



Neutral Citation Number: [2008] EWHC 2419 (Ch)

Case No: HC08C02015

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 15/10/2008

**Before :**

**THE HONOURABLE MR JUSTICE HENDERSON**

**Between :**

**SIMON WINTERS**  
**- and -**  
**MISHCON DE REYA**

**Claimant**

**Defendant**

**Mr Alastair Wilson QC and Mr Jeremy Reed (instructed by George Davies LLP) for the**  
**Claimant**

**Mr Justin Fenwick QC and Mr James Collins (instructed by Mishcon de Reya) for the**  
**Defendant**

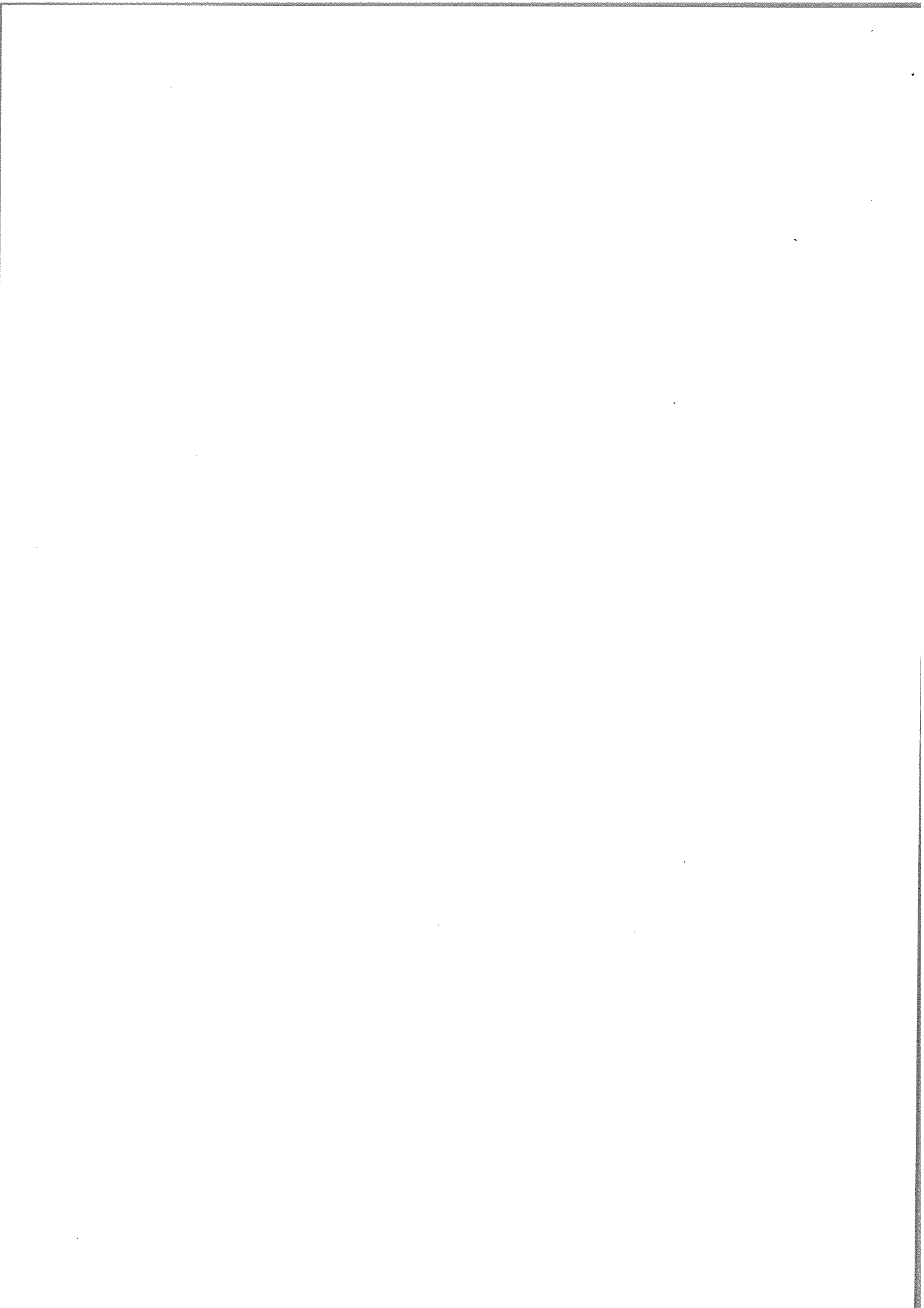
Hearing dates: 3, 4 and 5 September 2008

**Approved Judgment**

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

*Liam Henderson*

THE HONOURABLE MR JUSTICE HENDERSON



**Mr Justice Henderson:**

**Introduction**

1. In 1996 the claimant, Mr Simon Winters, became the Chief Executive of the United Kingdom branch of a prominent Jewish charity known as the JNF Charitable Trust (“the JNFCT”) or, more simply, the Jewish National Fund (“the JNF”). He continued to hold that post until at least June of this year, when his present solicitors, George Davies LLP, wrote to the then President of the JNF, Mrs Gail Seal, on 25 June claiming that his position as Chief Executive had been undermined by changes being made to the management structure of the JNF, and that the JNF had fundamentally breached his contract of employment. On 27 June a reply to this letter was sent by the JNF’s regular solicitors, Mishcon de Reya (“Mishcons”), denying that the JNF had acted in breach of Mr Winters’ contract of employment and informing him that the JNF had decided to suspend him from his duties with immediate effect. The letter went on to explain that the suspension was in connection with various allegations of financial misconduct in his role as Chief Executive, and that the purpose of the suspension was to enable the JNF to carry out an investigation into those allegations, and also into two other matters concerning the establishment of an Israeli charity, Nes Eretz Israel, and the bugging of the office of the new Chairman of the Trustees of the JNF, Mr Samuel Hayek. The investigation was being conducted in conjunction with a team of forensic accountants, and was expected to take no more than three weeks. Mr Winters was told that the investigation and any subsequent disciplinary procedures would be handled in accordance with the JNF’s disciplinary code. The letter concluded:

“Following the conclusion of the investigation, a decision will be made as to whether a disciplinary hearing should be convened. Our client believes that the allegations are so serious that, subject to the findings of the investigation, one potential outcome of the disciplinary hearing will be dismissal.”

2. On 1 July 2008 Mr Winters’ solicitors sent a letter of complaint to Mishcons, alleging that it was improper for Mishcons to act for the JNF in relation to the employment dispute with Mr Winters. The letter asserted that Mr Winters was a client of Mishcons, and that Mishcons had advised him in the past about the same or substantially similar matters to those in relation to which they were now acting against him. They claimed that Mishcons were in possession of confidential information about Mr Winters, and that four named individuals at Mishcons had advised Mr Winters in his personal capacity, namely Dr Anthony Julius, Mr Daniel Naftalin, Mr Daniel Morrison and Ms Victoria Pigott. The letter referred to and set out “a selection of written advice given by various partners and a consultant at your firm (Mr Julius)”, and said:

“It is impossible to see how your firm considered that it was entitled to act against a client that it had acted for, in circumstances where not only does your firm have confidential information but some of that information relates to actions taken upon your advice. We appreciate that these are very

serious allegations. We assure you that they are not made lightly.”

An undertaking was sought that Mishcons would cease acting for the JNF immediately.

3. On 4 July Mishcons responded, saying that at all times they had acted for the JNF and not for Mr Winters, with the sole exception of an occasion when Mr Winters instructed Mr Morrison at the same time as the JNF instructed him to discover the author of certain letters defamatory of Mr Winters. It was said that those instructions were given by Mr Winters “in order to have the nexus to obtain the information”. Subject to that exception, Mishcons maintained that the claim they had acted for Mr Winters in his personal capacity:

“... depends on a very unbalanced representation of the evidence. The emails and the excerpts are taken out of context and do not represent the true nature of the relationship this firm had with Mr Winters, which was not one of client and solicitor.”

The writer went on to say that he was unable to find any confidential information which Mishcons had obtained from Mr Winters which was relevant to the current issue. In conclusion, he said he could see no reason why Mishcons could not continue to act for the JNF.

4. Following some further debate in correspondence, Mishcons refused to give the undertaking sought and on 16 July Mr Winters issued a claim form and an application notice for an interim injunction. His claim was described on the claim form as being “for a threatened breach of confidence” by Mishcons, and the injunction which he sought was to prevent Mishcons from acting for the JNF against him “in relation to [his] employment by the JNF and the termination thereof”, together with other relief as set out in the draft order annexed. The application was supported by Mr Winters’ first witness statement dated 16 July. On 22 July witness statements in answer were filed by Dr Julius and by three partners of Mishcons, Mr Libson, Mr Morrison and Mr Naftalin.
5. On 23 July the application came on for hearing before Blackburne J, with a one hour time estimate. In their skeleton argument for Mishcons, counsel then instructed (Mr Vernon Flynn QC and Mr James Collins) argued, among other things, that Mr Winters had failed to identify in his evidence any information allegedly provided by him to Mishcons which was confidential to him, as opposed to confidential to the JNF. In the event, the application for an interim injunction was not pursued, and directions were instead given by consent for a speedy trial of the action on 3 and 4 September, without service of any particulars of claim, defence or reply, and with a timetable for the service of further evidence in August.
6. Further evidence for Mr Winters was then filed, mainly comprising his second and third witness statements dated 1 August 2008. His third witness statement was confidential, and was served subject to undertakings restricting its circulation to certain named individuals within Mishcons. In it he describes certain information which he alleges that he imparted in confidence to Dr Julius at a time when Dr Julius

was acting for him personally. Mr Winters also relies on a short witness statement dated 5 August 2008 by an Israeli lawyer, Mr Dror Zamir.

7. The written evidence was then completed by the service of witness statements in reply from Mr Naftalin and Dr Julius.
8. The hearing of the action took place before me on 3, 4 and 5 September 2008, and lasted for a full three days, the two-day time estimate having proved seriously inadequate. I heard oral evidence from all of the witnesses on each side, and detailed submissions on the facts and the law from leading counsel (Mr Alastair Wilson QC, leading Mr Jeremy Reed, for Mr Winters, and Mr Justin Fenwick QC, leading Mr James Collins, for Mishcons).
9. Since one of Mr Winters' prime objects in this litigation is to preserve the confidentiality which he says attaches to the material contained in his third witness statement, and to prevent the risk of its being used against him by the JNF in the context of the employment dispute, I acceded to applications made on his behalf that I should hear the relevant part of his oral evidence, and the relevant parts of counsels' closing submissions, in private. For the same reason, I will deal with those parts of the evidence, and the submissions relating to them, in a confidential appendix to this judgment, circulation of which will be restricted to counsel on both sides, to Mr Winters and his solicitors, and to the named individuals at Mishcons who have been permitted to see his third witness statement.
10. With this introduction, I shall now fill in some uncontroversial background before moving on to my assessment of the witnesses and my findings of fact about the relationship between Mr Winters and Mishcons. In the light of my findings of fact, I will then consider the relevant legal principles and state my conclusions.

