Neutral Citation Number: [2023] EWHC 1094 (KB)

Case No: QB-2020-003598

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 May 2023

Before:

HIS HONOUR JUDGE AUERBACH
(sitting as a Judge of the High Court)

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Between:

C. CHRISTO & CO LIMITED	**Claimant**
- and -	
(1) NICHOLAS CHRISTOFOROU	**Defendants**
(2) ALEXANDER CHRISTOFOROU	

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Victoria Windle KC (instructed by **Pinsent Masons LLP**) for the **Claimant**
Dan McCourt Fritz and **Andrew Gurr** (instructed by **Herrington Carmichael LLP**) for the **Defendants**

Hearing dates: 20 and 21 February 2023

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APPROVED JUDGMENT

This judgment was handed down by the Judge remotely on 12 May 2023 by circulation to the parties or their representatives by email and release to The National Archives.

HIS HONOUR JUDGE AUERBACH:

Introduction

1 The claimant is a limited company which for many years owned and ran a business of estate agents, valuers, surveyors, and property managers, under the style of Christo & Co ("the business"). Part, at least, of the business was sold in August 2020. The claimant's sole shareholder at all material times was and is Christofer Christoforou, known as Chris. The defendants are his sons, known as Nicholas and Alex. Where appropriate, to avoid confusion, I will refer to them by those names.

2 The claim was issued on 13 October 2020. It is claimed that the defendants have wrongly appropriated and/or used copies of documents containing confidential information held by the claimant, and that there is a real threat that, if not restrained, they will misuse its confidential information in the future. The relief sought includes an injunction and an order for delivery-up of certain devices. Particulars of claim and a defence have been served, and a reply to a part 18 request relating to the defence.

3 This is my judgment on an application by the defendants, made by a notice of 31 October 2022, for an order striking out the whole claim pursuant to CPR 3.4(2)(b). The application is supported by a statement of Stephen Nicholas Baker, the solicitor with conduct of the defence. This identifies that the specific basis on which it is contended that the claim is an abuse of process is on the grounds that it is:

(1) vexatious, brought for the collateral purpose of harassing the defendants by forcing them to re-litigate stale allegations, and/or *Henderson v Henderson* abusive; further or alternatively

(2) out of all proportion to any substantial relief which Christo & Co might hope to obtain if successful (i.e. *Jameel* abusive).

4 The same application notice seeks, in the alternative, a cost-capping order and, associated with it, an order for security for costs. But pursuant to a case management order made by Master Thornett at a hearing on 24 November 2022, and sealed on 29 November, I have only heard, and am only adjudicating, the strike-out application. As contemplated by the master's order there is a statement from Chris, dated 20 January 2023, in opposition to the strike-out application, and a short reply statement from Mr Baker of 2 February 2023. Chris' statement was filed and served a day late, but at the start of the hearing I extended time by consent, with no order for costs.

5 It is common ground that in 2014 the marriage of Chris to the mother of Nicholas and Alex, known as Betty, broke down. Divorce proceedings began in October 2014. Around this time, and stating the matter neutrally, relations between Chris, on the one hand, and Nicholas and Alex, on the other, also completely broke down. It is common ground that Nicholas worked for some years for the business, and was a director of the claimant, until a date in December 2014. Alex for some years assisted the business on IT matters, although there is a dispute as to whether he was for all that time an employee, or in later years did so gratuitously. It is common ground that he ceased to work for the business at the end of October 2014.

6 Since 2014, apart from the divorce proceedings between Betty and Chris, there have been a number of other pieces of litigation involving Chris, Nicholas, Alex, the claimant, and/or one or more other companies associated with one or more of them. I will say something more about two of these pieces of litigation at the outset.

7 The first was a High Court claim begun by Chris in 2014, to which the defendants were Nicholas and Alex, alleging, among other things, harassment and misuse of private information. Those proceedings were defended and there was a counterclaim. Those are the Harassment Proceedings. Among other matters, they raised issues concerning a lap-top and hard drive, which Nicholas and Alex admitted to having in their possession, but ownership of which was disputed. In 2015 those devices were delivered up to their then solicitors, Mr Baker's former firm Boyes Turner, for safekeeping pending some final determination or agreement about them.

