IN THE COURT OF APPEAL (CIVIL DIVISION) **Appeal Ref. CA-2026-000363**

ON APPEAL FROM THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

Mr Justice Trower and Master Kaye ([2026] EWHC 158 (Ch))

B E T W E E N:

LEE CASTLETON

Appellant/Claimant

- and -

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

Respondents/Defendants

FIRST RESPONDENT'S REPLACEMENT SKELETON ARGUMENT

A. INTRODUCTION

1. This is an appeal arising out of a case management decision ordering a trial of preliminary issues, and giving certain consequential directions.

   1.1. Mr Castleton ("**C**") was a sub-postmaster between 2003 - 2004, and has brought a claim alleging, among other things, that Post Office Limited ("**POL**") procured a civil judgment against him dated 22nd January 2007 by fraud, or that bringing that claim was an abuse of process. As against Fujitsu Services Limited ("**FSL**"), he alleges that the procuring of the judgment was an unlawful means conspiracy as between FSL and POL.

   1.2. However, on 10th December 2019 he (and 554 other sub-postmasters) entered into a settlement deed with POL ("**the Settlement Deed**"). POL and FSL (collectively [**CB/14/178**]

"**Ds**") say the effect of the Settlement Deed was to compromise all claims against it (including claims unknown in fraud).

1.3. C himself pleads in respect of the Settlement Deed in "Part A" of his Particulars of Claim ("**PoCs**") disputing its effect, or alternatively seeking to avoid its application on the grounds of the equitable doctrine of "sharp practice", or for fraudulent misrepresentation. C succeeding on Part A is effectively a condition precedent to what comes in Part B and Part C of his PoCs, which address his substantive claims pertaining to the 2007 judgment. [**CB/14/139**]

2. At a directions hearing on 23rd January 2026, Trower J and Master Kaye (the judges to whom these proceedings are docketed) ("**the Judges**") directed that there should be a trial of certain preliminary issues in these proceedings arising from Part A of the PoCs ("**the Part A Trial**"), with reasons to follow. A written judgment with neutral citation number [2026] EWHC 158 (Ch) ("**the Judgment**") was handed down a week later on 30th January 2026. The Judges also gave consequential directions embodied in their order of 23rd January 2026 ("**the Order**"). Those consequential directions included a direction (to which there was no objection raised by C during the hearing below) that POL and FSL (collectively "**Ds**") should not be required in advance of the Part A Trial to plead to a handful of passages which appear in Part A of the PoCs, but in fact relate to the claims advanced in Parts B and C which will not form part of the Part A Trial. Those passages are identified in Annex 2 to the Order ("**the Annex 2 Passages**"), which is the subject of this appeal. [**CB/12/118**] [**CB/11/113**] [**CB/11/117**]

3. By way of his application for permission to appeal, C attempted to mount a wholesale attack on the Order, and indeed the efficacious case management of this matter as a whole.[1] On 4th March 2026, Lewison LJ refused permission to appeal on six of the seven grounds of appeal advanced. Permission to appeal was granted on a single ground, Ground 6, by which it is contended that:

> *"The Court wrongly relieved the Respondents of the mandatory requirement to comply with CPR 16.5(1) by directing that they were not required to plead*

[1] On the day that C's appeal skeleton was filed, C also issued two applications seeking (i) to make extensive amendments to Part A of the PoCs and (ii) to stay the proceedings.

defences to the five paragraphs/phrases of Part A listed in Annex 2 to the Order." [**CB/6/75**]

4. As is clear from the language of the ground, Ground 6 pertains to the very narrow question of whether the Judges were right to postpone the requirement for POL and FSL to plead to the Annex 2 Passages. For the reasons set out more fully in Section D(1)(b) below, they plainly were correct to do so; and in any event, that decision was comfortably within the ambit of the very broad discretion afforded to first instance judges on case management decisions. As such, the appeal should be straightforwardly dismissed.

5. Nevertheless, C's appeal skeleton ("**ASkel**") now appears to seek to have the entirety of the Order set aside. Such a challenge is not properly open to C on the true scope of the permission. Not only was C refused permission to appeal against the decision to order the Part A Trial, but in refusing permission on Ground 1 Lewison LJ even noted that it was "*easy to see why*" the Judges had reached the view that there should be such a trial.

6. Furthermore, despite Lewison LJ having refused permission to appeal on the other grounds, ASkel also appears to seek to challenge the Judges' decision (embodied in Annex 1 of the Order, which sets out the preliminary issues) to direct one of the claims in the Part A Trial be tried on the basis of two assumptions in favour of C ("**the Annex 1 Assumptions**"),[2] with all other matters to be the subject of findings at that trial. Again, it is not accepted that this argument is properly within the scope of Ground 6. But even if it were, there is no principled reason why such a blended approach cannot be adopted, nor was the Judges' decision to do so on the facts of this case outside the generous ambit of the discretion afforded to them. Indeed, it was entirely consistent with their reasoning on the matters on which Lewison LJ refused C permission to appeal. Further, given that the two assumptions made for the Part A Trial are in C's favour, there is no prejudice to him. As such, even if the scope of the appeal does extend to the Annex 1 Assumptions, it should be dismissed. [**CB/11/116**]

[2] The two assumptions are set out in paragraph 3 of Annex 1, at fn.1 at (i) and (ii) respectively. [**CB/11/116**] See further paragraph 25 below.

B. BACKGROUND

(1) The Claims

7. The background to the proceedings is of some importance in understanding the different claims advanced by C. In brief summary: [**SB/3/79**]

7.1. As is well-known, in 1999, POL introduced a computer system called Horizon for the purpose of automating certain accounting functions of Post Office branches. Horizon has at all times been designed and administered by FSL (or its predecessors/subsidiaries). As is also now well-known, Horizon suffered from a number of bugs and errors which adversely affected its reliability.