### **Background**

11. The JNF is an unincorporated association with objects which are charitable under English law. Its affairs are run by a board of Trustees. The JNF was founded over a hundred years ago as a vehicle for collecting money for charitable purposes in Palestine, which was then part of the Ottoman Empire, with a particular view to the establishment there of a Jewish homeland. Over the years, individual autonomous branches of the JNF grew up in many different countries, but it is only the UK branch with which the present case is directly concerned. There is also a Scottish branch, which as I understand it was a subsidiary part of the UK organisation at the dates when it features in the present story, although steps are now under way for the formation of an autonomous Scottish branch.
12. In Israel there is an associated charity which is usually called KKL, an abbreviation of the Hebrew Keren Kayemeth Le'Yisrael. KKL was often (although not exclusively) used as the vehicle through which the JNF's funds were applied for charitable purposes in Israel. Unfortunately, however, disputes arose between the JNF and KKL, including in particular an intellectual property issue about who had the right to the name JNF. Underlying this dispute, there were also disagreements about how JNF monies should be distributed. There came a time when the JNF decided to stop using KKL to distribute its funds in Israel, and this ultimately led to a rupture from the KKL. Major litigation ensued, in which Herbert Smith acted for KKL and Mishcons

acted for the JNF. Legal fees approaching £4m had been incurred by the two charities by the time that a draft settlement was reached in or about February 2008. This settlement involved a stay of the litigation, but I was told that the settlement is still not final and the litigation is currently dormant rather than finally resolved. As part of the terms agreed in February, steps were taken to give KKL nominees a majority on the JNF's Board of Trustees and Mr Hayek was appointed as Chairman of the Board.

13. Mr Winters' role as chief executive was a full-time one, and from 1996 onwards he was employed and paid by the JNF. He was not himself a Trustee, in accordance with the standard practice that paid employees of charities should not themselves be Trustees of the organisation that employs them. In his first witness statement Mr Winters describes his task as being to maintain and enhance the flow of money into the JNF, and to ensure that the money was used to fulfil the JNF's charitable objectives. He describes how the JNF is a powerful force in the life of many British Jews, and how almost since its inception Jewish families were encouraged to have in their home a "Blue Box" for collecting money for the JNF, which is kept prominently on display. He says that in his view "most British Jews would have an instinctive feeling of warmth towards JNF". The income of the JNF did not come only from the Blue Boxes, and in common with other major charities they ran numerous functions and cultivated wealthy donors. It was part of Mr Winters' job to keep such donors, as he termed it, "on our side".
14. As I have already said, Mishcons acted for the JNF throughout the dispute with KKL, and still do so. According to the undisputed evidence of Dr Julius, Mishcons have represented the JNF since October 2005, and although the majority of the work carried out for them over the last three years has been in relation to the dispute with KKL, Mishcons have also advised the JNF on several ancillary matters. Mr Winters himself agreed in cross examination that Mishcons "were the company lawyers", and that whenever the JNF wanted lawyers they would turn to Mishcons, and in particular to Dr Julius.
15. Between October 2005 and February 2008, Dr Julius would take instructions on behalf of the JNF from Mrs Gail Seal (the President), Mr Winters in his capacity as Chief Executive, Mr David Kibel (the Treasurer), and Mr Harvey Bratt (a lawyer who worked in the JNF in various capacities, and acted informally as their in-house lawyer). Dr Julius also dealt with the Trustees from time to time, and attended several board meetings. Since February 2008, when Mr Hayek became Chairman, he has taken his instructions from Mr Hayek on behalf of the JNF.
16. In cross examination Dr Julius described his role as being "really as client partner... a manager of the relationship with JNF". Where there was work to be done that could or should be performed by somebody other than himself, he would introduce the client to those lawyers "and then let them get on with it".

### The witnesses

17. The four witnesses for Mishcons are all partners (or, in the case of Dr Julius, a consultant and former partner) of the firm. I have no hesitation in accepting their evidence on questions of fact, and I have no doubt that they all did their best to assist the court when they gave their oral evidence.

18. I was in particular impressed by the way in which Dr Julius gave his evidence. He was very careful to give nuanced and appropriately qualified answers to the questions put to him in cross-examination, when he felt that a simple yes or no answer would run the risk of over-simplification, and in general his evidence appeared to me to combine complete candour with thoughtful objectivity to a rare degree. It is easy to understand why the JNF should hold him in such high regard as an adviser, and equally easy to understand Mr Winters' initial dismay at the prospect that Dr Julius and his firm would now be acting against him in the context of the employment dispute, when he has had the benefit, directly or indirectly, of wise advice given by Dr Julius over the last three years (and whatever the precise capacity may have been in which he received that advice).
19. By contrast, I regret to say that I found Mr Winters' evidence, both written and oral, to be highly unsatisfactory in a number of respects. The assertions which he makes are often imprecise, partial or exaggerated, and sometimes demonstrably false. There were times in cross-examination when he seemed to shift his ground as each new point was put to him, and on at least two occasions I found his evidence simply incredible. I will come to these occasions in more detail when I set out my findings of fact, but at this stage I will give a few examples of the kind of inaccuracies which lead me to treat his evidence with very considerable caution.
20. I begin with a relatively trivial example. In paragraph 26 of his first witness statement, Mr Winters refers to discussions which he says he had with Dr Julius in the context of some proposed libel proceedings in late July 2006 (what I call below "the first proposed libel proceedings"). He then says this:
- "I cannot now recall all the details of what we discussed, though I am sure he must have full notes of our conversations: he always seemed to make full notes of conversations when we were together, and I assume he did so to when we discussed matters on the telephone."
- In cross-examination, however, Mr Winters accepted that he had never actually seen Dr Julius make notes, and maintained that what he meant to say was that Dr Julius had an assistant who made notes at their meetings. When asked to specify an occasion when this had happened, he replied (transcript, day 1, page 145):
- "I don't actually remember an occasion where there was somebody making notes in our office... I can't think of a date that that... happened."
- Accordingly, the picture presented to the court, in the evidence in support of Mr Winters' application for an interim injunction, of Dr Julius making full notes of their discussions, simply evaporated into thin air when it was tested in cross-examination.
21. A much more serious example is to be found in paragraph 25 of the same witness statement, where Mr Winters says, again with reference to the first proposed libel proceedings, that Mishcons acted for him personally "and they were compromised on the advice of Anthony Julius who obtained an apology for me". It emerged in cross-examination, however, that the proposed libel proceedings never progressed beyond the sending of a letter before action, to which no response was received from any of

the recipients, who simply ignored it. The threatened proceedings were never even begun, let alone compromised, nor did Dr Julius obtain an apology for Mr Winters. The only letter of apology that Mr Winters had received was some months earlier, from one Mark Lovatt, as I shall explain in due course; but that apology pre-dated the commencement of the alleged personal retainer, which Mr Winters agreed had begun on or shortly before 31 July 2006, and was not in any sense obtained for Mr Winters by Dr Julius. It followed rather from the unmasking of Mark Lovatt as the sender of certain defamatory letters to the Jewish press under the pseudonym of Anthony Jacobs. Mark Lovatt was the son of one of the Trustees of the JNF, Stanley Lovatt, who agreed to resign, and tendered an apology to the JNF, after he had been confronted with the evidence of his son's conduct at a meeting attended by Dr Julius. However, that was an apology to the JNF, not to Mr Winters; and Dr Julius' involvement in obtaining it had been on behalf of the JNF alone.

22. When these points were put to Mr Winters in cross examination, it is fair to say that he was left floundering and completely unable to explain what he had meant by the statement in paragraph 25 of his witness statement. The most charitable construction that I can place upon it is to say that this part of his evidence was prepared with culpable haste and carelessness, even though it lies at the heart of his complaint against Mishcons. Furthermore, the same paragraph contains further exaggerations which seem calculated to give an inflated impression of Dr Julius' involvement on Mr Winters' behalf. Mr Winters says that he recalls having numerous conversations with Dr Julius about the issues involved, and was speaking to him "on an almost daily basis over the phone". In cross-examination, however, these numerous conversations on an almost daily basis were whittled down to only "four or five" conversations relating to the proposed libel proceedings, and Mr Winters admitted that most of his conversations with Dr Julius had in fact been to do with other JNF matters. The result is that this paragraph of his statement gives a highly misleading and exaggerated picture of Dr Julius' involvement in the first proposed libel proceedings.
23. The final example which I will give at this stage is an error of omission rather than commission. In paragraph 31 of his first statement Mr Winters refers to a second libel matter ("the second proposed libel proceedings") which arose in February 2007, in relation to letters written to the Jewish press by a prominent businessman and former JNF patron, Mr David Lewis. Mr Winters says that he again took advice from Dr Julius about whether he should bring libel proceedings in his personal capacity:

"I spoke to Dr Julius on the phone, and there were emails between Dr Julius and myself in which I said what I was thinking of doing, and he advised me. This was between late February 2007 and mid-April 2007. These emails were between me and Anthony Julius. Those emails were not copied to the trustees of JNF because it was my libel claim, not JNF's."

24. What this evidence signally fails to mention, however, is that Mr Winters had in fact instructed a different firm, namely his present solicitors, George Davies LLP, to act for him in relation to this matter. Moreover, when asked by Mishcons in correspondence in July 2008 to give details of the matters in which they have acted for Mr Winters, George Davies LLP declined to do so on the basis that the information was privileged, and the request "had no relevance to our client's

complaint about your firm". It was only in the course of Dr Julius' cross-examination, on the morning of day 3, that the court was finally informed by counsel for Mr Winters, having taken instructions from Mr Lewis of George Davies LLP, that Mr Lewis was instructed by Mr Winters shortly after the offending article appeared in the Jewish Telegraph in Manchester on 23 February 2007. Mr Lewis explained that he and Mr Winters had met for the first time in April or May 2006, in connection with a car rally in June 2006 in which they both participated, and that they had met again at a reunion in the summer. A friendship between them developed, and when Mr Lewis read the article in the Jewish Telegraph on 23 February 2007, which said that an unnamed senior person within the JNF was being investigated, he rang Mr Winters to see if he knew who the individual was that the article referred to. It turned out to be Mr Winters himself, as a result of which Mr Lewis was instructed to act on his behalf.

