Neutral Citation Number: [2015] EWHC 218 (QB)

Case No: HQ11X02148

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 6 February 2015

Before: **Mr Justice Simon**

Between :

David Jackson	**Claimant**
and	
(1) Thompsons Solicitors (a Firm) **(2) Stephen Cavalier** **(3) Michael Antoniw** **(4) Philip King** **(5)Anthony Patterson** **(6) Geoffrey Shears** **(7) Robert Wood** **(8) Douglas Christie** **(9) Lawrence Lumsden** ~~**(10) Templeton Insurance Limited**~~ **(11) John Prescott, Baron Prescott of Kingston-upon-Hull**	**Defendants**

Mr Patrick Green QC, Mr Matthew Bradley and **Ms Hannah Curtain** (instructed by **Maitland Walker LLP**) for the Claimants
Mr Michael Pooles QC and **Mr Andrew Moran** (instructed by **Reynolds Colman Bradley LLP**) for the Defendants

---

Hearing dates: 6-10, 13-16, 20-24, 27-31 October, 3-5, 12-14 November 2014

Approved Judgment

I direct that pursuant to CPR PD 39A §6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MR JUSTICE SIMON

Mr Justice Simon:

Introduction

1. The Claimant is the assignee of claims from the liquidator of a firm of solicitors, Greene Wood and McLean LLP ('GWM'). The claims concern the failure of an application for a Group Litigation Order ('the GLO') brought on behalf of a group of coal miners. The object of the GLO was the recovery of sums which had been deducted from compensation awards in their favour (or in favour of their dependents) from the Coal Health Compensation Schemes in respect of personal injuries suffered in the course of their employment with the British Coal Corporation. The Coal Health Compensation Schemes covered two types of disease or injury: Chronic Obstructive Pulmonary Disease ('COPD') and Vibration White Finger ('VWF'). The Judge in charge of the COPD litigation from 1995 was Turner J. He retired from the High Court Bench in 2002 but continued to act as the Supervising Judge until 2006.

2. The GLO was brought against a number of respondents and was vigorously opposed. In a judgment on 18 May 2006 Sir Michael dismissed the GLO application with costs, made an interim costs order against GWM's clients in the sum of £600,000 and refused permission to appeal. He also invited the respondents to consider an application for a wasted costs order against GWM.

3. The GLO application had been backed by an After the Event ('ATE') insurance policy issued by an Isle of Man insurer, Templeton Insurance Limited ('Templeton'), whose managing-director was Ralph Brunswick. The Templeton policy insured GWM's clients against the risk of an order for adverse costs and liability for their own disbursements in connection with an action brought against the Union of Democratic Miners ('the UDM'), its claims handling company, Vendside Ltd and five firms of solicitors who had acted for the claimant miners. These were the seven respondents to the GLO application.

4. On 25 May 2006, a week after Sir Michael Turner's judgment dismissing the GLO application, Templeton purported to avoid the ATE insurance policy. It is the Claimant's case that the combination of the GLO decision and the subsequent avoidance of the ATE cover, effectively destroyed GWM's business.

5. In the present claim the Claimant seeks to recover a principal sum of the order of £71 million as damages for conspiracy and other torts against the 1st Defendant, a firm of solicitors. There are also claims against various named present or former partners of the firm, the 2nd-9th Defendants and the 11th Defendant (whom I shall refer to as Lord Prescott, although he was a Member of the House of Commons at the material time). Templeton, formerly the 10th Defendant, was released from the proceedings by a Consent Order dated 29 February 2012.

6. As the case progressed the Claimant dropped allegations against some of the Defendant partners and focussed his case against the firm, one of its partners: Geoff Shears (the 6th Defendant) and Lawrence Lumsden (the 9th Defendant), a partner in the separate firm of Thompsons Scotland. The case against Lord Prescott also became considerably narrowed.

7. In short summary, the Claimant's case contained three central allegations occurring in three material periods.

8. First, it is said that the 1st-9th Defendants ('the Thompsons Defendants') unlawfully interfered with the operation of the ATE cover provided by Templeton to GWM's clients. The effect of this included causing Templeton temporarily to withdraw its cover in November 2005, thereby giving rise to doubts about its sufficiency and enforceability when it came to be considered at the hearing of the GLO application in April 2006. Secondly, it is alleged that Thompsons took steps to ensure that Sir Michael Turner would hear the GLO application knowing or believing that he was biased against the application, and with the specific intention that the GLO application would be dismissed. Thirdly, it is said that in the course of concerted efforts on behalf of their union clients, the Durham Miners Association (the 'DMA') and the Durham Colliery Mechanics' Trust (the 'DCMT') Thompsons committed further unlawful acts against GWM (actionable breach of confidence and deceit); although by the conclusion of the trial this third aspect of the claim was relied on more by way of background than as a separate and independent route to judgment.

9. The first material period of enquiry is February and March 2005, when Sir Michael Turner sought and received a report from Mr Lumsden about the practice of solicitors making deductions from miners' compensation in favour of trade unions. It is the Claimant's case that in private correspondence the Judge revealed a predisposition in favour of Thompsons's position and adverse to what was to become GWM's position. This predisposition remained unknown to GWM throughout the period when the GLO was being advanced and up until the time of the GLO judgment.

10. The second period of enquiry is late October and early November 2005, when it is alleged that there was further private correspondence to and from Sir Michael Turner which excluded GWM, and during which some of the Thompsons Defendants took active steps to ensure that he would be the Judge hearing the GLO application. It was also during this period and, the Claimant says, not coincidentally that Templeton (in a letter dated 15 November 2005) withdrew its agreement to provide the ATE insurance cover for the GLO application, although it subsequently restored it on 23 November 2005.

11. The third material period is late February 2006, at a time when Thompsons became aware that Templeton had reinstated the ATE cover for the GLO application. The Claimant contends that illegitimate pressure was brought to bear on Templeton which was intended to stop its continued support of the GLO application. This pressure is said to have been applied during a number of telephone calls, and at a meeting at Thompsons's offices on 27 February 2006. Among those calls was one from Lord Prescott to Mr Brunswick at about 18.30 on 27 February when Mr Brunswick was at London City Airport.

12. The Defendants submit that, before one gets into the detail of the claim, there are a number of material matters which make the Claimant's factual case improbable. First, although there were five solicitors who were respondents to the GLO application, Thompsons was not one of them. They had no direct interest in the result. Secondly, Sir Michael Turner had taken a judicial oath which still bound him to 'do right to all manner of people ... without fear or favour, affection or ill-will.' Whatever the merits of the argument about appearances, the suggestion that he was actually biased against

GWM and their clients and was known to be, is inherently unlikely. Thirdly, the suggestion made to Sir Michael Turner that he should hear the GLO application, came not from Thompsons, but in a letter from the Claimants' Group (the 'CG'), who acted (as their name suggests) in the interests of all BCRDL claimants and which included solicitors who had never made any deductions, had no direct interest in the result of the GLO application although they had a clear interest in avoiding anything which might cause delay to the just and efficient determination of BCRDL claims.

Bias

13. It is convenient at this stage to consider what is meant by bias.

14. While the law on what constitutes apparent bias is well-settled the position with regard to actual bias is less so. There are potentially two types of case. The first is where the decision-maker has a direct pecuniary, proprietary or personal interest in the outcome of the case. The second is where the decision-maker is shown to have been directly influenced by a fixed predisposition or predilection. In the case of a fixed predisposition or predilection it will be for reasons unconnected with the merits of the case, and involves a closed mind, which is not susceptible to any reasonable persuasion, see for example, *R v. Inner West London Coroner, ex parte Dallaglio* [1994] 4 All ER 139, Simon Brown LJ at 151 and *Flaherty v. National Greyhound Racing Club Ltd* [2005] EWCA Civ 1117 at [28].

15. It is a human characteristic that people have predilections, beliefs and sympathies, and judges and tribunals are no exception. The fact that a Judge or Tribunal may hold certain pre-conceived views does not by itself constitute actual bias unless it is such as to render them immune to contrary argument. The crucial distinction is between a predisposition towards a particular outcome and a predetermination of the outcome.

> The former is consistent with a preparedness to consider and weigh factors in reaching the final decision; the latter involved a mind that is closed to the consideration and weighing of relevant factors;

see *National Assembly for Wales v. Condron* [2006] EWCA Civ 1573, Richards L.J at [43], (with whom Ward and Wall L.JJ agreed) and *De Smith's Judicial Review*, 7th Ed (2013). §10-058.

16. The courts have shown themselves reluctant to investigate allegations of actual bias and there is authority to the effect that submissions of actual bias should not be made, see for example *R. v. Gough* [1993] A.C. 646, see Lord Goff at 659D-H and Lord Woolf at 672G-673B. There are three reasons why the courts have seldom embarked on such inquiries. First, there are obvious difficulties in exploring the actual state of mind of a judge (for example, a judge is not compellable as a witness in relation to his own decision). Secondly, bias can operate in an insidious way so that the person alleged to be biased may be unconscious of it. Thirdly, it may be very difficult to establish. For an interesting discussion of the reasons for judicial diffidence in investigating actual bias, see Civil Justice Quarterly 2008: '*Facing Up to Actual Bias'*, by James Goudkamp. Nevertheless, and despite these difficulties, when an allegation of actual bias is made the court cannot avoid adjudicating on it and is bound to undertake, what has been described in a different context, as the 'duty of

decision', see *R v. Derek William Bentley (deceased)* [2001] 1 Cr App R p.307 at [68].

17. It is to avoid some of these difficulties that the Courts have developed the test of apparent bias, which avoids the difficulties of proof, is easier to demonstrate and will usually be sufficient, see for example *R v. Liverpool Justices, ex p. Topping* [1993] (DC) 1 WLR 119 at 122G-123D.

18. When considering the question of apparent bias the court's approach is, first, to ascertain all the circumstances which have a bearing on the suggestion that the judge or tribunal was biased, and secondly, to ask itself whether in those circumstances a fair-minded and informed observer would conclude that there was a real possibility that the tribunal was biased, see for example *Porter v.Magill* [2002] 2 AC 357, Lord Hope at [103]. In *Re Medicaments and Related Classes Goods (No.*2*)* [2001] 1 WLR 700 at [83] Lord Phillips of Worth Matravers described the principles.

> (1) If a judge is shown to have been influenced by actual bias, his decision must be set aside ... (2) Where actual bias has not been established the personal impartiality of the judge is to be presumed. (3) The court then has to decide whether, on an objective appraisal, the material facts give rise to a legitimate fear that the judge may not have been impartial. (4) The material facts are not limited to those which were apparent to the applicant. They are those which are ascertained on investigation by the court. (5) An important consideration in making an objective appraisal of the facts is the desirability that the public should remain confident in the administration of justice.

19. It may be that a further stipulation needs to be added: although the material facts are not limited to those which were apparent at the time, if there are no new facts, the principles associated with finality of judgments are likely to weigh heavily, if not dispositively, against the grant of relief.

20. In *Locabail (UK) Ltd. v. Bayfield Properties Ltd.* [2000] Q.B. 451 (the judgment of the Court consisting of Lord Bingham of Cornhill CJ, Lord Woolf MR and Sir Richard Scott V-C) at p.480 F-G, the Court of Appeal drew a distinction between (a) real grounds for doubting the ability of a judge to ignore extraneous considerations, prejudices and predilections so as to bring an objective judgment to bear on the issues before him, which would ground an argument of apparent bias, and (b) a different situation:

> The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness unreliable, would not without more found a sustainable objection.

21. I would add that the significance of a judge previously expressing views about a case or an issue must be viewed in the light of the circumstances. For example, if the judge has expressed the view at a 'without notice' hearing that a claimant has a good arguable case, it cannot preclude him from hearing the case or determining that issue

when both parties attend. Similarly, where a judge is case managing complex civil litigation, the expression of a view at a time when directions are being discussed cannot be taken as a predetermined view of the matter or an inability to bring an objective judgment to bear on the ultimate issue. Case management of large scale litigation would otherwise be impossible. As the Court went on to say in *Locabail* the question of apparent bias is likely to depend on the facts and circumstances of the case.

Bias: the Claimant's case

22. In the present case Mr Green QC advanced the Claimant's case on actual bias on the basis that the Judge had lost his objectivity. In other words, he was so involved in the effective management of the BCRDL scheme that he was unable to view the GLO application other than as a threat to it and consequently failed to deal with it on the merits. It seems to me that this way of characterising the complaint is not significantly different to an allegation that the decision-maker had, for a particular reason, a closed mind which was not susceptible to persuasion.

23. In support of his 'lack of objectivity' test, the Claimant relied on the decision of the Court of Appeal in *Co-operative Group (CWS) Ltd. v. ICL* [2003] EWCA Civ 1955 at [82-84]. These passages do not greatly assist. In [82] and [83] reference was made to the unusual conduct of the judge during the course of the trial in that case, and [84] sets out the statement of principle from the *Locabail case* (see above) that a Judge ought not to lose or give the appearance of losing the ability to try a claim with an objective judicial mind. The complaint which was upheld in the *Co-operative Group* case was not that the judge had come to the trial with any preconceived prejudice or predilection or bias: but that during the course of the trial he had shown 'an inability to grapple objectively with the issues of fact and law present to him, so that in the end the trial was unfair'. It is to be noted in the present case that there is no criticism of Sir Michael Turner's conduct of the hearing of the GLO application.

Causes of action

24. The Claimant makes an overarching submission that the facts of what occurred speak for themselves and that 'the law will not stand by and leave the Claimant without remedy,' particularly 'in the light of the special weight which the common law (and Article 6 of the European Convention on Human Rights) give to the citizen's free and fair right of access to courts, to which the Defendant's conduct is an affront.'

25. By the conclusion of the evidence the Claimant had narrowed the causes of action to: (1) an abuse of process tort, encompassing: (a) procuring a breach of Article 6 of the ECHR, (b) procuring a breach of the common law right to a fair trial, (c) interference with the administration of justice and (d) the tort of abuse of process; (2) causing loss by unlawful means and an unlawful means conspiracy; (3) procuring a breach of contract; (4) deceit; (5) actionable non-disclosure; and (6) harassment contrary to s.3 of the Protection from Harassment Act 1997.

26. Since there was little dispute as to the legal tests to be applied, I can summarise the law relatively briefly.

The Abuse of Process tort

27. This was put in a number of ways but each would depend on establishing that the judge was actually biased. Mr Green QC submitted that it involved the bringing about of the breach of a legal right. He referred to a passage in *Clerk & Lindsell on Torts* 21st Ed. at 24-27.

> The civil liability bequeathed by *Lumley v. Gye* (1853) 2 E & B 216 is not restricted to procuring a breach of contract. As Lord Nicholls recognised in *OBG Ltd v. Allan* [2008] 1 AC p.1, the majority view in *Lumley v. Gye* was that knowingly and intentionally procuring the violation of a right was a cause of action in all instances where the violation was an actionable wrong, as in violations of a right to property, whether personal or real, or to personal security. The requirements as to knowledge and intention are parallel to those determining liability for procuring breach of contract.

28. His submission was that the law will allow a claim for damages where a defendant with knowledge of the issues (or likely issues) in a trial, and with the intention to subvert the fair determination of those issues, deliberately does an act whose direct effect is to bring about a trial which is unfair. Although there may be difficulties with the precise formulation of the test, I am prepared to assume that where a defendant has deliberately and knowingly brought about the appointment of an actually biased tribunal or judge, so that in effect there is no real trial at all, the law may provide a remedy which goes beyond the conventional relief of setting aside an award or allowing an appeal.

29. The first stage of Mr Green QC's argument was the submission that a party to litigation should not communicate privately with a judge hearing a case. In general this is plainly correct. The second stage is that, having elicited that he held views favourable to their position, the Thompsons Defendants arranged for Sir Michael Turner to hear the GLO application and then implicitly represented to GWM that there was no reason why he should not hear the case. Each stage of the argument calls for a careful consideration of the facts.

Causing loss by Unlawful Means and Unlawful Means Conspiracy

30. The matters which a claimant must prove in order to establish the tort of causing loss by unlawful means are: (a) interference with the actions of a third party in which the claimant has an interest; (b) the use of unlawful means; (c) an intention to injure and (d) consequential loss and damage to the claimant, see for example *OBG Ltd and another v. Allan and others* (above) at [45]-[47]

31. The matters which the claimant needs to prove in order to establish liability for an unlawful means conspiracy are: (a) a combination or agreement between two or more persons; (b) either to take actions which are unlawful or use means which are unlawful; (c) with the intention of injuring the claimant by the use of those unlawful actions or means; and (d) the use of those unlawful actions or means caused damage to the claimant which is more than incidental, see for example *Kuwait Oil Tanker v. Al Bader* [2000] 2 All ER (Comm) 271 at 311 and *Clerk & Lindsell* §24-93 and following. Where a defendant seeks to advance his own interests by pursuing a course

which he knows will necessarily injure the claimant, the intention is established, see *OBG Ltd v. Allan* (above) at [164]-[166].

32. Similar facts are relied on in relation to these causes of action as in relation to the abuse of process tort, although some further background is relied on to establish the necessary intent.

Procuring a breach of contract

33. In order to sustain this cause of action a claimant must prove: (a) the procurement or persuasion (advice is not sufficient) of a third party; (b) the defendant's knowledge of the existence of the contract and that it is procuring a breach of contract; (c) an intention to cause the breach of contract; (d) a breach of contract; and (e) damage as a result of the intended breach, see *OBG Ltd v. Allan* (above) at [39]-[44] and *Clerk & Lindsell* at 24-14 and following.

34. The Claimant contends that Thompsons communicated with Templeton in November 2005 and that it tortiously procured Templeton to withdraw the ATE insurance cover for the GLO application on 15 November 2005. He also relies on the communications in February 2006 between Thompsons (and Lord Prescott) and Mr Brunswick of Templeton. Reliance is placed both as a free-standing cause of action and (particularly in relation to the February 2006 communications) as constituting the required unlawful means for the purposes of the conspiracies.

35. It will be necessary to consider these matters in the light of the facts as I find them to be.

Deceit

36. This requires proof that: (a) the defendant made a representation of fact to the claimant; (b) the representation was false; (b) the defendant knew it was untrue or was reckless as to whether it was true or not; (c) the defendant intended that the claimant act in reliance on it; (d) the claimant did in fact rely on it and thereby suffered loss, see for example *Clerk & Lindsell* at 18-01 and following.

37. As to requirement (a), the representation may be made once but nonetheless amount to a continuing representation, it may be made by silence or conduct and it may carry with it the implied representation that the defendant did not know of any matter which might falsify the assurance, see for example, *Mellor and others v. Partridge and another* [2013] EWCA Civ 477 at [17].

38. The Claimant relies first on the written report made by Mr Lumsden to Sir Michael Turner on 23 March 2005, for which Thompsons are liable; and secondly on the procurement of Sir Michael Turner as the judge hearing the GLO application. Again, these matters are also relied on as constituting the required unlawful means for the purposes of the conspiracies.

Actionable non-disclosure

39. This cause of action depends on there being a duty to disclose known material facts to the Court.

40. In this context it is necessary to distinguish two types of duty to disclose. First, where a party may be under a legal duty to disclose material facts to a contractual counterparty, for example, an assured's obligation to disclose to an insurer facts which are material to the risk. Secondly, the obligation of a party to litigation to make full and frank disclosure to a court in particular circumstances, for example on a 'without notice' application. The Claimant's case is the latter type. However, no authority was cited in support of the proposition that a duty is owed by a non-party or that a breach of such an obligation can give rise to a free-standing tort, rather than a potential obligation to compensate under the cross-undertaking in damages. While I do not rule out the possibility of such a free-standing tort, it is unnecessary to say anything more about it, since, if the facts relied on do not give rise to a claim under the Abuse of Process torts or the Conspiracy claims, they are very unlikely to give rise to a claim for damages under this heading.

Harassment contrary to s.3 of the Protection from Harassment Act 1997

41. This requires: (a) conduct which occurs on at least two occasions, (b) which is calculated in an objective sense to cause alarm and distress; (c) which is objectively judged to be oppressive and unacceptable; and (d) which causes loss. Two further points may be noted: (1) what is oppressive and unacceptable may depend on the social or working context in which the conduct occurs; and (2) a line is to be drawn between conduct which is unattractive and even unreasonable, and conduct which can be described as a 'torment' of the victim 'of an order that would sustain criminal liability', see for example *Clerk & Lindsell* at 15-21. Mr Green QC acknowledged that, since this claim relates to telephone calls made to Mr Brunswick on 27 February 2006, only he could have brought this claim. For this reason he did not rely on it as a free-standing cause of action, but as constituting the unlawful means for the conspiracies.

The British Coal Respiratory Disease Litigation

42. In a memorandum prepared for the Trade and Industry Select Committee which reported in February 2005, the Department of Trade and Industry ('DTI') set out the background and history of the British Coal Health Compensation Schemes ('BCHCS') which arose from claims in respect of lung disease (COPD) and hand injuries (VWF). British Coal, whose liabilities had been taken over by the DTI, had been found liable for both COPD and VWF.

43. Following these judgments the DTI set up compensation schemes to deal with the anticipated claims. One of these was the British Coal Respiratory Disease Litigation ('BCRDL') scheme.

44. The DTI entered into detailed Claims Handling Agreements ('CHAs') with the Claimants' Solicitors Group ('CSG'), following full and lengthy negotiations. Its purpose was that the BCRDL claims could be settled without recourse to the Court, save where issues of principle arose. The CSG was itself represented by a much smaller group of solicitors known as the Coordinating Group ('CG'). The CHA provided that the members of the CG were six firms of solicitors: Irwin Mitchell, Hugh James, Towells, Nelson and Co, Ross & Co and Thompsons, Scotland. In practice most of the work of the CG was carried out by five individuals from those firms: Andrew Tucker (Irwin Mitchell), Roger Maddocks (at the material time with

Irwin Mitchell), Lawrence Lumsden (Thompsons, Scotland), Gareth Morgan and Peter Evans (Hugh James). Membership of the CG was individual rather than as a representative of the firm.

