

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHCM 2021/0057

BETWEEN:

ANDREY TITARENKO

Claimant

and

[1] **APPLEBY (BVI) LIMITED**
[2] **TERENCE WYNDHAM WONG**
[3] **ANDREW WILLINS**
[4] **LAURE-ASTRID WIGGLESWORTH**
[5] **FRASER MITCHELL**

Defendants

Appearances:

Mr. Andrey Titarenko in person
Mr. Andrew Willins for the first named Defendant

2021: September 23;
November 9;
2022: January 20;
March 17.

JUDGMENT

[1] **WALLBANK, J. (Ag.):** This is the Court's Judgment in respect of:

- (1) an application filed by the First Defendant on 10th May 2021 for orders striking out this action or for summary judgment;
- (2) requests by the Claimant for judgment in default of Defence and in default of Acknowledgement of Service filed on 28th July 2021 and 17th September 2021 respectively, and
- (3) an oral application made by the Claimant that I should recuse myself from hearing these matters on grounds of alleged bias.

Background

- [2] A Claim Form was filed on 30th March 2021 by the Claimant, Mr. Andrey Titarenko. This document stated that Mr. Titarenko claims a sum of US\$98,954.33 against the five Defendants named therein, ‘as damages for deceit, or alternatively damages for conspiracy to cause loss by unlawful means, such means being joint fraudulent misrepresentation’ together with statutory interest, costs and further or other relief.
- [3] Mr. Titarenko chose to include in this Claim Form ‘Particulars of Claim’ spanning 24 paragraphs over the larger part of six pages, rather than to include them in a separate Statement of Claim.
- [4] Doing so, the nature and Particulars of Claim were placed in the public domain, because rule 3.14(1) of the Civil Procedure Rules 2000 (‘CPR’) provides:
- “On payment of the prescribed fee, any person is entitled, during office hours, to search for, inspect and take a copy of any of the following documents filed in the court office, namely —
- a. a claim form”
- [5] Going through these ‘Particulars of Claim’ a reader would note that the following is the gravamen of the claim filed by Mr. Titarenko:
- (1) Mr. Titarenko is a litigant in a high value legal action before this Court, in claim number BVIHCM2013/0160 (‘the Main Proceedings’). Since 3rd December 2020, Mr. Titarenko is acting in person in those proceedings. In them, he is claiming damages for deceit in an amount exceeding US\$60 million against a company called ‘Witel’ and an individual called Mr. Moskov.
 - (2) The First Defendant, Appleby (BVI) Limited, is a limited liability company incorporated in this jurisdiction (the ‘BVI’) which ‘purports to act as a law firm’ and legal practitioners on record for Witel and Mr. Moskov in those proceedings.
 - (3) The Second to Fifth Defendants are ‘employees and representatives’ of Appleby (BVI) Limited.
 - (4) Acknowledgments of Service were filed in those proceedings on behalf of Witel on 28th March 2019 and on behalf of Mr. Moskov on 23rd October 2019. Both Acknowledgement of Service forms recorded ‘Appleby’ as Witel’s and Mr. Moskov’s legal practitioners.

- (5) Mr. Titarenko claims that this reference to 'Appleby' was a reference to Appleby (BVI) Limited.
- (6) Mr. Titarenko claims that the name of Appleby (BVI) Limited is not entered on the register of legal practitioners, known as 'the Roll'. Thus, Appleby (BVI) Limited, as a legal person, is not licensed to practice law in the BVI in its own name.
- (7) Mr. Titarenko claims that by reason of section 18(1) of the Legal Profession Act, 2015, ('the LPA'), Appleby (BVI) Limited is practicing law illegally and possibly criminally, in so far as it is doing so under its own name without being registered on the Roll. Mr. Titarenko claims, similarly, that Appleby (BVI) Limited is practicing law illegally and possibly criminally, contrary to section 18(2) of the LPA, insofar as it is practicing law through the agency of its employees. He moreover claims that practicing law under the name of Appleby (BVI) Limited by its employees constitutes professional misconduct.
- (8) Mr. Titarenko then claims that pursuant to section 18(3) of the LPA, legal fees incurred by clients of Appleby (BVI) Limited for legal services provided by Appleby (BVI) Limited are not recoverable from opposing parties (such as himself) because such services were provided by a person not on the Roll.
- (9) On 3rd February 2020, this Court dismissed an application by Mr. Titarenko in the Main Proceedings and awarded his opponents (Witel and Mr. Moskov) costs. Mr. Titarenko claims that Appleby (BVI) Limited, on behalf of Witel and Mr. Moskov, filed a schedule of costs. Following negotiations, they agreed upon a discounted sum of US\$98,954.33, which Mr. Titarenko paid.
- (10) This is the sum Mr. Titarenko is now claiming in his Claim Form. He says he agreed this sum and paid it in reliance upon a misrepresentation that Appleby (BVI) Limited was a legal person licensed to practice law under its own name or as a general partnership consisting of partners, each being properly licensed to practice law in the Territory of the Virgin Islands ('BVI').
- (11) Mr. Titarenko also claims that Appleby (BVI) Limited has been acting for Mr. Moskov and Witel in the Main Proceedings in cooperation with foreign lawyers whose names are not on the Roll, such practice being illegal avers Mr. Titarenko, and Appleby (BVI) Limited's part of the costs are also non-recoverable, as a fee for services provided by way of illegal cooperation.

[6] The Claim Form included a list of alleged acts by Appleby (BVI) Limited constituting the practice of BVI law, from 28th March 2019 to 26th February 2021.

- [7] It can be readily appreciated that such allegations can be extremely prejudicial to the reputation of a provider of legal services and of the individual lawyers who are associated with it.
- [8] This is not the first time Mr. Titarenko had raised these or very similar arguments that Appleby (BVI) Limited (and indeed other BVI law firms and lawyers) are allegedly practicing law illegally. He had filed submissions to this effect in the Main Proceedings days earlier, on 16th March 2021. Those submissions were, however, not in the public domain.
- [9] Moreover, Mr. Titarenko, together with two companies he controls, Romos Limited and Goldfort Limited, also sent a 'letter before claim' to the Supreme Court Registrar, dated 18th March 2021, threatening judicial review proceedings unless she should issue and send to Witel and Mr. Moskov 'Notices of Rejection', as Mr. Titarenko called them, of Witel's and Mr. Moskov's Acknowledgement of Service forms that had been lodged on their behalf by 'Appleby', on grounds of Appleby (BVI) Limited's alleged illegal practice of law.
- [10] Mr. Titarenko did not, however, serve his Claim Form in these present proceedings. Nonetheless, the Claim Form did come to Appleby (BVI) Limited's attention. By a letter dated 26th April 2021 addressed to Mr. Titarenko, Appleby (BVI) Limited wrote the following:
- "It has come to our attention that you have initiated proceedings against Appleby (BVI) Limited and against four of the Legal Practitioners employed (or in the case of Mr Mitchell, formerly employed) by this firm. You have not taken any steps to serve those proceedings, and nor have you provided us with the authorization code for the E-Litigation Portal.
- Please now immediately effect service of the claim, or otherwise confirm that you will immediately discontinue it. In the absence of either, we shall be applying to strike it out and will then put this letter before the Court when all questions relating to costs are decided."
- [11] This letter was signed on behalf of Appleby (BVI) Limited by Mr. Andrew Willins, above the designation of 'Partner'. Other details of this letter are worthy of note. In the top righthand corner there was the name 'Appleby', in a distinctive brand font. In the lefthand margin was Appleby (BVI) Limited's full name and BVI office physical and postal addresses. Beneath the signature, to the right, was a service stamp showing that the letter was served on Mr. Titarenko at his designated address in the BVI on 27th April 2021 at 11.01 a.m. Below that, at the foot of the paper, was a list of 'Appleby's' offices in ten financial/off-shore centres around the world: in

Bermuda, the BVI, Cayman Islands, Guernsey, Hong Kong, Isle of Man, Jersey, Mauritius, Seychelles and Shanghai. In the bottom left-hand corner of the paper was this:

“Appleby (BVI) Limited (the Legal Practice) is a company limited by shares incorporated in the British Virgin Islands. The term “Partner” is a title referring to a director, shareholder or an employee of the Legal Practice. Legal services are supplied by Legal Practitioners admitted to the Roll and authorized to practice in the British Virgin Islands.”

- [12] Mr. Titarenko did not respond to this letter. Neither did he do what Appleby (BVI) Limited had asked.
- [13] Appleby (BVI) Limited’s evidence is that it had found out about the existence of the Claim Form as a result of a Court search on 19th April 2021. Appleby (BVI) Limited has also put in evidence a copy of the Claim Form obtained from the website ‘offshorealert.com’. Appleby (BVI) Limited gave evidence that the Claim Form and its contents are available to any worldwide subscriber of ‘offshorealert.com’.
- [14] That Appleby (BVI) Limited discovered the Claim Form on 19th April 2021 was incorrect, as it has acknowledged before this Judgment was finalised. Nothing turns on this error. The Claim Form had been discovered by Appleby (BVI) Limited some time sooner than this, because three days earlier, on 16th April 2021, Appleby (BVI) Limited filed an Acknowledgment of Service form, signed by Mr. Willins as ‘Legal Practitioner for the First Defendant’.
- [15] The Acknowledgement of Service form bore the following caveat in bold, immediately below the title block:
- “This Acknowledgement of Service is served without prejudice to the First Defendant’s position as to service.”
- [16] The Acknowledgement of Service form had otherwise been completed.
- [17] Appleby (BVI) Limited answered the first question, ‘Have you received the claim form with the above claim number?’ with ‘NO’.
- [18] Similarly, Appleby (BVI) Limited stated ‘NO’ to the questions whether it had received a Statement of Claim and whether it admitted the whole or part of the claim.

- [19] Appleby (BVI) Limited stated 'YES' to the questions whether the Claim Form properly stated its name and whether it intended to defend the claim.
- [20] On 10th May 2021 Appleby (BVI) Limited filed a Notice of Application stating its intent to apply for an order that the action be struck out against all of the Defendants pursuant to rule 26.3 of the Civil Procedure Rules, 2000 ('CPR') on the basis that it is an abuse of the process of the Court and/or likely to obstruct the just disposal of the proceedings; and/or that it does not disclose any reasonable grounds for bringing the claim.
- [21] In the alternative, Appleby (BVI) Limited said it would apply for an order entering judgment for the Defendants pursuant to CPR 15.2 (i.e. summary judgment) on the basis that Mr. Titarenko has no real prospect of succeeding with the claim and there is no other reason why the matter should be disposed of at trial.
- [22] The grounds for this application were cited (in summary form) as being that:
- (1) The claim represents a collateral attack upon a final and conclusive costs decision;
 - (2) This action
"is the latest in a long line of abusive and vexatious conduct, directed against the Court, and the legal representatives acting for the Claimant's adversaries in litigation before this Court in BVIHCM 0160/2013, as well as those that he previously instructed. This action is not brought in order to vindicate some legal right which the Claimant believes that he has, but in an effort to cause vexation and expense, and to discourage lawyers from continuing to act for his adversaries. The Claimant has not served these proceedings, and their only purpose appears to be to cause vexation."
 - (3) The 'Particulars of Claim' contained in the Claim Form do not plead with sufficient particularity the allegations of misrepresentation or deceit or falsity or of conspiracy or dishonesty;
 - (4) In any event, it had been impossible for the Defendants to have given any representation that Appleby (BVI) was licensed to practice law. It was on 1st October 2020 that the partnership known as 'Appleby' converted into a legal entity. As the supporting affidavit explained, until 30th September 2020, 'Appleby' traded in the BVI as a general partnership. That changed on 1st October 2020 when the business of the partnership was transferred to Appleby (BVI) Limited. Appleby (BVI) Limited obtained a trade license, approved and issued by the

Premier's Office on 29th July 2020. The costs consent order that Mr. Titarenko alleges was obtained by misrepresentation and other alleged wrongdoing on the part of Appleby (BVI) Limited was signed by him on around 6th May 2020, i.e., whilst 'Appleby' was still operating as a general partnership, and some three months before Appleby (BVI) Limited became licensed to trade;

- (5) The costs which had been the subject of the costs order were incurred by Mr. Moskov in respect of work done by legal practitioners admitted to the Roll;
- (6) The claim is not brought out of a genuine belief that Mr. Titarenko is entitled to recover the sums he had paid, but for the collateral purpose of causing annoyance and vexation to the parties in the Main Proceedings and their legal representatives.

[23] The application was supported by an Affidavit of a Mr. Jeffrey Kirk, who stated that he is a Director of Appleby (BVI) Limited, a Solicitor of the Eastern Caribbean Supreme Court, the Office Managing Partner and 'Local Practice Group Head of Appleby's Corporate & Commercial Practice Group in the British Virgin Islands'.

[24] Mr. Kirk's evidence supported, in more detail, the grounds for Appleby (BVI) Limited's application summarized above.

[25] Mr. Kirk asserted that he does not believe that Mr. Titarenko believes that he has any prospect of establishing the dishonesty, deceit or fraud he alleges against Appleby (BVI) Limited. Mr. Kirk says that alleging professional misconduct, or alleged breaches of section 18 of the LPA appears to have become a litigation tactic which Mr. Titarenko deploys against his adversaries' Legal Practitioners when it suits him, and increasingly also against the Court.

