[2024] EWHC 2803 (KB)

Case No: KA-2023-000101

IN THE HIGH COURT OF JUSTICE
HIGH COURT APPEAL CENTRE, ROYAL COURTS OF JUSTICE
ON APPEAL FROM THE CENTRAL LONDON CIVIL JUSTICE CENTRE
ORDER OF HHJ SAUNDERS DATED 7 DECEMBER 2022; 2 JUNE 2023
COUNTY COURT CASE NO: F15YM639
APPEAL REF: KA-2023-000101

Royal Courts of Justice
Strand, London, WC2A 2LL

6 November 2024

Before :

MR JUSTICE GRIFFITHS

- -

Between :

EUI LIMITED (t/a Admiral)	**Third Defendant / Part 20 Claimant / Respondent to appeal**
- and -	
VAUGHN SMITH	**Second Part 20 Defendant / Appellant**

- -

Robert Weir KC (instructed by DBTR Legal Services Ltd) for the Appellant
Derek O' Sullivan KC (written submissions only)
and **Paul Higgins** (written and oral submissions)
(instructed by Horwich Farrelly Solicitors) for the Respondent

Hearing date: 14 October 2024

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Approved Judgment

Mr Justice Griffiths:

1. This is an appeal against the refusal of an application to strike out a Part 20 claim or to enter reverse summary judgment against the Part 20 claimant under CPR Part 24. There is also an application by the respondent for permission to re-amend the Part 20 Particulars of Claim.

2. The appellant is Mr Vaughn Smith ("Mr Smith"), who prepared a report dated 29 August 2018 ("the Report") which stated, among other things, that a motorcycle ("the Motorcycle"), which had been involved in an accident on 17 August 2018, was "Beyond Economical Repair". The Motorcycle was a Honda SH125 model, with a relatively small 125cc engine. Photographs in the papers show that it was shaped like a scooter, with a floorboard for the driver's feet to rest on.

3. The motorcyclist (Mr de Souza) in September 2019 sued the driver said to be responsible for the accident (Mr Claydon). Mr Claydon was the First Defendant. The motorcyclist also sued the insurers of the Mr Claydon's car (the Second and Third Defendants). Of those, the only one I am concerned with is the Third Defendant, EUI Ltd, which was successful in resisting the applications in the court below and is now the respondent to this appeal ("EUI").

4. EUI brought a Part 20 claim against Mr Smith in March 2022. The Part 20 Claim Form said that the Report was "dishonest". The case was pleaded in a single document entitled "Amended Counterclaim / Part 20 Particulars of Claim" dated 8 March 2022 ("the Part 20 Particulars of Claim"). The Part 20 Particulars of Claim allege that the contact between the driver and the Motorcycle and its rider was "benign and glancing in nature", the driver "remaining upright and in control" after the car had pulled out from a parked position. They say that the Motorcycle "suffered no significant damage" and remained "driveable". They allege that the Report was "created dishonestly, with the intention that the scooter be declared undriveable even though it was driveable". They claim against Mr Smith for "the tort of deceit" and for "the tort of unlawful means conspiracy" with the motorcyclist.

5. Mr Smith applied on 21 June 2022 to strike out the Part 20 claim against him pursuant to CPR 3.4 and further or alternatively for summary judgment against EUI under CPR Part 24. That application was heard by His Honour Judge Saunders in the County Court at Central London on 7 December 2022. In a reserved judgment on 20 April 2023 ("the Judgment"), he dismissed both applications. By an Appellant's Notice dated 6 June 2023, Mr Smith appealed. On 18 January 2024, Mr Justice Martin Spencer refused permission to appeal, giving detailed reasons. Mr Smith renewed his application for permission at an oral hearing before Mr Justice Mould who granted the application and gave permission to appeal on 20 March 2024. On 12 August 2024, EUI filed an application to amend the Part 20 Particulars of Claim which, like the appeal, has come before me.

6. Mr Smith's efforts (so far unsuccessful) to get rid of the claims against him at the outset have meant that there has been no progress beyond the pleadings stage. There has been no mutual or full disclosure and no exchange of witness statements. No directions have been given towards a trial of the Part 20 proceedings, which are now the only proceedings in this matter.

The Report

7. Mr Smith's Report was on a two-page form, which he had completed with various details in order to constitute the Report.

8. The Report was headed: "Evans Harding Engineers (CG) Ltd", and subtitled "Consulting engineers & claims assessors", "Theft & claims investigation service". It was signed by Mr Smith in his own name.

9. On an additional sheet which went with the Report, Mr Smith completed an "Expert's declaration" which said that he understood that his duty "in providing written reports and giving evidence is to help the Court" and that he understood that "My report will form evidence to be given under oath or affirmation". It referred to the "Protocol for Instruction of Experts to give Evidence in Civil Claims" in CPR Part 35.

10. The Report was addressed to "Professional and Legal Services Ltd" ("PALS").

11. The Report stated as follows:

    i) The "Accident Date" was given as 17 August 2018. The "Inspection Date" was given as 29 August 2018 (and the Report was typed the same day).

    ii) Mr de Souza (the driver of the Motorcycle) was identified as the "Insured" and his Motorcycle (the subject of the Report) was identified by make, model, registration number, colour and other details.

    iii) "General Condition" was entered as "Beyond Economical Repair".

    iv) Pre-Accident Value was given as £615. This was based on Glass's Guide and took account of three incidents of "Total Loss", dated in 2013, 2016 and 2017 respectively.

    v) "Pre-Accident Damage" was noted as "Scratches Off Side".

    vi) "Impact Severity" was noted as "Moderate". "Impact Location" was noted as "To The Near Side". A birds-eye view of a generic motorcycle showed four diagonal arrows pointing to that side, along the whole length of the saddle (about two thirds of the length of the generic motorcycle illustrated).

    vii) Static checks were recorded as: steering "Satisfactory", brakes "Satisfactory" and "Roadworthy: Undriveable".

    viii) The Report form included space for the listing of "New Materials", "Repairs" and "Specialist Charges". The only section completed was for "New Materials" into which Mr Smith had inserted seven items, as follows:

        a) Centre Stand.

        b) NS Belly Pan (i.e. near-side belly pan).

        c) NSR Seat Fairing (i.e. near-side rear seat fairing).

d) NS Engine Case (i.e. near-side engine case).

e) Engine Case Gaskets.

f) NS Pannier (i.e. near-side pannier).

g) Air Box.

ix) Under the heading "Estimated costs", Mr Smith entered £315 for "Estimated Labour" and £470 for "Estimated Parts", making an "Estimated Total" of £785, and leading to a figure for "Repair Inc. Vat" of £942.

x) The Report then stated "This vehicle has been found to be: Beyond Economical Repair."

xi) The Report, finally, stated a Pre-Accident Value (PAV) of £615, a salvage value of £10 and a settlement figure of £605.

xii) Mr Smith signed the Report with his name and the post-nominal letters Aff.I.M.I. (Affiliate Member of the Institute of the Motor Industry) which I was told in argument is a form of membership open to all-comers, regardless of qualifications.

The original proceedings

12. The motorcyclist's claim against the driver began with a Claim Form dated 12 November 2019. An order of the court on 29 July 2020 both joined EUI to the proceedings as Third Defendant and gave leave to the motorcyclist to amend his Particulars of Claim.

13. His Amended Particulars of Claim dated 12 August 2020 referred to the accident on 17 August 2018, and claimed:

> "for damage sustained to their vehicle as particularised in the engineering evidence attached hereto".

The evidence attached was the Report. The Amended Particulars of Claim continued:

> "The damage to the Claimant's vehicle was estimated at £942.00 and the vehicle was unroadworthy as a result. The Claimant's vehicle was deemed to be uneconomical to repair and so was written off with a net pre-accident value of £605.000".

Those details were supported, as summarised above, by the Report.

14. The Amended Particulars of Claim then claimed special damages. The lion's share of these consisted of credit-hire charges of over £89,000, which continued indefinitely because of the motorcyclist's position (supported by the Report) that the Motorcycle was undriveable and beyond economic repair. The motorcyclist's case was that he could not afford to do without a motorcycle (because he worked as a courier) and was "impecunious as to the payment of the cost of repair or replacement of his motorcycle". His claim for special damages was as follows:

> "PARTICULARS OF SPECIAL DAMAGES
>
> Hire £89,876.72
>
> Recovery and Storage £923.00
>
> Pre-accident value £605.00
>
> Damaged top box £50.00
>
> Miscellaneous Expenses £50.00
>
> Please see attached Engineers report dated 29 August 2018."

15. The attached "Engineers report dated 29 August 2018" was the Report of Mr Smith already referred to.

16. The claimant was given leave to rely on Mr Smith's expert evidence, in the form of his Report, by order dated 2 October 2020.

17. Having been newly joined as Third Defendant, EUI filed a Defence and Counterclaim on 1 September 2020. It did not admit Mr Smith's Report and added "The Claimant is required to disclose all photographs of the moped". Those photographs were eventually disclosed on 14 January 2021.

18. On 29 January 2021, the motorcyclist updated his Schedule of Loss, dropping the claim for "Recovery and Storage £923", but maintaining the claims for hire (£89,876.72), Pre-accident value (£605), Damaged top box (£50) and Miscellaneous Expenses (£50).

19. On 12 February 2021, EUI served a Counter Schedule which accused both the motorcyclist and Mr Smith of fraud. At paras 3-7, the Counter Schedule said:

> "3. As set out herein, the Claimant's claim is a fraud – committed either by the Claimant, or his instructed expert, or both. There is no proper basis for the averment that the vehicle was damaged in the accident beyond economic repair, or that the vehicle's performance was altered such that it was undriveable as the Claimant alleges in his witness statement. The Claimant cannot have an honest belief in the averment that he is entitled to credit hire damages of £89,876.72, or to the pre-accident value of the vehicle.
>
> 4. The Third Defendant will seek an Order at trial that the claim is dismissed on the basis that it is fundamentally dishonest.
>
> 5. In advance of the trial, the Third Defendant will seek a direction that the Claimant's expert engineer give oral evidence at the final hearing, so that the serious charge of dishonesty and/or reckless disregard of his duty to the Court can be put to him, and appropriate findings made accordingly.

> 6. Should findings of dishonesty be made against the Claimant, or his expert, or both, then the Third Defendant will seek a direction that the trial Judge refer the matter to the Attorney General for consideration as to whether proceedings for contempt of Court should be brought against the Claimant, or his expert, or both.
>
> 7. Should findings of dishonesty or recklessness be made against the expert, the Third Defendant will additionally seek a non-party costs order against him personally."

20. The Counter Schedule of February 2021 also said, at paras 18-19 and 21:

> "18. (…) no properly competent honest expert can properly have opined that the accident resulted in damage to the vehicle's centre stand, nearside rear fairing, airbox, nearside lower fairing and crankcase cover (as opined by Mr Smith in his 29th August 2018 report). In the premises of the aforesaid, the only potentially implicated components of the vehicle were the top box, and perhaps the handlebar.
>
> 19. In the premises, the Third Defendant's case at trial will be that Mr Smith has:
>
> 19.1. Dishonestly asserted that the vehicle was undriveable; or
>
> 19.2. Definitively asserted that the vehicle was rendered unroadworthy in the accident, without having properly investigated the matter, in reckless disregard of his duty to the Court.
>
> (…)
>
> 21. The Third Defendant will shortly disclose expert engineering evidence in support of the aforesaid averments in relation to the damage which can conceivably have been suffered by the vehicle in the accident. (…)"

21. On 13 April 2021, the motorcyclist discontinued his proceedings against the driver and EUI. This meant that he was, not only abandoning his claims, but also losing his CPR 44.14 Qualified One-Way Costs Shifting (QOCS) protection. As a result of discontinuance, he would have to pay EUI's costs of the discontinued action without restriction (and the claimant confirmed this at a hearing before HHJ Saunders on 21 April 2021).

