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Case No: QB-2022-000113

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/03/2025

Before :

THE HONOURABLE MR JUSTICE SAINI

- -

Between :

ISRAEL RUSSELL	**Claimant**
- and -	
BARRY COULTER	**Defendant**

- -
- -

Thomas Brennan (instructed by **Karam, Missick & Traube LLP**) for the **Claimant**
Charlotte Eborall (instructed by **Mills & Reeve LLP**) for the **Defendant**

Hearing dates: 12, 13, 14 and 17, 18 February 2025

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JUDGMENT

This judgment was handed down remotely at 10am on Thursday 6 March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE SAINI

Mr Justice Saini :

This judgment is in 10 main parts as follows:

I. Overview

1. This is a professional negligence claim brought by a businessman, Israel Russell ("Mr Russell"), against a barrister, Mr Barry Coulter ("Mr Coulter"). Mr Coulter represented Mr Russell between 2015 and 2016 on a *Direct Access* basis in proceedings in the Central London County Court. Mr Russell was the Defendant and Counterclaimant in those proceedings. The proceedings had the title *Adaptainer Limited v Israel Russell*, Claim No. A03CL333 ("the Adaptainer Proceedings"). At the material time, Mr Russell's business was in letting out storage space in 20' steel shipping containers. He traded under the name *Economy Self Storage*. Adaptainer dealt in the sale and leasing of shipping containers. Thus, they came together in a business relationship which endured with its ups and downs over some years. That relationship ended in a commercial dispute which culminated in the Adaptainer Proceedings.

2. In those proceedings, Adaptainer sought against Mr Russell orders for: (i) delivery-up of shipping containers hired by (and in the possession of) Mr Russell or alternatively their market value; and (ii) damages in conversion of approximately £114,000.00 for wrongful retention of the containers. Mr Russell defended the claim and counterclaimed. Having initially acted in person he retained Mr Coulter in June 2015 to settle his pleadings and to represent him at trial. At trial, Mr Russell relied on a number of arguments under the Consumer Credit Act 1974 ("the CCA") said to regulate the hire purchase agreements ("the HPAs") under which the containers had been hired. However, his main arguments were allegations that Adaptainer and others had been in a form of tortious conspiracy against him. Mr Russell also said that a number of other economic torts had been committed by Adaptainer with the aim of damaging him and his business.

3. In an impressive and detailed oral judgment, delivered shortly after a 3 day trial ("the Judgment"), HHJ Luba QC ("the Judge") found for Adaptainer on all issues and dismissed the counterclaim. In summary, the Judge ordered Mr Russell: (i) by 19 August 2016, to deliver up 11 containers then situated at "Sam's Yard"; (ii) by 21 October 2016, to deliver up a further 34 containers situated at Abbey Wharf industrial estate; (iii) to pay damages to Adaptainer of £1.43 per day from 1

November 2014 for wrongful detention of these 45 containers; and (iv) to pay Adaptainer's costs of the action. The Judge dismissed Mr Russell's counterclaim (based on the torts to which I have made reference) which sought return of all monies paid by him for the hire of all 106 containers he had leased from Adaptainer, and damages for conversion of 51 containers (which were situated at Hale's Wharf and were in Adaptainer's possession).

4. Mr Russell was refused permission to appeal against the Judge's order by Lewison LJ on "the papers" (I set out his reasons later in this judgment at [132] below). That application was renewed orally before Burnett LJ on 18 July 2017. Burnett LJ gave a detailed judgment in refusing permission to appeal: [2017] EWCA Civ 1027 ("the Permission Judgment"). I will refer to the Permission Judgment and the written arguments before Burnett LJ in more detail below.

5. The claim before me was issued on 11 January 2022. In outline, it is argued by Mr Thomas Brennan, Counsel for Mr Russell (who also appeared before Burnett LJ), that Mr Coulter was negligent in what he pleaded, and in his failure to plead and raise various legal arguments under the CCA before the Judge. Mr Brennan said that as a result of these errors and omissions, Mr Russell lost the Adaptainer Proceedings, and suffered consequential damages. Those damages have fluctuated during the trial between around £500,000.00 and £200,000.00.

6. On behalf of Mr Coulter, his Counsel, Ms Charlotte Eborall, accepts that he owed Mr Russell a duty of care as his barrister. She argued that there was no breach of that duty and, even if established, she says that the claimed breaches did not cause loss to Mr Russell on the basis claimed.

7. I am grateful to Mr Brennan, Ms Eborall and their respective teams for the assistance they have given me. That assistance has included substantial out of hours and weekend work. That permitted the case to be completed in a reasonable period, although we substantially exceeded the rather unrealistic original time estimate of 2 days for a trial on liability and quantum.

II. The Issues

8. Mr Coulter faces a claim which makes serious allegations of professional negligence. Unfortunately, the case he has had to meet has been a moveable feast. That should not happen in any case, let alone one where a professional reputation is at stake. The shifting nature of the case is one of the reasons that the case has taken substantially longer than the time estimate. The underlying proceedings in which Mr Coulter is alleged to have been negligent were simple and straightforward property claims in the context of CCA regulated agreements. The approach which Mr Russell has taken to the present claim has caused it to balloon out of all proportion. At an earlier procedural stage in this claim, Mr Coulter's representatives challenged the discursive and voluminous Particulars of Claim in an application to strike out in July 2023. That led Mr Russell to shift to what he called his "Cornerstone Point" (Issue A2 below) albeit without deleting any other material. It appears that the strike out application was not finally determined, for reasons which are not clear to me.

9. The correspondence shows Mr Coulter's representatives prodded Mr Russell for further information, pressed him in relation to his pleaded losses and encouraged

him to plead an intelligible case for Mr Coulter to address. All to no avail. Even after a 5 day trial and substantial written submissions, many parts of Mr Russell's claim are incoherent and plainly inconsistent with the factual reasons Judge Luba QC (endorsed by 2 judges of the Court of Appeal) gave for finding against him. Yet, despite my encouragement to Mr Brennan at the start of the trial to perhaps focus on his strongest points, and to professionally re-evaluate whether it was really appropriate to make such wide-ranging allegations of negligence against a fellow member of the Bar, nothing was modified nor dropped.

10. Indeed, to the contrary, and as I describe below, the issues were instead multiplied. A wholly new point (the Termination Point: Issue A1 below) emerged and supplanted the Cornerstone Point to take centre stage. Part way through Mr Brennan's oral closing submissions, I had to seek clarification as whether this new Termination Point had even featured in the Agreed List of Issues settled just a week before trial. He accepted it did not. It had not been a matter which Mr Coulter had addressed in his witness statement when he answered the allegations of negligence. Although I do not need to determine whether the Termination Point was ever pleaded in the way now advanced, Ms Eborall made powerful submissions that this was not the case; and I would have required some persuading that it would be fair and consistent with the Overriding Objective for Mr Russell to be able to run it. However, Ms Eborall (with understandable reluctance) agreed the Termination Point could be advanced (it having been explored at trial), and Mr Coulter was cross-examined on the matter. I will address it, but its scope remains unclear. It is ironic that what had become the main point of the Claimant's case was not in the Agreed List of Issues, and was barely pleaded, while this aggressively pursued claim against Mr Coulter is a full-frontal attack on his professionalism in pleading.

11. Mr Russell's case as to the applicability of the CCA and the particular arguments raised against Mr Coulter lacked clarity such that it was unclear (even during trial) whether it was alleged that he ought to have raised the particular CCA points as a "*shield*" (Mr Brennan's word) in respect of Adaptainer's conversion claim (in relation to the 45 Containers) or, effectively, as a "sword" for Mr Russell's counterclaim to succeed in relation to the 51 Hale Wharf Containers. In his final written closing submissions, Mr Brennan argued that the (new) Termination Point "*applies to all the containers and all HP Agreements regulated by the 1974 Act.*" It was not explained however how it applied to both the conversion claim and the counterclaim, but I will do my best to address it.

12. Overall, Ms Eborall was right to submit in closing submissions that she (and Mr Coulter) have been required to hit a "moving target" throughout trial. This case has become one of litigation *whack-a-mole.* That accounts in large part of the length of this judgment.

13. I should also mention in these initial observations another troubling feature of this case. From the start of the claim and indeed to the end of the trial, several of the points advanced and maintained by Mr Russell as "particulars of negligence" (and which he said should have been pleaded) had in fact been pleaded and put by Mr Coulter in the Adaptainer Proceedings. Those points included: (1) that the HPAs were regulated under the CCA, which the Judge accepted; (2) that Adaptainer had, in breach of the CCA, failed to provide an agreement which contained all the prescribed terms under ss.60-61; (3) that Adaptainer, also in breach of the CCA, had failed to issue a default notice in compliance with s.87 of the CCA; (4) that

Adaptainer could not enforce the HPAs without a court order and that, by retaking possession, that amounted to an enforcement; (5) that Adaptainer was in breach of s.90 in taking possession of the 51 Hale Wharf Containers when it was not entitled to do so (because, as Mr Coulter advanced on Mr Russell's behalf, he argued that there was a conspiracy rather than an agreement in August 2013 at the Adaptainer trial); and (6) that all those acts together with the conspiracy amounted to an "unfair relationship" under the CCA between Adaptainer and Mr Russell. One could be forgiven for thinking on reading the ReAmended Particulars of Claim ("RAPOC") which Counsel had signed that none of these points had been taken by Mr Coulter.

14. As matters stood by the time of closing submissions, the case as to how Mr Coulter is alleged to have been in breach of duty was as set out below. As I have explained above, I have added issue A1 (the Termination Point) because it did not appear in the original Agreed List of Issues. For ease of reference I have added the complaint about Practice Direction 7B as Issue H. The lettering of the Issues is my own and is not the same as that adopted by Counsel (but it includes every issue).

15. The 9 Issues (with the paragraph references to where they are addressed below) are as follows:

A1. Mr Coulter was negligent in pleading that the HPAs had been repudiated by Adaptainer

("the Termination Point").

A1: Paras.[142]-[163].

A2. Mr Coulter was negligent in failing to advance the argument and authorities that Adaptainer's claim for:

i. the tort of conversion,
ii. an order for delivery up of the containers, and
iii. damages for lost rental on the containers, could not be granted by the Court, because no alternative remedies were open to Adaptainer outside of the Consumer Credit Act 1974

(the "Cornerstone Point").

A2: Paras.[164]-[173].

B. The negligent manner in which Mr Coulter advanced, or failed to advance, the argument that the HPAs could not be enforced, due to breaches of s.61 and s.65 of the 1974 Act (improper execution of the HPAs).

B: Paras.[174]-[178].

C. The negligent manner in which Mr Coulter advanced, or failed to advance, arguments in relation to s.87 and s.88 (need for a default notice).

C: Paras.[179]-[183].

D. The negligent manner in which Mr Coulter advanced, or failed to advance, arguments in relation to s.81 of the 1974 Act in relation to apportionment of payments made by Mr Russell under the HPAs.

D: Paras.[184]-[196] (dealt with together with E).

E. The negligent manner in which Mr Coulter advanced, or failed to advance, arguments in relation to s.90 and s.91, in particular in relation to:
   i. informed consent; and
   ii. the distinction between the containers at Hale's Wharf and those at Sam's Yard.

E: Paras.[184]-[196] (dealt with together with D).

F. The negligent manner in which Mr Coulter advanced, or failed to advance, arguments in relation to s.77A, and the requirement on Adaptainer to serve notices of sums in arrears.

F: Para.[197].

G. The negligent manner in which Mr Coulter advanced, or failed to advance, arguments in relation to s.140A and 140B of the 1974 Act, with particular reference to:
   i. Adaptainer's breaches of the 1974 Act referenced in 2(b) to (f), above, and
   ii. the burden of proof falling on Adaptainer pursuant to s.140B(9).

G: Paras.[198]-[208].

H. The negligent manner in which Mr Coulter failed to plead or argue that Adaptainer was obliged to use PD 7B for Consumer Credit Claims.

H: Paras.[209]-[213].

16. Some of these issues were very briefly touched on by Mr Brennan in his closing and I am not certain as to whether they were still being pursued by the end of trial. Out of an abundance of caution, however, I will address each of the Issues separately below. My approach will be to consider whether error/negligence was made out, and causation issues, together when I consider each issue, although they are legally distinct questions.

III. The Witnesses

17. I heard oral evidence from Mr Russell and Mr Coulter and struck out the witness statement of a further witness, Mr Paul Tilley, who was to be called by Mr Russell (see section IV below). I found both Mr Russell and Mr Coulter to be truthful witnesses genuinely seeking to help me. However, the impressions they made upon me were very different.

18. Mr Coulter was careful and measured in his responses, ensuring that he understood the question put and that he addressed it as fully as he could, to the best of his

recollection. He came across as a thorough, diligent, and kind person who had helped Mr Russell for over a year with his case and had done everything he could before a Judge who did not take to Mr Russell or to the case that he was alleging against Adaptainer. There is little doubt on the transcripts and statements that I was taken to that the Judge had not formed a positive view overall about Mr Russell and some of his business practices.

19. Mr Russell is a sophisticated and intelligent businessman. He showed however a lack of objectivity in his approach to the issues. I put that down to strongly held feelings that Mr Coulter was solely to blame for the financial position he now finds himself in. His lack of objectivity was reflected in what I consider to be unfounded and unfair allegations in his witness statement (but not pleaded or pursued in cross-examination of Mr Coulter) of poor court performance and advocacy by Mr Coulter. Having been provided with, and considered, the lengthy transcripts of the entire proceedings, I am satisfied that these allegations are wholly unjustified. Mr Brennan was wise not to pursue them in cross-examination of Mr Coulter.

20. Mr Russell, having lived with this case for many years, had also educated himself in the CCA and was keen to advance his case and make submissions during his evidence. Although he understood that he could not gainsay what was in the Judgment, I formed the impression that he was still firmly convinced that a conspiracy had been perpetrated against him and that the Judge's decision rejecting this theory was wrong. He digressed during his evidence to points concerning the conspiracy, or concerning the poor behaviour (as he saw it) of Adaptainer and others at the Hale Wharf site. As evidenced by the proceedings he had initiated against a number of other entities, he is a litigious and persistent individual. He is a person who I am sure understood what was being pleaded on his behalf by Mr Coulter.

21. I also consider, as I describe below, Mr Russell has a revisionist view of what he wanted Mr Coulter to focus on in the pleadings and at trial. I accept Mr Coulter's evidence that Mr Russell was not concerned at trial with the CCA arguments as much as the alleged conspiracy. Indeed, I note the Judge's finding at [55], that Mr Russell in his evidence "sincerely believed that there has been a conspiracy to damage him". That approach from a client would naturally be reflected in the attention Counsel would give to different parts of the case.

22. I address briefly at this stage why I found Mr Russell's evidence on quantum unsatisfactory. In evidence, he purported to support a Schedule of Loss which was difficult to follow, unevidenced in many respects, and I formed the view that certain claims for losses were a pure *try-on*. Mr Russell, in his claim for losses, sought to hold Mr Coulter financially responsible for costs he incurred which had nothing whatsoever to do with the alleged negligence including costs incurred some years before he instructed Mr Coulter. The pleaded claim for about £350,000.00 had ballooned in the schedule to a sum in excess of £500,000.00 and then came down to around £200,000.00 by the time of closing submissions. The difficulties with the quantum case being advanced were recognised in the fact that Mr Brennan, following conclusion of the evidence, relied on a new schedule which abandoned in a wholesale fashion many claims asserted by Mr Russell, and also sought to amend certain claims. I ruled at trial that I would not permit all of these revisions because they would need to be supported by evidence and Mr Coulter would need a chance to reply, requiring an adjournment.

23. My factual narrative below is based primarily on the Judge's findings in the Judgment. Mr Brennan confirmed he did not seek to challenge these findings, despite the different approach to that matter taken in the pleadings. I have also relied on the transcripts, and written documents below, and the evidence of Mr Russell and Mr Coulter. I underline that Mr Brennan rightly did not contend that I could depart from the unappealed factual conclusions reached by the Judge and he accepted he could not make a "collateral attack" on findings. However, some of his arguments do in fact involve such attacks as I describe below. Certain arguments also tended towards a submission that the Judge had come to incorrect legal conclusions on the basis of the arguments made to him at trial. That is not a course open to Mr Russell given his unsuccessful attempts to appeal the Judgment.

24. For the avoidance of doubt, where I refer in my factual narrative to what a witness said in evidence, I accept that evidence unless I expressly indicate to the contrary. Where there is any dispute as to events (which was not common in this case as regards anything that really matters), I prefer Mr Coulter's recollection.

IV. Admissibility - Mr Tilley's evidence: factual or expert evidence?

25. At the start of the trial on 12 February 2024, I heard an application on behalf of Mr Coulter under CPR 32.2(3) to strike out parts of Paul Tilley's witness statement ("the Tilley Statement"). Mr Tilley describes himself in the statement as a "Lawyer" at Roach Pittis Solicitors but said in response to my questions that he in fact holds no legal qualification as a lawyer but is a "fee earner" at that firm. He says in the statement that "I am a legal professional with extensive experience in practice, particularly with over fifteen (15) years in consumer credit law. I have been involved in numerous high-profile cases in this field over the years". His involvement in this case arises from his instruction by Mr Russell in the attempts to appeal the Judgment, including the hearing before Burnett LJ. At that time Mr Tilley worked for Howlett Clarke Solicitors.

26. As I describe below, the Tilley Statement, although served as factual evidence, essentially falls into two parts: (i) legal opinions on acts of alleged negligence by Mr Coulter in relation to the CCA aspects of the case, including commentary on the defence Mr Coulter settled for Mr Russell (said in Mr Tilley's view to be "shocking"), together with conclusions that Mr Coulter "blatantly" fell below the standards to be expected of a barrister (I will call this "the first aspect"); and (ii) subjective views of how he felt Burnett LJ at the oral renewal hearing appeared "receptive" to Mr Brennan's arguments and would have "accommodated the arguments" had they been made below (I will call this "the second aspect"). As I have indicated above, I have the benefit of the detailed Permission Judgment explaining why Burnett LJ refused permission to appeal.

27. Ms Eborall's application was focussed on the first aspect of the Tilley Statement. She did not seek an order striking out the subjective perceptions of Burnett LJ, the second aspect. Having heard argument, I indicated that I was minded to go further than the application and to strike out the Tilley Statement in its entirety (that is also, striking out, of my own initiative, the second aspect). I gave Mr Brennan an opportunity to address these aspects of the Tilley Statement (see CPR 3.3(2)(a)), which I said I proposed to strike out of my own motion.

28. Having heard further submissions, I struck out the Tilley Statement in its entirety and directed that he would not be permitted to give evidence. I said I would give my reasons for striking out with my judgment on the claim, and I do so now.

29. Ms Eborall's overall submission was that the Tilley Statement contained inadmissible and irrelevant evidence, including opinion evidence in contravention of CPR Part 35. The Tilley Statement was served as long ago as 29 July 2024. Mr Brennan was right to complain about the lateness of the application, Mr Tilley was in attendance and prepared to give evidence as the first witness to be called on behalf of Mr Russell. Given the views I had formed in pre-reading as to the contents of the Tilley Statement, I considered it appropriate to hear the application. Mr Brennan argued that the statement contained mixed factual and opinion evidence and that I might find it useful to hear from an expert in an area of law (the CCA) with which I may be unfamiliar. He also said that Mr Tilley could not be proffered as an independent expert because he had acted for Mr Russell, and that his evidence might assist as a counter to Mr Coulter's intended oral evidence in his defence. This seemed to be a submission that Mr Tilley would, through his statement, effectively be a further advocate in support of Mr Russell's claim. I will set out some basic principles before explaining my reasons for striking out the Tilley Statement.

