

B E T W E E N : –

DR DAVID PARSONS

Appellant/Claimant

-and-

CONVATEC LIMITED

Respondent/Defendant

APPELLANT'S SKELETON ARGUMENT
for hearing listed for 13 and 14 October 2026

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A. INTRODUCTION

1. The Appellant is Dr Parsons. The central point in issue in this appeal is a short point of statutory construction, namely the proper construction of **s.40(1)(b) the Patents Act 1977 ('the Act')**: can the Court consider the benefit from more than one patent or invention together when determining whether the employer ('**Convatec**') has derived or will derive '*an outstanding benefit*'? Dr Parsons says, Yes. Convatec says, No. The Judge did not decide the point. Dr Parsons contends he was wrong not to do so.
2. Dr Parsons had applied to strike out part of Convatec's Defence on this matter under CPR r.3.4(2)(a), listed to be heard at a CMC. In his Judgment, the learned Judge rightly accepted that the application raised a point of law which was both (i) *discrete* ('*distinct from any factual considerations*' [18] [**Core/7/44**]) and (ii) *important* ('*So much is riding on this point of construction of section 40 that it is not unrealistic to assume that the point, if decided, would be appealed to the Court of Appeal and the UK Supreme Court*' [33] [**Core/7/46**]).
3. Despite the fact that it was a short point of law and both parties had had a full opportunity to make submissions, the Judge nonetheless declined to determine it.
4. Dr Parsons contends that the Judge erred, both because of errors of approach and because deciding as he did was plainly wrong – indeed, the learned Judge appears to have been led into error by Convatec, in that regard. Convatec's submissions and the approach of the Judge stand in stark contrast to the hearing of Convatec's own application to strike out by Zacaroli J (as he then was) as explained at §29**Error! Reference source not found.**, below.

A.1 Permission

5. Arnold LJ granted permission to appeal by an Order dated 14 April 2026 [**Core/4/28**], giving the following Reasons and Information for the parties:

Reasons

Although the judge's decision was a case management decision, and it is normally inappropriate for this Court to interfere with such decisions, it is arguable with a real prospect of success that the judge failed to appreciate that the Appellant's application

gave rise to a short point of statutory construction which could and should be determined prior to trial in the interests of both parties.

Information for or directions to the parties

For the avoidance of doubt, the parties should be prepared to address the issue of the proper interpretation of section 40(1)(b) of the Patents Act 1977 [at the hearing].

6. Thus, two issues arise in the appeal: (1) the proper construction of s.40(1); and (2) whether the Judge was in error in declining to decide the issue on the application.
7. There is an undated Respondent's Notice (filed on 28 April 2026) [Core/3/26-27], which seeks to support the learned Judge's decision for different or additional reasons:
 - (1) The Judge could have held that he *could not be sufficiently certain* that the Respondent's case on the interpretation of s. 40(1)(b) was bound to fail.
 - (2) The Respondent's interpretation of s. 40(1)(b) is *correct*. (emphasis added)
8. The third point in the Respondent's Notice (para. 3) seeks to define an issue which remains, although Convatec has not actually pleaded any case at all on that issue.

A.2 Section 40

9. The critical threshold for the making of any award to an employee inventor is 'outstanding benefit' and is provided for in s.40(1) as follows (emphasis added):
 - (1) *Where it appears to the court or the comptroller on an application made by an employee within the prescribed period that —*
 - (a) *the employee has made **an invention** belonging to the employer for which **a patent** has been granted,*
 - (b) *having regard among other things to the size and nature of the employer's undertaking, the **invention or the patent for it** (or the combination of both) **is of outstanding benefit to the employer, and***
 - (c) *by reason of those facts it is just that the employee should be awarded compensation to be paid by the employer,**the court or the comptroller may award him such compensation of an amount determined under section 41 below.*

10. For patents before 1 January 2005, the benefit to be considered is confined to the *patent(s)*; thereafter, it includes the benefit from the *invention(s)*.
11. There have only been two successful applications for compensation by employee inventors under s.40:
 - 11.1. **Kelly v GE Healthcare Limited** [2009] EWHC 181 (Pat) [2009] RPC 12, in which Floyd J (as he then was) awarded Dr Kelly and Dr Chiu 2% and 1% of an outstanding benefit of £50 million: £1 million and £500,000 respectively; and
 - 11.2. **Shanks v Unilever plc and others (No 2)** [2019] UKSC 45, [2019] 1 W.L.R. 5997, in which Prof Shanks was awarded 5% of a net outstanding benefit to Unilever of £24 million. The award was increased from £1.2 million to £2 million to reflect the time value of money.
12. In the present, Dr Parsons pleads a benefit to Convatec in billions of dollars.

A.3 The underlying proceedings

13. Dr Parsons is the Claimant in the underlying proceedings in the High Court. He was a long-serving employee of Convatec. He joined in 1991, on an initial salary of £16,250. He issued the Claim Form in these proceedings on 5 September 2022. His employment ended in early 2023. Whilst at Convatec, he devised multiple inventions, some by himself and some with others. There are 7 patent families in issue. It is common ground that at least some of Convatec's products use more than one of Dr Parsons's inventions (Re-Re-Amended Defence ('Defence') at §90 [SOC/9/164-165]).
14. Dr Parsons pleads to the benefit in Section E of the Re-Re Amended Particulars of Claim ('Particulars of Claim') [SOC/2/34] and to considering the benefit from more than one patent or invention at §69 [SOC/2/35]. He pleads to benefit from the products which rely upon the patents and inventions, as being at '*at high profit margins and very high rates of return on the costs of making the underlying Inventions*' at §72.1 [SOC/2/36], with estimated '*total global sales [to 2021] as follows (i) AQUACEL Ag: approximately \$2.8 billion (ii) AQUACEL Ag+ products: approximately \$500 million*'.
15. To win, Dr Parsons has to establish that the benefit is '*outstanding*'. Convatec robustly defends the claim, including on the basis that (Defence at §104 [SOC/9/174]):

*'none of the Patents, patent families and/or inventions relied on considered **individually** resulted in an outstanding benefit to the Defendant'*

16. There is a Confidential Financial Summary (which Convatec seeks to amend), which vividly illustrates the scale and practical impact of some of these arguments [Conf/2/8-14].

