way to get some sort of collateral gain would not be taken kindly by the Court. This relates especially to our ability to try to get a copyright license out of these proceedings, which [Counsel M] strongly suspects is not going to happen. [Counsel M] states that if [Client A's] objective is to get the copyright, this is not a recommended option.*"

318 For the reasons which are explained in detail above, the copyright licence sought was not "*collateral*" in the relevant sense. Counsel M's statement was made – and was understood by the Respondent to have been made – specifically in the context of his advice on bringing an action, and as to how any attempt by Client A to seek remedies from the Court other than those to which Client A was entitled in bringing such proceedings was likely to be viewed with disfavour by the Court.

319 That Counsel M would have focused on such matters (and the Respondent would have understood Counsel M to be focusing on them) is unsurprising: Counsel M would almost certainly have been instructed as Counsel to draft the complaint and represent Client A in any contempt proceedings, had they ever been issued.

320 Further, Counsel M gave this advice having also been invited to consider a draft open letter to Company H, which raised a different breach of the Consent Order (the continuing publication of Client A's email address on Publication 1). Counsel M's advice meant (and would also have been understood by the Respondent to mean) that,

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[324] **[T422]**.

in relation to that breach, Hamlins should not make reference to a copyright licence in that open letter if contempt proceedings were in contemplation.

321 Counsel M did not make any statement to the Respondent to the effect that it would be improper for Client A to seek a copyright licence in the course of without prejudice settlement discussions, in an attempt to compromise such proceedings before they had been commenced and/or with a view to avoiding such proceedings ever needing to be commenced.

322 Further, it is apparent that the Respondent understood this to be the effect of Counsel M's advice from the terms of his email of 4 October 2018 which relayed that advice to Client A (**emphasis** added):[325]

> "*In a nutshell, [Counsel M] does consider you have the basis to bring a complaint and seek a further Order for Contempt of Court but… questions whether the potential outcome of [Publication 2] being pulped justifies the cost and time needed. You'll see* ***[Counsel M] flags that we cannot be seen to be seeking a copyright license as an alternative to such an outcome, although Callum and I are both of the view that if [Client B] seeks to negotiate, that would be a legitimate offer for us to make in order for [Client B] to avoid a finding of contempt***".

323 Accordingly, the Respondent's genuinely held view (which he shared with Mr Galbraith) was that Counsel M was not advising that it would also be illegitimate to seek a copyright licence as part of without prejudice negotiations. There is no allegation that the Respondent deliberately misunderstood, or misrepresented his understanding of, the effect of Counsel M's advice. In those circumstances, even if (which is denied) the effect of Counsel M's advice was to deprecate seeking a copyright licence on a without prejudice basis, that cannot be a relevant factor in determining whether the Respondent committed misconduct, because the Respondent did not understand that to be the effect of the advice.

324 The same or similar context applied to further statements which were attributed to Counsel M by the Respondent on 10 October 2018. Counsel M's suggestion that the "*letter cannot be* ***seen to be*** *offering a ticket out*" as otherwise the "*contempt*

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[325] **[T417]**.

proceedings will be thrown out" (**emphasis** added) was made (and was understood by the Respondent to have been made) in the context of the "*letter*" – i.e., draft open correspondence – with Counsel M addressing the issue of perception by the Court, and the consequences for such proceedings, once issued.[326] Thus, on 10 October 2018, the Respondent passed on Counsel M's comments to Client A expressly in respect of "*how a court will perceive matters*".[327]

325 Given Counsel M's focus on the Court's perception of matters, it would make little sense for that advice also to apply even to without prejudice negotiations, which are protected by privilege and which the Court would not see. As the *Cardiff City* decision makes clear, the seeking of a remedy which the Court cannot and will not grant, even in negotiations in the context of a threatened contempt application, does not come close to meeting the threshold for the unambiguous impropriety exception to without prejudice privilege.

326 In any event, even if – which is not the case – Counsel M did make any statement to the Respondent which "deprecated" (i.e., warned against) pursuing a copyright licence not merely openly but as part of without prejudice negotiations, such statement would merely have reflected Counsel's advice as to whether such a course was a strategically prudent one and/or one which would have served Client A's wider interests. It would not have constituted Counsel M advising that such a course was professionally improper. The fact of such advice again cannot be a relevant factor in determining whether the Respondent committed misconduct.

