Neutral Citation Number: [2019] EWHC 3042 (QB)

Case No: HQ18X03863

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/11/2019

Before :

HEATHER WILLIAMS QC,
SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

KAMRAN NAQVI	**Claimant**
- and -	
(1) HARRIS CARTIER LIMITED (IN LIQUIDATION) **(2) RICHARD SLADE & CO** **(3) JEFFREY BACON** **(4) BRIAN LEVY**	**Defendants**

- -
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Mr Philip Jones (instructed by **Croft Solicitors**) for the **Claimant**
Mr Matthew Bradley (instructed by Kennedys LLP) for the **Second and Fourth Defendants**
Ms Siân Mirchandani QC (instructed by DWF Law LLP) for the **Third Defendant**

Hearing dates: 17 October 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HEATHER WILLIAMS QC

Heather Williams QC:

1. The Claimant brings an action for damages for professional negligence against the solicitors and barrister who acted for him in his unsuccessful race discrimination claim against his former employer, Lloyds Banking Group ('Lloyds'). The Fourth Defendant, Mr Brian Levy ("D4"), was instructed by the Claimant from September 2011 to December 2013, initially in relation to Lloyds' internal disciplinary proceedings and then to act in his Employment Tribunal ("ET") claim. At the beginning of this period D4 was employed by Harris Cartier LLP and then from 22 August 2012 by the First Defendant, Harris Cartier Limited ("D1"). D4 continued to act for the Claimant when he moved to the Second Defendant, Richard Slade & Co ("D2"), on or about 5 November 2012. Mr Jeffrey Bacon, the Third Defendant ("D3") is a barrister who was instructed by D4 for the period 2 February 2012 – 18 January 2013 and again from 24 July 2013.

2. In summary, the Claimant alleges that the Defendants failed to adequately formulate and advance his claim for race discrimination ("the liability allegations") and failed to properly quantify the discrimination claim by reference to his loss of career ("the quantum allegations").

3. The following are before the court:

   i) Applications by D2, D3 and D4 to strike out the claim as an abuse of process pursuant to CPR 3.4(2)(b) because it amounts to an impermissible collateral challenge to the ET's determination of the race discrimination claim ("the abuse of process applications");

   ii) Applications by D2, D3 and D4 for summary judgment pursuant to CPR 24.2 in relation to the whole claim as it has no real prospect of success and there is no other reason why it should proceed to trial ("the main summary judgment applications");

   iii) In the alternative to ii), an application made by D2 and D4 only, to strike out the whole claim under CPR 3.4(2)(a) on the basis there are no reasonable grounds for bringing it ("the no reasonable grounds application"); and

   iv) In the further alternative, applications made by D2, D3 and D4 that paragraphs 17(10) – (14) of the Particulars of Claim ("PoC"), which contain the quantum allegations, be struck out on the basis there are no reasonable grounds for bringing this part of the claim / summary judgment be granted as they have no real prospect of success and there is no other reason why this part of the claim should proceed to trial ("the quantum applications").

   D1, who was placed into voluntary liquidation in May 2014, has filed a Defence also contending the claim has no reasonable prospect of success and is an abuse of process; but D1 has not applied to strike out the claim or for summary judgment and has played no part in the hearing.

4. D2 and D4's application is supported by a witness statement from Mr David Robinson, solicitor at Kennedys LLP, dated 8 July 2019. D3's application is supported by witness statements dated 8 July 2019 and 14 October 2019 from Mr John Bennett, solicitor and

partner at DWF Law LLP. The Claimant's witness statement, dated 9 October 2019, is made in response to the applications. Each of the statements addresses the Claimant's instructions to his lawyers and the course of the ET proceedings. They exhibit approximately 540 pages of documentation concerning those matters. Much of the narrative of what occurred is undisputed.

5. The structure of this judgment is as follows:

- An outline of the underlying events: paragraphs 6 – 15;
- The Claimant's pleaded case: paragraphs 16 – 36;
- Direct race discrimination: the law: paragraphs 37 – 41;
- The no reasonable grounds application: paragraphs 42 – 43;
- Summary judgment: the law: paragraphs 44 – 46;
- The main summary judgment applications: paragraphs 47 – 111;
- The quantum applications: paragraphs 112 – 116;
- The abuse of process applications: paragraphs 117 – 142.

An outline of the underlying events

6. The Claimant began employment with Lloyds on 30 September 2010. He was dismissed on 16 April 2012. He was employed as a private banker in the Wealth Business Unit ("WBU"), which was responsible for dealing with high net worth and ultra-high net worth individuals. His role involved attracting clients from Asian communities. The Claimant is of Pakistani national origins. For the majority of his employment his line manager was Mr Tim Pethybridge. Ms Pamela Godson was a HR Manager who joined the WBU in February 2011. She led the disciplinary investigation to which I shall now refer.

7. On 27 September 2011 the Claimant was required to attend a fact finding interview conducted by Ms Jenny Walker in relation to potential breaches of Lloyds' Conflicts of Interest and Personal Integrity Policies. The allegations concerned his relationship with the former world heavyweight boxing champion, David Haye, a Lloyds' client. They centred on the acceptance of gifts and hospitality and undertaking external work for Mr Haye and his company, Haymaker Limited, during working hours with Lloyds. On 5 October 2011 the Claimant was suspended from work. Disciplinary proceedings were instituted in December 2011, conducted by Ms Vicki Foster. The first disciplinary meeting took place on 24 February and was adjourned. The next hearing was on 7 March 2012. Ms Foster subsequently informed the Claimant that he was summarily dismissed for gross misconduct in a letter dated 16 April 2012. The letter described the misconduct as:

> "*use of vehicles provided by Mr Haye; sums of money transferred between your own and Mr Hayes account; the fact that you have a personal email account at Haymaker Ltd; your attendance at a meeting with Jack Barclay Bentley where you represented Mr Haye*

> *and lead discussions to broker a sponsorship deal on his behalf in work time and your Linked-In account stating your role as Adviser at Haymaker….In summary, it is my belief that your actions represent Gross Misconduct and are deemed as misconduct serious enough to destroy the employment contract between yourself and the Bank*"

8. The Claimant appealed his dismissal. Following a hearing conducted by Mr Takis Martakis, he was advised his appeal had been unsuccessful.

9. The Claimant first instructed D4 in relation to the internal disciplinary proceedings. On 25 January 2012 the Claimant emailed him two documents he had prepared, '*Draft Grievance'* and '*Summary of Lloyds' Evidence'*. At D4's request, D3 used these documents as the basis for finalising the Claimant's grievance complaint which was submitted to Lloyds on 7 March 2012 (with a slightly amended version submitted on 9 March 2012).

10. Following his dismissal, the Claimant retained D4 to act in his ET claim against Lloyds. Proceedings were issued on 13 July 2012 for unfair dismissal; discrimination on grounds of race and/or religion; and victimisation. The Grounds were drafted by D3. Lloyds defended all claims. Further Particulars of the discrimination and victimisation claims (which had been ordered by the ET), were drafted by D3 and served on 30 October 2012.

11. On 21 December 2012 D3 and D4 advised the Claimant in conference and he agreed to withdraw his claim for discrimination on grounds of religion. Shortly thereafter D3 provided an outline for the Claimant's witness statement, which was subsequently prepared by D2 and was signed by the Claimant on 18 January 2013. In February 2013 the Claimant provided his comments on the witness statements served by Lloyds. By this time D3 was no longer acting, as a result of the Claimant's before the event insurance funding running out. A Schedule of Loss was served on 9 January 2013; and an updated version was served during July 2013.

12. The ET hearing began on 12 March 2013. By this stage the Claimant was represented by alternative counsel, Mr Raoul Downey. Witness evidence was heard over seven days in March. The case was then adjourned part heard. During the intervening period Mr Downey became too unwell to continue acting and D3 was re-instructed, attending a conference on 24 July 2013. The ET hearing resumed for two concluding days of evidence on 1 and 2 August 2013. Closing submissions were then heard on 28 and 29 October 2013.

13. The ET's decision was sent to the parties on 11 December 2013. The unfair dismissal claim was upheld and the discrimination and victimisation claims were dismissed. The Tribunal's conclusions in relation to the Equality Act 2010 claims are considered below. As regards unfair dismissal, the ET accepted the Claimant had been dismissed for a potentially fair reason, namely the Respondent's genuine belief he had committed misconduct (paragraph 84). However, the ET found the procedure adopted and the investigations undertaken were so deficient as to fall outside the range of reasonable responses open to Lloyds and that the failings were of such a degree that belief in the Claimant's misconduct was not reasonably held (paragraphs 85 – 101). The identified deficiencies included: that the allegations were only framed in general terms, with requested particularisation never provided (paragraphs 89 - 91); that HR prevented Ms

Foster from knowing about earlier informal investigations carried out by the Claimant's line manager in April and August 2011 which had exonerated him (paragraphs 26 – 34 and 92 – 93); and an absence of proper controls over receipt of gifts and conflicts of interest in the WBU, which Ms Foster had not been aware of (paragraphs 95 - 96). The ET found that Ms Godson was concerned to ensure the case against the Claimant was prosecuted as rigorously as possible (paragraph 88). The role of HR and specifically Ms Godson in preventing Ms Foster from learning of the earlier investigations came to light as a result of late disclosure by Lloyds of a redacted version of the relevant HR log (paragraphs 40 and 96), shortly before the resumed hearing in August 2013.

14. The Claimant did not appeal the ET's decision. D2 and D4 were dis-instructed after the ET's decision was received. D3 continued to act for a short period of time instructed by the Claimant's sister (who is a solicitor).

15. On 19 December 2013 the ET sent out a Notice of Hearing for a case management telephone hearing on 6 January 2014 to discuss directions for a forthcoming Remedy Hearing in March 2014 (the previous decision having only addressed liability). D3 was no longer involved by the time of the hearing. The Claimant has not indicated whether the Remedy Hearing proceeded and if so what damages were awarded / whether an agreed settlement figure was arrived at for his unfair dismissal[1].

The Claimant's pleaded case in the present proceedings

The Particulars of Claim

16. Paragraphs 4 – 14 of the PoC set out the account of events relied upon. Paragraphs 15 – 16 plead the implied term of his retainer with D1, D2 and D4 to use the reasonable skill and care expected of employment law specialists; and the duty of care owed by all Defendants. Paragraph 17 identifies the alleged breaches and paragraph 18 the consequential loss and damage. The thrust of the liability allegations centre on a failure to place Ms Godson at the heart of the race discrimination claim.

17. Paragraph 4 of the PoC pleads that the *Draft Grievance* (paragraph 9, above) included the following complaints:

    i) Ms Godson, together with Mr Pethybridge and Mr Malcolm Glaister (the head of key clients private banking), "*had been engaged in a campaign to belittle the Claimant, preventing him from taking on new leads and taking all steps possible to find a reason for bringing allegations against him and to remove him from his job*";

    ii) From her arrival in February 2011 Ms Godson had been instrumental in side-lining the Claimant and had treated him badly, making decisions outside of Lloyds' policies;

    iii) On one occasion when he had given a lift to Ms Godson in a Bentley motor vehicle "*she initiated a strange conversation with the Claimant about his religion and culture*";

[1] A statutory cap applies to damages awarded for unfair dismissal. At the relevant time the cap was £74,200.

iv) On 3 May 2011, following the capture of Osama bin Laden in Pakistan, there were comments in Lloyds' offices which continued for some days about the 'Paki's' having had him.