7.2. C was formerly a sub-postmaster at a post office branch in Bridlington, Yorkshire, known as Marine Drive between 2003 and 2004. His contract was terminated by POL on 17th May 2004 following the discovery of apparent discrepancies in the signed accounts for the Marine Drive branch. POL subsequently brought a civil claim against C to recover the apparent shortfall ("**the Marine Drive Claim**"). Judgment in the Marine Drive Claim[3] was handed down in favour of POL on 22nd January 2007: Judgment [4]-[5]. POL acknowledges that the 2007 judgment had a profoundly damaging effect on C and his family. POL has apologised to C on numerous occasions for this, and POL repeats that apology here. POL has also repeatedly offered to have the 2007 judgment set aside by consent and remains willing to co-operate with C in doing so. [**CB/12/119**]

7.3. Between 2016 and 2019, C was one of 555 sub-postmasters and former sub-postmasters ("**the GLO Claimants**"), engaged in group litigation against POL known as *Bates & Ors v Post Office Ltd* ("**the GLO Action**") relating to the reliability of Horizon: Judgment [7]. There were two substantive trials in the matter, the second of which ("**the Horizon Issues Trial**") was heard between March-July 2019, with judgment handed down on 16th December 2019.[4] [**CB/12/119**]

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[3] *Post Office Limited v Lee Castleton* [2007] EWHC 5 (QB).

[4] *Bates & Ors v Post Office Limited* [2019] EWHC 3408 (Ch). Fraser J had circulated a draft judgment on 28th November 2019.

7.4. The GLO Action was ultimately compromised by way of the Settlement Deed entered into between POL, the GLO Claimants, and Freeths LLP (the firm representing the GLO Claimants) on 10th December 2019: Judgment [9]-[10]. [**CB/12/120**]

7.5. Since the settlement of the GLO Action, four compensation schemes have been established to provide financial redress for postmasters affected by Horizon. These include the GLO Compensation Scheme, administered by DBT, which makes *ex gratia* payments to postmasters who submit claims to the scheme. To date, and despite POL's encouragement, C has chosen not to make any claim in the GLO Compensation Scheme: Judgment [11]. [**CB/12/120**]

8. On 14th March 2025, C issued these proceedings against POL and FSL, serving the PoCs on 10th July 2025. [**CB/13/130**]

9. The claims advanced in the PoCs divide cleanly into two groups (which emerge from the structure of the PoCs themselves):

9.1. First, there are claims pertaining to the interpretation and/or enforceability of the Settlement Deed which are set out in Part A of the PoCs ("**the Part A Claims**"). [**CB/14/139**]

9.2. Secondly, there are claims (which POL and FSL contend have been compromised by the Settlement Deed) pertaining to the Marine Drive Claim. These are set out in Part B and Part C of the PoCs and, as pleaded, relate to events between c.1999 and c.2007 ("**the Historic Claims**"). [**CB/14/146**] [**CB/14/155**]

10. The Part A Claims can be summarised as follows:

10.1. Claim 1: A claim that, on its true construction, the Settlement Deed does not compromise the Historic Claims.

10.2. Claim 2: A claim that, if the Settlement Deed does compromise the Historic Claims, POL is nonetheless precluded from relying on that settlement by reason of "*unconscionability*". This is understood to be a reference to the equitable doctrine of "*sharp practice*", as explained in *BCCI v Ali (No. 1)* [2001] UKHL 8; [2002] 1 A.C. 251 at [31] (Lord Nicholls).

10.3. Claim 3: A claim that the Settlement Deed was procured by way of alleged fraudulent misrepresentations about the decision not to call Gareth Jenkins, a software engineer employed by FSL, as a witness during the Horizon Issues Trial. The alleged misrepresentations are said to have been made (i) in a single paragraph in POL's written closing submissions dated 27th June 2019; and (ii) in an earlier piece of solicitors' correspondence dated 12th February 2019. The relief sought is rescission, although the other 554 parties to the Settlement Deed have not been joined to these proceedings,[5] nor has C offered to make counter-restitution of the full settlement sum.

11. The Historic Claims consist of two distinct claims:

11.1. Claim 4: A claim that POL's pursuit of the Marine Drive Claim against C amounted to the tort of abuse of process.

11.2. Claim 5: A claim that POL, whether by itself or as part of an unlawful means conspiracy with FSL, procured the Marine Drive Judgment by way of fraud.

12. There is therefore a clear legal and temporal demarcation, or "bright line",[6] between the Part A Claims and the Historic Claims: Judgment [35], [38(i)] and [41]. The evidence of both POL and FSL – which was accepted by the Judges, and against which finding there is no appeal – was that fully investigating, pleading to, and conducting a trial in respect of the Historic Claims would be a very time-consuming and expensive exercise: Judgment [22], [36], [43], [47] and [49]. Further, that exercise may prove to be redundant if Ds are correct in their contention that the Historic Claims were compromised by the Settlement Deed, and the Settlement Deed is enforceable: Judgment [24], [36] and [45]. **[CB/12/125, 126,127]** **[CB/12/122, 125,127,128]** **[CB/12/122, 125,128]**

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[5] At the hearing below, Trower J suggested that the parties write to Freeths LLP notifying them of the existence of these proceedings: Transcript, p.141, ll.19-24. The drafting of a joint letter to Freeths LLP has been postponed at SMB's request, who have stated that they see no utility in writing to Freeths LLP whilst this appeal is pending. POL disagrees and is of the view that the GLO Claimants should still be jointly notified by the parties as soon as possible. **[CB/15/393]** **[SB/17/346]**

