Court of Appeal Reference: CA 2026 000323
(Lower Court ref. Case. No. Bl-2025-000341)

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AN PROPERTY COURT OF ENGLAND AND WALES
BUSINESS LIST (ChD)
MR JUSTICE TROWER sitting with MASTER KAYE

LEE CASTLETON

Appellant

-and-

(1) POST OFFICE LIMITED
(2) FUJITSU SERVICES LIMITED

Respondents

APPELLANT'S AMENDED AND REPLACEMENT APPEAL SKELETON ARGUMENT

Housekeeping

An application to rely on the Amendment below is made separately. Amendments are marked as strike-through or new text underlined in red.

As a result of Permission to Appeal ("PTA") being granted, and in the absence of agreement, the Appellant has applied for the timetable under the directions given by Trower J. and Master Kaye on 23 January 2026 to be extended generally, pending determination of this appeal or further order.

As foreshadowed in the Appellant's skeleton argument for the hearing on 23 January 2026, a draft amendment to the particulars of claim was served on the Respondents on 19 February 2026 and a further minor amendment served on 18 March 2026. An application for permission has been filed to make both these amendments. ~~The Draft Amended Particulars of Claim are in the Supplementary Bundle.~~

~~*References:* ***DAPOC –*** *~~Draft Amended Particular of Claim~~.*

1. This is the Appellant's appeal against the case management directions order made by Trower J. and Master Kaye on 23 January 2026 ("the Order") **(CB p. 113)** for the trial of five preliminary issues under Part A of the P/C **(CB p. 138)** on Ground 6 for which PTA was given by Lewison LJ on 4 March 2026 **(CB p. 2)**.

2. An appeal against a case management decision is a high bar. An appellate court should only intervene in such a decision where the court below has not applied the correct principles, has failed to take into account all relevant matters, has taken into account irrelevant matters, or where the decision is so plainly wrong as to be outside the generous ambit of discretion afforded to the judge.[1]

3. Granting PTA Lewison LJ said: "[t]here is a real prospect of successfully arguing that if the court directs the trial of preliminary issues it should either (a) provide for all the facts to be found or (b) direct a trial on the basis that the facts pleaded by the claimant are true. The hybrid approach of the court in this case may well be wrong." **(CB p. 2)**

4. The 'hybrid' directions given by Trower J. and Master Kaye, so far as is known,[2] are without precedent. No reported decision has been identified in which a court, in the exercise of its case management powers and discretion, has directed the trial of preliminary issues on the hybrid basis of some facts being assumed and others to be proved in relation to the same issue.[3]

5. The absence of a reported case management decision along similar lines, does not, of itself, mean that Trower J. and Master Kaye were thereby wrong, but it raises the

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1 Royal & Sun Alliance Insurance plc v T&N Ltd (In Administration) [2002] EWCA Civ 1964 [38]. **(Auth 11 p. 234)**

2 Pinsent Masons LLP, for the First Defendant, has been asked whether they are aware of the approach taken by Trower J. and Master Kaye having been adopted by a court in any reported decision. At the time of writing, a response on this point is still awaited.

3 McLoughlin v Grovers (a firm) [2001] EWCA Civ 1743, [2002] QB 1312 per Steel J. [66] (either agreed or assumed facts). **(Auth 10 p. 213)**

question as to why their approach has not commended itself to the court in any other (reported) case. It is submitted that the reason is that the approach adopted by Trower J and Master Kaye was wrong in principle.

The Appellant's claims under Part A of the particulars of claim

6. The Appellant makes three claims under Part A of the particulars of claim **(CB p. 139)**:

   a. That the December 2019 Settlement Deed, upon its proper construction, does not extend to cover his claims against the First Respondent under Part B and Part C;

   b. That, if contrary to (a) above, the Settlement Deed does extend to cover the claims under Part B and Part C, it is voidable at his instance and has been avoided for having been obtained by fraud of the First Respondent;

   c. That, if contrary to (a) above, the Settlement Deed does extend to cover the claims under Part B and Part C, the First Respondent is in any event precluded from relying upon it on grounds of 'sharp practice' and unconscionability.[4]

True construction of the December 2019 Settlement Deed

7. It is accepted, and was accepted by the Appellant before Trower J. and Master Kaye, that the issue of construction (namely whether the Appellant's claims fell within the terms of the Settlement Agreement) may properly be determined as a preliminary issue. This could clearly be done, expeditiously, on the basis of it being assumed that the facts pleaded in the particulars of claim are true. But construction of the Settlement Deed itself resolves nothing (below).