18. Paragraph 5 notes that the Grievance document sent to Lloyds in March 2011[2] made no mention of the latter two incidents. (I will refer to them, respectively, as "the Bentley conversation" and "the Osama bin Laden comments".)

19. Paragraph 7 refers to a Case Management Discussion in October 2012 at which D4 told the ET that the basis of the Claimant's race discrimination claim was that in comparison to a colleague, Mr Subbiah, an Indian Hindu, the Claimant had been discriminated against as someone of a Pakistani Muslim background.

20. The Claimant pleads that the Further Particulars contained "*lengthy and detailed allegations of unlawful discrimination, based on Mr Subbiah as a comparator and identifying Ms Kamel Hothi, the business and community director for group corporate affairs at Lloyds, as perpetrator of much of the discrimination complained of"*. Paragraph 8 also alleges that Ms Godson was only mentioned once in the Further Particulars; there was no plea she had subjected the Claimant to less favourable treatment; and the matters pleaded at paragraph 4 of the PoC were not included.

21. Paragraph 9 states that in an email sent on 27 October 2012 the Claimant pointed out the Further Particulars did not contain the Bentley conversation or the Osama bin Laden comments; and that D3 replied by email of 28 October 2012 explaining the allegations had been narrowed to concentrate on Ms Hothi.

22. Paragraph 11 pleads that D3's outline of the Claimant's witness statement contained no substantial reference to his discrimination claim; that his finalised statement contained virtually no evidence in support of this claim; and that "*such evidence as was contained in it focused on the acts of Ms Hothi, using Mr Subbiah as a comparator, and did not make any such allegations against Ms Godson*" or include the Bentley conversation or Osama bin Laden comments.

23. Paragraphs 12 and 13 complain that D2 and D4 took no steps to amend or supplement his witness statement, despite the comments he provided on Lloyds' witness statements from Ms Walker, Mr Martakis and Ms Godson, referring to race discrimination on the part of Ms Godson.

24. Paragraph 14 pleads that at the hearing the ET confined his case to the allegations set out in his witness statement.

25. As regards the pleaded Particulars of Negligence, the allegations at paragraph 17(1) – (9) relate to the failure of the race discrimination claim on liability. The particulars at (1), (3), (4), (5), (6), (8) and (9) allege that the Defendants failed to properly formulate, pursue or present a case of race discrimination based on Ms Godson's conduct, despite her central role in disciplining and dismissing the Claimant and despite his instructions to that effect. The identified failures in this regard encompass the Further Particulars, the Claimant's witness evidence, failing to take stock and rectify obvious defects in the

[2] The PoC gives the date of the grievance as 23 March 2011, which appears to be incorrect (paragraph 9, above).

case before the hearing and the presentation of the case before the ET. Sub paragraph (6) asserts that the Defendants:

> "*Formulated and presented to the Tribunal a claim of unlawful discrimination that was based only on the actions of Ms Hothi and/or took Mr Subbiah as a comparator despite the fact that: there existed a cogent case of unlawful discrimination based on the actions of Ms Godson and her involvement in the Claimant's dismissal; the allegations in respect of Ms Hothi were out of time; there was no sustainable case of discrimination to be advanced in respect of Ms Hothi;…Mr Subbiah was wholly unsuitable as a comparator; and/or events at the CMD…ought to have indicated that a case based on the difference in background between the Claimant and Mr Subbiah and the (assumed) difference in religion would at best be very difficult to sustain.*"

26. Sub-paragraph 17(2) alleges failures by the Defendants to properly follow up and take more detailed instructions from the Claimant as regards the role of Ms Godson and/or to act on his instructions. Sub-paragraph 17(7) covers a different topic, in that it alleges that having formulated a case based on the actions of Ms Hothi, using Mr Subbiah as a comparator, the Defendants failed to adequately support that claim.

27. Sub-paragraphs 17(10) – (14) allege failings in the presentation of the quantum of the claim. Sub paragraph 17(10) complains that the Defendants "*failed to obtain or to present to the Tribunal or to Lloyds evidence*": (a) of loss of earnings on the basis of a gross salary of £100,000 p.a.; and (b) of his potential future earnings and opportunities for promotion, absent the discrimination (with reference made to a salary of £300,000 - £350,000 p.a. when he was at Citibank in 2004 – 2007). Sub-paragraph (11) asserts a failure to present career-long financial losses; and sub-paragraph (12) a failure to investigate and present evidence of the difficulties he encountered in obtaining further employment after his dismissal. Sub-paragraph (13) complains that the Schedule of Loss submitted to the ET was limited to three years loss of earnings on the basis of a gross salary of £65,000 p.a. Sub-paragraph (14) contends that the shortfall in his salary should have been claimed as an unlawful deduction from wages.

28. Damages for the loss of a chance are claimed on the basis there was at least a 70% prospect of the race discrimination claim succeeding if properly formulated and advanced; and that the Claimant ought to have been entitled to overall compensation totalling £10,201,924.

The Claimant's Further Information

29. In response to requests from D2 dated 21 March 2019, the Claimant provided further information as to the way he puts his case ("the Claimant's Further Information"). The Claimant was asked to clarify what he said was the significance of the Bentley conversation. He replied at Response 9: "*It is not alleged that the conversation was itself an act of racial discrimination, although it did make the Claimant feel uncomfortable and make him question Ms Godson's motive for questioning the Claimant in the manner she did".* He then answered a request to explain why the conversation was 'strange', saying Ms Godson "*dwelt excessively on the Claimant's*

race and religion asking questions such as: 'what is it like being a Muslim here?'; 'what is it like to be Pakistani?'; 'how would you raise children in the UK in a western culture?'. When the Claimant told Ms Godson that being a Muslim in the UK was fine, she replied that it was 'regressive'. Ms Godson also made comments about how expensive and nice the Bentley was." Response 18 confirmed it was alleged that D2 should have taken more detailed instructions from the Claimant as to the content of the Bentley conversation.

30. The Claimant responded to a request to indicate who was involved in the Osama bin Laden comments as follows:

> "*The Claimant recalls two specific occasions. On neither occasion did the Claimant see who made the comment. On the first such occasion on or around 3 May 2011 the voice sounded female and therefore the Claimant infers in [sic] was Pamela Godson since she was the only female present. On the second occasion, on or around 6 May 2011, the comment could have come from Malcolm Glaister, Tim Pethybridge, Alan Hooks, Rosanna Eisedell or Pamela Godson as they were the only people present. However the Claimant was shocked that no one objected to these racist comments*."

31. The Claimant accepted he signed his grievance before it was sent to Lloyds, but said he did not notice the omission of the Bentley conversation or the Osama bin Laden comments at that stage (Response 11).

32. At Response 17 the Claimant set out the case of racial discrimination based on Ms Godson's conduct which he alleged the Defendants should have advanced. It is therefore important to set it out in full:

> "*Ms Godson treated the Claimant less favourably than she treated or would have treated others by: collating rumours within the office in relation to the Claimant Passing on such rumours and/or causing disciplinary proceedings to be commenced against the Claimant on the basis of such rumours and/or her own stereotyped views as to the sort of car which the Claimant ought to have been driving or sort of property in which he ought to have been living and/or as to his honesty and/or on the basis of allegations that had already been investigated and dismissed by Mr Pethybridge and/or on the basis of evidence of Mr Pethybridge which was false and Ms Godson (because of her attempt to conceal the same) knew to have been false; fabricating the HR log and or concealing the contents of Mr Pethybridge's fact finding interview; conspiring with Mr Pethybridge to ensure that the Claimant was suspended from work on 5 October 2011; ensuring that the disciplinary case against the Claimant was prosecuted as rigorously as possible due to her having taken offence at the fact that the Claimant drove an expensive car and lived in an expensive part of London and expecting the Claimant's dismissal from the outset of the disciplinary proceedings. Whether or not the Defendants could*

> *have found an appropriate actual comparator (had they looked and, given that Mr Pethybridge also appears to have fallen under suspicion, he may have provided a suitable comparator), it would have been easy to construct a hypothetical comparator whose circumstances (apart from race/religion) were not materially different from the Claimant. The calculated unreasonableness of Ms Godson's conduct directed at the Claimant, the use of the word 'Paki' by Ms Godson or in her vicinity (without objection from her), the context provided by her questioning of the Claimant when being given a lift in his Bentley and her stereotyped assumptions in relation to the Claimant indicated that the reason for her treatment of the Claimant was his colour, Pakistani origins or Muslim religion. These all constituted facts from which the Tribunal could have concluded, absent explanation from Lloyds, that the Claimant had been discriminated against on grounds of his race or religion. Accordingly, Lloyds would have been obliged to give a non-discriminatory explanation for the treatment of the Claimant and since no such explanation (or no credible explanation) was or could have been provided, the Tribunal would have been obliged to find in favour of the Claimant on the issue of direct discrimination…*"[3]

Further clarification provided in submissions

33. In their Skeleton Arguments and oral submissions, the Defendants emphasised that Response 17 still left question marks over the discrimination claim the Claimant said they ought to have run. In particular, Response 17 referred to a claim based alternatively on "*his colour, Pakistani origins or Muslim religion*" and no comparator, actual or hypothetical, was identified. Mr Bradley submitted that it was unrealistic to criticise the Defendants' failure to formulate a claim which the Claimant was still unable to identify with any precision.

34. In his oral submissions responding to the applications, Mr Jones clarified a number of matters. Whilst noting that this clarification does not, as yet, appear in any pleading, in fairness to the Claimant, I have proceeded on the basis of his claim as clarified and the Defendants did not raise objection to this.

35. Firstly, Mr Jones confirmed that no claim of negligence was made in relation to the non-pursuit of the religious discrimination claim (less favourable treatment on the basis the Claimant is a Muslim). Secondly, that no complaint of negligence was made in relation to the non-inclusion of a harassment claim.

36. Thirdly, Mr Jones clarified that the race discrimination claim which the Claimant said the Defendants negligently failed to formulate and pursue, was one that Ms Godson had treated the Claimant less favourably than she would have treated a white employee in similar circumstances in relation to the disciplinary process and dismissal ("the Ms Godson discrimination claim"). He accepted it was unlikely that there was an actual

[3] The claim it is said should have been pursued is also addressed at paragraphs 22.2 – 22.6 of the Claimant's Skeleton Argument.

comparator who could be identified to support this claim. Mr Jones said that the Bentley conversation and/or the Osama bin Laden comments would have provided the 'something more' or 'the spark' that would have sufficed to shift the burden of proof to Lloyds to show that no discrimination was involved in Ms Godson's actions.

Direct race discrimination: the law

37. There was no material dispute between the parties as to the law applicable to an employment related claim for race discrimination.

38. Race is a protected characteristic for the purposes of the Equality Act 2010. Race includes colour, nationality and ethnic or national origins: section 9(1). Direct discrimination is defined by section 13(1), as follows: "*A person (A) discriminates against another (B), if because of a protected characteristic, A treats B less favourably than A treats or would treat others"*. Where a comparison is made for the purposes of section 13, "*there must be no material difference between the circumstances relating to each case*".