45. The DTI memorandum described the operation of the CHAs:

> The courts oversee the CHAs' operation aiming to avoid further court action. The Judges resolve points of law and the CG reports back to them regularly (3-4 times a year) on progress in settling the claims.

46. Nearly 770,000 claims were registered under the two schemes, with costs then estimated to be of the order of £7.5 billion.

47. The terms of CHAs were approved by the High Court Judges who managed each of the schemes.

48. The role of the supervising judges in relation to the CHAs was reviewed by the Court of Appeal in *AB and others v. British Coal Corporation* [2006] EWCA Civ 1357. The case concerned two issues which had arisen under the VWF scheme: a general issue as to the power of the Supervising Judge and a narrower issue on the power to award interest. In relation to the general issue, Pill LJ at [24] described some of the features of the scheme: including the necessary powers of the Supervising Judges to ensure that individual claims were processed fairly and efficiently, and to ensure the just disposal of those cases. Pill LJ noted the close involvement of the Supervising Judges, the importance of cooperation between the parties and the need for active case management by the Judges, including the making of substantive and procedural rulings.

49. Members of the CG would meet regularly with representatives of the DTI to discuss and, where possible, resolve disputes in relation to the application of the CHAs. As the Judge in charge of the BCRDL, Sir Michael Turner held three or four review hearings each year, in the course of which the operation of the CHAs would be reviewed and points in issue would be determined. The CG would instruct counsel, draft reports for the Court and generally represent the interests of claimants under the scheme. Mr Tucker, as coordinator of the CG, would send and receive emails on its behalf. Generally, correspondence between the CG and Nabarro LLP (who acted for the DTI) was not copied to the Judge, but there were occasions when it was and there were occasions when the Judge corresponded with the parties, for example, when a question from a Member of Parliament called for a response.

BCRDL costs

50. Under the CHAs the fees of the solicitors in successful qualifying claims were met by the DTI on a scale set out in the CHAs; and there was a common understanding that solicitors would not recover costs in unsuccessful cases; it being understood that the costs of unsuccessful claims would be borne by the solicitors acting in those cases.

51. The work undertaken by the claimants' solicitors under the schemes was highly profitable; and the DTI came to be criticised for agreeing to pay rates that were too high.

52. An issue which emerged towards the end of 2004 was the practice of making contractually agreed deductions from awards of damages payable to claimants. There were of two types of deduction. The first were deductions for the use and benefit of solicitors and claims companies, in circumstances where no additional service was provided beyond those covered by the CHAs. The second were deductions from compensation made under agreements between a claimant and the supporting trades union. Under this second type of agreement the client (either a miner or a dependent) agreed that, if the claim were successful, a sum would be deducted from the compensation and paid over to the union. There was uncontroverted evidence that this way of funding union legal expenses by Members Return Contributions ('MRCs') by some unions as a way of meeting the collective cost of the union's legal service had operated over many decades.

53. It was also clear from the evidence that there was no consensus within the trades union movement that their deductions from the awards of damages was an appropriate way of funding trades union legal services. Some unions did not adopt the practice and even within individual unions which made deductions, some officials had principled objections to deductions from what was intended to be full compensation for injury or loss.

54. The National Union of Mineworkers ('NUM') is a federated association of interdependent miners' unions. Each of the NUM areas, South Wales, Yorkshire and (in Durham) the DMA, operated independently, with local officials instructing solicitors on behalf of their members. In Yorkshire Messrs Raleys were the solicitors instructed by the NUM; and in the Durham area Thompsons was instructed by the DMA and DCMT. Both the Yorkshire NUM and the DMA and DCMT adopted the practice of deducting MRCs.

55. Mr Shears gave evidence that after the end of the miners' strike in 1985 and the closure of coal pits, the Durham unions suffered from reduced membership and income. By the time the last pits closed in the early 1990s, there were no longer any working members of the unions and virtually no income.

> Yet there remained a vast and adverse legacy of injury and illness amongst the members and former members, compounded by poverty, social problems in what was left of the mining communities, and a large backlog of outstanding benefit claims. It was in this context that the union was forced to review its financial options in relation to the operation of its legal service, in the event by requiring contributions from damages in successful personal injury cases ...

56. This passage highlights a potential tension which Thompsons and its individual partners came to recognise. On the one hand, the social cohesion represented by strong and financially viable unions, and the historical importance of the collectivist principle by which members of unions paid out during their working lives and received benefits into retirement; and, on the other hand, the rights of individual union members (and those with derivative claims) to receive full compensation for injury and loss.

57. As criticism of deductions from miners' compensation increased during the course of 2005, Thompsons and other union law firms sought to highlight the distinction between deductions from damages for the benefit of unions and deductions for the personal benefit of solicitors and claims handling firms, such as Vendside Limited (a claims-handling firm set up by the Union of Democratic Miners). The position of Thompsons was also summarised in Mr Shears's evidence.

> Our position, and the union position, was that there was a factual and qualitative distinction between trade union arrangements for contributions from damages in successful cases and those of claims handling companies and some non-union law firms which were quite properly the subject of criticism because of the amounts they deducted, the results they achieved, and the poor quality of the service delivered. No real service was offered by those companies in return for those deductions, and neither was there any commitment to the funding of test cases and the wider extensive legal and other services offered by trade unions.

58. There were a number of potential difficulties with this approach.

59. First, as already noted, the costs regime under the CHAs was generous and the scale of deductions that were being made from damages bore no relationship to the costs of providing union assistance for the claims.

60. Secondly, the Law Society had begun to take an interest in deductions made by firms of Solicitors and, particularly, whether appropriate advice had been given before clients entered into MRC agreements. As set out below, one of its early enquiries was into the conduct and practices of Raleys.

61. Thirdly, union solicitors needed to make good their case that the deductions were being used for beneficial purposes. It was for this reason that emphasis was placed on union support for claimants appearing before pension and disability pension tribunals, and union support for a test case in what was known as the Miners' Knee Litigation.

62. Fourthly, the deductions in the NUM areas were not uniform. The South Wales area of the NUM did not make MRC deductions. It charged a flat fee of £60. Mr Antoniw explained that, in retrospect, he thought this had been a mistake since it placed a very heavy burden on the volunteers who provided support for the compensation claims, and may even have had an adverse effect on the levels of recovery. In the Yorkshire area Raleys deducted 3% from damages, capped at £750; while Thompsons made deductions of 7.5% on behalf of the DMA and DCMT, capped at £1,000.

63. Fifthly, by 2004 the way that individual personal injury cases were funded had changed. Unions no longer paid the legal costs on behalf of their members. Claims were now conducted by solicitors under Conditional Fee Agreements ('CFAs'). Nor were unions at risk of paying the other side's costs if the claims were unsuccessful, since these costs were insured under ATE policies. Additionally, neither Thompsons nor their union clients bore the cost of obtaining medical reports. In unsuccessful cases these costs were effectively cross-subsidised by the recovery in successful cases; and Thompsons had established a system for obtaining medical reports under

which they were only charged for the provision of the reports if the claim were successful, and then only at the conclusion of the case, at which point the cost could be recovered from the paying party as a disbursement.

64. Finally, although in the period up to February 2005 the DTI accepted that there was a distinction to be drawn between deductions for the personal benefit of claims handlers and solicitors on the one hand, and MRCs for the benefit of unions on the other, there was a growing political consensus in Government and among Labour Party politicians in Parliament that the distinction was not justified, and that no deduction from damages should be made without clear advice as to the possibility of alternative means of bringing claims which did not involve MRCs. These views were increasingly articulated in early 2005 and were particularly directed to deductions in favour of the UDM (a union which, for historical reasons, was regarded with disfavour by most Labour politicians and supporters), Vendside (its claims handler) and Beresfords (its solicitors).

65. The presentational issue was in drawing a logical and legally coherent distinction between these two forms of deductions.

Thompsons

66. Throughout its history Thompsons has based itself on support for and representation of trades unions and their members. The firm was started in 1921 by WH Thompson, split into two firms in 1974 (led by Robin and Brian Thompson), which merged (save for the Scottish partnership) to create the new firm of Thompsons in 1996.

67. There has always been a strong political dimension to its work. Individual partners have close contact with different trades union clients and the firm only represents claimants, never defendants or insurers. It regards itself as a firm of union solicitors with a deep and historic understanding and appreciation of the social and political principles which trades unionism represents.

68. Thompsons's involvement in the political aspects of their work was primarily carried out by one of their partners, Tom Jones. He was active on the party political front, and particularly in lobbying politicians in the Labour Party which Thompsons publicly supported as the political party most likely to advance the cause of those they acted for. Mr Jones's work on the political and parliamentary front, as Thompsons's Head of Policy and Public affairs, came under scrutiny during the course of the trial. On any view of the matter, the firm's political affiliations and its contact with Labour politicians and senior union officials meant that it was inclined and able to respond to perceived political threats to the interests of its union clients on a broader front than most firms of solicitors would have been able to do.

69. In about 2000, Thompsons had established a new structure, with Mr Shears as the Chief Executive Officer (CEO), Phil Smith as Chief Operating Officer (COO), the 2nd Defendant (Stephen Cavalier) as Client Director and Caoilionn Hurley, as Chief Financial Officer (CFO).

70. These four formed the Executive Board and were also (non-voting) members of the firm's Supervisory Board, chaired by Lord (Tom) Sawyer.

71. At the material time the other Defendants (apart from the 9th Defendant and Lord Prescott) were all partners of Thompsons. The 3rd Defendant (Mick Antoniw) worked in the Cardiff Office and was responsible for the case-load from the NUM (South-Wales area). The 4th Defendant (Phil King) was Director of Client Care. The 5th Defendant (Anthony Patterson), was the National Coordinator for Coal Litigation within the firm, based in Newcastle. The 7th Defendant (Rob Wood) was Branch Manager at the firm's North East branch, also based in Newcastle. The 8th Defendant (Doug Christie) had a number of trades union clients but these did not include any NUM area clients. So far as the present claim is concerned Mr Christie was involved in arrangements for litigation funding, which included insurance and self-insurance.

72. The 9th Defendant (Lawrence Lumsden) was a partner in the separate firm of Thompsons Scotland until 31 October 2005. While he was at Thompsons Scotland he was responsible for the firm's case-load of work from the NUM (Scotland area). As already noted he was also a member of the CG. After his retirement from Thompsons Scotland he continued as a consultant for Thompsons Scotland for 3 days a week and was employed by Thompsons (the 1st Defendant) as a consultant for 2 days a week.

73. One feature of the changing forensic landscape at the time was the potential rewards from ATE insurance business. Thompsons had secured ATE cover from Templeton for a significant proportion of its union cases and, under an agreement with Templeton, the unions were entitled to a profit share on premiums earned on insurance contracts placed with Templeton. This was payable to Thompsons's union clients. Not all unions insured claims in this way but the DMA and DCMT did. The financial consequence was that at any given time Templeton might hold substantial funds which, if profits, were available to the order of Thompsons's union clients.

74. The Claimant was entitled to characterise the position in 2004 as being one in which personal injury litigation had ceased to be a cost to some unions and had become a potential source of revenue.

The investigation of Raleys by the Law Society

75. In January and February 2004 the Law Society had issued a document entitled 'Compliance Board - Policy Statement. Miners' Compensation Claims.'

76. Paragraph 3 of the document was in the following terms:

> The Compliance Board considers that the making of an additional charge to the client is likely to give rise to:
>
> (i) a finding of inadequate services, and
>
> (ii) if there is also evidence of taking unfair advantage of the client by overcharging, a finding of misconduct,
>
> unless full information was given to the client at the start of the matter, and the additional charge involved was itself reasonable.

77. Paragraph 6 of the Policy Statement made clear that the Law Society's complaints process had been changed so that complainants were no longer required to raise their complaint with their solicitors.

78. The CG circulated the Compliance Board Policy Statement with its Bulletin of 2 February 2004, making it clear that:

> The Co-ordinating Group have always been of the clear view that in the current costs regime the tariff offered by the DTI should be sufficient reimbursement for solicitors and there should be no need for additional charges to be raised for Claimants even though the DTI (unreasonably) refuse to pay success fees on CFAs and therefore costs incurred in unsuccessful cases are written off. For some time new firms joining the solicitor's Group have been asked to confirm that they accept this costs model.

79. At some point in 2004, the Law Society had begun an investigation into Raleys in relation to deductions from miners' compensation. Information about this investigation is sparse, but it appears that there was a finding against Raleys of inadequate professional service in two Adjudicators' decisions, in that they failed to advise clients that other firms did not make MRC deductions. Raleys were directed to pay compensation to various clients and costs to the Law Society. The firm appealed those decisions without success.

80. Mr Smith followed these investigations and attended hearings in November 2004 on behalf of Thompsons. His evidence was that he immediately realised the significance of the adjudications:

> It seemed to me at that time that if you'd made deductions in breach of the Solicitors' Practice Rules, then the [Solicitors Regulatory Authority] would use their regulatory powers under the Solicitors' Practice Rules to ensure that deductions were repaid.

81. The financial implications were potentially serious for Thompsons not least because the levels of deduction in favour of the DMA and DCMT were larger than the deductions made by Raleys in favour of the Yorkshire NUM.

The Sunday Times article of 16 January 2005 and Sir Michael Turner's request for information

82. On 16 January 2005 The Sunday Times published the first of a number of articles about deductions made from damages awarded to claimants under the BCRDL scheme. The article, headed 'Scargill's Union gets £10m cut of miners' sick pay' was directed at the NUM (and, in particular, the Yorkshire area of the NUM) and Raleys. The article drew attention to the substantial fees earned by solicitors acting for claimants and contrasted the position of Raleys with firms which did not make deductions.

83. Some of the issues raised in this article had been previously aired by Labour Members of Parliament of whom one of the most active and vocal was John Mann MP.

84. The key charge made by the newspaper against the solicitors can be seen from one short extract:

> The NUM, of which [Arthur] Scargill is honorary president, linked with Raleys, the union's lawyers in its home base of Barnsley, South Yorkshire, to help victims. The scheme had provided the union with a steady income as former miners who took cases with the firm paid subscription fees to the NUM during the case and an 'administration fee of up to £750.
>
> Many had left the union and so were asked to rejoin. They claim, however, that they were not told other legal firms would take their case for free.

85. Among other points picked up in the article was the Law Society's interest in the regulatory issues.

> The allegation has now been backed by the Law Society in two cases where it ruled that Raleys had not properly advised the miners of their 'liability' to the NUM.

86. Thompsons was quick to recognise that the practice of deducting MRCs from damages would face a number of challenges: on the political front from Members of Parliament representing the interests of individual constituents, from the DTI, from the Press and from the Law Society.

87. On 19 January a draft note was circulated internally within Thompsons which was intended to be used by the DMA.

> It is a matter of record that we deduct 7.5% to a maximum of £1,000 from compensation paid to miners and their families. You only need to look at all the things we do as an organisation to understand why this is done. Unlike the deductions made by some solicitors and compensation claim firms, the money goes entirely into funding the advice and other support services that we provide for our members and their families. These include a free legal advice line and advice sessions in miners clubs, welfare and community centres and GP surgeries across the North East.
>
> ...
>
> It is also important for any organisation with membership and duties that we have to build up assets for the future. If we were to rely on volunteers in a fragmenting community such as the former mining communities of the NE are then there would come a point when we'd simply run out of volunteers and resources and that, frankly, is where our services would end ...

88. The note raised the issue which would become the subject of debate within Thompsons over the following months: how to demonstrate what the firm believed were the real advantages to the local community of MRC funding to the DMA and the DCMT. The debate focussed on the back-up provided by the Durham unions and what was said to be the consequently higher than average settlements secured for its clients.

89. On 21 January 2005, Mr Wood emailed a draft letter to Mr King stating:

> The NUM Durham have now agreed to the mail shot. I enclose a revised draft letter which I'd be grateful if you could consider. I believe this should satisfy Law Society requirements.

90. At a BCRDL hearing towards the end of January 2005 Sir Michael Turner expressed his concern about the contents of The Sunday Times article and the potential impact on the operation of the scheme. He asked counsel for the CG (Mr David Allan QC and Mr Ivan Bowley) to provide a response to the article. Although it seems that the request was not made in open court and there is no recording of its terms, Gareth Watkins of Nabarros (the DTI solicitor) recalled being told of the request by his counsel.

91. Mr Lumsden's evidence was that he was waiting outside court and was told that the Judge was concerned about the article, and wanted a report on the practice of union deductions which had been the subject of the press criticism. As far as he was aware, whatever the precise nature of the request, it had been communicated in the presence of counsel for the DTI, and the DTI was aware of it. In his evidence he said that he was told that a report should be prepared that dealt with the charging practices in the NUM Yorkshire area.

92. Since Raleys had been named in the article, it was decided that they would take the lead in providing the response. In a letter of 4 February, Ian Firth of Raleys highlighted the points which would need to be made in order to justify the deductions: for example, free representation before DSS Tribunals, free second medical reports where appropriate, the extension of the retainer to other scheme claims, providing indemnities against defence costs in litigated cases, as well as the achievement of higher success rates and better than average level of damages by union solicitors where deductions were made.

93. The report which eventually went to Sir Michael Turner was the subject of extensive consultation with the NUM area clients, discussion among the lawyers (including counsel), and went through a number of drafts.

94. On 3 February, Mr Lumsden wrote to members of the CG and others:

> I have spoken to Ian Firth at Raleys, who is preparing a draft response to the judge. This will go to him from the CG after [revision].
>
> As the [Sunday Times] article relates to Raleys and the practice in Yorkshire, it is not necessary to refer in detail to the practice in other areas in order to give the judge the explanation sought.

95. On the next day, Mr Firth wrote to Mr Patterson:

> After discussion with David [Allan QC] and Lawrence Lumsden we have preliminarily agreed that it will be unwise to provide the court with details of the different NUM area funding arrangements.
>
> ...
>
> The focus of the article was on the union's receipts so we need to concentrate - indeed the Judge specifically indicated he wanted information about 'where the money was going' i.e. what use will it be put to?

96. On 8 February, Mr Lumsden wrote to various solicitors instructed by the NUM ('the NUM solicitors'), the CG, Mr Allan QC and Mr Bowley, and others attaching a (first) draft report which he had prepared.

> I have put together a draft report to the court concerning the contents of the Sunday Times piece of 16th January for your comments. David Allan is happy that we use this as a basis for our deliberations as to the response to be made.

97. On 15 February, Mr Lumsden circulated a further (second) draft to the NUM solicitors for consideration at a meeting of NUM areas and the national union in Barnsley on 17 February 2005.

98. On 18 February, Mr Lumsden circulated a (third) draft of the report to the NUM solicitors and to Mr Allan QC. This incorporated various points discussed at the meeting in Barnsley the previous day:

> It would be helpful to have David Allan's input into the final version and on the issues surrounding release (mostly timing) if it is acceptable to the Union.

99. On 21 February, Mr Lumsden emailed the NUM solicitors, the CG and David Allan QC:

> David Allan has rung to discuss the third draft report to the judge. There are a few changes to make and he is otherwise satisfied with it. We'd like to add a sentence to the effect that the Union is no longer in a position of receiving substantial sums in dues from its active membership, given the decline in numbers employed in the coalfield in recent years … The [DTI] may ask for sight of the report once it is given to the judge. It may not be possible then to avoid its release to the department and the Union should be aware of that.

100. On 22 February, Mr Lumsden circulated a (fourth) draft of the report to the NUM solicitors and to David Allan QC.

101. In the meantime, at some time in early to mid-February, the DTI announced a change of approach in relation to union deductions. In a Departmental publication entitled, 'Compensation for Miners' (Newsletter No.10), there was a highlighted message of advice.

> If your solicitor is making deductions from your compensation via an additional fee or a union fee and did not advise you that other representatives are processing claims without making any deductions, you should contact the Law Society to make a complaint [a telephone contact was provided] or you may wish to speak to your MP.

102. This apparent encouragement of claimants to get in touch with the Law Society or their local MP was regarded with considerable concern by some of those within Thompsons. In their view a failure to distinguish between (a) solicitors making deductions for the benefit of unions, and (b) claims firms who made deductions for their own benefit, was politically naive. This reaction is illustrated by a short extract of an email sent by Mr Lumsden to Mr Jones on 16 February. After referring to the DTI's previous position which distinguished between levies made on behalf of trades unions and deductions made by others, Mr Lumsden added:

> The impression given that union schemes are effectively to be regarded in the same way as claims' company schemes and that any deduction in any circumstances ... is to be attacked if the solicitor did not give his client notice that he might receive the same service for nothing, is damaging to unions and their arrangement for assisting members and retired members to gain benefits and compensation across a wide range of matters.

However, the email also recorded that the DTI advice had been agreed with the Law Society after the two complaints had been upheld against Raleys.

103. During the course of 2004-2005, Thompsons had itself been the subject of three complaints made to the Law Society by clients: Mr Bell, Mr Reay and Mrs Natrass. It was apparent that there was an issue about the adequacy of the information provided to their clients and this was appreciated, in particular, by Mr King.

104. In relation to the complaint by Mr Bell, the Law Society's Consumer Complaint Service made a finding on 12 November 2004 that Thompsons had provided insufficient general client care and costs information in accordance with the requirements of the Guide to the Professional Conduct of Solicitors, 7th edition. The recommendation (which Thompsons accepted) was that the deduction of £536 which had been paid to the DMA should be repaid with compensation of £250.

105. This was the first of the three adverse findings against Thompsons and led the firm (at least by the beginning of 2006 and, in the case of many of the partners, earlier) to conclude that their practice of making contractual deductions in favour of their union clients was open to regulatory challenge on the basis of a failure to advise clients that they could be represented in their claims under the CHAs by solicitors who would not make deductions from damages recovered under the scheme.

106. In addition to dealing with Sir Michael Turner's request, Thompsons were also active in lobbying for support in the House of Commons and in Government, and Lord Prescott was identified as one of a number of potential political allies who might be approached by Mr Hopper of the DMA.

