Neutral Citation Number: [2017] EWHC 2900 (Ch)

Case No: HC-2017-002201

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (Ch D)
IN THE MATTER OF SECTION 50 OF THE SOLICITORS ACT 1974

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/11/2017

Before :

MR EDWIN JOHNSON QC

- -

Between :

(1) HARCUS SINCLAIR LLP	**Claimants**
(2) HARCUS SINCLAIR UK LIMITED	
- and -	
YOUR LAWYERS LIMITED	**Defendant**
- and -	
DAMON PARKER	**Third Party**

- -
- -

Christopher Butcher QC, Jawdat Khurshid and Josephine Higgs (instructed by Harcus Sinclair UK Limited) for the Claimants and the Third Party
Richard Coleman QC, Sophie Holcombe and Philip Ahlquist (instructed by Your Lawyers Limited) for the Defendant

Hearing dates: 27th, 28th and 29th September 2017, 2nd October 2017

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JUDGMENT

(This is the redacted public version of the Judgment following the trial of this action. The full version of the Judgment is private and confidential to the parties to this action, their legal advisers, and the Court. The full version of the Judgment may only be disclosed to any other parties with the permission of the Court granted pursuant to an application made on notice to all the parties to the action)

Mr Edwin Johnson QC :

Structure of this Judgment

1. The structure of this Judgment is as follows.

(I) Introduction (paragraphs 2-8).

(II) The Emissions Litigation (paragraphs 9-18).

(III) Procedural history of this action and the claims in this action (paragraphs 19-32).

(IV) The agreed issues (paragraphs 33-37).

(V) Witnesses (paragraphs 38-45).

(VI) Factual background – September 2015 to 10th April 2016 (paragraphs 46-65).

(VII) Factual background – Entry into the NDA (paragraphs 66-74).

(VIII) Factual background – 12th April 2016 to 27th April 2016 (paragraphs 75-80).

(IX) Factual background – The April Meeting (paragraphs 81-92).

(X) Factual background – May 2016 to September 2016 (paragraphs 93-126).

(XI) Factual background – October 2016 to November 2016 (paragraphs 127-159).

(XII) Factual background – December 2016 to January 2017 (paragraphs 160-171).

(XIII) The relationship between the Claimants (paragraphs 172-180).

(XIV) Did Sentence 2 constitute a solicitor's undertaking (paragraphs 181-247)?

(XV) What is the proper construction of Sentence 2 (paragraphs 248-326)?

(XVI) Did Sentence 2 cease to have effect as a result of the discussion between the parties at the April Meeting (paragraphs 327-328)?

(XVII) Did the Defendant give express permission to the Claimants to act for the group of claimants for whom they act in the Emissions Litigation (paragraphs 329-337)?

(XVIII) Are the Claimants or either of them in breach of Sentence 2 (paragraphs 338-351)?

(XIX) Has the Defendant lost the right to enforce Sentence 2 as a result of acquiescence, waiver or estoppel (paragraphs 352-385)?

(XX) Did the First Claimant use any information that was confidential to the Defendant for a purpose other than provided for in Sentence 1, without first obtaining the written agreement of the Defendant (paragraphs 386-428)?

(XXI) What relief should be granted (paragraphs 429-480)?

(XXII) Conclusions (paragraphs 481-483).

(I) Introduction

2. On 11th April 2016 Harcus Sinclair LLP, the First Claimant in this action, entered into an agreement in writing with Your Lawyers Limited, the Defendant in this action, described as a Non-Disclosure Agreement ("the NDA").

3. Clause 2 of the NDA provides as follows (italics have been added to all quotations in this Judgment).

> *"2. The Recipient* [the First Claimant] *undertakes not to use the Confidential Information for any purpose except the Purpose, without first obtaining the written agreement of the Discloser* [the Defendant]. *The Recipient further undertakes not to accept instructions for or to act on behalf of any other group of Claimants in the contemplated Group Action without the express permission of the Discloser."*

4. The Purpose, as referred to in clause 2 of the NDA, was identified in clause 1 of the NDA, in the following terms.

> *"1. The Discloser intends to disclose information (the Confidential Information) to the Recipient for the purpose of obtaining legal advice on behalf of Claimants in a large Group Action (the Purpose)."*

5. The First Claimant is a firm of solicitors, which conducts its practice as a limited liability partnership. The Defendant is also a firm of solicitors, which conducts its practice as a limited company. The NDA was signed by Mr. Damon Parker on behalf of the First Claimant, and by Mr. Amandip Johal on the behalf of the Defendant. Mr. Parker is a solicitor and a partner in the First Claimant. Mr. Parker is also a director of the Second Claimant. The Second Claimant also conducts the practice of a firm of solicitors, through its corporate personality. Mr. Johal is a solicitor and a director of the Defendant.

6. The Defendant's case is that the Claimants are in breach of the undertaking in the first sentence of clause 2 of the NDA ("Sentence 1") and are in breach of the undertaking in the second sentence of clause 2 of the NDA ("Sentence 2"). In the case of Sentence 2 the Defendant says that the undertaking took effect not only as a contractual obligation but also as a solicitor's undertaking, subject to the supervisory jurisdiction of the Court; that is to say both the inherent jurisdiction of the Court and the Court's jurisdiction under Section 50 of the Solicitors Act 1974.

7. The Claimants deny this. The Claimants say that Sentence 2 did not take effect as a solicitor's undertaking, that they were not and are not in breach of the obligations in

Sentence 1 or Sentence 2, and that the Defendant is not entitled to any of the relief which it seeks, by counterclaim and additional claim, in this action.

8. These issues have now come before me by way of an expedited trial. This is my reserved judgment following the trial (save for issues of quantum) of the claims, counterclaims and additional claims in this action.

(II) The Emissions Litigation

9. The backdrop to this action is a substantial piece of litigation, now proceeding in the Queen's Bench Division, concerning diesel emissions from vehicles manufactured by Volkswagen. The essential complaint in this litigation ("the Emissions Litigation") is that Volkswagen manufactured and sold vehicles with EA189 diesel engines which failed to comply with EU regulations regarding the emission of oxides of nitrogen. The case is that the relevant vehicles were fitted with a software device which recognised when the vehicles were being tested for compliance with emissions standards, and artificially reduced the level of emission of nitrogen oxides during the testing process. It is said that, between 2009 and 2014, some 1.2 million vehicles were sold with this defeat device in the United Kingdom. The relevant vehicles included vehicles sold under the Volkswagen, Seat, Audi and Škoda brands. It is said that the purchasers of these vehicles have all suffered loss for which Volkswagen companies are liable.

10. I give only the very briefest description of the case against Volkswagen in the Emissions Litigation both because that case is not directly relevant to what I have to decide, and also because the issues in the Emissions Litigation are not before me in this action. I should make it clear that I am making no findings in this judgment on any of the issues in the Emissions Litigation. I shall use the expression "the Emissions Events" to refer to the events (actual or alleged), briefly summarised in my previous paragraph, which have given rise to the claims in the Emissions Litigation.

11. In terms of issued proceedings, there are, as matters stand, what I understand to be two actions in the Emissions Litigation.

    (1) An action commenced by claim form issued on 25th January 2016 (HQ16X00241). There were originally 5 individuals named as claimants in this action, who were identified in a schedule to the claim form and whom I understand to have been selected as representative claimants. The firm of solicitors on the record in this action ("the January Action"), acting for these claimants, was the Defendant. The Defendant remains on the record for these claimants in the January Action. The defendant to the January Action was named as Volkswagen Group United Kingdom Limited ("VUKL"), which I understand to have been the company, incorporated in England and Wales, which marketed Volkswagen branded vehicles for sale in the United Kingdom and supplied these vehicles to various dealerships.

    (2) An action commenced by claim form issued on 19th October 2016 (HQ16X03625). There were originally 66 parties named as claimants in this action, who were identified in a schedule to the claim form. The firm of solicitors on the record in this action ("the October Action"), acting for these claimants, was originally the First Claimant. The First Claimant was replaced by the Second Claimant, as the firm of solicitors on the record for the

claimants in the October Action, by a notice of change of legal representative dated 25th January 2017 and signed by Mr. Parker in his capacity as a director of the Second Claimant. The defendants to the October Action were named as Volkswagen Aktiengesellschaft (which I understand to be the parent company of the Volkswagen Group of companies), Audi Aktiengesellschaft, ŠKODA Auto a.s., SEAT S.A., VUKL, and Volkswagen Financial Services (UK) Limited.

12. The claimants in the January Action and the October Action are however only some of those with claims against the Volkswagen Group as a result of purchasing vehicles fitted with the defeat device. As matters stand, the Second Claimant, acting jointly with Slater and Gordon (UK) LLP (another firm of solicitors involved in the Emissions Litigation), act for over 43,000 clients with claims against the Volkswagen Group arising out of the Emissions Events. The Defendant acts for over 9,000 clients with claims arising out of the Emissions Events. Although there were originally only 66 claimants in the October Action, further claimants were subsequently added to the October Action, bringing the total number of claimants to 6,726 claimants. In the January Action there are now 9 claimants, who are all, I assume, representative claimants, as opposed to the original 5 claimants.

13. On 28th October 2016 the First Claimant filed with the High Court, in the Queen's Bench Division, an application for a group litigation order in respect of the claims against the Volkswagen Group. This application ("the GLO Application") was supported by a lengthy first witness statement of Mr. Parker, dated 28th October 2016. The GLO Application was made in the October Action. The draft order attached to the GLO Application was expressed to apply to all claims for damages in misrepresentation/deceit in relation to the manufacture or supply of vehicles fitted with the defeat device. The draft order also provided for *"Harcus Sinclair"* to be the lead solicitors in the intended group litigation against the respondents to the GLO Application. The respondents to the GLO Application were the defendants to the January Action and the October Action, to whom I will refer collectively as "the Respondents". The reference to *"Harcus Sinclair"* in the draft order was not defined to mean either the First Claimant or the Second Claimant, but I take this reference to have been a reference to the First Claimant, as the solicitors then acting for the claimants in the October Action.

14. The GLO Application was not issued until 18th November 2016. I understand that this delay came about because there were difficulties in finding a date for the hearing of the GLO Application. As issued, the application notice provided for the GLO Application to come before the Senior Master on 30th January 2017, with a time estimate of one day. Thus it was that the GLO Application came before Senior Master Fontaine on 30th January 2017. As recorded in the order made by the Senior Master on that date, a number of parties were before the Court at the hearing, as follows.

    (1) The claimants in the October Action, jointly represented by the Second Claimant and Slater and Gordon (UK) LLP ("S and G").
    (2) The Respondents.
    (3) The claimants in the January Action, represented by the Defendant.
    (4) Two other firms of solicitors, Leigh Day and E. Rex Makin & Co.

15. By her order made on 30th January 2017 the Senior Master adjourned the hearing of the GLO Application to the first available date after 9th October 2017, with a time estimate of two days, and gave further directions in respect of that adjourned hearing.

16. In the event however the GLO Application came back before Senior Master Fontaine for a further hearing on 8th June 2017, at which further directions were given for the hearing of the GLO Application, including the addition of Inchcape Retail Limited as a further Respondent. By the time of this hearing the dispute between the Claimants and the Defendant, which has now come before me for trial, had become an issue in the GLO Application, because it was said to affect the question of who should be lead solicitors in the intended group litigation. The Senior Master included the following direction, in paragraph 4 of her order made at this hearing.

> *"By 4pm on 14 July 2017, Your Lawyers shall file and serve a witness statement stating whether, and if so how, any dispute between Your Lawyers and Harcus Sinclair affects the making of a Group Litigation Order. By 4pm on 28 July 2017, Harcus Sinclair, if so advised, may file and serve a Witness Statement in response."*

17. The substantive hearing of the GLO Application was listed for two days on 12th and 13th October 2017 before the Senior Master. I understand however that the GLO Application has now been relisted for a directions hearing on 27th November 2017.

18. It is the intended group action against the respondents to the GLO Application (the Respondents) which I am referring to as the Emissions Litigation. For the avoidance of doubt I include in this definition both the January Action and the October Action.

(III) <u>Procedural history of this action and the claims in this action</u>

19. This action was commenced, in the Chancery Division, by a Part 8 claim form issued on 3rd August 2017. The claim form was supported by a first witness statement of Mr. Beresford, also dated 3rd August 2017. Mr. Beresford identified himself in that witness statement as a solicitor and partner in the First Claimant, and a director of the Second Claimant. The relief sought in the action was declaratory relief, as set out in paragraph 7 of the Details of Claim attached to the claim form, in the following terms.

> *"7.1 The Undertaking* [Sentence 2]*, being one that was given by the First Claimant in their personal capacity and not in the course of their professional activities as solicitors, is not subject to the inherent summary supervisory jurisdiction of the Court; and/or*
>
> *7.2 In the exercise of its discretion, having regard to the issues in dispute and the practical implications of making an order, the Court should decline to invoke its inherent summary supervisory jurisdiction to enforce the Undertaking."*

20. As can be seen, the purpose of the claims for declaratory relief made by the Claimants was a relatively limited one. The Claimants sought a determination of whether Sentence 2 took effect as a solicitor's undertaking and, if it did, a declaration that the Court should decline to exercise its inherent summary jurisdiction to enforce the undertaking. Effectively, what the Claimants were seeking to do was to try to find a

way of resolving sufficient issues between the parties to allow the hearing of the GLO Application to proceed, without the interference of this dispute, while leaving the remaining issues between the parties to be resolved separately.

21. The action came before me for directions on 24th August 2017. For the reasons which I explained in a judgment delivered at that hearing, I took the view that the Claimants' approach would not work, and that all the issues arising between the parties in this dispute (save for the quantum of any damages/compensation to which the Defendant might be entitled) needed to be resolved as swiftly as possible, so that the hearing of the GLO Application could proceed without the interference of this dispute (in an unresolved state). I therefore made an order that the action should continue as if commenced by Part 7 claim form, and gave directions for an expedited trial. I ordered the Details of Claim attached to the Claimants' claim form and the first witness statement of Mr. Beresford to stand as the Claimants' Particulars of Claim in the action.

22. The Defendant served a Defence and Counterclaim in response to the Claimants' Particulars of Claim. The Defence and Counterclaim was subject to amendment and re-amendment, so that it now comprises a Re-Amended Defence and Counterclaim, and also includes an Additional Claim, within the meaning of Part 20 of the CPR, brought by the Defendant against Mr. Parker in person. In response the Claimants and Mr. Parker have served an Amended Reply and Defence to Counterclaim, which also incorporates a Defence to the Additional Claim.

23. The Counterclaim and the Additional Claim (by which I mean the Counterclaim and the Additional Claim as re-amended) allege that Sentence 2 took effect as a solicitor's undertaking, given by Mr. Parker and the First Claimant. The Counterclaim and Additional Claim allege that the Claimants or one of them are in breach of Sentence 2, essentially on the basis that the Claimants or one of them are, jointly with S and G, now acting for some 43,000 clients in the Emissions Litigation. The Counterclaim and Additional Claim seek a variety of declaratory and injunctive relief against the Claimants and Mr. Parker, pursuant to Section 50 of the Solicitors Act 1974 and pursuant to the inherent jurisdiction of the Court. The essential objective of this relief is to prevent the Claimants or Mr. Parker acting any further in the Emissions Litigation for their existing clients or any further clients. There is also a further, or alternative claim for compensation, for breach of solicitor's undertaking, against the Claimants and Mr. Parker.

24. The Counterclaim and Additional Claim also allege that Sentence 2 took effect as a contractual obligation, of which the First Claimant is in breach. In this respect there is, against the First Claimant, a claim for declaratory relief, specific performance of the obligation in Sentence 2, and a further, or alternative claim for damages for breach of contract, including a claim for damages in lieu of specific performance.

25. It was not contended by the Defendant that Sentence 2 was enforceable against Mr. Parker, as a matter of contract. I did however understand the Defendant's case to be that the Second Claimant was in breach of Sentence 2 as a matter of contract. In paragraph 72 of the Re-Amended Defence and Counterclaim, it is alleged that the First Claimant (incorrectly referred to as the First Defendant) is in breach of the NDA as a matter of contract. This is then followed, in paragraph 73.1, by a claim for a declaration that the Claimants are in breach of contract. The Defendant's skeleton

argument for trial also contended that the claim in contract lay against both of the Claimants. The Defendant's written closing submissions also pursued the argument that both of the Claimants were in breach of Sentence 2, as a matter of contract. Mr. Coleman QC (for the Defendant) conceded however, in closing submissions, that the Second Claimant was not a party to, and was therefore not bound by the NDA.

26. Turning to Sentence 1 the Counterclaim and Additional Claim allege that the Claimants and Mr. Parker have made unlawful use of confidential information provided by the Defendant, in breach of Sentence 1 and in breach a common law duty of confidence. The Defendant seeks damages and/or an account of profits in respect of these alleged breaches of confidence, against the Claimants. It was however confirmed to me, in closing submissions for the Defendant at the trial, that there is no claim for breach of confidence against Mr. Parker personally.

27. All of the above is responded to, in detail, in the Amended Reply, Defence to Counterclaim and Defence to the Additional Claim. For the reasons set out in that statement of case, and for the reasons set out in the Claimants' Particulars of Claim, the various claims made in the Counterclaim and Additional Claim are all denied.

28. At the hearing on 24th August 2017 it was agreed between the parties that standard disclosure should be dispensed with and that, in place of standard disclosure, there should be directions permitting each party to request specific disclosure of documents, with provision for application to Court to be made in the event of documents being requested and not provided. In the event there were applications for specific disclosure made by each side, which I dealt with at a pre-trial review in the action, held on 15th September 2017, and in a pre-trial hearing, held on 26th September 2017.

29. The action came on for trial on 27th September 2017. The expedited nature of the trial meant that a very large of amount of work had to be done, in a short space of time, in order to prepare for trial. I pay tribute to the legal teams on both sides for all their hard work in ensuring that the action was ready for trial on 27th September 2017, particularly given the large number of documents which eventually came to occupy the trial bundles. As a result of all this hard work, for which I am extremely grateful, I consider that I am in as good a position to determine the issues in this action as I would have been if the action had followed a conventional path to trial.

