Neutral Citation Number: [2023] EWHC 398 (Comm)

Case No: CL-2021-000405

IN THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/23

Before :

THE HON MR JUSTICE ROBIN KNOWLES CBE

- -

Between :

COMMISSION RECOVERY LIMITED

Claimant

- and -
(1) MARKS & CLERK LLP
(2) LONG ACRE RENEWALS (A Firm)

Defendants

- -
- -

John Machell KC and Russell Hopkins (instructed by **Clifford Chance LLP**) for the **Defendants**
Nico Leslie (instructed by **Signature Litigation LLP**) for the **Claimant**

Hearing dates: 3, 4 and 5 May 2022

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JUDGMENT

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 24 March 2023 at 10:30am.

Mr Justice Robin Knowles CBE:

Introduction

1. This is the Court's judgment on the Defendants' application to strike out the claim and for a direction that the Claimant, Commission Recovery Limited, may not act as a representative of others.

2. There are other applications but the parties have agreed that those be stood over until after this judgment. It is agreed that I should treat the statements of case as including currently proposed amendments.

3. The First Defendant, Marks & Clerk LLP, was incorporated on 19 February 2009. It operates as a firm of patent and trademark attorneys and is the successor to the business of a partnership named Marks & Clerk. Its primary business relates to the preparation, filing and prosecution of applications for patents, trademarks and designs. It also provides related advisory services.

4. On the evidence before the Court, it is common for the holders of registered intellectual property (IP) rights to have to pay renewal fees in the jurisdictions in which the rights are registered.

5. Assistance with renewals has been termed renewal services in these proceedings. Unless specifically agreed with a client, the First Defendant does not itself provide renewal services to its clients. Instead, its practice has been to pass information about the relevant client and upcoming renewal to a particular renewal service provider, CPA Global Limited ("CPA").

6. CPA then contacts the client of the First Defendant and the client may decide to retain CPA to provide renewal services. CPA pays commission to the Second Defendant, a firm by the name Long Acre Renewals, based on the fees it receives from those clients of the First Defendant who do retain CPA to provide renewal services. The Second Defendant is associated with the First Defendant. The Claimant describes it as a partnership established by partners and ex-partners of the First Defendant.

7. This practice, with the commission arrangements, is alleged by the Claimant (Commission Recovery Limited), to have been undisclosed to the clients concerned.

8. The Defendants suggest that in some cases information may have been provided informally, but there is at present little evidence and one example to support this position. Claims are alleged to be available to the clients of the First Defendant as a result. These have more recently been focussed on recovering the amount of the commissions. Declaratory relief is among the forms of relief sought.

9. The Claimant was not a client. Its sole director and shareholder is a Mr Rouse. Mr Rouse is a solicitor (non-practising) and is also the sole director and shareholder of Patent Annuity Costs Limited ("PACL"). PACL was incorporated in 2015 to advise holders of IP rights about alternative providers of renewal services. The Claimant itself

was incorporated on 22 January 2019. It claims to have two capacities in these proceedings.

10. The first capacity is as the assignee of claims against the Defendants of one of the clients of the First Defendant. The relevant client, now dissolved, was named Bambach Saddle Seat (Europe) Limited ("Bambach Europe").

11. The second capacity is as a representative under CPR Rule 19 of current and former clients of the First Defendant who have commission-related claims against the First or Second Defendants. There may be a large number of these. The commissions involved may range from 12% to 60% and total some tens of millions of pounds. As things stand the representation is proposed by the Claimant to continue on an "opt out" basis.

12. The above is a summary but appears to represent the essential pattern relevant to the present application. There may be some difference, including over time, from client to client or renewal to renewal and this will need to be considered.

Definitions

13. The period the subject of the proceedings is defined, and that definition of period is explained as follows in the Particulars of Claim in proposed amended form:

> "As for the temporal delimitation of the class by reference to 14 March 2009 and 1 February 2018, this is applied on account of (i) the alleged transfer to [the First Defendant] of the business of its predecessor firm on the former date, and (ii) changes in [the First Defendant's] terms and conditions that were made on or after 1 February 2018."

14. The Claimant continues:

> "The Claimant makes no admissions as to the relevance of the alleged transfer or of those changes and reserves the right to bring claims in respect of payments made on or before 14 March 2009, or on or after 1 February 2018. In the meantime, and pending disclosure, the Claimant infers that the commission arrangement which is the subject of the present proceedings existed before 31 January 2006 and/or 14 March 2009 on the same or substantially the same terms as the arrangement described below."

15. The "class" definition currently formulated by the Claimant is as follows, in proposed amended Particulars of Claim:

> "For the avoidance of doubt, the relevant class of affected clients comprises all current and former clients of [the First Defendant]: (i) that had a direct contractual relationship with [the First Defendant]; (ii) that were subject to [the First Defendant's] standard terms of business ("ToBs") from time to time; and (iii) in respect of the renewal of whose IP rights CPA made payments to [the First Defendant] and/or [the Second Defendant] after 14 March 2009 and prior to 1 February 2018. For the avoidance of doubt, the class includes current or former clients in respect of which such payments were made before 14 March

> 2009 and/or after 1 February 2018 (although by these Amended Particulars of Claim the Claimant only claims in respect of payments made between that those dates). The Claimant reserves the right to expand the relevant class pending disclosure and/or further particulars."

16. According to the Claimant, the class members are largely small or medium-sized businesses. According to the Defendants there are significantly larger businesses too.

Terms of Business

17. Written Terms of Business were provided by the First Defendant to its clients. Over the period of 2009 to 2015 the Terms were amended from time to time but on the Claimant's case they remained materially identical.

18. For present purposes I can adopt with thanks this summary by Mr Nico Leslie for the Claimant:

> "Pursuant to Clause 2.2, [the First Defendant] undertook to practice competently, conscientiously, and objectively, to put the client's interests foremost and to avoid conflicts of interest.
>
> Pursuant to Clause 4.1, [the First Defendant] notified its clients that it might be necessary to instruct third parties to act on their behalf (and if so then [the First Defendant] would do so), and at Clause 4.2 stated that it endeavoured to select third parties whose performance and expertise [the First Defendant] regarded as being of good quality.
>
> Pursuant to Clause 4.3, [the First Defendant] stated that its 'Services' did not extend to issuing reminders for and processing the renewals of any of the clients' IP rights, absent contrary agreement. However, its "standard practice is to pass details of all cases we handle requiring such renewal agents" and the [Terms of Business] granted [the First Defendant] an authority by which the client agreed in each case to authorise [the First Defendant] to instruct [CPA] to remind the registered proprietors concerned or their appointed representatives of due dates for payment of renewal fees." That authority was provided under the general rubric "Instruction of Third Parties to Act on Your Behalf.""

19. On 1 February 2018, the First Defendant introduced a new set of Terms of Business. At Clause 4.4 these did disclose that CPA paid a "client management fee" on "all renewals work that we refer to them". The "fee" was for "Services" provided in relation to the transfer of data to CPA and there was provision for the clients to consent to the "fee".