25. On any view of the matter, it seems to me that this information is highly material to Mr Winters' claim that Dr Julius acted for him personally in relation to the second proposed libel proceedings, and he ought to have referred to it in the evidence in support of his application for an injunction. Furthermore, although Mr Winters had an opportunity to rectify this omission when he served his second round of evidence in early August, he failed to take advantage of it.
26. The only other witness who gave evidence on behalf of Mr Winters was Mr Zamir, who is an advocate with a firm of advocates and notaries in Tel Aviv, Israel. Although he speaks fairly fluent English, he had the assistance of an interpreter to help with technicalities. I found him a reliable and helpful witness, but his evidence did not appear to me to provide any support for Mr Winters' case. His short witness statement suffers from various inaccuracies, no doubt due to language difficulties, which were clarified in cross examination. His evidence amounted to little more than saying that he had been asked by Mishcons to assist them in preparing a response to the Charity Commission when they investigated the JNF, and that he had also been asked to deal with allegations that the Israeli charity, Nes Eretz Israel, had been established in a way that breached UK charity law. He gave evidence of his understanding that when, as a lawyer, you represent a charity, you also look after the interests of the charity's officers; and when he was working with Mishcons, he thought that they were similarly engaged in trying to clear the individuals involved, including in particular Mr Winters, as well as the JNF itself. I do not doubt that this was Mr Zamir's perception of his role, but I agree with the submission of counsel for Mishcons that it is irrelevant, because it does nothing to establish what the actual position was as between Mr Winters and the firm.

### **The facts in detail**

27. I will now make my detailed findings of fact, concentrating in particular on the occasions when Mr Winters alleges that Mishcons were acting for him in his personal capacity, either alone or jointly with the JNF. At an early stage in his cross-examination, Mr Winters was asked to clarify what those occasions were. With the benefit of hindsight, it is perhaps regrettable that the contentions on this critical issue had not been defined in statements of case before the hearing. In any event, Mr Winters' clarification was to the following effect:
  - i) With regard to the Lee & Allen report and their investigation of the "dossier", Mishcons were acting for the JNF alone.

- ii) In relation to the obtaining of information about the identity of Anthony Jacobs, Mishcons were acting for the JNF and Mr Winters jointly.
- iii) In relation to the first proposed libel proceedings, Mishcons were acting for Mr Winters alone, over a period of several months.
- iv) In relation to the Charity Commission investigation of the JNF, Mishcons were acting for the JNF and Mr Winters jointly.
- v) In relation to the second proposed libel proceedings, Mr Winters retained George Davies LLP, but Mishcons also acted for him personally when Dr Julius advised him to drop the case, although Mr Winters accepted that Mishcons were also acting for the JNF at the same time.

In addition, it is clear from Mr Winters' written evidence, and later passages in his cross-examination, that he also alleges Mishcons acted for him personally in relation to a proposed variation of his contract of employment in or about November 2007.

**(1) The "dossier" and the Lee & Allen report**

28. In November 2005, and again in February 2006, letters were published in the Jewish Chronicle and the Jewish Telegraph purportedly written by a man called Anthony Jacobs. Copies of the letters were not in evidence, but it is common ground that they were critical of the management of the JNF and (at least prima facie) defamatory of Mr Winters. Unsurprisingly, the publication of these letters caused concern both to the JNF and to Mr Winters in his personal capacity. It soon became clear that Anthony Jacobs was not the real name of the sender of the letters, and the JNF were anxious to discover his true identity. A particular concern was that the writer might have been a disgruntled or disloyal employee, in which case disciplinary and contractual issues would arise.
29. In February 2006 a detailed dossier containing allegations of internal accounting irregularities by Mr Winters in his role as Chief Executive was presented to the Treasurer of the JNF, David Kibel, and the Vice-President, Jeffrey Zinkin. The dossier was presented to them by Harvey Bratt, but its compilation had largely been the work of David Pollock, the Financial Controller of the JNF. It contained allegations going back over a period of at least two years, none of which had been raised or discussed with Mr Winters at the time. The allegations were mainly concerned with Mr Winters' expenses, and irregularities relating to Gift Aid. The dossier was prefaced with short statements signed by two employees, Vicky Morris and Sue Spector, on 20 February 2006, referring to conversations in which Mr Winters had instructed them, when they received cash from various events, not to pay it in but to give it to him, "saying that we could then claim Gift Aid". Vicky Morris' statement then continues:

"My response – brilliant – He then tells me to keep it hush, hush, and told me not to tell anyone. I asked why we had to keep it quiet, as getting gift aid would be advantageous to JNF – he informed me that it was complicated, and basically did not give me any answer."

30. Section F of the dossier describes a particular incident which took place on 12 January 2005, and is headed "Gift Aid kept in his Charity Account". It alleges that on that date an employee came into the office with £600 in cash which had been given to her by a donor for six places at the JNF Business Breakfast. She gave this amount to another employee, who in turn asked Sue Spector to pay it in. However, Mr Winters then asked Sue Spector for the cash, and gave her a cheque for £1,500 to cover it. His stated reason for doing this was so that he "could play around with the Gift Aid", and he then gave instructions how the proceeds of the cheque were to be divided. The allegation then continues as follows:

"Simon then gave the £600 cash to Hilary [*another employee*] and asked her to pay it into his personal Charity Account. Hilary warned Simon that he should not be paying cash into his Charity Account as he is not paid in cash and he would [*be*] liable to Income Tax. He told Hilary not to worry about it.

Simon then received a Gift Aid tax refund of £169.24 from the Inland Revenue as a result of the £600 deposit. Although a voucher for £600 was issued by Simon on 12<sup>th</sup> January in favour of JNF, it was paid in as an entry under Simon Winters for the 2005 car rally. The extra £169.24 has to this date never been returned to JNF. Also since Simon Winters is a higher rate tax payer he would have received an additional tax rebate of £138.46."

Documents were then attached, evidencing the payments into and out of Mr Winters' Charity Account.

31. The dossier was initially investigated by Mr Kibel and Mr Zinkin, and they then passed it on to the President of the JNF, Gail Seal, when she returned from holiday a few days later. Mr Winters was summoned to a meeting to discuss the matter, and while he was able to explain some of the matters, there were others which he could not. The decision was taken to suspend him, and the JNF sought advice from Mishcons. Dr Julius advised that there needed to be an external investigation, and arranged for a specialist forensic accountant, Mr Tim Allen of Lee & Allen, to be appointed with immediate effect to perform this task.
32. Lee & Allen were engaged by Mishcons on Monday 27 February 2006. Mr Allen set to work at once, and an emergency meeting of the JNF Board was convened on 2 March which he attended together with Dr Julius in order to present his initial findings. The Trustees present at the meeting included the President, the Vice-President (Stanley Lovatt), Mr Kibel and Mr Zinkin. At the meeting the President explained the background, and then handed over to Dr Julius who introduced Mr Allen. Mr Allen reported on the work he had done. He said he had gone through everything in minute detail, and had spoken to all parties involved so that he could close down each complaint. He was satisfied that "everything had been solely to do with JNF business", although controls were weak with regard to Mr Winters' expenses and in cash receipting. He said it was important that accounting procedures should be tightened up, but "there was absolutely no evidence of any fraud". The Trustees then put various questions to Mr Allen, and according to the minutes of the meeting he agreed on two occasions that the matter had the appearance of a witch-

hunt. In response to a question from Mr Kibel about Gift Aid donation issues, Mr Allen said "he could only find one, but nothing to worry about".

33. The result of the meeting was that the Trustees passed a unanimous resolution completely exonerating Mr Winters of all the accusations against him, and accepting the verbal report given to them by Mr Allen. The first person to shake Mr Winters' hand after the meeting was Stanley Lovatt, who said he had been responsible for Mr Winters being chosen in the first place, and had always known he would be exonerated. Mr Winters' suspension had lasted for no more than a few days, and he then resumed his duties.
34. In due course Lee & Allen produced a formal written report to the Trustees, which is dated June 2006. The Gift Aid allegations are dealt with in sections 3.2 and 3.7 of the report. In paragraph 3.2.4 they recorded their understanding (clearly correct) that Gift Aid cannot be claimed on admission fees, or on cash donations in respect of which the individual donor has not filled in a Gift Aid declaration. With regard to the allegations in the statements of Vicky Morris and Sue Spector, they said in paragraph 3.2.5:

"No specific work was performed in respect of these particular allegations as they were of a generic nature and did not refer to specific sums of money... The use of cash from events was discussed with [Mr Winters] in this context."

With regard to the allegations in section F of the dossier, Lee & Allen described the work which they had performed and their conclusion in the following terms:

**"Work Performed**

- 3.7.2 We have been advised by Mr Kibel that following this specific issue being pointed out to [Mr Winters], he repaid £310.00 to the JNF to cover both the £169.24 'basic rate' tax refund plus £138.46 relating to the higher rate tax element which [he] would be eligible to personally reclaim (which totals £307.70...). We were advised not to investigate this issue further as it had been resolved.
- 3.7.3 No other similar instances were noted in the dossier. It would therefore appear to be an isolated incident.

**Conclusion**

- 3.7.4 This would appear to be an isolated incident and the cost to the JNF/benefit to [Mr Winters] has been accounted for."
35. In a later section of their report, Lee & Allen recommended (see paragraph 4.2.3) that all JNF personnel involved in handling and recording donations should be provided with a written policy which sets out the Gift Aid rules and explains that under no circumstances should attempts be made to "convert" ineligible donations into eligible ones, for example by misrepresenting their source.

36. Mr Winters accepted in cross examination that Mishcons were acting for the JNF alone in relation to his suspension and the investigation of the irregularities which were the subject of the Lee & Allen report. It is clear that he was right to accept this, and there is in my judgment no question of Mishcons having acted for Mr Winters, either alone or jointly with the JNF, in relation to those matters. Equally, there could be no question of Mr Winters asserting any claim to confidentiality as against the JNF with regard to the contents of the dossier or the Lee & Allen report, even though those documents were no doubt confidential as against the outside world until their disclosure in evidence in the present proceedings.

**(2) The disclosure of the identity of Anthony Jacobs**

37. Once Lee & Allen had given their oral report to the emergency Board meeting on 2 March 2006, and Mr Winters had been reinstated, the JNF was able to turn its attention to trying to discover the identity of Anthony Jacobs. The letters which he had sent to the Jewish Chronicle and the Jewish Telegraph were four in number, and had all been sent by email from the same account. They referred to the dispute with KKL, and appeared to leak information that could only have been known to those who were employed by, or were Trustees of, the JNF. The partner in Mishcons who dealt with the matter was Mr Morrison, who had considerable experience of making Norwich Pharmacal applications to discover the identity of wrongdoers. When it became clear that an application of this nature might be necessary, the matter was referred to him within Mishcons by Dr Julius, or possibly by the Head of Litigation, Mr Libson.
38. Some headway had already been made by Mr Winters, who obtained copies of the emails from the Jewish Telegraph. A firm of computer forensic specialists was instructed to analyse the header information on the emails, as a result of which four Internet Protocol (IP) addresses were retrieved, three of them owned by a provider called GlobalNet and the remaining one being owned by another provider called TurboDial.
39. At about this stage, a meeting took place between Mr Morrison, Mr Winters and Gail Seal at Mishcons' offices. Mr Morrison was concerned that, in order to mount a successful Norwich Pharmacal application, it would be necessary to show the existence of an underlying cause of action. He was not sure that the material in the published letters was cogent enough to justify the inference that an insider had leaked information, thereby giving rise to a cause of action by the JNF against him. However, the letters were also obviously defamatory of Mr Winters. It was accordingly agreed at the meeting that Mr Winters would, if necessary, lend his name to the proposed proceedings. Mr Morrison thought that his meeting with Mr Winters and Gail Seal would not have lasted for more than an hour at the most, because the proposed application was a reasonably straightforward one, and the part of the conversation which related to Mr Winters lending his name probably lasted for no more than five minutes.
40. Following the meeting, Mishcons wrote to both GlobalNet and TurboDial on 31 March 2006. Each letter began as follows:

“We act for the JNF Charitable Trust. Our client is a registered charity... which was incorporated in 1939 to promote

exclusively charitable projects in Israel. We also act for its Chief Executive, Simon Winters.”