327 Finally, even if – which is not the case – Counsel M did advise that the pursuit of the copyright licence on a without prejudice basis was improper, then any such advice would have been incorrect (or arguably incorrect) for the reasons set out above.

328 The Respondent's position is given further support by the evidence of Counsel L. Counsel L acted in the underlying proceedings up to the agreement of the Consent Order, but was not then involved in subsequent events or at the time of the Call. Nonetheless, Counsel L: (i) is one of the leading barristers in the field; (ii) has

326 **[T457]**.

327 **[T455]**.

experience of working closely with Counsel M, including on this matter; and (iii) has detailed knowledge of the underlying proceedings and the facts giving rise to them. Counsel L's evidence is that:[328]

(a) The Respondent's view that it would be legitimate for Client A to offer a settlement involving the copyright licence was not necessarily "*in contradiction of or opposition to Counsel M's advice*";

(b) There would be "*nothing wrong with*" offering a compromise that involved Client B providing real assistance to Client A in challenging third party websites, particularly if the breach constituted by Publication 2 meant that the ongoing presence in the public domain of the Third Party Republications needed more urgently and effectively to be taken down; and

(c) There is "*no reason*" why the Court would have "*looked askance*" at pre-application discussions around the possible grant of a copyright licence in return for Client A foregoing litigation over the breaches, although the reality is that "*such exchanges would not have been before the court at all if they were conducted on a WP basis*".

329 It is of course for the Tribunal to reach its own view as to whether the conduct complained of constituted misconduct. However, it is the SRA which seeks to pray in aid the content of Counsel M's advice. The Respondent's primary position is that the SRA has fundamentally misunderstood the effect of that advice, and in any event it is irrelevant to the issues which require determination, for the reasons set out above. However, to the extent that it <u>does</u> fall to be considered, the Tribunal should also take due note of, and pay particular regard to, Counsel L's evidence in respect of such matters. On the basis of Counsel L's evidence, Allegation 1.2 simply falls away.

330 The threat of litigation made was not improper and the Respondent acted in accordance with his client's instructions and best interests. The Respondent therefore denies that he acted in breach of Principles 1, 2 or 6 or Outcome 11.1.

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[328] Counsel L WS, para. 47 **[T200-T203]**.

G Conclusion

331 The Tribunal will hear the oral evidence and further submissions in due course. However, for the reasons set out above, each of the Allegations made by the SRA against the Respondent should be dismissed.

BEN HUBBLE K.C.

WILL COOK

6th October 2025

4 New Square, Lincoln's Inn
London WC2A 3RJ
020 7822 2000
b.hubble@4newsquare.com / w.cook@4newsquare.com

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APPENDIX 1 – DIFFERENT STATEMENTS MADE BY SOLICITOR G REGARDING COUNSEL M'S ADVICE

Date	Source	Statement
18.10.18	WhatsApp messages to Client B at 18:22 **[T263]**	"*First of all he raised concerns with [Publication 2], saying that it is in breach of the consent order… And saying that they have counsel's advice that you are in contempt*"
18.10.18	WhatsApp message to Client B at 23:04 **[T273]**	"*I have no doubt [Counsel M] can put together an argument that you breached the order by reference…*"
19.10.18	TAN **[T317]**	"*CH had gone to counsel on the issue, who had advised that [Client A] was entitled to bring committal proceedings against [Client B] over the breach. Counsel had advised that there was a strong contempt case… [Client A] was also entitled to ask for [Publication 2] to be pulped*"
19.10.18	TAN **[T317]**	"*CH's Counsel had now advised that [Client A] had a strong basis for bringing contempt proceedings against [Client B]*"
22.10.18	Email to Respondent at 17:46 **[T325-T236]**	"*You said that (1) your client has a strong basis for bringing committal proceedings against our client for contempt of court over certain passages of [Publication 2], which you say breach the consent order…*"
14.05.24	Solicitor G First WS, para. 19.1 **[T226]**	"*Christopher told me that he had spoken to counsel and been told that his client had a strong case for bringing contempt proceedings against [Client B], and that [Client A] was entitled to get [Publication 2] pulped*"
14.05.24	Solicitor G First WS, para. 31 **[T229]**	"*Hamlins' 26 October 2018 email repeated that counsel had told them that committal proceedings against [Client B] had strong merits…*"