17. Convatec's case is that Dr Parsons is not entitled to succeed if the benefit derived from two or more of the patents and/or inventions together is outstanding, but the individual benefit it is not. Instead, Convatec contends that Dr Parsons must show that the benefit from each one is outstanding, for an award under s.40. This is clearly set out in the last sentence of both §6 and §89 of the Defence, where Convatec pleads (emphasis added):

'6. [...] As a matter of law, a claimant cannot rely on an outstanding benefit of patents and/or inventions collectively if they are not of outstanding benefit individually.' [SOC/9/132-133]

'89. [...] As a matter of law, however, it is impermissible to seek to establish 'outstanding benefit' based on an aggregate benefit allegedly derived from the cumulative effect of multiple patented inventions (and a fortiori from multiple patented inventions / patents as well as other kinds of contribution).' [SOC/9/164]

18. This is an important part of Convatec's Defence, because, as set out at §40 to §42 below, Convatec's case is that the inventions were used in combination, and the benefit from the inventions and patents is interlinked. On this basis, Convatec contends that Dr Parsons cannot show that any individual patent or invention is of outstanding benefit (or in some cases, of any benefit).

19. At §58 of Dr Parsons's Reply, he contends that Convatec is wrong in law and that contention discloses no reasonable grounds for defending the claim [SOC/17/262]:

*'As to paragraph 89 and as noted above, it is denied that 'As a matter of law [...] it is impermissible to seek to establish 'outstanding benefit' based on an aggregate benefit allegedly derived from the cumulative effect of multiple patented inventions'. **The Defendant's contention is wrong in law and discloses no reasonable grounds for defending the claim.**'* (emphasis added)

20. It is a very short point indeed and, as the Judge held, fundamental to the litigation.
21. Thus, by an Application dated 29 September 2025 [Supp/4/22], Dr Parsons applied to strike out the relevant parts of Convatec's Defence and for an order that:–

'The last sentence of paragraph 6 and of paragraph 89 (and paragraphs 90(g) and 103, which refer to paragraph 89) of the Defence , dated 28 July 2025, be struck out pursuant to CPR r.3.4(2)(a), as disclosing no reasonable ground for defending the claim.'
22. This was an opportunity to determine an important issue in the case at an early stage and avoid the parties conducting the litigation on a twin-track approach.
23. This part of Convatec's pleaded case and the issue of statutory construction which it raises is not, in any sense, a prisoner to the facts, nor is it dependent upon any evidence. It is correctly pleaded by Convatec to be '*a matter of law*' because it is just that, a pure point of law. The Application was confined to that point, and that point alone.
24. Like his Reply, Dr Parsons's Application made it clear that his case is that the Defence '*is, in this respect, wrong in law and is bound to fail: under s.40(1)(b), the Court may consider the benefit of more than one invention or patent (or the combination of both) together*' (emphasis added) [Supp/4/22].
25. The reason it matters in this case is that during his employment, Dr Parsons made a number of inventions, upon which patents have been granted and which, as between Dr Parsons and Convatec, belong to Convatec and have led to a succession of successful products made by Convatec, pleaded to have generated billions of dollars.
26. Thus, Mellor J *declined to determine* the Appellant's strike-out application on that narrow issue of law, despite having expressed a fairly clear view on the merits in argument [Supp/12/130].
27. The learned Judge misunderstood both the *nature of the test* for a strike-out and *the principles* by which (in accordance with both the provisions and scheme of the CPR) his discretion was to be exercised in a case where that part of Convatec's pleaded case was wrong in law and, therefore, had no prospect of success and the application was heard in full over half a day before him. In short, as noted above, the learned Judge

was wrong not to decide the point and to leave it hanging in the air, to be argued all over again at trial.

28. Convatec was not very keen on this being resolved (perhaps for obvious reasons).
29. Early in the proceedings, Convatec itself made an application to strike out parts of Dr Parsons's claim. This required Zacaroli J (as he then was) to determine the proper construction of aspects of the relevant provisions in the Act [Supp/2/8-19] – which he did. He was right to do so. For example, Convatec submitted that the claim in respect of Bray 2003 should be struck out because (Convatec submitted, §20 and §22) that '*it is a necessary component of a claim under s.40 that the patent granted in respect of the relevant invention belonged, at the time of its grant, to the employer*' and that should extend to the patent [Supp/2/13]. Zacaroli J determined the proper construction of the statute, and dismissed that application on that point (§22, §24 and §25) [Supp/2/13]. Zacaroli J also determined: (i) whether the statute required that Dr Parsons be named as an inventor (§§26-31) [Supp/2/14]; (ii) the relevant limitation provisions (§§32-40) [Supp/2/14-16]; (iii) whether the invention must be used in a commercial product (§§44-47) [Supp/2/16-17]; and (iv) the effect of revocation of a patent (§§48-53) [Supp/2/17-18].

