Neutral Citation Number: [2026] EWHC 1512 (Ch)

Appeal Reference: CH-2025-000155

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

CHANCERY APPEALS (ChD)

On appeal from an order of His Honour Judge Monty KC made in the County Court at Central London on 29th May 2025 (Claim Number: L01CL171)

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

18th June 2026

Before :

MR JUSTICE EDWIN JOHNSON

- -

Between :

(1) ARRAN COGHLAN

(2) CLAIRE BURGOYNE

Respondents/ Claimants

and

LEXLAW LIMITED

Appellant/ Defendant

- -

- -

David Berkley KC (instructed by Lexlaw Limited) for the Appellant
Michael Phillis (instructed by Brandsmiths SL Limited), for the Respondents

Hearing date: 21st April 2026

- -

JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10.30am on Thursday, 18th June 2026 by circulation to the parties and their representatives by email and by release to the National Archives.

Mr Justice Edwin Johnson:

Introduction

1. This is an appeal against an order made by His Honour Judge Monty KC, sitting in the County Court at Central London, on 29th May 2025. By that order (**"the Order"**) Judge Monty dismissed the application of the Appellant for summary judgment against the Respondents or, in the alternative, for the action to be struck out pursuant to one or more of sub-paragraphs (a)-(c) of CPR 3.4(2).

2. Permission to appeal against the Order was granted to the Appellant by Foxton J (as he then was) by an order made on 17th October 2025.

3. At the hearing of the appeal (**"the Appeal"**) Mr Berkley KC appeared for the Appellant. Mr Berkley appeared as a late replacement for Mr Young, counsel. Mr Young prepared the original skeleton argument in support of the Appeal, to which Mr Berkley added a short supplemental skeleton argument. Mr Phillis, counsel, appeared for the Respondents. I am grateful to all three counsel for their assistance, by their written and oral submissions, in my determination of the Appeal.

The background to the appeal

4. The Appellant is the Defendant in this action. The Respondents are the Claimants in the action. I find it easiest to continue to refer to the parties as Appellant and Respondents. For reasons which will become apparent, I will refer to this action as **"the Lien Claim"**.

5. The Appellant is a firm of solicitors, which acted for the Respondents in a professional negligence action brought by the Respondents against various firms of solicitors and individual solicitors arising out of a previous action brought against the First Respondent by the Serious Organised Crime Agency. The claim in that previous action (**"the SOCA Claim"**) was for a civil recovery order vesting a property, in the joint ownership of the Respondents, in the Trustee for Civil Recovery, on the alleged basis that the property was an asset acquired by the First Respondent with the proceeds of drug trafficking. The Second Respondent was subsequently joined into the SOCA Claim.

6. In the professional negligence action (**"the Professional Negligence Claim"**) the Respondents accused the defendants to the Professional Negligence Claim of mismanagement of the SOCA Claim on their behalf, and alleged that they had, by reason of the defendants' negligence, suffered substantial damage. The solicitors who acted for the defendants in the Professional Negligence Claim were BLM Law (**"BLM"**).

7. The Appellant acted for the Respondents in the Professional Negligence Claim pursuant to a conditional fee agreement dated 16th May 2018 (**"the CFA"**). It is common ground that the CFA was terminated by the Respondents on 27th February 2020. In place of the Appellant, the Respondents instructed a firm called Athena Law (**"Athena"**) to act for them in the Professional Negligence Claim. Athena filed notice of change of solicitors on 6th March 2020.

8. At the time of the termination of the CFA there were said by the Appellant to be unpaid fees due to the Appellant from the Respondents, in addition to a success fee which

would be due to the Appellant if the Professional Negligence Claim resulted in a win for the Respondents, within the meaning of the CFA.

9. It is convenient at this point to explain, in outline, the basic charging structure which applied under the terms of the CFA. I will need to come back to some other provisions of the CFA later in this judgment. In the remainder of this judgment references to Clauses are, unless otherwise indicated, references to the clauses of the CFA.

10. Under the terms of Clause 4, the Respondents were required to pay the Appellant's Basic Charges, which were defined to mean *"our charges for legal work that we do in relation to the Claim from the date of this Agreement up to and including the Date of Termination, whether charged at the normal hourly rates or the discounted hourly rates as set out below;"* (italics have been added to all quotations in this judgment).

11. These Basic Charges were however payable, in the first instance, at the discounted rates shown in a table in Clause 4.2. By Clause 5.1 the Respondents were liable to pay the full amount of the Basic Charges if they won the Professional Negligence Claim. This element of the Basic Charges, payment of which was conditional on the Respondents winning the Professional Negligence Claim, was defined in the CFA as the Conditional Basic Charges. Clause 1.13 defined what constituted winning the Professional Negligence Claim.

12. By Clause 5.1 the Respondents were also liable to pay a Success Fee, if they won the Professional Negligence Claim. By Clause 8.1 the Success Fee was set at 100% of the Basic Charges.

13. On 19th March 2020 (15:22) Mr Willan, a partner in Athena, emailed Mr Akram, the senior partner in the Appellant, introducing his firm as having been instructed by the Respondents, and asking for the file to be forwarded to Athena, as a matter of urgency. Mr Akram responded the same day (15:30), to say that the Appellant was exercising a lien over the papers for unpaid invoices. The email went on to make the following assertions:

> *"As the retainer was terminated by your clients and they have not paid the bills in spite of promises and (b) there is no question of any misconduct on the part of the solicitor then the lien is inalienable. If you wish to suggest otherwise please provide legal authority."*

14. Mr Willan replied at some length, also on 19th March 2020 (17:24). The reply was emollient in tone. Mr Willan offered to assist in procuring payment, if the sum due was not large. Mr Willan also made the following proposals:

> *"I also observe that you go on to say that you have an interest in the outcome of the proceedings – by which I assume that you are implying there was a conditional fee agreement of some sort….which is also the basis upon which I am engaged.*
>
> *In these circumstances might it be possible to reach an accommodation? I would be happy to offer you and* [an] *undertaking to preserve your lien, and to procure payment to you* [of] *all proper fees at the conclusion of the case, and to work with you on the precise wording of that so you are content and your interests secured."*

15. Mr Willan then went on to justify his offer of an undertaking on the basis that there was a jurisdiction for the court to override a solicitor's lien in certain circumstances, which might be invoked to require delivery of the file.

16. On the following day, 20th March 2020, the email exchanges between Mr Willan and Mr Akram resumed. The first email was sent by Mr Akram (07:20). Mr Akram did not accept the suggestion that the lien, which the Appellant was claiming to be entitled to exercise over the Respondents' file in respect of unpaid invoices (**"the Claimed Lien"**), could be overridden in the manner suggested by Mr Willan. Mr Akram set out his reasons for this stance at some length. Mr Akram did not, in this email, address Mr Willan's offer of an undertaking in direct terms. Mr Akram did conclude the email in the following terms:

> *"In the circumstances, I would be grateful if your clients' common sense could be prevailed upon and I suggest you obtain all recent correspondence regarding the unpaid bills from your clients and kindly obtain instructions to both pay the overdue balance and interest and to give a reasonable undertaking to update us regularly, upon request and prior to settlement in order that we can be paid from the settlement monies the amounts that are on risk and will become due when the litigation settles.*
> *Please also obtain our hybrid CJFA and retainer and terms and conditions from your clients as no doubt it will assist you. I am afraid I cannot provide you any of these documents as we are enforcing our lien and, for the avoidance of any doubt, reserving all our legal rights."*

17. It will be noted that, in this final section of Mr Akram's email, an undertaking was sought from Athena *"to update us regularly, upon request and prior to settlement in order that we can be paid from the settlement monies the amounts that are on risk and will become due when the litigation settles"*. The undertaking sought by Mr Akram seems to me to have been in rather different terms to what had been envisaged by Mr Willan, in his offer of an undertaking made in his email of the previous day.

18. In response (09:00), Mr Willan indicated that Athena would look into the matter further, and respond. Mr Willan also asked what the outstanding sum was. Mr Akram responded (09:11), identifying three sums as awaiting payment, which totalled £7,930.02. Mr Akram stated in this email that nothing had been paid *"plus late payment on each invoice plus interest at the rate of 8% over base rate."*.

19. Mr Willan responded (10:17) in the following terms:

> *"I'm not sure we agree on the law, or that the cases you cite support your views – see the paragraphs attached above.*
> *However given the quantum, argument is probably futile, if I cannot persuade you to accept an undertaking, and equally applications to court would be disproportionate in costs terms."*

20. Mr Akram responded (11.01) with an email reiterating his stance. The email contained the following assertions:

> *"Please note clause 13 and 17.2 of the CFA in consequence of which we await payment and your solicitor's undertaking in respect of our success fee. Your client agreed to pay and agreed to a lien and agreed that you would provide an*

undertaking. Please ensure your clients honour their agreements otherwise we will take legal action without further notice.
This may include issuing the debt recovery claim we have written to your clients about and our rights as against you and your firm and others with respect to (i) tortious interference with contractual relations and (ii) our equitable interest in the fruits of the litigation. All of this firm's strict legal rights are reserved.