The letter went on to explain that its purpose was to seek information about the identity of Anthony Jacobs, and particulars were given of the IP addresses from which the relevant emails had been sent. The letter asked for disclosure of the name of the registered holder of the addresses, and said that an application would be made to the court for an appropriate order if they were not prepared to disclose the information voluntarily.

41. The terms of these letters reflected an email which Mr Morrison had sent to Mr Winters on the previous day, presumably shortly after their meeting. The email had said:

“Dear Simon,

A short note on our approach to open up the ISPs and to find out who is the ‘real Anthony Jacobs’...

We will write to the ISPs concerned stating that we act for you and JNF in an action for defamation. We tell them that we want disclosure of the name of the account holder for the ISP address. The ISP may want us to get a court order... and therefore we may have to prepare a short application to the Judge for an Order.”

He then gave an estimate of the costs involved, saying that the costs would be minimal (£500-£1,000) if the information was provided without the need for a court order, but if an order proved necessary the likely costs would then be in the region of £3-5,000.

42. In the event, GlobalNet agreed to provide the information requested, without opposition, provided that a court order was obtained. Accordingly, on 27 April 2006 a claim form was issued in the Queen’s Bench Division of the High Court, and a consent order was made by Master Ungley. The only claimant named in the proceedings was the JNF, no doubt because it was known that the application would be unopposed. This fact strongly reinforces Mr Morrison’s evidence that Mr Winters had only agreed to lend his name to the proceedings if it was necessary to do so.
43. On the following day, 28 April, GlobalNet responded to the order and disclosed the identity of the sender of the emails as Mark Lovatt. The associated account details included his address and telephone number in Glasgow. This information was forwarded by Mishcons to Mr Winters on the same day.
44. Now that the identity of Anthony Jacobs had been established, this particular matter was at an end and no further work was performed on it by Mishcons. They had, however, omitted to send a formal retainer letter to the JNF at the start of the matter, and on 9 May this omission was rectified when Mishcons sent a retainer letter to Mr Winters and asked him to sign it on behalf of the JNF. The letter was headed “JNF Charitable Trust – Disclosure of ISP Information”, and at the end of the letter the intended signatory was designated as “Simon Winters for and on behalf of JNF

Charitable Trust”. There was no suggestion anywhere in the letter that Mishcons had also acted for Mr Winters in his personal capacity, and no retainer letter was ever sent to him separately. Similarly, when Mishcons submitted their invoice on 25 May, the accompanying narrative identified the client as “The Trustees of the JNF Charitable Trust”. Mr Winters sent the bill down to the accounts office for payment, and it never crossed his mind that he should pay any part of it personally; nor was any such suggestion made by the Trustees.

45. In both his written and his oral evidence, Mr Morrison stoutly maintained that Mishcons’ only retainer in relation to this matter was by the JNF, and that the firm never acted for Mr Winters in his personal capacity. I can understand why Mr Morrison took this view, not least because it appears to be confirmed by the retrospective retainer letter which Mr Winters signed on behalf of the JNF, and by the fact that the JNF paid for all of the work done by Mishcons. Nevertheless, the fact remains that Mr Winters (as I have found) agreed to lend his name to the proceedings if necessary, and the whole point of his doing so was that he had a separate cause of action in defamation which could be used to provide the foundation for a disclosure application. Furthermore, Mishcons’ letters of 31 March 2006 to the two internet service providers said in terms that the firm “also” acted for Mr Winters. Any reasonable recipient of those letters would have assumed that Mishcons meant what they said, and I would be very reluctant to reach a conclusion which entailed that this statement, unqualified and in the present tense, was untrue. The correct analysis, in my judgment, looking at the matter objectively, is that Mishcons did indeed agree to act for Mr Winters in his personal capacity, but only to the limited extent that it might prove necessary to use his name and separate cause of action for the purpose of obtaining disclosure of the identity of Anthony Jacobs. In other words, it was an ancillary and secondary retainer, which in the event had virtually no independent life of its own because GlobalNet was prepared to cooperate in submitting to an order for disclosure. Given the ancillary and evanescent nature of the retainer, and given that both the JNF and Mr Winters had a common interest in ascertaining the identity of Anthony Jacobs, no possibility of any conflict of interest arose before the separate retainer came to an end. The precise date when the retainer terminated does not matter, but in my view it probably terminated on 28 April, when the disclosure details were forwarded to Mr Winters, and at the very latest when the JNF paid Mishcons’ invoice for the work done for them. Furthermore, there is no suggestion by Mr Winters that he imparted any confidential information to Mishcons in the course of this retainer. For all practical purposes, therefore, it can in my judgment be ignored.

### **(3) The first proposed libel proceedings**

46. I now move on to the first proposed libel proceedings. The discovery of the author of the Anthony Jacobs letter understandably caused anger within the JNF. Mark Lovatt was the son of Stanley Lovatt, who was himself one of the Trustees, and who had joined in the unanimous vote of the Board to reinstate Mr Winters. The JNF sought advice from Dr Julius, and on 16 May 2006 he sent an email to Gail Seal, which he copied to Mr Winters and Harvey Bratt. In this email Dr Julius reviewed the possible courses of action open to the JNF, and appended draft letters to be sent to Stanley Lovatt’s lawyers and to Mark Lovatt. The nub of Dr Julius’ advice was that Stanley Lovatt should be expelled, but no useful purpose would be served by the JNF suing him in Scotland. Dr Julius added:

“It is open to both you and Simon [*i.e. Mr Winters*] to sue father and/or son personally. I would recommend caution, however.”

47. In cross-examination Dr Julius agreed that the possibility of the JNF bringing defamation proceedings in its own name was never considered for more than a moment. Apart from the cost and risk involved, it would be an unwelcome distraction from the main task of addressing the KKL litigation. However, there was a lot of reluctance within the JNF to accept Dr Julius’ advice, because of the amount of hostility and bad feeling which the episode had engendered. Stanley Lovatt was, or at least considered himself to be, a wealthy and influential member of the Scottish Jewish community, as well as being the Vice-President of the JNF. The disclosure of his apparent disloyalty had therefore been a very considerable shock. Despite his advice to the JNF, however, Dr Julius did not agree that if either Gail Seal or Mr Winters wanted to start libel proceedings themselves, that would be a matter for them and not for the JNF. He said (transcript, day 2, page 94):

“No, it was very much a matter for the JNF. And I considered it to be a very important aspect of my representation of JNF to advise, when my advice was sought, individuals who were thinking about proceedings, in their own name, in relation to matters that had a bearing on JNF.”

48. The letter which Dr Julius had drafted was presumably sent to Mark Lovatt, and on 26 May Mark Lovatt emailed a letter of apology to Mr Winters. He offered his unreserved apologies for what he had done, and claimed that his father had not been involved. Stanley Lovatt had meanwhile resigned from the Board of Trustees, having been confronted with the matter at an interview with Dr Julius at the JNF headquarters. In his letter Mark Lovatt said that his father’s resignation from the Board was completely unrelated to anything he had done. Mr Winters did not believe this, because it seemed obvious to him that only his father could have been the source of the information on which the defamatory letters were based. The fact that Stanley Lovatt had agreed to resign when confronted with the matter appeared to corroborate this inference.
49. On 7 June Mr Winters forwarded Mark Lovatt’s email of apology to Dr Julius, and also to Shimon Cohen who was a publicity adviser retained by both the JNF and Mishcons; he was also a personal friend of Mr Winters. Dr Julius replied on the same day, saying:

“We ought to discuss this, both from the JNF’s point of view, and your own.”

50. On 15 June Mr Winters sent a non-committal reply to Mark Lovatt’s email of apology, saying that he had only just returned from the JNF Car Rally and had “a mountain of operational issues” to deal with before he could turn his attention to the matter. Mr Winters forwarded a copy of this reply to Dr Julius, who replied on the same day with the comment: “good letter”. In view of Mr Winters’ absence on the Car Rally, it seems to me unlikely that any significant discussions had taken place between him and Dr Julius between 26 May and 15 June. There is equally nothing in the documentary record to indicate that there was any further significant contact

between them from 16 June until mid-July, and I infer that if they discussed the matter at all during this period, it was only on a passing and informal basis. In his written evidence Mr Winters said that he and Dr Julius did discuss the libel matter in detail following Dr Julius' email to him of 7 June, but the only conversations of which Mr Winters gives any details took place towards the end of July, and Dr Julius himself had no recollection of any conversations between them over the intervening period. Given the lack of precision in Mr Winters' evidence, the lack of any documentary corroboration, and his tendency to exaggerate his evidence, I am not prepared to accept that any detailed discussions took place between him and Dr Julius with regard to the libel matter until late July.

51. The reason why the matter came to life again in late July is that a faction in the Glasgow office of the JNF had circulated in Glasgow, and also sent to the editor of the Jewish Chronicle in London, a letter which was highly critical of Mrs Seal and the JNF leadership. A watered down version of this letter was apparently printed by the Jewish Chronicle, but on 14 July a copy of the unabridged original was sent to Mr Winters in confidence by a Mr A Soudry, and on the same day Mr Winters forwarded it to various recipients, including Shimon Cohen, Mrs Seal and Dr Julius. The unabridged letter did not refer to Mr Winters by name, but it did mention that "[e]arlier this year a question as to the propriety of a senior head office executive arose in London". The letter said that a group of head office workers had reported certain possible breaches of procedure to Mrs Seal, who had then decided to appoint a company of forensic accountants to investigate. The result of the investigation was unknown to the writer of the letter, although Lee & Allen's report had of course been received by the Trustees in June.
52. The continuing dissension within the Glasgow office was obviously a matter of concern to the JNF leadership, and they sought advice from Dr Julius on how to respond to it. On the afternoon of 31 July, Mrs Seal emailed to Dr Julius and Mr Winters a draft letter that she proposed to send to the members of the Glasgow Committee, and about an hour later, at 4.25 pm, Dr Julius replied to Mrs Seal and Mr Winters saying "I think this is perfect". It is clear from this exchange of emails that Dr Julius was acting on behalf of the JNF, and that Mr Winters knew this to be the case.
53. On the very same day, by an email timed 4.01 pm, Mr Winters sent to Dr Julius, and copied to Shimon Cohen, drafts of letters to be sent by himself to the members of the Glasgow Committee, to Stanley Lovatt and to Mark Lovatt, saying "I await your comments/changes". Each draft letter took the form of a letter before action, threatening defamation proceedings. Reference was made to the earlier investigation of Mr Winters' conduct and to his unanimous exoneration by the Board, followed by the uncovering of the identity of Anthony Jacobs. The draft letter to the Committee Members then continued as follows:

"Your Chairman Stanley Lovatt has sold you his version about what happened and you have not only agreed to back him but written to our donors justifying your actions.