30. The CPR imposes several requirements on the form and content of witness statements, including the following: (1) a witness statement must contain evidence which the person would be allowed to give orally: CPR r.32.4(1); and (2) the witness statement must indicate (i) which matters are from the witness's own knowledge and which are matters of information and belief, and (ii) the source of any matters of information or belief: PD32 para 18.2. The KBD Guide also provides at paragraphs 10.61(2)-(3) that a witness statement "should not include commentary on the trial bundle or other matters which may arise during the trial…" and it "should be as concise as the circumstances allow; inadmissible or irrelevant material should not be included". Accordingly, and as explained by Professor Zuckerman in the leading text on our civil procedural regime, "English law has traditionally held that witnesses must confine their evidence to the facts and not offer their opinions.": Zuckerman on Civil Procedure, 4th Edition, at 12.117. Further, "...witness statements are a proper vehicle for relevant and admissible evidence going to the issue before the court, and for nothing else. Argument is for advocates. Innuendo has no place at all": William v Wandsworth LBC [2006] EWCA Civ 535 at [80].

31. No party may call expert evidence without the Court's permission: CPR 35.4. Such expert evidence must generally be given in a written report: CPR 35.5, PD35, para 3 and the expert must be independent and provide objective, unbiased opinions within their expertise and without assuming the role of advocate: PD35, para 2.2. The KBD Guide, paras 10.40-10.41 reiterate those points.

32. In New Media Distribution Co Ltd v Kagalovsky [2018] EWHC 2742 (Ch), Marcus Smith J held that a witness statement was not the proper vehicle for the giving of expert evidence and he struck out witness statements commenting on the position under Ukrainian and New York law, such statements were being used, improperly, "as a gateway, by way of which expert evidence can be introduced before this court without the sanction of the court" (at [7]), wrongly circumventing the provisions of CPR Part 35. In Buckingham Homes Ltd v Rutter [2018] EWHC 3917 (Ch), an application to strike out a witness statement from a forensic accountant was

successful because, inter alia, it was "in reality an expert report albeit dressed up as a witness statement of fact".

33. Although expert evidence may be required to resolve issues in some professional negligence claims, it is a general principle that a judge in a claim against a legal professional is well qualified, without any need of expert evidence, to assess the issue of negligence. In particular, a judge and not an expert can in this area of professional negligence determine the questions as to whether a barrister has discharged his duties with the requisite care and skill: see Jackson & Powell, *Professional Liability* (9th Edition) ("Jackson & Powell") at [7-008], citing Bown v Gould & Swayne [1996] PNLR 130 (CA). I should record that Bown was not cited by the parties but it simply reflects the principles to which Ms Eborall referred in her skeleton argument.

34. In my judgment, the Tilley Statement falls foul of the principles I have summarised above for a number of reasons.

35. First, Mr Tilley seeks to give his expert opinion to the court on the CCA provisions without Mr Russell having sought permission for such expert evidence to be adduced. Mr Tilley "*believe*[s he is] *qualified to comment on the standard of the defence and counterclaim expected from a barrister…*" Tilley/7, asserting in somewhat inflammatory terms that Mr Coulter's "*omissions were so fundamental that, in my professional opinion* [they would have been identified by even a layman]" Tilley/9; and identifying alleged "*key*" omissions (Tilley/10, 13-15). These are not opinions expressed by a factual witness as part of his account of admissible factual evidence. These paragraphs are pure opinion, made as a self-proclaimed expert in consumer credit law – it is expert evidence by the back door, in contravention of CPR Part 35 and it is plainly abusive. I put aside the question whether, even if it were to be admitted, Mr Tilley is in fact an expert given he has no legal qualifications.

36. Second, other passages of the Tilley Statement are recitation or commentary upon the CCA. Tilley/11 is pure recitation of s.87 CCA as is Tilley/14 of s.77A. Further statements by Mr Tilley speculate on what Mr Coulter "*surely would have come across*" (Tilley/12) and then conclude without reason that Mr Coulter "*ignored the relevant sections*" instead (Tilley/21). These statements are not evidence that Mr Tilley would give in chief, nor is such speculation within his knowledge. The court can read the provisions of the CCA itself.

37. Third, Mr Tilley trespasses upon the issue that is for me to determine - namely, whether Mr Coulter's conduct fell below the standard of the range of possible courses of action that reasonably competent members of the Bar might have chosen to take. I note, Mr Tilley concludes that "*…a reasonably competent barrister with experience in consumer credit law would have at the very least raised these points*" and that "*the failure to do so blatantly falls below the expected professional standard*" (Tilley/16); that it is "*inconceivable*" (Tilley/17) or "*inexplicable*" (Tilley/25) for an experienced barrister professing expertise in that field not to have done so and that Mr Coulter therefore "*breached his duty to the client and failed to meet the standard of a reasonably competent barrister.*" (Tilley/26). This is not only opinion evidence, but also impermissible opinion that attempts to usurp my role in a case of the present nature.

38. Fourth, and finally (and in relation to what I have called the second aspect), Mr Tilley's subjective views of how his client's arguments appeared to be going down with Burnett LJ during the oral application for permission are irrelevant. Experience at the Bar shows that little is to be gained by guessing what is in a judge's mind by seeking to assess his or her reactions including body language during submissions. More often than not, one is completely wrong. But in any event, such evidence is irrelevant. It is the Permission Judgment which matters as a definitive record of Burnett LJ's considered views. I strike out these additional parts of the statement under my powers in CPR 32.1 to control the evidence for trial.

V. The Consumer Credit Act 1974 ("the CCA")

39. Before I turn to the CCA provisions themselves, it is necessary for me to outline the interplay between contract law and the CCA. This is necessary because at points Mr Brennan appeared to me to be arguing that the common law (including the principles governing contractual breach) did not apply to regulated agreements. As Ms Eborall submitted, the CCA and common law are interlocking regimes. I will need to refer on many occasions below to the looseleaf publication, *Goode on Consumer Credit* and will use the shorthand *Goode*.

40. The CCA extensively regulates contracts for consumer credit. Nonetheless, it is not a complete code and unless otherwise provided by the CCA, the common law continues to dictate the rights and obligations of the parties. As explained in *Goode* at [11.2]:

> "Though very detailed, the Consumer Credit Act 1974 (CCA 1974) was never a complete Code. Except as otherwise provided by the CCA 1974, the rights and obligations of the parties remain governed by the common law, by other legislation and by the terms of the agreement between the parties so far as these are within the limits of contractual freedom set by the courts and by statute.
>
> […]
>
> The position of debtors and creditors under the consumer credit regime cannot be fully appreciated without a grasp of the underlying common law principles affecting typical credit transactions."

41. Further, *Halsbury's Laws of England*, Volume 21 (2022), paras.3 and 6, explains as follows:

> "The Consumer Credit Act 1974 does not replace the common law and although the Act repealed many statutes, it co-exists with certain other earlier and later statutory provisions in this area of the law and superimposes a system of regulatory controls on the existing law. In particular, the general law of contract remains applicable, save where it has been amended or disapplied by the Consumer Credit Act 1974.

> […]
>
> The Act interacts with the other statutory and common law rules as they govern contracts between creditor and debtor or owner and hirer, contracts between creditor and surety and ancillary credit business".

42. To adopt a useful example given by Ms Eborall, many rules in the CCA do not provide for sanctions in the event of their breach. This is the case with s.87. So, whilst s.87 prohibits a creditor from taking certain actions in respect of a regulated agreement until default notices are served, a creditor who does an act prohibited by s.87 is not subject to any prescribed sanctions. However, in doing so, the creditor may be found to have committed a conversion at common law: *Goode* at [5.167] and see also [5.125] in relation to s.65.

43. It is common ground that the key provisions relevant to this case are contained in the following chapters of the CCA:

    (1) Part V "Entry into Credit or Hire Agreements": ss. 60, 61 and 65.

    (2) Part VI "Matters Arising During the Currency of Credit or Hire Agreements": ss.77A, 81.

    (3) Part VII "Default and termination": ss.87, 88, 90, 91.

    (4) Part IX "Judicial control": ss. 127, 133, 134, 140A-D.

44. The nature of these provisions, and the restrictions imposed by, consequences of non-compliance with, and relevance to the pleaded case (both in the Adaptainer Proceedings and in Mr Russell's claim before me) is varied. I will seek to provide an overview of the provisions relied on by Mr Brennan and their effect and operation in this case. I will not reproduce the lengthy text of the provisions of the legislation itself which can be accessed with this link: The Consumer Credit Act 1974. In the language of the CCA, Mr Russell is the "debtor" and Adaptainer is the "creditor".

45. The first task is to consider whether the CCA is relevant to the agreement in question. S.8(1) provides that a consumer credit agreement is an agreement between a debtor and creditor by which the creditor provides the debtor with "*credit of any amount*". This broad definition is effectively repeated in s.140C(1) for the purposes of Part IX, ss.140A-B (unfair relationships). There, a "'*credit agreement' means any agreement between an individual (the "debtor") and any other person (the "creditor") by which the creditor provides the debtor with credit of any amount.*" Thus, the unfair relationship provisions have broader application than the remainder of the CCA, which proceeds to define a "*consumer credit agreement*".

46. A hire purchase agreement is a form of credit agreement. S.189 defines a hire-purchase agreement as an agreement in which goods are bailed in return for periodical payments, and the property in the goods will pass to that person if the terms are complied with and, inter alia, an option to purchase is exercised. S.9(3) provides that in a hire-purchase agreement, the debtor is regarded as obtaining

fixed-sum credit of an amount "*equal to the total price of the goods less the aggregate of the deposit (if any) and the total charge for credit*".

47. According to the CCA as it was at the material time, a consumer credit agreement will be a regulated agreement unless it is exempt (s.8(3)). These exemptions were set out under, *inter alia*, s.16B. S.16B(1) provided that the CCA does not regulate a consumer credit agreement by which the creditor provides the debtor with credit exceeding £25,000 if that agreement is entered into predominantly for the purpose of business (intended to be) carried on by the debtor. I pause here to record that I understand it is common ground that HPA 10 was not a regulated agreement. Ms Eborall also submitted that to the extent it is necessary to consider any loss suffered by Mr Russell, HPA 4 and HPA 11 are also not regulated agreements as their value exceeds £25,000. That appears to me to be correct and indeed it was not contested by Mr Brennan.

48. There are several CCA provisions applicable to regulated agreements designed to protect a debtor, as follows: **(1) Part V, ss.60-66 CCA** contain provisions regarding the making of an agreement designed to protect a debtor from unknowingly entering into a contract without sufficient information and understanding. Thus, s.60 permits the Treasury to make regulations regarding the form and content of such agreements; s.61 requires that form (the "*prescribed form*") to be adhered to, and for that agreement to be signed, and there are also duties to supply a copy and inform the consumer of their cancellation rights. **(2) Part VI, ss.75-86 CCA** address matters arising during the currency of a credit or hire agreement concerning statements of account, information on changes in the rate of interest, variations, and notice of sums in arrears. In particular, s.77A requires statements (in a prescribed form) to be provided periodically to the debtor. (3) **Part VII, ss.87-104 CCA** address default and termination of CCA regulated agreements, including the position as regards 'protected goods' under s.90 CCA.

49. The effect of non-compliance in respect of these provisions differs according to the breach. The court has powers to make orders, in favour of either creditor or debtor, under Part IX (judicial control) of the CCA.

50. Part V, ss.60 and 61 define when a regulated agreement is "*improperly executed*". S.65 provides that an improperly executed regulated agreement is enforceable against the debtor or hirer on an order of the court only. Where a claimant seeks an enforcement order from the court under s.65, s.127 provides that the court shall only dismiss an application for an enforcement order if it considers it just to do so with regard to (i) prejudice caused to any person by the contravention and the degree of culpability for it, and (ii) certain powers of the court, including the power to reduce the sums payable by the debtor under s.127(2).

51. Before its repeal on 6 April 2007, s.127 of the CCA contained subsection (3), which provided: "*The court shall not make an enforcement order under section 65(1) if section 61(1)(a) (signing of agreements) was not complied with unless a document (whether or not in the prescribed form and complying with regulations under section 60(1)) itself containing all the prescribed terms of the agreement was signed by the debtor or hirer (whether or not in the prescribed manner)*". Thus, where a creditor failed to produce a properly executed agreement, the court was barred from making an enforcement order under s.127(3). The practical effect of

s.127(3) was described in Wilson & Ors v Secretary of State for Trade and Industry [2003] UKHL 40 at [71]-[72].

52. This provision led to significant commentary and judicial consideration as to what "*enforcement*" of a credit agreement meant. As Professor Goode described, there had been an "*explosion of litigation fomented by 'claims managers' selling the idea that the provisions of the CCA 1974 concerning the form of agreements or concerning the supply of copy documents and statements can be manipulated so as to 'get you off your debts*"' (*Goode* [45.3]). As Professor Goode explained, "*Thus, the starting point is to determine whether an action taken or contemplated by the lender constitutes 'enforcement' in the technical sense, in which case it may be rendered unlawful by statute, or whether it does not, in which case the only issue is whether it is contractually permissible*" (ibid.).

53. Issues as to whether certain actions constituted "*enforcement*" were considered in McGuffick v RBS plc [2009] EWHC 2386 ("McGuffick") and it has been defined very narrowly, to exclude demanding payment, issuing a default notice, threatening legal action, and instructing a third party to procure payment. However, "*A retaking of goods or land to which a regulated agreement relates is an enforcement of the agreement*" according to s.65(2) CCA. As to that provision, there is commentary in *Goode* (to which I make reference at [172] below) addressing when there may be a retaking of goods without there being an "*enforcement*".

54. From 6 April 2007, the bar on enforcement under s.127(3) was abolished. However, if a creditor took enforcement action absent a court order, such would constitute a breach of the CCA, and a debtor would be entitled seek relief from the court on the basis that such action was unlawful.

55. Under Part VI, s.77A requires a creditor under a regulated agreement for fixed-sum credit to give statements which comply with s.77A. S.77A(6) provides that during a period of non-compliance, (i) the creditor cannot enforce the agreement, (ii) the debtor has no liability to pay interest calculated by reference to the period of non-compliance, and (iii) the debtor has no liability to pay any default sum payable or arising as a result of breaches during that period of non-compliance.

56. However, the creditor does not lose forever the right to recover interest and default sums, although the debtor is absolved from paying interest or any default sum that arose during the period of non-compliance. If the creditor serves compliant statements upon the debtor correctly identifying the interest and default sums thereafter and then seeks to enforce the agreement (compliantly) thereafter, it may do so. It is for that reason that s.77A has been described as a form of "*redeemable unenforceability*": see McGuffick per Flaux J at [72]. I return to this point below under Issue F. The period of non-compliance ends on the giving of a statement to a debtor: s.77A(7)(b).

57. S.87 requires a creditor to serve a default notice on a debtor in breach of a regulated agreement before it can be entitled to, *inter alia*, terminate the agreement (s.87(1)(a)) or recover possession of goods (s.87(1)(c)). S.88 sets out the prescribed form of the default notice.

58. However, unlike CCA provisions concerning improperly executed regulated agreements (Part V of the CCA), a creditor cannot seek an enforcement order if it

has tried to terminate the agreement or recover possession of goods absent a default notice. Further, unlike the position with obligatory statements under s.77A of the CCA, there is no express sanction for breach of s.87: see ***Goode*** [45.143]. As Ms Eborall submitted, in substance, these provisions lay down a "condition precedent" to enforcement. If the creditor fails to serve a compliant default notice under s.87, he simply cannot enforce the agreement, and a compliant notice will have to be served before he can do so. Accordingly, any purported termination under s.87(1)(a) would be of no effect, and any purported retaking of goods under s.87(1)(c) will have been unlawful.

59. S.90(1) provides that where the goods are "protected goods" - meaning that (i) a debtor in breach of a regulated agreement, (ii) has paid one-third of the price of the goods, and (iii) property in the goods remains with the creditor, the creditor cannot recover possession of the goods without an order of the court. It is relevant to note that this is not an enforcement order: see s.189 CCA. It is simply a s.90(1)(c) order (a 'creditor's claim for recovery of protected goods' – as it is described in Practice Direction 7B, para 3.1(c))

60. As I have noted above, many CCA provisions do not provide for specific consequences in the event of breach by the creditor. However, s.91 provides that in the event of breach of s.90(1), (i) the regulated agreement, if it has not yet terminated, shall terminate, and (ii) the debtor receives back all payments made under the agreement and is released from liabilities going forward.

61. Returning to s.127, it confers on the court the power to make an enforcement order under s.65(1) (among other sections not relevant to this case) absent a compliant, properly executed agreement. The court "*shall dismiss*" the creditor's application for such an enforcement order "*only if…just to do so having regard to prejudice…*" (see further s.127(1)(i) and (ii)). There is therefore a form of statutory presumption that the enforcement order will be made, subject to that provision.

62. S.133 provides for certain orders the court may make in the event of a creditor applying for an enforcement order (e.g. under s.65) or bringing an action to recover possession of goods (e.g. under s.90). The court may make (i) a return order, for the return of goods to the creditor, or, (ii) if one-third of the total price has been paid by the debtor (see s.133(3)), it may make a transfer order, transferring title to the debtor.

63. The remedies afforded by s.133 are expressly stated to supplement those in s.3 Torts (Interference with Goods) Act 1977: s.3(8) of the 1997 Act.

64. S.134 provides that where goods are comprised in a hire purchase agreement, and the creditor (i) brings an action or makes an application to enforce a right to possession of the goods from the debtor, or (ii) establishes that he included a demand in a default notice, or made a request in writing to the debtor to surrender the goods after the right to possession accrued and before the action was brought, then the possession of the debtor will be deemed to be adverse to the creditor.

65. As set out above, ss.140A-D impose rules in respect of unfair relationships between creditors and debtors who are individuals and who enter into a credit agreement, irrespective of whether the agreement entered into between them is regulated under

the CCA. S.140B sets out a wide range of orders which the court may make when a relationship is found to be unfair.

66. It is important to note that the finding of unfairness is by reference to the time when the determination was made: see Smith v Royal Bank of Scotland [2023] UKSC 34 [2024] A.C. 955 ("Smith") *per* Lord Leggatt at [19-20]. It is also well-established that assessing whether an unfair relationship exists is an inherently fact-sensitive exercise, requiring an evaluation of all the evidence by the court: see, e.g. Plevin v Paragon Personal Finance Limited [2014] UKSC 61 [2014] 1 WLR 4222 ("Plevin") *per* Lord Sumption at [10].

67. Under s.173 CCA, contracting out is forbidden. However, s.173(3) also makes clear that a provision of the CCA will not be breached if the action is taken by the creditor without an order of the court, but with the consent of the debtor: s.173(3).

68. PD7B (now PD49C) imposes various requirements on creditors making certain claims under the CCA, as set out in PD7B para 3.1. PD7B applies to a creditor's claim for an order for recovery of protected goods under s.90 (para 3.1(3)) and to a creditor's or owner's claim to enforce a regulated agreement under s.65(1) (para 3.1(6)(a)).

VI. The Facts

The Containers: the 51 and the 45

69. I will need to return to the Judge's findings in detail below, but I will first provide a brief initial factual narrative of how the dispute arose in order to put the issues I need to decide in context. Between 2010 and 2013, Mr Russell entered into 12 HPAs with Adaptainer, the subject matter of which were 106 containers. Each HPA refers to the relevant containers being hired as "the Equipment" and then sets out a Term and Rate, together with a Purchase Option. These agreements were subject to Adaptainer's "Terms and Conditions of Container Hire", which provided that title to the storage containers remained with Adaptainer during the period of hire, until and unless Mr Russell chose to exercise an option to purchase. He exercised his option in respect of, and acquired title to, 10 of the containers under HPA1.