39. Submissions before me proceeded on the basis of uncontroversial and well-established principles of direct discrimination law, in particular: that unreasonable treatment does not of itself justify an inference of unlawful discrimination; the treatment in question is because of a protected characteristic if it had a significant influence, whether it operated on the discriminator consciously or subconsciously; and in a case where no actual comparator is relied upon, Tribunals may compare the claimant's treatment to a constructed hypothetical comparator or may simply proceed to identify the reason for the allegedly discriminatory treatment.

40. Section 136 of the Equality Act 2010 provides for a shifting burden of proof to apply in a discrimination claim:

> "(1**)** *This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*"

41. The equivalent burden of proof provisions in earlier legislation were analysed by the Court of Appeal in *Igen v Wong* [2005] ICR 931 and *Madarassy v Nomura International* [2007] ICR 867. The first stage of the process requires a claimant to prove facts from which a Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of unlawful discrimination. The second stage, which only arises if the claimant surmounts the first stage, requires a respondent to show that an act of unlawful discrimination was not committed, if the claim is not to be upheld.

The no reasonable grounds application, pursuant to CPR 3.4(2)(A)

42. It is convenient to address D2 and D4's application that the PoC disclose no reasonable grounds for bringing the claim, within the meaning of CPR 3.4(2)(a), at this stage. Mr Bradley put this on the basis that the claim as pleaded is 'incoherent'. Practice Direction 3A, paragraph 1.4(2) contains examples of cases where the court may conclude that the circumstances fall within CPR 3.4(2)(a) and one is where the particulars "*are incoherent and make no sense*".

43. As will be apparent from my earlier summary of the PoC, the pleaded claim is intelligible and makes sense. It has benefitted from the additional clarification provided via the Claimant's Further Information and by Mr Jones orally, but any imperfections in its formulation fall far short of the kind of incoherence that would be required to strike out a claim. Accordingly, this aspect of the Defendants' application fails.

Summary judgment: the law

44. CPR 24.2 provides as follows:

> "*The court may give summary judgment against a claimant…on the whole of a claim or on a particular issue if -*
> *(a) it considers that—*
> *(i) that claimant has no real prospect of succeeding on the claim or issue;*
> *(ii) …; and*
>
> *(b) there is no other compelling reason why the case or issue should be disposed of at a trial.*"

45. The correct approach to applications for summary judgment made by defendants was helpfully summarised by Lewison J. (as he then was) in *Easyair Limited (trading as Openair) v Opal Telecom Limited* [2009] EWHC 339 (Ch) at paragraph 15, 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) [2011] 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 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 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…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."*

46. I propose to consider the applications for summary judgment before addressing the abuse of process applications. This is in keeping with the approach explained by Lord Hoffman in *Arthur JS Hall & Co v Simons* [2002] 1 AC 615 at 707C:

> "*I would suspect that, having regard to the power of the court to strike out actions which have no real prospect of success, the Hunter doctrine*[4] *is unlikely in this context to be invoked very often. In my opinion, the first step in any application to strike out*

[4] *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529.

an action alleging negligence in the conduct of a previous action must be to ask whether it has a real prospect of success."

The main summary judgment applications

Consideration of the pleaded events

47. I turn now to the documentation and steps that are the focus of the liability allegations in the PoC. Save where I indicate to the contrary, I refer solely to incidents that are agreed to have occurred and/or are documented.

The Claimant's Draft Grievance

48. The *Draft Grievance* supplied by the Claimant on 25 January 2012 (paragraph 9, above) comprised 47 pages of closely typed text, setting out a series of chronological entries. In light of the narrative at paragraphs 4 and 5 of the PoC it is necessary to consider the contents.

49. The document described numerous respects in which the Claimant said he had been treated less favourably than Mr Subbiah, who had also been hired by Lloyds to attract Asian clients. They included:

i) He was told that Mr Subbiah would cover the South of the UK and the Claimant the North. He felt this arrangement disadvantaged him as the South included London (page 2);

ii) In the second week of his employment, Mr Subbiah attended the Asian Business Awards, whereas the Claimant was not permitted to do so (pages 2, 3 and 5);

iii) Mr Subbiah met Ms Hothi before he was given the opportunity to do so (pages 3 – 5);

iv) When Mr Abhishek Sachdev joined the WBU he was placed next to Mr Subbiah and assigned to support him (pages 6 – 7);

v) Over the next few months the Claimant received a lack of support from the Asian Team, in contrast to that afforded to Mr Subbiah (page 7);

vi) By late November 2010 the Claimant discovered that Mr Subbiah had been given a significant number of potential leads, even including Pakistani clients, whereas he had yet to receive any (page 10);

vii) In December 2010 Ms Hothi travelled to Scotland, taking Mr Subbiah with her rather than the Claimant, despite the fact it was his region (pages 13 – 14);

viii) When he proposed Amir Khan (another boxer he knew) as a potential presenter for the Asian Women of Achievement Awards, Ms Hothi was dismissive (page 13);

ix) Ms Hothi cancelled a trip to Manchester with the Claimant, but never behaved in that way towards Mr Subbiah (pages 13 – 14);

x) In early 2011 Ms Hothi rejected the Claimant's proposal that Lloyds support Amir Khan's Pakistan Floods Appeal Charity Dinner, indicating the bank could not be seen to support a particular country [Pakistan] (pages 13 – 17);

xi) By March 2011 Mr Subbiah had more cases than he could handle, with 80% of his leads coming from internal sources, whereas the Claimant was still not receiving leads (page 18);

xii) Mr Subbiah attended the Asian Who's Who International Awards, but the Claimant was not invited (page 19);

xiii) In March 2011 Mr Subbiah was taken to meet a well-known introducer of Asian clients, but the Claimant was not invited (page 19);

xiv) In April 2011 Mr Subbiah was able to nominate a client/prospect for the Asian Women of Achievement Awards, yet the Claimant was not informed. When he became aware and nominated Amir Khan's mother, this was not accepted (page 21);

xv) In April 2011 his line manager checked if he had attended a training session, but equivalent checks were not made of Mr Subbiah (page 24);

xvi) In May 2011 Mr Subbiah was given the opportunity to attend the Family Business Forum, but the Claimant was told that his presence was not required (pages 25 – 26);

xvii) In May 2011 the Claimant received a negative reaction from Mr Glaister to his email about the Sports Industry Awards (pages 28 – 29);

xviii) At the May 2011 Asian Women of Achievement Awards the Claimant was side-lined by Ms Hothi (pages 30 – 32).

50. In an entry for 3 May 2011 the Claimant referred to the Osama bin Laden comments, as follows:

> "*Following the capture of the Osama Bin Laden, there were comments made in the office as the News flashed on the TV monitors where the news was displayed. Such as "the Pakis had him". Although this perhaps was not specifically directed towards me it was deeply offensive and went to somewhat explain the environment I was working in. Many of the bankers came from military backgrounds (Navy and Army) This included MG JN JVB JMS CCD and others if not from that background would regularly raise political issues such as AO JMS or RH OH if not had a Military background but would still portray an image of elitism and would regularly talk about their experiences*" (page 26).

51. Ms Godson was not named in that context. In the same section of the document, the Claimant also said that Indian colleagues had mocked him in front of other staff members over a Cricket World Cup win for their national team (page 27).

52. The Claimant described attempts to raise his lack of support with more senior managers, for example with Mr Guy Healey (pages 29 – 30). He set out the informal investigations

he had faced: the April 2011 meeting with Mr Pethybridge (pages 24 – 25); questioning from Mr Pethybridge in July 2011 (pages 33 - 36); and the August 2011 meeting with Ms Godson and Mr Pethybridge (pages 38 – 40). A few weeks after the questioning in July 2011, Mr Glaister accused him of not doing what he had been asked to in his half-yearly report. The Claimant commented, "*it soon became evident that the management team were now on the warpath to find whatever reason they could to harass me into either leaving the bank of my own accord or finding just reason to dismiss me*" (page 37).

53. The Claimant complained about an email he received from Mr Glaister raising his use of the parking facilities, which he said was not sent to anyone else (page 41). He said he had parked his car without objection and had bumped into several managers, who he named, when doing so. Within that paragraph he said:

> "*On one occasion I gave a lift to PG in the Bentley (this was the time I had a strange conversation with her about my religion and culture mentioned earlier)*[5]*. She also commented on how nice the vehicle was with envious undertones."* (Page 42)

54. Pages 43 – 46 of the document then dealt with the formal fact-finding meeting conducted by Ms Walker, which the Claimant described as a 'set-up'. He concluded by summarising his concerns. He made reference to "*underhand tactics and a discriminatory bully-boy approach*". In context, this was a reference back to the allegations of discrimination he had set out. He said he was being driven out of his job, was the victim of false allegations and Mr Subbiah had been given a work environment in which he could prosper, whereas he had been left in the lurch (pages 46 – 47).

55. Thus, in terms of discrimination, the clear focus of the *Draft Grievance* was on multiple occasions when the Claimant said he had been treated less favourably than Mr Subbiah, particularly, but not only, in terms of the opportunities afforded to him to develop business leads; Ms Hothi was repeatedly referred to in that context. The Claimant explicitly drew a comparison between his treatment as a Pakistani and that received by Mr Subbiah, an Indian. The Claimant also suggested that his adverse treatment stemmed from him being Muslim. Whilst the Claimant also complained that his managers were trying to get rid of him, the emphasis was on Mr Pethybridge, his line manager and those in the management chain above him. Ms Godson, the HR manager, was mentioned within the narrative, for example in relation to the August 2011 meeting, but she was not accorded any prominence in this lengthy document and was not specifically said to have discriminated against him. The attempt to get rid of him, was also contrasted with the more favourable treatment received by Mr Subbiah. The document did not identify the Claimant's treatment as stemming from him being non-white and the comparator he repeatedly referred to was also non-white.

The Claimant's 'Summary of Lloyds' Evidence'

56. The Claimant began this 10 page document by saying there was an orchestrated campaign of harassment against him by the bank's key employees "*due to a deep jealousy fuelled by a racist environment in which I was the only Pakistani and Muslim".* The Claimant referred to his Bentley when summarising his responses to Mr

[5] In fact, there is no earlier or other mention of this episode in this document.

Pethybridge's questions around how it was funded (pages 1 – 2). In the course of that section he said:

> "*Pamela Godson from HR accepted a lift from me in this vehicle, she made no complaints about this factor. Instead throughout the journey she asked me strange questions regarding my culture and religion vs. English Culture with ref to raising children in the UK despite the fact that I was born and raised in the UK myself.*"

57. The document went on to detail his responses to accusations that he had breached Lloyds' policy on receiving gifts. He said the allegations were malicious and had been orchestrated against him from the first day of his employment and the reason for this was the discrimination he had set out in his Grievance Report (page 5). The rest of the document responded to other allegations Lloyds had made regarding his relationship with Mr Haye. There were no further references to Ms Godson.