Bambach Europe

20. I should record that the Defendants emphasise their case that Bambach Europe was not, in fact, referred to CPA by the First Defendant contrary to the Particulars of Claim as originally pleaded.

21. The full ramifications of this are not clear, for there remain the facts on the Claimant's case that the involvement of the First Defendant with CPA and the receipt of commission by LAR from CPA were not disclosed. The Claimant also has an assignment from another client, Fire Angel, to use if Bambach Europe has no claim.

Secret or undisclosed commissions

22. In the recent decision of the Court of Appeal in *Wood v Commercial First Business* [2021] EWCA Civ 471, a number of passages in the judgment of David Richards LJ (with whom Males and Elizabeth Laing LJJ agreed) provide a valuable summary, with reference to authority and sufficient for present purposes, of the law in relation to secret or undisclosed commissions. The summary can be taken from this starting point:

> " 42. … Romer LJ said in *Hovenden & Sons v Millhof* (1900) 83 LT 41, [1900-03] All ER Rep 846:
>
> > "… It may, therefore, be well to point out what is a bribe in the eyes of the law. Without attempting an exhaustive definition, I may say that the following is one statement of what constitutes a bribe. If a gift be made to a confidential agent with the view of inducing the agent to act in favour of the donor in relation to transactions between the donor and the agent's principal and that gift is secret as between the donor and the agent – that is to say, without the knowledge and consent of the principal – then the gift is a bribe in the view of the law."
>
> 43. This passage makes clear that the meaning of bribe, for the purposes of civil remedies, extends well beyond its popular connotation of a corrupt payment, to include any payment or gift made as an inducement to an "agent" and not disclosed to the "principal". Romer LJ goes on to set out special rules that apply to such payments, two of which are of general application. First, the court does not inquire into the payer's motives in making the payment or allow evidence to be given as to motive. Second, the court will presume in favour of the principal and against the payer and the agent that the agent was influenced by the payment, and this presumption is irrebuttable. These rules are applied by the law, Romer LJ said, "in the interests of morality with a view of discouraging the practice of bribery".
>
> 44. The vice involved in the payment of a bribe, for the purpose of civil remedies, is that it may induce the payee to depart, consciously or otherwise, from the duty he owes to another person.
>
> 45. The circumstances in which such a duty may be owed will vary greatly. Some may involve persons who clearly owe fiduciary duties in any event, such as trustees, directors or employees. At perhaps the other extreme, a person may be retained for the purpose of giving a single piece of advice. In any of these cases, and in the many other cases that will arise somewhere between them, the person owing the duty is at risk of being suborned by a payment or offer from a third party as an inducement to favour the payer or others."

23. On the question whether the payee has to be in a pre-existing fiduciary relationship, David Richards LJ answered no, as follows:

> "47. The present cases do not involve relationships, such as trustee and beneficiary or director and company, which without more clearly qualify as fiduciary. They fall within a broad and common set of relationships which involve a contractual or other legal duty to provide information or advice or recommendations. The precise scope of the duties of the brokers in the present cases, as in all cases, will require examination by reference to the terms of their engagement.
>
> 48. To ask in cases of this kind whether there is a fiduciary relationship as a pre-condition for civil liability in respect of bribery or secret commissions is, in my judgment, an unnecessarily elaborate, and perhaps inaccurate, question. The question, I consider, is the altogether simpler one of whether the payee was under a duty to provide information, advice or recommendation on an impartial or disinterested basis. If the payee was under such a duty, the payment of bribes or secret commissions exposes the payer and the payee to the applicable civil remedies. No further enquiry as to the legal nature of their relationship is required.
>
> 49. This is not to say that, in the many cases in which a fiduciary relationship clearly exists, the remedies available cannot be analysed in terms of the consequences of a breach of fiduciary duty. If a fiduciary relationship exists, it is a breach of that duty for the fiduciary to accept a secret commission or the offer of a secret commission, and in such a case the payer or offeror will be procuring or assisting a breach of fiduciary duty. Both will be liable to a range of remedies: accounts of profits, compensation for loss and rescission of transactions.
>
> 50. While that applies in those cases where there is a fiduciary relationship, that is not the essential pre-condition, which in my judgment is the much simpler question posed above. Essentially, I consider that Mr Lord's second, alternative submission is correct. While it may sometimes be appropriate to describe a duty to give disinterested advice or information as "fiduciary", it is not necessary to do so. It is the content of the duty, not the label attached to it, that matters. This, as it appears to me, is in accordance with the authorities as well as with principle.
>
> 51. I should add that in most of the cases the law on bribery and secret commissions is referred to as applying to payments to "agents", whether or not they are said to owe fiduciary duties. As will appear, I doubt whether the law on bribery is restricted to an "agent" properly so called, by which I mean a person authorised or ostensibly authorised to act on behalf of another. It is enough, in my view, that the person who is offered or paid a secret commission is, as Christopher Clarke J put it in *Novoship (UK) Ltd v Mikhaylyuk [2012] EWHC 3586 (Comm) at [108],* "someone with a role in the decision-making process in relation to the transaction in question e.g. as agent, or otherwise someone who is in a position to influence or affect the decision taken by the principal."
>
> …
>
> 92. I conclude from … authorities [cited in the judgment] that the suggested requirement for a fiduciary relationship is no more than saying that, in the type of

case with which we are concerned, the payee of the bribe or secret commission must owe a duty to provide disinterested advice or recommendations or information. As I said earlier, it is the duty to be honest and impartial that matters.

…"

24. On remedies, David Richards LJ explained:

"94. … bribery is an actionable wrong at common law, as well as in equity, for which common law remedies, as well as equitable remedies, are available. The remedies include rescission of the transaction in connection with which the bribe or secret commission was paid. The payer of the bribe is rightly viewed not as an accessory but as a primary wrongdoer.

95. The remedies available were analysed by Lord Diplock, giving the judgment of the Privy Council, in *T. Mahesan S/O Thambiah v Malaysia Government Officers' Co-operative Housing Society Ltd* [1979] AC 374 (*Mahesan*). The appellant was a director and employee of the respondent housing society. He was paid a substantial bribe by the vendor of property sold to the society at a considerable overvalue. The society brought proceedings against the appellant for payment to it of the amount of the bribe and for damages equal to the amount of the overvalue. The Privy Council held that the society was not entitled to both remedies but had to elect between them before judgment was entered."