8. In an attempt to narrow the scope of this appeal, the Appellant has canvassed with the First Respondent's Solicitors, Pinsent Masons, the possibility of agreeing that the

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[4] As explained by Lord Nicholls in BCCI v Ali (No. 1) [2001] UKHL 8 [2002] 1 AC 251 at [32] **(Auth 9 p. 174)**.

single preliminary issue on assumed facts be limited to the question of whether the Appellant's claims are claims that were settled under the terms of the December 2019 Settlement Deed **(CB p. 179)**.

9. Though unnecessary to this appeal, it appears that until the decision of HH Judge Tindal (sitting as a judge of the High Court) in Takhar v Gracefield Developments Ltd [2024] EWHC 1714 Ch, [2026] 4 WLR 12 at paras [505]-[565] **(Auth 25 pp. 1284 – 1310)**, subsequent to the decision in Takhar and ors. v Gracefield Developments Ltd [2019] UKSC 13 [2020] AC 450 **(Auth 19 p. 492)**, there was no previous reported decision in which the facts relied upon for applying to set aside a judgment for having been obtained by fraud had been held also to support a claim for unlawful means conspiracy. A claim not recognised in law until Takhar cannot have been (objectively) intended by the parties to be settled by the specific release under the December 2019 Settlement Deed **(CB p. 179)**.

10. Entirely separately from the foregoing, obtaining a judgment by fraud is a discrete cause of action and is unaffected by the usual principles of *res judicata,* for the reasons explained by Lord Sumption in Takhar and ors. v Gracefield Developments Ltd,[5] namely, that the wrong is in connection with the process of the court, separate from the issues between the parties, even if those issues involve fraud and dishonesty. For that reason, Maranello Rosso Ltd v Lohomij BV and ors. [2022] EWCA Civ 1667 **(Auth 24 p. 1073)** may be distinguished (but the previous substantial settlement achieved in that case is a further basis for distinguishing it, on its facts).

Sharp practice

11. While Lord Nicholls's speech in BCCI v Ali is the most commonly cited of the speeches in connection with 'sharp practice' in the negotiation of settlement agreements and unconscionability, Lord Hoffmann at paras [68]-[71] **(Auth 9 pp. 185 – 186)** explains the principle in more detail:

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5 [60] **(Auth 19 p. 509)**. Aikens LJ to similar effect in RBS v Highland Financial Partners LP [2013] EWCA Civ 328 **(Auth 16 p. 349)**.

> "A transaction in which one party agrees in general terms to release another from any claims upon him has special features. It is not difficult to imply an obligation upon the beneficiary of such a release to disclose the existence of claims of which he actually knows and which he also realises may not be known to the other party."[6]

Lord Hoffmann said that a party to a general release cannot take advantage of a *suggestio falsi* or *suppressio veri* – equating that with sharp practice.

12. The hybrid approach adopted by Trower J. and Master Kaye was first canvassed in connection with sharp practice/unconscionability in the First Respondent's skeleton argument for the directions hearing on 23 January 2026 (exchanged on 19 January 2026) at footnote 2, p. 3 **(SB p. 191)**. This was in connection with what the First Respondent characterised as "Issue 3" (skeleton para 5.1) **(SB p. 189)**: "Whether, if the Settlement Deed did release those claims [i.e. the Part B and Part C claims under the P/C] against POL, POL is nonetheless precluded from relying on the effect of that settlement by reason of "unconscionability" (as alleged in paragraph 9 of the POCs)." Footnote 2 provided:

> "For the avoidance of doubt, and without making any admission, POL proposes that this issue is determined <u>on the provisional assumptions, for the purposes of the preliminary issues trial only, that (i) the Historic Claims are viable claims; and (ii) that POL knew this on 10th December 2019</u>. Thus the sub-issues for determination by way of preliminary

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6 "There are different ways in which it can be put. One may say, for example, that inviting a person to enter into a release in general terms implies a representation that one is not aware of any specific claims which the other party may not know about. That would preserve the purity of the principle that there is no positive duty of disclosure. Or one could say, as the old Chancery judges did, that reliance upon such a release is against conscience when the beneficiary has been guilty of a suppressio veri or suggestio falsi. On a principle of law like this, I think it is legitimate to go back to authority, to Lord Keeper Henley in *Salkeld v Vernon,* 1 Eden 64, 69, where he said: "no rule is better established than that every deed obtained on suggestio falsi, or suppressio veri, is an imposition in a court of conscience" [69] **(Auth 9 p. 186)**.