The 23 March 2005 letter from Mr Lumsden (on behalf of NUM), the subsequent letter from Sir Michael Turner and the issue of private correspondence

107. On 23 March, Mr Lumsden wrote to Sir Michael Turner enclosing the report on The Sunday Times article which Mr Allan QC had agreed would be provided. The covering letter appears to have been sent on the headed notepaper of Thompsons (Scotland); and Mr Lumsden's evidence was that, at least at this time, he was not acting for the English firm of Thompsons.

108. After referring to the Judge's concerns which had been raised with counsel for the CG, the letter concluded.

> The union [the NUM] has willingly responded to the requests made of it for information and understands that the report is for your consideration. It has not authorised us to copy it to other parties in the litigation and so we have not done so. If you are minded that copies should be made available to those parties, we should be grateful for the opportunity to make representations to you if that is thought appropriate, before disclosure.

109. The Report set out the main features in the Article and then made a number of points.

110. First, in relation to the deductions (§7):

> It is understood that the financial terms of the legal support extended to retired miners for COPD and VWF compensation claims by Yorkshire NUM are as follows. Claimants subscribe to receive the Union's assistance to pursue a claim on a no win, no pay basis. Former members are required to bring themselves into a form of membership called 'limited membership' for the period of the claim up to a maximum duration of three years. The provision of assistance to non-members is prohibited. Limited members pay half the dues of full members, the dues being collected only upon successful conclusion of the claim and not otherwise. An administration fee is charged only in the event that the claim succeeds, amounting to 3% deduction from damages, capped at a maximum of £750. The total sum deducted from damages including the amount of subscriptions and administration charge shall not exceed 15% of the damages' award. Deductions made by the solicitor are not used to augment the solicitor's fee, but are mandated in accordance with the claimant's authority to the union as a condition of its support for the claim.

111. The report cited a decision in the County Court which approved this form of authority (§8), while drawing attention to the two complaints upheld by the Law Society that claimants had not been properly advised about their liability to the union, which were being contested by Raleys (§6). It described the range of benefits offered by the union in consideration of the payment of the deductions (§§9-10, 12). There was also reference to the history of deductions from damages over many years (§13). The report concluded with two final points.

112. First, it contrasted the practice of the Yorkshire NUM solicitors with that of other organisations which made deductions from damages (§15).

> In offering their service within mining communities, unions have to contend with different organisations and in particular, claims' handling companies whose activities have previously been the subject of adverse comment both by the court and the community representatives. Many claimants who might otherwise have ended up with such companies have gone to their union and so offered their support to a non-profit making representative body.

113. Secondly, it made a broader point (§16).

> Large numbers of miners and their families up and down the country authorise deductions from damages in favour of their union or former union because they support its activities and recognise that it has provided and continues to provide important services within their communities. The NUM area unions are governed by rules which require funds raised by subscription and deductions from damages to be used for the benefit of members and not for the purpose of making a profit. A wide variety of benefits and services are extended to members and former members, although it is recognised that the latter do not pay dues as active members due. The ST article allows little credit for such service provision.

114. On 24 March Sir Michael Turner replied under the heading 'National Union of Mineworkers. Allegations in the 'Sunday Times' - 16 January 2005. Miners COPD.'

> Thank you for your letter dated 23 March and the report which accompanied it. As so often happens, a full investigation has shown a balanced picture which is, sadly, not always the case with a poorly researched article. Your report explains the well understood relationship of any trades union to its members where they may have suffered personal injury in the course of their employment. It would not appear that the (locally based) NUM and the individual claimant is any different in principle from that which obtains in other fields. There is nothing in the article which, in the light of your thorough report, requires either to be considered by me or referred to the Law Society. If the Audit Office has decided to undertake its own investigation,

> it would be surprising if it came to conclusions other than your own.
>
> From my point of view, the issue having been raised, I can see no objection to the release of your report to other members of the CG. It might serve to allay doubts which may have arisen as regard to the conduct of the NUM, which as I have said, appear to be groundless.

115. As noted above, the Claimant's case is that the private correspondence 'was enough to establish both apparent bias and ... actual bias (in the sense of loss of the necessary objectivity)'. Mr Green QC submitted that, by responding as he did, Sir Michael Turner acted improperly in (a) engaging in private correspondence with one party to litigation and (b) implicitly agreeing that information coming to him should not go to the other side (the DTI).

116. On the face of it, the direct communication between the Judge and a member of the CG appears odd. However, it seems that although he was responsible for the management of highly complex litigation he did not have any clerical assistance through whom he could pass on communications.

117. The failure to inform the DTI about the contents of the CG report was (at least in retrospect) a mistake, because it suggested that one party was telling the Judge something that it did not want the other side in the litigation to know. Even private communications which are thought to be essential in the overall interests of justice have their dangers in terms of perception: a matter which is well understood in the criminal and public law fields.

118. On the other hand, I am quite clear that the Claimant has overstated the complaint. Sir Michael Turner was in an unusual position. He depended on both the professionalism of the lawyers who appeared before him and their cooperation. It is clear that he was uneasy about the contents of the report not being made available at least to the CG (as in due course it was); and the exchange illustrates some of the dangers of unrecorded hearings in private. However, it is important to bear in mind that neither Mr Allan QC nor his junior, Mr Bowley, regarded either the request or the response as being objectionable in the context of the scheme hearings. The Sunday Times report had not raised any issue which was relevant to be determined between the CG and the DTI.

119. Furthermore, Mr Allan QC, who was closely involved in the drafting of the report, was aware of the sensitivities of disclosure. His evidence, that he was concerned to ensure that it was a clear and accurate response to the Judge's expressed concerns, was not the subject of any criticism by the Claimant. In addition, it is quite clear that the DTI knew about the request and Mr Lumsden was aware that the response might have to be disclosed to it. In the event the DTI never showed any curiosity about its contents.

120. The Claimant also criticises the report as being incomplete and lacking in candour. It was said to be incomplete because it was limited to the practices of the NUM Yorkshire area, and was said to be lacking in candour because it did not point out that Thompsons were themselves being investigated by the Law Society, believed that the investigation was in relation to deductions, did not disclose the Law Society's view in

the Bell case and had sent out letters to clients whose cases had not yet concluded in order to 'satisfy Law Society requirements.'

121. In my view these criticisms are ill-founded. The analogy with the principles of disclosure on a 'without notice' application is inapposite. The request and response were not concerned directly with issues which had arisen in the scheme litigation. The report was designed specifically to meet the Judge's concerns about matters raised in the 16 January article. It was not intended nor expected to provide a running commentary on other issues.

122. Nevertheless, it is clear that there were those in Thompsons who were pleased by the Judge's letter of response, and that the Judge had been presented with a picture which would become inaccurate. This is a matter to which I will return below.

123. In §136 of his closing submissions Mr Green QC advanced the case on bias on the following basis:

> The rule as to private communication (excluding another party to the proceedings) is so elementary that Sir Michael Turner's conduct calls for an explanation, an explanation found in his loss of objectivity, such that he was no longer acting in accordance with the norms of judicial impartiality and objectivity. In short, he had lost his judicial compass, or its indications were distorted by his sense of proprietorship over the Scheme, such that he strayed from well-established and well-understood principle, and unwisely committed himself to the above views in private correspondence with Mr Lumsden (and, through him, the CG).

124. In my view these submissions are extravagant and unrealistic. The original request was not regarded as objectionable by any of the experienced lawyers present at the time it was made, including those representing the DTI. All that the Judge was indicating in his letter of 24 March was that the report confirmed his prior understanding that deductions in favour of unions were not objectionable: a view of the matter that was apparently shared by the DTI until shortly before his letter was written. In due course the Judge came to see that there was more to the issue than he had appreciated (particularly in relation to the regulatory implications), and changed his mind about it. This correspondence does not (at least by itself) advance the Claimant's case based on bias.

125. In §138 of the closing submissions the Claimant's argument was developed further:

> This private correspondence was enough to establish both apparent bias and ... actual bias (in the sense of loss of the necessary objectivity). It was not appropriate for him to have the GLO transferred to him, *a fortiori* without disclosing the fact and content of the correspondence to all relevant parties ...

126. For the reasons already stated, I do not accept the first part of this submission. I will return to the second part later in this judgment, when dealing with the transfer of the GLO.

Greene Wood and McLean.

127. GWM was incorporated as a limited liability partnership on 8 October 2004, and started to operate as a firm in November 2004 with three equity partners, Wynne Edwards, Edward Friend and Simon Evans. The firm occupied serviced offices at 10 Old Bailey on a 15 months lease expiring on 31 October 2006.

128. Mr Edwards had qualified as an attorney in South Africa in 1976. He had worked for a firm in Pretoria, in which he became a partner and the head of its insurance department. He acted for large insurance companies and his work covered group claims.

129. In 1999, on the basis of his experience of class actions in South Africa, he was invited to join the London-based firm, Class Law, which specialised in group actions. In 2003 he moved to another firm, St David's, from which he resigned in 2004 in order to set up GWM with Mr Friend, a former property partner at Class Law and Mr Evans who had also been at Class Law.

130. Mr Friend had qualified as a solicitor with Nabarro Nathanson in 1989 where he worked until 1993. From 1994 to 1998 he was an assistant solicitor at Paisner & Co, from where he moved to Chethams and thence to Paul Joseph & Co, where he subsequently became a partner. He joined Class Law as a partner in or about 1998, where he met Mr Edwards. He left Class Law to join St David's as a partner in 2003, and subsequently became one of the three founding partners of GWM. He specialised in property related matters, and his role in GWM was to run the property practice and to assist in managing the firm.

131. Mr Evans did not give evidence. At least in relation to the GLO application, he seems to have assisted Mr Edwards, for example in liaising with counsel who were instructed.

132. Mr Edwards first became aware of a potential claim on behalf of the miners for the recovery of union deductions at a time when he was a partner of St. Davids, in the spring or early summer of 2004. In early 2005 he was asked by John Mann MP if he could assist the miners in their claim for the recovery of deductions. At this stage it was made clear to him that the claims could only be made on the basis that claimants should not be exposed to any cost or financial risk.

133. By June 2005, GWM had approximately 19 employees in what was intended to be a broadly based commercial practice with an emphasis on class actions. Mr Edwards envisaged that the firm would scale up quickly by recruiting temporary staff if the firm thrived. As he explained in evidence.

> Our intention was that the firm should expand rapidly off the back of the miners' group litigation as a 'once in a career' opportunity and we intended to exploit it to the maximum.

134. This vision for the long-term prosperity of the firm was imperilled by the short to medium financial difficulties it faced for some time before May 2006.

The summer of July 2005

135. By at least the beginning of May 2005 Thompsons was aware that they were being investigated by the Law Society, although the precise nature of the investigations remained unclear until February 2006. A letter had been received by Mr Shears in April 2005, notifying him of the investigation; and it was following this that Mr Smith attended a conference with John Foy QC to discuss the regulatory issues in the light of the findings against Raleys. Although the Law Society had not indicated the nature of its investigations, it was assumed that it was a response to the deductions issue; and the firm began to marshal the material which could be used to answer the regulatory case.

136. On 28 June 2005 The Times published another article. This time the focus was on the UDM, its claims handling company, Vendside Limited, and what was said to be the preferential treatment of the UDM by the Government.

137. On the same day, Mr Jones circulated an internal document proposing the line to be adopted in relation to the Law Society investigation. This included:

> Thompsons want to:
>
> Reach a satisfactory conclusion with the Law Society
>
> Inform and protect our clients
>
> Reinforce the importance of union legal services with relevant MPs
>
> Seek positive support from the Government for union legal services (something recently supported by the Lord Chancellor).

138. Mr King replied:

> I have given some thought to some matters.
>
> If the Law Society take the view that we failed to advise our clients about alternative methods of funding, then:
>
> 1 They could refer us to the SDT;
>
> 2 Order us to repay the amounts our clients paid to the union;
>
> 3 Order us to pay the costs of the Law Society investigation
>
> 4 " CCS investigation into each individual case.

139. On 29 June Mr Smith wrote to Mr Patterson:

> We need to put some detail on the statements we have made about the quality of our service and how it differentiates from that provided by, in particular, the UDM, Vendside and its solicitors. Here we need actual, hard, raw data, preferably using

> the DTI figures where possible, which show: a) that we have recovered higher average damages for each head on [COPD] and VWF; and b) the reason for that in respect of the work which we have done.

140. On the same date a further article was published in The Times. This was critical of Beresfords, the solicitors instructed by the UDM, the profits made by that firm and the extravagant lifestyle of its partners.

141. On 30 June, in response to these articles and the reports that there was a police investigation into allegations of fraud by individuals connected with the UDM and Vendside, Sir Michael Turner called an Extraordinary Review Hearing in the Royal Courts of Justice on 5 July 2005. His email sent to members of the CG made clear that the hearing would consider:

> ... the situation in the light of the events recently reported in the press concerning the actions of the UDM, Vendside and Beresfords. The objective is to enable the Court to be satisfied, so far as it can, what steps have been and are being taken to safeguard the claims handling under the CHA generally and the security of claims which have been made under it.
>
> One of the issues to be considered will be what can and should be done to protect the cases being handled by UDM, Beresfords and Vendside in the event that the investigations now being undertaken by the police make it impracticable for any of those organisations to continue to act on behalf of claimants. The Law Society has therefore beeen invited to attend and make representations.
>
> It is of the utmost importance that:
>
> 1. no undue delay to the progress of the scheme is introduced;
>
> 2. there is re-assurance forthcoming that the problems which currently exist are limited to the named organisations;
>
> 3. if there are to be problems about representation, these should be overcome at the earliest possible moment
>
> 4. the hearing is convened as soon as possible and that its purpose is made widely known.

142. It is clear from this email that the Judge's concern at this stage was about the possible effect of the police investigation on the claims of individual claimants and the proper representation of those claimants.

143. At the hearing on 5 July the Law Society was represented, as well as the CG, the DTI and other interested parties. Among those who attended were Messrs Patterson, Smith and Lumsden.

144. Before the hearing began the Judge made a statement which included the following.

> There is another area of potential dispute which concerns claims which have been advanced through the auspices of the mining unions. From time immemorial it has been part of the contract between a member and his union that the union will support claims made by the member against his employer. It is common place, if not universal, for the union to deduct a percentage of the sum recovered in order to cover the costs of other members whose claims may not be successful. It is undoubtedly the fact here that many claims are being brought under union auspices, although it should be said that there is no obvious financial benefit to the member to bring his claim in this way. All claims, with the possible exception of some brought on behalf of UDM members, which are successful already enjoy the benefit of the costs revision written into the CHA. I understand that in some cases quite substantial proportions of awards have been taken in this way for the benefit of the union. It is a matter for the individual union to consider whether the arrangements intended for a risk situation are compatible with what exists in the present case, that is an exemption from liability for costs in the unsuccessful claim, and a guaranteed sum of costs in the event that the claims succeed.

145. Although expressed in terms of being a matter for individual unions, this passage shows that Sir Michael Turner was doubtful as to whether the deductions were justifiable in the light of the way in which the schemes operated. To this extent the views he had expressed on 24 March had changed.

146. In a position paper, the Law Society informed the Court that it had,

> ... either carried out or will have shortly carried out investigations into over 30 firms of solicitors involved in VWF and [COPD] cases.

147. Mr Dutton QC, for the Law Society told the Judge that the Law Society had been investigating solicitors in relation to the handling of VWF and COPD cases and that this was the largest group investigation that it had carried out. Its aims were the protection of the public interest and those affected by the scheme, and to protect the reputation of the profession. Since its sources were confidential the Law Society felt constrained as to what could be put in the public domain. It was concerned by the damage done to the solicitors profession in relation to rule breaches and inadequate professional services but, in its view, the Schemes were capable of being continued. Some solicitors appeared to have charged or permitted charges in breach of Regulations 1, 8 or 9 of the Solicitors Practice Rules and in breach of Introduction and Referral Codes.

148. There was discussion at the hearing as to the ‘serious nature’ of the Law Society’s concerns; and this was addressed in an exchange between Sir Michael Turner and Mr Allan QC, on behalf of the CG.

> Mr Allan: ... your Lordship has been the supervising judge in this litigation since 1995 and you have been able to observe the manner in which this litigation has been conducted. And you will recall in your judgment you paid tribute to the way in which the litigation had been conducted by those who represented the claimants involved in that litigation.
>
> Sir Michael Turner: Subject to the matters about which we are in discussion today, that remains my view.
>
> Mr Allan: And it has been made clear that the lead solicitors are not involved in those investigations.

149. The Claimant makes the point, confirmed in his oral evidence, that Mr Allan QC was unaware of any alleged regulatory breaches by any CG firm on whose behalf he was appearing. In fact, as already outlined, Thompsons were aware that the Law Society were investigating them, although they did not know the nature of those enquiries.

150. However, to the extent that Mr Allan was hoping for the Judge's unconditional endorsement of the solicitors he represented, it is clear that he did not get it.

151. Sir Michael Turner concluded the hearing by confirming that he saw no need to make any special order in light of the statements made and information provided to him, and noted that:

> It would in my judgment be in the highest degree mischievous for any interruption to the claims' process to be inflicted unless the court could be satisfied that irreparable harm would be done to the interests of justice, the claimants and the public - please note the word 'irreparable.'

152. The transcripts of the hearing demonstrate the Judge's approach to the issues as they appeared to him at the time. He clearly felt a responsibility for the operation of the BCRDL scheme which had come under attack, but that does not mean he was motivated by, what Mr Green QC characterised as, 'proprietorship,' to the extent that he would permit the operation of the scheme to operate contrary to the overall interests of justice. Rather the contrary. As I read his remarks, he was saying that, although he considered the proper operation of the scheme was in the overall interests of justice, the interests of justice might nevertheless require its interruption. However, before reaching such a conclusion, the orderly implementation of the scheme (with all its benefits to the individual claimants) would weigh heavily in the balance. His view, which took into account both the potential importance of regulatory breaches and the public interest in the continuation of the Scheme, at least to some extent, replicated the views of the Law Society. Importantly in the context of the present claim the Judge did not exhibit a fixed predisposition.

Templeton Insurance Limited.

153. At some point Mr Edwards had been introduced to Mr Anthony Fresson (a business associate of Mr Ridgway). Mr Fresson was an insurance broker who, at this point in his career, acted as a consultant to Templeton. Although he acted as a conduit

between GWM and Templeton, Mr Fresson was not directly involved in the obtaining of the GLO ATE.

154. Templeton was an insurance company incorporated and based in the Isle of Man. In addition to being the managing director Mr Brunswick was executive chairman, and Phil Maule was the underwriting and claims manager. Templeton had previously agreed to provide ATE insurance to clients of GWM in two of its group litigation cases (the British Biotech and Claims Direct claims). These two claims were conducted by GWM on the basis of CFAs supported by ATE insurance. Neither were GLO claims.

155. In a telephone conversation between Mr Edwards and Mr Brunswick, which took place shortly before the end of June 2005, Mr Brunswick agreed to instruct Mr Maule to provide ATE cover for the miners' claims at an agreed level of cover of £1m.

156. According to Mr Edwards's witness statement:

> The position adopted by Templeton was very different to the two previous cases which we had obtained insurance from them, the Claims Direct and British Biotech cases. In those cases, we had been obliged to work hard to persuade Templeton of the merits of insuring the cases, including obtaining counsel's opinion. For the miners' GLO, Mr Brunswick told me, 'I know all about it, I have read all about it, it's a good case, let's do it', or words to that effect and Templeton agreed to cover it immediately.

157. Mr Brunswick's agreement to underwrite was made without having neither underwriting information or counsel's advice. Furthermore he had plainly not considered the broader commercial implications of insuring the claim. As matters turned out his commitment to the insurance of the GLO was to prove highly unreliable.

158. On 28 June Mr Edwards emailed a draft press release to Mr Maule describing how GWM had been instructed to issue legal proceedings against solicitors and certain claims management companies. The draft included quotations from the February DTI newsletter (no.10) and referred to Templeton's involvement as the insurer. In his reply Mr Maule suggested that Mr Edwards add the information that the premium (45%) was agreed to be deferred as well as insured and that Templeton was a specialist ATE insurer.

159. As already noted, a problem which Mr Brunswick had not foreseen was how Templeton's support for the miners' deduction claims would impact on its commercial relationship with Thompsons. This relationship went back to 2002, when Templeton had begun to provide ATE insurance for the claims of Thompsons' clients. This amounted to approximately 50% of the ATE business placed by Thompsons. Although Thompsons decided at the end of November 2005 that there would be a 40% reduction in this business, the business relationship between Thompsons and Templeton continued throughout the material time.

160. This relationship between Templeton and Thompsons was unusual, but consistent with the relationship between Thompsons and its union clients. Templeton received an advance premium of £50 when issuing a certificate of insurance. Thompsons was liable to top up the premium fund if it proved insufficient to pay claims. Any profit in the accounts of Templeton was treated as held on behalf of the unions.

161. Mr Booth had been the Chief Financial Officer of Thompsons between 2000 and 2002, and thereafter was paid a retainer of £7,000 per month for consultancy work. From 31 July 2005 to March 2006, he continued to be paid by Thompsons for consultancy services as and when requested.

162. Between 2002 and 2007 Mr Booth (either in a personal capacity or through his company VISP Ltd) assisted Templeton in obtaining ATE legal expense insurance business from various solicitors, including Thompsons. For each case placed by Thompsons with Templeton he was paid a commission of £20. This was a secret commission paid to Mr Booth, unknown to his principal, Thompsons. Significantly in the present context, it placed Mr Booth in a position of conflict between his interest and his duty (such as it was) to Thompsons.

163. The Claimant has characterised Mr Booth's position as follows:

> [His] relationship with Templeton was such that he was uniquely placed to act on Thompson's behalf in directing, persuading or pressurising Templeton with regard to its provision of ATE insurance to GWM's miner clients.