21. The reference to tortious interference with contractual relations provoked a fairly short and terse response (11:17) from Mr Willan:
"I must say I am taken aback by your suggestion our firm may have done anything akin to "(i) tortious interference with contractual relations and (ii) our equitable interest in the fruits of the litigation",
On the contrary I have approached [*a*] *you with courtesy and I think pragmatically to seek to resolve matters without undue difficulty, and therefore must request you immediately withdraw your inappropriate threat against us."*

22. The email exchange of 20th March 2020 concluded with the following email (11:51) from Mr Akram:
"Thank you for your email. No threats have been made against your firm but we will protect and seek to enforce this firm's strict legal rights wherever possible. To clarify: This may include issuing the debt recovery claim we have written to your clients about and our rights as against you and your firm and others with respect to (i) tortious interference with contractual relations and/or (ii) our equitable interest in the fruits of the litigation. All of this firm's strict legal rights are reserved. Please take instructions for your clients to conduct themselves in line with our agreements with them."

23. To my knowledge this email exchange did not continue beyond 20th March 2020. For present purposes the next relevant event occurred on 21st May 2020, when the Appellant wrote a letter to BLM which is the foundation of the Lien Claim. It will be recalled that BLM were the solicitors acting for the defendants in the Professional Negligence Claim. By the letter of 21st May 2020 (**"the Lien Letter"**) the Appellant gave formal notice to BLM:
"of our client solicitor's equitable lien in the fruits of the litigation between your clients and our client's former clients"

24. The Lien Letter gave the following particulars of the Claimed Lien:
"Please note that, pursuant to a Conditional Fee Agreement, our client has an equitable lien over fees in the amount of £93,259.62 plus interest at 8% per annum over base rate and late payment fees (together the "Payment"), which has arisen as a result of our client's retainer with the Claimants in the above Claim. Please let us know as and when you require an up to date calculation of the Payment."

25. The Lien Letter then went on to cite case law relied upon in support of the Claimed Lien. The Lien Letter then concluded with the following notice to BLM, and the following request for confirmation:
"This letter constitutes notice that no settlement sums should be paid to our former clients unless the Payment due to our client has been discharged by your clients pursuant to our client's equitable lien. Your clients now have the

requisite notice and knowledge to render a subsequent payment of settlement monies direct to the claimant unconscionable (to the extent of the Payment), as an interference with our client's interest in the fruits of the litigation.
In the event that you disregard this notice of our client's equitable lien, our client has given us instructions to enforce its lien against your clients and to recover from your clients not only the Payment sum due but also the costs of and occasioned by and incidental to such enforcement on the indemnity basis.
In the circumstances please confirm:
(i) receipt of this notice;
(ii) that you will keep us regularly updated as to settlement discussions;
(iii) that you will seek the updated level of the Payment whenever relevant in settlement discussions;
(iv) *that your clients will discharge the Payment directly to our client out of any agreed settlement monies (bank details will be emailed to you)."*

26. At some point subsequent to these events, the Respondents instructed a separate firm of solicitors, Brandsmiths SL Limited (**"Brandsmiths"**), to act for them in the Professional Negligence Claim. Brandsmiths also now act for the Respondents in the Lien Claim.

27. The Professional Negligence Claim was settled by a confidential settlement agreement on 21st May 2022, A settlement sum was received by Brandsmiths. A proportion of that sum has been retained by Brandsmiths and is currently the subject of proceedings to determine who is entitled to the retained sum. In those proceedings the Appellant claims to be entitled to the sum of £42,674.80, together with interest on that sum.

The Lien Claim

28. The Respondents commenced the Lien Claim by claim form issued in what was then the Queen's Bench Division of the High Court on 21st May 2021. The Lien Claim was originally commenced against the Appellant and Mr Akram, mentioned above as the senior partner in the Appellant.

29. The Respondents filed their Particulars of Claim in the Lien Claim on 17th September 2021. The following claims were pleaded in the Particulars of Claim:
(1) The principal claim which was pleaded in the Particulars of Claim was a claim in defamation, on the basis that the Lien Letter had defamed the Respondents. I will refer to this claim as **"the Defamation Claim"**.
(2) The Respondents further alleged that the Appellant had, by the Lien Letter, breached the duty of confidence which it owed to the Respondents. The Respondents alleged that they had suffered loss and damage by reason of this alleged breach of duty. I will refer to this claim as **"the Confidentiality Claim"**.
(3) The Respondents further alleged that the Appellant had, by the Lien Letter, sought to profit from its position as the Respondents' solicitor, in breach of the fiduciary duty which it owed to the Respondents, by sending the Lien Letter to BLM. The Respondents alleged that they had suffered loss and damage by reason of this alleged breach of duty. I will refer to this claim as **"the Fiduciary Duty Claim"**.
(4) Finally, the Respondents alleged that the Appellant had, by sending the Lien Letter, processed the personal data of the Respondents, in breach of the General Data Protection Regulation (**"the GDPR"**). The Respondents sought compensation and

relief under Section 167 of the Data Protection Act 2018 in respect of the alleged breach of the GDPR. I will refer to this claim as **"the GDPR Claim"**.

30. On 5th September 2022 the Appellant issued its application notice, which was to come before the Judge, for summary judgment in the Lien Claim or, in the alternative, for an order striking out the Lien Claim. I will refer to this application, which is the subject of the Appeal, as **"the Application"**.

31. On 23rd October 2022 the claim against Mr Akram in the Lien Claim was struck out by Senior Master Fontaine on the basis of lack of jurisdiction. The Appellant is thus now the sole Defendant in the Lien Claim.

32. The Defamation Claim was the subject of a preliminary issue in the High Court. The preliminary issue came before His Honour Judge Lewis, sitting as a Judge of the High Court, for a determination on paper. Judge Lewis handed down his judgment on the preliminary issue on 10th June 2023; neutral citation number [2023] EWHC 1453 (KB). For the reasons set out in the judgment the Defamation Claim was dismissed, by an order of Judge Lewis made on 15th June 2023.

33. I will use the expression **"the Remaining Claims"** to refer, collectively, to those claims which were left in the Lien Claim, following the striking out of the claims against Mr Akram and the dismissal of the Defamation Claim; that is to say the Confidentiality Claim, the Fiduciary Duty Claim and the GDPR Claim.

34. On 1st February 2024, an order was made transferring the Lien Claim, comprising the Remaining Claims, to the County Court at Central London.

35. By application notice issued on 22nd May 2025 the Respondents applied to amend the Particulars of Claim (**"the Amendment Application"**). In the usual way, draft Amended Particulars of Claim were attached to the application notice. I will refer to the draft Amended Particulars of Claim as **"the Amended Particulars of Claim"**, but it is important to keep in mind that they were, and remain draft Amended Particulars of Claim. No permission to amend has been granted.

<u>The hearing of the Application before the Judge</u>

36. The Application came before Judge Monty (**"the Judge"**) for hearing on 29th May 2025 (**"the Hearing"**). Both parties were represented by counsel at the Hearing.

37. After hearing the submissions of counsel, the Judge delivered his judgment on the Application (**"the Judgment"**).

38. For the reasons set out in the Judgment, the Judge decided that the Application failed, and fell to be dismissed. By an order of the same date the Judge formally dismissed the Application and ordered the Appellant to pay the Respondents' costs of the application, summarily assessed in the sum of £27,500. The Judge also gave certain case and costs management directions, and directed the listing of a case and costs management conference.

39. So far as the Amendment Application was concerned, this was not listed for the Hearing. I have seen a transcript of the Hearing, from which it is apparent that the

Judge was aware of the Amendment Application. There was the following exchange, at the outset of the submissions, between Mr Young, for the Appellant, and the Judge:

> *"MR YOUNG: Thank you, judge. Can I just clarify, my learned friend's application is not before you?*
> *JUDGE MONTY: I do not think it has been listed for today, no.*
> *MR YOUNG: I just want to be clear, so we are not dealing with --*
> *JUDGE MONTY: I do not know; we will see where we are once we have heard all the submissions."*

40. Thereafter, there was no reference to the Amendment Application or the Amended Particulars of Claim in the submissions. The Judge returned to the Amendment Application after delivering the Judgment and dealing with costs. The Judge observed that, in theory, the Hearing could be extended into the afternoon in order to deal with the Amendment Application. The Judge also observed that the Amendment Application had only just been issued, that the amendments were substantial, and that the Amendment Application had not formally been listed for the Hearing.

41. Mr Phillis, for the Respondents, did not take issue with these observations. He explained the Respondents' position in the following terms, so far as the Amendment Application was concerned:

> *"JUDGE MONTY…….*
> *All right, I am going to summarily assess the costs at £27,500. Is there anything else that I need to do now before we go on to think about what we do about your application. In theory, we have the afternoon, but it may be that the defendant is not in a position to deal with it. I do not know when the application was issued. Very recently.*
> *MR PHILLIS: Yes, it is short notice.*
> *JUDGE MONTY: Yes, and it is quite a substantial amendment.*
> *MR PHILLIS: Yes, so it is primarily around the construction of the CFA. Essentially, if the defendant had succeeded today, then we would have had to come to this, so my thinking was, because I would have then said well, using Straczynski --*
> *JUDGE MONTY: Do you actually want to amend in the terms set out in those Amended Particulars of Claim?*
> *MR PHILLIS: Yes, we do.*
> *JUDGE MONTY: Okay. It may be that Mr Young's position and the defendant's position is they want some time to consider it. It is not formally listed today.*
> *MR PHILLIS: Yes."*

42. Following this exchange, the Judge decided that the appropriate course to take was to adjourn the hearing of the Amendment Application to the case and costs management conference which he had directed. In consequence, the Amendment Application was not dealt with at the Hearing.