[6] To adopt the language used in *Soroka v Payne Hicks Beach (a firm)* [2025] EWHC 602 (Ch); cf. Transcript p.6 ll.16-24; p.79 l.25 – p.80 l.9; p.87 l.20 – p.88 l.6; p.116 ll.14-24. **[CB/15/258, 331,339,368]**

13. In contrast, not only may the Part A Claims be determinative of the entirety of the proceedings, but they are likely to be capable of being investigated and tried in much shorter order than the Historic Claims (in circumstances where all parties are understood to be agreed that it is desirable for these proceedings to be resolved as swiftly as possible): Judgment [51]-[53]. Claim 1 is a short point of construction, which is unlikely to require much (or perhaps any) disclosure. Whilst Claims 2 and 3 will require some disclosure and witness evidence, these are likely to be relatively circumscribed as compared to the Historic Claims (subject to one point in relation to Claim 2, discussed in Section B(2)(c) below, which is resolved by the Annex 1 Assumptions). [**CB/12/129**]

(2) The Hearing Below

(a) The Matter of a Part A Trial

14. The bulk of the hearing below was occupied by the parties' submissions on whether there should be a split trial/preliminary issue trial. Following a short adjournment at 3.37pm, the Judges returned and announced their decision that there should be a split trial/preliminary issue trial, with the Part A Claims tried first in time ("**the Part A Trial**"). Having announced their decision, Trower J said "*We are conscious of the fact that this is an important decision for the purposes of this litigation generally, so we will produce a reasoned judgment in fairly short order I hope, explaining why we have reached that conclusion*". The Judgment was handed down a week later on 30th January 2026. [**CB/15/388**]

(b) Consequential Matters

15. After the Judges had announced their decision following a short adjournment, the submissions then turned to consequential directions in light of the decision to order the Part A Trial. At the outset of that discussion, Trower J observed (consistently with submissions made by POL and FSL in their skeleton arguments) that "*we do not think it is appropriate for the defendants to be required to plead and serve defences in respect of the Part B and Part C claims at this stage*".[7] In refusing permission to appeal against [**CB/15/388**]

[7] Transcript, p.136, ll.21-23. [**CB/15/388**]

this decision on Ground 3, Lewison LJ held that postponing defences to Part B and Part C was an entirely "*proper exercise of case management powers*". [**CB/1/2**]

16. Counsel for POL then drew the Judges' attention to "*the slightly tedious but very important point about the difference between pleading to Part A and pleading to [the] Part A [C]laims which is reflected in our document*".[8] This was a reference to a suggestion made in POL's skeleton argument that Ds should not be required to plead to the certain stray references to historic matters in Part A – i.e. the Annex 2 Passages – in advance of the Part A Trial because this would "*necessarily result in incurring the time and cost of responding to Claims 4 and 5, the postponement of which is the very purpose of a split trial*".[9] That suggestion was reflected in the form of draft order filed with POL's skeleton argument, save for the fact that the words "*wrongfully and unlawfully*" (pertaining to POL's termination of C's contract in 2004) in paragraph 1 of Annex 2 were not included in that draft. [**CB/15/389**]

17. At no point during the hearing did C's counsel seek to argue that the Annex 2 Passages should not be excluded from the pleadings for the Part A Trial.

18. Following the hearing, Ds provided a proposed draft order to C's solicitors, Simons Muirhead Burton LLP ("**SMB**"). SMB agreed the majority of the draft order, but objected to the inclusion of the additional words "*wrongfully and unlawfully*" in Annex 2. The only reason given was that "*the words 'wrongfully and unlawfully' are not in Annex 2 of the draft order before the Court on Friday 23rd January 2026*".[10] No issue was taken with the exclusion of the other Annex 2 Passages, nor was it suggested that, as a matter of principle, the exclusion of certain passages in this way was wrong or impermissible. Ultimately, the matter was referred to the Judges, who approved the Order with the inclusion of those three additional words in Annex 2. [**SB/13/337**]

(c) The Annex 1 Assumptions

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[8] Transcript, p.137, ll.8-11. [**CB/15/389**]

[9] POL's skeleton below, at paragraph 39.1 and fn.17. [**SB/9/209**]

[10] Per SMB's email dated 28th January 2026 at 16:20. [**SB/13/337**]

19. The five preliminary issues for determination in the Part A Trial ("**the Preliminary Issues**") are set out in Annex 1 to the Order. In broad terms they encapsulate Claims 1, 2 and 3, with two additional issues addressing the effect on FSL if the Settlement Deed (to which it was not a party) released the Historic Claims (Annex 1, paragraph 2) and the question of relief (Annex 1, paragraph 5).

20. The majority of the Preliminary Issues are to be tried in the "usual" way, with the Court determining all issues of fact and law relevant to them.

21. The Annex 1 Assumptions relate only to the third of the Preliminary Issues (being Claim 2), i.e. the claim that the Settlement Deed was procured by "*sharp practice*". In order to understand the reasons for this, it is necessary to say something about the operation of the doctrine of sharp practice.

22. As explained by the House of Lords in *BCCI v Ali (No.1)*, the doctrine of sharp practice may operate where "*the party to whom the release was given knew that the other party had or might have a claim and knew also that the other party was ignorant of this*" (at [30]). There are therefore four elements which must be made out for the doctrine to potentially apply ("**the Sharp Practice Issues**"):

    (i) whether the claimant had or might have a claim against the defendant; if so:

    (ii) whether the defendant knew of that claim or potential claim; and

    (iii) whether the claimant was ignorant that he had that claim or potential claim; and, if so:

    (iv) whether the defendant knew that the claimant was ignorant.