164. If the suggestion is that Mr Booth acted on behalf of Thompsons to bring pressure on Templeton, I reject it. Mr Booth was acting at all material times in his own interest. If it happened also to be in Thompsons's interest, it was not because he was acting on their behalf but because it was in Mr Booth's concealed financial interest.

165. On 30 June an article in The Times referred to GWM's involvement in potential claims on behalf of miners who had signed agreements consenting to deductions being made from damages.

166. On 29 June GWM wrote a letter to Vendside Ltd notifying the company of a claim and informing it that an application would be made to court for a GLO on 1 July. In its reply of 7 July, Vendside Ltd's solicitors, Brooke North, commented on 'the brevity and generality' of the letter and drew attention to the Practice Direction to the Pre-Action Protocol. Inadequate preparation followed by inexplicable delay was to prove characteristic of GWM's conduct of the litigation.

167. At a meeting on 7 July in the Isle of Man, attended by Mr Edwards, Mr Fresson, Mr Brunswick and Mr Maule, the outline of the ATE cover was agreed. The broad terms would be the same as those agreed for the British Biotech and Claims Direct ATE insurance: cover of £1m at a premium of 45%, to be deferred but never to be paid by the claimant miners. One point which arose was the position of Thompsons. Templeton indicated that it could not insure against Thompsons because they were 'a big client of Templeton.' There may have been some further discussion about this because Mr Edwards also noted:

> Offer Thompsons a solution - ADR - Mediation etc and if they refuse [Templeton] will insure.

168. It is striking that, although Templeton had agreed to provide ATE cover in the British Biotech and Claims Direct claim, it had still not issued any policies in respect of these risks over 4 months later. This casual and uncontractual approach to its legal obligations was a feature of Templeton's and Mr Brunswick's way of conducting business. The GLO policy wording was not provided until April 2006 and the British Biotech and Claims Direct policies seem never to have been produced.

169. Significantly for present purposes, it was agreed by Mr Edwards that neither Thompsons nor its NUM client would be intended defendants under the terms (such as they were) of Templeton's ATE insurance cover.

170. Following this meeting, Mr Edwards drafted documentation to be used in connection with the miners' deduction claim. The documents consisted of (1) a Conditional Fee Agreement between the client miner and GWM, (2) an insurance proposal form, (3) an insurance wording drafted by Mr Edwards on the basis of previous ATE insurance provided by Templeton, and (4) a document headed,

> Mineworkers' Group Action. The GWM Guarantee to Clients. No win, no fee, no risk, no cost.

171. On 4 August 2005 Mr Powles QC and Mr Oliver Campbell gave a written advice to GWM about the impact of the Law Society investigations on the proposed GLO application.

172. It was recognised that the GLO had the potential to disrupt the ongoing Law Society investigation, that there would be difficulties in pursuing the claim against the UDM and Vendside without joining the solicitors, and that a GLO would provide a means for appropriate case management of the claim. Additionally, and by reference to the transcript of the 5 July hearing, it was noted that the Law Society had suggested that the validity of the Vendside agreement might be resolved in civil litigation, and that the proposed proceedings would probably lead to a stay of the Law Society proceedings.

173. In a letter dated 4 August, GWM wrote to Sir Michael Turner, under the heading, DTI 'Coal Health Compensation Scheme,' notifying him of their,

> ... intention to apply in the very near future for a [GLO] on behalf of any miners who have been charged unnecessary fees by their unions, and/or solicitors or claims handling organisation ...
>
> In the light of the above our firm would consider itself to be an interested party in respect of the issues which we understand were discussed at the Hearing before you at the High Court on 5th July 2005.
>
> We also understand that at a Hearing the issue of the lawfulness or otherwise of the DTI's CHA with the [UDM] and its

> subsidiary Vendside Ltd was debated. Clearly the lawfulness of this Agreement is significant to our clients in respect of their proposed claims.

174. It is striking that, having considered the transcripts of the 5 July hearing, GWM considered that an appropriate forum for debating the issues which were likely to arise on the GLO application was a BCRDL scheme hearing before Sir Michael Turner. It is also striking that the Judge did not share that view.

175. On 7 August, he replied.

> I have to acknowledge your letter dated 4 August in regard to the above compensation scheme. It is not immediately clear to me why you should be writing to me, except perhaps as a matter of courtesy. The issue of the legality, or otherwise of the agreements made between UDM, Vendside and any other claims handling organisation is not a matter which is of interest in the litigation of which I am the Managing Judge. If you were present at the meeting which was held on 5 July, you would appreciate that the enforceability of agreements between the named organisations and the individual miners is something which the Law Society was to investigate, and possibly litigate, with interested solicitors. It was not the intention or expectation that the BCRDL would be concerned directly with that issue.
>
> I would be grateful to receive your assurance that you will send a copy of your letter to me to the Chief Executive of the Law Society.
>
> If you should wish to be present and make representations to, the Court in relation to any matters of true mutual interest, you should notify Nabarro Nathanson (DTI) and Irwin Mitchell (CG) of your intention so to do at the earliest reasonable opportunity, identifying the issue(s) which you wish to ventilate. I have taken the liberty of copying your letter, to them so that they will already be aware of your potential involvement.

The autumn of 2005

176. The legal case for recovery of MRC deductions proceeded in tandem with a political and press campaign centred on an organisation named Action Group for Miners (AGM), under the chairmanship of a retired police officer and Labour politician with connections to the North-East of England, Lord Mackenzie. Although the legal proceedings conducted by GWM and the broader campaign conducted by AGM were intended to be separate their activities overlapped in a way which was to cause difficulties to GWM.

177. It is convenient to pick up the narrative at the beginning of October 2005. By this stage Thompsons had discovered that Templeton was insuring the miners claim for wrongful deduction of MRCs. On 5 October Mr Shears challenged Mr Booth about

this at a meeting between them. Mr Booth's note to Mr Edwards (copied to Templeton) reads:

> As agreed I am reporting back on my meeting with Geoff Shears (CEO) yesterday.
>
> It is obvious that someone has let the cat out of the bag as his first words were 'I understand that Templeton are insuring a firm looking to sue lawyers involved in scheme cases'. He appears to be unsure of the firm involved ... This opening gambit put me somewhat on the back foot & I had to reassess my tactics accordingly.
>
> Consequently I countered by saying that Ralph [Brunswick] had approached me & said that, because of his long relationship with the firm, he was hopeful an agreement could be reached with Thompsons to, at best, take Thompsons out of the picture or, alternately, reach a mediated settlement which enabled them to restrict the cost to the firm & allow them to handle the spin on the settlement.

178. On 11 October 2005 GWM sent claim letters to various prospective defendants in the group litigation. The letters were in similar form. Former clients of the proposed defendants who were now GWM clients were identified; the amount of the deduction was specified; the basis of the claim was set out, with references to breaches of the Solicitors' Costs Information, Client Care Code 1999 and alleged fiduciary obligations; demand for repayment was made; information about other clients for whom the recipients of the letter acted was requested; and the intention to apply for a GLO forthwith was stated (subject to any reply).

179. On Friday 21 October GWM sent a claim letter to Thompsons on behalf of its client, Barbara Hardy. It differed to the claim letters sent on 11 October. Mr Shears was the named addressee and the letter contained the following:

> We have been instructed to issue proceedings against your firm and are going to issue an application for a Group Litigation Order ('GLO') next week. If that application is granted and a GLO is made all miners who assert a claim against the defendants will be encouraged to participate in the action.
>
> We have desisted from including your firm as a Respondent/Defendant in those proceedings because it appears to us that agreement is capable of being reached with your firm in relation to the reimbursement of clients that will obviate the need for your firm to be sued and we are prepared to engage in a discussion with you in this regard to attempt to resolve the issue and reach a settlement for clients who are entitled to reimbursement. If we and our clients are persuaded that your firm has no liability then we will advise our clients not to pursue claims against your firm but, if you are wrong, we

> would expect you to adopt a policy whereby clients who are entitled to reimbursement are paid.

As GWM well knew, the real reason why it had 'desisted' from including Thompson as a defendant was that Templeton had made clear that it would not insure claims against Thompsons unless attempts at mediation failed.

180. The letter continued,

> In relation to the basis for its claim against your firm we refer to the case of Mrs Barbara Hardy handled by your Newcastle firm ...

181. The letter then set out in detail the union funding agreement under which a deduction of £845.47 had been made from the damages awarded to Mrs Hardy, and referred to the regulatory infractions upon which the claim for repayment was advanced: rule 9(1) of the Solicitors' Practice Rules 1990, s.2(3) of the Solicitors Introduction and Referral Code 1990 and the Solicitors' Costs Information and Client Care Code 1999. The letter made a number of requests for information, and continued.

> In our view the matters we have identified above amount, either individually or collectively, to a clear breach of your fiduciary duty to Mrs Hardy and also of your duty of care towards her. There are a considerable number of other prospective claimants in the same position as Mrs Hardy.
>
> …
>
> We suggest that we now agree that we will attempt to resolve the issue of your liability to reimburse clients by Alternative Dispute Resolution and that a structured mediation is the appropriate form of ADR.
>
> Mediation is confidential, is not costly, is quick and could result in an outcome that is positively reported and received.
>
> It is of course crucial for the interests of <u>all</u> your clients to be represented at any mediation and we would suggest agreeing the terms of a letter that you could write to each client who we believe would be entitled to participate in a GLO [if your firm were cited as a Defendant].
>
> That way we can ensure that if a settlement is reached, the settlement is inclusive and final. We would suggest too that the mediation be held under the terms of a set of Rules agreed by your firm and ours, and that the clients form a committee which will represent them at the mediation.
>
> We believe that we can avoid having to sue your firm and that by the process that we have suggested: -

> - all of those clients who are entitled to be reimbursed are reimbursed; and
>
> - those who are not entitled to be reimbursed are content that they had been properly charged and have no claim against you.
>
> We hope that this letter will be well received in the spirit that it is written and look forward to your written and urgent response.

182. There are a number of strange features of this letter. First, although GWM commended the confidentiality of mediation, it appeared to envisage the publication of the outcome. It is unclear in whose interest this would have been other than GWM, for the purpose of publicising its successful efforts. Secondly, it appeared to require that Thompsons give all its clients the opportunity to instruct GWM in respect of deductions, and be represented by GWM in the mediation. Thirdly, for no stated reason it called for an urgent reply.

183. The letter could not have been seriously intended to elicit a positive response. It was plainly written so as to satisfy what GWM understood to be a condition precedent to Templeton's agreement to provide cover for any claim against Thompsons, and was framed to achieve more than could have been achieved under a GLO order.

184. GWM's letter was passed on to Mr Smith who dealt with the response.

185. Also on 21 October 2005 a press release was released on behalf of AGM, confirming that the GLO application was to be issued at the High Court on 26 October by GWM. The press release stated that there were 'estimated to be up to 500,000 miners' who had not received the full compensation in respect of their scheme claims, and quoted Lord Mackenzie calling on miners with outstanding claims and miners who had been over-charged in concluded cases to seek assistance from AGM.

> Lord Mackenzie, President, Action Group for Miners, commented, 'Miners wishing to make a compensation claim will be best off with AGM. AGM has been set up to ensure that miners get all the compensation owing to them so we have assembled an expert team to represent them. Those miners seeking compensation should not have to pay any third party for managing their claim. The DTI has put in place a direct payment structure, therefore miners should not have to stand any legal or other costs of bringing their claim. Excessive charging has gone on in the past and is unacceptable and miners who want to report those who have acted improperly to the Law Society will be assisted by us in this regard.

The press release was seen by Thompsons and by the CG.

Monday 24 October

186. On 24 October, Mr Smith spoke to John Foy QC by telephone and then began to draft a response to GWM's letter of 21 October.

187. On the same day Mr Lumsden wrote to Sir Michael Turner:

> Earlier this year you asked the CG to prepare a report for you about allegations made in an article appearing in The Sunday Times on 16th January 2005, concerning deductions from damages operated by the National Union of Mineworkers.
>
> I conferred with all of the main firms representing NUM Areas who are part of the BCRDL before reporting to you.
>
> At the Court Hearing in July this year, the Law Society reported that it has been discussing deductions from damages with a number of firms who do so under client authority. The Society will be meeting my colleagues in Thompsons England and Wales very soon.
>
> My colleagues are anxious that all of the material that might be relevant to a full and proper consideration of matters should be available to the Society, including the CG Report and your letter of 24th March which responds to it. I have attached the letter to this e-mail for your convenience.
>
> Although your response was not designated a confidential item, you may recall that the report itself was submitted to you as a document which the NUM proposed should remain confidential, unless you were minded that it should be available to other parties, in which event the Union asked for the opportunity to be heard by the Court. As it transpired, this was not necessary.
>
> Thompsons would now like to present the report and your letter of response to it as part of the paperwork that the Law Society will review and have asked me to write to you in case you have any difficulty with that. I have discussed the matter with Mr. Tucker and although neither of us believe that there should be a fundamental difficulty, we both think it right to seek your approval.
>
> Thompsons are separately approaching the NUM to obtain their formal permission to disclose the report, which is unlikely to be withheld given the circumstances.

188. The Claimant contends that the purpose of this letter was to remind Sir Michael Turner of the views which he had expressed in March in favour of union deductions as part of the conspiracy to ensure that a biased Judge heard the GLO application. His pleaded case (at §90A of the Re-amended Particulars of Claim) is as follows:

> On 24 October 2005, three days after Thompsons' receipt of GWM's letter before action, Mr Lumsden reminded Sir Michael Turner of his considered or concluded views,

> formulated as a result of his receipt of the Report and set out in the letter of 24 March 2005.

189. The letter may have had the effect of reminding the Judge of the views he had expressed in the March letter. However, for the reasons already set out above, I am clear that the Judge did not have fixed and predetermined views, and that his mind was not closed to contrary persuasion. It remains to consider what Mr Lumsden's purpose was in writing as he did.

190. In his witness statement at §6.23 he gave his explanation.

> At this point I understood that Thompsons were considering their response to matters raised during the investigation by the Law Society into deductions. Mr Shears ... contacted me and asked me if Thompsons could present the report together with Sir Michael's letter responding to it to the Law Society. It seemed to me that this shouldn't be done without the permission of the Judge and so I wrote to him.

191. In cross-examination Mr Lumsden responded to the allegation that the letter to the Judge was a response to GWM's letter written on behalf of Mrs Hardy.

> There wasn't any prompt, not made known to me. I received a request from Mr Shears … to send the Judge's letter and the report as part of the Law Society paperwork the firm wanted the Law Society to review, and there wasn't any connection between that and the Hardy letter or other things that were going on, not that I was aware of.

192. Mr Shears's witness statement also dealt with Mr Lumsden's letter to Sir Michael.

> I cannot actually remember asking Lawrence Lumsden to write the letter of 24 October 2005 … but on reflection I believe it is probable I did ask him to do so. I remember discussing and agreeing with Lawrence Lumsden that it was a good thing to get this correspondence with the Judge into an arena with the Law Society and any other arena that would help. I don't remember ever having seen the letter.

193. He too was asked whether it was a coincidence that the letter of claim arrived on 21 October and Mr Lumsden sent his letter on 24 October. He said that it was.

194. Although I can see why the Claimant views the sequence of correspondence with suspicion, having heard the evidence of Mr Lumsden and Mr Shears, I have concluded that their evidence should be accepted. Although the letter on behalf of Mrs Hardy had been received by Thompsons, it did not raise the immediate prospect of litigation and was a matter that was being handled by Mr Smith. I see no sufficient reason not to treat Mr Lumsden's letter of 24 October at face value: as a wish to put before the Law Society the views expressed by Sir Michael Turner in March 2005. Whether it would have carried very much weight in view of the regulatory issues the Law Society was considering is another matter.

Tuesday 25 October

195. At 11.15 on 25 October Sir Michael Turner replied to Mr Lumsden's request, saying that he was content that his letter of 24 March should be released to the Law Society.

196. In an internal email timed at 16.50 Mr Lumsden forwarded Sir Michael Turner's email consent to Mr Shears and Mr Smith.

> Approval for disclosure has been given by the judge - see enclosed.
>
> I have read the fax from Phil [Smith] and the material from [GWM].
>
> I think the Rule 9 point was covered with Hugh James and the letter copied to Phil earlier this year.
>
> Phil's note of conference with Counsel does not I think cover Rule 9 - was this dealt with at an earlier meeting or by separate Note from Counsel?
>
> I suggest that Counsel should be appraised of the recent [GWM] letter and its threat.
>
> The judge has indicated very recently, that he wants progress on the enforceability point (the UDM / Vendside contracts) which the Law Society agreed in July, could be determined by him but which has been forgotten since then.
>
> See also enclosed press release from Action for Miners, a front for [GWM] and perhaps others.
>
> Does anyone know who Lord Mackenzie is?
>
> ….
>
> PS Have received Phil [Smith]'s draft letter to [GWM].

197. It is clear, at least at this point, that Mr Lumsden and Mr Shears were dealing with a number of different but overlapping issues: the GWM claim on behalf of Mrs Hardy, the Law Society and the regulatory issues, the involvement of AGM and Lord Mackenzie, and the ambit of future hearings before Sir Michael Turner, in particular, the possibility of a determination of the issues raised by the UDM/Vendside contracts.

Wednesday 26 October

198. On 26 October 2005 GWM emailed Irwin Mitchell with a copy of the GLO application and supporting documents. These appear to have been either in draft or incomplete, because GWM wrote on the following day with a copy of the application and supporting documents which had been issued on 27 October.

199. During the course of 26 October, Thompsons sent a reply to GWM's letter of 21 October in which it responded to and rejected the allegations of breach of the regulations which GWM had relied on.

200. An earlier draft was in the following form:

> We are satisfied that the legal advice and assistance agreement is lawful as between our client and the union. It reflects the well-understood basis of union legal advice and assistance schemes and the role which they have played for decades in establishing rights to compensation for personal injuries suffered.

This became:

> We are satisfied that the legal advice and assistance agreement is lawful as between our client and the union. It reflects the basis well-understood by the courts, of union legal advice and assistance schemes and the role which they have played for decades in establishing rights to compensation for personal injuries suffered (*emphasis added*).

201. In my view the Claimant is right to identify the change as an allusion to the views which Sir Michael Turner had expressed in his letter of 24 March 2005.

202. AGM's 21 October press release was the subject of a letter from Mr Tucker to Sir Michael Turner on behalf of the CG.

> I write following consultation with my colleagues and Counsel to provide you with a copy of a press release issued by an organisation called [AGM]. It seems appropriate to draw this press release to your attention because this organisation, by its press release, is critical of the operation of the scheme and invites Claimants to transfer their instructions to AGM who in turn will put them in touch with 'one of the team of leading solicitors firms'. In our view, the claims made by AGM, are inaccurate and misleading. Any significant transfer of claims from existing advisers to this organisation would cause dislocation to the scheme.
>
> One firm of solicitors who are named in the press release, [GWM], have recently joined the CSG having informed us that they are acting for a number of former mine workers pursuing claims following the transfer of instructions. We have asked Greene Wood & McLean to provide us with a copy of the Group Action application that it is said is being lodged with the High Court today.
>
> It is, in our view, objectionable that Claimants who have no complaint with regard to the service provided by their current legal adviser are being induced to transfer instructions

> elsewhere. There is, of course, no objection if Claimants wish to transfer because they are dissatisfied with the service and/or because they may be concerned about charges that have been raised of them.
>
> It seems to us that the activities of AGM as framed in this press release cross the line between the regulatory rules that affect solicitors that may be on their panel (there is no regulation of AGM) and potentially fall within the jurisdiction of the Court in view of the criticism made of the operation of the scheme. It is for this reason that we consider it appropriate to draw the press release to your attention. We will consider the position further as and when we receive a response from [GWM] and we have had an opportunity to consider that which may be published in the media as a consequence of the press release and the offer to provide interviews.
>
> I have copied this letter to the DTI.

203. A number of points arise from this letter. First, it was written by Mr Tucker (who had never acted for union clients) on behalf of the CG and not on behalf of any of the solicitors who were facing claims in the GLO application. Secondly, it drew attention to AGM's criticism of the administration of the BCRDL scheme and the potential dislocation to the scheme if there were significant transfers from current legal advisors. Thirdly, there was a reference to GWM's intention to apply for a GLO.

204. Although Mr Lumsden accepted that he liaised with Mr Tucker in relation to the drafting of the letter, it was plainly written on behalf of the CG and expressed the concerns of CG and its Counsel about the activities of the AGM and the potential for wholesale disruption of scheme's operation.

205. At 19.09 Sir Michael Turner responded by email copied to the DTI and the Law Society.

> To all interested parties;
>
> Please find attached my letter to Andrew Tucker of the CG which is also of immediate interest to you.

It was not sent to GWM.

206. The attached letter was in the following terms:

> Your letter by e-mail came as no surprise to me. As it happened, I heard an interview on radio 4 this morning in the course of which the purpose and activities [AGM] was the subject of discussion. Again it comes as no surprise to me that [GWM] are involved, since they had threatened some months back that they were minded to seek a group litigation order for the very purpose which has been adopted by [AGM]. They had sought my permission to appear at the review hearings as

> 'persons interested'. I informed them that if they wanted to appear at the Review Hearings they would need to make the appropriate application. I heard nothing more from, or of, them until this morning.
>
> These are matters of great concern to me as the developments are calculated, if not intended, to destabilise the scheme as it is running at present for what appear to be spurious reasons. One possible view of [AGM] is that this is a thinly veiled attempt to circumvent Solicitors' Practice Rules through the front of a company which claims to be a charity. Of course, I am unable to say that this is the case, but it is a matter in which the Law Society should interest itself as a matter of extreme urgency. You will be aware that I recently wrote to that organisation expressing my concern about the lack of overt action to challenge the legality and enforceability of deductions made by UDM/Vendside from miners' awards. It is this area which the AGM seek to exploit.
>
> To the extent that [AGM] claim that they are able to short circuit 'bureaucracy and excessive charging', this is almost certainly both misleading and mischievous.
>
> What action the CG should take, is not at this stage for me to dictate. Suffice it that I would be sympathetic to any application to reconvene a further Extraordinary Review Hearing provided that a substantive basis for such an application can be found.
>
> For reasons which will be self-evident, this letter is being copied to Nabarro Nathanson and the Law Society (Russell Wallman).

