

Neutral Citation Number: [2026] EWCA Civ 1487

Case No: CA-2025-002348

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Mr Justice Thompsell
[2025] EWHC 1961 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/11/2026

Before:

LADY JUSTICE ASPLIN
LORD JUSTICE ARNOLD
and
LORD JUSTICE FANCOURT

- -

Between:

(1) Mr Pradeep Morjaria	**Claimants/**
(2) Mrs Sangita Morjaria	**Respondents/**
(3) Summerhill Trust Company (Isle of Man) Limited	**Cross-Appellants**
(4) Viper Limited (a company incorporated under the laws of Jersey)	
- and -	
(1) Mr Camran Mirzna	**Defendants/**
(2) Tydwell Limited	**Appellants/**
(3) Mrs Saira Mirzna	**Cross-**
(4) Mr Ameer Mirzna	**Respondents**
(5) Boomzone Limited	
(6) Redwire DC Limited	
(7) Wolverine Finance Limited	
(9) London Media Hib Limited	

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Hefin Rees KC, Jack Fletcher and **Michael Campbell** (instructed by **Noble Solicitors**) for the **Appellants** and **Respondents to Cross-Appeal**
Thomas Williams KC and **Oliver McEntee, who did not appear below** (instructed by **Forsters LLP**) for the **Respondents** and **Cross-Appellants**

Hearing dates: 26-29 October 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 20 November 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Asplin, Arnold and Fancourt LJJ:

Introduction

1. This hard-fought and lengthy appeal from a judgment of Thompsell J ("the Judge") raised a number of important issues particularly in relation to claims in deceit, the incidence of fiduciary duties and the availability of a number of equitable proprietary remedies. It also raised the question of the proper ambit of the tort of abuse of process. The central issue, however, was whether the trial, which lasted 30 sitting days and was followed by further written submissions, had been tainted by procedural unfairness.

2. Having heard submissions on the grounds of appeal, but before counsel opened the cross-appeal, we decided that the appeal on the procedural unfairness ground should be allowed on the basis that the effect of the conduct complained of was that the trial of the claims against the Appellants was unfair. We came to this conclusion with considerable reluctance, having afforded both the Appellants and the Respondents the opportunity to re-consider their respective positions in relation to this ground of appeal. Having taken instructions, Mr Rees KC, who appeared with Mr Fletcher on behalf of the Appellants (the "Mirza parties"), stated that his clients wished to proceed with the ground even though the consequence, if it were successful, would be a re-trial.

3. The parties invited us to consider whether we could decide grounds of appeal that turned on questions of law, in order to reduce the scope of any re-trial. The difficulty with this is that questions that were ultimately legal questions fell to be decided in the context of facts found and evaluations made by the Judge. The exception was the appeal on ground 1 (abuse of process), which was tried by the Judge on the basis of undisputed facts. The appeal on this ground can therefore be addressed by us. We set out in this judgment of the court our reasons for allowing the appeal on the ground of procedural unfairness and for dismissing the appeal on abuse of process.

The factual context

4. It is helpful to understand a little of the background to the appeals. The dispute arose from a property development joint venture, established by a joint venture agreement ("JVA") entered into in December 2007 between Mr Camran Mirza, Mr and Mrs Morjaria and the joint venture vehicle, Otaki Holdings Limited ("Otaki"). The joint venture was for the development of 22-24 Uxbridge Road, London. The development resulted in the construction of a hotel and a data centre. The data centre proved unsuccessful and much of it was converted into office space, starting in early 2016.

5. The main drivers behind the joint venture were Mr Mirza and Mr Morjaria. Mr Mirza and the Morjarias jointly were 50/50 shareholders in Otaki. Otaki operated through two subsidiary companies, Viper Limited ("Viper") and Krugar Limited ("Krugar"). Krugar held a long lease of the hotel at 24 Uxbridge Road and let it to Premier Inn. Viper held a long lease of 22 Uxbridge Road. Viper ceased to be a wholly-owned subsidiary of Otaki in 2022, when its shares were transferred to a company controlled by Mr Morjaria, Trafalgar Limited ("Trafalgar").

6. The development works were carried out by Mr Mirza's development company, Tydwell Limited ("Tydwell"). Later, some of the operations of the joint venture concerning the data centre were carried out by Redwire DC Limited ("Redwire"). The shares in Redwire were originally all owned by Mr Mirza, but later 50% of them were transferred to Trafalgar. Various other companies that were in the ownership of Mr Mirza or his family took property interests in 22 Uxbridge Road: Boomzone Limited ("Boomzone"), Wolverine Finance Limited ("Wolverine") and London Media Hub Limited ("LMH").

7. A helpful summary of the background to this matter is contained in paragraphs [11] – [66] of the judgment of the Judge. Reference can be made to those paragraphs, as necessary, to understand more detail, but the following points assist an understanding of the context of the allegations of procedural unfairness and the abuse of process issue:

   i) Mr Mirza had discovered the development opportunity at 22-24 Uxbridge Road which led to the JVA. Mr Mirza carried on construction business in the UK; Mr and Mrs Morjaria lived in Dubai.

   ii) Otaki, Viper and Krugar ("the JV Entities") were offshore companies, for tax reasons that required the business decisions to be made by offshore directors. Professional directors for the JV Entities were provided by an offshore professional services company, IQEQ: these included Mr Lewin, Mr Webster and Ms Yates, who were parties to a Part 20 claim and witnesses at the trial.

   iii) The JVA required Mr Mirza to manage the daily operation of the joint venture and make decisions (including the appointment of contractors) through his construction company, in the best interests of the joint venture.

   iv) Tydwell made a development procurement agreement with Viper and then contracted with Mace as the main contractor for the development. Tydwell invoiced Otaki for the costs incurred by it and Mace.

   v) At the time when the data centre was converted into offices, Mr Mirza incorporated Boomzone. Short-term underleases of parts of 22 Uxbridge Road were granted to Boomzone in 2017 and 2018; then in 2021 a third underlease of the whole building was granted to Boomzone, for a term of 11 years at a fixed rent that was the same as the rent under the second lease.

   vi) Viper mortgaged its headlease of 22 Uxbridge Road to Bank of Singapore to raise funds for investment in other ventures of Mr Mirza and Mr Morjaria. The loan was guaranteed by them both.

   vii) In 2020, the cladding on the hotel had to be replaced. Tydwell was the main contractor on this project and invoiced Otaki. It sub-contracted the work to a cladding specialist (Teampol).

   viii) In April 2021, Mr Morjaria sent a letter before action to Mr Mirza alleging fraud in relation to the amounts that Tydwell had invoiced Otaki. In October 2021, he initiated a private prosecution of Tydwell, Mr and Mrs Mirza and

their son for fraud in relation to the cladding work invoices. Summonses were issued in August 2022.

ix) Bank of Singapore required repayment of the Viper loan in 2022. The shares in Viper were sold by Otaki to Trafalgar, and Otaki then went into liquidation.

x) In January 2023, DJ Sternberg set aside the fraud summonses on the basis that the primary purpose of the prosecution was improper and an abuse of the process of the criminal courts. A challenge to this decision failed in the High Court ([2023] EWHC 2936 (Admin)).

xi) In May 2024, Mr Mirza paid the Bank of Singapore debt, took an assignment of its mortgage and then sold the Viper lease to Wolverine in exercise of his power of sale as mortgagee. This transaction was funded by Wolverine's borrowing from Al Rayan Bank, secured by a charge over the Viper lease.

8. The Judge also provided a helpful overview of the claims which were made at [67] and the counterclaims at [69]. The claims with which the appeal and cross-appeal are concerned are the "Invoice Misrepresentation Claims", of which the "Cladding Claims" are a sub-set, the "Excess Payments Claim", the "Boomzone Lease Claims", the "Wolverine Transaction Claims" and the abuse of process part of the "Wrongful Prosecution Claim".

The judgment below

9. The trial was heard by the Judge over 30 sitting days across 27 January 2025 to 20 March 2025. The judgment was handed down on 28 July 2025 ([2025] EWHC 1961 (Ch)).

The Morjarias' claims

10. A finding of some importance to the arguments before this Court (which relates to no less than seven of the Mirza parties' grounds of appeal) was that Mr Mirza owed fiduciary duties to the JV Entities.

11. The basis of this finding is at paragraphs [183] to [196] of the judgment. Despite the offshore structure of the joint venture being the result of tax advice issued to the parties, the Judge found that the offshore directors reposed "an enormous amount of trust and confidence" in Mr Mirza, such that he undertook to act as a fiduciary. Whilst recognising that a shadow director claim was not pleaded by the Morjarias, the Judge nevertheless considered that Mr Mirza exercised "a decisive influence on what decisions were taken by the Directors" (para [190]).

12. The duties owed by Mr Mirza were defined by the Judge at paragraphs [853] to [859]. These were: (i) a "disinterested" duty to make recommendations with regard to what he considered genuinely to be in the interests of the JV, disregarding his own personal interests; and (ii) a duty to obtain the informed consent of the JV Entities to any transactions.

13. The Judge found that those duties were breached by Mr Mirza in relation to the Invoice Misrepresentations Claim and Cladding Claims (para [554]), and the Boomzone Lease Claims (para [914]). These breaches formed the basis of the Judge's

findings against the Mirza parties in respect of the dishonest assistance and knowing receipt claims.

14. The Judge further found that Tydwell, for the same reasons as Mr Mirza, owed fiduciary duties to the JV Entities (para [201]), albeit the Judge did not go on to define those duties.

15. As relevant to this appeal, the Morjarias also succeeded in their claims in deceit (regarding the Invoice Misrepresentations Claim and Cladding Claim, but not the Boomzone Lease Claims), breach of contract (regarding Tydwell overcharging invoices) and in unlawful means conspiracy.

The Mirza parties' counterclaim on the tort of abuse of process

16. The Mirza parties brought counterclaims in breach of contract and in the tort of abuse of process as regards the failed private prosecution. For the purposes of the trial, the facts found by the District Judge, in particular that Mr Morjaria brought private prosecution proceedings against Mr Mirza for the purpose of extracting a settlement regarding their civil dispute, were undisputed.

17. The Judge concluded that, under the existing law, the tort of abuse of process does not encompass criminal proceedings (para [1367]). He considered it was a matter for a higher court or the Law Commission to consider whether the law should be extended in this manner.

Grounds of appeal

18. The Mirza parties were granted permission for 12 grounds of appeal:

    i) Ground 1: The Judge was wrong to find that no tort of abuse of criminal process exists, nor should the law be extended to encompass such a tort. This is a pure point of law that is dealt with further below in our judgment.

    ii) Grounds 2-3: The Judge erred in finding that Mr Mirza and Tydwell owed fiduciary duties.

    iii) Ground 4: As to the fair-dealing rule in respect of the Boomzone Lease Claims, the Judge erred in (i) allowing the Claimants to run an unpleaded case; and (ii) finding that the fair-dealing rule applied.

    iv) Ground 6: The Judge's analysis that Mr Mirza and Tydwell were liable in the tort of deceit in relation to the Invoice Misrepresentations Claim was wrong in law.

    v) Ground 7: The Judge erred in law in finding unjust enrichment in relation to the Invoice Misrepresentations Claim, the Cladding Claim and the Boomzone Lease Claims, in circumstances where: (i) no unjust factors were pleaded or proved by the Morjarias; and (ii) benefits were transferred pursuant to subsisting contracts.

    vi) Ground 8: The Judge was wrong in law to hold that the sale of the Viper Lease to Wolverine is susceptible to rescission on the grounds that:

a) Mr Mirza failed to meet the burden of proof to show that he took reasonable precautions to obtain the best price reasonably obtainable for the Viper Lease at the time of sale (the "Price Duty");

b) Mr Mirza's sole remedy to exercise a power of sale was the remedy available to him in equity according to the doctrine of subrogation; and

c) Mr Mirza did not come to the court with "clean hands" such that equitable principles might bar the remedy of subrogation.

vii) Ground 9: The Judge should not have allowed the claim relating to breach of contract.

viii) Ground 10: The Judge should not have allowed the claims relating to dishonest assistance and unlawful means conspiracy.

ix) Ground 11: The way in which the Judge conducted the trial, particularly in respect of Mr Mirza's live evidence, was procedurally unfair.

x) Grounds 12-13: In relation to knowing receipt: the Judge erred in finding that (i) there could be any knowing receipt claim; and (ii) Boomzone and LMH were liable in knowing receipt and that the Boomzone Lease and the LMH Lease were held on constructive trust.

19. The Morjarias were granted permission for four grounds of cross-appeal:

i) Ground 1: The Judge should have found that a mortgagee's Price Duty can constitute "unlawful means" for the purposes of a claim in unlawful means conspiracy.

ii) Ground 2B: The Judge erred in finding that the rule against self-dealing was not breached by Mr Mirza's sale of the Viper Lease to Wolverine.

iii) Ground 4B: The Judge erred in finding that Tydwell was entitled to keep amounts invoiced as management and overhead charges. He failed to direct himself to the question whether Tydwell required (and lacked) fully informed consent.

iv) Ground 5: The Judge was wrong to conclude Tydwell was entitled to make: (i) any profit margin on the cladding work; or (ii) a profit margin scaled up by reference to the increase in third party costs.

Appeal Ground (11): Procedural unfairness

20. In full, the eleventh ground of appeal (with original emphasis) reads:

> "During the cross-examination of the Claimants and Part 20 Defendants' witnesses, the Judge unfairly intervened on a number of occasions, as set out in the attached Schedule, either (a) **before** the witness had given an answer to the question, in a way that **pre-empted** the answer, or (b) **after** the witness had given an answer that was unhelpful to the Claimants or Part 20

> Defendants, in a way that allowed the witness to **improve** their answer and (c) on numerous occasions, took over the cross-examination of the First Defendant. In itself, and by reason of a combination of the factors in (a), (b), and/or (c), this was procedurally unfair because it tainted the evidence and was over-bearing and unfair to the First Defendant."

21. It is worth emphasising, at the outset, that there is no challenge to the judgment on the basis of appearance of bias or actual bias. Rather, the emphasis, as the argument developed, was that the Judge, "through constant interruptions, conducted the trial in a manner that was procedurally unfair to the Defendants and to Mr Mirza in particular".

22. In very short summary, the Appellants allege that the Judge: repeatedly intervened and took over the cross-examination of the witnesses, sometimes for pages of the transcript at a time; pre-empted the answers of witnesses by making suggestions; put his own (unpleaded) theories to the witnesses, often in the form of leading questions; indicated to Mr Mirza on occasions that he did not accept what he said; and expressed conclusions on factual issues in the case before having heard all the relevant evidence.

23. These interventions are said to have occurred during questioning on some of the most important factual disputes in the case: whether, despite the express terms of the JVA, Mr Mirza and Tydwell undertook or should be understood to have undertaken to subjugate their own interests entirely to those of Mr and Mrs Morjaria, as co-venturers, or to Otaki and its subsidiaries, as the JV Entities; whether Mr Mirza had undertaken to advise the offshore professional directors of Otaki with the unqualified loyalty to be expected of a fiduciary; whether these directors exercised any independent discretion or simply acted in accordance with Mr Mirza's instructions; and whether the directors understood that Boomzone was the creature of Mr Mirza rather than a JV- controlled company.

24. In their skeleton argument, the Appellants provided references to 40 separate examples of what they say were inappropriate interventions by the Judge during the evidence. They said that these are only examples (no doubt they are the most serious examples that they could find) of irregular interventions, not the sum total. To illustrate the extent of the interventions, junior counsel counted up the pages of the transcript of the evidence of Mr Mirza on which the Judge speaks. In 1021 pages of transcript, the Judge speaks in 645 of them; by way of comparison, in 678 pages of evidence of Mr Morjaria, the Judge speaks in 379 of them.

25. The evidence of Mr Mirza had been scheduled for 3 days of the trial. In the event, it took 6 days of extended sitting hours for his evidence to be completed. The Appellants say that this in itself was unfair, particularly to Mr Mirza, who had been identified by his counsel at the start of the trial to have health issues and need some accommodation on this account. The Appellants suggest (but the Respondents deny) that the Judge's interventions were the primary reason why his evidence required so much additional time.

26. The Appellants contend that the interventions amounted to the Judge wrongly entering the fray, conducting a quasi-inquisitorial process and losing his detachment and objectivity, such that his ability to judge the evidence fairly and dispassionately

was impaired. They also say that the interventions unsettled Mr Mirza and made it more difficult for him to give full and coherent evidence, and interfered with Counsel's attempts to pursue carefully planned lines of questioning, on occasions derailing them.

27. The combined effect of this, when taken with interventions in the evidence of other parties' witnesses, is claimed to be an unfair trial, such that this court, applying clear authority, must set aside the Judge's order and direct a re-trial of the issues.

The law

28. The applicable law on fairness of trials was not in dispute before us. It can be summarised as follows, so far as necessary to inform our decision-making.

29. The starting point is the judgment of the court in Jones v National Coal Board [1957] 2 QB 55 ("*Jones v NCB*"), given by Denning LJ. The court explained the role of a judge in a civil cause, with reference to previous authority:

> "If a judge, said Lord Greene, should himself conduct the examination of witnesses, 'he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict': see *Yuill v Yuill* [1945] P. 15, 20
>
> …
>
> The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses where it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevances and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well."

30. The court then turned to the significance of interference during the cross-examination of witnesses, recognising that a judge is entitled to intervene to make sure that he understands the evidence, but then stated:

> "Nevertheless, it is obvious for more than one reason that such interventions should be as infrequent as possible when the witness is under cross-examination. It is only by cross-examination that a witness's evidence can be properly tested, and it loses much of its effectiveness in counsel's hands if the witness is given time to think out the answer to awkward questions; the very gist of cross-examination lies in the unbroken sequence of question and answer. Further than this, cross-examining counsel is at a grave disadvantage if he is prevented from following a preconceived line of inquiry which

> is, in his view, most likely to elicit admissions from the witness or qualifications of the evidence which he has given in chief. Excessive judicial interruption inevitably weakens the effectiveness of cross-examination in relation to both the aspects which we have mentioned."

31. The court concluded that:

> "…the interventions by the judge while Mr. Mars-Jones was cross-examining went far beyond what was required to enable the judge to follow the witnesses' evidence and on occasions took the form of initiating discussions with counsel on questions of law; Further, and all too frequently, the judge interrupted in the middle of a witness's answer to a question, or even before the witness had started to answer at all."

32. More recently, in the context of an appeal against a criminal conviction because the defendant had not had a fair trial owing to constant interruptions and participation by the judge, Lord Brown of Eaton-under-Heywood JSC, giving the judgment of the Privy Council in Michel v The Queen [2009] UKPC 41; [2010] 1 WLR 879, referred to *dicta* of Lord Bingham of Cornhill in the case of Randall v The Queen [2002] 1 WLR 2237 warning that a standard of perfection should not be sought and that not every departure from good practice renders a trial unfair:

> "But the right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial."

33. Lord Brown cited other cases in which it had been held that extensive interventions by a judge deprived a party of a fair trial, and added at [31], with reference to *Jones v NCB*:

> "… the Board would add that not merely is the accused in such a case deprived of the opportunity of having his evidence considered by the jury in the way that he was entitled. He is denied too the basic right underlying the adversarial system of trial, whether by jury or jurats: that of having an impartial judge to see fair play in the conduct of the case against him. Under the common law system one lawyer makes the case against the accused, another his case in response, and a third holds the balance between them, ensuring that the case against the accused is properly and fairly advanced in accordance with the rules of evidence and procedure. All this is elementary and all

> of it, unsurprisingly, has been stated repeatedly down the years. The core principle, that under the adversarial system the judge remains aloof from the fray and neutral during the elicitation of the evidence, applies no less to civil litigation than to criminal trials."

34. A valuable reminder is provided by the judgment of the court in Southwark LBC v Kofi-Adu [2006] EWCA Civ 281; [2006] HLR 33 that judicial interventions are not necessarily unfair, and that practices in civil trials have changed since the time of the judgment in *Jones v NCB*:

> "Nowadays, of course, first instance judges rightly tend to be very much more proactive and interventionist than their predecessors, and the above observations made, in the case of Lord Denning MR, almost 50 years ago, and, in the case of Lord Greene MR, more than 60 years ago must be read in that context. That said, however, it remains the case that interventions by the judge in the course of oral evidence as opposed to interventions during counsel submissions must inevitably carry the risk so graphically described by Lord Greene MR. The greater the frequency of the interventions, the greater the risk; and where the interventions take the form of lengthy interrogation of the witnesses, the risk becomes a serious one.
>
> It is, we think, important to appreciate that the risk identified by Lord Greene MR in *Yuill v Yuill* does not depend on appearances, or on what an objective observer of the process might think of it. Rather, the risk is that the judge's descent into the arena (to adopt Lord Greene MR's description) may so hamper his ability properly to evaluate and weigh the evidence before him as to impair his judgement, and may *for that reason* render the trial unfair."