[26] Mr. Kirk illustrated these observations by reciting the following. Where other legal professionals are mentioned not presently before or in the Court I have anonymized them so as not to cause them professional embarrassment. I wish to stress that none of the legal professionals mentioned have been found liable in respect of any kind of wrongdoing and none should be assumed (to the contrary, the complaints at (i) below have been dismissed):

- "(i) He [i.e. Mr. Titarenko] instituted (hopeless) proceedings before the Disciplinary Tribunal against [Ms. A] of Agon Litigation (Agon) which were dismissed, and

- sought to institute such proceedings against [Mr. B (one of Her Majesty's Counsel)], then of Agon, DLA Piper LLP (DLA), [Mr. C] of that firm and Agon;
- (ii) He has sought to appeal the dismissal of that complaint to the Court of Appeal;
- (iii) He instituted a judicial review against the Chairman of the Disciplinary Tribunal (one of Her Majesty's Counsel) before the Court of Appeal, which was dismissed;
- (iv) He has applied to remove Walkers from the Court Record;
- (v) He applied to remove my firm from the Court Record;
- (vi) He instituted judicial review proceedings against the Registrar for not retrospectively rejecting my firm's documents, and in doing so, he sought an order that the Registrar be required to express her gratitude to him for his assistance. My firm was put to the trouble and expense of responding to it – only for Mr. Titarenko then to purport to withdraw it two clear days before the hearing – it was subsequently dismissed by the Court;
- (vii) He has accused a Judge ([Justice D]) of forging Court Orders, and he has threatened (and I believe may also have instituted) judicially [sic] review proceedings in relation to the re-appointment of that Judge."

[27] Each of the law firms mentioned in this list (Messrs. Agon, Messrs. Walkers and Appleby (BVI Limited) represent, at material times, Mr. Titarenko's opponents in the Main Proceedings. Mr. Kirk observes that Mr. Titarenko has stated that the two law firms (then) representing Mr. Titarenko and his companies do not 'wish to be associated with' the proceedings he had instituted before the Disciplinary Tribunal.

[28] Mr. Kirk gave evidence that Mr. Titarenko's proceedings before the Disciplinary Tribunal alleged breaches of section 18 of the LPA, on the basis that, so Mr. Titarenko contended, it is professional misconduct for BVI lawyers to refer a significant part of their functions to a foreign lawyer who has no BVI practicing certificate. Mr. Kirk says he understands that Mr. Titarenko's allegations were all dismissed. That, said Mr. Kirk, led to Mr. Titarenko to bring judicial review proceedings against the Chairman of the Disciplinary Tribunal in the Court of Appeal, and those proceedings were dismissed by the Court of Appeal on 30th March 2021. At the same time, said Mr. Kirk, Mr. Titarenko filed an appeal from the Disciplinary Tribunal's dismissal of the complaint against Ms. A. In this, said Mr. Kirk, Mr. Titarenko accused the Chairman and the legal practitioner members of the Disciplinary Tribunal of bad faith, the Chairman (one of Her Majesty's Counsel) of professional misconduct and Ms. A's Leading Counsel (also one of Her Majesty's Counsel) before the Disciplinary Tribunal also of professional misconduct.

[29] Mr. Kirk gives evidence that Mr. Titarenko has similarly accused the law firm that previously represented him, Messrs. Walkers, of the same or similar illegal practice of law, and that Mr.

Titarenko has suggested, without any evidence, that partners of Messrs. Walkers are impermissibly sharing their fees. Mr. Kirk says also that Mr. Titarenko has made other serious allegations against Messrs. Walkers, including that they, their leading and junior counsel had knowingly and deliberately set out to mislead the Court.

[30] Mr. Kirk summarises what he calls ‘Allegations against Judicial Officers’ as follows:

- “(i) Wallbank J now stands accused of (albeit innocent) abuses of the process [...]
- (ii) [Justice D] stands accused of forgery, of professional misconduct [...] and “*contumacious abuse ... of the process of the Court.*” Mr. Titarenko has even gone so far as to threaten (and I understand, although I have not seen it, actually to bring) judicial review of [Justice D’s] re-appointment [...] and of [Justice D’s] supposed falsification, bizarrely, of his own order.
- (iii) He has offensively, and wrongly, accused my colleague Miss [E] of being a “dummy” signatory, who “*signs and swears without reading whatever is given to her by Mr [F].*” [...]
- (iv) The Registrar has been accused of failing to comply with her duties, and she has been threatened with judicial review proceedings in the event that she does not retrospectively reject documents filed by my firm [...]. He then commenced such proceedings [...] which I understand from Mr [F] were dismissed by Ellis J on 21 April 2021, after he purported to withdraw them [...].
- (v) ... the Chair of the Disciplinary Tribunal, has been accused of acting in bad faith [...] and also of professional misconduct. ...”

[31] On 7th May 2021, Appleby (BVI) Limited’s application was notified to the parties as listed for hearing on 23rd September 2021, with a time estimate of one day.

[32] Appleby (BVI) Limited served its application the same evening, at 5.20 p.m.

[33] On 28th July 2021 Mr. Titarenko, acting in person, filed a request (‘the First Request’) for entry of judgment in default of defence against Appleby (BVI) Limited, in a sum of US\$104,739.21. His basis for doing so was that

- “(a) the time for [Appleby (BVI) Limited] to file and serve a defence has expired since 18 May 2021 (being 28 clear days after the deemed date of service pursuant to EC CPR 5.19(3)(a), i.e. the date of filing an acknowledgement of service on behalf of [Appleby (BVI) Limited]...);
- (b) no defence or counterclaim by [Appleby (BVI) Limited] has been served on me/us; and
- (c) [Appleby (BVI) Limited] has not paid any monies in settlement of the Claim.”

[34] The same day, 28th July 2021, Appleby (BVI) Limited wrote to the Registrar, inviting her to reject the request for judgment in default or to refer it to a Judge, with a suggestion that this

could be listed for hearing on 23rd September 2021, at the same time as Appleby (BVI) Limited's strikeout application.

[35] In that letter, Appleby (BVI) Limited stated that this request for judgment in default was misconceived because

- (1) the proceedings had not been served on any of the Defendants;
- (2) Mr. Titarenko had not provided the authorization code to the Electronic Litigation Portal ('ELP'), despite Appleby (BVI) Limited's request in its letter to him dated 26th April 2021, such that these proceedings are deemed not to have been served by virtue of section 13(4) of the Eastern Caribbean Supreme Court (Electronic Litigation Filing and Service Procedure) Rules, 2018 as amended;
- (3) the effect of filing an application to strike out the proceedings on 7th May 2021 was to stop any time from running for the filing of a defence, *per* the decision of our Court of Appeal in **Wilfred Smith v Attorney General**.¹

[36] Appleby (BVI) Limited further explained in its letter dated 28th July 2021 that it had filed an Acknowledgment of Service on 16th April 2021, which specifically confirmed that service had not taken place, in an attempt to obtain access to the ELP.

[37] The same day, 28th July 2021, the parties were notified that the request for judgment in default of defence had also been scheduled for hearing on 23rd September 2021.

[38] Approximately a month and a half later, on 17th September 2021, some five days before the hearing on 23rd September 2021, Mr. Titarenko filed what he called a 'Notice of Withdrawal of Claim from the 2nd to 5th Defendants'. In this he stated that he

"HEREBY WITHDRAWS with immediate effect, without prejudice, the Claim from the 2nd to 5th Defendants, as made by way of the Claim Form dated 26 March 2021, filed on 30 March 2021."

[39] In doing so, Mr. Titarenko did not explain what he meant by 'without prejudice'. He did, though, insert a preamble in which he stated that Appleby (BVI) Limited did not file a 'valid acknowledgement of service' or Defence before the expiry of time for doing so and that he accordingly wished to exercise his 'right' to obtain judgment against Appleby (BVI) Limited in

¹ BVIHCVAP2018/0003 (unreported, delivered 31st January 2019).

default of acknowledgement of service and that he relied upon such 'entitlement'. Mr. Titarenko contended in a footnote that Appleby (BVI) Limited's purported acknowledgement of service was a 'nullity' 'since it had been discovered that the 1st Defendant Appleby (BVI) Limited did not intend to acknowledge service and made in the 'Purported AoS' (as Mr. Titarenko labelled it) a reservation in this regard.'

- [40] Three minutes later, also on 17th September 2021, Mr. Titarenko filed a document entitled 'Renewed Request for Entry of Judgment in Default' (the 'Renewed Request'), this time, in default of acknowledgement of service.
- [41] The names of the second to fourth Defendants had been struck through, commensurate with withdrawal of proceedings against them.
- [42] This Renewed Request was a longer document. In this, Mr. Titarenko stated that he had discovered that Appleby (BVI) Limited's reservation as to its 'position in relation to service', appearing to be a denial of service, 'avoids this document as acknowledgement of service in Form 4 (prescribed by EC CPR 9.2(1) and also that the making and filing by Appleby (BVI) Limited of its 'Purported AoS' constitutes 'abuse of process of the Court with the ulterior purpose "to obtain access to the ELP"'. Mr. Titarenko advanced his contention that the 'Purported AoS is a nullity' and that Appleby (BVI) Limited had not filed 'a valid acknowledgement of service (in other words, has not entered an appearance in the action)'.
- [43] Mr. Titarenko went on to infer that Appleby (BVI) Limited must have obtained the authorization code to access the ELP from the Court Office on or around 19th April 2021. That, said Mr. Titarenko, amounted to service or deemed service of the claim on Appleby (BVI) Limited by the Court, no later, he estimated, than 27th April 2021. Mr. Titarenko went on to state an intention that he would apply, no later than 27th September 2021, for a declaration that the Claim Form had been served, or deemed to have been served on Appleby (BVI) Limited by that date and that the 'Purported AoS is nullity' [*sic*].
- [44] On 20th September 2021 the parties were given notice that Mr. Titarenko's Renewed Request would also be heard on 23rd September 2021.

- [45] Appleby (BVI) Limited prepared and, on 21st September 2021, filed a bundle of documents for the hearing on 23rd September 2021.
- [46] The same day, Appleby (BVI) Limited filed its skeleton argument. The next day, 22nd September 2021, Appleby (BVI) filed a bundle of authorities.
- [47] Appleby (BVI) Limited's skeleton argument was 17 pages, 55 paragraphs, in length.
- [48] Mr. Titarenko filed his skeleton argument at 11.33 a.m. of the hearing day, 23rd September 2021. The hearing had started at 10 a.m. Mr. Titarenko caused his agent, Mr. Niyazov, to email an unfiled version of his skeleton to my Judicial Assistant, which he did at 9.03 a.m., together with a 'Supplemental Bundle'. Mr. Titarenko's skeleton was 29 pages in length and the 'Supplemental Bundle' was 100 pages in length. This 'Supplemental Bundle' included submissions previously filed in other proceedings, correspondence, and orders.
- [49] Mr. Titarenko's skeleton raised a range of arguments, and referred to an application (that he had not yet made) that I recuse myself on grounds of alleged bias towards Appleby (BVI) Limited against Mr. Titarenko in the Main Proceedings and to a cross-application (that he had also not yet made), to have parts of Mr. Kirk's Affidavit and of Appleby (BVI) Limited's Notice of Application struck out for abuse of process, on grounds that they are vexatious and/or 'circumventing the procedure for obtaining a civil restraint order pursuant to section 26 of the Supreme Court Act'. He explained that 'instead of annoying the Court with general allegations of my vexatious conduct, [Appleby (BVI) Limited] should have first requested Attorney General to file a proper application against me in the High Court.'
- [50] Mr. Titarenko did not file any evidence in response to Appleby (BVI) Limited's strike-out application.
- [51] In relation to the applications which Mr. Titarenko indicated he would be making at the hearing, he had not filed any Notice of Application or evidence in support. Nor had they been subject to case management and listing consideration. They were oral applications Mr. Titarenko intended to make at the hearing.

[52] The hearing on 23rd September 2021 proved insufficient to complete the scheduled matters. At this hearing, Mr. Willins made submissions for about two hours, followed by Mr. Titarenko for about two and a half hours. At the close of the day, I enquired of Mr. Titarenko how long he anticipated he was going to require in order to complete his submissions. He answered that he would need about another three days, two of which would be needed to deal with the allegations against him of vexatious litigation. I did not accept that startling time estimate. I could not see how any such further time could reasonably or fairly be required in light of the limited material before the Court (which included none of the judgments or orders made in respect of Mr. Titarenko's failed applications that he appeared to wish to refer to), the fact that several months had elapsed in which the original one-day hearing time estimate could have been adjusted in an orderly manner, and that Mr. Willins had limited himself to a couple of hours. I thus adjourned the matter part-heard, expressing the hope that the parties could come to agreement as to the further time that should be allowed.

[53] When the parties failed to agree, the matter came back before me on 9th November 2021 for a short appointment. For reasons then given orally, I gave directions that Mr. Titarenko would be permitted to speak for another two hours, excluding the mid-afternoon break, and that Appleby (BVI) Limited would be allowed 30 minutes in which to reply, with both time limits on a guillotine basis. I also directed that the bundle before the Court on 23rd September 2021 was to be the bundle of materials available to the parties at the resumed hearing, and that no further evidence, or documents (save for authorities), was to be referred to without the prior written leave of the Court given upon an application made on notice in writing. The resumed hearing of Appleby (BVI) Limited's strike-out application and Mr. Titarenko's request for judgment in default was listed to take place on 20th January 2022 at 2 p.m., with a time estimate of 2½ hours.

[54] Less than a day before the hearing on 9th November 2021, at 3.29 p.m. on 8th November 2021 to be precise, Mr. Titarenko filed an application, to seek eight orders and declarations:

“O&D1. a declaration that the Claim Form was served or is deemed to have been served on the First Defendant and Respondent (“Appleby Ltd”) not later than on 27 April 2021;

O&D2. a declaration that the document titled “Acknowledgment of Service on behalf of the First Defendant” (“the Purported AoS”) is a nullity and not effective as an instrument of entry of appearance in this action;

O&D3. an order that the Purported AoS be struck out for abuse of process;

O&D4. an order that Appleby Ltd's Application dated 6 May 2021 for striking out the Claim Form on allegations of abuse of process by the Applicant ("Appleby's Abuse Application") be struck out as not properly constituted, and as made and pursued for abuse of process;

O&D5. directions that—

(a) the Court shall consider and determine the Applicant's Renewed Request for Entry Judgment in Default, filed on 17 September 2021, ("the Judgment Request") together with this Application at a combined hearing to be held for one day ("the Combined Hearing"); and

(b) In the event the Court have not made an order for striking out Appleby's Abuse Application as a result of the Combined Hearing, Appleby's Abuse Application shall be listed for a 2 days hearing;

O&D6. a declaration that each party be entitled to appeal to the Court of Appeal from the orders to be made as a result of the Combined Hearing, and such appeal(s) shall not be treated as interlocutory appeals; and

O&D7. an order that Messrs Andrew Willins and Jeffrey Kirk, legal practitioners for Appleby Ltd, shall pay the Applicant's costs incidental to this Application and Appleby's Abuse Application on a wasted costs basis."