207. The Claimant submits that the contents of this letter illustrate Sir Michael Turner's hostility to GWM and its clients. I disagree. GWM is mentioned in the first paragraph in terms which are neither hostile nor untrue. The second paragraph deals primarily with AGM and the claims it made in the press release. The Judge's concern was that AGM were attempting to get around the Solicitors' Practice Rules and that this was a matter of legitimate concern to the Law Society. The Judge also referred to his concern, first expressed at the 5 July hearing, in relation to the legality and enforcement of the UDM/Vendside deductions. His views about AGM's claims to be able to short circuit bureaucracy were not unreasonable.

208. Although the word 'calculated' might have been better expressed as 'have the potential to', I do not read the letter as constituting either a complaint about GWM nor a threat to report GWM to the Law Society. Nor do I consider that it demonstrates a fixed predisposition against GWM and its clients. It is important to note that the letter was sent to the DTI which did not consider that the letter gave rise to any reason for the Judge not to be involved in the GLO application, and to note that the GLO did not concern transfer cases, only deductions in settled cases.

Thursday 27 October

209. At 10.55 on 27 October Mr Lumsden wrote to Messrs Shears, Smith and Thompson:

> The judge is now interested in the AGM move - not unhelpfully - there may be another extraordinary hearing.
>
> More to follow.

210. This was clearly a reference to the contents of Sir Michael Turner's letter of 26 October 2005.

211. GWM's GLO application was brought against (1) Ashton Morton Slack solicitors; (2) Moss solicitors; (3) Beresfords solicitors, (4) Wake Smith solicitors, (5) Raleys solicitors, (6) the UDM (Nottingham section) and (7) Vendside Limited. The 1st to 4th Respondents were on the UDM/Vendside panel of solicitors. Only Raleys was instructed by the NUM.

212. At 12.32 Mr Lumsden forwarded GWM's application and the supporting documents to Mr Shears and Mr Smith. Included as an 'untitled attachment' to the email was a message, which read as follows:

> See enclosed - a large bundle, I suggest you have someone print off one copy and take further copies for whoever needs them.
>
> I also suggest that you defer sending your response to Greene Wood McLean until you have considered their GLO.
>
> …
>
> Lord MacKenzie an ex-copper who wrote about problems in policing the miners' strike - can Jennie dig up as much as possible about him and who is in AGM? A man with scores to settle apparently.
>
> Our thinking is to ask judge to convene special hearing, citing damage to scheme, flush out opportunistic approach masquerading as outrage over miners, get the judge to deal with Vendside contract issue and stay GLO or refer to our judge, pending Vendside issue being determined.
>
> Flush out too, what their case is supposed to be in law - other than failures of various professional kinds that are for the Law Society and not the courts to deal with - probably at bottom, an argument that union services being extended and level of deduction applied, under false pretences and solicitor complicit in this.
>
> Also to seek to get [DTI] to support as 'scandal' not good for them nor generally.

> If Vendside contract argument loses in court however, further problems over NUM deductions likely to follow even though different ...

213. This email, which the Claimant characterized as 'the strategy email', plainly covers a number of issues. Among these were: first, the response to GWM's claim letter of 21 October and to the GLO application; secondly, the broader political issues arising out of the involvement of AGM in the deduction claims; thirdly, how it might be a good idea to persuade Sir Michael Turner to deal with the Vendside issue and either stay the GLO or deal with it himself, pending the determination of the Vendside issue; and fourthly the importance of bringing into account, as the justification for the deductions, support for miners knee litigation.

214. It will be necessary to consider the 'strategy email' in the context of the claim as a whole. However the suggestion that Sir Michael Turner should be invited to convene a special hearing to review the state of play does not strike me as inherently objectionable. It was in any event a request to him which came from the CG.

The transfer of the GLO application from Master Turner to Sir Michael Turner on 11 November 2005.

215. On 10 November 2005, Mr Tucker wrote to Sir Michael Turner on behalf of the CG.

> We write to notify the Court of applications the Claimants propose to pursue arising as a consequence of events that have taken place since June of this year culminating recently in a press release issued by an organisation called [AGM] to coincide with the lodging of an application for a Group Litigation Order by [GWM] on behalf of a number of Claimants.
>
> The CG, on behalf of the CSG, plainly have responsibility for pursuing the best interests of Claimants who seek to recover damages from British Coal Corporation/the DTI for respiratory diseases. However, we believe that our role extends further and that we have a responsibility as custodians of the scheme (together with the Court and the DTI). It is this feature of our role that gives rise to the applications we propose to bring before the Court which, in outline, are as follows:-
>
> > 1. That the Court should order that the GLO application is listed before you and stayed on terms that interested parties appear before the Court so that directions may be given for the determination of the validity of the various Vendside agreements entered into between individual Claimants and Vendside.
> >
> > 2. That the Court gives directions as to the terms upon which Claimants may transfer instructions from one legal adviser to another.

> The factors that we have taken into account in arriving at the decision that application should be made to the Court to make Orders in the above terms are as follows:-
>
> > 1. The question of the legality of the various forms of the Vendside agreement is a running issue which may be the cause of continuing damage to the integrity of the scheme generally. Although there are regulatory and other enquiries underway which are not a matter for the Court we submit that the integrity of the scheme is a matter for the Court. It seems to us that resolution of the validity of the said agreements will have a positive effect and, as the Law Society have indicated, may speed up the regulatory enquiries. More importantly the Claimants concerned will have certainty where presently they face uncertainty. Further, it appears to us from consideration of the GLO application that the outcome may determine whether or not the GLO is susceptible of proceeding further. The CG accept that a question may be raised as to locus in relation to this application. We seek no more than the direction indicated above. If the Court sees fit to order the relevant parties to formulate an issue for determination the CG would expect to have no part to play in subsequent hearings.
> >
> > 2. The AGM press release criticises the operation of the scheme generally and appears to be designed to encourage Claimants to transfer instructions to a panel of six firms of solicitors whom, it is alleged, will be able to handle claims more expeditiously than present advisers. We do not believe there is any foundation in fact for this assertion. Any transfer of claims from one solicitor to another, on a spurious basis, will achieve no more than delay for the individual Claimants concerned and dislocation of the scheme generally. Claimants who have a genuine grievance with their solicitor should be entitled to transfer instructions but those who do not should be encouraged to remain with their legal adviser.
>
> We have copied this letter to the DTI and invite them to inform the Court as to whether or not, in their role as custodians of the scheme, they support the proposed applications. We have also copied this letter to The Law Society, to GWM and to the solicitors named in the GLO application.
>
> We should be grateful if you would confirm whether or not the Court is prepared to hear the proposed applications by reconvening the Extraordinary Review Hearing or otherwise on the hearing listed for 1 and 2 December 2005.

216. The Claimant is critical of this letter. Mr Green QC points out that the criticism of ‘transfers … on a spurious basis’ mirrored part of the Judge’s letter of 26 October (which was not sent to GWM) in which he had referred to destabilizing of the scheme

'on what appear to be spurious reasons.' However, in so far as it is a valid criticism, I do not accept that it advances the claim against the 1st to 9th Defendants. While I accept that the letter reflected Mr Lumsden's views and that he saw it in draft, it came from Mr Tucker on behalf of the CG and raised issues of justifiable concern to the CG. There is nothing to suggest that Mr Tucker and the CG were simply the mouthpiece of Thompsons and Mr Lumsden, and good reason to conclude that they were not. In any event I reject as entirely artificial the assertion that the letter constituted a misrepresentation by omission by Thompsons and/or Mr Lumsden. There was no representation, no failure to disclose what should have been disclosed and no conspiracy.

217. One proposal was that Sir Michael Turner should consider the validity of the 'Vendside agreement' and the terms on which claimants should be permitted to transfer their instructions. This was plainly sensible. It had been the UDM/Vendside agreement which had generated much of the adverse publicity since it appeared to lead to the enrichment of individuals. The issue had been raised as a suitable preliminary issue in the summer; and if the Court was in a position to determine issues of principle, it would have speeded up the Law Society investigations and lessened the potential disruption to the operation of the scheme from the transfer of instructions.

218. On the following day 11 November 2005, Senior Master Turner wrote to the respondents to the GLO application, to GWM and to Irwin Mitchell.

> Sir Michael Turner has now directed that this application for a GLO is to be made to him.
>
> The conversations which some of you may have had with my P.A ... concerning dates of availability and any correspondence you have sent in with dates to avoid are now non valid as this case is being dealt with by Sir Michael Turner.

219. It is unclear how the GLO application came to be transferred from the Senior Master (Master Turner), before whom such applications were usually made. Although a search for the Court File was carried out at my request, it seems to be no longer available. In the course of argument during the GLO application hearing on 4 April 2006, Sir Michael Turner informed counsel for the GLO claimants.

> The Senior Master consulted me and he agreed to refer the application to me.

220. It is apparent that at this point GWM was concerned about Sir Michael Turner hearing the GLO application, and a draft letter was prepared opposing the transfer. This was never sent. Among the points made in the draft was the argument that the lawfulness of the Vendside agreements was only one of the many issues that arose and that the claims were private law claims brought against parties most of whom were not parties to the BCRDL scheme. The draft letter resisted the making of a direction as to the terms on which transfers might be made and offered the firm's reassurance that it had not encouraged (and would not encourage) clients to transfer instructions unless the clients had a genuine grievance with their existing solicitors and had been independently advised that it was in their interest to do so.

221. I will deal later with my overall conclusions about the Claimant's claims. At this stage it is sufficient to state that, although it is clear that Mr Lumsden and Thompsons played their part in supporting the CG request that Sir Michael Turner should hear the GLO application and, like the CG were aware of his earlier views about union deductions, their actions were not tortious.

222. In his unchallenged evidence at trial Mr Allan QC expressed his own view of the matter.

> Given his experience of dealing with the BCRDL since 1995, Sir Michael Turner had an obvious advantage over any other judge in understanding the background to the application

223. The correspondence highlights a potential issue on which I should express my very clear view. Those involved in litigation should not seek to influence a decision as to the identity of the judge who will hear their case. Information about the case (which is agreed between the parties) may be helpful to Court Listing Officers. Suggestions by parties as to the identity of the judge who should hear their case should not be made, and are likely to be treated as unwelcome.

The withdrawal of Templeton's ATE cover on 15 November and its reinstatement on 23 November 2005

224. On 2 November there was a meeting between Mr Booth and Mr Shears. Mr Shears plainly did not know (and had no reason to believe) that what he said would be reported by Mr Booth to Mr Edwards. Part of Mr Shears's memorandum (dated 4 November) recording the meeting included:

> [Mr Booth] also wanted to discuss the possibility of settlement, which issue he had raised with me before we received the initial letter of claim ...
>
> He remained of the view that it may be possible to achieve a finite settlement which could be attractive in the context of any uncertainty. I said we did not accept that there was any risk to our union clients on any of these likely claims, and there seemed to me to be little vulnerability on the part of Thompsons save, perhaps, politically in relation to the next of kin cases, on which we remained confident as to the strength of the legal arguments.

225. Both Mr Shears's and Mr Booth's notes record Mr Booth suggesting that he be authorised to approach GWM on the basis that, although confident that there was no liability, Thompsons were interested in exploring a finite settlement on satisfactory terms. Mr Shears's note records that he refused to authorise Mr Booth to make such an approach to GWM.

226. On 14 November GWM replied to Thompsons' 26 October letter and repeated its offer to settle the dispute by a structured mediation with a timetable which would result in a mediation on 23 December 2005. Neither the prescriptive proposal for an

unseasonal mediation nor the timetable were realistic. The proposal was bound, if not intended, to be rejected. The letter contained the implicit threat:

> Arrangements are currently being made in relation to the hearing of the application for a Group Litigation Order, and if there is to be any prospect of settling with your firm rather than joining it into the proceedings, urgent attention will have to be given to the matter.

227. Although this was the second time GWM had insisted on a speedy response, it continued to show very little urgency itself.

228. Mr Brunswick's evidence was that he came under pressure from Mr Shears of Thompsons. According to his witness statement:

> 41. Mr Booth telephoned me in the early evening of 14 November. He explained that Thompsons had reacted extremely badly to the letter from GWM, and that he felt that the letter also undermined the role of intermediary that he had agreed to undertake. Mr Booth asked me to cancel the agreement to provide ATE cover for GWM. I refused to do so.
>
> 42. Later that evening I was telephoned by Geoff Shears of Thompsons. He was very angry about the letter from GWM and blamed Templeton for allowing the situation to arise. He explained that Thompsons did not want a mediation: an internal review had revealed that Thompsons had been making deductions from compensation awards for miners from the Durham area and paying those to the Durham Miners Association branch of the NUM. The Durham Miners Association was now almost broke, so he was worried that Thompsons might end up having to foot the bill for the deductions that might have to be repaid to miners.
>
> …
>
> Mr Shears wanted me to cancel the insurance and was very persuasive in suggesting I should do so and how I might best proceed to manage the risk to Templeton. Eventually I agreed, under pressure and against my better judgment.
>
> 43. On 15 November I instructed Mr Maule that he should write to GWM revoking the insurance cover. The grounds given were that Templeton was conflicted from providing cover because of its prior relationship with Thompsons.
>
> 44. The same day Mr Booth called me. He did not know what had been agreed the previous evening so I told him that I had agreed to cancel the insurance cover. He asked if he could get confirmation and I told him he should speak to Mr Maule.

229. Mr Booth's first account of what occurred was made in a statement made to the Claimant pursuant to s.236 of the Insolvency Act 1986 on 29 October 2010.

> 29. On 14 November 2005 GWM wrote to Thompsons warning that they would be joined in the proposed litigation. Thompsons' reaction was dramatic. Geoff Shears and Lawrence Lumsden both telephoned me that evening to express their anger at the situation. To the best of my recollection, Geoff Shears asked me to speak to Ralph Brunswick and intimated that I should use my best endeavours to get Templeton to withdraw ATE cover for the GLO.
>
> 30. I did speak to Ralph Brunswick as requested, but I was unable to persuade him to cancel the insurance cover Templeton had already agreed with GWM. I telephoned Geoff Shears to inform him of my conversation with Ralph Brunswick and I advised him that he should himself speak to Ralph Brunswick.
>
> 31. I understand that later that evening Geoff Shears and/or Lawrence Lumsden telephoned Ralph Brunswick who agreed that he would cancel the GWM ATE cover.

230. Mr Booth was cross-examined about this account and the more detailed account he had given in his witness statement for the trial (dated 26 February 2014).

231. In his evidence, Mr Shears denied speaking to either Mr Brunswick or Mr Booth during the evening of 14 November 2005, and denied ever having spoken to Mr Brunswick.

232. Mr Lumsden also emphatically denied speaking to Mr Brunswick and Mr Booth, and in his closing speech Mr Green drew back from contending that Mr Lumsden had spoken to them notwithstanding Mr Booth's evidence that he had.

233. Having heard the witnesses give evidence, I have concluded that Mr Brunswick and Mr Booth were both mistaken in their evidence. It seems to me unlikely that either Mr Shears or Mr Lumsden would have engaged in anything as clumsy as a direct attempt to get Templeton to break its contract with GWM and withdraw the ATE cover. It is not just that as solicitors they would have been aware of the dangers of acting in such a way, nor that the suggestion must be that they conducted themselves in a singularly (and, in my view, uncharacteristically) unsubtle way, nor that similar accusations of interference and harassment would later be made by Mr Brunswick during telephone calls on 27 and 28 February 2006, nor even that Mr Brunswick was an inherently unreliable witness (a matter which I will come to later in this judgment). It is that I was (subject to one point) persuaded by the evidence of Mr Shears and Mr Lumsden, and unpersuaded by the evidence of Mr Brunswick and Mr Booth.

234. The most likely explanation for what occurred was that Mr Booth saw GWM's letter to Thompsons which was sent to him under cover of an email (timed at 14.33) in which Mr Edwards wrote:

> For information
>
> A mediation by the end of the year will be pushing it but we have to rush this otherwise the opportunity will pass.

235. Having read the letter Mr Booth felt that GWM had broken a clear understanding and, at 17.28 on 14 November, he emailed Mr Edwards with a copy to Mr Brunswick.

> When we met last Tuesday it was agreed that you would write to me setting out the mediation methodology & how you felt this would address the concerns of Templeton. Once Ralph [Brunswick] & I had this information, & had ensured that we were happy with it, we would jointly decide how best to move it forward both tactically & strategically. I discussed this approach and he agreed.
>
> We now find that you have short-circuited this arrangement by going straight on the offensive with Thompsons without any discussion with either Ralph or me. Why – as this totally contradicts our agreement.

236. It was Mr Booth who was agitated by GWM's letter. He realised that the careful arrangement by which Templeton would not have to insure against Thompsons had been jeopardised. Mr Brunswick would have been aware that Mr Booth had his own interests to protect and that he would not necessarily be making requests on behalf of Thompsons.

237. There is one point on which I find that Mr Shears was mistaken in his recollection. I have concluded that it is likely he spoke to Mr Booth at some time on 14 November and expressed his displeasure at receiving the GWM letter. However, it was Mr Booth's fear that his secret commission on the premium paid to Templeton in respect of the insurance provided to Thompsons' union clients which generated his email to GWM, and led him to put pressure on Templeton to resile from its promise to insure GWM's case.

238. In any event, on 15 November Mr Maule of Templeton wrote to GWM cancelling the ATE cover for the GLO.

> I write with reference to your e-mail addressed to Ralph Brunswick attaching a copy of your letter to Thompsons, the contents of which are duly noted.
>
> I regret to advise that Templeton's position is compromised by virtue of a conflict of interest. Consequently, we can have no further involvement or participation in this risk. It does not appear from my records that insurance cover had in fact incepted, although for the avoidance of doubt, I confirm no such legal expenses insurance is in place.

239. Templeton's decision was not maintained for long. As soon as he received the letter Mr Edwards got in touch with Mr Fresson, and on 23 November Mr Fresson was able

to reassure him that Mr Brunswick had told him that the 15 November letter 'could be ignored as if it was not sent,' so long as Thompsons were specifically excluded from the claim pursued by GWM.

240. The Claimant's case that the terms on which the cover was reinstated departed from the prior agreement in so far as it excluded Thompsons is incorrect. As both Mr Edwards and Mr Fresson accepted in evidence, claims against Thompsons were excluded in both the original and in the reinstated cover. It follows that when cover was reinstated on 23 November in terms which exclude Thompsons, it was not due to pressure from Thompsons, it was because the cover had always excluded Thompsons.

241. Since the insurance was reinstated the main relevance of this part of the evidence is that the temporary suspension of the insurance was to emerge later as a feature at the GLO hearing before Sir Michael Turner.

The press and political campaign in late 2005 and early 2006.

242. The issue of the GLO application on 27 October was followed by a considerable amount of publicity in the media which was generated by AGM, and to activity by Thompsons (and in particular, Mr Jones) about which Mr Green QC was highly critical. Thompsons was concerned to answer the political argument on deductions and draw the distinction between those which were made in favour of the unions and those which were diverted to solicitors or claims managers.

243. One of the difficulties faced by Mr Edwards, which he fairly acknowledged in evidence, was the confusion about the objects of AGM and, in particular, its relationship with GWM.

244. Some of AGM's publicity fed into the press. On 18 January 2006, The Times published an article stating that John Prescott (the Deputy Prime Minister) had thrown his 'support' behind AGM's campaign. Other Members of Parliament were also mentioned as supporters of AGM. Each of these subsequently disavowed support for AGM, to some extent as a result of Mr Jones's activities. Nevertheless it is clear that there was still significant support for AGM and its aims among certain Labour MPs. This political battle for support is relied on by the Claimant as the context for the later events in February 2006.

245. As Thompsons's Head of Policy and Public Affairs Mr Jones was engaged in liaising with Government and Members of Parliament. During the period with which this case is concerned it is clear that Thompsons considered that the deduction issue needed to be addressed on the political front. The firm plainly thought that the unions' natural political allies were not giving their union clients the support that they should have given.

246. Although much of the evidence was not of direct relevance to the present case, I was concerned by some of what I heard. It appeared that Mr Jones and private investigators whom he employed to assist him engaged in activities which were open to objection. I accept that most of the information acquired by questionable means (for example about Lord McKenzie and AGM) was intended to be deployed on the political front and in associated media campaigns, rather than in the litigation, and that the deployment of such material is not the proper focus of this trial. On the other

hand, Thompsons also showed itself closely interested in Mr Edwards's political background in South Africa and carried out research into it.

247. On 16 February 2006 Mr Jones emailed various of his contacts, directing them to GWM's website.

> FYI. The website of the firm that he is part of.
>
> They are trying to screw the UK NUM. Any dirt gratefully received. If you think a Private Eye would get more on the bloke or his/their links give me a ring and it may be worth some investment from us on our clients' behalf.

248. I have little doubt that if they had found something to discredit Mr Edwards it would have been deployed in some way. In fact, they found nothing damaging about him, since the information which emerged was only to his credit. One of the features of this case has been the close scrutiny of the internal email correspondence within Thompsons. This has revealed how the firm operated and how individuals within the firm reacted to information. The information was confidential and never intended to be seen by third parties, and was certainly not intended to be read out in open court. I bear this in mind. Nevertheless I find it surprising that it was thought either necessary or desirable to carry out this sort of research into a solicitor acting for the other side.

