**Dunn v Glass Systems (UK) Ltd** [2007] Adj.L.R. 07/11

**JUDGMENT : John Behrens.** QBD. Newcastle upon Tyne District Registry. Mercantile Court. 11th July 2007

**1. Introduction**

1. This is an application by Glass Systems (UK) Limited ("Glass Systems") to strike out a Particulars of Claim filed by Stewart Dunn ("Mr Dunn"). It is brought on 4 grounds:
   1. The Particulars of Claim are so prolix and unintelligible and oppressive as to constitute an abuse of the Court's process or are otherwise likely to obstruct the just disposal of the proceedings ("Basis 1").
   2. The Particulars of Claim disclose no reasonable grounds for bringing the claim and/or Mr Dunn has no real prospect of succeeding on the claim ("Basis 2").
   3. The Particulars of Claim fail to comply with the requirements of CPR r.16.4 and paragraph 7 to the Practice Direction to CPR Part 16 ("Basis 3").
   4. The Particulars of Claim contain material which is by its very nature privileged ("Basis 4")
2. Mr Dunn does not accept that any of these grounds are valid. Indeed he contends that Glass Systems' conduct in this litigation is itself abusive. Thus shortly after the application was brought he brought his own application to strike out the application.

**2. Representation**

3. Mr Dunn has throughout the litigation represented himself. Glass Systems have been represented by Mr Thomas Grant and Mr Alec McCluskey instructed by Halliwells LLP of City Plaza, Pinfold Street, Sheffield. I hope that Mr McCluskey will forgive me if I refer only to Mr Grant in the course of this judgment. I am conscious that he has had significant input both into the skeleton argument and into the submissions that have been made on behalf of Glass Systems.
4. I have in fact been provided with a very detailed 53 page skeleton argument on behalf of Glass Systems and a further 128 page document from Mr Dunn. I am very grateful to all involved for the care and research which has gone into them.

**3. Evidence**

5. The application is supported by a witness statement dated 14th March 2007 from Mr Inglis, the solicitor with day to day conduct of the claim on behalf of Glass Systems. On 29th March 2007 Mr Dunn filed an application to strike out the application. That application together with the Particulars of Claim contain a statement of truth signed by Mr Dunn. On 25th June 2007 Mr Dunn filed a further 128 page witness statement or skeleton argument in support of his submissions. He had previously lodged with the Court 6 bundles of documents (which were annotated)

**4. The Facts**

***4.1. Background***

**Mr Dunn**

6. Mr Dunn is a barrister. According to the entry on his web page current at the date of the contract

> I have a diverse construction industry background which began in 1980 with training as a construction cost/quantity surveyor with a multi-national contractor based in Glasgow, Scotland. In the first few years I attended Glasgow College of Building and Printing, taking a Certificate in Building on a part-time/day release basis. Thereafter I studied Quantity Surveying at Napier College (now Napier University), Edinburgh (also on a day release basis). I graduated with commendation in 1988.
> In September 1988 I moved to Newcastle Upon Tyne, England to study law (again on a part-time basis) at Newcastle upon Tyne Polytechnic (now University of Northumbria at Newcastle). Whilst studying law I also practised as a construction claims consultant.
> I was called to the Bar in 1992 and from 1994 to 1998 I practised from home, in Newcastle Upon Tyne, England, specialising in construction law. Legal research in connection with The Law of Damages began during practice at the Bar in 1994. From 1999 to 2003 I was engaged in research and writing only. In 2003 I returned to practice at the Bar.

   After the draft judgment was promulgated but before it was handed down Mr Dunn has amended his web page and it is now somewhat more concise.

7. He practices from Chambers in Regency Court, Jesmond Road, Newcastle upon Tyne. He has a clerk – Mrs Gillian Nemri. There are no other members of his Chambers.

**Glass Systems**

8. Glass Systems is a small family-run company employing 12 staff, which supplies Glass panelling to construction projects. Until December 2006 its 2 directors were Alan and Jackie Wallis, who are husband and wife. Mr and Mrs Wallis are the only shareholders in the company.

***4.2. The dispute with Clestra***

9. Mr Dunn was initially instructed by Glass in relation to a construction dispute which arose between Glass Systems and Clestra in relation to an office development in London. Clestra, a contractor on the development, sub-contracted to Glass Systems the installation of glass partitions in the development ("the Installation"). The agreed price for the partition works was initially £127,796.55 plus VAT. The project was delayed, and Clestra

negotiated with Glass an additional fee of £14,400 plus VAT in return for the installation being completed more quickly than originally agreed.

10. Clestra complained that the finish of the partitions was sub-standard. Glass Systems stated that any defects in the finish of the partitions were caused by the working conditions imposed on it by Clestra, which rendered it impossible to obtain a clean and smear-free finish on the glass partitions.

**The adjudication proceedings**

11. In about April 2005, Clestra brought adjudication proceedings against Glass Systems in relation to the Installation ("the Adjudication"). Clestra sought payment of some £70,000 from Glass Systems in the Adjudication.

12. Mr Dunn was instructed on a public access basis to represent Glass Systems at the Adjudication under a written retainer dated 15 April 2005. This retainer was specific to the Adjudication and involved Mr Dunn charging £95 per hour.

13. At the Adjudication, Glass Systems was found to be liable for 40% of the overall defects. Glass was ordered to pay Clestra £9,748.80 plus costs, interest and VAT, amounting to £19,844.50 in total.

**The enforcement proceedings**

14. In July 1995 Clestra brought proceedings against Glass Systems to enforce the adjudicator's award, and sought summary judgment on its claim under CPR Part 24, relying on the adjudicator's decision.

15. Mr Dunn was again instructed by Glass Systems on a Public Access basis under a further written retainer to represent it at the summary judgment proceedings. This retainer, which is dated 21 July 2005, was specific to the Part 24 application and Mr Dunn again charged £95 per hour, though there was now introduced a contingency element: Glass Systems was again unsuccessful at those proceedings, at which Clestra succeeded in obtaining summary judgment against it, together with an order that Glass Systems pay its costs. The hearing took place on 26 July 2005.

16. Glass Systems has paid Mr Dunn's fees in relation to the Adjudication and summary judgment hearing in full, and these fees are not in issue in this Application.

***4.3. The contemplated proceedings***

17. Adjudication proceedings are employed in the construction industry to resolve cash flow issues, and do not constitute final determinations of legal liability in relation to disputes. Thus following the Adjudication, Glass Systems discussed with Mr Dunn the possibility of issuing proceedings against Clestra in relation to the underlying dispute ("the Proposed Proceedings").

