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High Court Employment Litigation
Simon Devonshire QC

Introduction

1. On 22nd April 2015, Lord Woolf (the Master of the Rolls) gave a speech at the Law Society's 'Magna Carta' event. His theme was that *"Delay too often defeats Justice*'. In the course of his address, he considered the complexity of the High Court's current procedural regime. He said this:-

> "*One of the declared aims of the major procedural reforms that have taken place in recent times has been the simplification of the rules. "Simplify the rules" is cry a very commonly heard. And yet it does not happen. Instead, the number of pages of the White Book increases inexorably edition by edition. The publishers attempt to keep the size and weight of the volumes down by making the paper thinner and thinner. But this fools nobody. It is a common complaint that the CPR have grown like topsy, with its collation of rules, practice directions, protocols, guides and practice statements. There must be room for rationalisation. ...*
>
> *If we are genuinely concerned to reduce the complexity of our rules and the cost and delay which are its inevitable consequence, we must do something about it. The cost and effort of doing this is surely a price worth paying. I know that there are those who say that, if the rules are made too simple, there will be interstices which the court will have to fill and this will simply encourage a great deal of procedural litigation. There may be some force in this argument. It is a striking fact that the number of procedural appeals to the Court of Appeal is relatively small these days. But I am not persuaded that we should not be trying to simplify the rules. We should not overlook the fact that a high proportion of litigants who use our civil courts are self-represented. To say that for the majority of them the CPR are daunting must be an under-statement*."

2. Simplifying the rules is no doubt a laudable aspiration, but of little assistance to those of us having to deal with High Court litigation in the 'here and now'. In addition to the CPR, each division of the High Court has its own practice guide, which contains 'bear traps' for the unwary. The Mercantile Courts and District Registries sitting outside London often have their own practice directions and protocols, drafted by the local 'Section 9' judges in front of whom you will appear on any regional High Court litigation. Whatever the number of procedural appeals making it to the CA, case watchers will be aware of a bewildering array of authority on post-Jackson CPR points, faithfully 'blogged' by Leeds' barrister Gordon Exall (the CPR's answer to

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Daniel Barnett) on an almost daily basis at https://civillitigationbrief.wordpress.com/. Nor does the 'practice' stay still. To take just one example, there have recently been significant changes to the scope of CPR Part 36, to allow for time limited offers and to legislate for what the judge may be told about Part 36 offers when there is a split trial of liability and quantum

Scope of this Paper

3. This is an employment law conference and this paper focuses on issues of particular relevance to High Court employment disputes. What are the differences of the procedural culture in the High Court as against the Tribunal, and when are we at risk if we apply tribunal habits or practices to High Court litigation? Outside of the realm of wrongful dismissal claims and bonus disputes, High Court employment litigation will typically revolve around business protection and unlawful competition issues – team moves, the protection of confidential information, the enforcement of PTRCs and the like. Often, such claims start (and indeed finish) with applications for interim relief. So this Paper focuses on:-

3.1 Pleading out your claim in such cases – the do's and don'ts;

3.2 Applying for injunctive relief – when and how to go to court, and the consequences of doing so; early disclosure of information from the other side – when will it be ordered;

3.3 Monetary alternatives to injunctive relief in employee competition cases – how is the law moving, and where?

3.4 What do High Court judges expect of practitioners in the conduct of litigation before them?

3.5 The adjudicative process – how will the Court resolve your commercial employment dispute and what evidence is the most important?

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4. However, any paper or talk on High Court litigation cannot ignore 'costs budgeting' and relief from sanctions in the post-Jackson era, and these are briefly addressed first.

Costs Budgeting

5. Mitchell v News Group Newspapers [2013] EWCA Civ. 1537 famously highlighted the consequences of failing to file a costs budget in the time directed by the rules. Mitchell was refused 'relief from sanctions', with the consequence that he was treated as filing a budget comprising only the applicable court fees. Even if you get your budget in on time, it is important to keep it up to date. Approved budgets are not costs caps; the court will expect the parties regularly to review them and either agree or apply for suitable revisions if (and/or when) the case takes an unexpected turn. You will need to show a 'good reason' to depart from the last agreed costs budget. "*If approved costs budgets can be revised at a later date because of mistaken or self-induced inadequacies in the original, the whole purpose and effect of the new costs management reference may be thwarted*": Murray v Dowlman Architecture Ltd [2013] EWHC 872 (TLC) Coulson J.

6. So much for the theory; what about the practice? Costs budgeting has introduced its own delays and complexities. In a case I am currently involved with, the parties were unable to agree their costs budgets. Master Leslie offered them the choice of a summary costs budgeting assessment at the CMC, or a proper budgeting hearing in 3 months' time, with all steps in the action stayed in the meantime. This is a common experience.

7. In his recent speech, Lord Dyson noted that:-

> "*There are complaints in some quarters that costs management hearings are taking up a considerable amount of court time and that they are not taking place until months after the issue of proceedings. Any new procedure carries with it the potential for delay while the users and judges learn how to apply it. I have little doubt that the teething problems will subside in time as everybody becomes more familiar with costs management. It is easy to forget that there were delays and difficulties in the early days of case management hearings. But gradually, we all adapted to them. Routine case management hearings take less time now than they did in the pioneering days in the immediate post-*

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> *Woolf era. There is no reason in principle why the same should not happen in relation to cost management hearings*."

Let us hope he is right, but don't hold your breath.

Compliance with Time-Limits and Relief from Sanctions

8. The Court of Appeal fairly quickly retreated from the unforgiving stance it had taken in Mitchell. That decision had encouraged unmeritorious 'rule fascism' amongst practitioners and undermined (rather than promoted) litigation co-operation. In Denton v TH White Ltd [2014] 4 Costs LR 752, the court advocated a 3 stage approach:-

   8.1 Was the breach 'serious or significant'? Did the breach imperil future hearing dates or otherwise disrupt the conduct of litigation? If the breach is not serious or significant, it is not generally necessary to spend time on stages 2 and 3.