B. SINGULAR OR PLURAL

30. Section 40(1) of the Act is set out at paragraph 9 (on p.3) above. The critical wording for the purpose of this appeal is in subsections (a) and (b), as follows:
 - (a) *the employee has made **an invention** belonging to the employer for which **a patent** has been granted*
 - (b) *having regard among other things to the size and nature of the employer's undertaking, the **invention or the patent for it** (or the combination of both) is of outstanding benefit to the employer*
31. It is clear that the invention or patent in s.40(1)(b) is that identified in s.40(1)(a). Dr Parsons submits that it is clear that the singular includes the plural, in respect of both the patent and the invention, as a matter of statutory interpretation.
32. Convatec appears to rely upon the use of the singular '*patent*' and '*invention*' in s.40(1)(a) and (b) as the basis for its case.

33. A striking feature of Convatec's Defence is that §6 accepts that there can be more than one patent relied upon where they are granted for the same invention [Supp/9/132]. That must be as a result of the application of s.6 of the Interpretation Act, set out below.
34. However, that sits very oddly with the parts of the Defence that Dr Parsons seeks to strike out. Convatec will have to explain to the Court how its case works in practice – perhaps its Skeleton Argument will reveal that.
35. Indeed, Convatec's case on statutory construction is hopeless for a number of reasons, the first of which is the default position s.6(c) of the **Interpretation Act 1978**, noted above, which provides as follows (emphasis added):

6 Gender and number.

In any Act, unless the contrary intention appears, — [...]

- (c) words in the **singular include the plural** and words in the plural include the singular.

36. The contrary intention plainly does *not* appear; so, that is an end of Convatec's case. Indeed, Convatec's concession is only consistent with reading the word '*patent*' in the plural – albeit only for some selective purposes, and not for others.
37. However, putting Convatec's concession to one side, there are obvious reasons which drive the analysis to that conclusion, including (i) any sensible purposive construction of the statutory provisions and (ii) the avoidance of absurdity in the outcome that would result from atomising plainly related patents that might well be invented by the same person and included in the same product, potentially with interactive effects too.
38. The point may have been put most simply by Meade J to counsel for Convatec, in the course of argument, as follows (Transcript p.11 ln 15 to p.12 ln 3) [Supp/3/20]:

MR. JUSTICE MEADE: I am not sure how you would do anything else, actually. If there were five patents, what would you do; try and treat them all differently even though they actually had an interactive effect in the market?

MR. NICHOLSON: The question is whether or not one has made such an outstanding invention that it leads to compensation.

MR JUSTICE MEADE: [...] If they are all, if I can put it this way, qualifying patents, you are not going to try and treat them separately if in fact, in the real world, they had an aggregate effect because you could keep some competitors off with one and other competitors off with another, and some competitors were deterred ...

MR. NICHOLSON: It depends how one goes about analysing it.

39. Against that background, the further reasons to support that analysis are as follows:–

(1) First, the earlier cases are consistent with Dr Parsons’s construction: in GEC Avionics Ltd’s Patent [1989] 2 WLUK 50; [1992] R.P.C. 107, it was accepted that an application can relate to a foreign patent and more than one patent; in British Steel Plc’s Patent [1991] 6 WLUK 131; [1992] R.P.C. 117, referred to GEC, although noted that all patents relied upon would need to be identified; and in Electrolux’s Patents O/075/98, both parties proceeded on that basis.

(2) Secondly, if Convatec were right, the seminal decision of Floyd J (as he then was) in Kelly v GE Healthcare Limited [2009] EWHC 181 (Pat) [2009] RPC 12 is wrong in law, because that case involved *two different inventions and two separate patent families*. Floyd J is obviously right. Indeed, unless there were compelling reasons to depart from his approach, Mellor J was bound to follow it. It is apparent from the judgment that there were *two patent families*, each comprising multiple patents. In Kelly, at [4], [12] and [15] Floyd J said:–

*‘4. There are **two patents (or more accurately patent families)** involved in the action. The first, European Patent (UK) No 0311352 (‘352’) has a claimed priority date of 6th October 1987. The second, European Patent (UK) No 0337654 (‘654’) has a claimed priority date of 11th April 1988.’*

*‘12. It is not in dispute here that Drs. Kelly and Chiu were properly named as inventors **on the patents** in question here.’*

*‘15. It is not in dispute that by virtue of Section 39(1), **the inventions made by Drs Kelly, Chiu and Latham** vested in their employer.’ (emphasis added)*

(3) The case of Shanks v Unilever plc and others (No 2) [2019] UKSC 45, [2019] 1 W.L.R. 5997 involved only one patent family, but a number of patents. This is apparent from the speech of Lord Kitchin:

- (a) At [1], Lord Kitchin explained that Prof Shanks's claim was brought '*on the basis that **the patents for an invention which he made** in 1982 have been of outstanding benefit to his employer.*'
 - (b) At [8], he explained that, after filing the European patent application :

'Corresponding patent applications were filed in Australia, Canada, Japan and the USA. It was in relation to the patents which were granted on all of these applications ('the Shanks patents') that Professor Shanks made the application for compensation which is the subject of these proceedings.' (emphasis added)
- (4) Furthermore, and in any event, as noted above, Convatec's construction of s.40(1) would lead to absurdity and defeat the purpose of the section. For example, if Convatec were correct as to the proper interpretation of s.40(1):
- (a) an employee inventor could invent a product using three different inventions, all patented separately, from each of which the employer derived 90% of what would be considered an outstanding benefit – the employer would derive a benefit of 270% of what would be considered outstanding, yet the claim would fail;
 - (b) employers would have every incentive to try to atomise inventions into more than one inventive concept, and patent them accordingly, wherever possible, to sidestep the provisions of ss.40– 43 of the Act.
40. Convatec's pleaded case reinforces the practical absurdity of its construction in the present case by highlighting that an employer can contend that, where a product depends on two patents, the employer derives no benefit from either, since neither was itself sufficient to bring about the product. For example, in relation to Bray 2003 and BJP 2002, Convatec pleads that it derived no benefit from either patent, as follows:
- '64(a) [...] (ii) The Defendant deemed discolouration on exposure to light to be aesthetically unacceptable and/or unacceptable to patients, notwithstanding the fact that there were dark, non-white wound dressings on the market at the time. For example, ACTICOAT (Smith & Nephew) was blue / black.*
- (iii) Bray 2003 did not solve this problem.*