23. There are three important points to note about the formulation of the four Sharp Practice Issues:

    23.1. First, even if all four Sharp Practice Issues were to be resolved in favour of a claimant, the doctrine might still not apply: as Phillips LJ observed in *Maranello Rosso Ltd v LOHOMJ* [2022] EWCA Civ 1667 at [67], "*where a release is*

construed as covering unknown claims in fraud…that would seem to leave little scope for a finding that one of the parties was guilty of sharp practice".[11]

23.2. Secondly, in order for POL to succeed on Claim 2 and prevent C relying on the doctrine, it need only succeed on any *one* of the four Sharp Practice Issues.

23.3. Thirdly, and critically, the four Sharp Practice Issues are not matters of *fact*. Rather, they are mixed questions of law and fact which constitute necessary *ingredients* for the doctrine to be potentially engaged in favour of a claimant. For example, the existence of a claim (i.e. Sharp Practice Issue (i)) will necessarily engage both factual and legal questions. Similarly, in a case involving a corporate defendant, a defendant's knowledge of any claim at the relevant date (i.e. Sharp Practice Issue (ii)) will engage issues of fact (e.g. whether an individual had knowledge of the claim) and law (e.g. the attribution of a given individual's knowledge to the company). The application of the relevant law to the relevant facts will determine whether or not a given ingredient is made out.

24. Sharp Practice Issue (i) reflects the fact that, whilst the doctrine therefore operates on the basis of the parties' knowledge at the moment that the settlement in question was entered into, it is obviously a necessary prerequisite to its operation that there is a claim at all. (Where there is a claim, and that claim is based on the alleged dishonesty or bad faith of the defendant, it would likely follow in most cases that the defendant will be aware of its existence, such that Sharp Practice Issue (ii) would also be made out).[12] The factual matrix might consequently expand beyond the immediate context of the settlement to encompass the entirety of the factual matrix and legal issues pertaining to the underlying claim which is alleged to have been settled.

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[11] Approved in *Riley v National Westminster Bank Plc* [2024] EWCA Civ 883 at [77]-[79].

[12] In the case of an individual this would almost be a certainty; however, the proposition becomes less obvious in circumstances where (i) the defendant is a company in relation to which questions of attribution may arise; and (ii) where there has been a significant passage of time (i.e. many years) between the moment the claim came into existence and the point at which the defendant's awareness of that claim is being tested.

25. It was suggested by POL that this expansion – which may have significantly complicated and lengthened any split trial/preliminary issue trial – could be avoided by making the Annex 1 Assumptions in favour of C: i.e. Sharp Practice Issues (i) and (ii) would be assumed to be made out in C's favour, whilst Sharp Practice Issues (iii) and (iv) would remain to be determined by the court. This was a suggestion to which the Judges acceded, and which was one factor in the decision to order the Part A Trial: see the Judgment at [30] and [40(iii)].[13] The assumptions to be made, and the issues which remained for determination, were encapsulated in footnote 1 of Annex 1 to the Order as follows: [**CB/12/124, 126**] [**CB/11/116**]

> *"… [Preliminary Issue 3 / Claim 2] shall be determined on the provisional assumptions, for the purposes of the preliminary issues trial only, that (i) the claims pleaded in Part B and Part C of the Particulars of Claim are viable claims; and (ii) that the First Defendant knew this on 10th December 2019. The sub-issues for determination by way of preliminary issue are (a) did the Claimant know of those claims on 10th December 2019; (b) if not, did the First Defendant know that the Claimant was unaware of the those claims; and (c) can the doctrine of sharp practice apply given the terms and effect of the general release contained in the Settlement Deed."*

26. The two assumptions made are manifestly to C's benefit because they assume that C has made out two of the four necessary ingredients for him to succeed on Claim 2 – a point made by Trower J to C's counsel during the hearing below.[14] Put another way, it is simply limiting POL's challenge to the remaining two Sharp Practice Issues at this stage – it is confining POL's attack on the applicability of sharp practice, not C's reliance on it. Furthermore, they also preserve the considerable benefit of the Part A Trial of potentially avoiding the cost and delay which would be involved in fully investigating and trying the Historic Claims, only for it to transpire that they had in fact been settled.

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[13] See also the Transcript at p.89 ll.4-22. [**CB/15/341**]

[14] Transcript, p.107, ll.8-21. [**CB/15/359**]

C. THE SCOPE OF THE APPEAL

27. At the outset, there appears to be a dispute between the parties about the true scope of this appeal.

    27.1. POL's position is that the scope of the appeal is limited, as per the language of Ground 6 itself, to the question of whether it was permissible, or alternatively appropriate in all the circumstances, for the Judges to direct that POL and FSL should not be required to plead to the Annex 2 Passages at this juncture ("**the Narrow Interpretation**").

    27.2. However, it appears to be C's position that the appeal goes beyond this to engage two other aspects of the Judges' decision: (i) the decision to order the Part A Trial at all; and (ii) the decision to direct the Part A Trial to be conducted on the basis of the Annex 1 Assumptions ("**the Broad Interpretation**").