   8.2 Why did the default occur? Was there a good reason for it? Negligence or oversight is unlikely to suffice;

   8.3 Should relief be granted in all the circumstances of the case (even if the breach was serious and substantial and there was no good reason for it)? The circumstances include (i) the need for litigation to be conducted efficiently and at proportionate cost, and (ii) the need to enforce rule compliance.

9. Some of the Respondents in the Denton case were mulcted in costs for seeking to take unmeritorious tactical advantage of modest mistakes after the promulgation of Mitchell. As the Court observed (summarising from the headnote):-

> *"Where a party's failure can be seen to be neither serious nor significant, or where a good reason is demonstrated, or where it is otherwise obvious that relief is appropriate, parties should agree that relief from sanctions be granted without the need for further costs to be expedited in satellite litigation. Parties should in any event be ready to agree limited but reasonable extensions of time up to 28 days. It should be very much the exceptional case where a contested application for relief from sanctions is necessary. Heavy costs*

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> *sanctions should be imposed on parties who behave unreasonably in refusing to agree extensions of time or unreasonably oppose applications for relief from sanctions. The court can in an appropriate case also record that the opposition to the relief application was unreasonable conduct to be taken into account under CPR r 44.11 when costs are dealt with at the end of the case".*

10. It should not be assumed that Denton has completely softened the approach advocated in Mitchell. In Fouda –v- Southwark [2015] EWHC 1128 (QB) the Court dismissed an appeal from a pre-Denton refusal to grant relief from sanction where a witness statement had been served late. Whilst the breach was not serious or significant, the Court was influenced by the fact that the solicitors for the defaulting party had been serial offenders, having displayed a "*dismissive attitude to their disclosure obligations*" and having regard to "*the unsatisfactory way the case was pleaded*" and their "*failure to contact Southwark and Newlyn to prepare a bundle for the hearing [which] culminated in the loss of the first day of the hearing*." In Patel –v- Mussa [2015] EWCA Civ 434, the CA upheld the striking out of an appeal resulting from the late filing of a skeleton argument and the appellant's failure to lodge a bundle in accordance with the Court's directions. The recent cases also reveal a considerable hardening in attitude towards late amendments, even where they do not jeopardise the trial date; see, e.g., Monks –v- Nat West [2015] EWHC 1177 (Ch), Wani –v- RBS [2015] EWHC 1181 (Ch), and Cockell –v- Holton (No 2) [2015] 1117 (TCC).

11. Mitchell/Denton do not apply to cases in which the breach does not result in the imposition of an express or implied sanction or (crucially) to an in-time application for an extension of time. A prospective application for an extension of time (even if heard after the time limit has expired) does not engage the Mitchell strictures. On those, the pre-Jackson jurisprudence remains good law; Hallam Estates v Baker [2014] EWCA Civ. 661. For a recent illustration of this principle in operation, see Peak Hotels –v- Tarek Investments (ChD 12.3.15). **So If you are going to miss or are at risk of missing a deadline, get in early**. And if your opponent has failed to do this and you are responding to an application under CPR3.9, **think carefully before you oppose an application for relief** – there are costs risks of doing so having regard to para 9 above and judicial practice is not invariable.

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12. For all of the appeal to rule compliance and procedural simplicity, the commentary of CPR 3.9 now covers 19 'wafer thin' pages. In his recent address, Lord Dyson said this:-

> "*The final point I want to make on the subject of efficient case management relates to Mitchell and Denton. These two authorities (which need no introduction to an audience like this) sought to enhance procedural efficiency. Their aim was to eliminate, as far as possible, a laissez-faire approach by the courts and litigants to rule compliance. It was not to punish recalcitrant litigants. Nor was it to trap ignorant or lazy litigants. The aim was simply to ensure that claims are efficiently prosecuted at a cost which is proportionate to the parties and the court system. This is an aim which focuses both on the private and public interest I identified earlier.*
>
> *This approach may appear to produce unfair results in some individual cases. For example, if a claim is struck out for non-compliance it might be said that this is the very epitome of a denial of justice, particularly if the innocent party is not prejudiced by the non-compliance. But an effective justice system is not only concerned with delivering justice in the individual case. Justice requires the court to be able to promote the public interest in the rule of law. The courts can only do that if they are able to ensure that no more than a proportionate amount of court time and resources is expended on single claims. Judges must look beyond the individual cases that they are managing and consider the effect of their case management decisions on the system as a whole. Only by means of proportionate case management can the courts hope to meet the aspiration that all claims that require court adjudication are determined efficiently and proportionately. As Carr J. put it recently in Su-Ling v Goldman Sachs International when setting out the principles to be derived from, amongst others, Mitchell*
>
> > *'The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so.'"*

Pleading out your Claim in the High Court

13. ET claims are frequently characterised by a 'discursive', narrative pleading style. There are dangers in adopting such an approach in the High Court. In Hague Plant Ltd v Hague [2014] EWCA Civ. 1609, an application for permission to amend was refused because (although granting it would not imperil the trial) the amendment was

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too lengthy and would cause the respondent unfair prejudice in having to address the revised case so late in the day. The judgment was clearly informed by the 'spirit of Jackson'. Mitchell was cited. Clarke LJ said this (at paras 76 to 78):-