18. Mr Dunn was subsequently instructed on a Public Access basis to draft the Particulars of Claim in the Proposed Proceedings. There are disputes as to the terms of Mr Dunn's retainer. I shall return to these disputes when considering Basis 2 of the application.

19. Mr Dunn states that he started working on the Particulars of Claim on 2 August 2005 and, indeed, it is his case that from that day onwards he worked on this one case and no others. There are extensive e-mails between the parties in some of which Mr and Mrs Wallis expressed dissatisfaction with the delays that were occurring and the costs being incurred. In his submissions Mr Dunn distinguished between the body of the claim and the quantum of the claim. Work on the quantum commenced in October 2005.

20. Mr Dunn produced an ostensibly finalised draft Particulars of Claim, for comment, on 24 April 2006. This was more than 100 pages in length (not including Appendices), and purported to claim sums in excess of £3 Million from Clestra.

21. Mr Dunn has so far been paid some £35,000 for his work on drafting the Particulars of Claim. According to a revised schedule submitted for this hearing he contends that he has spent a total of 836.90 chargeable hours in drafting the Particulars of Claim in the Proposed Proceedings.

22. If this case proceeds to trial it may well be said that the time spent by Mr Dunn was excessive and that the work carried out by Mr Dunn was not carried out with proper professional skill and care. However Mr Grant very properly accepted that these were not allegations that could be made for the purpose of a strike out application.

23. With the possible exception of the small amount of work carried in June and July 2006, inter alia in regard to finalising the draft Particulars of Claim, Mr Dunn has received no further express instructions from Mr and Mrs Wallis to carry out any further work for them. He has, however spent significant further time in preparing documents that seek to justify the time taken to prepare the Particulars of Claim, criticise the conduct of Mr and Mrs Wallis, and in drafting the Particulars of Claim in these proceedings.

**5. The claim**

24. The claim was issued by Mr Dunn on 13th December 2006. The claim form is commendably brief. The nature of the claim is said to be: *"the failure to honour a fee agreement and cash flow agreement in respect of legal services. The Claimant is engaged to represent the Defendant in an intended action against a third party for the duration of an intended action against a third party. The Defendant has ceased to pay cash flow instalments and is frustrating the continued progress of the action."*

25. The monetary relief sought is the payment of instalments - £59,000 inclusive of VAT, Damages in the sum of £166,602.32 (excluding VAT) and Interest.

26. It is clear from an amended Appendix to the Particulars of Claim that Mr Dunn seeks to increase these sums substantially. He seeks to increase the sum of £59,000 to £100,124.99 and to increase the sum of £166,602.32 to £304,163.82.

27. It is also clear from the Appendix that the claim for £166,602.32 (or £304,163.82) is in fact a claim for Mr Dunn's work engaging in pre-action correspondence, in preparing the Particulars of Claim in these proceedings and for defending this application. He is thus seeking his costs in these proceedings as damages for non payment of the fee agreement. The figure of £166,602.32 is obtained by multiplying the number of hours spent by Mr Dunn (628.25 hours) by £265 per hour.

28. Mr Dunn's costs in these proceedings are thus already said to be over £300,000. If the case proceeds to trial, they will obviously be substantially higher. On any view these figures appear wholly disproportionate to the moneys involved in the claim. Indeed Mr Grant told me that if Glass Systems is compelled to pay these sums it will probably be forced into some form of insolvency.

29. The claim was served on about 18th December 2006. Mrs Wallis completed the acknowledgment of service form with an outline defence. She immediately applied for an extension of time for a proper defence. That application was supported by a witness statement signed by Mr and Mrs Wallis giving quite considerable details of the nature of the defence. I made an order on paper extending the time for the defence until 16th March 2007. Mr and Mrs Wallis consulted solicitors in January 2007. On 7th March 2007 Halliwells wrote to both Mr Dunn and the Court informing them of the proposed application to strike out the Particulars of Claim. On 29th March 2007 Mr Dunn submitted an application to strike out the strike out application. On that day I gave directions on both applications including a direction that Mr Dunn file any further evidence by 3rd May 2007 and listing the applications for 4 days starting on 25th June 2007. For reasons that were not fully explored Mr Dunn was unable to file his evidence by 3rd May 2007. At a telephone hearing on about 19th June 2007 (at the suggestion of Mr Grant) I refused to adjourn the hearing and directed that Mr Dunn file any further evidence/skeleton argument by 10.30 a.m on 25th June 2007 (i.e. the first day of the hearing – a reading day). Mr Dunn complied with that order and filed a further 128 page document at about 10.30 a.m on 25th June 2007. Oral argument commenced on 26th June 2007. It lasted for 2½ days whereupon judgment was reserved.

**6. Basis 1, 3 and 4**

***6.1. The Rules and Practice Directions***

30. The starting point is CPR 16.4(1) which provides that: *"Particulars of Claim must include … (a) a concise statement of the facts on which the claimant relies; … (d) such other matters as may be set out in a practice direction."*

31. The editors of the *White Book*, note at para.16.4.1 that *"The primary function of the particulars of claim is to state concisely the facts on which the claimant relies….The claimant should state all the facts necessary for the purpose of formulating a complete cause of action."*

32. The practice direction to CPR Part 16 provides, so far as relevant as follows:

33. Under Paragraph 7.3: *"Where a claim is based upon a written agreement…(a) a copy of the contract or documents constituting the agreement should be attached to or served with the particular of claim…".*

34. Under Paragraph 7.4: *"Where a claim is based upon an oral agreement, the particulars of claim should set out the contractual words used and state by whom, to whom, when and where they were spoken."*

35. At Paragraph 8.1 are set out the well-known exceptions to the general rule that evidence is not to be pleaded (e.g. particulars of a conviction).

36. At Paragraph 8.2 it is provided that the claimant must specifically set out various matters in his particulars of claim when he wishes to rely on them in support of his claim. These include any allegation of fraud and wilful default.