> issue would be (a) did C know of the Historic Claims on 10th December 2019; (b) if not, did POL know that C was unaware of the Historic Claims; and (c) can the doctrine of sharp practice apply given the terms and effect of the general release contained in the definition of Like Claims (as to which see paragraph 34 below)." (Underlining supplied.) **(SB p. 191)**

Gareth Jenkins and the reason for him not being called as a witness at the Horizon Issues trial as sharp practice/unconscionability

13. The role of Gareth Jenkins in Post Office prosecutions emerged for the first time in November 2020, in the 42 appeals referred to the Court of Appeal (Criminal Division) by the Criminal Cases Review Commission under s. 9 of the Criminal Appeal Act 1995: Hamilton and ors. v Post Office Ltd [2021] EWCA Crim 577 at paras [81]-[87] **(Auth 22 pp. 867 – 869)**.

14. The explanation for the absence of Gareth Jenkins as a witness for the First Respondent at the Horizon Issues trial is relied upon in connection with the Appellant's claim that the December 2019 Settlement Deed was obtained by fraud.

15. By its Defence to the original Particulars of Claim, served by the First Respondent on 20 February 2026, the First Respondent denies that the explanation provided to Fraser J. for not calling Mr Jenkins as a witness was misleading, as asserted by the Appellant at paragraph 22 of the P/C and DAPOC **(CB p. 143)**. In particular, the First Respondent pleads (Defence para 41.6 and para 55) **(CB p. 432 and 437)**:

> "To the extent that the statement did purport to set out reasons why POL did not call Mr Jenkins as a witness, it is denied that any reasons given therein were false or materially false. The meaning of that statement, objectively interpreted and with due regard to the Circumstances and the context in which it was made, was that POL believed that (i) calling Mr Jenkins would not assist POL in its efforts to successfully defend the GLO Action because POL was concerned that Mr Jenkins' conduct in the Misra trial and other criminal

cases could become the subject of scrutiny during the course of his cross-examination which could make him an unfavourable witness for POL; and (ii) calling witnesses in addition to Mr Godeseth would in practice prejudice the trial timetable. It is averred that that meaning was true, or true in all material respects."

16. The reference to the possibility of Mr Jenkins's conduct in the Misra trial becoming the subject of scrutiny may indeed have been one factor relevant to the decision not to call him. However, there is no reference to this being a material consideration in the Womble Bond Dickinson Memorandum of 14 November 2019 (below) **(CB p. 230)**. That document appears to be the formal record of the circumstances in which, on 10 September 2018, it was decided that the First Respondent *could not call* Mr Jenkins at trial (below). The fact that he had given evidence in the Misra trial is expressly noted; however, the memorandum does not record any concerns arising from that evidence as a reason for deciding that he should not be called.

17. Further, Mrs Misra's trial represented the high-water mark[7] of Post Office prosecutions. It was the only case in which the Post Office secured a conviction for theft (rather than false accounting) against a postmaster at a fully contested trial at which there was expert evidence called on both sides and the reliability of Horizon was squarely in issue. Further, Mrs Misra's trial in October 2010 at Guildford Crown Court was the only occasion on which Mr Jenkins gave oral evidence, among the many cases in which he had provided evidence by witness statements made in support of the First Respondent's prosecutions of its postmasters and others.

    a. In September 2010, shortly before Mrs Misra's trial, senior managers from the Second Respondent, including Mr Jenkins, met with senior managers of the First Respondent to discuss a bug in the Horizon system that Fraser J. refers to as the "Receipts and Payments mismatch bug" **(CB p. 239)**. He identified it as the most important of the Horizon bugs that he considered.

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[7] The description given by Brian Altman K.C., the Post Office's leading counsel on the CCRC appeals, in March 2021.