> "*The resultant pleading, for which permission was sought, is unworkable. Particulars of Claim must include a concise statement of the facts on which the claimant relies: CPR 16.4(1)(a). But they need not, and should not, contain the evidence by which they are to be proved or the opposing party's pleadings or admissions. Whilst it may be appropriate in some circumstances to rely, as proof of dishonesty, on the fact that the defendant's account of his position requires explanation and that he has given several different accounts, all unacceptable, this can and should be done in a concise way, referring to documents (but not quoting in extenso) which makes clear what is the issue. The pleading cannot be used as the first draft of an opening or a delineation of points for cross examination.*
>
> *In the present case the form and content of the proposed amendment is wholly disproportionate. It will not assist the judge in understanding the gist of the case. The inevitable request for further and better information and the response thereto, no doubt after yet another interlocutory battle, would exacerbate the position. A re-re-amended defence would, in all probability, be inordinately long and involving setting out the respondents' disagreement with the appellant's summaries of the respondents' position, arguments about the context in which things were said or what was meant by them, and the addition of qualifying or supplementary material of the same kind as is referred to in the proposed new Particulars of Claim. The resultant combination of Particulars of Claim and of Defence, with accompanying particulars, would be unmanageable.*
>
> *Pleadings are intended to help the Court and the parties. In recent years practitioners have, on occasion, lost sight of that aim. Documents are drafted of interminable length and diffuseness and conspicuous lack of precision, which are often destined never to be referred to at the trial, absent some dispute as to whether a claim or defence is open to a party, being overtaken by the opening submissions. It is time, in this field, to get back to basics."*

14. In the Commercial Court, there is now a requirement on a party to seek permission for any statement of case that exceeds 25 pages in length. In Tchenguiz & Ors v Grant Thornton LLP & Ors [2015] EWHC 405 (Comm) Leggatt J. dismissed a retrospective application to serve a 94 page pleading in a commercial fraud case. He ordered the claimant to re-plead its case in no more than 45 pages at its own cost. He said this (at para 16):-

> *"1 Statements of case must be concise. They must plead only material facts, meaning those necessary for the purpose of formulating a cause of action or*

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defence, and not background facts or evidence. Still less should they contain arguments, reasons or rhetoric. These basic rules were developed long ago and have stood the test of time because they serve the vital purpose of identifying the matters which each party will need to prove by evidence at trial.

2 As commercial transactions have become more complex and more heavily documented (including electronically), adhering to the basic rules of pleading has become both increasingly difficult and all the more important. It is increasingly difficult because it is harder for pleaders to distil what is essential from the material with which they are provided and because they can feel pressure to show their mettle and enthusiasm for their client's case by treating the pleadings as an opening salvo of submissions in the litigation. It is all the more important because prolixity adds substantial unnecessary costs to litigation at a time when it is harder than ever to keep such costs under control.

3 The tendency towards longer and longer pleadings was one of the problems considered by the Commercial Court Long Trials Working Party chaired by Aikens J (now LJ) which reported in December 2007. In its report the Working Party concluded that "the length and complexity of statements of case in even 'average' cases in the Commercial Court, let alone H[eavy and] C[omplex] C[ase]s, has increased, is increasing and ought to be diminished." It added that "the prolixity of statements of case means that they become virtually unreadable." To address this state of affairs, the Working Party recommended that there should be a limit on the length of statements of case in the Commercial Court of 25 pages and that, although permission could be granted for a longer document in very exceptional cases, a very good reason would have to be given. The Working Party also recommended that the Commercial Court Guide should remind the parties of what a statement of case should and should not contain.

4 These recommendations were adopted in the 8th Edition of the Commercial Court Guide published on 30 April 2009 in guidance which has remained unchanged since. Section C1.1 of the Guide is in the following terms:

> *(a) Particulars of claim, the defence and any reply must be set out in separate consecutively numbered paragraphs and be as brief and concise as possible. They should not set out evidence. They should also comply with Appendix 4 to the Guide.*
>
> *(b) Statements of case should be limited to 25 pages in length. The court will only exceptionally give permission for a longer statement of case to be served; and will do so only where a party shows good reasons for doing so. Where permission is given the court will require that a summary of the statement of case is also served. Any application to serve a statement of case longer than 25 pages should be made on paper to the court briefly stating the reasons for exceeding the 25 page limit.*

5. In addition, Appendix 4 sets out principles applicable to all statements of case, which include the following:

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> *"9. Contentious headings, abbreviations and definitions should not be used. Every effort should be made to ensure that headings, abbreviations and definitions are in a form that will enable them to be adopted without issue by the other parties.*
>
> *10. Particulars of primary allegations should be stated as particulars and not as primary allegations.*
>
> *11. If it is necessary to rely on a substantial factual information or lengthy particulars in support of an allegation, these should be set out in schedules or appendices.*
>
> *12. Particular care should be taken to set out only those factual allegations which are necessary to support the case. Evidence should not be included."*

This case was followed and endorsed in Fielden –v- Christie-Miller [2015] EWHC 752 (Ch), where an application for permission to amend was refused because of the complexity of the proposed amendment (although the Court afforded the applicant one last opportunity to get his pleading right).

15. Unfortunately for us as practitioners, pleading points have a chameleon quality. Keep it simple and you are likely to be accused of bare assertion without particulars. Set out the fact from which you say that an inference of knowledge and dishonesty may properly be drawn, and you will be accused of '*prolixity*' or pleading evidence. However, the recent trend in the cases should make it easier to argue that your case is not demurrable (or liable to striking out) because it is sketchily pleaded. In Dellal –v- Dellal [2015] EWHC 907 (Fam), the Court declined to strike out a claim under the Inheritance (Provision for Families And Dependents) Act 1970 on the basis that it was inadequately pleaded. Instead, the Court said that the appropriate course was to adjourn the defendant's application for reverse summary judgement until after they had given limited disclosure, reserving to them liberty to restore. On the pleading points, the judge (Mostyn J) said this (at paras 55 & 56):-

> *"[The Defendant's] case on the strike out route is that the claimant has failed to comply with the elementary requirements of CPR 8.2(b) in that the claim form does not specify with sufficient particularity what the claimant is seeking or the legal basis for it. She argues that it is a requirement of adversarial proceedings that those who make charges must state at the beginning what they are and the facts upon which they seek to base them and it is an abuse*

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of process for a claimant to issue a claim against a party at a time when she is not able to plead a factual basis for a claim against him in the hope that facts that will enable her to properly plead her case will emerge on disclosure. She relies on Hytrac Conveyors Ltd v Conveyors International Limited [1983] 1 WLR 44 at 47G-48.