Up until now I have kept my dignity and not reacted to your below the belt strategy.

There are arguments in communities, there are arguments in business, but your public accusations about me in the press exceed all normal boundaries and it is with regret that I am giving you notice that I will be suing you in an English court.

The top libel lawyer in the UK, Mr Anthony Julius, was so outraged by your agenda that he has very generously agreed to represent me, free of charge.

He has reassured me that I have a negligible chance of losing and therefore, you will be hearing from Mishcon De Reya, in due course.

It is most regrettable that you have forced me to act in this way but your actions have left me with no choice. Please address any further correspondence to my lawyer.”

54. Half an hour later, at 4.36 pm, Dr Julius emailed amended drafts of the letters back to Mr Winters. The amendments did not alter the substance or general tone of the drafts, but improved the wording in a number of respects and made it read more cogently. The only alterations which Dr Julius made to the paragraphs which I have quoted were to omit the words “by your agenda” in the penultimate paragraph, and to replace the words “free of charge” with “on a ‘no win, no fee’ basis”, so that the first sentence of that paragraph now read:

“The top libel lawyer in the UK, Mr Anthony Julius was so outraged that he has very generously agreed to represent me, on a ‘no win, no fee’ basis.”

The letters were then sent out by Mr Winters, in the form of the amended drafts, on 2 August.

55. In his first witness statement Mr Winters said that Dr Julius had outlined the gist of a letter which he should send to various people, including Stanley Lovatt and Mark Lovatt, in the course of one of their telephone conversations towards the end of July. He then composed draft letters as suggested, and these were the drafts which he emailed to Dr Julius on 31 July. In his second witness statement, Mr Winters gave a more circumstantial account of the background to the sending of the letters. He said that Dr Julius continued to advise him on the libel claim, after the identity of Anthony Jacobs had been uncovered, and was happy to act for him personally. They had numerous conversations, some about JNF matters but others about his personal affairs. When they discussed his personal situation, Mr Winters always made sure that he was on his own with the door shut, or called Dr Julius from his car. Once the JNF had decided, on Dr Julius’ advice, that it was not going to pursue a libel claim of its own, it was only Mr Winters who intended to pursue such a claim. In the course of their discussions, he disclosed the matters referred to in his third confidential witness statement. Having discussed those matters, Dr Julius agreed to act for him on what he called a “no win, no fee” basis. Dr Julius advised him that he would be liable for the other side’s costs if he lost, but unless there were any skeletons in his cupboard he could not see how he could lose. Dr Julius then asked him if there were any skeletons in his cupboard, and in particular whether there was anything over and above the

matters that had come out in the dossier and the subsequent Lee & Allen investigation. Mr Winters says that he and Dr Julius spoke “on an almost daily basis” at this time, and one of the matters they discussed was who he should sue for libel. Dr Julius gave him robust advice, to the effect that he should send letters to Mark Lovatt, Stanley Lovatt, and each member of the Glasgow Committee. He said it would be best if the initial letter were sent by Mr Winters, even though he would draft it. As Mr Winters had never pursued a libel case before, and had no idea where to begin when drafting a letter of claim, “Dr Julius more or less dictated the letter to me over the telephone”.

56. For his part, Dr Julius had no recollection of these alleged conversations, but says he recalls being “slightly embarrassed” by the language of the draft letters sent to him by Mr Winters. In paragraph 27 of his first witness statement, he says:

“Trying the best I can to remember what happened that day two years ago, I think that I was much more concerned with the correspondence between [Mrs Seal] and Mr Lovatt and felt that Mr Winters could be left to say what he wanted (within reason – I would not have wanted him to write anything that was prejudicial to my client).”

57. Dr Julius went on to say that his firm rarely acts on a “no win, no fee” basis, and “It would here have been as a service to JNF rather than for Mr Winters personally”.
58. It is interesting to note how Mr Winters’ account of Dr Julius’ involvement in the drafting of these letters developed from outlining the gist of the letter, in his first witness statement, to more or less dictating it over the telephone, in his second witness statement signed some two weeks later. In my judgment this is symptomatic of Mr Winters’ tendency to exaggerate and embellish his evidence. Furthermore, despite the detailed account given in his second witness statement, Mr Winters accepted in cross examination that his alleged personal retainer of Mishcons only started on 31 July (transcript, day 1, pages 118-119). When asked how long the retainer lasted, Mr Winters could say no more than that he discussed the matter “several times” with Dr Julius after 31 July, and then “it just kind of drifted to one side” (ibid, page 120). I find, in the circumstances, that although there was probably some telephone contact between Mr Winters and Dr Julius shortly before 31 July, Dr Julius did no more than suggest the outline of the letters which Mr Winters wished to send, and indicate that there was no objection from the JNF’s point of view if the letters were sent. He also agreed that, if matters reached the stage where proceedings were commenced, Mishcons would be willing to act for Mr Winters personally on a no-win, no-fee basis. I am unable to accept Mr Winters’ evidence that the letters were virtually dictated to him by Dr Julius, and I can well believe that Dr Julius found the reference to himself as “the top libel lawyer in the UK” rather embarrassing, although he allowed it to stand in the amended draft because it was, after all, Mr Winters’ letter and not his own.
59. Dr Julius’ perception of the situation, as he explained in cross-examination, was that the draft letter was an aggressive and angry one, but if Mr Winters understandably wished to “sound off” it would not damage the interests of the JNF if he did so, and it might even help if he was writing in this angry fashion at the same time as Mrs Seal was sending a more emollient letter to the members of the Glasgow Committee. Dr

Julius described this as “a carrot and stick” approach, but accepted it was entirely possible that he had not explained his thinking to Mr Winters on 31 July. One reason why Dr Julius took a relatively relaxed attitude to the sending of the letters by Mr Winters was that he did not take Mr Winters’ threats of legal action seriously. He saw it as “a spasm of anger”, which lanced the boil in the sense that the pressure to do something was then relaxed. His recollection is that the “threat of libel proceedings was, so to speak, a dead letter from the moment that it was sent”, and once the letters had been sent on 2 August that was effectively the end of the matter. Dr Julius has no recollection of the “several conversations” referred to by Mr Winters, and thought the matter was never sufficiently animated to go to sleep.

60. I have already commented earlier in this judgment on the wholly misleading and inaccurate statement in paragraph 35 of Mr Winters’ first witness statement, where he said that the proposed libel proceedings were compromised on the advice of Dr Julius who obtained an apology for him.
61. Against this background, two questions seem to me to arise. The first question is whether a separate retainer ever came into existence between Mr Winters and Mishcons in relation to the proposed libel proceedings. The second question is whether, in connection with the proposed libel proceedings, he ever disclosed to Dr Julius the alleged confidential information referred to in his third witness statement.
62. So far as the first question is concerned, there can be no doubt (and Dr Julius rightly accepted) that a separate retainer would have come into existence if the threatened proceedings had progressed beyond Mr Winters’ letters before action, and if Mishcons had begun to act for him in the manner contemplated in the letters. However, the letters do not say that Mishcons were acting for him at the time when they were written, but rather that Dr Julius had generously agreed to represent Mr Winters on a no win, no fee basis. An agreement to act in the future is not the same thing as an existing retainer. Furthermore, had matters progressed to the stage of a formal retainer one would expect a client letter to have been sent by Mishcons to Mr Winters and the necessary paperwork to have been completed for a conditional fee agreement. On the other hand, Dr Julius took it upon himself to amend the draft letters, at a time when there was no question of the JNF itself initiating libel proceedings, and he did not strike out or amend the passages at the end of the letters which represented that he had told Mr Winters that he had a negligible chance of losing, and which referred to Mishcons as “my lawyer”. The matter is finely balanced, but looking at the question objectively I conclude that a retainer did, just, come into existence on or very shortly before 31 July, and that it continued in existence, although in a virtually moribund state, until the matter petered out, probably a month or two later. The inchoate nature of the retainer is brought out by the fact that neither Mishcons nor Mr Winters took any steps to formalise it in writing. Furthermore, I am satisfied that it was perceived on both sides as involving no conflict of interest at that stage with the JNF, for which (as Mr Winters well knew) Dr Julius was acting at the same time, both in relation to the ongoing litigation with KKL and in relation to the particular problems posed by the unrest in Glasgow. Dr Julius appreciated that a time could come in the future when the interests of the JNF and Mr Winters would no longer necessarily coincide, but no such question arose at that stage. If it had, a solicitor as experienced as Dr Julius would hardly have agreed to review and amend Mr Winters’ draft letters to the Lovatts and the Glasgow

Committee on the same afternoon as he was approving the letters to be sent by Mrs Seal to the Committee on behalf of the JNF. Moreover, there was no reason to suppose that a conflict was at all likely to arise in the foreseeable future, given Dr Julius' view, which events proved to be correct, that nothing would come of the threatened libel proceedings.

63. I now come to the second question identified above: did Mr Winters in fact disclose to Dr Julius the information described in his confidential third statement? Given the adverse view which I have formed of the credibility of much of Mr Winters' evidence, and given his failure to identify any confidential information allegedly imparted to Mishcons in his first witness statement, I have not found this an easy question to determine. Nevertheless, I am prepared to accept, on the balance of probabilities, that Mr Winters did indeed give this information to Dr Julius on or around 31 July 2006, in the context of his proposed libel proceedings. It would be natural for any prudent and competent solicitor, who was discussing contemplated libel proceedings with a client, to warn him of the risks involved, and to ask if he had any skeletons in the cupboard which might come to light if the matter progressed. I do not think that Dr Julius would have been happy to review the draft letters, and give his blessing to Mr Winters sending them, unless he had taken this elementary precaution and satisfied himself that the information disclosed by Mr Winters was innocuous. I will discuss this aspect of the matter more fully in the confidential appendix to my judgment, but I will say at this point that in my judgment nothing disclosed by Mr Winters to Dr Julius either alerted him, or should have alerted him, to the existence of any conflict of interest between Mr Winters and the JNF, or otherwise made it improper for Dr Julius to continue acting for them both.