249. Mr Pooles QC sought to justify this as being, 'unfamiliar to those not involved, in much the same way that marketing would seem unfamiliar to legal practitioners of previous generations.' His submission seemed to be that the Court should simply accept that this is the way in which litigation is conducted nowadays, and that to view this approach adversely is to be old-fashioned and out of touch. I reject that submission. While it has only a marginal bearing on the issues in the case, I am not prepared simply to treat this with the forensic equivalent of a sigh of regret at the way in which things have changed. While I accept that research on the experience of professional opponents is legitimate, trying to 'dig up dirt' on them, with the intention of leaking it to the press is not. To the extent that this conduct was encouraged or condoned within Thompsons it does not reflect credit on the firm.

December 2005: further hearings before Sir M Turner and the Templeton ATE policy.

250. There was a directions hearing in the GLO application on 7 and 8 December 2005. The hearing was attended by the legal representatives of the GLO applicants (represented by GWM and counsel), the seven Respondents (four of which shared two counsel), the DTI, the Law Society and the CG. Sir Michael Turner expressed concerns about the cost to benefit return of a GLO in the light of GWM's apparent concession that only 69 clients had signed up and only 398 potential applicants had contacted GWM. Given the potential costs and the number of potential individual claims Sir Michael Turner's warning that there was 'a hill to climb' was not surprising. The warning to GWM had already come from their counsel.

251. The Judge's order of 9 December (among other matters) directed disclosure by the respondents of relevant documents including details of deductions made. The Order also provided that (a) the applicants should state by 16 December whether they were

prepared to disclose the ATE insurance policy; (b) the applicants should serve generic Particulars of Claim identifying the common issues of law and fact; (c) both applicants and respondents should serve a summary of costs incurred to date and up to the conclusion of the GLO hearing; (d) the applicants should serve a summary of costs up to the conclusion of the litigation, (i) on all the issues in the proposed group litigation and (ii) on issues restricted to pursuing the non-solicitor respondents and their appointed agents; (e) the respondents should set out in writing their full objections to the GLO; (f) the applicants should state whether they intend to claim against any Trade Union other than the UDM and, if so, to amend the application; (g) the applicants should state any basis for opposing issues affecting non-solicitor questions being tried separately (h) the case to be listed for hearing before Sir Michael Turner in a 2-3 day period in April-May 2006.

252. I have set out the order in some detail because they indicate some of the issues which were likely to arise, the way in which the Judge dealt with the parties and the likelihood that the application would be hard fought over a period measured in days and not hours. It is important to note that no objection has been, or could be, taken as to the form of the order and there is no criticism of how the Judge conducted himself at the hearing. Nor is it submitted that he exhibited a closed mind or any predisposition in relation to the application during the hearing.

253. On 17 December Mr Shears met with his union clients. At this meeting Thompsons offered to underwrite any liability of the unions to repay deductions. So far as Mr Shears was concerned, despite the financial commitment, it removed any potential conflict of interest between the firm and its union clients. His evidence was:

> ... once I'd had a meeting with the Durham miners' leader, I was a very happy man, because I knew that we had a solution to the problem ... in our hands, and it could be delivered.

As already noted, Mr King had already formed the view that the firm would be liable for deductions.

254. A decision was made by the Executive Board of Thompsons to provide for the liability to repay union deductions in the firm's accounts from January 2006. Ms Hurley's evidence on this point was emphatic: the provision made in Thompsons's year-end accounts reflected a recognised liability of Thompsons to make refunds to clients and the motivation for making the provision and offering repayment was the regulatory issue raised as a result of the Law Society investigations. Ms Hurley's evidence (which I accept) was that the GLO application (to which Thompsons was not a party) was not the primary concern of those managing Thompsons's finances.

255. Later, in 2007-8, Thompsons initiated a voluntary repayment of the deductions which had been made and then paid over to the unions, and contacted all former clients of the firm. All those who requested a refund of deductions were paid out in full. This involved payments totalling £3,640,443 in respect of 6,304 claims.

256. Turning back to the position in December 2006, although Templeton had appeared to have insured GWM on terms which had been agreed in the summer, it had still failed to furnish a policy. This meant that, despite GWM's wish to disclose the ATE policy as envisaged by the 9 December Order, it was unable to do so. Although Mr Fresson

made increasingly urgent enquiries, he received no satisfactory response. A summary of the cover was sent by Mr Maule on 22 December and was passed on to the GLO respondents on 23 December.

257. On 16 January Brooke North (acting on behalf of the UDM and Vendside Ltd) wrote to GWM requesting a full copy of the ATE policy and, on 30 January, GWM informed Templeton that it was coming under increasing pressure to produce the policy.

258. On 6 February Mr Maule sent a draft ATE policy to GWM adding, 'This should give you the general gist!' This document showed track-change amendments and comprised mainly formatting changes. Mr Edwards's evidence was that he considered the wording unacceptable, but he does not appear to have responded to Mr Maule's email.

259. On 23 February Weightmans (acting for the 3rd respondents, Beresfords) issued an application for disclosure of the ATE policy. On 28 February a consent order was signed in which GWM agreed to disclose the policy by 10 March. It is clear that, as a result of Templeton's delays the GLO respondents had now become interested in the existence and terms of any ATE cover.

260. As already noted, GWM's difficulties in obtaining a policy from Templeton in relation to the GLO ATE cover was matched by Templeton's inefficiency in issuing the British Biotech and Claims Direct policies. These had been outstanding even longer by this stage. Mr Fresson described the reason for the delay in producing the GLO ATE policy as 'sheer inefficiency.' I agree. Mr Maule's glib response to what had become an urgent issue demonstrates at the very least a high degree of casual indifference to GWM's position. Mr Brunswick could offer no explanation for the delay and said that, when made aware of it, he had gone to see Mr Maule whom he described as 'dragging his feet.' This part of the history reinforces the general impression of a thoroughly discreditable approach by Templeton to its contractual obligations. It was an approach which was to cause some of the difficulties that GWM and its clients faced at the hearing in April.

The events of 27 February 2006

261. The Claimant's case has changed in the course of the case to accord with Mr Brunswick's altered recollection.

262. The pleaded case (at §140 of the Re-Amended Particulars of Claim) was that Mr Brunswick (1) received 12-15 telephone calls from various Thompsons partners and/or Stephen Booth on behalf (and at the request) of Thompsons; (2) was required to attend a meeting at Thompsons' office in Congress House; (3) was informed that since Thompsons had become aware that Templeton was insuring the claims brought by GWM on behalf of miners, they had been placing its business elsewhere; (4) was shown that over £300,000 worth of business which would have been placed with Templeton had been diverted to other insurers since October 2005; (5) was told that if Templeton issued an insurance certificate which included Thompsons they would remove their business from Templeton altogether; and (6) was concerned about the degree of pressure he was being put under.

263. In his s.236 statement to the Claimant which formed the basis for this part of the claim, he described what happened after he informed Mr Booth that he was providing ATE cover for the GLO.

> 53. Mr Booth must have informed Thompsons immediately because over the next day or so I was called by several Thompson partners, all very angry and calling me all the names under the sun. They were clearly not content that the ATE cover existed at all, notwithstanding that Thompsons was not a defendant and angry in that they had understood that Templeton had already withdrawn cover.
>
> 54. On 28 February 2006 I attended a meeting with Thompsons at their office at Congress House. The meeting had been arranged to discuss several routine matters. I first met with a number of partners to discuss PI LEI insurance; they all knew by then that I had agreed to provide ATE insurance for the GWM GLO and I was extensively criticised.

264. The statement continues [at §55] with an account of how he was invited into Ms Hurley's office to discuss GWM's GLO where they were joined by Mr Shears, and where he was told about the political fall-out and asked to cancel the cover.

The case against Thompsons

265. The case against Thompsons was based on the application of illegitimate pressure and harassment as part of the continuing conspiracy whose purpose was to get Templeton to withdraw its ATE cover for the GLO.

266. The documents show that Mr Lumsden emailed Mr Booth on 23 February asking whether there was any word on the insurance issue yet, and expressing his concern that the Court should not be misled into believing that there was cover whilst Thompson's understanding was that the GLO ATE cover had been cancelled in November 2005. On Monday 27 February 2006 (at 15.16) Mr Booth emailed Mr Lumsden (with a copy to Mr Shears) informing him that Templeton had reinstated the GLO cover. Mr Lumsden acknowledged receipt of the information at 17.37.

267. It follows that the telephone calls which are said to have been made to Mr Brunswick must have taken place after 15.16 on 27 February 2006 when Thompsons were first informed of the 'reinstatement' of the cover by Mr Booth.

Who made the telephone calls to Mr Brunswick?

268. Having not previously identified the individuals whom he said made the calls on 27 and/or 28 February, in his evidence at trial Mr Brunswick initially said that he spoke to Mr Christie, Mr Shears and a partner from Thompsons Newcastle office. Later, he corrected himself and said that it was not Mr Shears who called but Mr Lumsden, although he was not sure of this. In any event, his evidence was that he received the calls in his office in the Isle of Man. He described the calls in various ways:

> Multiple phone calls from at least several individuals.

> Some phone calls from some partners of Thompsons.
>
> Multiple phone calls from multiple partners.
>
> They might have been people impersonating partners, but I believe they were partners.

269. Mr Shears denied emphatically that he had ever spoken to or met Mr Brunswick. Mr Christie also denied speaking to Mr Brunswick about the ATE cover at this time. Mr Lumsden said that he was asked by Mr Booth to speak to Templeton and spoke to a man whom he later realised was Mr Brunswick on Monday 27 February at some time after 17.37 (when he had acknowledged receipt of Mr Booth's email timed at 15.16). He told Mr Booth that there was an inherent conflict between insuring union-backed claims and insuring a claim which involved a challenge to union deductions.

270. I am satisfied that Mr Lumsden was the only one of the 2nd to 9th Defendants, and the only person who might have been authorised to speak on Thompsons's behalf, who spoke to Mr Brunswick on 27 February.

Where did Mr Brunswick receive the call?

271. It is now common ground that Mr Brunswick was in London on Monday 27 February 2006. His evidence was that the calls he described were received in the Isle of Man at his office. This means that they were either received on the Sunday (which was before Thompsons knew of Templeton's change of position) or on 28 February when he had returned to the Isle of Man. It is likely that Mr Lumsden called Mr Brunswick on his mobile phone on 27 February at some time after 17.37.

What was said?

272. Mr Brunswick's evidence at trial was that he was looking for guidance from Thompsons as to what he should do about having agreed to insure the GLO. He wanted a way out and he wanted Thompsons to give him that way out. He agreed that the pressure came from his having placed himself in an awkward commercial position. In his cross-examination Mr Pooles QC explored Mr Brunswick's complaint.

> Q: There was no threat?
>
> A: No threat
>
> Q: No instruction?
>
> A: No.
>
> Q: No pressure?
>
> A: Well, no threats, no instruction. There was certainly pressure.
>
> Q: The pressure is on you because you are acting in circumstances where you can poison the commercial relationship?

A: And I'm asking for guidance and they won't give it to me.

273. Much of the Claimant's case at trial on this part of the case was conducted on the basis that there had been a meeting between Ms Hurley and Mr Brunswick at Thompson's office on 28 February. An internal email from Ms Hurley timed at 19.25 on 28 February recorded a conversation between them earlier on the same day (i.e. 28 February).

> He said that yesterday was a difficult day and he had received a number of phonecalls telling him 'he should not do this as you do not understand the consequences' these phone calls had been from [Mr Booth]. He said he did not know the ramifications, it was good money for him and a good case and so he backed it. However, if it was going to cripple our friends he would listen. Lawrence [Lumsden] was explaining the potential fallout, but was being very guarded in what he was saying ... He offered to kick them [GWM] in the teeth and void the policy if that was what we wanted, we just had to ask. [Mr Brunswick] said he was exasperated yesterday, he was preparing for a trial, he was stressed out and [Mr Booth] was on the phone saying you cannot do this – do something now. He said if it was a big deal, let me know, I will try and arrange an elegant exit ... He said he had started a minor argument with them to create the conditions to exit if we asked him to. They might find it strange but he would pull the cover, he had gone over the file at 10.20 pm last night given the pressure from [Mr Booth] and we would do whatever he asked.
>
> I said that we had been advised by him that he had removed cover when we last met, it would have been helpful if he had updated us when he issued another policy, only because we may have acted on out of date information which might have been embarrassing for us. We also had received calls yesterday, and had been advised that he was keen to talk to us. As far as I was concerned we just wanted clarification of the position, we were happy to let matters stand.

274. I accept that the contents of the email gave an accurate and reliable account of a telephone conversation between Ms Hurley and Mr Brunswick on 28 February in relation to what Mr Brunswick said had happened on 27 February.

275. Mr Christie's evidence, which I accept, was that Templeton's insurance of the GLO was 'a small, peripheral issue' for him. His reaction was that it was a bit stupid for Templeton to be insuring against the unions and putting at risk their own business. He was not angry, it was more 'a raised eyebrow.'

276. In my judgement, five points are clear from the evidence.

277. First, the telephone calls on 27 February which Mr Brunswick was saying had put him under pressure were from Mr Booth who was surprised to hear that Templeton was still insuring GWM and was concerned that Thompsons might withdraw its business

from Templeton, thereby jeopardising his commission. In his oral evidence Mr Brunswick described Mr Booth as 'angry'. He was, however, neither conveying Thompsons's views, nor acting on their behalf, nor to be regarded in law as acting on their behalf.

278. Secondly, Mr Brunswick did not receive phone calls from Thompsons or its partners putting him under pressure or telling him what to do, and made no complaint to Ms Hurley that he had.

279. Thirdly, in the telephone call from Mr Lumsden about the potential fallout from Templeton's agreement to insure the GLO action, Mr Lumsden was 'very guarded'. This is apparent from both Ms Hurley's email note and Mr Lumsden's evidence. This is inconsistent with Mr Lumsden pressurising Mr Brunswick to break Templeton's contract with GWM.

280. Fourthly, Mr Brunswick said he was more than willing to break Templeton's contractual obligations with GWM if he received any encouragement from Thompsons. He did not receive any such encouragement, and did not avoid the policy until after the judgment of Sir Michael Turner in May.

281. Fifthly, Ms Hurley expressed Thompsons's reaction to the discovery of the continuing existence of Templeton's ATE policy as embarrassment that the firm may have been acting on out of date information. The content of Ms Hurley's internal email is emphatically not the language of interference in third party contractual rights, harassment or the application of unlawful means.

282. None of this was inconsistent with the evidence which Mr Brunswick gave at trial.

> Q: Again, there was no suggestion in that statement on your part that Thompsons were placing you under pressure ...?
>
> A: Previously - on a previous question, you have asked me if they threatened me, and I've said no. You've asked me if they told me what to do, and I said no. And you asked me if they'd put me under pressure and to that one I can't answer it clearly. I was certainly under pressure. They knew it. They didn't - they - were fully aware of their commercial position vis-à-vis me. I was seeking guidance from them in the meeting with Carolyn, and she did not give it to me and she did not threaten me, but she certainly maintained the pressure on me.
>
> Q: How?
>
> A: By not - by not helping me.

283. The difficulty Mr Brunswick faced was the consequence of his own commercial decisions to insure GWM without considering the potential consequences for his other business. His complaint was not that he had been subjected to threats or instruction, but that Thompsons had not helped him find a way out of a difficulty which he had created for himself. He wanted someone else to make a decision for Templeton or to be able to say he had been forced into reneging on Templeton's obligations to GWM.

284. It is clear that the Claimant's case against Thompsons and the Defendant partners on this part of the case is inconsistent with (1) such contemporary written accounts as there are, (2) the inherent commercial likelihood, and (3) the evidence from Mr Shears, Mr Lumsden, Mr Christie and Ms Hurley (all of whose evidence I accept). It is also fatally undermined by Mr Brunswick's own oral evidence, inconsistent as it was with his earlier s.236 Statement. I have concluded that Mr Brunswick, encouraged by Mr Booth (for his own reasons) was looking for an excuse to repudiate his contractual obligations to GWM; and that Thompsons did nothing to help him out of his predicament. In any event, he continued to insure GWM.

285. I have concluded that Mr Brunswick's evidence on this part of the claim is untrue; and this informs my view of his credibility on other issues.

The case against Lord Prescott

286. The pleaded claim against Lord Prescott was set out in §140.6-8 of the Re-amended Particulars of Claim: (1) Mr Brunswick was told that Thompsons had arranged for him to receive a phone call which 'might encourage' him not to be involved in the insurance of miner's claims; (2) thereafter he received a telephone call from Lord Prescott (acting in concert or combination with Thompsons and/or at the direct or indirect request of Thompsons), in which he was told that if Templeton continued to support the claim he would ensure that the FSA (the Financial Services Authority) would make a full enquiry into Templeton; and (3) Mr Brunswick was concerned about the degree of pressure he was being put under by this call.

287. The source of these allegations was not Mr Brunswick, but Mr Fresson who, in a telephone conversation with Mr Edwards on 1 March 2005, reported what he had been told by Mr Brunswick. Mr Fresson added that the purpose of a FSA enquiry appeared to be to make sure that Templeton could not do business in the UK, and gave his own endorsement of Mr Brunswick's account by describing him as 'a straightforward man'. As will be apparent, this is not a view of Mr Brunswick which I share. Mr Edwards suggested telling Sir Michael Turner what had happened or going to the newspapers with the story, but was dissuaded by Mr Fresson, who said that Mr Brunswick would not agree to this since he had spoken to Mr Fresson about this in confidence. Following this conversation Mr Fresson got in touch with Mr Ridgway; and Mr Ridgway and Mr Barry Cavie (a business associate of Mr Ridgway) travelled to the Isle of Man to hear Mr Brunswick's account of the reported conversation with Lord Prescott. Mr Fresson repeated to them what he had been told by Mr Brunswick, who agreed with what they were told.

288. Although the Particulars of Claim against the Thompsons Defendants were based on the statement made by Mr Brunswick to the Claimant on 16 November 2010 under s.236 of the Insolvency Act 1986 and his 1st witness statement dated 29 July 2013, neither of these statements made any reference to the involvement of Lord Prescott. At that stage the Claimant's case against Lord Prescott was based on the evidence of what Mr Brunswick told Mr Fresson.

289. Mr Brunswick's 16 November 2010 statement was expressly stated to represent 'a full disclosure of [his] knowledge of and involvement in these matters.' To the extent that he had been told by someone at Thompsons to expect a call which might discourage him from being involved in insuring the miners' claims and to the extent that this was

followed by a call from Lord Prescott, that statement was untrue since no mention was made of these matters.

290. After the trial began the Claimant was given leave to rely on an affidavit made by Mr Brunswick on 3 October 2014. In this affidavit he set out (for the first time) his account of the phone call from Lord Prescott.

> 5. The context of the call was that I had been receiving phone calls around the time of the meeting with Thompsons around 28 February 2006 from Stephen Booth on behalf of Thompsons and several Thompson partners, all very angry that Templeton's ATE cover for the miner's GLO had been reinstated.
>
> 6. I received the call from John Prescott on or around 28 February 2006 on my mobile phone ... after my meeting with Thompsons at Congress House. I was in the check-in area at London City Airport. The flight was leaving for the Isle of Man at about 7 pm; the call was received at about 6.30 pm. The caller said he was John Prescott. I understood him to be John Prescott MP, who was then Deputy Prime Minister.
>
> 7. It was completely unexpected and out of the ordinary for me to be speaking to the Deputy Prime Minister. I had never spoken to him previously, nor any other senior politician. Nothing like it has occurred in my life, before or since. Nonetheless, I had no doubt at the time of the call - and have no doubt now - that the call was from John Prescott MP. The way he spoke, his accent and the tone of his voice were all consistent with the person I had seen and heard on TV and radio.
>
> 8. Mr Prescott said that the GLO on behalf of the miners was of great concern to the trades unions. I understood this to be a reference to the practice of making deductions from union members' damages and paying them to their unions. The miners' GLO would have been an attack on that practice. I had not appreciated the wider implications of the case at the outset.
>
> 9. Mr Prescott said to me that Templeton were involved in some very serious issues and asked me if I understood what I was involved with. He did not ask me to take any specific step, nor can I recall him making any specific threat, but I can clearly remember the terror I felt during and after this call. The threat felt real, even though it was unspoken.
>
> 10. It was clear to me from the coincidence of (a) Mr Prescott's call, (b) my earlier meeting with Thompsons, and (c) the numerous angry phone calls from Stephen Booth and the Thompson partners, that I was being pressurised by Mr Prescott

> to cancel Templeton's insurance so that the miners' GLO would be unable to continue.

291. At §9 his affidavit specifically draws back from the allegation of a threat that, if Templeton continued to support the claim, Lord Prescott would make sure that there would be a full FSA enquiry into Templeton. Furthermore, despite what he told Mr Fresson and (implicitly) others, his evidence in court was that there had been no overt threat during the course of the conversation with Lord Prescott.

292. Having initially said that the conversation took place on 28 February, it emerged late in the trial, on the basis of the records of Mr Brunswick's travel arrangements, that the call (if it occurred) must have been made on 27 February in the early evening, since that was when Mr Brunswick was at City Airport in the course of returning to the Isle of Man.

293. In view of this information, on Day 19 of the trial, Mr Green QC clarified that his client's case was now that the call to Mr Brunswick was made by Lord Prescott between two votes in the House of Commons on the evening of 27 February, at a time when Mr Jones was in the bar of the House of Commons.

294. Somewhat surprisingly (not least in view of the vigorous cross-examination of Mr Jones) when it came to the cross-examination of Lord Prescott (on Day 20), it was not suggested that Mr Jones was involved in the telephone call. It was suggested instead that Lord Prescott had been passed Mr Brunswick's mobile phone number between 17:52 and 19:13 (the times of the two votes) in the Lobby of the House of Commons by one of his 'parliamentary colleagues'. It will be recalled that Mr Brunswick said that he had been rung at 18.30 while at City Airport.

295. While I recognise that the Claimant would have difficulty in identifying what precisely happened, the difficulties are largely as a consequence of relying on Mr Brunswick's account.