30. At the trial, the Claimants and Mr. Parker were represented by Christopher Butcher QC, and Jawdat Khurshid and Josephine Higgs. The Defendant was represented by Richard Coleman QC, and Sophie Holcombe and Philip Ahlquist. In this action the Second Claimant acted as solicitors for the Claimants and for Mr. Parker, in his capacity as Defendant to the Additional Claim. The Defendant acted as its own solicitors in this action. I am indebted to Counsel on both sides, for the assistance given to me in their submissions, and for their assistance in ensuring that the trial kept to the agreed timetable, notwithstanding the large amount of oral evidence which fell to be heard.

31. There is one other important point which I should record in relation to the hearings in this action. Both in the pre-trial hearings and in the trial itself it has been necessary to consider a large amount of sensitive (meaning confidential) and privileged material. In order to maintain privilege and confidentiality, and in the exercise of my powers under CPR Rule 39.2(3)(c) and (g), I directed that the three pre-trial hearings to which

I have referred, and the trial itself should all be heard in private. I also record that it would not have been feasible for any of these hearings to have been heard partly in public and partly in private.

32. I will use the following collective expressions to identify the various claims in the Action.

(1) I will refer to the claims made by the Claimants against the Defendant in the action as "the Claim".
(2) I will refer to the counterclaims made by the Defendant against the Claimants and each of them in the action as "the Counterclaim".
(3) I will refer to the claims made by the Defendant against Mr. Parker in the action as "the Additional Claim".

(IV) The agreed issues

33. I have had the benefit of an Agreed List of Issues for the trial. The agreed issues which I have to determine are as follows.

(1) Does Sentence 2 constitute a solicitor's undertaking?
(2) What is the proper construction of Sentence 2?
In particular:
(i) Does Sentence 2 preclude the Claimants (or either of them) from accepting instructions from or acting for the group of claimants for whom they act in the Emissions Litigation, or for any other group of claimants save for the Defendant's group, without the express permission of the Defendant?
(ii) Does Sentence 2 bind the Second Claimant and the Third Party (Mr. Parker) in addition to the First Claimant?
(iii) Does Sentence 2 preclude the First Claimant from procuring, facilitating or permitting the Second Claimant to do anything which, if done by the First Claimant, would amount to a breach of Sentence 2 by the First Claimant?
(3) Did Sentence 2 cease to have effect as a result of the discussions between the parties on 28 April 2016?
(4) Did the Defendant give express permission to the Claimants to act for the group of claimants for whom they act in the Emissions Litigation?
(5) Are the Claimants (or either of them) in breach of Sentence 2 by acting for the group of claimants for whom they act in the Emissions Litigation, and in the other respects alleged in paragraph 70 of the Re-Amended Defence, Counterclaim and Particulars of Defendant's Additional Claim against a Third Party?
(6) Has the Defendant lost the right to enforce Sentence 2 as a result of acquiescence, waiver, or estoppel?
(7) Did the First Claimant use any information that was confidential to the Defendant for a purpose other than that provided for in Sentence 1, without first obtaining the written agreement of the Defendant?
(8) Should the court make the declarations sought by the Claimants?
(9) Should the Court make the declarations and orders sought by the Defendant?

34. It will be seen that the agreed issue in sub-paragraph (7) of the previous paragraph is not quite accurately stated. As the counterclaim for breach of confidence was

pleaded, and explained in the Defendant's closing submissions, this counterclaim included the question of whether the Claimants were in breach of a duty of confidence arising in equity (ie. a non-contractual duty of confidence arising outside Sentence 1).

35. There are two other important points to record at this stage, in respect of the issues to be determined in this Judgment.

    (1) In my order made on 15th September 2017, at the pre-trial review, I directed that issues of quantum, in relation to the Defendant's claims for damages and compensation (for alleged breach of solicitor's undertaking) should be determined separately from this trial. Accordingly such issues of quantum, if and in so far as they may arise, will require separate determination.

    (2) At the conclusion of the oral closing submissions I directed that the parties should, sequentially, lodge further written submissions on two particular issues, namely whether Sentence 2 was unenforceable as being in restraint of trade, and how the Defendant put its case that information was, in breach of obligations of confidence, passed by the First Claimant to the Second Claimant. The Defendant's Note on these further points included an additional section, in which the Defendant made reference to a decision of the Court of Appeal to the effect that the Court's supervisory jurisdiction over solicitors, in respect of solicitor's undertakings, is confined to individual solicitors, and does not extend to recognised bodies, such as limited liability partnerships and companies, through which solicitors conduct their practice. The Defendant therefore accepted that the Court's jurisdiction in respect of the claim for breach of solicitor's undertaking (if Sentence 2 was a solicitor's undertaking) was limited to Mr. Parker. The Claimants' Note in response confirmed this position. The effect of this was that a substantial part of agreed issue (1) disappeared as a live issue.

36. The documents for trial expanded steadily, both before and during the trial. I have also received six files of authorities, of varying size, and various sets of written submissions. In addition there is also the body of written and oral evidence. In saying this I intend no criticism. All of this material was both necessary and helpful to my resolution of the issues in this trial. It is however inevitable, with this volume of material, that not all of the submissions, evidence and documents can be the subject of express reference in this Judgment. For the avoidance of doubt, I have taken all of this material into account in reaching my decisions on the issues before me, whether expressly referred to in this Judgment or not. In this context there is a related point. In setting out the factual background to the issues I have to decide, and in explaining my reasons for my conclusions in this Judgment, I have sought to avoid, so far as reasonably possible, reference to the content of confidential and privileged documents. This applies particularly to my consideration of the counterclaim for breach of confidence. All of this content has been taken into account, whether expressly referred to in this Judgment or not.

37. In discussing the issues and arguments in this action it is convenient to refer to those issues and arguments as between the Claimants and the Defendant. I include Mr. Parker in such references to the Claimants, where the relevant issue or argument affects the position of Mr. Parker as Defendant to the Additional Claim. It will be understood that I intend no disrespect to Mr. Parker in taking this course.

(V) Witnesses

38. The principal witnesses in the trial were, for the Claimants, Mr. Parker and, for the Defendant, Mr. Johal, both of whom were cross-examined at length by respective Leading Counsel.

39. I also heard evidence from the following witnesses, for the Claimants, all of whom were cross-examined.

(1) Gregory Fairley - a director of Capital Interchange Limited, a company which acts as a broker in the obtaining of third party finance for litigation, including group claims such as the Emissions Litigation.

(2) Nicholas Moore – an employee of Therium Capital Management Limited, a company which provides third party finance for litigation, including group claims such as the Emissions Litigation.

(3) Oliver Campbell QC – Leading Counsel instructed by the Claimants in the Emissions Litigation. The precise nature of the original instructions to Mr. Campbell in this matter is in issue. I return to this issue later in this Judgment.

(4) Adam Heppinstall – Counsel instructed by the Claimants in the Emissions Litigation. The precise nature of the original instructions to Mr. Heppinstall in this matter is also in issue. I return to this issue later in this judgment.

(5) Desiree Maghoo – a partner in Questor Consulting, a marketing and public relations firm.

(6) Mungo Park – a digital marketing consultant and co-founder of blueprint.tv, a content marketing agency.

(7) Jacqueline Young – a partner in S and G and the head of that firm's Group Litigation practice.

(8) David Strawson – chairman of the claimant committee which has been established to manage the claims being made by the group of claimants for whom the Second Claimant and S and G now jointly act.

40. I also heard evidence from the following witnesses for the Defendant, who were likewise cross-examined.

(1) Jonathan Whittle – a chartered legal executive and senior manager of the Defendant.

(2) Thomas Goodhead – Counsel instructed by the Defendant in the Emissions Litigation, on behalf of the claimants for whom the Defendant acts, including the claimants in the January Action.

41. There was one additional witness for the Claimants, Gregory Treverton-Jones QC, Leading Counsel specialising in regulatory and disciplinary matters, instructed by the First Claimant to advise in connection with the Emissions Litigation. The witness statement of Mr. Treverton-Jones was not challenged by Mr. Coleman, and thus stood as the evidence of Mr. Treverton-Jones to the Court.

42. I have had the benefit of a live note of the evidence and submissions in the trial. Where I refer to extracts from the transcripts of the trial in this Judgment, I do so by giving the relevant day of the trial, the relevant page of the transcript, and the relevant lines of that page of the transcript, all in square brackets and bold print. In the course of this Judgment I will also be making copious references to e mails passing between the parties. Where I refer to an e mail I give the time of the e mail in brackets.

43. I do not regard it as necessary to this Judgment to provide a general commentary on the witness evidence. I did not and do not regard any of the issues which I have to decide in this Judgment as turning on disputed points in the oral evidence. It seems to me that the documentary evidence is much more important in this context. In my view the most important witness was Mr. Parker. I found Mr. Parker's written and oral evidence to be of considerable assistance to me, in respect of the issues which I have to decide.

44. There is a further point to make, by way of introduction to the evidence. The fact that the Claimants each have separate legal personality has come to assume considerable importance in this action. This does however give a misleading impression of the way in which the Claimants were regarded in the course of the events which I am about to describe. The First Claimant and the Second Claimant were often treated as interchangeable, and the documents in the action, including the witness statements and some of the written submissions, have a tendency to refer simply to *"Harcus Sinclair"*, without distinction. I have endeavoured to avoid doing the same in this Judgment. Where I refer, without distinction, to Harcus Sinclair in describing the factual background to this action, I do so because the relevant document or witness refers to Harcus Sinclair, without distinction.

45. Finally, in the course of setting out the factual background to this dispute I shall set out, at various stages, particular findings of fact which I make. For the avoidance of doubt those particular findings of fact are not exhaustive as to the relevant part of the factual background with which I am dealing.

(VI) Factual background – September 2015 to 11th April 2016

46. In September 2015 what became known as the Volkswagen emissions scandal became public, when the US Environmental Protection Agency issued a Notice of Violation stating that Volkswagen had manufactured and installed defeat devices designed to manipulate the results produced when a vehicle underwent emissions testing. It quickly became apparent that vehicles in the UK and Europe were potentially affected by this issue, and indeed my understanding is that litigation has been commenced in other jurisdictions around the world, arising out of the Emissions Events.

47. A number of solicitors made appearances in the media, commenting on the Emissions Events. They included Ms. Young of S and G, who spent a period of some two weeks making media appearances, following the story breaking in the media on 18th September 2015. The other firms involved in such media appearances included Leigh Day, which I understand to be another firm which specialises in group claims. Ms. Young gave evidence in her witness statement, which I accept, that, over the period of the following 12 months, S and G built up, I assume through a dedicated website through which interested persons could register, a database of over 11,000 persons with potential claims arising out of the Emissions Events.

48. Mr. Parker also gave evidence in his witness statement, which I accept, as to his reaction when he learned of the Emissions Events, following the breaking of the story in the media in September 2015. [redacted]

49. [redacted]

50. Mr. Johal also became aware of the Emissions Events in September 2015. [redacted] In this respect the Defendant took a number of steps.

(1) The Defendant began extensive marketing efforts to recruit potential claimants in the proposed group claim as clients, and set up a dedicated website for the purposes of signing up such clients.
(2) On 26th October 2015 the Defendant sent an initial letter before action to Volkswagen Group UK Limited and subsequently engaged in pre-action correspondence with Freshfields, solicitors for VUKL.
(3) [redacted]
(4) [redacted]
(5) A claim form on behalf of 5 representative claimants was issued in the Queen's Bench Division on 25th January 2016. This was the claim form by which January Action was commenced.
(6) By April 2016 the Defendant had obtained instructions from approximately 4,000 potential claimants in the proposed group claim.

51. In order to run a group claim, there are two particular forms of financial assistance which are required. The first is funding to meet the costs of pursuing the group claim against the relevant defendants. There are companies which specialise in providing such third party funding, as it is known, one of which is Therium Capital Management Limited ("Therium"). The second is ATE insurance, to cover the risks of adverse costs orders in the pursuit of the group claim. Mr. Parker had experience of obtaining funding for group claims, and was known to providers of such third party funding. [redacted]

52. Mr. Fairley is a broker, specialising in the provision of third party funding and ATE insurance. Mr. Fairley operates through a company, Capital Interchange Limited ("CIL"), of which he is the sole shareholder and sole director. On 22nd February 2016 Mr. Fairley had a meeting with Mr. Johal and Mr. Whittle at the offices of the Defendant, to discuss the proposed group claim against Volkswagen and its funding. Prior to that meeting Mr. Fairley had been required to sign, and had signed a non-disclosure agreement between CIL and the Defendant, in similar but not identical terms to the NDA. This non-disclosure agreement was dated 18th February 2016, but the signatures of the parties thereon are dated 19th February 2016. I take it therefore that this non-disclosure agreement was concluded on 19th February 2016. On 22nd April 2016 CIL concluded an agreement with the Defendant for the provision of CIL's services as funding broker. This gave CIL the exclusive right to seek to obtain funding on behalf of the Defendant for the proposed group claim.

53. On 25th February 2016 (12:08) Mr. Fairley e mailed Mr. Purslow of Therium with information about the proposed group claim. [redacted]

54. Therium was interested and, on 4th April 2016, a meeting took place at Therium's offices which was attended by Mr. Moore and Mr. Mayer of Therium, Mr. Johal and Mr. Whittle, Mr. Goodhead (junior counsel instructed by the Defendant in the proposed group claim), and Mr. Fairley. Following that meeting, on 5th April 2016, Mr. Fairley e mailed to Mr. Mayer and Mr. Moore a pack of documents ("the Litigation Pack"). The Litigation Pack, which was too large to be sent as an attachment to one e mail, and required two e mails (11:22 and 11:27), comprised the following.

(1) A Note prepared by the Defendant on the proposed group claim. The proposed group claim was referred to, on the front page of that Note ("the Defendant's Note"), as the VW Group Litigation.
(2) [redacted]
(3) [redacted]
(4) The letter before action dated 26th October 2015.
(5) The claim form by which the January Action had been commenced.
(6) Correspondence with Freshfields following the letter before action.
(7) The transcripts from the proceedings in the United States.
(8) Wikipedia information relating to the Emissions Events.

55. In his oral evidence Mr. Moore accepted that he regarded these e mails from Mr. Fairley and their attachments as confidential (to the extent that the attached information was not available to the public), save for the Wikipedia information, and that he had no authority to send the confidential material attached thereto on to anyone else **[2/240:19-243:24]**. Mr. Moore did however qualify this. Mr. Moore claimed that he was entitled, under his arrangement with Mr. Fairley, to take legal advice from his advisers **[2/244:4-5]**.

56. Mr. Parker met Mr. Moore at a lunch on 7th April 2016. Mr. Moore mentioned the proposed Volkswagen group claim, and asked Mr. Parker what he thought. On the evening of the same day (21:22) Mr. Fairley e mailed Mr. Parker, seeking an initial conversation in respect of the proposed group claim, which Mr. Fairley did not identify specifically. Mr. Parker replied by e mail the following day (14:28 on 8th April 2016) asking if he could see the opinions. Mr. Parker did not identify what he meant by the reference to the opinions. Mr. Parker did say that he would be happy to sign a non-disclosure agreement, and asked if he could ask Therium for the opinions. Mr. Fairley e mailed in reply (14:33) saying that he would get back to Mr. Parker on that.

57. On 8th April 2016 (15:21) Mr. Moore e mailed Mr. Parker, attaching the Litigation Pack and saying that he would be interested in the opinion of Mr. Parker on the legal merit of the case. The e mail was marked private and confidential.

58. On 9th April 2016 Mr. Parker had an e mail exchange with Mr. Fairley regarding the proposed group claim. In the first of these e mails (10:32) Mr. Parker inquired as to whether there were Particulars of Claim for the five issued claims, which I take to have been a reference to the claim form in the January Action, which Mr. Parker would have seen in the Litigation Pack. In the second e mail (12:42) Mr. Parker said that he had some ideas on how to beat other firms to the punch and come out of the GLO process as the lead solicitors. In reply (18:15) Mr. Fairley said that he had been told by Mr. Johal that the Defendant's information was that they were significantly ahead of the other firms. Mr. Fairley also said that he hoped to hear from Mr. Johal shortly *"and then we can proceed with NDA and information sharing etc."*. On the following day, 10th April 2016, Mr. Parker replied by e mail (09:36) [redacted]

59. Mr. Fairley responded by e mail on 10th April 2016 (19:48), repeating that the position would become clearer once the non-disclosure agreement was in place. Mr. Parker responded by e mail (08:09) on 11th April 2016 [redacted]

60. On 9th April 2016 (09:30) Mr. Fairley e mailed Mr. Johal, reporting that he had made contact with Mr. Parker and, amongst other matters, confirming that Mr. Parker was willing to sign a non-disclosure agreement.

61. On 10th April 2016 (14:13) Mr. Parker sent an e mail to himself (in the form of a draft e mail to Mr. Moore), with his thoughts on the matter. These thoughts were formulated with the benefit of Mr. Parker having seen the Litigation Pack, which Mr. Parker had been sent by Mr. Moore on 8th April 2016.

62. In closing submissions Mr. Coleman pointed out that, in his e mail exchanges with Mr. Fairley on 9th, 10th and 11th April 2016, Mr. Parker did not inform Mr. Fairley that he already had the Litigation Pack from Mr. Moore. Mr. Coleman submitted that this was because Mr. Parker was aware that Mr. Fairley would object to his having seen documents which were confidential and privileged, in advance of a non-disclosure agreement being signed. This seems to me to read too much into the relevant e mails. So far as Mr. Moore was concerned, his evidence in cross examination was that he was seeking legal advice from Mr. Parker, as his legal adviser, on the documents sent to him by Mr. Fairley, and was entitled to do that pursuant to his arrangement with Mr. Fairley/CIL **[2/244:4-9]**. I do not accept that, in providing the Litigation Pack to Mr. Parker, Mr. Moore was exercising a legal right conferred upon him by CIL or the Defendant to seek legal advice on the Litigation Pack. This begs the question of where, and in what terms this legal right existed. This also seems to be inconsistent with the circumstances in which Mr. Moore met with Mr. Parker and provided the Litigation Pack to Mr. Parker. The Litigation Pack was provided to Mr. Parker not because Mr. Moore decided to seek advice from Therium's solicitors, but because Mr. Moore bumped into Mr. Parker at a lunch, and asked him for his thoughts on the proposed group claim. It seems to me that Mr. Moore had no right to send the Litigation Pack to Mr. Parker without the authority of the Defendant. It also seems to me that Mr. Parker should have appreciated that he was being sent a pack of documents which included documents which were confidential and, in some cases, subject to legal privilege.