22. However, since EUI had a Counterclaim against Mr de Souza, this did not bring the action entirely to an end.

The EUI pleadings subject to this appeal

23. On 8 March 2022, EUI issued its Part 20 Claim Form against Mr Smith. This is one of the documents Mr Smith wishes to strike out in this appeal. The "Brief details of claim" on the Part 20 Claim Form said:

> "A claim for exemplary damages, damages and a declaration arising out of the Third Party writing a dishonest expert's report relating to damage supposedly caused to the motorcycle index LB13 VPX on 17th August 2018 whilst being ridden by the Claimant when it was in collision with a motor vehicle (…) driven by the First Defendant".

24. On the same day, 8 March 2022, EUI served an Amended Counterclaim (against the motorcyclist) and Part 20 Particulars of Claim (against Mr Smith). This is the other document Mr Smith wishes to strike out, insofar as it concerns the Part 20 claim against him.

25. It was a single, undivided document (that is, there was no internal heading showing a division between paragraphs dealing with the Amended Counterclaim against the motorcyclist and paragraphs dealing with the Part 20 claim against Mr Smith).

26. The Part 20 Particulars of Claim made the following averments of fact:

    i) When the accident occurred, there was contact between the offside door mirror of the car and the motorcyclist and/or the Motorcycle (para 4). The contact was "benign and glancing in nature".

    ii) The Motorcycle suffered "no significant damage" (para 4).

    iii) The Motorcycle "was driveable" after the accident (para 4).

    iv) Mr Smith's Report stated the Motorcycle "was undrivable" (para 8.a.).

    v) The Report also stated that "Seven new parts were required to put the [Motorcycle] back into its pre-accident position" (para 8.b.). These parts were then listed, as in the Report (see para 11.viii) above).

    vi) The Report stated that the Motorcycle "was an economic write off" (para 8.f.).

    vii) Mr Smith's Report and the photographs disclosed by the claimant in January 2021 had been analysed by a forensic engineer instructed by EUI, Mr Charles Murdoch, and his report was annexed to the statement of case (para 12).

    viii) Mr Murdoch's report had reached the following conclusions in relation to the seven new parts said to be required by Mr Smith's Report (para 12):

        a) "Centre Stand". No damage was apparent from the photographs. The stand was supporting the Motorcycle as intended. The centre stand spring was present, intact and apparently undamaged. There appeared to be no damage to the centre stand which rendered the Motorcycle undrivable. (Para 12.a. of the pleading).

b) "Near-side rear seat fairing" and "Air box". The Near-side rear seat fairing had cosmetic damage in the form of a crack. The Air Box cover had cosmetic damage but did not appear to be fractured, displaced or damaged in any other way. The damage so the Near-side rear seat fairing and the Air Box "was not caused in this collision" (for reasons which were pleaded). In any event, the damage to both items was cosmetic and "would have had no effect on control or the handling of the machine". (Para 12.b.).

c) "Near-side belly pan". This was not damaged in the collision. In any event, it is a cosmetic part. Damage to it "would have had no effect on control or the handling of the machine". (Para 12.c.)

d) "Near-side engine case" and "Engine case gaskets". No photographs of the crank case cover showing the damage alleged in Mr Smith's Report had been disclosed. However, it would have been protected during the collision by the centre stand foot lever. It was "not damaged in this collision". The cover gasket "appears to be oil tight and undamaged". (Para 12.d.).

e) "Near-side pannier". There were no panniers fitted to the Motorcycle. However, it did have a large top or delivery box, apparently made of corrugated plastic. It had not been displaced. It had damage consistent with its use. Although it was likely that contact with it would have been made during the collision, it was made of thin, but durable material "which will deflect during a collision" and "minimise collision damage". It appeared to be "essentially undamaged" and, in any event, any damage "would have had no effect on control of the handling of the machine". (Para 12.e.)

27. Following these averments of fact, the Part 20 Particulars Claim alleged that Mr Smith's Report "was created dishonestly, with the intention that the scooter be declared undrivable even though it was drivable" (para 13.d).

28. The Part 20 Particulars of Claim then made a number of further points to which great exception is taken by the appellant in the argument before me, and I therefore summarise those additional points (as well as what might be regarded as the more essential points above), as follows:

i) EUI drew an inference that Mr Smith was prepared to act dishonestly "in this way" (i.e., as pleaded previously), in order "to ingratiate himself with Professional and Legal Services Limited" (which, it will be recalled, was the company to which Mr Smith had addressed his Report). Professional and Legal Services Limited are (the pleading said) a subsidiary of Anexo Group plc. Mr Smith did this (it was pleaded) "in the hope that [he] would receiver a greater number of subsequent instructions from PALS than otherwise [he] might". Anexo Group plc includes (the pleading said) the driver's solicitors (Bond Turner Ltd), PALS itself (which the pleading explained "arranges third party reports") and the credit hire company relevant to the claim for credit hire damages in the action. (Para 13.e and 13.f.1.)

ii) EUI quoted a listing document issued by Anexo as saying that it focusses on providing credit hire vehicles to impecunious claimants bringing accident claims which allows them to charge "commercial hire rates which are typically 2-3 times higher than the rates agreed by the ABI" (para 13.f.ii.). It had experienced significant growth "due to specific marketing aimed at the UK motorcycle community and in particular motorcycle couriers" (para 13.f.iii).

iii) EUI also quoted (in para 13.f.iv.) the following passage from the same Anexo listing document:

> "The hire period for motorcycles is typically longer than for cars as write off percentages are higher since repair costs are generally a higher percentage of the pre-accident value. On a write off, the hire period does not end until payment of the pre-accident value has been received by the customer from the insurer. This compares to a repair where the rental lasts only for as long as it takes to complete the repair."

iv) The pleading then said (in para 13.h.):

> "This set of circumstances is ripe for exploitation by a dishonest engineer… The more likely that an engineer is to declare that a vehicle is undriveable and to write it off, the more likely it is that the engineer will receive repeat instructions from Anexo. This creates an insidious self-reinforcing mechanism by which the dishonest engineer obtains a greater and greater number of instructions at the expense of the honest engineer. This strikes at the heart of the civil justice system because the exposure of the honest engineer is marginalised whilst the dishonest engineer's workload increases."

29. Finally, the Part 20 Particulars of Claim made the following claims against Mr Smith, based on the averments which I have summarised above:

i) A claim "for the tort of deceit" (para 18).

ii) Loss is pleaded, based on "the cost associated with the detection of and response to his dishonest report and the Claimant's dishonest claim" (para 18).

iii) A claim against the claimant driver and Mr Smith, jointly and severally, for "the tort of unlawful means conspiracy". They are said to have "combined to use unlawful means to inflict harm" on EUI. They are said to have "created dishonest evidence, attempted to pervert the course of justice and attempted to defraud [EUI]", with intent to injure EUI (para 19).

iv) A claim for exemplary damages, on the ground that Mr Smith's "conduct in producing a dishonest report" was calculated to make a profit that would in all probability have exceeded the compensation payable (para 20).

v) A declaration that the Report was dishonestly created by Mr Smith (para 21).

vi) An order for Mr Smith to pay or contribute to EUI's costs of the main action (para 22).

vii) Interest, further or other relief, and costs.

Expert evidence obtained by EUI about Mr Smith's reports

30. The evidence of Mr Murdoch which was annexed to the Part 20 Particulars of Claim by EUI was an expert's report, for which leave was required. This leave was given by order of HHJ Saunders, after a hearing, dated 8 March 2022. The order allowed EUI to rely on two reports from Mr Murdoch; one dated 12 February (pre-dating and annexed to the Part 20 Particulars of Claim dated 8 March 2022) and one dated 17 May 2021.

31. Mr Murdoch's first report has already been summarised through the Part 20 Particulars of Claim, which relied on it (see para 26.viii) above). It stated his qualifications as a Master's degree in Engineering from Imperial College, London; professional graduate membership of the Institute of Materials, Minerals and Mining; Associate membership (ARSM) of the Royal School of Mines; and career experience at Rolls Royce plc (including 2 years in the Failure Investigation Team) and at Hawkins & Associates Ltd (7 years as a consultant engineer, involved in forensic investigations, including road traffic accidents and vehicle inspection).

Mr Smith's 2017 report

32. Mr Murdoch's second report related to a point pleaded at para 14 of the Part 20 Particulars of Claim, which was that Mr Smith "wrote a report relating to the same scooter following an accident in 2017 in which, similar, if not identical issues, have arisen".

33. Mr Murdoch's second report (which post-dated the Part 20 Particulars of Claim) made the following points about that earlier accident in 2017 and about Mr Smith's earlier report upon it:

i) The 2017 accident involved the same Motorcycle and occurred on 30 October 2017. Although the Motorcycle was the same, it had on that occasion a different driver and a different registered keeper.

ii) Mr Murdoch had access to Mr Smith's 2017 report, and also 19 photographs of the Motorcycle which Mr Smith had taken on that occasion.

iii) Mr Murdoch set out the history of the Motorcycle from the records of the Driver and Vehicle Licensing Agency as follows.

a) It was first registered in August 2013.

b) In October 2014 it was a "Category C total loss", meaning (as explained by Mr Murdoch) it had sustained structural damage requiring professional repair but could, upon repair, be put back on the road.

c) In July 2016, it was a "Category D total loss", meaning it had non-structural damage, was uneconomic to repair (with, for example, cosmetic or electrical damage) but could be repaired on a "DIY" or do-it-yourself basis and could be put back on the road after that.

d) It passed MOT tests on 9 August 2016 and on 29 April 2017.

e) On 13 July 2017, the Motorcycle passed to a new registered keeper, who was the person involved in the earlier accident on 30 October 2017.

f) Mr Smith then produced his earlier report, on 8 November 2017. The Motorcycle was declared as a "Category N total loss" (explained by Mr Murdoch as the term replacing "Category D total loss"), i.e. it had non-structural damage and was uneconomic to repair, but could be repaired on a DIY basis and put back on the road.

g) It passed an MOT test on 22 February 2018.

h) It acquired a new registered keeper on 21 May 2018.

i) Mr Souza had the collision on 17 August 2018 which is the subject of the present proceedings, and it was placed into storage. Mr Smith's Report (the subject of the present proceedings) was (according to Mr Murdoch) dated 29 August 2018 and declared it a "Category N" total loss, i.e. it had non-structural damage and was uneconomic to repair, but could be repaired on a DIY basis and put back on the road.

j) On 11 September 2018, the Motorcycle was taken out of storage. On 18 December 2018 it acquired a new registered keeper (not Mr de Souza). On 4 February 2019 it passed an MOT test. It had mileage of 4,007 since Mr Smith's Report, and total mileage of 9,769 since the previous MOT test. It passed another MOT test on 21 February 2020.

iv) Mr Murdoch noted that Mr Smith's earlier report (addressed, like the later Report, to Professional and Legal Services Ltd, or PALS) listed 13 items requiring replacement and stated that the Motorcycle was "undrivable" and "Beyond Economical Repair". Mr Murdoch understood "undrivable" to mean that, in Mr Smith's opinion, the Motorcycle could not physically be moved under its engine power; or would fail an MOT test inspection; or involved "a danger of injury to any person" within the meaning of section 40A of the Road Traffic Act 1988; or would not at the time of inspection comply with the Road Vehicles (Construction and Use) Regulations 1986 (para 4.1.1 of Mr Murdoch's second report).

v) However, Mr Murdoch's opinion, based on Mr Smith's photographs, was that the damage in 2017 was "cosmetic in nature" and "would not have affected the performance or handling of the machine". He went through the 13 items said by Mr Smith to require replacement and explained his opinion by reference to the photographs.

vi) Mr Murdoch also stated that, in his opinion, all the damage identified by Mr Smith in 2017, and other areas of damage not referred to by Mr Smith, were "commensurate with normal use given the mileage of the machine and its collision history".

vii) Mr Murdoch concluded that, of the 13 items identified by Mr Smith in his 2017 report as requiring replacement, from the photographs available (taken by Mr Smith in 2017), there was "no evidence that any damage had been caused to any of those items during the collision" (para 5.1).

viii) Mr Murdoch said that the Motorcycle was "almost certainly drivable and roadworthy at the time of Mr Smith's 2017 inspection" (para 5.4). However, it was possible that this conclusion, based on the photographs alone, overlooked some defects, which could not be identified in photographs, which might constitute a reason for MOT rejection (para 5.4).