As I have shown, we have moved on a long way since 1983, particularly with the extension of section 33 of the Senior Courts Act 1981 to all forms of proceedings by section 8 of the Civil Procedure Act 1997 and the Civil Procedure (Modification of Enactments) Order 1998 (S.I. 1998 No. 2940). Before that the power had been confined to personal injury cases. These wider powers are procedurally regulated by CPR 31.16 and came into force with the rest of the CPR on 26 April 1999. It seems to me that we now operate in a different legal world to that which pertained when Hytrac was decided in 1983. This brave new world allows full pre-action disclosure to be made where the applicant can put up a prima facie case which is more than a speculative punt. Mr Vos QC was undoubtedly right in my judgment in the Arsenal case to say that a claimant can plead a case in a laconic or protean way in anticipation of particularisation following disclosure. That is what the claimant has done here. I reject [the Defendant's] contention".

16. The Arsenal case (Arsenal –v- Elite Sports Distribution [2002] EWHC 3057 (Ch)) to which Mostyn J referred is also worth consideration. In that case, Vos QC (sitting as a deputy) refused to strike out a claim that was sketchily pleaded in advance of disclosure. He said (paras 35 & 36)

"It seems to me that the position under the Civil Procedure Rules is somewhat different from what it was under the previous rules of the supreme court. This is because under the Civil Procedure Rules, Part 31.16 enables the court to order disclosure in a case like the present to enable a potential claimant to ascertain whether he has a pleadable claim or not. Mr Purvis says of course the claimants do not apply for pre-action disclosure under Part 31.16 so I should not take this into account, but it seems to me that it is a relevant factor. Even if, which is not the case here in my judgment, the case was not pleadable and was too speculative as in the cases of A to Z Couriers and UpJohn, the courts could and would consider an application for pre-action disclosure. In my judgment, there is no reason why, in order to save costs in this case, disclosure should not be ordered now to see whether the claim is doomed to fail as the defendants implicitly suggest. It would be pointless and contrary to the over-riding objective to strike the case out and force the claimant to seek pre-action disclosure before starting the case again.

The defendants have that stoically refused to cooperate with the claimants to give any information, to make any disclosure. They say that it is contrary to their commercial interests to do so, but it seems to me that if they had an absolute defence to the claim and the allegations made against them were wrong it would be in their interests, and not contrary to their commercial

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interests, to produce the disclosure that is sought to demonstrate to the claimants that they had acquired the information lawfully."

17. In a team move case, at least in advance of disclosure, you are likely to be inviting the Court to infer a conspiracy and/or guilty knowledge from primary facts. You are required to set out the facts from which you say an inference may be drawn. The divide between 'facts' and 'evidence' is not as clear as the recent cases suggest. Moreover, in other contexts, the Courts have demanded particularity as the quid pro quo for interim relief (see below). However, the message is clear. Where possible brevity is to be preferred. One solution may be the use of schedules, so that the key allegations in the pleading are kept simple and the necessary detail is given by way of annex. All of the Court Guides allow for this.

Applying for Injunctive Relief

18. In the commercial employment context, many employee competition cases will start with an application for interim injunctive relief. Where possible (e.g in cases featuring routine PTRCs) the parties are encouraged to agree undertakings over to a speedy trial, to avoid the need for contested interim applications; Lawrence David Ltd –v- Ashton [1989] ICR 123. The speedy trial timetable can be very challenging. If speedy trials have a silver lining, it is perhaps that the Court can usually be persuaded to dispense with costs budgeting in such cases.

19. Applications for without notice relief are (in practice) increasingly rare in the commercial employment context. As the Court noted in CEF Holdings Ltd & Anor – v- Mundey & Ors [2012] EWHC 1524 (QB) (para 255): (i) moving without notice is an exceptional step only to be followed in very limited circumstances "*where to give notice would enable the defendant to take steps to defeat the injunction .... or where there is some exceptional urgency, which means literally there is no time to give notice*", (ii) an application without notice will need to be carefully justified by more than a "*bland statement that the defendant might do something if warned* ", (iii) a witness statement on a without notice application "*should contain a statement setting out the duty to give full and frank disclosure perhaps along the lines set out by Bingham and Mummery LJJ in [Siporex and Memory Corpn –v- Sidhu] and then*

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indicating how the duty has been complied with", and (iv) *"[a]ny application for an injunction must be based on facts and ... mere suspicion is not enough".* These were all "*serious lessons*" which (as the Court found) the Claimants had failed to observe or heed, it seems by some margin. They were ordered to pay indemnity costs.

20. This judgment built on the observations of Tugendhat J in O'Farrell –v- O'Farrell [2012] EWHC 123 (QB), deprecating "*the number of spurious ex-parte applications that are made in the Queen's Bench Division*". He also expressed "*real concern*" at the frequency with which the requirements of CPR 25.3 and PD 25A para 4(3) were ignored. These provisions require the applicant to explain why notice has not been given, and provide that except where secrecy is essential, the applicant should take steps to notify the respondent informally of the application. According to the Judge (paras 66 and 67):-

> "*In these days of mobile phones and emails it is almost always possible to give at least informal notice of an application. And it is equally almost always possible for the Judge hearing such an application to communicate with the intended defendant or respondent, either in a three way telephone call, or by a series of calls, or exchanges of e-mail. Judges do this routinely, including when on out of hours duty. Cases where no notice is required for reasons given in PD 25A para 4.3(3) are very rare indeed.*
>
> *The giving of informal notice of an urgent application is not only an elementary requirement of justice. It may also result in a saving of costs. The parties may agree an order, thereby rendering unnecessary a second hearing on a return date*".