(iv) The Defendant therefore considered that additional development was needed in order to launch a silverised version of AQUACEL.' [Supp/9/152]

'104

(a) Bray 2003: paragraphs 64(a) and 90(c) above are repeated. There is no benefit. Further:

(i) The Bray 2003 IC itself did not lead to a commercial product for the Defendant because the Defendant wished to market an antimicrobial wound dressing which did not discolour. Bray 2003 did not solve that problem. [...]

(b) BJP 2002: paragraph 90(c) above is repeated. There is no benefit. Further, although the Defendant wished to market an antimicrobial wound dressing which did not discolour, this is not essential for a commercial antimicrobial wound dressing...' [Supp/9/174]

41. Convatec also repeatedly contends – at §§84, 90(b), 101(c) and (d)(ii), 104(d)(v) and 104(e)(iii) [Supp/9/161-176] – that later products cannibalised the sales of earlier products – such that the benefits derived by the employer are inherently intertwined. But according to Convatec, the Court cannot consider the benefit derived by the employer from the aggregate effect of the patents in the same product line and will have to disaggregate the benefits to apportion them to individual patents.
42. Moreover, in Convatec's clarification of its Defence, it relies upon the aggregate benefit from the 'Hydrofiber patents and inventions' (§1-§3 [Supp/16/238]). Convatec also pleads that the patents had an aggregate benefit as part of an overall portfolio, thereby identifying a type of benefit which it relies on, but contends that Parliament has deliberately left out of the scope of these provisions (§4-§6 [Supp/16/238-239]).
43. Convatec's case makes no sense. There is only one available interpretation of s.40(1) and it cannot be reconciled with Convatec's pleaded case in the Defence.

C. CONCLUSION ON STATUTORY CONSTRUCTION

44. In conclusion, s.40(1)(a) and (b) clearly envisage and permit consideration of the benefit from more than one patent and, indeed, more than one invention upon which those patents are granted, in determining whether that benefit is outstanding.

45. Section 6 of the Interpretation Act is dispositive, as the contrary appears nowhere in the Patents Act 1977, and would lead to absurdity if it did.
46. Dr Parsons would, therefore, respectfully invite the Court to allow the appeal and strike out the relevant paragraphs of the Defence pursuant to CPR r.3.4(2)(a) as disclosing no reasonable ground for defending the claim.

D. STRIKE OUT: JURISDICTION & APPLICABLE PRINCIPLES

47. By way of preface, this is not an appeal against a bare and open-textured exercise of discretion. On the contrary, the Appellant contends that the learned Judge misdirected himself and failed to apply to the correct test (Grounds 1 & 2) and made his decision on fundamental misapprehension as to the nature and effect of determining the Application (Ground 3), in circumstances in which there was an obvious answer on the point of statutory construction (Ground 4), which the Judge appeared to accept in argument.
48. In substance, Dr Parsons contends Convatec has fundamentally misunderstood the exercise undertaken by the Court on an application to strike out and led the learned Judge into error. On the correct approach:–
 - (1) There is only one answer to the point of construction. The Defendant's pleading is wrong as a matter of law and should be struck out. It is a short point.
 - (2) The learned Judge (who appeared to recognise the answer above in argument) was wrong not to decide the Application, in two respects:
 - (a) his decision was wrong in principle and he misunderstood the correct approach on an application to strike out *on a pure point of law*;
 - (b) therefore, the Judge failed to apply the correct test under CPR r.3.4(2)(a);
 - (c) in any event, the Judge fundamentally misunderstood the nature and, perhaps particularly, the effect of the Application, such that his decision (including the exercise of discretion at [38]) was vitiated by that error.

49. There are important distinctions of principle between a strike-out application:
 - (a) on a *pure point of law*, which does not depend on any facts (e.g. construction of a statutory provision);
 - (b) on a point of law that is *fact-sensitive* (e.g. existence or scope of a common law duty of care or equitable obligations); and
 - (c) as to whether *factual allegations* disclose a viable case.
50. Dr Parsons's Application should have been both decided and granted, not deferred to be argued all over again at a trial. Dr Parsons invites the Court so to order.