The application to strike out and for summary judgment

34. On 21 June 2022, Mr Smith's solicitors issued an application to strike out the Part 20 claim, alternatively for summary judgment.

35. The application was supported by a witness statement from his lawyer Darren Bartlett dated 19 June 2022.

36. In para 5, Mr Bartlett described Mr Smith as:

> "…a self-employed engineer, who provides vehicle assessment reports for, amongst others, Evans Harding Limited [who] in turn, receive instructions to produce such reports from an agency, Professional and Legal Services Limited ("PALS") on behalf of individual claimants whose claims are being managed by Direct Accident Management Limited ("DAML")."

37. In para 14, Mr Bartlett said:

> "Even if [Mr Smith's] opinion was wrong (and, as set out below, this is not conceded) there is simply no factual basis for [EUI] to assert that this arises from dishonesty, rather than an incorrect opinion."

38. In para 21, Mr Bartlett said:

> "…I am informed by [Mr Smith] that, as is normally the case in such matters, he has never met or spoken to the Claimant [i.e. Mr de Souza]."

39. In para 25, Mr Bartlett described Mr Smith as "an engineer who carries out hundreds of valuations and inspections every year and has done so for many years". He referred to "Mr Smith's regular role in road traffic cases (carrying out an essential function of the post-accident and pre-litigation process)".

40. In support of the summary judgment application, Mr Bartlett exhibited and relied upon a report from Mark Littler, whom he described as a "forensic engineering expert". Mr Littler is a retired police officer and forensic collision investigator. Unlike Mr Murdoch, he has no Master's or other degree in engineering. His relevant experience and qualifications are in the field of accident investigation rather than, specifically, road-worthiness. He describes himself as "an expert in the field of Road Traffic Collision Investigation". Unlike Mr Murdoch, Mr Littler has not been formally allowed into the action as an expert for whose evidence leave has been given.

41. Mr Littler singled out (as Mr Smith's Report did not), from the seven items listed by Mr Smith as "New Materials", the Near-side belly pan. Mr Littler said that the absence of a belly pan did indeed render the Motorcycle "undriveable". He explained that opinion as follows:

> "I have examined the inspection report prepared by Mr Smith and the photographs taken at the time of the inspection. The missing nearside lower belly pan allowed the side stand to be exposed and a 'folded' piece of metal to protrude out, beyond the leading edge of the side stand.
>
> In my opinion, this would constitute a dangerous condition contrary to Section 40a of the Road Traffic Act 1988 and Section 100 of the Road Vehicles (Construction and Use) Regulations 1986. Hence, in my opinion, the missing belly pan, on its own, would render the Honda undriveable."

42. Section 40A of the Road Traffic Act 1988 provides:

> "A person is guilty of an offence if he uses, or causes or permits another to use, a motor vehicle (…) on a road when—
>
> (a) the condition of the motor vehicle (…),
>
> (…)
>
> is such that the use of the motor vehicle (…) involves a danger of injury to any person."

43. Para 100 of the Road Vehicles (Construction and Use) Regulations 1986 provides:

> "100.—(1) A motor vehicle (…) shall at all times be in such condition (…) that no danger is caused or is likely to be caused to any person in or on the vehicle (…) or on a road."

44. In opposition to the applications, and in response to Mr Littler's report, EUI's solicitor Andrew Baker filed a witness statement dated 29 June 2022 in which he said (at para 9):

> "Mr Littler seeks to argue that the missing nearside belly pan rendered the motorcycle unroadworthy. There is nothing within Mr Smith's report which explains that this was why he considered the motorcycle unroadworthy or even gives a hint

> that this may be the case. Mr Smith never said that this was the justification for the motorcycle being deemed unroadworthy in all the time we were writing to him prior to him being added to the proceedings (a point raised in Horwich Farrelly's letter of 18th May 2022 [see ADB.20/9 to 10; Admiral's Reply also sets out the correspondence at ADB.20/20 to 26]). The first time such point was raised by Mr Smith was in his defence to the Additional Claim (see paragraph 15 thereof).
>
> Mr Littler states that the motorcycle was dangerous because of the exposed piece of metal he identifies as having been exposed by the missing nearside belly pan. Mr Smith's application proceeds on the basis that this must be right. Admiral entirely disputes this – the existing evidence of Mr Murdoch already contradicts this. One only needs to point out that a missing nearside belly pan would not have been an MOT failure to see that Mr Littler's assessment is open to serious challenge."

45. Mr Murdoch filed a third report, dated 28 October 2022, in response to Mr Littler's. Mr Littler had said that "In my experience, it is not the role of the vehicle inspector to comment on the causation of damage sustained by the vehicle". Mr Murdoch disagreed, saying:

> "I do not agree with Mr Littler. It is crucial that an examiner can consider and differentiate between existing damage which pre-dated a collision, damage which was caused in the collision and if possible, damage which might have been caused since the collision occurred, during recovery or handling in a storage yard (for example).
>
> If an examiner cannot differentiate between damage caused in the collision and damage not caused in the collision, then it would be hard, or impossible, to attribute repair costs to a particular collision, or draw conclusions regarding whether, for example, a vehicle was previously damaged or roadworthy at the time of a collision, since all damage would simply be attributed to the collision itself."

46. Mr Murdoch also pointed out that Mr Smith's Report did specify "Pre-Accident Damage", namely "Scratches Off Side", and reported the "Impact Location" as "To The Near Side". Mr Murdoch also said that, whilst Mr Smith's Report identified only the "NS Belly Pan" as requiring replacement, "It is of note that the offside belly pan was also missing, but was not listed as an item for replacement" (Murdoch 3 para 3.3.5).

47. Mr Littler had expressed the view that Mr Smith's Report was within a range of opinions that might be held by an engineer on the subject. He said (at para 56 of Mr Littler's report):

> "In my opinion, the potential danger caused by the missing belly pan is obvious, however, I can understand how different

> engineers could reach different conclusions, based on the individual's knowledge and interpretation of the law.
>
> In my opinion, it was reasonable for Mr Smith, as an expert examiner, to reach the conclusion that the Honda was undriveable, based on the missing belly pan. Different engineers could reach different conclusions."

48. Mr Murdoch disagreed with that. He said:

> "Nor do I agree that "*different engineers could reach different conclusions*". I would expect a range of trained and suitability experienced engineers to reach the same conclusion since the matter of impact mechanics has a narrow scope (i.e. Mr Littler was only able to provide two scenarios in which someone could be injured as a consequence of the missing nearside belly pan)."

49. Mr Murdoch concluded his third report as follows:

> "4.2 In my opinion, there is little doubt that the nearside belly pan was not damaged in the collision. On that basis, the belly pan was missing before the collision occurred and whatever the reason for the missing belly pan, it is unrelated to the collision.
>
> 4.3 In order to support his assertion that the scooter was undriveable, Mr Littler suggests two scenarios in which the missing belly pan could result in someone sustaining injury due to contact with the side stand mount; contact with a pedestrian when the scooter was being ridden and contact with other road users once the scooter has been involved in a collision. Both these scenarios are on the premise of a road traffic collision having occurred. During a road traffic collision it is inevitable that there is danger to road users and pedestrians and, in my opinion, the missing nearside belly pan would not increase the risk of "a danger of injury to any person" (see Section 40A, Road Traffic Act 1988) beyond the level of risk which is ordinarily expected in a collision.
>
> 4.4 Regardless, the side stand mount does not protrude beyond the outer edge of the footboard. Therefore, there was no increase in the risk of injury to any road users as a consequence of the nearside belly pan being missing when compared to it being present when the scooter was used for its intended purpose. A far greater risk is the likelihood of a pedestrian being contacted by the centre stand foot lever which protrudes, as standard, much further out beyond the nearside of the machine."

The Judgment

50. Mr Smith's applications to strike out and for reverse summary judgment were heard by HHJ Saunders on 7 December 2022 and he delivered his reserved Judgment on 20 April 2023.

51. The Judgment noted that there was no application to amend EUI's pleadings, "in that sense, it is an 'all or nothing' case" (para 22).

52. HHJ Saunders rejected the strike out claims. He found that both the claim in deceit and the claim in unlawful means conspiracy were sufficiently pleaded, and supported by sufficient pleaded fact to justify the allegations being made.

53. He noted (correctly) that the strike out application had to be determined on the assumption (to which EUI was entitled) that the facts as pleaded were true, citing *Sofer v Swissindependent Trustees SA*. In that case, Arnold LJ said at [2020] EWCA Civ 699, [2020] 2 P. & C.R. DG16 para 25:

> "As is common ground, on an application under CPR rule 3.4(2)(a) to strike out particulars of claim as disclosing no reasonable grounds for bringing the claim, the facts pleaded must be assumed to be true. That does not mean, however, that the court will not scrutinise particulars of dishonesty with care to see if they disclose a sustainable case."

54. HHJ Saunders rejected a submission that there was not enough in EUI's pleadings to justify their claims of dishonesty. He said (at para 48 of the Judgment):

> "…having considered the pleadings, they have been sufficiently pleaded. I do not see how much further they can go – the Third Defendant can only plead on the evidence he has and that may or may not be enough if the matter is to go to a trial where that will be fully evaluated by the trial judge – particularly where both parties to a greater or lesser extent agree that the case relies upon inference."

55. He referred to passages in the Part 20 Particulars of Claim which I have already summarised in this respect.

56. He also referred to paras 24-30 of EUI's Part 20 Reply. Those paragraphs say (omitting some passages):

> "25. For the avoidance of doubt, the Third Party's case is that the Third Defendant stated in his report that the scooter was undrivable without an honest belief in that statement, and that accordingly the statement – that the scooter was undrivable - was made dishonestly.
>
> 26. As to this, it was unclear from the Third Party's report why he said that the scooter was undrivable. Seven parts were put down for replacement and the Defendant's case concerning the

alleged damage to each of those parts, and whether the scooter was undrivable in consequence of the same, is set out with full particularity in its Part 20 Particulars of Claim (…)

27. In his Defence to the Part 20 Claim dated 12th April 2022 at paragraph 15 the Third Party states: 'The Third Party was of the opinion, and remains of the opinion, the motorcycle was undriveable at the time he inspected it on 29.08.18 due to the side mounting/ side stand being exposed by the missing nearside belly pan'.