8 The second piece of litigation has been referred to as the Torriano Proceedings, or the Gracestone Proceedings. It concerned the disputed equitable ownership of a property of which the legal owner was Gracestone – a company controlled by Chris. Alex was the claimant. Chris and Gracestone were the defendants. It ran from August 2018 until it was substantively settled in June 2020 on the basis that Alex was the beneficial owner (although further aspects were not settled until January 2023).

9 Starting when the strike-out application in the present claim was issued, and in the run-up to the hearing before me, the parties traded open offers and counter-offers of settlement. At the start of day one, following a request from the claimant, I adjourned for a short time, to allow for further discussions. However, no agreement was reached and the substantive hearing then proceeded. I was copied in to a further open offer made during the course of the two-day hearing. Issues were raised in argument before me as to the bearing, if any, of these exchanges, on this application.

10 More about all of these matters later.

The Law

11 It is convenient at this stage to set out an overview of the essential relevant legal principles. I will return to some of the more specific points of legal argument later on.

12 CPR 3.4(2)(b) gives the court the power to strike out a statement of case, which therefore includes part or all of a claim, if it appears that it is an abuse of the court's process. The power is permissive, not mandatory. It may be exercised if there is an abuse, but the court must decide whether to do so, having regard to the overriding objective, and the fundamental nature of the sanction. In particular the court should consider proportionality, and whether the abuse can be sufficiently addressed by some lesser sanction in the given case. See, for example, the discussion in *Walsham Chalet Park Ltd v Tallington Lakes Limited* [2014] EWCA Civ 1607 at [44].

13 Abuse can take a number of distinct forms, which are given different legal names, though some interact or overlap. As Lord Sumption put it in *Virgin Atlantic Airways Limited v Zodiac Seat UK Limited* [2013] UKSC 46; [2014] AC 160, at [17]: "… the label tends to distract attention from the contents of the bottle."

14 In *Henderson v Henderson* (1843) 3 Hare 100, 115 Wigram VC said:

> "… where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time..."

15 The modern exposition of this form of abuse is to be found in the following passage in the speech of Lord Bingham of Cornhill in *Johnson v Gore-Wood & Co* [2000] UKHL 65; [2002] 2 AC 1.

> "But *Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

16 *Jameel* abuse takes its name from *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75; [2005] QB 946; but the relevant principles emerging from it, and from subsequent authorities, have more recently been captured by Nicklin J in *Harlow Higinbotham v Teekhungam and Perry* [2018] EWHC 1880 at [44] as follows:

> "i) The Court has jurisdiction to stay or strike out a claim where no real or substantial wrong has been committed and litigating the claim will yield no tangible or legitimate benefit to the claimant proportionate to the likely costs and use of court procedures: in other words, "the game is not worth the candle": Jameel [69]–[70] per Lord Phillips MR and Schellenberg -v- BBC [2000] EMLR 296, 319 per Eady J. The jurisdiction is useful where a claim "is obviously pointless or wasteful": *Vidal-Hall -v- Google Inc* [2016] QB 1003 [136] per Lord Dyson MR.
>
> ii) Nevertheless, striking out is a draconian power and it should only be used in exceptional cases: *Stelios Haji-Ioannou -v- Dixon* [2009] EWHC 178 (QB) [30] *per* Sharp J.
>
> iii) It is not appropriate to carry out a detailed assessment of the merits of the claim. Unless obvious that it has very little prospect of success, the claim should be taken at face value: *Ansari -v- Knowles* [2014] EWCA Civ 1448 [17] *per* Moore-Bick LJ and [27] *per* Vos LJ.
>
> iv) The Court should only conclude that continued litigation of the claim would be disproportionate to what could legitimately be achieved where it is impossible "*to fashion any procedure by which that claim can be adjudicated in a proportionate way*": *Ames -v- Spamhaus Project Ltd* [2015] 1 WLR 3409 [33]-[36] *per* Warby J citing *Sullivan –v- Bristol Film Studios Ltd* [2012] EMLR 27 [29]-[32] *per* Lewison LJ."

17 In *Alsafi v Trinity Mirror plc* [2018] EWHC 1954; [2019] E.M.L.R 1, however, while restating essentially the same guidance Nicklin J also added this:

> "44 At the heart of any assessment of whether a claim is *Jameel* abusive is an assessment of two things: (1) what is the value of what is legitimately sought to be obtained by the proceedings; and (2) what is the likely cost of achieving it?
>
> 45 But it is clear from *Sullivan* that this cannot be a mechanical assessment. The Court cannot strike out a claim for £50 debt simply because, assessed against the costs of the claim, it is not 'worth' pursuing. Inherent in the value of any legitimate claim is the right to have a legal wrong redressed. The value of vindicating legal rights – as part of the rule of law – goes beyond the worth of the claim. The fair resolution of legal disputes benefits not only the individual litigants but society as a whole."