D.1 The law

51. It is well-established that a strike-out application under CPR r.3.4(2)(a) may be based on a pure point of law. PD3A expressly says so (emphasis added):
 - 51.1. Paragraph 1.4(2) states that '*A defence may fall within rule 3.4(2)(a) where: (2) the facts it sets out, while coherent, **would not amount in law** to a defence to the claim even if true.*'
 - 51.2. Paragraph 1.5 states that '*A party may believe they can show without a trial that an opponent's case has no real prospect of success on the facts, or that the case is bound to succeed or fail, **as the case may be, because of a point of law** (including the interpretation of a document). In such a case the party concerned may make an application under rule 3.4 or apply for summary judgment under Part 24 (or both) as they think appropriate.*'
52. Where a party applies to strike out another party's case on a short point of law, if the Court is satisfied that it has before it all the evidence necessary for the proper determination of the question, and the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide the point of law.
53. The test was articulated by Lewison J (as he then was) in Easyair Ltd (trading as Openair) v Opal Telecom Ltd [2009] EWHC 339 (Ch) in relation to applications for summary judgment, and was approved by the Court of Appeal in Global Asset Capital v Aabar Block [2017] 4 WLR 163 in the context of strike out applications, per Hamblen LJ (as he then was) at [27(3)]. It was more recently set out in Frank v Attorney General

of Antigua and Barbuda [2022] UKPC 25, per Lord Burrows and Lady Rose (with whom Lord Reed, Lord Sales and Lord Hamblen agreed) at [6] (emphasis added):

*‘... there is no dispute between the parties as to the relevant test for striking out a claim. That test is whether the claim has a realistic prospect of success. In this case the facts are straightforward and are not in dispute (and have been set out in para 1 above). The Board and the courts below have been presented with a pure question of law. In Easyair Ltd (trading as Openair) v Opal Telecom Ltd [2009] EWHC 339 (Ch) , Lewison J made clear at para 15(vii) that where a case raises a point of law and ‘the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the [claimant’s] case is bad in law, he will in truth have no real prospect of succeeding on his claim ...’. In order to determine whether the claim should be struck out the Board **should therefore ‘grasp the nettle’ and decide the point of law one way or the other.**’*

54. In order to determine whether a claim should be struck out, or summary judgment granted, on a pure point of law, the Court must decide the point of law **one way or the other**. The respondent does not need to make a cross-application to strike out and/or summary judgment on the same point of law, or an application for trial of a preliminary issue, in order for the Court to determine the point of law against the applicant. The Judge was plainly wrong on this issue.
55. The test is **not** whether the respondent’s case on the law has a real prospect of success. This follows from the fact that the Court must **decide the point of law one way or the other**. The principle was made clear by Christopher Hancock KC (sitting as a deputy High Court Judge) in Kompaktwerk GmbH v LivePerson Netherland BV [2024] EWHC 2278 (Comm); [2025] Bus. L.R. 474 at [19], who rejected that as the wrong test when the Court is deciding points of law on a summary judgment application:

‘Where the Court decides a point of law on such an application, the usual balance of probabilities test applies: see On the Beach Ltd v Ryanair [2023] EWHC 2694 (Comm) at [74]:

“Where the Court does decide to ‘grasp the nettle’ and finally decide a point of law, then it must follow that the Court decides the issue on the balance of probabilities rather than simply on the basis of whether the applicant has a real as opposed to a fanciful prospect of success.”⁴

4 Claimant’s skeleton §23(a) and §35 suggest that if its legal arguments are “more than merely arguable” or have a “real prospect” then permission to amend should be given. That is the wrong test when the Court is deciding points of law.’

56. The correct approach to determining a strike out application on an issue of statutory construction was followed by Waksman J in Lessees and Management Co of Herons Court v Heronslea Ltd [2018] EWHC 3309 (TCC) at [8]:

‘It is said that the case before me is a developing area of jurisprudence in the law of torts and it would require all kinds of factual findings for a resolution which could only be made appropriately at trial. There is nothing in this point. This is not a case of some difficult or developing area of law which is much better decided against particular facts found at trial. Rather, first, it is a question as to whether this defendant falls within the words of a well-known statute or not. Second, this would be ascertained by reference to proper construction of the provision in the context of some well-known authorities and the role of an approved inspector. Thirdly, no particular facts need to be found and indeed, none are alleged in the particulars of claim, other than the fact, which is not denied, that BCS purported to carry out its role as an approved inspector. Fourth, it is a relatively short point of law and in the event was dealt with together with ground 2, well within a day. Accordingly, I proceed to consider ground 1 on the merits.’

57. In that case, Waksman J proceeded to decide the point of law in favour of the applicant (defendant), and the claim was struck out [59]. That was a correct approach to and decision upon the application before him. However, if the point of law had been decided against the defendant, that would have meant that the Defendant could not advance this argument again at trial, and the relevant part of the defendant’s pleaded case would have to be struck out. In this scenario, it is not necessary for the claimant to make a cross-application to strike out on the same issue of law, or for a preliminary issue to be ordered.
58. In Kyndryl UK Ltd v Jaguar Land Rover Ltd [2024] EWHC 2329 (TCC), David Quest KC was asked to make a final decision on some issues of interpretation. The Judge held as follows at [55-56]:

“55. JLR urged me to “grasp the nettle” by making a final decision on some of the issues of interpretation discussed above (although presumably in the hope that I would take a more favourable view of its arguments than I have). Kyndryl was more cautious, suggesting that I should simply dispose of the application by reference to the summary judgment test.

56 The issues on the validity of any assignment depend entirely on the interpretation and application of clause 1.11.7. They were argued in detail, both in writing and orally, and I consider that a future trial judge will be in no better position than I am to resolve them. Given that I prefer Kyndryl’s case on clause 1.11.7, the only reason to defer a

final decision would be to allow JLR to adduce any further relevant evidence or to develop its arguments in the light of the facts as may be found at trial. However, as I have said, JLR urged me to make a final decision now; it did not suggest that there might be any disputed factual or contextual issues that might result in a different outcome at trial. I will therefore grasp the nettle to the extent of deciding that, if there was an assignment of any of Kyndryl's claims by the SPA, then that assignment was not avoided by clause 1.11.7 through lack of consent by JLR. To be clear, however, I grasp it no further, and the prior question of whether there was an assignment will be a matter for further consideration at trial in the light of the evidence at that time."