#### **(4) The Charity Commission Investigation**

64. On 19 September 2006, Stanley Lovatt returned to the attack. He wrote to the Charity Commission in London, setting out his version of events and enclosing a copy of the dossier which Lee & Allen had investigated. He said that neither the dossier nor Lee & Allen's report had been made available to him in his capacity as Joint National Vice President, despite several requests, but a copy of the dossier had arrived suddenly at his home (he did not say how) on 1 September. He referred to the letters sent to the press by his son, and said this had been done without his knowledge. He offered to make himself available should the Charity Commission wish to take any further statements from him.
65. Ten days later, on 29 September, the Charity Commission wrote separately to each of the Trustees informing them that a serious complaint had been made to the Commission, and asking them to discuss the matter and provide a collective response on behalf of all the Trustees. The letter went on to say that the allegations concerned the conduct of Mr Winters, and summarised the main allegations in the dossier, including the allegation that Mr Winters had contravened the Gift Aid rules by replacing cash sums with cheques from his own charity account, and that he had claimed higher rate tax relief on those sums. The letter continued:

“Documentary evidence has been provided in relation to the above allegations. We have been informed that these issues have been raised with the Trustees and that a forensic accountant was employed by the Charity, which resulted in Mr

Winters being cleared of any misconduct. However it has been suggested that the remit of the forensic accountant and the written report produced were not circulated to all the Trustees.

I would be grateful for the Trustees' comments on the concerns raised above and confirmation on what action has been taken. Please clarify the remit of any forensic accountant employed and provide a copy of the report that was produced."

The Trustees were requested to provide a response by 13 October 2006.

66. This was obviously a matter that needed to be taken seriously, and the JNF turned, as usual, to Mishcons to act for them. On 13 October Mishcons wrote to the Charity Commission, confirming that they acted for the JNF and were responding to the Commission's letter of 29 September on behalf of all the Trustees. The letter referred to Mr Allen's investigation of the complaints in the dossier, and the report which he had given of his findings at the Board meeting on 2 March. A copy of Lee & Allen's subsequent written report was enclosed for the Commission to review. The Commission were asked to treat it as privileged and confidential, and not to disclose it to any third party, including the complainant. Various comments of an adverse nature were then made about the conduct of Stanley Lovatt.
67. Over the next six months the Charity Commission continued to investigate the matter, and correspondence passed between them and Mishcons. It is unnecessary for me to review the course of the investigation in any detail. The upshot was that on 27 March 2007 the Commission wrote to Mrs Seal to inform her that all the relevant evidence had been considered in detail, and although there were some areas relating to governance that required review, the Commission had found no evidence of mismanagement or misconduct by the Trustees, and no proof of deliberate criminal activities by any JNF employees. The letter made a number of recommendations, and pointed out some shortcomings in the manner in which the Trustees had dealt with the allegations in the dossier. However, the Commission said they were satisfied that appropriate management and financial controls were now in place, and they had therefore decided to close the case.
68. It is common ground that Mishcons acted for the JNF throughout this investigation. Mr Winters maintained that they were also acting for him personally, but in my judgment he was unable to produce any solid evidence to support this assertion. No support for the contention is to be found in any of the documents, although the investigation lasted for a full six months. It seems to me inconceivable that Mishcons would not have entered into a separate formal retainer agreement with Mr Winters, if they were indeed acting for him personally throughout this period. It is of course true that the investigation concerned him personally, in the sense that it was his conduct which had been under scrutiny when Lee & Allen were called in to investigate the dossier; and if the Trustees' handling of that complaint were now found to be at fault, Mr Winters' personal conduct could be expected to come under scrutiny again. However, that does not lead to the conclusion that Mishcons were therefore acting for him in his personal capacity at the same time as they were acting for the JNF. It merely reflects the fact that both the JNF and its Chief Executive, Mr Winters, had a common interest in satisfying the Charity Commission that the matter had been appropriately dealt with by the Trustees, and proper steps had been taken to prevent

any recurrence of the irregularities identified in the Lee & Allen report. As Dr Julius said in cross-examination, the main focus of the Charity Commission's investigation was on the adequacy of the JNF's response to the dossier, rather than on the truth or otherwise of the underlying allegations. Mr Winters was potentially in the firing line, in his personal capacity, if the Trustees' response was found to have been inadequate; but that stage was never reached, because Mishcons succeeded in persuading the Commission that, subject to various minor criticisms, the matter had been properly dealt with. Dr Julius was of course concerned for Mr Winters in the context of his overall representation of the JNF, and was also concerned for him as a friend and as a matter of ordinary compassion; but that is not the same thing as saying that Dr Julius was acting for him personally, either separately or jointly with the JNF.

69. At one point in his cross-examination Dr Julius drew an analogy with acting for newspapers in libel cases, which I found illuminating. He said (transcript, day 3, page 7):

“Rarely is it the company that holds the newspaper that’s sued. It’s the editor, it’s the journalist. One is acting for the journalist, one is acting for the editor but one is acting for them in the context of one’s overall representation of the newspaper title. Sometimes there are also insurers involved. There is therefore a plurality, even, on occasion, a diversity of interests being represented and its one of the things that solicitors simply have to learn to manage in a sensitive way.”

Those comments were in fact made in the context of the first proposed libel proceedings, where I have held that, for a short period, a separate retainer did come into existence; but the general message seems to me valuable for its recognition of the pragmatic approach that solicitors often have to adopt in acting for large organisations. Another way of making the same point is to say that the court should in my judgment be slow to infer the existence of a separate retainer where a firm is already acting for an organisation as a whole, and the matter in which they are acting also involves the interests of a senior officer of the organisation. In the case of the Charity Commission investigation, I am satisfied that no such inference should be drawn.

#### **(5) The second proposed libel proceedings**

70. Mr Winters described this matter in paragraph 31 of his first witness statement as follows:

“A second libel matter arose in late February 2007. This was in relation to letters that David Lewis had written to the Jewish Chronicle. Again, I took advice from Anthony Julius... about whether I should bring libel proceedings in my personal capacity. I spoke to Dr Julius on the phone, and there were emails between Dr Julius and myself in which I said what I was thinking of doing, and he advised me. This was between late February 2007 and mid-April 2007. These emails were between me and Anthony Julius. Those emails were not copied

to the Trustees of JNF because it was my libel claim, not JNF's."

71. I have already drawn attention to the fact that, in giving this evidence, Mr Winters completely failed to mention that he instructed his present solicitors, George Davies LLP, to act for him in relation to the matter. This omission, and Mr Winters' failure to rectify it in his second statement, is important for two reasons. First, it provides a graphic illustration of the unreliability of much of his evidence. Secondly, it shows that when Mr Winters considered his personal interests to be affected, he did not hesitate to instruct separate solicitors. In the circumstances, any suggestion that Dr Julius was also acting for Mr Winters personally in relation to this matter faces obvious difficulties. The most that Mr Winters can point to by way of documentary support is an exchange of emails between himself and Dr Julius on 16 April 2007. Mr Winters referred to a suggestion that he should issue a letter before action, and asked Dr Julius "what do you think?", to which the answer came 20 minutes later:

"Dear Simon – I think it would be a mistake for you to sue.  
Best – Anthony."

When asked in cross examination whether this was the total extent of Dr Julius' advice to him in relation to the matter, Mr Winters said that later down the line, after George Davies LLP had been instructed, Dr Julius suggested that he drop the matter. I accept that Dr Julius may well have given advice to this effect, in an informal manner; but in a context where Mr Winters had his own solicitors acting for him, both when the exchange of emails took place in April and when the subsequent oral advice was given, I find it impossible to conclude that any separate retainer had come into existence. As a matter of friendship and concern for his well-being, and because of his role as Chief Executive of the JNF, Dr Julius was prepared to give Mr Winters the benefit of his advice, on an informal basis, when specifically asked to do so; but Mr Winters should have realised that the giving of such advice formed part of Dr Julius' general client management role on behalf of the JNF, or at the highest was given as a favour on a basis of friendship. He cannot sensibly have supposed that he was getting the benefit of a second and separate retainer for free, at a time when George Davies LLP were already acting for him.

72. There is, in any event, no suggestion that, even if Mishcons were in some way acting for Mr Winters at this stage, any further confidential information was disclosed to them by him. Thus this episode can for all practical purposes be disregarded, apart from the light which it throws on the reliability of Mr Winters' evidence.

#### **(6) The employment advice**

73. In paragraph 42 of his first witness statement, Mr Winters alleged that Mishcons gave advice to him in his personal capacity in November 2007 in relation to a proposed variation of his contract of employment. He said that Mrs Seal sent him and Harvey Bratt a "draft addition" to their contracts of service, and although it appeared to be entirely favourable to them, she recommended that they take their own independent legal advice, and said that if he took such advice from Mishcons then the JNF would pay for it. Mr Winters went on to say that towards the end of the month he had a detailed discussion with Daniel Naftalin, a partner in Mishcons' Employment Department, about the alteration to his contract. He professed to be unable to

remember the details of what he said to Mr Naftalin, or what advice Mr Naftalin gave to him, but said he was certain that this advice was being given to him, and was not advice to the JNF.

74. In his written evidence in answer, Mr Naftalin said that in early November 2007 he was instructed on behalf of the JNF to discuss the possibility of amending the contracts of employment of Mr Winters and Mr Bratt by insertion of a five year term. He was told that this was at the request of the Trustees, in order to protect and compensate Mr Winters and Mr Bratt in the event that the JNF lost its litigation with KKL. He said his initial advice was that this would be inconsistent with good corporate governance, and possibly the rules of the Charity Commission, but he would discuss the issue with Dr Julius. This he then did, and Dr Julius strongly agreed with his view that any such change to the contracts of employment would be inadvisable. Dr Julius also suggested that, if possible, third party guidance should be found which would give that message to Mr Winters, without Mishcons themselves needing to deliver it and therefore appear to pass judgment on a suggestion which had come from the Trustees. To that end, Mr Naftalin instructed a colleague, Laura Penny, to research the subject and draft a memorandum. She duly prepared a memorandum, which Mr Naftalin discussed with Dr Julius after his return from a visit to Israel on 15 November. Dr Julius' view was that it would be better just to send to Mr Winters the relevant guidance from the Charity Commission on duties of trustees, and the provisions in the Companies Act 2006 regarding termination payments for loss of office. Mr Naftalin then did this on 23 November, under cover of an email which read as follows:

“Further your query of a couple of... weeks back, and prior to discussing this with you in detail, I thought I would email you certain extracts on the Charity Commission’s Guidance on Trustees and Governance, and a summary of recent changes to the Companies Act, which together give some guidance about what is best practice in this area and what considerations to bear in mind.”