296. The Claimant's case focussed on three points: first, Thompsons's anxiety about the deduction issue and the GLO application and Mr Jones's political role; secondly, the unlikelihood of Mr Brunswick inventing such a call; and thirdly, that it would have been possible for Lord Prescott to have made a call at 18.30 between the two votes.

297. The first point assumes (contrary to my earlier findings) that Mr Brunswick was correct in describing Thompsons as 'very angry that Templeton's ATE cover for the miner's GLO had been reinstated'. If the insurance of the GLO was not a matter of such urgent critical concern to Thompsons they had no good or sufficient reason to call on such an important political favour as a personal intervention from the Deputy Prime Minister. Although I accept that, if he had been able to procure the political intervention of Lord Prescott in favour of the NUM and against AGM, Mr Jones would have done so, I am very doubtful whether he was ever in such a position. He was (in political terms) a relatively peripheral figure and appears to have been at a reception in Portcullis House between 17.00 and 19.00. This may have been why the Claimant's case was put (perhaps 'floated' is a better way of expressing it) on the basis that Lord Prescott 'may well have discussed the issue with Dick Caborn and Alan Meale, and possibly Dennis Skinner.' There is, however, very little basis for

concluding that any of these MPs were sufficiently interested in the GLO application to have involved themselves in persuading Lord Prescott to make such a call.

298. The second point depends on my view of Mr Brunswick.

299. The Claimant's strongest point is that the known timings mean that it was possible for Lord Prescott to have made a call from the House of Commons to Mr Brunswick at City Airport at about 18.30 on 27 February.

300. There are, however, a number of difficulties with the Claimant's case before one gets to the credibility of Mr Brunswick upon whom the entire case against Lord Prescott depends.

301. First, Mr Fresson's evidence was that he was not sure if he believed Mr Brunswick's account of the telephone conversation.

302. Secondly, Mr Lumsden was first notified that Templeton were still insuring the GLO in the conversation with Mr Booth after 15.16 and, according to Mr Brunswick, this was followed by a number of calls from Thompsons. It follows that Thompsons would have had very little time to persuade Lord Prescott to make a call at 18.30, even assuming that he would have been willing to do so.

303. Thirdly, although Carolyn Hurley's internal email note of 28 February records Mr Brunswick's complaints about telephone calls from Thompsons on 27 February, there was no mention of a phone call from Lord Prescott or even the slightest of hints that he had been put under pressure from such a powerful source. The whole tone of his recorded complaints to Ms Hurley is inconsistent with Lord Prescott's intervention.

304. Fourthly, it is part of the Claimant's case that Mr Brunswick was told that Thompsons had arranged for him to receive a phone call which might encourage him not to be involved. In this context I accept Mr Shears's evidence that as CEO if anyone had got in touch with Lord Prescott he would know about it, and he did not.

305. Fifthly, Thompsons have given extensive disclosure of internal email exchanges which the Claimant's legal team has studied assiduously. As already noted, although these exchanges do not always show the firm in the best light, they demonstrate that Thompsons was not averse to noting its successes. Yet there is no reference to, nor the slightest intimation of, any call made by Lord Prescott at the firm's request.

306. Sixthly, although Lord Prescott's oral evidence was not always clear, on the central part of the case against him he was emphatic: he had never met Mr Brunswick, had never heard of Templeton Insurance, had not been given Mr Brunswick's mobile phone number, had never made the call and had not spoken to him. His evidence was, and always has been, that no such conversation between them ever took place and that as a senior Minister he would never have become involved in such an issue.

307. It is implicit from the Claimant's case against him that Lord Prescott misconducted himself as a Minister of the Crown and conspired with Thompsons to harass Templeton into withdrawing its insurance of the GLO. In these circumstances is seems to me that Mr Pooles QC is correct in saying that, although the standard

remains the civil standard of a balance of proof, the Court is entitled to have regard to the inherent probabilities, see *In Re B (Children)* [2009] 1AC Lord Hoffmann at [15].

308. Finally, there are a number of Court findings where Mr Brunswick's honesty has been in issue. He was found to have acted dishonestly in two cases: in *Markel International Insurance Co. Ltd v. Surety Guarantee Consultants* [2008] EWHC 1135 (Comm), by Teare J, and in *Templeton v. Brunswick* [2012] EWHC 1522 (Ch), by HHJ Simon Barker QC. He has also been banned for life by the FCA and disqualified as a director by the FSC in the Isle of Man for 13 years, 6 months. This record of adverse findings does not mean that he is incapable of telling the truth, but would have led me to treat his evidence with considerable caution even if I had not been able to form my own view of his credibility.

309. Taking all these matters into account (and one further matter to which I refer later in this judgment), I have concluded that the Claimant has failed to prove that Lord Prescott made a call to Mr Brunswick in the terms that they now assert and has failed to make good the allegation of conspiracy or harassment against him.

310. Although it is unnecessary to form a concluded view about the matter, I suspect that Mr Brunswick's account of this phone call was another attempt to shift responsibility for making a decision about insuring the GLO.

The GLO hearing before Sir Michael Turner

311. The hearing took place over 3 days (3-5 April 2006); and it is a central plank of the Claimant's case that in reaching his decision to dismiss GWM's application for a GLO Sir Michael Turner was actually biased. The case against Thompsons, Mr Shears and Mr Lumsden is that they deliberately procured the hearing of the GLO application by a Judge whom they knew was biased.

312. In his Judgment on the GLO application given on 18 May 2006, *Hobson and others v. Ashton Morton Slack, solicitors and others* [2006] EWHC 1134 (QB), at [71] Sir Michael Turner summarised the seven reasons why the GLO application failed and would be dismissed. At the risk of abbreviating what was a summary, these were that: (1) no sufficient thought had been given to alternative ways of adjudicating the underlying claims; (2) no group litigation issue had been sufficiently or precisely identified; (3) the claims against Raleys had no natural affinity with the claims against the UDM and Vendside, and their instructed solicitors; (4) there were other unions and independent sections of those unions who ought to have been joined; (5) there was a gross imbalance between the costs incurred and to be incurred and the sums to be recovered; (6) the validity and enforceability of the contract between the claimants and the UDM, and the recoverable damages were fact sensitive, and (7) there was a lack of certainty about the sufficiency and enforceability of the ATE cover.

313. There are three broad strands to the Claimant's case on actual bias. First, reliance is placed on the background to Sir Michael Turner's involvement from March 2005, to which I have already referred, and which does not in my view demonstrate actual bias or, to the extent that it is material, either 'a loss of objectivity' or 'a complete loss of objectivity.'

314. Secondly, the Claimant relies on an exchange which took place on 16 May 2006 at the start of a Review hearing which led Mr Watkins of Nabarro Nathanson (on behalf of the DTI) to be concerned that the material:

> ... might give rise to the perception that Sir Michael had a closed mind on the issue of the criticism of the CHA such as to make it difficult for him to take an even handed approach to the GLO application.

315. The exchange occurred at a scheme hearing and related to another report in The Times to which the CG took objection and the DTI did not. Having read the exchange I am doubtful that it assists the Claimant beyond establishing that Sir Michael and the CG were sensitive to criticism that the CHAs were not being managed as effectively as they might. The DTI seems to have taken a more relaxed view, at least at this stage.

316. Thirdly, the reliance is placed on the conclusions of Cooke J in *Greene Wood McLean LLP (in administration) v. Templeton Insurance Limited* [2010] EWHC 2679 (Comm) at [165]-[193] and, in particular, [179] of the Judgment.

> It may be noted that Sir Michael appears there and elsewhere in the course of the proceedings to have been protective of the CHAs schemes and those involved, optimistically thinking, perhaps, that the Vendside fee was justifiable and that solicitors would not be capable of the actions to which the Solicitors Disciplinary Tribunals have referred.

317. Cooke J's analysis of Sir Michael Turner's judgment was in the context of an argument advanced on behalf of Templeton that GWM (and the Counsel they had instructed) had been negligent in advising that a GLO application should be made. It was therefore necessary to consider the reasons given by Sir Michael Turner for dismissing the GLO application, since they were relied on by Templeton to demonstrate that the lawyers had acted negligently. Cooke J decided that they had not been negligent, and it was therefore unnecessary for him to form a concluded view as to whether the Judge was right or wrong in his decision and, to the extent that he was critical of Sir Michael Turner's reasoning, it is of limited assistance to the Claimant.

318. The general observation that Sir Michael Turner was sensitive to criticisms of the BCRDL scheme and the lawyers that had appeared before him seems to be justified. Doubtless he had formed the view that without their expertise and cooperation the schemes would have been unworkable. However, this does not significantly advance the Claimant's case. The CHAs had been successful in resolving a multitude of claims and the many issues that had arisen; and applications whose effect was likely to cause disruption to the operation of the schemes was bound to be looked at critically by whoever heard it.

319. Like Cooke J, I am not directly concerned with whether Sir Michael Turner's decision was right or wrong. Quite apart from the difficulties of one court deciding such matters in relation to a court of equal jurisdiction, I have not listened to the arguments or had to consider the very large amount of evidence and other material that was deployed at the hearing.

320. At §482 of his closing written submissions the Claimant made the following point:

> The transcripts of this hearing speak for themselves, but include the judge adjourning the hearing of the GLO application to hold a CG meeting, inviting those involved in the GLO application to have a cup of tea. Even by the standards of the events in this case, this was surprising.

321. This submission demonstrates the lack of any real material to support the plea of actual bias at the hearing. There was nothing surprising in adjourning the application which was overrunning while the Judge dealt with another unrelated case management hearing which had already been fixed.

322. The suggestion that the transcripts speak for themselves is plainly correct; and I have accepted the Claimant's invitation to consider them. However, it is striking that, although the hearing took 3 days and GWM was closely involved throughout, not one single passage in the transcript has been relied on by the Claimant in support of the assertion of actual bias.

323. In a case where actual bias is alleged one would expect to see the bias demonstrated in the course of a 3 day hearing: either by the Judge exhibiting concluded views, or by his hostility to one side or favour to another. The transcript of the hearing shows a characteristically terse and even abrupt manner; but that is a matter of style and not substance. More importantly the transcripts show that he listened attentively to the submissions and tested the arguments of both sides. He put points to Counsel for the respondents which had been made on behalf of the applicants (see for example day1. pp.83, 86 and 90; and day 2. pp.49, 52, 80), and other points which could properly be taken against them (see for example day 2. pp.3, 5, 23, 31, 33, 44, 50, 82, 87; and day 3 pp.68, 75, 86, 87). He allowed the applicants to put in a late statement from Mr Edwards during the course of day 2, extended the time in which questions were to be answered by Mr Edwards in the applicants' favour, declined to accede to an application summarily to strike out the GLO application under Part 24 (day 3 p.23) and extended time to deal with further coverage issues which had not been adequately dealt with in GWM's evidence (day 3. p.26). The Judge also emphasised the importance of trying to produce a solution where justice could be achieved between all parties (day 2. p.56; and day 3. p.71). What is clear is that the application faced formidable difficulties due to the uncertainty of Templeton's insurance policy (delay in providing the terms and ambiguities as to the extent of the cover). These were highlighted by the respondents and were recognised by Counsel for the applicants (day 3. p.6). The application also faced extensively argued opposition from each of the respondents.

324. Having considered the transcripts of the hearing I have found no support for the claim of actual bias in the place where one would most expect to find it.

The judgment of 18 May 2006 and subsequent events

325. Following the handing down of the adverse judgment on 18 May 2006, GWM wrote to Templeton on 22 May enclosing a copy of the order.

> As you will see, regrettably, the application was dismissed with costs ordered against the Applicants on an indemnity basis. We have, however, been advised by Counsel that the prospects of success on an appeal are good. Accordingly we intend, with your permission, to appeal to the Court of Appeal forthwith ...

326. On 25 May Templeton wrote to Brooke North (who acted on behalf of the UDM and Vendside) purporting to give notice of an entitlement to avoid the GWM policy on a number of grounds. It was characteristic of Templeton's failure to understand the most elementary of its contractual obligations that the letter was not sent to its assured, GWM. Templeton relied on a number of grounds for avoiding the policy deriving from its interpretation of the 18 May judgment, including reference to [71(7)] and the lack of certainty as to the sufficiency and enforceability of the policy. It is unnecessary to spend much time on Templeton's grounds for repudiating the policy, since it is clear that it was not entitled to do so. The relevant debate before Cooke J in *Greene Wood McLean LLP (in administration) v. Templeton* (see above) was about the ambit of the indemnity.

327. Mr Edwards's evidence was that the failure of the GLO application had very serious consequences for GWM. Apart from the adverse order for costs on an indemnity basis, an application for a wasted costs order was made by the respondents and, on the advice of GWM's Professional Indemnity insurers, was conceded, with GWM becoming potentially liable for sums said to be over £1 million. There was also adverse publicity, not least as a result of UDM/Vendside pursuing a campaign against the individual applicant miners, which included obtaining interim charging orders against the homes of 27 of the individual GLO applicants. The outcome of the GLO application and the consequences to its clients destroyed GWM's relationship with them. It also damaged its reputation and its prospects of attracting clients who wished to bring group claims. GWM were also liable for the fees of counsel whom it had instructed in the GLO application. Templeton's refusal to meet its liabilities under the policy (which included own side disbursements) meant, not only that GWM was unable to pay these fees, but that Counsel pursued GWM and obtained judgment for the debt, all of which affected GWM's ability to instruct other counsel.

328. Mr Edwards also described the effect on GWM's relationship with its bankers. The firm had a £240,000 credit facility with Barclays Bank. The relationship prior to this had been good because GWM had been able to reassure the Bank about the prospects of recovering fees for work in progress. The unexpected costs and delay in the GLO application affected GWM's cash flow and its failure made it impossible to repay the overdraft. It was this that led to Barclays appointing BDO Stoy Hayward to review GWM's trading position.

329. According to Mr Edwards's evidence, there were yet further consequences of the judgment, with GWM having to deal with the press, their political supporters and the Law Society. It was necessary to make a claim under GWM's own Professional Indemnity policy, which meant that its freedom of action was severely curtailed.

330. A Law Society investigation and SRA proceedings against Mr Edwards and Mr Evans in relation to account irregularities concerning the retention of disbursement monies in the office account, the costs 'guarantee', the costs information given by GWM to its miner clients, and the referral fees paid by GWM's personal injury department,

finally concluded in September 2011 with a Regulatory Settlement Agreement with the SRA.

331. GWM was due to renew its PI cover from November 2006, but had difficulty in obtaining competitive quotes because of the insurers risk assessment of GWM; and the firm was finally forced to obtain cover in the Assigned Risks Pool at a cost of over £100,000 per annum.

332. There was also the effect on staff morale resulting from the bad publicity and the deterioration of GWM's ability to attract business. Within a matter of months, several good fee earners left the firm and others had to be made redundant. Losing fee earners further undermined the firm's ability to win and deliver work, setting off a spiral of decline.

333. Mr Edwards described a further consequence of the judgment: its adverse effect on the Claims Direct and British Biotech claims.

334. GWM represented 12 shareholders in the Claims Direct case with claims of approximately £850,000 (excluding exemplary damages, costs and interest) against Investec Bank (UK) Limited and others (the former directors of Claims Direct). By June 2006, Particulars of Claim had been served on behalf of 3 claimants. There were two other claimant groups representing a number of other claimants. Leading Counsel had advised on behalf of the GWM claimants that the prospects of success were about 65%. By June 2006, negotiations with the defendants had been proceeding for some months and a mediation had been fixed for 27 and 28 July 2006. According to Mr Edwards's evidence, the failure of the GLO application and the avoidance by Templeton of the miners' ATE policy undermined the confidence of GWM's Claims Direct clients in their own ATE policy, which was also underwritten by Templeton; and GWM was obliged to advise its Claims Direct clients that their ATE policy could not be relied on. Aware of GWM's difficulties the defendants delayed, thereby applying pressure to GWM which was effectively funding the case. GWM obtained alternative ATE cover from Elite Insurance, but the terms were unsatisfactory and the clients' confidence had been undermined to the extent that they had little faith in the validity of the new policy. In March 2007, the clients agreed a settlement with Investec Bank and its insurers. Under the terms of the settlement, GWM recovered fees of £575,000 (excluding VAT) against the value of its work in progress, uplift under the CFA and disbursements of more than £2 million. It was unclear whether the other defendants (former directors of Claims Direct) could meet the remainder of the claim, but the matter was never tested since, in September 2007, GWM ceased business.

335. GWM represented 11 shareholder claimants with claims against Vernalis (formerly British Biotech), valued at approximately £850,000 (excluding exemplary damages, costs and interest). In March 2004, Leading Counsel had advised the claimants that the prospects of success were 70%. If no settlement was reached, it was intended that there would be a trial on a preliminary limitation issue in respect of a particular group of claimants. Leading Counsel had advised that their prospects of success on the preliminary issue were 60%. A mediation which did not resolve the case was held in May 2006, after which negotiations continued. As with the Claims Direct case, there was serious doubt as to whether Templeton's ATE cover for the British Biotech claimants would be honoured. The British Biotech claimants instructed GWM to

withdraw from the litigation to avoid potential liability for costs. To achieve a settlement, GWM was obliged to sacrifice the majority of fees it was owed and a substantial part of its disbursements. It was entitled to fees of nearly £300,000 plus a success fee uplift, which increased the sums due to over £530,000. In addition, there were recoverable disbursements of about £170,000. GWM's actual recovery under the settlement was about £223,000, which included about £105,000 towards disbursements. Without consideration of any discount GWM might have agreed, its total loss on this case was in excess of £480,000.

336. On 29 September 2009 the Claimant entered into a CFA with the administrators of GWM to act on their behalf in order to realise for GWM 'the fullest possible potential for recoveries under claims against Templeton and Thompsons.'

337. On 21 January 2010 the Claimant interviewed Mr Brunswick and heard his account of how Lord Prescott had telephoned him in February 2006. As already noted this account did not figure in Mr Brunswick's s.236 statement. The Claimant's evidence, which I accept, was that Mr Brunswick refused to allow him to refer to it. After unsuccessful attempts to meet Lord Prescott to discuss what he had been told about the phone call, the Claimant sent an email to Lord Prescott's secretary on 12 April 2010. Although the email described the Claimant as authorised to act on behalf of the liquidator of GWM and described GWM's failed application for a GLO in respect of unlawful deductions, it did not say anything about a call from Lord Prescott to Mr Brunswick.

> I understand that [Lord] Prescott may have had some involvement at the time with Templeton Insurance. Could you please arrange for [Lord] Prescott to meet me within the next week.

338. When this elicited no response the Claimant tried to make contact through Lord Prescott's constituency office. It was as a result of this contact that Lord Prescott, who had retired from the House of Commons and was then engaged in campaigning in the General Election, telephoned the Claimant. It is plain that Lord Prescott had the Claimant's email in front of him. However, although the Claimant tried to make a note of the conversation, it is not easy to reconstruct the conversation from these notes. The Claimant thought Lord Prescott was being evasive, but I am not prepared to draw that conclusion on the basis of the Claimant's view of the matter. When the Claimant told him that he was concerned with events around 28 February 2006, Lord Prescott said. 'No, I'd be a Minister then.' There was no clear denial that he had made a call to Mr Brunswick, but there had been no allegation that he had. I have, nevertheless, taken this conversation into account in my overall consideration of whether Lord Prescott made the alleged telephone call to Mr Brunswick, four years earlier, on 27 February 2006.

339. On 8 June 2011 the Liquidator assigned GWM's causes of action to the Claimant, and on 10 June the Claim Form was issued.

Decision on liability

340. The main part of the Claimant's case is founded on a causative link between the conduct of the Defendants and Templeton's avoidance of cover, which is said to have

resulted in all of GWM's subsequent difficulties and its ultimate liquidation. The Claimant sought to establish a causative link on the basis that (1) Templeton's decision to avoid the policy was based on Sir Michael Turner's judgment, (2) Sir Michael Turner was not simply wrong, but was actually biased, and (3) the Thompsons Defendants had procured that he should hear the GLO application.

341. The first difficulty with the Claimant's claim is that it has not been made clear (a) which causes of action are properly those of GWM's clients rather than those of GWM; and (b) why claims have been brought against the Thompsons Defendants rather than the many others who on the Claimant's case must have been party to any conspiracy or other tort.

342. Another difficulty is that, although much of the argument and evidence was devoted to investigating the contacts between the Defendants and Mr Brunswick in November 2005 and February 2006, whatever may have been said or done did not have any lasting effect on Mr Brunswick. As already noted, the ATE policy (such as it was) was in place and in evidence at the time of the GLO hearing; and it was Mr Maule (with whom the Thompsons Defendants had no contact) who made the decision to avoid it after the judgment was handed down, and he did so in breach of contract.

343. It was for this reason that, by the end of the trial, the Claimant's case was directed to three particular allegations.

344. The first allegation is that Thompsons (and Mr Shears) procured Templeton to write its letter of 15 November 2005 withdrawing cover from GWM and/or conspired with or through Mr Booth to procure the breach of Templeton's insurance contract, which amounted to an unlawful act conspiracy, and this letter 'affected' the Judge's view as to the certainty, sufficiency and enforceability of the ATE cover, see [66.2 & 3] and [71.7] of the 16 May 2006 Judgment.

345. For reasons already outlined I have rejected the factual premise of this allegation. Neither the letter of 15 November nor Templeton's subsequent vacillation and inefficiency in producing a policy compliant with its agreement to insure, nor GWM's inability to secure a contractual policy was due to any act of the Thompsons Defendants or anyone acting on their behalf.

346. The second allegation is that Thompsons procured a breach of contract in February 2006. This argument is summarised in §510 of the Claimant's closing submissions on liability.

> It is plain that Thompsons took a keen, indeed anxious, interest in the existence of insurance for the GLO. Furthermore, they had previously procured (through or with Mr Booth) its withdrawal in November 2005. These matters inform the proper analysis in law of what took place, even on the Defendants' evidence, in February 2006. Thompsons clearly expected to be provided with confidential information by Templeton about the GLO insurance arrangements, when Thompsons and their union clients were not parties. This was inconsistent with Templeton's obligations to the insured and

> (with the other matters set out above) colours the analysis of conduct which the Defendants otherwise contend was anodyne.