70. In argument, I was taken to one of the HPAs as an example. The documents are simple but the Judge's observation at [11] that these documents would "win no prizes for legal drafting" was understandable. The document contradicts itself in various ways described by the Judge but it is clear that in order to achieve the ability to purchase the containers which are subject to the HPAs it must be shown that the instalments have been paid in a timely manner (quarterly in advance and by return of invoice), and that notice needs to be given to exercise the buyout.

71. All 106 containers were initially kept by Mr Russell at the "Hale's Wharf" site in Tottenham Hale, North London. This site was leased from the Canal and River Trust ("the CRT"). However, following a deterioration in his relationship with his landlords, the CRT, Mr Russell was evicted from this site.

72. Mr Russell moved 45 containers, title to which remained with Adaptainer, to two alternative sites: Abbey Wharf Industrial Estate (34 containers) and Sam's Yard (11 containers) (together, "the 45 Containers"). 51 containers, title to which remained with Adaptainer, stayed at Hale's Wharf ("the 51 Containers"). Mr

Russell was unable to arrange for their removal and was charged for their storage by the new tenant of the Hale's Wharf site, a company called IMove4U. Mr Russell issued proceedings against CRT, DTZ (CRT's agent), IMove4U, Adaptainer and its managing director, Mr John Clark ("Mr Clark") in the High Court. They were dismissed with costs.

73. In order to deal with the 51 Containers, and putting matters neutrally at this stage, Mr Clark made "arrangements" in or around August 2013 under which IMove4U would take over the rental payments for the 51 Containers left at Hale's Wharf but Mr Russell would retain his option to purchase them. I will refer to this compromise as "the August Agreement". I will return to this point in more detail below given that it was the subject of important factual findings of the Judge.

Proceedings are commenced in the County Court

74. These arrangements did not work. Mr Russell stopped all his payments to Adaptainer. On 28 October 2013, Adaptainer's solicitors wrote to him seeking possession of the 45 Containers no longer held at Hale's Wharf. On 21 November 2014, Adaptainer brought proceedings in the Central London County Court seeking delivery up of the 45 Containers, or alternatively damages for their market value, as well as damages for use of the containers until delivery up. They did not bring a claim for the balance of the payments Mr Russell was meant to be making for the 51 Containers at Hale's Wharf (as part of the August Agreement). Adaptainer's claim for the 45 Containers was a claim at common law with no reference to the CCA or the fact that the underlying HPAs might be regulated thereunder. It was pleaded that all the hire agreements between Mr Russell and Adaptainer had come to an end or had been terminated. The legal basis of the claim was that Mr Russell had committed the tort of conversion by detaining the 45 Containers, contrary to the Torts (Interference with Goods) Act 1977.

75. Mr Russell represented himself in the claim until the instruction of Mr Coulter on a Direct Access basis in June 2015, as I describe in more detail below. In his original pleadings (prior to the involvement of Mr Coulter), Mr Russell asserted, in summary, that Adaptainer had colluded with IMove4U and DTZ to cause him "economic injury" by unlawfully "stripping him of his assets" including the containers; and that the "August 2013 Heads of Terms" (by which I understand he meant the August Agreement) were forced on him by Adaptainer. A very broad form of conspiracy to injure and a claim for procuring breach of contract was asserted in the counterclaim dated 6 March 2015. But of particular significance is the fact that by way of what seems to me to be an *add on* in the part of that pleading (where the prayer would normally appear), Mr Russell pleaded various CCA provisions in a rudimentary fashion as follows:

> "AND THE CLAIMANT CLAIMS:-"
>
> (1) 'Protected Goods' under the Consumer Credit Act Section 91, for all monies to be returned for containers under attached agreements pertaining to the 51 containers, totalling circa £80,000 for defendant's breach of Section 90.

(2) Complete Statutory Relief from HPA 2 to 12 under the CCA 1974 section 60.1A-D 'Prescribed Terms' for which all said contracts HPA 2-12 do not include Prescribed Terms.

(3) Nor so said HPA above £25,000 threshold contain the Prescribed Declaration relation to Exemption in Accordance with CCA 2006 16B(2)

Damages as the Court sees fit, for Defendants willful Breach of.

(1) CCA 1974 Unfair Relationships Section 140(A-D)

...".

Instruction of Mr Barry Coulter

76. Mr Coulter was called to the Bar in 1986. He is currently a member of Thomas More Chambers and has a general civil law practice including arbitration. At the time material to the present claim he was a tenant at Goldsmith Chambers, Temple, where he accepted instructions on a Direct Access basis. There is an issue as to whether Mr Coulter advertised himself on the Goldsmith Chambers' website as an expert or specialist in consumer credit law. Mr Russell said that he did so advertise himself and Mr Coulter says there was no such content on the site. Having been presented with an old version (but from 2016) of a website screen shot of Mr Coulter's profile (which appears not to have been updated for some time and which did not say anything about CCA disputes) I find that he did not publicise himself as a specialist. But it is accepted on his behalf that he did hold himself out as having experience in the CCA field. This point as to what was on the website is not ultimately relevant because he accepted instructions from Mr Russell on the basis that the issues which arose in the Adaptainer Proceedings, and which included the CCA, were within his area of expertise and competence. It was also not suggested by Ms Eborall that the claimed expertise (or not) in CCA matters affected the nature of the duty of care which Mr Coulter owed to Mr Russell as regards conduct of the litigation.

77. In his oral evidence, Mr Coulter had a relatively clear recollection of the facts which have given rise to the claim but given that the events took place about eight years ago, he naturally could not recall matters in detail. As I have indicated earlier in this judgment, on all issues of fact in dispute between Mr Coulter and Mr Russell, I have found Mr Coulter's recollection to be more reliable and accurate and it is often supported by contemporaneous documents. The overall impression I obtained from the oral evidence and the documents is that Mr Coulter went out of his way to assist Mr Russell at a time of crisis in his professional and business life. I turn to the initial meeting between them.

78. Mr Coulter was introduced to Mr Russell in or around the Summer of 2015 through a member of his chambers, who had met Mr Russell at synagogue, and where Mr Russell had said he required legal assistance. Mr Coulter's colleague informed him that although it was unclear precisely what the dispute was about, he understood that Mr Russell needed representation in relation to a matter described as "involving a conspiracy whereby unpleasant people were doing unpleasant things to him".

79. Mr Russell came to Goldsmith Chambers for a preliminary meeting to discuss his case with Mr Coulter in June 2015. Mr Russell brought three or four plastic carrier bags filled with papers, and which were not in any coherent order. The first question Mr Coulter asked him was why he was not using a solicitor given Mr Coulter's initial impression that it did not appear to be a simple matter. Mr Russell said he had been to solicitors but that they wanted money in advance of about £10,000.00 in order to just read the papers and he did not have the amount required. Mr Russell informed Mr Coulter that he was earning money on a monthly basis in his business and could pay as they went along, and that he could do much of the "solicitor" work. At this initial meeting Mr Coulter asked Mr Russell to explain what his case was about. Mr Coulter found him to be very distressed as he described the case, and found his story difficult to follow because he jumped from point to point. Mr Russell explained that he was running a business providing storage for goods, which involved the purchase of storage containers, and that he believed several or all of the organisations he had been dealing with had conspired to "steal" his business. Mr Coulter asked him to take his papers away and put them into some order so that he could understand them.

80. Mr Russell came back some time later after this initial meeting with his papers in ring binders, but they were still difficult to follow and included duplicates and pages which to Mr Coulter seemed not correctly or coherently ordered. It took a long time and several meetings between them for Mr Coulter to understand the background and basic facts of the case. Mr Coulter was told that Mr Russell had purchased storage containers from Adaptainer under several hire purchase agreements. Mr Russell believed that Adaptainer had conspired with CRT, IMove4u and DTZ to re-take possession of the containers from him. He explained that he wished to defend Adaptainer's claim against him for possession of some of the containers and bring a counterclaim to defeat what he described as the "conspiracy" against him. He said he needed help in drafting an Amended Defence and Counterclaim. They agreed that because he did not have much money for fees, he would pay an hourly rate of £250. I have been taken to the letter of engagement.

81. In total, Mr Russell paid £5,774.99 plus VAT for all the work undertaken by Mr Coulter including trial. I accept Mr Coulter's evidence that that this did not come anywhere close to reflecting the amount of time that he spent on the case. In particular, he was not paid anything for the trial. I accept Mr Coulter granted this indulgence because he felt sympathetic towards Mr Russell. He had a genuinely distressed client who desperately needed someone to help him.

The Amended Defence and Counterclaim ("the ADC")

82. I need to address this matter in some detail because the alleged errors of approach by Mr Coulter in the amended pleading at ADC [16] are the foundation of the new complaint called the Termination Point. The initial defence and counterclaim settled by Mr Russell (when acting in person) is a brief and rudimentary document. As I note above, these pleadings do however refer to the CCA. Mr Russell said that these references were a result of his own research on Google. Having read the documents, and following a number of discussions with Mr Russell, Mr Coulter formed the view that the CCA applied. He noted that Adaptainer did not regard the case as being a consumer credit case, so it was clear that this needed to be dealt with properly and in detail in the ADC.

83. Although Mr Russell agreed that the CCA applied and was to be included, he insisted that he did not want to focus his and Mr Coulter's energies on the CCA arguments. He was insistent that the focus of the pleading be on the alleged conspiracy. As he had said earlier, Mr Coulter advised that conspiracy would be very difficult to prove and they would need very strong evidence to succeed in establishing it. Mr Russell was however confident that this would not be difficult and again insisted that Mr Coulter focus on the "conspiracy angle". This is a point Mr Russell came back to on more than one occasion as I describe below. As Mr Coulter said in evidence, he was faced with firm instructions that there had been manifest acts of effectively criminal wrongdoing by Adaptainer and others.

84. Mr Coulter prepared the ADC, dated 11 January 2016. ADC [16] was the focus of much of Mr Brennan's cross examination of Mr Coulter. It said: "[Adaptainer] was in fundamental breach of contract such that [Mr Russell] was entitled to and did treat the contracts as repudiated". The plea was followed with detailed particulars of breach asserting serious allegations of misconduct by Adaptainer, including a conspiracy to injure Mr Russell. Of significance is also ADC [9] where Mr Coulter had expressly denied the paragraphs of Adaptainer's Particulars of Claim that it had terminated the HPAs as a result of Mr Russell's breach of contract.

85. Mr Coulter explained that he "*drafted this on instructions*". In particular, in relation to ADC [16], his oral evidence was that he was "*...pleading what I'm pleading. I pleaded that there was a fundamental breach, so the defendant was entitled to treat the contracts as repudiated. This was a specific pleading concerning the conduct by Adaptainer and various conspirators which Mr Russell was very concerned about.*" In answer to a further question, Mr Coulter repeated "*I'm pleading that he* [Mr Russell] *treats them* [Adaptainer] *as having treated the contract as repudiated. Those were his instructions. I thought it was a simple and clear sentence which was understood, and it was the case he made to me strongly in conversations we had had in chambers and over the telephone.*" It was put to Mr Coulter that he was hiding behind his instructions. Mr Coulter fairly rejected this. He said "*No, they're my pleadings. You and I will often plead cases on instructions about which we may know very little.*" It was suggested to him that Mr Russell did not instruct him to plead specifically that the HPAs were "terminated". He agreed, and said: "*No, he* [Mr Russell] *didn't say that terminology and I didn't use that terminology.* [But] *he did instruct me to say that the actions of Adaptainer, Mr Clark and other members of the Clark family had resulted in breaches, which I particularised. He told me he was the victim of a serious and malicious conspiracy by the Clarks, Mr Metzner, CRT, bailiffs, a number of people. And that involved breaches of his agreements. It was his case.*"

86. Mr Coulter was taken in cross-examination to the Judgment and, in particular, the passage in which the Judge recorded that the HPAs had been determined. It was put to him that he had pleaded termination of the HPAs and that was a "problem". Mr Coulter reiterated that: "*Those were my instructions, you have to do the best you can in those circumstances".* Mr Brennan sought to develop the point, taking Mr Coulter to s.65 CCA. He put to him that the problem that the pleading had created for Mr Russell was that there were no more agreements to be enforced, because the Judge concluded that they are determined. Mr Coulter did not accept that he created that problem for Mr Russell. Mr Brennan suggested that "*the agreements are at an end. So, at that point, there are no agreements to enforce anymore. So, they don't exist.*" Mr Coulter's response was "*you're probably right.*

But I don't accept that I created it". He explained, "*I don't act in a vacuum. I don't come to it* [a case] *and decide oh, this is a CCA case, I must do whatever I can to ensure I don't reduce the prospects of successful employment of the Act unless that's consistent with instructions. I take first of all my instructions and work forward from that. That's my recollection of what I did in this case.*" And "*I'm not responsible for my instructions. I'm responsible for turning my instructions into a draft. I can't run a case that isn't there*".

87. On considering the ADC as a whole and the oral evidence I have sought to summarise above, I find that Mr Coulter faithfully followed his instructions to plead a detailed conspiracy case. I further find that, if the acts of conspiracy were true, it is hard to see how these did not also amount to repudiation of the HPAs which Mr Russell was entitled to terminate to put an end to continuing obligations thereunder. Mr Coulter was correct in law and as a matter of professional practice to take that approach.

88. Crucially, however, Mr Coulter also pleaded a detailed case on the CCA. Contrary to Mr Russell's evidence, this CCA aspect was not a "cut and paste" of the original pleading which Mr Russell had served: it is in fact a much more elaborate pleading of the CCA (I set out the relevant parts below). Further, nothing pleaded on his behalf amounted to giving up the CCA protections, as Mr Brennan suggested. In fact, the pleading (and the way the Judge dealt with the CCA issues) demonstrate the opposite.

89. I will briefly address the oral evidence at trial given by Mr Russell on the ADC. In my judgment, it was consistent with him understanding what Mr Coulter had pleaded on his behalf. First, it was put to him by Ms Eborall that Mr Russell had pleaded correctly to Adaptainer's asserted termination of the HPAs in that he had denied that they had expired: ADC at [9] pleading to Adaptainer's POC. Mr Russell somewhat faintly suggested that the paragraph only denied the dates on which the HPAs were "*arising and expiring*". It was rightly put to him that he was reading something into the pleading that was not there. I also noted that Mr Coulter had pleaded a denial to Adaptainer's POC at [7] (which also averred that another HPA had expired on an earlier date). Mr Russell maintained: "*Yes, but he does not expand on that. It's just a general denial. He wasn't denying that the contract had expired. They then went on to plead they had expired.*" It was put to Mr Russell that Mr Coulter was abiding by his instructions. Mr Russell shrugged and said "*I was in his hands. I went to him as the professional.*" When I asked him for clarification about what he meant (and I sought to put matters in non-legal terms) Mr Russell accepted that he understood that it was being said that Adaptainer had done things that were "wrong" and that he was putting forward that they were in breach of contract (although he claimed it was only because this had been suggested to him). In re-examination on these points, Mr Russell was asked whether he knew what repudiated meant. His answer was that he understood it to mean "s*omething to the effect that it ceased, it is over, repealed*".

90. In my judgment, Mr Russell, who is an intelligent and sophisticated businessman, knew precisely what was being pleaded on his behalf and the consequences. The pleading in fact and in law was consistent with his instructions to Mr Coulter. The correspondence shows that he asked Mr Russell to read the drafts of the ADC with care and he signed a statement of truth. That endorsement by a statement of truth

included acceptance that there had been repudiation of the HPAs on the basis of the very acts which Mr Russell wanted at the forefront of his conspiracy case.

91. In summary, the case advanced on Mr Russell's clear instructions in the ADC, and thereafter, was that Adaptainer: (i) had committed various breaches of the CCA, (ii) was consequently in breach of contract (by reason of those and a conspiracy to injure) and had committed the tort of conversion through its detention of the 51 Containers at Hale's Wharf; and (iii) was party to a conspiracy along with CRT, its managing agent DTZ Ltd, and IMove4U. Adaptainer was therefore not entitled to return of the 45 Containers (the Defence) and was itself liable for its statutory, tortious and contractual breaches, including in respect of the 51 Containers (the Counterclaim).

92. ADC [18] was the subject of evidence given by Mr Coulter, which I address below. It provided as follows:

> "The defendant will say that in refusing, at the meeting on 2 October 2013 to allow the defendant to make the payments under each of the agreements that had reached the stage of completion, and for making demands to various further sums, the claimant was in breach of each individual contract and the defendant will seek an order in appropriate terms providing for transfer of title of the containers on hire purchase under each of the relevant contracts."

93. Finally, I should set out the material part of the ADC dealing with the CCA (this plea appearing in the same terms in the Defence and the Counterclaim):

> "19. Further and or in the alternative the claimant was in breach of their duties under the consumer credit act 1974 ("the act") and therefore the claimant is not entitled to any loss or damage damages for breach of contract it may otherwise establish.
>
> particulars of breach of statute
>
> a. Contrary to section 60 of the act, the claimant failed to provide any and all of the Prescribed Terms as required under with each or any of the agreements and in the premises. In the premises the court will be invited to make an order that contract is the taking of possession by the claimant of containers was illegal and to award damages to the defendant.
>
> b. Failed to serve a default notice contrary to sections 87 and 88 of the act and therefore the claimant was not entitled to take possession of the containers the subject of hire purchase agreements and the claimant has thereby been guilty of conversion. For the avoidance of doubt it is denied that any of the correspondence pleases in the particulars of claim is a default notice complying with the act.

c. Contrary to section 90 of the act the claimant took possession of the defendants containers subject to the hire purchase agreements when by virtue of the sums paid the claimant was not entitled to do so without an order of the court and thereby has been guilty of conversion.

d. Of the agreements HPA's 1, 2, 3, 5, 6, 7, 8, 9, and 12 did not exceed the £25,000 threshold do not contain the prescribed declaration contrary to section 16(b)(2) of the act.

e. The conduct set out in paragraph 17 above will be relied on as the particulars relied on to show that the claimant is guilty of an unfair relationship under section 140A of the act.

f. In the premises the court will be invited to make an order for under section 140B of the act to require the claimant to repay all sums paid by the defendant to the claimant under the various agreements in the region of £200,000 the claimant has full particulars".

Adaptainer's position

94. Following service of the ADC, Adaptainer served a Reply and Defence to Counterclaim. I note the following as regards its position going into trial. First, absent identification and supply of the HPAs, it entered non-admission that they were CCA regulated agreements. Second, subject to this, it said it relied upon section 134(1) of the CCA and would also invite the court to enforce its right to possession (to the 45 Containers) under sections 65, 127 or section 133 of the Act. As to ADC [16] (the repudiation), Adaptainer denied that it had repudiated the HPAs and pleaded that Mr Russell had failed to state whether by reason of such repudiation he "...has elected to affirm or terminate the said contracts".

95. This last plea was understandable. It is fair to observe that the ADC [16] plea did not in terms identify whether it was being said this "repudiation" had been accepted, thereby bringing the HPAs to an end under conventional common law principles. That is generally known as "discharge by breach": see *Chitty on Contracts* Vol. 1 (34th Edition) ("*Chitty*") at [27-001]. As further explained at [27-003] of *Chitty*, the term "repudiation" is apt to cause confusion, although frequently used. Equally, the word "termination" is also problematic because, as I said in argument, it might imply that the contract itself has been extinguished which is not accurate: see [27-005] of *Chitty*.

96. However, the potential confusion as to Mr Russell's stance in this regard had been resolved by the time the Judgment was given. I will return to this below but, for present purposes, I note that the Judge recorded at [31], that Mr Coulter argued that the repudiation had been accepted by Mr Russell and that was his client's case as to how the HPAs "had been determined". It seems to me that the case being put at trial was one of classic discharge by breach as I describe above.