37. Under Paragraph 13.3;

"A party may:

(1) *refer in his statement of case to any point of law on which his claim or defence, as the case may be, is based.*

(2) *give in his statement of case the name of any witnesses he proposes to call, and*

(3) *attach to or serve with his statement of case a copy of any document which he considers is necessary to his claim or defence, as the case may be…."*

38. In his oral submissions Mr Grant also referred me to CPR 1 and 3.4

***The overriding objective***

*1.1 (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.*

*(2) Dealing with a case justly includes, so far as is practicable—*

*(a) ensuring that the parties are on an equal footing;*

*(b) saving expense;*

*(c) dealing with the case in ways which are proportionate—*

*(i) to the amount of money involved;*

*(ii) to the importance of the case;*

*(iii) to the complexity of the issues; and*

*(iv) to the financial position of each party;*

*(d) ensuring that it is dealt with expeditiously and fairly; and*

*(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases ...*

***Power to strike out a statement of case***

*3.4 (1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.*

*(2) The court may strike out a statement of case if it appears to the court—*

*(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;*

*(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or*

39. Mr Grant contends that the length and complexity of the Particulars of Claim in this case makes it impossible to deal with the case justly, would mean that an inappropriate amount of time would be allotted to the case, and is likely to obstruct the just disposal of the claim and should thus be struck out in its entirety.

***6.2. The Authorities***

40. It is not in my view necessary to refer to the authorities before the CPR. They are summarised in Mr Grant's skeleton argument. The leading post CPR authority is ***McPhilemy v Times Newspapers*** [1999] 3 All ER 775 where Lord Woolf MR, whose dicta on the CPR are of course of the highest authority, commented, at 793: *"The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules….As well as their expense, excessive particulars can achieve directly the opposite result from that which is intended. They can obscure the issues rather than providing clarification."*

41. As Mr Grant points out *McPhilemy* was followed in ***Mahon v Rahn*** [2000] 1 WLR 2150 at paragraph 135 where the Court of Appeal said that "under the CPR prolix pleadings are no longer encouraged" He also referred me to a citation in the judgment of Peter Smith J the case of ***Barnes v Handf Acceptance*** [2004] EWHC 1095 (Ch) where he quoted with approval at the words of Fulford J:

"These amended proposed particulars of claim may be shorter, but they are nonetheless extraordinary in their discursive formulation and they reveal an idiosyncratic and wholly unhelpful structure. In essence they are so prolix, detailed and confusing in the way they are developed that the burden imposed on the respondents and the court in dealing with them would be wholly unreasonable. The length[y] process of unravelling, understanding, answering and adjudicating on them would defeat the overriding objective and would constitute an abuse of the process of the court. This proposed pleading would not allow the case to be dealt with expeditiously and fairly.

*Hart J. indicated to the applicant that any proposed amendment should contain a concise statement of the facts on which he seeks to rely. These proposed amended particulars of claim do not begin to comply with such a clear and readily achievable indication. Further, this document does not in any sense lend itself to division between permissible and impermissible paragraphs. It would have been impossible for the learned Judge to dissect these proposed pleadings, allowing certain amendments while disallowing others."*

42. Mr Grant submits that those words could be applied with equal force to Mr Dunn's Particulars of Claim. In particular he submits that the burden imposed on Glass Systems and the Court would be wholly unreasonable. The process of dealing with them would defeat the overriding objective and thus constitute an abuse of the process of the court.

43. In the course of his submissions Mr Dunn referred me to one sentence in the judgment of Gray J in ***O'Neill v Clarke*** [2005] EWHC 178 where he said: *"By the same token, prolixity would not be a reason of itself to justify striking out the claim."*

44. Mr Grant does not disagree with this statement if all that it means is that longwindedness by itself should not found an application to strike out: He does not accept that it is a "*statement of law*" Furthermore he makes the points that prolixity is now strongly discouraged and that this application is not based solely on prolixity.

***6.3. The Particulars of Claim***

**General points**

45. The Particulars of Claim is 221 pages long. According to Mr Dunn he has devoted a total of 628.25 hours in drafting it and the documents comprising what he describes as the pre-action protocol.[1] At the end of the Particulars of Claim Mr Dunn seeks a number of declarations as to a number of points of the contract between

[1] Between the beginning of May 2006 Mr Dunn prepared a number of lengthy documents justifying his work. These include a 52 page document prepared in May (which the court was not shown), a 14 page letter dated 22nd May 2006, and a 40 page document sent on 2nd August 2006.

himself and Glass Systems. He then seeks £50,212 (unpaid cash flow instalments) and continuing at the rate of £5,000 per month from 1st January 2007, payment of £166,602.32 as damages in the alternative to costs or in the further alternative as fees. He also claims interest and costs on the indemnity basis.

46. Before dealing with criticisms of the Particulars of Claim in detail Mr Grant made a number of general points:

1. This is a fee dispute between a barrister and his client under a Public Access Agreement. The dispute arises in the context of an instruction given at the end of July 2005 to prepare Particulars of Claim. Those Particulars were eventually prepared, or purportedly prepared, in April 2006.
2. It follows that on the face of it the dispute (absent the novel fact that the claimant is not a solicitor but a barrister) is of a fairly run of the mill nature. It is analogous to a claim by solicitors for their fees.
3. At the very heart of the Public Access Rules, which of course constitute a new and fundamental departure in respect of the way barristers are retained, is the requirement for transparency and clarity as regards the nature of the work the barrister is required to do and the fee basis for that work. This requirement is embodied in those Rules at Rule 6:
*"A barrister who accepts public access instructions must forthwith notify his lay client in writing, and in clear and readily understandable terms of [the various aspects set out therein]". Given the necessity for clarity, any dispute about fees arising of a direct access agreement should be capable of being stated with conciseness and brevity.*

47. He submits that it should be possible to plead a case for overdue fees in a relatively few pages. There can be no justification for a 221 page document.

***6.4. Criticisms in the skeleton argument***

48. In paragraphs 49 - 64 of the skeleton argument Mr Grant sets out his criticisms of the Particulars of Claim. Although it will necessarily lengthen this judgment I think it important to set out paragraph 49 in full and to summarise the remainder:

**49.** *Simply reading through the Particulars of Claim reveals that it is prolix and largely unintelligible. The disproportionate length at which the document is pleaded renders it impossible to identify the actual points which it seeks to make. It is not merely that the Particulars of Claim do not constitute a concise statement of the facts on which Mr Dunn relies, but that no identifiable statement of those facts is offered at all. It would be disproportionate to attempt to set out fully even the major faults with Mr Dunn's statement of case (the topic will, insofar as necessary, be addressed in oral argument), by way of example:*

(1) *Paragraph 5 purports to deal with "Particulars of the Contract". It is 32 pages long [**2/3/22-52**]. It is not clear what aspect of the alleged contract Mr Dunn seeks to particularise over those pages: the pleading seems to be simply a collection of evidence, observations and allegation, none of which appear aimed at narrowing or identifying the issues in dispute between the parties. For instance "Particular mm" is simply "13.12.05 Claimant's e-mail containing further detailed explanation of 3rd draft fee agreement". Why has Mr Dunn included this? What contractual significance does it have? How is Glass supposed to plead to it? The authors of this Skeleton do not know the answers to these questions.*