59. The same underlying issue had been considered by the Court of Appeal, under the old Rules of the Supreme Court, in Byrne v Hall Pain & Foster (A Firm) & Others [1999] 1 W.L.R. 1849, *per* Simon Brown LJ, at 1852C-H:

'As to the procedural objection that the case is not sufficiently clear to justify striking out the action under Order 18, rule 19 —see paragraph 18/19/11 at 349 of the Supreme Court Practice (1999 Vol. 1)—Laws J. said this:

*'...the argument would mean that merely because the law is doubtful or difficult I should decline to decide the point on this strike-out appeal. Were I to take that course, the case would go to trial and the trial judge would have to decide it. That cannot possibly be right. The question, from what date time runs in this case, is discrete and specific. I am clearly in as good a position to decide it as would be the trial judge, and it is in the parties' interest that I do so. As I understand it, it has never been the law that because a strike-out application may turn on a difficult legal point, that itself requires the court to refuse the application. Indeed some of the common law's seminal cases, such as *Donoghue v. Stevenson* and *Dorset Yacht* , were decided on such applications or as preliminary points before trial. The right approach is for the court to proceed on the footing that all the factual allegations made by the plaintiff are true and then decide whether the plaintiffs' case is arguably sustainable. If at law it is doomed to failure, it should be struck out.'*

Although before this court the plaintiffs have returned to the procedural point (which, indeed, they were given express leave to argue), Mr McCormick has been content to rely upon his written argument and not to press the matter in oral submission. His essential contention is that the Order 18, rule 19 procedure is inappropriate to resolve a difficult and novel point of law of general public interest. For my part I would reject

this contention. No doubt it is more conventional to decide such points by way of preliminary issue under Order 33, rule 3 . Given, however, that no evidence was required, that would have brought no possible advantage. In short, I find myself in full agreement with Laws J.'s view upon this question. It is also, I believe, supported by what Lord Templeman said in Williams & Humbert v. W & H Trade Marks [1986] A.C. 368 at 436...'

60. By way of background, RSC Order 14A was introduced expressly to allow the Court finally to determine '*questions of law or construction*' at any stage of the proceedings and it was often used in conjunction with an application for summary judgment under Order 14, as well as in a strike-out. Indeed, Order 14A(2) provided that '*Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just*'. It would be wrong to proceed as if this power were removed by the CPR.
61. Lord Woolf's subsequent reforms placed *increased* emphasis on active case management and the Court's ability to identify and determine issues at an early stage, which now find expression in the express provisions of the CPR.
62. Indeed, paragraph 32 of Lord Woolf's Access to Justice Report made clear the powers that were to find expression in the CPR (although ultimately not united in one rule as he was contemplating):

32. In the interim report I recommended a single procedure for summary disposal, applying a single test for its exercise. The single procedure would replace existing, separate procedures which currently allow:

- (a) summary judgment on the application of the plaintiff;*
- (b) summary determination of a point of law;*
- (c) striking out pleadings which disclose no cause of action on the defendant's application.*

63. Notably, and in the context of the wider scheme of the CPR, the Court will not grant permission to amend a statement of case unless the amendments establish a claim that has a real prospect of success (Sayn-Wittgenstein-Sayn v Juan Carlos I [2022] EWCA Civ 1595; [2023] 1 W.L.R. 1162 per Simler LJ at [63]). As per the White Book commentary at 17.3.6.9, '*a claimant should not be granted permission to amend their claim in order to raise a claim which is not maintainable in established law.*' It cannot be right that Convatec's pleaded case on aggregate benefit would be disallowed at an interlocutory

stage if first introduced as an amendment, but could not be struck out at the same stage under CPR r.3.4(2)(a) because there were vestiges of it in the original Defence.

64. The above principles are not at odds with the overriding objective. On the contrary, as per Lord Woolf's Access to Justice Report, paragraph 16, essential elements of the proposals for case management include '*summarily disposing of weak cases and hopeless issues*'. As per CPR r.1.4(2), active case management includes:

65. As per CPR r.1.4:

'(1) The court must further the overriding objective by actively managing cases.

(2) Active case management includes – ...

(b) identifying the issues at an early stage;...

(c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;...

(f) helping the parties to settle the whole or part of the case;...

(h) considering whether the likely benefits of taking a particular step justify the cost of taking it;

(i) dealing with as many aspects of the case as it can on the same occasion.'

66. Furthermore, PD 26, paragraph 10(1), expressly states that '*Part of the court's duty of active case management is the summary disposal of issues which do not need full investigation and trial (rule 1.4(2)(c)).*'

67. The right course is to dismiss a hopeless case summarily, even where the conclusion is reached on the facts (Pepin v Taylor [2002] EWCA Civ 1522,, esp. at [9]).

68. Thus, consideration of the development of the old Rules of the Supreme Court and both the genesis and the scheme of the CPR clearly establish a principled and increasing emphasis on both the early determination of issues which do not require a full trial and preventing hopeless cases from proceeding to a full (and expensive) trial.¹

¹ Ironically, Convatec later relied upon the complexity arising from this issue not being resolved as a justification for its costs budget in excess of c.£12.5 million at the CCMC. [Supp/24/272] and [Supp/26/296]