97. The Judge also clarified with Mr Dabbs for Adaptainer what his case was as to the continuation, or not, of the HPAs. The Day 3 transcript records the following exchange:

> "Judge: ...how were any of these agreements terminated?
>
> Mr Dabbs: Well, it seems both sides are agreed they are terminated, but on different bases.
>
> Judge: Well, what is yours?
>
> Mr Dabbs: Yes. Our basis of termination is that there is consistent non-payment since July 2013."

98. These exchanges explain how the Judge was able to record that it was in effect common ground that the HPAs had "long since been determined": Judgment [32]. It is not in dispute that he did not determine which of Adaptainer or Mr Russell were correct in their cases as to breach and why the HPAs had come to an end.

Events running up to the trial

99. At some point before the trial in early 2016, Mr Russell arranged a meeting with David Lammy (the current Foreign Secretary) who was the MP for the constituency where some of the containers were stored. He asked Mr Coulter to attend to give the legal background, and gave him the impression that he and Mr Lammy had been in contact for some time and that Mr Lammy was going to help him in some way. When they arrived, Mr Lammy asked something to the effect of "what am I meant to do about it?". Mr Russell was upset because he thought Mr Lammy was going to hear what his case was about and make some kind of political decision which would resolve matters. Mr Coulter felt his client's expectations seemed out of kilter with reality. I was shown an email recording Mr Russell's thanks to Mr Coulter for attending this meeting. I only mention the Lammy meeting because it underlines the view I formed of the extent to which Mr Coulter went out of his way to assist Mr Russell at a very difficult time in his professional and business life.

100. While he was drafting the ADC, and thereafter, Mr Russell was in frequent contact by telephone and email, providing detailed instructions. Over the course of the instruction, Mr Russell sent hundreds of emails to Mr Coulter. He also sent videos to him that Mr Russell had taken on his mobile telephone. These videos were intended to demonstrate the alleged conspiracy against him, such as videos showing him attempting to remove his containers from the site where they were stored and his not being permitted to do so. Mr Coulter recalled Mr Russell being angered when he told him that such actions in themselves did not amount to a conspiracy. In this regard and at an early stage in his involvement, Mr Coulter asked Mr Russell why he was not seeking to join the other alleged conspirators (the CRT, IMove4U and DTZ) as defendants. Mr Russell said he could not bring a claim against them because they had obtained a cost order against him in relation to proceedings against him for an injunction, which he had not paid and did not intend to pay. Mr Coulter advised that not including all the alleged conspirators made establishing a conspiracy harder.

101. In conversations following the serving of the ADC, Mr Coulter returned on more than one occasion to the importance of focussing on the CCA, rather than the conspiracy. Mr Coulter's assessment of the case was the evidence that Mr Russell had provided did not match his enthusiasm that there was a form of criminal

conspiracy at play. Mr Russell did not accept this and he remained adamant that the conspiracy was where the focus must be.

102. That Mr Coulter advised Mr Russell on repeated occasions that the strongest part of his claim was based on the CCA was not challenged when he gave evidence. Nor was the evidence of Mr Coulter that he considered the conspiracy "angle" was so important to his client that he did not believe that he could have given stronger or better advice that would have changed Mr Russell's mind or instructions. That Mr Russell was focussed principally on the conspiracy case is evidenced by the fact that when answering Adaptainer's Solicitor's letter which stated by reference to the defence being asserted by Mr Russell that "the thrust of [his] defence appears to be that these agreements were hire purchase agreements and as such caught by the Consumer Credit Act", Mr Russell's response was "No, the thrust of my claim is that your client has been caught, lying, conspiring, manipulating in an attempt to defraud me and enrich themselves". This wholly supports Mr Coulter's evidence before me as to the instructions which Mr Russell gave him.

103. Mr Coulter advised that he did not consider there was sufficient evidence to establish the alleged conspiracy, but whether it was established would be a matter for the trial judge having heard the oral testimony. Mr Russell told Mr Coulter that he was confident that the trial judge would believe him and there would be the public exposure of a serious criminal conspiracy to damage him. As appears from the Judgment, Mr Coulter was right in his assessment of the weakness of the conspiracy case, and the Judge also focussed in large part on the CCA defences.

The trial

104. The trial took place at the Central London County Court between 18 and 20 July 2016. In addition to Mr Clark for Adaptainer, Mr Russell gave oral evidence. Adaptainer's claim was a claim in the tort of conversion for the 45 Containers: Judgment [3]. That was also plain from Adaptainer's Claim Form and Reply. Mr Coulter prepared a skeleton argument and, following evidence, written closing submissions for trial, as well as making oral submissions**.**

105. In addition to making arguments in relation to the conspiracy/economic torts which Mr. Russell wanted him to focus upon, Mr Coulter specifically argued:

1) The HPAs were hire purchase agreements.

2) The CCA regulated certain of the HPAs, (three of the HPAs were excluded by s.16B due to their high value).

3) Those regulated HPAs were improperly executed contrary to s.60, such that Adaptainer was not entitled to take possession of the containers without an order of the court (s.65).

4) Adaptainer had failed to serve a default notice contrary to s.87 and s.88, such that Adaptainer was not entitled to take possession of the containers and was guilty of a conversion.

5) Adaptainer had breached s.90, attracting the consequences in s.91.

6) There was an "unfair relationship" contrary to ss.140A-140C, arising from the conspiracy and Adaptainer's alleged rejection of Mr Russell's attempts to exercise his purchase options.

The Judgment

106. On 2 August 2016, the Judge delivered the Judgment and found for Adaptainer on all issues. I will summarise his headline conclusions below but at this stage I will address the events running up to, and culminating in, the August Agreement.

107. Whilst Adaptainer pleaded that each HPA lasted not less than three years, Adaptainer's case was premised on the HPAs having "*expired*" on their third anniversary. The Judge said "*it was suggested to me in argument that this document created an agreement for a three year term. As even the most junior lawyer will appreciate, it does no such thing. This is an agreement for the indefinite rental of a container, which might, were other matters not to interrupt it, run on forever.*": Judgment [10]. Accordingly, the HPAs were agreements of an indefinite length. The Judge also found that, to exercise the right (at two intervals) to become the owner of the containers, Mr Russell was required to have paid "in a timely manner" and to have given notice: Judgment [11].

108. The Judgment sets out the Judge's conclusions as to the evidence (and in particular why the conspiracy claim was effectively found to be hopeless at [55]-[74]). I will not set those out. But one significant point that I should record at this stage is that Mr Russell in his evidence before the Judge (and with claimed support from documents) said that the containers were "protected goods" because he had paid more than one-third of the price (for s.90 CCA purposes). I was taken to parts of the transcript recording Mr Coulter's submissions to the Judge on this issue. It is clear to me (and I find) that Mr Coulter did his best with the evidential material Mr Russell had provided. The Judge made a finding of fact at [50] (which cannot be challenged in this claim) that Mr Russell had not established the one-third condition had been met. Indeed, no attempt was made before me to show me by documentary and oral evidence that one-third (either actually or by a process of apportionment) had in fact been paid. This point is ignored in Mr Russell's witness statement. I will return to this issue again below.

109. It was accepted at the trial that Mr Russell had not acquired title to any of the 45 Containers removed by him, nor was it suggested that he had title to the 51 Containers left on the Hale Wharf site. As I have already noted, given the common ground that the HPAs had come to an end, the Judge did not have to rule on whether the plea of repudiation in para. [16] of the ADC was made out on the facts (or indeed, whether Mr Dabbs' contrary case as to how they had come to an end was correct).

110. Given the other findings of the Judge (essentially concerning the failed conspiracy claim which also rooted Mr Russell's repudiation claim), I find that the Judge would have rejected the plea in ADC [16]. He would in my judgment plainly have found, consistently with his other factual findings, that the HPAs had not been discharged as a result of Adaptainer's repudiatory breach and acceptance of it.

111. However, it was not argued below (nor did the Judge find) that the determination of the HPAs (by whatever route) meant that the CCA had become irrelevant and

that such protections as Mr Russell enjoyed thereunder had been lost. As I explain below, he dealt with the CCA points in some detail. That course would make no sense if the pleaded case had resulted in the protections having been abandoned. I reject Mr Brennan's submission that the Judge was only dealing with the CCA points as an "alternative" basis for his decision.

The August Agreement

112. Based on the oral evidence from Mr Russell and Mr Clark, as well as the written documents, the Judge made important factual findings as to the events before and after that Agreement. Mr Brennan concedes that this is the factual basis against which I must assess the negligence allegations made against Mr Coulter. Indeed, his client has not submitted evidence which seeks to challenge any of those factual findings and the case advanced by Mr Brennan is that had different *legal* points been taken, the Judge's conclusions would or might have been different. In this regard, I have considered the comprehensive statement of principles concerning collateral attacks and abuse of process identified by Marcus Smith J in Allsop v Banner Jones [2022] Ch 55 (CA) at [20]-[42].

113. The Judge made what he called "an early" finding of fact that Mr Clark positively encouraged Mr Russell to comply with the leasing arrangements for the full three-year term. That would enable him to gain the ability to use the buyout options and to acquire ownership of the containers at the lowest possible one-off purchase price. Mr Clark considered, and Mr Russell agreed, that it was the best business model for Mr Russell for him to become the outright owner of the containers so that he could thereafter let them out for storage without the ongoing liability to pay rent to the original container owner, Adaptainer. Indeed, it had throughout been part of Mr Russell's case that he was able, anxious and willing to activate and exercise his buyout rights under the various agreements. He was doing that, and asserting that right, because it was in his best interests to do so.

114. The Judge found that, initially, things seemed to be going well. So, Mr Russell obtained ever larger numbers of containers from Adaptainer, no doubt because he had found many business persons to sublet the containers to. Mr Russell expanded his operation at the Hale Wharf site. He took other parcels of land under arrangements from the CRT. Indeed, matters progressed sufficiently smoothly for him, in due course, to become the purchaser outright of the first tranche of 10 containers covered by the first of the agreements (HPA1). The Judge explained that thereafter, things did not work out for Mr Russell entirely as planned. Despite having agreed to the prompt payment terms of the agreements with Adaptainer, he was quickly in arrears and by 2012 was significantly in arrears with his repayments, owing many thousands of pounds to the company. Much more importantly his business model was built, almost literally, in the Judge's words "on sand". That was because he had never acquired any land from the CRT for which he had security of tenure.

115. In the summer of 2012, the CRT decided to terminate the arrangements they had made with Mr Russell and gave him three months' notice to clear himself and his business from their land. He responded with an offer to clear all the arrears if he were permitted to stay on the Hale Wharf site. In his dealings with the CRT, Mr Russell sometimes dealt with one of their officers directly but he dealt primarily with a Mr Metzner, of the landlord's agents DTZ. In due course, and following

discussions and communications with Mr Metzner, Mr Russell managed to clear the arrears and the CRT agreed to grant fresh three month licences from November 2012 to February 2013. This period was to see whether he could make good a consistent compliance with arrangements for the occupation of the land. That trial period did not prove satisfactory to the CRT and they decided that they would not let him remain further when the licences expired. Mr Russell was thus required to vacate the land in February 2013. He did not do so. He thought that he could negotiate a further period, at least a period sufficient to arrange the orderly removal of the many containers by that time on the Hale Wharf site. However, that permission to continue in occupation was refused. Mr Russell remained on site, holding over as, at best, a tenant at will.

116. Finally, the CRT put bailiffs in possession of the Hale Wharf site. They gave instructions to the bailiffs in relation to the regulation of access and egress to and from that site. A pattern developed of Mr Russell saying to CRT and DTZ, and then to the bailiffs, that he was going to remove the containers. During the course of July 2013, he was able to move some containers to other sites but many remained.

117. On 29 July 2013, the CRT granted a licence of the land at Hale Wharf to IMove4U. The terms of the licence gave that tenant control of the land but did not allow them to interfere with Mr Russell's goods save in compliance with the terms of the 1977 Act. In due course, the several parties, CRT, DTZ, initially the bailiffs and then IMove4U, were involved in further attempts, by Mr Russell, to get the containers off the land. However, matters did not go smoothly. IMove4U began to exact and levy charges on Mr Russell in respect of those containers that remained.

118. By early to mid-August 2013, matters were in crisis. Mr Russell could not afford the charges being imposed by IMove4U, when taken together with his continuing liability for rent under the HPAs with Adaptainer, and when added to the costs involved in relation to cranes and trailers for the removal of the items from the Hale Wharf site. For its part, Adaptainer became increasingly concerned that the CRT, or its agents or its licensees, might dispose of their containers not removed. On the ground, problems arose in relation to access to the site. As found by the Judge these included issues of asbestos, issues in relation to inappropriate lifting equipment for the weight of the boxes, various health and safety issues and the like.

119. There was a site meeting on 8 August 2013 between all of the parties, the upshot of which was believed to be that Mr Russell would expedite the programme of removal of the containers. As the Judge explained, agreement appears to have been reached but the expeditious removal of the containers did not follow.

120. The precarious position of Adaptainer, already fast developing, was made stark on 16 August 2013. On that date, Solicitors for the CRT wrote to Adaptainer, stating that unless the containers remaining on site were removed within the course of the next seven days, CRT would make their own arrangements for the removal of the containers (at the cost of Adaptainer). The Judge said that this letter crystallised the "storm which had been brewing". It was at this point that Mr Clark began to formulate a plan to rescue the situation. He discussed the plan in outline with Mr Russell at a meeting on 16 August 2013. He shared the outline of that plan with his own staff and with Mr Russell in an email on the same day. In that email, Mr Clark reviewed the outcome of the meeting he had just had with Mr Russell and explained:

> "We had a long meeting and talked very openly. Basically he has given us a whole bunch of money to date and feels he is losing his investment and being turned over by the world and his wife. I ran scenario past him and in principle he agrees with the plan. I Move 4 U can lease the boxes from Adaptainer, £7.50 per week and we do a management thing. Israel will pay the shortfall from our agreement with him and pay the purchase option so the boxes still become his but we get around the asbestos stuff, trucking problems, trucking cash flow, everything just disappears. Maybe we need to charge a nominal fee for the expenses we incur of the deal but we did not mention this. It's peppercorn stuff. We then manage them up to and including final sale [to Mr Russell] on terms to be agreed but to be fair and equitable to all of us. Nobody is to know the details of this very private arrangement, including Israel's own brother, because if word leaks out it could well be most counterproductive. If he fails to pay we just become the owners instead of him anyway. In such case we will still pay him some conscience money to be agreed probably upon final but there is a lot of money that can be generated from these units whichever way it goes and I want to be entirely honourable, despite all the recent problems that grant us favour in any event. I want to have a completely clear conscience over this deal. We have to date and I wish for that to continue. That is the bones of the agreement. We pad it out more carefully over the next few days, but I have given him until 1400 hours to accept. It was a lot for him to mentally acclimatise to, in one sitting. In my mind there is no other practical way to reach resolution. I feel that this restores matter to an acceptable level for all parties".

121. The Judge found that what he called the "bare bones" of the plans were straightforward. His summary, based on the email and the oral evidence of Mr Russell and Mr Clark, was as follows. The containers that remained on the Hale Wharf site were to remain governed by the original leasing agreements between Adaptainer and Mr Russell, but the liability in respect of regular payment for them was (for the most part) to be met by payments from IMove4U directly to Adaptainer. The balance in payment was to be made by Mr Russell and, in due course, the outcome for him would be an entitlement to purchase the containers under the options in the relevant agreements. The email of 16 August 2013 was not only shared by Mr Clark with his staff but also with Mr Russell. The Judge held that under "... some pressure, [Mr Russell] initially found the agreement acceptable and assented to it". He added that in contemporaneous communications he expressed his gratitude to Mr Clark for having come up with this scheme. Having given his assent by the 2pm deadline, matters then needed to be fleshed out in greater detail. In further email exchanges on 16 August, Mr Russell wrote to Mr Clark, "Thanks for coming to our arrangement. Not happy with the situation but note that this is the best of a bad situation".

122. A few days later, whilst the matters were still "in ferment" (as described by the Judge), Mr Russell wrote, "[I] appreciate the scheme. Thanks for working on it". For its part, Adaptainer, through Mr Clark, represented to DTZ, on the same day

that IMove4U had essentially taken over the lease arrangements for the containers. That was intended to achieve the result, which it indeed did achieve, of pacifying the CRT. I was shown an email at the hearing dated 8 August 2013 in which Mr Russell warmly thanks Mr Clark (and his son) for supporting him and looking forward to them "…entering a progressively fruitful and calm era".

123. This compromise is what I have referred to above as "the August Agreement". In effect, the approach described in the Judgment at [25], was to keep the agreements in relation to the 51 Hale Wharf Containers "alive", albeit that the liability for the regular payment would be met by IMove4U rather than Mr Russell (with the balance to be paid by Mr Russell).

124. The Judge explained that at least initially, the scheme under the August Agreement worked. But Mr Russell soon became disenchanted with the arrangement. He decided that he would make no further payment to Adaptainer in respect of any of the containers. Mr Russell began litigation against the CRT and DTZ. He sought to join Mr Clark as a party to those proceedings in the High Court but his application was dismissed with costs.

125. In October 2013, Adaptainer's solicitors sent a letter before action demanding the delivery-up of the remaining containers, which had been removed from the Hale Wharf site by Mr Russell. That letter also stated that all the agreements were to be treated as determined.

The Judge's approach to the CCA

126. Contrary to the way in which Mr Brennan put his case at various points, the decision by Mr Coulter to plead that the agreements had been terminated did not lead to Mr Russell losing the protections of the CCA. First, as I have noted above, the Judge made no findings relying upon this plea of termination (but he would in my judgment have rejected it on the facts). Second, this submission ignores the Judgment where the Judge accepted the CCA applied and dealt with the statutory provisions in some detail: see [33]-[55], which are devoted to the pleaded case in the ADC as amplified orally and in writing by Mr Coulter at trial. I will summarise the Judge's conclusions.

127. The Judge found "with some reluctance", that the series of business transactions before him fell within the purview of the definition of 'hire purchase agreement' and therefore the CCA had application to them. He noted that Adaptainer had conceded the absence of default notices and the absence of compliance with the strict provisions of the CCA as to the form in which regulated agreements are to be entered into. The Judge explained that the "central bite" of the CCA is contained in Section 90 which prohibits the recovery of possession of the goods. He recorded that Mr Coulter contended that there had been the wrongful retaking of possession by Adaptainer of the containers left at Hale Wharf (the 51) and of the 11 at Sam's Yard. In those circumstances, Mr Coulter argued that there had been a plain breach of Section 90 and that that sounded in a remedy for Mr Russell.

128. The Judge held that Counsel for Adaptainer (Mr Dabbs) had advanced a series of "compelling answers" to the embargo which Section 90 might otherwise seem to impose. Firstly, subsection 90(1)(b) requires it to be established that the debtor has paid to the creditor one third or more of the total price of the goods. That would

require it to be shown what the total price of the goods was under each of the relevant agreements and it to be established by evidence that Mr Russell had paid one third or more of each. The Judge said that "that is not the way in which the case was presented to me and I am not satisfied that that condition precedent has been made out". I have referred above to why the Judge was not satisfied on the basis of the oral and documentary evidence before him, despite Mr Coulter's best efforts to deploy that material. The Judge went on to say that even if it had been made out, Section 90 only has application where there is a recovery of possession from the debtor. He explained that must mean "from the debtor without the acceptance or acquiescence of the debtor". The Judge said that Adaptainer was "plainly right" that no adverse possession of the goods at Hale Wharf (the 51) was taken by Adaptainer from Mr Russell, because in the August Agreement, Mr Russell had agreed to the arrangements under which the nominal recovery of possession would be taken of the containers on the site with their subsequent underleasing, to IMove4U. Overall, the Judge concluded that a breach of Section 90 had not been made out and it followed that the draconian consequences set out in Section 91 did not apply.