Fraser J. deals with this from paragraph [427] of his Horizon Issues judgment **(Auth 21 p. 659)**. The effect of the bug was to cause transactional (cash account) balancing errors on the Second Respondent's main servers as compared with the *actual* transaction undertaken at a branch post office – errors that would not be known to or identifiable by a postmaster.

b. Following that meeting, Mr Jenkins wrote a memorandum that was circulated within the First Respondent, including to Mr Jarnail Singh, the solicitor with conduct of the First Respondent's prosecution of Mrs Misra. Fraser J. described it (para [429]) as a *"most disturbing document in the context of this group litigation. It is a 2010 document and issues between the Post Office and many SPMs concerning the accuracy of Horizon had, for Legacy Horizon, gone on for a decade (2000 to 2010) and these continued under Horizon Online (introduced in 2010)."* **(Auth 21 p. 661)** Among the possible means of addressing the errors caused by the bug, Mr Jenkins canvassed ("SOLUTION THREE") the possibility of remotely correcting the error without the knowledge of postmasters, the First Respondent writing-off 'the loss'. Mr Jenkins noted that this carried "[h]uge moral implications for the integrity of the business". A month after that meeting, Mr Jenkins gave evidence at Mrs Misra's trial, in which she complained of repeated balancing errors at her branch post office. The September 2010 memorandum was not disclosed. Mrs Misra's defence team had made four unsuccessful applications for disclosure of Horizon material. At the conclusion of her trial, she was convicted of theft and given an immediate custodial sentence. She was 8 weeks' pregnant.

18. Fraser J. refers to the "Receipts and Payments mismatch bug" as having been kept "secret" by the First Respondent (Horizon Issues para [934]) **(Auth 21 p. 823)**. Mr Jenkins's reference to the "Receipts and Payments mismatch bug" to Mr Ron Warmington of Second Sight – which Mr Warmington then communicated to Mr Simon Baker, the principal link between the Post Office and Second Sight - appears to have triggered both (i) Mr Simon Clarke's review and the resulting July 2013 Clarke

Advice **(Auth 22 pp. 867 – 869)**, and (ii) the review undertaken by Cartwright King LLP in 2013-2014 of some 200 prosecutions brought by the First Respondent.

19. Fraser J. was sufficiently concerned about Mr Jenkins's evidence at Mrs Misra's trial that, in January 2020, he referred Mr Jenkins to the DPP for withholding evidence in criminal proceedings while acting as a witness for the prosecution.

~~20.~~ The circumstances in which the First Respondent decided not to call Mr Jenkins as a witness, and the ostensible reasons given to Fraser J. for that decision, constitute or evidence sharp practice by the First Respondent in entering into the December 2019 Settlement Deed. ~~Three documents are of particular importance:~~

~~a. An Attendance Note of a conference prepared by Herbert Smith Freehills LLP on 4 October 2019: DAPOC para 24E(5);~~

~~b. A Memorandum written by Womble Bond Dickinson dated 14 November 2019 **(CB p. 228)**: DAPOC para 20;~~

c. ~~An email from Mr de Garr Robinson K.C. dated 12 November 2018: DAPOC para 24E(2)~~.

21. ~~The Attendance Note records that Mr de Garr Robinson K.C. perceived that the Group Claimants considered Mr Jenkins not being called as a witness at the Horizon Issues as the "suppression of evidence" and that was an issue at the forefront of their case – particularly in relation to the number of bugs known to, but not disclosed by, the Respondent at the pre-action stage~~.

~~22. Under Question 4 in the Attendance Note, Mr de Garr Robinson K.C. is recorded as having said that: "*Gareth Jenkins was the expert used for the criminal cases. And unfortunately he seems to have given expert evidence to say that they were no bugs in Horizon whatsoever.*" That accords with the "Clarke Advice", considered in September 2018 when the decision was taken not to call Jenkins as a witness. The First Respondent understood that his evidence had placed it in breach of its duty of disclosure as prosecutor in its prosecutions by Mr Jenkins's failure to disclose his~~

knowledge of bugs and errors in Horizon. At the conference, Mr de Garr Robinson K.C. is recorded as having expressed his perception/understanding as follows:

> "…that first of all, they [the Group Claimants] made huge complaints that we didn't call Gareth Jenkins, who is a god but an unreliable god. They say that the fact we didn't call Gareth Jenkins is suppression.
>
> And you know what, that might be right. They would have killed him at trial.
>
> The judge will love it – he is likely to go large on it. By all accounts he would have been disastrous. Anyone who has dealt with Gareth would say that he would kill our case.
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> Also, Gareth Jenkins was the expert used for the criminal cases. And unfortunately he seems to have given expert evidence to say that the[re] were no bugs in Horizon whatsoever.
>
> And I can't even imagine… Fujitsu seems to have the extraordinary ability to say what is opposite to the case. For example, on remote access, Andy had a meeting where Fujitsu tried to say there was no remote access."