35. The most recent decision on judicial impropriety of this kind at the highest level is Serafin v Malkiewicz [2020] UKSC 23; [2020] 1 WLR 2455 ("*Serafin*"). The facts of that case encompass not just inappropriate interference with the process of hearing evidence but also a "barrage of hostility" from the judge directed at the defendant, who was acting as a litigant in person. (Conduct of the latter kind was expressly disavowed in this case, although the Appellants do rely on occasions on which the Judge suggested that Mr Mirza was not being honest and that he found the evidence unacceptable.)

36. *Serafin* is of value not just as an endorsement of the principles set out in the authorities cited above, but as a reminder that the question of whether a trial was unfair or not is a binary one. At the end of careful analysis, which requires the court to decide whether, overall, the trial was fair or unfair to the party complaining about it, if the trial was unfair then the judgment and resulting order can have no effect:

> "What order should flow from a conclusion that a trial was unfair? In logic the order has to be for a complete retrial. As

> Denning LJ said in the *Jones* case … at p 67, 'No cause is lost until the judge has found it so; and he cannot find it without a fair trial, nor can we affirm it.' Lord Reed PSC observed during the hearing that a judgment which results from an unfair trial is written in water. An appellate court cannot seize even on parts of it and erect legal conclusions upon them. That is why, whatever its precise meaning, it is so hard to understand the Court of Appeal's unexplained order that all issues of liability had, in one way or another, been concluded. Had the Court of Appeal first addressed the issue of whether the trial had been unfair, it would have been more likely to recognise that the only proper order was for a retrial. It is no doubt highly desirable that, prior to any retrial, the parties should seek to limit the issues. It is possible that, in the light of what has transpired in the litigation to date, the claimant will agree to narrow the ambit of his claim and/or that the defendants will agree to narrow the ambit of their defences. But that is a matter for them. Conscious of how the justice system has failed both sides, this court, with deep regret, must order a full retrial." [49]

37. Finally, both parties sought to rely on the decision of this court in Hossain v Secretary of State for the Home Department [2024] EWCA Civ 608 ("*Hossain*"). The Respondents rely on it for the propositions (established by authorities cited) that excessive interventions by judges during the evidence do not necessarily or of themselves make a trial unfair; and that it is appropriate to consider the matter not just quantitatively but qualitatively, with regard to how the interventions impacted on the important issues in the case, or on the performance of the judge, witness or counsel in their different roles. We accept that that is so: the volume of interventions, however undesirable, does not of itself create an unfair trial.

38. The Appellants rely on *Hossain* for a slightly different proposition, established by reference in it to paras 43 and 44 of a decision of Ouseley J given in 2004 as President of the Immigration Appeal Tribunal, JK (Conduct of Hearings) Cote d'Ivoire [2004] UKIAT 00061, which was expressly endorsed by Moylan LJ in *Hossain*:

> "If there are inconsistencies between documents and oral evidence or between answers which have already been given, it is nearly always best to wait until after cross-examination and re-examination to see what matters are put. However, it is wholly legitimate for the Adjudicator to ask his or her own questions on issues of inconsistency, points raised in the refusal letter or matters which troubled the Adjudicator whether or not they are raised by the other party. What is important, however, in relation to those matters is that the Adjudicator should not develop a different case from that being presented by the other party or pursue his or her own theory of the case.
>
> …

> It is also important, however, that an Adjudicator should keep a sense of proportion about the questions which he or she asks. It is not for the Adjudicator to take over conduct of the case either by the number of questions asked or the development of his or her own theories."

The materials before the court

39. We were provided with a selection of transcripts from the trial, running to 140 pages of the bundle, each of which contains (for the most part) 4 pages of transcript. No doubt the majority of this selection was included at the behest of the Appellants, to support their appeal on this ground, but the Respondents will have had the opportunity to request any extended excerpts or different pages from the transcript in order to provide a balanced or more complete selection or support their arguments, as they saw fit.

40. It is right to acknowledge, however, that the passages of transcripts provided probably amount in aggregate to about 3 days' worth of trial, whereas the evidence of the witnesses took up about 18 days in total. The court cannot see (nor in practice would it be able to read) the totality of the transcripts. However, it was not suggested by the Respondents that the selection provided was misleading as regards the way that the Judge dealt with the evidence, save that self-evidently the Appellants had chosen to include the examples that best support their case (which the Respondents characterised as "cherry-picking"). Rather, the Respondents' criticism was that the passages relied on were "shorn of their proper context and given a tendentious characterisation in an attempt to portray anodyne judicial intervention as an egregious exercise in inquisitorialism". We will return to that suggestion later.

41. We therefore assume (because it otherwise would have been expressly denied by the Respondents) that the selection does not show the only occasions on which the Judge intervened in the evidence. In their skeleton argument, the Appellants expressly state that "[the 40 selected examples] were not rare or isolated incidents nor are the examples exhaustive". That is supported to some extent by the statistics mentioned previously about the number of pages of relevant transcripts on which the Judge appears as a speaker, though of course some of these are likely to have been wholly innocuous.

42. The excerpts of transcripts before the court are relevant parts of the evidence of Mr Morjaria, the directors of Otaki and Viper, Mr Lewin, and Ms Yates, their manager, Mr Stobart, and Mr Mirza himself, who gave evidence on days 10-15.

43. We will take the same course as the Appellants took in presenting the appeal, namely to focus on some, but not each one, of the passages relied upon. We set out the most relevant extracts in this judgment. The particular words relied on do, of course, need to be seen in their context. That often requires an extended passage of transcript to be set out. In other instances, in order to make this judgment more readable, we have included only a shorter passage, leaving the fuller context to a schedule to this judgment.

The Boomzone Leases: examples (8) to (11)

44. These examples in the Appellants' list relate to interventions in Mr Mirza's evidence about the Boomzone Lease claims, in which the allegations were ones of dishonesty and conspiracy in granting out of Viper's long leasehold interest underleases that effectively transferred most of the value to a company controlled by Mr Mirza, in breach of alleged fiduciary duties to Otaki.

45. The criticism here is that the Judge took over the cross-examination on occasions, suggested to Mr Mirza that he had not been honest, warned him that his evidence was not persuasive, and announced a pre-emptive finding of fact about the knowledge that the company directors had, before those directors had all given their evidence. These exchanges were on the second, third and fourth days of Mr Mirza's evidence.

46. On day 11 of the trial, Counsel was asking Mr Mirza about the first Boomzone underlease, of the fourth floor of 22 Uxbridge Road, granted at an annual rent of £12,000. Counsel was taking him to the document and the Judge intervened to raise his own line of enquiry about what the directors understood about the company Boomzone:

> Extract 1
>
> "MR JUSTICE THOMPSELL: Is it your belief at the time that the directors agreed to sign that lease in favour of Boomzone that they knew about this Ariix arrangement?
>
> A. Absolutely, my Lord, they --
>
> MR JUSTICE THOMPSELL: They did know about that?
>
> A. They knew everything. I mean, there was nothing hidden. Mr Morjaria --
>
> MR JUSTICE THOMPSELL: And is it your belief that at that time they thought that Boomzone was remaining part of the joint venture?
>
> A. (Pause) They thought that Boomzone would remain part of the venture provided Mr Morjaria was paying the costs equally with me, but -- sorry, I will rephrase that. They were not sure. They knew Boomzone -- they were not sure what's happening with Boomzone. Boomzone is a company that I set up on my own.
>
> MR JUSTICE THOMPSELL: Wasn't that a bit negligent of them then, if they knew that they had a lease with 13,000-odd coming in a month and they were giving that away to a company which they weren't sure if the joint venture would own and at a rental that was less than a tenth of that?
>
> A. On the face of it, it looks like it, but it's a shell and core building which needs to be fitted out --

MR PETO: It has been fitted out --

A. It has not been fitted, only partially a floor's been fitted out or two. There's only partial, very, very thin fitting, the rest has to be fitted out. It's got losses through the data centre ...

MR JUSTICE THOMPSELL: But we're just talking about this lease of the fourth floor at this stage.

A. Yes, well, you might argue they were negligent, I don't know. But I'm just saying that's what they did. They were not -- in my view, they never, ever -- I thought about -- thinking about it, thought Boomzone was part of the joint venture, it was never a joint venture company --

MR JUSTICE THOMPSELL: They never thought it -- sorry, I thought, just a moment ago, you said --

A. Yes, I did say that and that was a mistake. I've been thinking -- I'm just thinking, because Redwire was set up as a joint venture and that was not part of the joint venture -- sorry, not part of the -- the offshore entities, so was Boomzone, so it's following the same model.

MR JUSTICE THOMPSELL: But both Redwire and Boomzone were initially set up with you holding all the shares, I believe, or --

A. No, Redwire, Mr Morjaria owned 50% and I owned 50%.

MR JUSTICE THOMPSELL: Not initially.

MR PETO: Initially --

A. Yeah, initially, just to set it up, because --

MR JUSTICE THOMPSELL: So I'm just trying to look at this from the directors' viewpoint.

A. Yes.

MR JUSTICE THOMPSELL: They have one company, which everyone agrees is a joint venture company, Redwire, but you're holding all the shares, that's a technicality, you will they'll hand them over at some point, and then they've got Boomzone, which you also hold all the shares on. Why wouldn't they also think that was the same as Redwire?

A. Okay, Redwire was nothing to do with the offshore entities, it was an independent limited company, UK, set up with its own joint venture agreement.

> MR JUSTICE THOMPSELL: It had its own joint venture agreement?
>
> A. Yes.
>
> MR JUSTICE THOMPSELL: So it wasn't -- oh, I thought -- yes, okay, yes. So in fact neither of them were part of the joint venture --
>
> A. Precisely, my Lord.
>
> MR JUSTICE THOMPSELL: -- so again I'll put myself in the position of the directors: why do I grant leases for the benefit of a company that my company has no part of?
>
> A. Well, hindsight is a wonderful thing. I would say to you I didn't think -- well, I don't want to say. I've said it."

47. This long exchange shows that the Judge effectively took over the cross-examination, at times in tandem with Mr Peto KC, who was also asking (or trying to ask) questions, and that the Judge was putting to Mr Mirza questions about what the directors understood and why they would have approved a lease at a rent that was very substantially below the amount of rent coming in from the occupiers. The Judge is, in substance, suggesting to Mr Mirza that the directors could not have known the full details or that Boomzone was a company controlled by Mr Mirza, not a JV company. These were not open questions seeking clarification, but a pre-emptive cross-examination on an important factual issue. A few pages later, the Judge explained to Mr Mirza that his job was to "*ask questions when I don't think we have got to the bottom of things*".

48. The line of cross-examination about the incoming rent or licence fees continued, with Mr Peto raising the time at which a company called Timeline wished to take a 10-year lease of substantial space in the building, and suggesting that, as Boomzone only had about 2 ½ years of its underlease then remaining, such an occupational lease would be of substantial value to Viper. The following exchange, starting with a question from Mr Peto, then occurred:

> Extract 2
>
> "Q. So what I'm suggesting to you is that this great opportunity which has come in for the property is an opportunity that properly belongs to Viper; isn't that right?
>
> A. No.
>
> MR JUSTICE THOMPSELL: Would you like to explain why it doesn't belong to Viper.
>
> A. Because Mr Morjaria stopped contributing in September 2019. I sent him the -- through Charles, because I couldn't

really talk to him by that time, so I thought I'd just get an independent chartered accountant so that there's no shouting and screaming on the -- in fact, there was more shouting from his end than my end. And I told Charles Homan, who's a very decent individual, I said, "Just send it to him, that's what I said I'll give him -- what I said I'll give him, and agree to do it within 50% Boomzone shareholding and the JV agreement".

MR JUSTICE THOMPSELL: So I can see that. So what you're saying is at that point you didn't believe that Mr Morjaria was interested in financing Boomzone, and therefore whatever was Boomzone's was yours, because he wasn't going to join in.

A. Correct, and there was the background of COVID(?).

MR JUSTICE THOMPSELL: But that doesn't answer Mr Peto's point that on a ten-year lease, as Boomzone didn't have a ten-year lease at that stage --

A. Yes, agree.

MR JUSTICE THOMPSELL: -- seven and a half years of that would be for Viper. That was Mr Peto's point, I think. I don't think you appreciated it.

MR PETO: Yes.

A. I don't -- yeah, well, okay, you had asked -- yeah, sorry, my Lord, I didn't -- yeah. So what is the point?

MR JUSTICE THOMPSELL: So the point is that you've got what seemed to be an interested tenant who was willing to pay a good rent, who wanted to sign a ten-year lease. By that time you say that Boomzone is yours, Mr Morjaria's not interested in it. I'm not making a finding on that point, by the way --

A. Yeah. No, no, my Lord. Yes.

MR JUSTICE THOMPSELL: -- but that is your evidence. But seven and a half years, even if that is the case, seven and a half years of the Timeline thing is for Viper, because Viper owns the reversion.

MR PETO: That's right.

MR JUSTICE THOMPSELL: It only won't be for Viper if you persuade the Viper board to grant Boomzone the longer lease.

A. Well --

MR JUSTICE THOMPSELL: And in doing that, if you were doing that in a very forthright and honest manner, you would

say -- you would come to the Viper board and say, "We want an extension for ten years. By the way, Boomzone's no longer part of any joint venture. And by the way, we're going to carry on paying 60,000, but we've go someone in who will pay much more than that". That's the point Mr Peto is putting to you.

A. I get -- yeah. Yeah, I mean --

MR JUSTICE THOMPSELL: I'm sorry for stealing your lines, Mr Peto.

MR PETO: You're putting it much better than me, my Lord. I'm grateful the point is put.

A. Sorry, the question is? Is that your question?

MR JUSTICE THOMPSELL: Well, yes, what is the question?

A. I've got lost.

MR JUSTICE THOMPSELL: Do you agree that, at this point, seven and a half years of any ten-year lease with Timeline was for Viper?

A. Do I agree seven and a half years ... I mean, what I really -- we had two and a half years is, whatever the figure is, of Boomzone remaining.

MR JUSTICE THOMPSELL: Yes, so --

A. We didn't have --

MR JUSTICE THOMPSELL: So if you'd signed this lease and hadn't got an extended lease from Viper, if Boomzone hadn't got an extended lease from Viper, then the result of that would be that after two and a half years Boomzone would stop receiving rent from Timeline, and then the remaining rent for the next seven and a half years would go to Viper, unless Viper agreed some other intermediate tenancy.

A. Yeah, but, my Lord, Boomzone didn't have the money, nor did Mr Morjaria, to put into the fit out that Timeline needed.

MR JUSTICE THOMPSELL: Well, didn't it? Because it only had to pay 50% of that, Timeline were going to pay 50% and it was going to get six months rent in advance.

A. Yeah, that -- that was -- it was over £2 million, as …"

49. This passage rather graphically demonstrates that, after an initial, fair question, in substance asking the witness to elaborate his short denial, the Judge took over the cross-examination on the issue for an extended period, with various questions, and the witness seems at times to be confused and unable to put together a coherent answer. At one point, the Judge is effectively suggesting to Mr Mirza that he had not been honest ("*if you were doing that in a very forthright and honest manner, you would say ....*"), and then recognises that he had done Mr Peto's job for him ("*stealing your lines*"), for which Mr Peto was grateful. The Judge had, in effect, quite forcefully put Mr Peto's case.

50. The Respondents' argument that these questions were framed in a neutral manner is wide of the mark, as is the suggestion that stealing Mr Peto's lines was no more than an indication that he had reached the point at which Mr Peto should take over. By this point, the witness was clearly lost, as he said to the Judge; but then the Judge put a further question, which was answered, and the Judge challenged the answer given ("*Well, didn't it?*"). Mr McEntee realistically conceded that the Judge was contradicting the witness.

51. On the following day of the trial there was further cross-examination of Mr Mirza about the relationship between Redwire, Boomzone and the directors, and Mr Peto then said "Let's move on", before the Judge indicated that he had two more questions about the previous topic. According to the Appellants' count, the Judge then asked 49 questions over 13 pages of the transcript, of which the "first question" took up 11 pages and the second question two pages.

52. The first question was whether Mr Mirza had had conversations with the directors prior to the grant of the third Boomzone underlease, to explain why a longer lease was required and what the business case for it was. After ten more questions from the Judge on the same issue, all in the nature of cross-examination, the following exchange took place:

> Extract 3
>
> "MR JUSTICE THOMPSELL: Yes, but why was it -- two and a half years away from the end of the Boomzone -- the first Boomzone -- or the second Boomzone lease, why was it in the interests of the director to commit itself for another ten years after that?
>
> A. Well, my Lord, I don't know, you'd have to ask the directors that. They made a decision. I wasn't party to that decision. That's why I put it through my solicitors, so therefore I cannot be seen as influencing them in any way. I -- they discussed, I told them what we're going to do, and they said, "Okay, we'll come back to you". So I said, "Fine". It's through the lawyers; they made the decision, not me.
>
> MR JUSTICE THOMPSELL: I'll be upfront with you. The conclusion I draw from that is that the directors did think that at that point, when they entered into that lease, that Boomzone

> was part of the joint venture and therefore they weren't too worried about the terms of it.
>
> A. Well --
>
> MR JUSTICE THOMPSELL: Because I can't see any other explanation.
>
> A. Well, my Lord, I mean, I think --
>
> MR REES: My Lord, can I assist. Obviously it's not a memory test, any of this.
>
> MR JUSTICE THOMPSELL: No.
>
> MR REES: There's a section in the witness statement which deals with this. I don't know if it helps for me to address that.
>
> MR JUSTICE THOMPSELL: Yes, why don't -- if you -- I think you can certainly --
>
> MR REES: If you're reaching a preliminary view and I'm not sure you've --
>
> MR JUSTICE THOMPSELL: Well, I try to be upfront with people, because then it gives them a chance to disabuse me of any false ideas.
>
> MR REES: No. No, that's very wise, if I may say so, yes…"

53. This exchange is concerning because, having received an answer that the Judge would have to ask the directors why they made the decision to approve the lease, and not having yet heard from them in evidence, the Judge appears to put a factual conclusion to Mr Mirza ("*I'll be upfront with you …. I can't see any other explanation*"). Mr Rees KC tried to steer the Judge away from that line of questioning, drawing his attention to what was contained in other witness statements. Two director witnesses gave a different account from the conclusion that the Judge was expressing. Mr Rees explained that he had been put in a difficult position and did not want to fall out with the Judge. The Judge's conclusion was one that was later expressed in his judgment, namely that the directors (despite what they later said) were not aware that Boomzone was not a JV entity. The Respondents accepted in oral submissions that it was "unfortunate" that the Judge did not leave the questioning to Mr Peto.

54. The Respondents' argument on this point is that the Judge was being fair to Mr Mirza, and his mind was not made up, which was why he was putting the questions that he did. We find that unconvincing, so far as the above exchange is concerned. The Judge had already given Mr Mirza, in the previous 10 questions, ample opportunity to give his evidence about the commercial justification for the third Boomzone lease. It was not necessary or appropriate for the Judge in effect to warn Mr Mirza that he did not accept his evidence; to do so at a time when he had yet to hear the evidence from the

relevant directors was a mistake. Whether the Judge was right or wrong in the inference that he drew is not the point: such inferences and findings must be made at a time when a judge has heard all the relevant evidence, not intimated to a witness before that stage had arrived.

55. Later in the same passage of evidence, after many more questions from the Judge relating to whether the fit out works were a justification for the return that Boomzone would obtain, the Judge warned Mr Mirza that his evidence was not persuasive, which led to a strange exchange in which the Judge appeared to be giving evidence, or expressing his conclusion:

> Extract 4
>
> "MR JUSTICE THOMPSELL: But you weren't -- but I come back to the point that there was an existing lease that you already -- if you had that obligation, if it was an obligation, and secondly, the lease didn't include that obligation, so I'm not quite -- I'm not quite persuaded by that, I'm warning you, Mr Mirza.
>
> A. Yeah, but who -- so, okay, my Lord, can -- may I just put my last point?
>
> MR JUSTICE THOMPSELL: Yes.
>
> A. Who was responsible for fitting out the building then?
>
> MR JUSTICE THOMPSELL: Well, no one was responsible, but it was in lots of different people's interest.
>
> A. Well --
>
> MR JUSTICE THOMPSELL: But there was no one who had obliged themselves to fit out the building; the joint venture could have left it shell and core and tried to sell the building shell and core –
>
> A. Well, that would have been a disaster.
>
> MR JUSTICE THOMPSELL: Boomzone wasn't obliged to fit it out, but might see it in its interests to see that there was a fit out. Under the first Boomzone lease, I understand -- no, the fit out was already done, but I think you said it was redone?
>
> A. Well, only for the sixth floor, we're talking about --
>
> MR JUSTICE THOMPSELL: The sixth floor. Yes, that was the first one."