21. As made clear in CEF, if short notice is given, the obligation of full and frank disclosure remains engaged, because: the ordinary requirement to give 3 days notice was "*the minimum period specified to ensure that proper legal and factual submissions of the respondent [could] be put before the Court*" (para 181); if shorter notice was given, the respondent could not be expected to be fully prepared and the full and frank disclosure obligation remained engaged, unless notwithstanding the short notice the respondent said all that could be said (paras 182-183); if this was not the case, the applicant was required to "*explain all legal and factual issues which were relevant to [the respondent's] submissions ...to bridge the gap between what fell*

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within his duty of full and frank disclosure and what [the respondent] said " (para 184).

22. Even if you can get away with pleading out your case "*in a laconic or protean way in anticipation of particularisation following disclosure"* (para 14 above), you cannot adopt this approach in your evidence if you want injunctive relief. In Caterpillar Logistics Services (UK) Limited –v- de Crean [2012] EWCA Civ 156, the claimant sought (amongst other things) an injunction restraining the employee from using confidential information. The order sought was refused because (para 68) it was "*hopelessly wide and vague. It does not specify the confidential information to be the subject of restriction with any certainty, but simply describes it as "all or any confidential information acquired by the respondent during her employment with [CLS] in whatever form". Paragraph 10 of CLS's Particulars of Claim does attempt to identify some of the confidential information it seeks to protect. I say some, because the allegation is that the respondent had access to the identified information "in particular, but not limited to" the listed information. It is I think significant that there is no evidence that the respondent has a copy of any of the documents referred to in that paragraph".* Indeed, the CA struck out the claim.

23. In Caterpiller the CA sounded a number of warning shots to over aggressive employers. First, the allegation that the employee might deliberately misuse the employer's confidential information in the future "*was wholly unsupported ... and ... should not have been made*" (para 39). Secondly, the Court was highly critical of the failure to explore an amicable solution before engaging in aggressive correspondence and then litigation – "*particularly ... where there is on one side a large corporation and on the other a former employee whose annual salary would be a small fraction of the costs of the litigation. Many Defendants, faced with such a claim, would simply concede rather than risk bankruptcy*" (para 71). Thirdly, the Court criticised delays in serving the Particulars of Claim, particularly given the serious allegations made. As Stanley Burnton LJ put it: "*[The employer's] Counsel told the Judge that it was normal practice in claims for confidentiality injunctions for the service of the particulars of claim to be deferred until after the application for an interim injunction has been dealt with. If that is the normal practice ... it should be discontinued ... it is the interests of justice and the efficient and fair conduct of*

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proceedings that the claimant's case be defined and pleaded as soon as possible, so that the defendant knows precisely what is the case against her, and so does the judge ... particularly ... where, as here, allegations of misconduct are made against a defendant ".

24. The differences in emphasis in Caterpillar and the more recent cases on pleading practice illustrate the chameleon quality of 'pleading points'. This tension can be seen in other aspects of the jurisprudence. Applicants for interim relief in employee competition cases frequently seek orders that would compel the Defendant to disclose what he has been up to – in circumstances where his conduct is by its very nature likely to have been secret and surreptitious. Such orders have been more grudgingly granted in recent years. In Aon v JLT [2009] EWHC 3448 (QB) [2010] IRLR 600 the court said that disclosure orders should not be allowed to "*subvert the usual accusatorial basis of our litigation, where the horse precedes the cart, into an inquisitorial one from the assumption that guilt has been proved and saying .... 'Tell us everything you have done which was is wrong*". This judgment has proved influential. Generally speaking, such orders should only be allowed where necessary to give effect to other interlocutory relief or to assist in undoing on-going harm, not simply to assist the applicant to prove his claim, because that is to put the cart before the horse (Landmark Brickwork Ltd –v- Sutcliffe & ors [2011] EWHC 1239 (QB) esp at paras 63-65 & 71). See too Thomson Ecology –v- APEM & Ors [2013] EWHC 2875 (Ch); intrusive search and deletion orders inappropriate in advance of standard disclosure. But isn't it slightly at odds with the suggested procedural course in Dellal?

25. In Republic of Djibouti –v- Boreh [2015] EWHC 769 (Comm), a solicitor's zeal to advance his client's case for freezing relief meant that he failed to correct evidence that he discovered was misleading. His client relied on that evidence at an *inter partes* hearing. The order the Court made at that hearing was later set aside, when the solicitor's misconduct was discovered, because "*although the duty of full and frank disclosure does not apply at the* inter partes *stage, the court should apply the same principles by analogy when considering the duty not to mislead the court (which applies at any stage) and the consequences of a breach of that duty*". As the Judge (Flaux J) put it at para 249:-

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> "*Given the seriousness of what occurred and the fact that [the solicitor] deliberately misled the court at the hearing on 10 and 11 September 2013, I have no doubt that … it is necessary to demonstrate to these claimants the importance of honesty and openness in all applications to the court,* a fortiori *in applications for worldwide freezing relief, by setting aside the freezing injunction. As Mr Kendrick QC put it at the outset of his written submissions:* "the devastation caused by the hydrogen bomb of a [freezing order] is far wider than the strict legal effect" *(per Jacob J in OMV Supply and Trading AG v Clarke, 14 January 1999 , quoting an earlier judgment of his own in Alliance Resources Plc v O'Brien). In cases where such wide ranging orders are sought, the importance of the court not being misled, let alone deliberately misled, cannot be over-emphasised. That is so whether the misleading is at an* ex parte *application or an* inter partes *hearing. This court operates in large measure on trust of the parties and lawyers who appear in cases before it, so that an abuse of trust such as occurred here has to be dealt with by discharging the relief which had been obtained by misleading the court"*.