23. The Clarke Advice revealed that, from 2013, the Post Office knew (i) that Mr Jenkins had given misleading evidence to the court and (ii) that the Post Office had provided materially incomplete disclosure of bugs and their effects in every one of the criminal cases sampled and reviewed by Mr Clarke in which Mr Jenkins had given evidence as a prosecution witness. That was information and material to which every Convicted Claimant in the Group Litigation who had been convicted on the basis of Mr Jenkins's evidence (and arguably others also, where uncorroborated Horizon data was essential to the prosecution case), most notably Mrs Misra (a Group Claimant), was entitled in law as a matter of right.

24. The information in the Clarke Advice concerning Mr Jenkins's known unreliability as a witness in Post Office prosecutions and his knowledge of bugs in Horizon and the First Respondent's knowledge of *that* knowledge, only emerged during the 42 appeals referred by the CCRC to the CACD in November 2020.

25. Disclosure of the material contained in the Clarke Advice would likely have materially affected the course of the Horizon Issues litigation, including the terms on which it was settled.

26. In that regard, Herbert Smith Freehills advised that, if established, the Group Claims represented a contingent exposure for the First Respondent of approximately £253 - £309 million, were it to lose 'all the way down the line' in two years' time (i.e. if the Group litigation concluded in 2021): UKGI (urgent) authorisation letter 15 November 2019, para 20.

27. The Settlement Sum agreed under the December 2019 Settlement Deed therefore represented for the First Respondent a conspicuously successful (low) settlement. It is highly improbable that the same figure would have been achieved against the Group Claimants had the material in the Clarke Advice not been withheld by the First Respondent but instead disclosed to the Group Claimants, their solicitors, the funder, and their insurers – as it should have been.

28. Had the information in the Clarke Advice been disclosed, it would also likely have affected the Convicted Group Claimants' claims (understood to have been stayed in the litigation) and appeals against conviction would likely have been launched years before the CCRC references in June 2020.

29. Mr Jenkins, his role, and what was known about him by the First Respondent in 2019, at the time that the Settlement Deed was negotiated, are of central importance. What the 2013 Clarke Advice revealed:

    a. caused the First Respondent to notify its insurers in 2013;

b. resulted in Cartwright King LLP being required to undertake a review of several hundred prosecutions by the Post Office between 2013 and 2014 (not one of which resulted in an appeal) (the "Cartwright King Sift Review").

c. resulted in an email sent on 1 July 2013 by Hugh Flemington, the First Respondent's Head of Legal, to Alwen Lyons, Simon Baker, Rodric Williams (a solicitor employed by the First Respondent) and Jarnail Singh, requesting: "Jarnail – can you get castleton case details plse asap as alwen has asked for" - to which Mr Singh replied stating that "The most significant case reviewed was that of Lee Castleton (Civil case only)".

30. From 2014, the First Respondent effectively ceased prosecuting its postmasters for Horizon shortfalls but failed to disclose to defendants whom it had prosecuted and convicted in reliance upon Mr Jenkins's evidence his known unreliability as a witness, and its own knowledge and information about Mr Jenkins's knowledge of bugs and errors in Horizon. No replacement witness was found to perform the role of technical witness on Horizon issues that had previously (until 2013) been undertaken by Mr Jenkins.

31. Although not called as a witness at the Horizon Issues trial, on handing down judgment on 16 December 2019, Fraser J. told the parties that he was going to refer Gareth Jenkins and Anne Chambers (who had given evidence at Mr Castleton's trial in 2006) to the DPP.

Why Trower J. and Master Kaye were wrong

32. Considerable caution should be exercised before embarking on a trial on assumed facts.[8]

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[8] Sumner v William Henderson & Sons Limited [1963] 1 WLR 823 **(Auth 1 p. 3)** (this Court) cited [23] in Royal & Sun Alliance Insurance plc v T&N Ltd (In Administration) [2002] EWCA 1964 Civ and also to same effect at [41] per Chadwick LJ **(Auth 11 p. 225 – 226 and p. 235)**.