56. The Respondents contended, in oral submissions, that no prejudice resulted from these interventions because the Judge reasonably concluded that ownership of Boomzone at the time of the second Boomzone underlease did not make any material difference to the claim, and that they were not aware at the date of the third Boomzone underlease that Mr Mirza had or would have full control and ownership of Boomzone. This was therefore consistent with the Judge's initial view, expressed during the evidence, and favourable to Mr Morjaria, because it tended to support his case that, if Mr Mirza owed fiduciary duties, he had not disclosed to the directors his interest in the transaction.

57. It is difficult therefore to follow the submissions that no prejudice was caused in any event, even if that were a sufficient answer to the criticisms that the Appellants make about the fairness of the trial process overall.

58. On the following day, Mr Mirza was being cross-examined on behalf of the Part 20 Defendants, the company directors, to the effect that he was saying one thing to the bank about the amount of rent coming in and something different to the directors. Counsel for the directors was seeking to put to Mr Mirza that he had been deliberately dishonest and had misrepresented to them the rental income. This was a very important issue for both the main claim (whether Mr Mirza was in breach of fiduciary duties he owed to the JV Entities) and for the Part 20 claim for breach of the directors' duties.

59. The transcript shows that the Judge interrupted Mr Mirza's answer to put his own point, which was a cross-examination question, and then, following the allegation of dishonesty having been put and Mr Mirza having given his answer, the Judge himself implies that Mr Mirza had not acted honestly:

> Extract 5
>
> "A. No, it doesn't matter what I've said to the bank. We're saying this is what we're -- we're telling them that's what we're contractually due. Whether we got it or not is a separate matter, is what I'm saying.
>
> Q. Well, you sent that to the bank and it suggested you were getting 6,950 net rent for –
>
> A. Yes, because that's what we --
>
> Q. -- the fourth floor.
>
> A. -- expected.
>
> Q. And the one you sent to the directors you said you were getting 1,050 for the fourth floor, and what you've done is you've deleted tenants from the version you sent --
>
> A. Well --
>
> Q. -- to the directors, haven't you?

> A. No, we probably sent to the directors, from what you're telling us, what we're actually receiving, because w*e* weren't receiving --
>
> MR JUSTICE THOMPSELL: Well, that wouldn't explain why it says "vacant". It should just say "in default". It should say "CM2 (not currently ... "--
>
> A. No --
>
> MR JUSTICE THOMPSELL: -- "... paying)".
>
> A. -- I agree, it should have said "default". But I mean, I know -- I mean, I can't say for a fact, but I knew there was a few -- well, quite a few of the tenants were not paying the rent, and I can -- I'm looking through this list and I can recognise one or two I know who weren't paying the rent and one who was supposed to pay the rent, they had promised us they would pay the rent, but they didn't.
>
> MR LLOYD: Well, I'll put to you that you knew that the version that Toji John sent to the directors on 31 March contained false information.
>
> A. No.
>
> Q. And you were lying to the directors about the income being generated by the office, and you did that in order to generate justification for the a paltry write-off for the rent that Boomzone was contractually obliged to pay.
>
> A. Completely disagree with you. I will say we were struggling, because people were not paying the rent and people were now finding any excuses. In fact, the hotel next door asked for a ROTE(?) and send, "We want a rent-free period", and that's Premier Inn, Whitbread plc.
>
> MR JUSTICE THOMPSELL: But wouldn't the honest thing be to say, 'Several of our tenants are not paying their rent', and rather than show the units as being vacant, to say, 'In default', and then say, 'Whilst the contracted rent is 6,950, we're only currently receiving 1,000, our lawyers are looking into it'?"

The Cladding Claim

60. Examples (1) to (7) in the Appellants' list related to interventions in Mr Mirza's evidence on the cladding misrepresentation claim, in which Mr Mirza and Tydwell were alleged to have fraudulently misrepresented the reason for a substantial increase in the cost of the cladding works that was being charged to Otaki.

61. The Appellants point to passages in which the Judge effectively took over the cross-examination of Mr Mirza about the charges made by a cladding sub-contractor, across 9 pages of the transcript at a time. These pages, on day 10, are set out in full as 'Example 1' in the Schedule. What they show, according to the Respondents, is that the Judge was affording Mr Mirza an opportunity to deal with something that he wanted to address. That was indeed the occasion for questions about sub-contractor quantities to be asked, but it was not a subject on which the Judge should have conducted the cross-examination, which is very largely what happened, with Mr Peto succeeding in asking a few questions himself.

62. The same happened again the following day, when Mr Mirza was challenged by Counsel on the basis that he had deliberately provided misleading information to Mr Morjaria and Otaki. Mr Mirza gave his answer to the question, explaining that the charges made included insurance, but that answer was challenged by the Judge:

> Extract 6
>
> "MR JUSTICE THOMPSELL: It didn't include insurance, did it, it included you taking responsibility?
>
> A. Well -- oh, yes. Tydwell took responsibility and I --
>
> MR JUSTICE THOMPSELL: Because if you were an insurer, you'd have to be regulated for that.
>
> A. That's right. We took the risk, and their lawyer had said --
>
> MR JUSTICE THOMPSELL: What was the risk on removal and disposal of existing facades?
>
> A. Well, there's no risk on removing it and taking it away.
>
> MR JUSTICE THOMPSELL: So why was that figure inflated?
>
> A. No, it was -- no, we took a view that our total costs -- we -- you see, it goes back when the lawyer, Mads, wrote to me and said, "You do realise it could cost you £250,000 per annum". So now, you know, if you take 12 years as the responsibility, that's £3 million. So I had to make what -- personally, to decide what to do, and I -- looking also, on balance, that Tydwell has to -- has got a responsibility to pay tax, it's a UK-registered company, so it would be liable. So we have to show a reason. So we -- and I did explain this on the phone, that I'm going to put it all together and, you know, encompass it in the price and do the best I can, and I think --
>
> MR JUSTICE THOMPSELL: But you spread that price amongst the things that had no risk as well?
>
> A. I did, yes, I took that risk.

> MR JUSTICE THOMPSELL: Where I've got some sympathy with Mr Peto's question is that if you had presented this differently and said, "This is the cost of doing this and I'm adding another million pounds because I'm taking responsibility and I can't get insurance for that", then the directors could have taken a view: well, then we'll cross out the warranty, we'll take responsibility and we'll keep the million pounds."

63. The questions are leading questions, interrupting the witness, with the Judge expressing his agreement with the premise of Counsel's questions, using the suggestive word "inflated" to describe the amounts in the invoices, and implying that Mr Mirza's answer was not satisfactory or persuasive. Mr McEntee accepted that the Judge was putting to Mr Mirza a "somewhat contentious proposition". The remainder of this extract is set out as 'Example 2' in the Schedule. It shows, as Mr Rees summarised, that the Judge asked 37 questions in total on this issue.

64. The Respondents say that, in relation to the passage set out above, the Judge was only seeking to set out, for Mr Mirza's benefit, "out of conspicuous fairness to the witness", that there was an inherent logic to the questions put in the light of his answers. The Judge was not, they suggest, seeking to be partisan or pre-judge the matter. The unfortunate appearance is nevertheless given, and would have been given to Mr Mirza, that the Judge was sympathetic to the suggestion that Mr Mirza had indeed been misleading the JV Entities. This was in the context of serious allegations of fraudulent misrepresentation where it was essential for the Judge to hear all the evidence before forming a conclusion.

65. The same impression is given by two further extracts shortly after the previous one. The Judge repeatedly interrupts the witness, seeking to have his own questions answered, expanding on Counsel's questions about leaving the directors with no choice but to approve the necessary works at an inflated cost, and curtailing the witness's answers.

> Extract 7
>
> "Q. He mentions the deadline for insurance. The truth is, you had him over a barrel, didn't you? He had to agree to this because it was urgent the work was done. You had him over a barrel, didn't you?
>
> A. How did I have him over a barrel? When he knew, for seven months, was on notice, him and Mr Morjaria, for seven months on notice that the cladding has to be removed and you're telling me I had him over a barrel? What --
>
> Q. At this stage you did.
>
> A. No, absolutely --

> Q. At this particular moment.
>
> A. -- not.
>
> MR JUSTICE THOMPSELL: But, Mr Mirza, the additional 1.4, we've established hasn't come from the requirement for the cladding to be done, that was covered by the Teampol quote. The additional 1.4 has come from what we're calling the insurance, but --
>
> A. The requirement, yes.
>
> MR JUSTICE THOMPSELL: -- the warranty point.
>
> A. Correct, yes.
>
> MR JUSTICE THOMPSELL: And the first time that that turned into something that went into an email at least was when they got the quotation that this is responding for saying it's 2.5 million -- odd-million for Tydwell to do the work. So to answer the point that you were putting back, isn't it -- well, the point is slightly answered, if I believe that you had, much earlier than that, raised the point that, "Of course I'll have to do a 1.4 million markup to cover the responsibility". If you had said that to Mr Lewin six months before, then I can see your point, that they were happy to carry on with you and not look for other -- with Tydwell and not look for other quotes. But if they only found that out a few days before, then doesn't that answer the point why they were happy to carry on with Tydwell and not look for someone else to run this?
>
> A. My Lord, may I -- can I just explain?"

66. The Respondents say that this was no more than going over the gist of what had been put by Counsel to Mr Mirza, flagging issues about timing to give Mr Mirza an opportunity to respond. But this is not correct. Mr Mirza had given his answer to the "over a barrel" suggestion, pointing out that the directors had known for 7 months. The Judge was pursuing a different question, which was whether the substantial increase in the alleged cost of the works was Tydwell inflating its own bill, under the guise of carrying the insurance risk, which the directors had not appreciated until later. In effect, the Judge was floating with the witness his own understanding of what the incomplete evidence might lead him to decide, and looking to see if the witness would agree with him.

67. The same issue was addressed in re-examination this time, and the Judge intervened again, asking 16 questions in one passage (day 15, pages 57-63) ('Example 3' in the Schedule) and 41 questions at a slightly later time in a second passage (day 15, pages 77-83) ('Example 4' in the Schedule). A number of these questions were leading and apparently hostile to Mr Mirza. The following is one example from the first passage:

Extract 8

"MR REES: So it was the 10 March email that you were thinking of when you gave that answer --

MR JUSTICE THOMPSELL: So when you discussed it with Mr Morjaria and Mr Stobart, did you just say, "I don't think I'm going to be able to get insurance for -- or be able to afford insurance for Tydwell", or did you say,

> "I'm going to have to self-insure so that's another £1 million on the cost"?

A. I -- my memory is not that brilliant, so I'm not ... but I made it very, very clear, which is why there was frustration on the call, so I said what we thought it's going to be, it's not going to be. The lawyers and everybody else saying the same thing. I therefore will have to self-insure for the combustibility.

MR JUSTICE THOMPSELL: Why did you? Why couldn't you have just -- well, I think you said earlier that you had sole responsibility. That's not true, because Teampol gave more or less the same warranty that you did.

A. I'm afraid -- sorry, my Lord, but, no, they didn't. They -- they --

MR JUSTICE THOMPSELL: But we looked at the warranty yesterday.

A. Yeah, but, if you look at the contract between -- the subcontract and if you look at the design, we -- w*e* employed -- and it's important, my Lord -- I mean, I'll leave it to the experts, but I am telling you that there was no one prepared to accept the fire combustibility nor Teampol, nobody. All Teampol was saying --

MR JUSTICE THOMPSELL: We keep coming back to this phrase "fire combustibility". I didn't see a warranty that talked about fire combustibility."

68. The Respondents suggested that the Judge was not questioning the truthfulness of the evidence given by Mr Mirza, and that what he said was "*untrue*" was a reference to the objective fact of what was in the subcontractor agreement. It may be that the Judge had in mind the content of that agreement, but nevertheless he was putting to the witness, during re-examination by his counsel, that what he had said was untrue, in the course of an extended passage of judicial cross-examination, as the fuller context shows.

69. The effect on Mr Mirza of these interventions, at the end of more than 5 days of cross-examination, can be seen from the following excerpt from the second passage. Mr Rees is prevented from conducting his re-examination, which has broken down, and the witness seems bewildered:

> Extract 9
>
> "MR JUSTICE THOMPSELL: You didn't take any insurance at all.
>
> A. No, because we *gave a warranty to -- to Premier Inn.*
>
> MR JUSTICE THOMPSELL: No, but what I'm saying is that your warranty wasn't backed by insurance. Teampol gave a warranty and their warranty was backed by insurance but not for fire combustibility. You gave a warranty with no insurance whatsoever. So if it wasn't a problem with combustibility, the cladding just fell off the wall, and that was your fault because you'd approved the design, then there was no insurance for that.
>
> A. Well, okay, I mean –
>
> MR REES: Shall we ask -- may I ask you some questions on this, on this very point.
>
> MR PETO: Well, maybe his Lordship's --
>
> A. It might be better if --
>
> MR PETO: -- question could be answered.
>
> MR REES: No, no, no, well ...
>
> MR JUSTICE THOMPSELL: I think you had answered it, hadn't you --
>
> A. What, sorry?
>
> MR JUSTICE THOMPSELL: Had you finished your answer to my question --
>
> A. No, I hadn't got any --
>
> MR JUSTICE THOMPSELL: Well, then you should finish your answer --
>
> A. -- I was interrupted, but ...
>
> MR JUSTICE THOMPSELL: I think Mr Mirza said he hasn't finished his answer --
>
> MR REES: Please finish --

> MR JUSTICE THOMPSELL: -- and he's collecting his thoughts to do so.
>
> A. You might as well -- I mean, if Mr Rees wants to ask me a question, I don't want to be blamed for taking up time, so I mean ask me the questions, I don't mind –"

The fiduciary duty claim

70. The Appellants' example (15) relates to interventions in Mr Mirza's evidence on the issue of whether Mr Mirza owed fiduciary duties to Otaki arising, in part, from his dealings with its directors. Examples (24) to (31) relate to interventions in Mr Morjaria's and the directors' evidence in connection with the question of the role of the directors in managing the JV Entities. These were central issues in the trial, on which the claims based on breach of fiduciary duty by Mr Mirza and Tydwell, claims to set aside transactions based on the fair-dealing rule, and claims for knowing assistance in breach of trust and knowing receipt of property transferred in breach of trust largely depended. Here, it is suggested by the Appellants that the Judge advanced his own case theory, namely that Mr Mirza was an "advisory fiduciary", who made recommendations to the directors that they simply followed, and he put facts to witnesses that were consistent with his theory. This was not a case that had been pleaded by the Claimants, and it arose for the first time, from the Judge, during the opening of the trial.

71. On day 9, junior counsel for the Defendants (Appellants) was questioning Mr Stobart, an administrator at IQEQ, about his understanding of why the second Boomzone underlease was granted, and whether he knew that Boomzone was not a JV-controlled company. Mr Stobart said he could not recall whether he had passed on information about ownership for Ms Yates, a director of Otaki, to review, or whether information about the ownership of Boomzone was considered important:

> Extract 10
>
> "A. I don't know whether it was important or not, but it obviously wasn't on the -- the document that was prepared for consideration. I think generally, given there was a lease already in place, the recommendation had come from -- I can't quite remember how this was received, from Mr Mirza or Mr John.
>
> MR JUSTICE THOMPSELL: So in putting that pack together, you didn't make your own recommendation saying, "I've looked through this and I think this is a good deal", you were passing on Mr Mirza's recommendation to deal with the company that may have been in the ownership of Mr Mirza?
>
> A. Yeah, ultimately it's part of the JV agreement and, yeah, involved in -- in asset decisions. Yeah, I certainly don't put a -- a recommendation or a*n* opinion on there, my Lord.

> MR JUSTICE THOMPSELL: You wouldn't have been concerned that Mr Mirza might have had a conflict of interest in recommending a lease in favour of a company which he might have owned?
>
> A. I certainly -- I can't recall I thought about it at the time, but I think given, I guess, the underlying assumption that this was supposed to be owned by two parties and I guess if the recommendation from Mr Mirza was on behalf --
>
> MR JUSTICE THOMPSELL: But I think that may be why
>
> Mr Fletcher was pressing you on what your knowledge of the ownership was there, and if you had that knowledge, if you passed it on to Ms Yates.
>
> A. Yeah.
>
> MR JUSTICE THOMPSELL: Because I think you're saying "assumption" there. Okay."

72. The Judge is here suggesting to Mr Stobart, by a leading question, that Mr Mirza might have been making a recommendation, not (as Mr Stobart said) that he could not remember and that Mr John or Mr Mirza might have been involved.

73. On the following day, the first day of Mr Mirza's cross-examination, he explained in an answer to Mr Peto that he did not fully understand how offshore professional directors worked because he only worked in the construction development business in the UK:

> Extract 11
>
> "That's what I was used to. I wasn't used to this murky world of offshore entities and --
>
> MR JUSTICE THOMPSELL: And if you had understood that, you wouldn't have said I can give you instructions --
>
> A. Absolutely, my Lord.
>
> MR JUSTICE THOMPSELL: (Overspeaking - inaudible).
>
> A. Absolutely, my Lord.
>
> MR JUSTICE THOMPSELL: But would you have said I would give you advice or I will make recommendations?
>
> A. The word I was told was you can make suggestions.
>
> MR JUSTICE THOMPSELL: Suggestions.

> A. That's the word actually stuck in my head, suggestions.
>
> MR JUSTICE THOMPSELL: And once you realised you weren't giving instructions but might be giving suggestions, recommendations, advice or whatever, would you have done that in the best interests of the company?
>
> A. Yes. I would have suggested we all -- you know, we should be. Because it's relatively new, it's 2008, we're starting, and I am saying, look, it's in the interests of everybody, all work for the best interests of the company, yeah, 100%, my Lord.
>
> MR JUSTICE THOMPSELL: Okay, thank you."

74. This, submit the Appellants, is the Judge putting to Mr Mirza, early in his cross-examination, his theory that Mr Mirza was an advisor with fiduciary duties to the JV entities. The Respondents contend that this is to take the few questions cited above out of context, which was that Mr Peto was putting to Mr Mirza an email dated 15 April 2008 that he had previously sent to Mr Lewin and the Morjarias asking for confirmation that, during the construction phase, the directors would take instructions from the Mirzas under the JVA, and that the instructions would follow what was in the best interests of the JV Entities. Mr Mirza then confirmed in evidence that he would use the word "suggestions".

75. It is true that the questions asked by the Judge flowed from the context, but nevertheless the Judge is developing the line of questioning and departs from the "instructions" on the construction phase, which is the subject of the email, to "suggestions, recommendations, advice or whatever" in the best interests of the company more generally, as a leading question.

76. On its own, the last example might have been less significant, but the Judge intervened repeatedly, with various witnesses, on the issue of the balance of control, instructions or advice to, and the independence of the company directors. During cross-examination of Mr Lewin, the Judge interrupted his explanation that the directors had strategic oversight and were executive directors but that property matters relating to the JV were left to Mr Mirza, and suggested, overspeaking the witness, that "you're not an executive director, are you?". There were then interventions in the evidence of Mr Morjaria, when Mr Rees suggested that Mr Lewin was "Mr Morjaria's man" on the board, and the Judge suggested that Mr Morjaria's evidence was that Mr Lewin was "*not my creature … not my puppet, he was an independent contractor*", which were not words that the witness had used.

77. In cross-examination, Mr Lewin was asked about the decision to grant the first Boomzone underlease and whether the lease was specifically approved at a board meeting in August 2017. The Judge interrupted:

Extract 12

> "Was this -- sometimes I think these – minutes like this get prepared by the lawyers dealing with the lease ahead and the meeting consists of you nodding at each other."

Mr Lewin said that it was an internally prepared document, whereupon the Judge suggested:

Extract 13

> "I'm not sure if you would have gone through this line by line, but certainly you would both have understood … what was being agreed here."

The same suggestion about pre-prepared formal documents was put by the Judge to Ms Yates later in the trial, in terms that suggested to Ms Yates an answer that she had not given:

Extract 14

> "So these were pre-prepared minutes that were in front of you at the meeting, you ran through the minutes to see if you agreed and, you did agree so you initialled that as the minutes of the meeting?"

Ms Yates corrected the Judge: they were typed up and initialled after the board meeting.

78. These are further examples of the Judge leading the witness to seek to obtain confirmation of his assumption, or theory, about what had probably happened.

79. The Judge then intervened in the evidence of Ms Yates relating to the way that the directors worked in relation to the construction management. Ms Yates confirmed that the directors did not attend the site or deal with the contractors. The following exchange then took place:

Extract 15

> "MR JUSTICE THOMPSELL: -- and that sort of thing, so were you relying on advice from anybody?
>
> A. Well, Mr Mirza has the responsibility under the JVA for the --
>
> MR JUSTICE THOMPSELL: Yes, that's slightly contentious in that the responsibility under the JVA was to manage the project, and I think it's common on all sides that once the tax advice was received that it was agreed he would not be

> managing the contract -- managing this, but he would instead -- the directors would be managing it.
>
> A. Yes.
>
> MR JUSTICE THOMPSELL: But did you understand that he would be giving you advice in the interests of the joint venture companies?
>
> A. He would be -- yeah, on the development and managing the property.
>
> MR JUSTICE THOMPSELL: If he brought a proposal to you that would be a proposal in the interest of the joint venture?
>
> A. Absolutely, yeah, so it's what the directors would consider.
>
> MR JUSTICE THOMPSELL: He was on your side, not on the other side as contractor?
>
> A. Yes.
>
> MR JUSTICE THOMPSELL: I see."