63. This is not however the same as saying that Mr. Parker set out to cover all this up in his e mail exchanges with Mr. Fairley. A close reading of Mr. Parker's first e mail would have disclosed that Mr. Parker was aware that there were five issued claims, which was information most likely to have been obtained by looking at the claim form in the January Action. The e mail in reply from Mr. Fairley referred generally to information sharing. It did not refer specifically to the Litigation Pack as the information which would be released once the non-disclosure agreement had been signed. It seems to me that the subsequent e mails were no more specific in these respects.

64. My finding is that Mr. Parker did not inform Mr. Fairley, in this e mail exchange, that he, Mr. Parker, had already seen the Litigation Pack because Mr. Parker did not give the matter any proper thought. By this I mean that Mr. Parker did not give any proper thought as to whether he was entitled to see the Litigation Pack, when it was sent to him by Mr. Moore, and did not give any proper thought to that question in his e mail exchange with Mr. Fairley. As a result, this question simply got obscured in the e mail exchange.

65. I make this finding, which is relevant to my overall assessment of Mr. Parker's evidence, for three reasons. First, there is my reading of the relevant e mails, which

do not seem to me to support the argument that Mr. Parker was being devious in his dealings with Mr. Fairley. Second, I do not regard Mr. Parker as a devious person. That was not my impression of Mr. Parker, either from Mr. Parker's written evidence or his oral evidence. Third, I think that, in this instance and as part of his initial and informal assessment of the merits of the proposed group claim, Mr. Parker paid less attention than he should have done to the legalities of the position, in terms of whether he had a right to see the Litigation Pack when it was sent to him by Mr. Moore.

(VII) Factual background – Entry into the NDA

66. On 10th April 2016 (19:29), and following Mr. Fairley's earlier confirmation that Mr. Parker was willing to sign a non-disclosure agreement, Matthew Plemper of the Defendant e mailed Mr. Parker a draft version of the NDA. Mr. Parker was asked to sign and return the draft at his earliest convenience.

67. On 11th April 2016 (08:09) Mr. Parker e mailed his colleague, Jennifer Morrissey, the NDA. The e mail stated as follows.

> *"You like NDAs, I feel. Could you bear to look?"*

68. Ms. Morrissey replied by e mail on 11th April 2016 (08:57), attaching the NDA with some suggested revisions, shown as tracked changes. Her e mail, which identified Ms. Morrissey as a solicitor with the Second Claimant, stated as follows.

> *"Signed version and tracked change version. I have made a number of minor changes including: changing the date, adding one definition, amending the signature blocks for the LLP and adding a counter-parts clause along with some minor formatting to accommodate these changes. I hope they will not be controversial."*

69. As Ms. Morrissey indicated in her e mail, the revisions were minor. The most significant revision was to the signature block, which was amended to make it clear that Mr. Parker was signing for and on behalf of the First Claimant. There was no revision to clause 2 of the NDA. I did not hear any evidence from Ms. Morrissey, who was not called as a witness at the trial. I assume however, from the revisions which Ms. Morrissey made to the NDA, that Ms. Morrissey read the NDA, considered the NDA and, subject to her revisions, regarded the NDA as an acceptable agreement for the First Claimant to enter into.

70. At 09:17 on 11th April 2016 Mr. Parker e mailed the NDA, signed by Mr. Parker on behalf of the First Claimant and with the revisions made by Ms. Morrissey, to Mr Plemper. The NDA, as signed by Mr. Parker was a clean version (ie. not tracked changes version) of the revised draft of the NDA provided by Ms. Morrissey. For the Defendant, the NDA was signed by Mr. Johal. Mr. Plemper returned the NDA to Mr. Parker, as signed by both parties, later the same day (14:00).

71. In his witness statement (paragraph 31) Mr. Parker explained that Ms. Morrissey was a senior solicitor in the team working on another major group action, and that he asked her to look at the NDA because she had looked at a number of similar such agreements in the previous year. In oral evidence Mr. Parker also said that he and Ms. Morrissey had been looking at another non-disclosure agreement on the morning of 11th April 2016, which Mr. Parker signed in relation to another potential case **[1/47:6-11]**.

72. So far as the signing of the NDA was concerned, Mr. Parker's evidence in his witness statement (paragraph 31) was that he did not recollect reading the NDA or giving it any thought. He simply signed the NDA, as revised by Ms. Morrissey.

73. Mr. Parker confirmed this written evidence in his oral evidence. It was put to Mr. Parker in cross examination that he would surely have read the NDA, but his reply was that he did not recall doing so. Mr. Parker said that he could not think that he would have read the offending clause (clause 2), because if he had, he would not have signed the NDA. Mr. Parker thought it likely that, having given the NDA to someone else to look at, he would not have read the NDA **[1/54:2-25]**.

74. I make the following particular findings of fact in relation to the entry of the parties (the Defendant and the First Claimant) into the NDA.

(1) Mr. Parker signed the NDA without reading the NDA or giving it any thought.
(2) Ms. Morrissey read and considered the NDA and, subject to her minor revisions, (i) regarded the NDA as an agreement which it was acceptable for the First Claimant to enter into, and (ii) regarded the restrictions in the NDA as restrictions to which it was acceptable for the First Claimant to become subject.
(3) At the time when the NDA was entered into, both Mr. Parker and Ms. Morrissey were familiar with the concept of non-disclosure agreements, and understood and accepted their use by firms of solicitors seeking external advice and assistance in respect of contemplated group actions.

(VIII) Factual background – 11th April 2016 to 27th April 2016

75. In three e mails sent to Mr. Parker late on 11th April 2016 (17:31 and 17:32) Mr. Fairley attached the contents of the Litigation Pack. Later the same day Mr. Parker e mailed Mr. Moore at Therium (20:59) [redacted]

76. This e mail is of some importance because it demonstrates the close relationship which Mr. Parker had with Therium, from the outset. Essentially, Mr. Parker had his own line of communication with Therium, which remained in place for the remainder of his dealings with Mr. Johal and the Defendant. It was submitted by the Defendant that this put Mr. Parker in a position of conflict. I do not see this at all. As at 11th April 2016 the only legal obligations owed by the First Claimant to the Defendant were those contained in the NDA. The NDA said nothing about how precisely the Defendant and the First Claimant would work together, moving forward. Everything was up in the air. Nor did the NDA prohibit Mr. Parker from speaking directly to Therium, provided that he did not breach the obligations of confidentiality in the NDA. I see no reason why Mr. Parker was not entitled to maintain his own line of communication with Mr. Therium.

77. The next day, 12th April 2016, Mr. Parker e mailed to Mr. Fairley (12:03), copied to Mr. Johal and Mr. Goodhead, an anonymised draft collaboration agreement. In response Mr. Johal e mailed Mr. Parker (19:48) thanking him for the draft, which he described as *"extremely helpful"*, and saying that he looked forward *"to taking matters forward and working together"*.

78. This draft collaboration agreement identified the First Claimant as one of the parties to the agreement, but did not identify the other party, given that the agreement was an

anonymised draft of a collaboration agreement previously used by the First Claimant in a different group claim. The following things were clear from the draft collaboration agreement.

(1) It was an agreement for two firms of solicitors to work together on what was defined in the draft as *"the Claim"*.
(2) The two firms would be working together to combine their strengths with a view to ensuring the optimum result for the combined Claimant group; see recital (3) of the draft agreement.
(3) Each firm would have its own clients. This was clear from the wording of a number of clauses in the draft agreement.

79. On 21st April 2016 Mr. Fairley e mailed Mr. Parker (20:12). The e mail proposed a meeting with Mr. Johal and Mr. Goodhead, at the offices of the First Claimant, to progress matters. [redacted] On 22nd April 2016 Mr. Fairley e mailed Mr. Parker (15:47), again proposing a meeting with Mr. Johal and Mr. Goodhead. [redacted] Mr. Parker replied by e mail the same day (16:02), saying that the First Claimant could help simply on a consultancy basis if that seemed best.

80. On 27th April 2016 (20:59) Mr. Fairley circulated details of the meeting and the proposed agenda to Mr. Johal, Mr. Parker, Mr. Whittle and Mr. Goodhead. Included within the agenda was the following proposed item.

> *"Proposed collaboration between Your Lawyers & Harcus Sinclair and outline framework for that"*

(IX) Factual background – The April Meeting

81. The meeting arranged by Mr. Fairley took place on 28th April 2016, at the offices of the First Claimant in Lincoln's Inn Fields. Those attending were Mr. Johal, Mr. Whittle, Mr. Fairley, Mr. Goodhead, Mr. Parker, and Rosanne Murray from the First Claimant. Separate manuscript notes of this meeting ("the April Meeting") were taken by Mr. Whittle and Ms. Murray. I had the benefit of typed transcripts of these notes. I also had the benefit of written and oral evidence on the content of the April Meeting from all those present, with the exception of Ms. Murray.

82. I also have the benefit of an e mail sent on 29th April 2016 (14:52) by Mr. Fairley to Mr. Moore and Mr. Mayer at Therium [redacted]

83. The Claimants contend that an agreement to collaborate was reached between Mr. Parker and Mr. Johal at the April Meeting, on the basis that the Defendant and the First Claimant would each have clients of their own. The Claimants contend that Sentence 2 thereby ceased to have effect. [redacted]

84. [redacted]

85. [redacted]

86. [redacted]

87. [redacted]

88. [redacted]

89. It is clear to me, from the documentary and oral evidence which I have received, that no legally binding agreement of any kind was reached between the Defendant and the First Claimant at the April Meeting. It seems to me that Mr. Fairley was correct to identify the April Meeting as the start of the process of collaboration which followed the April Meeting. [redacted]

90. It is equally clear to me, from the evidence, that nothing occurred at the April Meeting which could possibly have had the effect of releasing the First Claimant from its obligations in Sentence 2. The NDA was not even mentioned at the April Meeting. Nor was anything agreed between the parties, at the April Meeting, which could have functioned as any kind of release from Sentence 2.

91. In this context there are four particular findings of fact, in respect of the April Meeting, which I make on the evidence which I have received.

(1) The basis on which the April Meeting took place, and the basis on which the parties thereafter proceeded was that the parties would be working towards agreeing the terms of a written collaboration agreement, in whatever terms were developed and agreed from the first draft of such a collaboration agreement produced by Mr. Parker.

(2) Following the April Meeting, an informal process of collaboration commenced. Pending the signing of such a written collaboration agreement, neither the Defendant nor the First Claimant was legally committed to this process of informal collaboration which followed the April Meeting. Pending such a written collaboration agreement, either party was free to walk away from the informal collaboration process at any time.

(3) Neither Mr. Johal nor Mr. Parker addressed their minds, either at the April Meeting or thereafter, as to what would happen if the terms of a written collaboration agreement could not be agreed, and one or both parties walked away from the informal process of collaboration which followed the April Meeting. There was a very good reason for this. Mr. Johal assumed that he had the protection of the NDA, so that if the process of collaboration ended without agreement on the terms of a written collaboration agreement, the Defendant would be protected by the NDA from competition in the proposed group claim from the First Claimant. On his side, Mr. Parker's assumption, which was confirmed in his oral evidence, was that he and the First Claimant would be free to strike out on their own or in collaboration with another firm or firms, in terms of acting for their own group of claimants in the proposed group claim. Mr. Parker held this assumption not because of anything which passed at the April Meeting, or because of anything said to him by Mr. Johal or any other representative of the Defendant. Mr. Parker held this assumption because he had not read the NDA, and was thus in ignorance of the restriction in Sentence 2, and of the other restrictions in the NDA.

(4) Nothing occurred at the April Meeting which had the effect of releasing the First Claimant from its obligations in Sentence 2, or indeed from any part of the NDA. Nor was anything agreed between the parties, at the April Meeting, which could have functioned as any kind of release from Sentence 2, or from any other part of the NDA.

92. In referring to an informal process of collaboration, both in my previous paragraph and in the remainder of this Judgment, I mean the process of collaboration which

followed the April Meeting and which was taking place without any binding agreement to collaborate being in place between the Defendant and the First Claimant.

(X) Factual background – May 2016 to September 2016

93. On 1st May 2016 Mr. Parker sent an e mail (12:44) to Mr. Fairley, the Defendant, Mr. Goodhead and Ms. Murray, by way of follow up to the April Meeting. [redacted]

94. On 8th June 2016 Mr. Parker sent a lengthy e mail to Mr. Johal (10:11). [redacted]

95. [redacted] Mr. Parker then proceeded to instruct Oliver Campbell QC. [redacted]

96. [redacted]

97. [redacted]

98. [redacted]

99. At a meeting on 15th June 2016 Ms. Maghoo of Questor Consulting presented what was described as a proposal to the Defendant and the Second Claimant for PR and marketing services. The intention was that Questor Consulting should market the services of the two firms in connection with proposed group claim to potential claimants. On 20th June 2016 Ms. Maghoo sent, further to the meeting on 15th June 2016, a joint e mail (10:28) to Mr. Johal and Mr. Parker, to which was attached the proposal for PR and marketing services dated 15th June 2015.

100. In her evidence Ms. Maghoo sought to claim that her instruction was to build a separate website for Harcus Sinclair, for clients of Harcus Sinclair. Mr. Park made the same claim in his evidence. This generated a certain amount of cross examination of Ms. Maghoo and Mr. Park on the terms of their brief in the matter. Ms. Maghoo claimed in cross examination that she had a version of the proposal for PR and marketing services dated 15th June 2016, which was addressed to Mr. Parker alone, as opposed to the document in the trial bundles, which was addressed to both Mr. Johal and Mr. Parker **[2/342:4-7]**.

101. I do not accept the evidence of Ms. Maghoo and Mr. Park to the effect that they were instructed to provide separate marketing services to Harcus Sinclair. That evidence is clearly contradicted by the proposal document of 15th June 2016. As for Ms. Maghoo's claim in cross examination that there was a separate proposal document addressed to Mr. Parker alone, no such document was produced to the Court and, in its absence, I find that there was no such document. I find that the instruction of Ms. Maghoo and Mr. Park took place as part of the informal process of collaboration between the Defendant and the First Claimant, and was intended to be part of a joint marketing exercise.

102. On 23rd July 2016 Mr. Parker sent an e mail (08:40) to Mr. Johal and Mr. Goodhead [redacted]

103. On 25th July 2016 the First Claimant sent a formal letter of claim to Volkswagen Financial Services (UK) Limited on behalf of Elizabeth Gabrel. The letter of claim, which was lengthy and detailed, stated that the First Claimant acted for Ms. Gabrel,

and set out a detailed claim arising out of the acquisition by Ms. Gabrel of a VW vehicle pursuant to a leasing agreement with an option to purchase or return the vehicle. The letter of retainer in respect of Ms. Gabrel was, I believe, a letter dated 2nd June 2016, sent by the Second Claimant to Ms. Gabrel. It is not clear why the retainer letter, which bore Mr. Parker's reference, was sent by the Second Claimant rather than the First Claimant, given that the First Claimant was responsible for sending the subsequent letter of claim on behalf of Ms. Gabrel. I was told that the retainer letter was sent out inadvertently on the notepaper of the Second Claimant. My finding is that the sending out of the retainer letter by the Second Claimant was the result of a tendency on the part of Mr. Parker and others in the First Claimant to refer to, and act by the First Claimant and the Second Claimant interchangeably. The documentary and oral evidence at trial was shot through with references to Harcus Sinclair, without distinction between the First Claimant and the Second Claimant.

104. [redacted]

105. On 10th August 2016 Mr. Johal e mailed Mr. Parker (14:38) seeking to arrange a call in order to try to agree on the collaboration agreement. As matters then stood, the collaboration agreement had not progressed beyond the draft which had been provided by Mr. Parker on 12th April 2016. On 17th August 2016 (16:22) Mr. Johal e mailed a draft of the collaboration agreement to Mr. Fairley, copied to Mr. Parker, together with a proposal for the budgeting of the proposed group claim. This second draft of the collaboration agreement contained various revisions made by Mr. Johal. In particular, the Defendant was identified as a party to the collaboration agreement, with the First Claimant remaining as the other party. Recital (3) referred to the Claimant group, as opposed to the combined Claimant group. It remained apparent, from various clauses in this second draft of the collaboration agreement, that the Defendant and the First Claimant would, under the terms of the collaboration agreement, each have their own clients.

106. Also on 17th August 2016 Mr. Parker had an e mail exchange with Mr. Moore. Mr. Moore was growing impatient with the delay in what Mr. Moore referred to as Mr. Johal getting *"his ducks in a row"*. Mr. Moore concluded his e mail (16:42) in the following terms.

> *"I want to kick on with this and the Fairley/Johal Dream Team are holding it up. Alternatively I can put it to the committee on the basis that HS alone is acting and Greg/Aman can fight over the 5% introducer fee when we win!"*

107. Mr. Parker responded the same day in the following terms (16:44).

> *"Like it. Would that I could bring myself to. Aman has just sent something through that he has spoken to me about but I have not read. Shall we discuss a response when you have seen it."*

108. I take Mr. Parker's reference to the material sent through by Mr. Johal to be the second draft of the collaboration agreement and the budgeting proposal which would have reached Mr. Parker shortly before his e mail to Mr. Moore.

109. [redacted]

110. [redacted]

111. On 28th August 2016 Mr. Fairley e mailed Mr. Moore (10:00) [redacted]

112. On 30th August 2016 Mr. Johal e mailed Mr. Parker (10:42) [redacted]

113. Mr. Moore responded to Mr. Parker by e mail the same day (13:39). [redacted]

114. On 1st September 2016 the Second Claimant sent a detailed letter of claim to Freshfields, on behalf of Edward and Laura Parkes. The letter of claim set out details of a claim arising out of the purchase by Mr. and Mrs Parkes of VW vehicles. The letter of claim was also expressed to have the additional purposes of (i) picking up on a number of unanswered issues, which were described as unanswered issues within the existing pre-action correspondence between Freshfields and the Defendant, and (ii) making further requests for information at the pre-action stage *"on behalf of our clients and the Claimant group as a whole"*.