28. The complaint in Ground 6 is that Ds were "*not required to plead defences to the five paragraphs/phrases of Part A listing in Annex 2 to the Order.*" It is therefore necessarily confined, in its application to the Order, to those paragraphs of the Order that prescribes Ds' pleading obligations, being paragraph 3 (specifically the words underlined) and paragraph 5: [**CB/6/75**]

    "*3. The Defendants shall file and serve Defences to Part A of the Particulars of Claim, save for the passages identified in Annex 2 to this Order, by no later than 4.30pm on 20 February 2026.*

    …

    5. *The time for the Defendants to file and serve Defences to the remainder of the Particulars of Claim is extended to the date of the consequentials hearing after the handing down of judgment following the Part A Trial, or as otherwise ordered by the Court.*" [**CB/11/114**]

    (emphasis supplied)

29. Limb (i) of the Broad Interpretation is plainly not open to C. As set out above, Lewison LJ refused permission to appeal against the decision to order the Part A Trial, and in doing so even appeared to express agreement with that decision ("…*it is easy to see why*…"). Having staunchly refused permission on Ground 1, Lewison LJ cannot have [**CB/1/2**]

intended to permit C to nonetheless pursue that ground via the back door by granting permission on Ground 6 so construed.

30. Limb (ii) is also not open to C, but a more detailed analysis is required to see why not.

30.1. Ground 6 does not refer to Annex 1 or the Annex 1 Assumptions at all. [**CB/6/75**]

30.2. The Annex 1 Assumptions were an important aspect of the Judges' decision to order the Part A Trial at all, a decision supported by Lewison LJ's refusal of permission to appeal on Ground 1. Having done so, Lewison LJ cannot have intended to grant permission for an attack on one of the key premises of the decision to order the Part A Trial.

30.3. It is accepted that the reasoning of Lewison LJ in granting permission on Ground 6 might nonetheless be said to have left the door ajar to limb (ii) when he observed: "*There 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 of the facts pleaded by the claimant are true. The hybrid approach of the court in this case may well be wrong.*". There are a number of points which, taken together, may explain the source of this statement: [**CB/1/2**]

30.3.1. The Permission Skeleton filed on behalf of C alleged at paragraph 4 that the court below had directed a hybrid approach: "*The Court directed and ordered that: … The trial be on the hybrid basis of assumed facts put forward by [POL]…*". But the court below did no such thing. As explained above, the court assumed two completed *ingredients* (in C's favour). It made no assumptions of fact. The court did not even consider, or prescribe the determination of, *what* facts would even be relevant to those ingredients. The Permission Skeleton may not have assisted Lewison LJ in this respect. [**CB/7/77**]

30.3.2. In contrast, although Annex 1 and the Annex 1 Assumptions are not about facts, the Annex 2 Passages *are* factual allegations. Whereas the scope of pleading is a wholly separate matter from the preliminary issue assumptions, the presence of Annex 2 in the Order creates a risk of confusing the two concepts.

30.3.3. The risk of confusion is made all the greater by the fact that pleading to the "Part A Claims" and pleading to "Part A" are not the same thing. The carving out of the Annex 2 Passages simply ensured that it was only the Part A Claims that were pleaded to in advance of the Part A Trial. The carve out (in Annex 2) and the assumptions (in Annex 1) are performing different functions. However, the Permission Skeleton elided the two by asserting at paragraph 63 (in relation to Ground 6) that the Annex 2 Passages "*form part of the factual matrix and context for the agreement of the December 2019 Settlement Deed…It is no answer to say for the purpose of the preliminary issues, these are to be assumed*". [**CB/7/97**]

30.4. Accordingly, the only coherent interpretation of the scope of the Ground 6 appeal, when read in the light of both the refusal of permission to appeal on Grounds 1-5 and 7, and the reasons given for that refusal, is the Narrow Interpretation.

31. Notwithstanding the above, for completeness, both the Narrow Interpretation and the Broad Interpretation are addressed below. The appeal must fail whichever interpretation is adopted.

32. Finally, it is noted that paras.13-31 of ASkel effectively seek to give evidence in relation to numerous matters. These paragraphs are seemingly an attempt to argue the substance of the case; their relevance to the procedural issue that forms the subject matter of this appeal is opaque. It is not accepted that the factual assertions made in those paragraphs were properly in evidence at the hearing below,[15] and no *Ladd v Marhsall* application has been made to adduce evidence in support of them. However, noting the direction for

[15] C was directed to file evidence in reply to Ds' evidence by no later than 3rd December 2026, [**SB/6/146**] but did not do so. Between 16th and 19th January 2026, C filed a further three witness statements, running to 33 pages, with 553 pages of exhibits. Ds did not have any opportunity to file responsive evidence in advance of the hearing on 23rd January 2026. No application to rely upon the statements was ever made. C's counsel also filed two skeleton arguments, both [**SB/11/230**] late and running to a combined total of 105 pages, which also covered a large amount of factual [**SB/12/291**] ground.

expedition, and their patent irrelevance to the issues in this appeal, POL has no objection to the Court reading those parts of ASkel *de bene esse*.

D. SUBMISSIONS

(1) The Narrow Interpretation

(a) New Point On Appeal

33. As will be clear from the summary above, no principled issue was taken with the inclusion of the Annex 2 Passages in the Order during or after the hearing below. The Narrow Interpretation is, therefore, a new point raised for the first time by C on appeal.

34. The correct approach where a new point is raised on appeal was summarised by Haddon-Cave LJ in *Singh v Dass* [2019] EWCA Civ 360 at [15]-[18], as amplified by Snowden LJ in *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337; [2019] 4 WLR 146. Whilst it is accepted that Ground 6 is somewhat akin to a "pure point of law", and that the three criteria identified in [18] of *Singh* are met, the Court retains a discretion as to whether or not to admit the new point in all the circumstances.

35. The present case is one in which it would be appropriate to exercise that discretion against admitting the new point.

    35.1. If the court will rarely allow a point which was not argued below to be advanced, that should *a fortiori* be the position where the part of the order under challenge was not contested as a matter of concept by the party now appealing, and almost completely agreed as a matter of drafting, there being only a three-word difference in the language of Annex 2 between that agreed to by C and that ultimately ordered.