[55] The existence of this application was raised at the short appointment hearing on 9th November 2021. I directed that this application should come up for 'mention' at the conclusion of the resumed hearing on 20th January 2022, time permitting.

[56] For the hearing on 20th January 2022, Appleby (BVI) Limited did not file a further skeleton. In the evening of 19th January 2022, though, Appleby (BVI) Limited sent three orders to my Judicial Assistant by email 'in case it is necessary to refer to them' at the hearing the following day. The covering email identified these orders as firstly the order I made at the hearing on 9th November 2022 and two orders made by the Court of Appeal, upon applications made to the Court of Appeal by Mr. Titarenko, in connection with the part-heard applications before this Court.

[57] Mr. Titarenko did file a new skeleton argument. He filed a 32-page document, at 3.08 p.m. on 20th January 2022 (the hearing started at 2 p.m.), having caused Mr Niyazov to send in an unfiled version, together with seven authorities, by email to my Judicial Assistant, at 1.16 p.m. – some 45 minutes prior to the start of the hearing.

[58] At the hearing, Mr. Titarenko raised a preliminary objection concerning the two Court of Appeal orders Appleby (BVI) Limited had sent in, and requested an adjournment:

“As a preliminary issue I note that today in the morning Mr Willins referred Wallbank J to two Orders made by the Hon. Mr Paul Websters [*sic*], Justice of Appeal, on 19 January 2022. Making this reference constitutes a breach of the Order made by Wallbank J on 11 November 2021 which undermines fairness of today’s hearing. This breach is serious, and I see only one way of rectifying this breach: the hearing should be adjourned, and I should be provided with a right to refer to court orders or court documents which are not in the bundles submitted for the hearing on 23 September 2021. Accordingly, I apply for such adjournment with Appleby Ltd’s and my costs of today’s hearing to be paid by Mr Willins on a wasted costs basis.”

[59] This request for an adjournment was argued out by both sides and I ruled upon it immediately, refusing the adjournment for the reasons I there gave. This led to a further dispute over how much time Mr. Titarenko should be allowed to complete the 2 ½ hours he had been allotted. I ruled on that issue too. In the event, the matters listed were completed that afternoon, with the Court sitting until some 45 minutes after the usual close of business. I reserved judgment.

Discussion

[60] At this point it is apt to take stock.

Introductory remarks

[61] In Appleby (BVI) Limited’s skeleton arguments could be seen a set of legal submissions which address the specific merits of the applications presently before the Court for determination, with reference to authorities – as the Court would expect from submissions prepared by a Legal Practitioner.

[62] Mr. Titarenko’s submissions were significantly more wide ranging. Mr. Titarenko advanced propositions without citing authority to support them. He included assertions which are evidential in nature, but which had not been included in an affidavit or witness statement. Mr. Titarenko also sought to have the Court engage with matters which it is inappropriate for this Court to comment upon, as well as being unnecessary. Examples of the latter are Mr. Titarenko’s request that this Court should, now, make preliminary findings upon his allegations against another Judge of the Commercial Court and on the merits of Mr. Titarenko’s appeal to the Privy Council in respect of his complaints against the Chairman of the Disciplinary Tribunal.

To do so would be inappropriate for a host of reasons, not least being that the applications here before the Court do not turn on such questions, the parties involved in those complaints are not before the Court in these proceedings, and there is no evidential material before the Court in respect of those matters. This Court is not seized of them.

[63] Mr. Titarenko's point in respect of these requests seems to be that he cannot be found to be a vexatious litigant unless the Court finds that his complaints on those matters (and the numerous other proceedings Mr. Titarenko has unsuccessfully brought against public officers and his opposing lawyers) are 'totally without merit'. This phrase is part of the legal terminology to be found in the English Civil Procedure Rules, at CPR 3.11 and Practice Direction 3C made pursuant to it. These govern the circumstances in which, under English law, a 'limited civil restraint order' can be made against a person who has 'persistently' issued claims or made applications which are 'totally without merit'.²

[64] Mr. Titarenko wished to supplement his filings, while the applications before the Court were part-heard, with materials from those other legal proceedings (in particular with orders made therein) and then to address the Court on them over a number of days on whether he should be found to be a vexatious litigant. However, the applications before the Court do not seek orders that Mr. Titarenko is to be treated as a vexatious litigant. Appleby (BVI) Limited does not seek any ruling that Mr. Titarenko is a vexatious litigant. Mr. Titarenko appears to want to make this a central issue, but it is not. Rather, Appleby (BVI) Limited wishes the Court to find that *this claim* has been brought vexatiously and thus liable to be struck out for that reason (as well as others). That does not require any finding, preliminary or otherwise, whether Mr. Titarenko's numerous other unsuccessful legal proceedings were brought vexatiously. Appleby (BVI) Limited expressed their view, and no more, that Mr. Titarenko had brought those proceedings vexatiously, and that Mr. Titarenko's conduct in other proceedings has been that of a vexatious litigant. They do not ask the Court to make any finding that *those other proceedings* were indeed brought vexatiously. Appleby (BVI) Limited clearly wishes the Court to view Mr. Titarenko's actions through a hermeneutic of vexatiousness, but this does not require any finding that they were indeed vexatious. Appleby (BVI) Limited does nothing more than to say that Mr. Titarenko's conduct is congruent with a vexatious pattern.

² See e.g. *Central Bridging Loans Limited v Anwer* [2020] EWHC 1745 (Ch) at paragraphs 11 to 16 (Zacaroli J).

- [65] At the same time, it is proper for Appleby (BVI) Limited to establish context by laying out before the Court the fact that Mr. Titarenko has brought a considerable number of other claims and applications which seem to have a commonality of features to them: including, saliently, that they have been brought by him as a litigant in person, against lawyers acting for Mr. Titarenko's opponents in the Main Proceedings, and that those actions which have reached the stage of determination have been dismissed. This much Mr. Titarenko has not disputed.
- [66] Irrespective of whether any of these other proceedings had any merit to them (which is presently not relevant), the bigger picture is necessary to bear in mind because, in deciding whether this claim has been brought vexatiously, it is relevant for the Court to know what it appears to be that Mr. Titarenko is doing. Where (as here) claims and/or applications appear to form part of a campaign of similar proceedings, and that on an industrial scale, rather than as isolated incidents, the likelihood that the Court is dealing with vexatious litigation increases.
- [67] Whether or not legal steps taken are vexatious, it can be stated that it is most unusual for a litigant to sue his opponent's lawyers, let alone with the frequency adopted by Mr. Titarenko. The vast majority of litigants sue only their opponents. Very occasionally, they sue their own lawyers or other professional advisers. But for a litigant to sue his opponent's lawyers is not the ordinary course of litigation. It requires no great imagination to see that a comprehensive, aggressive and apparently systematic litigation strategy which includes targeting opponents' lawyers, would entail considerable resources, including legal costs, time and emotional and physical energy, being expended by the opponents and their lawyers to defend themselves, distracting them from focusing their resources upon the real issues in the Main Proceedings. It also warrants observation that Mr. Titarenko's litigation campaign against his opponents' lawyers is being conducted on a large scale, without regard, it would appear, for consistently adverse findings and the inevitable cost to Mr. Titarenko (or his financial backer(s)) that such a strategy must entail.
- [68] One can then reasonably ask oneself whether that is not in fact the whole point of such a campaign – to make it as troublesome and disruptive as possible to oppose Mr. Titarenko in litigation, and to deter lawyers from accepting instructions to act in opposition to Mr. Titarenko, and, as Counsel for Appleby (BVI) Limited submitted, to separate his opponents from their legal representatives.

- [69] Alternative explanations are possible, but they would have to make sense of a manner of conducting litigation that can be described as a unique and remarkably large phenomenon.
- [70] Irrespective of Mr. Titarenko's intentions and/or purpose, it cannot sensibly be gainsaid that this claim does vex Appleby (BVI) Limited. As I shall explain, it does so unjustifiably. It has the hallmarks of a contrived claim.
- [71] We can usefully here summarise the issues requiring determination. They can be broadly stated as follows:
- (1) Should this action be struck out pursuant to CPR 26.3 on the basis that it
 - a. Is an abuse of the process of the Court; and/or
 - b. Is likely to obstruct the just disposal of proceedings; and/or
 - c. Does not disclose any reasonable grounds for bringing the claim?
 - (2) Alternatively, should judgment be entered for the Defendants pursuant to CPR 15.2 on the basis that the Claimant has no real prospect of succeeding on the claim and there is no other reason why the matter should be disposed of at trial?
 - (3) Should Mr. Titarenko be granted judgment upon the claim in default of Acknowledgement of Service?
- [72] Mr. Titarenko submits that the Court should determine as a preliminary issue whether legal representation of a client in the BVI can lawfully be arranged by a limited liability company even if such company always purports to act through individual legal practitioners each having a practicing certificate.
- [73] The manner in which Mr. Titarenko has phrased this issue is replicated in paragraph 14 of his Claim Form. There, Mr. Titarenko wrote:
- "Although since Mr Titarenko knew that fees of foreign lawyers are not recoverable, until February 2021 Mr Titarenko did not realise that a limited liability company might not have its name entered on the Roll (as a matter of law and/or practice of legal profession in the BVI) and could not lawfully arrange provision of legal services neither under its corporate name, nor through its employees."
- [74] It is important to note here that what Mr. Titarenko says a limited liability company cannot lawfully do is 'arrange provision of legal services'.

- [75] Elsewhere in his Claim Form, Mr. Titarenko states at paragraph 8 that ‘practicing law by [Appleby (BVI) Limited] (under its own name without being registered on the Roll) is illegal and possibly criminal’, pursuant to section 18(1) of the LPA, and at paragraph 9 that ‘practicing law by [Appleby (BVI) Limited] through the agency of its employees is also illegal and possibly criminal’.
- [76] It is apparent from this that Mr. Titarenko contends that ‘arranging the provision of legal services’ is the same as ‘practicing law’. As I shall explain below, they are not the same.
- [77] Appleby (BVI) Limited, for its part, also invites the Court to determine whether or not it is lawful for a law firm to be organized as a limited liability company.
- [78] The Court will address and determine this issue. It goes to the issues whether the Claim Form discloses any reasonable grounds for bringing the claim and also whether the Claimant has any real prospect of succeeding on the claim.
- [79] It warrants observation here that the claims made in the Claim Form in essence have two parts:
- (1) The first is that Mr. Titarenko was purportedly induced to pay a costs order by a misrepresentation that the law firm known as ‘Appleby’ ‘was either a legal person properly licenced to practice law under its own name or a general partnership consisting of partners each being properly licenced to practice law in the BVI’ (per paragraph 15 of the Claim Form).
 - (2) The second is that in filing a costs schedule on 24th February 2020, which set out certain legal costs and disbursements in respect of work done by certain lawyers, Appleby (BVI) Limited and the other Defendants named in the Claim Form made a representation that no other lawyers had been involved in doing that work. Mr. Titarenko stated that that representation was false and that it induced him to pay the costs order (per paragraphs 16 to 24 of the Claim Form).
- [80] The issue whether or not Appleby (BVI) Limited was illegally practicing law goes to the first part of the claims expressed in the Claim Form.

Discussion on whether a law firm practices law illegally by reason of being organized as a body corporate.

[81] The essence of Mr. Titarenko's argument is that the Eastern Caribbean Supreme Court (Virgin Islands) Act³ (the 'Supreme Court Act') rendered it unlawful and a contempt of court for a body corporate, such as a limited liability company, to practice law and that the repeal of the relevant provisions to that effect in Part IV of the Supreme Court Act dealing with the legal profession did not change that.

[82] The reason given by Mr. Titarenko why the repeal did not change that is because:

"Although Part IV of the BVI SCA containing these sections is repealed pursuant to section 66(1) of the BVI LPA, the provisions set out in these sections continue to apply by virtue of section 26(3) of the BVI LPA."

[83] Mr. Titarenko advanced the same point at paragraph 65 of his skeleton argument for the hearing on 23rd September 2021, where he quotes from submissions he previously made, at paragraph 18e, stating that:

"Moreover, for the avoidance of doubt, the rules set out in sections 75(1) and 76 of the SCA and the practice of the legal profession established in accordance with these rules, pursuant to section 26(3) of the LPA, continue to apply after the entering of the LPA into force".

[84] A flaw in this argument is that section 26(3) of the LPA does not speak to issues of **who** is allowed to practice law. It concerns disciplinary matters – **how** law is to be practiced by those who are allowed to do so, 'of a legal practitioner'. This is apparent from the fact that section 26 of the LPA is the first section in the Part of the LPA (Part V) which makes provision for '**Disciplinary and Related Matters**'. It is instructive to read section 26 of the LPA in full:

"Rules to govern professional practise

26. (1) The rules contained in the Code of Ethics set out in Schedule 4 shall regulate the professional practice, etiquette, conduct and discipline of a legal practitioner.

(2) A breach of the rules in Part A of Schedule 4 may constitute professional misconduct and in Part B shall constitute professional misconduct.

(3) Where no provision is made by the rules in respect of any matter, the rules and practice of the legal profession which before the commencement of this Act governed that particular matter, shall apply in so far as is practicable."

[85] It is apparent from this that

³ Cap. 80.

- (1) section 26 introduces a new Code of Ethics for legal practitioners; and
- (2) section 26(3) is concerned with filling any gaps in the new Code by then applying any previous ethical rules and practice.

[86] That is all section 26 does. Mr. Titarenko's interpretation would have section 26(3) do much more - to undo the effect of the repeal of Part IV of the Supreme Court Act by section 66(1) of the LPA. The latter provides:

"Part IV of the Eastern Caribbean Supreme Court (Virgin Islands) Act is repealed."