18 Pursuit of litigation, not to vindicate a legal right but for some other illegitimate purpose, may also be a form of abuse. But the institution of proceedings with an ulterior motive is not enough. The following passage in *Broxton v McClelland* [1995] E.M.L.R. 485 at 497 – 498 explains why:

> "(1) Motive and intention as such are irrelevant (save only where 'malice' is a relevant plea): the fact that a party who asserts a legal right is activated by feelings of personal animosity, vindictiveness or general antagonism towards his opponent is nothing to the point. As was said by Glass JA in *Champtaloup v Thomas* (1976) 2 NSWLR 264, 271 (see *Rajski v Baynton* (1990) 22 NSWLR 125 at p.134):
>
> 'To impose the further requirement that the donee [of a legal right] must be actuated by a legitimate purpose, thus forcing a judicial trek through the quagmire of mixed motives would be, in my opinion, a dangerous and needless innovation.'
>
> (2) Accordingly the institution of proceedings with an ulterior motive is not of itself enough to constitute an abuse: an action is only that if the Court's processes are being misused to achieve something not properly available to the plaintiff in the course of properly conducted proceedings. The cases appear to suggest two distinct categories of such misuse of process:
>
> (i) The achievement of a collateral advantage beyond the proper scope of the action – a classic instance was *Grainger v Hill* where the proceedings of which complaint was made had been designed quite improperly to secure for the claimants a ship's register to which they had no legitimate claim whatever. The difficulty in deciding where precisely falls the boundary of such impermissible collateral advantage is addressed in Bridge LJ's judgment in *Goldsmith v Sperrings Limited* at page 503 D/H.
>
> (ii) The conduct of the proceedings themselves not so as to vindicate a right but rather in a manner designed to cause the defendant problems of expense, harassment, commercial prejudice or the like beyond those ordinarily encountered in the course of properly conducted litigation.
>
> (3) Only in the most clear and obvious case will it be appropriate upon preliminary application to strike out proceedings as an abuse of process so as to prevent a plaintiff from bringing an apparently proper cause of action to trial."

19 The court in *Wallis v Valentine* [2002] EWCA Civ 1034; [2003] E.M.L.R. 8, at [32], cited this passage, and added some further points, including that, at an interlocutory stage, where there is no cross-examination and the case is founded on a proposed inference, the test of collateral purpose must be an objective one.

The Claim

20 Nicholas and Alex have not applied for summary judgment. They accept that there are contested allegations in this case which could require a trial to resolve. They accept that, in deciding whether or not these proceedings are an abuse of process, I must assume the facts to be as pleaded in the particulars of claim.

21 The particulars of claim set out that the confidential information about which the claimant is concerned is said to relate to the operation of the business itself and to client case files relating to estate agency and estate management services. The defendants are said to have retained back-up tapes, the hard-drive and lap-top already mentioned, and an electronic copy of the whole or a substantial part of the claimant's server, thereby giving them the means to access and use its confidential information.

22 In support of the general contention that there is a risk of the defendants in fact wrongfully accessing or using the confidential information in the future, the claimant relies upon a number of allegations relating to various past events or episodes. These are said to support inferences that the defendants have accessed and misused confidential information stored by the claimant in the past, or might attempt to do so (again) in the future. These include, in summary, the following allegations:

(1) A letter from Chris to HMRC, that had been stored on the claimant's server or back-up tapes thereof, was disclosed in the matrimonial proceedings by Betty. It is suggested that this had been provided to her by the defendants;

(2) Over, I was told, a period from August 2019 to April 2020, Alex disclosed a large number of documents in the Gracestone litigation which had been stored on servers, or back-up tapes, belonging to the claimant;

(3) In litigation involving another company, Docklock, of which Nicholas is a director, he disclosed, over, I was told, a period from June to October 2020, a large number of documents which had been stored on the claimant's servers;

(4) In litigation in which a third party company claimed a referral fee from the claimant, Nicholas gave evidence in which he referred to an email on the claimant's servers;

(5) Nicholas informed a client of the claimant, who was sued by it for a commission, of documents which it is suggested he would not have known about at the time, or could not possibly have recalled just from memory;

(6) Nicholas provided information about a certain property transaction in which he had not been involved, and the details of which it was implausible that he would recall without accessing the documents on the claimant's servers;

(7) Reference is made to judges in various litigation questioning the reliability of credibility of the evidence of Nicholas and/or criticising his motives; and

(8) There has been litigation relating to what is said to have been an improper attempt by Nicholas to use trademarks incorporating the "Christo" name in his own real estate business.