<u>The Judgment</u>

43. Unless otherwise indicated, all references to Paragraphs in the remainder of this judgment are references to the paragraphs of the Judgment.

44. After setting out the background to the Application, including the email exchanges between Mr Akram and Mr Willan which I have set out above, the Judge summarised

the Respondent's case in the Lien Claim in the following terms, at Paragraphs 22 and 25:

> *"22. The Claimants' case is that either the lien did not arise at all, as a matter of its proper construction and the implementation of the CFA, or else did not arise in the amount stated in the equitable lien letter."*
>
> *"25. There is also no dispute that it is possible for a solicitor exercising an equitable lien to write not only to the former client's new solicitors, but also to a third party, particularly if there is litigation in train, in order to assert that lien. That is not, nor could it be, the basis of the Claimants' case. What they say, as I have indicated, is that the lien did not or should not in the circumstances have arisen."*

45. The Judge then dealt with the Respondent's reliance upon Clause 17.2, at Paragraphs 26-28:

> *"26. First, the Claimants refer to clause 17.2 of the CFA, set out above, which gives the right to preserve the lien and that is of course coupled with clause 13, which says that the lien "may be applied after the agreement ends unless another solicitor working for you undertakes to pay us what we are owed." I will return to the other wording of 17.2 in a moment.*
>
> *27. As I read the email exchange which I have also summarised, the new solicitors, Athena Law, did proffer an undertaking, subject to the agreement as to its precise wording, to pay what was owed. It seems to me in those circumstances it is at least reasonably arguable that the Defendant was not entitled to write the equitable lien letter, because that was, I think it is reasonably arguable, a breach of that provision. I think the argument is put this way: having been offered an undertaking, by the new solicitors Athena Law, that undertaking had to be accepted, unless for some reason it was, for example, on its face unenforceable or susceptible to some other form of challenge; therefore, as a matter of proper construction of clause 17.2, the lien would no longer be preserved.*
>
> *28. I regard that as at least reasonably arguable for the purposes of summary judgment. It seems to me that it is possible for the Claimants to contend, with reasonable prospects of success, that the equitable lien letter should not have been sent at all."*

46. The Judge then dealt with the Respondent's challenge to the statement, in the Lien Letter, that the Claimed Lien was a lien over fees in the amount of £93,259.62, plus interest and late payment fees. The Judge said this, at Paragraphs 29-30:

> *"29. Secondly, the Claimants say that the amount referred to in the equitable lien letter was not an amount that could have given rise to the lien. Putting it another way, the argument is that, whatever was due and owing, which is a matter of separate dispute between the parties, it cannot be £93,000, as that can only be an amount which includes an element of success fee to which the Defendant was not entitled.*
>
> *30. Looking at clause 16 of the CFA, which deals with the effect of termination and what the Claimants are obliged to pay, I can see nothing there which entitles the Defendant, in the event of the Claimants' termination of the agreement prior to a win, to a success fee. The only possible assistance that the Defendant might get on this point is clause 17.2 which refers to the*

right to preserve the lien and an undertaking "to pay us what we are owed, including our success fee if you win" (emphasis added). It seems to me that this all depends on the stage at which the litigation has got. It is possible to contemplate a situation where a Claimant wins at trial, terminates the retainer, and gets a different firm of solicitors to deal with costs; the success fee would then be on its face payable because there would have been a win. So I do not think, in the circumstances, clause 17.2 assists the Defendant. It is clause 16 which governs what is payable on termination, and that says nothing about a success fee. I think it is therefore arguable, with reasonable prospects of success, that the amount stated in the equitable lien letter, was wrong."

47. The Judge then proceeded to consider whether it could be said that the Respondents had a reasonable prospect of success, in relation to the Remaining Claims. It will be recalled that the Defamation Claim had been dismissed, earlier in the proceedings, and that the claims against Mr Akram personally had been struck out.

48. So far as the Confidentiality Claim was concerned, the Judge concluded that this claim was arguable, at Paragraphs 31-32:

> *"31. Does this mean that the Claimants have a reasonable prospect of success in this claim? So far as the allegations of breach of duty of confidentiality are concerned, I accept that in the usual case the termination of the solicitor/client relationship brings to an end the fiduciary relationship, that ends on the termination of a retainer: see Lord Millett's speech in Bolkiah v KPMG [1999] 2 AC 222 at 235:*
>
> > *"The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence."*
>
> *32. I do not think I can really put it higher than this, but in my view it is not completely hopeless to argue that, on the termination of a retainer, any misuse of information obtained by the fiduciary during the course of the solicitor/client relationship may nonetheless, despite the termination of the retainer, constitute a breach of the duty of confidentiality."*

49. The Judge reached a similar conclusion in relation to the Fiduciary Duty Claim, at Paragraphs 33-34:

> *"33. So as to the fiduciary duty claim, the question of the scope and the duration of the fiduciary duty is, to a certain extent, dealt with again in Bolkiah, where it was recognised that, despite the termination of the retainer and the end of the fiduciary relationship, there nonetheless remain obligations which a solicitor has, which may include not to use confidential information. It is, in my view, arguable that to send a letter to a third party saying that your former client owes, in other words has not paid, in excess of £93,000 (particularly if there was no basis for saying that the client owed that amount) is a breach of the duty to keep the client's affairs confidential. I think that it is not wholly beyond the bounds of possibility*

that it might be said that, in the present circumstances, even the disclosure of the CFA might have been a breach of that confidential information.

34. I am not persuaded, if it is part of the Claimants' case, that notification of the existence of the CFA itself would have been a breach of duty, but I think in the circumstances it does strike me as reasonably arguable that there was a breach of the duty to keep information confidential."

50. The Judge also reached a similar conclusion in relation to the GDPR Claim, at Paragraphs 35-37:

"35. As to the GDPR claim, the Claimants say that the Defendant is a data controller in respect of the Claimants' personal data. It processed personal data by sending the equitable lien letter and did not do so lawfully, fairly or transparently or in a way that was accurate and to ensure that the personal data was accurate.

36. With respect to the pleader, this is simply another way of putting the same point that, if the amount of money that is set out in the lien letter as being due was not in fact due or even possibly if the writer of the letter, Mr Akram, did not hold a reasonable belief that it was true, that that was a breach of the provision of the GDPR.

37. I think again that is also reasonably arguable."

51. The Judge then made reference to some of the case law on the grant of summary judgment, and proceeded to set out his conclusions on the application for summary judgment, at Paragraphs 45-47:

"45. So what is the Defendant's current answer to these points in the context of this application? I do not think that there is one. So far as the fiduciary case is concerned, Mr Young refers to the ending of the fiduciary relationship upon termination as set out in Bolkiah, but he does not address and did not address me orally today on the point made by Mr Phillis for the Claimants that misuse of confidential information post-termination of retainer might also be a breach of fiduciary duty (which I have held is at least arguable). Similarly, with the confidentiality claim, I do not accept Mr Young's argument that, if the confidentiality claim would not succeed, a solicitor would never be able to give notice of an equitable lien where there was a CFA. That is not the point of the Claimants' case, which focuses on the amount of fees that were said to be due and the fact that there was no basis for that, and indeed no basis, on Mr Phillis's contention, for the equitable lien letter to have been sent in the first place because of clause 17 of the CFA.

46. So far as the GDPR claim is concerned, I regard this as probably the weakest of the three elements of the claim, but I am not persuaded that it is either deficiently pleaded nor that it is not reasonably arguable. Mr Young was unable to explain to me, other than in the way I have just summarised from his skeleton argument, why the Defendant says that the claim is bad in law. I need to make it clear that I am not saying this is a claim which will inevitably succeed. It plainly has its difficulties. I am saying no more than it is reasonably arguable for the purposes of applying the principles on a summary judgment application.

47. I can see, for example, that there may be difficulties in proving causation and quantum, but having said that, it seems to me that this is not a suitable

claim to be decided on the basis of summary judgment. The claim is arguable."

52. Consequent upon his conclusions on the application for summary judgment, the Judge also concluded that the strike out application could not succeed. The Judge thus concluded that the Application fell to be dismissed.

53. As I have already explained, the Judge returned to the Amendment Application after delivering the Judgment. Following the exchange with Mr Phillis, which I have quoted earlier in this judgment, the Judge decided that the appropriate course to take was to adjourn the hearing of the Amendment Application to the case and costs management conference which he had directed.