28. As to this:

a. this is the first occasion that the Third Party has provided any explanation as to why he says that the scooter was undrivable,

b. the explanation has emerged almost a year after he was first asked to comment,

c. even now, the Third Party does not seek to explain why the exposure of the side mounting and/or side stand is said to render the scooter undrivable – the proposition is baldly asserted without any supporting explanation,

d. it now forms no part of the Third Defendant's case that any alleged damage to any other part of the scooter rendered it undriveable.

29. The Third Defendant denies that the scooter was undriveable for the reasons now alleged by the Third Party generally, and in particular:

a. The nearside belly pan is a cosmetic item of trim which enhances the aesthetic appeal of the scooter but is immaterial to the drivability or roadworthiness of the scooter.

b. The side stand is not down for replacement or repair in the Third Party's report dated 29th August 2018 and it can be agreed that it was undamaged.

c. To the extent that the side stand is 'exposed', it is designed to be 'exposed' (to enable the rider to access it). The scooter is neither undrivable nor unroadworthy on account of its 'exposure'.

d. The fact that the side mounting is exposed is immaterial to the drivability or roadworthiness of the scooter.

30. Accordingly, the Third Defendant repeats its allegation of dishonesty against the Third Party. He did not honestly believe

> that the scooter was undrivable/unroadworthy when he made his report."

57. The Judgment decided that the deceit claim was "pleaded in full", both "by inference" and by reference to specific pleaded facts, and was not susceptible to striking out.

58. The Judgment also decided that the conspiracy claim was adequately pleaded and supported. The judge said:

> "51. (…) I have considered the authorities cited by both Mr Vickers and Mr Higgins and it appears to me that proving a conspiracy is regarded, as I have set out several times previously in this judgment, [as] "a matter of inference, deduced from certain acts of the parties accused, done in pursuance of an apparent purpose in common between them" - *Brisac* (1803) 4 East 164 at 171, cited with approval in *Mulcahy v The Queen* (1868) L.R. 3 H.L. 306 at 317.
>
> 52. All that is required is combination and common intention where a party is a willing and knowing participant in another's fraudulent act - *Belmont Finance Corporation v Williams Furniture Limited* [1980] 1 All ER 393.
>
> 53. To that end, the Part 20 claim is, in my view again, sufficiently pleaded."

59. He also rejected arguments based on abuse of process and other parts of CPR 3.4.

60. The judge then turned to the application for summary judgment. He cited Lewison J's well-known summary of principles in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at para 15.

61. He reminded himself that he should "not conduct a mini-trial of the issues – especially where resolution of some of the central issues depends upon evaluation of expert evidence opinion" (para 59).

62. He decided that this was not case where EUI's claim was "fanciful"; it was "a point of some significance". It was also not a case "…where there is a short point of law or construction. It needs to go to trial" (para 63).

The Grounds of Appeal

63. Mr Smith's Grounds of Appeal are essentially as follows:

i) The judge was wrong to find that EUI had pleaded sufficient material to support a *prima facie* case of dishonesty. There was not enough to support either the claim based on the tort of deceit or the claim based on unlawful means conspiracy (Ground 1).

ii) The judge should have appreciated that the allegation of dishonesty was inherently unlikely and required particularly cogent evidence (Ground 2).

iii) The points considered by the judge in paras 35-41 of the Judgment were "irrelevant" (Ground 3).

iv) The judge should have found that the Part 20 claim did not plead a case or disclose a sufficient evidential basis "to support the inference that appellant made the representation, upon which the Part 20 claim is founded, with the intention to deceive the respondent" (Ground 4) or "with the intention of injuring the respondent" (Ground 5).

v) The judge should have found that the Part 20 claim did not plead a case or disclose a sufficient evidential basis for a case that Mr Smith's representation was made "pursuant to an agreement (whether express or tacit)" with Mr de Souza (Ground 6).

64. As to Ground 3 (asserting that the matters considered in paras 35-41 of the Judgment were irrelevant), the matters referred to in those paragraphs of the Judgment were as follows:

i) This section opened with an observation by the judge that he was, in that section, considering "what the basis and context of [EUI's] claim against [Mr Smith] is – and how it is pleaded" (para 34 of the Judgment).

ii) In para 35 of the Judgment, the judge quoted a statement from the driver of the car which had collided with the Motorcycle. The statement said that only the car driver's mirror had been clipped and "this appeared to be the only damage to the vehicles". He did not carry out any repairs to his car. The judge said: "That, in itself, could be seen to raise concern about what is reported about the scooter" (Judgment para 35). That is in line with paras 4 and 5 of the Part 20 Particulars of Claim, which allege that contact between the car and the motorcycle "was benign and glancing in nature" (para 4) and "The moped suffered no significant damage in the incident and was driveable after it" (para 5 of the Part 20 Particulars of Claim).

iii) In para 36, the Judgment noted that the Report "by declaring the moped or scooter undriveable, "opened the way for a claim for hire charges in this case which reached, by any interpretation, a quite considerable sum of £89,876.92". That reflects what is pleaded in paras 8 and 9 of the Part 20 Particulars of Claim.

iv) In para 37, the Judgment paraphrased the matters pleaded in para 13.f.-h. of the Part 20 Particulars of Claim (which I have summarised in para 28 above).

v) In para 38, the Judgment said:

> "It is accepted that this is an inference. However, it is stated that it is important for these issues to be raised, particularly when considered in the context of Part 35 declarations."

vi) In para 39, the Judgment referred to the importance of experts understanding their duty to assist the court by providing their objective, unbiased opinion upon consideration of all material facts, including those that might detract from their opinion.

vii) Para 40 of the Judgment referred to the fact that Mr Smith "failed to answer any correspondence in which he was advised of the claim up to the issue of proceedings".

viii) Para 41 of the Judgment referred to the report of Mr Murdoch saying (contrary to Mr Smith's Report) that the Motorcycle was driveable after the accident (and its handling would not be affected, and the engine sound would not, contrary to averments by Mr de Souza, have been affected). It stated that EUI concluded from this "that Mr Vaughn Smith's report was created dishonestly" (para 41 of the Judgment).

65. Given the correlation between these paragraphs of the Judgment and EUI's pleaded case, it is not clear why they should be considered "irrelevant" on consideration of an application to strike out and for reverse summary judgment. But Mr Smith certainly does say that the points made in these paragraphs did not justify the pleaded case, and that the pleaded case should have been struck out, or reverse summary judgment have been entered upon it, accordingly.

Submissions by the appellant on the applications to strike out and for reverse summary judgment

66. On behalf of Mr Smith, it is argued by his counsel (who did not appear below) that EUI's case is based solely on an allegation that Mr Smith made a dishonest representation that the Motorcycle was undriveable and no other dishonest representation. He says that the Part 20 Particulars of Claim do not allege a dishonest representation that the Motorcycle had been damaged, or that damage had been caused by the accident, or any dishonesty in respect of causation. He rejects as irrelevant the evidence about the negligible impact on the Motorcycle in the accident. He also relies on Mr Smith's defence that he was not asked to comment on causation.

67. He argues that the facts pleaded are not capable of supporting the claims of deceit and conspiracy, citing *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 at paras 55, 160 and 186. He says that the evidential material is also inadequate; citing *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at para 18.3 and *Elite Property Holdings Ltd v Barclays Bank plc* [2019] EWCA Civ 204 at para 41. He emphasises the importance of the claim being of dishonesty, borrowing language from *Playboy Club London Ltd v Banca Nazionale Del Lavoro SpA (No 2)* [2018] EWCA Civ 2025 at para 46 to the effect that it lacks a solid foundation in the evidence and is therefore improper. He cites *UK Insurance Ltd v Gentry* [2018] EWHC 37 (QB) at para 19 and says that the allegation of deceit is an allegation of criminal behaviour, is inherently unlikely, and will therefore require particularly cogent evidence if it is to be proved at trial. He argues that, at the strike out and summary judgment stage, it follows that the degree of conviction must also be high.

68. In relations to Grounds 1 – 3 of the Grounds of Appeal, he submits that the judge failed to recognise the limited scope of EUI's pleaded case of dishonesty and failed to look for the required degree of conviction in the pleaded evidence in relation to such a charge. He says that there was no allegation of dishonesty relating to the extent of the damage identified in the Report, or its cause, and so the circumstances of the accident were irrelevant. He suggests that the judge was wrongly influenced by the size of the credit hire claim in circumstances where the Report was produced without knowledge

of the credit hire losses that would subsequently be claimed in reliance on it. He also argues that Mr Smith did not know about the facts pleaded about Anexo or the document quoted as the basis for them (see para 28 above). He submits that the motive attributed to him of acting dishonestly in order to obtain repeat instructions is fanciful; and motive is, in any event, not proof of a dishonest act. He discounts the failure to respond to pre-action correspondence as irrelevant. It was not surprising that Mr Smith chose to be cautious in response to these allegations. He says that only that part of Mr Murdoch's report relating to roadworthiness was relevant, and that was not in itself enough to support an allegation of dishonesty, rather than misrepresentation. No inference of dishonesty could be drawn from a difference of opinion. The Defence and the Littler evidence also needed to be taken into account in Mr Smith's favour.

69. In relation to Ground 4 of the Grounds of Appeal, he says that intent to deceive is an essential element of the tort of deceit and there is no case of intention pleaded. Intention cannot be inferred. He cites *Kasem v University College London Hospitals NHS Foundation Trust* [2021] EWHC 136 (QB) at para 34 for the need to plead and prove an intent to deceive, or an intent that EUI should act in reliance on the false representation, and the need to establish that EUI did so act and suffered loss by so doing. He submits that the Part 20 Particulars of Claim do not plead these matters at all, or, if they do, fail to provide a sufficient basis for such claims.

70. In relation to Grounds 5 and 6 of the Grounds of Appeal, he accepts that the unlawful means conspiracy is adequately pleaded in para 19 of the Part 20 Particulars of Claim, when alleging that Mr Smith and the claimant motorcyclist "combined to use unlawful means to inflict harm", provided that "combine" is taken to mean "agree, whether expressly or tacitly". He says, however, that no evidence is pleaded in support which would justify the necessary inference that Mr Smith entered into an agreement with Mr de Souza, or that he did so with the intention to injure EUI. He says that it is not suggested, and is not the case, that Mr Smith ever met or discussed the case with Mr de Souza. Mr Smith was not instructed by Mr de Souza but (submits his counsel) "by Evans Harding, which was itself instructed by PALS" (skeleton argument para 68).

71. He argues that the connection between Mr Smith and his Report on the one hand and Mr de Souza (the claimant) on the other hand is so remote as to require clear and cogent evidence from which a conspiracy could reasonably be inferred, and that such evidence has not been pleaded.

Submissions by the respondent on the applications to strike out and for reverse summary judgment

72. Opposing the appeal, counsel for EUI emphasises that the Report, which included a CPR Part 35 declaration and expressly referred to litigation, was used to support what Mr Justice Martin Spencer (when refusing permission to appeal on the papers) described as an "eye-watering" credit hire claim against EUI by Mr de Souza, amounting (at just under £90,000) to about 150 times the value of the Motorcycle. The Report was addressed to PALS, which was a subsidiary of the holding company that stood to profit from hire charges which were extended by reason of the Report's diagnosis that the Motorcycle was a write-off.