Wrotham Park Damages; an alternative to injunctive relief?

26. Damages have traditionally been regarded as an inadequate remedy in employee competition cases, because of the difficulties of assessment. To take a recent example, in the garden leave case of Sunrise Brokers LLP –v- Rodgers [2014] EWCA Civ 1373; [2015] IRLR 57 no-less an employment specialist than Underhill LJ said (at para 53):-

> "*In a case of this kind there are evident and grave difficulties in assessing the loss which an employer may suffer from the employee taking work with a competitor: even where it is possible to identify clients who have transferred their business (which will not always be straightforward, particularly where the new employer is outside the jurisdiction) there may be real issues about causation and the related question of the length of the period for which the loss of the business could be said to be attributable to the employee's breach. If the sums potentially lost are large they will not be realistically recoverable from the employee in any event: in the present case no claim was advanced against EOX. There may be other intangible but real losses to the employer's reputation. I do not say that there may not be particular cases in which relief should be refused on the basis that damages are an adequate remedy – Mr Craig referred us to Phoenix Partners Group LLP v Asoyag [2010] EWHC 846 (QB), [2010] IRLR 594 – but unless a specific case to that effect was explicitly advanced, the Judge was in my view fully entitled to proceed on the assumption that injunctive relief was the appropriate remedy".*

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27. This dictum undoubtedly reflects the orthodoxy. In many cases, the new employer will be joined as a co-defendant, and will have deeper pockets than the individual. But the difficulties of proving damages (at least by a conventional method of assessment) will remain. But what if the employer could be awarded transfer fee damages, or a sum assessed by reference to a fair release fee for a relaxation of the restrictions in question? Traditionally, the Courts have set their face against the recognition of such damages, but there are signs that the position is changing.

28. In Wrotham Park v Parkside Homes [1974] 1 WLR 798, the Court declined to order a land-owner to destroy a property he had built on his land in breach of a covenant in favour of his neighbour. Instead, it awarded the neighbour damages in lieu of an injunction under Lord Cairns' Act, in such sum "*as might reasonably have been demanded by the [covenantee] … as the quid pro quo for relaxing the covenant"* (815). The Court assessed the damages as a modest percentage of the profit anticipated ("*with the benefit of foresight*") by the contract breaker. Employment lawyers have sought to exploit Wrotham Park for some time now, but conventional wisdom has leant against the award of such damages in the paradigm employee defection cases. Thus in Lighthouse Carrwood Ltd v Luckett [2007] EWHC 2866 (esp at para 58) it was said that (i) Wrotham Park damages are not available to the victim of a (contractual) breach as of right, but (ii) only "*where it is impossible to compute the loss or where compensatory damages would be inadequate*";.

29. In BGC –v- Rees & Anor [2011] EWHC 2009 (QB) Jack J gave short shrift to a claim for Wrotham Park or transfer fee damages for the alleged breaches by individual brokers of their notice periods and PTRCs. The claims posited a hypothetical negotiation between the recruiter and the employer from whom the employee had been (allegedly) poached. Tullett Prebon (i) argued that Wrotham Park could not be used as a panacea where the loss could be conventionally assessed, but where the alleged breach had not in fact harmed the victim's economic interest, and (ii) pointed to the fact that there was no decided case where such damages had been awarded for breach of an employment contract. Jack J. agreed (at para 97): "*I have concluded that in the present situation release payment damages are not available … In English law three cases are of particular relevance: AG v Blake [2001] 1 AC 268, World Wide Fund for Nature v World Wrestling Foundation [2008] 1 WLR 455*

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and van der Gaarde v Force India [2010] EWHC 2373 QB. The situation in the present case is one in which the court will ordinarily assess the loss of profit as best it may and award a figure. The assessment may be difficult depending on the evidence which is available. But the court is used to that, and can arrive at a figure just as it can, for example, in the difficult situation where it has to assess the loss of future earnings of a seriously injured teenager. ***The intended function of the claim here is to avoid BGC's problem that it cannot show that it has suffered any loss because it has not in fact done so. In my judgment the award of release payment damages is not available as a substitute for conventional damages to compensate a claimant for damage he has not suffered. Nor should it be used to award a larger sum than a conventional calculation of loss provides****. [Emphasis Supplied]*".

30. There were signs in subsequent cases that other decisions of the High Court might take a less restrictive approach. An attempt was made to claim Wrotham Park damages for breach of a confidentiality agreement in Jones –v- IOS (RUK) Ltd & Anor [2012] EWHC 348 (Ch). Whilst the Judge found that (on the facts) a hypothetical negotiation would have yielded no (or at most a nominal) licence release fee, he did not suggests that this sort of case was *per se* inappropriate for such an approach to the assessment of loss. On the contrary, he regarded it as "*now well established that in an appropriate case damages for breach of contract may be measured by the benefit gained by the contract breaker from the breach ... the court may award damages to the claimant to represent the price he could reasonably have extracted for requiring a licence payment in return for permitting the defendant to do what he has done*" (para 97). However, the consideration of the hypothetical negotiation had to be "*founded upon the underlying realities of the situation against which it falls to be undertaken*" (para 108) and would only be appropriate where it was manifestly unjust to leave the claimant with no award (para 109). More recently, in Force India –v- I Malaysia Racing Team & Ors [2012] EWHC 616 (Ch) Arnold J concluded that what he called "*negotiating damages*" were available for breaches of both contractual and equitable obligations of confidence, although only where the claimant could not prove that he had suffered loss in any of the more conventional ways (para 424).