    35.2. Satellite litigation in relation to case management decisions can be a pernicious blight on the expeditious and cost-effective conduct of litigation. There is a public interest in not readily permitting such decisions, which rarely involve the substantive legal rights of the parties, to be re-opened on wholly new grounds which could (and should) have been raised at first instance.

(b) The Annex 2 Passages

36. There is no dispute that an appeal against a case management decision faces a high bar. An appellate court will only reverse or otherwise interfere with a case management decision of a first instance judge where "*he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree*": *Broughton v Kop Football (Cayman) Ltd* [2012] EWCA Civ 1743 at [51] per Lewison LJ.

37. There is some suggestion in the language of Ground 6 and at paragraph 35 of ASkel that the Order falls foul of the "*mandatory*" provisions of CPR r.16.5(1). If by this it is meant that the Judges lacked the power to postpone the time at which Ds should plead to the Annex 2 Passages, this is incorrect. Properly read, r.16.5(1) relates to the contents of the defence, not to the time at which the defence is to be produced. In respect of timing, CPR r.3.1(2)(a) and CPR r.3.1(2)(p) plainly gave the Judges sufficiently broad powers to make the order that they did.

38. Nor was the Judges' decision to exercise their discretion only to require Ds to plead to the parts of Part A which are relevant to the Part A Claims "*plainly wrong*" in the relevant sense. Indeed, it was plainly the right decision in light of the other directions given, and in light of all the circumstances of this case. Further, the deferral of pleading to Parts B and C until the Part A Claims had been decided was recognised as "*a proper exercise of case management*" by Lewison LJ in refusing permission in respect of Ground 3. [**CB/1/2**]

39. The majority of the Annex 2 Passages are not relevant to the issues to be tried in the Part A Trial at all. In particular:

    39.1. The passages in paragraph 1 of Annex 2 relate to (i) the contractual position as between POL and C in and around 2004 (specifically the lawfulness of the termination of C's contract) and (ii) the alleged evidential basis for the Marine Drive Claim. Both of these may well be relevant to the Historic Claims. They are not relevant to the issues which arise in the Part A Claims about the interpretation of the Settlement Deed and the events surrounding its execution in 2019.

39.2. The words in paragraph 2 of Annex 2 relate to findings said to have been made by the court in the Marine Drive Claim. Again, this may well be of relevance to the Historic Claims; it is of no relevance to the Part A Claims.

39.3. As to paragraph 4 of Annex 2, the majority of paragraph 11 of the PoCs consists of alleged evidence of, or commentary upon, POL's alleged abuse of process in bringing the Marine Drive Claim, i.e. Claim 4, as particularised in Part B. [**CB/14/141**]

39.4. As to paragraph 5 of Annex 2, paragraph 12 of the PoCs consists of allegations about the conduct of FSL and Anne Chambers (an employee of FSL) in relation to the Marine Drive Claim. Once again, this may well be of relevance to the Historic Claims; it is of no relevance to the Part A Claims. [**CB/14/141**]

40. The Judges were therefore quite right not to require Ds to undertake the costly and time-consuming exercise of investigating and pleading to those historic events which would not have any relevant bearing on the Part A Trial.

41. Two of the Annex 2 Passages would be of potential relevance to Claim 2, but only had the Annex 1 Assumptions not been made:

41.1. The allegation in paragraph 9 of the PoCs that in 2019 POL "*knew that the Claimant had a claim in fraud*", i.e. that POL knew of the matters giving rise to Claim 5, as pleaded in Part C. [**CB/14/139**]

41.2. The allegation in the first part of paragraph 11 of the PoCs that in 2019 POL knew that it had "*combined with others to injure the Claimant by abusing the process of the Court…*", i.e. that POL knew of the matters giving rise to Claim 4, as pleaded in Part B. [**CB/14/141**]

42. The decision to exclude these two passages was therefore no more than a natural corollary to the decision to order the Part A Trial on the basis of the Annex 1 Assumptions, and postpone Ds pleading to Part B and Part C. Further, having made the Annex 1 Assumptions in C's favour, there was no discernible prejudice to C in excluding them. Instead, it is to C's benefit to have some of the ingredients necessary for the engagement of the sharp practice doctrine to be assumed to be present for the purposes of the Part A Trial.

43. Finally, ASkel at paragraph 36 is critical of the Judges for giving "*no reason*" for excluding the Annex 2 Passages. This should be given short shrift:

43.1. The appropriate approach on appeal is to assume that the judge(s) knew how to perform their function and which matters to take into account, with latitude given for the exigencies of litigation: *Piglowska v Piglowski* [1999] 1 WLR 1360 HL at 1372. Given that the decision to exclude the Annex 2 Passages flowed inexorably from the decisions to direct the Part A Trial and postpone Ds pleading to Parts B and C, there is no warrant for the insinuation that it was a decision reached without proper reasoning.

43.2. That is all the more so in circumstances where the decision in question was a consequential matter which flowed from the decision taken on the main subject matter of the hearing (and so might not be expected to be reflected in the Judgment), and in circumstances where no principled issue with the exclusion of the Annex 2 Passages was articulated on behalf of C below.

(3) The Broad Interpretation

(a) The Part A Trial

44. The Judges' decision to order the Part A Trial disclosed no error of principle. Indeed, the authorities cited at [32] and [33] of the Judgment (*Electrical Waster Recycling Group Ltd v Phillips Electronics UK Ltd* [2012] EWHC 387 (Ch) and *Steele v Steele* [2001] CP Rep 106) were cases cited in C's first skeleton argument below.