115. The letter of claim identified the capacity in which the Second Claimant was acting in the following terms.

> *"We should say that we are in contact with and are now working with Your Lawyers Limited ("Your Lawyers") and have seen the correspondence between your two firms. Together with Your Lawyers, we act (as opposed to being in receipt of expressions of interest) for approximately 5,000 potential claimants."*

116. It is, again, unclear why this letter, which bears Mr. Parker's reference, was sent by the Second Claimant rather than the First Claimant. There is no written retainer available in respect of Mr. and Mrs Parkes. My finding is that this was, again, the result of a tendency on the part of Mr. Parker and others in the First Claimant to refer to, and act by the First Claimant and the Second Claimant interchangeably.

117. On 1st September 2016 a copy of this letter of claim was e mailed (15:52) to a number of parties, including the Defendant, by Joseph De Lacey, whose e mail address identified him as acting by the Second Claimant. Mr. Johal responded by e mail the same day (15:59) [redacted]

118. In response to this letter of claim Freshfields queried whom the Second Claimant was acting for. In an undated letter, written in response to a third letter from Freshfields dated 9th September 2016, the Second Claimant stated as follows.

> *"You have asked about our "actual status". We act directly for those claimants on whose behalf we have identified ourselves as acting. As we are instructed by others, we will from time to time identify them to you instead of writing separate letters of claim. We act for Your Lawyers' clients through Your Lawyers, having been instructed by them to correspond with you on their behalf."*

119. Freshfields replied on 14th September 2016. Their letter, which was expressed to be addressed to Mr. Parker of *"Harcus Sinclair LLP"*, recorded their understanding that *"Harcus Sinclair"* acted only for Mr. and Mrs Parkes. Freshfields also recorded that they had received letters of claim, dated 5th and 12th September 2016, from the Defendant on behalf of the Defendant's clients. Freshfields objected to dealing with two firms in relation to the same clients.

120. On 16th September 2016 Mr. Moore e mailed (01:16) to Mr. Fairley a revised version of the draft collaboration agreement, in clean and tracked changes versions, with a request that it be circulated to the Defendant and the First Claimant. Mr. Moore anticipated in his e mail that there would be some push back from Mr. Johal on not being named as lead solicitor. [redacted] Mr. Moore's anticipation of push back from Mr. Johal proved correct. The *"kickback"* from Mr. Johal was notified to Mr. Moore by Mr. Fairley in an e mail sent on 19th September 2016 (17:47).

121. [redacted]

122. On 29th September 2016 Mr. Parker sent letters of retainer to 12 clients, additional to Ms. Gabrel and Mr. and Mrs Parkes. It is not clear whether these were retainers of the First Claimant or the Second Claimant or both. The information on the dates of these retainer letters comes from a list of clients which I have seen, which records the dates on which letters of retainer were sent to various clients, including the retainer letter sent to Ms. Gabrel on 2nd June 2016. The list also records whether the relevant client was retained pursuant to Version 1 or Version 2 of the retainer. I have seen a draft retainer letter, dated 29th September 2016, which is expressed to be sent by the First Claimant. I am told that this letter was Version 1 of the retainer. I have also been directed to what I have been informed was Version 2 of the retainer, which was also expressed to be from the First Claimant. The list of clients records that the first 12 clients shown on the list were sent Version 1 of the retainer. The list of clients is described as a list of clients of the First Claimant *"or"* the Second Claimant in what is described as the VW Litigation. Notwithstanding this description, I have been told that the retainer, in the case of each client on the list, was sent out by the First Claimant. The only exceptions are said to be Mr. and Mrs Parkes, in respect of whom there was no written retainer, and Ms. Gabrel. In the case of Ms. Gabrel it is said that the letter of retainer was inadvertently sent out on the headed notepaper of the Second Claimant. For reasons which I set out in the next section of this Judgment, my finding is that the first 12 clients shown on the list of clients were clients for whom the First Claimant was effectively acting as from 29th September 2016, regardless of whether their particular retainers were sent out by the First Claimant or the Second Claimant. I will also come back to the question of whether any of the retainers were in fact sent out by the Second Claimant, in the next section of this Judgment.

123. These letters of retainer were sent out without the knowledge of the Defendant. They marked the beginning of the formation by Mr. Parker, without the knowledge of the Defendant, of a group of claimants in respect of the proposed group claim who were separate to the Defendant's group of claimants.

124. In saying this I have not overlooked the fact that the First Claimant had already, to the knowledge of Mr. Johal, commenced to act for Ms. Gabrel and Mr. and Mrs Parkes. In re-examination Mr. Johal confirmed that he had seen both the letters of claim written to Freshfields on behalf of Ms. Gabrel and the Parkes **[3/546:7-17]**. Mr.

Parker explained in his evidence that Ms. Gabrel and Mr. and Mrs Parkes were either employees or family members of employees at the First Claimant **[1/78:9-11]**. Mr. Johal said in his witness statement (paragraphs 30 and 31) that he regarded these clients as having been recruited by Harcus Sinclair in the context of the continuing cooperation between the Defendant and Harcus Sinclair, with a view to working up the case for the benefit of the Defendant, and with a view to the obtaining of funding from Therium for the proposed group claim. I accept this evidence of Mr. Johal, and I find that Mr. Johal did not object to the acquisition of these three clients by the First Claimant or the Second Claimant for the reasons given in paragraphs 30 and 31 of Mr. Johal's witness statement.

125. I make the following particular findings of fact in respect of the period from May 2016 to September 2016.

(1) During this period the informal process of collaboration between the First Claimant and the Defendant in respect of the proposed group claim continued, pending agreement on the terms of a binding collaboration agreement.

(2) It might seem odd that the First Claimant should commit such substantial legal resources (its own and those of counsel instructed by the First Claimant) without a formal collaboration agreement in place. I find that there were two reasons for this. First, it is in the nature of group claims that a good deal of initial investment may be required, in putting the claim together and getting it off the ground. Whether that initial investment can then be recovered, depends upon what happens thereafter in relation to the group claim. Second, Mr. Parker explained to me in his oral evidence that, if funding could be achieved from Therium, it would cover the initial expenditure **[1/65:16-20]**.

(3) Negotiations over the terms of a binding collaboration agreement continued during this period, but without agreement being reached.

(4) By late August 2016 Mr. Parker was aware that there was a diminishing prospect of Therium agreeing to fund the proposed group claim with the Defendant in a prominent role, and without the First Claimant in a leading role. Mr. Parker did not share this information with the Defendant.

(5) There was no discussion between the parties as to what would happen if the parties failed to agree on the terms of a binding collaboration agreement. Mr. Johal assumed that he would have the protection of the NDA in this event. Mr. Parker, in continuing ignorance of the restrictions in the NDA, assumed that he and the First Claimant would be free to act for their own group of claimants in the proposed group claim, if they so chose.

(6) The Defendant was made aware, in each case after the event, of the retention of the First Claimant and/or the Second Claimant by Ms. Gabrel and Mr. and Mrs Parkes as clients of the First Claimant and/or the Second Claimant. The Defendant acquiesced in this on the basis that it was accepted by the Defendant to be part of the informal process of collaboration which was continuing between the Defendant and the First Claimant, and was part of the working up of the Defendant's case in the proposed group claim, which was intended to be pursued in collaboration with the First Claimant, if the terms of a binding collaboration agreement could be agreed.

(7) By the end of September 2016 Mr. Parker had begun to form, without the knowledge of the Defendant, his own group of claimants, separate from the Defendant's group of claimants. This group of claimants was separate to

those clients, namely Ms. Gabrel and Mr. and Mrs Parkes, of whom the Defendant was aware and to whom the Defendant had not objected. The solicitors acting for these claimants were the First Claimant. Whether, in some cases the Second Claimant was also acting for these claimants, by virtue of having sent out the relevant letter of retainer, is a question I come to in the next section of this Judgment.

(8) As at the end of September 2016 Mr. Parker had not given up on the prospect of collaboration with the Defendant, and the informal process of collaboration was continuing.

126. I will use the expression "the HS Group" to refer to the group of claimants which Mr. Parker had begun to form at the end of the September 2016, and which has expanded substantially since that date. The expression does not include Ms. Gabrel and Mr. and Mrs Parkes, whose recruitment as clients was, as I find, acquiesced in by the Defendant as part of the informal process of collaboration. Where reference is made to the HS Group in this Judgment it means the members of this group at the relevant time. Thus a reference to the HS Group as it currently stands means the 43,000 or so claimants for whom the Second Claimant, jointly with S and G, acts in the Emissions Litigation.

(XI) Factual background – October 2016 to November 2016

127. On 4th October 2016, without the knowledge of the Defendant, a further set of retainer letters was sent out by, I am told, the First Claimant, adding to the group (the HS Group) which Mr. Parker had begun to form. Again, this information comes from the list of clients which I have mentioned above. The list of clients demonstrates that further retainer letters were sent out on 7th October 2016, 10th October 2016, 14th October 2016, 17th October 2016, 25th October 2016, 31st October 2016, 9th November 2016 and 10th November 2016, in each case without the knowledge of the Defendant.

128. [redacted]

129. On 5th October 2016 the First Claimant wrote a lengthy letter to Freshfields, stating an intention to issue an application for a GLO in the course of the next week, in addition to a set of generic Particulars of Claim. Freshfields responded on 7th October 2016, restating their point that they were not prepared to deal with two firms about the same clients. Freshfields pointed out that *"To date, you* [the letter was addressed to Mr. Parker of the First Claimant] *have sent us four letters of claim (Ms Gabrel, Mrs Hollman, Mr Harvey, Mr and Mrs Parkes), but you have also held yourself out as corresponding more widely on behalf of clients of Your Lawyers (your letter of 1 September 2016 and your undated letter received on 13 September 2016)"*. As can be seen the correspondence with Freshfields continued to proceed without any clear distinction between the First and Second Claimants.

130. On 12th October 2016 the First Claimant replied to Freshfields. On the question of clients, the letter said as follows.

> *"1. An arrangement whereby Your Lawyers instructed this firm to conduct correspondence on its behalf would not be at all confusing, or indeed unusual in the context of group litigation with more than one firm of solicitors acting for claimants. Nevertheless, in order to avoid controversy, this letter is sent on our clients' behalf only.*

2. *We enclose a schedule of clients on behalf of whom this letter is sent."*

131. A list of clients was attached to this letter. The list included Ms. Gabrel, Mr. and Mrs Parkes, and a number of further clients in the group of claimants (the HS Group) which Mr. Parker was forming. It is on the basis of this letter, which was sent by the First Claimant, that I find that the First Claimant was regarded as acting and did act for the clients retained by the retainer letters sent out in September, October and November 2016, regardless of whether the relevant retainer letter was sent by the First Claimant or the Second Claimant. This leaves the question of whether the Second Claimant was acting for any of these clients in 2016, either because the relevant retainer letter was sent by the Second Claimant or for some other reason. I do not think that I can make a finding to this effect. The list of these clients, to which I have previously referred, is headed as a list of clients of the First Claimant *"or"* the Second Claimant, but I have been told that the relevant retainer was, in each case, sent out by the First Claimant; the only exception being the letter of retainer which is said to have been sent out to Ms. Gabrel on the notepaper of the Second Claimant as a result of inadvertence. Given what I regard as the unsatisfactory state of the evidence in this respect, and given that I do not regard this question as having any significant implications, so far as this Judgment is concerned, I propose to leave this particular question undecided in this Judgment. In referring to this particular question, I mean the question of whether the Second Claimant was acting, in 2016, for any of the clients retained by the retainer letters sent out in September, October and November 2016, either instead of or alongside the First Claimant.

132. The letter of 12th October 2016 also enclosed a draft group litigation order for Freshfields' comments, and draft generic Particulars of Claim settled by Mr. Campbell and Mr. Heppinstall. Those draft generic Particulars of Claim had been sent by Mr. Campbell to the First Claimant by e mail (12:24) on the same day.

133. Also on 12th October 2016 Mr. Fairley e mailed (16:31) a further draft of the collaboration agreement to Mr. Moore, with further amendments made by Mr. Johal. [redacted] What Mr. Fairley wanted to know was whether this draft of the collaboration agreement would, subject to sight of the detail, be acceptable to Mr. Moore.

134. [redacted]

135. On 14th October 2016 a telephone call took place between Mr. Parker, Ms. Murray, and Ms. Young of S and G. I have seen a transcript of a manuscript note of the call. Ms. Young was impressed at how far the First Claimant had progressed in getting to the *"let's go stage"*. In the call Mr. Parker raised the possibility of a collaboration with S and G.

136. On 19th October 2016 the claim form was issued, by which the October Action was commenced. The claimants were identified in a schedule to the claim form, and numbered 66 (strictly 67 as Mr. and Mrs Parkes were listed as one party). I believe, but I have not carried out a cross-checking exercise, that the list attached to the claim form included all those who had appeared on the list attached to the First Claimant's letter of 12th October 2016. Effectively the claimants identified in the list attached to

the claim form were the HS Group at that date (subject to the point that my definition of the HS Group excludes Ms. Gabrel and Mr. and Mrs Parkes). The claimants' solicitors were identified as the First Claimant.

137. On 20th October 2016 (10:01) Mr. Parker sent a lengthy e mail, with attachments, to Mr. Johal [redacted]

138. [redacted]

139. [redacted]

140. Mr. Johal replied at some length by e mail (17:36) the same day. [redacted]

141. [redacted]

142. On 24th October 2016 Mr. Parker sent a further long e mail (14:41) to Mr. Johal [redacted]

143. [redacted] an impression which I formed in the course of the trial, namely that the solicitor/client relationship in group claims such as the Emissions Litigation is, on the claimants' side, substantially different to the relationship which exists between a solicitor and an individual client or small group of clients. In the case of group claims such as the Emissions Litigation, where a firm may act for many thousands of clients, the relationship necessarily has to be an impersonal one, conducted through a website rather than by more personal means of communication. This in turn means that a client making a decision on a firm of solicitors to instruct is likely to make that decision substantially on the basis of matters such as the relevant website of a firm and the marketing of that firm, as opposed to a decision made on the basis of an investigation into that firm's work and experience or on the basis of any personal contact.

144. On 28th October 2016, as I have already recorded in this Judgment, the First Claimant filed the GLO Application. The GLO Application was not issued until 18th November 2016 because, so I understand, there were problems with finding a convenient hearing date. The witness statement in support of the GLO Application was made by Mr. Parker. The order sought on the GLO Application included provision for Harcus Sinclair to be appointed as lead solicitors. I assume that the reference to Harcus Sinclair meant the First Claimant, because the First Claimant was then acting for the HS Group, and because the supporting witness statement was made by Mr. Parker in his capacity as a partner in the First Claimant.

145. On 6th November 2016 Mr. Johal e mailed (13:22) Mr. Parker with the draft collaboration agreement, as previously produced by Mr. Johal in September 2016, for Mr. Parker to consider and to propose any amendments to clauses with which Mr. Parker did not agree.

146. On 4th November 2016 Mr. Parker, Ms. Murray and Ms. Young had a further telephone conversation. Again, I have a note of this conversation. The basis of the claims against Volkswagen was discussed in some detail, including a discussion of the expert evidence which would be required. This was followed by a further telephone discussion with Ms. Young on 9th November 2016, at 2.00pm, which

involved more representatives of the First Claimant and S and G. The note of this telephone conversation which I have seen shows that the mechanics and pitfalls of running a group claim were discussed in some detail.

147. On 31st October 2016 a meeting took place between the various firms of solicitors representing clients with claims arising out of the Emissions Events. Mr. Whittle attended the meeting for the Defendant. This was followed by a telephone conference between the firms on 8th November 2016. Following the telephone conference Mr. Johal e mailed (18:55) Mr. Parker the same day. [redacted]

148. Mr. Parker responded to Mr. Johal the following day, 9th November 2016, by e mail (09:41). [redacted]

149. [redacted]

150. Later the same day (16:00) Mr. Parker e mailed to Ms. Young the draft generic Particulars of Claim prepared by Mr. Campbell and Mr. Heppinstall, and the third draft Particulars of Claim prepared by Mr. Goodhead. Mr. Parker did not have the permission of the Defendant to send Mr. Goodhead's third draft Particulars of Claim to Ms. Young.

151. On 11th November 2016 a telephone call took place between Mr. Johal, Mr. Whittle, Mr. Campbell, Mr. Heppinstall, Mr. Goodhead, Mr. Parker and Ms. Murray. A note of this telephone call was made by Ms. Murray, but it subsequently emerged that the Defendant had made a recording of this telephone call. I was therefore provided with a transcript of the recording.

152. [redacted]

153. Following the telephone conversation, on 12th November 2016, Mr. Johal e mailed Mr. Campbell (11:27). [redacted]

154. Mr. Campbell replied by e mail (16:22) on 13th November 2016. [redacted]

155. In a lengthy e mail sent to Mr. Johal on 14th November 2016 (11:16), Mr. Parker [redacted]

156. [redacted]

157. On 17th November 2016 a meeting took place between the First Claimant, Therium and S and G, at which the First Claimant agreed to provide S and G with a draft Co-Counsel agreement (a collaboration agreement) to be entered into between the two firms. On the same date Mr. Parker had a meeting with Mr. Johal to discuss collaboration. Mr. Parker reported on that meeting to Mr. Purslow of Therium in an e mail (08:49) sent on 18th November 2016. Also on 18th November 2016 Ms. Murray of the First Claimant e mailed to Ms. Young a draft of the Co-Counsel agreement proposed to be entered into between the First Claimant and S and G in respect of the Emissions Litigation.

158. On 25th November 2016 Mr. Moore e mailed (17:52) Mr. Parker and Mr. Purslow, copying the e mail to Mr. Johal and Ms. Murray, to say that Therium had come to the

conclusion that it should not fund the Defendant. The e mail then set out the reasons for this decision.