This is another instance of the Judge interrupting the witness to put to her in leading questions a theory about the role of Mr Mirza in giving advice, with duties owed to the JV. The Judge was playing a part in the questioning of witnesses that was shaping the evidence that was given to him.

80. Finally, we refer to questioning of Mr Morjaria about what was referred to at trial as the Non-Contemporaneous Note ("NCN"). This appeared to be a note dating from 2008 with reference to an email dated 10 January 2008. It was made by Mr Morjaria, recording an agreement that Tydwell would not charge the JV for the work that it would do. The Defendants' case was that it was a forgery and had been written only in 2020, not 2008, and had then been deployed on behalf of Mr Morjaria to lend apparent credibility to his case of fraud by Mr Mirza and Tydwell. The NCN was said by Mr Rees to be the only document at trial that appeared to support the claimants' case that Tydwell was to provide free services to the joint venture, so the document was an important matter relating to a factual issue and the credibility of Mr Morjaria.

81. Mr Rees was showing Mr Morjaria the letter that had been written by the defendants' solicitors, stating that the NCN's metadata showed that the document had been created in 2020. The Judge advanced his opinion that the metadata showed that the document had first been created in 1900 – an obviously impossible conclusion – then 2019. The Judge's interruption led to a discussion between him and Counsel, further delaying the cross-examination. When this resumed, Mr Rees put to Mr Morjaria that he was wrongly blaming junior solicitors for misstating that the document was produced in 2008, when it had been produced in 2020. The Judge again interrupted to suggest that it was a note about an email sent on 10 January 2008, and proceeded to debate with Mr Rees what was the proper interpretation of what the document showed, and to say what he (the Judge) concluded about it. This concluded:

Extract 16

> "MR JUSTICE THOMPSELL: But all I'm saying is that if you're saying that Mr Morjaria made a representation on the face of this letter that this was a contemporaneous note, or that he emailed it himself, that is not apparent on this note itself".

Mr Rees said that he respectfully disagreed and that "you'll have to hear evidence on it during the course of the trial". We include the full context of this as 'Example 5' in the Schedule.

82. On an important evidential point in the trial, therefore, the Judge interrupted Counsel twice and proceeded to ask 20 questions, derailing the cross-examination. This was plainly wrong, benefited Mr Morjaria in giving him time to think about what he was going to say, and was prejudicial to Mr Mirza's case, which in the circumstances could not be put by Mr Rees in the way that he wished to develop the line of questioning.

83. The Respondents contended, in relation to this episode, that there was nothing extraordinary about the Judge's expression of views, which were based on what was apparent within the four corners of the document. We disagree. An allegation of fraud, forgery or deliberately attempting to mislead is not one where a judge should descend into the fray. It is a matter for experienced counsel to deal with.

84. In oral submissions, the Respondents suggested that the Judge's view about the NCN led nowhere, because it was not relied on by the Judge in his judgment, who warned himself to be careful about accepting the recollection of Mr Morjaria where unsupported by other evidence. Again, we cannot accept that this cured the prejudicial effect of the interventions. The Judge's overall evaluation of Mr Morjaria as a witness was that he appeared to be answering questions honestly and that he was "quite impressive" as a witness. The Appellants were seeking to establish that the NCN had been created and deployed by Mr Morjaria dishonestly in order to mislead. The Judge did not address this in his judgment, possibly because the forensic attempt to do so was undermined and ineffective for that reason.

85. We do not find it necessary to go through in detail more of the 40 examples on which the Appellants relied. The further examples, which we have not addressed, include: a number of instances of interventions in Mr Mirza's and Mr Morjaria's evidence which, the Appellants suggest, were liable to unsettle Mr Mirza by showing that the Judge was reaching conclusions adverse to him, but that he was more favourable in his treatment of Mr Morjaria (examples (16) to (23)); and interventions concerning the alignment of the interests of the directors and Mr Morjaria, where it is alleged that the Judge's questions wrongly influenced the answers that the witnesses gave, or prevented Counsel for Mr Mirza from effectively cross-examining them (examples (38) to (40)). We note, however, that there is no appeal by the Defendants against the dismissal of the Part 20 claim.

86. The court was able to read the transcripts of the other examples outside sitting hours, using the skeleton arguments of each side (which addressed all of the 40 examples) to understand the points being raised in relation to them – to the extent that these were not obvious from the transcripts themselves. It is fair to conclude from this that the

examples that were developed orally are the most serious examples of inappropriate interventions; that some of the remainder are of a similar character, but less serious; and others are more minor examples of interventions by the Judge that, ideally, would not have been made.

The Appellants' case

87. The Appellants argued that the Judge, by constant intervention over 6 days of evidence given by Mr Mirza, and by other inappropriate interventions with other witnesses, created an unfair trial for Mr Mirza.

88. Despite objections from counsel and requests to take into account Mr Mirza's medical condition, he was required to give evidence for extended hours on each of the days, on one day from 10:00 to nearly 17:30. No accommodation in terms of shorter sitting hours, or breaks, was given to him.

89. Mr Mirza was subjected to lengthy cross-examination by the Judge, on occasions at the same time as Mr Peto KC was trying to cross-examine him – a practice that Mr Rees KC characterised as the Judge and counsel "playing tag" with the questioning of the witness. The excessive interventions and character of them was said to have affected the Judge, the witnesses and counsel who were seeking to cross-examine or re-examine the witnesses.

90. The Appellants submit that the Judge lost his dispassionate overview of the case and sought instead to pursue his own line of questioning. The witnesses, Mr Mirza in particular, were interrupted, challenged and deflected from giving their best evidence, in a case in which credibility was important. Counsel were affected in that the course of their orderly and structured cross-examination was distorted by the Judge raising his own issues and breaking the sequence of questioning, creating difficulty for them and disadvantage for their clients.

91. Mr Rees summarised the Appellants' case as being that the extensive interventions by the Judge breached the core principle of the judge having to remain neutral and above the fray during the evidence. The Judge wrongly adopted a quasi-inquisitorial role. The Judge's conduct, including constant interruptions of his evidence, was unsettling for Mr Mirza in particular, accompanied as it was by suggestions from the Judge that Mr Mirza had been dishonest and that he (the Judge) had formed a view on certain disputed facts.

92. The Judge, he submitted, wrongly used the course of the evidence to pursue his theory that Mr Mirza was an "advisory fiduciary", which he later found proved. He repeatedly derailed counsel's cross-examination, either by interrupting before the witness had answered or during their answer, or by suggesting answers to the witness. The Judge's interventions were on important issues in the trial, and made before all the evidence had been heard, so that in the judgment it was the Judge's own theory, supported by the answers that he received, that determined the outcome of central claims, rather than a full and fair evaluation of the parties' evidence.

The Respondents' case

93. The Respondents suggested, in their skeleton argument, that the criticisms made of the way that the Judge conducted the trial were "fundamentally unfair and present a wholly distorted picture of what happened at trial". They contended that the scope and nature of the Judge's interventions reflected the need for robust trial management, given the "welter of causes of action" involving 18 years of business dealings in which the actions of multiple parties were under scrutiny, with many factual and expert witnesses giving evidence: "a substantial measure of judicial intervention was necessary to keep the proceedings moving".

94. The Respondents say that it would have been unrealistic, given the length of the evidence, for the Judge to hold back all his questions until the end of the re-examination of each witness, and that it was fairer to the witness to allow them to deal with his questions as and when they arose, in context. Moreover, they suggest that the questions asked were not unfair, or that no prejudice arose from them.

95. As previously indicated, the Respondents suggest that the Appellants have cherry-picked the examples relied on and are looking at them out of context, as well as wrongly characterising what they show. In general terms, the Respondents suggest that the examples on which the Appellants rely are "unsustainable on a careful review of the exchanges on which [the Appellants] rely". The major part of their submissions in writing and as presented orally was to the effect that the Appellants are misreading in the transcripts what was happening, or are misinterpreting their significance, and that "none of the individual allegations about the supposed unfairness of the trial is made out".

96. More specifically, the Respondents contend that the suggestion that the Judge was partisan, or invented case theories, or derailed the cross-examination of witnesses is wrong.

97. It was notable, however, that the aggressive line taken in the skeleton argument (namely that the presentation of the Appellants in writing was misleading, partial and tendentious) was not repeated in oral submissions. Instead, Mr McEntee, more realistically, accepted that the Judge was "at the interventionist end of the spectrum", that the cross-examination was prolonged by the Judge's interventions, and that in principle forensic prejudice could result from the Judge's interventions, while maintaining the line that in fact no unfairness or prejudice resulted.

Analysis

98. It is convenient to make some general observations.

99. First, this was a complex case which had been over-complicated by the laborious pleading of multiple causes of action against various defendants. It would be understandable that, even with the benefit of allocated pre-reading time, the Judge needed clarification and guidance from the parties, and might need to ask some questions, during the early stages of the trial. The mere fact of interventions from the bench, perhaps numerous interventions, during the first week or so of the trial would therefore not be too surprising. The Judge, however, had the benefit of experienced senior counsel acting for the parties and needed to allow them to guide him through

the case, not to interfere with their conduct of the evidence unless it was necessary to do so.

100. By the time that the main protagonists gave their evidence, one would think that the Judge would have identified that the central and serious issues for the evidence were: whether Mr Mirza (or Tydwell) had knowingly or recklessly made untrue representations in invoices to obtain overpayment by Otaki; whether in all the circumstances Mr Mirza or Tydwell had (or were reasonably to be understood as having) undertaken responsibilities of a fiduciary nature, and if so what and to whom; the extent to which the directors of the JV Entities deferred to Mr Mirza; and whether there had been dishonest arrangements or a conspiracy to injure the joint venture by the grant of the Boomzone underleases, the LMH underlease and the sale of the Viper headlease. These required a careful evaluation of the evidence of all witnesses.

101. Second, it is evident that the Judge intervened a lot during the course of the evidence throughout the trial, and far too much. Given that the parties and the Judge had the benefit of a live transcript in court, one would expect fewer rather than more routine interruptions, seeking clarification or repetition of something previously said. Therefore, in a complex case involving serious allegations of wrongdoing, the evidence should have been allowed to flow, to give each witness a chance to give their best evidence and a coherent account, and to give counsel a chance to keep the questioning within a carefully prepared and logical structure.

102. Third, many of the interventions in the transcripts that we have read are undoubtedly of the character of cross-examination; that is to say, not open questions or simple requests for clarification or confirmation, but closed questions. Many of these amounted to challenges to what the witness had said, or putting to the witness a contrary fact or interpretation of events. The extracts that we have set out above prove that, on many occasions, the Judge took over the cross-examination, or joined in it, and continued to ask questions for pages of the transcript at a time.

103. Fourth, the interventions were generally not made at a convenient point, when counsel had finished a particular line of questioning or even after the witness had finished an answer, but by interrupting the question or answer, speaking over the witness, and on occasions seeking an answer from either the witness or counsel about something different from the particular question at hand. The impression from the transcripts is that the Judge interrupted the evidence to raise something that had occurred to him and to which he wanted an answer there and then. While it may be justified in a long trial for a Judge to ask their questions at the end of a chapter of the cross-examination, rather than store them all up for the end, that is not what happened in this case.

104. Fifth, the Respondents' suggestion that the interventions were in the interests of case management in a difficult case, to ensure the efficient running of the trial, is patently wide of the mark. The interventions that we have read in the transcripts are not of a kind trying to confine or shorten evidence, prevent repetition, or move matters on, but rather the opposite, seeking to investigate in more detail a matter raised by Counsel or touched upon in an answer, and sometimes raising a discrete matter that the Judge had at the forefront of his mind. Instead of holding the parties to their agreed timetable, the Judge's interventions, while probably not the only cause of the overrunning of Mr Mirza's evidence, clearly significantly contributed to its taking more than twice its estimated time.

105. Sixth, the number of pages of the transcript on which the Judge's name appeared at least once (63% of Mr Mirza's 6 days of evidence and 56% of Mr Morjaria's 3 days) demonstrate that the evidence was not taken as it should have been. The pages of the transcript are short – only 25 lines each. As we have seen, a good number of those pages include the Judge's name repeatedly, sometime to the exclusion of the name of counsel. While it is the quality and effect of the interventions that ultimately matters, rather than the quantity, the quantity in this case is a clear indication that the evidence was not taken in the right way, with Counsel controlling the questioning and the witness, and the Judge only intervening if necessary.

106. Seventh, having read the transcripts provided, we do not accept the suggestion that the Appellants have cherry-picked passages from them and so provided a misleading impression. While the extracts to which we were taken are, from the Appellants' point of view, the best examples of the conduct that they criticise, there were a good number of additional examples that, given the constraints of time, were not referred to at the hearing.

107. With that general appraisal, we turn to the examples that we have set out above.

108. The five extracts relating to the issues about the Boomzone underleases on which the Appellants relied show without doubt that the Judge descended into the arena and took up the cross-examination of Mr Mirza, sometimes in place of Counsel and sometimes alongside him. The Judge on one occasion pursued Mr Peto's line of cross-examination so far that he apologised to Counsel for stealing his lines. The witness was left confused and "lost", to use his word. In the course of conducting a cross-examination, the Judge warned Mr Mirza that he was finding his evidence unpersuasive and that he could see no alternative to a factual conclusion that he himself had suggested. By asking the witness whether it would not have been honest to have acted differently, the Judge clearly signalled to Mr Mirza that he thought that what he did do may have been dishonest.

109. The extracts demonstrate that taking this course unsettled the witness and led, on one occasion, to a discussion between Judge and witness in which the witness was asking the Judge factual questions which the Judge was answering. In other words, the Judge's approach subverted the orderly approach that was required, which was that the witness gives answers in response to Counsel's questions.

110. The extracts relating to the invoice misrepresentation claims also show the Judge taking over the cross-examination at length, and putting matters to Mr Mirza, departing somewhat from Counsel's line of questioning, in a way that suggests that he has formed a view of what happened and is trying to secure an admission from Mr Mirza. The Judge interrupted Mr Rees's re-examination of Mr Mirza on this subject and cross-examined him further, over many pages of the transcript, suggesting that what Mr Mirza had said was untrue. Mr Rees struggled to continue his re-examination ("*may I ask you some questions on this*") but the witness had evidently lost his way by then, and said that he did not want to be blamed for taking up time. This is a clear sign that things had gone wrong.

111. The extracts relating to the existence of fiduciary duties and the relationship between the directors and Mr Mirza show that the Judge frequently intervened to ask questions that suggested answers that fed into his theory about Mr Mirza being an "advisory

fiduciary". The Judge's interventions shaped the evidence that was given, where the exact understanding of the directors, in their own words, was crucially important. The extract relating to the NCN illustrates the corrosive effect that the Judge's interventions, giving a pre-emptive assessment of a factual issue, had on the course of the evidence.

112. We are persuaded by what we have seen that the Judge did, at these times, conduct a quasi-inquisitorial hearing in which he played a substantial part, trying to "get to the bottom of things", as he put it. He did not remain "aloof from the trial" and at times did not appear to be neutral but somewhat antipathetic to Mr Mirza. The Judge had his own ideas and apparently wanted to test them by questioning the witnesses. This is not, as the Respondents suggested in writing, an attempt to portray anodyne judicial intervention as an egregious exercise in inquisitorialism. These interventions were far from anodyne and would not be expected in a serious trial being conducted by experienced counsel in the High Court. Nor do we accept that the passages relied on by the Respondents are "shorn of their proper context". We have read them in context, and if there were further context that cast a different light on any of them, the Respondents could have added it to the Supplementary Bundle.

113. The interventions can be seen from the extracts set out above, and in the schedule, to have impacted the ability of the witnesses to give a clear, uninterrupted account of the facts as they recalled them, and on the ability of counsel to conduct questioning in a way that was orderly and therefore helpful to the witness and to the court. Witnesses should not have to struggle to complete their answers, or face two inquisitors asking challenging questions at once. Counsel should be able, within reason, to conduct their questioning in the way that they consider best suits their client's case. The observations of the court in *Jones v NCB* at [20] above remain as true today as they were in 1957.

114. There is a further respect in which the Judge's interventions to ask leading questions give us concern about the overall fairness of the trial. Whether or not Mr Mirza and Tydwell were fiduciaries was a key question for the Judge in this trial, as we explained at [70] above. The pleaded case against them was that the duties arose because they were trusted to make decisions on behalf of the JV and exercised substantial control over its operation and the use of its financial and other assets. It was not that Mr Mirza was a shadow or de facto director of Otaki or its subsidiaries, or that the directors of those companies were reliant on Mr Mirza's advice. Nevertheless, the Judge raised in the opening of the trial, and then (as seen above) pursued during the evidence, the question of whether Mr Mirza was not an "advisory fiduciary" who made recommendations to the directors that they simply followed.

115. This issue was doubtless present in the Judge's mind because of the decisions of the Court of Appeal in the well-known car sale finance cases (including Johnson v FirstRand Bank Ltd [2024] EWCA Civ 1282), that buyers of cars had a legitimate expectation that car dealers who arranged hire purchase or finance for them owed them a fiduciary duty to advise them on a wholly disinterested basis. These decisions were overturned by the Supreme Court in Hopcraft v Close Brothers Ltd [2025] UKSC 33 ("*Hopcraft*"), judgment on which was delivered four days after the Judge handed down his judgment. The Supreme Court held that no such fiduciary duty arose on the facts of the car sales cases, and that the correct question in law was whether the alleged fiduciary had undertaken, or would reasonably be understood to have

undertaken, to act with loyalty to serve only the interests of the beneficiary and not his own interests.

116. The Respondents adopted the Judge's idea of Mr Mirza owing an advisory fiduciary duty in written closing submissions, and then in additional written closing submissions that were filed some time after the trial had concluded. The Appellants protested, on the basis that such a duty had not been pleaded and that it was being advanced much too late to be fair. The Judge rejected their complaints.

117. Having done so, the Judge had to embark on an evaluation of all the evidence that he had heard about how Mr Mirza, Tydwell, the Morjarias and the directors of the JV Entities conducted the JV's business, in light of the terms of the JVA, and about the extent of their involvement, in order to decide whether, applying the pre-*Hopcraft* authorities, the Morjarias and Otaki had a legitimate expectation that Mr Mirza and Tydwell would advise them on a disinterested basis and placed trust in them to do so. The Judge recorded in his judgment that the Claimants' case was that:

> "Fiduciary duties may also arise where P is entrusted to recommend the best course of action to C, but without P having the authority to bind C to that course of action. If P has undertaken to perform that role, and has accepted a duty to do so in the best interests of C, then the starting point is that he must do so on a disinterested basis, and his duty to do so is a fiduciary one."

The Judge then referred to the car finance cases as authority for that proposition.

118. The particular issue for the Judge to decide was whether, despite the fact that the directors of Otaki had full control and ownership of the JV assets, "the circumstances are sufficiently similar [to previous joint venture cases where fiduciary duties had been found to exist] such that a fiduciary duty of some kind can be found despite the difference in circumstances".

119. The Judge found that a fiduciary duty could, and should, be found, based on the way that the directors of Otaki reposed trust and confidence in Mr Mirza and Tydwell and allowed them to have effective day-to-day control of the assets and business. The Judge relied on what happened in practice ("*time and time again the directors showed themselves to be content to accept recommendations made by Mr Mirza or Tydwell* ...."), the directors' understanding, and Mr Mirza's de facto control of the joint venture to justify his conclusion that limited fiduciary duties were owed.

120. This was clearly an evaluative conclusion of mixed fact and law for the Judge, as there was no express undertaking by Mr Mirza or Tydwell of fiduciary duties and the Judge did not conclude that such duties followed from the terms of the JVA. The evidence that the Judge heard from Mr Morjaria, Mr Mirza and the directors was therefore the foundation for his evaluative conclusion on this key issue, and also for the conclusion of breach of duty in relation to the Boomzone underleases. Yet it is this very evidence, concerning the interplay between Mr Mirza and the directors, the recommendations that Mr Mirza was giving and how the directors dealt with that,

with particular reference to the grant of the underleases, that was adversely affected by the Judge's interventions, as we have described.

121. The Judge did not make express findings about what Mr Mirza said in his evidence. He concluded, in a very brief summary in two paragraphs of his judgment, that Mr Mirza was not reliable. He identified his telling the directors of Otaki a different story about occupational rents from the story he had told the bank as being one reason for this. Otherwise, the Judge's relevant factual conclusions were generalised, such as:

> "… Mr Mirza was entrusted with all or virtually all dealings with counterparties and the Directors (encouraged by Mr Morjaria) were accustomed to complying with recommendations made by Mr Mirza or Tydwell." [189]

122. Apart from the generally corrosive effect that the interventions had on the witnesses and on Counsel during the trial, therefore, we conclude that the Judge's evaluative conclusions on key issues are liable to have been infected by his quasi-inquisitorial approach to fact finding. He has, by reason of getting involved in the process, hampered his ability to form dispassionate findings based on the evidence from the witnesses. Instead, the conclusion that a duty arose because of an understanding that the directors would comply with Mr Mirza's recommendations had its origin not in the Claimants' case but in the Judge's own suggestions, made first in opening and then to the witnesses.