96. Lord Diplock traced the origins of the claim for recovery of a bribe from the payee to equity (although this has been questioned: see *Beatson: The Use and Abuse of Unjust Enrichment* (1991) at pp.222-23), but showed that by the late 19th century it was established that the bribe was recoverable at common law as money had and received, without the need to show any loss. The payee was also liable in tort for damages for the loss suffered by the claimant. The same remedies were available against the payer. The position, illustrated by decisions such as *Grant v Gold Exploration and Development Syndicate Ltd* and *Hovenden and Sons v Millhoff*, was summarised by Lord Diplock at p.383:

> "Upon analysis, what these rules really describe is the right of a plaintiff who has alternative remedies against the briber (1) to recover from him the amount of the bribe as money had and received, or (2) to recover, as damages for tort, the actual loss which he has sustained as a result of entering into the transaction in respect of which the bribe was given; but in accordance with the decision of the House of Lords in *United Australia Ltd. v Barclays Bank Ltd.* [1041] A.C. 1 he need not elect between these alternatives before the time has come for judgment to be entered in his favour in one or other of them.
>
> This extension to the briber of liability to account to the principal for the amount of the bribe as money had and received, whatever conceptual difficulties it may raise, is now and was by 1956 too well established in English law to be questioned. So both as against the briber and the agent bribed the principal has these alternative remedies: (1) for money had and received under which he can recover the amount of the bribe as money had

> and received or, (2) for damages for fraud, under which he can recover the amount of the actual loss sustained in consequence of his entering into the transaction in respect of which the bribe was given, but he cannot recover both."
>
> 97. The earlier authorities also established that where a party to a contract had paid a bribe or secret commission to the agent or advisor to the other party, the latter was entitled to rescission of the contract.
>
> 98. Rescission was then, and remains, a remedy available both at law and in equity.
> …
>
> …
>
> 101. … authorities [cited] demonstrate that the common law remedies of money had and received and damages are available against the third party payer of a bribe or secret commission, and that rescission of a transaction with the third party is available as of right, subject to making counter-restitution. None of this depends on establishing that the third party is an accessory to a breach of fiduciary duty by the payee."

25. David Richards LJ expressed his conclusion as follows:

> "102. My conclusion from this over-lengthy citation of authority is that, in cases such as the present where an "agent" providing advice, information or recommendations has received or been offered a bribe or secret commission, the question that the court should ask and focus on is: did the "agent" owe a duty to be impartial and to give disinterested advice, information or recommendations? If the answer is "yes", the remedies discussed above are available. Courts have, principally in recent cases, characterised this as a fiduciary duty of loyalty. While this may be accurate, it does not mean that in such cases courts need involve themselves in complex analyses of the nature of a fiduciary relationship or the duties which may be associated with a fiduciary relationship. It would be better to avoid doing so. It is enough just to ask the straightforward question stated above."

The application to strike out

26. The Defendants seek an order striking out the Particulars of Claim and dismissing the claim. They say first that the assignment from Bambach Europe to the Claimant is unlawful and invalid. It is said that it was an unlawful champertous assignment of a bare right to litigate. There is one other ground to strike out that I identify at the end of this section.

27. The assignment is in writing. The parties to the assignment recorded in the document the background to it in these terms at the time:

> "BACKGROUND (A) [Bambach Europe] retained [the First Defendant] to undertake professional services work for it, including the registration of certain IP rights.

> (B) [Bambach Europe] contracted with [CPA, among others] to undertake renewal work in relation to those IP rights.
>
> (C) [Bambach Europe] contracted with [CPA, among others] based upon the recommendation, or pursuant to the standard terms and conditions and/or standard working practice, of [the First Defendant] (the "Referral").
>
> (D) Investigations undertaken by [the Claimant] have revealed that, as a consequence of the Referral, payments were or may have been made by [CPA, among others] to [the First Defendant], alternatively to persons or entities associated with it, without [Bambach Europe's] knowledge or consent …. These commissions whose amounts, continuing nature and collection through hidden charges invoiced by [CPA, among others] were not made plain to [Bambach Europe] by [the First Defendant] or [CPA] (the "Undisclosed Commission").
>
> (E) [Bambach Europe] believes that: (a) it has unprosecuted legal claims in respect the Undisclosed Commission; (b) it would not be financially or commercially viable for [Bambach Europe] to pursue those legal claims alone; and (c) other parties are in the same position as [Bambach Europe].
>
> (F) [Bambach Europe] understands that [the Claimant] is investigating the legal viability of similar claims with a view to [the Claimant] also receiving them by way of assignment and prosecuting them in its own name for the benefit of other assignees.
>
> (G) [Bambach Europe] has therefore agreed to assign to [the Claimant] any and all legal claims and property rights it may have in, and in connection with, the Undisclosed Commission on the terms of this Agreement with effect from its date (the "Effective Date")."

28. Clause 1.1 defined "Claims" in these terms:

> "Claims means each and every claim or right arising out of or in any way connected to the Undisclosed Commission that [Bambach Europe], either directly or indirectly, may have or seek to assert against [the First Defendant], CPA, and/or any other person, including any and all statutory, legal or equitable cause or causes of action whether in England and Wales or any other jurisdiction that are, or may be, vested in [Bambach Europe], including but not limited to any claims that [Bambach Europe] has or may have against CPA in relation to charges levied by CPA to [Bambach Europe]."

29. Clause 2.1 provided for assignment in these terms:

> "With effect from the Effective Date, [Bambach Europe] unconditionally, irrevocably and absolutely assigns all of its rights, title, interest, and benefit in and to the Claims, and all interest due thereunder and to become due thereon, and costs which may be or become payable to [the Claimant] in respect of the recovery thereof and the right to commence, prosecute and settle proceedings in respect of the Claims in the name and sole discretion of [the Claimant]."

30. The assignment included these provisions under the heading "Conduct of the Claims":

> 3.1 [Bambach Europe] recognises that [the Claimant] requires total freedom to investigate and conduct the Claims as it sees fit and further recognises that there is a benefit to [Bambach Europe] in [the Claimant] doing so. Accordingly, [Bambach Europe] hereby: (a) gives authority for [the Claimant] to correspond and issue legal proceedings for the purpose of prosecuting and settling the Claims; (b) consents to [the First Defendant] disclosing to [the Claimant] and to the Court whatever confidential and privileged information and documents that it holds and may be requested by [the Claimant] in respect of [Bambach Europe] and its affairs; (c) consents to [the Claimant] using and disclosing such information and documents in any way it sees fit and appropriate for the purposes of advancing the Claims and/or seeking a recovery of the Undisclosed Commission; (d) consents to [the Claimant] disclosing the terms of this Agreement to [the First Defendant], CPA and to the Court if requested or ordered to do so; (e) acknowledges that neither [the Claimant], nor any legal or other professional advisers it retains, owe any duty to [Bambach Europe] and further acknowledges that a solicitor / client relationship does not exist between any solicitors instructed by [the Claimant] and [Bambach Europe]; and (f) agrees that common interest privilege exists between [Bambach Europe] and [the Claimant] and that [Bambach Europe] will not do anything that may waive, threaten or undermine that privilege (including responding to press enquiries or speaking to the press, without the express written consent of [the Claimant's] legal advisors) and will seek to uphold confidentiality in all communications between the Parties, including periodic updates pursuant to clause 4.2 below."

31. Under the heading "Ongoing updating and assistance", the assignment continued:

> "4.1 [Bambach Europe] shall take such action and provide such information or documentation as [the Claimant] may reasonably request to pursue or settle the Claims or to dispute, compromise or defend any claim, action or proceedings brought against [the Claimant] under or in connection with the Claims."