(2) *What is important is that this section is not a statement of the terms of the Contract: that is to be purportedly found at Paragraphs 7 – 24, themselves 21 pages long [**2/3/52-73**]: yet the written fee agreement Mr Dunn attaches as Appendix 4.1 is only 6 pages long. It is submitted that a plea of 21 pages of "terms" of a contract between barrister and client under a direct access basis is scandalous and oppressive.*

(3) *Despite the space devoted to the topic, however, it is not possible to identify which terms Mr Dunn wishes to rely on, what the source of those terms is, and what relevance they have to the causes of action which Mr Dunn seeks to assert. There is no obvious link between the matters pleaded by Mr Dunn in his statement of case, and the causes of action asserted against Glass in his Claim Form. Mr Dunn includes allegations which clearly are irrelevant to his claim in breach of contract. See, for example, the allegation that Glass' director Mrs Wallis acted with an "intention to deceive": paragraph 33.h.iii [**2/3/117**.*[2]

(4) *Mr Glass sets out the purported breaches of contract by Glass over 38 pages, under the heading "Breach+chronology" [**2/3/93-131**]. Again, it is impossible to ascertain from the statement of case "the facts on which the claimant relies" (CPR 16.4(1).*

(5) *Paragraphs 36 to 37 [**2/3/131-141**] contain no less than 10 pages of "Particulars of wilful default and bad faith" and "collateral intent". Indeed these phrases are littered throughout the Particulars of Claim. The purpose of these paragraphs, other than to be prejudicial is not apparent. But in any event it is quite inappropriate for a barrister to be making such allegations in such a form.*

(6) *Paragraphs 38 to 40 [**2/3141-146**] relate to "Inaccuracy of assumptions and misrepresentations" and "Inappropriateness of assumptions and representations" and "Defendant acting with collateral intent – laying foundation to impose terms". The authors of this Skeleton are bewildered by these paragraphs, not just because they have nothing to do with any cause of action asserted, but because they are unintelligible. Take Paragraph 40: "In the premises the Defendant's inappropriate assumptions…were made with admitted collateral intent".*

(7) *Paragraphs 41-55 of the statement of case, running to over 80 pages [**2/3/146-226**] do not even purport to contain any statement material to Mr Dunn's causes of action. Instead, they consist of lengthy extracts from correspondence, supplemented by comment and invective. This is not the proper content of a statement of case.*

[2] As discussed below, an allegation of deceit is not, of course, to be made lightly, and certainly not when irrelevant to the cause of action. As a practising barrister, Mr Dunn must be aware of the restrictions on this provided by the Bar's Code of Conduct.

49. In paragraph 50 Mr Grant makes the point that the claim for fees is for £50,000. It is grossly disproportionate for Mr Dunn to spend 628 hours in preparing the Particulars of Claim. He makes the point that it is disproportionate for Glass Systems to have to incur the expense of instructing lawyers to deal with the allegations.

50. In paragraph 51 he submits that the situation is analogous to that in ***Wallis v Valentine*** [2002] EWCA Civ 1034, on which the *White Book* comments at 3.4.3: *"The claim was being brought not to vindicate a right, but to cause expense, harassment or commercial prejudice beyond that normally encountered in the course of properly conducted litigation."*

51. In paragraphs 52 to 57 Mr Grant submits that it is impossible to plead to the Particulars of Claim because of a number of stylistic devices employed by Mr Dunn:

1. The use of referential pleadings. Even where Mr Dunn has chosen to head a section "Particulars" it is not the case that all relevant particulars are contained therein. Instead, allegations are made by reference to other parts of the document. Mr Grant gives as example the references in paragraph 28, 34, 5 and 40.
2. Unfocussed peppering of allegations. Mr Dunn saturates almost every paragraph of his Particulars of Claim with unfocussed allegation against Glass and its directors, allegations whose relevance to Mr Dunn's claim in breach of contract is not made clear, yet to which Glass is expected to plead. On occasion those allegations are preceded by the words "it is alleged and averred that"; often they are not. Extracting the allegations from this morass, let alone collating and then pleading to them, would be an enormous, not to say impossible, task. Mr Grant gives as examples the particulars given in paragraph 5, and the allegations of bad faith, deceit in paragraph 33.
3. Irrelevance. Mr Grant submits that part of the Particulars of Claim is wholly irrelevant: He cites the allegation in paragraph 34 that Mrs Wallis hindered and prevented compliance with the Code of Conduct. In paragraph 35 Mr Dunn has set out the procedure for making a complaint to the Bar Standards Board.

52. Paragraph 58 represents a completely separate allegation incorporating what is – in effect – Basis 4 of the application.

*58.Inappropriate Content/Persistent pleading of evidence. In breach of CPR r.16.4(1), Mr Dunn's pleading makes no attempt to include "a concise statement of the facts on which the claimant relies". Mr Dunn does not just include evidence instead of fact, he actually reproduces verbatim the contents of (privileged) correspondence between the parties. These extracts are more often than not followed by Mr Dunn's comments on their contents, e.g.:*

(1) *Paragraph 45 [**2/3/158-181**] comprises 24 pages of lengthy, verbatim extracts from correspondence between the parties, with each extract followed by comment, purportedly in the form of allegation and averment, on the matters contained therein.*

(2) *Paragraph 48 [**2/3/190-203**] consists entirely of block, verbatim quotations from privileged emails between the parties followed by comment and further evidence. These comments appear to be a muddle of observation and allegation, which in turn make identifying allegations almost impossible.*

(3) *As a practising barrister Mr Dunn must be well aware that the inclusion of lengthy extracts from documents is not permitted by 16PD paragraph 8.1, and comment on documents is a matter for witness statements.*

(4) *The view that Mr Dunn has failed to distinguish between the role of pleadings and witness statements in drafting the Particulars of Claim is supported by other elements of the Particulars of Claim. Although paragraph 28, for example, is headed "Particulars", it in fact amounts to a 16-page chronology/witness statement, littered with allegations, averments and lengthy quotations of evidential documents.*

***6.5. Privilege***

53. In paragraphs 62 and 63 of Mr Grant's skeleton he deals with the question of privilege

*62.In the course of preparing the Proposed Proceedings, Mr Dunn necessarily received instructions and gave Glass advice as to its potential claims in those proceedings. Such advice is by its very nature privileged. As Mr Dunn's client, this privilege belongs to Glass, and only Glass can opt to waive it.*