45. Nor can the Judges' careful balancing of the various factors be fairly criticised. There is no suggestion in ASkel that any of the factors referred to in [35]-[55] of the Judgment were irrelevant, nor that any relevant factors were left out of account. Nor was it plainly wrong; rather, as Lewison LJ noted, it is "*easy to see why*" the Judges reached the decision they did. It is a quintessential example of a case management decision with which an appellate court should not interfere. [**CB/1/2**]

(b) The Annex 1 Assumptions

46. The decision to direct that the Part A Trial take place with the Annex 1 Assumptions being made in respect of Sharp Practice Issues (i) and (ii), and all other legal and factual

matters being for determination by the Court, was also one which the Judges were entitled, and correct, to reach.

47. ASkel focuses solely on the question of whether it is appropriate for the issue of sharp practice to be determined on the basis of assumed facts (whether all facts are assumed, which ASkel appears to concede may be permissible at paragraph 40, or just some facts as part of a "hybrid' approach" which it contends is impermissible at paragraph 43). But as explained above, that argument depends upon a misapprehension as to the nature of the assumptions being made.

48. Once it is understood that the Annex 1 Assumptions involve assuming that entire ingredients of C's cause of action are made out (rather than assuming facts from which the court will decide whether or not a given ingredient is made out), it becomes clear that the generalised warnings about the potential complications of using assumed facts in the cases cited in ASkel can have little bearing on the Judges' decision. Instead, the authorities *support* the legitimacy of assuming the existence of a valid claim for the purpose of allowing the court to determine as a preliminary issue whether or not there is a valid defence to that claim. For example, in *FII v HMRC* [2020] UKSC 47; [2022] AC 1, in relation to the application of s.32 of the Limitation Act 1980 to a mistake claim, the Supreme Court noted at [199] that the question "*is often conveniently dealt with as a preliminary issue*" before continuing:

> *"If the action runs its full course, it may transpire that there was no fraud or mistake, indeed no cause of action at all. But where, at the stage of an inquiry into the defendant's plea that the action is time-barred, the claimant relies on section 32(1)(a) or (c), the question is not whether there was in reality any fraud or mistake: that will not be established unless and until the court issues a judgment on the merits of the case. The question under section 32(1)(a) and (c) of the 1980 Act is whether, upon the assumption that there was fraud or mistake, as identified by the claimant in the way in which he pleads his case, it was discovered or could with reasonable diligence have been discovered at such a time as would render the claim time-barred."*

49. By parity of reasoning, the Judges were entitled to direct that the third preliminary issue (i.e. sharp practice) should be determined upon the provisional assumption that POL abused the court's process and/or obtained a judgment by fraud (and, given that

assumption, also on the assumption that POL would have known that in December 2019) for the purpose of ascertaining whether C can avoid the effect of the Settlement Deed.

50. But in any event, even if (contrary to the foregoing) the Annex 1 Assumptions are properly characterised as assumptions of fact, this presents no difficulty. There is no principled bar to using assumptions of fact (whether in relation to all facts, or as part of a "hybrid" approach) in cases of sharp practice, nor could the Judges' decision to do so on the facts of this case be said to be "plainly wrong".

51. The argument in ASkel develops as follows:

    51.1. First, it is said that the Court should be cautious about conducting trials on the basis of assumed facts: ASkel paragraph 32.

    51.2. Secondly, it is said to be "*inappropriate*" for allegations of sharp practice to be determined on the basis of assumed facts: ASkel paras.33-34.

    51.3. Thirdly, it is said that sharp practice "*may be*" capable of being determined on the assumption that all facts alleged by C are true (somewhat contradicting the second contention), although the "*better course*" would be to direct all facts to be found; but that it is "*unsatisfactory*" for the issue to be determined on the basis of both assumed and found facts: ASkel paragraph 40 and §44.

52. Beginning with the first contention, whilst it is right that there are statements in the authorities which urge a measure of caution in the use of assumed facts, such high-level and generic statements are of limited assistance in the context of an appeal against a highly fact-sensitive case management decision. Indeed, the authorities also recognise that the use of assumed facts in preliminary issue trials can, in appropriate cases, be a valuable and effective case management tool,: *Royal & Sun Alliance Insurance Plc v T&N Ltd (in administration)* [2002] EWCA Civ 1964; [2003] P.I.Q.R. P26 at [46].

53. Further, such warnings often stem from cases in which the assumptions of fact are far more complex than the Annex 1 Assumptions. In *Steele v Steele,* Neuberger J refused to hear a preliminary issue trial on the basis of "*11 pages of agreed facts running to 46 paragraphs with 30 separate footnotes identifying disputes of one sort or another*". It is

easy to see why. But the two brief and unqualified assumptions made in Annex 1 are very far removed from such a situation.

54. The second contention goes too far. The cases cited by ASkel at paras.33-34 do not stand for any general proposition that assumed facts are inherently inappropriate in the context of an allegation of sharp practice. Properly read, those cases turn on their own facts which are very different to those in the present case.

54.1. The *obiter* observations of Flaux J in *Satyam Computer Services Ltd v Upaid Systems Ltd* [2008] EWHC 31 (Comm) at [81]-[82] arose in circumstances where it was the party alleging sharp practice (Upaid) which was inviting the court to determine the issue on the basis of assumed facts. Unsurprisingly, Flaux J balked at deciding such serious allegation against the party accused of sharp practice (Satyam) without it being given the opportunity to adduce evidence. But the opposite is true in the present case, where it is the party *against* whom the allegation is made (POL) which is inviting the court to determine the issue, and to do so by assuming the existence of complete ingredients against it. Indeed, this was a point made by Trower J in response to C's counsel's reliance on *Satyam* during the hearing below:

> "*Well now I think it is very different, actually, because it is the other way around. The reason they were concerned about assumed facts in this case* [Satyam] *was because it was unfair to assume the facts against the other side. Whereas in this instance, what Mr Bailey is saying is that, assume the worst of my clients…*".[16]

54.2. It also seems that the party accused of sharp practice (Satyam) went on to invite the court to determine the issue at that juncture against Upaid on the basis that it had failed to produce any evidence in support of its case. Again, Flaux J indicated that he would have been disinclined to do so, had it been necessary to decide the point. In contrast, POL is not suggesting that any absence of evidence is held against C on either of the two assumptions; rather, it is inviting the court to decide

[16] Transcript, p.107, ll.14-20. [**CB/15/359**]

the issue on the basis that C's position is at full strength in relation to the matters which are assumed.