32. As regards proceeds, the assignment included these provisions:

> "4.3 [Bambach Europe] agrees and undertakes to [the Claimant] that any and all monies it shall receive directly from [the First Defendant] in respect of the Undisclosed Commission on or after the Effective Date shall be: (a) disclosed to [the Claimant] promptly and in any event no later than 14 days after receipt; (b) received solely for, and held on trust on behalf of, [the Claimant]; and (c) transferred to [the Claimant] promptly upon its request, following which it shall be distributed in accordance with the terms of clause 5.2 below."
>
> "Proceeds means the money payable to [Bambach Europe] in accordance with clause 5.2 below following any settlement or determination of any Claims."
>
> …
>
> "Distribution of the Proceeds
>
> 5.1 Subject to clause 5.2 below [Bambach Europe] acknowledges that it shall have no claim (proprietary, beneficial or otherwise) on any sums received by or payable to [the Claimant] as a consequence of the assignment or any other circumstances

> arising from [the Claimant's] exercise of the rights, title, interest and benefit in and to the Claims assigned by this Agreement. Any monies or other benefit recovered by [the Claimant] in respect of the Claims shall vest in [the Claimant] absolutely.
>
> 5.2 In the event of a settlement or determination of any Claims which results in [the Claimant] receiving monies from [the First Defendant], CPA and/or any third party, [the Claimant] will pay the Proceeds to [Bambach Europe], which shall be calculated as follows: (a) The total amount received from [the First Defendant], CPA and/or any third party shall be known as the "Gross Recovered Amount". (b) [The Claimant] shall deduct from the Gross Recovered Amount: (i) all legal and other expenses incurred by [the Claimant] in the investigation, prosecution and/or settlement of the Claims; (ii) any other third party liability incurred by [the Claimant] in the investigation, prosecution and/or settlement of the Claims (including but not limited to any amounts payable to third parties who have financed the costs incurred in investigating and/or prosecuting the Claims); and (iii) an amount equal to 15% of the Gross Recovered Amount, which [the Claimant] shall retain as remuneration for investigating, prosecuting and (as the case may be) settling the Claims, producing the "Net Recovered Amount". (c) The Net Recovered Amount shall be distributed to [Bambach Europe] proportionate to [Bambach Europe's]'s assigned Claims as against the value of other Claims assigned to [the Claimant] by other parties.
>
> 5.3 At any time, instead of participating in a distribution as envisaged by this clause 5, [Bambach Europe] can demand payment from [the Claimant] of £1."

33. It will be noted that on its terms the assignment passes the right to undisclosed commission (and other connected rights) to the Claimant outright. Bambach Europe receives in its place a contractual commitment from the Claimant to be paid a sum measured by reference to net recovery made by the Claimant from the assigned rights. The calculation of net recovery and the effect of the contractual commitment are designed to leave the Claimant with 15% of gross proceeds of recoveries made of undisclosed commission and from other connected rights.

34. In my view there is a short answer to the application order and the contention that the assignment from Bambach Europe to the Claimant is unlawful and invalid. The answer lies in recognising the nature of undisclosed or secret commissions, rather than dwelling on the several ways in which a claim may be framed to recover a commission or advanced as a result of its payment.

35. Undisclosed or secret commissions are, in the hands of the agent (here, the First Defendant) and as between the agent and the client, property. The client is entitled to say to the agent, and (where another is used to receive the commissions, to that other (here, the Second Defendant) 'that commission is mine not yours'. The assignment in the present case therefore includes (if the Claimant is right) an assignment of property. As we have seen from Wood (above) we are concerned with the common law and not simply with equity, but in equity, and consistently, the undisclosed or secret commission received by an agent is held by the agent on trust and the principal is not confined to a claim for equitable compensation: see FHR European Ventures LLP and others *v* Cedar Capital Partners LLC [2014] UKSC 45.

36. It was not in issue on the application before me that an assignment of property is not champertous (and thus is not unlawful and invalid for that reason). The assignment of a debt may be taken as an often encountered example. The authorities also show that the fact that there is a dispute as to whether the Claimant (acting bona fide) is correct (i.e. if there is a dispute that the client does have the property that is being assigned) does not affect the validity of the assignment in this context.

37. Ancillary or incidental rights of action may validly accompany an assignment of property. These include a claim for money had and received and for restitution, and may be used to recover the commission. These rights of action are not being assigned alone, so as to make the assignment an assignment of "bare rights to litigate". It would only be if they were, that the further requirement (identified in *Trendtex Trading Corpn v Credit Suisse* [1982] AC 679 at 703 per Lord Roskill) for the assignee to possess a "genuine commercial interest in the enforcement of the claim of another" would engage.

38. In these circumstances I am not prepared to strike out the claim as one based on an unlawful champertous assignment of a bare right to litigate.

39. I am not unhappy to reach the conclusion I have. I ask myself, in the present case, what purpose is served if the law treats this assignment as unlawful? In my view none. Notwithstanding, I respect the fact that different jurisdictions are at different points on this subject.

40. There is no material risk in the present context to the reputation of justice. Whatever the merits in the present case, in another they could be very compelling. If the law treated an assignment of this type as lawful there is no reason why the claim could not proceed in an organised, dignified, way. The Defendants are fully protected by the case management procedures available to the Court.

41. When asking why the position should be otherwise, it may also be relevant to keep in mind that in a case where the claim is practically all a particular client has, the Claimant could acquire its value by purchasing the (corporate) client. It could do the same by purchasing the client and selling its other assets. Either route would allow the very same claim to be advanced without challenge based on champerty.

42. It is not in the event necessary in the present case and on this aspect to consider whether wider access to justice considerations could or should be invoked. It was nonetheless valuable to be taken to some of the treatment in the authorities of those considerations. Mr Leslie here drew on the discussion in *Sibthorpe v Southwark LBC* [2011] 1 WLR 2111 at [34]-[41] per Lord Neuberger MR; *Casehub Ltd v Wolf Cola Ltd* [2017] EWHC 116 (Ch) at [28] per Stuart Isaacs QC; and *Farrar (Deceased) v Miller* [2021] EWHC 1950 (Ch) at [38] and following per Marcus Smith J; and on appeal [2022] EWCA Civ 295 at [29]-[35], [51]-53] per Arnold LJ.

43. The Defendants advance an additional ground for saying the Particulars of Claim should be struck out. They contend:

> "[the Particulars of Claim] do not purport to plead facts and matters that would constitute a cause of action on the part of each member of the purported class."

This ground, which among other things gives rise to the question of whether asserted deficiencies may be addressed by amendments, is best considered in light of a conclusion on the application under CPR 19.6 to which I now turn.

The application under CPR 19.6

44. CPR 19.6(1) provides:

> "(1) Where more than one person has the same interest in a claim – (a) the claim may be begun; or (b) the court may order that the claim be continued, by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest

45. By CPR 19.6(2) the court "may direct that a person may not act as a representative".

46. The Defendants seek a direction pursuant to CPR 19.6(2) that:

> "the Claimant may not act as representative pursuant to CPR 19.6(1) because: (a) the "same interest" requirement in CPR 19.6(1) is not satisfied for the reasons set out in paragraphs 33-35 of the Defence and Counterclaim; (b) alternatively, the Court should refuse to exercise its discretion to permit the Claimant to act as representative for the reasons set out in paragraph 36 of the Defence and Counterclaim."