[87] Part IV of the Supreme Court Act was headed 'Legal Practitioners' and comprised eleven sections, sections 68 to 78. The scope and contents of this Part can be seen from the section headings. They are:

- (1) 'Existing practitioners' – section 68.
- (2) 'Admission of legal practitioner' – section 69
- (3) 'Enrolment of legal practitioners' – section 70
- (4) 'Barristers practicing as solicitors' – section 71
- (5) 'Queen's Counsel' – section 72
- (6) 'Solicitors and Commissioners for Oaths are officers of the court' – section 73
- (7) 'Legal practitioners may be suspended or struck off roll' – section 74
- (8) 'Unauthorised persons drawing legal documents' – section 75
- (9) 'No legal practitioner to act as agent for unqualified person' – section 76
- (10) 'No sharing of profit costs with person not enrolled as a legal practitioner' – section 77
- (11) 'Law relating to solicitors, taxation and recovery of costs' – section 78.

[88] Section 69 of the Supreme Court Act ('Admission of legal practitioner') was a long section, comprising ten subsections. They included the following, which referred to 'unqualified persons' and 'body corporate'.

[89] Subsection (5) materially provided:

"No unqualified person shall act as a legal practitioner..."

[90] Subsection (8) provided:

"If any act is done by a body corporate or by a director, officer, or servant thereof, of such a nature or in such a manner as to be calculated to imply that the body corporate

is qualified, or recognized by law as qualified, to act as a legal practitioner, the body corporate shall be liable on summary conviction before a Magistrate to a fine of \$400 for each such offence, and in the case of an act done by a director, officer or servant of the corporation, he or she also shall be liable on summary conviction before a Magistrate to a fine of \$100 for each such offence.”

[91] Subsection (10) materially provided:

“It is hereby declared that in ... section 75 references to unqualified persons include references to bodies corporate.”

[92] We will look more closely at section 76 of the Supreme Court Act later.

[93] It was in respect of section 69(8) that Appleby (BVI) Limited submitted that the provisions therein ‘were regarded (by some) as operating to prevent Legal Practitioners operating through bodies corporate’.

[94] Counsel for Appleby (BVI) Limited submitted that the effect of the repeal of subsection 69(8) was that ‘if it was then impermissible to practice through a body corporate, it ceased to be so’. As he also submitted, this provision was not replicated in the LPA, which did not use the language of the body corporate and the repeal of these provisions suggests that the legislature’s intention was to permit the practice of law through a body corporate.

[95] In my respectful judgment, Counsel for Appleby (BVI) Limited is correct in this regard.

[96] In particular, it is noteworthy that under the LPA, only a natural person can be admitted and enrolled as a legal practitioner. As Counsel for Appleby (BVI) Limited submitted, it is a metaphysical impossibility for a legal person to satisfy the qualifying requirements of, *inter alia*, age, academic and professional qualifications, pupillage and overseas admission set out in section 10 and 11. Moreover, a legal practitioner is referred to in both the LPA and the CPR as ‘he’ or ‘she’, never as ‘it’. A body corporate is neutre, not masculine or feminine. It would have been easy for the LPA or CPR to specify that he/she/it are used interchangeably but they did not.

[97] The LPA lays down a scheme of responsibility and liability. Although not yet in force, section 17(2) of the LPA provides that if a legal practitioner contravenes subsection (1) thereof (which imposes a requirement that a legal practitioner should print his or her name and the name of

the firm, if any, in which he or she is employed, together with the appropriate address, on legal documents drawn or prepared by him or her), he or she 'commits professional misconduct'. Clearly this applies only to natural persons, because a body corporate cannot be admitted or enrolled as a legal practitioner.

[98] Section 18 is expressed in somewhat wider and more severe penal terms. It materially provides as follows:

“Unlawful practice and similar offences

18. (1) Subject to this Act, where a person whose name is not registered on the Roll—

(a) practises law;

(b) wilfully pretends to be a legal practitioner; or

(c) makes use of any name, title or description implying that he or she is entitled to be recognised or to act as a legal practitioner, he or she commits an offence and is liable on summary conviction to a fine of not less than fifteen thousand dollars or to imprisonment for a term of not less than three years, or both.

(2) A person who, not being entitled to act as a legal practitioner, acts in any respect as a legal practitioner in any action or matter or in any court in the name or through the agency of a legal practitioner entitled so to act, commits an offence and is liable on summary conviction to a fine of not less than ten thousand dollars or to a term of imprisonment of not less than two years, or both.

(3) No fee in respect of anything done by a person whose name is not registered on the Roll or to whom subsection (2) relates, acting as a legal practitioner, is recoverable in any action, suit or matter by any person.

(4) ...

(5) ...”

[99] Section 18(1), in providing that a ‘person’, as a ‘he’ or a ‘she’, commits an offence if ‘he’ or ‘she’ does something, clearly applies only to natural persons.

[100] Section 18(2) is not expressed in terms of gender. It could, on its face, apply also to bodies corporate. Counsel for Appleby (BVI) Limited submitted, as a primary position, that within the scheme of the LPA it should be read more narrowly as applying only to natural persons notwithstanding the provisions of section 36 of the Interpretation Act.⁴ This section provides:

“36. (1) Words in an enactment importing (whether in relation to an offence or otherwise) persons or male or female persons shall include male and female persons, corporations (whether aggregate or sole) and unincorporated bodies of persons.

⁴ Cap. 136.

(2) In an enactment – (a) words in the singular include the plural; and (b) words in the plural includes the singular.

(3) Without affecting subsections (1) and (2), a reference in an enactment to a party aggrieved shall include a reference to a body corporate in every case where such a body is a party aggrieved.”

[101] Whilst that submission is possibly correct, I am respectfully inclined to disagree. The reasons why I disagree are as follows:

(1) Reference in section 18(2) to ‘acts in any respect as a legal practitioner’ could include purporting or pretending to act as a legal practitioner when not on the Roll. A body corporate could conceivably try to do both, in which case, it would commit the prescribed offence.

(2) Reference in section 18(2) to ‘A person who, not being entitled to act as a legal practitioner, acts...through the agency of a legal practitioner’ is not new. Very similar language was to be found at section 76(1)(a) of the Supreme Court Act. This provided:

“No legal practitioner to act as agent for unqualified person

76(1) No legal practitioner shall wilfully, and knowingly –

(a) Act as an agent in any action, any matter in bankruptcy or in relation to any business which can only be transacted by a person with legal qualifications, for any unqualified person.”

(3) That provision too did not specify whether an ‘unqualified person’ included a body corporate. But section 69(8) of the Supreme Court Act did, expressly including bodies corporate. The effect of section 69(8) was to disqualify bodies corporate from lawfully acting as a legal practitioner.

(4) What is more, section 76(1) of the Supreme Court Act had its close equivalent in section 39 of the English Solicitors Act 1974. Subsection (4) provided in that Act’s original form:

“(4) For the avoidance of doubt it is hereby declared that in subsection (1) references to an unqualified person include references to a body corporate.”

(5) Whilst section 76 of the Supreme Court Act did not include a similar clear statement, section 69(8) supplied the necessary provision.

- (6) The legislative purpose behind section 39 of the English Solicitors Act 1974 appears to have been to prevent solicitors from entering into partnership with persons who were not solicitors⁵ prior to the advent of multi-disciplinary and multi-national practices in the United Kingdom.
- (7) It is, in my respectful judgment, reasonable to conclude that the similar language used in the BVI Supreme Court Act and now the LPA (at section 18(2)) was and is intended to address the same mischief.
- (8) Whilst such an undesirable 'partnership' could be between natural persons, it could also take the form of properly qualified and admitted legal practitioners being employed, say, by, or working in association with, firms or companies of accountants, tax advisers, corporate service providers or the like, who might wish to hold themselves out as multi-disciplinary practices.
- (9) Thus, I am persuaded that section 18(2) was drafted in a manner so as to be wide enough to catch both natural and legal persons who purport to act as a legal practitioner when not entitled to do so.

Does section 18(2) prevent a law firm from being organized in the form of a body corporate?

[102] To see whether section 18(2) prevents a law firm from lawfully being organized in the form of a body corporate, we need to look closely at precisely what it is that persons caught by that subsection may not **do**.

[103] This is expressed as 'acts in any respect as a legal practitioner in any action or matter or in any court in the name or through the agency of a legal practitioner entitled so to act'. Mr. Titarenko argues that this includes a limited liability company acting as a legal practitioner through legal practitioner employees who are on the Roll.

[104] To see whether Mr. Titarenko is right or wrong about this (he is, in my respectful judgment, wrong), we need to consider what is meant by 'acts ... as a legal practitioner'.

⁵ See e.g., notes to the United Kingdom Courts and Legal Services Act 1990, Chapter 41 at <https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/gb/gb263en.html>.

- [105] The LPA treats a legal practitioner as ‘practising law’. Section 2(1) defines ‘practise law’ as meaning ‘to practise as a legal practitioner or to undertake or perform the functions of a legal practitioner, as recognized by any law whether before or after the commencement of this Act’.
- [106] This, clearly, is a broad definition. It does not lend itself readily to the type of strict construction that is to be applied to penal provisions (see, e.g., the Privy Council case of **Dyke v Elliott** (**‘The Gauntlet’**)⁶ or, more proximately to our present inquiry, the English Court of Appeal case of **Agassi v Robinson (Inspector of Taxes) (No. 2)**.⁷) But, broad though the definition is, it prompts the Court to consider whether the person to whom the subsection applies is *undertaking or performing the functions of a legal practitioner*. In other words, the Court must look at what the person concerned is **doing**.
- [107] This was precisely the question our Court of Appeal focused on in **Garkusha v Yegiazaryan & Ors**.⁸ There, the question was whether the fees incurred by lawyers in an overseas law firm were recoverable, or whether such fees were not recoverable because the work had been done by lawyers not registered on the Roll, and thus unlawfully, pursuant to section 18 of the LPA.
- [108] At paragraph [72] of **Garkusha**, Justice of Appeal Webster stated as follows:
- “...the Act has provisions that show a clear intention to regulate the persons who can practise BVI law in the BVI and overseas, and charge fees for such practice. The analysis above shows that overseas lawyers assisting in a BVI matter are **performing the functions** of a legal practitioner and therefore practising BVI law for the purposes of the Act. The Act, and in particular section 18, make the practice unlawful.”
[Emphasis added.]
- [109] The work there done by the overseas lawyers had included assisting the Claimant, Mr. Garkusha, ‘generally with his defence of the application [in the BVI Court] for security for costs’.⁹ This, the Court of Appeal ruled at paragraph [72], was ‘performing the functions of a legal practitioner’.

⁶ (1872) LR 4 PC.

⁷ [2005] EWCA Civ 1507.

⁸ BVIHMAP2015/0010 (unreported, delivered 6th June 2016).

⁹ **Garkusha v Yegiazaryan & Ors**. BVIHMAP2015/0010 (unreported, delivered 6th June 2016) at paragraph [49] (Webster JA (Ag.)).

[110] The Court of Appeal's approach in **Garkusha** was to look at the work done by the overseas lawyers and asked itself whether these were functions that a BVI legal practitioner would do.

[111] A similar approach is appropriate here. The Court should ask itself whether a BVI law firm organized as a body corporate or other legal person performs the functions of a legal practitioner.

[112] But this does not mean that anything whatsoever a BVI legal practitioner can do is, by dint thereof, 'practising law' and thus rendered unlawful if done by a person (natural or legal) not on the Roll. This is because section 18(2) is a penal provision. It is well settled that penal provisions are to be construed strictly. As stated by James LJ in the Privy Council case of **Dyke v Elliott ('The Gauntlet')**:¹⁰

"No doubt all penal statutes are to be construed strictly, that is to say, the court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, it is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common sense meaning of the language used, and the court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument."

[113] This passage was described by our Court of Appeal in **Deon Davis v Commissioner of Police**¹¹ as the 'best expression' of the strict construction rule.¹² Justice of Appeal Gordon, QC, giving the judgment of the Court of Appeal, with which the other two members of the panel (comprising Justice of Appeal Gordon, QC, Acting Chief Justice Saunders and Justice of Appeal Alleyne, SC) concurred, prefaced this observation with a short review of the development of the strict construction doctrine.¹³ A starting point of this was that 'penal statutes, properly so called' mean statutes 'creating an offence against the state'.¹⁴ The LPA,

¹⁰ (1872) LR 4 PC at 191.

¹¹ SVG Crim APP 2004/0034 (unreported, delivered 20th September 2004).

¹² At paragraph [10] (Gordon JA).

¹³ At paragraphs [8] and [9] (Gordon JA).

¹⁴ At paragraph [8] (Gordon JA).

and section 18(1) and (2) thereof in particular, create offences against the state. They are thus penal and are to be construed strictly.

[114] A strict construction approach was adopted by the English Court of Appeal in **Agassi v Robinson (Inspector of Taxes) (No. 2)**¹⁵ in determining whether the costs of a firm of tax law experts, who were not solicitors, were recoverable under the English Solicitors Act 1974. As we have seen, above, that statute had close similarities to Part IV of our Supreme Court Act. I should observe, here, though, that the same analysis has not been followed by our own Court of Appeal when it comes to construing section 18 of the LPA (as I shall explain further below), as the LPA adopts a broad, inclusive, although not boundless, definition of what it is to 'practice law'.

[115] In **Agassi**, one of the issues was whether the fees of the claimant's firm of tax law experts, who were not solicitors, were recoverable following successful legal proceedings. That firm had assisted the claimant with preparing for legal proceedings to challenge a finding by the United Kingdom tax commissioners. That firm's work included briefing counsel, who appeared in court on behalf of the claimant. The claimant ultimately succeeded on appeal to the Court of Appeal.