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31. In One Step (Support) Ltd –v- Morris-Gardner & Anor [2014] EWHC 2213, the claimant (a company providing supported living services to children leaving care and to vulnerable adults) alleged that the defendants (a former director and manager) had breached non-compete covenants and obligations of confidentiality by setting up and operating a rival business. The Court found the claim well founded. It declined a claim for an account of profits for breach of contract (on the basis that such a remedy was only available exceptionally following AG –v- Blake, and on the facts the breaches were relatively straightforward and unremarkable). However, the Court concluded that there was no need to find "*exceptional circumstances for there to be an award of Wrotham Park damages, which might be considered to be simply one form of compensatory damages*" (para 104), and that this was "*a prime example*" of a case in which such damages should be available – "[*t[he defendants have breached straightforward restrictive covenants in circumstances where it will be difficult for One Step to identify the financial loss it has suffered by reason of the ... wrongful competition, not least because there was a degree of secrecy in the establishment of [the defendant's] business which has not been fully reversed by the disclosure process*" (para 106). The Judge buttressed the conclusion that negotiating damages were available because "*the covenants provided that the restraint was subject to consent, not to be unreasonably withheld*". He awarded Wrotham Park or ordinary damages, at the Claimant's election (para 108).

32. This judgment (if followed) seems to show a significant relaxation of the circumstances in which Wrotham Park damages might be appropriate. Indeed, the judgment doesn't recognise any of the notes of caution or restriction sounded in earlier cases (perhaps because they weren't cited or relied upon), and suggests that such damages are available on an either/or basis at the claimant's election (presumably depending upon the option that yields the greatest return). There was indeed nothing unusual about the facts of One Step – where ex-employees set up a competing business, their actions are almost always secretive and surreptitious. Even where a covenant does not recite that it may be relaxed by agreement, this is always possible by negotiation and it is hard to see this as a potent independent justification for the Court's order.

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33. One Step was followed by CF Partners (UK) LLP –v- Barclays & Ors [2014] EWHC 3049 (Ch), in which the High Court (Hildyard J) awarded the Claimant 10 million Euros as 'Wrotham Park' damages for breach of an equitable obligation of confidence. So far as the writer is aware, this is the largest award of its kind to date, and is indicative of the increasing judicial willingness to assess damages by reference to the release or licence fee that would have been agreed in a hypothetical negotiation. The CF Partners case gives some interesting guidance on the nature and basis of assessment, as well as on breach of confidence as a cause of action more generally.

34. Basing himself on Seager –v- Copydex (No. 2) [1969] 1 WLR 809, the Judge started from the premise that the basic approach to any assessment of damages for breach of confidence (whether the obligation was contractual or equitable) was to assess the value the information that the defendant took (para 1182). If the information was trivial and readily available elsewhere, its value might be charged at the price a consultant would have charged to obtain it. If it was very special indeed, it might be valued on the basis of a capitalised royalty. If it fell somewhere in the middle ("*involving something unusual such as could not be obtained by just going to a consultant*") a Wrotham Park approach would be justified (valuing the information "*at the price a willing buyer would pay a willing seller*") (para 1184). The Judge thought that this was just such a case (paras 1194-1195).

35. Thus the Court had to ask - what consideration could CFP reasonably have demanded from the Bank as the quid pro quo for permitting the use of its confidential information (para 1198). This was a very artificial exercise, especially given the huge differences between the parties as to what would have been their negotiating position, which made it hard to envision any reasonable discussion between them (paras 1199-1200). In carrying out the exercise: the fact that the parties would not in practice have agreed a deal is irrelevant; the notional negotiation is deemed to have taken place in the commercial context as it existed at the date of breach; but if there had been nothing like an actual negotiation between the parties, the court could look at the eventual outcome and consider whether that provides a useful guide as to what the parties might have thought at the time of their negotiation (para 1204). Whilst the assessment is an objective one "*the hypothetical negotiation may be*

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informed by evidence as to what factors and negotiating arguments the parties say (subjectively) they would have advanced" (para 1205). But "*it is for the court to decide what the shape and result of the hypothetical negotiation .... would have been*" (para 1209). Whilst expert evidence may assists in identifying metrics for measuring the risks and potentialities idenitified during the hypothetical negotiation "*the resolution is not for expert opinion but overall judicial assessment*" (para 1210).

36. These are potentially significant developments for High Court employment practitioners. It would be a bold defendant who argued that the injunction should not be granted because Wrotham Park damages could be awarded against him. And on the present state of the jurisprudence, such an argument is unlikely to deprive the employer of his injunction (if he wants it). That would create a position where the wealthy poacher could seek to effect the compulsory purchase of his rival's key employees and clients. But this is a developing jurisprudence that those of us practising in this area must watch closely. In Brainfield –v- Harrison [2015] EWHC 399 (Ch) a claimant sought to rely upon One Step to secure damages in a case where serving employee fiduciaries had set up a rival business in their employer's time, but having failed to plead or even open the claim on that basis, the Judge concluded that the argument was not open to him. We need to ensure that we do not miss similar opportunities for our clients.

What does the High Court Judge expect of Practitioners?