123. Finally, we accept that it is not merely aspects or parts of a trial that, if conducted unfairly, render the decision a nullity: the trial as a whole must be shown to be unfair in the light of what happened. While there may have been parts of the evidence that were taken in an unexceptionable way, to which we have not been referred, we are satisfied that, for all the reasons explained above, the trial as a whole was unfair to Mr Mirza.

124. Subject therefore to any orders that have not been appealed remaining in place and to two further matters, we set aside the Judge's order based on his judgment and will direct a re-trial. We do so with regret, given the length and cost of the original trial and indeed of this appeal, but no different conclusion can arise as to the legal effect of an unfair long and expensive trial as compared with a short and cheaper trial, provided always that the trial as a whole is found to be unfair.

125. The two matters that will not be subject to a re-trial are, first, our decision below on the pure point of law that was fully argued on the ambit of the tort of abuse of process (ground 1 of the appeal). This was tried as a point of law on undisputed facts, and so is unaffected by any of the impaired fact finding or by any facts that may be found at a re-trial. It is therefore appropriate for us to decide the point, as the parties agreed.

126. The second matter is the legal questions that formed grounds 8(b) and 8(c) of the Mirza parties' appeal. These were that the Judge was wrong in law to hold that Mr Mirza's remedy, arising from his discharge as surety of Viper's debt to the Bank of Singapore, was an equitable remedy only, such that the right lawfully to exercise the powers of the mortgagee was potentially liable to be refused on the basis that Mr Mirza did not come to court "with clean hands". These grounds involve the questions whether, by reason of s.5 Mercantile Law Amendment Act 1856, Mr Mirza had a

parallel remedy at law; and alternatively, whether the equitable remedy of subrogation is not a discretionary remedy.

127. The Respondents conceded before making submissions in response to the Appellants' case that a parallel remedy at law exists and so Mr Mirza was entitled to sell the Viper lease as assignee of the bank's mortgage. Whether he sold it in breach of his equitable duty as mortgagee to use reasonable endeavours to obtain the best price available (or, perhaps, can show that he complied with that duty) is a separate issue and is for re-trial, if it cannot be agreed in the meantime.

128. In that regard, we do urge the parties, having had the benefit of lengthy debate on many issues at trial and on this appeal, to agree or concede what further issues they can, so that the re-trial can focus on the key disputed issues, rather than on claims that add nothing of substance or on arguments the answer to which may now, objectively, be sufficiently clear.

Appeal Ground (1): The Tort of Abuse of Process

The background

129. The essential facts, which are not in dispute, are as follows. On 21 December 2021, solicitors acting on behalf of Mr Morjaria wrote to the Mirzas stating that the Morjarias intended to bring a private prosecution against them and that they should attend for interview under caution in January 2022. On 15 August 2022, the Morjarias applied to Westminster Magistrates' Court for the issue of criminal summonses against Tydwell, Mr and Mrs Mirza and their son Ameer, seeking to charge each of them under a draft indictment with one count of conspiracy to defraud at common law and six counts of fraud contrary to the Fraud Act 2006. The allegations were based upon what became known as the Cladding Representations. (The Judge described them as the contention that it was represented that the sums charged under the cladding invoices were required to defray Tydwell's costs of doing the cladding work and did not include any of Tydwell's fees for doing that work.) On 23 August 2022, District Judge Sternberg gave written reasons for the issue of the summonses and they were duly issued on 30 August 2022.

130. District Judge Sternberg heard an application to set aside the summonses on 20 January 2023. At [6] of his ruling he stated that there had been non-disclosure of "highly relevant material" and that had it been presented to him at the time that the summonses were sought he would not have issued them. He went on, also at [6], to add:

> ". . . I am more than convinced that the primary and dominant motive of the private prosecution is not a proper one and that the proceedings plainly are an abuse of the court's process on the second limb, described in R v Crawley [2014] EWCA Crim 1028 at [17] as being where a stay of proceedings is necessary to protect the integrity of the criminal justice system."

At [91] of the ruling he addressed the matter in more detail:

> ". . . the application of the law to the facts reveals that in this case there is a primary motive so unrelated to the proceedings that it tenders them a misuse or abuse of the process of the court. It seems to me there is little difference between that category of abuse and the category of oblique motive which is so dominant and unrelated to properly constituted proceedings that it renders them an abuse of process. Whichever is the correct formulation, for the reasons I have explained in my findings set out above at [85], I am satisfied that in this case the prosecutor's primary and dominant motive for pursuing criminal litigation was to exert pressure on the defendants in order to extract a settlement from them. It is correct that he refers to wishing to see Camran Mirza imprisoned. However, in his full and final story it is the threat of jail time to which he refers first as the means to bring Camran Mirza to his knees. Getting the money first is what he wants, 'time inside' for Camran Mirza is a secondary consideration. I do not consider that that demonstrates mixed motives on the part of the prosecutor. It shows his dominant and primary motive was to threaten the defendants to seek to exert leverage over them to force them to settle the civil claims which the prosecutor made, rather than being motivated by a desire to see justice done. I consider that motive to be an oblique and dominant one and unrelated to properly constituted criminal proceedings."

131. In *Morjaria & Anr v Westminster Magistrates Court & Ors* [2023] EWHC 2936 (Admin), William Davis LJ and Stacey J stated that they were wholly unpersuaded that the District Judge had been wrong to set aside the summonses and refused permission to apply for judicial review of his decision. At [48], in a judgment of the court, they stated:

> "Applying the legal principles as he did, was the judge's decision that the criminal proceedings were an abuse of process irrational? We are satisfied that his conclusion that PM's [Mr Morjaria's] primary motivation in issuing criminal proceedings was to use those proceedings as a threat in order to force CM [Mr Mirza] to settle the civil claim cannot be open to sensible criticism. As PM put it in the document he entitled "Full and Final Story" which was provided to EMM in October 2021, he intended to use the threat of criminal sanction "to bring (CM) to his knees and make him want to settle and close the chapter". The content of messages over the succeeding months confirmed that this was PM's purpose. This was not a proper use of criminal proceedings. Whilst it is correct that restitution for the victim may be a proper objective of the criminal justice system, this assumes that the criminal process is to be used directly for that reason. In this instance, the criminal proceedings were to be used as a means to an end. The purpose of the criminal process is not to serve the private interests of any individual. The fact that there was and is prima facie evidence of fraud on

> the part of CM and others cannot legitimise criminal proceedings when their purpose was to threaten. It was apparent from the exchanges between PM and EMM, in particular the e-mail of 8 July 2022, that PM envisaged the threat carried by the issue of criminal proceedings having the desired effect in which event the summonses would be withdrawn. That shows that the criminal proceedings were not an exercise in criminal justice. Rather, they were a tool being used by PM for his private purposes. In our view, that constituted an improper motive."

132. At [1239] of his judgment the Judge stated that the question of Mr Morjaria's primary motivation could be regarded as *res judicata* and that, even if it were not, the evidence was so strong that he would have no hesitation in finding it himself. *Res judicata* was neither pleaded nor proved. In the Re-Re-Amended Reply, however, at paragraph 111R, under the heading "Tort of abuse of process" it was stated, amongst other things, that for the purposes of the proceedings, Mr Morjaria did not seek to go behind the findings of the criminal courts and that paragraphs 178.1 and 178.2 of the Defence were not disputed. They were that:

> ". . . As was found by DJ Sternberg and the Divisional Court:
>
> 178.1 Mr Morjaria's dominant purpose in bringing the Private Criminal Prosecution was to threaten the Mirzas in order to exert pressure on them and extract a settlement.
>
> 178.2 That purpose was an improper one and not within the proper use of criminal proceedings."

Treatment of the related torts in the judgment

133. Having considered the relevant case law, the Judge rejected a claim in malicious prosecution on the basis that Mr Mirza had not established the absence of reasonable and probable cause and, as a result, had not met the "heavy burden" in *Willers v Joyce* [2016] UKSC 43; [2018] AC 779 ("*Willers*") (judgment at [1284]). There is no appeal against that decision.

134. The Judge went on to consider the alternative claim for abuse of process at [1286] – [1368]. He concluded at [1305], [1311] and [1347] that the tort of abuse of criminal proceedings is not known to the law in the sense that there are no recorded cases in which it has been found to exist. He went on to consider why there should be a distinction between civil and criminal proceedings for the purposes of the tort of abuse of process, in the light of *Willers* in the Supreme Court and the advice of the Board of the Privy Council in *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17; [2014] AC 366 ("*Sagicor*"). Having considered the opposing arguments, the Judge concluded that it would be inappropriate to extend the law. He held as follows:

> "1365. I do not think that it would be correct or desirable to adopt the contention argued for on behalf of the Mirzas that such an extended version of the tort would apply whenever the object of the prosecutor was to achieve some other object that lies outside the range of remedies applicable within the criminal proceedings. Given that criminal proceedings are not designed to obtain a remedy for a prosecutor that would very clearly open up uncertainties as to when a prosecutor would be liable for the tort and this could have a chilling effect on prosecutions, particularly where these are being brought by prosecutors that have a wider agenda than just the upholding of the law, such as the RSPCA or the Financial Conduct Authority.
>
> 1366. However, adopting in relation to this question what I have described as the algebraic approach proposed on behalf of the Morjarias would narrow the application of the extended tort so substantially that it may be doubted whether the extended tort would add very much to the existing tort of malicious prosecution.
>
> 1367. Whatever the policy arguments, these are not points that can be determined by a court of first instance. I consider that it is tolerably clear that under the existing law the tort of abuse of process extends only to civil proceedings and that it is not the role of the court of first instance to extend the law on this point contrary to the understanding of at least two eminent judges of the Supreme Court. This would be a point to be dealt with by the higher courts (if not the Law Commission)."

135. Lastly, in this regard, he held that the tort would not have been made out in any event:

> "1368. . . . although I can see that there may be circumstances where a case could be made where this tort might perform a valuable role, I do not consider that this would be one of these cases. As I have explained, it would be difficult to apply the existing law relating to abuse of civil actions without importing in some way the existing rule that an aim that is reasonably related to the relevant proceedings is not to be regarded as an attempt to incur a collateral advantage. I consider that Mr Morjaria's counsel have made the case that his aims were to obtain redress in relation to the very matter on which he was bringing the prosecution. In such circumstances, even if the tort were to be extended to cover criminal prosecutions, I do not think the tort would be committed in this case."

The submissions in brief

136. Mr Fletcher, on behalf of the Mirza parties, submitted that the tort of abuse of process encompasses both civil and criminal proceedings. He says that, accordingly, it is not necessary to develop the law to include criminal proceedings because they are already included. He submits that the authorities in which the relief has been granted do not draw a distinction between civil and criminal proceedings. Secondly, he submits that if it does not already exist, this court should extend the law to include a tort of abuse of process of criminal law. Lastly, he says that the Judge was wrong to hold that the legal test for the tort of abuse of process was not satisfied. In summary, Mr Williams KC, on behalf of the Respondents, submitted that there is no such tort as the abuse of process of criminal proceedings, we should not create one and that, in any event, it had not been committed. He submitted that the English common law has not recognised such a tort, despite the fact that other common law jurisdictions have done so; that it should not be created because the additional requirements and high hurdle in relation to the tort of malicious prosecution protects the honest prosecutor and should not be diluted; and the creation of such a tort would have a chilling effect upon the constitutional safeguard of private prosecutions.

The authorities

137. The first reported case in which the tort of abuse of process was made out is the decision of the Court of Exchequer Chamber in *Grainger v Hill* (1838) 4 Bing NC 212. That was a case in which mortgagees became concerned about the strength of their security. They decided to put pressure on the mortgagor/debtor to make early payment of a loan. In an action for assumpsit they falsely claimed that the loan was already repayable. They swore an affidavit of debt, which entitled them, without judicial authority, to cause to be sued out of court a writ of *capias ad respondendum* directed at the debtor. This obliged the local sheriff to capture the debtor with a view to him being brought before the court and made to respond. The sheriff indicated to the debtor that the mortgagees would be content for him not to be arrested if he were to surrender the register of the vessel which was the subject of the mortgage. He did so. He soon repaid the loan, but in the interim the absence of the register had required him to forego four voyages to Caen, causing him loss.

138. The court upheld the judgment for the debtor in his action on the case. Tindal CJ, with whom Park, Vaughan and Bosanquet JJJ agreed, held that the tort committed by the mortgagees was not malicious prosecution, but abuse of the process of the law to effect an object not within the scope of the process which they had initiated, being to obtain the ship's register, to which they had no right.

139. Tindal CJ observed at [221] that:

> " . . . this is an action for abusing the process of the law, by applying it to extort property from the Plaintiff, and not an action for a malicious arrest or malicious prosecution, in order to support which action the termination of the previous proceedings must be proved, and the absence of reasonable and probable cause be alleged as well as proved. In the case of a malicious arrest, the sheriff at least is instructed to pursue the exigency of the writ: here the directions given, to compel the Plaintiff to yield up the register, were no part of the duty enjoined by the writ. . . the Plaintiff's remedy is by an action on

> the case, applicable to such new and special circumstances; and his complaint being that the process of the law has been abused, to effect an object not within the scope of the process, . . ."

Park J stated at [222] that:

> "The argument as to the omission to prove the termination of the Defendants' suit, and to allege want of reasonable and probable cause for it, has proceeded on a supposed analogy between the present case and an action for a malicious arrest. But this is a case *primae impressionis*, in which the Defendants are charged with having abused the process of the law, in order to obtain property to which they had no colour of title; and, if an action on the case be the remedy applicable to a new species of injury, the declaration and proof must be according to the particular circumstances."

Vaughan J added at [223] that it was:

> "an action for abusing the process of law, by employing it to extort property to which the Defendants had no right: that is of itself a sufficient cause of action, without alleging that there was no reasonable or probable cause for the suit itself."

And at [224], Bosanquet J explained the matter in the following terms:

> "This is not an action for a malicious arrest or prosecution, or for maliciously doing that which the law allows to be done: the process was enforced for an ulterior purpose; to obtain property by duress to which the Defendants had no right. The action is not for maliciously putting process in force, but for maliciously abusing the process of the Court. . . the register was illegally obtained by duress, under an abuse of the process of this Court."

140. The only other reported English case in which the claim for abuse of process succeeded, is *Gilding v Eyre* (1861) 10 CBNS 592. That, too, was concerned with an *ex parte* process of enforcement. The defendant was a judgment creditor who had obtained a writ of *capias ad satisfaciendum*. The writ directed the sheriff to arrest the debtor and unless he satisfied the judgment, to produce him to the court. The writ was endorsed with a sum which substantially exceeded the sum which was due. The debtor tendered the amount due and refused to pay the rest. He was arrested and had to pay the remainder to obtain his release. Willes J, delivering the judgment of Williams, Byles and Keating JJ in the Court of Common Pleas, stated at p 604:

> ". . . in the present case, the complaint is not that any undetermined proceeding was unjustly instituted. The alleged cause of action is, that the defendant has maliciously employed the process of the court in a terminated suit, in having by means of a regular writ of execution extorted money which he knew had been already paid as no longer due on the judgment."

141. Mr Fletcher also referred us to the more recent authority of *Land Securities plc & Ors v Fladgate Fielder (a firm)* [2009] EWCA Civ 1402; [2010] Ch 467 (the main holding of which Lord Wilson JSC in *Sagicor* considered to be wrong (see [77])). It was an appeal in relation to the question of whether the claimant's claim for economic loss caused by abuse of process was sufficiently arguable to be allowed to proceed to trial. The defendants had applied to strike out the claim pursuant to CPR r3.4(2)(a) and/or for reverse summary judgment pursuant to CPR r24.2. As Etherton LJ (as he then was) explained at [2], the claimants alleged that the defendants were liable for substantial damages in tort for threatening and bringing proceedings against Westminster City Council for judicial review of the grant of planning permission for development of a site in London. As he stated, the essence of the claim was that the defendants' predominant purpose for threatening and bringing the proceedings was not to obtain relief against Westminster City Council by quashing the permission, but to put pressure on the claimants to assist the defendants to relocate their offices.

142. Etherton LJ (with whom Moore-Bick and Mummery LJJ concurred) set out the points which he said appeared clearly from the authorities. He noted that *Grainger v Hill* had never been overruled and went on:

> "It is authority for a tort of abuse of process. The only other case within this jurisdiction, in which the tort has arguably been successfully invoked, is *Gilding v Eyre* 10 CBNS 592, over 140 years ago. Both cases concerned a blatant misuse of a particular process, namely arrest and execution, within existing proceedings. In both cases the abuse of that process involved compulsion by arrest and imprisonment to achieve a collateral advantage. . . statements in the English authorities describing a broader application of the test of abuse of process than the critical factual elements of *Grainger v Hill* and *Gilding's* case were all obiter. . ."

143. Moore-Bick LJ in his concurring judgment at [77] stated that: "Although the concept of abuse of process is well known to the law, both in civil and criminal proceedings, it has rarely been treated as giving rise to a cause of action." He went on at [78] to note that "it has been recognised for over 150 years, however, that in some circumstances abuse of process is actionable as a tort at common law." He then went on to consider *Grainger v Hill* and *Gilding v Eyre* at [78] – [81]. Mr Fletcher draws our attention to Moore-Bick LJ's reference to both civil and criminal proceedings. He also drew our attention to [89] in the judgment of Moore-Bick LJ in which he referred to *Broxton v McClelland* [1995] EMLR 485. He stated that:

> ". . . Simon Brown LJ identified as the essential element in abuse of process the misuse of the court's process to achieve something not available in the course of (or, I would say, by means of) properly conducted proceedings. I respectfully agree. It seems to me that whether the question is one of staying or striking out the proceedings themselves or of the existence of a cause of action, the claimant must be able to establish that the defendant's predominant purpose in bringing the proceedings is not to obtain the remedy that the law offers (disregarding for this purpose the use he may seek to make of that remedy once

> he has obtained it) but to achieve some other object that lies outside the range of remedies that the law grants. …"

144. In *Broxton v McClelland* [1995] EMLR 485 the defendants issued various applications to strike out the claim, including a claim of abuse of process. The action was being financially maintained by a third party. The defendants contended that the maintainer's purpose was to oppress and ultimately bankrupt the defendants, and for that reason the action should be struck out as an abuse of process. Simon Brown LJ, with whom the other two members of the Court of Appeal agreed, referred to *Grainger v Hill*, *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478 and *Speed Seal Products Ltd v Paddington & Anr* [1985] 1 WLR 1327 ("*Speed Seal*") and stated that the proceedings should not be struck out since the plaintiffs were not seeking to achieve a collateral advantage beyond the scope of the action. He said that the motive for bringing proceedings is irrelevant, and that a plaintiff is entitled to seek the defendant's financial ruin if that would be the consequence of properly prosecuting a legitimate claim.

145. Simon Brown LJ also distilled the central principles from the authorities at p497 which included the following:

> ". . .
>
> (2) Accordingly the institution of proceedings with an ulterior motive is not of itself enough to constitute an abuse: an action is only that if the Court's processes are being misused to achieve something not properly available to the plaintiff in the course of properly conducted proceedings. The cases appear to suggest two distinct categories of such misuse of process:
>
> (i) The achievement of a collateral advantage beyond the proper scope of the action - a classic instance was *Grainger v Hill* where the proceedings of which complaint was made had been designed quite improperly to secure for the claimants a ship's register to which they had no legitimate claim whatever. The difficulty in deciding where precisely falls the boundary of such impermissible collateral advantage is addressed in Bridge LJ's judgment in *Goldsmith v Sperrings Limited* at page 503 D-H.
>
> (ii) The conduct of the proceedings themselves not so as to vindicate a right but rather in a manner designed to cause the defendant problems of expense, harassment, commercial prejudice or the like beyond those ordinarily encountered in the course of properly conducted litigation. . . ."

146. *Goldsmith v Sperrings Limited* was concerned with civil proceedings against the publishers, the editor and the main distributors of "Private Eye", claiming damages and an injunction in respect of each of the articles which he alleged to be libellous. In addition, seventy-four writs were issued against thirty-seven secondary wholesale and retail distributors of the magazine claiming the same relief against them. Sixteen distributors reached settlements with the plaintiffs on terms, in effect, that the actions

were discontinued and they ceased to handle the magazine. Seventeen, took a different course and the remainder applied for the actions to be stayed or dismissed as an abuse of process of the court in that the plaintiff's purpose in pursuing the actions against them was not to protect his reputation but the collateral purpose of destroying the magazine by cutting off its retail outlets.