The Defendants' Headline Points

23 Mr McCourt Fritz identified eight headline points which then provided a menu from which he drew in respect of each strand of abuse. These were as follows.

24 The first was what he said was delay and the extreme staleness of the proceedings. The most recent document said to have been misused in the past dated from 2015. These proceedings were not begun until October 2020, but at that point were kept under wraps. The Harassment Proceedings, which included a claim for breach of confidence, were begun in 2014. For some years they were inactive. On 24 November 2020 the defendants complained of abusive warehousing of them. In response in December Chris tabled draft amended particulars of claim (APOC) in the Harassment Proceedings. Then, in January 2021, the defendants applied to strike them out. The particulars of claim in the present proceedings were only then served on 10 February 2021 and Chris only then actually applied to amend the Harassment Proceedings on 26 February. Just before the hearing of the strike-out application in March 2021 the Harassment Proceedings were settled. Since then the present proceedings have themselves made only limited progress.

25 The second point was the context of the protracted bitter family feud, from 2014 onwards, including multiple litigation, and Chris' prior conduct in relation to some of those proceedings. This context supported the natural inference that Chris had caused the claimant to commence the present proceedings when he had no other stick left with which to beat the defendants, which pointed to a collateral-purpose abuse.

26 The third point was the factual overlap between matters relied upon in the APOC in the Harassment Proceedings, and the matters relied upon in the present claim as founding the claimed fear of future wrongful conduct. A telling slip, he submitted, was that the claimant's EDQ in the present proceedings used some search terms which were only relevant to the Harassment Proceedings.

27 The fourth point was that the claimant had failed to identify any specific document that was, and is still, confidential, to which the defendants have access, and which it feared might be wrongly used. Its pleading was entirely vague and general. The fifth point was the limited subject matter of the claim. The claimant had identified a limited number of repositories from which the defendants might obtain documents, and the most recent document contained in these dated from 2015.

28 The sixth headline point was that the claimant had not sought interim relief, or anonymisation, or a private hearing. This was a reflection of the inherent weakness of the claim that information, relating to an estate agent and property-management business, that is now at least eight years old, is still confidential and of significance.

29 The seventh headline point was that the claimant was litigating this matter disproportionately, having regard to all the earlier points, the fact that it had issued in the High Court, and combined costs budgets in the region of £1.5m provided for such matters as forensic examination of the hard drive and laptop, which it had now been agreed in open correspondence was not required. Mr McCourt Fritz relied also on the fact that the claimant's part 18 request in response to the defence had included 184 requests, and on the length of Chris' witness evidence in response to this application.

30 Finally, Mr McCourt Fritz referred to the correspondence about settlement. When this strike-out application was made, in October 2022, the defendants also made an open offer. The claimant had not responded until January 2023. By the start of this hearing, the parties

had reached complete agreement on the terms of undertakings which the defendants were prepared to give, and the claimant to accept, to resolve this claim. But they were apart on costs. The claimant sought a costs contribution of £100,000, then £80,000, then, at the end of day one, £75,000. The defendants' position was, and remained, that there should be no costs order.

31 Mr McCourt Fritz submitted that no inference should be drawn from the fact that the defendants were willing to give undertakings in the context of settlement, without admission. However, he also submitted that the intransigence of the claimant on the question of costs was symptomatic of Chris' unreasonable approach to this litigation, and supported his clients' case that this claim is abusive.

***Henderson v Henderson* abuse**

32 The central plank of the defendants' case on this form of abuse is that the factual allegations made in the present claim, about the defendants' past conduct, and said to form the basis for the claimant's fear as to their future conduct, have been raised in previous proceedings, and are now being recycled. In his evidence Mr Baker refers specifically to the Torriano Proceedings and the Harassment Proceedings.

33 I can deal shortly with the Torriano Proceedings. I have briefly described their nature and parties already. In the course of them Chris sought to pursue an amendment to his defence and counterclaim which did indeed seek to raise a number of factual allegations which are the same as those now relied upon by the claimant in the present claim. But that amendment was struck out by a judge, on the basis that those allegations were essentially irrelevant to the core issues in that case.