159. I make the following particular findings of fact in respect of the period from October 2016 to November 2016.

(1) Mr. Parker was subjected to considerable criticism by Mr. Coleman for concealing (to use Mr. Coleman's expression) his dealings with S and G from the Defendant. I find that those dealings were not disclosed to the Defendant by Mr. Parker. The information which was given by Mr. Parker to the Defendant, to the effect that he had met with S and G, did not, I find, amount to disclosure of those dealings. Indeed it was not until January 2017, as I shall describe in the next section of this Judgment, that the Defendant learnt of the collaboration agreement between the Second Claimant and S and G. I do not however find that this non-disclosure constituted deliberate deception on the part of the Mr. Parker. I find that the explanation for this non-disclosure was as follows. First, Mr. Parker had not read the NDA and thus remained unaware of the restrictions in the NDA. In any event, those restrictions did not prevent Mr. Parker having discussions with S and G, provided that the obligations of confidentiality in the NDA were observed. Second, in October and November 2016 the informal process of collaboration between the Defendant and the First Claimant, while faltering, had not been treated as abandoned by either party, in their dealings with each other, and had not finally been abandoned by either party. In these circumstances I can understand that Mr. Parker, as a matter of professional courtesy, felt some embarrassment in having to tell Mr. Johal that he was in fact engaged in collaboration negotiations with another firm of solicitors. I find that this was the second reason for Mr. Parker's failure to disclose to the Defendant his dealings with S and G.

(2) During this period the informal process of collaboration between the First Claimant and the Defendant in respect of the proposed group claim, pending agreement on the terms of a binding collaboration agreement, was faltering, but was not treated as abandoned by either party, in their dealings with each other, and had not finally been abandoned by either party. Nor had the parties, in their dealings with each other, formally given up on the prospect of collaboration. Mr. Parker, by virtue of his dealings with S and G, would have known that this was a remote prospect, but he did not communicate that knowledge to the Defendant.

(3) Negotiations over the terms of a binding collaboration agreement were not formally abandoned during this period, but were treated as continuing.

(4) There continued to be no discussion between the parties as to what would happen if the parties failed to agree on the terms of a binding collaboration agreement. Mr. Johal assumed that he would have the protection of the NDA in this event. Mr. Parker, in continuing ignorance of the restrictions in the NDA, assumed that he and the First Claimant and/or the Second Claimant would be free to act for their own group of claimants in the proposed group claim, in collaboration with S and G, if they so chose.

(XII) Factual background – December 2016 to January 2017

160. On the 21st December 2016 S and G and the Second Claimant entered into a Co-Counsel agreement, agreeing to work together in the Emissions Litigation.

161. On 30th December 2016 Mr. Johal e mailed (18:56) [redacted]

162. On 6th January 2017 Mr. Johal sent a lengthy e mail (10:47) to Mr. Parker. [redacted]

163. [redacted]

164. Mr. Parker responded by e mail (17:06) on 7th January 2017. [redacted]

165. On 9th January 2017 the Second Claimant issued a press release, publicising the GLO Application, advertising its role in the Emissions Litigation and its collaboration with S and G, and identifying the Second Claimant as the firm which would be lead solicitor in the Emissions Litigation. Therium was identified as the litigation funder.

166. On the same date the Defendant, by Mr. Johal, wrote a letter to the First Claimant in response to the e mail of 7th January 2017. The letter attached the NDA and drew attention to the undertakings in Sentence 1 and Sentence 2. Mr. Johal said in the letter that he had seen an article on the front page of the Daily Mail, which I assume derived from the press release. The letter asserted that there had been breaches of the NDA, and called for an immediate response from Mr. Parker.

167. Thus were the battle lines drawn between the Defendant, on the one side, and the Claimants and Mr. Parker, on the other side. Until the commencement of this action, the battle has, as I understand the position, effectively been conducted in the context of the GLO Application, to the general detriment, so far as I can see, of all the claimants and their representatives in the Emissions Litigation.

168. I make the following particular findings of fact in respect of the period from December 2016 to January 2017.

    (1) The dispute which broke out in January 2017 marked the effective end of the informal process of collaboration which had commenced following the April Meeting, although neither Mr. Johal nor Mr. Parker formally abandoned the prospect of collaboration.
    (2) It was not until the exchanges of 6th and 7th January 2017 that the parties addressed, as between each other, the question of what the legal position was between themselves, in the absence of agreement on a formal collaboration agreement and in circumstances where the informal process of collaboration was at an effective end and the First Claimant was acting, with S and G, for its own group of claimants.

169. There is one other matter with which I should deal, before leaving the factual background, which concerns two telephone conversations between Mr. Fairley and Mr. Johal, of which Mr. Fairley gave evidence in paragraph 38 of his witness statement. Mr. Fairley was not able to be precise as to the date of these conversations. Mr. Fairley's evidence as to the content of these conversations was as follows.

170. At the conclusion of Mr. Coleman's cross examination of Mr. Fairley, Mr. Butcher pointed out that Mr. Coleman had not challenged Mr. Fairley on these conversations.

This was very much to the credit of Mr. Butcher who could, as it seemed to me, have reserved this point to his closing submissions, when it would likely have been too late for Mr. Fairley to be recalled. Mr. Coleman made an application for Mr. Fairley to be recalled, so that Mr. Coleman could cross examine Mr. Fairley on these conversations. To his further credit Mr. Butcher did not resist that application. I decided that the application should be allowed, essentially because I did not want what might turn out to be important evidence left unexplored in cross examination.

171. Mr. Fairley was therefore recalled to give evidence on the following day, when he was cross examined by Mr. Coleman. In the event Mr. Fairley confirmed in this further cross examination what I had in fact assumed to be the case; namely (i) that there was no discussion in those conversations as to what would happen if Harcus Sinclair tried to set up their own group of claimants, either on their own or with another firm of solicitors, and (ii) that the context in which the conversations took place was that there would be a jointly funded and insured group of claimants, with Harcus Sinclair and the Defendant acting in collaboration and working together **[3/502:17-504:6]**. This accords with my own understanding of all the various exchanges between the Defendant and the First Claimant in which reference can be found to the Defendant and the First Claimant having their own clients. This was all in the context of the intended collaboration between the firms, pursuant to a formal and binding collaboration agreement.

(XIII) <u>The relationship between the Claimants</u>

172. For the purposes of this Judgment it is necessary to describe, in brief summary, the relationship between the Claimants. I take this description principally from (i) the information provided in a letter from the Second Claimant, dated 27th September 2017, which set out the reasons why the First Claimant's conduct of the Emissions Litigation, on behalf of the HS Group, was transferred to the Second Claimant, and (ii) the oral evidence of Mr. Parker **[1/137:21-142:19]**.

173. The First Claimant is the successor firm to Harcus Sinclair. In this section of the Judgment references to Harcus Sinclair do not mean either of the Claimants, but rather the predecessor firm to the First Claimant. Harcus Sinclair was a general partnership. The First Claimant was incorporated in March 2016, for the reasons identified in the letter of 27th September 2017.

174. The Second Claimant was incorporated in May 2014, and commenced trading later that year. The Second Claimant was originally created for the purposes of taking over the conduct of a substantial group action from Harcus Sinclair. Again, the reasons for the formation of the Second Claimant and this transfer of the group action are set out in the letter of 27th September 2017.

175. In order that the Second Claimant should have the legal resources which it required to conduct the group action a secondment agreement was concluded between Harcus Sinclair and the Second Claimant, pursuant to which employees of the general partnership were seconded to the Second Claimant from Harcus Sinclair. Harcus Sinclair continued to be responsible for paying the employees their salary and other remuneration, and the Second Claimant paid a fee to Harcus Sinclair for the secondment. Mr. Parker said that the Second Claimant has no employees of its own.

176. This secondment agreement, which was entered into on 24th November 2014 and was then extended by further agreement dated 28th July 2015, has now been novated between the First Claimant and the Second Claimant. I note from the documents with which I have been provided that this novation agreement, by which the original secondment agreement (as extended) was novated, is dated 20th September 2017. My understanding of the letter of 27th September 2017, and of Mr. Parker's evidence, is however that the same secondment arrangements existed between the First Claimant and the Second Claimant prior to the formal novation of the original secondment agreement by the agreement of 20th September 2017.

177. The letter of 27th September 2017 goes on to explain the reasons why the decision was taken to transfer the conduct of the Emissions Litigation from the First Claimant to the Second Claimant. I am satisfied that those reasons did not include any consideration regarding the possibility of sidestepping the restrictions in the NDA. I am satisfied of that for three reasons. First, the reasons identified in the letter, which I accept as a genuine statement of the reasons for the transfer, make no reference to any such consideration. Second, there are attached to the letter minutes of certain meetings of the First Claimant and certain other internal communications, at which the transfer of the conduct of the Emissions Litigation to the Second Claimant was considered. Those documents do not make reference to the NDA. Third, the letter states that the decision to make the transfer of the conduct of the Emissions Litigation had effectively been taken by 25th November 2016, although the formal notice of change of solicitor was not effected until the notice of change of 25th January 2017. As at 25th November 2016, and prior to January 2017, my finding of fact is that Mr. Parker remained in ignorance of the restrictions in the NDA. This would not have been true of Ms. Morrissey, but I have not heard evidence from Ms. Morrissey, the letter makes no reference to her being involved in the decision to transfer, and I have not found specific reference to Ms. Morrissey in the documents attached to the letter. I therefore infer that the decision to transfer the conduct of the Emissions Litigation to the Second Claimant was taken in ignorance of the restrictions in the NDA.

178. The letter of 27th September 2017 confirms that the First Claimant has been, and is, providing the Second Claimant with the legal resources, meaning the First Claimant's members and employees, which the Second Claimant requires to conduct the Emissions Litigation. This is being done on the same basis as Harcus Sinclair previously provided the services of its partners and employees to the Second Claimant. Those acting for the HS Group in the Emissions Litigation, in collaboration with S and G, are therefore the members and employees of the First Claimant, whose salaries and any other remuneration and expenses are paid by the First Claimant. I understood from Mr. Parker that the Second Claimant has no employees of its own. As I understood Mr. Parker's evidence the actual legal personnel working for the HS Group in the Emissions Litigation, in collaboration with S and G, are all members/employees of the First Claimant.

179. Mr. Parker is a member/partner of the First Claimant, and a director of the Second Claimant. The same applies to Mr. Beresford, whose witness statement now stands as part of the Particulars of Claim in this action. In his oral evidence Mr. Parker confirmed that all the members/partners of the First Claimant, subject to one or two possible exceptions of which Mr. Parker was unsure, were directors of the Second Claimant. Mr. Parker also thought that, subject to one or two possible exceptions, the

shares in the Second Claimant are held by the members/partners of the First Claimant according to their equity shares in the First Claimant. The same was true of Harcus Sinclair, whose partners held the shares in the Second Claimant according to their equity shares in that partnership.

180. Put simply, the correct description of the Second Claimant seems to me to be that it is the corporate vehicle through which the First Claimant conducts group litigation such as the Emissions Litigation.

(XIV) Did Sentence 2 constitute a solicitor's undertaking?

181. For the Claimants Mr. Butcher accepted, subject to questions of construction and subject to his case on restraint of trade, that Sentence 2 gave rise to enforceable contractual obligations. Mr. Butcher contended however that Sentence 2 did not take effect as a solicitor's undertaking, essentially for two reasons.

(1) The First Claimant gave the undertaking on its own behalf, and not on behalf of a client. An undertaking cannot be a solicitor's undertaking, unless it is given in connection with a transaction involving a client.
(2) Even if this was wrong, the undertaking was not given by the First Claimant in the course of the First Claimant acting as a solicitor, but in connection with the pursuit of a business opportunity. As such, it could not have taken effect as a solicitor's undertaking.

182. For the Defendant, Mr. Coleman disputed both these points. He said that an undertaking given by a solicitor could be a solicitor's undertaking, even if the solicitor was not acting for a client. He also said that the undertaking was given by the First Claimant acting in its capacity as a firm of solicitors.

183. There is also a further, subsidiary issue between the parties which has now come to assume considerably more importance in the case. The subsidiary issue is whether, if Sentence 2 did take effect as a solicitor's undertaking, it is enforceable against Mr. Parker in his individual capacity as a solicitor, as well as against the First Claimant. Mr. Butcher says that it is not. Mr. Coleman says that it is.

184. The bulk of this is now water under the bridge. As I have explained earlier in this Judgment, the Defendant's Note subsequent to the trial conceded that the supervisory jurisdiction of the Court over solicitors is confined to solicitors as officers of the Court, and does not extend to recognised bodies, such as limited liability partnerships and companies, through which solicitors conduct their practice; see Kanat Assaubayev v Michael Wilson & Partners [2014] EWCA Civ 1491 (paragraphs 46-47).

185. The Defendant's Note described the view expressed in Kanat as supported by the leading works; namely Gould, The Law of Legal Services (2015), at paragraph 6.164, and Cordery on Legal Services, at E[702]). I am not sure that this is quite correct. The extract from Gould with which I was provided did not seem to me to address this specific point, although it does cite Kanat. The extract from Cordery does make the point that the shift in the statutory framework to entity-based regulation does not easily fit with the underlying common law position, and does say that the jurisdiction of the Court does not extend to entities. In any event, the position is clearly stated by Christopher Clarke LJ in Kanat, at paragraphs 46-47, in the following terms.

> *"46 I am quite satisfied that the Court's supervisory jurisdiction does not extend to anyone or any body who or which (a) is not a solicitor, (b) does not act as one, and (c) does not pretend to be one — for the simple reason that anyone in that category is not, and does not purport to be, an officer of the Court. The Court's jurisdiction arises in respect of its officers. That it does so is confirmed by section 50 of the 1974 Act which provides:*
>
> *"(1) Any person duly admitted as a solicitor shall be an officer of the Senior Courts;*
>
> *(2) Subject to the provisions of this Act, the High Court, the Crown Court and the Court of Appeal respectively, or any division or judge of those courts, may exercise the same jurisdiction in respect of solicitors as any one of the superior courts of law or equity from which the Senior Courts were constituted might have exercised immediately before the passing of the Supreme Court of Judicature Act 1873 in respect of any solicitor, attorney or proctor admitted to practise there."*
>
> *47 A corporate body recognised under section 9 of the 1985 Act may provide legal services entirely lawfully. But it does not, on that account, become an officer of the Court and thereby subject to the supervisory jurisdiction. Noticeably neither the 1985 Act nor the LSA 2007 makes any provision for the exercise of the Court's jurisdiction in respect of solicitors to be extended to non-solicitors although section 14(4) of the LSA 2007 does extend the contempt of court jurisdiction to those who offend against section 14(1) . Recognised legal bodies may, of course, have members who are solicitors, in respect of whom the court will have jurisdiction; but that will not apply to a body such as MWP – a BVI company – itself."*

186. On the above basis the Defendant conceded, as it seems to me it had to, that the Court's jurisdiction in respect of the claim for breach of solicitor's undertaking was limited to Mr. Parker.

187. As I have also explained, the Claimants' Note in response to the Defendant's Note confirmed the position, in respect of the Court's jurisdiction in respect of the claim for breach of solicitor's undertaking.

188. There is in fact an authority in the agreed bundle of authorities for trial which concerned the question of whether a solicitor's undertaking had been given by a firm of solicitors trading as an LLP; see Greenpine Investment Holding Limited v Howard de Walden Estates Limited [2016] EWHC 1923 (Ch). In that case it was decided that an e mail from the LLP did not, as a matter of construction of the relevant e mail, amount to a solicitor's undertaking. The point appears not to have been argued in that case that the LLP could not be subject to the supervisory jurisdiction of the Court, whether or not the relevant e mail would otherwise have constituted a solicitor's undertaking. It is however clear from the Kanat case that the Court's supervisory jurisdiction is not capable of extending to the First Claimant, as an LLP, or to the Second Claimant, as a company.

189. The above sequence of events has a dramatic effect upon the first agreed issue which I have to decide, namely whether Sentence 2 constituted a solicitor's undertaking. If Sentence 2 did constitute a solicitor's undertaking, the only candidate for enforcement pursuant to the Court's supervisory jurisdiction is Mr. Parker, in his individual capacity as a solicitor and an officer of the Court.

190. In the case of Mr. Parker however there is a question which, as it seems to me, falls to be addressed prior to the question of whether Sentence 2 did constitute a solicitor's undertaking. That question is as follows. If it is assumed that Sentence 2 was otherwise capable of taking effect as a solicitor's undertaking, can Mr. Parker be regarded as having given the undertaking in Sentence 2 in his individual capacity as a solicitor? The same question can be put another way. Is the supervisory jurisdiction of the Court available against Mr. Parker personally, in respect of the undertaking in Sentence 2, if it is assumed that the undertaking was otherwise capable of taking effect as a solicitor's undertaking? Mr. Parker did sign the NDA, but he did so on the express basis that he was signing the NDA for and on behalf of the First Claimant.

191. It seems to me that this question falls conveniently to be considered first. If Mr. Parker did not give the undertaking in Sentence 2 in his personal capacity as a solicitor and/or if the supervisory jurisdiction of the Court is not available against Mr. Parker, it seems to me that the substantial argument which I heard on the question of whether Sentence 2 did or did not constitute a solicitor's undertaking, as opposed to being simply a contractual obligation, becomes irrelevant. I therefore take the question of the capacity in which Mr. Parker signed the NDA first.

192. To my surprise, there appeared to be no direct authority on the position of a solicitor who gives an undertaking on behalf of his firm, where the firm trades as an LLP or a company. No such authority was cited to me. It may be that this is because, historically, firms of solicitors traded as ordinary partnerships, rather than through a separate legal personality such as a company or an LLP, so that the distinction between the individual and the firm was of less importance.

193. In these circumstances it seems to me that the best I can do is to take the course suggested to me by Mr. Butcher in his closing submissions, and approach the matter by reference to principles of agency law.

194. The general rule, as the Claimants submitted, is that where an agent signs on behalf of a disclosed principal, only the principal is liable; see Bowstead & Reynolds on Agency (20th Edition) at 9-001. Should the position be any different where a solicitor signs an undertaking, expressly on behalf of the LLP or company through which his or her firm conducts its practice, in circumstances where the undertaking, if it had been signed by the solicitor in his or her own capacity, would have taken effect as a solicitor's undertaking subject to the supervisory jurisdiction of the Court?

195. I have difficulty in seeing why the position should be any different. A number of the cases which were cited to me demonstrate, at least in principle, that the law of agency does apply, in determining who is responsible on an undertaking. Thus in Geoffrey Silver & Drake v Baines [1971] 1 WLR 396, a written undertaking was given by an assistant solicitor employed by a firm of solicitors with a sole principal. The Court of Appeal decided that the undertaking was not subject to the supervisory jurisdiction of the Court. An issue in the case, which the Court of Appeal did not have to decide,

was whether the assistant solicitor had authority to give the undertaking on behalf of the sole principal of the firm. It is however apparent from the reasoning of all three members of the Court of Appeal that, as a matter of agency, there was no objection to treating the undertaking as one given by the assistant solicitor on behalf of the firm of solicitors, represented by its sole principal.