129. The Judge was also satisfied that Section 134 gave Adaptainer what he called a "pathway to relief" at [52], notwithstanding the breaches of the CCA in relation to formal notice and form of demand. In that regard, Mr Dabbs had argued a number of points which the Judge accepted, and I should set out those points in some detail, given the way in which the arguments before me developed:

> "46. Mr Dabbs took me to Section 134 of the Consumer Credit Act which is headed, 'Evidence of adverse detention in hire purchase etc., cases'. Put shortly, that section addresses the situation where the owner of goods, provided under a hire purchase agreement, seeks to enforce a right to recover possession. It provides at subsection (1)(b) that if the hirer proves a demand for the delivery of the goods in the form of a default notice or, 'After the right to recover possession of the goods accrued but before the action was begun or the application was made, he made a request in writing to the debtor to surrender the goods', then the possession of the goods by the debtor or hirer shall be deemed to be adverse to the creditor or owner. Mr Dabbs uses the provisions of Section 134 in two senses. First, he says, the provision in subsection (1)(b) makes clear that, even in the absence of a default notice, a hirer is entitled to demand surrender of the goods which the hirer owns. If they are not returned then they are to be treated as held adversely to the creditor or owner. That may suffice to underscore a claim to their return.
>
> 47. Alternatively, as he reminds me, Section 134 subsection (3) provides that, 'Nothing in the section affects a claim for damages for conversion'. It must follow, he submits, that it is open – notwithstanding whatever breaches of the Act may be made out in terms of formalities – to an owner of good to bring an action for the recovery of them in conversion. Mr Dabbs submits that the thrust of the 1974 Act is to prevent those who provide goods from taking high handed means to recover

them, by seizing them or otherwise. The pith of the legislation being to ensure that no one is deprived of the goods except by an order of the court. He seeks just such an order".

130. At [55]-[74], the Judge then addressed in some detail the conspiracy and other economic tort claims. No issue is taken, nor could it be taken, with those findings. That part of the case was rejected in strident terms. Significantly, the Judge found:

> "70. In my judgment, the trail towards a 'conspiracy to injure by lawful means' was a trail that led nowhere. Frankly, doing the best I could to assemble the various straws identified by Mr Coulter, I got nowhere near a sheaf of straws let alone a brick. I accept as entirely credible the evidence given by Mr John Clark. I accept in particular that he went the extra mile to help not hinder Mr Russell in the difficult circumstances he faced in August of 2013. He was certainly not involved and nor was the claimant company, in any of the initial decisions of the Canal & River Trust to either determine the rights of Mr Russell to occupy the land at Hale Wharf or to grant only limited further indulgences. I am not satisfied that the claimant company was in any way involved in a plan hatched by it, or by anyone else with it, to do the defendant down.
>
> 71. I am satisfied that Mr Clark extended to Mr Russell, as a particular customer of the business, indulgences and support that he did not, as he candidly told me in his evidence, extend to any other customer, nor had he extended such assistance to any other customer over the decades in which he had worked in the container business. His reasons for helping Mr Russell to the extent he did remain entirely personal to him, although known to Mr Paul Clark and indeed known, I think, to the defendant himself. I treated Mr John Clark's evidence, I must say, with some initial caution. He seemed to me to be somewhat truculent or insouciant when initially giving his evidence. However, standing back from it after it was given and examining it in the context of the case as a whole, I am satisfied that the manner in which he gave his evidence was borne of exasperation with the defendant to whom he had genuinely extended the hand of assistance and support, only to find it brushed away by the pursuit of this allegation of conspiracy and in the earlier conduct of the defendant since late 2013.
>
> 72. I am quite satisfied, from the evidence I have heard, read, listened to and seen, that the content of the emails passing between the parties does not demonstrate a pattern of intention to harm but in fact 'does what is says on the tin'. Namely, demonstrate an attempt on the claimant company's part to assist rather than do down the defendant in his hour of difficulty and need".

131. Overall, one can summarise the Judge's main conclusions as follows:

a) The HPAs were hire purchase agreements; they provided for an indefinite rental period, as well as two opportunities to exercise a right to buy out the agreement.

b) Mr Russell did not have title to the 45 Containers or the 51 Containers.

c) The relevant (by the date of trial) HPAs were, with one exception, regulated credit agreements. Therefore, 43 of the 45 Containers were governed by the CCA.

d) It was agreed as common ground that all of the HPAs had, by the time of trial, "long since been determined".

e) Adaptainer's claim was brought in the tort of conversion under the 1977 Act. The claim therefore did not rely on the regulated HPAs. In any event, Adaptainer was entitled to relief under s.134 of the CCA on the basis of his findings of fact.

f) S.90, which was the central "bite" of the CCA, did not apply for the following reasons: (i) one-third of the full price had not been paid (a finding of fact being made to that effect), (ii) Mr Russell had consented to Adaptainer taking possession of the 51 Containers (again a finding of fact based on the August Agreement), and (iii) Adaptainer had not taken possession or control of any other containers (not in dispute). I underline here that there were freestanding reasons which led to the non-application of section 90. At the risk of stating the obvious, the termination/determination (by whatever) means and for whatever reasons, of the HPAs did not have any impact on these reasons in the way the Judge approached matters.

g) Unfair dealing under ss.140A-140C of the CCA was not made out on the facts.

h) There was no conspiracy. Whilst Mr Russell passionately and sincerely believed there had been, Adaptainer had in fact extended significant support and indulgences to him, beyond those which would have been offered as a matter of course.

The Court of Appeal

132. Mr Russell instructed a new legal team to seek permission to appeal: Mr Paul Tilley as his "lawyer", and Mr Brennan. Permission to appeal was refused, on the papers by Lewison LJ for the following reasons:

> "(1) So far as the 51 containers are concerned (which forms the main basis of the allegation that the goods were wrongfully repossessed) the judge found that the Appellant had agreed to the arrangements in August 2013. Thus whether or not section 90(1)(b) of the Consumer Credit Act 1974 was satisfied became immaterial. Moreover the judge found as fact

> that it had not been shown to have been satisfied, and the attempt to demonstrate the contrary on appeal would not be permitted since the case was not presented that way below.
>
> (2) Once the 51 containers are cleared out of the way, the Claimant's case was a simple case on conversion which is permitted by section 134(3) of the Act. It was common ground that the agreements had all been terminated (see judgment at [30] to [32]) and it was also common ground that the Appellant had not title to the goods.
>
> (3) The argument under section 140A starts from the premise that the retaking of the 51 containers was unlawful. But since the judge found that the parties agreed the fate of the 51 containers, the premise is unsound. In consequence the argument cannot succeed. In addition, even if there was an unfair relationship the power to acquire the creditor to repay sums paid by the hirer is discretionary; and cannot be said to be wrong not to have ordered the creditor to repay all hire charges when the Appellant has had the full benefit of the hired goods."

133. Mr Brennan had sought permission to appeal on 10 grounds, only 7 of which were maintained at the oral permission hearing. These included the following new arguments:

1) Ground 3: the Judge should have had regard to the apportionment mechanism in s.81 of the CCA when applying the one-third-price rule in ss.90: para.3 Amended Grounds of Appeal.

2) Ground 4: there had been no informed consent for the purposes of s.90 of the CCA, per the judgment in Chartered Trust v Pitcher [1988] RTR 72: para. 4 Amended Grounds of Appeal.

3) Ground 5: there were no statements, as required by s.77A of the CCA: para. 5 Amended Grounds of Appeal.

4) Ground 6: There can be no remedy in conversion for an agreement regulated under the CCA, on the basis of (i) the principles said to be established by Orakpo v Manson Investments Ltd [1978] AC 95 (Orakpo), Dimond v Lovell [2002] 1 AC 384 (Dimond), and Wilson & Ors v Secretary of State for Trade and Industry [2003] UKHL 40 (Wilson), and (ii) s.133 of the CCA: para. 6 Amended Grounds of Appeal.

134. At the renewed oral application, Burnett LJ explained that Mr Russell sought to (i) reargue much of the factual case, and (ii) raise arguments on appeal which were not raised at first instance. He also adopted Lewison LJ's reasons for refusing permission. There are particular parts of the Permission Judgment which I need to refer to below in more detail.

VII. Legal Principles

135. There was no dispute as to the applicable legal principles.

Standard of care

136. Mr Coulter accepts that he owed Mr Russell a duty of care as his barrister. As to the nature of the duty:

1) Breach of the duty can only be established if Mr Russell proves that Mr Coulter made an "error […] which no reasonably competent member of the relevant profession would have made": Hall v Simons [2002] 1 AC 615 ("Hall").

2) A barrister is subject to the same rules as other professionals: the test as to whether there has been negligence is the standard of the ordinary skilled person exercising and professing to have that special skill: Matthew v Maughold Life Assurance Co Ltd [1955-1995] PNLR 51. In Saif Ali v Sydney Mitchell & Co [1980] A.C. 198 at 218 and 229, Lord Diplock underlined that not every error made by a barrister (or any other professional) constitutes negligence, but only such an error "as no reasonably well-informed and competent member of that profession could have made". This dictum has been widely followed and as explained in Jackson & Powell at [12-009], it was adopted in McFarlane v Wilkinson [1997] PNLR 578. In Hall, the relevant standard of care was expressed by Lord Hope at 726D-726E, to be of ordinary professional practice and ordinary skill, and by Lord Hobhouse at 737G-737H, in identical terms to Lord Diplock in Saif Ali.

3) I would add to this a point which may be obvious. The wisdom of decisions made by a barrister should be assessed by reference to the instructions they are given and in particular the specific approach the client instructs the barrister to take. It is a common feature of litigation that different points are taken as primary, secondary or alternative positions. If a client is determined that the focus of the arguments is to be on a particular point as a primary position, care must be taken in criticising as negligent (and with the benefit of hindsight) a lawyer's decision to comply with those instructions.

137. In determining whether Mr Coulter is liable, it is common ground that I need to consider matters in two stages: (i) first, whether the particular omission/error complained of was "wrong" and that question must be addressed by reference to Mr Russell's instructions and evidence; and (ii) second, even if that is established, I must be satisfied the omission/error amounted to negligence by reference to the standard of skill and care. I refer in this regard to the useful summary in Jackson & Powell at [12-009].

Causation and loss

138. Mr Russell claims for the lost chance of succeeding in the Adaptainer Proceedings (at first instance or on appeal). In Perry v Raleys Solicitors [2019] UKSC 5, [2020] AC 352 (Perry), the Supreme Court reiterated (at [20]) the principles in Allied Maples Group Ltd v Simmons & Simmons (a firm) [1995] 1 WLR 1602. When assessing what would have happened in the counterfactual world in professional negligence cases:

> "…the courts have developed a clear and common-sense dividing line between those matters which the client must prove, and those which may better be assessed upon the basis of the evaluation of a lost chance To the extent (if at all) that the question whether the client would have been better off

> depends upon what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of probabilities. To the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation."

139. Where a loss of a chance evaluation is required, Mr Russell must show that he had a "real and substantial", rather than negligible, prospect of success. As explained in Mount v Barker Austin [1998] PNLR 493 (cited in Perry at [33]):

> "When a person sues his former solicitors for negligence in the conduct of proceedings which has led to his action being struck out his loss is normally measured by reference to his prospects of success in the primary litigation: see Kitchen v. R.A.F. Association [1958] 1 W.L.R. 563. However, in order to recover for the loss of that kind the court must be satisfied that the plaintiff had at least a "real" or "substantial" chance that he would have succeeded in the primary action, not merely a speculative one: see Allied Maples Group v. Simmons & Simmons [1995] 1 W.L.R. 1602 per Stuart-Smith L.J. at 1614. If his prospects of success fall short of that, the court will ascribe no value to them, but provided the court can see that there were real prospects of success it will evaluate them notwithstanding the difficulties that may involve. The need to evaluate the prospects of success in that way usually arises because of uncertainty as to the final shape of the evidence which would have been before the court trying the primary action. In some cases, however, the outcome of the primary action is not in doubt, for example, if it can be seen that the claim is bad in law and could never have succeeded. In such a case, of course, there never were any prospects of success at all."

140. I turn to the way in which the claim in negligence is put by Mr Brennan. I preface this section by noting that the RAPOC (drafted originally by Mr Russell in person but amended by Mr Brennan) contained a wide-ranging combination of factual allegations and allegations of negligence, as well as a continuation in some respects of the conspiracy and misconduct allegations which the Judge had rejected in resounding terms. Unfortunately, despite various amendments, including during the trial, the pleading continues to include such material. I will however determine only the Issues I identified at the start of this judgment.

VIII. The Alleged Negligence

141. In this section, I will address each of the Issues A1-H. I will consider both negligence and causation together. Accordingly, I will consider whether, if negligence is made out, Mr Russell lost a real or substantial chance of a positive outcome.

ISSUE A1: the Termination Point

142. As I have noted above, despite never having been clearly pleaded, addressed in witness statements, nor indeed even identified in the Agreed List of Issues, at the trial this became Mr Brennan's main point. Even then, the way the point was put changed from time to time during different parts of the hearing. I have summarised the point below in terms which I understood him to accept as accurate in the course of Ms Eborall's closing submissions. I also gave him the opportunity overnight to reflect on how she had described the point in her written closing, given that understandably he had not had time to absorb her lengthy document while focussing on preparing his own oral closing.

143. The Termination Point appears to run as follows:

> (1) In the ADC [16] Mr Coulter pleaded that Adaptainer was in fundamental breach of contract such that Mr Russell was entitled to and did treat the contracts as having been repudiated.
>
> (2) "*Repudiated*" (Mr Brennan said during cross-examination of Mr Coulter) meant "terminated", therefore, by the pleading it was being said that Mr Russell had (inadvertently, it appears it was being alleged) asserted that the HPAs were no longer in existence.
>
> (3) By this plea it was asserted that Mr Russell (the "debtor" for CCA purposes) was the party who had terminated the agreements.
>
> (4) The detrimental impact of that upon the CCA case was fourfold:
>
> a) First, under s.65(1), the HPAs having been found to have been improperly executed, and Adaptainer needing to seek an enforcement order, was an argument that could not be run if the agreements had been terminated.
>
> b) Second, that under s.90(5), if the debtor had terminated the agreement, then s.90(1) does not apply.
>
> c) Third, that s.87 only applies where a creditor (Adaptainer) is seeking to terminate an agreement, so if the debtor terminated, then no default notice would be required and the CCA protections for the debtor where the creditor does not issue a default notice, are lost.
>
> d) Fourth, that Mr Coulter's pleadings on Mr Russell's behalf had also exposed him to the conversion claim because it enabled Adaptainer to assert that it had an immediate right to possession, because the HPAs had terminated.

144. In my judgment, the Termination Point is a thoroughly bad point for the multiple reasons given by Ms Eborall in her cogent submissions. I will give my reasons under sub-headings.

The Termination Point is divorced from reality

145. First, the Termination Point wholly ignores the factual realities of the case. It ignores Mr Coulter's clear evidence that he pleaded the case at ADC [16] on

instructions and it disregards what actually happened between Adaptainer and Mr Russell.

146. In relation to the first of these matters, as Mr Coulter explained in his evidence, which I accepted, he did not act in a "vacuum" but was obliged to consider what Mr Russell was telling him regarding the conduct of Adaptainer and his strongly held belief that he was the subject of a serious and manipulative conspiracy being waged against him by Adaptainer and others. It was in that context that Mr Coulter pleaded that, by the acts pleaded in ADC [16] and particularised thereunder that Mr Russell was entitled to and did treat the HPAs as repudiated. I have found as a fact that Mr Russell knew perfectly well what was being pleaded on his behalf. For Mr Russell now to suggest that Mr Coulter ought to have acted contrary to his instructions is tantamount to obliging him to act negligently in another respect by ignoring clear instructions.

147. Mr Coulter's evidence (which Mr Russell did not suggest was wrong when it was put to him) was that Mr Russell came to Mr Coulter's Chambers in early January 2016, following receipt by Mr Russell of the draft of the ADC; and they discussed it in Chambers after which Mr Russell signed it. This is consistent with the documents before me. In addition, for Mr Russell now to allege that Mr Coulter ought to have pleaded differently would have required him to ignore not only his instructions, but also the facts of the case as Mr Russell presented them:

(1) As I have noted above, Mr Coulter's unchallenged evidence was that Mr Russell's focus and energies were on the conspiracy claim. It would have been perverse and contrary to the facts presented to counsel for him, in January 2016 (when the ADC was settled) to have pleaded that the HPAs were continuing when Mr Russell was, at the same time, telling him that Adaptainer (his contractual counterparty) and others were conspirators plotting against him in a criminal enterprise.

(2) In addition, the Judge found as a fact that Mr Russell had not made any payments to Adaptainer since July 2013. Although it was Adaptainer's, and not Mr Russell's case, that the HPAs had expired or determined as a result of the significant arrears unpaid by Mr Russell, again, it would have been unreal for Mr Coulter to have pleaded that the HPAs were continuing when Mr Russell had not made any payments for three years (by the date of trial).

(3) As Mr Coulter explained during cross-examination, his pleading did not cause the HPAs to be determined by the date of trial; that was simply the position on the facts of the case as common ground between the parties.

The terms of the Judgment as regards the "determination" of the HPAs

148. Although the Judge found that the HPAs had "*long since determined*", as has been highlighted by Mr Brennan in his skeleton, according to [25] of the Judgment, as of August 2013, "*The containers that remained on the Wharf site were to remain governed by the original leasing agreements…*". So, as at August 2013 at least, the HPAs still remained 'live'.

149. Mr Russell does not plead in the claim before me until what date he says the HPAs ought to have remained in place. But Mr Coulter's pleading did not have the effect of 'killing' the HPAs in August 2013 as was submitted. Moreover, the Judge did

not find that the agreements had long since determined because of that pleading. As I reminded Mr Brennan on several occasions during the trial the Judge noted (but made no findings) that the HPAs were at an end. This was common ground and had nothing whatsoever to do with the Judge accepting the plea of repudiation was correct.

The Termination Point does not engage with the counterfactual

150. Mr Russell's position must be that, had Mr Coulter not been negligent as alleged, i.e., here, had Mr Coulter not pleaded ADC [16], then the position would have been different. However, at trial, the Judge recorded that Mr Russell had made his last payment to Adaptainer in July 2013, having been in arrears prior to that point, and Mr Dabbs (Counsel for Adaptainer) contended that all HPAs had determined: [30]. Three years had passed since payment and Mr Russell still held the 45 Containers in his possession. Although the Judge did not determine what had happened to the HPAs, had he been required to do so, it is difficult to see what different conclusion he could have drawn on the facts. Moreover, Mr Russell does not identify any such counterfactual in his (unpleaded) case.

"Termination" vs "repudiation" and timing

151. Mr Brennan's submissions and cross-examination assumed that the pleading had asserted that the HPAs had "terminated". As Mr Brennan recognised in his written closing submissions (para 4), *"repudiation"* provides a contracting party with options and does not automatically mean termination. There was re-examination of Mr Coulter on this matter. He was asked what he was intending to plead by ADC [18]. His response was that he was pleading that the HPAs were still 'live' at that stage, i.e. in October 2013. That is relevant because Mr Russell's case is that the wrongful recovery of possession of the 51 Hale Wharf Containers the subject of the s.91 counterclaim took place in August 2013. Thus, any later termination would, even given s.90(5) CCA, not have affected any claim that Mr Russell wished to make under s.91. (s.91(a) CCA provides that "*If goods are recovered by the creditor in contravention of section 90 the regulated agreement if not previously terminated shall terminate*" indicating that it was contemplated by the statute that, by the time of recovery of sums paid, the agreement may have terminated in any event).