[116] To address this issue, the English Court of Appeal was reconstituted in light of the 'considerable importance to the conduct of civil litigation and to the legal profession' that the case had, and the General Council of the Bar (of England and Wales) and the Law Society had been invited to make representations, which they did.¹⁶

[117] The English Court of Appeal took as a starting point that it was common ground that 'whatever costs may be recoverable by a litigant in respect of professional services such as those provided by [the firm of tax law experts], they cannot include the cost of any activities which are unlawful'.¹⁷

[118] I pause to note that the English Court of Appeal homed in on the 'activities' undertaken by the firm in question. In other words, the court focused on what the firm **did**.

¹⁵ [2005] EWCA Civ 1507.

¹⁶ **Agassi v Robinson (Inspector of Taxes) (No. 2)** [2005] EWCA Civ 1507 at paragraph 2 (Dyson LJ).

¹⁷ **Agassi v Robinson (Inspector of Taxes) (No. 2)** [2005] EWCA Civ 1507 at paragraph 20 (Dyson LJ).

[119] The penal statutory provision in question in **Agassi** was section 20 of the English Solicitors Act 1974. The phrase which required interpretation was:

“(1) No unqualified person shall - (a) act as a solicitor...”

This clearly was the English equivalent to section 69(5) of our Supreme Court Act.

[120] It was common ground that the firm in question, and the professionals in it, were not solicitors. The more difficult concept was what ‘act as a solicitor’ should be construed as meaning. As stated at paragraph 29: ‘[t]he phrase “act as a solicitor” is ambiguous’.

[121] As part of an extensive review of authorities, the English Court of Appeal held¹⁸ that a test laid down in the English High Court case of **Piper Double Glazing**¹⁹ should be applied. This was cited with exactitude at paragraph 36 of **Agassi**, in what the Court of Appeal described as a ‘critical passage’. In **Piper Double Glazing**, the issue was whether the costs of certain ‘claims consultants’ who were not solicitors, and who had conducted legal proceedings, could be recovered. The passage stated as follows:

"So far as I am aware, the claim consultants have not at any stage held themselves out as solicitors, but have at all times acted specifically as "claims consultants" in relation to their representation of the claimant. Section 25 of the Solicitors Act 1974 is linked and, in my view, falls to be construed with the sections which precede it. Those sections are penal in nature and relate to unqualified persons acting as solicitors (section 20), pretending to be solicitors (section 21), drawing or preparing instruments of transfer or charge etc., the drawing of which is limited to solicitors and certain other exempted professions (section 22) and preparing papers for probate, etc.: section 23.

By section 24 of the Act of 1974 those penal provisions are applied to bodies corporate. **In these circumstances, it seems clear to me that the words "acting as a solicitor" are limited to the doing of acts which only a solicitor may perform and/or the doing of acts by a person pretending or holding himself out to be a solicitor. Such acts are not to be confused with the doing of acts of a kind commonly done by solicitors, but which involve no representation that the actor is acting as such. On that basis it seems plain to me that the claims consultants did not "act as a solicitor" in conducting the arbitration on behalf of the claimant.** Accordingly, on the basis of the facts existing in this case, I answer the first preliminary issue in the affirmative." [Emphasis added.]

[122] I have recited this at some length because, although we are not concerned here with precisely the same wording (as ‘(1) No unqualified person shall - (a) act as a solicitor...’), the opening

¹⁸ *Agassi v Robinson (Inspector of Taxes) (No. 2)* [2005] EWCA Civ 1507 at paragraph 49 (Dyson LJ).

¹⁹ [1994] 1WLR 777 at page 786 (Potter J).

words of section 18(2) of the LPA are somewhat similar: 'A person who, not being entitled to act as a legal practitioner, acts in any respect as a legal practitioner in any action or matter or in any court in the name or through the agency of a legal practitioner entitled so to act commits an offence...'

[123] It would, I think, be right to observe that the provisions of the English Solicitors Act 1974 that the English courts had to consider in **Agassi** and in **Piper Double Glazing** were closer in equivalence to our repealed Part IV of the Supreme Court Act than to our LPA, because our LPA adopted a broad definition of 'practising law' in section 2(1) (pursuant to the construction thereof held by our Court of Appeal). Indeed, in **Yao Juan v Kwok Kin Kwok & Anor.**,²⁰ a case concerning whether the costs of an in-house foreign lawyer, not admitted to practice in the BVI, were recoverable, our Court of Appeal expressly distinguished **Agassi** and **Piper Double Glazing**.

[124] Thus, in terms of disallowing costs incurred by overseas lawyers, in **Garkusha** for example, our Court of Appeal considered that a general function of assisting local lawyers with the advice and conduct of BVI court proceedings must be regarded, as a matter of BVI law, as practicing BVI law.²¹

[125] Such a broad, inclusive, view of what comes within the ambit of 'practising law', runs counter to the restrictive construction adopted in **Agassi** and in **Piper Double Glazing**. However, it does not do away with, nor depart from, the canon of strict construction of penal statutory provisions expounded in **Dyke v Elliott ('The Gauntlet')**.²² This canon is that the Court must consider whether the 'thing charged' 'is brought within the words and within the spirit' of the penal provision.

[126] The 'thing charged' would here be that a body corporate, as a legal person, not being entitled to act as a legal practitioner, acts as a legal practitioner in the name of, or through the agency of a legal practitioner when its employees, directors or officers, as properly admitted legal practitioners, perform the functions of a legal practitioner.

²⁰ BVIHCM2018/0042 (unreported, delivered 1st June 2021) at paragraph [84] (Ellis JA (Ag.)).

²¹ **Garkusha v Yegiazaryan & Ors.** BVIHCMAP2015/0010 (unreported, delivered 6th June 2016) at paragraph [70] (Webster JA (Ag.)).

²² (1872) LR 4 PC at 191.

- [127] In my respectful judgment, it cannot be said that this is either within the wording or the spirit of section 18(2).
- [128] To see whether this 'thing' would come within the wording of section 18(2), it warrants observation that there are many things a properly admitted legal practitioner can do which only such a legal practitioner or a litigant in person can do. This is so, both as a matter of law and of physical possibility.
- [129] As it was observed in **Agassi**, the (English) CPR 'envisage litigation being conducted on two bases, either by a litigant in person or by a solicitor'.²³ This is also the scheme of our CPR and the LPA, with 'legal practitioner' substituted for 'solicitor'. Legal documents are to be signed, for instance, by either a legal practitioner or a litigant in person. No provision is made for some third person, whether natural or legal, to do so.²⁴
- [130] A significant distinction between cases such as **Garkusha** and **Kwok** and the current case is that the former each involved a natural person. It is possible for a natural person to 'practise law' and the question in each case was whether in fact they were doing so. Conversely, as Counsel for Appleby (BVI) Limited submitted, a legal person, as opposed to a natural person, cannot appear before a Judge, draft legal documents or give legal advice. A body corporate can no more do such things, or have itself enrolled as a legal practitioner, than could a horse or a dog, Counsel for Appleby (BVI) Limited submitted. It would perhaps be a closer analogy to say that a body corporate can no more do these things than it can take and pass a driving test, obtain a driving license and drive a car. A body corporate can **own** a car but cannot drive it. Or, to use the parlance of section 2(1) and section 18(2) of the LPA, a body corporate cannot act as, or perform the functions of, a car driver.
- [131] As an aside, it is here that an argument advanced by Mr. Titarenko, that if a body corporate can commit corporate manslaughter it can also practice law, breaks down. Whilst a body corporate could be liable for the acts of its agents, that is different and distinct from whether a body corporate actually does the act which gives rise to the liability. To continue with the motoring

²³ *Agassi v Robinson (Inspector of Taxes) (No. 2)* [2005] EWCA Civ 1507 at paragraph 18 (Dyson LJ).

²⁴ See, e.g. CPR 3 and PD No.1 of 2008.

analogy, the body corporate that owns a car might be liable to pay a speeding ticket, but that does not establish that the body corporate can drive the car.

- [132] Returning to the notion of 'practising law', it cannot sensibly be said that if a legal practitioner, being an employee or an associate of a body corporate, signs legal documents, he or she causes the body corporate to do that which is both metaphysically impossible and not countenanced by the CPR. The body corporate cannot and does not perform these functions, which are those of a legal practitioner.
- [133] It should also not be forgotten that section 18(2) says:
- “(2) A person who, not being entitled to act as a legal practitioner, acts in any respect **as a legal practitioner** in any action or matter or in any court in the name or through the agency of a legal practitioner entitled so to act, commits an offence” (Emphasis added)
- [134] The emphasized words are important. It is only when a person (whether natural or legal) acts '**as a legal practitioner**' that his, or her, or its, liability for the offence in question is engaged.
- [135] Wide though the definition of 'practising law' in section 2(1) of the LPA is, and difficult though it may be to state with certainty where the limits of this concept are, it can be stated with certainty that it is not a boundless concept.
- [136] It can be seen that certain functions or acts do not come within it. To take a (hopefully obvious) example, continuing the motoring analogy, section 18(2) does not render it unlawful for a body corporate to use the car it owns to collect clients from the airport, carry boxes of files to the Court Office, or to pick up refreshments from the supermarket.
- [137] Providing an organizational and administrative framework and facility within which a team of legal practitioners can practice law is not itself undertaking or performing the functions of a legal practitioner. Nor is arranging for those who need legal representation (i.e., clients) to receive the legal services of one or more of the legal practitioner team members. Such things are not acts of a person **acting as a legal practitioner**. These are things any person, including a body corporate, can lawfully do under section 18(2). Such acts are not unlawful within the wording of section 18(2) of the LPA.

- [138] Although the fact that such acts do not fall within the words of the penal provision suffices to exclude them as an offence, it can also be seen that such acts do not fall within the spirit of section 18(2).
- [139] The interpretative key, in my respectful judgment, is, once more, the phrase ‘acts ... as a legal practitioner’. Doing so does not just mean performing those functions that a legal practitioner does in the matter that he or she is handling. It includes doing these things *for some other person* who wants or needs them done, i.e., a client.
- [140] What is caught by section 18(2) is a situation where a person who is not on the Roll performs the functions of a legal practitioner for a client, in the name of or through the agency of a legal practitioner. What is not caught is performing some other function for a client or providing the legal practitioners with an organizational and administrative structure and facility.
- [141] By way of concrete example, the firm of tax law experts in **Agassi** would be caught by section 18(2), to the extent that they conducted litigation for their client Mr. Agassi in the name of or through the agency of the Barrister they had instructed to appear in court for him. The firm of tax law experts would be caught irrespective of whether it was organized as a partnership or as a body corporate, if it was the corporate body that purported to conduct the litigation.
- [142] Section 18(2) also prohibits persons from practicing law whilst unqualified, in partnership or association with properly qualified legal practitioners. An example of this would be using ‘in-house foreign lawyers’ to conduct BVI litigation for a client, as in **Yao Juan v Kwok Kin Kwok & Anor**.²⁵ To allow such a mode of practice would enable any number and kind of unqualified persons to take advantage of the regulated status of a legal practitioner when such other unqualified persons are not regulated at all.
- [143] It can be seen from this, on the other hand, that the form taken by a law firm – whether as a classic general partnership, a limited liability company or a limited partnership – is irrelevant. It simply does not matter. The entire focus of section 18(2) (and its concomitant in section 18(3)) is on what the person or entity, in whatsoever form it might be organized, does.

²⁵ BVIHCM2018/0042 (unreported, delivered 1st June 2021) at paragraph [84] (Ellis JA (Ag.)).

- [144] What this means is that the legal person Appleby (BVI) Limited commits no offence in providing an organizational and administrative structure and facilities for a team of legal practitioners, and no offence in arranging, for the benefit of others, legal representation by members of its team of legal practitioners. Appleby (BVI) Limited therefore does not 'practise law' within the meaning of Section 18(1)(a) of the LPA.
- [145] Mr. Titarenko has adduced no evidence that Appleby (BVI) Limited does anything more than this, which would infringe Sections 18(1)(b) or (c) of the LPA. He has adduced no evidence that Appleby (BVI) Limited 'willfully pretends to be a legal practitioner' (Section 18(1)(b)) or 'makes use of any name, title or description implying that it is entitled to be recognized or to act as a legal practitioner' (Section 18(1)(c)). Mr. Titarenko himself claimed that what Appleby (BVI) Limited does is to 'arrange provision of legal services', at paragraph 14 of his Claim Form.
- [146] Appleby (BVI) Limited's evidence, which is not contradicted, is careful to make it clear, both through its notepaper and its Articles of Association that Appleby (BVI) Limited itself does not willfully pretend to be a legal practitioner or to imply that it can so act as to practice law. The notepaper states in terms that 'Legal services are supplied by Legal Practitioners admitted to the Roll and authorized to practice in the British Virgin Islands.' Clause 5.1 of Appleby (BVI) Limited's Amended and Restated Memorandum of Association materially states:
- "...the principal purpose of the Company is to facilitate the provision of legal and professional services through Legal Practitioners employed or otherwise engaged by the Company that are admitted to the Roll of Legal Practitioners."
- [147] Article 11.6 of the Amended and Restated Articles of Association tracks this language in identical terms.
- [148] Simply put, Appleby (BVI) Limited itself does not provide legal and professional services. That is done by legal practitioners. Appleby (BVI) Limited merely facilitates this. As I have explained above, this is not a distinction without a difference.
- [149] Mr. Titarenko raises an objection that Appleby (BVI) Limited cannot do this, because there is no regulatory framework within which it may do so, such as in England. But Mr. Titarenko does not (and indeed it appears that he cannot) point to any law applicable in the BVI which imposes such a requirement. In support of its argument that there is no question of public policy in the

BVI preventing the practice of law through legal persons, Appleby (BVI) Limited adverts to the fact (which Mr. Titarenko does not dispute) that the Premier's Office has granted it a trade license as sufficient authorization to trade. I agree.

[150] As urged by Appleby (BVI) Limited, these conclusions are supported by the fact not only that the Premier's Office issued a trade license, but also because Appleby (BVI) Limited is not the only law firm in the BVI that has now been organized as a body corporate (whether as a limited company or a limited partnership with legal personality). Appleby (BVI) Limited has put in evidence numerous and indeed very recent examples of such. Whilst weight of numbers can never render an incorrect position correct, it does here indicate that seeing this as permitted is not an isolated opinion.