54.3. Similarly, in *Royal & Sun Alliance v T&N* (a case concerning, amongst other things, allegations of misrepresentation and material non-disclosure to an insurer, rather than the doctrine of a sharp practice), the Court of Appeal was concerned that a trial on assumed facts, in circumstances where the insurer had only by that stage been able to plead best particulars of non-disclosure on the materials available, would deprive the insurer of the opportunity to strengthen its case on a fact-sensitive issue following disclosure and evidence if the court decided that issue against it at the preliminary issue stage: [42] (Chadwick LJ) and [54]-[55] (Arden LJ). In contrast, the positions assumed in the Annex 1 Assumptions are binary: C either did or did not have viable claims against POL, and POL either did or did not know this on 10th December 2019. Each is being assumed positively in C's favour, rather than subject to a determination. It is therefore hard to see how disclosure or evidence could strengthen C's case at a final trial, or how the lack of it could weaken his position at the Part A Trial: there is no risk that the court will conclude on incomplete evidence that Sharp Practice Issue (i) is not made out.

55. Further, not only is there no general bar on using assumptions of fact in relation to allegations of sharp practice, but it seems that this was done in *Maranello* itself (in the context of an application for summary judgment, rather than at a trial of a preliminary issue). At [65], Phillips LJ summarised one of the appellant's arguments: "*MRL argues on this appeal that the Judge's reasoning failed to recognise the (necessarily assumed) fact that the respondents knew that they had unlawfully conspired against MRL and that MRL was unaware of that conspiracy.*". He went onto hold that that even on the basis of that assumption, the appellant's claim had been properly dismissed because it had entered into a widely worded general release in circumstances where it was fully aware of the potential claims against the respondent: [66]-[67]. It also appears that in *Riley v Nat West* (again, in the context of strike out/summary judgment), one of the grounds of appeal was that the judge below had erred in concluding that the application of sharp practice was capable of being determined in the defendant's favour on the basis of assumed facts: see [48]. The appeal was dismissed on all grounds ([90]), and [65]-[67] of *Maranello* were quoted with express approval by Bean LJ at [77].

56. Thirdly, given the (correctly made) concession at paragraph 40 of ASkel that it may be possible for Claim 2 to be tried on the basis of *all* facts being assumed, it is hard to see what principled objection there can be to *some* facts being assumed as part of a hybrid approach.

56.1. One thing which is conspicuously absent from ASkel is any articulation of *why* a hybrid approach specifically is objectionable. Instead, there is just the general preference against the use of assumed facts at all. But once it is accepted, as it seems to be in ASkel paragraph 40, that assumed facts could legitimately be used in the present case, it becomes clear that C's objection is one of form rather than substance.

56.2. The reason that ASkel is unable to articulate any cogent objection to a hybrid approach is that there simply cannot be one. Indeed, given C's stated preference for *all* facts to be determined by the Court, a hybrid approach ought to be *less* objectionable than one where all facts are assumed in C's favour. From a litigation perspective, there is only downside for C in Sharp Practice Issues (i) and (ii) being subject to argument and determination, as the Court might conclude that those ingredients which are currently assumed to be present are not actually sufficiently pleaded or made out.

56.3. Finally, even if it *were* possible to identify any disadvantages to any hybrid factual assumptions, these would have to be balanced against the considerable potential savings of time and cost in avoiding the need for a 12-week fraud trial, an exercise that would be very burdensome for the parties, their witnesses and the court.

E. RECUSAL / TRANSFER

57. ASkel at paragraph 44 seeks an order (presumably only in the event that the appeal succeeds) that the matter be remitted to different judges. POL is not aware of any recusal application having been made, nor is it suggested that there would be a basis for recusal. Whilst ultimately a matter for the court, it is submitted that in circumstances where there are docketed judges, who have spent time reading into the case and have familiarity with it, the court should be slow to remit the matter to different judges. There is also presently a case management hearing listed before the Judges in a window from 1st – 3rd July 2026, [**SB/15/344**]

which POL is keen to retain to allow the litigation to progress as expeditiously as possible.

58. Further, ASkel at paragraph 45 suggests that the matter should be remitted to the TCC. The reason given for this is that the court which it is alleged was misled by way of the matters advanced in Claim 3 was the TCC. That appears to be wrong: the judgments in the GLO Action suggest that it was heard in the Queen's Bench Division (as it then was), not the TCC. In any event, there is but one High Court – there is no reason that a different division of the High Court cannot hear a claim relating to events in a different division. It was open to C to issue in any court he wished. There is no formal transfer application (which would, in any event, not lie to this court: CPR r.30.5). This appears to be another attempt to disrupt the efficacious management of this litigation, which had been set on a clear and expeditious path by the Judges.

F. CONCLUSION

59. For all the reasons set out above, the Court is invited to dismiss the appeal.

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JAMES BAILEY KC
DANIEL PETRIDES

27th March 2026 (original)

10th April 2026 (replacement)