147. The appeal was dismissed on the basis that the plaintiff in an action for libel had a cause of action against any distributor of the alleged libel and it would be a denial of justice to stay such an action at an interlocutory stage, unless there was strong evidence to show that the plaintiff's purpose in bringing such actions was not the legitimate purpose of protecting and vindicate his reputation. Lord Denning MR, who was in the minority, described the abuse of legal process at 489 C-D, in the following way:

> "In a civilised society, legal process is the machinery for keeping and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. . . ."

148. Bridge LJ, with whom Scarman LJ concurred, stated at 503E-H:

> "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 a 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. But on the view I take of the facts in this

> case the question does not arise and it is neither necessary nor desirable to try to lay down a precise criterion in the abstract."

149. *Speed Seal* was a case in which plaintiffs brought an action against the defendants for wrongful use of confidential information and applied for an injunction restraining its use. The defendants applied to strike out the claim for an injunction on the basis that the information had already been published in a brochure and a patent application. They also applied for permission to amend the pleadings by adding a counterclaim asserting that the action was brought in bad faith for the purpose of damaging the defendants' business and not for the protection of any legitimate interests of the plaintiffs. On appeal it was held that there was an arguable case of an actionable abuse of the process of the court and that permission to amend the pleadings was justified.

150. Fox LJ, with whom Lloyd LJ agreed, reviewed the authorities in relation to abuse of process. When considering *Grainger v Hill* he stated at 181H that the abuse in that case, as he understood it, "was that the purpose of the original proceeding was not the recovery of the debt (which was not due) but the extortion of the register." He also noted at 182F that section 682 of the *American Restatement, Torts, 2d,* under the heading "Abuse of Process" states that:

> "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process."

He also noted that *Grainger v Hill* was cited for the proposition that termination of the proceeding in favour of the plaintiff need not be shown. A full survey of the United States jurisprudence, as it stood in 2014, was carried out by Lord Neuberger PSC, in the *Sagicor* case.

151. In any event, we enquired of counsel whether there is a more recent version of the American Restatement. They replied that they were unaware of one. Since the hearing, however, we have been provided with a more up to date version. We are told that the version to which Fox LJ referred (and which Lord Neuberger considered in *Sagicor*) has been superseded by section 26 of Chapter 4 of the *Restatement (Third) of Torts: Liability for Economic Harm* (American Law Institute, Official Text, 2020), which is entitled "Abuse of Process". It states that:

> "An actor is subject to liability for the abuse of judicially issued process to achieve an objective that is outside the purpose for which the process is intended".

The reference to "process, whether criminal or civil" has been removed. Comment (a), headed "*Scope*", also states that the tort discussed under section 26 "addresses specific misconduct that typically occurs within a civil case." At comment (c), headed "*Actionable process*", it is stated that liability arises under Section 26 "for the abuse of process issued by a court or under its authority", the common forms of which are "subpoenas, warrants, and writs of garnishment or attachment."

152. Under the same heading, it is stated that issuance of a summons or subpoena to begin a law suit does not support liability under section 26 if the complaint is that they were

used to start a case that should never have been brought, and that liability for wrongfully initiating a case, civil or criminal, is governed by the rules of sections 21 and 24. Section 21 is headed "Malicious Prosecution" and is limited to criminal proceedings; and section 24 is headed "Wrongful Use of Civil Proceedings" and is limited to civil proceedings. It appears, from the most recent *Restatement*, at least, that an action for abuse of process for wrongly issuing criminal proceedings does not lie in the United States, and that the only applicable tort is malicious prosecution.

153. Mr Fletcher's submission is that the courts have not differentiated between abuse of process in civil and criminal proceedings and the tort recognised in *Grainger v Hill* applies equally to criminal proceedings. Furthermore, he says that the judge misread the decision of the Privy Council in *Sagicor*. In that case, the Board of the Privy Council considered the scope of the torts of abuse of process and malicious prosecution and their origins and accordingly, it merits detailed consideration.

154. The case was concerned solely with civil proceedings. Insurers of a large residential development in the Cayman Islands which had been damaged by a hurricane engaged a chartered surveyor and a firm of which he was a principal to provide loss adjustment services in respect of claims arising from the damage. The owners engaged another firm of which the surveyor was a principal as project manager, and for a time the surveyor acted as both project manager and loss adjuster in respect of the works. The surveyor instructed a local firm as building contractors to carry out the works. The contractors were responsible for procuring and paying for subcontractors and materials for which they received a series of advance payments approved by the surveyor. Advances totalling CI$2.9m having been made, the surveyor advised the insurers to settle the claims at CI$5.5m. The recommendation came before the recently appointed senior vice-president of the insurers, who had a strong dislike of the surveyor and a low opinion of his professional competence. He reviewed the recommendation and found it insufficiently documented. He concluded that the surveyor and the contractors had dishonestly overstated the value of the works. He stated that he intended to drive the surveyor out of business and to destroy him professionally. Lawyers were instructed and the senior vice-president appointed a loss adjuster to assess the value of the contractors' work. The loss adjuster valued the work at less than the senior vice-president had and in a second report reduced the figures further. The lawyers advised, on the basis of the reports, that the degree of overcharging was so gross as to be prima facie evidence of fraud. Proceedings were issued against the surveyor, the two firms and the contractors claiming damages, amongst other things, for breach of contract, deceit, conspiracy to defraud and negligence.

155. The senior vice-president of the insurer was instrumental in alerting the local press to the allegations which, as a consequence, were published, causing considerable harm to the surveyor's reputation and business.

156. By a defence and counterclaim the surveyor and the firms denied the allegations and sought payment of outstanding fees and expenses. Prior to trial the contractors disclosed invoices and other documentation which indicated that they had made extensive payments to sub-contractors and suppliers. The insurers withdrew the claims of conspiracy and fraud and discontinued the action.

157. The judge ordered payment of indemnity costs in favour of the surveyor and the firms and gave them leave to serve an amended counterclaim to plead the tort of abuse of process. In giving judgment on the counterclaim the judge found that: (1) the senior vice-president was the directing mind and will of the insurers in relation to the proceedings; (2) the object of the proceedings was to recover the relief sought; (3) the senior vice-president genuinely but unreasonably believed that the insurers had been overcharged; (4) the senior vice-president knew that the loss adjuster's reports were not a proper basis for alleging fraud and that the valuation was too low and omitted factors which he knew should have been included; (5) the surveyor had contributed to the senior vice-president's suspicions of fraud by combining the conflicting roles of project manager and loss adjuster and by failing to explain his recommendation when asked to do so; (6) the dominant factor in the senior vice-president's mind leading him to allege fraud was his personal dislike of the surveyor; and (7) the surveyor and the firms had suffered substantial damage over and above what was recoverable under a costs order.

158. The judge dismissed the counterclaim. He found that, although the proceedings had been discontinued in favour of the surveyor and the firms, the allegations had been made without reasonable cause and maliciously and as a consequence they had suffered substantial loss and damage. The tort of malicious prosecution did not apply since it did not extend to civil proceedings. The insurer was not liable for abuse of process because it had not sued the surveyor in order to secure an object for which the legal action was not designed, and the fact that the insurer's dominant motive in making the allegations was improper did not convert its use of the legal proceedings into an abuse.

159. In relation to the tort of malicious prosecution, the judge held that, save in respect of one crucial feature of law, the surveyor had established all of the four elements of the tort: (i) the prior proceedings had been determined in favour of the surveyor; (ii) the allegations of fraud and conspiracy made against him in the proceedings had been made without reasonable cause; (iii) the allegations against him had been made maliciously; and (iv) as a result of the allegations, he had suffered substantial financial loss and significant other damage. The judge held, however, that the present state of the law did not allow extension of the tort of malicious prosecution to civil proceedings.

160. In the Court of Appeal of the Cayman Islands it was conceded that it would not be open to that court to hold that the tort of malicious prosecution had been established and the ground was dismissed. The Court of Appeal went on to hold that the judge had been correct to reject the claim for abuse of process for the reasons which he had given.

161. In the Privy Council it was also accepted that the remedy of abuse of process was not available to the surveyor. At [79] Lord Wilson JSC noted that Sagicor did not commit the tort of abuse of process, a conclusion with which Lord Kerr agreed at [93]. Henderson J had found that the predominant factor which led Sagicor to allege fraud and conspiracy against the surveyor had been an obsessive determination to destroy him professionally, but he had not found that it was intended to achieve that destruction other than through the successful prosecution of the action.

162. The real focus of the appeal was whether the tort of malicious prosecution extends to civil proceedings. Lord Wilson JSC with whom Baroness Hale JSC concurred held that the tort had always extended to civil proceedings (see [43] and [83] respectively). Lord Kerr JSC noted at [93] the "intense focus on the policy arguments for and against the extension (or renewed recognition) of liability for malicious prosecution to civil proceedings." Whether by renewed recognition or extension, he agreed that it should. Lord Neuberger PSC and Lord Sumption JSC dissented. The consideration of the tort of abuse of process, therefore, was obiter.

163. It is helpful, however, to consider the Board's analysis of the case law. Lord Wilson JSC explains at [56] that the decision of the Court of Exchequer Chamber in *Grainger v Hill* "gave birth" to the tort of abuse of process. As Lord Wilson explains, the judges held that "the tort committed . . . was not malicious prosecution but abuse of the process of the law to effect an object not within the scope of the process which they had initiated. . ." Lord Wilson noted at [62] that:

> "It is hard not to regard abuse of process as a tort distinct from malicious prosecution if only because, apart from the need to establish a purpose not within the scope of the action (ie a "collateral" or, more helpfully, an "improper" purpose), abuse of process requires neither that the action should have been brought without reasonable cause nor that it should have terminated in favour of the alleged victim: Tindal CJ said so in the *Grainger* case itself, at p 221, and it has never been gainsaid. Nevertheless the two torts sprang from the same tree and one would not expect issues common to them both, such as whether they enable recovery for economic loss, to be resolved differently."

164. Lord Sumption JSC, who dissented in relation to the issue before the Board as to whether the tort of malicious prosecution should be extended to civil proceedings, also addressed the tort of abuse of process. He explained the tort in the following way:

> "149. Abuse of process emerged as a tort considerably later than malicious prosecution and differs from it in significant respects. It applies to the initiation or conduct of civil proceedings. It is not necessary to prove malice. It is not necessary to show that the proceedings have gone to judgment. It is not even necessary to show that they were baseless, although in practice they often will be. The essence of the tort is the abuse of civil proceedings for a predominant purpose other than that for which they were designed. This means for the purpose of obtaining some wholly extraneous benefit other than the relief sought and not reasonably flowing from or connected with the relief sought. The paradigm case is the use of the processes of the court as a tool of extortion, by putting pressure on the defendant to do something wholly unconnected with the relief, which he has no obligation to do. Such cases are extremely rare. Although there is a moderately substantial body of case law, there are only two reported cases in England in which the action has succeeded, both involving the now

> obsolete procedures for the arrest of debtors, which had an obvious potential for abuse. No case has succeeded in England since 1860, although Australian litigants appear to have been both more persistent and more successful. Like the tort of malicious prosecution as it was conceived to be before this case, abuse of process is on the verge of extinction, the only recent sightings being in Australia."

165. Lord Neuberger PSC, who also dissented, stated at [162] that Lord Sumption had comprehensively, and in his view, accurately, set out the history and current state of English law in relation to malicious prosecution and abuse of process. He went on to state at [163] that Lord Wilson would use the opportunity to extend the tort of malicious prosecution to a case of the kind under consideration (a civil case) but Lord Sumption would not, but that neither Lord Wilson nor Lord Sumption would extend the law of abuse of process. He stated that he agreed with them about abuse of process and that it was unnecessary to say any more about it. As we have already mentioned, he also considered the United States jurisprudence as at 2014 and the conclusions which could be drawn from it at [165] – [196].

166. Baroness Hale JSC noted at [83] that the Board was faced with the task of discerning rational principles to enable it to define the boundaries between the torts of malicious prosecution and abuse of process. She also noted that in an ideal world the two torts might be brought together into a single coherent tort of misusing legal proceedings, but that that would be a task much better suited to the Law Commission.

167. For completeness, we should also mention the Supreme Court decision in *Willers*. That was an appeal in which Lord Toulson JSC, with whom Baroness Hale DPSC, Lord Kerr, Lord Clarke and Lord Wilson JJSC agreed (Lord Neuberger PSC, Lord Mance, Lord Sumption and Lord Reed JJSC dissenting), held that the tort of malicious prosecution included the prosecution of civil proceedings. Lord Toulson concluded at [59] that he would allow the appeal for the reasons he had set out "which largely replicate the judgments of the majority in [*Sagicor*]." The appeal was concerned solely with the question of whether the tort of malicious prosecution should apply to civil proceedings. Abuse of process was not considered.

168. Lastly, we should add that it is not in dispute that there are a number of authorities in Ontario, Australia and the United States in which the tort of abuse of process has been applied to the improper use of criminal proceedings.

Discussion and conclusions

169. We agree with the Judge that, as it stands, the tort of abuse of process is limited to civil proceedings. Both cases in which the tort was made out, being *Grainger v Hill* and *Gilding v Eyre,* involved abuse of civil proceedings. It seems to us that the references to abusing the process of "the law" in *Grainger v Hill* must be read in context. The proceedings in question were civil. The same is true of the references to "the process of the court" and abusing the "process of the law" in *Gilding v Eyre*, and to "abuse of the process of the court" in *Speed Seal*.

170. All of the other authorities to which we have been referred were concerned with civil proceedings. We do not consider that Moore-Bick LJ's reference to the "concept of

abuse of process" being well-known in both civil and criminal proceedings in the *Land Securities* case is sufficient basis for a different approach. That case was also concerned with an alleged abuse of process in civil proceedings and Moore-Bick LJ's dictum is best read as a reference to the ability of civil and criminal courts alike to prevent abuse and so to protect innocent parties. This is clearly the context of his dictum in [77] and was a matter to which Mummery LJ also alluded, at [109]. The judgments of all members of the court were in favour of giving the tort of abuse of process "very limited application" and emphasised the differences between the torts of abuse of process and malicious prosecution.

171. It also seems to us that, although a different approach has been adopted in Australia and Ontario and in some decisions in the United States the present state of English law is that the tort of abuse of process is limited to civil proceedings.

172. This conclusion is consistent with the advice of the Board of the Privy Council in the *Sagicor* decision and with the Supreme Court decision in *Willers.*

173. Lord Sumption in *Sagicor,* albeit in the minority, makes specific reference to the application of abuse of process to civil proceedings. Furthermore, Lord Neuberger PSC (also in the minority) stated that he considered that Lord Sumption had accurately recorded the current state of English law in relation to both malicious prosecution and abuse of process. He also noted that neither Lord Wilson, who was in the majority, nor Lord Sumption would extend the law of abuse of process.

174. Furthermore, we consider it to be significant that despite considering the torts of malicious prosecution and abuse of process in some detail, and despite the Board's focus on the ambit of those torts and the conclusion that the tort of malicious prosecution applies in civil and criminal proceedings alike, none of those in the majority in *Sagicor* suggested that the tort of abuse of process applies to, or should apply to, criminal proceedings. If the reasoning that supported the availability of malicious prosecution in civil proceedings too applied to any extent to the tort of abuse of process, one would have expected at least one of nine Justices sitting on the appeal to have made some observation in that regard.

175. Should the tort be extended? Although the Board of the Privy Council saw fit in the *Sagicor* appeal to advise that the tort of malicious prosecution applies to civil cases and the Supreme Court so held in *Willers*, we consider that it is not for us to take what might be viewed as a mirror image step by extending the tort of abuse of process to criminal proceedings.

176. We reach this conclusion despite the fact that Lord Wilson JSC in *Sagicor* described the two torts as springing from one tree and that Lord Toulson in *Willers* noted at [25] that, although it was not necessary to express a firm view on the point, it might be better to see *Grainger v Hill* as an instance of malicious prosecution in which the pursuit of an unjustifiable collateral objective was evidence of malice, rather than as a separate tort. It is clear that the torts are closely related. It is not for us, however, to bring them yet closer or to assimilate them.

177. We also agree with Mr Williams that applying the tort of abuse of process to criminal proceedings raises serious policy issues. It might be considered to undermine the tort of malicious prosecution in a manner that would render the law incoherent.

178. The legal principles governing a claim for malicious prosecution in relation to criminal proceedings are succinctly set out in the opinion of Lord Richards JSC in *Attorney General of Trinidad and Tobago v Maharaj* [2024] UKPC 1 at [8]. A claimant "must establish that (i) the defendant initiated a criminal charge against the claimant; (ii) the claimant was acquitted of the charge or the proceedings were otherwise determined in the claimant's favour; (iii) in instituting and continuing the prosecution, the defendant acted without reasonable and probable cause; (iv) the defendant was actuated by malice; and (v) in consequence, the claimant suffered damage." The third and fourth requirements, absence of reasonable and probable cause and malice respectively, are separate requirements: *Willers,* per Lord Toulson JSC at [54]. The proposed tort of abuse of process in criminal proceedings would not require principle (ii) and would diminish, if not eradicate, principle (iii), which protects the prosecutor with a proper cause.

179. As Mr Williams pointed out, the tort of malicious prosecution is narrowly defined. The rationale for keeping liability within strict bounds is to limit the "chilling effect" that the threat of a civil action might exert upon an honest private prosecutor. The public interest in having the citizen co-operate in the enforcement of the criminal law outweighs the interest of a party ultimately vindicated in criminal proceedings in being able to proceed against their prosecutor. See *Gregory v Portsmouth CC* [2000] 1 AC 419 per Lord Steyn at 426. The right to bring a private prosecution is a valuable constitutional safeguard: per Lord Wilberforce in *Gouriet & Ors v Union of Post Office Workers & Ors* [1978] AC 435 at 477B and per Lord Neuberger PSC at [68] in *R(Gurja) v Crown Prosecution Service* [2013] 1 AC 484.

180. In the light of the approach to the tort of malicious prosecution in *Sagicor* and Lord Toulson's analysis of *Grainger v Hill* in *Willers v Joyce* at [25], it is possible that the Supreme Court or the legislature may see fit to assimilate the torts of abuse of process and malicious prosecution or to reset the boundaries which apply to them, but it is not for us to do so. As Lady Hale pointed out in *Sagicor*, even if it were appropriate for us to consider such a step, we do not have the resources to consider all of the potential policy issues which may arise.

181. In the circumstances, it is not necessary to consider whether, if the tort extends to the improper use of criminal proceedings, or should be extended to do so, it has been committed in this case.

182. For the reasons set out above, we dismiss this ground of appeal.

SCHEDULE

Example 1 (Day 10, pages 217-225)

A. On those figures, yes. I mean, that's what I -- I mean, it is a dynamic situation. I don't know --
Q. How has it changed in four days?
A. I put a plus. Well, if we can look at the quantity, then I'll -- I'll be able to tell you.
MR JUSTICE THOMPSELL: I think perhaps we should look at quantities so Mr Mirza can make his point.
A. Thank you, my Lord. It might be the same, I don't know, but let's look at it.
MR PETO: It might be the same but you don't know, you say?
A. I'm saying when you put it on. I mean, I can't remember.
Q. Oh, I see, so ...
A. So that's why I'm asking if I can have a look at it.
Q. Of course, yes. So, sorry, we need to go back to {K1/2840.2/1}.
(Pause)
I think we may need to go down.
(Pause)
MR JUSTICE THOMPSELL: Was there a particular quantity you wanted to look at, Mr Mirza?
A. My Lord, I mean, I think it may be for the experts to decide, but there's 2,200 square metres of render. As

I remember, there was an element of render just behind the Trespa, etc, and -- and from recollection, I think we did -- you know, as I said, we worked together to get it off. So I -- I -- and we just worked out that there's more, quite a bit of render. So I'm not saying that --
MR JUSTICE THOMPSELL: But from your recollection --
A. Yes, my Lord.
MR JUSTICE THOMPSELL: -- when, four days after this, you were writing the email that we just --
A. Yes.
MR JUSTICE THOMPSELL: -- looked at, do you recall whether you believed: well, we've had this quote, but it doesn't deal with the total --
A. That's right, my Lord.
MR JUSTICE THOMPSELL: -- (overspeaking - inaudible)
A. I -- it was -- I was told, I believe, again, from -- from my best of my recollection, that we were told there's going to be more because there was this silicon, the plastic in the render that came about, because I -- I think there was the -- I believe the insurance representative from -- came and said they want all the rest of the render to be removed. There was render already included in the price, but it wasn't as much as we thought it would be.
MR JUSTICE THOMPSELL: And is the difference that there was render underneath the cladding and that render hadn't been allowed for --

A. That hadn't been --
MR JUSTICE THOMPSELL: -- (overspeaking - inaudible)
A. -- allowed for. And then there was render round the building, that part of it hadn't been allowed for. So it was like, what we did is a complete --
MR JUSTICE THOMPSELL: So what had been allowed for in this?
A. I beg your pardon?
MR JUSTICE THOMPSELL: What had been allowed for in the Teampol --
A. I think, from -- again, from memory, they took the Trespa off and they took the ACM cladding. On part of it there was render, so they removed that. And then they hacked off --
MR JUSTICE THOMPSELL: No, but this -- you've got this quote. Nobody's taken anything off at this stage, you're getting quotes to take it off --
A. Yes, yes, yes.
MR JUSTICE THOMPSELL: -- so at this point, and four days after this point, did your -- did you get an understanding that: well, we've got this quote from Teampol, but it doesn't cover everything? Or four days later, would you have thought this covered everything?