34 Ms Windle KC submitted that it therefore cannot be said that the factual allegations in the present claim both could and should have been pursued in the Torriano proceedings. While he relied on Chris' conduct in the Torriano Proceedings in other ways, Mr McCourt Fritz did not seek, in his skeleton or oral submissions, to gainsay that logic; and on this point I indeed agree with Ms Windle KC.

35 Rather, Mr McCourt Fritz relied, in respect of this strand of abuse, on the Harassment Proceedings. Precisely the same factual allegations as are advanced by the claimant in the present claim were advanced by Chris in the draft APOC in those proceedings. The attempt to pursue them again in the present proceedings was therefore, he submitted, as clear an instance of this type of abuse as there could be.

36 Mr McCourt-Fritz submitted that it is no answer that the Harassment Proceedings were brought by Chris personally, given that the factual allegations are the same, and that he owns and controls the claimant; and given that, in the APOC, some of the conduct was said to have damaged the claimant as well as Chris. Further, Chris had at an earlier point mooted that the claimant might apply to join in the Harassment Proceedings. Further, prior to the Harassment Proceedings settling, the defendants had applied to strike them out, but had also indicated that if that application did not succeed, they would not oppose Chris's amendment application.

37 It was also no answer that the Harassment Proceedings were settled before the amendment application was determined. The guidance given by Thomas LJ in *Aldi Stores Limited v WSP Group plc* [2007] EWCA Civ 1260; [2008] 1 WLR 748 at [29] – [31], further discussed in *Clutterbuck v Cleghorn* [2017] EWCA Civ 137 at [74] – [82] was in point. If

the claimant wished to pursue a claim arising from the same matters as Chris had raised in the Harassment Proceedings, it had a duty to put its cards on the table and proactively raise the matter with the court. So it was also not an answer to say that the defendants might have objected to the claimant joining in. Further, as the factual allegations were the same, and the claimant was Chris' alter ego, joinder would not have materially affected the Harassment Proceedings.

38 My conclusions as to whether this is an appropriate case for strike out on *Henderson v Henderson* grounds by reference to the Harassment Proceedings follow.

39 First, the fact that the claimant in the present proceedings is not Chris, but a separate limited company, does not automatically preclude a finding of this type of abuse by reference to the Harassment Proceedings, given that Chris owns and controls the claimant. As discussed by Lord Bingham of Cornhill in *Johnson v Gore-Wood* itself, to take such a formalistic approach would be contrary to the purpose of this doctrine, and the mischief at which it aims.

40 Secondly, I also agree with Mr McCourt Fritz that it is not an automatic answer, as such, to this way of putting the complaint of abuse, that the application to introduce the APOC had not been adjudicated, at the time when the Harassment Proceedings had been compromised, and hence that there was no live complaint relying on the allegations in the APOC that was itself thereby compromised. That only means that the particular doctrines which may be invoked where a previous live pleaded complaint *has* been adjudicated by the court or compromised, could not be invoked in this case. But it is not an impediment to *Henderson v Henderson* abuse being alleged.

41 I note for good order that, subsequent to the hearing before me, the Court of Appeal promulgated *Warburton v Avon and Somerset Constabulary* [2023] EWCA Civ 209, holding that it is not an answer to a *Henderson v Henderson* application to say that the doctrine can have no application if complaints were the subject of an amendment *application* in earlier litigation, as "not raised" means not pleaded. I have not thought it necessary to invite further submissions on *Warburton*, because the court there rejected Mr Warburton's novel argument for the existence of such a new category of case, to which neither *res judicata* nor *Henderson v Henderson* abuse could apply, as contrary to established authority, and the rationale of the principle.

42 As Mr McCourt Fritz also fairly submitted, had the Harassment Proceedings not been compromised, Chris would have been able to take forward the allegations in the APOC as part of his pleaded case in those proceedings, because the defendants had, prior to the settlement, indicated that the application to amend would not be opposed.