*63.Glass has not opted to waive this privilege, and Mr Dunn is accordingly not entitled to plead this information in his Statement of Case. Nonetheless, Mr Dunn has included a large quantity of privileged information in his Particulars of Claim (as a result, principally, of the fact that his Particulars of Claim are largely composed of evidence); see paragraphs 41-55 passim [2/3/155-226]. It is submitted that the proper response to Mr Dunn's breach of his client's privilege is to strike out the Particulars of Claim under Basis 4*

54. In paragraph 31.3.6 of the White Book this privilege is set out in the following way:

*Letters and other communications passing between a party, or his predecessors in title, and his, or their solicitors are privileged from production, provided they are, and are sworn to be, confidential, and written to, or by, the solicitor in his professional capacity, and for the purpose of getting legal advice or assistance for the client (**O'Shea v. Wood** [1891] P. 286, CA; **Gardner v. Irvin (**1878) 4 Ex.D. 49 at 53, CA; **Kennedy v. Lyell** (1883) 23 Ch.D. 387 at 404, CA; **Wheeler v. Le Marchant** (1881) 17 Ch.D. 675 at 682, CA; cf. **More v. Weaver** [1928] 2 K.B. 520; **Minter v. Priest** (1930) 46 T.L.R. 301, HL; **Re Duncan, (decd.), Garfield v. Fay** [1968] P. 306; [1968] 2 W.L.R. 1479—foreign legal advisers); but not otherwise (ibid., **Original Hartlepool Collieries v. Moon** (1874) 30 L.T. 193 at 585; **Moseley v. Victoria Co.** (1886) 55 L.T. 482).*

***6.6. Oral submissions***

55. In his oral submissions Mr Grant took me through the Particulars of Claim at high speed. He did not go through each and every paragraph. He estimated it would have taken over a day to do so. I think his estimate was accurate. I shall not lengthen this judgment by reference to all of his comments but will mention the major complaints.

56. His first complaint related to paragraph 5. He complained that some 20 pages were devoted to Particulars of the Contract. He suggested that perhaps less than 10 documents were in fact relevant to the contract between the parties. He described paragraph 5 as a paradigm example of the way the Particulars of Claim is constructed. It is impossible to plead to. It contains allegations of misrepresentation, misconduct, and references to collateral purpose.

57. Mr Grant then drew to my attention to paragraph 28; it is described as "Particulars – chronology from 7/10/05 – information requests and receipts". It comprises some 15 pages setting out e-mails and telephone conversations and making a number of allegations on the contents of the e-mails.

58. Mr Grant then referred me to paragraph 33. On 12th July 2006 Mrs Wallis sent a fax to Mr Dunn. It is not necessary for me to refer to it in detail save to comment that it was – in a number of respects - critical of Mr Dunn. Paragraph 33 contained some 18 pages of comments on that fax including a number of allegations of "collateral intent and making false representations". It is also interesting to note that even though the fax is plainly critical of Mr Dunn, the Particulars of Claim devotes 2 pages (internal 93 and 94) to the assertion that it amounted to "an implied withdrawal of complaints and allegations".

59. Paragraph 35 comprises some 10 pages under the heading "Breach cont'd - Defendant frustrating continued progress and/or refusing to progress the action". Paragraph 36 contains some 7 pages of allegations of bad faith. Paragraph 52 contains some 5 further pages of allegations of collateral intent.

60. Mr Grant made the point that this was in effect a claim for professional fees. The allegations of collateral intent, deceit and many of the other allegations were wholly irrelevant to it. Much of the Particulars of Claim comprised detailed comments by Mr Dunn on supposed defences that he believed that Glass Systems would raise, or on e-mails that had been sent by Mr and Mrs Wallis in the course of the dispute. It was – he said – wholly inappropriate for the Particulars of Claim to take that form. He accepted that in some cases, for example where there was an obvious limitation defence, it was appropriate in the Particulars of Claim to plead matters dealing with that defence. However, in the normal case the pleader should wait to see what points were taken in the Defence and then deal with them in the Reply. It was, he said, wholly inappropriate in this case to devote a large part of the 220 pages of the Particulars of Claim to dealing in minute detail with defences that may or may not be raised by Glass Systems.

**Mr Dunn's submissions**

61. Mr Dunn devoted a great deal of his response document to a submission that Mr and Mrs Wallis' conduct was so disgraceful as to make it appropriate to allow Glass Systems no further time to file a defence, to grant summary judgment to Mr Dunn, and to make an order for costs (by analogy with the law relating to exemplary damages) outside the ordinary costs regime. In effect he asked me to make an order for indemnity costs and then to add a further percentage as a deterrent to punish Glass Systems for their conduct. These submissions are to be found in Section 4 of the response document and occupy some 32 pages.[3] I shall not lengthen this judgment by setting them out in detail. However paragraphs 26 to 29 of the submissions give a flavour of the submissions

> ***Conduct during performance of the workConduct during performance of the work "Conduct during performance of the work"***
>
> *26. All of the defences to the claim for unpaid cash flow instalments and VAT are based upon a clear, admitted, collateral cost controlling objective and upon its own inappropriate assumptions and misrepresentations in regard to the amount of work and/or time which would be required to complete the work.*
>
> *27. In the premises the defences to payment are dishonest and have no merit.*
>
> *28. The Defendant acted dishonestly, oppressively and in bad faith (Particulars of Claim paragraphs 36-52) in seeking to impose said objective. The Defendant has no answer and has a no time sought to address (despite raising an inordinate number of defences) any of the unanswerable issues considered in Part 3 thereof.*
>
> ***Conduct in the pre-action protocol period****Conduct in the pre-action protocol period "Conduct in the pre-action protocol period"*
>
> *29. In the post-completion of draft Particulars/protocol period, the Defendant flagrantly and wilfully continued to pursue its collateral cost controlling objective. Particulars of the Defendant's flagrant conduct are contained in the Particulars of Claim paragraphs 52-55. Conduct includes inter alia:*
>
> *a. Failing to honour express assurances in regard to payment, notwithstanding approval of the work.*
>
> *b. Wilfully frustrating any possibility of narrowing the issues (instead of co-operating, wilfully adding further issues including numerous unwarranted conditions precedent to continued performance (considered in the next paragraph hereof), thereby frustrating the overriding objective (inter alia refusing to pay cash flow*

[3] There is in fact a slight difficulty in the page numbering in this document. It was, apparently, written in WordPerfect format and the page numbering has not translated wholly accurately into Word. Fortunately the electronic copy with which I was provided contained hyperlinks so there was no real difficulty.