The grounds of the Appeal

54. The grounds of appeal identify three grounds of appeal, as follows:
    (1) The Judge erred in law in concluding that it was arguable that the Claimed Lien was capable of amounting to (i) a breach of fiduciary duty, (ii) a breach of confidentiality, and/or (iii) a breach of the GDPR (**"Ground One"**).
    (2) As such, the Judge was wrong to dismiss the Application (**"Ground Two"**).
    (3) The Judge erred in law when assessing the quantum of the costs payable by the Appellant following the dismissal of the Application. The Judge failed to carry out a proper assessment of the costs and made arithmetical errors (**"Ground Three"**).

55. In this context, it is relevant to note the reasons given by Foxton J for granting permission to appeal in his order of 17th October 2025:
    "It is realistically arguable that:
    a. the Judge was wrong to conclude that the summary judgment test was not satisfied in respect of the equitable lien claim;
    b. the Judge failed to address the Respondent's case as pleaded, but addressed a different case which was not pleaded; and
    c. the Judge was wrong to conclude the unpleaded case was arguable.
    Accordingly I grant permission to appeal."

56. The grant of permission to appeal was unqualified; by which I mean that it was not restricted to any particular grounds of appeal. As such, it seems to me that the grant of permission to appeal, while not making express reference to Ground Three, was a grant of permission to appeal which extended to Ground Three.

57. Although some argument in support of Ground Three was advanced by Mr Young in his skeleton argument in support of the Appeal, Mr Berkley conceded, in his oral submissions at the hearing of the Appeal, that he did not have the materials to advance argument on Ground Three.

58. It seems to me that this concession was both sensible and correctly made. It would be an unusual case where an appeal court was willing to interfere with an assessment of costs made by a judge at first instance. It was not obvious to me what basis there was for challenging the Judge's exercise of his discretion in relation to the assessment of costs. In any event, Mr Berkley did not advance any argument in support of Ground Three, and I understood Mr Berkley's position to be that he was not pursuing Ground

Three. In these circumstances, I take Ground Three to have been abandoned by the Appellant.

59. This leaves Grounds One and Two. In his skeleton argument in support of the Appeal, Mr Young's primary argument, in relation to Grounds One and Two, was the contention that the Judge had decided the Application on the basis of a claim which was not pleaded in the Particulars of Claim, in circumstances where there was no application before the court to amend the Particulars of Claim.

60. The essence of this argument can be found in paragraphs 6-8 of Mr Young's skeleton argument:

> *"6. The Judge summarised the position at ¶25 thusly:*
>
> > *"There is … no dispute that it is possible for a solicitor exercising an equitable lien to write not only to the former client's new solicitors, but also to a third party, particularly if there is litigation in train, in order to assert that lien. That is not, nor could it be, the basis of the Claimants' case. What they say, as I have indicated, is that the lien did not or should not in the circumstances have arisen."*
>
> *7. Pausing there:*
>
> *i. No where in their Particulars of Claim do the Respondents allege that the lien did not, or could not, have arisen.*
>
> *ii. Contrary to the Judge's comment at ¶25, the Respondents' pleaded case is precisely that which the Judge concluded it could not be: i.e. the Respondents allege in the Particulars of Claim that the Appellant should not have written to the opposing solicitors.*
>
> *8. At ¶27 judgment, the Judge concludes that because the solicitors who had replaced the Appellants had given an undertaking (that is factually incorrect, they had offered an undertaking but the terms could not be agreed) to the Appellant in respect of the success fee, the Judge concluded that it was arguable that the equitable lien did not arise.*
>
> *i. Again, that was not (and is not) the Respondents' pleaded case.*
>
> *ii. What is more, that is wrong as a matter of law. The offer of an undertaking by the Appellant's predecessor does not cause the Appellant's equitable lien on the fruits of litigation to fall away."*

61. This argument drew a protest from Mr Phillis in his skeleton argument in response to the Appeal. Mr Phillis protested that the Amendment Application had been before the Judge at the Hearing, In this context Mr Phillis made reference to the transcript of the opening part of the Hearing. I have already made reference, earlier in this Judgment, to the relevant part of the transcript of the Hearing, which contains the exchange between the Judge and Mr Young which took place at the opening of the Hearing. As I have explained, the exchange concluded with the Judge stating, in response to Mr Young's request for confirmation that the Amendment Application was not before the court, that *"we will see where we are once we have heard all the submissions."*. The Amendment Application was not then further addressed until the submissions on the Application had been completed, and the Judge had delivered judgment and dealt with the costs of the Application.

62. In his supplemental skeleton argument for the hearing of the Appeal, and in his oral submissions, Mr Berkley, while adopting all of Mr Young's arguments in his skeleton

argument, concentrated upon the argument that the Judge had gone wrong in deciding the Application by reference to what was said to have been an unpleaded case. On the Respondents' pleaded case, so Mr Berkley contended, the Respondents' claims had no real prospect of success, with the consequence that the Appellant should have been granted summary judgment.

63. Mr Berkley's fallback argument, if I was not persuaded by that argument, was that there had been a *"dislocation"* of the Application and the Amendment Application, which the Judge should not have permitted. Mr Berkley argued that the Amendment Application, if it was to be pursued, required to be considered with the Application. On this basis, Mr Berkley argued that I should, at the least, set aside the Order and remit the Application to the County Court at Central London, to be heard by a different judge to the Judge, at a hearing at which both the Application and the Amendment Application could be heard together.

64. Given the terms of the arguments in the Appeal, and given the Appellant's primary argument that the Judge decided the Application on the basis of a case which was not pleaded, it is necessary to look closely both at what is pleaded in the Particulars of Claim and what is sought to be pleaded, by the Amendment Application, in the Amended Particulars of Claim. It is therefore necessary, before I come to my analysis of the arguments in the Appeal, to set out, in summary form, what is pleaded in the Particulars of Claim, and what is sought to be pleaded in the Amended Particulars of Claim.

The Particulars of Claim

65. Paragraphs 1-6 of the Particulars of Claim plead the background to the Lien Claim, including the sending of the Lien Letter. Paragraphs 7-11 plead the Defamation Claim.

66. The Confidentiality Claim is pleaded in paragraphs 12-15 of the Particulars of Claim, in the following terms:

> *"12. Further, the May letter contained confidential information, the property of the Claimants.*
>
> *PARTICULARS OF CONFIDENTIAL INFORMATION*
>
> *(1) The terms of the Claimants' retainer with the First Defendant.*
>
> *(2) Details of professional fees and disbursements allegedly owed by the Claimants to the First Defendant.*
>
> *13. The First Defendant owed an obligation of confidence to the Claimants in relation to the said confidential information.*
>
> *14. Further, having been responsible for and authorising the May letter, the Second Defendant knew that the said information contained in the May letter was confidential information and subject to an obligation of confidence on the part of the First Defendant.*
>
> *15. The First Defendant and Second Defendant have therefore breached their obligation of confidence to the Claimants by sending and publishing the May letter to BLM Law and their clients, the 2018 proceedings Defendants."*

67. The Fiduciary Duty Claim is pleaded in paragraphs 16-18 of the Particulars of Claim:

> *"16. Further, as solicitors under their retainer and continuing subsequently to the termination of the retainer, the First Defendant owed to the Claimants a*

fiduciary duty in regard to the terms of the Claimants' retainer, the duty being, insofar as is material, not to profit from its position as the Claimants' solicitors.

17. The Second Defendant, having been responsible for and authorising the May letter, knew or must have known of the said fiduciary duty.

18. The First Defendant and the Second Defendant have acted in breach of their said fiduciary duty by sending and publishing the May letter to BLM Law and the 2018 proceedings defendants so as to profit from such breach of fiduciary duty."

68. A claim for loss and damage alleged to have been caused by these alleged breaches of duty is pleaded in paragraph 19 of the Particulars of Claim.

69. The GDPR Claim is pleaded in paragraphs 20-26 of the Particulars of Claim. I need not quote these paragraphs in full. The essence of the GDPR Claim is contained in paragraphs 24 and 25 of the Particulars of Claim:

"24. By sending and publishing the May letter as aforesaid, the First Defendant has processed the Claimants' said personal data in breach of the GDPR.

PARTICULARS OF BREACH

When the said personal data was processed by sending the May letter, the processing did not meet any of the conditions in Article 6 of the GDPR. In particular, the Claimants had not consented to the said processing and there was no legal obligation that the First Defendant could enforce against the Claimants in respect of any debt of £93,259.62 in interest, save for a sum of £7,930.02. Such processing was thereby also unfair.

25. The First Defendant has thereby breached its statutory duty under the GDPR and is liable to pay the Claimants compensation under Article 82 of the GDPR and section 168(1) of the Data Protection Act 2018."

The Amended Particulars of Claim

70. It is a notable feature of the Amended Particulars of Claim that the paragraphs which plead the Remaining Claims remain, subject to re-numbering, in the same terms as in the Particulars of Claim. The Confidentiality Claim is pleaded, in the same terms as before, in paragraphs 39-42 of the Amended Particulars of Claim. The Fiduciary Duty Claim is pleaded, in the same terms as before, in paragraphs 43-45 of the Amended Particulars of Claim. The GDPR Claim is pleaded, in the same terms as before, in paragraphs 47-53 of the Amended Particulars of Claim.