43 But these considerations, and factual features, are not, by themselves, necessarily sufficient to show that the present proceedings amount to a *Henderson v Henderson* abuse. The court must, in every case, be satisfied that the complaint that is said to be abusive *could* have been pleaded as part of the earlier proceedings, and, if so, that in all the circumstances, it *should* have been so raised, taking a broad merits-based approach. As also emphasised by Lord Millett in *Johnson*, when considering this, the court needs to keep in mind that, whereas other forms of *res judicata* may operate so as to prevent a party seeking to reopen or rerun allegations that *have* previously been adjudicated or compromised, *Henderson v Henderson* abuse, where made out, entails a party being prevented from litigating a matter, which has *not* previously been adjudicated or otherwise determined.

44 In this case it is pertinent that, although the causes of action relied upon in the Harassment Proceedings when instigated in 2014 included breach of confidence, the principal allegations relied upon in those proceedings, when they were begun, were of a different character, including allegations of use of spyware and hacking of Chris' mobile phone, and so forth, with a central theme being infringement, or threatened infringement, of his personal rights to private and family life; and a number of causes of action were asserted. The factual conduct relied upon in support of the present claim also occurred in point of time after the Harassment Proceedings were instigated.

45 The defendants, however, point to the fact that in 2015 Chris indicated that he was contemplating applying to join the claimant in the Harassment Proceedings, and what they say is the almost total factual overlap between the factual allegations underpinning the APOC in the Harassment Proceedings, advanced in 2020, and the particulars of claim in the present claim; further, the former included at least one allegation of use of the claimant's confidential information as well as that of Chris.

46 However, I agree with Ms Windle KC that, while the particulars of claim in the present case do draw almost entirely on the same factual and circumstantial allegations *in support*, the proposed APOC in the Harassment Proceedings would not have served the purpose of protecting the confidential information of the claimant, including that of its business and its clients; and, in that sense, there is a meaningful difference between the two matters. While Chris controls the claimant it cannot be said that it has no protectible information distinct from his own. So, while they draw on the same factual material, it cannot be said that the present proceedings are, in their substance, a pure duplication of the APOC in the Harassment Proceedings.

47 It is said that, nevertheless, Chris could – and should – still, instead of causing the claimant to bring the present claim, have caused it to apply to join in the Harassment Proceedings, adding the complaints that have in the event in fact been brought in the present claim to those that were being brought by him in those proceedings. Alternatively, given that these proceedings were nevertheless separately issued in October 2020, he could and should then at least have sought to have the two sets of proceedings tried together. Mr McCourt Fritz submitted that, in substance, this approach would have added little to the issues, costs and time entailed by the Harassment Proceedings alone, and the onus was on Chris to take such steps.

48 Ms Windle KC maintained that this wrongly focussed just on the factual overlap between the matters relied upon in the APOC and in the present complaint. The substantive distinction between the factual and legal complaints raised by Chris in the original unamended Harassment Proceedings, as well as between the relief sought by him in the APOC, and the complaints raised by the claimant, and the relief sought by it in the present claim, suggested that it was not obvious that all elements of both sets of proceedings should or would have been joined together. Another view might have been, for example, that it would be more efficient to combine the APOC with the present proceedings, rather than with the original Harassment Proceedings.

49 I see force in Mr McCourt Fritz's contention that, if all three had gone forward – the original pleaded Harassment Proceedings, the APOC and these proceedings – the most efficient way forward would have been to try all three together. But, on that scenario, had the Harassment Proceedings continued, it would have been open to the defendants, as much as to Chris / the claimant, to apply for orders to bring that about. Importantly, it is not the case that

Chris only brought the present claim forward for the first time *after* the Harassment Proceedings had been compromised. While the defendants were not made aware of it when it was issued in October 2020, the particulars of claim were served in January 2021. The draft APOC in the Harassment Proceedings had been tabled in December 2020, and the application to amend to introduce them was then made in February 2021. So the defendants *were* aware of the present proceedings, their content, and the factual overlap with the proposed APOC in the Harassment Proceedings, before the Harassment Proceedings settled.

50 So, in my judgment, the defendants cannot rely on the claimant having ambushed them, by failing to put its cards on the table in the *Aldi Stores* sense, prior to the Harassment Proceedings being settled. Though I know nothing of what may have been discussed on a without prejudice basis, it would have been open to any party to decline to settle the Harassment Proceedings alone, without the present proceedings also being settled at the same time. What I also have been told is that the Harassment Proceedings were settled on the basis of mutual undertakings by Chris and the defendants not to assault or harass one another, and not to use personal confidential information of the other to which each had certain access.