*instalments asserting that important work in completing the draft Particulars of Claim was attributable to the fault of the Claimant).*

c. *Wilfully re-opening resolved issues in knowledge that significant time had been expended in attempting to resolve the matters*

d. *Failing to acknowledge and/or to respond to subsequent further detailed protocol submissions including proposals that Dickinson Dees should be consulted with a view to resolving the issues.*

e. *Causing unnecessary particularity in the Particulars of Claim (wholly failing to narrow the issues and adding to the issues):*

i. *Three Rivers v The Bank of England is a case in point on the matter of relevance of said particulars and on the matter of which party should bear the costs thereof (42.a, 20);*

ii. *The general aim of the protocol is to ensure that inter alia 2(vii): "proceedings will be conducted efficiently if litigation does become necessary." (Paragraph 2(viii) refers).*

(i) *http://www.dca.gov.uk/civil/procrules_fin/contents/protocols/prot_ced.htm*

f. *In the premises, the whole of the costs (the issue of costs is further considered below) of the present action are attributable to dishonesty, bad faith and collateral intent on the part of the Defendant/Mrs Wallis (Particulars of Claim paragraphs 55.f.ii. refers).*

62. Amongst other authorities he referred me to paragraphs 131 – 133 of the judgment of Tomlinson J in ***Three Rivers District Council & Ors v The Governor & Company of the Bank of England*** [2006] EWHC 816 (Comm) and to paragraph 55 of the judgment of Chadwick LJ in ***Arrow Nominees Inc & Anor v Blackledge & Ors*** [2000] EWCA Civ 200.

63. In my view these submissions are wholly unrealistic – I may have used somewhat stronger language during the course of Mr Dunn's submissions. If I did I apologise. The facts of this case are a mile from the facts in either the ***Three Rivers case*** or the ***Arrow Nominees case***. The observations of Tomlinson J and Chadwick LJ plainly have no application.

64. This is a claim where the only actual work carried out by Mr Dunn for Glass Systems is the production after some 10 months of a Particulars of Claim. He is seeking to charge in excess of £85,000 for that work. He is further alleging that his retainer entitles him to £5,000 per month irrespective of any work carried out. He is further contending that he is entitled to costs (which he describes as damages) which already exceed £300,000. In addition he seeks to persuade the court to grant punitive costs in excess of this. To suggest that such a claim is suitable for summary judgment and/or that Glass Systems should not be allowed a proper amount of time to prepare a defence or to apply to strike out the claim is to my mind fanciful. The case bristles with highly arguable defences. Indeed I shall examine some of them later in this judgment.

65. It may be that some of the language used by Mr and Mrs Wallis in some of the e-mails may have been somewhat strong. It may well be that they will contend that their comments were justified. However the comments do not begin to justify a case of dishonesty against Mr and Mrs Wallis.

66. Equally the conduct in what Mr Dunn describes as the pre-action protocol period does not begin to justify the relief sought by Mr Dunn. During that period Mr Dunn sent amongst other things a 40 page document which he alleged summarised his case. At one stage in his oral submissions he said he knew what their answer to it was; at another he said they did not reply. Either way it is not conduct that justifies a refusal to allow Glass Systems to defend the action. Furthermore as Mr Dunn was contending that he was entitled to charge Glass Systems £265 per hour in respect of the preparation of the document it was probably prudent of them not to answer.

67. In my view all of Mr Dunn's submissions under this head and in relation to his application to strike out the application are hopeless and to be rejected. Mr Grant however makes the point that they are part and parcel of the oppressive way that Mr Dunn has been conducting this litigation. I shall return to this point at the end of the judgment.

68. In Section 6 of his response document Mr Dunn deals with allegations made by Mr Grant under this head. In summary he makes the following points:

1. He refers to the note in the White Book at paragraph 1.4.10. He suggests that before the court can strike out a claim the court must do a cost/benefit analysis to see whether the likely benefits justify the costs of any particular step.
2. He submits that the benefit of striking out cannot conceivably be greater than the costs associated with the application. He suggested in oral submissions that it would have been far more economical for Mr Grant to draft a defence and for the matter to proceed from there. He reminded me that this application had taken 4 days and generated an enormous amount of costs
3. He submits that the inevitable further delay associated with the application would be contrary to the overriding objective and Article 6 of the ECHR. He reminds me that it is now 22 weeks from the time when the Defence ought to have been filed.
4. He submits that a strike out is the wrong remedy.
5. He submits that Mr Grant could have pleaded relatively easily to the allegations of "wilful default" even though they take up 96 pages of the pleading.

6. He submits that the pleading is justified because the matters contained in it are in dispute. Alternatively his pleading could be regarded as a witness statement. He develops this argument in paragraphs 132 – 135 of his response document.

7. He submits that Mr Grant has withdrawn from the application matters that he considers are of the highest relevance.

8. 1. In paragraphs 140 and 141 of his written response Mr Dunn does not appear to challenge that much of the material he has pleaded is privileged. He contends that as Glass Systems has acted dishonestly equitable relief is inappropriate.

**Conclusions**

69. I am satisfied on the basis of the authorities cited by Mr Grant that there is power to strike out the Particulars of Claim on the grounds relied on by him. The Court, however, will only take such a course in an extreme case as a matter of last resort – especially if it is open for the Claimant to bring a new claim. As Mr Dunn points out to strike out a claim may only add to the delay and the cost.

70. I have read the Particulars of Claim and am satisfied that the complaints made by Mr Grant are justified. I agree with the view that it ought to be possible to plead the claim in comparatively few pages. The sheer length of the pleading makes it oppressive. It takes over a day to read it in detail. If a full defence is to be filed it will no doubt take many days and many hours to respond. In my view any trial based on this document will be unmanageable and excessively long. I also agree with the criticisms that it contains a mass of details which are irrelevant to the cause of action. There can, for example, be no justification in devoting 18 pages to analysing one e-mail that is not on any view a contractual document. I agree that it was not appropriate for the Particulars of Claim to attempt to deal with points that Mr Dunn assumed would be in the Defence. He should have waited for the Defence. I agree that the Particulars of Claim contains a large amount of evidence. I also agree that it contains a large number of terms that are simply incomprehensible – such as collateral intent, continuing to withhold on basis of presumption, continuing to withhold on basis of presumed fault. Mr Dunn does not appear to understand the meaning or relevance of the word dishonesty. His claim is a claim for fees under a contract and/or damages for breach of contract. It is neither relevant nor appropriate to make allegations of dishonesty simply because Glass Systems are challenging those fees. It could equally be said that Mr Dunn was being dishonest in seeking to claim those fees and costs in this action. However Mr Grant was careful (and in my view correct) to make it clear that he was not making an allegation of dishonesty against Mr Dunn.