Abuse of process and conspiracy

32A. Trower J. and Master Kaye approached the question of whether to determine preliminary issues on the premise that "resolution of the Part A claims is potentially dispositive of the whole proceedings": Judgment [39] **(CB p. 126)**. At P/C Part A para 11 **(CB p. 141)** it is pleaded that: *"At the date of the Settlement Deed, the Claimant did not know and could not have known, but the First Defendant did know, that the First Defendant had combined with others to injure the Claimant by abusing the process of the Court for the collateral unlawful purpose of obtaining judgment against the Claimant without expectation of recovering a net financial gain, in circumstances in which the Defendant's counsel described the litigation as "madness" and its solicitor had said of the First Defendant's claim against the Claimant that "… if you look at the case in isolation it is completely nonsensical…"."* The claim of abuse of process is pleaded under Part B **(CB p. 146)**.

32B. By Annex 2 of the Order Trower J and Master Kaye relieved the Respondents of having to plead a defence to para 11 of Part A **(CB p. 117)**. As to knowledge, for the purpose of the determining the preliminary issues, by footnote 1 to Annex 1 of the Order **(CB p. 116)**, it is provisionally assumed that (i) the Part B (abuse of process) claim/conspiracy are "viable claims" and (ii) that R1 knew this on 10 December 2019. The issues for trial on abuse of process as preliminary issues are:

a. Did the Appellant know of the abuse of process claims on 10 December 2019?

b. If not, did R1 know that the First Defendant was unaware of those claims?

c. Can the doctrine of sharp practice apply given the terms and effect of the general release?

32C. Abuse of process is a discrete tort and independent claim. It is not the same as malicious prosecution: **Crawford Adjusters Cayman Ltd v Sagicor General Insurance (Cayman) Ltd** [2014] AC 366 (PC) Lord Wilson paras [62], [63] **(Auth 17 pp. 441 – 442)**. The Appellant contends that the "true and predominant purpose of [R1] … was to

obtain a judgment that would serve as a deterrent to other postmasters…. and [in the words of R1's solicitor] for the purpose of protecting the Horizon system against challenge and sending out "a clear message" to postmasters" (P/C Part B para 43) **(CB pp. 153 - 154)**.

32D. Malicious prosecution *is a claim* that expressly fell within the claims made by Mr Castleton in the Group Litigation. It is listed as a claim under his Schedule. Abuse of process *is not a claim* that is listed under the Appellant's Schedule of claims in the Group Litigation. Abuse of process was not a claim made in the Group Generic Amended Particulars of Claim. As a matter of ordinary construction, it does not fall within the specific release under the December 2019 Settlement Deed. As an intentional tort it may in principle fall within the terms of the general release under the Settlement Deed. There is thus no requirement to determine as a preliminary whether the Settlement Deed released the claim for abuse of process and conspiracy (Issue 1). The issue is whether R1 can rely upon the general release as releasing a claim for abuse of process/conspiracy because of what it knew in 2019 about the circumstances of the judgment that it obtained against the Appellant from HHJ Havery Q.C..

32E. As a corporation/abstract legal person R1's knowledge turns not on what individuals knew but on what knowledge *is to be attributed to it* under rules of attribution: Meridian Global Funds Asia Limited v Securities Commission [1995] 2 AC 500 **(Auth 3 p. 34)**.

32F. By making the assumption under footnote 1 to Annex 1 of the Order **(CB p. 116)**, Trower J and Master Kaye in effect 'short circuit' the question of what knowledge is to be attributed to R1 at the time of the December 2019 settlement, by the assumption that R1 knew the Appellant had "viable claims" under Part B of the P/C.

32G. Under the directions given by Trower J and Master Kaye **(CB p. 113)** there are, accordingly, to be two trials for the Appellant:

(a) 'Trial 1' in which R1 is deemed/assumed to have known in 2019 that the Appellant had "viable claims" for abuse of process under Part B, at which the construction of the settlement deed is to be determined and at which Mr Castleton will be required to prove that he did not have knowledge in 2019 of the matters that he alleges under Part B of the P/C **(CB p. 146)** and additionally, that R1 knew that he did not know.

(b) 'Trial 2', where if the Appellant succeeds in Trial 1, R1 will be able to defend the claim that it is to have *knowledge attributed to it*[9] of the Appellant's claim for abuse of process/conspiracy in 2019 i.e. a trial on the true, rather than assumed, facts.