347. This seems to alight on procuring a breach of a duty of confidence which is neither made out on the facts nor is such as to have caused recoverable loss or damage. In any event it did not affect Sir Michael Turner's judgment in the GLO application.

348. The third allegation was, and remains, the most substantial and serious. The case is put on the basis that Thompsons, acting through Mr Lumsden and with the knowledge of Mr Shears, procured the appointment of Sir Michael Turner to hear the GLO application as part of an agreed strategy, which was achieved through the letter from the CG of 10 November 2005, see §500 of the Claimant's closing submissions on liability.

> Mr Lumsden had well in mind the judge's favourable disposition (knowing of the private correspondence, recently revisited) and his adverse views of AGM and GWM, not least from the tenor of his letter of 26 October 2005. In that context, seeking the appointment of Sir Michael Turner to deal with the GLO application amounted to procuring a breach of the article 6 rights of GWM and/or their miner clients, an unlawful act (for the purposes of unlawful means conspiracy and causing loss by unlawful means) by reason of the fact that neither the private correspondence of March and October 2006 between Mr Lumsden and Sir Michael Turner, nor the correspondence copied to the DTI (and by Sir Michael Turner to the Law Society) was then or subsequently disclosed to GWM.

349. This way of looking at the case is inconsistent with the facts as I have found them to be; but in any event, it does not advance the Claimant's case unless it can be shown that the Judge was actually biased, which is a submission that I have rejected. In particular, it was recognised on the Claimant's behalf that in order to recover the bulk of his very substantial damages he would have to prove that (a) it was the Thompsons Defendants who procured that Sir Michael Turner heard the GWM application, (b) that they did so knowing and intending that he would be actually biased, and (c) he was actually biased. For the reasons set out above, I have concluded that they have failed to prove each of these matters. Furthermore, as set out above, the Claimant's analysis fails to take into account what I have found to be the real cause of GWM's collapse: not the Judgment but Templeton's breach of contract.

350. As an alternative route to damages, Mr Green QC submitted that the Thompsons Defendants procured the appointment of a Judge who was apparently biased, in the sense that a fair minded and informed observer having considered the facts would conclude that there was a real possibility that he was biased, see *Porter v. Magill* [2002] 2 AC 357 at [103] and the other cases referred to above.

351. The first difficulty with this argument is a factual difficulty in the light of the findings I have made. The second difficulty is in identifying how, if correct, it would give rise to a claim for damages. A judge who is apparently biased may not in fact be biased: it is the appearance not the substance which leads to a conclusion that the judge or tribunal should not hear the case or that the decision is vitiated.

352. The Claimant seeks to avoid this difficulty by submitting that the apparent bias of the Judge, if it had been known to GWM, would have led either to reasonable objection to his hearing the GLO application or give rise to a solid ground of appeal. However, looking at the matter now, I am very far from satisfied that the Claimant's case on apparent bias is made out. Such views as the Judge had expressed earlier on the basis of his current understanding were no more than that, see for example the passage from the *Locabail* case (referred to above). He did not exhibit fixed views and predilections such as to give rise to a legitimate concern that he might not be impartial in his hearing of the GLO application. Furthermore, even if a party to litigation is under a duty to another party to litigation to inform it of all matters relevant to the apparent bias of the tribunal, it is difficult to see how a non-party not acting tortiously is under such a duty. There is also the further difficulty of assessing damages where a party might have been in a position to argue apparent bias, but where (as I find) the same result is likely to have occurred whoever had heard the application: the same costs order would be made.

353. For the above reasons I have concluded that the Claimant's claim fails against all the Defendants in relation to all of its causes of action.

Decision on quantum

354. In the light of this conclusion, I can deal with the issue of damages more shortly.

355. The damages potentially fall into two categories: losses which can be ascertained on the balance of probabilities to have been caused by tortious acts; and losses resulting from tortious acts which are implicitly uncertain since they depend on the occurrence of future events. In some cases a Judge will be able to predict what would occur on the balance of probabilities, but in others he may not. Some uncertainties may be due to the contingency of a third party acting in a particular way, see *Allied Maples Group Ltd v. Simmons & Simmons* [1995] 1 WLR 1602. Other uncertainties may involve an assessment of the loss of a chance, and in these cases the quantification does not involve the application of a balance of probabilities as it would to the proof of past or ascertainable facts. As Lord Reid expressed it in *Davies v. Taylor* [1974] AC 207 at 213 (referred to in *Allied Maples* at 1613 H)

> You can prove that a past event happened, but you cannot prove that a future event will happen and I do not think that the law is so foolish to suppose that you can. All that you can do is to evaluate the chance. Sometimes it is virtually 100 per cent: sometimes it is virtually nil. But often it is somewhere in between.

356. As Toulson LJ expressed it in *Parabola Investments Ltd v. Browallia Cal Ltd* [2011] QB, at [23]:

> The ... task is to quantify the loss. Where that involves a hypothetical exercise, the court does not apply the same balance of probability as it would to the proof of past facts. Rather, it estimates the loss by making the best attempt it can to evaluate the chances great or small (unless those chances are no

> more than remote speculation), taking significant factors into account.

See also, *Vasiliou v. Hajigeorgiou* [2010] EWCA Civ 1475 Patten LJ at [21] and [25] and *Wellesley Partners LLP v. Withers LLP* [2014] EWHC 556 (Ch), Nugee J at [188(2)-(3)].

357. The primary way of putting the claim for damages is advanced on the basis that (a) the GLO application would have succeeded in the light of the analysis of Cooke J in *Greene Wood McLean LLP (in administration) v. Templeton* (see above); (b) as a result of the subsequent decisions of the Solicitors Disciplinary Tribunal and the Regulatory Settlement Agreement, there is a sound basis for concluding that the GLO proceedings would have been a success; and (c) with the benefit of available funding, GWM would have taken a large number of profitable GLO cases and traded successfully in a number of areas of law over the following years.

358. An initial problem with this argument is that (as already noted) Cooke J was not deciding whether the GLO application would or should have succeeded, but whether it was negligent to advise that the application be made and then pursued. The second problem is that Solicitors Disciplinary Tribunal determinations and RSAs were likely to undermine the GLO as potential source of revenue. The probability is not that large number of claimants would have joined the GLO and received repayment of deductions by way of damages, but that they would have opted for repayment and compensation under regulatory supervision.

359. The Claimant has calculated GWM's loss under nine heads of claim ('HOC').

> (1) The profit that GWM would have earned from the GLO at its conclusion: £2,645,000 (HOC.1).
>
> (2) The profit GWM would have earned from the GLO proceedings following the conclusion of a trial (85,000 client claimants): £51,902,000 (HOC.2).
>
> (3) The loss of Scheme claims that would have transferred to GWM (1,000 cases): £400,000 (HOC.3).
>
> (4) The loss of its general litigation and class action practice over a period of 3-4 years: £21,546,000 (HOC.4).
>
> (5) The loss of profits from its personal injury practice: £9,606,000 (HOC.5).
>
> (6) Losses due to the disadvantageous settlement of the Claims Direct litigation: £795,000 (HOC.6).
>
> (7) Losses due to the disadvantageous settlement of the British Biotech litigation: £323,000 (HOC.7).
>
> (8) Loss in relation to GWM's property work: £4,787,000 (HOC.8).
>
> (9) Increased costs of PII cover from November 2006 to September 2007, plus run-off cover: £178,000 (HOC.9).

Less overheads: (£12,735,000).

Total claim: £79,447,000, plus interest

360. The total principal sum of £79,447,000 was reduced to a figure of £71,650,000 in the concluding summary schedule of loss, but the heads of claim remained the same.

361. In my judgment there are very significant flaws in this calculation and they derive partly from an overoptimistic view of the prospects of GWM and its business, and partly from some wholly unrealistic assumptions which underlie the particular calculations.

362. The viability of GWM and its inherent profitability was hotly in issue.

363. Mr Edwards and Mr Friend were both clearly affected by the financial failure of GWM. The former was an impressive witness in terms of his professional and personal qualities, which have come under close scrutiny in the course of this and other litigation. However, his vision for the firm appears not to have been matched by practical steps to achieve it; and he did not strike me as having brought sufficient focus to bear on either the management issues which would arise in the establishment of a new firm of solicitors, nor in dealing with the problems raised by the GLO litigation. In the context of the present litigation, his failure to secure the policies of insurance from Templeton which he had negotiated was particularly damaging. Mr Friend was a frank and engaging witness, whose experience as a lawyer was limited to property business.

364. The evidence suggests very strongly that none of the three partners were experienced in, or particularly capable of, financial management. For financial expertise and support they depended on Mr McHale and Mr Ridgway. Mr McHale was an experienced businessman, as well as being qualified as a barrister and an accountant. He took a close personal interest in GWM, made loans to the firm and worked as a consultant, having considerable knowledge and experience in leasehold enfranchisement. Mr Ridgway was also experienced in business, made loans to the firm and took an interest in its work. The loans made by Mr McHale and Mr Ridgway reflected their view of the inherent risks involved.

365. Mr Edwards's vision for the long-term prosperity of the firm was imperilled by the short to medium term financial difficulties that it faced for some time before May 2006.

366. In October 2005 Mr McHale assisted in the preparation of a cash-flow forecast for the 14 months to December 2006 for the purpose of raising funds for the firm. He used information provided to him by Mr Edwards which estimated that 5,000 CHA cases would be transferred from their current solicitors as a result of the success of the GLO and that the profit for the period covered by the forecast would be just under £6m.

367. On 6 December 2005, the manager of Barclays Business Support, Birmingham, wrote to the Partners of GWM describing, in the language of modern business, 'Our Shared Concerns'. These included, among other matters:

The existing overdraft facility is expired

> Excesses on the bank account
>
> There is an element of borrowing within the overall facility that is not currently fundable from trading income
>
> The Partners' recent request for additional working capital facilities that have been declined as they are outside of our normal lending criteria
>
> The ability of the Partnership to meet its liabilities as they fall due.

368. Mr Edwards fairly accepted that the listed items indicated that GWM had exceeded the agreed overdraft limit, that it had requested and been refused further loans, and that the Bank was concerned that GWM might be trading whilst insolvent.

369. In a draft report commissioned by GWM's bankers dated 15 September 2006, BDO Stoy Hayward set out its independent accounting review of the firm. The report raised a number of issues: (1) the overall reliability of the management information; (2) the small amount of actual fee billings for the 18 months to June 2006: £0.5m; (3) the unbilled work in progress of £1.8m, which had been financed by loans from Mr McHale, Mr Ridgway (in respect of which no documentation was available), the Barclays overdraft, and, as to £135,000, by another lender, Defender; and (4) although a profit and loss account and balance sheet had been provided by GWM, the accountants had,

> concerns over the reliability of information, and have not been provided with supporting documentation behind significant balances, including loan documentation, WIP balance and accruals.

370. The summary of the review findings included:

> The practice is suffering from very poor working capital management, and the Partners have run out of available finance to continue funding the practice.
>
> We have found the quality of management information to be weak, and do not place any reliance upon the balance sheet and profit and loss account provided.
>
> In particular, we have received no support for the £1.8m of WIP that is currently held, or any documentation to support the various loans made from private individuals.

371. So far as the Bank was concerned the draft report concluded.

> Given the lack of proper management information that has been made available to us we have no certainty over the viability of the practice going forwards.

372. In the summer of 2005 GWM had purchased a book of files from another firm of solicitors, Easthams. Half of these files had proved to be, in the words of Mr Edwards, 'a complete disaster'. The purchase had been funded by a £200,000 loan from Mr McHale and had plainly failed to provide the intended cash-flow.

373. It is apparent that the financial position of the firm was insecure and its attempts to relieve the short to medium term cash-flow needs had proved problematic.

374. It is necessary to view the claim for damages against this background. In order for GWM to have achieved anything like the profitability on which the claim calculations are based, it would have needed a secure capital base, a successful track record in the areas of intended practice and good management. I am not persuaded that GWM would have acquired any of these, let alone all of them.

375. The capital available to the firm was insufficient even before the May 2006 Judgment, the terms on which their loans would have been extended by Mr McHale and Mr Ridgway were unlikely to be favourable and the possibility of obtaining further capital was problematic in the short to medium term. GWM's first accounting period ran from 31 October 2004 to 31 March 2005. The abbreviated accounts for that period show a balance sheet deficit of £516,556. Much of GWM's future depended on securing funding. The Claimant called Ms Jane Jones to give evidence about the availability of funding. Her qualifications to give expert evidence on this issue were confined by the nature of her experience. Although she had worked for a risk consultancy company specialising in advice to funders in the period 2006-8, she had no direct knowledge of the basis on which funders made loans to solicitors, and some of her assumptions were either wrong or based on material which was controversial (for example, the assumption that there would have been approximately 85,000 claimants in the GLO). Having considered her evidence I have concluded that GWM would not have been able to obtain practice funding in view of the state of their accounts, at least in the short to medium term. I do not accept that further funding for the firm could have been raised in 2006-2007, although it is probable that some funding would have been available in the period from mid 2008. The further funding for the claim would also have been problematic without some short term success in the GLO or other ongoing litigation.

376. As Mr Edwards and Mr Friend agreed in their evidence, GWM's ambitions considerably exceeded its cash flow. It also greatly exceeded its capacity to deal with the intended business. Its ambitions can be seen from the view expressed by Mr Edwards in a contemporary document in which he envisaged 100,000 claimants transferring to GWM with fees of £1,800 per claimant. This would have produced overall fees of £180 million. This was neither realistic nor a case load that GWM could ever have managed; and it is no answer to say that GWM could have expanded to deal with the work or sub-contracted it. GWM's lack of capacity for managing its business is illustrated by its acquisition of the personal injury files from Easthams. This was intended to ease the cash flow of the firm, but the price paid was far too high for the value of what was acquired. A proper management system would have carried out a due diligence exercise before the acquisition. GWM did not seem to learn from its mistake.

377. Although I have identified Templeton's repeated failures to produce a Policy in the terms of its agreement, Mr Edwards allowed this situation to continue until a time it

damaged the prospects of success for the GLO, with further evidence having to be lodged during the course of the hearing.

378. The largest Heads of Claim (HOC.2, HOC.4 and HOC.5) are based on predictions that a firm like GWM would be expected to have become increasingly profitable. The preparation of each Head of Claim was carried out by the Claimant. He is by qualification an accountant and by experience a management consultant and businessman. The preparation and promotion of the claim had plainly involved a significant investment of his time and effort. However, as he agreed in evidence, he had no personal knowledge of the economics of a firm of solicitors, and his research was confined to information which was largely in the public domain.

379. He took Stewarts Law as his model for the heads of claim, basing his figures on that firm because it showed how a firm of solicitors could grow 'extremely fast'. The model was, in my view, unrealistic. Stewarts Law is a leading firm in a specialist litigation field, with 20 or so partners and which has been in business for a number of years. In contrast GWM had only been in business for 18 months, had only 3 partners, was neither well-managed nor well-funded, and had no track-record in what was a competitive market of lawyers specialising in large-scale and group litigation. The proposition that if the GLO application had been successful it would have led to abundant profits for GWM is very far from being self-evident.

380. Although each side called expert evidence in the field of accounting and costs to deal with the detail of the damages calculation, in my judgment the claim for damages can only be addressed realistically on the basis of a broad approximation.

381. **HOC.2** (£51,902,000), The premise is that 85,000 claimants would have applied to be joined after the successful conclusion of the GLO application, and that GWM's profits for each union deduction case would have been £610, taking into account all associated overheads and disbursements. Although the individual figures which make up the profit figure were debated by the experts, it is necessary to stand back for a moment and look at the matter realistically. The likelihood of a Court permitting a firm of solicitors to recover profits of £610 per claim on a mass of what were mostly relatively straightforward small claims is as likely as 85,000 claimants joining the group when they were likely to be offered compensation through the professional regulatory regime. In my view the sums claimed under this heading are fanciful. The deduction issue had run in tandem with accusations in Parliament and the Press that solicitors had been grossly over-rewarded under the compensation schemes. I am clear that the chances of making the sorts of profits envisaged by this head of claim in relation to a mass of small claims, was negligible.

382. **HOC.4** (£21,546,000) the premises for this head of claim is described as follows:

> GWM's role in the GLO, over the next 3-4 years, would have ensured considerable positive publicity and a high profile in the legal profession. [Mr Edwards] was a charismatic and commercial leader, who would have attracted clients and staff. Beginning in June 2006 with the RBS claim, GWM would have picked up increasing volumes of cases, and would by now have a steady and successful litigation business.

383. The calculation is based on the assumption that GWM would have acquired roughly 29 new cases between 2006 and 2012, each of which would have produced profits of the order of £765,539. The assumption that so many profitable cases were available in the relevant period would require an analysis of what cases were being litigated, rather than an extrapolation based on the Stewart Law's success, and I can see no proper basis for any calculation based on a single figure of lost profits per case.

384. But there is also a more fundamental problem with this head of claim. Although I have identified Mr Edwards's positive qualities, they would not have been enough to have ensured the success of GWM. There would always have been the very serious problem in trying to match his ambitions with the realities which faced the firm before the May 2006 Judgment.

385. **HOC.5** (9,606,000) loss of personal injury practice. This claim is based on what is said to be GWM's established and successful personal injury practice which would have been built up into a department with a sustainable business with at least 10 fee earners, each with an average case-load of 200 cases per year, and with average fees of between £1,850 and £2,500 per case. On this basis the calculation was of lost profits from £1,210,000 in 2009 to £2,112,000 in 2013.

386. Again there is simply no proper foundation for the claim. The history of the short period during which GWM operated does not suggest any inherent ability to manage and successfully develop a personal injury practice. The Easthams experience suggests the contrary. No doubt there were fees to be generated by personal injury claims, but it would require experience, ability, funding and an understanding of the economics of the business to have made the sort of profits that are claimed.

387. So far as the other heads of claim are concerned, I have reached the following conclusions.

388. **HOC.1** (£2,645,000) This is profit which it is said GWM would have earned at the conclusion of the trial of the GLO proceedings. It is claimed that it would have taken 3-4 years for the core liability issues to have been determined with appeals, first on intermediate issues and later against the final judgment, and that 'GWM would have earned very substantial fees, which would then have been uplifted by 80% under the terms of the CFA.'

389. This scenario, with intermediate issues and unsuccessful appeals, again assumes that the litigation would have been managed in a way which would confer the most favourable financial rewards for GWM. In my view any Court would have been astute to manage the issues in a way which was consonant with the overriding objective (see CPR Part 1.2(c)), and have exercised its case management powers to control the costs (see CPR Part 1.4(2).

390. **HOC.3** (£400,000) is based on the loss of BCRDL scheme claims which would have transferred to GWM. It is said that the AGM was encouraging miners to transfer their claims in order to avoid future deductions. The claim is based on 1,000 claims being transferred at £400 per claim. In its draft letter to Sir Michael Turner in November 2005 GWM had recognised that there were a number of obstacles to transfers being made. For the reasons already outlined, in relation to HOC.2, I consider this to be unrealistic.

391. **HOC.6** (£795,000) Claims Direct and **HOC.7** (£323,000) British Biotech. In each of these class actions it is said that GWM successfully represented their clients and obtained a settlement for them. However, in each case, GWM 'was forced to advise its clients of the risks' of insuring with Templeton as a result of Templeton's avoidance of the GLO ATE cover. As a result the claimants 'decided to accept a much lower settlement than would have been achievable,' and GWM failed to recover the majority of its profit costs.

392. I was not persuaded by the evidence of Mr Edwards either that his clients were rendered so vulnerable by the uncontractual act of Templeton in another case in different circumstances, that the settlement was unrealistic, or that (even if a loss could be reliably identified) it can be said to be attributable in law to the Thompson Defendants tortious acts (which are to be assumed for this purpose).

393. **HOC.8** (£4,787,000) losses in relation to GWM's property department. On an annualised basis the property department had not earned more than £70,000, and Mr Friend frankly accepted in evidence that there had been no investment in the property side of GWM's practice by May 2006 due to cash-flow difficulties. He fairly acknowledged that there were no contemporaneous documents which supported this head of claim.

394. **HOC.9** (£178,000) is the increased Professional Indemnity insurance costs which GWM incurred 'following the failure of the GLO and by virtue of the claim on QBE [GWM's PI insurers],' and the additional cost of PI insurance through the assigned risks pool with increased annual costs from November 2006 until the firm folded on 30 September 2007. In my view this head of claim fails on both causation and remoteness grounds.

395. In summary, I have concluded that some heads of claim are irrecoverable and in respect of others the losses claimed have been grossly exaggerated. In either case the schedule of loss forms neither a proper basis for predicting the future of the firm on the balance of probabilities nor a proper basis for the awarding of damages.

396. The alternative basis of the claim is for the loss of an opportunity.

397. Where the claimant is asserting not the loss of an opportunity of acquiring a specific benefit which is dependent on the actions of a third party, but the loss of an opportunity to trade generally and thereby to make profits, the Court must first decide whether the claimant would have traded successfully and, if so, it must make the best attempt it can to quantify the loss of profits, taking into account the various contingencies which affect this, see for example *Wellesley Partners LLP v. Withers LLP* (see above).

398. On a fine balance I have concluded that the GWM would have traded profitably without being particularly profitable, for the reasons set out above.

399. Once one eliminates most of the extravagant and unrealistic assumptions underlying the heads of claim there is not very much to go on and the calculation of damages is necessarily based on a broad view. I have however, concluded that the best estimate of the value of the lost opportunity over the period of the claim if the GLO had not failed (net of overheads) can properly be assessed as follows:

HCO.1-3: £750,000

HCO.4: £1,000,000

HCO.5: £750,000

HCO.6-7: nil

HCO.8: £750,000

HCO.9: nil

Total: £3,250,000

Conclusion

400. However, for the reasons set out above the claim fails and must be dismissed.