51 It seems to me that both parties opted to settle the Harassment Proceedings knowing of the existence, and substance, of the present claim, and that it would not be disposed of by that settlement. Both sides were able to make an informed judgment as to whether, nevertheless, settling the Harassment Proceedings, as they both did, on the terms that they did, while leaving the present litigation as live and unfinished business, was a worthwhile thing to do, and a step forward in its own right.

52 Having regard to all those circumstances, the claimants have not persuaded me that the *Henderson v Henderson* basis for striking out this claim is made out.

Vexatious Conduct / Collateral Purpose Abuse

53 Mr McCourt Fritz drew on a number of strands of his headline points in support of this ground, in particular: the context of the bitter family dispute, including instances in other litigation of severe criticism by the courts of Chris' conduct; the claimant's service of 184 part-18 requests in the present litigation while at the same time failing to identify any particular confidential documents at risk; the delay in pursuing these proceedings and their overlap with the APOC in the Harassment Proceedings; the minimal relief which, he submitted, the claimant could hope to gain.

54 All of this, he submitted, supported the inference, applying an objective test, that the purpose of these proceedings is simply to harass and vex the defendants.

55 My conclusions on this strand of alleged abuse are as follows.

56 First, as to other litigation, I was shown examples of the court severely censuring certain conduct of Chris related to the financial and property aspects of the matrimonial litigation, but also on occasion in other litigation passing adverse comment on Nicholas. I was told something about each of a number of pieces of litigation outside of the matrimonial proceedings: who brought them, against whom, about what, and how they turned out. It is not necessary to set out all the details here. The picture which emerges does not show an overwhelming pattern of litigation being solely initiated by Chris or the claimant, or them doing so vexatiously. They were by no means the claimants in all or the overwhelming

majority of claims, and in those in which they were, they achieved some, albeit varying, measure of success.

57 The picture here is therefore not of the one-sided behaviour of a single obsessive, persistent and misguided litigant, who will simply not desist from unmeritorious litigation unless restrained. Rather it is another kind of picture that is also sadly familiar to the courts, that of matrimonial and associated familial breakdown in a family with valuable and complex interests and assets, whose affairs require orderly disentanglement, but, because of the bitterness of the dispute, and the division of the family into opposing camps, are incapable of amicable resolution.

58 In light of that context, whilst the matrimonial litigation has been marked by instances of conduct on the part of Chris that has been severely deprecated by the court, that does not show, in itself, that the present claim by the claimant, which Chris controls, could not and plainly does not have any objective legitimate purpose.

59 In so far as the defendants say that aspects of the claimant's approach to this litigation, such as the voluminous part-18 questions, have been disproportionate, the court has the tools to manage that, and this criticism does not, in my judgment, as such, make good the qualitatively different charge of collateral-purpose abuse. The court also has the tools to manage abusive delay or inactivity. So far as the recent exchanges on open offers are concerned, I do not agree that the claimant's stance on costs should be treated as indicative of a collateral purpose.

60 Further, the authorities are clear that the presence of mixed motives would not by itself be enough to warrant a strike-out on this ground, if the proceedings do have a proper basis; and as I will describe in the next section, I do not accept that the claim is, in practice, entirely pointless and could not objectively have a legitimate purpose.

61 For all of these reasons, this basis for the application does not get home.

Jameel *abuse*

62 In respect of this form of abuse Mr McCourt Fritz highlighted the following from his menu of headline features. No claim for damages is pursued. While I must take the facts to be as pleaded by the claimant, I am, he submitted, able to assess whether they would support the inferences that it invites the court to draw from them, as to there being a threat of future misuse of the claimant's confidential information. Bearing in mind a number of features, such as that much of the past conduct relied upon related to information concerning, not the claimant, but other companies or Chris individually, there was no credible threat. Consistently with that, no interim relief had been sought and no specific documents have been identified as of concern.

63 The most recent document at stake dates from 2015. The lap top and hard drive (which I will call together the devices) are ancient and have no intrinsic value. Although the relief sought originally included interrogation of the devices, whether there was a proper juridical basis for this was at best doubtful. In any event, it had not been pursued in the open correspondence, nor had the remedy of delivery up. Instead, the agreed undertakings simply provide for the devices to be kept in independent custody, with no party having access to them except by consent or further order.

64 Given all of that, the prospects of the claimant obtaining any significant injunctive relief at trial were, he submitted, poor in the extreme. In any event, High Court litigation entailing combined budgeted costs of some £1.5m was plainly grossly disproportionate to the minimal, if any, relief that the claimant could hope to gain.