32H. The construction of the Settlement Deed as regards abuse of process resolves nothing. There is no obvious or principled basis for requiring the Appellant to undergo 2 trials to establish his claim. The approach adopted on preliminary issues decouples *what the Appellant actually knew* from *what R1 is assumed to have known*. It is difficult to see how that approach can work, because the question of sharp practice and unconscionability necessarily turns on what *actual knowledge* of the circumstances of the claim against the Appellant in 2006-2007 R1 had/is to have attributed to it.

32I. Further, it is difficult to see that this approach is either fair to the Appellant or in accordance with CPR 1. It wholly disregards the fundamental question of what knowledge of the circumstances in 2006-2007 is to be attributed to R1 in 2019 under rules of attribution. It is *that knowledge* to which what Lord Hoffmann refers to in

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9 The question of what R1 knew in 2019 will depend upon how rules of attribution are applied and whether there is such a thing as 'corporate forgetfulness'. That will depend upon the rules and importance of the relevant facts/knowledge. R1 reaped the important commercial benefit/advantage of the decision of HHJ Havery Q.C. in 2007, that Horizon was working properly at the material times, and no postmaster challenged R1/Horizon in civil proceedings until the Group Litigation – ten years after the Havery judgment against the Appellant. R1 can be said to have succeeded in its (collateral) purpose.

BCCI as the 'suggestio falsi' or 'suppresio veri' applies **(Auth 9 p. 186)**, not whether the Appellant had a 'viable claims under Part B'.

32J. The approach is thus objectionable on exactly the grounds for objection given by Chadwick and Arden LJ in Royal & Sun Alliance Insurance Ltd v T&N Ltd [2002] EWCA Civ 1964: Arden LJ at para [46] and Chadwick LJ at paras [39]-[42]. (Chadwick LJ said that tying one party to assumed facts and not the other was in itself unfair.) **(Auth 11 pp. 234 – 237)**

33. As submitted on behalf of the Appellant on 23 January 2026, it is inappropriate for a serious allegation of sharp practice to be determined on assumed facts **(CB p. 346 and p. 350)**. It is more inappropriate still for the issue to be determined on the basis of facts, some assumed and some required to be proved, thereby resulting in an unbalanced approach to the facts and to the outcome. Not least, that creates difficulties on appeal: Royal & Sun Alliance Insurance plc v T&N Ltd (In Administration) [2002] EWCA Civ 1964 per Arden LJ at [46] **(Auth 11 p. 237)**, Tilling v Whiteman [1980] AC 1 **(Auth 2 p. 9)**.[10]

34. In Satyam Computer Services Ltd v Unpaid Systems Ltd [2008] EWHC 31 (Comm), a decision in which the judge considered whether certain claims brought by Unpaid against Satyam in Texas were precluded by the terms of a settlement agreement, at paras [81]-[82] Flaux J (as he then was) was invited to determine an issue of sharp practice under Lord Nicholls's formulation in BCCI v Ali **(Auth 12 p. 285 – 286)**. The judge decided the two main preliminary issues in favour of Unpaid. He was invited to determine the issue of sharp practice on the basis of assumed facts. He rejected that

[10] The point has particular force in connection with the issue of the effect of a release by one tortfeasor taking effect as releasing a joint tortfeasor not a party to the release, relied upon by the Second Respondent, given the criticisms of the rule by Steyn LJ as he then was in Watts v Aldington (1993) CAT 1578 **(Auth 6 p. 95)**, repeated by Auld LJ in Jameson v Central Electricity Generating Board [1998] QB 323, at 336-337 **(Auth 4 pp. 60 – 61)**. This would be a paradigm case for review of the law on appeal to the Supreme Court. It is doubtful that the Supreme Court would entertain an appeal on assumed facts.

invitation, saying at [82]: “it seems to me wholly inappropriate to proceed on "assumed facts" in relation to such a serious allegation.” **(Auth 12 p. 286)** On appeal, in Satyam Computer Services Ltd v Unpaid Systems Ltd [2008] EWCA 487, Collins LJ[11] (with whom Rimer and Waller LJJ agreed) at para [87] recorded Flaux J’s reasons for declining to determine the issue of sharp practice on assumed facts **(Auth 13 p. 315)**.[12]

35. Further, Trower J. and Master Kaye wrongly relieved the Respondents of the requirement to comply with CPR16.5(1) by directing that they were not required to plead defences to the five paragraphs/phrases of Part A listed in Annex 2 to the Order. **(CB p. 114)**

36. The Court gave no reason for excluding these sentences/paragraphs from the requirement under CPR 16.5(1) that the defendant must deal with each and every allegation in the particulars of claim whether by admission, non-admission or denial..