Submission of the grievance to Lloyds

58. On 1 March 2012 the Claimant provided a further version of his grievance document which was not materially different to the above. In his covering email he said he had spent five months writing the report and that it was "*of paramount importance".*

59. On the 2 March 2012 D4 sent the Claimant's documents to D3, asking him to turn them into a formal grievance complaint. On 5 March 2012 D3 sent the grievance document with tracked changes, showing how he had amended the Claimant's document. I am not clear from the materials before me, that the Claimant saw this version and so I will assume in his favour for present purposes that he did not. The grievance documents submitted to Lloyds were signed by the Claimant. They reflected the focus of his discrimination complaint in the *Draft Grievance*. The Bentley conversation was included, using the same text as appeared in the *Draft Grievance.* The grievance did not include reference to the Osama bin Laden comments.

The Employment Tribunal Claim

60. The Grounds attached to the ET Claim Form ("ET1") alleged that the Claimant, a Pakistani, had been treated less favourably than Mr Subbiah, an Indian, throughout his employment (paragraphs 5 – 8, 11, 15 and 22). The allegation was summarised in paragraph 11 as follows: "*he was discriminated against on the grounds of his race / nationality in the opportunities he was given to pursue leads, in the opportunities which were kept away from him and in his being suspended and dismissed in that he was treated less favourably in all of those respects than SS [Mr Subbiah]".* The Grounds also included an allegation that the disciplinary process he faced and his dismissal were acts of victimisation following his undertaking of protected acts, including the submission of his grievance (paragraphs 13, 14, 16 – 21 and 30). The characterisation of the discrimination claim reflected the contents of the *Draft Grievance*.

The Claimant's 27 October 2012 email

61. The Claimant relies on this email at paragraph 9 of the PoC (paragraph 21, above). It was sent by him to D3, at a time when counsel was preparing the Further Particulars ordered by the ET. The Claimant had already sent him a lengthy document, described

in an email at the time by D3 as "*a re-hash of the grievance and contains a lot of comment and background*". The first part of the Claimant's email said the "*bank set on orchestrating my dismissal by hook or by crook*" after he had complained about harassment and discrimination; in other words, this was a reference to the victimisation claim. The second paragraph noted that the Claimant's recent document (sent to his lawyers) included the Osama bin Laden comments which had been deleted from the submitted grievance. In the third paragraph the Claimant said he felt "*my side-lining had something to do with my ethnic background and yet it was never even looked at. My treatment that was so different to my peers and the opportunity to compare me to a direct comparable of SS [Mr Subbiah] poses some serious questions…".*

62. On the following day, 28 October 2012, D3 replied to the Claimant indicating that an angle he was pursuing which they "*had not really discussed before is to focus on Hothi. She is Indian. SS is Indian. Also she has been commended and won some fairly high up awards for her initiatives. That makes her a difficult person to say is racist but politically it is unpleasant for them and when one looks at the Dec event you knew nothing about, Scotland with SS and others*[6]*, one can make the argument that she favoured her fellow Indian*". The Claimant has not suggested that he replied to that email objecting to or querying this proposed course.

63. Thus in summary, the Claimant's email was largely concerned with the victimisation claim and the existing race discrimination claim (based on the comparison of his treatment with Mr Subbiah). The contents of his email indicated he wanted both these claims pursued. He did not propose that a discrimination claim be formulated in relation to Ms Godson's actions; or assert that he had been treated less favourably by her or by other managers in comparison to white employees. He did not suggest that Ms Godson's actions should have had a more prominent role in the discrimination claim.

The Further Particulars

64. The Further Particulars prepared by D3 focused on the existing discrimination and victimisation claims. This was in keeping with the correspondence I have just referred to. The discrimination claim was summarised on the second page of the document. It alleged that "*the Claimant (who is Pakistani) had been treated differently on racial grounds to Sathish Subbiah (who is Indian) with regard to..*": (a) the provision of client leads; (b) the opportunities afforded for attendance at client networking events and dinners; (c) the way the territory was divided between the two of them; (d) the denial of access to clients and the placing of obstacles in his way; (e) in criticism he received over attendance and training; and (f) the bringing of disciplinary charges against him. Paragraphs 1 – 30 of the document then detailed these allegations, with the focus on (a) – (d). Paragraphs 31 onwards particularised the victimisation allegations concerning the disciplinary proceedings and the Claimant's dismissal.

65. An email from the Claimant to D3 and D4 sent at 14:12 hours on 30 October 2012 raising "*A final point…before it is sent*" indicates he had an opportunity to consider the Further Particulars before they were served. The matters in paragraph 8 of the PoC were not raised.

[6] This was a short hand reference to some of the allegations contained in the Claimant's *Draft Grievance*.

The Third Defendant's Advice

66. On 9 January 2013 D3 provided an updated assessment of merits and quantum. Disclosure had now taken place. He still considered the unfair dismissal claim had 60% prospects of success and there were aspects of this claim that were now improved. He addressed a query raised by the Claimant as to the pleading of the victimisation claim (paragraph 10). D3 then said that he was concerned about the merits of the discrimination claim, for reasons he identified. In summary, Lloyds' disclosure appeared to provide answers for the alleged differential treatment with Mr Subbiah (paragraph 12). He opined that the merits of the discrimination claim were now no better than 50% (paragraph 13). He went on to detail difficulties with the victimisation claim, not least that the disciplinary process had been instituted before the protected act was undertaken.

67. On 9 January 2012 at 22:19 hours the Claimant sent a lengthy email to D4 after seeing this Advice. He made a number of points about Mr Subbiah. He did not suggest that an alternative race discrimination complaint be advanced, or that there was a basis for doing so.

The Claimant's witness statement

68. The Claimant's witness statement was mostly focused on matters relevant to his unfair dismissal claim. Victimisation in relation to his suspension (paragraph 11) and his dismissal (paragraph 39) were covered briefly. Discrimination in comparison to Mr Subbiah regarding their relative opportunities to develop business leads was addressed in paragraphs 24 – 27. Discrimination in relation to suspension and dismissal was not included.

69. Paragraph 11 dealt with the Claimant's suspension in September 2011. It included the following: "*I believe part of the reason for me being suspended was a perceived jealousy relating to my lifestyle; the Respondent considered something must be wrong because I drove a nice car and lived at a Chelsea address. More specifically, I believe that the suspension was a reaction to me raising allegations of unfavourable treatment in various meetings that I had had during the course of my employment*". The suspicion described was linked to envy and characterised as a reaction to his complaints of unfavourable treatment (victimisation). A link to the Claimant's race was not suggested.

70. The Claimant was sent his witness statement by the Second Defendant at 15:35 hours on 18 January 2013. He was asked to approve it in time for an exchange at 16:30 hours. At 17:03 the Claimant emailed saying he would give his final authority in 10 minutes. The statement was signed by the Claimant. Although he had agreed it, the sequence of emails indicates he had a limited opportunity to consider the contents before doing so.

The Claimant's comments on Lloyds' witness statements

71. On 21 February 2013 the Claimant sent comments on Ms Walker's statement to Mr Downey (who was now acting in place of D3), copied to D4. His comments included:

> "*"I don't see the purpose of this witness statement. My claim was on the basis of discrimination between Indian and Pakistani. The Muslim issue came from two incidents in the office. The first was shortly after the capture of Osama Bin*

> *Laden and comments were made about me. The other was of Pamela Godson in my car when I gave her a lift back home and she asked me a number of questions about my culture my religion raising children in a western culture and made a number of derogatory remarks. Both these incidences were covered in my initial grievance report, I will need to check if they are in the final version that was sent….*
>
> *Therefore the religion aspect came from here. The discrimination issue regarding the leads came from Indian and Pakistani perspective I do not know why Jenny Walker is attempting to confuse the issues.*"

72. In his covering email sent on 21 February 2013 the Claimant had said:

> "*Also please do let me know if you are aware of the racist incidents such as the comments made following the capture of Osama Bin Laden in Pakistan in the office and Pamela Godsons direct attack on my culture and ethnic background whilst giving her a lift in the Bentley after work (I am not sure if they have been included in the final draft of the Grievance report but are crucial as they are direct racist comments)*"

73. The Claimant also provided comments on Ms Godson's witness statement by inserting text under the paragraphs of her statement. He said several times that Ms Godson had racially discriminated against him. In particular, under a paragraph in which she described a need to investigate suspected breaches of Lloyds' Gifts Policy, he said:

> "*You did so because you were discriminating against me. You made discriminatory remarks in the car that time I gave you a lift and you saw where I lived. Why did you make the complaints whereas nobody else did who were in daily contact with me. You were not and we rarely engaged whereas my line managers and MG that did see the cars etc did not make the complaint. PG is a racist and I know so because of the specific remarks she made to me about my religion and culture.*"

The ET proceedings

74. As the ET noted in their Reasons, the Claimant's witness statement did not deal with all of the allegations in the Further Particulars (paragraph 2) and Mr Downey generally restricted his cross examination to matters covered in the statement; at one point when he sought to go beyond the scope of the statement, the Tribunal refused him leave to do so (paragraph 3). Ms Godson was cross examined during the period that Mr Downey was acting.

75. During the course of the Claimant's cross examination it was put to him that it was not his case that anyone had used racist language. As recorded in the notes provided by D2, the Claimant replied: "*yes there was racist language – there was a specific instance of racist languag*e." The Employment Judge accepted the Respondent's point that this was not in the pleadings, but said "*I am asking out of curiosity, perhaps it can be explored in re-examination. Not in the written case so let's draw it out in re-examination*". The evidence which the Claimant then gave on this topic when re-examined was noted to be as follows:

> "*We have TV screen in the office. Around the time of the catch of Osama Ben Laden (and some of my colleagues were from military background), there were comments around that time that "pakis" had him. I found it hurtful. I am proud to be British Pakistani, comments like that were really hurtful.*"

76. The Claimant accepts he did not link Ms Godson to this conduct in the evidence he gave, nor did he refer to the Bentley conversation when asked about use of racist language.

77. D3 prepared the written closing submissions. They alleged that the late disclosure (provided in August 2013) showed Ms Godson had been the main protagonist in bringing about the Claimant's dismissal. The majority of the submissions focused on the unfair dismissal allegations, with Ms Godson referred to prominently (paragraphs 2 – 31). Discrimination and victimisation were then addressed from paragraph 34 onwards. The discrimination complaint was largely focused on the comparison with how Mr Subbiah was treated in relation to developing client leads. Ms Godson's actions in wanting the Claimant dismissed at all costs were referred to in the context of the victimisation claim (paragraph 60).

The ET's Decision

78. The ET made various references in their Reasons to Ms Godson and the car the Claimant drove. At paragraph 36 the ET set out what Ms Godson had described telling her managers:

> "*I said that Mr Naqvi had been seen driving a Bentley to the office and that I could not see how he could afford this on his salary. I was also aware that Mr Naqvi lived in a very expensive area of London. I was concerned that Mr Naqvi could be receiving gifts from Mr Haye or that Mr Naqvi could be working for Mr Haye in addition to his role with the bank.*"

79. At paragraph 38 the ET said that it had no doubt that Ms Godson was the person collating various rumours about the Claimant and "*we have no doubt that she was highly suspicious about the Claimant's activities*" (and see paragraph 44 to like effect).