A. No, four days after we realised it didn't cover everything.
MR JUSTICE THOMPSELL: You did, okay.
A. Yes. That's what I believe, from memory. I -- I would say to you, I'll leave it to the building experts, because I can't remember fully exactly.
MR JUSTICE THOMPSELL: Well, they probably won't know who knew what when.
A. Sure.
MR JUSTICE THOMPSELL: They can say what was needed in the end.
A. Yeah, but in the end we did do a deal. We used some of our people and we used Teampol's people to get all the render off.
MR PETO: Looking at this --
A. It might have been included, I don't know. Go ahead.
Q. Well, if we look at {K1/2857/1} again -- we might be going back and forth a little -- and look at the third major paragraph.
A. Sorry, which paragraph?
MR JUSTICE THOMPSELL: The "Just to be clear ..." paragraph.
A. Yes.
MR REES: "Just to be clear, prior to this, we were only looking to remove the ACM Cladding and Trespa which is circa 1000 sq m and the estimated cost for this is circa £l.lm+ ..."
So stopping there, here you're saying -- you say --

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go on to say:
"... over and above this we need to do the total render ..."
A. Yes.
Q. But -- so you're clearly saying here the estimated cost --
A. Yes.
Q. -- for the works, apart from the render --
A. Yes.
Q. -- is 1.1 million, isn't it? That's what you're saying here, yes?
A. I am -- yeah, I mean, I'm trying to say what -- I'm trying to explain what the position is. It's not a full and final commitment. The full and final commitment is when we know what the price is. We are still working for -- getting quotations or prices, and people looking at it, and our guys looking and seeing what else we can do. We're also looking at the materials that we've got to replace.
MR JUSTICE THOMPSELL: I understand. But at this stage, when you said 1.1 million for the ACM cladding and Trespa --
A. Yes.

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MR JUSTICE THOMPSELL: -- was that based on the Teampol quote for those elements, or the best quote that you'd had for those elements, plus the margin for dealing with the work that you --
A. My Lord, it was --
MR JUSTICE THOMPSELL: -- (overspeaking - inaudible).
A. -- yeah, discussions with QS. We had a QS that we knew, who said, "This is what it will cost", so I am -- for me, at that position -- particular point, I'm thinking has Teampol got their price right, or could -- they got to change? I don't know, you know, because everybody, at that time, with lockdown, prices were moving rapidly. So it was a -- a snapshot at that time. I'm just sort of flagging up there to say, look, this is what it is.
MR JUSTICE THOMPSELL: Did you later proceed to give a subcontract to Teampol?
A. Yes, I did.
MR JUSTICE THOMPSELL: And do you know what you paid under that subcontract?
A. I think it was 860 or 870 including VAT, yeah.
MR JUSTICE THOMPSELL: So they did stick very close to their original quote.
A. They did, yeah, because we gave them some work on the other side and we did a deal.
MR PETO: I mean, I want to -- you're saying here the estimated cost on the cladding and Trespa is 1.1. "The estimated cost". That's just without the render.

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A. Yes.
Q. Let's go back again to the Excel spreadsheet, which is at {K1/2840.2/1}, and we look at "Total to Collect", if we click on that. So here we see the total quote, which is 867,000. Of that, 361,000 is render, but the rest of the work, if one subtracts the 361 from the total of 867, we have -- it's almost exactly £500,000. So, in fact, the estimated cost for the ACM cladding and Trespa which you have before you now is about £500,000, isn't it?
A. If you say so, yeah.
Q. The estimated cost you have for the ACM cladding and Trespa, without the render, is about £500,000, isn't it?
A. Yeah, I mean, those are the figures. I'm not disputing them, yeah.
Q. So if we go back to {K1/2857/1}, if you were being truthful, you would have said, "The estimated cost for this is circa £500,000", wouldn't you?
A. No.
Q. I suggest to you --
MR JUSTICE THOMPSELL: Would you like to explain why you say "no" there.
A. Because, as I say, my Lord, I was looking at -- my yardstick was Mace. They have said they will -- they paid 2.75 million, and I know because I spent two and a half years negotiating with them, and I actually was asking for 3.5 million and they put several exclusions, and I was trying to work out how they work that price out, so I'm talking to all types of people. I mean, we had other quotations and there were severe exclusions. It just so happens that Teampol were working on our site, and we gave them more work and I said, "Look ..." -- and -- and I must add, my Lord, you know, it was lockdown, it was extremely difficult to get people to work and to get a price, so I -- I was estimating, I was just guessing what it would be. I'm sharing these thoughts with -- with --
MR JUSTICE THOMPSELL: But why did you have to guess? If you had a quotation from, you know, someone who was clearly --
A. Yeah.
MR JUSTICE THOMPSELL: -- reputable enough that you went ahead with them --
A. Well --
MR JUSTICE THOMPSELL: -- in the end --
A. That's -- well --
MR JUSTICE THOMPSELL: -- why didn't you base it on that quotation and say, "Well, we want a margin on that for what we're doing" --
A. Yeah, yeah.

Example 2 (Day 11, pages 38-47)

the contract.
A. And I think I did my job more than adequately.
Q. If we go back to the schedule, which was at {K1/2891/1}. Now, this first figure here about the facades, on the first line, which you are proposing to charge £192,258.27, now, that figure has replaced the Teampol figure of £65,389.70. I don't think there's any dispute about that. We can go back and look at it, but that's the amount.
So how did you reach this precise sum of £192,258.27?
A. I can't specifically remember, but it was a figure which, we go back to the -- it was a figure, the grand total, which included a combustibility warranty, it was all encompassed in it, and the directors knew, so did Mr Morjaria knew, everybody knew.
Q. Everybody knew that you were charging for a warranty in this?
A. Yes.
Q. At this time?
A. Yeah, absolutely they were aware there's a warranty involved, because we talked about insurance.
Q. It doesn't say that --

A. No, it doesn't need to. It's encompassed in the price.
Q. It doesn't -- here, it says you're charging for the: "Removal/Disposal of existing Facades, Insulation & Sub frame: £192,000."
Where does it say that you are charging for an insurance or a warranty risk? Where does it say?
A. My Lord, we are very small organisation --
Q. Does it -- where does it say that? Does it say that there?
A. I don't -- I mean, you tell me. I can't see it, but --
Q. Look at that document which you helped produce.
A. I am looking at that document.
Q. Now, does that say in it that you are charging for insurance or a warranty or for a risk?
A. As I said, it's wrapped up into that price.
Q. So it doesn't say it, does it?
A. No, it doesn't specifically.
Q. No, it doesn't.
A. Nobody does ever do that.
Q. And so that means that this is actually a misleading --
A. Absolutely not.
Q. -- statement --
A. No.
Q. -- because you look as though --
A. No.
Q. -- and you're deliberately being misleading in that statement, aren't you, by not itemising the things that

you now saying you're itemising, the insurance or a warranty or taking a risk? You're being deliberately misleading, aren't you?
A. Absolutely not. It was a quotation, my Lord, from Tydwell Limited, which is nothing to do with the joint venture, as an independent company, gave a price. The directors themselves said they will check it with their surveyors. Mr Morjaria didn't object. If they had -- they had ample time if they're not happy, do it. In fact, I remember the telephone conversation. I said, "Listen", where Mr Lewin says I got heated up. I got heated up and he's right, I didn't scream or shout, I don't do what Mr Morjaria does, if you don't listen to him, that's it. But I made it very clear, this includes insurance, and he said to me, "Oh, you know ..." --
MR JUSTICE THOMPSELL: It didn't include insurance, did it, it included you taking responsibility?
A. Well -- oh, yes. Tydwell took responsibility and I --
MR JUSTICE THOMPSELL: Because if you were an insurer, you'd have to be regulated for that.
A. That's right. We took the risk, and their lawyer had said --
MR JUSTICE THOMPSELL: What was the risk on removal and disposal of existing facades?

A. Well, there's no risk on removing it and taking it away.
MR JUSTICE THOMPSELL: So why was that figure inflated?
A. No, it was -- no, we took a view that our total costs -- we -- you see, it goes back when the lawyer, Mads, wrote to me and said, "You do realise it could cost you £250,000 per annum". So now, you know, if you take 12 years as the responsibility, that's £3 million. So I had to make what -- personally, to decide what to do, and I -- looking also, on balance, that Tydwell has to -- has got a responsibility to pay tax, it's a UK-registered company, so it would be liable. So we have to show a reason. So we -- and I did explain this on the phone, that I'm going to put it all together and, you know, encompass it in the price and do the best I can, and I think --
MR JUSTICE THOMPSELL: But you spread that price amongst the things that had no risk as well?
A. I did, yes, I took that risk.
MR JUSTICE THOMPSELL: Where I've got some sympathy with Mr Peto's question is that if you had presented this differently and said, "This is the cost of doing this and I'm adding another million pounds because I'm taking responsibility and I can't get insurance for that", then the directors could have taken a view: well, then we'll cross out the warranty, we'll take responsibility and we'll keep the million pounds.

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A. My Lord, I understand where you're coming from, but please remember, the whole claim that Mace settled was because they were not taking responsibility for the combustibility and the directors are fully aware. And in my conversations with Mr Lewin I specifically said -- and I said, "I'm just going to give you a price, lump it all up and I'll take -- I'll take a view", because he knew that his own lawyers were telling him it was going to cost £3 million, and there's --

MR JUSTICE THOMPSELL: But what they wouldn't have known, looking at this --

A. Yes, they would.

MR JUSTICE THOMPSELL: -- is -- no, what they wouldn't have known is how much of the margin had been added to deal with the warranty responsibility and how much of it was just a project management markup.

A. I accept that, my Lord. They wouldn't have known that. But, I mean, I explained it on the phone, because you've got to do -- we were running against time constantly. Their lawyer was jumping all over us, the insurance -- and --

MR JUSTICE THOMPSELL: So you explained on the phone --

A. I did.

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MR JUSTICE THOMPSELL: -- how much of the risk --

A. Yes --

MR JUSTICE THOMPSELL: -- but with figures?

A. Yes. In fact, I remember quoting him 1.4 million. I said, "I think we need 1.4 million", and he --

MR JUSTICE THOMPSELL: For what, sorry?

A. For the cladding. I said, "Look, I might have to ..." -- the -- sorry, the -- I think I would say it about for the combustibility warranty. Because what was in my head was the 250,000 times 12, which is 3 million, and I think I said, "Okay, we'll just split in half", or something like that, you understand? Because it was not possible, and that's when it dawned on to me why Mace agreed --

MR JUSTICE THOMPSELL: So you were saying you had a conversation with -- who was that with?

A. Mr Lewin.

MR JUSTICE THOMPSELL: With Mr Lewin --

A. Yeah, and I explained to him.

MR JUSTICE THOMPSELL: -- saying I might have to add 1.4 million --

A. Words to that effect. I said, you know, because there was quite a few conversations we had and I told him that, "You are aware of this", and he -- and I remember he said, "No, we'll have to check it with our own independent quantity surveyor". And that's on record, he said, and he went to a company, I believe --

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MR JUSTICE THOMPSELL: It's on record?

A. Yeah, he said he'll check it with the quantity surveyor and "Caltech", he mentioned the name -- Cladtech, sorry.

MR JUSTICE THOMPSELL: Well, perhaps we should look at that record because this sounds like a very important conversation.

MR PETO: Yes. So you are telling his Lordship that you had a telephone conversation with Mr Lewin around this time, in June 2020 --

A. Yes, several conversations, yes.

Q. No, wait. A conversation in which you said Tydwell will need to charge about £1.4 million in order to be paid for taking the risk of there being a claim in relation to cladding? You said that to him? You're saying you said that to him?

A. Sorry?

Q. You're saying that you said that to Mr Lewin?

A. I discussed this quotation in detail with him, yes.

Q. That's not quite what I asked.

A. No, no, let me finish, please. And I did tell him that I suspect it's probably worth 2 or 3 million is the -- the insurance cost, but I -- I'll have to take a view, I'll have to reduce it because we don't have the money. So, we, Tydwell, the company, will have to take the risk.

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Q. But you just told his Lordship that you told Mr Lewin --

A. Yes, I was -- from memory -- from memory, I remember and I -- 1.4 million sort of seems to ring a bell, that I would have said a figure of 1.4 million, and Mr Lewin was not accepting that because he said Mr Morjaria wouldn't, so -- and he said, "We will employ a quantity surveyor and we will check out the figures", and I believe there is an email to say that.

Q. Are you saying there's an email that mentions the 1.4 million?

A. No, no, we discussed it before. I'm saying he said -- why would he have said to me --

MR JUSTICE THOMPSELL: Well, you said there was a record of that, so what was --

A. A record of what, my Lord?

MR JUSTICE THOMPSELL: I don't know. You said there was a record --

A. No, I'm saying there's a record of him saying he will check my -- my figures, this -- he will check it --

MR JUSTICE THOMPSELL: Well, I think when he got your revised quote, he wrote back and said, "Well, please go ahead on the basis, but you understand that we'll want to check" --

A. Yeah, he told me on the phone, look --

MR JUSTICE THOMPSELL: And there was an email to that

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effect --
A. I believe there is, yes. I mean, he told me on the phone that he will, and I said, well, look --
MR JUSTICE THOMPSELL: So is that what you're referring to --
A. I believe so --
MR JUSTICE THOMPSELL: -- as the record?
A. Yes, yes, yes.
MR PETO: Oh, I see, just that. But you're not suggesting there's a record of you saying that you're charging 1.4 million for taking the risk, that figure?
A. I'm saying I spoke to him on the phone and I believe I mentioned this to him, because that was the root of it --
Q. But you're not saying there's a written record of the 1.4 million figure?
A. May I finish? We had given all the Teampol quotes, he knew what the Teampol price was.
Q. Who? Who? Who knew what the Teampol price was?
A. He must have, Mr Lewin, because we gave it to his lawyers.
Q. So --
MR JUSTICE THOMPSELL: Do you know whether Mads, I think we'll call him, was in contact with Mr Lewin passing on whatever you'd told to him?

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A. My Lord, I don't know. All I know is, later on, he was chasing for his fees and then he contacted me, when he was owed £4,000. So I had no idea whether he actually -- he didn't copy me, because he had made it clear to me that, you know, that's --
MR JUSTICE THOMPSELL: Right, so you don't know that Mr Lewin --
A. Well --
MR JUSTICE THOMPSELL: -- knew? You know that you'd given it to a lawyer --
A. Who represents --
MR JUSTICE THOMPSELL: -- who represents Otaki, Mr Lewin was a director of Otaki.
A. That's right, my Lord.
MR JUSTICE THOMPSELL: Mr Lewin was entitled to call on Mads to say, "What do you know about this contract" --
A. Yeah, absolutely.
MR JUSTICE THOMPSELL: -- but you don't know if he ever did?
A. I don't. I mean, I -- I'm not privy to that.
MR PETO: If you're now saying that you told Mr Lewin that 1.4 million was what you were charging for the taking on the risk, then why would you have not wanted to show Mr Lewin the Teampol quote, because it's pretty obvious then that you're paying the subcontractor an awful lot less, 1.4 million plus less than what's in this schedule

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here? (Pause). There's no need to keep the Teampol quote from him any more, is there, if you've told him that this schedule -- let me put it a different way, if you don't want to answer that. If you told him 1.4 million was the cost of taking on the risk, why didn't you openly itemise that in this schedule?
A. Is that your question?
MR JUSTICE THOMPSELL: That was a question, yes.
MR PETO: Yes --
A. I was just waiting because he was --
Q. No, it was a, why? I said if --
MR JUSTICE THOMPSELL: Unlike a lot of the questions which are just statements and asking you to confirm --
A. Yes, my Lord.
MR JUSTICE THOMPSELL: -- that had a "why" in it.
A. Yes. Sorry, my Lord. I beg your pardon, Mr Peto. I -- it was a difficult time, you had lockdown, you had all of that. I made it clear to Mr Lewin, I believe, I don't have a -- you know, that documented, but I -- the conversations, because we had several conversations, because the time was really pressing, and I made it clear to him, because this was all about combustibility and I sent the details, as I've said, to the lawyer. Whether he shared it with him or not, I assumed he did. I mean, that's all I can do. And I made it very clear that there is a combustibility charge. So I made it very clear. And this is a lump sum price. And in the same token, perhaps I'm wearing two hats, I'm a director of Tydwell Limited, which is an independent company, a separate, and nothing to do with the JV, it has given a price, why --

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MR JUSTICE THOMPSELL: I think we've heard that.
A. Thank you, my Lord.
MR JUSTICE THOMPSELL: Mr Rees [sic], will you be taking us to the so-called combustibility warranty with this witness?
MR PETO: Well, I suppose we will, yes. I hadn't planned to but --
MR JUSTICE THOMPSELL: You hadn't, okay.
MR PETO: -- we'll make a note of doing that. I don't mind being mistaken for my learned friend though.
MR JUSTICE THOMPSELL: Oh, sorry. I've got so used to dealing with Mr Rees.
MR PETO: Well, he's a lot more good-looking than me, so ... If we take a look at {K1/2908/1}. There you're writing to Mr Morjaria, who you say is not your JV partner, for some reason you're writing to him, and copied to Mr Lewin:
"Pradeep,
"I have just come off the phone after a lengthy

Example 3 (Day 15, pages 57-63)

an email from Otaki's lawyer, who you refer to as "Mads", Mads Ekayanake, who said it could cost 250,000 a year to insure. Do you remember that answer?

A. Yes, I mean, that's an email I received. It was in 20 -- yeah, 2020, yeah.

Q. So you say there:

"... the first thing that went through my head was, when I looked at that ..."

I think you mean looked at the email:

"... 2.5 million ..."

Is what you say:

"... and that's their lawyer telling me ..."

And then you said:

"... I've just got to take that risk. And he told me, well, that's down to you, that's why Mace washed their hands [of] it ..."

Now, if we look, please, at {K1/2731/1}, there's an email there on 10 March 2020, towards the bottom of the page. Now, is that the email that you were referring to in your evidence?

A. Yes, I believe so, yeah. This is the one I refer to combustibility insurance and there's another email which says I will not charge, but, yes.

Q. So this is the day after the D&B contract is signed on 9 March, we know that. And so what you were saying on Day 10 of your evidence is that you had received an email from Otaki's lawyer, who said it could cost £250,000 a year to insure, and your evidence, as I've just said, in transcript page 257 was:

"The first thing that went through my head was it could cost £2.5 million -- that's their lawyer telling me I've just got to take that risk and he told me, well, that's down to you, that's why Mace washed their hands of it."

So what was your understanding on receiving this email on 10 March, the day after the D&B contract was signed, from Otaki's lawyer? What did you think?

A. That I have to take -- or should I say Tydwell will have to take sole responsibility for combustibility, Tydwell is only going to have to charge for the minimum that it can do, plus this little margin, Tydwell could not, as I said before, my family and all of them, that was the projection, they could not -- they will not be receiving anything, and all we have to do is to minimise this indemnity insurance. And we discussed this on phone, I explained --

MR JUSTICE THOMPSELL: Sorry, you discussed with whom?

A. With Mr Morjaria, on Skype calls, and I believe Mr Stobart -- or Chris Stobart, because he -- yeah, so ...

MR REES: So it was the 10 March email that you were thinking of when you gave that answer --

MR JUSTICE THOMPSELL: So when you discussed it with Mr Morjaria and Mr Stobart, did you just say, "I don't think I'm going to be able to get insurance for -- or be able to afford insurance for Tydwell", or did you say, "I'm going to have to self-insure so that's another £1 million on the cost"?

A. I -- my memory is not that brilliant, so I'm not ... but I made it very, very clear, which is why there was frustration on the call, so I said what we thought it's going to be, it's not going to be. The lawyers and everybody else saying the same thing. I therefore will have to self-insure for the combustibility.

MR JUSTICE THOMPSELL: Why did you? Why couldn't you have just -- well, I think you said earlier that you had sole responsibility. That's not true, because Teampol gave more or less the same warranty that you did.

A. I'm afraid -- sorry, my Lord, but, no, they didn't. They -- they --

MR JUSTICE THOMPSELL: But we looked at the warranty yesterday.

A. Yeah, but, if you look at the contract between --

the subcontract and if you look at the design, we -- we employed -- and it's important, my Lord -- I mean, I'll leave it to the experts, but I am telling you that there was no one prepared to accept the fire combustibility, nor Teampol, nobody. All Teampol was saying --

MR JUSTICE THOMPSELL: We keep coming back to this phrase "fire combustibility". I didn't see a warranty that talked about fire combustibility.