73. The judge was exercising a discretion when refusing to strike out the Part 20 claim, and refusing to grant reverse summary judgment. He should be allowed "the generous ambit

within which a reasonable disagreement is possible", citing *G v G* [1985] 1 WLR 647 (a family case about the custody of a child) in which (at 651H) that phrase was quoted by Lord Fraser from *Bellenden (formerly Satterthwaite) v Satterthwaite* [1948] 1 All ER 343 at 345.

74. A strike-out must proceed on the basis of the case as pleaded, and on the assumption that what is said in the pleading is true. However, EUI acknowledged that a broader enquiry is permissible in the case of the application for reverse summary judgment although, in the latter case, the principles summarised by Lewison J in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at para 15 apply.

75. EUI took issue with the reliance by counsel for Mr Smith on statements by Lord Hope and Lord Millett in *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 at paras 50 and 186 to the effect that (as Lord Millett put it):

> "It is not open to the court to infer dishonesty (…) from facts which have been pleaded but are consistent with honesty."

76. Those observations were considered by the Court of Appeal in *Bank St Petersburg PJSC v Arkhangelsky* [2020] 4 WLR 55, [2020] EWCA Civ 408, where Sir Geoffrey Vos C said, at para 41, that they were made in the context of pleadings that did not expressly mention fraud, and, at para 42:

> "Thus, when Lord Millett said that it was not open to the court to infer dishonesty from facts which have been pleaded but are consistent with honesty, he was not laying down a general rule that can affect a case like this where there were multiple allegations founding an inference of dishonesty…"

77. The Court of Appeal in *Arkhangelsky* also referred, at para 45, to *JSC BM Bank v Kekhman* [2018] EWHC 791 (Comm) at para 44 per Flaux J:

> "[the] claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact 'which tilts the balance and justifies an inference of dishonesty'. I entirely agree with that passage."

78. EUI pointed to the lack of evidence from Mr Smith himself (points of fact on his behalf being either pleaded or in a witness statement from his lawyer). He suggests that a trial, in which Mr Smith might be expected to give evidence, ought not to be pre-empted, citing *Tesco Stores Ltd v Mastercard Incorporated* [2015] EWHC 1145 (Ch) at para 69. EUI argued that an adverse inference might be drawn should he remain silent, citing *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324, [1988] EWCA Civ 596, in which Brooke LJ, citing earlier authority, accepted the possibility of an adverse inference when a defendant or important witness did not give evidence, whilst emphasising that this could only be after a *prima facie* case had been established. The Supreme Court has said that the drawing of any such inference would not be a legal

point but "just a matter of ordinary rationality": *Royal Mail Group Ltd v Efobi* [2021] UKSC 33 at para 41.

79. EUI also said that it was entitled to see what comes up from disclosure. It made the point that Mr Smith has not yet (although asked to do so) disclosed his handwritten notes concerning his inspection, which EUI wish to see in order to test the suggestion of his expert Mr Littler that Mr Smith might have failed the Motorcycle (stating it was "undriveable") solely on the basis of the missing near-side belly pan (which EUI does not accept, and which it says is not a point made in the Report itself, or anywhere before service of the Defence, which was drafted after Mr Littler had been instructed). I understand that, although those notes are referred to in Mr Littler's report, they have still not been disclosed, although they will presumably have to be disclosed when the disclosure stage of any trial process is reached.

80. EUI submitted that an action in deceit does not require proof that EUI acted in reliance on a false representation in the sense of believing it to be true, but only that it was influenced by it; citing *Zurich Insurance Co plc v Hayward* [2016] UKSC 48 at para 26.

81. In relation to the unlawful means conspiracy, EUI relied on *Kuwait Oil Tanker Co SAK v Al Bader (No 3)* [2000] 2 All ER (Comm) 271, where the Court of Appeal in a unanimous judgment said, at paras 110-11:

> "… The essence of the unlawful means conspiracy is injury to the claimant as a result of an unlawful act or acts where two or more people have combined to cause the injury. It is not necessary that every overt act is done by every conspirator, but the act must be done pursuant to the conspiracy or combination.
>
> 111. A further feature of the tort of conspiracy, which is also found in criminal conspiracies, is that, as the judge pointed out at page 124, it is not necessary to show that there is anything in the nature of an express agreement, whether formal or informal. It is sufficient if two or more persons combine with a common intention, or, in other words, that they deliberately combine, albeit tacitly, to achieve a common end. Although civil and criminal conspiracies have important differences, we agree with the judge that the following passage from the judgment of the Court of Appeal Criminal Division delivered by O'Connor LJ in *R v Siracusa* (1990) 90 Cr. App. R. 340 at 349 is of assistance in this context:
>
> > "Secondly, the origins of all conspiracies are concealed and it is usually quite impossible to establish when or where the initial agreement was made or when or where other conspirators were recruited. The very existence of the agreement can only be inferred from overt acts. Participation in a conspiracy is infinitely variable: it can be active or passive. If the majority shareholder and director of a company consents to the company being used for drug smuggling carried out in the company's

> name by a fellow director and minority shareholder, he is guilty of conspiracy. Consent, that is agreement or adherence to the agreement, can be inferred if it is proved that he knew what was going on and the intention to participate in the furtherance of the criminal purpose is also established by his failure to stop the unlawful activity."
>
> Thus it is not necessary for the conspirators all to join the conspiracy at the same time, but we agree with the judge that the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of. (…)
>
> 112. In most cases it will be necessary to scrutinise the acts relied upon in order to see what inferences can be drawn as to the existence or otherwise of the alleged conspiracy or combination. It will be the rare case in which there will be evidence of the agreement itself..."

82. EUI submitted that specific intent to harm is not required, because intention to injure may follow from the inevitability of loss, citing *OBG v Allan* [2008] AC 1 at para 167.

83. EUI said that its maintenance of a counter-fraud unit (which is pleaded in para 17 of the Part 20 Particulars of Claim) was enough to satisfy the requirement of loss (citing *British Motor Trade Association v Salvadori* [1949] Ch 556 at 569) and, thereafter, damages are at large (citing *Lonrho v Fayed (No 5)* [1993] 1 WLR 1489 at 1494B).

84. EUI submits that it is not, contrary to submissions made on behalf of Mr Smith, required to plead evidence, so long as it pleads sufficient fact in support of its claims, citing Leggatt J in *Tchenguiz v Grant Thornton UK LLP* [2015] EWHC 405 (Comm) at para 1.

85. EUI submits that its pleaded case does challenge, not only the assertion in the Report that the Motorcycle was "undrivable", but also the Report's representation (also said to have been made dishonestly) that the new parts were required as a result of the accident. EUI referred to the pleading in that respect, which I have summarised above.

86. EUI argues that the Report, on its face, and especially when read in combination with the accompanying CPR Part 35 declaration, could only have had one purpose, which was to substantiate a claim for credit hire charges arising from the accident whose details were given in the Report. It says that the assertion that Mr Smith was not instructed by PALS carries little weight given that his Report was addressed to PALS.

87. It argues that Mr Smith's motives are justifiably called into question by the pleading (including the passages summarised at para 28 above). It submits that the facts relied upon in this respect are sufficient to justify a trial. It says that the possibility of "an indirect financial motive (such as a desire to obtain more work from a particular solicitor or claims manager)" has been recognised in expert evidence cases, quoting

Holroyde LJ in the contempt case of *Liverpool Victoria Insurance Co Ltd v Zafar* [2019] 1 WLR 3833, [2019] EWCA 392 (Civ), at para 59.

Principles to be applied on appeal

88. These appeals are by way of "a review of the decision of the lower court": CPR 52.21(1). That is to be distinguished from a re-hearing, starting entirely afresh.

89. I must allow the appeal if I consider the decision of the Judge was "wrong": CPR 52.21(3).

90. When (as here) the appeal is against the exercise of a discretion by the lower court, the appeal should only interfere if the judge has "exceeded the generous ambit within which a reasonable disagreement is possible": *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1 WLR 577 CA at paras 9-10, quoting *Tanfern Ltd v Cameron-MacDonald (Practice Note)* [2000] 1 WLR 1311, 1317, which was in turn picking up the formulation of Lord Fraser in *G v G* [1985] 1 WLR 647, 652. One of the differences between a review and a rehearing is that "appropriate respect" must be given to the decision of the judge: *E I Dupont de Nemours & Co v S T Dupont* [2006] 1 WLR 2793 CA at para 94.

91. The application notice (of 21 June 2022) asked for an "order that Part 20 be struck out or summary judgment" without specifying which provision of the CPR was relied upon in relation to the strike out. The witness statement in support dated 19 June 2022, from Mr Smith's lawyer, Mr Darren Bartlett, also did not do this, but it dealt with the application under the sub-headings "Part 20 pleads no facts in support of the allegation of dishonesty"; and "Unlawful means conspiracy similarly lacking in pleaded facts".

92. The skeleton argument filed for the hearing below on behalf of Mr Smith relied on CPR rule 3.4(2), paragraphs (a), (b) and (c), which it quoted, as follows:

> **"Power to strike out a statement of case**
>
> 3.4
>
> (2) The court may strike out a statement of case if it appears to the court –
>
> > (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
> >
> > (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
> >
> > (c) that there has been a failure to comply with a rule, practice direction or court order."

93. An application to strike out should only be granted "in very exceptional circumstances and in plain and obvious cases": *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 77E per Hirst LJ. It is a draconian remedy to be employed only in clear and obvious cases where it is possible to say at the interim hearing stage and

before full disclosure that a particular allegation is incapable of being proved: *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 79G.

94. The application for reverse summary judgment was made under CPR rule 24.3 (para 12 of the skeleton argument for the court below quotes rule 24.3 although it misstates it as rule 24.2), which provides:

> **"Grounds for summary judgment**
>
> 24.3 The court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if—
>
> (a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

95. The principles to be applied on an application for summary judgment are conveniently summarised by Lewison J in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at para 15, which was approved by the Court of Appeal in *AC Ward & Son v Catlin (Five) Ltd* [2009] EWCA Civ 1098 at para 24. This summary was referred to by the Judge and is also relied upon before me.

> "15. As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:
>
> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can

> reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

Decision on the application to strike out

96. I prefer the submissions of the respondent (as I have summarised them in paras 72 to 87 above).

97. I will deal first with the suggestion that there was not a sufficient basis for EUI to allege that Mr Smith was dishonest.

98. In this respect, it is correct that I must assume (as the Judge did) that the pleaded averments are true, although I must also see (as he did) whether the factual basis set out in the pleading justifies the averment of dishonesty. That is, it would not be enough to say that, simply because it is pleaded that Mr Smith is dishonest, he must be taken to have been so. But it is correct to proceed on the basis that the particular facts of the case

pleaded are true, and then to assess whether they are sufficient to support the allegation of dishonesty.

99. The pleaded case of dishonesty appears to me to be amply sufficient to justify the Judge in his refusal to strike it out. The pleaded case ranges over the whole of the Report and says that it was dishonest both in the sense that it was untrue and in the sense that no-one could honestly have believed it to be true. The level of untruth pleaded, and its degree of variance with the (pleaded) facts is so great as to support the plea that Mr Smith must have been dishonest in saying what he did in the Report.

100. In order to explain my conclusion in this respect, I will start with the pleading itself and then turn to the Report.

The pleading

101. The Claim Form says that Mr Smith wrote "a dishonest expert's report relating to damage supposedly caused to the motorcycle… when it was in collision with a motor vehicle… driven by the First Defendant". It therefore makes it clear that the claim is about what the Report said about damage *caused in the accident*. The argument advanced to me that the claim is based on solely on roadworthiness, rather than (additionally) on causation, is therefore immediately placed in difficulty. I do not consider that what is said in the Reply should be taken as cutting down what is said in EUI's prior pleadings in this respect.