75. Mr Naftalin went on to say in his statement that the advice which he gave on this issue was always based on instructions given on behalf of the JNF. He said he had never been asked to advise Mr Winters personally, and would have declined to do so if asked.
76. In his witness statement in reply, Mr Winters stood by what he had said in his first statement. He said in terms: “I specifically asked Mr Naftalin to act for me personally, and he agreed to do so”. He said he had made it clear to Mr Naftalin that the JNF had agreed to pay Mishcons to give him personal advice, and this had been authorised by Mrs Seal. He said he was concerned to protect his position, but wanted to do so in a legitimate manner. He thought it would be beneficial to him if the JNF had to give him longer notice before dispensing with his services, and Mrs Seal had agreed, but thought it was important that he obtain independent advice on the subject. That was why she said that the JNF would pay for it if he took such independent advice from Mishcons. Mr Winters said that he explained all this to Mr Naftalin. He was adamant, however, that he never said anything about wanting a five year term:

“I did not say that, and it is not true. I wanted advice about increasing a 6 month period to a 1 year notice period.”

77. This acute conflict of evidence was explored in cross-examination of both Mr Naftalin and Mr Winters. Before the date of the hearing, Mr Naftalin had also filed a second witness statement, to which he exhibited a contemporary handwritten note of a telephone conversation which he had with Mr Winters on 7 November 2007. The note was written in his day book while the conversation was taking place, and it matched a time recording entry for the same date, the narrative for which read “Telephone call advice to JNF”. The note in the day book is headed with Mr Winters’ telephone number, and immediately beneath it there is a reference to an apparently unrelated matter. Mr Naftalin explained that he had probably taken two messages off his voicemail, and he then returned the call to Mr Winters. The note then refers to “Harvey & Gail”, which Mr Naftalin agreed probably indicates that Mr Bratt and Mrs Seal had suggested that Mr Winters should call him. The note then records that, if the JNF lost the cases, the Trustees wanted to protect [Mr Winters and Mr Bratt] by compensating them greatly if KKL took over, and that the Trustees wished to put a contract in place. This was followed by a reference to “5yr service contract”, with an arrow and then the word “compensate”. Thus far, as Mr Naftalin explained, the note evidently records what he was told by Mr Winters. The remainder of the note then indicates the initial advice which he gave, with references to “penalty clause”, “CC [i.e. Charity Commission] guidance”, and “Good corporate governance”.
78. In my judgment this contemporary note makes it abundantly clear that the suggestion made by the Trustees, probably at the request of Mr Winters and Mr Bratt, was that they should be given five year service contracts, with a view to entitling them to very substantial compensation should their contracts be terminated following a victory by KKL in the litigation. I am unable to accept Mr Winters’ evidence that he said nothing about a five year term, and am driven to conclude that here at least he was not being frank with the court. It was suggested to Mr Naftalin in cross examination that there might have been some misunderstanding, and that possibly the suggestion of a five year term had emanated from Mr Bratt rather than Mr Winters. Mr Naftalin was confident that he had not misunderstood the position, and in my view he was right when he said in answer to one question:
- “I have not one element of doubt in my mind that the sole purpose of the conversation was to discuss whether we could increase the term of [Mr Winters’] contract to 5 years.”
79. The request was a discreditable one, coming from the Chief Executive of a major charity, and it is perhaps unsurprising that Mr Winters should now seek to disown it, even though it had the initial support of the Trustees. I am, however, satisfied that when Mrs Seal asked Mr Winters and Mr Bratt to discuss the matter with Mishcons, she intended them to do so on behalf of the JNF, with a view to finding out whether the proposal was acceptable from a legal point of view. I am unable to accept Mr Winters’ evidence that he was told to seek independent advice, and I find it significant that the entry on Mr Naftalin’s time sheet refers to “advice to JNF”. Here too I am regretfully driven to conclude that Mr Winters has not told the truth to the court.

## Discussion

80. I have found that Mishcons acted for Mr Winters in his personal capacity for two brief periods only, the first in March/April 2006 in connection with the action taken to discover the identity of Anthony Jacobs, and the second beginning in late July 2006 and continuing for a month or two thereafter in connection with the first proposed libel proceedings. Each retainer was closely linked with a contemporary retainer of Mishcons by the JNF, in circumstances where there was no perception on either side of any conflict of interest between the JNF and Mr Winters. Mr Winters accepted that the first retainer was a joint one. The second retainer was in my judgment a separate one, but so closely linked with the retainer of Mishcons by the JNF relating to the ongoing litigation with KKL and the troubled affairs of the Glasgow branch of the JNF that no question of privilege or confidence as between Mr Winters and the JNF could reasonably have been seen as arising at that stage, at any rate in relation to matters of common interest to Mr Winters and the JNF.

81. It is in my judgment clear that in circumstances where there is a joint retainer, or where the same solicitors act for two clients in related matters in which they have a common interest, neither client can claim legal professional privilege against the other in relation to documents which come into existence, or communications which pass between them and the solicitors, within the scope of the joint retainer or matter of common interest concerned. The principle was stated as follows by Bridge LJ. in CIA Barka de Panama SA -v- George Wimpey & Co Limited [1980] 1 Lloyd's Rep 598 at 615:

“As regards the claim for legal professional privilege, it seems to me that the general principle underlying several authorities to which our attention has been called by Mr Lincoln, can be accurately stated in quite broad terms, and I would put it in this way. If A and B have a common interest in litigation against C and if at that point there is no dispute between A and B then if subsequently A and B fall out and litigate between themselves and the litigation against C is relevant to the disputes between A and B then in the litigation between A and B neither A nor B can claim legal professional privilege for documents which came into existence in relation to the earlier litigation against C.”

I should add that only documents were in issue in that case, but the same principle must apply to communications of all kinds passing between A and B and their lawyers.

82. It is not suggested that Mr Winters imparted to Mishcons any information which he now wishes to keep confidential from the JNF in the course of the first retainer which I have identified. The information which he wishes to protect, and to prevent the JNF from using against him in the forthcoming employment proceedings, is the information described in his confidential third statement. I have found, albeit with some hesitation, that Mr Winters did impart this information to Dr Julius on or around 31 July 2006: see paragraph 63 above. However, I have also found that no reasonable expectation of confidence arose in respect of that information as between Mr Winters and the JNF, for whom Dr Julius was also acting at the same time. This

principle was indeed recognised by Mr Winters himself in an important passage in his cross-examination, when he was asked about one of the matters described in his third statement which he said he had disclosed to Dr Julius in the context of the Charity Commission investigation, as well as in the context of the first proposed libel proceedings. It was of course Mr Winters' case that Dr Julius was also acting for him personally at the time of the Charity Commission investigation, under a joint retainer; so from his point of view the position was not materially different from the earlier occasion when he had first given the information to Dr Julius. The cross-examination then proceeded as follows:

“Q. So, during the time that Dr Julius was acting in relation to the Charity Commissioners, you passed on to him some of the material which you now identify as confidential?”

A. I think I may have repeated it.

Q. Right. Again, don't tell me what it is, but is it one of the matters which are included in your third witness statement?

A. Yes.

...

Q. ...Now, you knew, did you not, at the time that Mishcons were acting in relation to the Charity Commissioners that they were acting both on your behalf and on behalf of JNF, as you saw it?

A. Yes.

Q. And you therefore realised, did you not, that anything which you were saying to Dr Julius was a matter which was not confidential between yourself and JNF, because you were both his clients, as you saw it, and he had a duty to protect their interest? Do you agree?

A. Yes.”

83. Mr Winters went on to say that he also felt that Dr Julius was looking out for his interests, but agreed that he never imparted any information to Dr Julius on the express footing that it was to be confidential between him and Dr Julius and was not to go back to the JNF. He also agreed that he would have expected Dr Julius to tell him to seek separate advice if Dr Julius felt that the information was something which might give rise to a conflict of interest between him and the JNF. The examination then continued:

“Q. You told him these things believing that they were matters which would not harm you with JNF and

which, if necessary, could be passed on to JNF without damage to yourself. That's right, isn't it?

A. Yes.

Q. You would have expected him to understand those matters in exactly the same way?

A. Yes.

Q. That is to say: Don't pass them on unless it's relevant because it's confidential and embarrassing, but to the extent you feel you need to, then of course you must.

A. I think that's what was in my mind at the time, yes."

84. Since I have found that Mishcons were acting for the JNF alone during the Charity Commission investigation, no question of confidence as between Mr Winters and the JNF could have arisen in respect of the information which he gave to Dr Julius in the course of and for the purposes of that investigation. However, the principles which Mr Winters accepted in the passages from his cross-examination which I have quoted do in my judgment apply to the earlier occasion when Dr Julius was, as I have found, also acting for him personally and he disclosed the material referred to in his third statement.

85. The primary argument advanced before me by counsel for Mr Winters was based on alleged misuse of confidential information, and the principles enunciated by the House of Lords in Bolkiah -v- KPMG [1999] 2 AC 222. The facts of the Bolkiah case are well known. KPMG had acted as the auditors of the Brunei Investment Agency ("the BIA") since its establishment in 1983. The function of the BIA was to hold and manage the general reserve fund and the external assets of the Government of Brunei. In 1996 Prince Jeffrey Bolkiah, who was then the Chairman of the BIA, was involved in major litigation relating to his financial affairs and he retained KPMG to provide forensic accounting services and litigation support. In the course of that work KPMG performed many tasks of a kind usually undertaken by solicitors, and were given access to highly confidential information concerning the extent and location of Prince Jeffrey's assets. The litigation was settled in March 1998, and thereafter KPMG undertook no further work for Prince Jeffrey, who ceased to be their client. At about the same time, he was removed from his position as Chairman of the BIA. In June 1998 the Government of Brunei appointed a finance task force to conduct an investigation into the activities of the BIA during the period when Prince Jeffrey had been its Chairman. The BIA retained KPMG to investigate the whereabouts of certain assets which were suggested to have been used by Prince Jeffrey for his own benefit. They took steps to protect his confidentiality by ensuring that there was no overlap between the personnel who had worked for Prince Jeffrey in the past, and those who were now engaged in investigating his conduct, and appropriate "Chinese walls" were erected within the firm. Against this background, Pumfrey J. granted an injunction restraining KPMG from continuing to act for the BIA, on the basis that although KPMG had an honest intention not to disclose confidential information, the barriers which they had established were inadequate to deal with the problems of inadvertent disclosure. The Court of Appeal disagreed and

discharged the injunction, but the House of Lords unanimously restored the decision of Pumfrey J.