71. The major amendments of the Particulars of Claim are to be found in two sections of the Amended Particulars of Claim. First, paragraph 5 of the Particulars of Claim has been substantially amended, and new paragraphs 6-21 have been introduced into the Amended Particulars of Claim, prior to the pleading of the sending out of the Lien Letter in what was paragraph 6 of the Particulars of Claim, but is now paragraph 22 of the Amended Particulars of Claim. Second, new paragraphs 23-33 have been introduced into the Amended Particulars of Claim, prior to the pleading of the Defamation Claim.

72. These major amendments can be broken down as follows.

73. Paragraph 5 of the Amended Particulars of Claim is substantially expanded to plead specific terms of the CFA, including Clause 16 and Clause 17.1.

74. Paragraph 6 of the Amended Particulars of Claim pleads the alleged termination of the CFA on 27th February 2020.

75. Paragraphs 7-11 of the Amended Particulars of Claim plead various matters relating to the fees invoiced and claimed by the Appellant from the Respondents.

76. Paragraphs 12-17 of the Amended Particulars of Claim plead extracts from the email exchanges between Mr Akram and Mr Willan which I have summarised earlier in this judgment.

77. Paragraphs 18-21 of the Amended Particulars of Claim then plead as follows:

> *"18. At the time of the Defendant writing that letter:*
>
> *a. No success fee was or would become due;*
>
> *b. no undertaking was required in respect of the success fee under the CFA;*
>
> *c. a proper undertaking under Clause 17.1 had been offered twice with no acknowledgement by the Defendant;*
>
> *d. the Defendant had apparently already filed the 2020 Claim.*
>
> *19. On 30 March 2020 the Claimants wrote to the Defendant offering the Defendant two ways forward:*
>
> *a. The amount of £7,930.02 be paid to the Defendant at the end of the case, alongside the Conditional Basic Charges (which leaving aside Invoices 1402, 1498, and 1554 would be £36,886.86). In context, this was an offer to pay £44,816.88 later against a maximum potential liability of £7,930.02 and £44,816.88 later.*
>
> *b. If the above offer was not accepted, all Invoices rendered were challenged, including Invoices 1402, 1498, and 1554, and an actual breakdown of fees by time billed against tasks and fee earner was required as offered in the Defendant's letter of 18 March 2020.*
>
> *20. The Defendant never responded to the Claimants' email of 30 March 2020.*
>
> *21. The Conditional Basic Charges are by the terms of the CFA equal to the Basic Charges. At this point, they could have been no higher than £44,816.88. The total indebtedness of the Claimants to the Defendant could have been no higher than this amount plus £7,930.02, i.e. £52,746.90."*

78. The reference to *"that letter"*, in paragraph 18 of the Amended Particulars of Claim, is a reference to what is described as a letter in paragraph 17 of the Amended Particulars of Claim. It is however apparent that this reference to a letter is actually a reference to the email sent by Mr Akram to Mr Willan on 20th March 2020, at 11:01, which forms part of the email exchanges I have summarised earlier in this judgment.

79. Moving forward to new paragraphs 23-33 of the Amended Particulars of Claim, paragraph 23 alleges that the calculation of the amount of £93,259.62 plus interest referred to in the Lien Letter has never been explained, and that the CFA did not give rise to an entitlement to this amount.

80. Paragraphs 24-28 of the Amended Particulars of Claim make reference to what I understand to have been previous proceedings brought by the Appellant against the Respondents for fees alleged to be due. Paragraphs 29-33 of the Amended Particulars then plead the following allegations, in relation to the Appellant's alleged state of knowledge and alleged motive when sending the Lien Letter:

> *"29. The Defendant's assertion of an entitlement to £93,259.62 plus interest was untrue at the time of the May Letter and at the time of filing the 2022 Claim.*
>
> *30. The Defendant either knew or should have known, or was reckless as to the truth of the assertion that, at the time of sending the May Letter £93,259.62 plus interest was not owed to it under the CFA or otherwise, and it was prevented by the terms of the CFA from asserting a lien for £93,259.62 or at all.*
>
> *31. It may be inferred that the Defendant's motive in sending the May Letter was either or both to:*
>
> *a. Secure protection over an interest to which it was not entitled; and/or*
>
> *b. To pressurise the Claimants into paying the Defendant £93,259.62 or at any rate more than the Defendant was entitled to inter alia.*
>
> *32. Insofar as the May Letter was sent with the motive to obtain for the Defendant more than it was due under the CFA, it was calculated to cause pecuniary damage to the Claimants.*
>
> *33. The Defendant sent the May Letter with an improper motive."*

81. The connection between the new material pleaded in paragraphs 5-21 and paragraphs 23-33 of the Amended Particulars of Claim and the unamended pleading of the Remaining Claims in the Amended Particulars of Claim is not clear. If there is intended to be a connection, the pleading of the Remaining Claims in the Amended Particulars of Claim is deficient in not identifying or explaining this connection.

Analysis of the Appeal

82. For the reasons which I am about to set out, I have come to the conclusion that I have no option but to set aside the Order, and remit the Application to the Central London County Court, so that the Application can be heard with the Amendment Application. In my view the problems with the Respondents' pleaded case, both in its existing form and in its proposed amended form, and the conclusions which follow from my analysis of the Judge's reasoning, leave me with no option but to take this course.

83. This has the important consequence that it will be necessary for a judge in the Central London County Court to hear the Application afresh. It is not my intention that anything I say in this judgment, by way of expression of my views on the issues which have to be determined for the purposes of deciding the Application afresh, should be regarded as binding upon the judge hearing the Application. It is my intention that the judge should have freedom of decision in relation to the Application. I am making a binding decision only on those matters which require to be determined for the purposes of reaching my conclusions in relation to the Appeal.

84. Subject to what I have said in my previous paragraph, my reasons for the conclusions stated above are as follows.

85. It is convenient first to deal with Mr Berkley's argument that the Application and the Amendment Application should have been heard together, and that there should have been no *"dislocation"* of the two applications.

86. In my view there is merit in this argument. In *Mishcon de Reya LLP v RJI (Middle East) Limited* [2020] EWHC 1670 (QB), which was a case involving an appeal against a decision of the Judge to refuse a summary judgment application, Jeremy Johnson J stressed the importance of statements of case, when considering an application for summary judgment. As the judge explained, at [57]:

> *"57. Accordingly, when a judge entertains a summary judgment application the statements of case are relevant and important documents. That is because they identify the matters that – as matters stand – will be in issue at trial. There are, however, cases where the defined issues may foreseeably change (for example as a result of disclosure and a consequential application to amend a statement of case). In those cases, a judge considering an application for summary judgment may need to take account of the possibility of an amendment to the statements of case when assessing whether a defendant has a real prospect of success at trial."*

87. The judge went on, in his judgment at [58]-[59], to explain the correct approach, when an application for summary judgment or a strike out order provoked an application to amend:

> *"58. In some cases an application to strike out a statement of case, or for summary judgment, will provoke an application to amend. The determination of the amendment application will then help inform the resolution of the summary judgment application. That is what ought to have happened here: once the Respondent appreciated that there was a potential issue as to the existence of a counterpart signed by the Appellant (as it certainly had done by the date of the hearing) it ought to have applied to amend its Defence. More generally, where there is an issue between the parties as to the adequacy of a statement of case there is an obligation to seek a ruling from the judge – see the observations of Lawton LJ in Rolled Steel Products Holdings Limited v British Steel Corporation & Others [1986] 1 Ch 246 at 309-310, quoted by Tomlinson LJ in Skrzynski v Commissioner of Police of the Metropolis [2014] EWCA Civ 9 at [4].*
>
> *59. As it was, the Judge in this case was left to determine the issue without an application to amend having been made by the Respondent. It would have been open to the Judge to put the Respondent to an election – either to proceed on the basis of its pleaded Defence or to apply to amend. However, given that the matter was not confronted by the parties, the Judge cannot be criticised for not raising it of his own motion, and for determining the application without reference to the defence."*

88. If the amendments set out in the Amended Particulars of Claim were relevant to the Application, it seems to me that Mr Berkley was right to submit that one of two things should have happened. The Judge should have dealt with the Amendment Application at the same time as the Application, so that his decision on the Application could be informed (i) by his decision on whether to grant permission for the amendments and (ii) assuming the grant of permission to amend, by the content of the amendments. Alternatively, and on the assumption that it would not have been fair to expect the Appellant to deal with the Amendment Application on short notice, the Judge should

have adjourned the hearing of the Application so that it could be heard with the Amendment Application.

89. It does not seem to me that the Judge should be criticised for not taking either of these courses. It seems to me that it was incumbent upon the parties and each of them to draw the attention of the Judge to the point that, if the amendments were said to be relevant to the Application, the Amendment Application needed to be addressed at the same time as the Application.

90. By reference to the transcript of the Hearing Mr Young's position, for the Appellant, appears to have been that, in circumstances where the Amendment Application was not being heard by the Judge, the Application had to be heard and determined without reference to the proposed amendments in the Amended Particulars of Claim. For his part, the position of Mr Phillis, for the Respondents, emerges from his exchange with the Judge at the conclusion of the Hearing, which I have quoted earlier in this judgment, when the Judge was considering what to do with the Amendment Application. By reference to that exchange the position of Mr Phillis appears to have been that, if the Judge had decided to grant summary judgment for the Respondents, they would then have *"come to"* Amendment Application; I assume on the basis that Mr Phillis would have argued that Remaining Claims could be saved by the proposed amendments.