A. No -- okay, I mean, the whole -- I mean that's why I keep saying if we could look at the Gallagher email also, which sets it out, but if -- if I may explain, my Lord, when -- because if you look at -- there's emails from Sean Cummins, who was the building control and Grenfell committee member, who kept saying to me that you cannot -- just -- you've got to -- somebody's got to take carte blanche responsibility for this, we don't know what's going to be behind it. And that's somebody who's looking at it from Grenfell's point of view. Then you had people from Premier Inn and they had their own requirements, and their requirements were the U-values. The U-values is the rate of energy that is dissipated from the building. Teampol did not have anybody, and that was the whole design was based on that. So we had somebody who worked for Tydwell, I think his name was Malcolm Maclean, SRE, who then, we sat together, worked out the calculations and say that these are the calculations for working out the U-values

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which -- which will -- which will show how heat is dissipated. We set those parameters, Teampol said, "Fine, we will just -- you certify the materials we use, we will only give responsibility of if we have put the structure up properly; if it collapses, falls, then we will be responsible for it". We -- they were aware also that, at the same token, they -- I said, "We will try to get insurance", and they said, "We are being told for the combustibility ..." -- because, yes, you're right, my Lord, I did ask them to cover the whole lot, but they weren't. They said we will -- we bid £250,000 a year, so I said go and get the insurance but they couldn't so they just said no. Then we asked AJ Gallagher which is the largest insurance broker in the country and another broker, they came back and their letter said that even if you put it all together properly and use all known combustibility -- we still don't think you can get insurance because we still think the system could collapse. And that --

MR JUSTICE THOMPSELL: Well, you wouldn't have insurance, but you might not have breached your warranty because your warranty was to fit in accordance with current building standards.

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A. But, my Lord, the laws were changing with the --

MR JUSTICE THOMPSELL: Well then -- then that was a problem for -- that was a problem for the owners of the property, because if the laws changed, they couldn't sue you if you'd adhered to current building standards.

A. Okay. Well, then why did Mace pay out? If Mace -- Mace -- Mace paid out because they knew that they could be sued on that matter. It wasn't a responsibility for the owners, it was the contractor's responsibility. And if -- then the laws have changed since then and I was being told by Sean Cummins, who sat on the committee, and said laws are going to change, watch what's happening with the Dame Hackett inquiry, and you've got to take the risk. It had nothing to do with the owners.

MR JUSTICE THOMPSELL: Where's the bit where it said you took -- Tydwell took the risk for the laws changing?

A. No, I mean, I -- yeah, I mean, I didn't put it in my contract saying that "Look, it is subject to the law". I --

MR JUSTICE THOMPSELL: Well, you did, you said -- the only warranty you gave was a warrant that the scheme of building, the design and the materials met all current standards.

A. No, I -- I went further than that. We had to take responsibility for the fire combustibility, that is why --

MR JUSTICE THOMPSELL: But you didn't contractually take

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that responsibility. There's no warranty that says, "I take responsibility for fire combustibility".

A. Well, so I -- so then, my Lord, I'm confused, because then Mace could have just said, "We didn't take any responsibility for fire combustibility, we built it according to the building regs ...", which is quite true, which was all signed off, "... and you can all ..." -- could have told me to bugger off, we're not paying you a penny.

MR JUSTICE THOMPSELL: Well, I've no idea --

A. Well, they paid it, my Lord. I'm saying to you, categorically, they paid it because they recognised that they were responsible for fire combustibility and the same, and they washed their hands of it and I had to sit on that and take the responsibility. That is what the owner's lawyers told me, that is what Teampol said. And I only took it because I was looking at the fact that if I -- if Tydwell does not take that responsibility, the properties will be worth zero. And Mr Stobart, I think on 28 May, sent that, all of the -- via Tydwell, because the insurers wanted to know who is going to be sitting behind this, just for that combustibility, the fire combustibility. And with

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the greatest respect --

MR JUSTICE THOMPSELL: But Tydwell didn't have more assets than Kruger or Otaki or Viper, did it?

A. Well, at that particular point it did, because Tydwell -- Kruger, on their assets, were worth zero.

MR JUSTICE THOMPSELL: And what were Tydwell's assets worth?

A. More than zero.

MR JUSTICE THOMPSELL: More than zero.

A. Yeah.

MR JUSTICE THOMPSELL: Well, they certainly were --

MR REES: As part --

MR JUSTICE THOMPSELL: Yes.

MR REES: As part of your evidence --

A. Sorry, my Lord.

Q. -- in this, when you gave your evidence on Day 10, you used the expression "my yardstick was Mace", in terms of the £2.75 million. What did you mean by that expression, "My yardstick was Mace £2.75 million"?

A. It goes to the heart of what I've been saying. And, yes, Mr Morjaria and I both -- I mean, well, I thought, if can do it for 750, we can obviously make some money, but I'm also conscious of the fact that -- but then in the back of my head, I'm thinking: nobody's stupid, and Mace is the largest construction company in this country, or one of the largest; they took two and a half years and if they can't find anybody to cover the fire combustibility, there must be something wrong here. And

Example 4 (Day 15, pages 77-83)

the combustibility or fire resistance/performance of any cladding, curtail walling or glazing or which does not comply with the relevant UK, Irish or EU planning, building safety or fire regulations."

So what was your understanding on reading that endorsement to the Teampol insurance policy?

A. To my understanding, that's quite clear. But over and above the obvious, we spoke to Teampol on several occasions. They made it very clear that "Listen ..." -- not only that we are -- we want you -- and that's why it's in their contract we put that paragraph in, where you will sign off on the design, you take full design responsibility; all we're going to just take responsibility for is if the whole thing collapses or falls, we will take. But the design responsibility, that's why we want you to sign off every single material and you set the parameters within which we're going to work, and we want this coming from your guy, which is why I remember Malcolm Maclean, SRE, designed all --

MR JUSTICE THOMPSELL: Mr Mirza, again, you're going beyond the question that's been asked of you. We are pressed for time.

A. I know, but, my Lord, this is -- yeah.

MR JUSTICE THOMPSELL: And you have made that point before.

MR REES: Yes.

So what would be the significance to the hotel or to the data centre if there was nobody saying they're providing insurance?

A. Premier Inn would have walked. Simple as that. NatWest would have called in the facility.

MR JUSTICE THOMPSELL: But there was nobody saying they would provide insurance on -- well, they did -- Teampol got some insurance. I don't think you got any insurance, did you, for Tydwell?

A. Teampol got insurance but not for the fire combustibility.

MR JUSTICE THOMPSELL: Well, not -- with an exclusion for cladding combustibility.

A. Yeah.

MR JUSTICE THOMPSELL: You didn't take any insurance at all.

A. No, because we gave a warranty to -- to Premier Inn.

MR JUSTICE THOMPSELL: No, but what I'm saying is that your warranty wasn't backed by insurance. Teampol gave a warranty and their warranty was backed by insurance but not for fire combustibility. You gave a warranty with no insurance whatsoever. So if it wasn't a problem with combustibility, the cladding just fell off the wall, and that was your fault because you'd approved the design, then there was no insurance for that.

A. Well, okay, I mean --

MR REES: Shall we ask -- may I ask you some questions on this, on this very point.

MR PETO: Well, maybe his Lordship's --

A. It might be better if --

MR PETO: -- question could be answered.

MR REES: No, no, no, well ...

MR JUSTICE THOMPSELL: I think you had answered it, hadn't you --

A. What, sorry?

MR JUSTICE THOMPSELL: Had you finished your answer to my question --

A. No, I hadn't got any --

MR JUSTICE THOMPSELL: Well, then you should finish your answer --

A. -- I was interrupted, but ...

MR JUSTICE THOMPSELL: I think Mr Mirza said he hasn't finished his answer --

MR REES: Please finish --

MR JUSTICE THOMPSELL: -- and he's collecting his thoughts to do so.

A. You might as well -- I mean, if Mr Rees wants to ask me a question, I don't want to be blamed for taking up time, so I mean ask me the questions, I don't mind --

MR REES: I want to ask you on this very subject matter, that's the point. It's all about the warranties and what the directors knew and whether the directors relied on those warranties at the time.

So you were asked at the Day 11 -- if we look at the transcript, please, {Day11MT1/49:21-25}.

A. Sorry, which line?

MR JUSTICE THOMPSELL: 21 to 25.

A. Thank you, my Lord.

MR REES: You said there:

"... Chris Stobart, who then sent my -- Tydwell's quotation confirming that I'll take responsibility on the combustibility to the building insurers, who then also he sent it to Premier Inn and Tower 8, at that time had said in their letter ..."

Do you remember giving that evidence?

A. Yes. Yes, I do.

Q. So Chris Stobart had sent your Tydwell quotation confirming that Tydwell would take responsibility for combustibility to the building insurers as well as to Premier Inn and Tower 8, that's what you say?

MR JUSTICE THOMPSELL: Have we seen the quotation that confirms that?

MR REES: Shall we look then, please, at {K1/3058.1/1}.

So if we look here, there's an email of 27 May 2020, from Chris Stobart to Alexander Margolin. Can you just remind us who he is?

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A. He's the insurance guy, yeah, the broker. He dealt -- he got the insurance.
Q. Yes.
So he is -- Chris Stobart is writing to the insurance broker, copying you in --
MR JUSTICE THOMPSELL: That's the broker dealing with the building insurance for the whole building?
MR REES: That's right.
A. That's right. That's right, my Lord.
Q. And then he then says, at the bottom -- he says:
"Please see below and attached ..."
And if you go to the bottom of that page, this is the email that Alexander Margolin sent to you on 27 May, and we can see what that says, and over the page, please {K1/3058.1/2}. So you'll see, in the second bullet point, there's a copy of the contract of work between Otaki and Tydwell which is attached to that email. So that's the --
MR JUSTICE THOMPSELL: So it wasn't a quotation that was sent, it was the D&B contract?
MR REES: It's the D&B contract with those -- obviously the clauses.
MR JUSTICE THOMPSELL: Yes.

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MR REES: Yes.
So that's -- is that the email you're referring to in the extract from the transcript I was --
A. Absolutely, and -- well, I can say more, but, yeah.
Q. If we then look, please --
MR JUSTICE THOMPSELL: But that was in response to something to say we need to work urgently to take off the current non-compliant cladding and put on new stuff. It wasn't dealing with the requirement for insurance for the new cladding. If we go back to the previous page {K1/3058.1/1}:
"We are in a position ... they [need] to see evidence you have to what takes to complete the cladding and render work ..."
Response: here's the contract where we've got an arrangement in place to complete the contract and render work. That's what that's saying. It's not responding to a need for insurance or a warranty in relation to that work.
MR REES: It's referring -- it's the email which Mr Mirza is referring to at Day 11, when he says that Chris Stobart had passed on the Tydwell -- first it was "quotation", but in fact it's the contract confirming that you would take on -- or Tydwell would take on the responsibility on combustibility and he'd forwarded it to the building insurers.
MR JUSTICE THOMPSELL: Well, it is what it is.

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MR REES: Yes.
MR JUSTICE THOMPSELL: Yes, yes.
MR REES: Do you understand the significance of why Mr Stobart was doing that to the building insurers? Why was he telling them about the Tydwell D&B contract?
A. Sorry, you're asking me?
Q. Yes.
A. Yeah, because this is Allianz insurers, who had already said they're going to withdraw the insurance. So there was no question, it was trying to hold the line with them. There were other insurers, Touchstone and some other company, who were not really interested in any other warranties apart from who's going to take responsibility for the fire combustibility, because when we spoke to the broker, he said, "If something falls off", and all of that, "It's the design that you have taken, Tydwell, and it's your contract with -- that determines that, but if something falls off, you can claim it under building insurance, but the new insurers will also want to know", and I can remember this, "you are on the hook for the fire combustibility", because that was the hot -- well, it still is, that's all they were interested in. And I answered, said, "We're out". So I was just like holding the Allianz to hold on.
MR JUSTICE THOMPSELL: But what they asked for was evidence that the cladding was going to be replaced, not it was going to be replaced and there would be a warranty and there would be insurance for the warranty. They're not doing that. It's just the simple question here: when are you going to do the cladding? That's the question -- that's -- "... they are demanding to see ... that you have what it takes to complete the cladding and render work within the 6 month time frame ...". That's the question that's being answered by sending the D&B contract.
A. That's right, my Lord, but it was on the basis of the fact that it was a building that had the worst combustibility cladding on and --
MR JUSTICE THOMPSELL: And it needed to be taken off and replaced.
A. That needed to be taken off. And ideally, yes, if -- if -- ideally, if you could get insurance for it, for the combustibility, you'd have all of that, but they knew that you couldn't get it, and that's why Mace took two and a half years to ... and they couldn't get it. So it goes down all in the sequence.
MR JUSTICE THOMPSELL: Okay.
MR REES: So in terms of the warranties that Tydwell had given in the contract, obviously Chris Stobart is attaching the contract to the building insurer. You

Example 5 (Day 5, pages 99-106)

A. That's what happened.
Q. -- CMS made it absolutely clear that they regarded this as a fraudulent note and wrote in terms in the letter of response making that absolutely clear.
A. No, I believe --
Q. I can show you. It's paragraph 90 of the letter of response, if we can find it in the bundle {J/6/1}, paragraph 90, please {J/6/18}. Thank you very much. Paragraph 90:
"We wish to make very clear that any suggestion that our clients were not entitled to charge for their services is denied and your clients' suggestion that there was some form of verbal agreement to the contrary is unsustainable. Indeed, our clients' view is that Mr Morjaria is alleging the existence of that agreement purely for the purposes of persuading you to make the allegations of fraud in your letter. Your firm should have tested those allegations properly with your clients and it is our view that you have considerably failed in that obligation (given the substantial amount of documentary evidence to the contrary) then made very serious allegations, on instruction, against our clients. Again, that course of conduct is completely unacceptable."
And paragraph 91:

"It has already been shown that the Note (as defined in our letter of 24 May 2021) was not, as alleged in your [Letter Before Claim] a contemporaneous document. Nor, as you alleged, was it emailed by your client to himself in 2008 either. Instead, you/your client have said you/your clients made a simple mistake in referring to it as a contemporaneous document that your client emailed it to himself at the time. That explanation, as we have said, is neither accepted nor credible.
"In your letter of 4 June 2021, you belatedly provided a copy, including metadata, of the Note. In your letter, you stated that you were instructed it was created 'on or around 24 July 2020'. The metadata of the Note does not support that. We have taken a screenshot of the document's properties."
Then over the page {J/6/19}, and that shows the properties on the screenshot, which says, "Last Modified", 4 June 2021; "Created", a different date --
MR JUSTICE THOMPSELL: 1900, it seems.
MR REES: Sorry?
MR JUSTICE THOMPSELL: It was created in 1900.
MR REES: Yes.
A. No, my Lord, if I may interrupt you.
MR JUSTICE THOMPSELL: Well, I think I know what -- well, do

-- I think you can explain the metadata, if you wish, Mr Morjaria.
MR REES: Well, let me ask you some questions about it.
MR JUSTICE THOMPSELL: Okay, yes.
MR REES: I mean, obviously, CMS were on to this right from beginning. They had seen the note, thought this is incredible, and wanted to test the veracity of this document and asked for metadata. I think you know, because you've been so closely involved in this litigation, working well over 12 hours a day every day on this case for so many years, that it took several attempts to get the actual metadata. Various screenshots were given and it's all very unsatisfactory, but three or four -- it took six months, eventually, for Jones Day to provide the metadata, and that was provided in about December of 2021, and that showed that the actual date of the creation of the documents was 24 July 2020. We were given all sorts of different versions without the metadata --
MR JUSTICE THOMPSELL: Sorry, have we got another -- in the file then, have we got the metadata showing that, because this one shows 1900 for the "created"?

MR PETO: I mean, the date of 24 July, my Lord, of course, comes from that letter which my learned friend just showed, which of course was written I think in -- just six weeks after the initial mistake was made in April. So the date was given correctly --
MR JUSTICE THOMPSELL: So before this to and fro --
MR PETO: All the metadata did --
A. No, but, my Lord, let me just --
MR PETO: -- (overspeaking - inaudible) -- confirm that situation. The actual correct date was given within six weeks of the original mistaken letter.
MR JUSTICE THOMPSELL: Well, I think Mr Rees is questioning whether the correct date -- a later date was given. It was admitted it was not 2008, but Mr Rees is correcting that -- is suggesting that the date that was given, which I think was 2019 --
MR PETO: No, no, it was 24 July 2020, my Lord, was what was given --
MR JUSTICE THOMPSELL: Do you agree that that's --
MR REES: That's my case. That's what I put to the witness, yes.
MR PETO: Yes, and that was put in -- and that was corrected in the letter merely six weeks after the original letter of action that contained the error. What Mr Rees is now chasing is, "Ah, we didn't get the confirming metadata until months later", but the correct date was given, 24 July, six weeks after the original mistake and the metadata later provided merely confirmed that date,

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24 July 2020.
MR REES: Let's clarify what we're talking about here.
Mr Morjaria, you're trying to blame these junior lawyers, that they made some mistake in referring to it as a contemporaneous document. You're being entirely unfair and trying to distance yourself from your own culpability in this by suggesting they didn't realise it was a contemporaneous document. But you'd created the document, you'd dated it 12 and a half years later, you had --
MR JUSTICE THOMPSELL: Is that right, Mr Rees, because it seemed to me that the dating of it related to the email.
MR REES: No.
MR JUSTICE THOMPSELL: There was no date on the document that said what date the document was of --
MR REES: This is --(overspeaking) --
MR JUSTICE THOMPSELL: -- or have I misread that?
MR REES: This is the bizarre thing of the note, actually, my Lord.
{K1/35/1}. Perhaps if we look at that. You might, on a first glance at this, misunderstand and think this is an email. It's not.
MR JUSTICE THOMPSELL: Well, I read this:

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"Reference: Email from Richard Spencer-Breeze ... 10th January ..."
In other words, this is a note about an email sent on 10 January 2008. It doesn't say in terms this note is dated 10 January 2008.
A. Erm --
MR JUSTICE THOMPSELL: I'm asking Mr Rees for his case, Mr Morjaria.
MR REES: Well, obviously it's -- this is an attempt to mislead the reader that this was a -- either an email or a call which happened on 10 January 2008.
MR JUSTICE THOMPSELL: So not to mislead them that this was an email sent on 10 January 2008?
MR REES: Well, it wasn't obviously an email in the end. When you read --
MR JUSTICE THOMPSELL: No, I'm just trying to say what -- if you've just got this piece of paper in front of you, what do you conclude about it? What I conclude about it -- and you can tell me if there are reasons why I'm wrong on this -- is that this is a note about an email from Richard Spencer-Breeze Spencer on 10 January 2008.
A. Correct.
MR JUSTICE THOMPSELL: I don't see that, on the face of this, this is claiming to be a contemporaneous note.
Now, it was represented as such in the letter before action and it was represented in the letter before action that it was emailed by Mr Morjaria to himself.

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I don't know where that came from, but I don't think it came from the note itself.
MR REES: My Lord, it is, we say, a very obvious inference that what is being said -- what is being claimed that this note purports is that this was what happened at a meeting, or a call --
MR JUSTICE THOMPSELL: A call.
MR REES: -- in January 2008.
MR JUSTICE THOMPSELL: I'm not questioning that, Mr Rees. It says this is about a call in --
MR REES: Which didn't happen.
MR JUSTICE THOMPSELL: -- 2008. Well, we don't know whether it happened. What we do know is that this is not a contemporaneous note of it happening.
MR REES: Well, my Lord --
MR JUSTICE THOMPSELL: You say it didn't happen and Mr Morjaria says it did.
MR REES: Mr Morjaria --
MR JUSTICE THOMPSELL: You've got the evidence that Jordans didn't bill for it, or you can't show that Jordans billed for it.
MR REES: Yes, what's misleading -- thank you to my learned junior. So, yes, anyone reading that would not understand that it was created in 2020.

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MR JUSTICE THOMPSELL: No, they would have no understanding about when it was created.
MR REES: Well, they would. They would look at the "10th January 2008" and would assume that it was with reference to that.
MR JUSTICE THOMPSELL: With reference to that, but that doesn't mean it's written then.
MR REES: Well, around then. My Lord, I mean --
MR JUSTICE THOMPSELL: Well, presumably, Jones Day thought that, so I can see your point.
MR REES: Absolutely.
MR JUSTICE THOMPSELL: But all I'm saying is that if you're saying that Mr Morjaria made a representation on the face of this letter that this was a contemporaneous note, or that he emailed it himself, that is not apparent on this note itself. I'm --
A. My Lord --
MR REES: Well, I respectfully disagree and obviously we'll make submissions on it in due course.
MR JUSTICE THOMPSELL: Yes.
MR REES: And you'll have to hear evidence on it during the course of the trial.
MR JUSTICE THOMPSELL: Of course.
MR REES: But we would say that it was obviously created with the purpose to mislead Jones Day, so this is why they wrote in the letter before action, in paragraph 21,