102. Turning to the Part 20 Particulars of Claim, the allegation is that contact in the accident was "benign and glancing"; and the Motorcycle (and this is a pleading of fact) suffered "no significant damage" and "was driveable" (para 4 of the Part 20 Particulars of Claim). The pleading then goes on to say that what the Report said was about this was not true. The Report said that it was "undriveable" and that "seven new parts were required" to put it "back into its pre-accident position"; and that it was "an economic write-off" (quoting from para 8 of the Part 20 Particulars of Claim). Again, this makes it clear that the pleading is that the Report is drawing a false comparison between the condition of the Motorcycle before and after the accident; in other words, that causation is (contrary to the submissions made to me) very much in issue, as well as the roadworthiness being in issue.

103. The pleading then relies upon and pleads Mr Murdoch's report dealing with each of the seven parts said by the Report to be required and to support the allegation in the Report that the Motorcycle was "undrivable" and "beyond economic repair". In the case of each part, Mr Murdoch's report (attached to the Part 20 Particulars of Claim), and explicit pleas in para 12 of the Part 20 Particulars of Claim (set out at para 26 above), aver that none of them was damaged in the collision and, moreover, none of them was damaged at all, save cosmetically, and to an extent which was completely inconsistent with the Report's suggestion that the need to replace them rendered the Motorcycle "undrivable".

104. These are multiple and specific averments of fact which support the core allegation that the Report was saying things that were demonstrably untrue. The Report was saying that the Motorcycle was undriveable when it was driveable. The Report was saying that items required replacement because of the accident when they had not been affected by

the accident and when they did not, in any event, require replacement. The averments of fact are sufficient to support the allegations of untruth.

105. It is then pleaded that the Report was created dishonestly with the intention that it be declared undriveable even though it was driveable: para 13 of the Part 20 Particulars of Claim.

106. Whilst it will be a matter for the trial judge, the pleaded fact that the Report says things that were not true, and which were (as Mr Murdoch's report says, although not in these words) demonstrably and egregiously untrue, is certainly sufficient to support the allegation of dishonesty (taking that first). The pleading makes both those points (the Report is not only wrong, but obviously wrong), and therefore justifies the plea of dishonesty. Dishonesty can properly be inferred from the fact (which is pleaded) that untruths are told which are obviously and demonstrably untrue.

107. Similarly, the allegation that there was an intention to declare the Motorcycle undriveable even though it was driveable (the second part of the above proposition from para 13) is sufficiently pleaded (it is pleaded explicitly in para 13.d. of the Part 20 Particulars of Claim) and sufficiently supported by pleaded fact for it to be wrong to suggest it would be appropriate to strike it out. The Report said in terms (and this is pleaded) that the Motorcycle was undriveable. The pleading says in terms that it was not, and gives details of the basis upon which that is said. The pleading supports the inference that the writer of the Report cannot honestly have believed in what he was saying.

108. The pleading of facts to support the allegation of dishonesty by showing a motive for dishonesty (as I have set them out in para 28 above) is not necessary, but neither is it in any way objectionable. If the facts support an inference of dishonesty (as I have found they do, without, of course, deciding whether that inference will in fact be drawn by the trial judge), the argument that the allegation of dishonesty should be struck out has already failed. But that does not mean that going on, as the Part 20 Particulars of Claim do go on, to plead a plausible motive to explain the dishonesty does not strengthen the case (and, therefore, further undermine the application to strike it out).

109. The significance, as I read it, of the points made in paragraphs 13.e. to h. of the Part 20 Particulars of Claim (summarised in para 28 above) is that they are averments of fact. They are averments made plausible by their presence in a listing document prepared by PALS' own parent company (to which the pleading at this point refers). But it is not necessary to EUI's case that EUI proves that Mr Smith had himself read that document. What matters is whether the facts there set out are true (and, on an application to strike out, they are to be assumed to be true) and were part of the context in which Mr Smith wrote his Report. In fact, there is no suggestion in the evidence, even in support of the reverse summary judgment claim, that they are not true. They are, on their face, facts relevant to and supportive of a motive on Mr Smith's part for writing a Report which stated that the Motorcycle was a write-off, and was a write-off because of the accident.

110. For example, they include the alleged fact that PALS (to whom Mr Smith addressed his Report) was connected with the company which would profit from the hire charges; and that these charges were significant; and it would benefit PALS (and its associated operations in claiming hire charges) if the Motorcycle was proved to be a write-off because then, not only could hire charges be claimed in the action, but they could be

claimed for a longer period. I do not think it is far-fetched or unsustainable to suggest, by pleading the facts in para 13.e. to h. of the Part 20 Particulars of Claim, that this was part of Mr Smith's thinking. Whatever the precise contractual relationship between them, Mr Smith addressed his Report to PALS. He had also addressed to PALS the earlier report commissioned in relation to an earlier accident in which this same Motorcycle was involved. Para 5 of the witness statement filed on his behalf suggests that PALS was a regular customer (see para 36 above). His own case is that the Report was not a one-off so far as he was concerned, but one of "hundreds" he does "every year… and for many years". His own case refers to his "regular role in road traffic cases (carrying out an essential function of the post-accident and pre-litigation process)" (see para 25 of the evidence filed on his behalf, quoted in para 39 above).

111. The context pleaded against Mr Smith is context which is (allegedly) part of the world in which he operates. His Report was, in its own words, about an "Accident" and an "Insured" and it was filed in the context of court proceedings which Mr Smith (as shown by his CPR Part 35 "Expert's Declaration" which formed part of the Report) fully expected to consider his Report. His Report was being used to support a claim for hire charges. Although it was written before proceedings were issued, it referred to an insurance claim following an accident and to court proceedings, and therefore anticipated the issue of such proceedings. If what he said in his Report was deliberately untrue, it is part of EUI's pleaded context for the untruth that he was supporting a claim for hire charges that was false; and which would be larger because the vehicle was said by him to be a write-off rather than capable of a repair which would mean lower hire charges and a smaller claim, because if repairable (as Mr Smith's Report said it was not, but which EUI's case, supported by Mr Murdoch, says it was) the Motorcycle could be put back on the road, and the need for hire (and, consequently, the claim for hire charges) would cease sooner.

The Report

112. Equally, I do not think it can be said that these pleaded facts, or this pleaded case of dishonesty, are so inconsistent with the Report, or go so far outside what can fairly be drawn from the Report, that the Part 20 Particulars of Claim (and Claim Form) should be struck out.

113. The core argument addressed to me in this respect is that Mr Smith can credibly defeat the claim by asserting that he did not intend by his Report to say anything at all about damage caused in the accident.

114. However, whilst Mr Smith is free to run that point at trial, and to have a decision made upon it, the question for me is whether it is so powerful and unanswerable an argument as to justify the striking out of the claim.

115. I will for the moment ignore the point (which is, however, relevant) that, strictly speaking, Mr Smith is not entitled to have his disputed evidence of fact considered on an application to strike out the case against him.

116. Even without that point, I do not consider that what Mr Smith says in this respect (in paras 15-16 of his Defence, which is signed with a statement of truth by him) is strong enough to undermine EUI's case to the point where it should be struck out without a trial.

117. It is not only possible to read the Report as suggesting that the seven new parts which it says are required are required as a result of the accident; it is quite difficult (although I make no finding, that being a matter for the trial judge) to read it in any other way. The whole context of the Report is a legal action. That is demonstrated by the reference to Part 35 and by the contents of the Expert's Declaration which states in terms (for example) "I understand that… My report will form evidence to be given under oath or affirmation" and "I understand that my duty in providing written reports and giving evidence is to help the Court". The Report starts with a "Claim Number" and then goes on to state the name of the "Insured" and the date of the "Accident". None of this is easily reconciled with Mr Smith's case that his Report was intended to be, and should be read as, a mere condition report, prepared without regard to the issue of causation of damage in an accident.

118. The Report also states what the "Pre-Accident Damage" is; and states it only as "Scratches Off Side". That suggests (or at least might suggest) that all the other damage, including particularly the seven new parts, which have nothing to do with "Scratches Off Side", are *post*-accident damage.

119. The Report states what the "Impact Severity" was ("Moderate") and the "Impact Location" ("To The Near Side"). It reinforces that with the diagram showing arrows to the near-side only. It then proceeds to itemise the seven "New Materials". It is hard, in that context, to say that the Report is not thereby suggesting that these are all "New Materials" required as a result of the accident. This is reinforced by the fact that Mr Smith specifies, in the case of four of the seven itemised New Materials, that they are "NS" i.e. on the near-side. (This is even more striking when it is appreciated, as Mr Murdoch points out, that Mr Smith appears to be leaving out parts which are missing on the other side; see para 46 above, and para 3.3.5. of Mr Murdoch's latest report.)

120. Mr Smith's case that he can avoid the allegation of error, and dishonesty, by having the Report read as a condition report rather than a report of damage caused by the accident, is therefore in my judgment somewhat weak, and certainly not so strong as to support an application to strike out the case against him.

121. I have, therefore, decided that EUI's case that Mr Smith's Report was dishonest and untrue is sufficiently pleaded and not so far-fetched as to justify striking it out without a trial.

Other arguments

122. EUI's case that the Report was intended to deceive them, the insurers of the vehicle involved in the accident, is to my mind adequately pleaded.

123. The Report was written (apparently, given the points I have highlighted) for the purposes of litigation; that is, for the purposes of the "Insured" making a claim (there was a claim number in the Report) as a result of an "Accident"; all the words I have placed in quotations being words in the Report. Given EUI's case that the Report was untrue and dishonest, it is necessarily and obviously EUI's case that it would deceive the insurer who would be required to fund the claim being made by the insured - and EUI was that insurer (as pleaded in para 1 of the Part 20 Particulars of Claim). The Part 20 Particulars of Claim are all about the effect of the Report on the claim, and the Report being prepared in the context of the claim. The Report was explicitly relied upon (on

the question of causation) in the claim, being referred to in the motorcyclist's Particulars of Claim (see para 13 and para 15 above). The deception, if established, can hardly on these facts have been an accident. Such a deception, on these facts, must (at least arguably) have been intentional. Mr Smith does not suggest that he thought the spare parts were required as a result of the accident; he argues, to the contrary, that he gave no thought to that. Therefore, if he is found to have been deliberately representing that they were required as a result of the accident (and if it is found that this was the Report's basis for saying that the Motorcycle was beyond economic repair), it will follow that he is at least likely to have intended the consequence of his actions, which was that his Report would be used to support an accident claim for damages which Mr Smith, as the author of the Report, could not justify and which EUI, as the insurer, would be required to fund.

124. I am also not persuaded that the Part 20 Particulars of Claim are defective by reason of an inadequately pleaded case on EUI's reliance on the Report or on loss suffered by EUI as a result of it. It is sufficient that EUI was "influenced by the misrepresentation": per Lord Clarke in *Zurich Insurance Co plc v Hayward* [2016] UKSC 48 at para 26. It is also sufficient that EUI should have sustained expense in maintaining its counter-fraud unit: *British Motor Trade Association v Salvadori* [1949] Ch 556 at 569. EUI pleads that the Report was served on EUI (para 10 of the Part 20 Particulars of Claim) and was relied upon by Mr de Souza in his witness statement (para 11). EUI pleads that it then acted upon the Report, by commissioning Mr Murdoch to prepare his own reports (para 12). EUI pleads the cost of its counter-fraud unit (para 17), as well as "the cost associated with the detection of and response to [Mr Smith's] dishonest report and the Claimant's dishonest claim" (para 18; see also para 19). EUI claims its costs of the main action (para 22) and interest (para 23). All of these are losses sustained in consequence of and in reliance upon the Report.