152. Again, Mr Russell's case was opaque. It is difficult to understand either when, or if, Mr Russell says the HPAs came to an end, how that would have been put consistently with the conspiracy case he wanted to run, and how the Judge would have accepted that position. As Ms Eborall correctly observed, this is all unexplained. One suspects that this was because the Termination Point, as a late entrant in these proceedings, was not properly set out in any pleaded case which could have been responded to flush out the precise scope of Mr Russell's complaint.

Alleged loss of CCA protections

153. Even if the above four points could be overcome, the claim by Mr Brennan that his client "lost" valuable CCA protections is simply wrong. In short, they were either not lost, or they had already been lost, or were never available, or the rejection of those CCA arguments by the Judge was not made on the ground that the HPAs had

come to an end. On this issue, it is important to distinguish between the 45 Containers (the subject of the conversion claim) and the 51 Hale Wharf Containers.

154. The 45 Containers had been moved by Mr Russell (to Abbey Wharf and Sam's Yard). There were therefore in Mr Russell's possession although Adaptainer still had title and ownership of them. The only protection that he required in respect of the 45 Containers was a defence to the conversion claim (because Adaptainer was not seeking repayment of the arrears that he had not paid since July 2013). I will address the various CCA provisions as regards the 45 Containers under four sub-headings.

(i) S.65 CCA – the 45 Containers (conversion claim)

155. Mr Coulter pleaded that, in breach of the CCA, Adaptainer had failed to provide an agreement containing the prescribed terms under the CCA: ADC [19a]. He submitted at trial (Judgment [40]) that Adaptainer was retaking the goods under s.65(2) which amounted to enforcement, and that Adaptainer could only do so upon seeking an enforcement order from the court. Nothing pleaded in ADC [16] prevented Mr Coulter from making those submissions or the Judge from considering the s.60, 61 and 65 issue.

156. The reason why the s.65 argument failed was as follows. Adaptainer submitted that it was not seeking to enforce the HPAs but was instead seeking a claim in conversion: Judgment [45]. But Mr Coulter properly referred the Judge to s.65(2) (Judgment [40]), which provides that a retaking of possession amounts to enforcement. The Judge also considered s.134, as relied on by Adaptainer's counsel: Judgment [46]. After setting out the submission (which I have cited in full above at [129]), the Judge found that "I am also satisfied that Mr Dabbs' submissions in relation to the application of section 134 given him the pathway to relief that he seeks...": Judgment [52]. It is fair to observe that the Judge's reasoning for this conclusion is not immediately apparent. However, as a matter of law, if a debtor evinces an intention both to refuse performance and to refuse to return the goods, this may constitute conversion: see *Goode* at [5.125].

157. On the facts as they were determined by the Judge, Mr Russell had not paid anything towards the 45 Containers since July 2013 and he had received two demands, in October 2013 and October 2014, for delivery-up of those 45 Containers. Mr Russell had also, in late August 2013, commenced proceedings against CRT and others and sought to join Mr Clark of Adaptainer to those proceedings. That was a sufficient evincing of intention on Mr Russell's part not to return the containers and for such detention to be wrongful and constitute a conversion. On that basis, a right to recover possession of the goods accrued and then Adaptainer made a request in writing for him to surrender the 45 Containers.

158. In my judgment, in light of the Judge's findings, Mr Russell cannot now seek to argue that he "lost" any CCA protections because of Mr Coulter's pleading. First, this was not a protection that was lost. In reality, it was never available to him because s.134 precluded it where the claim was in conversion. Second, the Judge's reasoning does not indicate that s.134 was engaged because of anything said or done by Mr Coulter in the pleadings or during submissions.

(ii) S.90 CCA – the 45 Containers (conversion claim)

159. Mr Coulter also pleaded s.90 of the CCA: ADC [19c] which I have set out above. This was pleaded in respect of the 51 Hale Wharf Containers (as Mr Coulter pleaded that Adaptainer *took* possession, which it had not done by that date in respect of the 45 Containers the subject of the conversion claim). It was also advanced in respect of the 45 Containers as well as the 51 Containers at trial: Judgment [42].

160. Mr Russell's case now (as far as I can follow it) is that it could and should have been argued that Adaptainer was not entitled to recover those goods because they were "protected goods" and Adaptainer could therefore only recover them upon an order from the Court. His case is that this argument was precluded because of ADC [16]. As to this:

1) It is not clear whether s.90(5) applies where a creditor has breached the agreement and thereby repudiated it, allowing the debtor to accept such repudiation and terminate the agreement. There is to my mind a powerful argument that the subsection only applies where the debtor chooses freely to terminate without any action by the creditor prompting such termination.

2) In any event, the Judge held that he was not satisfied that Mr Russell had paid one-third of the price of the goods under any of the HPAs. Therefore, the protection under s.90(1) would not have been available to him.

3) Even if the protection had been available, I do not understand what difference this would have made in relation to the conversion claim. S.90(1) provides that the creditor is not entitled to recover possession except on an order of the court. But as Mr Dabbs submitted to the Judge: "*He seeks just such an order*": Judgment [47]. The Judge would have granted that order (as he did) therefore Mr Russell would not have achieved any different outcome.

(iii) S.87 CCA – the 45 Containers (conversion claim)

161. Mr Coulter also pleaded s.87 of the CCA: ADC [19b]. Mr Russell's case now (on the basis of Mr Brennan's written closing submissions) appears to be that Mr Coulter did not plead that Adaptainer was not entitled to *terminate* the HPAs. As to this:

1) It was common ground that nothing constituting a default notice was given in Adaptainer's case: Judgment [41]. Mr Russell therefore succeeded on this part of his argument before the Judge.

2) Mr Brennan's argument appears to be that, in pleading that the HPAs had been repudiated (and the Judge concluding that they had been determined) this opened the way for Adaptainer to assert that Mr Russell had "adverse possession" of the containers permitting the conversion claim. But that presupposes that (i) the basis for adverse possession was upon Mr Coulter's pleading and the fact that the HPAs had been determined in the way Mr Brennan alleges arose from that pleading; and (ii) the Judge was only willing to find adverse possession *because* of the terminated agreement. As to the second of those points, it ignores that adverse possession was capable of being established on the facts of the case.

3) In those circumstances, the plea would not have made any difference.

(iv) Ss.65, 87 and 90 CCA – the 51 Hale Wharf Containers (the counterclaim)

162. The analysis of the case in relation to the counterclaim and the Termination Point differs from (i) to (iii) above in the following respects:

1) Under s.65, the assertion would be that Adaptainer had failed to obtain an enforcement order when it took possession in August 2013. That runs into the obstacle of the August Agreement, a fact found by the Judge that Mr Brennan cannot go behind.

2) Under s.90, the Judge still would not have been satisfied that Mr Russell had paid one third of the price of the goods so as to avail himself of that section. Further, s.173(3) would have permitted Adaptainer to recover the goods based on the August Agreement.

3) S.87(1)(a) does not appear to be relevant, because by retaking the 51 Hale Wharf Containers in August 2013, Adaptainer was not seeking to terminate the HPAs. S.87(1)(c) was pleaded.

163. In conclusion, in my judgment the Termination Point is a bad point which does not progress the claim any further. Mr Coulter was not wrong or negligent in pleading ADC [16] and in any event that plea had no causative effect in the Judge granting the claim and dismissing the counterclaim.

ISSUE 2A: the Cornerstone Point

164. This was formerly the mainstay of Mr Russell's case. It has however now been relegated behind the Termination Point (indeed, on the basis of Mr Brennan's closing arguments it appeared to be parasitic upon the Termination Point). In summary, Mr Brennan argued that Mr Coulter failed to meet the necessary standard of care because he negligently failed to argue before the Judge that authority established that conversion cannot provide an alternative remedy to the CCA. It will be recalled that Adaptainer's case began as a simple claim for conversion of the 45 Containers which Mr Russell had retained. That conversion basis for the claim remained the principal, but not the only argument, advanced by Adaptainer in closing submissions: Judgment [45]. Mr Brennan relied on three authorities which he says were wrongly not cited to the Judge: Orakpo v Manson Investments Ltd [1978] AC 95 (Orakpo), Dimond v Lovell [2002] 1 AC 384 (Dimond), and Wilson & Ors v Secretary of State for Trade and Industry [2003] UKHL 40 (Wilson). The last case, submitted Mr Brennan, demonstrates that once the CCA is engaged, there is no alternative remedy available other than in compliance with the CCA. The three cases have been referred to by the parties as "the Alternative Remedy Authorities".

165. In his evidence Mr Coulter said he had considered these three authorities. However, he said he had made a professional judgement not to refer to them because he did not believe (bearing in mind constraints of time and that they were not central to Mr Russell's case) that focus on them would be proportionate. Instead, he focussed such time as had not been taken up with the conspiracy (the client's desired primary case) on establishing that the CCA applied to the HPAs. He also said he considered the textbook by *Goode* in forming his decisions as to which points to take.

166. Ms Eborall's overall response that the finding of the Judge that Adaptainer was not seeking to enforce the HPAs under the CCA was a finding he was entitled to make as a matter of law. She submits that Mr Coulter therefore made no error, alternatively no negligent error, by not seeking to establish the contrary by reference to the Alternative Remedy Authorities. Even if he had done so, she argued that Adaptainer's reliance on s.134 would have been a complete answer to the point (as accepted by the Judge at [52]).

167. In my judgment, Ms Eborall's submissions are correct. I will summarise my reasons. I consider Mr Brennan's argument to be wrong on the face of the authorities, and in light of s.134 which expressly preserves and supports a claim in conversion.

168. As to the authorities:

1) Wilson concerned the now repealed s.127(3), and whether it was compatible with Article 6 ECHR. Whilst ordinarily an agreement rendered unenforceable by s.65 can be enforced by order of the court, s.127(3) prescribed a "*rigid ban on enforcement of security and contractual rights*", compelling a court to refuse an enforcement order and render the regulated agreement "*irredeemably unenforceable*": [43]-[44] and [46]. The House of Lords held that a lender could not bring a restitutionary claim for money lent under an irredeemably unenforceable agreement: [46]-[50]. Parliament's intention was that the lender be "*left without recourse against the borrower in respect of the loan*"; the borrower was not "*unjustly enriched*", as that would be "*inconsistent with the parliamentary intention in rendering the entire agreement unenforceable*": [49]-[50].

2) Dimond also concerned an agreement regulated under the CCA which was rendered irredeemably unenforceable by s.127(3), and whether a restitutionary claim could be brought against the borrower. Again, it was held that it would be wrong to treat the borrower as unjustly enriched: "*Parliament intended that if a consumer credit agreement was improperly executed, then subject to the enforcement powers of the court, the debtor should not have to pay. This meant that Parliament contemplated that he might be enriched and I do not see how it is open to the court to say that this consequence is unjust and should be reversed by a remedy at common law*".

3) Orakpo concerned loans rendered unenforceable by ss.6 and s.13(1) Moneylenders Act 1927. The lender sought to be subrogated to the unpaid vendors' liens and equitable charges. The House of Lords rejected the subrogation argument. Lord Diplock (reluctantly) observed that whilst the borrower had obtained an "*undeserved enrichment*" as a result of the unenforceability, such that subrogation might be engaged as a remedy, there were "*insuperable obstacles to relying upon this particular kind of subrogation to mitigate the harshness to the moneylender and the undeserved enrichment of the borrower which would otherwise follow from a technical failure to observe the provision of section 6 of the Moneylenders Act 1927*". The terms necessary to establishing a right to subrogation were, on the facts, rendered unenforceable by ss.6 and 13.

169. In my judgment, these claimed Alternative Remedy Authorities do not establish the proposition contended for by Mr Brennan. In short, these cases plainly concern (i) different statutory provisions which have since been repealed (s.127(3) CCA, and s.6 and s.13 Moneylenders Act 1927), and (ii) different claims (in restitution rather than conversion).

170. As I said during the closing submissions, although one might have an interesting academic debate about these cases, the flaw in the arguments made for Mr Russell is that the proposition contended for on his behalf is contrary to the express provision in s.134 CCA (as was argued by Adaptainer and accepted by the Judge). That acceptance is a final and binding determination which cannot be questioned in this claim. Permission to challenge it was refused by the Court of Appeal.

171. However, any attempt to question it would fail in any event. S.134 provides in summary that where goods are subject to a hire purchase agreement, and a creditor (i) brings an action to recover possession and (ii) can prove that it made a demand for delivery of goods, the debtor's possession will be deemed adverse to the creditor. Moreover, nothing affects a claim for damages for conversion: s.134(3). The purpose of s.134(1) is to ensure that a creditor can establish adverse possession in a conversion claim, notwithstanding the fact that the debtor may argue that it is entitled to possession by virtue of s.65 or s.90 CCA. ***Goode*** at [5.264] explains that a creditor "brings an action", as opposed to making application "for enforcement",[1] within the meaning of s.134 if they bring a claim for "an order for delivery under the Torts (Interference with Goods) Act 1977", and that:

> "A party seeking the recovery of goods must show that the defendant's possession of those goods is adverse to his own right to possession (whether his action is brought in contract or based upon his title to the goods). Certain provisions of this Act, however, entitle the debtor or hirer to retain possession of the goods until and unless the creditor or owner obtains a court order for delivery (see, in particular, CCA 1974, ss 65 and 90). The provisions of this section are necessary in order that the creditor or owner may treat the defendant's continuing possession as adverse to his own right to possession and prevent the defendant from arguing that he is retaining possession merely by virtue of the relevant statutory protection."

172. Ms Eborall was right to submit that this makes clear that there is an alternative remedy in conversion, which remedy is anticipated and supported by the CCA. For completeness, I note the same is noted in the commentary in ***Goode*** at [5.125] on s.65 CCA, which explains that notwithstanding unenforceability under s.65:

> "Ownership of the goods remains vested in the creditor, however, and if the debtor wrongfully disposes of the goods to a third party, the creditor will be able to sue the third party in conversion; the debtor's own action in parting with

[1] As observed in ***Goode***, s.134 anticipates that a creditor who wishes to recover possession may "[bring] an action" or "make an application to enforce a right to recover possession of the goods". The former refers to an order for delivery under the 1977 Act, whilst the latter refers to an application under e.g. ss.65 and 127(1) CCA.

> possession destroys any right of his to possession, which right reverts immediately to the creditor: see Union Transport Finance Ltd v British Car Auctions Ltd [1978] 2 All ER 385, [1999] GCCR 499; Kasaam v Chartered Trust plc [1999] GCCR 2245. Where the debtor merely remains in possession of the goods without complying with his/her obligations to repay the creditor, the latter's remedy will normally be for breach of contract and he/she must apply for an enforcement order under CCA 1974, s 127. If, however, the debtor evinces an intention both to refuse performance and to refuse to return the goods, this may constitute a conversion by him for which the creditor may take action in tort notwithstanding CCA 1974, s 65, since he in so doing relies on the conversion and is not seeking to enforce the regulated agreement itself: cf Bowmakers Ltd v Barnet Instruments Ltd [1945] KB 65, [1944] 2 All ER 579, [1999] GCCR 71. The debtor's possible argument, that in refusing to redeliver the goods he is merely relying on CCA 1974, s 65 to retain possession and is not denying the creditor's title or maintaining any adverse possession, may be met if the creditor has made a request for repossession complying with CCA 1974, s 134."

173. Finally I would add that the claimed Cornerstone Point of law raised under this ground, already appears to have been determined by the Court of Appeal in this case to have no real prospect of success. In the Permission Judgment at [23], Burnett LJ held that although the "*various points in ground 6*" were not argued in the court below, he also noted that the arguments "*also run up against the factual findings made by the judge*". The Cornerstone Point did not, in my judgment, meet the threshold of reasonable arguability. But even if it did, I find that Mr Coulter was not wrong, nor was he negligent in considering the point, taking a view on whether it was a possible point to argue, and exercising his professional judgement and concluding not to do so. Had it been made, it would have made no difference to the final order made by the Judge. Nothing was lost by the alleged negligence.

ISSUE B: consequences of improper execution

174. The alleged negligence of Mr Coulter is said to be in the way in which he advanced, or failed to advance, the submission that the HPAs could not be enforced due to breaches of s.61 and s.65 CCA (essentially failure to include prescribed terms). The pleaded case is as follows:

1) Mr Russell acknowledges that Mr Coulter referred to s.60 in the ADC.

2) Mr Russell complains that s.60 is not the operative provision – in fact, it is under s.61 that an agreement is required to be signed by the debtor.

3) Mr Russell regards this misquoting of the CCA as casting doubt on Mr Coulter's "previous experience in this technical area of law".

4) But the key point is that Mr Russell argues that Mr Coulter "failed to follow through that argument" to assert that the agreements were improperly executed under s.65(1).

5) Mr Russell points out that s.65(2) renders retaking of the goods an enforcement of the agreement.

6) He complains that Mr Coulter never explained to the Judge that Adaptainer ought to have been applying for an enforcement order and that, had it been applying for an enforcement order, the Judge would have been required to consider s.127.

175. These points are pleaded in respect of Adaptainer's claim to the 45 Containers only. It does not seem that Mr Russell pleads failings in relation to ss.60, 61 and 65 in respect of the counterclaim for the 51 Containers (although orally Mr Brennan submitted that Issue B arises across the board).

176. I consider this allegation of negligence to be without merit and I am somewhat surprised it was maintained to the end of trial:

1) It is correct that s.61 contains conditions which, if unfulfilled, render the regulated agreement improperly executed. S.61 was not referred to in the ADC settled by Mr Coulter. However, this caused no harm whatsoever. His express reference to s.60 made the basis of his argument clear, and there was no need to refer to s.61 thereafter and interrogate the requirements for proper execution in light of Adaptainer's concession that the agreements were improperly executed. I note the following exchange {Transcript, Day 3 page 13}: Mr Coulter said "*I am not going to take you to the specific requirements. I understand that the defendant does not suggest – sorry, the claimant does not suggest at any stage that they ever provided any of the required information, but the details are set out in the Act. I take it that the claimant concedes that there was no compliance, because the claimant's case was that this was not an actual agreement.*" Mr Dabbs responded: "*Well, perhaps an easier way of putting it is: if it is, there was no compliance*". The position was entirely understood by the Judge who recognised that it was "*common ground*" that the agreements were improperly executed and the consequence of that is dealt with in s.65: Judgment [40].

2) S.65(2) renders retaking of the goods an enforcement. Whilst bringing proceedings is not itself an enforcement, obtaining possession by the bringing of proceedings would constitute enforcement.

3) However, the Judge found that Adaptainer were not enforcing the HPAs therefore no enforcement order was required.

4) In any event, even if Adaptainer were enforcing the HPAs, the Judge understood the consequence of s.65 to be that Adaptainer required a court order; as is recorded in the transcript, the Judge put it to Mr Dabbs that "*Section 65, Mr Coulter relied on, says your rights are only enforceable by court order*". However, the Judge understood Mr Dabbs' response to be: "*that is what I am here seeking*": {Day 3/75}. It is further recorded in the Judgment that Mr Dabbs submitted "*that the thrust of the 1974 Act is to prevent those who provide goods from taking high handed means to recover them, by seizing them or otherwise. The pith of the legislation being to ensure that no one is deprived of the goods except by an order of the court. He seeks just such an order*": Judgment at [47].

177. As for arguments in relation to s.127, Mr Brennan argued that had Mr Coulter raised s.127, then the Judge would have been bound to consider whether prejudice was

caused by the contravention in question. I assume that the suggestion is that in consequence, the Judge would have concluded that the improper execution caused prejudice to Mr Russell such that Adaptainer was not entitled to an enforcement order.