91. I do not criticise counsel for the respective stances which they took in relation to the Amendment Application. I do not doubt that they had good forensic reasons for taking their respective stances, in respect of which it is not appropriate for me to inquire or speculate. Nevertheless, on an objective basis, I do not think that the stance adopted by either counsel was feasible. Unless the parties were agreed that the proposed amendments were irrelevant to the Application, and plainly they were not, or unless the Judge indicated that he would decide the Application without reference to the proposed amendments, which he does not appear to have done, I do not see how the Amendment Application could effectively be left to one side while the Application was being argued out. Unless it was agreed or determined that the proposed amendments were irrelevant to the Application, or should be disregarded in the determination of the Application, the proposed amendments had to be addressed in the arguments on the Application. In the absence of such agreement or determination, the proposed amendments were, at least in theory, capable of having an effect on the question of whether the Remaining Claims had a real prospect of success.

92. The case law demonstrates that the courts have a discretion in this respect. In theory, in the present case, the Judge could have adopted the course of deciding the Application by reference to the pleaded cases, disregarding the Amendment Application and then, assuming a decision to grant summary judgment to the Appellant, giving the Respondents the opportunity to retrieve the position by hearing the Amendment Application. As I have said, this appears to have been what Mr Phillis had in mind, in the event that the Judge had decided to grant summary judgment. In case management terms however, I cannot see that this would have been a sensible course to take. This was not a case where the proposed amendments were inchoate, and only raised in or subsequent to the Hearing. The Amendment Application had been made, albeit only shortly before the Hearing, and was before the court, in the sense of being an outstanding application with which the court would be required to deal, at some point.

In these circumstances I cannot see that there would have been any merit in separating out a decision on the Application (i) by reference to the pleaded case, and then (ii) by reference to the proposed amendments.

93. It follows, as I have said, that there is merit in Mr Berkley's argument that the Application and the Amendment Application should have been heard together. From this, it might be said to follow that there should, at the least, be a remission of the case in order to allow this to happen.

94. This argument seems to me however to engage three assumptions. The first assumption is that if regard is had only to the existing pleaded cases of the parties, the Judge was wrong to refuse the grant of summary judgment. The second assumption is that the Judge, in making his decision on the Application, did rely upon matters which were not pleaded in the Particulars of Claim. If the Judge was entitled to refuse summary judgment on the basis of the Respondents' pleaded case, then the separation of the Amendment Application from the Application may be said not to matter. The third assumption is that the Judge was not entitled, on the basis of the material which was before him, to refuse the grant of summary judgment, even if his reasoning did extend beyond the Respondents' pleaded case. The Respondents argued that the Judge was entitled, in making his decision on the Application to have regard both to the proposed amendments in the Amended Particulars of Claim and to what was said in the evidence before him; specifically in the witness statements of the First Respondent.

95. I therefore turn to the Remaining Claims and the Judge's conclusion that each of the Remaining Claims had a reasonable prospect of success. I start with the Confidentiality Claim. For ease of reference, I repeat the Judge's conclusion, at Paragraph 32:

> *"32. I do not think I can really put it higher than this, but in my view it is not completely hopeless to argue that, on the termination of a retainer, any misuse of information obtained by the fiduciary during the course of the solicitor/client relationship may nonetheless, despite the termination of the retainer, constitute a breach of the duty of confidentiality."*

96. I find it difficult to understand this conclusion. As the Judge noted, where a solicitor/client relationship is brought to an end, the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during the subsistence of the relationship; see the speech of Lord Millett in *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 at 235C-D.

97. What is not clear to me is how the sending of the Lien Letter could have breached this obligation of confidentiality. As the Judge recorded, at Paragraph 26, there was no dispute that a solicitor exercising an equitable lien could write to a third party to assert that lien. This is what the Respondents did, by sending the Lien Letter. In these circumstances, the question which arises is how the sending of the Lien Letter could have amounted to a breach of the continuing duty of confidentiality. The Judge's answer to this question, as I read the Judge's reasoning in Paragraph 26 and following, was that it was reasonably arguable that the Claimed Lien had either not arisen or should not have arisen, and that the Respondents thus had no entitlement to send the Lien Letter.

98. The argument that the Claimed Lien had not arisen, or should not have arisen was treated by the Judge as being based upon Clause 17.2, which provided as follows:

> *"17.2 We have the right to preserve our lien unless another solicitor working for you undertakes to pay us what we are owed including our Success Fee if you win."*

99. Without formally deciding this question, I have difficulty in seeing how Clause 17.2 could have been engaged on the facts of the present case. I have summarised the email exchanges between Mr Akram and Mr Willan. In the course of those exchanges Mr Willan offered, in the following terms, an undertaking:

> *"to preserve your lien, and to procure payment to you* [of] *all proper fees at the conclusion of the case, and to work with you on the precise wording of that so you are content and your interests secured."*

100. As I read Clause 17.2, the Respondents' lien was preserved unless another solicitor working for the Respondents actually undertook to pay the Appellant what it was owed.. Mr Willan did not give any such undertaking. Mr Willan offered to provide an undertaking. Entirely properly, Mr Willan stipulated that the precise wording would need to be resolved between himself and Mr Akram. The offer was not however taken up. No undertaking was actually given. In these circumstances, and as I read Clause 17.2, I have difficulty in understanding how the Claimed Lien was not preserved.

101. Independent of this point however, there is nothing in the Particulars of Claim which explains why, or on what basis the Lien Letter contained confidential information. Nor is there anything in the Particulars of Claim which explains why the sending of the Lien Letter constituted a breach of the duty of confidentiality. All that the Lien Letter disclosed to BLM was that there had been a conditional fee agreement between the Respondents and the Appellant, pursuant to which the Claimed Lien had arisen over fees which were said to be in the amount of £93,259.62. Mr Berkley conceded, but only for the purposes of the Appeal and not in the Lien Claim generally, that this figure was wrong and should not have contained the Success Fee. If however one assumes that the figure was wrong, it remains unclear why getting the figure wrong constituted a breach of the duty of confidentiality.

102. In particular, the Confidentiality Claim is not pleaded in the Particulars of Claim on the basis that the Claimed Lien either did not exist or had ceased to have effect. The Confidentiality Claim is effectively left unparticularised in the Particulars of Claim.

103. In summary, I find it difficult to understand the basis on which the Judge refused summary judgment in relation to the Confidentiality Claim, by reference to the pleaded case of the Respondents. The Judge's reasoning appears to have been based on a case which had not been pleaded and, in any event, is reasoning which I find difficult to follow.

104. I cannot see that this position changes, by reference to the Amended Particulars of Claim. As I have already pointed out, the pleading of the Confidentiality Claim remains the same, in the Amended Particulars of Claim, as in the Particulars of Claim. All that has changes are the paragraph numbers.

105. Nor do I accept that the position in this respect was made good by the evidence of the First Respondent. I say this for two reasons. First, witness statements are not statements of case. What mattered, on the hearing of the Application, was the pleaded case of the Respondents and, as the Respondents would argue, what was in prospect as the amended pleading of the Respondents' case. Second, having read the First Respondent's evidence for myself, it has left me none the wiser as to the basis on which it is said that the sending of the Lien Letter constituted a breach of the continuing duty of confidence owed by the Appellant to the Respondents. This is not a criticism of the First Respondent. The Lien Claim has been commenced by a Part 7 claim form. Witness statements in the Lien Claim are not, and should not be treated as statements of case. In relation to the Application, the role of the witness statements before the Judge was to identify matters of fact relevant to the Application.

106. What one can find in the Amended Particulars of Claim, if one looks outside the pleading of the Confidentiality Claim, is a pleading to the effect that the undertaking offered by Mr Willan was an undertaking *"within the meaning of Clause 17.1 of the CFA"*; see paragraph 15 of the Amended Particulars of Claim. I assume that the reference to Clause 17.1 is intended to be a reference to Clause 17.2. Going on in the Amended Particulars of Claim, there is the pleading, in paragraphs 29-33, that the Lien Letter was sent by the Appellant with an improper motive and in circumstances where the Appellant either knew or should have known that the figure quoted in the Lien Letter was not due, or was reckless as to the true position. What connection, if any, the new material pleaded in paragraphs 5-21 and paragraphs 23-33 of the Amended Particulars of Claim has to the Confidentiality Claim is left unexplained. It may be that a further revision of the Amended Particulars of Claim, which remain a draft, might address these problems, but that is a matter for speculation. No such proposed further revision was before the Judge, or before me.