[151] Mr. Titarenko points to the treatment of bodies corporate which are considered to be practicing law in other common law jurisdictions, such as the United States of America. Mr. Titarenko contends that there is a common law principle of general application that it is unlawful for bodies corporate to practice law. In doing so, he quotes from a single academic article, written by a professor from the United States of America. No distinction appears to have been drawn there between such a body corporate arranging the provision of legal services and actually itself providing such services. This does not take Mr. Titarenko far, since what stands to be construed are the specific terms of a BVI statute, within the context, primarily, of BVI and Eastern Caribbean law and authorities, rather than in the context of a transnational notion of common law principles.

[152] During his oral submissions, Mr. Titarenko sought to highlight difficulties with the concept of a body corporate arranging the provision of legal services. He characterized Counsel for Appleby (BVI) Limited as implying that such a company would be like a Barrister's Chambers. Furthermore, Mr. Titarenko saw difficulties with rights to confidentiality and privilege, particularly where a legal practitioner leaves to go and work elsewhere. Mr. Titarenko's understanding was that a body corporate such as Appleby (BVI) Limited should be seen as, or as employing, a collective of legal practitioners each acting independently from each other, as sole practitioners.

[153] Such a view is misconceived, however. It ignores that the relationships between shareholders or members (or similar) in a body corporate, and between the directors, officers, employees

and/or associates and the body corporate, and between the body corporate and its client, are governed by a complex network of contractual terms, express or implied, and that such terms can be different from those that apply to a Chambers of Barristers. Such terms are capable of addressing matters such as the preservation of confidentiality and termination of representation upon the departure of one of the body corporate's team of legal practitioners. As such, they do not present an insurmountable obstacle to the analysis of a body corporate arranging the provision of legal services by its employed legal practitioners.

Conclusion on preliminary issue

- [154] The Court's conclusion is that there are no legal or evidential grounds for holding that Appleby (BVI) Limited practices law in contravention of section 18(2) of the LPA. Moreover, a legal person whose purpose is to facilitate the provision of legal and professional services through legal practitioners employed or otherwise engaged by the body corporate that are admitted to the Roll of legal practitioners does not thereby contravene section 18(2) of the LPA.

Consequences of preliminary issue conclusion for the claim

- [155] These conclusions mean that the legal premise underlying the first part of Mr. Titarenko's claim is misconceived.
- [156] Consequently, Mr. Titarenko's claim, at paragraph 11 of his Claim Form, that legal fees incurred by Appleby (BVI) Limited's clients 'for legal services provided by' Appleby (BVI) Limited are not recoverable from opposing parties, such as himself, because they were provided by a person (Appleby (BVI) Limited) whose name is not on the Roll in contravention of sections 18(1) and (2) of the LPA, cannot succeed.
- [157] Mr. Titarenko's ensuing allegation that various actions constituted a misrepresentation by Appleby (BVI) Limited that it was either a legal person properly licensed to practice law under its own name or that it was a general partnership consisting of partners each being properly licensed to practice law in the BVI, and that this induced him to pay a costs order, fares no better. This allegation is based upon two legal misconceptions, that:
- (1) a legal person practices law if it facilitates legal practice by its employed or associated legal practitioners; and

(2) a law practice can only be lawfully organized as a general partnership.

[158] For these legal reasons alone, this first part of the claim cannot succeed. It is incapable of amendment. It has no realistic prospect of success. It would thus not be appropriate to allow it to go forward. It is liable to be struck out as part of the Court's case management function.

The second part of the claim

[159] The second part of Mr. Titarenko's claim concerns what he has characterized as 'the Other Lawyers Representation'.

[160] This does not turn on whether Appleby (BVI) Limited practices law, thus the analysis above does not apply to this head of claim.

[161] The crux of this second part of the claim appears to be that in presenting its claim for costs for assessment, Appleby (BVI) Limited did not refer to costs of any lawyer(s) other than of its own employees and of the London Queen's Counsel. 'Accordingly', says Mr. Titarenko at paragraph 20 of his Claim Form, 'the Defendants made a representation of non-involvement of other lawyers'. Mr. Titarenko avers that this 'representation' was false, in that, says Mr. Titarenko, Appleby (BVI) Limited was acting in cooperation with foreign lawyers whose names are not entered on the Roll. Mr. Titarenko said (at paragraph 21 of the Claim Form), that he had no direct evidence of this, but concluded this 'by way of necessary implication' from certain circumstances.

[162] Mr. Titarenko claims that he was induced, in part, by this false representation to pay costs, in a discounted sum of US\$98,954.33.

[163] There are a number of fundamental flaws in this second part of the Claim Form.

[164] The first is a flaw in the logic. It is a non-sequitur that, just because no costs other than those of Appleby (BVI) Limited's employees and of their London Queen's Counsel were referred to, this was a representation that no other persons were involved in doing the work. It could simply mean that Appleby (BVI) Limited were rightly not claiming costs for work done by persons not on the Roll. Mr. Titarenko's transition word 'accordingly' is fatally overworked.

There was no actual representation to this effect (and Mr. Titarenko does not allege that there was) and it is, with respect, fanciful to suggest that it must be implied.

- [165] A second fundamental difficulty is that no such representation, even if it should be implied, can properly be said to have induced Mr. Titarenko to pay any part of the costs in question. What Mr. Titarenko omitted to mention is that he had been ordered by this Court on 17th March 2020 to pay costs, and that he had acceded by consent to the terms of an order of this Court dated 6th May 2020 quantifying his costs liability at US\$102,000.00. He was bound to pay this amount, unless the parties were to agree that payment of a lesser amount fulfilled the obligation, as indeed happened, or unless that order should be set aside upon appeal, which it was not.
- [166] This part of the claim, in particular, appears to have been artificially constructed, i.e., contrived. This conclusion appears to be reinforced by the fact that the claim does not work, on its own terms, as I have just explained above. To all appearance, Mr. Titarenko set out to create a claim against his opponent's lawyers, in circumstances where no claim arises naturally.
- [167] One is then bound to ask oneself why Mr. Titarenko would do that. The contrived nature of the claim suggests a deliberate attempt to create a claim. Mr. Titarenko's filing of this claim is commensurate with a deliberate attempt to create legal proceedings that could cause trouble and disruption for his opponent's lawyers at an opportune moment, or indeed simply by lying there unserved but prominently accessible in the public domain. It requires little imagination to conclude, as indeed I am persuaded to do, that this claim had been constructed with such a vexatious purpose in mind.
- [168] It is of course correct to observe that Mr. Titarenko did not serve the Claim Form. But, in circumstances where Mr. Titarenko had chosen to take the course of including Particulars of Claim in his Claim Form, highly prejudicial allegations of illegal practice and misrepresentation against Appleby (BVI) Limited have been placed in the public domain for all to read. A Claim Form is a public document, despite Mr. Titarenko's protestations that he thinks the Court Office should not provide members of the public with copies of Claim Forms until they have been served. In contending for such a proposition, Mr. Titarenko provided no authority to support this. It directly contradicts the clear words of CPR 3.14, which contains no such limitation. It is

also the case that Mr. Titarenko did not withdraw the claim when formally requested to do so by Appleby (BVI) Limited.

- [169] A further flaw in respect of Mr. Titarenko's claim is that he could have raised his arguments prior to the order of 17th March 2020 or before the order of 6th May 2020 was made. Mr. Titarenko submitted that he does not attack those orders, but he had a right of appeal from them and he could have explained why he should not have to pay costs either before those orders were made, or at its latest, upon appeal.
- [170] At both dates in March and May 2020, Mr. Titarenko was still represented by a team of BVI legal practitioners, including a London senior junior Barrister duly admitted to the Roll. Neither Mr. Titarenko nor his legal practitioners took these points then. Mr. Titarenko has advanced no reason, nor set of circumstances, which should move the Court to grant the indulgence of a further opportunity to do so. That new arguments occur to a litigant after an order is made is not of itself sufficient reason to re-open the matters that led to an order.
- [171] The same difficulty, and it is a fundamental one, applies to Mr. Titarenko's allegations found in the first part of his Claim Form.
- [172] In my respectful judgment the claim is liable to be struck out, in the exercise of the Court's case management powers, on account of the fundamental defects I have alluded to.
- [173] The claim also falls to be struck out as it discloses no cause of action, it lacks a legal basis, and is an abuse of process, amounting to an impermissible collateral attack upon this Court's previous costs orders and filed for a vexatious purpose.
- [174] Moreover, Appleby (BVI) Limited has shown that Mr. Titarenko has no real prospect of succeeding with his claims, both upon the law and the matters Mr. Titarenko has pleaded. Appleby (BVI) Limited is thus entitled to summary judgment.²⁶ Mr. Titarenko's claims are devoid of reality, and there is no other reason why they should proceed to trial.

²⁶ See, e.g., *Comodo Holdings Limited v Renaissance Ventures Limited & Anor.* BVIHCMAP2014/0032 (unreported, delivered 3rd May 2016 at paragraphs [83] to [91] (Blenman JA) for the legal test applicable to summary judgment.

[175] Although Appleby (BVI) Limited's affidavit evidence concerning transfer of the business of the Appleby general partnership to Appleby (BVI) Limited on 1st October 2020 is incomplete, these are not matters that need to proceed to trial here. That is because Mr. Titarenko's claims are legally and factually groundless upon their own terms.

Requests for judgment in default

[176] I will now consider whether Mr. Titarenko's request for default judgment succeeds.

[177] Mr. Titarenko relies upon his request for judgment in default of acknowledgement of service, not his request for judgment in default of defence.

[178] Mr. Titarenko argues that Appleby (BVI) Limited did not enter an appearance in these proceedings, that he has sufficiently proved service of the Claim Form upon Appleby (BVI) Limited, and since he has requested judgment in default of acknowledgement of service before Appleby (BVI) Limited has filed a valid Acknowledgement of Service, he is entitled to judgment in default.

[179] Before we look more closely at the current request for judgment in default, it warrants observation that the procedural background to this is rather convoluted. It strongly has the appearance of Mr. Titarenko trying to work backwards from the result he wants to achieve and trying to make the facts and procedure fit. As we shall see, they do not.

[180] The procedural starting point is that the Claim Form was filed on **30th March 2021**.

[181] Mr. Titarenko did not serve the Claim Form. Nonetheless, Appleby (BVI) Limited discovered its existence. On **19th April 2021** Appleby (BVI) Limited filed a document entitled 'Acknowledgement of Service on behalf of the First Defendant'. The same day, the Registry sent Mr. Titarenko a Notice that Appleby (BVI) Limited had filed an Acknowledgement of Service on that day, attaching a copy.

[182] On **10th May 2021** Appleby (BVI) Limited filed its application to seek orders that the action be struck out pursuant to CPR 26.3 or, in the alternative, for summary judgment pursuant to CPR 15.2.

[183] On **28th July 2021**, i.e., after Appleby (BVI) Limited had filed its strikeout/summary judgment application, Mr. Titarenko filed a 'Request for Entry of Judgment in Default'. This Request was for judgment in default of defence. In this Request, Mr. Titarenko certified that:

- (1) the 28 day period in which Appleby (BVI) Limited had to file a defence expired on 18th May 2021;
- (2) no defence or counterclaim had been served on Mr. Titarenko; and
- (3) Appleby (BVI) Limited had not paid any of the monetary sums claimed.

[184] In his certification, Mr. Titarenko explained that he had calculated the 28 day period from the date Appleby (BVI) Limited had filed its Acknowledgement of Service, since CPR 5.19(3)(a) deemed that to have been the date of service of the Claim Form. CPR 5.19(3)(a) materially provides:

“If an acknowledgment of service is filed, whether or not the claim form has been duly served, the claimant may treat –

- a. the date of filing the acknowledgment of service; or
- b.; as the date of service.”

[185] This Request was not dealt with administratively but referred to a Judge (me) and then listed for hearing on 23rd September 2021. The Court Office sent out a Notice of Hearing to this effect to Mr. Titarenko and to Mr. Willins as legal practitioner on behalf of Appleby (BVI) Limited on 28th July 2021.

[186] I should observe that Appleby (BVI) Limited, through Mr. Willins, had sent a letter to the Registrar dated 28th July 2021 requesting that the Request should be rejected and/or referred to a Judge, suggesting that it could be heard on 23rd September 2021, when Appleby (BVI) Limited's own application had been listed for hearing.

[187] In this letter, Mr. Willins contended that:

- (1) Since the proceedings had not been served, (a) time for filing a Defence had not started to run; and (b) Mr. Titarenko had not, and could not, file a Certificate or Affidavit of Service;
- (2) The effect in law of Appleby (BVI) Limited filing an application to strike out the claim was to stop time running for any Defence to be filed, with specific reference to the Court of Appeal case of **Wilfred Smith v Attorney General**;²⁷ and
- (3) Appleby (BVI) Limited had filed its Acknowledgment of Service (a) in an attempt to obtain access to the matter in the ELP as Mr. Titarenko had not acceded to a request to provide the authorization code; and (b) specifically confirming that service had not taken place.

[188] It must have been apparent to Mr. Titarenko from this letter that his Request for Judgment in Default of a Defence suffered from a number of serious and indeed fatal flaws.

[189] On **17th September 2021**, i.e., some five days before the hearing on 23rd September 2021, Mr. Titarenko purported to withdraw his Request for Judgement in Default of Defence. He took two steps.

[190] Mr. Titarenko filed a 'Notice of Withdrawal of Claim from the 2nd to 5th Defendants' on 17th September 2021. In this, he purported to withdraw the claim 'with immediate effect, without prejudice' from the Second to Fifth Defendants. He also indicated that he intended to rely upon his 'entitlement' to a default judgment against Appleby (BVI) Limited in default of acknowledgement of service.

[191] The same day, on **17th September 2021**, Mr. Titarenko filed a document headed 'Renewed Request for Entry of Judgment in Default'. In this, Mr. Titarenko stated that he 'has decided to no longer pursue the Initial Request [i.e. his earlier Request for Judgment in Default of Defence] since it is premised on a wrong presumption that the Purported AoS [Appleby (BVI) Limited's Acknowledgement of Service] is effective'.