47. The crucial recent treatment of the subject area, "the representative rule", by Lord Leggatt JSC in *Lloyd v Google* [2021] UKSC 50; [2022] AC 1217, includes passages that are particularly material in the present case. Lord Reed, Lady Arden, Lord Sales and Lord Burrows agreed with Lord Leggatt's opinion.

48. I have found it helpful to divide these passages into approach, jurisdiction and discretion, although each informs the other.

Approach

49. On approach, Lord Leggatt JSC said:

> "68. I agree with the highest courts of Australia, Canada and New Zealand that, while a detailed legislative framework would be preferable, its absence (outside the field of competition law) in this country is no reason to decline to apply, or to interpret restrictively, the representative rule which has long existed (and has had a legislative basis since 1873). I also agree with the view expressed in *Carnie* that the very simplicity of the representative rule is in some respects a strength, allowing it to be treated as "a flexible tool of convenience in the administration of justice" and "applied to the exigencies of modern life as occasion requires".
>
> …

> 71. The phrase "the same interest", as it is used in the representative rule, needs to be interpreted purposively in light of the overriding objective of the civil procedure rules and the rationale for the representative procedure. The premise for a representative action is that claims are capable of being brought by (or against) a number of people which raise a common issue (or issues): hence the potential and motivation for a judgment which binds them all."

Jurisdiction

50. On jurisdiction, Lord Leggatt JSC said:

> "69. … Only one condition must be satisfied before a representative claim may be begun or allowed to continue: that is, that the representative has "the same interest" in the claim as the person(s) represented.
>
> …
>
> 71. … The purpose of requiring the representative to have "the same interest" in the claim as the persons represented is to ensure that the representative can be relied on to conduct the litigation in a way which will effectively promote and protect the interests of all the members of the represented class. That plainly is not possible where there is a conflict of interest between class members, in that an argument which would advance the cause of some would prejudice the position of others. *Markt* and *Emerald Supplies* are both examples of cases where it was found that the proposed representative action, as formulated, could not be maintained for this reason.
>
> 72. … So long as advancing the case of class members affected by the issue would not prejudice the position of others, there is no reason in principle why all should not be represented by the same person: see *Zuckerman on Civil Procedure: Principles of Practice*, 4th ed (2021), para 13.49. As Professor Zuckerman also points out, concerns which may once have existed about whether the representative party could be relied on to pursue vigorously lines of argument not directly applicable to their individual case are misplaced in the modern context, where the reality is that proceedings brought to seek collective redress are not normally conducted and controlled by the nominated representative, but rather are typically driven and funded by lawyers or commercial litigation funders with the representative party merely acting as a figurehead. In these circumstances, there is no reason why a representative party cannot properly represent the interests of all members of the class, provided there is no true conflict of interest between them."

51. Paragraphs 33 to 35 of the Defence and Counterclaim (relied on for this application: see paragraph 46 above) include many points. In the summary below I attempt to convey an overview:

    (1) The Claimant has not purported to plead facts and matters that would constitute a cause of action on the part of each and every member of the purported (amended)

class and (given the nature of the asserted claims) it cannot do so because it does not have the details and individualised enquiry would be needed.

(2) The class may include not only a person who holds or asserts a right but also a person related or connected to such a person. Some clients acted through intermediaries. Some may be subject to the First Defendant's standard terms, which would have been received on different dates. In these and other respects the definition "fails to address client-specific variations that arise in practice."

(3) The First Defendant did not take over all of the liabilities of Marks & Clerk (the partnership), and some members may be able to point to a referral by the First Defendant and others (including the Claimant) may not, with the result, it is suggested, that the members of the class will have conflicting interests depending on their individual circumstances.

(4) Claims may straddle the period before and after the dates chosen for the class and this might prevent some additional claims by some clients on the basis of *Henderson v Henderson* abuse of process.

(5) The claims or part of the claims of some clients might be statute barred, whereas the claims of some members of the class (whether as originally defined or as amended) are not. The Claimant intimated in pre-action correspondence it would resist a limitation defence on the basis of deliberate concealment under section 32 of the Limitation Act 1980, but this would require details of the knowledge of individual clients.

(6) The interests of clients may differ in relation to remedy: it might be in the interests of some clients to elect for an account (or to assert a proprietary remedy) and it might be in the interests of others to elect for damages (if they consider they have suffered loss in excess of the commission). The Claimant is not entitled to arrogate to itself the right to make that election. Nor is the Claimant entitled to arrogate to itself the right to limit its alternative claim to damages to the amount of the commission. A precise amount will have to be calculated for each client.

52. In argument Mr John Machell KC with Mr Russell Hopkins for the Defendants drew particular attention to three groups of points, emphasising that they overlapped.

53. First, he says that whilst the claims being advanced give rise to common issues they are not sufficiently similar; they do not arise from the same events at the same time; each claim is a separate one arising from a separate contract entered into with the First Defendant at different times. He suggests each claim would require details of the date and terms of the relationship with the First Defendant, the facts and matters giving rise to fiduciary duties and their content, the knowledge and expertise of the client, the introduction by the First Defendant of the client to CPA, the instruction by the client of CPA, and the relief sought by the client including quantum and particulars of loss, and the knowledge of the Second Defendant when receiving money.

54. Second, Mr Machell KC says that there are conflicts of interest between the Claimant and members of the class and as between the members of the class. Those identified are (a) that some clients might be in a position to rely on an introduction or referral by the Claimant to CPA whilst others (Bambach Europe being one) might not; (b) the claims

of some clients might fall part in and part outside the period of the claim and if represented in these proceedings may not be able (for reasons of estoppel or otherwise) to pursue the part that fell outside; (c) different clients if successful might make different elections as to remedy; (d) tracing remedies may differ where distributions have been made by the Second Defendant to its partners over the years; (e) differences between the interest of the Claimant, Mr Rouse or PACL on the one hand and the clients on the other over the consultancy fees and financial return for each.

55. Third, Mr Machell KC argues that the class is defined by reference to matters that are in issue and is conceptually and practically uncertain. It will involve the Court adjudicating on the meaning of "client" and "direct contractual relationship", establishing who was a client of the First Defendant rather than only of a predecessor partnership and who contracted on the First Defendant's Terms of Business, and deciding "in respect of the renewal of whose IP rights CPA made payments to" the Second Defendant and deciding to which rights it applied.

56. The points above from the statement of case and submissions on behalf of the Defendants are only a summary. It is a summary of a comprehensive attempt on the part of the Defendants to identify issues facing clients of the First Defendant, including differences, complexities and difficulties. But what matters is whether the "same interest" requirement is met, and in particular whether the points involve class members affected by an issue prejudicing the position of others. None do.