107. Drawing together my analysis of the Judge's decision to refuse summary judgment in relation to the Confidentiality Claim, I reach the following conclusions:
    (1) If regard is had only to the pleaded cases of the parties, the Judge was wrong to refuse the grant of summary judgment for the Appellant in relation to the Confidentiality Claim. On the basis of the pleaded claim, it was impossible to understand how the sending of the Lien Letter could have constituted a breach of the continuing duty of confidentiality.
    (2) If regard is had to the proposed amended case of the Respondents, there was still no basis for refusing the grant of summary judgment for the Appellant in relation to the Confidentiality Claim. On the basis of the proposed amendments, it remained impossible to understand how the sending of the Lien Letter could have constituted a breach of the continuing duty of confidentiality.
    (3) If the Judge had addressed the Amendment Application, together with the Application, it might have been that the problems with the Amended Particulars of Claim which I have identified could have been addressed, and a coherent version of the amended case would have emerged, which would have demonstrated that the Confidentiality Argument had a real prospect of success. This must be a matter for speculation.
    (4) The Judge made his decision to refuse the grant of summary judgment on the Confidentiality Claim on the basis of a case which was not pleaded either in the Particulars of Claim or the Amended Particulars of Claim. In my view, the Judge was not entitled to take this course. This renders it unnecessary to consider

further whether the Judge was right in his actual reasoning in relation to this decision. I have expressed some difficulties with this part of the Judge's reasoning but, because I consider that there is no option but to remit the Application back to the Central London County Court, I have refrained from making a decision on the correctness of the Judge's reasoning. For present purposes, the relevant point is that this reasoning addressed a case which was not pleaded.

108. I can take my analysis of the Fiduciary Duty Claim more shortly, because it is, essentially, the same as my analysis of the Confidentiality Claim. Again for ease of reference, I repeat the Judge's conclusion at Paragraph 33:

> *"33. So as to the fiduciary duty claim, the question of the scope and the duration of the fiduciary duty is, to a certain extent, dealt with again in Bolkiah, where it was recognised that, despite the termination of the retainer and the end of the fiduciary relationship, there nonetheless remain obligations which a solicitor has, which may include not to use confidential information. It is, in my view, arguable that to send a letter to a third party saying that your former client owes, in other words has not paid, in excess of £93,000 (particularly if there was no basis for saying that the client owed that amount) is a breach of the duty to keep the client's affairs confidential. I think that it is not wholly beyond the bounds of possibility that it might be said that, in the present circumstances, even the disclosure of the CFA might have been a breach of that confidential information.*

109. Again, I find it difficult to follow this conclusion. The conclusion appears to rest on the same basis as the Judge's reasoning in the relation to the Confidentiality Claim; namely that the Claimed Lien had not arisen or should not have arisen. For the reasons which I have already set out, I have difficulty in seeing how it can be said that the Claimed Lien did not exist when the Lien Letter was sent, whether or not the sum stated to be protected by the Claimed Lien was correctly stated. Equally, I have difficulty in understanding how a breach of fiduciary duty arose in the circumstances assumed by the Judge, unless the alleged breach of fiduciary duty is taken to be effectively the same as the alleged breach of the duty of confidence.

110. The overriding point is however, again, that there is nothing in the Particulars of Claim which explains why, or on what basis the sending of the Lien Letter constituted a breach of fiduciary duty. The pleaded case of the Respondents is that the Appellant owed to the Respondents a fiduciary duty not to profit from its position as the Respondents' solicitors. The Appellant was not acting for the Respondents when the Lien Letter was sent. If however the Respondents' pleaded case is that the duty was a duty not to profit from the Appellant's position as the Respondent's former solicitors, the pleaded case is that the sending of the Lien Letter constituted the breach of fiduciary duty. In circumstances where, as the Judge recorded at Paragraph 25, there was no dispute that it was possible for a solicitor exercising a lien to write to a third party to assert that lien, it is impossible to understand how a breach of fiduciary duty is said by the Respondents to have occurred.

111. As with the Confidentiality Claim, the Fiduciary Duty Claim is not pleaded in the Particulars of Claim on the basis that the Claimed Lien either did not exist or had

ceased to have effect. The Fiduciary Duty Claim is effectively left unparticularised in the Particulars of Claim.

112. In summary, and as with the Confidentiality Claim, I find it difficult to understand the basis on which the Judge refused summary judgment in relation to the Fiduciary Duty Claim, by reference to the pleaded case of the Respondents. The Judge's reasoning appears to have been based on a case which had not been pleaded and, in any event, is reasoning which I find difficult to follow.

113. Once again, I cannot see that this position changes, by reference to the Amended Particulars of Claim. The pleading of the Fiduciary Duty Claim remains the same, in the Amended Particulars of Claim, as in the Particulars of Claim. All that has changed are the paragraph numbers. Nor do I accept, for the reasons which I have already set out, that this position was made good by the evidence of the First Respondent.

114. As with the Confidentiality Claim, there is the new material pleaded in the Amended Particulars of Claim, at paragraphs 5-21 and 23-33. Again, what connection, if any, this new material has to the Confidentiality Claim is left unexplained. Again, it may be that a further revision of the Amended Particulars of Claim, which remain a draft, might address these problems, but that is a matter for speculation. No such proposed further revision was before the Judge, or before me.

115. Drawing together my shorter analysis of the Judge's decision to refuse summary judgment in relation to the Fiduciary Duty Claim, I reach the same conclusions as with the Confidentiality Claim:
    (1) If regard is had only to the pleaded cases of the parties, the Judge was wrong to refuse the grant of summary judgment for the Appellant in relation to the Fiduciary Duty Claim. On the basis of the pleaded claim, it was impossible to understand how the sending of the Lien Letter could have constituted a breach of any fiduciary duty said to have been owed by the Appellant to the Respondents.
    (2) If regard is had to the proposed amended case of the Respondents, there was still no basis for refusing the grant of summary judgment for the Appellant in relation to the Fiduciary Duty Claim. On the basis of the proposed amendments, it remained impossible to understand how the sending of the Lien Letter could have constituted a breach of any fiduciary duty said to have been owed by the Appellant to the Respondents.
    (3) If the Judge had addressed the Amendment Application, together with the Application, it might have been that the problems with the Amended Particulars of Claim which I have identified could have been addressed, and a coherent version of the amended case would have emerged, which would have demonstrated that the Fiduciary Duty Argument had a real prospect of success. This must be a matter for speculation.
    (4) The Judge made his decision to refuse the grant of summary judgment on the Fiduciary Duty Claim on the basis of a case which was not pleaded either in the Particulars of Claim or the Amended Particulars of Claim. In my view, the Judge was not entitled to take this course. This renders it unnecessary to consider further whether the Judge was right in his actual reasoning in relation to this decision. I have expressed some difficulties with this part of the Judge's reasoning but, because I consider that there is no option but to remit the Application back to the Central London County Court, I have refrained from

making a decision on the correctness of the Judge's reasoning. For present purposes, the relevant point is that this reasoning addressed a case which was not pleaded.

116. This leaves the GDPR Claim. The position in relation to the GDPR Claim seems to me to be different. I say this because the Particulars of Claim do plead a claim in this respect which can be understood. As I read paragraphs 20-26 of the Particulars of Claim, and disregarding the question of what remedy or remedies the Respondents might be entitled to, assuming a breach of the GDPR, the alleged breach of the GDPR is said to have occurred in the following manner:
    (1) By sending and publishing the Lien Letter the Appellant processed the personal data of the Respondents.
    (2) The processing failed to meet any of the conditions in Article 6 of the GDPR. In particular the Respondents had not consented to this processing of their data, and there was no legal obligation that the Appellant could enforce against the Respondents in respect of any debt of £93,259.62 or interest, save for a sum of £7,930.02.
    (3) The Appellant thereby breached its statutory duty under the GDPR.

117. Whether the GDPR Claim is actually a viable claim, with a real prospect of success, is not a matter which I am able to decide. The Judge's reasoning in respect of the GDPR Claim is set out in Paragraphs 35-37, which I repeat for ease of reference:
    "35. As to the GDPR claim, the Claimants say that the Defendant is a data controller in respect of the Claimants' personal data. It processed personal data by sending the equitable lien letter and did not do so lawfully, fairly or transparently or in a way that was accurate and to ensure that the personal data was accurate.
    36. With respect to the pleader, this is simply another way of putting the same point that, if the amount of money that is set out in the lien letter as being due was not in fact due or even possibly if the writer of the letter, Mr Akram, did not hold a reasonable belief that it was true, that that was a breach of the provision of the GDPR.
    37. I think again that is also reasonably arguable."

118. The Judge's conclusion in relation to the GDPR Claim was set out in Paragraph 46, which I also repeat for ease of reference:
    "46. So far as the GDPR claim is concerned, I regard this as probably the weakest of the three elements of the claim, but I am not persuaded that it is either deficiently pleaded nor that it is not reasonably arguable. Mr Young was unable to explain to me, other than in the way I have just summarised from his skeleton argument, why the Defendant says that the claim is bad in law. I need to make it clear that I am not saying this is a claim which will inevitably succeed. It plainly has its difficulties. I am saying no more than it is reasonably arguable for the purposes of applying the principles on a summary judgment application."

119. The Judge appears to have treated the GDPR Claim as resting on the argument that the amount of fees stated in the Lien Letter was wrong, and that Mr Akram did not hold a reasonable belief that this amount of fees was due. This does not appear to me to be the basis of the GDPR Claim, as it is pleaded in paragraph 24 of the Particulars of Claim.