The pleading of conspiracy

125. The unlawful means conspiracy is pleaded in para 19 of the Part 20 Particulars of Claim as follows:

> "Yet further, or in the alternative, the Claimant and Third Party are jointly and severally liable to the Third Defendant in the tort of unlawful means conspiracy having combined to use unlawful means to inflict harm upon the Third Defendant. The Claimant and Third Party have created dishonest evidence, attempted to pervert the course of justice and attempted to defraud the Third Defendant. Such conduct was intended to be injurious to the Third Defendant. The Third Defendant is required to fund a counter-fraud unit so as to detect and respond to dishonest claims such as that intimated and prosecuted by the Claimant and facilitated by the Third Party's dishonesty as set out above. The Claimant and Third Party are liable to the Third Defendant in respect of the cost associated with the detection of and response to the Claimant's dishonest claim and the Third Party's dishonest report."

126. This seems to be an adequate pleading, supported by the facts and matters that precede it which I have already considered in detail. Contrary to Grounds 4 and 5 of the appeal,

the Part 20 Particulars of Claim do plead a good case, supported by a sufficient evidential basis, to support the inference that Mr Smith made the representation upon which the Part 20 claim is founded with the intention of deceiving the insurer, i.e. EUI.

127. That leaves Ground 6 of the appeal, which challenges the pleading and the evidential basis for a case that Mr Smith's representation was made pursuant to an agreement, whether express or tacit, with Mr de Souza. In argument, it was made clear that, while the language of the pleading was accepted as adequate ("having combined to use unlawful means to inflict harm upon the Third Defendant"), Mr Smith's case is that there is no evidential basis to justify it. There is no evidence that Mr Smith met Mr de Souza or that the Report was written in combination with him. There is no evidence that Mr Smith and Mr de Souza entered into an agreement to injure EUI by the production of the Report. It is argued that the connection between them is too remote for the pleading of a conspiracy between them to stand up.

128. In this respect, I am assisted by paras 111-112 of on *Kuwait Oil Tanker Co SAK v Al Bader (No 3)* [2000] 2 All ER (Comm) 271 (which I have quoted at para 81 above). No express agreement is required, whether formal or informal. "It is sufficient if two or more persons combine with a common intention, or, in other words, that they deliberately combine, albeit tacitly, to achieve a common end.": *Kuwait Oil* at para 111. Per O'Connor LJ in *R v Siracusa* (1990) 90 Cr. App. R. 340 at 349, "The very existence of the agreement can only be inferred from overt acts. Participation in a conspiracy is infinitely variable: it can be active or passive." What is required is that the parties are "sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of.": *Kuwait Oil* at para 111. "In most cases it will be necessary to scrutinise the acts relied upon in order to see what inferences can be drawn as to the existence or otherwise of the alleged conspiracy or combination.": *Kuwait Oil* at para 112.

129. It is clear from the Report that Mr Smith prepared it with a view to it being presented in legal proceedings, and it clear from the Report that he knew that these would be for the benefit of the insured, whom he named as Mr de Souza. EUI's case is that the purpose and effect of the Report was to support a dishonest claim for damages, based on the lie (as EUI characterises it) that the Motorcycle had been damaged in the accident and rendered undriveable and beyond economic repair. The connection between Mr Smith, Mr Smith's Report, and Mr de Souza as the Insured following an Accident is neither speculative nor remote: it is stated on the face of the Report. The purpose of the Report being to "give… evidence to help the Court" (as Mr Smith said in his Expert's Declaration), I am satisfied that the unlawful mean conspiracy is, not only correctly pleaded, but also adequately supported by the pleaded facts.

Decision on the reverse summary judgment application

130. I consider that the Judge was entitled to decide that the Part 20 claims have a realistic prospect of success and must be decided at a trial, applying the *EasyAir* principles which I have set out in para 95 above.

131. Mr Smith's case is relevant, not so much to his claim to strike out the Claim Form and the Part 20 Particulars of Claim (which conventionally require the focus to be on EUI's own pleadings, and take them essentially at face value), but, particularly, to his claim

for reverse summary judgment against EUI's claim (which provides more scope for the consideration of evidence).

132. Mr Smith's Defence to the Part 20 Particulars of Claim alleges that, when Mr Smith did his Report, the Motorcycle "had damage and was undrivable" (para 6).

133. This is hotly contested as a fact by EUI, and EUI is supported in that contest by the expert evidence of Mr Murdoch. That is a dispute which is suitable for a trial. Mr Littler's report is not conclusive, for the reasons given by Mr Murdoch. It is also fair to say that Mr Murdoch's expertise appears to be more relevant than Mr Littler's. Those are further points against Mr Smith obtaining summary judgment on the basis of Mr Littler's contested opinions.

134. Mr Smith's Defence says, however, that Mr Smith "does not state, has never stated, or been instructed to state, what damage was or was not caused to the motorcycle in the alleged accident, or that the accident caused the motorcycle to be undrivable" (para 6). Similarly, he pleads (in para 15) that he "has not stated that the motorcycle was undrivable because of the accident", but only that it was undrivable when he inspected it. EUI has a realistic prospect of overcoming that assertion, given the context and content of the Report.

    i) The Report contains an expert declaration saying that Mr Smith understands that his report will form evidence to the court (para 1 and para 11.1 of his "Expert's Declaration").

    ii) The Report itself is addressed to PALS (Professional and Legal Services Ltd).

    iii) The Report letterhead is Evans Harding Engineers (CG) Ltd, described as "Consulting Engineers & Claims Assessors; Theft & Claims Investigation Service".

    iv) The body of the Report starts by giving Mr De Souza's name as the "Insured" and the "Accident Date" as 17 August 2018.

    v) Both the Report itself and the accompanying "Expert's Declaration" state a PALS "Claim Number".

    vi) The Report identifies "Pre Accident Damage" only as "Scratches Off Side", and contrasts Pre Accident Value of £615 with the Report's itemisation of "Moderate" impact severity, impact location "To The Near Side" (with arrows along the near side to illustrate this), and a list of seven "New Materials" required (four of them stated to be on the near-side), followed by the Report's conclusion that these repairs will cost £942 so that the vehicle is "Beyond Economical Repair".

    vii) The Report says that the vehicle is now "Undrivable" and gives no indication that, in Mr Smith's opinion, this was or might have been so before the accident whose date (17 August 2018) is at the top of the Report.

135. Whilst I note Mr Smith's case in this respect, I consider that it falls well short of rendering EUI's contrary case (that Mr Smith's Report was deliberately written to

suggest, falsely, that it was the accident which caused the Motorcycle to be beyond economic repair and undrivable), so weak as to justify summary judgment against EUI without a trial.

136. Mr Smith's Defence also says that he "was told what damage was caused in the accident" (para 11). This may be meant to imply that he did, in fact, think that the new parts he identified were required as a result of the accident as a result of what he was told, perhaps by the claimant, but, if that is his case, it would be a matter for a trial to decide whether it can be proved and what effect it has on the outcome of the case. It does not render the pleadings liable to strike out; nor is it sufficient to establish Mr Smith's case to a point where a trial is not required and he can claim summary judgment.

137. Mr Smith's Defence states (as the Report does not) that the reason he considered the Motorcycle to be "undrivable" when he inspected it was "due to the side mounting / side stand being exposed by the missing nearside belly pan" (Defence para 15). In the Report, by contrast, the list of the seven items as "New Materials" did not single out the belly pan but simply listed it (as the second of seven "New Materials") without further explanation or emphasis (see para 11 above). What the basis of his opinion was, and what by his Report he represented it to be, is therefore properly a matter for examination and determination at trial.

138. A clear dispute which is key, both to EUI's efforts to establish that Mr Smith's Report was dishonest and an act of deceit, and to Mr Smith's defence, is that Mr Smith denies "that he intended the motorcycle be declared undriveable even though it was driveable" (Defence para 18). Whether the motorcycle was in fact driveable, and whether (if it was driveable) that was so obviously the case that a proper inference is that Mr Smith's Report to the contrary was dishonest, and promoting a deliberate falsehood, are matters for trial.

139. Mr Smith's Defence says he has "never received instructions from PALS", and that his instructions "came from Evans Harding Engineers (CG) Limited" so he "had and has no interest in 'ingratiating himself' with PALS" (Defence para 20). However, the Report is addressed to PALS and, although Evans Harding are on the letterhead, Mr Smith wrote and signed it, and also signed the accompanying Expert's Declaration. On the face of it, Mr Smith is giving his Report to PALS, therefore. What the relationship between Mr Smith and Evans Harding might be is not stated in the Defence but that, and whether it means that Mr Smith had no interest in PALS providing repeat business can be explored, if necessary, at trial. Mr Smith's bare assertion does not dispose of the point, or render it unarguable. It is also EUI's case, supported by Mr Murdoch, that Mr Smith had given a previous report to PALS in respect of the 2017 accident, so the element of repeat business was arguably present.

140. Mr Smith denies the case against him, also, in respect of the unlawful means conspiracy. He states that he has "never met or communicated with the Claimant" (Defence para 31). The Claimant was, however, according to Mr Smith's Report, the "Insured" and so his name, and his interest in the claim, was apparently known to Mr Smith. I have dealt with this point in paras 128 and 129 above.

141. Mr Smith's Defence says it is not clear to him whether the Report statements summarised in para 8 of the Part 20 Particulars of Claim (see para 26 above) are alleged

to have been dishonest. However, that flies in the face of the Part 20 Particulars of Claim which very clearly state that EUI's case is that the Report was dishonest. This is said in the Claim Form, quoted in para 23 above. It is also said in terms in para 13.d. of the Part 20 Particulars of Claim (quoted in para 27 above). That averment comes directly after the passages in which what Mr Smith said in his Report about each of the seven new items said to be required (as pleaded in para 8 of the Part 20 Particulars of Claim) are contrasted with statements, backed up by Mr Murdoch's evidence, that none of them were required (as pleaded in para 12 of the Part 20 Particulars of Claim) and that Mr Smith's own photographs do not support his Report.

142. Mr Smith denies dishonesty. This denial is based on alleging that he did not intend to imply anything at all about the relationship between the accident and the damage, and that he stands by all the assessments in his Report (which Mr Murdoch's evidence rejects). However, that is a dispute between him and EUI which cannot be resolved by way of summary judgment. EUI's case, as pleaded, and as I have summarised it above, is sufficient to justify a trial which includes the question of whether the Report was dishonest and deliberately deceitful. EUI's case (supported by Mr Murdoch) is that Mr Smith's Report was not only wrong, but stated something that no reasonable expert could have stated (that the Motorcycle was "undriveable") and this supports the allegation of deliberate deceit on Mr Smith's part. EUI's case is also that Mr Smith's Report suggests that damage had been caused by the accident which was not caused by the accident. That is a case which is at least arguable, given the implication of the Report read as a whole and Mr Smith's acceptance that he did not believe that the parts he listed as requiring replacement had been damaged in the accident which his Report was, on its face, about.

143. The conspiracy claim also has a realistic prospect of success, given the analysis I have already performed when deciding not to strike out that claim.

The application to amend the Part 20 Particulars of Claim

144. EUI issued an application for permission to amend the Part 20 Particulars of Claim on 12 August 2024. The application is opposed.