[192] Mr. Titarenko contended in this Renewed Request that Appleby (BVI) Limited's Acknowledgement of Service had been a 'nullity', and thus not valid, and not having the effect

²⁷ BVIHCVAP2018/0003 (unreported, delivered 31st January 2019).

of entering appearance in the proceedings by Appleby. Mr. Titarenko alluded to three bases for such alleged 'nullity', that:

- (1) Appleby (BVI) Limited did not intend to acknowledge service of the Claim Form;
- (2) Since it contained a statement that 'This Acknowledgement of Service is served without prejudice to the First Defendant's position as to service', this did not accord with the requirement to file an Acknowledgement of Service in Form 4, prescribed by CPR9.2(1), thus rendering Appleby (BVI) Limited's Acknowledgement of Service void; and
- (3) The Acknowledgement of Service had been an abuse of process because it had been filed for an ulterior purpose, of obtaining access to the matter on the ELP.

[193] Mr. Titarenko further contended in his Renewed Request that since Appleby (BVI) Limited had apparently obtained the Claim Form and authorization code for the ELP from the Court Office, on or about 19th April 2021, this meant that service, or deemed service, of the Claim Form had been effected upon Appleby (BVI) Limited by the Court Office. Mr. Titarenko stated in his Renewed Request that he 'estimates the date of service to be not later than 27th April 2021'.

[194] This Renewed Request was also referred to me for further consideration. It too was listed for hearing on 23rd September 2021.

[195] At the hearing, Mr. Titarenko developed his contentions in relation to his Renewed Request.

[196] He argued that Appleby (BVI) Limited's Acknowledgement of Service was literally a 'sham', in that it was not what it purported to be. It was not intended to be an acknowledgement of service, argued Mr. Titarenko, as Appleby (BVI) Limited had described it as an 'acknowledgement of non-service'.

[197] Mr. Titarenko argued that Appleby (BVI) Limited:

- (1) did not intend to acknowledge service of the Claim Form;
- (2) treated its Acknowledgement of Service as not having effect for the purpose of CPR 5.19(3), and that, accordingly, Mr. Titarenko could not apply this rule for treating the date of filing of its Acknowledgement of Service (i.e. 19th April 2021) as the date of service on Appleby (BVI) Limited of the Claim Form;
- (3) made in the Acknowledgement of Service a reservation of Appleby (BVI) Limited's

'position as to service' (which Mr. Titarenko said appeared to be denial of service); denial of the service in the body of the Acknowledgement of Service avoids this document as an Acknowledgment of Service in Form 4 (prescribed by CPR 9.2(1)); and

- (4) pursued an ulterior purpose 'to obtain access to the ELP' as stated by Appleby (BVI) Limited themselves in correspondence.

[198] Mr. Titarenko also argued that service of the Claim Form should be deemed to have been effected upon Appleby (BVI) Limited at the point (which Mr. Titarenko cannot precisely identify) when the Court Office provided Appleby (BVI) Limited with the Claim Form and/or ELP authorization code.

[199] Appleby (BVI) Limited made two main points in response:

- (1) Mr. Titarenko has not proved service of the Claim Form, as he is required to do in order to succeed with a request for judgment in default;
- (2) The filing of Appleby (BVI) Limited's strikeout application stopped time running for filing a Defence, per **Wilfred Smith v Attorney General**.²⁸

[200] I can deal briefly with this last argument. It is a complete answer to Mr. Titarenko's first Request for Judgment in Default of Defence, to the extent that it might otherwise be capable of being revived. Whether that is possible is not entirely clear, but to the extent, if any, that it is, this complete answer warrants that that Request for Judgment in Default of Defence be dismissed.

[201] Mr. Titarenko submits that it is not an answer to his Renewed Request for Judgment in Default of Acknowledgment of Service. It is correct that the decisions in **Wilfred Smith v Attorney General**²⁹ and **St Kitts Nevis Anguilla National Bank Limited v. Caribbean 6/49 Limited**³⁰ are cases where the Court of Appeal held that judgment in default of a *defence* is not available where an application has been made to strike out the claim. Learned Counsel for Appleby (BVI) Limited contends that if the filing of a strike out application stops time running for

²⁸ BVIHCVAP2018/0003 (unreported, delivered 31st January 2019).

²⁹ BVIHCVAP2018/0003 (unreported, delivered 31st January 2019).

³⁰ St Christopher and Nevis Civil Appeal No. 6 of 2002 (unreported, delivered 31st March 2003).

the defence, there is no reason why it should not have the same effect in relation to an acknowledgement of service – a view which learned Counsel for Appleby (BVI) Limited contends is supported by the fact that a default judgment is not available under CPR 12.4(b) in default of an acknowledgement of service where a defence has already been filed. This is a point of some complexity. Without fuller argument on the point, and as it is not an essential finding to be made to determine the matters presently before the Court, I will leave this question undecided. There are other fatal flaws in respect of Mr. Titarenko's request for judgment in default of acknowledgment of service.

[202] Before considering whether Mr. Titarenko has proved service, I will nevertheless address whether or not Appleby (BVI) Limited's Acknowledgement of Service was valid, or whether it was a 'nullity'. For the reasons I shall explain, the Acknowledgement of Service was, in my respectful judgment, valid. If that is right, as I am persuaded it is, that is a further complete answer to Mr. Titarenko's Renewed Request for Judgment in Default of Acknowledgement of Service.

[203] The nub of Mr. Titarenko's argument is that Appleby (BVI) Limited has not complied with CPR 9.2(1). That provision states:

"9.2

1. A defendant who wishes to –

- a. dispute the claim; or
- b. dispute the court's jurisdiction; must file at the court office at which the claim form was issued an acknowledgment of service in Form 4 or 4(A) containing a notice of intention to defend."

[204] The reason Mr. Titarenko gives for the alleged non-compliance is that Appleby (BVI) Limited included a remark on its Acknowledgement of Service form that:

"This Acknowledgement of Service is served without prejudice to the First Defendant's position as to service."

[205] Mr. Titarenko argues that the terms of the CPR are to be strictly complied with. To support this proposition he argues that our CPR should be treated as including, by way of statutory importation, an amendment made to the English Civil Procedure Rules in 2013 at their Rule 1.1(2)(f) which provides:

"Dealing with a case justly and at proportionate cost includes, so far as practicable — [...] (f) enforcing compliance with rules, practice directions and orders."

- [206] Mr. Titarenko calls this the ‘Strict Compliance Rule’. He does not, however, refer to any authority on how this provision of the English Civil Procedure Rules is applied in the United Kingdom.
- [207] The very words, ‘so far as practicable’ suggest that the rule is not intended to impose unjust results by mechanical application of the civil procedure rules, contrary to their Overriding Objective.
- [208] It should be apparent upon its own terms that the provision in the English Civil Procedure Rule 1.1(2)(f) does not impose a literalist and absolute interpretative key to the application of those Rules. This is apart from the consideration whether or not that rule should be treated as imported into our own CPR, which seems to me to be doubtful, given our own CPR’s largely independent, organic growth and vitality over the past 22 years.
- [209] What Mr. Titarenko seeks to do is to have our CPR 9.2(1) interpreted as meaning that any deviation from Form 4 is to be treated as invalidating an Acknowledgement of Service.
- [210] An example demonstrates that this contention cannot be right. If a defendant were to misspell the word ‘Acknowledgment’ in the prescribed heading in Form 4, it would be surprising indeed if that alone were to invalidate an otherwise clear and complete acknowledgement of service. Indeed, such a robotic rejection would be contrary to our CPR 1.2, which materially provides that
- “1.2**
The court must seek to give effect to the overriding objective when it –
...
(b) interprets any rule.”
- [211] Similarly, if a defendant were voluntarily to have his signature notarized on the Acknowledgement of Service form, or even if he were voluntarily to state his nationality or passport number and date and place of birth for additional identification purposes, it would be absurd to hold that he had thereby rendered his Acknowledgement of Service void. These are matters which, in the context of acknowledgement of service, our law does not require as a matter of prescribed form. Put differently, in the ordinary course our law treats such matters as

being of no moment. The point speaks for itself: an Acknowledgement of Service cannot be rejected as automatically invalid merely because it contains an additional item.

- [212] This begs the question, how the Court should decide whether or not additions are legally of any moment. The obvious answer is to consider the form, nature and substance of the addition.
- [213] Even if Mr. Titarenko's submission is to be taken as meaning that it is not every deviation from the precise prescribed form which invalidates an Acknowledgement of Service, his argument is still flawed, on at least two levels.
- [214] The first flaw is apparent from Form 4 itself. This begins with the following warning:
- “WARNING: If this form is not fully completed and returned to the court at the address below within 14/28 days of service of the claim form on you, the claimant will be entitled to apply to have judgment entered against you. If the claimant does so, you will have no right to be heard by the court except as to costs or the method of paying any judgment unless you apply to set judgment aside.”
- [215] The words that require particular attention are ‘fully completed’. There can be no argument that Appleby (BVI) Limited did fully complete the form, and return it within the requisite time, and Mr. Titarenko does not dispute this. On Form 4's own terms, Appleby (BVI) Limited fulfilled the requirements for a valid Acknowledgment of Service.
- [216] Moreover, there is no express prohibition in the CPR or Form 4 against adding additional details.
- [217] Furthermore, it has to be recalled what the purpose of filing an Acknowledgement of Service is. It can first briefly be said what it is not. Filing an Acknowledgement of Service is not a sterile technical requirement, an end in itself. Filing an Acknowledgment of Service is a statutory means of submitting to the jurisdiction and entering an appearance. There are other, common law, means of submitting to the jurisdiction of the court.³¹
- [218] It can be generally stated that a completed and timeously filed acknowledgement of service form will show whether or not a defendant has submitted to the jurisdiction of the court.

³¹ See, e.g., *Rubin v Eurofinance SA* [2013] 1 AC 236.

- [219] I pause here to note that Form 4 requires a Defendant to state whether he has received the Claim Form and also whether he has received a Statement of Claim. This clearly envisages circumstances (such as the present) where a defendant is filing an Acknowledgement of Service where he may not actually have been served with any of these documents.
- [220] In order to ascertain whether or not a defendant has submitted to the jurisdiction, irrespective of whether or not he has yet been served, the Court must thus have regard to what a Defendant states on his Acknowledgement of Service form.
- [221] This was the approach taken by the English Court of Appeal in **Deutsche Bank AG v Petromena ASA**.³² The English Court of Appeal looked at the substance of what had been stated on a first acknowledgement of service and a second acknowledgement of service, as part of a wider inquiry whether or not the filing by the defendant of a second acknowledgement of service amounted to a submission to the jurisdiction. In that case, by seeing how the defendant had ticked boxes on options (which were not identical to those in our Form 4), and how it had conducted proceedings, the English Court of Appeal concluded that the Defendant had submitted to the jurisdiction.
- [222] Similarly (for present purposes) in **Hoddinott & Ors v Persimmon Homes (Wessex) LTD**³³ the English Court of Appeal looked at the defendant's conduct of the proceedings as well as what it had substantively stated in its Acknowledgement of Service, finding that the defendant had submitted to the jurisdiction.
- [223] The crucial inquiry in those cases was whether the defendant had submitted to the jurisdiction. This was important, because the answer to that question determined whether the court could exercise its powers over the defendant. That is a fundamental and most important question.
- [224] An equivalent approach is called for here. The Court needs to consider whether Appleby (BVI) Limited's Acknowledgement of Service shows that it had submitted to the jurisdiction in respect of the subject matter of the present proceedings. What this comes down to is to consider whether the addition of Appleby (BVI) Limited's remark negated the submission to the

³² [2015] EWCA Civ 226.

³³ [2007] EWCA Civ 1203.

jurisdiction evinced by the totality of Appleby (BVI) Limited's otherwise complete answers in Form 4.

[225] Before addressing this question, I should observe that the present case is unusual. Ordinarily, as in **Deutsche Bank** and **Hoddinott**, and countless other cases, it is the defendant who seeks to argue that he has not submitted to the jurisdiction. Here, it is the inverse. Here, it is the Defendant who wishes to submit to the Court's jurisdiction and maintains that it has, whilst the Claimant wishes to insist that the Defendant has not.

[226] So, what, if any effect does Appleby (BVI) Limited's remark have?

[227] First, it must be obvious, but is worth observing, that it does not say that Appleby (BVI) Limited does not submit to the jurisdiction.

[228] Secondly, it also does not say that Appleby (BVI) Limited has not been served as a matter of law. Mr. Titarenko seeks to characterize the additional remark as meaning that Appleby (BVI) Limited was trying to deny the effect of the service deeming provision in CPR 5.19(3). But this is not a sensible interpretation: it is impossible for a party to derogate from the effect of that provision and Appleby (BVI) Limited must be taken to have known that.

[229] Thirdly, the remark does not say in terms what Appleby (BVI) Limited's position on service is. At best it is an oblique statement, which does no more than indicate that Appleby (BVI) Limited might, in some unspecified subsequent context, wish to rely upon lack of actual service.

[230] Indeed, lack of actual service of the Claim Form can be highly material to matters other than submission to the jurisdiction or entry of an appearance. For example, even though the act of filing an Acknowledgement of Service would operate to deem service of the Claim Form to have occurred under CPR 5.19(3), if the Defendant has not in fact received the Claim Form or Statement of Claim, he might not reasonably be able to comply with the requirement under CPR 10.5 (1) to set out all the facts he relies upon to dispute the claim, and thus might wish to apply for case management orders that would allow him to do the best he can, albeit imperfectly, or otherwise to postpone the obligation.