178. As Ms Eborall correctly submitted, such a case ventures into the world of "fantasy":

1) First, it rides roughshod over the fact that Adaptainer was not seeking an enforcement order. It was making a claim in conversion, which it was perfectly entitled to do and in accordance with s.134.

2) Second, even if Adaptainer had not been entitled to claim in conversion and it therefore did require an enforcement order:

a. The Judge was aware of the requirements of s.127, as Adaptainer's Amended Reply expressly invited the court to "*exercise its discretion to enforce the Claimant's right to repossession of the said containers pursuant to sections 65 [and] 127*": Amended Reply/13.

b. In any event, it is entirely unreal to suggest that the Judge would have found that Mr Russell suffered prejudice in consequence of the improperly executed agreement and exercised his discretion in his favour. I note that in cross-examination before me, Mr Russell accepted that the agreements were simple and easy to understand and that he never raised a lack of understanding with Adaptainer. Further, the Judge found that Adaptainer had extended substantial indulgences and support to Mr Russell beyond that which had ever been extended to any other customer: Judgment [71]-[72]. Mr Coulter's oral evidence to me was to the effect that Mr Russell's case floundered because of the facts and because of the allegations that he was raising against the helpful Mr Clark of Adaptainer. In those circumstances, and where the statute is drafted in favour of a presumption of making such an order, there was no real or substantial chance that the Judge would have determined that Mr Russell had suffered prejudice by the fact that an improperly executed agreement had been provided by Adaptainer.

ISSUE C: Sections 87 and 88 CCA (need for default notice)

179. In summary, Section 87 requires a default notice before a creditor can become entitled by reason of a breach by the debtor to terminate an agreement or to recover possession of goods. Section 88 prescribes requirements for such a default notice. The pleaded basis for the allegation of negligence against Mr Coulter under this head is as follows:

1) Adaptainer's failure to serve a default notice prior to terminating the HPAs and/or retaking possession of the 51 Containers was in "gross breach" of the obligations of the CCA.

2) Mr Coulter's only reference to this failure was in relation to the 51 Containers. The point was equally relevant in the context of the Defence to the claim for the 45 Containers.

3) Mr Coulter argued that the HPAs were repudiated (ADC [16]), and the Judge subsequently relied on this "erroneous statement grossly contrary to the Act that the termination of the Hire Purchase Agreement was a point which was agreed by both parties"; and

4) Adaptainer was not entitled to judgment on its claim which would have been dismissed with the consequential consequences in costs.

180. I reject this allegation of negligence for essentially the reasons given by Ms Eborall. I will consider the 45 Containers, and the 51 Containers separately.

181. In relation to the defence to the claim for the 45 Containers:

1) Adaptainer's failure to serve a default notice was pleaded: ADC [19(b)]. The Judge was satisfied that this was sufficiently pleaded, having been directed to [19] after asking "*where is this point taken as a defence to the claim? "I do not have to give you anything, because you have not served a default notice"?*": {Day 3 Transcript/21}. The Judge was satisfied with this, responding "*Right. Thank you. That is helpful. Yes*".

2) The matter was fully argued by Mr Coulter before the Judge. He submitted in oral closings that "*the Consumer Credit Act applies and that because of […] the provisions in that Act, the claimant is not entitled to obtain possession of the containers […] without having first provided his default notice in the terms of the Act […] And, secondly, without an order of the court – the order of the court following on from the service of the default notice*": {Day 3 Transcript/4}.

3) The effect of this submission was understood by the Judge who responded to Mr Coulter in oral closing submissions as follows: "*Yes, I have understood, Mr Coulter. So the claim must, you say, be defeated and if they want their containers back, they have to serve a default notice and then if they are not delivered up in answer to the default notice, obtain an order of the court for their delivery up in some subsequent proceedings based on the default notice?*": {Day 3 Transcript/4}.

4) It is wrong for Mr Brennan to submit the pleaded repudiation prevented success on this argument. In short, that did not operate on the Judge's reasoning in the Judgment, which considers whether Adaptainer is entitled to succeed in its claim in the face of the CCA provisions pleaded by Mr Coulter. Rather, the operative reasoning was that Adaptainer was not enforcing the HPAs; the Judge found that Adaptainer was entitled to claim in conversion "*notwithstanding the breaches of the Act in relation to formal notice and form of demand*": Judgment [52]. I note that this followed submissions by Adaptainer that s.134(1)(b) makes "*clear that, even in the absence of a default notice, a hirer is entitled to demand surrender of the goods which the hirer owns*": Judgment at [46]**.**

5) In any event, as Mr Coulter said during cross-examination, the pleading on repudiation was consistent with, and necessary in light of, his instructions. Even if (which I find was not the case) this negatively affected Mr Russell's position under the CCA, it would have been contrary to Mr Russell's instructions to plead a different case solely to preserve his protections under s.87.

182. In relation to the Counterclaim for the 51 Containers:

1) Adaptainer's failure to serve a default notice was (and Mr Russell accepts) pleaded in relation to the Counterclaim at ADC [22.b] and [33.e].

2) Mr Brennan's submission that Mr Coulter's pleading on repudiation prevented the protections from s.87 is incorrect.

3) His argument is not supported by the Judgment, which does not make findings in relation to or rely on the pleading on repudiation.

4) I repeat, in his evidence Mr Coulter explained that the effect of his pleading was such that the HPAs remained live on 2 October 2013: ADC [18]**.** That being so, there was no termination in any event in August 2013 when IMove4U/Adaptainer took possession of the 51 Containers. As August 2013 is the relevant point in time for the Counterclaim, I agree with Ms Eborall that it cannot be correct to suggest that the pleading on repudiatory breach affected the Counterclaim.

5) In any event, and again, as Mr Coulter explained during cross-examination the pleading on repudiation was consistent with, and necessary in light of, his instructions.

183. I reject the allegation that the pleadings were wrong, or that they were negligent. I also find that the alleged negligence had no causative effect on the Judgment.

ISSUES D AND E: Section 81 (apportionment) and Sections 90-91 (informed consent)

184. I take Issues D and E together. Issue D, apportionment under s.81, is relevant only to determining whether one-third of the price under the HPAs was paid such that the goods were protected under s.90(1) (arising under Issue E). So, both of Issues D and E concern the s.90(1) protection. These complaints concern only the 51 Containers (as confirmed by Mr Brennan in his written closing submissions).

185. I understand Mr Brennan's submission in broad terms to be:

1) Although Mr Coulter did raise s.90, he did not raise s.81 on apportionment. That meant that Mr Russell could not prove to the Judge that he had paid one-third of the price of the goods.

2) Mr Russell wrongly failed to refer to Chartered Trust v Pitcher [1998] RTR 72 ("Pitcher") to demonstrate that he did not give his "informed consent" to the August Agreement (which stood in the way of success on s.90: see the Judgment at [50]).

186. I will set out the more detailed arguments below but I consider these allegations of negligence under Issues D and E to be without merit for the following reasons.

The s.90 argument

187. As I have described above, Mr Coulter referred to ss.90-91 and the Judge considered them in some detail. There can be no argument that these points were not raised or not sufficiently raised. There appeared to be a submission made by Mr Brennan that, by Mr Coulter's pleading of repudiation, he had deprived Mr Russell of the protections under s.90 because the debtor would have been the one to terminate under the HPAs, thus falling within s.90(5) of the CCA. That is a

misguided position. As set out above, according to the Judgment, the HPAs continued after the August Agreement. S.90(5) was therefore not engaged and, if Mr Russell wished to allege that Adaptainer recovered possession of the 51 Hale Wharf Containers in breach of s.90(1) in August 2013, it was still open for him to do so.

The one-third price, s.81 and apportionment

188. Mr Brennan referred to the fact that the Judge found that the precondition of one-third payment required by s.90 and s.91 in relation to the HPAs had not been met. He sought to blame Mr Coulter for this by submitting that he had failed to show the Judge the evidence. He said this was a "critical failing" and meant that Mr Russell could not avail himself of these sections. Mr Brennan also submitted that Mr Coulter negligently failed to refer the Judge to s.81(2) which sets out a method for appropriating equally any payments made by Mr Russell where he had not elected any such appropriations between the HPAs. He said that had Mr Coulter properly pleaded or advanced this point in submissions, then his client would have succeeded on his counterclaim for payments made in respect of *at the least* the Hale Wharf Containers.

189. Turning to the evidence, it was accepted in his evidence that Mr Coulter did not refer to s.81. His cross-examination focussed on the evidence placed before the Judge to substantiate the one-third payment. Although not part of the pleaded case, Mr Coulter nevertheless responded, explaining that Mr Russell had collated all the spreadsheets and tables, and that he considered this to be a thorough job and the best evidence (because Mr Russell said there was nothing more). In re-examination, Mr Coulter was taken to the passage of the transcript in which he had shown that evidence to the Judge and to the evidence itself. Further, in Mr Russell's cross-examination, although he explained that he did not receive particular invoices for certain HPAs or containers, he had nevertheless categorised or attributed the payments towards a particular HPA.

190. In those circumstances, in my judgment:

1) Mr Coulter was not wrong nor indeed negligent in not referring to s.81. All the surrounding evidence points to the evidential problems arising from the material as to payments presented by Mr Russell at the Adaptainer trial, which was not to do with Mr Coulter. Mr Russell took on that "solicitor" role and was the master of the payments. I have made findings above that Mr Coulter did his best with the material Mr Russell had provided.

2) In any event, it is highly questionable whether s.81 would even have applied where Mr Russell had apparently made a form of appropriation by attributing certain payments to certain HPAs. Appropriation must take place at the time of payment: Julian Hodge Bank Ltd v Malcolm John Hall [1998] CCLR 14. The evidence in the Adaptainer Proceedings to which I was taken suggested to me that such appropriation had taken place by Mr Russell. S.81 therefore would have served no purpose beyond what the evidence already demonstrated.

3) There is also a basic evidential problem with Mr Russell's case. I note in his opening skeleton argument, Mr Brennan said **"**[Mr Coulter] also negligently failed to refer the Judge to s.81(2) of the 1974 Act which sets out a clear method for appropriating equally any payments made by [Mr Russell] where he had not

elected any such appropriations between the HP Agreements...Had [Mr Coulter] properly pleaded or advanced this point in submissions, then Mr Russell would have succeeded on his counterclaim for payments made in respect of *at the least* the Hale Wharf containers. The evidence of collective payments made by [Mr Russell] to Adaptainer was available to [Mr Coulter] to plead and refer to during submissions to the Judge, but [Mr Coulter] failed to do so". I have underlined this text. It is significant that Mr Brennan did not present me with evidence (which would in any event have to be in a witness statement) which demonstrated that applying the apportionment mechanism in s.81 (or indeed by any other method) Mr Russell had paid more than one-third. It is no answer to this to say that had Mr Coulter acted correctly Adaptainer would have had to do this job - Mr Russell needed to show for the purposes of his cause of action in *this claim* that in fact the one-third requirement (by apportionment or otherwise) had been met (or there was a real and substantial chance of it being met). He needed to do this to show the alleged negligence in failing to refer to s.81 had any relevant causative effect on the outcome. This issue was left unaddressed.

4) Further, as appears from Judgment [50] the s.90 claim failed for the further independent reason concerning the August Agreement and the circumstances in which possession had been given to the 51 Containers to IMove4U. I turn to Mr Brennan's arguments in that regard.

Pitcher

191. Mr Brennan needs to undermine the August Agreement to succeed in his s.90 arguments because the Judge found that agreement fatal to any claim that adverse possession to the 51 Containers was taken. Mr Brennan argued that Mr Coulter negligently failed to plead or make submissions in respect what he called "informed consent" to the taking of possession. In particular, he said that Mr Coulter should have made reference to Pitcher. He argued that the question that he should have made submissions on was not "did Mr Russell consent to the August Agreement", but rather, "what consent did Mr Russell give in that August Agreement"? Mr Brennan said that at no point did the Judge suggest (or find) that Mr Russell had given possession of the Containers "unequivocally" to Adaptainer. He also argued that Burnett LJ refused permission for lack "informed consent" to be run in the appeal because it had not been raised at the trial or in pleadings, and the Pitcher judgment had not been put before the Judge. He submitted that there were "striking similarities" between the case of Pitcher and the August Agreement; and had this issue or case been addressed to the Judge, then the Judge would not have dismissed the counterclaim in respect of s.90 and s.91 of the 1974 Act.

192. In his cross-examination, it was put by Mr Brennan to Mr Coulter that he had not referred to Pitcher before the Judge. Mr Coulter agreed, and explained that:

> "The Judge didn't find that Mr Russell was consenting to something he might not have understood. Mr Russell was faced with a very stark choice. Take it or leave it. Here is what he described to us again yesterday as a choice that was leave the containers or leave the containers and pay for the pleasure. It was no choice at all. So, his case was I gave no consent – not I gave some consent but I hadn't considered the minutiae of the CCA and how that might affect matters down line. The Judge found he had consented. I didn't plead he only

> consented to having containers removed, business stripped, etc but he didn't consent to lose his CCA rights. I can't see how I could seriously have made that submission to the Judge. I don't believe that referring to Pitcher would have helped us at all."

193. Pitcher has a narrow compass as was explained by Burnett LJ at [22] in the Permission Judgment (cited below). The facts of that case are very different to those before me:

1) In Pitcher, the debtor had been told that the creditor would write to the debtor and terminate the agreement. Then the creditor could repossess the car, and the debtor could pay off the balance. The creditor also said that if it did not write a letter it would have to go to court to obtain possession of the car. But nothing was said about the equivalent s.90 protections available to the debtor on such a court application.

2) The debtor never wished that the creditor simply take the car back. She wanted to keep it and desired a re-arrangement of her financial obligations.

3) Save for the fact that Mrs Pitcher had telephoned the finance company, this situation was not of the debtor's making at all.

194. By contrast, Mr Russell's position in the claim before me is very different:

1) The Judge found that he was "*able, anxious and willing to activate and exercise his buyout rights…. because it was in his best interests to do so*": Judgment [13].

2) Mr Russell's evidence was that he approached Mr Clark of Adaptainer and sought his assistance regarding the 51 Hale Wharf Containers.

3) Neither party had any idea that the HPAs were CCA-regulated therefore nothing was kept covert because there was no knowledge of what matters to be kept secret.

4) Adaptainer therefore (as the Judge found) dealt with Mr Russell openly and in order to help him.

5) The financial difficulties in which Mr Russell found himself were of his own making.

195. Accordingly, I agree with Ms Eborall that the facts of Pitcher were a far cry from the instant case and, to the extent that any principle can be derived from it, it does not apply in this case on the facts. It was not wrong (nor negligent) to omit reference to it and there is no prospect, given the Judge's factual conclusions surrounding the making of the August Agreement, that it would have persuaded him that true or informed consent had not been given to that compromise. In short, in my judgment on the facts found there was zero chance that Pitcher would have persuaded the Judge that the August Agreement did not have the effect he found as regards the possession of the 51 Containers which had been ceded to IMove4U.

196. I respectfully refer to and adopt Burnett LJ's observations as to the merits of the Pitcher argument (with my underlined emphasis):

> "In any event, I consider ground 4 [the Pitcher point) to be unsound. Mr Brennan submits that the key to appeal is section 90 of the CCA (ground 4) and informed consent. He relies upon Chartered Trust v Pitcher [1988] RTR 72, based upon the Hire Purchase Act 1965, for the proposition that for an agreement by a hirer to give to give up possession of the hired goods and this the right to purchase to effective, there must be informed consent, which includes a full understanding of his rights under the legislation. The proposition is drawn too widely, as it seems to me, as it seems to me, but this authority was not referred to below, the issue was not explored in the evidence or in submission. That said, the reality is that once possession of the land on which the containers stood had been recovered by Mr Russell's landlord and he failed to remove them, they were entitled, as they threatened, to dispose of them. The judge was entitled to conclude that his consent to the four-party arrangement was real consent. It is very difficult to understand how, in the face of the dilemma confronting Mr Russell which, contrary to his assertion that it resulted from a wide-ranging conspiracy, was of his own making he could have been influenced by any consideration of the minutiae of the CCA. He was in a fix and Adaptainer helped him through it – as he recognised in his email of thanks thereafter. As the judgment recorded, it appears that the ex post facto suggestion made by Mr Russell was that Adaptainer should have removed the containers at their own expense from Hale's Wharf, because he was without funds, and delivered them to another unspecified site (para 73). As the judge noted, this was entirely "unreal". So too, in my view, are these arguments".

ISSUE F: Section 77A (arrears)

197. Mr Brennan's complaint was that under s.77A, Adaptainer were required to provide notices of sums in arrears, without which the HPAs could not be enforced. Adaptainer were accordingly not entitled to delivery up of the containers or damages for conversion. He said that this point was negligently not advanced by Mr Coulter. I note first that the loss claimed under the s.77A complaint originally related exclusively to the purchased containers under HPA 1, which is irrelevant to the Adaptainer Proceedings: item 1 Schedule of Loss in its first iteration (now abandoned: Item 1). Absent any relevant loss, Ms Eborall was right to argue that time should not be wasted on this point. In any event, the short answer is that Adaptainer was not enforcing the long determined HPAs: see the Permission Judgment at [23]. It was making a claim in conversion. Mr Coulter was not wrong, nor was he negligent, nor indeed is any loss now claimed. This is another of the points which, to my surprise, was pursued to the end of trial.

ISSUE G: Sections 140A and 140B (unfair relationship)

198. Mr Russell's pleaded complaint in relation to this issue was:

1) Had the breaches of the CCA alleged been pursued before the Judge "*in the manner in which they ought to have been*" then the Judge would have determined that:

    a. Adaptainer had failed to comply with various CCA provisions (ss.60, 65, 77A, 87, and 90 addressed above) and the Consumer Credit Practice Direction.

    b. There were "*deliberate and detrimental breaches of duty and trust and actions taken by Adaptainer against my interest, in direct contravention with all the fundamental provisions of the Act, and the letter and spirit of the FCA Rules*";

    c. Adaptainer sought to claim in conversion notwithstanding these failures and "*how Adaptainer has conducted itself in its obligations and duties dealing with me under s.140A(1)(b)*".

2) The burden of proof was on Adaptainer under s.140B(9) to demonstrate that the relationship was not unfair, and the evidence of unfairness would have been "insurmountable".

3) The Judge had a wide discretion as to how the relationship should be adjusted to mitigate the unfairness, and Mr Russell lost an opportunity for adjustment of the relationship.

199. I agree with Ms Eborall that the unfair relationship assessment is to be undertaken in two stages. First, it must be determined whether the relationship between creditor and debtor arising out of the credit agreement is unfair as a result of one or more of the matters specified in s.140A(1). Second, if the relationship is found to be unfair, then the court must consider "what, if any, order to make" from the list of options in s.140B(1).

200. As to the first stage, s.140A affords the court a particularly wide discretion which must be exercised in line with the court's judgment of all the relevant facts. As explained by Lord Sumption in Plevin at [10].

201. Further:

1) It must be determined whether the relationship itself, arising out of the credit agreement, is unfair rather than the "fairness or otherwise of the credit agreement" itself: Smith at [18].

2) The assessment is "broad", "open-ended" and "holistic", subject to the three relevant bases for unfairness set out in s.140A(1); there is "no restriction on the matters to which the court may have regard in deciding whether the relationship is unfair to the debtor, provided only that the court thinks them relevant": s.140A(2), Smith [22] and [25]. Matters must be considered across the "whole history of the relationship": Smith [23].

202. As to the second stage, where a determination of unfairness is made, the court has "the broadest possible remedial discretion in deciding what order, if any, to make under section 140B": Smith [25].