80. In the section of the decision explaining why the dismissal was unfair, the ET said the following at paragraph 88:

> "*From the outset she [Ms Godson] seems to have been offended by the fact that he drove an expensive car, the Bentley, and lived in an expensive part of London. This excited her suspicions and there is nothing in the evidence to suggest that she ever moderated those suspicions over time. The written evidence shows that she expected the Claimant to be dismissed from the very outset….We cannot detect any evidence that she abandoned her early view that the Claimant was living beyond his means and came from a modest background. The suspicion therefore was that his lifestyle indicated dishonesty and the committing of disciplinary offences.*"

81. The ET addressed its conclusions on the race discrimination and victimisation allegations at paragraphs 102 – 107. The Tribunal noted that the way the issues were put in the final written submission was helpful, more particularly as the discrimination case had not been clearly articulated in the Claimant's witness statement. The ET then summarised the scope of the discrimination claim as set out in the ET1 (paragraph 102).

82. At paragraph 84, when considering the unfair dismissal claim, the ET had already addressed its findings as to the reason for the dismissal, noting that it was necessary to ask whether there were competing reasons, such as race:

> "*As appears below, we have determined that his various discrimination and related claims fail. However, as a matter of fact, when the disciplinary process is analysed in detail all questions of race and ethnicity fall away. The reason, at least in part, for some of the unfairness which we can identify in the procedure is that various managers believed that the Claimant had committed misconduct. Ms Godson, who in some ways initiates the procedure, is a very clear example although the dismissing and appeals officers have satisfied us that they readily came to this conclusion. It is therefore beyond any real doubt that the reason why the Respondent dismissed the Claimant was because of a genuine belief that he had committed misconduct.*"

83. At paragraphs 103 – 104 the ET addressed the race discrimination complaint that the Claimant was treated unfavourably in relation to business leads and opportunities. The Tribunal had already set out its findings of fact on these matters at paragraphs 12 – 17. At paragraph 103 the ET said that the treatment the Claimant perceived as less favourable between himself and Mr Subbiah was due to their different circumstances, as explained by Ms Hothi in her evidence. The ET concluded that the allegations raised against her had "*conspicuously failed to be made out*"; and the Claimant had not established any facts from which a properly directed tribunal could find or infer that he received less favourable treatment than Mr Subbiah because of his race. "*The evidence establishes to our satisfaction that none of the treatment he complains about, even if established, is because of race, nationality or ethnic or national origin*".

84. At paragraphs 105 – 106 the ET addressed the complaints that the suspension and dismissal constituted race discrimination or victimisation:

> "*The facts we have outlined above show to a high degree of certainty that all of the material witnesses for the Respondent believed that the Claimant had committed misconduct. The belief is inextricably bound up with the unfair dismissal. This does not mean that claims of victimisation or discrimination must necessarily fail. We recognise that if we could conclude on a consideration of all the facts that the protected act(s) or the Claimant's race etc. had any influence on the disciplinary process, the burden of proof can transfer to the Respondent. However, on these facts, we consider that the Claimant fails to overcome the first stage of Igen. There are no facts established from which we could find or infer that the steps in the disciplinary process were motivated by anything other than a belief in misconduct, divorced from any considerations of race, ethnicity or the fact of having raised those matters in any protected act.*

> *There is a striking absence of evidence from which such an inference could be drawn. The Claimant barely advances such a case in evidence and his claims here have two further difficulties. First, there is no connective evidence to support them, as we have indicated, and nothing in the evidence to suggest that relevant decision takers were, when taking their decisions, influenced by either the grievances or racial/ethnic considerations when they acted. Second, if we ask ourselves whether a hypothetical comparator would have been treated any differently, the clear answer is that a comparator of a different race or ethnic origin would have been dealt with identically, given the belief we have described concerning misconduct.*"

85. The ET went on to say that their conclusion was the same when they asked how the Claimant would have been treated if he not undertaken a protected act.

Do the liability allegations have a real prospect of success?

Failure to formulate and advance the Ms Godson discrimination claim

86. As indicated above (paragraphs 25, 32 and 36), the Claimant's central allegation is that the Defendants failed to formulate and pursue a claim for direct race discrimination alleging that Ms Godson treated him less favourably than she would have done a white employee in relation to the disciplinary process and his dismissal. In determining whether the Claimant's allegations have a realistic prospect of success it is necessary to consider both the instructions and the information which the documents indicate the Claimant gave to the Defendants; and the extent to which such a claim would have appeared viable at the time.

The early instructions

87. I have reviewed the contents of the Claimant's *Draft Grievance* and *Summary of Lloyds' Evidence* documents at paragraphs 49 – 57 above. That review indicates there is no realistic prospect of the Claimant showing that these materials included allegations of race discrimination by Ms Godson because he was non-white, which his lawyers negligently failed to include in the submitted grievance or the ET1. Nor is it arguable that the contents of these documents should have alerted his legal advisers to explore the possibility of such a claim with him.

88. As I have summarised at paragraphs 49 and 54 – 55 above, the clear focus of the Claimant's multiple complaints of less favourable treatment was that he, a Pakistani, had been treated less favourably than Mr Subbiah, an Indian. The Claimant also raised the prospect that he had been discriminated against because of his Muslim religion (paragraph 56 above) – a complaint which was also initially pursued on his behalf. Ms Godson was not said to have discriminated against him, unlike a number of other named mangers who were accused of treating him differently to Mr Subbiah. Furthermore, she was not included in the list of those referred to as involved in the Osama bin Laden comments (paragraphs 50 - 51 above). The Bentley conversation was raised in the context of the Claimant showing that managers knew about his use of the car-parking facilities (paragraph 53 above). The Claimant simply described the conversation as 'strange'. There was no suggestion that he perceived it as discriminatory. Paragraph 4 of the PoC, which forms an important foundation of the pleaded case, is highly selective

in its references to the contents of the *Draft Grievance*, taking material that formed a small part of that lengthy document wholly out of context.

89. For the reasons I have summarised at paragraphs 56 to 57 above, the Claimant's pleaded position is not assisted by the contents of the accompanying *Summary of Lloyds' Evidence* which also attributed the treatment complained of to him being the only Pakistani and Muslim.

90. The Claimant has not relied upon any particular instructions given to his lawyers between the time when he supplied his second version of the *Draft Grievance* (March 2011) and the documents he provided in October 2012. For present purposes, I assume in his favour that he did not notice the absence of the Osama bin Laden comments or that the reference to the Bentley conversation was limited to the text in the *Draft Grievance,* until some while after the finalised grievance was submitted. In any event, he does not suggest that he raised any issues with his lawyers as to the scope of the grievance or the claim set out in the ET1 before the October 2012 correspondence. The ET1 Grounds faithfully reflected the instructions he had given (paragraph 60 above).

91. The secondary proposition that his lawyers were negligent in not probing the Claimant further to see if there were any additional or alternative possible discrimination claims, has to be looked at in context. The Claimant had supplied a very detailed, articulate explanation of the adverse treatment he had experienced in a document which he himself described as being "*of paramount importance*". In my judgment there is no realistic prospect of the Claimant showing a lack of reasonable skill and care on the part of D3 or D4 in them basing the grievance and the Grounds in the ET1 on the very claims he had set out, rather than exploring with him possible alternative cases of discrimination that he had not raised.

92. In this regard, it is also of significance that the allegations described in the *Draft Grievance* of less favourable treatment based on the comparison with Mr Subbiah, appeared to identify a reasonably promising claim. Accordingly, there was no apparent reason for his then lawyers to seek to identify a different case with him, as opposed to preparing one based on the material the Claimant had provided. The pleaded contention (paragraph 17(6) of the PoC) that the Defendants should have formulated and presented a discrimination claim based on the actions of Ms Godson as *"there was no sustainable case of discrimination to be advanced in respect of Ms Hothi…Mr Subbiah was wholly unsuitable as a comparator*" (paragraph 25 above), is itself unsustainable in light of the instructions and material the Claimant provided at the time.

The 27 October 2012 email and the Further Particulars

93. Paragraph 9 of the PoC depends on taking part of the Claimant's 27 October 2012 email out of context. It also reverses the sequence of events, apparent from the documents, between that email and the draft Further Particulars. The email indicated a desire on the Claimant's part to pursue the victimisation claim and the less favourable treatment allegations based on the comparison with Mr Subbiah (paragraph 61 above). The email did not propose or tend to suggest inclusion of the Ms Godson discrimination claim, nor raise concerns that this was not currently pleaded. Although he referred briefly to the fact that the Osama bin Laden comments were not in the submitted grievance, the Claimant did not suggest that this incident gave rise to a further discrimination claim. Nor did he suggest (as is now pleaded in the Claimant's Further Information) that Ms

Godson had any involvement in the Osama bin Laden comments. As he had already identified names of those he believed to be involved in that incident in the *Draft Grievance* (paragraph 50 above), there was nothing to link that incident to Ms Godson. D3 explained in his email in reply why he was focusing the Further Particulars on the conduct of Ms Hothi and the Claimant does not suggest he queried or opposed this.

94. The Further Particulars reflected the case the Claimant had articulated to D3 and D4. The victimisation claim and the difference in treatment from Mr Subbiah were both accorded prominence. (The victimisation claim encompassed Ms Godson, amongst other managers.) The Claimant had an opportunity to check the draft Further Particulars (paragraph 65 above). Given these undisputed circumstances, the proposition that his then lawyers were negligent in not adding the Ms Godson discrimination claim or replacing the existing allegations with such a claim has no realistic prospect of success. The complaint that there was too much focus on Ms Hothi relies considerably on hindsight. On the basis of the tactical reasons D3 explained at the time; it would be very hard for the Claimant to show this was other than a legitimate course to take.

Witness statements

95. The Claimant has not relied upon any particular instructions to his lawyers between the submission of the Further Particulars and the preparation of his witness statement. Thus, on the material before me, the relevant content of his instructions remained as I have discussed above. He had not alleged to his lawyers that Ms Godson was present at the time of the Osama bin Laden comments; or that she had treated him less favourably than she would have done a white employee; and he had not elaborated on the Bentley conversation beyond the material contained in his *Draft Grievance* and *Summary of Lloyds' Evidence*. In these circumstances there is no realistic prospect of the Claimant showing that D2, D3 and/or D4 were negligent in not including a race discrimination claim based on her actions in his witness statement.

96. The Claimant's comments on Lloyds' witness statement did allege that Ms Godson had racially discriminated against the Claimant (paragraphs 72 – 73, above). On any view this is the highest point of the Claimant's pleaded liability allegations. It will be recalled that D3 was not involved at this stage. The Claimant alleges that D2 and D4 were negligent in not re-formulating his case at this juncture.

97. Mr Bradley addressed this aspect in his oral submissions. He noted that the comments on Ms Walker's and Ms Godson's statements were provided on 21 February 2013, with the full merits hearing due to start in under three weeks on 12 March 2013. The Claimant's comments on Ms Walker's statement in terms referred to a religious discrimination claim which had been withdrawn by that stage with the Claimant's agreement (paragraph 71, above). Mr Bradley submitted that any competent lawyer would know that an attempt at such a late stage to try and re-formulate the case to include the Ms Godson discrimination claim would have been fraught with difficulties; it would have required an application to amend the ET1 Grounds, which would have been met with vigorous opposition from Lloyds (who would say they had not prepared to meet such a claim) and the potential adjournment of the listed hearing with significant costs implications, if the application to amend was granted. It was in any event an evidently weak claim to include for the reasons identified at paragraphs 105 - 106 below; and to do so would have exposed the Claimant to damaging cross examination as to why his case was being changed so substantially so late on.