65 My conclusions in relation to this basis of the application follow.

66 First, I do not consider that I am in a position to say, upon this interlocutory application, that the claimant has no legitimate claim to relief that it should be permitted to pursue at all. True it is that the defendants have a number of points on which they can seek to rely in resisting the grant of injunctive relief following a trial, including the absence of interim relief having been granted, or even sought, the passage of time, even when measured from the date of the last conduct relied upon, and the vintage of the most recent document that might be protected. These are all, potentially, highly relevant to the prospects of it obtaining injunctive relief at trial.

67 Yet true it also is that the defendants have not applied for summary judgment because they accept that there are factual disputes that could only be resolved at a trial. In particular, though counsel before me differed about whether the pleadings should be read as including any admission of copying by the defendants, as alleged in the particulars of claim, it appears that there have been at least partial admissions by them that the devices, which, prior to being placed in the custody of solicitors, were admittedly in their possession, contain some information belonging to the claimant, relating to its or its clients' affairs which, at least at one time, was confidential; and it is not denied, or beyond arguability, that they had the *means* to make or use copies.

68 The claimant has also advanced a case as to why the intrinsic nature of some of this information, relating both to its own business, and to the property affairs of its clients, is such that at least some of it would still remain confidential and protectible today, and notwithstanding the recent sale or licensing of part of its business to a third party. It has also advanced a case that various developments in other litigation in a period from roughly 2016 to October 2020 support an inference that copies of documents, or information stored by the claimant, have been made and/or used by the defendants. I do not think I am equipped on this interlocutory application to conclude that there could be no sufficient factual basis for such an inference.

69 The defendants point to the fact that, in open correspondence, the parties have, in principle, agreed terms in relation to the future preservation and control of access by either side to the devices, such that they would not need to be interrogated, and whereby the defendants would undertake not to use or disclose confidential information belonging to the claimant obtained from them, or other relevant repositories used by the claimant at one time or another. Mr McCourt Fritz submits that there is no further relief which the claimant could realistically hope to obtain.

70 The difficulty with that argument, however, is that, even if that is a fair assessment, because the parties have not agreed the position in relation to costs, such terms have not yet in fact been bindingly agreed, and such undertakings have not yet in fact been given; nor do I think that the relief which is contemplated by those terms could be said itself to be of such obviously limited or trivial value to the claimant so as to make good the application for a strike-out on the basis of *Jameel* abuse, on that footing alone. It is meaningful relief and a

significant part of what is sought. As I have said, I do not agree that the fact that the parties have not agreed terms on costs is indicative of abusive conduct by the claimant.

71 Further, this is not a case where there is no proportionate procedure by which the claim can be managed and adjudicated. The court has the power to exert controls on the costs which may be incurred or recovered by either party. The next order of business indeed, if I refuse this application, is for the master to consider an application for a costs cap as well as for security for costs. The court also has the power to direct a transfer to the County Court. In considering what orders to make the court also does not have to ignore the features of the common ground that the parties have reached in open correspondence, albeit without admission, and though they have not agreed an overall settlement. I do not think the court is obliged to, or should, ignore correspondence which the parties have placed in front of its eyes.

72 I therefore conclude that it would not be appropriate for me to grant the strike-out application on the basis of *Jameel* abuse. But nor should the parties assume that the court will allow this litigation to continue to be conducted in the High Court on the basis of the *status quo* as to costs budgets and costs management. The way forward in that regard now requires proactive consideration by the parties and the court, taking account of the most recent developments and my present decision.

Outcome

73 For all the foregoing reasons, I am not persuaded that this application for a strike-out order is made out, by reference to any of its three strands, whether viewed individually or cumulatively. It is therefore refused.

74 Following circulation of this decision in draft under embargo, counsel made written submissions on the question of costs, which I have considered. In light of the outcome, I am directing that the defendants pay the claimant's costs occasioned by the strike-out application. The claimant claims £100,804.23; the defendants have tabled wide-ranging objections which, if accepted in their entirety, would result in an award of £29,112.92. Having regard to the length of the hearing, the amount claimed, and the extensive points of dispute, I am directing a detailed assessment. The claimant has sought a payment on account of £80,000. The defendants have proposed £32,950.79. Having considered the submissions, and what would be a reasonable amount, I am directing a payment on account of £50,000.