D.2 Error & misdirection: deciding the point of law one way or the other

69. Where a party applies to strike out another party's case on a point of law, the Court is invited to decide the point of law one way or the other. In this case, that issue was whether aggregation is permissible or impermissible. The issue was not whether Convatec's interpretation was arguable, but rather, whether Convatec's interpretation was right or wrong. That is a *unitary* and final decision, deciding what is the proper construction of s.40(1)(b) and the decision on striking out follows, as night follows day, from the conclusion on the point of law – as it did before Zacaroli J.
70. The learned Judge's Judgment does not engage with the law on strike out *at all*, despite this being a central issue between the parties at the hearing. Instead, he held that '*The law on strike out is well established and I need not repeat it here.*' [17].
71. The Judge was wrong to find that, under CPR r3.4(2)(a), the task of the Court is not to decide the point of law one way or the other. The Judge was wrong to ignore the other side of the coin and to fail to consider the significant impact on the litigation if he were to *find against Dr Parsons* on the narrow but important point of law. This was obviously wrong although, being fair to the Judge, Convatec invited him into this error.
72. Ignoring the other side of the coin was premised on a wholesale misunderstanding of the Application, the issue of construction and/or the Court's jurisdiction, namely by:
- 72.1. failing to appreciate that the issue of construction is a unitary exercise (i.e. to decide what it means) resulting in a decision in favour of one of the parties, i.e. a binary decision one way or the other on the point in issue; and/or
- 72.2. put another way, thinking Dr Parsons' Application could only result in a decision in his favour and that the Court could not consider, less still decide, the necessary corollary if the Application failed; and
- 72.3. thinking that the Court could not decide that Convatec's case was correct and that aggregation of the benefit was impermissible, unless Convatec had made a cross-application to strike out Dr Parsons' claim on the same point of law [24], or without an order for a preliminary issue [25].

73. That is clearly wrong. Where an applicant applies for a strike out on a point of law, the Court must necessarily decide that point of law and the outcome is binary, one way or another. There is no undistributed middle.
74. Further, there is no need for the respondent to make a cross-application to strike out the applicant's case on the very same issue of statutory construction or, indeed, an application to determine a preliminary issue. The Court can strike out either party's case pursuant to CPR r.3.4(2)(a) as a result of determining the point of law without a cross-application. Indeed, it would be wrong not to do so, in a case such as the present. And, in any event, CPR 3.3 expressly empowers the court to make case management orders of its own initiative, which includes striking out a statement of case or dismissing an application (subject to procedural fairness, see CPR 3.3(5)–(6)).
75. The Judge's refusal (or failure) to consider the impact of the Application in this scenario was important, because it blinded him to an obvious and significant benefit from determining the Application, which (as a result) he held did not exist, namely that, if the point of law were decided against Dr Parsons, he would be unable to contend at trial that the benefit from different patents (or inventions) can be taken together, in any combination, when it comes to determining outstanding benefit, such that (A) his case on that should be struck out and (B) the benefit from each patent/invention would have to be considered individually, and not in combination with any other, which would significantly narrow the issues between the parties and save costs (as discussed below).

D.3 Error & misdirection: importing the approach to a preliminary issue

76. The Judge concluded that Dr Parsons' application for strike out "*was in fact an invitation to construe section 40 by way of a preliminary issue.*" (§25) Accordingly, he proceeded to consider the matters which would normally be considered when deciding whether to order a preliminary issue: "*Furthermore, on further consideration it is clear that my initial indication that I wanted to explore the possible benefits of the strike out, involved the issues (or some of them) which would normally be considered when deciding whether to order a preliminary issue.*" (§26) [**Core/7/45**]
77. The Judge was wrong in law to treat Dr Parsons' strike out application as if it were an application to direct a separate trial of any issue under CPR r.3.1(2)(j), and consider the

factors which would normally be considered when deciding whether to order a preliminary issue. As set out by the authorities above, the test to be applied under CPR r3.4.(2)(a) in relation to a pure point of law is that if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it, one way or the other.

D.4 Error & misdirection: exercise of discretion flawed and plainly wrong

78. The Judge was plainly wrong to conclude that *‘there is highly unlikely to be any material benefit gained’* [32]. That finding was wrong, based on his misapprehension as to the effect of determining the Application, and inconsistent with his earlier finding that there was “[s]o much” riding on this point of law that it was likely to be appealed [33].
79. If the Court were to determine the Application, the parties would know whether aggregation is permissible in principle. That has an obvious material benefit:
 - 79.1. It would narrow the issues for trial.
 - 79.2. The parties can then plead their respective cases clearly and on an informed basis in the light of the outcome on that issue of construction.
 - 79.3. If the application is decided in Dr Parsons’ favour, the parties will know that, at trial, the Court will have to consider whether aggregation is appropriate on the facts of this case, and the relationship between the inventions. That is highly relevant to the case management of the proceedings. In particular, it meant that a split trial of the inventions would not be possible (an issue which was considered by the Judge after the strike out application).
 - 79.4. Alternatively, if the application is decided against Dr Parsons, the issue as to whether aggregation is appropriate on the facts of this case will fall away. This will save significant costs. By paragraph 3 of Mellor J’s order dated 12 May 2026, C was ordered to file and serve Re-Re-Re-Amended Particulars of Claim *“containing full particulars of his case on the benefit derived (or expected to be derived) by the Defendant from the Patents and/or (as the case may be) Inventions, whether that benefit is outstanding, and the fair share of the benefit to be awarded to the Claimant.”*, with consequent amendments to the Defence and Reply. If the aggregation

issue falls away, the parties will not need to incur the costs of pleading such matters, and experts will not need to deal with this in their evidence.