98. Mr Bradley also pointed out that in these comments the Claimant did not tell his lawyers that Ms Godson was involved in the Osama bin Laden comments; and they would have had no reason to think that she had been present. At most, the Claimant was now saying that Ms Godson had made discriminatory remarks, which attacked his culture and ethnic background, during the Bentley conversation. His lawyers would have been aware that this was not how he had previously characterised the conversation and that it had already been covered in his witness statement in a more anodyne way, based on the instructions of the time. The Claimant did not suggest in this or any other communication that he was asking for the ET claim to be re-formulated and for a different discrimination case to be presented.

99. Mr Bradley's submissions are well-founded. Accordingly, I do not consider the allegation that D2 and D4 were negligent in failing to re-formulate the claim at this stage has a realistic prospect of success. Further, simply adding the allegations to the (already served) witness evidence, would not have enabled the Claimant to now pursue the Ms Godson discrimination allegation without amendment of the claim.

100. Equally, at the hearing, the Claimant would not have been permitted to pursue allegations of race discrimination that had not been pleaded and which the parties had not had the opportunity to address in advance. Accordingly, if the allegations relating to case preparation have no real prospect of success, there can be no viable complaint regarding the non-presentation of the Ms Godson discrimination claim at the hearing itself.

The Claimant's submissions

101. In arriving at these conclusions I have considered all of the submissions advanced on the Claimant's behalf by Mr Jones. I will explain my assessment of some specific points he made. He submitted that it was for his lawyers, not the Claimant, to formulate the race discrimination claims; that this was a difficult area of law and it was for the employment law specialists to "*join the dots*" (as he put it). However, as I have indicated in reviewing the relevant documentation, the striking feature in this case is that the Claimant did not provide those dots, either in terms of the factual account he gave to his lawyers or in terms of the concerns he raised about his treatment. The Claimant would understandably look to his lawyers to formulate his complaints as legal causes of action, obtaining further instructions where necessary to enable this; but it was not their role to think up complaints he was not making or seek out discrimination claims that had not been raised. Still less, could it be negligent to fail to do so.

102. Mr Jones pointed out that it would be inappropriate for the court to make findings of fact on disputed evidence at this stage. I agree and I have not done so. As I have indicated above, where matters are contentious, for example as to whether the Claimant had an opportunity to appreciate the contents of his witness statement before it was served; I have proceeded on the basis of assumed facts in his favour. Similarly, in so far as the Defendants' submissions have been partly based on casting aspersions on the Claimant's credibility (for example suggesting he is being untruthful in saying in his current pleadings that Ms Godson was present at the time of the Osama bin Laden comments, when he did not say this in the accounts he gave before and during the ET claim), I have put such points to one side and not let them influence me, since I agree that it would not be appropriate to take them into account at this stage when no oral evidence has been heard. My assessment is based on the contemporaneous documents.

As the authorities cited at paragraph 45 above indicate, the court is not required to take the Claimant's case at face value, where it is clear there is no real substance to the assertions made. Here, the Claimant's case is not borne out by the very documents he has pleaded reliance on.

103. Mr Jones also submitted that the court should be slow to accede to the applications because this was a document heavy case where more *might* emerge following disclosure and before trial. As the Defendants pointed out, the Claimant had already been given copies of all of D4's files relating to his case. I asked Mr Jones to give me examples of documentation that his client did not have currently. Firstly, he noted that Mr Robinson had claimed in his statement that the Claimant "*took care*" to approve his witness statement and his client disputed this. I reassured him that I would assume in the Claimant's favour that he did not have a full opportunity to check the contents of the draft statement before service (paragraph 70, above). Secondly, Mr Jones said that the Claimant's comments on Ms Walker's witness statement had to be seen in the light of his covering email sent on 21 February 2013. However, that document is already available at this stage and I have taken it into account. It did not link Ms Godson to the Osama bin Laden comments and as regards the Bentley conversation it went no further than the observations the Claimant made on Ms Godson's statement, which I have considered at paragraphs 97 - 99 above. Accordingly, Mr Jones was unable to identify any outstanding documentation that would be likely to add to or alter the evidence at trial. The Claimant's witness statement has extensive documentation exhibited to it and it can be inferred that he has included all material from D4's files that assists his case.

104. Accordingly, I have taken into account the extent to which further evidence could reasonably be expected to be available at trial. None has been identified and for the reasons I have identified, I do not consider that a fuller investigation into the facts would add materially to the case as it is before me. A claim that does not have a realistic prospect of success should not be permitted to go to trial on the speculative possibility that more may emerge (paragraph 45 above).

Was the Ms Godson discrimination claim viable?

105. I also accept the Defendants' submissions that a discrimination case based on the proposition that Ms Godson had caused the Claimant to be disciplined and dismissed because he was non-white, would not have presented as a viable alternative at the time (even if the Claimant had made his lawyers aware he believed this to have been the case). Accordingly, this is an additional reason why the liability allegations relating to the non-pursuit of the Ms Godson discrimination claim do not have a realistic prospect of success.

106. Firstly, there would have been a credibility difficulty unless such instructions were provided at the outset, given that a different complaint of race discrimination, based on the difference between his treatment and that afforded to an Indian comparator, had already been put forward. Secondly, an alternative case based on the proposition that part of his adverse treatment was because the Claimant was non-white would fly in the face of the existing claim that Mr Subbiah, who was also non-white, was treated very well by managers at the bank. Thus this new race discrimination claim would both undermine the existing claim (which the Claimant had not suggested should be withdrawn) and be seriously undermined by that existing claim. Thirdly, as Mr Jones accepted, there was no actual white comparator that the Claimant could point to.

Fourthly, it was already the Claimant's case that he was dismissed because he was Pakistani (in comparison to the Indian, Mr Subbiah); that his dismissal was victimisation because he had undertaken a protected act; and he had also alleged he had been dismissed because of his Muslim religion. Whilst it is at least possible for treatment to be due to more than one protected characteristic or other proscribed ground (if not inconsistent with each other), to introduce a yet further reason for the dismissal in the pleaded claim, would run the risk of weakening existing claims.

107. In oral submissions Mr Jones' response to these points was to emphasise that the ET had found Ms Godson had an '*animus*' (as he put it) against the Claimant. He said given this and that her poor treatment of him was unexplained, if accompanied by focus upon the Bentley conversation and her involvement in the Osama bin Laden comments, it would have been sufficient to shift the burden of proof to Lloyds to show that the suspension and dismissal was not related to the Claimant being non-white.

108. This submission rests on a good deal of hindsight as to what the ET made of Ms Godson (after the late disclosure). Moreover, the suggestion that Ms Godson had an unexplained antipathy to the Claimant is not an accurate characterisation of the ET's findings. Whilst the ET found that Ms Godson seemed "*offended*" by the Claimant driving a Bentley and living in Chelsea, this was squarely placed in the specific context of her genuine suspicion that *given the level of his salary*, he appeared to be living beyond his means (paragraphs 78 and 80 above). Thus, the ET's decision does not provide material for suggesting that her view could be shown to spring from a general prejudice, conscious or subconscious, around non-white young men driving expensive motor vehicles and having expensive lifestyles. Furthermore, the Osama bin Laden comments cannot be prayed in aid, as the Claimant had not linked Ms Godson to this incident by this time. The suggestion that the Bentley conversation would suffice to shift the burden of proof is extremely optimistic in circumstances where there was no evidence of a white comparator being treated more favourably and indeed evidence of other non-white employees being treated very well. In my judgment, Mr Jones' suggestion that this could supply the "something more" (paragraph 36 above) is incorrect; this concept stems from the observation of Mummery LJ in *Madarassy v Nomura International* at paragraph 56 of his judgment, that where a difference in treatment between comparators of different races / sex had been shown, something more was still required for a claimant to satisfy the first stage and so shift the burden of proof. By contrast, no such difference in treatment existed on the available evidence in this case.

Presentation of the existing discrimination claim

109. Paragraph 17(7) of the PoC raises an alternative complaint, namely that the Defendants failed to adequately support the discrimination claim that was pleaded. I do not consider this allegation has a real prospect of success either. The complaint that the Claimant was treated less favourably than Mr Subbiah was articulated in the ET1, the Further Particulars and his witness statement. It is plain from the Reasons that it was ventilated before the ET, who made a series of negative findings in relation to it (paragraph 83, above). Post-disclosure D3 had highlighted the potential difficulties with this claim in his Advice (paragraph 66 above). No specific failings are identified in relation to this part of the claim (and elsewhere the Claimant pleads, presumably in the alternative, that this claim was in any event hopeless, see paragraph 17(6)). In so far as it is said that this aspect of the case should have been dealt with more fully in the Claimant's witness statement; I note that it was addressed there and then addressed more fully in the closing

submissions document. The ET's findings indicate that the detail was considered. Further, or alternatively, given the strong, reasoned conclusions arrived at by the ET on this part of the claim, I do not consider the Claimant has a realistic prospect of showing that any additional step he might identify would have had more than a negligible impact upon the outcome.

Conclusion

110. I therefore conclude that the liability allegations have no real prospect of success. Although recital of the relevant documentation is inevitably quite lengthy, once undertaken, the lack of merit in the pleaded claim is apparent at this stage from the undisputed documentation. There is no more than a speculative prospect that matters will improve from the Claimant's point of view if the case were to proceed to a trial.

111. The Claimant did not suggest that there was any other reason to refuse the application for summary judgment if I concluded that the liability allegations had no real prospect of success. Although D1 has not made an application for summary judgment, its Defence raises similar points to those relied upon in these applications. Accordingly, the position of D1 does not of itself provide a reason for declining to grant summary judgment if the test for doing so is met in respect of the other Defendants.

The quantum applications

112. I will address these applications more briefly (and only for completeness), since the Claimant accepts that if the main summary judgment applications succeed, the pleaded quantum allegations inevitably fall away.

113. The central allegation raised by paragraphs 17(10) – (14) of the PoC is that the Defendants failed to present a case to the ET that reflected the Claimant's true financial losses. I accept the Defendants' submissions that this contention has no real prospect of success, given that the parties prepared for a liability hearing in 2013, with the intention that a hearing on remedies would be scheduled in due course if the Claimant succeeded on at least part of his claim. This was what occurred in practice (paragraph 15, above). The Claimant's witness statement did not address remedies issues at all. No adverse comment was made on this by the ET, who did not suggest that they had envisaged evidence relating to remedy being given during the 2013 hearing days. Closing submissions also addressed liability only. The subsequent Notice of Hearing sent to the parties for the telephone CMD envisaged directions being given for the exchange of further witness evidence. Whilst an earlier Schedule of Loss had been served, there would have been opportunity for amendment before a hearing on remedies. It was not characterised as a 'final' Schedule of Loss, as the PoC assert. Accordingly, far from there being a realistic prospect of showing a negligent failure to provide evidence in relation to the Claimant's losses, the time for providing such evidence had yet to arise and the chance to do so had not been lost.