196. Further support for the proposition that the normal law of agency applies to solicitor's undertaking can be found in United Bank of Kuwait v Hammoud [1988] 1 WLR 1051, Hirst v Etherington [1999] Lloyds Rep PN 938 and Ruparel v Awan [2001] Lloyd's Rep PN 258. In each of these cases issues arose as to whether an undertaking given by one partner in the relevant firm bound the remaining members of the firm. In Etherington Stuart-Smith LJ specifically stated that, notwithstanding the special features relating to the enforcement of solicitor's undertakings, no special rules apply as to whether an undertaking given by a solicitor is binding on his partners; see the analysis of Stuart-Smith LJ at pages 942-943. In other words, the normal law of agency applies to this question.

197. It seems to me, following the guidance which I take from the above authorities, that I should approach the question of whether Mr. Parker gave the undertaking in Sentence 2 in his personal capacity by reference to the normal law of agency. On this basis it seems to me that Mr. Parker plainly did not give the undertaking in his personal capacity. He gave the undertaking on behalf of his firm, the First Claimant, which is not subject to the supervisory jurisdiction of the Court in respect of solicitor's undertaking, assuming that the undertaking would otherwise have been capable of taking effect as a solicitor's undertaking.

198. In a further Note lodged by the Defendant's counsel, following the Claimants' Note mentioned above, the point was urged upon me that the Court's jurisdiction over solicitors is very wide, and sufficiently wide to extend to members of a firm of solicitors, trading as an LLP, where a solicitor's undertaking is given on behalf of the LLP. In this context I was referred to what was said by Sir Thomas Bingham MR as to the nature of the Court's supervisory jurisdiction in Bolton v The Law Society [1994] 1 WLR 512, at 518A-519E. I was also referred to a decision of the Solicitors Disciplinary Tribunal (Solicitors Regulation Authority v Robert Andrew Schofield and Megsons LLP – Case No. 10801-2011) as authority for the proposition that an undertaking could be binding upon the individual who gives the undertaking, and the entity or recognised body within which he or she practises.

199. I accept that the Court's jurisdiction over solicitors is a wide one. I also can see that there are potential problems with the enforcement of solicitor's undertakings if, following the decision in Kanat, such undertakings cannot be enforced against entities practising as solicitors, or against the particular solicitor who gives the relevant undertaking but only on behalf of the relevant entity. If my view is correct, it would be important to ensure, when dealing with an LLP or a company, that the relevant undertaking was given by the individual solicitor expressly on his or her own behalf.

200. It seems to me however that neither of the authorities cited by the Defendant bears on the particular question which I am considering. The decision in Bolton clearly establishes the importance of maintaining the highest standards in the conduct of solicitors. I do not think however that it bears on the particular question which I have to decide. Turning to the Schofield case, it seems to me that this decision also does

not address the particular question which I have to decide. I refer to paragraph 24.2 of that decision, which sets out an extract from the letter which contained the relevant undertaking. It is not clear from that paragraph in what capacity the First Respondent, Mr. Schofield, signed the letter. It is simply recorded that Mr. Schofield signed the letter. The decision records that Mr. Schofield had originally not accepted that he had been personally liable on the undertaking, but had subsequently accepted that he was responsible from a regulatory perspective (paragraph 24.78 of the decision). As the Defendant's Note points out, the Tribunal found that both Mr. Schofield and Megsons LLP had failed to comply with the terms of the undertaking, but the basis upon which both parties were found to be responsible for the undertaking is not clearly set out in the decision. There was no discussion of the issue which I have to decide, and it is not clear from the decision whether the undertaking was given on the same basis as Mr. Parker signed the NDA in the present case.

201. In summary, I do not think that I can accept any of the authorities cited in the Defendant's final Note as establishing that all or any members of an LLP are personally bound by an undertaking which is given by a member of the LLP expressly on behalf of the LLP, as opposed to being given by the individual member in his or her individual capacity. Nor do I think that I can take any of these authorities as establishing that the supervisory jurisdiction of the Court is available against all or any members of an LLP in such circumstances.

202. I therefore conclude that the supervisory jurisdiction of the Court is not available against Mr. Parker in his personal capacity, if it is assumed that the undertaking in Sentence 2 was otherwise capable of taking effect as a solicitor's undertaking.

203. This decision is sufficient to dispose of what is left of agreed issue (1). I have considered, in case this matter should go further, whether I should go on to consider whether the undertaking in Sentence 2 would have been capable of taking effect as a solicitor's undertaking if, contrary to my decision, it can be treated as an undertaking in respect of which the supervisory jurisdiction of the Court is available against Mr. Parker in his personal capacity or if, contrary to the agreed position of the parties before me, the supervisory jurisdiction of the Court is available in respect of the First Claimant.

204. With some hesitation I have decided that I should do so. I have decided to do so in case this question should go further and, in that event, in case my decision on the point engages questions of fact which it will be necessary for me to have addressed. In doing so, I will try to take the question as shortly as I reasonably can. That is no easy endeavour, given the breadth and quality of the arguments advanced on each side. I therefore repeat, but specifically in relation to this point, that I have taken into account all of the arguments and authorities put before me on this point, even though not all of them will be mentioned in my decision on this point.

205. I start with a survey of the law. A solicitor's undertaking is defined in the Eighth Edition of Jackson & Powell on Professional Liability, at page [780] (side note 11-070), as a promise made by a solicitor in the course of practice that he will do or refrain from doing a certain act. The relevant promise can be given orally or in writing, and does not have to include the word *"undertake"* or *"undertaking"*. The recipient of the promise must reasonably place reliance upon it.

206. The key feature of a solicitor's undertaking, which differentiates it from an ordinary contractual obligation, is that breach of a solicitor's undertaking is regarded as a matter of professional misconduct. This has the following consequences, in terms of enforcement of a solicitor's undertaking, as explained by Balcombe LJ in Udall v Capri [1988] QB 907, at 916C-E.

> *"In my judgment the true position is as follows. There are three ways in which a party who seeks to enforce a professional undertaking given by a solicitor can proceed:*
>
> *(1) By an action at law, if there is a cause of action.*
>
> *(2) By an application to the court to exercise its inherent supervisory jurisdiction.*
>
> *(3) By an application to the Law Society. In The Professional Conduct of Solicitors (The Law Society, 1986) it is stated in Paragraph 15.02:*
>
> > *"A solicitor who fails to honour the terms of a professional undertaking is prima facie guilty of professional misconduct. Consequently the Council will require its implementation as a matter of conduct."*

207. It is the inherent supervisory jurisdiction of the Court which is most frequently exercised in the enforcement of solicitor's undertakings. This supervisory jurisdiction was further explained by Balcombe LJ in Udall, at 916H-918D. The ability of the High Court to exercise this supervisory jurisdiction was given statutory recognition in Section 50(2) of the Solicitors Act 1974, which provides as follows.

> *"(2) Subject to the provisions of this Act, the High Court, the Crown Court and the Court of Appeal respectively, or any division or judge of those courts, may exercise the same jurisdiction in respect of solicitors as any one of the superior courts of law or equity from which the Senior Courts were constituted might have exercised immediately before the passing of the Supreme Court of Judicature Act 1873 in respect of any solicitor, attorney or proctor admitted to practise there."*

208. A number of cases have addressed the question of when an undertaking is given by a solicitor in the course of practice, such as to qualify the undertaking as a solicitor's undertaking.

209. In Silver & Drake v Baines [1971] 1 QB 396, B, a solicitor and sole proprietor of a firm of solicitors, employed as his assistant an admitted solicitor, who dealt with most of the work of the firm. The assistant solicitor obtained advances of sums of money for a client of B's firm from another firm of solicitors and gave a partner in that other firm a written undertaking in the following terms: "*In consideration of your handing to me the sum of £4,000, we hereby undertake to repay the said sum to you together with interest at 2 per cent per month*". These sums were not paid on the due date. B denied knowledge of the transaction and repudiated liability. The other firm of

solicitors, who had provided the advances, sought to invoke the summary jurisdiction of the Court in respect of B's repudiation of the undertaking.

210. The Court of Appeal held that the undertaking was not given by B "*in his capacity as solicitor*" and, accordingly, refused to try the matter under the summary jurisdiction.

211. Lord Denning MR described the ambit and purpose of the summary jurisdiction as follows at page 402D-E:

> "*This court has from time immemorial exercised a summary jurisdiction over solicitors. They are officers of the court and are answerable to the court for anything that goes wrong in the execution of their office. Even if the solicitor has been guilty of no fault personally, but it is the fault of his clerk, he is accountable for it: see Myers v Elman [1940] AC 282. This jurisdiction extends so far that if a solicitor gives an undertaking in his capacity as a solicitor the court may order him straightaway to perform his undertaking. It need not be an undertaking to the court. Nor need it be given in connection with legal proceedings. It may be a simple undertaking to pay money, provided always that it is given 'in his capacity as a solicitor': see United Mining & Finance Corporation Ltd v Becher [1910] 2 KB 296, 307 by Hamilton J.*"

212. Similarly, Widgery LJ said at page 403F-H:

> "*This was not the common case of an undertaking given to the court in which any default is akin to a contempt and naturally attracts the remedy of attachment and committal. The undertaking in question here was not given to the court. It was not even given in the course of litigation. There is clear authority, however, from the earliest days that a solicitor, being an officer of the court, is liable to attachment for a breach of an undertaking - even though the undertaking is not given to the court itself. But the first requirement of the exercise of that jurisdiction, as Lord Denning MR has pointed out, is that the undertaking in question must have been given by the solicitor in the course of his activities as a solicitor. It must be given by him professionally as a solicitor and not in his personal capacity. The reason for that is clear enough, because a remedy of this kind is intended primarily to discipline the officers of the court, to ensure the honesty of those officers. The court is thus concerned only with their activities as solicitors, and anything done by a solicitor in his private capacity is outside this jurisdiction*."

213. In considering the question whether, on the facts of the case, the solicitor had given the undertaking "*in his capacity as a solicitor*", Lord Denning MR said as follows, at 402G-403B.

> *"The first question in the present case is whether the solicitor gave the undertaking "in his capacity as a solicitor." This is difficult to define. But I think it will usually be found, in regard to money, that it is an*

undertaking to pay money which he has in his hands on trust, or on an undertaking that he will apply it in a particular way. Thus if a solicitor is acting for a client on the sale of land and gives an undertaking to a bank that he will pay over so much of the money, when received, to the bank, the undertaking is given 'in his capacity as solicitor': see In re A Solicitor (Lincoln) [1966] 1 WLR 1604. So also, if a solicitor gives an undertaking that he will hold a sum of money in his hands pending the conclusion of negotiations, that too is given in his capacity as a solicitor, as in United Mining and Finance Corporation Ltd v Becher [1910] 2 KB 296. But this case is very different from either of those cases. The solicitor here was not holding money in his hands at all. All that happened was that Mr. Batts received money and paid it over to a client, Mr. Izzet, and promised to repay it to Mr. Silver. It was an undertaking to repay money lent. That is all. It was at good interest too, 2 per cent, a month. The money may have been for the benefit of a client. But that does not matter. It was in truth nothing more nor less than an undertaking to repay money lent. That is not an undertaking 'in his capacity as a solicitor'."

214. Widgery LJ likewise concluded that the undertaking was not given by the solicitor in his capacity as a solicitor. He stated at pages 403H-404B:

> "*On its face it is simply an undertaking to repay a debt which is being contracted by the solicitor in question. If a solicitor borrows money personally and incurs a personal obligation in that regard, his promise to pay the money is not a promise in his capacity as a solicitor, even though he sits in his office when he receives the money and even though he acknowledges the debt on his professionally headed notepaper. Another possible view of this particular case is that this was in truth the giving of a guarantee by a solicitor for a debt incurred by his client. But looking at it in that way it seems to me to make no difference. Here again one cannot describe this as an act done in the capacity of a solicitor merely because a client of the partnership was involved in the transaction. ...*"

215. Thus, the central point in Silver was that it involved a promise by B's assistant to repay a debt which he had contracted. That was a personal borrowing, in respect of which a personal obligation was incurred. The promise was not given by B's assistant in his capacity as a solicitor.

216. In United Bank of Kuwait v Hammoud [1988] 1 WLR 1051 the question again arose as to whether an undertaking given as security for a loan was within the ordinary business of a solicitor. Staughton LJ identified the relevant question to be answered in the following terms, at 1063G-H.

> *"The evidence establishes that two requirements must be fulfilled before an undertaking is held to be within a solicitor's ordinary authority. First, in the case of an undertaking to pay money, a fund to draw upon must be in the hands of, or under the control of, the firm; or*

> *at any rate there must be a reasonable expectation that it will come into the firm's hands. Solicitors are not in business to pledge their own credit on behalf of clients unless they are fairly confident that money will be available so that they can reimburse themselves. Secondly, the actual or expected fund must come into their hands in the course of some ulterior transaction which is itself the sort of work that solicitors undertake. It is not the ordinary business of solicitors to receive money or a promise from their client, in order that without more they can give an undertaking to a third party. Some other service must be involved."*

217. In support of his contention that an undertaking given by a solicitor can only be a solicitor's undertaking when it is given in connection with a transaction involving a client, Mr. Butcher drew my attention to a series of cases from the 19th Century, to be found at the beginning of the main authorities bundle which, so he submitted, establish that an undertaking will only be enforced as a solicitor's undertaking where the undertaking is given by the solicitor on behalf of the client. There was some debate, in the written submissions provided to me following the conclusion of the hearing, as to whether all of these cases involved a solicitor acting for a client. I find it necessary only to refer to United Mining v Becher [1910] 2 KB 296, where this line of authorities was considered by Hamilton J. The case again involved the question of whether an undertaking to repay money had been given by a solicitor in his capacity as a solicitor. In answering that question, Hamilton J. provided the following guidance, at 307.

> "*Whatever that expression may mean, I think it must at least go as far as this, that when a solicitor, in the course of business which he is conducting for clients with third parties in the way of his profession, gives an undertaking to those third parties incidental to those negotiations, that undertaking is one which is given in his capacity as solicitor and not as a mere layman undertaking the office of stakeholder or guaranteeing the payment of money. It seems to me that the part which solicitors are nowadays known to play in elaborate negotiations, which constantly have to be embodied at various stages in legal forms of a highly technical character, constantly involves for the purpose of facilitating the business, the giving of subsidiary undertakings largely because they are solicitors and deemed therefore, and found to be, especially worthy of trust.*"

218. A further case involving undertakings given by a solicitor to pay money, which seems to me to provide useful guidance, is Ruparel v Awan [2001] 1 Lloyd's Rep PN 258. In this case an undertaking given by a solicitor to repay a sum of money to the claimant was held not to be a solicitor's undertaking because it was not given by the solicitor in her capacity as a solicitor. In reaching that finding, David Donaldson QC (sitting as a Deputy Judge) stated as follows, at page 262:

> *"The essential requirement is that the undertaking should have been given by the solicitor in his capacity as a solicitor ... since that is the element which attracts the supervisory jurisdiction of the court. The mere fact that the giver of the undertaking happens to be a solicitor is*

not enough. The undertaking must therefore be given as part of or in connection with a transaction or activity which is "solicitorial"…"

219. The Deputy Judge noted that the principles articulated in United Bank v Hammoud were in line with the Court of Appeal's decision in Silver & Drake v Baines and were followed in Hirst v Etherington [1999] Lloyd's Rep PN 938, where Stuart-Smith LJ had said the following, at page 941:

> "*It is part of the usual or normal course of the business of a solicitor to be in possession or receipt of funds of or for a client in the course of handling a substantial transaction for that client. On the other hand it is not part of the usual or normal business of a solicitor either to receive money or a promise from a client in order that without more they can give an undertaking to a third party, or to give guarantees for the debt incurred by a client.*"

220. The Deputy Judge held that the relevant undertakings by the solicitor were simply to "*repay*" monies due to the claimant, and that the solicitor was to be no more than a conduit for this purpose and did not expect to receive those funds in the course of acting as solicitors on a transaction. He said that there was no element of actual or contemplated work or services in the capacity as a solicitor.

221. The Deputy Judge also rejected the attempt to find some element of solicitorial work in the fact that the solicitor had attended a meeting at which the possibility of the repayments being routed through the solicitor had been discussed. He held that the acts envisaged were not solicitorial but that, even if the contemplated actions had been solicitorial, "*they would have been independent of any undertaking, not closely connected as in the classic form of solicitors' undertaking, which is to pay over monies received by the solicitor in consequence of a transaction on which he acts as a solicitor.*"

222. What I take from this authority (Ruparel) is that it is not enough that the undertaking is provided in the context of, or in connection with, the provision of solicitorial services: what is required is that, in giving the undertaking, the solicitor is acting in the character of a solicitor. It is that element which engages the Court's supervisory jurisdiction over performance of the undertaking.

223. The SRA Code of Conduct 2011, made pursuant to the provisions of the Solicitors Act 1974 and other relevant statutes, has the force of subordinate legislation: see Swain v The Law Society [1983] 1 A.C. 598. Outcome 11.2 of the SRA Code of Conduct 2011 requires solicitors to *"perform all undertakings given by you within an agreed timescale or within a reasonable amount of time."*. *"Undertaking"* is defined in the Glossary to the SRA Code of Conduct 2011, which forms part of the Code. An undertaking is defined in the following terms.

> *"undertaking*
>
> *means a statement, given orally or in writing, whether or not it includes the word "undertake" or "undertaking", made by or on behalf of you or your firm, in the course of practice, or by you outside*

the course of practice but as a solicitor or REL [Regulated European Lawyer], to someone who reasonably places reliance on it, that you or your firm will do something or cause something to be done, or refrain from doing something."

224. At first sight this definition of a solicitor's undertaking might be thought to be rather wider than the definition established by the relevant case law. In closing submissions however Mr. Coleman accepted that the references to *"in the course of practice"* and *"outside the course of practice but as a solicitor"* preserved the requirement that the relevant undertaking, in order to be a solicitor's undertaking, had to be given by the relevant solicitor in the capacity of a solicitor. It is not therefore contended before me that the definition in the SRA Code of Conduct has widened the circumstances, as established by the case law, in which an undertaking given by a solicitor will take effect as a solicitor's undertaking.