- [231] All this additional remark appears to do is to call attention to the unusual but clearly permissible fact that Appleby (BVI) Limited has answered in the negative the questions in Form 4 whether or not it has actually been served with a Claim Form and a Statement of Claim, and that Appleby (BVI) Limited might seek relief as a result.
- [232] The additional remark stops short of negating Appleby (BVI) Limited's entry of an appearance or submission to the jurisdiction.
- [233] I thus find that the Acknowledgement of Service was valid and effective.
- [234] Mr. Titarenko, though, submitted that it should be treated as a nullity because, he argues, it was an abuse of process for Appleby (BVI) Limited to file an acknowledgment of service for the 'ulterior purpose' of obtaining the ELP authorization code. This is a submission which would have it, on no authority, that an 'ulterior purpose' behind filing an Acknowledgement of Service somehow inherently invalidates it. But if a defendant needs to enter an appearance (which is what Appleby (BVI) Limited did) in order to obtain the ELP authorization code, so that it can engage with the same proceedings, then there is nothing 'ulterior' about this. It is merely a necessary step in those proceedings. This is not an abuse of process.
- [235] Mr. Titarenko's argument that Appleby (BVI) Limited's Acknowledgement of Service was a 'sham' has as its goal that this Court should treat it as of no effect because it did not acknowledge that service had taken place. This submission attaches a literal and narrowly exclusive significance to the title to Form 4, 'Acknowledgement of Service'. It is clear, from that Form, that this title merely describes what the Form concerns. It concerns acknowledgement of service.
- [236] The title does not represent that service has actually occurred. Questions 1 and 3 ask a binary question whether or not a defendant has received the Claim Form and also a Statement of Claim. The Defendant must answer these questions, with a 'yes' or a 'no' to each. If the answer is 'yes', then the defendant is required in questions 2 and 4 to state when he did so. If he did not, then, logically questions 2 and 4 are not applicable. It is thus permissible for a defendant to state that he has not received the Claim Form and/or Statement of Claim, in other words that actual service has not occurred. Form 4, correctly and completely filled in, establishes a factual record of actual service, or lack thereof, as the case may be.

[237] Appleby (BVI) Limited's legal representative did complete the form, and in doing so has shown that, as at the date of filing that form, it had not received the Claim Form nor a Statement of Claim. In doing what Form 4 expressly permitted and indeed required, it cannot sensibly be said that Appleby (BVI) Limited's Acknowledgement of Service was a 'sham'.

Service

[238] Appleby (BVI) Limited argues that Mr. Titarenko is unable to obtain judgment in default of Acknowledgement of Service or, for that matter, in default of Defence, for additional procedural reasons. Mr. Willins, on behalf of Appleby (BVI) Limited, summarised its position as follows:³⁴

"7 ...CPR 12.4 and 12.5 make it clear that a pre-condition
8 to a request for a default judgment is proving service
9 which Mr. Titarenko can't, because Mr. Titarenko
10 hasn't. So that's the short answer to it already.
11 There is a secondary answer, section
12 13(4) of the e-litigation rules
[...]
17 "Where the authorisation code generated
18 by the ELP is not served on a party in accordance with
19 sub-rule (3), service shall be deemed not to have been
20 affected."
21 So Mr. Titarenko's cunning answer to this
22 is to say well it must be inferred that Appleby at some
23 point got the authorisation code from the court, and
24 true it is we did, albeit after the strike out
25 application was filed. But that doesn't avail him.

1 Because if you look up to sub-rule (3):
2 "Where proceedings have been commenced,
3 service must be effected in accordance with the
4 applicable rules of court and the filing party," i.e.
5 Mr. Titarenko, "must at the same time serve the
6 authorisation code." So it's not the court's
7 responsibility to do it for him. And he can't avail
8 himself of the fact that the court was good enough to
9 provide it."

[239] CPR 12.4 and 12.5 materially provide:

"Conditions to be satisfied – judgment for failure to file acknowledgment of service"

³⁴ Pages 68 to 69 of the transcript of the hearing on 23rd September 2021.

12.4 The court office at the request of the claimant must enter judgment for failure to file an acknowledgment of service if –

- (a) the claimant proves service of the claim form and statement of claim;
- (b) the defendant has not filed –
 - (i) an acknowledgment of service; or
 - (ii) a defence to the claim or any part of it;
- (c) the defendant has not satisfied in full the claim on which the claimant seeks judgment;
- (d) the only claim is for a specified sum of money, apart from costs and interest, and the defendant has not filed an admission of liability to pay all of the money claimed together with a request for time to pay it;
- (e) the period for filing an acknowledgment of service under rule 9.3 has expired; and
- (f) (if necessary) the claimant has the permission of the court to enter judgment.

Rules 5.5, 5.11, 5.12 and 5.15 deal with how to prove service of the claim form and statement of claim.

Conditions to be satisfied – judgment for failure to defend

12.5 The court office at the request of the claimant must enter judgment for failure to defend if –

- (a) (i) the claimant proves service of the claim form and statement of claim; or
- (ii) an acknowledgment of service has been filed by the defendant against whom judgment is sought;
- (b) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired;
- (c) the defendant has not –
 - (i) filed a defence to the claim or any part of it (or the defence has been struck out or is deemed to have been struck out under rule 22.1(6)); or
 - (ii) (if the only claim is for a specified sum of money) filed or served on the claimant an admission of liability to pay all of the money claimed, together with a request for time to pay it; or
- (iii) satisfied the claim on which the claimant seeks judgment; and

(d) (if necessary) the claimant has the permission of the court to enter judgment.”

[240] It should be noted here that one of the conditions to be satisfied for entry of a judgment in default of acknowledgment of service is if ‘the claimant proves service of the claim form and statement of claim’, per CPR 12.4(a).

[241] The footnote to CPR 12.4 is instructive. It points to four sub-rules of CPR 5, and to no other Rule, nor to any other practice, for how to prove service of a Claim Form and Statement of Claim. CPR5.5 deals with personal service. CPR5.11 deals with postal service. CPR5.12 deals with proof of service by electronic means.

[242] CPR5.12 provides:

“5.12

1. Service by electronic means is proved by an affidavit of service by the person responsible for transmitting the claim form to the person to be served.
2. The affidavit must exhibit a copy of –
 - a. the document served;
 - b. any cover sheet or email to that document;
 - c. the transmission record; and
 - d. proof of electronic service of the document, and must state the –
 - i. electronic means by which the document was served;
 - ii. e-mail address or FAX number to which the document was transmitted; and
 - iii. date and time of the transmission.
3. Electronic confirmation of delivery may be treated as proof of service for a document that is served electronically and may include a written e-mail response, a read receipt, a successful FAX transmission notification or an automated response that a document was posted in an online shared drive.”

[243] Lastly, CPR5.15 provides for proof of service by a method specified in an order.

[244] In the present case, it is only CPR5.12 that can apply.

[245] Mr. Titarenko, however, argues that the Court Office should be deemed to have served the Claim Form on Appleby (BVI) Limited. He purports to put in evidence circumstantial

documents from which he submits proof of such service can be extrapolated. But he has not adduced any affidavit (or witness statement) evidence from a person within the Court Office as CPR5.12 would require. That itself is fatal. Moreover, if that is not enough, Mr. Titarenko is unable to adduce evidence of the matters laid down by CPR5.12(2) or (3). Those matters go to showing (a) what was served; (b) when; and (c) how. Mr. Titarenko does not do any of these. Indeed, it appears, he cannot.

[246] This is not just a conceptual or formalistic problem. It is of primordial importance to be able to pinpoint exactly when service of a claim form did or did not occur – hence the degree of specificity required for proof of service by the Rules I have just referred to.

[247] This point has been iterated at the highest level of authority in the United Kingdom. In the United Kingdom Supreme Court case of **Barton v Wright Hassall LLP**³⁵ Sumption LJ stated at paragraph 16:

“The first point to be made is that it cannot be enough that Mr Barton’s mode of service successfully brought the claim form to the attention of Berrymans. As Lord Clarke pointed out in *Abela v Baadarani*, this is likely to be a necessary condition for an order under CPR rule 6.15, but it is not a sufficient one. Although the purpose of service is to bring the contents of the claim form to the attention of the defendant, the manner in which this is done is also important. Rules of court must identify some formal step which can be treated as making him aware of it. This is because a bright line rule is necessary in order to determine the exact point from which time runs for the taking of further steps or the entry of judgment in default of them. Service of the claim form within its period of validity may have significant implications for the operation of any relevant limitation period, as they do in this case. Time stops running for limitation purposes when the claim form is issued. The period of validity of the claim form is therefore equivalent to an extension of the limitation period before the proceedings can effectively begin. It is important that there should be a finite limit on that extension. An order under CPR rule 6.15 necessarily has the effect of further extending it. For these reasons it has never been enough that the defendant should be aware of the contents of an originating document such as a claim form. Otherwise any unauthorised mode of service would be acceptable, notwithstanding that it fulfilled none of the other purposes of serving originating process.”

[248] Moreover, as was stated by this Court in the case of **Tethyan Copper Company PTY Limited v Islamic Republic of Pakistan & Ors**:³⁶

“One can go further, and I do, and say that the formal act of service is also required in order for the Court take jurisdiction over a defendant. That comes out of the English

³⁵ [2018] UKSC 12.

³⁶ BVIHC (COM) 2020/0196 (unreported, delivered 25th May 2021).

case of **Deutsche Bank AG v Sebastian Holdings Inc & Anor** ([2014] EWHC 112 (Comm).) which was approved by our Court of Appeal in **Rogalskiy v JSC MCC Eurochem** (BVIHCMAP 2017/0007). This is necessary in order for the Court and all concerned to be able to ascertain when the 'bright line' has been crossed, in terms of the exact point from which time runs for the taking of further steps or the entry of judgment. The reference to a 'bright line' comes from the case of **Barton v Wright Hassall LLP** ([2018] UKSC 12 at paragraph 16 (Sumption LJ)).”

[249] Of course, one other way, apart from through actual service, by which a claimant can establish that a claim form should be treated as having been served, is through the application of CPR5.19(3). This rule deems service of a claim form to have occurred on the date an acknowledgment of service has been filed, whether or not a claim form has duly been served. But, in this case, Mr. Titarenko cannot (and does not) rely upon this for the purpose of his request for judgment in default of acknowledgement of service, because his case is that Appleby (BVI) Limited’s Acknowledgment of Service was a nullity. He is limited to CPR5.12 to be able to prove service and, as I have explained, he has not brought himself within the requirements of that sub-rule.

[250] To conclude, Mr. Titarenko’s Request for Judgment in Default of Acknowledgement of Service fails because (a) Appleby (BVI) Limited had filed a valid Acknowledgment of Service before that Request had been made; and (b) Mr. Titarenko did not satisfy the requirements for proof of service of the Claim Form.

Recusal application

[251] Mr. Titarenko made an oral application that I should recuse myself on account of alleged bias in favour of Appleby (BVI) Limited against himself. Mr. Titarenko urges that a fair-minded and informed observer would conclude that I am biased.

[252] This allegation arises out of an application in the Main Proceedings that I had determined on 15th April 2021. As I stated at paragraph [139] of that judgment:³⁷

“[139] It was argued that Ms. Wigglesworth’s evidence should be struck out as an abuse of process because it was said to constitute a breach of the Code of Ethics for a Legal Practitioner to give evidence on behalf of a client. As a matter of procedural fairness, in the present case the Legal Practitioner(s) and their employer(s) potentially

³⁷ BVIHCM2013/0160 Renova Industries Limited & Ors v Emmerson International Corporation & Ors (unreported, delivered 15th April 2021).

concerned were not separately represented to defend themselves in respect of this allegation. In the present case, there are other, more fundamental deficiencies with Mr. Moskov's case. It is not necessary for the Court to decide this point in the context of these applications. This is not a matter where the success or failure of Mr. Moskov's application turns on whether or not the Court comes down in favour of excluding the evidence on grounds of an alleged abuse of process."

[253] As I had made clear there, I did not rule upon the allegation that had been leveled (by Mr. Titarenko) against the 'Appleby' employee in question for reasons of procedural fairness, because neither 'Appleby' nor its employee(s) in question had been separately represented at the hearing to defend themselves in respect of this allegation. Had I proceeded to determine that allegation, this would have entailed a serious breach of natural justice. In my respectful judgment, a fair-minded and informed observer would not translate a Judge's desire to uphold procedural and natural justice into bias. Mr. Titarenko moreover appears to forget that in that matter, overall, I found in favour of Mr. Titarenko and others aligned with him, against Appleby's client.

[254] Mr. Titarenko's recusal application will thus stand dismissed.

Disposition

[255] For the reasons given above:

- (1) Appleby (BVI) Limited's application filed on 10th May 2021 succeeds. Thus
 - a. This action is struck out against all of the Defendants pursuant to CPR26.3 on the basis that it is an abuse of the process of the Court, and discloses no reasonable ground for bringing the claim;
 - b. Alternatively, Appleby (BVI) Limited shall be entitled to an order entering judgment against Mr. Titarenko pursuant to CPR15.2 on the basis that he has no real prospect of succeeding on the claim and there is no other reason why the matter should be disposed of at trial.
 - c. Mr. Titarenko shall pay Appleby (BVI) Limited its costs of this application and of this action, to be assessed if not agreed within 21 days.
- (2) Mr. Titarenko's Request for Judgment in Default of Defence, filed on 28th July 2021, and his Renewed Request for Entry of Judgment in Default of Acknowledgement of Service are refused and stand dismissed.

(3) Mr. Titarenko's oral recusal application stands dismissed.

[256] The claim in this action, the two requests for judgment in default and the oral recusal application are each, all four of them, for their own separate reasons, totally without merit. There is no reason why the Order upon Judgment should not reflect this, as Appleby (BVI) Limited has requested. It would be apt for the Order to do so, so that this may be apparent without any need to look behind the Order. Mr. Titarenko has wished to refer to Court Orders with the intention of arguing that he should not be considered to be a vexatious litigant. In the event that such a contention will require further consideration in the future, a clear indication in the Order that the present four matters are totally without merit would save time and expense.

[257] For the sake of clarity and good order, only the finalised Judgment herein is to be treated as containing and setting forth the Court's findings and reasons. The draft of the Judgment, circulated for review, is *ipso facto* not a judgment or order and shall thus be treated as entirely superseded by the finalised Judgment herein.

Gerhard Wallbank
High Court Judge

By the Court

Registrar