114. In my judgment, the highest it could be put on behalf of the Claimant is that the inclusion of the lower figures in the Schedule of Loss already served may have impacted on the extent of his ability to obtain permission to amend the document after the ET's decision on liability and/or may have affected the credibility of a larger claim. This is a much more modest proposition than the way the claim is currently pleaded and at best it involves a high degree of speculation.

115. Thus, if I had not concluded that the main summary judgment applications should be granted, I would in any event have granted summary judgment on the quantum applications on the basis that the allegations do not have a real prospect of success.

116. A further plank to the Defendants' submissions is that in any event nothing significant was lost, as the high value claim the Claimant alleges should have been brought was unsustainable, lacking in credibility and would not have been accepted by the ET. Whilst the figures set out in the PoC are surprisingly large, I decline to draw the conclusion that the Defendants have invited on this point, because, in fairness to the Claimant, I have been presented with relatively limited documentation relating to the potential quantum of his claim.

The abuse of process applications

117. I have addressed these applications, as it may be of assistance were it to be found that I was wrong to grant the main applications for summary judgment. I heard full argument on this topic. Consistent with Lord Hoffman's analysis in *Arthur JS Hall v Simons* (paragraph 46 above), the question of abuse of process only arises in the counterfactual situation where the Claimant's liability allegations have a real prospect of success.

The legal principles

118. The Defendants accept that the well-established rule against using litigation to mount a collateral challenge to the earlier decision of a court or tribunal is not necessarily offended by a negligence action based on the proposition that a different outcome would have been achieved in the earlier case had the claimant's lawyers acted competently. As Lord Hoffman explained in *Arthur JS Hall & Co v Simons* [2002] 1 AC 615 at 705G – 707B:

> *"The Hunter question…is whether allowing even a successful action to be brought would be manifestly unfair or bring the administration of justice into disrepute…I can see no objection on grounds of public interest to a claim that a civil case was lost because of the negligence of the advocate, merely because the case went to full trial. In such a case the plaintiff accepts that the decision is res judicata and binding upon him. He claims however that if the right arguments had been used or evidence called, it would have been decided differently, This may be extremely hard to prove in terms of both negligence and causation, but I see no reason why, if the plaintiff has a real prospect of success, he should not be allowed the attempt.*
>
> "*… in civil (including matrimonial) cases, it will seldom be possible to say that an action for negligence against a legal adviser or representative would bring the administration of justice into dispute. Whether the original decision was right or wrong is usually a matter of concern only to the parties and has no wider implications. There is no public interest objection to a subsequent finding that, but for the negligence of his lawyers, the losing party would have won. But here again there may be*

> *exceptions. The action for negligence may be an abuse of process on the ground that it is manifestly unfair to someone else.*"

119. Save for one point I will come on to discuss, the parties are agreed about the principles I should apply. They were helpfully summarised by Simon LJ at paragraph 48 in *Michael Wilson & Partners Ltd v Sinclair & Ors* [2017] 1 WLR 2646:

> "(1) *In cases where there is no res judicata or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated: see Lord Diplock in Hunter v Chief Constable, Lord Hoffman in the Arthur Hall case and Lord Bingham in Johnson v Gore Wood. These interests reflect unfairness to a party on the one hand and the risk of the administration of public justice being brought into disrepute on the other, see again Lord Diplock in Hunter v Chief Constable. Both or either interest may be engaged.*
>
> *(2) An abuse may occur where it is sought to bring new proceedings in relation to issues that have been decided in prior proceedings. However, there is no prima facie assumption that such proceedings amount to an abuse, see Bragg v Oceanus; and the court's power is only used where justice and public policy demand it, see Lord Hoffman in the Arthur Hall case.*
>
> *(3) To determine whether proceedings are abusive the Court must engage in a close 'merits based' analysis of the facts. This will take into account the private and public interests involved and will focus on the crucial question: whether in all the circumstances a party is abusing or misusing the court's process, see Lord Bingham in Johnson v Gore Wood and Buxton LJ in Taylor Walton v Laing.*
>
> *(4) In carrying out this analysis it will be necessary to have in mind that: (a) the fact that the parties may not have been the same in the two proceedings is not dispositive, since the circumstances may be such as to bring the cases within 'the spirit of the rules', see Lord Hoffman in the Arthur Hall case; thus (b) it may be an abuse of process, where the parties in the later civil proceedings were neither parties nor their privies in the earlier proceedings, if it would be manifestly unfair to a party in the later proceedings that the same issues should be relitigated, see Sir Andrew Morritt V-C in the Bairstow case; or as Lord Hobhouse put in in the Arthur Hall case, if there is an element of vexation in the use of litigation for an improper purpose.*
>
> *(5) It will be a rare case where the litigation of an issue which had not previously been decided between the same parties or*

> *their privies will amount to an abuse of process, see Lord Hobhouse in In re Norris."*

120. Self-evidently the parties to this litigation are not the same as those to the ET proceedings. In accordance with the principles I have just referred to, I must undertake a close analysis of the circumstances in this case and assess whether it would be manifestly unfair to either those involved in the ET case or those involved in these proceedings to permit the claim to proceed; and whether the proceedings are being used for an improper purpose or would otherwise bring the administration of justice into disrepute. In addition to the principles I have already referred to, the parties were agreed that: (a) the onus is on the Defendants to show that this litigation is an abuse of process; (b) if an abuse is established the court has a duty, rather than a discretion, to strike out the claim; and (c) the question of whether an abuse exists requires resolution at this stage of the litigation.

121. The parties disagreed over whether this claim must rely on new evidence which entirely changes the aspect of the case, in order for it not to be classed as an abuse of process. This approach is derived from the judgment of Lord Cairns LC in *Phosphate Sewage Company v Molleson* (1874) 4 App Cas 801 at 814 (a case in which the *res judicata* doctrine was applied). The Defendants submit that the current claim involves an attempt to reverse the ET's findings, in particular that race discrimination played no part in his suspension and dismissal and that in these circumstances the *Phosphate Sewage* test must be satisfied. The Claimant submits that the *Phosphate Sewage* test is inapplicable (and, in the alternative, that it is satisfied, if applicable).

122. Sir Andrew Morritt V-C referred to the *Phosphate Sewage* test in *Secretary of State for Trade and Industry v Bairstow* [2004] Ch 1 at paragraph 38, when summarising the principles regarding objectionable collateral attacks:

> *"(b) If the earlier decision is that of a court exercising criminal jurisdiction then, because of the terms of sections 11 to 13 of the Civil Evidence Act 1968, the conviction will be conclusive in the case of later defamation proceedings but will constitute prime facie evidence only in the case of other civil proceedings. (It is not necessary for us to express any view as to whether the evidence to displace such presumptions must satisfy the test formulated by Lord Cairns LC in Phosphate Sewage Co Ltd v Molleson…(c) If the earlier decision is that of a court exercising a civil jurisdiction then it is binding on the parties to that action and their privies in any later civil proceedings. (d) If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issue should be relitigated or (ii) to permit such relitigation would bring the administration of justice into disrepute*."

123. This passage was considered by Arnold J. in *Ridgewood Properties Group Ltd v Kilpatrick Stockon LLP* [2014] EWHC 2502; [2014] PNLR 31 at paragraph 36. Having

noted that all of the cases discussed in *Bairstow* in which the *Phosphate Sewage* test had been applied were ones where the claimant had been convicted of a criminal offence in the earlier proceedings, he observed: "*it does not appear to me that Morrit V-C treated this test as applicable where the earlier proceedings were civil proceeding which did not involve the same parties (or their privies) as the later proceedings"*. However, after considering the judgments of Buxton and Moses LJJ in *Laing v Taylor Walton* [2007] EWCA 1146; [2008] PNLR 303 Arnold J concluded: "*It appears from Buxton LJ's judgment that he treated the test in Phosphate Sewage as applicable even though the earlier proceedings were not between the same parties (or their privies). I have to say that I am doubtful whether this is correct, but in my judgment it is binding on me*" (paragraph 43).

124. Similarly, the decision in *Laing* is binding upon me. The Court of Appeal decided that in some circumstances at least the *Phosphate Sewage* test applied where the earlier proceedings were civil proceedings and did not involve the same parties or their privies. However, it is necessary to consider whether those circumstances include those that arise in the present instance.

125. *Laing v Taylor Walton* was a professional negligence action brought against the claimants' former solicitors over their preparation of a written loan agreement under which he had obtained a substantial loan from company B, owned by W. A dispute arose over the terms that had been agreed for the loan. The claimant contended that it was secured by a charge in favour of B over 12.5% of the issued shares of his company; whereas W maintained the parties had agreed B was entitled to a 12.5% share of the profits of a planned development and a beneficial interest in 12.5% of the shares. The dispute over the loan went to trial and HHJ Thornton QC ruled in favour of B on this issue. The defendant solicitors applied to strike out the negligence action as an abuse of process, contending it attempted to relitigate findings adverse to the claimant made at the earlier trial. The Court of Appeal agreed; in order to succeed in the negligence claim, the claimant had to establish that the written agreement prepared by his then solicitors had failed to accurately reflect the terms he agreed with W, but that, in turn, depended upon him showing that the terms of the underlying agreement were as he asserted, rather than as the Judge had already found (paragraph 19).

126. Buxton LJ, giving the leading judgment, explained at paragraph 25:

> " *I therefore conclude that it would bring the administration of justice into disrepute if Mr Laing were to be permitted in the second claim* ***to advance exactly the same case as was tried and rejected by H.H. Judge Thornton****. If H.H. Judge Thornton's judgment was to be disturbed, the proper course was to appeal, rather than seek to have it effect reversed by a court not of superior but of concurrent jurisdiction hearing the second claim.* ***That the second claim is in substance an attempt to reverse H.H. Judge Thornton is important in the context of wider principles of finality of judgments****. In Hunter at 545D, Lord Diplock said that the proper course to upset the decision of a court at first instance was by way of appeal. Where, wholly exceptionally, a collateral first instance action can be brought it has to be based on new evidence, that must be such as entirely changes the aspect of the case: see per Earl Cairns L.C. in*

> *Phosphate Sewage v Molleson (1879) 4 App. Cas. 801 at 814. The second claim in our case not merely falls short of that standard, but relies on no new evidence at all*." (Emphasis added)

127. At paragraph 27 Buxton LJ continued:

> "*I of course agree that it will not necessarily, or perhaps, usually, be a valid objection to a claim for solicitor's negligence in or about litigation that the claim asserts matters different from those decided in the litigation. That is so…where errors in assembling the evidence or understanding the law are alleged to have led to an incorrect result, as was the case in Hall v Simons itself. But* ***the present case is significantly different*** *from those just mentioned.* ***The difference is that, as shown at [19] above, in order to succeed in the new claim Mr Laing has to demonstrate not only that the decision of H.H. Judge Thornton was wrong, but also that it was wrong because it wrongly assessed the very matters that are relied on in support of the new claim. That*** *is an abusive relitigation of H.H. Judge Thornton's decision not by appeal but in collateral proceedings and in substance if not strictly in form falls fouls of the Phosphate Sewage rule*." (Emphasis added)

128. In light of the circumstances in *Laing* and the reasoning in these passages which I have emphasised, it does not appear to me that Buxton LJ went further than determining that the *Phosphate Sewage* test was to be applied in situations where the second action depended on showing that the court in the first case had wrongly assessed the very matters now relied on to establish the later claim. In those circumstances it is not difficult to see why it is an improper abuse of the court's processes to allow the second claim to proceed absent new evidence which entirely changes the case. However, Buxton LJ did not need to address and it does not appear to me that he was addressing a situation where the alleged negligence concerns a failure by legal advisers to formulate and pursue a particular claim (or a defence) in the earlier proceedings; in this scenario the court in the first action will not have already determined the very matters that are relied upon in the second proceedings, unless they also fell for determination under other the claims that were pursued at that earlier stage. In keeping with this approach, when Buxton LJ's characterised the second claim in *Laing* as "*in substance an attempt to reverse H.H. Judge Thornton*", he was referring to the claimant's attempt to 'reverse' the Judge's specific findings (as to the terms of the agreed loan).