225. In his submissions Mr. Butcher made the point to me that cases in which the supervisory jurisdiction of the Court has been invoked and in which the requirement that the solicitor must have been acting "*in his capacity as a solicitor*" has been considered, have very frequently involved undertakings by solicitors to repay sums of money or to deal with sums of money in a particular way.

226. Mr. Butcher submitted that the relevant case law in this area demonstrates that, in deciding whether an undertaking given by a solicitor takes effect as a solicitor's undertaking, the Court will consider carefully the capacity in which the solicitor was acting when the undertaking was given, and whether the giving of the undertaking was itself part of a solicitorial service. I accept that submission as a correct statement of the approach I should adopt in deciding whether Sentence 2 took effect as a solicitor's undertaking.

227. Mr. Butcher also submitted however that the undertaking in question had to be given by the solicitors in connection with a transaction involving one of his clients. Mr. Butcher identified this as a necessary, but not a sufficient condition for an undertaking to take effect as a solicitor's undertaking. Mr. Butcher made the point that there have been numerous cases in which the Courts have held that solicitors were not acting in their capacity as solicitors when undertaking to pay or repay monies, notwithstanding that the solicitors were acting on behalf of their clients. In the present case therefore, so Mr. Butcher submitted, this necessary condition was not satisfied. When the undertaking in Sentence 2 was given, it was not given by the First Claimant in connection with a transaction involving a client.

228. Thus the first question I have to decide, in this context and with the relevant case law in mind, is whether it is right that an undertaking cannot be a solicitor's undertaking if it is given by a solicitor in circumstances where there is no transaction involving a client.

229. Somewhat to my surprise neither Counsel was able to identify any direct authority on this point. Mr. Butcher of course made the point that the authorities all involve transactions in which the solicitor was acting for a client and that, as such, the authorities supported his submission. There is also the point that, in the cases involving undertakings to pay money, the critical point which emerges is that an

undertaking by a solicitor to pay money, in circumstances where the solicitor is effectively pledging his own credit rather than undertaking to pay monies out of a client fund, will not qualify as a solicitor's undertaking. This demonstrates, so it can be argued, that there is a requirement that the relevant undertaking be given on behalf of a client, and directly in connection with the transaction in which the solicitor is acting on behalf of the client.

230. I am not however persuaded that this is the effect of the authorities to which I have been referred. It seems to me that the key point which emerges from the authorities is that which I have identified above. In considering whether an undertaking given by a solicitor takes effect as a solicitor's undertaking, the Court must consider carefully the capacity in which the solicitor was acting when the undertaking was given, and whether the giving of the undertaking was itself part of a solicitorial service.

231. In my judgment the authorities do not justify an approach whereby an undertaking given by a solicitor is disqualified from being a solicitor's undertaking, regardless of the circumstances, if the undertaking is not given in connection with a transaction involving a client. I do not think that it is right to treat this as a necessary condition, or to separate out this question from the general question of whether the relevant undertaking was given by the relevant solicitor in his capacity as a solicitor.

232. In the course of his closing submissions Mr. Coleman suggested the example of a prospective client going to see a solicitor, and providing the solicitor with confidential documents to review, against an undertaking on the part of the solicitor to preserve the confidentiality of the documents. Mr. Coleman's submission was that there was no reason not to treat such an undertaking as a solicitor's undertaking. I find this example compelling, not least because of its obvious closeness to the role of the NDA in the present case. It seems to me that it would be wrong to treat such an undertaking as disqualified from taking effect as a solicitor's undertaking, simply because it was not given on behalf of the client.

233. I also find the example useful because it does not involve the case of a solicitor pledging his own credit on behalf of a client. I am wary of taking the line of authorities dealing with solicitors pledging their own credit as establishing a rule that an undertaking must be given by a solicitor in connection with a transaction involving a client, in order to qualify as a solicitor's undertaking.

234. Another way of testing the argument is to take the facts of this action. As I have explained, both the Defendant and the Second Claimant act as their own solicitors in this action. Leaving aside the First Claimant and Mr. Parker for these purposes, neither of these firms has a separate client. In the course of closing submissions I put the question to Mr. Butcher of what would have happened if, say, the First Claimant had given an undertaking to the Defendant, in the course of this action, to do something or refrain from doing something (I should mention that, when I put this question, I was under the impression, now corrected, that the First Claimant was acting for itself in this action). Would that undertaking be prevented from taking effect as a solicitor's undertaking because the First Claimant had no client? Mr. Butcher suggested that the position would be different, and that the undertaking could function as a solicitor's undertaking because the undertaking was given in the context of litigation. I did not find this distinction a convincing explanation as to why the undertaking in Sentence 2 could not function as a solicitor's undertaking because the

First Claimant had no client at the time, while an undertaking given by the First Claimant to the Defendant in this action could do so.

235. In my view the question which I have to ask myself in the present case, as it emerges from the relevant case law, is a single question, as follows. In giving the undertaking in Sentence 2 was the First Claimant acting in its capacity as a firm of solicitors? Putting the matter more precisely, was the undertaking given by the First Claimant as part of a solicitorial service?

236. It seems to me quite clear that the undertaking in Sentence 2 was given by the First Claimant as part of a solicitorial service. I say this for the following reasons.

237. The NDA recorded, in clause 1, that the Defendant intended to disclose information to the First Claimant *"for the purpose of obtaining legal advice"* from the First Claimant. The giving of legal advice is a classic instance of a solicitorial service.

238. Looking at the matter more widely, the NDA was put in place at the outset of a process of collaboration between the Defendant and the First Claimant in respect of the working up of the Defendant's group claim. The working up of this group claim involved a set of activities which can all be correctly described as solicitorial services. Preparing a legal claim for a client or a group of clients is another classic instance of a solicitorial service.

239. The whole point of Sentence 2 was to protect the Defendant from the First Claimant accepting instructions from or acting on behalf of any other group of claimants in the contemplated Group Action. I will have to decide what precisely these words meant in the next section of this judgment. For present purposes the important point is that Sentence 2 was intended to provide the Defendant with a particular form of protection in connection with the First Claimant giving its advice and, more generally, in connection with the intended collaboration between the Defendant and the First Claimant.

240. The point has been made to me that the NDA, in itself, contained no agreement for the First Claimant to give any advice, or to provide any co-operation. The effective submission, as it seems to me, is that the undertaking in Sentence 2 was not in itself a solicitorial service, but was rather an activity equivalent to solicitors pledging their own credit in the series of cases where this pledging of credit was held not to be an activity in which a solicitor's undertaking could be given.

241. I see the force of this point, particularly in the light of authorities cited to me, but I am not persuaded by it. It seems to me that the relevant question is whether the connection between the undertaking and the relevant activity is sufficiently close for the undertaking itself to qualify as part of the solicitorial service. This, it seems to me, is an intensely fact sensitive exercise.

242. On the facts of the present case, as I have found them, I find it impossible to separate out the giving of the undertaking in Sentence 2 from the provision by the First Claimant of the solicitorial services which were contemplated in the NDA. The two seem to me to have been intimately bound together. I do not think that the undertaking in Sentence 2 can be treated as the equivalent of the undertakings by solicitors to pledge their own credit which were held not to be solicitors' undertakings

in the authorities cited above. In my judgment the undertaking in Sentence 2 was given by the First Claimant as part of the solicitorial services provided by the First Claimant.

243. So far as the position of the Defendant is concerned, I have already found that the Defendant relied upon the undertaking in Sentence 2; see my findings that Mr. Johal relied upon the NDA to protect the Defendant in the event that a formal and binding collaboration agreement was not entered into. I am in no doubt that the Defendant was reasonably entitled to rely upon the undertaking in Sentence 2. It was central to the protection which the Defendant regarded itself as having, both at the outset of its collaboration with the First Claimant, and during the period of collaboration.

244. I therefore conclude that the undertaking in Sentence 2 did take effect as a solicitor's undertaking given by the First Claimant. As the supervisory jurisdiction of the Court is agreed not to be available against the First Claimant, this conclusion does not assist the Defendant, as against the First Claimant. It also follows that the claim for compensation against the First Claimant, pursuant to the Court's supervisory jurisdiction, falls away. The Defendant's pleaded case and submissions at trial suggested that the Second Claimant could also be held liable on the undertaking in Sentence 2, as a solicitor's undertaking. This point now seems to me to be academic, given that the supervisory jurisdiction of the Court would not be available against the Second Claimant, as a company. I should however say, for the sake of completeness, that I cannot see how, on any view of the matter, the undertaking in Sentence 2 could be treated as an undertaking given by the Second Claimant. The Second Claimant was not a party to the NDA.

245. So far as Mr. Parker is concerned, I repeat my earlier conclusion, that the supervisory jurisdiction of the Court is not available against Mr. Parker, in his personal capacity, in respect of what I have found to be the solicitor's undertaking in Sentence 2. Again therefore, the claim for compensation against Mr. Parker, pursuant to the Court's supervisory jurisdiction falls away.

246. There is a postscript to this part of this Judgment. In contrast to the other conclusions which I reach in this Judgment, I do not regard the above conclusions as particularly satisfactory. I have concluded that the undertaking in Sentence 2 did take effect as a solicitor's undertaking. It seems right to me however that this undertaking should be not be regarded as an undertaking given by Mr. Parker in his personal capacity. This is because it seems wrong to me to treat the undertaking as one given by Mr. Parker, in circumstances where the NDA made very clear the capacity in which Mr. Parker signed the NDA. The position of Mr. Parker would not matter if the supervisory jurisdiction of the Court was available as against the First Claimant. It is however common ground that it is not so available.

247. If my conclusions are correct, it would follow that parties dealing with solicitors practising through recognised bodies, such as limited liability partnerships and companies, need to be careful to ensure that solicitor's undertakings are given personally by individual solicitors, rather than on behalf of the relevant recognised body. I cannot help wondering whether this difficulty with solicitor's undertakings given by recognised bodies is as widely appreciated as it needs to be, given the importance of solicitor's undertakings in legal transactions such as conveyancing transactions.

(XV) What is the proper construction of Sentence 2?

(i) The arguments

248. The issue of the proper construction of Sentence 2 raises three general issues, or groups of issues, which need to be identified at the outset.

249. First, there is the question of what the words in Sentence 2 mean. What is their effect? The Defendant says that the meaning of Sentence 2 is clear. It prohibits *"Harcus Sinclair"* from acting for any group of claimants in the *"VW Litigation"* other than the Defendant's group of claimants. In its Skeleton Argument for trial the expression *"Harcus Sinclair"* was used to identify both Claimants, without distinction. The expression the *"VW Litigation"* was not defined, but I take it to mean the same litigation in the Queen's Bench Division which I am referring to as the Emissions Litigation.

250. The Claimants say that Sentence 2 had a much narrower meaning, which is helpfully summarised in paragraph 16 of the Claimants' very helpful, and full Note in Closing. What is said in paragraph 16 is as follows.

> *"As set out in section D of Harcus Sinclair's skeleton argument, on its proper construction, Sentence 2: (1) was confined to Harcus Sinclair LLP, (2) was confined to the group action that was contemplated in the information in respect of which confidence was to be preserved, which Your Lawyers intended to disclose to Harcus Sinclair LLP in anticipation of discussions between them about a possible collaboration; (3) did not preclude Harcus Sinclair LLP from representing clients of their own; and (4) governed the position only until the parties agreed to collaborate."*

251. Second, there is a related question of construction, which concerns the enforceability of the undertaking in Sentence 2 against the Second Claimant. There are several different points here, which need to be separated out.

(1) First, there is the question of whether the Second Claimant is itself bound by the restriction in Sentence 2, as a matter of contract. The answer to that point seems clear to me. The Second Claimant was not a party to the NDA. It has a separate legal personality and, in the course of the trial, Mr. Coleman accepted (realistically) that this was not a case where I could pierce the corporate veil, so as to treat the Claimants as the same party. As a matter of contract I cannot see how the Second Claimant is itself bound by the restriction in Sentence 2. As I have previously mentioned, this was accepted by Mr. Coleman in closing submissions.

(2) This leaves Mr. Coleman with what I understood to be two arguments, so far as the enforceability of the NDA against the Second Claimant is concerned.

(3) The first of these arguments is that the First Claimant was not, either by itself or Mr. Parker, entitled to act in a way which prevented performance of the obligation in Sentence 2. As such, as I understand the argument, the Defendant is entitled to relief, in respect of the breach of Sentence 2, which extends to the Second Claimant. This seems to me to be an argument which is better dealt with when I come, in a later section of this Judgment, to consider the question of breach of Sentence 2.

(4) The second of these arguments, which I should consider in this section of the Judgment, is that the NDA was subject to an implied term. The formulation of this implied term was put in the following terms in the Defendant's (also very helpful) Note on the Oral Evidence submitted as part of the Defendant's closing submissions.

> *"The implied term could be formulated in a number of ways, but its essence is that the First Claimant undertakes that the Second Claimant will not do anything that, if done by the First Claimant, would be a breach of the undertakings in the NDA."*

(5) The Claimants' case is that the legal requirements for the implication of such a term come nowhere near being satisfied.

252. Third, in terms of the construction issues, there is a point taken on restraint of trade. In their Note in Closing the Claimants took the point that, if I accepted the Defendant's case on construction, the result would be that Sentence 2 was unenforceable, as a clause in restraint of trade. This was not a point which, in my judgment, had been pleaded by the Claimants. In the course of closing submissions however, I ruled that the point could be taken, and stated that I would set out my reasons for that decision in this Judgment. Those reasons were, briefly, as follows.

(1) In view of the expedited nature of the trial, and the large amount of preparation work which the parties were required to carry out in a short space of time, I took the view, both in the pre-trial hearings and at the trial itself, that a certain amount of flexibility should be exercised in the making of case management decisions.

(2) The restraint of trade point (ie. the point that Sentence 2 was, on the Defendant's construction, unenforceable as being in restraint of trade) was indirectly foreshadowed in paragraph 30 of Mr. Beresford's witness statement, which was ordered to stand as part of the Particulars of Claim in this action, and also in paragraphs 61-63 of the Claimants' Skeleton Argument for trial, where it was contended that the restraint of trade point was relevant as an aid to construction of Sentence 2.

(3) Given the quantity of evidence which I had heard and read, I took the view that the restraint of trade point was essentially a matter for argument, and did not raise unexplored factual issues.

(4) I took the view that any prejudice caused to the Defendant by the late introduction of this point could be met by giving the Defendant permission to lodge a separate written submission on this point, with permission for the Claimant to respond, also in writing. I gave directions to this effect at the conclusion of the trial hearing.

(5) My original object, in directing an expedited trial, was to secure a swift resolution of this dispute. It seemed to me to be unsatisfactory to make a decision in this dispute whilst leaving a potentially critical point undecided.

253. I have now received the further written submissions, by way of Notes, of the Defendant and the Claimants on the restraint of trade point. The Defendant's case in its further Note is that if its case on construction is accepted, Sentence 2 is not unenforceable for being in restraint of trade, for the reasons set out in the Defendant's further Note. The Claimants' further Note contends that Sentence 2 is, on the Defendant's construction, unenforceable for being in restraint of trade. Indeed the

Claimants' further Note makes the point in terms that the fact, as the Claimants contend, that Sentence 2 is an unreasonable restraint of trade is not just an aid to the construction of Sentence 2, but a *"self-standing reason"* why the Court should not enforce the undertaking in Sentence 2 by making the orders sought by the Defendant.

254. Having thus identified the three general issues, or groups of issues, which fall to be dealt with in this part of the Judgment, I will take each general issue in turn.

(ii) What do the words of Sentence 2 mean?

255. In dealing with this first general issue I put to one side, for the purposes of dealing with this first general issue, questions of restraint of trade. I return to those questions, and their implications for my decision on the first general issue, when I come to the third general issue.

256. There is no dispute before me as to the relevant principles of construction. They are to be found in the three decisions of the Supreme Court in Rainy Sky SA v Kookmin Bank [2011] UKSC 50, Arnold v Britton [2015] UKSC 36, and Wood v Capita Insurance Services Limited [2017] UKSC 24.

257. I find it useful to keep in mind the following general guidance given by Lord Clarke, giving the judgment of the Supreme Court in Rainy Sky, at [21].

> *"21 The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."*

258. I also note that in Wood v Capita Lord Hodge stated, at [14], that there is no conflict between what was said in Rainy Sky and what was said in Arnold v Britton.

259. It is common ground that these principles of construction apply to the construction of Sentence 2.

260. There could have been one further consideration, in terms of the principles which should govern my decision on construction. In the case of a solicitor's undertaking it has been said that the critical question is how the undertaking would reasonably have been understood by the recipient, where the existence or construction of an undertaking is in question. This in turn has been said mean that, in the case of an ambiguity, the undertaking should be construed in favour of the recipient; see Reddy v Lachlan [2000] Lloyd's Rep PN 858 and Templeton Insurance Ltd v Penningtons Solicitors LLP [2006] EWHC 685 (Ch). I am however now concerned with the

construction of Sentence 2 as a contractual obligation only. I have decided that Sentence 2 did take effect as a solicitor's undertaking, but the supervisory jurisdiction of the Court is not available in respect of that undertaking. In these circumstances it seems to me that I should construe Sentence 2 without regard to any particular rule or principle of construction applicable to solicitor's undertaking, and that I should concentrate on the construction of Sentence 2 as a contractual obligation.

261. With the above guidance in mind, I turn to the wording of Sentence 2, and the parties' contentions.

262. As I have said, Mr. Butcher has helpfully summarised his case on construction in the following four propositions, contained in paragraph 16 of his Note in Closing. For ease of reference I repeat paragraph 16 of the Note in Closing.

> *"As set out in section D of Harcus Sinclair's skeleton argument, on its proper construction, Sentence 2: (1) was confined to Harcus Sinclair LLP, (2) was confined to the group action that was contemplated in the information in respect of which confidence was to be preserved, which Your Lawyers intended to disclose to Harcus Sinclair LLP in anticipation of discussions between them about a possible collaboration; (3) did not preclude Harcus Sinclair LLP from representing clients of their own; and (4) governed the position only until the parties agreed to collaborate."*

263. So far as (1) is concerned, I understood this to be common ground between the parties, in the sense that the Second Claimant was not a party to the NDA, and did not itself give the undertaking in Sentence 2. Beyond that, it seems to me that the relevant question is whether the NDA was subject to the implied term contended for by the Defendant. I shall come to that question in the next section of this Judgment.