145. A substantial part of Mr Smith's objection to the proposed amendments was that they amounted to a rearguard action to protect EUI against the consequences of what Mr Smith alleged by his application to strike out were deficiencies in the original pleading. It was also suggested that they did not, in fact, cure those deficiencies. Those parts of the argument have fallen away because I have rejected the arguments that the original pleading was defective.

146. In his skeleton argument, counsel for Mr Smith challenged EUI's contention that the proposed amendments do no more than clarify the existing pleading. He submitted that the amendments are so extensive and wholesale that they amount to "a complete revision of the respondent's case". Other than that, Mr Smith's counsel declined in his skeleton to be specific, until after the determination of his appeal on the strike out and reverse summary judgment, saying only, in the skeleton:

> "At that point, the appellant will respond as regards the lateness of the application, fairness, issues relating to limitation given the

> report, the subject of the respondent's criticism, was created on 29 August 2018, over 6 years ago, and so forth."

147. At the hearing, he developed his submissions on the application to amend more fully, as follows.

148. He submitted that the application to amend could have been made sooner. It was noted in the Judgment below that EUI had, at that stage, disavowed any intention of amending (paras 22 and 46 of the Judgment). He argued that the amendment is a complete revision of the case and should not be allowed at this late stage, a positive decision having been made in the court below not to attempt amendment.

149. He cited Carr J's summary of principles, drawn from earlier cases, in *Quah Su-Ling v Goldman Sachs* [2015] EWHC 759 (Comm) at para 38:

> "38. … the relevant principles can be stated simply as follows:
>
> a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
>
> b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
>
> c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
>
> d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
>
> e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;

> f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
>
> g) a much stricter view is taken nowadays of non-compliance with the CPR and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

150. He submitted that the rigour suggested by this passage applied with even greater force at the appeal stage, and in the case of an insurance company, citing Sir Geoffrey Vos C in *Nesbit Law Group LLP v Acasta European Insurance Co Ltd* [2018] EWCA Civ 268 at para 41 and paras 42-44.

151. Both those cases were, however, decided either in the context of applications made late in the sense that they were very close to, and therefore potentially imperilled, a trial (*Quah Su-Ling*) or in the context of an appeal from a decision already made at a trial (*Nesbit*, albeit it was the trial of a preliminary issue), whereas the appeal before me is an interlocutory or interim appeal in relation to an application to strike-out, and any trial of this matter is very far off. It does not seem to me that, were these amendments to be allowed, they would have any effect on the date of the trial, or any significant effect on the rate of progress in the litigation.

152. A case not cited to me, but which supports this analysis, is the decision of the Court of Appeal in *CNM Estates (Tolworth Tower) Ltd v Carvill-Biggs* [2023] 1 WLR 4335 which draws a distinction (at para 47 per Males LJ and at para 67 per Sir Geoffrey Vos C and Newey LJ) between a "late" amendment and a "very late" amendment; a "very late" amendment being one which puts a trial date at risk. *CNM Estates* emphasises at several points the importance of that distinction in the judgment of Carr J in *Quah Su-Ling* which was in the context of a "very late" amendment in that sense: see *CNM Estates* at paras 67-68 and 76.

153. *CNM Estates* gives the following guidance at paras 76-77:

> "76. Aside from very late amendments, we do not think the perceived strength of the case is normally a factor to be taken into account when undertaking that balancing exercise. As Carr J recognised, however, in *Quah Su-Ling* at [38(d)]: "lateness is not an absolute, but a relative concept". There will therefore perhaps be cases where the quality of the delay is unclear. In such cases, it may be necessary to consider, as Carr J suggested: "a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done". But even if it is necessary to adopt that approach

> when the amendment is on the cusp of being "late" and "very late", it will never be appropriate to attempt to conduct a mini-trial.
>
> 77. The general rule is that, except in the case of "very late" amendments, unless it can be seen that a claim has no real prospect of succeeding, its merits should be determined at a full trial. The warnings against mini-trials apply with just as much force to applications to amend as they do to summary judgment or jurisdiction disputes."

154. It follows, since the amendments proposed by EUI are not "very late" in the *CNM Estates* sense, the need for a review of "the quality of the explanation for its timing" is less acute. However, the explanation for the timing of the application to amend is obvious. It was made because, although the Judge below refused the application to strike out, and although permission to appeal was initially refused by Martin Spencer J, permission to appeal was eventually granted by Mould J on a renewed application at an oral hearing on 20 March 2024. The application to amend followed immediately after that grant of permission, on 12 August 2024 (see chronology in para 5 above). The application for permission to amend was made in order to provide EUI with a fall-back position, in the event that its existing pleading was found on appeal to be defective. This is made clear in the witness statement in support of the application to amend, which says that the amendments followed the instruction (for the first time) of Leading Counsel, and were put forward to make EUI's case "slightly clearer and to address criticisms of the pleaded case by [Mr Smith]". That appears to me to be reasonable. It is in line with the practice explained in *Kim v Park* [2011] EWHC 1781 (QB) at para 40:

> "…where the court holds that there is a defect in a pleading, it is normal for the court to refrain from striking out that pleading unless the court has given the party concerned an opportunity of putting right the defect, provided that there is reason to believe that he will be in a position to put the defect right."

155. Nor can EUI be criticised for only instructing Leading Counsel at the appeal stage. Mr Smith did the same himself, Mr Weir KC appearing for the first time at the oral hearing before Mould J.

156. As to what *CNM Estates* calls "a fair appreciation of the consequences in terms of work wasted and consequential work to be done": if I grant permission to EUI to amend, this will be on terms that Mr Smith has permission to respond to the amended pleading. No other work will have been wasted, and the need for an amended pleading from Mr Smith at this stage is not something which would justify refusal of permission to amend in itself. Mr Smith's existing Defence to the Part 20 Particulars of Claim is signed by him personally, with no counsel or solicitors identified as responsible for it, and the relatively recent instruction of Mr Weir KC means that he has played no part in it.

157. Mr Smith also argued that any amendment would now be made after the expiry of the limitation period, since the date of the Report was 29 August 2018, and the date of the hearing was more than six years after that, on 15 October 2024. He cited CPR 17.4, which says:

> **"Amendments to statements of case after the end of a relevant limitation period**
>
> 17.4
>
> (1) This rule applies where –
>
> (a) a party applies to amend their statement of case in one of the ways mentioned in this rule; and
>
> (b) a period of limitation has expired under –
>
> (i) the Limitation Act 1981; (…)
>
> (2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as are already in issue on as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings."

158. He cited *Welsh Development Agency v Redpath Dorman Long Ltd* [1994] 1 WLR 1409 CA to show that whether the limitation period has expired is tested by reference to the date of the decision to allow the amendment, and not the date of the application to amend.

159. He said that the amendments raise for the first time the question of whether the Report was about damage caused in the accident, as opposed to the Report being a condition report silent on the question of causation. I have, however, already decided that the unamended pleading also raises that issue.

160. In any event, the amended pleading appears to me, even if does raise any claim, to arise "out of the same facts or substantially the same facts as are already in issue" in the existing Part 20 Particulars of Claim, and so CPR 17.4(2) permits the amendment. This is apparent from reading the amendments alongside the original pleading.

161. Mr Smith's counsel submitted that the existence of a limitation argument should nevertheless be part of the exercise of my discretion. In this respect, the four-stage test in *Geo-Minerals GT Ltd v Downing* [2023] EWCA Civ 648 CA at para 25 is relevant. This summarises the law as follows:

> "There is a four stage test, as explained in *Ballinger v Mercer Ltd* [2014] EWCA Civ 996, [2014] 1 WLR 3597 at [15] and *Mulalley & Co Ltd v Martlet Homes Ltd* [2022] EWCA Civ 32 at [38]:
>
> (1) Is it reasonably arguable that the opposed amendments are outside the applicable limitation period?
>
> (2) Did the proposed amendments seek to add or substitute a new cause of action?

> (3) Does the new cause of action arise out of the same or substantially the same facts as are already an issue in the existing claim?
>
> (4) Should the Court exercise its discretion to allow the amendment?"

162. I have already considered stage (3). But Mr Smith must also fail at stage (1). The limitation period for these torts (which include no claims for personal injury) is six years "from the date on which the cause of action accrued" (section 2 of the Limitation Act 1980). An action in tort is not complete without proof of loss. But, in any event, section 32(1) provides, so far as material:

> "**32 Postponement of limitation period in case of fraud, concealment or mistake.**
>
> (1) (…) where in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> (a) the action is based upon the fraud of the defendant; or
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
>
> (c) the action is for relief from the consequences of a mistake;
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it."

163. EUI's action for the torts of deceit and unlawful means conspiracy in respect of the Report is "based upon the fraud" of Mr Smith within the meaning of section 32(1); see *Old Park Capital Maestro Fund Ltd v Old Park Capital Ltd (In Liquidation)* [2023] EWHC 1886 (Ch) per Richards J at para 270. Therefore, the limitation period did not begin to run until EUI "discovered the fraud (…) or could with reasonable diligence have discovered it".

164. No evidence has been put before me to suggest that EUI could with reasonable diligence have discovered the Report to have been made dishonestly and as an act of deceit and unlawful means conspiracy against them before they were joined to the proceedings in which claims were made against them in reliance on the Report. There is no evidence that they were even aware of the Report before they were joined into the proceedings. That was when they were added as Third Defendants by amendment of the Claim Form, on 12 September 2019. Even if (which is an assumption in Mr Smith's favour) they could with reasonable diligence have known they had a case for deceit and unlawful means conspiracy based on the Report as soon as they were joined to the action, six years from then does not expire until September 2025.

165. Therefore, the *Geo-Minerals* stage (1) test is not in Mr Smith's favour; in addition to the stage (3) test not being in his favour. In the circumstances I have already considered, I see no reason why I should not, at stage (4), exercise my discretion in favour of the

amendment. That is so even if I assume, in relation to the stage (2) test, that there is something in the proposed amendments which amounts to a new cause of action, as opposed to greater detail in support of the existing causes of action. Even that is not, however, clear; since the amendments, although extensive, seem to me to provide greater detail and more facts in support of the existing claims, rather than raising entirely new causes of action.

166. Finally, counsel for Mr Smith submitted that to allow an amendment would prejudice his position in relation to any Part 36 offer he may have made because of the operation of CPR 36.17. It was submitted that, if EUI recovered more than any such offer only as a result of the amendments, CPR 36.17(1)(a) would apply and, in consequence of CPR 36.17(3) and (5), an offer which was reasonable when it was made, might have become unreasonable only as a result of the late amendments, but Mr Smith would still suffer the adverse costs consequences of CPR 36.17(3).

167. That is not, however, correct. The court has a discretion under CPR 36.17(3), because of the proviso "unless it considers it unjust to do so". The arguments now advanced to me can be made at that stage, if they arise.

168. I have reviewed the proposed amendments, and none of them appears to me to be objectionable, now that the points I have already considered have been decided against Mr Smith. No other specific objection was put to me. I remind myself that it is not my function at this stage to conduct a detailed assessment of the merits of the proposed amendments, provided they are not so obviously weak as to be immediately susceptible to an application that they be struck out: *CNM Estates (Tolworth Tower) Ltd v Carvill-Biggs* [2023] 1 WLR 4335 at para 77.

Summary and conclusion

169. For these reasons, the appeal will be dismissed and the application to amend the Part 20 Particulars of Claim will be granted.

170. This case should now go to trial. A trial is the most efficient and appropriate way of Mr Smith challenging and, if he can, disposing of the allegations being made against him.