71. I agree that the Particulars of Claim contains material subject to privilege. It may be that when or if a defence were filed it would waive privilege in respect of some or all of the documents. That would depend on the allegations in the Defence. For the moment there has been no such waiver. In the absence of such waiver the suggestion that privilege has been lost by the sort of allegations of dishonesty that have been made in this case is to my mind fanciful and unrealistic.

72. I must consider whether any remedy less than striking out is appropriate in this case. At no stage has Mr Dunn offered to amend his pleading so as to cure its obvious defects. He has chosen to defend the pleading as it stands. Equally, as Mr Grant points out it would be possible to strike out only part of the pleading. It might for example be possible to strike out only paragraph 33. In the end I have decided that the problems with the Particulars of Claim are so serious that it must be struck out as a whole.

**7. Basis 2 – No reasonable prospect of success.**

73. In advancing submissions on this basis Mr Grant made it clear that he was not suggesting for the purpose of the application that Mr Dunn had no cause of action at all against Glass Systems. If, for example, after this claim had been struck out, Mr Dunn brought a claim on conventional grounds alleging that he was entitled to be paid £85,000 for the drafting of the Particulars of Claim then such a claim might be arguable.

74. However he submitted that the claim has not been pleaded in that way. There are 2 distinct claims that are pleaded. The first is that there was an agreement (the cash flow agreement) to pay Mr Dunn £5,000 per month by way of interim payments until the dispute with Clestra is resolved. That obligation commenced on 1st September 2005 and is still continuing because the dispute with Clestra has not been resolved. Mr Grant submits that claim is fanciful and should be so declared at this stage.

75. The second claim is that the costs of preparing these proceedings and of defending this application are to be regarded as damages for breach of the cash flow agreement and are to be assessed at the rate of £265 per hour for how ever many hours Mr Dunn chooses to spend on it. Again Mr Grant submits that any costs that Mr Dunn has incurred in relation to these proceedings are recoverable as costs in these proceedings or not at all. He goes on to submit that if Mr Dunn does recover costs they are to be assessed on the basis that he is a litigant in person.

**8. The retainer**

76. During the course of their respective submissions I was taken through a large number of the documents in Mr Dunn's 6 bundles. I do not intend to lengthen this judgment by going through them. However some of them are important.

***8.1. The Fee Agreements***

77. During the time when Mr Dunn was carrying out the instructions to prepare the Particulars of Claim he submitted a number of agreements to Glass Systems described as "Agreements for the Provision of Legal Services". The first

of these was sent on 28th July 2005; it was amended on 1st September 2005 and further amended on 21st October 2005. Eventually on 13th February 2006 Glass Systems signed the 21st October document. A number of features are to be noted:

1. None of the Agreements contain any reference to the obligation to pay an interim fee of £5,000 per month until the resolution of the Clestra dispute. There is, however a reference to interim invoicing said to be on the basis of a rate of £95 per hour.
2. The scope of the work to be carried out by Mr Dunn changed. In the first 2 documents it was to draft a Particulars of Claim and to prepare a preliminary advice in relation to the effect of the signed final account. In the document that was signed it was more extensive.
   a) *Draft the Particulars of Claim and supporting quantum particulars and do all things necessary to prepare the case for commencement of proceedings. This includes advising as to the merits … and as to the evidence as appropriate*
   b) *Represent you throughout your intended legal action against Clestra until the said matter is resolved.*
3. Each of the agreements had a contingency element to the fees that were chargeable. In the first document the base rate was £180 per hour with a conditional fee proviso reducing the figure to £95 per hour to the extent that Glass Systems were unsuccessful. In the second agreement the base rate figure had been increased to £265 per hour but the contingency proviso remained at £95 per hour. In the agreement that was signed the base rate figure and the contingency fee rate remained the same although the agreement was amended to refer to the £95 per hour liability as being a "lower liability rate" but there was provision for a success fee of 65%.[4]

78. At my instigation there was a discussion as to whether the signed agreement was enforceable in the light of the fact that there appeared to be an overall mark-up in excess of 100%.

79. My attention was drawn to section 58 of the Courts and Legal Services Act 1990, the Conditional Fee Agreements Order 2000 and to the decision of the Court of Appeal in ***Jones v Caradan Catnic*** [2005] EWCA Civ 1821.

80. Mr Dunn argued that the only success element of the arrangement was the 65% success fee. That was plainly under the 100% permitted figure. Mr McCluskey argued that anything over the £95 was within the regulations. I was initially attracted to Mr McCluskey's submissions but on reflection I am less sure. It has to be remembered that in the usual CFA the Claimant's minimum liability is nothing. It is not suggested that those sorts of arrangements offend the regulations. In all the circumstances I do not think it appropriate in this application to determine the point.

***8.2. The e-mails***

81. On 28th July 2005 Mr Dunn sent the first draft Agreement to Glass Systems. It was sent just after the Part 24 application brought by Clestra had been heard and disposed of. In the covering letter written by Mr Dunn on 28 July 2005 he wrote that he was "conscious of the fact that…a decision has yet to be made to proceed with an action" and that therefore "he would carry out only what I believe to be necessary work on Glass' behalf at this stage"… "The decision whether or not to commence proceedings will be after the Statement of Claim has been completed".

82. It was in response to this draft document that Glass sent the email of 31 July 2005, just before Mr and Mrs Wallis were due to go on holiday for 3 weeks. The email expressed concern about the 7 day payment provisions contained in the draft Public Access agreement:

*"If possible can we have your fee based on 30 days payment. Also can we spread the cost over month periods so that in any given month we have a maximum of £5,000 against the account. I can plan for this contingency and cash-flow it over the period of the action you will also receive regular income and continual payments until the end of the action….I think suggestion of £5,000 max month should keep food on table for you and flow your money through months and spread financial risk/outgoings within our capabilities. What do you think?"*

83. Mr Dunn's reply is dated 22 August 2005. In it he mainly deals with other issues. However at the end he refers to Glass's suggestion and writes, in "relation to your suggestion of an interim payment structure"

" - It would in principle be acceptable if I had a regular cash flow and, from my point of view, a payment at the end of each month including this month/August 2005 would be acceptable.