57. There are those points that go to current shortfall in information about clients, including, it is said, that which is pleaded. An exercise will lie ahead to improve available information about what commission was paid in respect of what client, and there may be amendments required, but that does not prejudice the interests of some clients at the expense of others. And this information will be available to the Defendants and not simply from the clients.

58. The dates of the contracts with the First Defendant and with CPA will differ, and amounts paid by and to CPA may differ, but these points do not affect suitability for representative proceedings and can be ascertained. It is clear enough that the class is only intended to comprise those to whom the commission was not disclosed, but there is an evidential basis for non disclosure being the starting position for the position of all clients concerned. Any to whom it was disclosed are not in a position of conflict with those to whom it was not disclosed.

59. Some of the points, including those just mentioned, may increase or reduce the eventual size of the class. This may affect the total liability of the Defendants if their defences fail. However, in the present case there is not a limit to that total liability (or the ability to meet it) such that the success or recovery by one client prejudices the interests of another.

60. The Defendants refer to limitation. Limitation is not part of the cause of action of a client. For some clients at least, even if one assumes any amendments by the Claimant do not relate back, an argument that there is a defence of limitation will not be available to the Defendants because of the chronology. The response advanced by the Claimant to any defence of limitation involves a substantial focus on the Defendants rather than the clients. In the context of section 32 of the Limitation Act 1980 the Claimant is able to focus on the question whether the Defendants realised throughout that there was "at

least a risk that they had a duty to tell" the client about the commission (*Canada Square Operations Ltd v Potter* [2021] EWCA Civ 339; [2022] QB 1 at [137] per Rose LJ. Further, on the face of it, and save where the Defendants can allege otherwise in relation to a client or clients, there was no disclosure until the 2018 Terms of Business at the earliest, even if the disclosure then was adequate.

61. I accept that there may well be some case management ahead in those situations where a limitation issue does arise, and there may even be some clients for whom a defence of limitation taken by the Defendants will in due course require individual arrangements outside CPR 19.6. But in the present case it is clear the limitation point does not prejudice the interests of some clients at the expense of others. Nor (in contrast with the position of damages claims in *Lloyd v Google*) does limitation make the present case one in which there will need to be individualised assessment of every represented person.

62. The Defendants identify points where, it is suggested, the proposed focus on the recovery of the commission rather than other remedies may deprive clients of other remedies. These too are points that need not prejudice the interests of some clients at the expense of others. They will require careful stewardship of the litigation by the Claimant and its lawyers, but in a context where there is no evidence that clients are in fact or need to be at odds. At the same time, Mr Leslie is here right to emphasise the flexibility of *Henderson* estoppel.

63. It will be necessary to place reliance on the Claimant as representative party and its lawyers to pursue vigorously lines of argument not directly applicable to the Claimant's individual case. That reliance is realistic in this case because properly pursued by the Claimant's legal team none of those lines is likely to involve a conflict of interest. In particular and in context a declaration of entitlement to one or more remedies, and especially to commission, is likely to assist all. This is clear today. Where necessary the subject of remedy can receive further particular attention at a later stage or at any dedicated remedies stage.

64. Standing back, the points include those that will require care but each is capable of resolution and none is fatal on jurisdiction. They will inform discretion, as will other material circumstances, but there is no absence of "same interest".

Discretion

65. On discretion, Lord Leggatt JSC said:

> "75. Where the same interest requirement is satisfied, the court has a discretion whether to allow a claim to proceed as a representative action. As with any power given to it by the Civil Procedure Rules, the court must in exercising its discretion seek to give effect to the overriding objective of dealing with cases justly and at proportionate cost: see CPR rule 1.2(a). Many of the considerations specifically included in that objective (see CPR rule 1.1(2)) - such as ensuring that the parties are on an equal footing, saving expense, dealing with the case in ways which are proportionate to the amount of money involved, ensuring that the case is dealt with expeditiously and fairly, and allotting to it an appropriate share of the court's

resources while taking into account the need to allot resources to other cases - are likely to militate in favour of allowing a claim, where practicable, to be continued as a representative action rather than leaving members of the class to pursue claims individually.

…

77. … It is, however, always open to the judge managing the case to impose a requirement to notify members of the class of the proceedings and establish a simple procedure for opting out of representation, if this is considered desirable. Equally, if there are circumstances which make it appropriate to limit the represented class to persons who have positively opted into the litigation, it is open to the judge to make this a condition of representation. The procedure is entirely flexible in these respects.

78. … while it is plainly desirable that the class of persons represented should be clearly defined, the adequacy of the definition is a matter which goes to the court's discretion in deciding whether it is just and convenient to allow the claim to be continued on a representative basis rather than being a precondition for the application of the rule. *Emerald Supplies* illustrates a general principle that membership of the class should not depend on the outcome of the litigation. Beyond that, whether or to what extent any practical difficulties in identifying the members of the class are material must depend on the nature and object of the proceedings.

…

80. … it is not a bar to a representative claim that each represented person has in law a separate cause of action nor that the relief claimed consists of or includes damages or some other monetary relief. The potential for claiming damages in a representative action is, however, limited by the nature of the remedy of damages at common law. What limits the scope for claiming damages in representative proceedings is the compensatory principle on which damages for a civil wrong are awarded with the object of putting the claimant - as an individual - in the same position, as best money can do it, as if the wrong had not occurred. In the ordinary course, this necessitates an individualised assessment which raises no common issue and cannot fairly or effectively be carried out without the participation in the proceedings of the individuals concerned. A representative action is therefore not a suitable vehicle for such an exercise.

81. In cases where damages would require individual assessment, there may nevertheless be advantages in terms of justice and efficiency in adopting a bifurcated process - as was done, for example, in the *Prudential* case - whereby common issues of law or fact are decided through a representative claim, leaving any issues which require individual determination - whether they relate to liability or the amount of damages - to be dealt with at a subsequent stage of the proceedings. In *Prudential* [1981] Ch 229, 255, Vinelott J expressed the view (obiter) that time would continue to run for the purpose of limitation until individual claims for damages were brought by the persons represented; see also the dicta of Fletcher Moulton LJ in *Markt* [1910] 2 KB 1021, 1042, referred to at