37. A practitioner's duty of honesty and trust to the Court (discussed in the Djibouti case) surely goes without saying. But what does the Court expect beyond or in addition to that? This paper referred earlier to (i) the criticisms of opportunistic opposition fo to relief from sanctions cases, and (ii) the guidance in Lawrence David –v- Ashton, encouraging parties (where possible) to avoid contested interim hearings. These are examples of a more general judicial expectation of co-operation and proportionality. By way of recent illustration, in Kazaksthan Kagazy –v- Khunus [2015] EWHC 996 (Comm), the Commercial Court has deprecated the tendency of parties' solicitors to be unnecessarily aggressive, combative and disparaging in correspondence. The Court identified a number of "*universal guiding principles*" for practitioners to follow (at para 3)-

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"i) The court expects solicitors and counsel to take appropriate steps to conduct the debate, whether in advocacy or in correspondence, in a way which will lower the temperature rather than raise it.

ii) This remains the case even where – indeed particularly where – any concession is perceived as anathema by one or other or both sides. It is perfectly possible to be vigorous without being insulting.

iii) Imputations on others, whoever they may be, should only be made if they are both necessary and justified. If they are not strictly necessary, or they are not objectively justified, they should be rigorously excluded. Sometimes they are necessary, for example when seeking a freezing order, or when an allegation of bad faith is necessary. They must be confined to what is necessary. As to what is objectively justifiable, regard should be had to the degree of proof that is needed. What is needed in order to support an application for a freezing order may differ from what may be required if an imputation is to be made and sustained in a different context.

iv) Rather than focus on criticisms of the other side, the focus should be on working out a timetable which will enable opposing parties to consider what facts and issues can be agreed, and what information and revised estimates for reading and hearing time can be given to the court prior to the hearing so as to ensure that the court's time is used efficiently and productively".

v) If it is likely that a point which might be taken by a party, or it becomes likely that a point previously taken by a party, will not significantly advance that party's case, or will require a disproportionate amount of time or resources if it is to be resolved, then notification should be given that the point will not be relied upon for present purposes. The notification can be accompanied by an appropriate reservation as to the position in future."

38. Judges hate aggressive and bad tempered correspondence. If they read it all, it is with boredom and disinterest and it frequently rebounds to the disadvantage of the party responsible for it. The guidance in the Khunus case is worth heeding (and adhering to). And as already observed, you need to be careful if you are seeking to take tactical advantage of a modest mistake on an application for relief from sanctions; this is not what the Court expects of you, and may penalise your clients in costs if it considers that you/they have been unreasonable (para 9 above).

How will the Judge Resolve your High Court Dispute (and what does this tell you about how to advise your client and conduct litigation)?

39. The importance of documents in civil/commercial litigation has long been recognised. The fact that a party (or his witness) may perform poorly or come across badly when

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giving evidence is unlikely to furnish the Court's *first* touchstone or stopping point in resolving the issues of credit and finding the facts. By way of example, in Onassis –v- Vergottis [1968] 2 LR 403, Lord Pearce said (at 431, emphasis supplies) that:-

> "*'Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be … though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or overmuch discussion of it with others?* ***… a witness, however, honest, rarely persuades a judge that his present recollection is preferable to that which was taken down in writing immediately after … contemporary documents are always of the utmost importance …****"*

40. This reflects a consistent judicial approach. See e.g. Re Mumatz Properties [2011] EWCA Civ 610 (per Arden LJ at paras 12 & 14) and the Ultraframe case ([2005] EWHC 1638 (Ch)) (Lewison J at paras 13 & 16: "*when faced with sharply conflicting oral testimony, judges often like to start with the contemporaneous documents as providing a firm scaffolding from which to build a picture of the facts ... I have taken as my stepping stones ... those documents which both sides accept as authentic*".

41. More recently, Leggatt J has gone further. In Gestmin SGSP S.A. –v- Credit Suisse (UK) Ltd & Anor [2013] EWHC 3560 (Comm), he said (emphasis supplied):-

> ***"Evidence based on recollection***
> *15. An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.*
> *16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.*
> *17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has*

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demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).

18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

21. It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all

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remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.
22. In the light of these considerations, ***the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.***
23. It is in this way that I have approached the evidence in the present case".

42. The same judge returned to his theme in Brogden v Investec Bank Plc [2014] EWHC 2785 (Comm); [2014] I.R.L.R. 924, where he said (at paras 50 & 51) that:-

"*50 .... This case seems to me to illustrate the truth of the observation of Lord Justice Browne that "the human capacity for honestly believing something which bears no relation to what really happened is unlimited": quoted in Tom Bingham, 'The Business of Judging' (OUP, 2000) at p.15, and by Mostyn J in A County Council v M and F [2011] EWHC 1804 (Fam) at para 30.*

51 I have formed that view for three main reasons.

No documentary evidence

52 The first is that there is no documentary record of, nor documented reference to, any such discussion or agreement. It is not merely that there is a want of proof – though there is. This is a situation in which absence of evidence is itself evidence that no agreement was in fact made. The size of the bonuses to which they would be contractually entitled, and hence the way in which such bonuses would be calculated, was clearly a matter of great significance to the claimants. On their own evidence, it featured prominently in their discussions with Mr Van Der Walt and in their decision to leave secure jobs and join Investec. If in those discussions an agreement had been reached about how the claimants' bonuses were to be calculated which was intended to bind the Bank, I am sure that they would have thought it of sufficient importance to make some record of that fact ...."

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43 Leggatt J's judgment is proving influential. It is important to practitioner's in two key respects. First, when we advise our clients on merits, we are really telling them what we think that the judge is likely to do. To understand the process of judicial resolution should enable us to give our clients a more accurate steer as to likely judicial outcome. Secondly, Leggatt J's comments underscore the critical importance of document preservation at the earliest possible stage of any dispute. 31BPD.3 requires that "*as soon as litigation is contemplated, the parties' legal representatives must notify their clients of the need to preserve disclosable documents. The documents to be preserved include electronic documents which would otherwise be deleted in accordance with a documents retention policy or … in the ordinary course of business*". In contested High Court litigation, solicitors and their clients frequently find themselves trading blows about compliance with this obligation (in terms that offend against the guidelines given in the Khunus case). In extreme circumstances, a serious failure to comply with this obligation can lead to the dismissal of the claim as an abuse of the process, if it renders a fair trial impossible; Arrow Nominees –v- Blackledge [2001] BCC 591. The circumstances in which such an argument has succeeded to date have been rare, but that may change in these post-Jackson times.

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