What Trower J. and Master Kaye ought to have done

37. As noted, it is accepted that the issue of construction of the terms of December 2019 Settlement Deed – and whether those terms extend to cover the claims made by the Appellant – may be tried as preliminary issues on assumed facts, the assumed facts being that the facts pleaded in the particulars of claim (as amended) are true. It is

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11 Who also at para [85], in the context of the construction of a general release said: “It is not, I think, very helpful to consider whether the release/covenant not to sue applies in the abstract to unknown claims, and then separately whether it applies to fraud-based claims. The true question is whether on its proper construction it applies to claims of the type made in the Texas proceedings, namely that, unknown to Unpaid when the Settlement Agreement was entered into, Unpaid was supplied by Satyam with forged assignments. To that question it seems to me that there is only one possible answer.” **(Auth 13 pp. 314 – 315)**

12 Both Flaux J’s and Collins LJ’s judgments were referred to on the hearing on 23 January 2026.

further accepted that the determination of the issue of construction could be resolved relatively quickly.

38. Apart from the foregoing, it was open to Trower J. and Master Kaye to give directions for trial of the Appellant's claims that the Settlement Deed was obtained by the First Respondent taking advantage of a *suggestio falsi* or *suppressio veri*/sharp practice.

39. The issue of sharp practice, if found, is materially different in its effect from the claim that the Settlement Deed was obtained by fraud. The effect of a finding that the Settlement Deed was obtained by sharp practice is that a person cannot be allowed to rely upon a release in general terms if he knew that the other party had a claim and knew that the other party was unaware that he had a claim: per Lord Hoffmann in BCCI v Ali at para [70] **(Auth 9 p. 186)**.[13] The issue of rescission/avoidance of the Settlement Deed does not arise in connection with the issue of sharp practice/unconscionability – an issue that was of concern to Trower J. and Master Kaye as to how those considerations might engage with the interests of other parties to the December 2019 Settlement Deed.

40. It may be that the issue of sharp practice could possibly be determined as a preliminary issue on the assumption that all the facts alleged by the Appellant are true, but that would be unfair and unsatisfactory for reasons given above. ~~it may be that t~~The ~~better~~ only appropriate course is that, if sharp practice/unconscionability *is to be taken* as a preliminary issue, the facts should be required to be proved, on the grounds that the allegation is a serious one and should not be tried merely on the basis of assumed facts for the reason given by Flaux J. in Satyam Computer Services **(Auth 13 p. 293)**. In particular, the disadvantage of trying issues on assumed facts is particularly obvious where the facts assumed may subsequently be

[13] concurring with the same view expressed by Sir Richard Scott V-C [2000] ICR 1410, 1421 and Chadwick LJ **(Auth 7 p. 118)**.

contested/disavowed and the Appellant must, prospectively, face two trials on the same issue/claim on differing bases – should he succeed on the first.

41. It would only be necessary to determine the separate issue of whether the 2019 Settlement Deed was obtained by fraud where:

    a. The December 2019 Settlement Deed *does,* upon its true construction, extend to cover the Appellant's claims under Parts B and C; and

    b. The Settlement Deed *was not* obtained by sharp practice by the First Respondent taking advantage of a *suggestio falsi* or *suppressio veri*.

Submissions

42. The Order made by Trower J. and Master Kaye on 23 January 2026 should be set aside for being wrong in principle.

43. It is unsatisfactory, and was always unsatisfactory, that allegations of sharp practice, *a fortiori* fraud, should be determined on the basis of both assumed facts and found facts.

44. The claim should be remitted to a differently constituted court for consideration of whether, and if so how and on what basis, the issues of (1) the true construction of the December 2019 Settlement Deed should be tried as a preliminary issue, and (2) whether it is appropriate to determine the issue of sharp practice on either entirely assumed, or entirely proven, facts, and in both cases for further directions.

45. Given that the court that the Appellant contends was misled in 2019 was the Technology and Construction Court (Fraser J.), consideration may be given to whether, for the purposes of further case management or directions, the claim should be transferred to that court.

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Amended and Re-dated 13 April 2026 18 March 2026 SIMONS MUIRHEAD BURTON LLP