> para 44 above. The court in *Prudential* did not have cited to it, however, the decision of the Court of Appeal in *Moon v Atherton* [1972] 2 QB 435. In that case a represented person applied to be substituted for the named claimant after the limitation period had expired when the claimant (and all the other represented persons) no longer wished to continue the action. The Court of Appeal, in allowing the substitution, held that the defendant was not thereby deprived of a limitation defence, as for the purpose of limitation the represented person was already a party to the action, albeit not a "full" party. It might be clearer to say that, although the represented person did not become a "party" until substituted as the claimant, an action was brought within the meaning of the statute of limitation by that person when the representative claim was initiated. Such an analysis has been adopted in Australia, including by the New South Wales Court of Appeal in *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83; (2005) 63 NSWLR 203, and by the New Zealand Supreme Court in *Credit Suisse Private Equity v Houghton* [2014] NZSC 37.
>
> 82. There is no reason why damages or other monetary remedies cannot be claimed in a representative action if the entitlement can be calculated on a basis that is common to all the members of the class. Counsel for the claimant, Hugh Tomlinson QC, gave the example of a claim alleging that every member of the class was wrongly charged a fixed fee; another example might be a claim alleging that all the class members acquired the same product with the same defect which reduced its value by the same amount. In such cases the defendant's monetary liability could be determined as a common issue and no individualised assessment would be needed. The same is true where loss suffered by the class as a whole can be calculated without reference to the losses suffered by individual class members - as in the cases mentioned at para 53 above. Such an assessment of loss on a global basis is sometimes described as a "top down" approach, in contrast to a "bottom up" approach of assessing a sum which each member of the class is individually entitled to recover.
>
> 83. The recovery of money in a representative action on either basis may give rise to problems of distribution to the members of the class, about which the representative rule is silent. Although in *Independiente* Morritt V-C was untroubled by such problems, questions of considerable difficulty would arise if in the present case the claimant was awarded damages in a representative capacity with regard to how such damages should be distributed, including whether there would be any legal basis for paying part of the damages to the litigation funders without the consent of each individual entitled to them: see Mulheron R, "Creating and Distributing Common Funds under the English Representative Rule" (2021) King's Law Journal 1-33. Google has not relied on such difficulties as a reason for disallowing a representative action, however, and as these matters were only touched on in argument, I will say no more about them."

66. Paragraph 36 of the Defence and Counterclaim (relied on for this application: see paragraph 46 above) is in these terms:

> "36. Fourthly, in any event, the Court should exercise its discretion to direct that the Claimant may not act as a representative:

> 36.1 The Claimant has artificially and arbitrarily narrowed the purported (amended) class by: (1) self-selecting a first cut-off date of 14 March 2009; (2) self-selecting a second cut-off date of 1 February 2018; (3) confining the class to clients subject to [the First Defendant's] standard [Terms of Business]; (4) by excluding clients who retained [the First Defendant] through agents … and (5) by amending the basis on which the claim is advanced in an attempt to deal with the particular circumstances of Bambach Europe …. On the Claimant's pleaded case, these proceedings will not necessarily resolve all possible claims and leaves the Defendants with the possibility of being vexed with other similar claims.
>
> 36.2 The pursuit of this claim by the Claimant (and its funder) is commercially motivated and the claims arise in a commercial context in which the clients other than Bambach Europe and Fire Angel have intimated no desire to pursue claims, notwithstanding that they know about the payment of [commission] (either as a result of the amended [Terms of Business] or in any event).
>
> 36.3 The Claimant's sole director and shareholder, Peter Rouse, is also the sole director and shareholder of Patent Annuities Costs Limited (PACL), which seeks to act as a broker with other renewals services providers that compete with CPA. The Defendants understand that, pursuant to the assignment agreement between Fire Angel and the Claimant dated 21 September 2020, PACL has a further financial interest in the outcome of the Claimant's claim (15% of the "Net Recovered Amount" as defined therein) and PACL is to be remunerated by the litigation funder for unspecified consulting services provided to the Claimant.
>
> 36.4 If the Claimant were to be permitted to rely on CPR 19.6, [the First Defendant] may be required to disclose information that is confidential to its clients and former clients (other than Bambach Europe and/or Fire Angel), in respect of which the Claimant has no legitimate interest and in respect of which, as a result of his other commercial interests in IP renewals, Mr Rouse has a conflict of interest.

67. Let me review at least the more material of these points, and more importantly the position as a whole, and with the benefit of the argument I have read and heard.

68. The first thing to say is that it is not a requirement of the CPR 19.6 jurisdiction that these proceedings will "necessarily resolve all possible claims". In the present case the Claimant has sought to draw the definition as best as it is able in the circumstances known to it.

69. Subject to jurisdiction, if some can be assisted to access the court to establish whether the Defendants have their property or have not fulfilled their obligations to them then that is better than none. If the litigation leaves the Defendants with the possibility of being "vexed" with other similar claims, the Defendants can help mitigate that possibility by the provision of more information at this stage.

70. From the available evidence, it is not clear to me that, as asserted by the Defendants, the clients do "know about the payment of [commission] (either as a result of the amended [Terms of Business] or in any event)." I acknowledge that some may, but the Defendants are better placed to know which or to provide a channel of communication to find out which. Whatever its effect from its introduction, the reference to commission that started to be made when the Terms of Business were amended does not inform the

question of what knowledge there was before then or about the period before then. The Defendants provide little information at this stage on their reference to "in any event".

71. A claim for undisclosed or secret commission is perhaps a reasonable example of a claim where an "entitlement can be calculated on a basis that is common to all the members of the class". The fact that it appears the commission varied between clients does not deflect from that point. In any event there are still present at least some of the "advantages in terms of justice and efficiency" if "common issues of law or fact are decided through a representative claim, leaving [over] issues which require individual determination". The phrasing quoted in this paragraph are from Lord Leggatt JSC's opinion in *Lloyd v Google* at [81].

72. All that said, I can see that the clients of the First Defendant can be expected to include many who are experienced in making business decisions, including on whether and how to pursue a claim in the circumstances of this case. I am prepared to accept that they would see individual pursuit as unviable, but I can also see the possibility that some would not decide to pursue a claim in the particular circumstances of this case even if they could. I can also see the possibility that some would decide not to put their claim in the hands of the Claimant, or Mr Rouse (or with the involvement of services from PACL) and would choose to leave matters where they lie. The considerations for them would of course include the point that even if the litigation is successful there is no certainty over levels of net recovery (rather than levels of gross commissions).

73. On the question of the deduction of sums to reach net recovery, Mr Machell KC also raised the argument that the Court cannot absent legislative intervention direct that sums paid by a defendant in respect of a claim pursued by a representative on behalf of others are paid otherwise than to the person or persons whose cause of action have been established. This was an attempt to build on an aspect identified but not developed by Lord Leggatt JSC (see above at paragraph 65 quoting [81] in *Lloyd v Google*). As it is raised in the present case, I should say a little more, but not too much as the argument was limited and without full reference to authority. I confine myself to saying three things.

74. First, as between the Claimant and the Defendants, the argument is for the Claimant and its funders to worry about more than the Defendants. It does not increase the amount of any liability on the part of the Defendants. Second, the point does not arise for final consideration at this stage. In the present case it is likely to be at a later stage, perhaps as late as when and if the Court is dealing with remedy, that there may be greater visibility of clients and knowledge of their position (which can of course include agreement to what is paid to whom).

75. But third, even as things stand and subject to fuller argument, in my view the situation is one that the common law and equity can be expected to be able to resolve where necessary. I do not immediately see why the Court could not order the sums awarded to each of those represented to be paid into court or to a trustee. The Court might, having regard to the point that secret or undisclosed commission is property (see the treatment of assignment above), be asked to consider the exercise of a jurisdiction, perhaps of the type recognised in *Re Berkeley Applegate (Investment Consultants) Ltd* [1989] BCLC 28, or developed from it, to allow reasonable costs of the recovery achieved to be paid before disbursement to the members of the class. Other approaches and techniques may fall for consideration at the appropriate time.