129. In considering the scope of the Court of Appeal's decision in *Laing*, I also bear in mind that where a claimant does have a real prospect of showing that his lawyers in the first action were negligent in failing to bring a claim that was viable on the evidence then available, it does not appear to be in the interests of justice to *per se* characterise such a claim as abusive and impermissible, simply because the evidence was already in existence, so that the *Phosphate Sewage* test would not be met. Such a rigid approach would not accord with the fact-sensitive evaluation of all the circumstances commended in Simon LJ's review of the applicable principles (paragraph 119 above). In this regard, I also note that Lord Hoffman in *Arthur JS Hall v Simons* contemplated the possibility of a non-abusive negligence claim based on allegations that the claimant's former

lawyers had not used the right arguments *or* called the right evidence (see paragraph 118 above).

130. Moses LJ gave a shorter judgment, agreeing with Buxton LJ. His analysis at paragraphs 36 – 37 accords with the interpretation of Buxton LJ's judgment that I have discussed:

> "*I should explain why I conclude that the challenge is impermissible. Allegations of negligence during the course of litigation, against solicitors or advocates, will normally involve an attempt by a Claimant to demonstrate that the previous conclusion of the court would have been different, absent negligence on the part of the lawyer. In many cases it will, indeed, be necessary to do so in order to prove causation and loss. The paradigm is the loss of a case due to negligent advocacy. But to bring such proceedings for negligence does not bring the administration of justice in to disrepute; Hall v Simons teaches to the contrary.*
>
> "*But such cases differ from the instant appeal in two important respects. Firstly, in the normal run of case, the impugned conduct of the lawyer is independent of the factual conclusions of the court; those conclusions are only relevant to prove causation and loss. His case does not, in reality, involve any challenge to the findings or conclusions of the court. He merely contends that, in light of the negligence of which he now complains, the court's conclusions would have been different. But this is not so in the present case. As Buxton L.J. had demonstrated (at [19] and [27], the claimant cannot establish that his adviser's drafting of the agreement was negligent without challenging the judge's findings as to credibility and fact. To make good the allegations of negligence, Mr Laing must show that his account of the agreements is the truth. He must demonstrate that H.H. Judge Thornton's judgment of his credibility was wrong.*"

Application of the principles to the present case

131. The Defendants rely upon the following aspects of the ET's decision:

i) That "*all questions of race and ethnicity fell away*" when the disciplinary process was analysed in detail (paragraph 84 of the ET's Reasons; paragraph 82 above);

ii) It was "*beyond any real doubt*" that the reason for the Claimant's dismissal was a genuine belief he had committed misconduct (also paragraph 84 of the ET's Reasons);

iii) "*A comparator of a different race or ethnic origin would have been dealt with identically given the belief we have described in the misconduct*" (paragraph 106 of the ET's Reasons; paragraph 84 above); and

iv) The belief in the misconduct was "*divorced from any consideration of race or ethnicity*" (also paragraph 106 of the ET's Reasons).

132. Whilst these findings were indeed made by the ET, in my judgment it is important to consider the context in which they were expressed, rather than taking these words in isolation. As I have explained earlier, no case was advanced before the ET that the Claimant was treated less favourably by Ms Godson than a white colleague would have been in relation to his suspension and dismissal. The only race discrimination advanced in the pleaded ET1 and Further Particulars was that he was treated less favourably than his Indian comparator, Mr Subbiah, because he was Pakistani.

133. I see no basis for concluding that the ET determined claims that were not pleaded or advanced before it (and had it done so, that in itself would be a potential ground of appeal). Furthermore, the wording used by the ET supports the proposition that it was focusing on the pleaded claims. The observation at paragraph 84 of the Reasons that "*all questions of race and ethnicity fall away*" came immediately after the ET said "*As appears below, we have determined that* ***his various discrimination and related claims fail***" (emphasis added). Thus, the ET was plainly referring to the conclusion it had reached on the discrimination claims raised in the proceedings. The second passage relied upon from the ET's paragraph 84 is subject to the same qualification.

134. The opening sentences of paragraph 106 of the Reasons indicate in terms that the ET was considering "*the claims of victimisation or discrimination*", that is to say the claims that had been made. The finding that the disciplinary process was "*divorced from any considerations of race and ethnicity*" appeared immediately after the ET explained: "*However, on these facts, the Claimant fails to overcome the first stage of Igen*". Thus, in the wording relied upon by the Defendants, the ET was setting out its conclusion that the Claimant had failed to satisfy the first part of the two-stage shifting burden of proof test in relation to the claim of discrimination he had brought. The ET's conclusion later in the same paragraph that "*a comparator of a different race or ethnic origin would have been dealt with identically*" was again related to the race discrimination claim brought in those proceedings.

135. I also note that the finding made in relation to the unfair dismissal claim that the Respondents genuinely believed the Claimant had committed misconduct does not in and of itself preclude the proposition that this belief was influenced by discriminatory factors that were not before the ET.

136. Accordingly, the ET did not make a determination that the Claimant was not treated less favourably by Ms Godson than a white colleague would have been in relation to his suspension and dismissal.

137. The Claimant could not have appealed against the ET's decision on the basis of it erring in not finding he was racially discrimination against by Ms Godson as a non-white person; he would simply have been met with the response that such a claim was not argued before nor determined by the ET.

138. Accordingly, establishing his pleaded allegations of negligence in relation to the Ms Godson discrimination claim would not entail the Claimant having to show that the ET wrongly decided the very matters he relies on or that in substance this action involves an attempt to reverse the findings of the ET. It therefore follows that the Claimant is

not required to satisfy the *Phosphate Sewage* test. As the issue in question was not previously decided by the ET, this part of his claim does not involve the administration of justice being brought into disrepute.

139. Further on the counterfactual assumption I am applying for these purposes that the claim has a real prospect of success (paragraph 117 above), I do not consider it would be unfair to the Defendants to permit the action to proceed. Unfairness to Ms Godson was also suggested, but this does not come close to a situation where an abuse would be shown on that basis, bearing in mind: (i) her actions have already been seriously criticised by the ET; and (ii) the negligence claim would not require the court to make a finding that she had discriminated against the Clamant as a non-white employee, as opposed to assessing the chance of such a claim succeeding if it had been pursued before the ET.

140. I add for completeness that if the *Phosphate Sewage* test does apply, I do not accept the alternative submission that it is met in these circumstances. The additional evidence the Claimant says should have been deployed before the ET, such as it is, does not come near to material that entirely changes the case.

141. By contrast, the much more limited part of the liability allegations that criticise the way the discrimination claim that was pleaded in the ET1 and Further Particulars (less favourable treatment as a Pakistani, compared to Mr Subbiah, an Indian) was presented to the ET, inevitably entails the Claimant saying that in the passages identified by the Second – Fourth Defendants, the ET wrongly assessed his claim. Accordingly, the *Phosphate Sewage* test is to be applied to the allegation at paragraph 17(7) of the PoC, so that it amounts to an abuse of process unless there is evidence that entirely changes this aspect of the case. Plainly there is not.

142. Accordingly, if I had concluded that the liability allegations had a real prospect of success, I would not have struck them out as constituting an abuse of process, save for paragraph 17(7) of the PoC.

Outcome

143. For the reasons explained above, I grant summary judgment to D2, D3 and D4 in relation to the whole claim against them on the basis that it has no real prospect of success and there is no other reason why it should await trial. I have also indicated that had I concluded it had a reasonable prospect of success, I would not have granted the applications to strike it out as an abuse of process, save in respect of the allegation pleaded at paragraph 17(7) of the PoC.

Costs

144. Following circulation of the draft judgment to the parties, I have received and considered written submissions in relation to costs.

145. In light of the outcome, it is accepted that D2 – D4 are the successful parties for the purposes of CPR 44.2(2)(a) and that an entitlement to their costs follows. However, Mr Jones submits that I should reflect these Defendants' lack of success on their abuse of process applications, by making a proportionate reduction in the costs I order in their favour, pursuant to CPR 44.2(2)(b). He submits that resisting those applications

involved a significant amount of time and effort for the Claimant, which should be reflected in the order I make.

146. I have directed myself in accordance with the propositions from the relevant case law, summarised at numbered sub-paragraphs 1 – 5 at pages 1363 – 1364 of the 2019 White Book. The mere fact that the successful party was not successful on every issue does not of itself justify a departure from the general rule that costs follow the event. I bear in mind the extent to which it was reasonable for the abuse of process applications to be pursued and whether the interests of justice require a departure from that general rule.

147. In this instance, I consider that the interests of justice point to the application of the general rule, rather than a departure from it. As a result of their success on the summary judgment applications, the claims against D2 – D4 will proceed no further. A majority of the evidential material before the court and a substantial portion of the legal argument related to the summary judgment applications. Moreover, the basis upon which I have rejected the abuse of process applications (that the Ms Godson discrimination claim was not before the ET: paragraphs 136 and 138 above) only became clear during the hearing itself after Mr Jones clarified the way the Claimant put his central complaint of negligence (paragraph 36 above).

148. I will therefore order that the Claimant is to pay the costs of the application and the costs of the action in relation to D2, D3 and D4.

149. I do not propose to summarily assess the costs of the application, as I consider there is good reason within the meaning of Practice Direction 44, paragraph 9.2 for all of the costs of D2, D3 and D4 to be subject to detailed assessment. In particular: (i) the Defendants' accept their costs of the action should be subject to detailed assessment, rather than assessed summarily, so a detailed assessment will take place in any event (absent agreement); (ii) the divide between whether certain costs were incurred in relation to the application or to the action is not always clear from the Statements of Costs; (iii) a significant number of the items included in the Defendants' Statements of Costs for the application are challenged by the Claimant, so that fuller investigation is required; and (iv) there is no significant hardship to these Defendants; the Claimant accepts I should order payments on account of costs to be made to them.

150. Pursuant to CPR 44.2(8) I will order that the Claimant do pay 50% of the total figures shown in the Statements of Costs for the application and for the action in respect of D2, D3 and D4. The resulting figures appear in the Order. I have limited the proportion to 50% because there has been no Costs Management Order in this action. For the reasons advanced by Mr Jones, the Claimant will have 28 days to pay.