- 79.5. It is likely to have a critical bearing on funding, Dr Parsons's access to justice and the prospects of settlement or the success of ADR, which it is now clearly the policy of the CPR to facilitate and support (as reflected in orders made by the Court).
- 79.6. The Judge himself identified some of these benefits at [22] *'There was also a strong hint in the submissions made by Counsel for Dr Parsons that the outcome of the strike out might have a big effect on external funding for Dr Parsons' case. Perhaps the most striking material benefit he identified on Dr Parsons' side was that the strike out would help to identify whether the case was worth the risk.'*
- 79.7. Convatec did not accept the potential costs savings of the Application at the Application hearing in November 2025. However, at the subsequent Costs Management Conference before Richards J on 30 January 2026, Convatec sought to justify its very high costs budget on the basis that the point of law had not been decided, and remained open, such that significant costs would have to be incurred. Counsel for Convatec submitted:

'The claimant says he can rely on the aggregate effect of all of them [the patents and inventions]. You have a very large number of possible permutations, so your Lordship should not have the impression, and indeed we would not have a 37-day trial if the issues are narrowed between the parties.' [Supp/26/296]

- 79.8. This submission was accepted by Richards J at [12-13]:

"12. There is also a new issue of law that arises in this claim. Section 40 of the Act has been modified since it was first enacted. In its new form, s40 asks whether, having due regard to factors such as the size and nature of the Defendant's undertaking, the invention or the patent or the combination of both is of outstanding benefit. That raises the prospect of "outstanding benefit" coming from inventions and not just patents or any of the various permutations of inventions and patents, including all of the relevant inventions and patents considered together. The court will need to decide on the scope of the enlarged s40.

13. The Claimant is, as matters stand, relying on all possible permutations of invention and patent for the purposes of s40 of the Act. That is a compendious case and I consider that to be a relevant factor as well." [Core/17/104]

80. The learned Judge observed in argument that he thought the Appellant was right, as a matter of law [**Supp/12/130**], and that his legal team could give the Appellant robust advice. However, that is not the same as resolving the point of law in issue – not least because an indication (however forthright) in argument is not the same as a decision and is plainly not binding on the parties or any Judge thereafter, including the Judge hearing the trial. If it was so obvious, the right course was to ‘*grasp the nettle*’ as per the authorities above.
81. The Judge was plainly wrong to hold that:
- 81.1. *“there are circumstances in which even if I were to dismiss the strike out application having considered the statute, Dr Parsons will remain able to advance his plea (in paragraph 69) i.e. his cases on aggregate benefit”* [27] [**Core/7/45**]. The Judge did not identify any circumstances in which Dr Parsons would still be able to advance his case on aggregate benefit if the Court found that, as a matter of law, it was impermissible to aggregate benefit. Indeed, he could not do so because there are none. Moreover, Dr Parsons accepted at the hearing that there would be no such circumstances.
- 81.2. *“any finding that I might make on the alleged lack of reasonable grounds under this strike out application will likely only lead to further satellite litigation as to what one or both parties is/are permitted to plead”*[28] [**Core/7/45**]. The Judge did not identify any basis for the suspicion that deciding the point of law will only lead to satellite litigation about what the parties are permitted to plead, and neither party suggested that it would. Again, it would not. The outcome would be straightforward: if the Application is granted, Convatec cannot contend that aggregation is, as a matter of law, impermissible. If the Application is decided against Dr Parsons, Dr Parsons cannot advance a case on aggregation. Convatec had (and still has) no pleaded case that such aggregation of benefit would be inappropriate in the present case – indeed its Defence emphasised factors suggesting it should.
- 81.3. The issue was a ‘*difficult point of law*’ which needed to be decided at trial by reference the facts of this case [33] [**Core/7/46**]. It does not. The issue is a straightforward question of statutory construction.

82. The learned Judge failed to take proper account of the fact that:
 - 82.1. the issue was a short point of statutory construction, because he misunderstood the effect of deciding the Application;
 - 82.2. the parties had an adequate opportunity to address the issues in argument;
 - 82.3. it is not proportionate to make all the same arguments twice, or to throw away costs of preparing for and presenting those arguments at a hearing at which the Application was listed to be determined.
83. In light of the above, the basis upon which the learned Judge decided as he did was fatally undermined by his misunderstanding as to the nature and effect of the decision to be made on the application before him; he appeared to be under the misapprehension that his decision would only operated in one direction and he did not need to decide the issue of law before him (on which he stated in open court that he thought Dr Parsons was correct) but to consider whether the threshold for strike out had been met (as if this was different). It was not. It is not.
84. Dr Parsons respectfully invites the Court to allow the appeal and strike out Convatec's pleaded case on this issue of law in its Defence.

E. CONCLUSION

85. The Judge had emphasised the importance of deciding as much as possible at the CMC, in furtherance of the overriding objective. On this basis, he considered and decided late applications made by Convatec. In contrast, he refused to decide the Application, which he should have determined, despite there being a short point of law and the parties having had a fair opportunity to make submissions on the point. His reasons for doing so were premised upon a misunderstanding of the scheme of the CPR and the nature and effect of the exercise he was called upon to undertake. He also fell into error in his analysis of the consequences and benefit of determining the issue.
86. The learned Judge's exercise of such discretion as he may have had not to decide the issue was plainly vitiated by his misunderstanding of the nature of the exercise required of him and the effect of his discretion on the application.

87. In all the circumstances, the learned Judge's approach was clearly wrong and/or in any event contrary to the overriding objective and/or contrary to both the terms and scheme of the CPR and the authorities on striking out a case that has no prospects of success. There was *only one answer as a matter of law* and the Judge should not have let a plea that was bound to fail proceed to trial – especially having heard argument upon it and a hearing at which the Application was listed to be determined
88. Dr Parsons, therefore, asks this Court , to grant him permission to appeal, to allow the appeal and to grant the Application and strike out those passages in Convatec's Defence .

PATRICK GREEN KC

24 June 2026

BEN NORTON