76. I do consider that in the present case it is realistic, and appropriate, to accept the focus can be on the recovery of the commission rather than other remedies. I appreciate that other remedies could be claimed. And in other cases, questions of the suitability of the focus now adopted by the Claimant might be a greater concern. I have regard to the circumstances and conduct alleged to have been involved, the likely business circumstances of the clients, and the fact that the amount of the commission likely reflects the material part of the value of a claim if brought individually. Here as elsewhere, it is relevant to keep in mind that the true alternative would in practice likely be, not the advance of further remedies, but no claim at all.

77. In oral submissions, including in reply, there was greater emphasis from Mr Machell KC on the position in relation to the stage of disclosure of documents by the parties. The parties recognise that disclosure of documents from clients is not anticipated if the litigation is approached in the way the Claimant proposes. Mr Machell KC's position is however that this shows both unsuitability and unfairness in that approach. Each individual case of each individual client needs to be examined, he argues, and as a result litigation that will not have disclosure from all clients is unsuitable. But the answer is that where, as here, the focus is on undisclosed or secret commission there are limits to the need for disclosure from clients rather than from the Defendants. Mr Machell KC would urge that even then, knowledge and limitation are examples where individual scrutiny will be required. But even there, as we have seen, there are limits to the need for disclosure by clients. None of this is to rule out disclosure where it is needed. It is simply to recognise that the need for disclosure is not a decisive point in the present case.

78. Looking ahead, some information or choice from each client may be needed or highly desirable. Some of the information may be available from the Defendants and might be provided on terms, if that is suitable in the interests of the confidentiality of clients or if that is necessary to protect the proceedings from abuse.

79. But it is also possible that this litigation could break down if the clients were unresponsive at later stages and after much cost. That would do nothing for the reputation of litigation and would mean that the Court's resources had been wasted. The resources could have been considerable with a corresponding adverse impact on other users. The Overriding Objective requires these things to be taken into account.

80. Each case turns on its own facts and circumstances. The complexion could be different with different parties. For example, members of the public who were alleged to be victims of conduct that made it more obvious that they would all or almost all support the vigorous pursuit of remedy (with the limits of remedy that CPR 19.6 can support: see *Lloyd v Google*) and that collective proceedings, including "opt out" collective proceedings, were the sensible and appropriate course that could, if successful, make an important difference now or in the future to almost all, or to many who were in particular need. That example is on the claimant side. An example on the defendant side might include a case where the course being taken was oppressive.

81. Nonetheless, taking this present litigation as it stands (including the points raised by the Defendants under jurisdiction that also inform discretion), and focussed as it is on the recovery of undisclosed or secret commission rather than damages requiring individualised assessment, I have reached the decision, in the exercise of my discretion,

to allow the Claimant to represent the class, and to do so on the "opt out" basis proposed. If the choice is this or nothing, then better this.

82. Let me return to the point that it is the Defendants, not the Claimant, who know who the clients are. On the face of it they can communicate with the (present or former) clients of the First Defendant in appropriate terms, subject to due consideration of the professional rules given that those clients are now legally represented in these proceedings. But I would consider, at the Defendants' request, authorising a suitable form of communication from the Court (sent by the Defendants' solicitors as the court's officers) to all material clients advising them expressly that they may "opt out".

83. An individual response to such a communication will have individual effect. But it may also be that the responses or lack of responses materially further inform the overall picture. If appropriate the Defendants may ask the Court to look at the position under CPR 19.6(2) again. The provision is not a "once and for all time" provision; it is dealing with a question that may be of continuing relevance, and that question may be re-examined where appropriate. Obviously re-examination will not be suitable where the points are simply the same.

Statements of Case and Case Management

84. I return to this subject, as a part of the application that was to strike out. It is also the subject of a separate application that is stood over until after this judgment.

85. Confining myself to the strike out application, I regard the Particulars of Claim (including proposed amendments) as sufficiently pleaded in the sense that I have been able to work with them and I am satisfied the Defendants know the case they have to meet.

86. I do not believe, as the Defendants contend, that it is necessary for the Particulars of Claim to be extended to plead, member by member, "the facts and matters that would constitute a cause of action on the part of each member of the purported class". It is clear enough that what is pleaded is in essential terms the same for each member, and if that is not clear it can be addressed by amendment.

87. Where the Particulars of Claim do not contain details that will be required now or in due course, the Defendants are not placed at a disadvantage at this stage. I will not strike out the Particulars of Claim.

88. However, in light of this judgment, the statements of case may repay review on all sides. It should be possible to simplify. Both sides will need to consider what information needs to be sought by the Claimant and supplied by the Defendants and whether at this or a later procedural stage.

89. The Court will expect the parties, assisted by their legal teams, to cooperate in this and all other procedural stages ahead.

90. I propose to direct a Case Management Conference not before the expiry of 3 months to enable the parties to reflect, review, prepare and liaise in the meantime. The parties

should also reflect on the other applications that they have agreed should be stood over until after this judgment. Insofar as these are pursued, they should be considered as part of the Case Management Conference ahead.

Endnote

91. All the above said, we are still perhaps in the foothills of the modern, flexible use of CPR 19.6, alongside the costs, costs risk and funding rules and practice of today and still to come. In a complex world, the demand for legal systems to offer means of collective redress will increase not reduce.

92. It will be the legal systems that actively prepare, but choose well in that preparation, that are likely to fare the best. The Courts, the common law and equity all have their part to play. The case for further development through legislation may also be strong, in this area and areas connected with it. If legislative policy is to take this in steps then it may be time for next steps.

93. Of the results that come from this complex world, Lord Leggatt JSC observed in *Lloyd v Google* at [67]:

> "The mass production of goods and mass provision of services have had the result that, when legally culpable conduct occurs, a very large group of people, sometime numbering in the millions may be affected. As [*Lloyd v Google*] illustrates, the development of digital technologies has added to the potential for mass harm for which legal redress may be sought."

It is of course readily possible to identify other sources and activity that will add further to that potential.

94. To help preparation in this jurisdiction we are very fortunate to have significant contributions to thinking in this area of the administration of justice. The writing of Professor Rachael Mulheron KC (Hon.), a former member of the Civil Justice Council, was noted by Lord Leggatt JSC, as was that of Dr John Sorabji, a current member of the Civil Justice Council. Taking up Lord Leggatt JSC's reference in *Lloyd v Google* that "detailed legislative framework would be preferable", Professor Mulheron is one of those contributing to an edition of Civil Justice Quarterly dedicated to the subject (42 CJQ Issue 1 2023) co-edited Professor Andrew Higgins, also a current member of the Civil Justice Council. We have the opportunity to combine the thinking and research of academic leaders with the thinking and experience of leading practitioners, and of the Courts as they fashion ways of managing in the meantime. The subject is on the agenda for London International Disputes Week 2023: a reminder that there is the opportunity to learn from discussion with other jurisdictions. Always valuable, here the value of that discussion may be the more obvious today as we can see the more clearly that the results from mass production, provision, harm or impact will often not be experienced by just one jurisdiction.