*- The proposal of £5,000 plus VAT as a monthly amount until the case is resolved also seems to be reasonable in principle at the moment.*

*- It is possible that I would have to request an increase to meet any special outgoing such as tax and VAT and I could give you notice of this*

*- I would also suggest that:*

*We leave this arrangement flexible and informal so that it can be reviewed as we proceed.*

*We also leave this arrangement as a matter independent of the written agreement which I sent to for signature (attached herewith). I have not altered the 7 day payment period if that's OK. It is not something I would ever enforce strictly (it is merely a standard term) and I am happy to proceed with our separate informal arrangement for interim payment."*

[4] On one view of the agreement the success fee is 35% but nothing turns on this.

84. There are a number of other e-mails where the arrangement is described as informal. It is, of course to be noted that as well as being described as "flexible and informal" it was by no means clear whether there were going to be any proceedings at that time.

***8.3. Payments***

85. It is common ground that payments of £5,000 were made on 30/9/05, 5/11/05, 8/12/05, 12/1/06, 8/2/06, 14/3/06 and 20/6/06. It is evident from the correspondence that in April 2006 Mrs Wallis decided to stop the payment plan. She took the view that the cost ought to have been £10,000 and that Glass Systems had already paid £30,000. She set this out in an e-mail on 4th April 2006. Mr Dunn alleges that he had a conversation with Mr Wallis. In that conversation Mr Wallis is said to have assured Mr Dunn that he would be paid. On the 6th April 2006 Mr Dunn sent an e-mail to Mr Wallis in which he asked whether he had persuaded Mrs Wallis to make the interim instalment. On the same day Mr Wallis replied that he had. In fact one further payment was made – on 20th June 2006.

***8.4. Conclusions***

86. In his Particulars of Claim Mr Dunn alleges that there was a contract to pay interim fees at the rate of £5,000 per month until the litigation with Clestra is concluded. Hence in his Appendix he seeks a continuing loss of £5,000 per month.

87. In my view Mr Dunn's contentions are hopeless and/or fanciful and I agree that any claim based on those allegations should be struck out. My reasons are:

1. The claim is not only not mentioned in the fee agreement signed on 13/2/06 it is inconsistent with it. The fee agreement states that interim payment will be based on the rate of £95 per hour. The £95 per hour is in respect of work properly carried out by Mr Dunn. It is not payable irrespective of whether he does any work.
2. The e-mails cannot in my view bear the construction that Mr Dunn seeks to place on them. Mrs Wallis's e-mail dated 31st July 2005 was written at a time when the parties had not decided whether to proceed to litigation. Furthermore she expressly refers to spreading the cost over month periods and to the payment being in any given month"a maximum of £5,000 against the account". That to my mind is inconsistent with there being a retainer as suggested by Mr Dunn.
3. The arrangement was described by both sides as flexible and informal.
4. The terms of the retainer as suggested by Mr Dunn are most unusual. I am prepared to assume for the purpose of this application that it is possible in law for a barrister to be engaged on the basis suggested by Mr Dunn; however such a contract would be an unusual and would need to be expressed in clear terms. There is nothing in the fee agreement that amounts to such clear terms. Whilst Mr Dunn has agreed to represent Glass Systems in its claim there is in my view nothing in that document compelling Glass Systems to proceed with the litigation or from preventing Glass Systems from disinstructing Mr Dunn and instructing any other barrister. There is, furthermore nothing that requires Glass Systems to pay a monthly figure irrespective of whether any work has been carried out.
5. At one stage I was troubled as to whether it was open to Mr Dunn to mount some sort of argument based on the events of April 2006. This appears on a close reading of paragraphs 16 – 19 of the Particulars of Claim. However in the light of the e-mails of 6th April 2006 it seems plain that the discussions related solely to the one withheld payment for April 2006. That payment was eventually made in June 2006.

88. I would therefore accede to Mr Grant's submission and strike out on its merits the claim based on the continuing cash flow obligations.

**9. The claim for costs as damages**

89. As Mr Dunn knows the Court has a discretion under Part 44.3 of the CPR to award him his costs. There is a general rule that costs follow the event but the Court may make a different order. Costs are awarded on either the standard basis or the indemnity basis.

90. In my view Mr Dunn cannot sidestep these rules by claiming that the costs are damages for non payment of his fees. It follows that the claim for damages in lieu of costs is misconceived and should be struck out.

91. There are cases where a party can legitimately claim as damages costs incurred in third party litigation. However those costs are also subject to taxation. In my view they have no application where (as in this case) Mr Dunn is seeking to recover the costs of this litigation as damages.

92. In his response document Mr Dunn suggests that as an alternative these could be regarded as stand by time. However as I have held that there is no continuing contract the allegation is also misconceived. It is also very difficult to see how work done in preparing a claim against Glass Systems can properly be described as stand by time.

93. I would thus strike out this claim as well.

**10. Post Script**

94. In the course of his submissions Mr Grant described Mr Dunn's method of conducting this litigation as being oppressive and scandalous. He said it with regret bearing in mind that Mr Dunn is a member of the same profession as him.

95. I regret to say that I agree with Mr Grant. In my view Mr Dunn has been both unprofessional and oppressive in these proceedings:

1. In my view the length of the Particulars of Claim is of itself oppressive in a case of this simplicity.
2. In my view the conduct of the litigation by Mr Dunn is oppressive. This includes the refusal of reasonable requests for the adjournment, the allegations that Glass Systems should not be allowed to defend, the unnecessary allegations of dishonesty.
3. The demands for large fees outside the fee agreement. These include the fee note sent 17th May 2006 including as it did a claim for £15,966 in respect of drafting a Particulars of Claim.
4. The astronomical sums that Mr Dunn is seeking in relation to the costs of this dispute. He must know that there is no reasonable possibility of being allowed them on assessment and it is oppressive in my view to claim them. If anything is disproportionate in this case it is the sums claimed by Mr Dunn for costs
5. The claim for punitive costs over and above indemnity costs is a further example of oppressive conduct by Mr Dunn.

96. I regret that I also have serious reservations about the competence of Mr Dunn. The criticisms of Mr Grant show that he has no idea how to draft a pleading. The nature of his submissions seriously leads me to doubt his judgment.

97. My provisional view is that this is a matter where all the papers ought to be referred to the Bar Standards Board for the protection of the public. However before I take that step I shall hear submissions both from Mr Grant and Mr Dunn at the resumed hearing.