86. The leading speech was delivered by Lord Millett, and his discussion of the law begins at page 233H. He referred to the decision of the Court of Appeal in Rakusen – v- Ellis, Munday & Clarke [1912] 1 Ch. 831 as being authority for two propositions: first, there is no absolute rule of law in England that a solicitor may not act in litigation against a former client; but secondly, the solicitor may be restrained from acting if such a restriction is necessary to avoid a significant risk of the disclosure or misuse of confidential information belonging to the former client. The Bolkiah case was of course concerned with the duties of an accountant, not a solicitor; but it was common ground that an accountant who provides litigation support services of the kind which KPMG provided to Prince Jeffrey must be treated in the same way as a solicitor: see 234B-D. Lord Millett then went on to consider the basis of the jurisdiction, and affirmed that where the court is being asked to intervene on behalf of a former client, “the court’s intervention is founded not on the avoidance of any perception of possible impropriety but on the protection of confidential information” (234G). Lord Millett then explained that the position is different where the court’s intervention is sought by an existing client, because a fiduciary (such as a solicitor) cannot act at the same time both for and against the same client, and his firm is in no better position. The disqualification in such a case has nothing to do with the confidentiality of client information, but is based “on the inescapable conflict of interest which is inherent in the situation” (235A).

87. Lord Millett then continued as follows at 235C:

“Where the court’s intervention is sought by a former client, however, the position is entirely different. The court’s jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.

Accordingly, it is incumbent on a plaintiff who seeks to restrain his former solicitor from acting in a matter for another client to establish (i) that the solicitor is in possession of information which is confidential to him and to the disclosure of which he has not consented and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own. Although the burden of proof is on the plaintiff, it is not a heavy one. The former may readily be inferred; the latter will often be obvious. I do not think that it is necessary to introduce any presumptions, rebuttable or otherwise, in relation to these two matters. But given the basis on which the jurisdiction is exercised, there is no cause to impute or attribute the knowledge of one partner to

his fellow partners. Whether a particular individual is in possession of confidential information is a question of fact which must be proved or inferred from the circumstances of the case.”

88. In the light of this statement of the law, Mr Alistair Wilson QC for Mr Winters rightly accepted that it is an essential precursor to invoking the Bolkiah jurisdiction to establish that Mishcons were in possession of information which was confidential to Mr Winters and to the disclosure of which Mr Winters had not consented. However, in view of the findings of fact which I have made it is clear, to my mind, that Mr Winters’ case breaks down at this preliminary stage. The information which he disclosed to Dr Julius in July 2006 was not confidential as between himself and the JNF, although it was no doubt confidential as against the rest of the world. In the absence of any confidentiality attaching to the information as between Mr Winters and the JNF, he cannot now invoke the Bolkiah principle in order to prevent Mishcons from acting against him. There is no general principle which prevents a solicitor from acting against a former client after the relationship between them has terminated. As Lord Millett said at 235C, the “only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence”.
89. Counsel for Mr Winters sought to circumvent the problem that there was no confidence as between him and the JNF in two ways. First, it was argued that no reliance could be placed upon Mr Winters’ position as Chief Executive of the JNF as imposing upon him an obligation to disclose the relevant information to the JNF in any case. An equivalent point was taken by KPMG in the Bolkiah case, and was dismissed by the House of Lords on the ground that it was premature to take the point at that stage in the proceedings: see the speech of Lord Millett at 239E-G. Secondly, it was argued that no reliance could be placed on the principle that there can be no confidence as between joint clients of the same solicitors, because at the time when the relevant information was disclosed to Dr Julius by Mr Winters, Mishcons were acting for him alone, and the JNF had decided against taking libel proceedings itself. Furthermore, even if the disclosure was made at a time when Mishcons were acting for the parties jointly, they should have appreciated the possibility of a conflict of interest between Mr Winters and the JNF, and advised him to seek separate legal representation before taking detailed instructions from him. In particular, it was argued that Dr Julius should have given this advice to Mr Winters before asking him whether he had any skeletons in his cupboard. Because no such warning was given, it is now too late to speculate what Mr Winters would have decided to do had he been so warned, and the only way to protect him now against the disclosure of the information to the JNF (assuming it has not already occurred) is for Mishcons to cease to act for the JNF.
90. In my judgment there is no substance to these arguments. With regard to the first argument, the facts are entirely different from those of the Bolkiah case. In the present case, there is no dispute that Mr Winters was the Chief Executive of the JNF at the material time, and he knew that Mishcons were acting for the JNF. Furthermore, he accepted in cross-examination, as I have already explained, that Dr Julius would in certain circumstances be bound to disclose to the JNF the information which he disclosed to him. In Bolkiah, on the other hand, the question whether Prince

Jeffrey was liable to account to the BIA and to provide them with the information which they were seeking had yet to be considered, and the answer to it was not obvious. As Lord Millett said at 239F: “This may or may not be true, for the information which the BIA is seeking to obtain would appear to go far beyond what a recipient of proper payments would be bound to disclose”.

91. With regard to the second argument, it is true that the JNF had decided against taking libel proceedings itself, but the situation is not one where Mishcons were acting for Mr Winters alone at the time when the allegedly confidential information was disclosed. As I have found, Mishcons were also acting at the same time for the JNF in relation to the closely related matter of how to deal with the dissension in the Glasgow Committee, and Dr Julius was, as Mr Winters well knew, advising on the letters to be sent to the Committee by Mrs Seal at the very same time as he was reviewing the draft letters to be sent by Mr Winters. Furthermore, I regard the suggestion that Dr Julius should have advised Mr Winters to seek separate representation before asking him whether he had any skeletons in his cupboard as wholly unrealistic. As Dr Julius explained in cross examination, the possibility of a conflict of interest arising between Mr Winters and the JNF was at that stage a remote one, particularly as Mr Winters’ conduct had been examined by Lee & Allen and he had been exonerated by the Trustees. The settlement of the KKL litigation still lay well in the future, and there was no reason to suppose that Mr Winters’ tenure as Chief Executive of the JNF was in any way precarious. To say that Dr Julius should not have acted for him merely because a time might come when his interests would diverge from those of the JNF is in my judgment like saying that a solicitor should not act for a happily married husband and wife merely because a time may come when the marriage breaks down and they divorce.
92. Since Mr Winters’ case based on misuse of confidential information falls at the first hurdle, it is unnecessary for me to go on to consider whether the other requirements which would entitle the court to intervene are also satisfied. I can also deal very briefly with two alternative arguments which were advanced on Mr Winters’ behalf.
93. The first argument was that the court should intervene in exercise of its common law power to supervise the conduct of solicitors. It was submitted that this power is well-established, and that Lord Millett cannot possibly have meant to sweep it aside, or leave no scope for its operation, when he said that the “only duty” owed by a solicitor to a former client is a duty to preserve confidential information. The submission was buttressed by reference to a valuable discussion of the subject by Charles Hollander QC and Simon Salzedo in the third edition (2008) of their book “Conflicts of Interest” and the Australian and New Zealand authorities therein referred to, including in particular the decision of the New Zealand High Court in Raats v Gascoigne Wicks [2006] NZHC 598. The general conclusion of the learned authors, following their review of the relevant material, is that there may be scope for the court to exercise its traditional jurisdiction over the conduct of solicitors in certain cases which are not covered by the Bolkiah principle, and that one of the types of case in which it may be appropriate for the court to intervene is where a solicitor seeks to act for one of two former joint clients against the other. Such cases are likely to be exceptional, but Commonwealth jurisprudence recognises the existence of such a jurisdiction “and gives effect to it where the fair-minded observer would think that the administration of justice required the solicitor not to act” (paragraph 5-018 on page 99).

94. I am prepared to assume, without deciding, that there may be rare circumstances in which the court will intervene, in exercise of its general jurisdiction over solicitors as officers of the court, notwithstanding that there is no risk of misuse of confidential information. However, the facts of the present case seem to me far removed from a situation where it would be appropriate for the court to exercise any such jurisdiction. The employment dispute between the JNF and Mr Winters has nothing in common with the two matters in which Mishcons briefly acted for Mr Winters, and is much more closely akin to the investigation of Mr Winters' conduct by Lee & Allen, when Mishcons were acting for the JNF alone. The present case is therefore not one in which Mishcons have "changed sides" in any objectionable sense, and in the absence of any risk of misuse of confidential information I can see no good reason why Mishcons should now be prevented from acting for the JNF in relation to the employment dispute. There is a public interest in clients being able to retain the solicitors of their choice, and they should only be prevented from doing so on solid grounds. This public interest was recognised by Neuberger J, as he then was, in Halewood International Ltd v Addleshaw Booth & Co [2000] 1 PNLR 298 at 301. The Court of Appeal has also emphasised the need for the court to be satisfied that there is a real risk of disclosure of confidential information, and not merely a fanciful or theoretical one, in cases where the Bolkiah principle is invoked: see Koch Shipping Inc v Richards Butler [2002] 1 PNLR 603. The need for a relatively robust and commonsense approach is in my judgment even more necessary if the case is one which is not covered by the Bolkiah principle. The English rules of professional conduct for solicitors do not prevent a solicitor from acting against a former client in a situation where the solicitor's duty of confidentiality to the former client is not put at risk: compare rule 3.03 of the Solicitors' Code of Conduct 2007. The English rules appear to be less stringent in this respect than those in New Zealand which were considered by the High Court in the case of Raats, and in my view an English court should be very slow to intervene to prevent a solicitor from acting in circumstances where he is not prevented from doing so by the Code of Conduct.
95. The final argument advanced on behalf of Mr Winters was to the effect that Mishcons were acting in breach of the rules of professional conduct which were in force when they acted for Mr Winters, and such breach not only exposes them to possible disciplinary proceedings before the Solicitors' Disciplinary Tribunal but is also actionable at the suit of the client. Accordingly, so the argument runs, the court can intervene at the suit of the client to prevent the solicitor from taking advantage of the breach. This argument was only faintly advanced by counsel for Mr Winters, and I have no hesitation in rejecting it. There is no authority to support the argument that a breach of the professional conduct rules by a solicitor gives rise to a private law right enforceable by the client, whereas there are long-established disciplinary procedures for dealing with solicitors who fail to comply with the rules. The rules made by the Law Society acting in its public capacity take effect as a form of delegated legislation: see Swain v The Law Society [1983] AC 598 at 608 per Lord Diplock. It is therefore a question of construction whether they create rights in private law which are enforceable at the suit of a client. In the absence of any authority on the point, I would be reluctant to hold that any such private law rights are created. However, it is unnecessary for me to express a concluded view on the question, and I prefer not to do so, because Mr Winters has failed to persuade me that Mishcons breached the rules in any relevant respect when they acted for him on the two brief occasions which I have identified. In particular, I do not consider that there was at those times any

significant risk that the duties owed by Mishcons to Mr Winters might conflict with the duties which they owed to the JNF: see rule 3.01(2)(a) of the Solicitors' Code of Conduct 2007, which re-enacted similar provisions which had been in force since 2004.

**Conclusion**

96. For the reasons which I have given, this action must in my judgment be dismissed.