203. In my judgment, Mr Coulter made no error in relation to unfair relationship submissions and pleas. First, the allegations of an unfair relationship were pleaded and were addressed by the Judge. Second, Mr Brennan's argument amounts to a collateral attack on the Judgment. The finding of an unfair relationship is a discretionary and highly fact-specific determination to be undertaken by the court by reference to any matters which it considers relevant. It is therefore difficult to see how his arguments on unfair relationship can amount to anything other than a collateral attack on the Judgment, in which the Judge held:

1) It was common ground that the HPAs were improperly executed.

2) It was common ground that default notices had not been served.

3) Adaptainer had repossessed the 51 Containers with Mr Russell's consent.

4) Adaptainer was not enforcing the HPAs but rather claiming in conversion.

5) Adaptainer was entitled to claim in conversion "notwithstanding the breaches of the Act in relation to formal notice and form of demand".

6) There was no unfair relationship, whether because of an alleged wrongful failure by Adaptainer to allow Mr Russell to exercise his accrued purchase options (held not to be made out on the evidence: Judgment [53]) or, more pertinently, because of the alleged conspiracy. In particular, the Judge held that:

    a. *"*Mr Clark extended to Mr Russell, as a particular customer of the business, indulgences and support that he did not, as he candidly told me in his evidence, extend to any other customer, nor had he extended such assistance to any other customer over the decades in which he had worked in the container business": Judgment [71]**.**

    b. The Judge was "quite satisfied, from the evidence I have heard, read, listened to and seen, that the content of the emails passing between the parties does not demonstrate a pattern of intention to harm but in fact what 'does what it says on the tin'. Namely, demonstrate an attempt on the claimant company's part to assist rather than do down the defendant in his hour of difficulty and need".

    c. The "high water mark of the case to the contrary advanced by Mr Russell" was a "contention that the claimant company could have gone the further mile"; that was "unreal".

204. These observations were reinforced by Burnett LJ's observations at [22] in the Permission Judgment, which I have cited above, that Mr Russell was in a "dilemma of his own making".

205. Therefore, the finding that there was no unfair relationship was made by the Judge with full recognition of the fact that the agreements were improperly executed, there were no default notices served, and that Adaptainer was claiming in conversion rather than seeking an enforcement order. The Judge's decision rested in large part on his perception of the factual witnesses, and in particular the evidence Mr Clark of Adaptainer (satisfying the requirement that the creditor prove

fairness of the relationship: s.140B(9)), which he found did not support allegations that Adaptainer had acted contrary to Mr Russell's interests.

206. Putting to one side the question whether this complaint involves an improper collateral attack on the findings of the Judge, in my judgment, it is unreal to suggest that the Judge would have found an unfair relationship had Mr Coulter pleaded his points differently (as is the essence of the allegations on ss.60, 61, 65, 87, 90 and 91) or raised arguments under s.77A or PD7B. Having found that Adaptainer's treatment of Mr Russell was, in essence, manifestly fair, the Judge would not have exercised his wide discretion under s.140A any differently. Nor was there any chance that the Judge's determination have been overturned on appeal, in light of Burnett LJ's clear agreement with the Judge's factual assessment.

207. Even if, contrary to my conclusion above, the Judge's finding on unfairness of the relationship could be displaced, it is equally unrealistic to suggest that the Judge would have exercised his wide discretion (which entitled him to make no order at all) to make an order under s.140B. I take into account in that conclusion where the burden of proof would lie.

208. There was no error, no negligence and even if the points alleged to have been omitted had been made, there was no prospect of a different outcome.

ISSUE H: non-compliance with Practice Direction 7B

209. I address this issue at this stage because it appears in various guises and at points is a sub-issue to various main issues. In short, Mr Russell's pleaded case as to negligence by Mr Coulter had the following parts:

1) Adaptainer was required to use PD7B because it was enforcing under s.65(1), and paragraph 2.1 of the PD makes adherence to the requirements mandatory.

2) Paragraphs 7.1 and 7.4 set out what should be contained in the particulars of claim.

3) The failure to comply with PD7B impacted upon the Defence and Counterclaim, as Mr Russell needed to show the amounts paid under the HPAs for s.90.

4) Had Mr Coulter advanced an argument under PD7B, Adaptainer would not have obtained an enforcement order for the 45 Containers.

210. Mr Russell accordingly relies on PD7B in respect of both the Defence and Counterclaim, on the basis that (i) Adaptainer would not have been entitled to an enforcement order in respect of the 45 Containers, and (ii) he would have been able to demonstrate that one-third price was paid in respect of the 51 Containers.

211. I consider Ms Eborall's response to these allegations was correct:

1) PD7B did apply to CCA claims brought by a creditor under s.65(1).

2) However, Adaptainer's claim was not brought under the CCA. This is because, first, Adaptainer did not accept that the CCA applied to the HPAs. As I have noted above, the applicability of the CCA was not admitted in Adaptainer's Reply. Mr Russell concedes in his pleadings that Adaptainer did

not accept that the CCA applied until trial, and Mr Coulter explained during cross-examination that this was accepted only once they reached closing submissions. Second, even if the CCA applied to the HPAs, Adaptainer's case was that it was claiming on the basis of its title rather than enforcing the HPAs.

3) The Judge went on to find that, whilst the HPAs were regulated (with the exception of HPA 10), Adaptainer's claim was in common law conversion and did not amount to enforcement of the HPAs. The Judge was entitled to make that finding, and that being so PD7B was irrelevant to Adaptainer's claim.

4) Even if the Cornerstone Point is accepted, such that Adaptainer should have been found to be enforcing under the CCA, the Judge accepted Mr Dabbs' submission that a court order of the type required under s.65 was precisely what he sought in any event: Judgment at [47]**.**

5) Moreover, PD7B does not impose a specified sanction on a claimant who fails to comply. That being so, it is not clear that the Judge would have exercised his discretionary case management powers to, for example, require Adaptainer to amend its particulars of claim to comply with PD7B.

6) Even if Adaptainer was required to amend its particulars of claim to comply with PD7B, it would have made no difference to the outcome. In my judgment, Adaptainer would in any event have been granted an enforcement order under s.65: see above.

212. I would add to these points, the matter I have already referred to in relation to s.81 (apportionment). For the purposes of this claim and in order to establish his cause of action in negligence as regards causation, Mr Russell needed to show that had PD7B been complied with by Adaptainer, Mr Russell would have shown (or lost a real and substantial chance of showing) that he had met the one-third "protected goods" requirement. Mr Russell needed to establish that if Adaptainer had been required to set out the total price paid under the HPAs, the paid-up sum and unpaid balance, he would have satisfied the one-third requirement to bring s.90 and s.91 into play. By the end of trial however no attempt had been made in a witness statement by reference to payments made to establish this fact. I note that in the RAPOC it was pleaded at [49] that Mr Russell could "demonstrate that more than 1/3 of the total price had been paid", but as I have already said, this plea (which was put in issue by Mr Coulter's Defence) was not supported by a witness statement referring to calculations or documents.

213. In my judgment, a failure on the facts of the case to refer to PD7B was not wrong, nor was it negligent. But even if it should have been referred to, on the material before me, there was no prospect of the result being different had it been referred to. The Judge would plainly have made an order for the delivery up of the 45 Containers, damages and costs.

Overall conclusions on alleged negligence

214. My conclusions above are that in respect of each of the nine allegations of negligence against Mr Coulter he was not in breach of duty. I have also concluded that in any event, even if a breach of duty had been established, each separate head of alleged negligent omission/conduct did not deprive Mr Russell of any "real or

substantial" chance of succeeding in his Defence and Counterclaim, whether at first instance or on appeal. The Judge's factual findings were an insurmountable hurdle to success. These were factual findings Lewison LJ and Burnett LJ expressed no interest in disturbing or expressly endorsed in the paper refusal and the Permission Judgment.

215. Standing back, in my judgment, the answer to this entire claim can be found in Lewison LJ's succinct reasons for refusing permission to appeal: see [132] above. Taken together with the elaboration in the Permission Judgment of Burnett LJ, each of the three points Lewison LJ made demonstrates why the Judge allowed the claim and dismissed the counterclaim. Those points would remain good even if the claimed errors and omissions by Mr Coulter were not made.

216. In short, on the facts found by the Judge, Mr Russell had paid nothing in respect of any containers since 25 July 2013. Adaptainer retained title to them. As to the 51 Containers he gave informed consent to possession being taken of them under the August Agreement. As to the 45 Containers, Adaptainer was entitled to enforce their property rights at common law and pursuant to s.134. There was no basis for the counterclaim in relation to any of containers or claimed conspiracy/economic torts.

217. The overall impression I was left with at the end of the trial was that this claim was a form of backdoor appeal against the Judge's decision on the law and facts as he found them (and the upholding of his Judgment by the Court of Appeal), as opposed to a legitimate professional negligence claim.

IX. Quantum

218. The issue of quantum does not arise but I will set out my findings in the event this matter goes further. Although not clearly pleaded and with any particularity, I understood the basis for losses was essentially that Mr Russell, but for the alleged negligence, would have succeeded in his Defence and Counterclaim (with positive costs orders and no obligation to pay Adaptainer's costs), that he would have been repaid all amounts paid under the relevant HPAs, and he would have avoided the costs of the Court of Appeal. How these points were tied to particular Issues where negligence was alleged was never explained in submission or evidence. A claim was also made for fees paid to Mr Coulter (a modest sum).

219. As I indicated at the start of this judgment, Mr Russell's approach in evidence to quantum was highly unsatisfactory. The Schedule of Loss ("SOL") I set out below identifies (as items struck through) the very substantial amounts which were removed by Mr Russell's representatives following his oral evidence (the claim coming down at stroke from about £536,000.00 to £275,000.00). The version of the SOL finally relied upon was produced following my refusal to allow an amended intermediate version of the SOL (seeking about £505,000.00) which Mr Brennan had produced following conclusion of evidence. In short, I ruled that new items could not be added but items could be deleted. I turn briefly to the oral evidence of Mr Russell in relation to quantum.

220. In cross-examination, Ms Eborall took Mr Russell to the original SOL filed in support of his claim. He explained that he and his solicitors had prepared it together and that he was familiar with the document. I formed the impression that little or

no care had been taken in preparing the SOL. In substantial respects it had no supporting documents and the calculations were simply in Mr Russell's head. The SOL was an unreliable document. It should have been supported by a witness statement which explained with specificity how figures had been reached (and attached supporting documents). Instead, the SOL simply asserted financial claims and had attached a rag tag of often incomprehensible documents, random bank statements and schedules (taken from, it appears, some of the evidence in the Adaptainer Proceedings).

221. The evidence of Mr Russell and my conclusions (by reference to the SOL relied on in closing submissions and noting that some of these items have been deleted) are summarised below. I have provided only examples of the problems with the SOL in order to explain why I found it wholly unreliable. (Ms Eborall made more points than those I have summarised below and I have taken them into account).

222. The final form of the SOL was as follows:

Item	Description	£ (to include VAT where applicable)	Tab No.
1	~~Late Purchase Costs and Principal Interest incurred under Hire Purchase Agreement 1 pursuant to s77A of the Act for 10 units @ £8.4 for 156 weeks~~	~~7,770.00~~	~~Tab 1 - This figure excludes VAT although some VAT was incurred~~
2	Costs incurred under Hire Purchase Agreement 2-12 pursuant to s90/s91 of the Consumer Credit Act 1974 ("Act")	145,706.47	Tab 2 - This figure excludes VAT although some VAT was incurred
3	Court Order dated 4 August 2016	104,940.00	Tab 3
	Legal Costs incurred by Claimant in original Claim by Adaptainer		
4	~~Barker Gillette~~	~~£3,000.00~~	~~Tab 4~~
5	~~Mr David Holder~~	~~£2,091.00~~	~~N/A~~
6	Court Fees split as follows: 1. £345 – 28 September 2016 – written permission to appeal 2. £528 – October 2016 – oral permission to appeal	£873.00 ~~1,473.00~~	N/A
7	~~Negative Costs Order – Imove4You~~	~~£1,325.00~~	~~Tab 6~~
8	Goldsmith Chambers	£6,929.99 ~~7,430.00~~	Tab 7 – Some Bank Statements not available as they go back over 7 years
9	~~Adaptainer – Costs paid towards Statutory Demands, Harrisons High Court Enforcement and Statement of Costs~~	~~£11,979.00~~	~~Tab 8~~
10	~~Thirteen Old Square Chambers – Counsel Katherine Hallett~~	~~£360.00~~	~~Tab 9~~
11	~~Ms Flax~~	~~£600.00~~	~~N/A~~

12	Legal costs incurred by Claimant acting as Litigant in Person during proceedings including permission to appeal Time spent: 650 hours @ £19 p.h.	£12,350.00	N/A
	Legal costs incurred during permission for appeal, Letter of Claim for professional negligence, obtaining transcripts		
13	~~No5 Chambers – Fees for Counsel Phillip Mantle~~	~~£5750.00~~	~~Tab 10~~
14	Howlett Clarke	£4,720.00	Tab 11 - Some Bank Statements not available as they go back over 7 years
15	~~Transcripts from John and Paul Clarke's cross-examination~~	~~£948.00~~	~~Tab 12~~
	Direct Damages		
16	~~Unloading/Reloading of 39 containers @ £400/container~~	~~£15,600.00~~	~~Tab 13~~
17	~~Cost of 5 Cranes @ £700/crane~~	~~£3,500.00~~	~~Tab 13~~
18	~~Cost of Haulage of 39 containers @ £150/haulage~~	~~£5,850.00~~	~~Tab 13~~
	Legal Costs incurred by Claimant in current Professional Negligence Claim		
19	~~Legal costs incurred by Claimant acting as Litigant in Person prior to instructing KMT since 2016~~ ~~Time spent: 325 hours @ £19 p.h.~~	~~£6,175.00~~	~~N/A~~
20	~~Karam, Missick & Traube LLP Solicitors Invoice no. 57409~~	~~£2,841.00~~	~~Tab 14~~
21	~~Karam, Missick & Traube LLP Solicitors Invoice no. 57509~~	~~£6,231.60~~	~~Tab 14~~
22	~~Karam, Missick & Traube LLP Solicitors Invoice no. 57573~~	~~£4,153.20~~	~~Tab 14~~
23	~~Chambers of Thomas Brennan Banks – Counsel Thomas Brennan Banks~~	~~£7,740.00~~	~~Tab 15~~
24	~~Claim Issuing Fee 2022~~	~~£10,000.00~~	~~N/A~~
	TOTAL	~~**£372,463.27**~~ **£275,519.46**	
	~~**Statutory Interest Accrued @ 8% as of 05 July 2024**~~		
25	~~HPA 1~~	~~£4,955.77~~	~~N/A~~
26	~~HPA 2-12~~	~~£92,932.78~~	~~N/A~~
27	~~Court Order dated 2016~~	~~£66,517.58~~	~~N/A~~
	~~**GRAND TOTAL**~~	~~**£536,978.40**~~	

223. In relation to this SOL:

1) **Item 2 (costs incurred under HPAs)**. As I noted when Mr Russell gave his evidence in relation to this item, it was impossible to tell if the figures were accurate, or where they came from, because they were all in Mr Russell's "head". I would add that it has never been explained in evidence nor indeed in submissions the precise basis for this claim. I note that in the RAPOC [107.6], the plea was: "*Further, had the Defendant* [repeated allegations of negligence] *...in s.90- then it is patently obvious that the Court would have concluded that all the containers under all Hire Purchase Agreements from Adaptainer were properly to be considered to be protected goods within the meaning of the Act*". But the loss is not particularised (nor is causation explained). Moreover, as established by Ms Eborall in cross-examination, Mr Russell conceded that HPA 10 is an unregulated agreement and that about 30 Hale Wharf Containers were hired under that agreement (they should form no part of this claim). The pleaded loss appears to take no account of that point, or if it does, it is not explained how these containers have been excluded. The documentary evidence in support of the claim bears no (explained) relationship to the pleaded loss. It comprised: NatWest bank statements for a company called Urban Working Limited (Mr Russell said in cross-examination that this is his company) or for Mr Russell himself showing periodic payments to Ashtons Legal (Adaptainer's solicitors), a list of payments (Mr Russell could not identify what these concern) and emails regarding chasers for payment from Ashtons Legal (including in relation to a charge over property). In his final reply closing oral submissions, Mr Brennan sought to establish the basis for Item 2 by taking me to a number of schedules which appeared in the trial bundle. He did his best to run through some of these schedules and to show me on his feet how the calculations were done. None of this calculation exercise was in evidence and I was not satisfied that (even on a cursory consideration of the points being made orally by Mr Brennan) I could be satisfied that the figure for Item 2 was accurate.

2) **Item 3 (court order dated 04.08.2016).** This was, Mr Russell said, discernible from the Judge's court order. I have considered that order. It does not correspond with or support the claim. Mr Russell explained that "*this is because after the hearing, it went to appeal so the other side billed me for another year of holding onto the containers*". It was put to Mr Russell that this was not evidenced, in response to which he referred to an email from Adaptainer's solicitors but he could not identify evidence demonstrating whether this was paid and what it was for. As to the Judge's Order following trial, save for a payment of £20,000 on account of costs, specific damages or costs are not calculated. Further, there is no evidence that Mr Russell paid those sums (or when they were paid). The remainder of the tab of alleged supporting evidence merely appends email correspondence between Mr Russell and Ashtons Legal chasing for payment from Mr Russell. Insofar as the Judge's Order required Mr Russell to pay the costs of the claim and counterclaim, it is hard to see how Mr Coulter could be held responsible for the costs of the hopeless conspiracy counterclaim which Mr Russell insisted be pursued.

3) **Item 6 (court fees)**. This claim does not appear to be pleaded (what is pleaded is "*court/legal costs resulting from this claim for professional negligence*") but in cross-examination, Mr Russell referred to several court fees paid historically

in relation to unrelated applications or hearings. Mr Russell said that those fees were in respect of joining IMove4U, which as I observed when he gave evidence appears to have nothing to do with Mr Coulter.

4) **Item 8 (Goldsmith Chambers)**. The amount paid to Mr Coulter £6,929.99 would in principle be recoverable.

5) **Item 12 (Mr Russell's legal costs as a Litigant In Person)**. Mr Russell said of these that they were "*my token of costs and I can assure you I have spent at least that time.*" Whilst not doubting that he had spent time on the Adaptainer Proceedings, it was put to him that the estimate of hours was not evidenced or substantiated, and it was unclear whether time was spent in relation to the failed IMove4U application or other actions unrelated to the involvement of Mr Coulter in the Adaptainer Proceedings. These are all fair points.

6) **Item 14 (Howlett Clarke, Court of Appeal)**. Mr Russell's evidence was that Mr Tilley "*will have definitely sent me some invoices*" but all that was appended to the SOL was bank statements. Aside from the lack of evidence, I do not consider the costs of a hopeless appeal to the Court of Appeal were Mr Coulter's responsibility as a result of the alleged negligence.

7) I**tem 15 (transcripts)**. It was never explained why the costs of these transcripts were Mr Coulter's responsibility. In cross-examination, Mr Russell invited me to assume that he had incurred costs because the emails exhibited evidence of him requesting the transcripts, and he had then obtained those transcripts. However, this is not sufficient evidence of the costs incurred. He could not provide any further explanation.

224. The burden of proving losses was on Mr Russell. By the end of the trial, I was satisfied only in respect of one item, Mr Coulter's fees. (Item 8). Overall, I do not doubt that other costs including hiring costs were incurred and that if an explanation of causation was forthcoming they might in principle be recoverable, if Mr Russell had succeeded in his claim. But it is not appropriate for the court to take a "stab" at working those out when a claimant has not put the submissions or the evidential material in support before the court; and the defendant has not had a chance to respond to submissions and to question that material.

225. This was a trial on liability and quantum but little attention had been paid in preparation and presentation to the quantum issues.

X. Conclusion

226. The professional negligence claim against Mr Coulter is dismissed.