Nor does it appear to me to be the correct basis on which to consider whether the GDPR Claim has a real prospect of success. Analysis of the viability of the GDPR Claim seems to me to require consideration of whether the sending of the Lien Letter constituted a breach of the GDPR, giving rise to a cause of action, vested in the Respondents, against the Appellant. This in turn requires consideration of the GDPR themselves.

120. I am not in a position to carry out that analysis. In the hearing of the Appeal the GDPR Claim was not properly explained to me, either in the written or the oral submissions of counsel. So far as the Appellant was concerned, it was not explained to me, either in Mr Young's skeleton argument or in Mr Berkley's written and oral submissions, why the Judge should have decided that the GDPR Claim had no real prospect of success. Mr Phillis did provide a short summary of the GDPR Claim in his skeleton argument, but this was not sufficient to allow me to understand what is in issue in relation to the GDPR Claim.

121. I can see the argument that, on my own reasoning, the GDPR Claim stands in a different category to the Confidentiality Claim and the Fiduciary Duty Claim. The Judge was satisfied that the GDPR Claim had a real prospect of success. The burden is upon the Respondents to demonstrate that the Judge was wrong in this decision. If the Respondents cannot discharge that burden then the Appeal should be dismissed, so far as the GDPR Claim is concerned, and the Judge's refusal of the grant of summary judgment in favour of the Appellant on the GDPR Claim should stand.

122. I am not however persuaded that this is the right course to take with the GDPR Claim. I do not, if I may respectfully say so, understand the basis on which the Judge concluded that the GDPR Claim had a real prospect of success. It is also apparent that there is an overlap, as between the unpleaded issues which appear to be raised by the Confidentiality Claim and the Fiduciary Duty Claim, and the issues engaged by the GDPR Claim. There is also the practical consideration that I have decided, for the reasons which I have explained in my analyses of the Confidentiality Claim and the Fiduciary Duty Claim, that I have no option but to remit the Application to the Central London Court, to be heard afresh. While this reasoning may be said only to apply to those two claims, it seems to me that it would be most unsatisfactory to allow the Judge's decision on the GDPR Claim to stand, and to confine the remission of the Application to the Confidentiality Claim and the Fiduciary Duty Claim. There would, at the least, be the risk of inconsistent findings, as between the Judge's decision on the Application, so far as it concerned the GDPR Claim, and the decision of a different judge on the Application, so far as it concerned the Confidentiality Claim and the Fiduciary Duty Claim.

123. In summary, and for the reasons which I have given, I conclude that the decision of the Judge to refuse the grant of summary judgment in favour of the Appellant on the GDPR Claim cannot stand and must be set aside, so that the GDPR Claim can be included in the remission of the Application to the Central London County Court.

124. Drawing together all of the above analysis, and for the reasons which I have explained, I have reached the conclusion that there is no option but to set aside the Order and remit the Application to the Central London County Court to be heard afresh, at the same time as the Amendment Application.

125. I reach this decision with some reluctance, given that it requires the parties to re-address the Application, at first instance, with the additional expense which that will entail. The Particulars of Claim do not identify the quantum of the damages or compensation claimed by the Respondents, but it seems reasonable to assume, given the costs which were incurred in relation to the original hearing of the Application, and given the costs which will already have been incurred in securing the dismissal of the Defamation Claim, that the economic justification for the Remaining Claims, as against the costs incurred and likely to be incurred, is at least open to question.

126. Nevertheless, I have concluded that the Judgment cannot stand, and that the position is such that there is no option but to send the parties back to the starting gate, in relation to the Application, so that the Application can be heard with the Amendment Application, and so that the issues raised by the Application can properly be addressed.

127. There is one other matter with which I should deal, for the sake of completeness, before I conclude my analysis of the Appeal. It will be recalled that, in his skeleton argument in response to the Appeal, Mr Phillis protested that the Amendment Application had been before the Judge at the Hearing. Mr Phillis criticised the way in which the Appellant's argument in support of the Appeal was presented, on the basis that it represented that there had been no application to amend before the Judge at the Hearing. Mr Phillis asserted that this was untrue, because the Amendment Application had been before the Judge. He pointed out that the Amendment Application was referred to in the transcript of the Hearing, and that the Amendment Application had been included in a supplemental bundle of documents which had been before the Judge at the Hearing.

128. I do not think that this protest was justified, for two reasons.

129. First, the protest seems to me to beg the question of what is meant by saying that the Amendment Application was before the Judge. The Amendment Application was before the Judge, in the sense that the Judge was plainly aware of the Amendment Application, from the outset of the Hearing, and in the sense that the Amendment Application was amongst the documents before the Judge at the Hearing. The Amendment Application had not however been listed for hearing at the Hearing. In that sense the Amendment Application was not before the Judge. Equally, the Amendment Application was not referred to in the argument before the Judge on the Application. The Amendment Application was not addressed by the Judge until the conclusion of the Hearing, when the Judge decided to adjourn the hearing of the Amendment Application to the costs and case management hearing which he had directed. There was, to state the obvious, no decision by the Judge on the substance of the Amendment Application. In all these senses, the Amendment Application was not before the Judge. In all these circumstances, I do not think that the way in which Mr Young framed the argument in support of the Appeal in his skeleton argument does justify the criticisms made by Mr Phillis in his skeleton argument in response to the Appeal.

130. Second, the protest seems to me to rest on a misconception which, in my view permeated much of the argument, on both sides, in relation to the Appeal. The protest, and much of the argument in the Appeal seemed to me to proceed on the assumption

that the Judge, in deciding the Application on the basis of a case which was not pleaded in the Particulars of Claim, had decided the Application on the basis of a case which was pleaded, in draft form, in the Amended Particulars of Claim. For the reasons which I have endeavoured to explain, it seems to me that this assumption is wrong. It seems to me that the Judge decided the Application by reference to a case which was not pleaded either in the Particulars of Claim or in the Amended Particulars of Claim. It is essentially for this reason that I have concluded that I have no option but to remit the Application for a rehearing.

131. If, by way of example, the Judge had decided the Application by reference to the case pleaded in the Amended Particulars of Claim, the position would have been different. On that hypothesis I could have made my own decision on whether the Judge was right or wrong in his decision on the Application. If I had concluded, on that hypothesis, that the Judge was right in his decision, this would have had obvious implications for the question of how to deal with procedural course taken by the Judge in relation to the Amendment Application. On that hypothesis, the question would have arisen of what useful purpose would have been served by overturning the Judge's decision on the Application, on the basis that the Judge had made his decision by reference to an unpleaded case, in circumstances where the unpleaded case was already the subject of an application to amend, and disclosed that the Remaining Claims (in their amended form) had a real prospect of success. On that basis, it might have been said that the *"dislocation"* of the Application and the Amendment Application complained of by Mr Berkley did not ultimately matter.

132. As I have explained however, the assumption which underlies the example given in my previous paragraph is not correct. In these circumstances, it seems to me that the complaint raised by Mr Phillis in his skeleton argument misses the essential point, which is that, in my judgment and for the reasons which I have endeavoured to explain, the Judge decided the Application by reference to a case which was not pleaded in the Particulars of Claim or in the Amended Particulars of Claim. It is in these circumstances that I have reached the reluctant conclusion that I have no option but to remit the Application to the Central London County Court, for rehearing.

<u>The outcome of the Appeal</u>

133. The outcome of the Appeal is as follows:
    (1) For the reasons which I have given, the decision of the Judge on the Application cannot stand, and must be set aside.
    (2) Paragraph 1 of the Order, by which the Application was dismissed, therefore falls to be set aside.
    (3) The Application is remitted to the County Court at Central London, to be heard with the Amendment Application.

134. In my judgment, it follows from the outcome of the Appeal that the costs order made by the Judge in paragraph 2 of the Order must also be set aside. I will need to hear counsel on the question of what order should be made in its place, in relation to the costs of the Application in the Central London County Court, up to and including the Hearing, I will also, of course, need to hear counsel on the costs of the Appeal.

135. So far as the remission is concerned, I will also need to hear counsel on the terms of the remission of the Application. It seems to me that the following two directions should

be given in relation to the remission, without prejudice to the question of what other terms may be required:

(1) It seems to me that the Application, as remitted, should be heard, with the Amendment Application, by a judge different to the Judge. It will be understood by all that I intend no disrespect to the Judge by a direction of this kind. It is simply the case that the Application requires to be heard afresh. Given that the Judge has already formulated his own views on the Application it seems to me, as would be the position in any other such case, that the remitted Application should be heard by a different judge.

(2) Given that the remitted Application needs to be heard with the Amendment Application, the parties may wish to separate the hearing of these two applications from the costs and case management conference directed by the Judge. In any event, the hearing of the two applications, whether or not incorporated into the costs and case management conference, requires a realistic time estimate which will allow proper consideration of the issues raised by the Application. I will not prescribe this revised time limit at this stage, but my provisional view is that the two applications, leaving aside the time otherwise required for a costs and case management conference, will require a time estimate of at least half a day, with an additional half day for judicial pre-reading.

136. I will also hear counsel further, as necessary, on all other matters consequential upon this judgment. In the usual way, the parties are encouraged to agree as much as they can, subject to my approval, in relation to the terms of the order to be made consequential upon this judgment.