264. (2) requires more analysis. It seems to me that the contemplated Group Action referred to in Sentence 2 must be taken as a reference back to *"a large Group Action"*, as referred to in clause 1 of the NDA. On one view this reference could be construed very narrowly, as a reference to the January Action which the Defendant had, at the time of the NDA, only just commenced on behalf of 5 claimants. If this is correct, it would mean that Sentence 2 only prevents the First Claimant from acting for any group of claimants, other than the Defendant's group of claimants, within the January Action. On this basis, and provided that the First Claimant only acted for another group of claimants in another action, there could be no breach of Sentence 2.

265. This narrow construction of Sentence 2 seems to me to be both unrealistic and uncommercial. At the time when the NDA was entered into both the Defendant and the First Claimant well understood what was involved in a group action such as the litigation which I am now referring to as the Emissions Litigation. [redacted] At the time when the NDA was entered into the Defendant had produced, and the First Claimant, by Mr. Parker, had seen the Defendant's Note [redacted]. My reference to the Defendant's Note is, for the avoidance of doubt, a reference to the same Note, forming part of the Litigation Pack, which I have already defined as the Defendant's Note. [redacted]

266. [redacted]

267. If however the reference to the contemplated Group Action in Sentence 2 meant no more than the January Action, Sentence 2 was effectively a dead letter from the outset. The First Claimant would be at liberty, at any time, to start its own set of proceedings on behalf of its own group of claimants. I find it very difficult to believe that any reasonable reader of the undertaking in Sentence 2, let alone a firm of solicitors with a high degree of experience and expertise in group litigation, could have thought that the undertaking was so restricted.

268. It seems to me that the contemplated Group Action, as referred to in Sentence 2, was intended to refer and did refer generally to the group litigation [redacted]; that is to say the claims against Volkswagen, arising out of the Emissions Events, which, it was contemplated, would be made in a group action by various groups of claimants, to be governed by a group litigation order.

269. My general reference to Volkswagen is deliberate. At the time when the NDA was entered into, there was only one defendant to the January Action, namely Volkswagen Group United Kingdom Limited. As such, the Claimants have argued that the restriction in Sentence 2 was confined to the particular claim which the Defendant had launched against this company. It did not, so it is argued, catch claims against different companies, advanced on the basis of causes of action which were different to those relied upon by the claimants in the January Action, at the time when the NDA was entered into.

270. It seems to me that this is simply another way of putting what is essentially the same argument which I have just considered, namely that the contemplated Group Action was confined to the January Action. I have already rejected that argument. It seems to me however that the argument set out in my previous paragraph also involves far too narrow a reading of reference to the contemplated Group Action. It is important to keep in mind that clause 1 of the NDA identified that confidential information was to be disclosed to the First Claimant for the purpose of the Defendant obtaining legal advice from the First Claimant. As part of that advice, and as both parties would have appreciated, it was likely that the claims made by the Defendant's group of claimants would evolve, both in terms of causes of action, and in terms of defendants. Equally it was likely that other firms of solicitors, acting for other groups of claimants in the contemplated Group Action, would have their own views on what causes of action should be advanced, and against which defendants from the parties involved in the Emissions Events.

271. I therefore conclude that the Defendant is correct to say, in paragraph 86.2 of its Skeleton Argument for trial, that the contemplated Group Action, as referred to in Sentence 2, means *"any actual or intended group action in the English courts involving the Defendant's client group against anyone who could be held responsible in civil proceedings in respect of the diesel emissions scandal"*. This is not an impossibly wide definition, nor is it uncommercial. It is simply a precise statement of [redacted] what was understood by the parties to the NDA to be in contemplation when the NDA was entered into.

272. Once the meaning of the contemplated Group Action is established, it seems to me that Sentence 2 makes perfect commercial sense. What Sentence 2 prevented the First Claimant from doing was accepting instructions for, or acting for, a rival group of claimants to the Defendant's group of claimants. As this action demonstrates, group

litigation is, or at least can be a competitive business between firms of solicitors. Sentence 2 was intended to ensure that the First Claimant, having provided its advice on the claim made by the Defendant's group of claimants and having had the benefit of insight into that claim, could not then strike out on its own, or in collaboration with another firm, with its own rival group of claimants.

273. Putting the matter more simply, it seems to me that Sentence 2 was intended to prevent the very thing which has occurred, namely the First Claimant forming its own rival group of claimants in the Emissions Litigation.

274. I should make it clear that I reach this conclusion without finding it necessary to resort to the presumption of construction in favour of the Defendant, which would have been available if the position had been that the undertaking in Sentence 2 was subject to the supervisory jurisdiction of the Court as a solicitor's undertaking. In my view there is no ambiguity in Sentence 2, and I would not have needed to resort to any presumption, one way or the other, to construe Sentence 2. In my view the meaning of Sentence 2, construed in the context of the advice and assistance which the First Claimant was intending to provide to the Defendant at the date of the NDA, is clear.

275. Returning to (3), in paragraph 16 of the Claimants' Note in Closing, it follows from the conclusion which I have just stated that Sentence 2 does indeed prevent the First Claimant from representing clients of its own in what is now the Emissions Litigation, without the express permission of the Defendant.

276. So far as (4) is concerned, this proposition seems to me to be wrong. The restriction on acting for other groups of claimants in Sentence 2 was subject to only one qualification, namely that the First Claimant could so act with the express permission of the Defendant. An agreement between the Defendant and the First Claimant to collaborate, entered into subsequent to the NDA, might or might not involve the granting of such an express permission, and/or might or might not involve an agreement between the parties to vary or release the restriction in Sentence 2. All would depend upon the terms of any subsequent agreement to collaborate. It seems to me to be quite impossible to say, as at the date of the NDA, that Sentence 2 would govern the position until the parties agreed to collaborate. There is no such provision in Sentence 2.

277. So far as the construction of Sentence 2 is concerned therefore, and leaving aside for present purposes questions of implied terms and restraint of trade, I prefer the argument of the Defendant. I conclude that, as a matter of construction, Sentence 2 precludes the First Claimant from accepting instructions from or acting on behalf of any group of claimants, in what is now the Emissions Litigation, other than the group of claimants for whom the Defendant acts in the Emissions Litigation.

278. I have tied my conclusion to the circumstances in which the construction issue now arises, namely the Emissions Litigation. For the avoidance of doubt however, I repeat my conclusion that the Defendant is correct to define the contemplated Group Action, as that expression appears in Sentence 2, as any actual or intended group action in the English courts involving the Defendant's client group against anyone who could be held responsible in civil proceedings in respect of the diesel emissions scandal.

(iii) <u>Can a term be implied into the NDA?</u>

279. The conclusion on construction which I have just reached does not affect the Second Claimant, which was not a party to the NDA and did not give the undertaking in Sentence 2. Is it then possible to imply the term contended for by the Defendant into the NDA?

280. There is no dispute between the parties as to the test for implication of an implied term. The law has been authoritatively stated by Lord Neuberger PSC in the Supreme Court in Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72. It is necessary for me to quote from this decision at some length. Lord Neuberger summarised the law, in the following terms, at [16] to [20].

> *"16 There have, of course, been many judicial observations as to the nature of the requirements which have to be satisfied before a term can be implied into a detailed commercial contract. They include three classic statements, which have been frequently quoted in law books and judgments. In The Moorcock (1889) 14 PD 64 , 68, Bowen LJ observed that in all the cases where a term had been implied, "it will be found that ... the law is raising an implication from the presumed intention of the parties with the object of giving the transaction such efficacy as both parties must have intended that at all events it should have". In Reigate v Union Manufacturing Co (Ramsbottom) Ltd [1918] 1 KB 592, 605, Scrutton LJ said that "[a] term can only be implied if it is necessary in the business sense to give efficacy to the contract". He added that a term would only be implied if "it is such a term that it can confidently be said that if at the time the contract was being negotiated" the parties had been asked what would happen in a certain event, they would both have replied "'Of course, so and so will happen; we did not trouble to say that; it is too clear'". And in Shirlaw v Southern Foundries (1926) Ltd [1939] 2 KB 206 , 227, MacKinnon LJ observed that, "[p]rima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying". Reflecting what Scrutton LJ had said 20 years earlier, MacKinnon LJ also famously added that a term would only be implied "if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'".*
>
> *17. Support for the notion that a term will only be implied if it satisfies the test of business necessity is to be found in a number of observations made in the House of Lords. Notable examples included Lord Pearson (with whom Lord Guest and Lord Diplock agreed) in Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board [1973] 1 WLR 601 , 609, and Lord Wilberforce, Lord Cross, Lord Salmon and Lord Edmund-Davies in Liverpool City Council v Irwin [1977] AC 239 , 254, 258, 262 and 266 respectively. More recently, the test of "necessary to give business efficacy" to the contract in*

issue was mentioned by Lady Hale in Geys at para 55 and by Lord Carnwath in Arnold v Britton [2015] 2 WLR 1593 , para 112.

18. *In the Privy Council case of BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings (1977) 52 ALJR 20 , 26, Lord Simon (speaking for the majority, which included Viscount Dilhorne and Lord Keith) said that:*

> *"[F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."*

19. *In Philips Electronique Grand Public SA v British Sky Broadcasting Ltd [1995] EMLR 472 , 481, Sir Thomas Bingham MR set out Lord Simon's formulation, and described it as a summary which "distil[led] the essence of much learning on implied terms" but whose "simplicity could be almost misleading". Sir Thomas then explained that it was "difficult to infer with confidence what the parties must have intended when they have entered into a lengthy and carefully-drafted contract but have omitted to make provision for the matter in issue", because "it may well be doubtful whether the omission was the result of the parties' oversight or of their deliberate decision", or indeed the parties might suspect that "they are unlikely to agree on what is to happen in a certain ... eventuality" and "may well choose to leave the matter uncovered in their contract in the hope that the eventuality will not occur". Sir Thomas went on to say this at p 482:*

"The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong. [He then quoted the observations of Scrutton LJ in Reigate , and continued] [I]t is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred ..."

20Sir Thomas's approach in Philips was consistent with his reasoning, as Bingham LJ in the earlier case The APJ Priti [1987] 2 Lloyd's Rep 37, 42, where he rejected the argument that a warranty, to the effect that the port declared was prospectively safe, could be implied into a voyage charter-party. His reasons for rejecting the implication were

"because the omission of an express warranty may well have been deliberate, because such an implied term is not necessary for the business efficacy of the charter and because such an implied term would at best lie uneasily beside the express terms of the charter"."

281. Following this summary of the existing case law Lord Neuberger went on to add the following six comments, at [21].

> *"21 In my judgment, the judicial observations so far considered represent a clear, consistent and principled approach. It could be dangerous to reformulate the principles, but I would add six comments on the summary given by Lord Simon in BP Refinery as extended by Sir Thomas Bingham in Philips and exemplified in The APJ Priti . First, in Equitable Life Assurance Society v Hyman [2002] 1 AC 408, 459, Lord Steyn rightly observed that the implication of a term was "not critically dependent on proof of an actual intention of the parties" when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly, as Lord Hoffmann I think suggested in Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988, para 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is "vital to formulate the question to be posed by [him] with the utmost care", to quote from Lewison, The Interpretation of Contracts 5th ed (2011), para 6.09. Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption in argument, that a term can only*

be implied if, without the term, the contract would lack commercial or practical coherence."

282. With the above guidance in mind I turn to the question of whether the implied term contended for by the Defendant can be implied into the NDA. In my view it can. I say this for the following reasons.

283. I have already set out the relationship between the Claimants. While the Claimants have separate legal personalities, and separate regulation by the SRA, and while this is not a case where the corporate veil can be pierced, the practical reality is that the Second Claimant was created by the First Claimant and is used by the First Claimant as a vehicle through which to conduct group litigation. At the time when the NDA was entered into the First Claimant was aware of the existence of the Second Claimant, and its purpose, but the Defendant was not.

284. The NDA, in its express terms, does not make provision for the situation which has now arisen, namely the Second Claimant acting for the group of claimants which, as I have found, the First Claimant is not entitled to act for.

285. What would have happened, if this point had been raised at the time when the NDA was entered into? What would the reaction of the parties have been, if the parties had been asked whether it was intended that the First Claimant would not only comply with the undertakings itself, but would also ensure that the Second Claimant complied with the undertakings?

286. It seems to me that the parties would have responded with the testy suppression envisaged by MacKinnon LJ in Shirlaw v Southern Foundries. It seems to me that this would have been seen as obvious. What point would there have been to the NDA, if its restrictions could have been avoided by the simple expedient of the First Claimant using its corporate vehicle, namely the Second Claimant, to carry out the relevant restricted activity?

287. The position seems to me to be the same if the implication of this term is considered by reference to the test (whether cumulative or alternative to the test of obviousness) of business efficacy or business necessity. The essential point is the same point as made in my previous paragraph. It seems to me that it would make a mockery of the obligations in the NDA if they could be sidestepped by the simple expedient of the First Claimant using its corporate vehicle, namely the Second Claimant, to carry out the relevant restricted activity.

288. I keep firmly in mind that it is not open to me to imply a term into the NDA now, simply because it seems right to me to do so now. I have to consider the position as it stood when the parties entered into the NDA. The decisive point seems to me however to be this. At the time when the NDA was entered into, the First Claimant was content to accept that, for a period of six years, it should become subject to the restrictions in the NDA; being restrictions which would effectively prevent the First Claimant from acting independently of the Defendant in the contemplated Volkswagen group action. If the First Claimant was willing to accept these restrictions for itself, it is difficult to see why the First Claimant would have had any objection to ensuring that the Second Claimant would observe the same restrictions. The situation would not have been one where the First Claimant was being asked to

guarantee the conduct of a third party. Rather, the situation would have been one where the First Claimant was being required to ensure that the vehicle through which it conducted the relevant part of its business did not breach the restrictions in the NDA.

289. In closing submissions Mr. Butcher made the point that, if Sentence 2 had been intended to apply more widely than the First Claimant, the parties could easily have said so. By way of example the definition of Recipient in the NDA could have been expanded to include all associated or related companies, as well as managers, directors, officers and employees of those companies. I see the force of this point, but I do not think that it follows from this point that the test of obviousness, or the test of business efficacy is not met. I come back to the fact that, given the particular way in which the First Claimant conducted its business, with the Second Claimant used as its vehicle to conduct the relevant part of that business, the NDA would have been more or less a pointless agreement, if its restrictions could have been avoided by the simple expedient of using the Second Claimant to carry out the restricted activity. Given that the First Claimant was willing to accept the restrictions in the NDA for itself, I find it difficult to see why the First Claimant would not also have been willing to accept an obligation to ensure that the Second Claimant observed the same restrictions.

290. I therefore conclude that the NDA was subject to the implied term contended for by the Defendant; that is to say an implied undertaking that the Second Claimant would not do anything which, if done by the First Claimant, would be a breach of the undertakings in the NDA. I will refer to this implied term as "the Implied Term".

(iv) Was Sentence 2 unenforceable as being in restraint of trade?

291. The relevant law is conveniently summarised in Chitty on Contracts (32nd Edition), Volume 1, at 16-085-16-113.

292. Restraint of trade is a common law doctrine, going back centuries, which is based upon public policy. A contract which is in restraint of trade is enforceable only if it is reasonable, with reference to the interests of the parties concerned and with reference to the interests of the public. Where a contract is in restraint of trade, it is for the party seeking to rely upon the contract to establish that the contract is no more than reasonable. If it is established that the contract is no more than reasonable, by reference to the interests of the parties, the onus of proving that the contract is contrary to the public interest lies on the party attacking the contract.

293. The time for testing whether a particular restriction is valid, and not unenforceable as being in restraint of trade, is the date when the restriction was imposed.

294. It can be a difficult task to determine whether a contract is in restraint of trade. In Esso Petroleum Co. Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269 Lord Hodson approved the following test, identified by Diplock LJ in Petrofina (Great Britain) Ltd v Martin [1966] Ch. 146 at 180.

> *"A contract in restraint of trade is one in which a party (the covenantor) agrees with any other party (the covenantee) to restrict his liberty in the future to carry on trade with other parties not parties to the contract in such manner as he chooses."*

295. Whether a particular provision operates in restraint of trade is to be determined not by the form which the restraint takes, but by its operation in practice.

296. In terms of judging the reasonableness of a contract the relevant restraint must be no more than is reasonably necessary to protect the legitimate interests of the party seeking to rely upon the restraint (the promisee) and also commensurate with the benefits secured to the party subject to the restraint (the promisor) under the contract.

297. The first question in the present case is therefore whether the restriction in Sentence 2 was in restraint of trade, within the terms of the test formulated by Diplock LJ. It seems to me that the restriction was in restraint of trade. As I have construed Sentence 2, it prevented and prevents the First Claimant from acting for the HS Group in the Emissions Litigation, and indeed for any group of claimants other than that represented by the Defendant. The point can also be made that the restriction is, in theory, capable of applying more widely than the Emissions Litigation. As I have construed Sentence 2, and quoting from the Defendant's skeleton argument for trial, the restriction applies to *any actual or intended group action in the English courts involving the Defendant's client group against anyone who could be held responsible in civil proceedings in respect of the diesel emissions scandal"*. On this basis the restriction would apply equally to proceedings in this jurisdiction which were independent of the Emissions Litigation. It must also be kept in mind that the restriction applies for a period of six years. This period of time was, as I understand the position, selected to ensure that, by the time this period expired, claims arising out of the Emissions Events would, or would be likely to have become statute barred.

298. The burden is therefore upon the Defendant to justify the restriction in Sentence 2 as one which (i) was no more than was reasonably necessary, as at the date of the NDA, to protect the legitimate interests of the Defendant, and (ii) was also commensurate with the benefits secured to the First Claimant under the NDA.

299. I am in no doubt that the restriction in Sentence 2 was one which was no more than was reasonably necessary, to protect the legitimate interests of the Defendant, as at the date when the NDA was entered into. I am also in no doubt that the restriction was also commensurate with the benefits secured to the First Claimant under the NDA. I say this for the following reasons, beginning with the Claimants' arguments.

300. The Claimants' argument on the question of reasonableness focuses on the question of protection of the Defendant's confidential information in relation to the proposed group claim. [redacted] I shall have to consider that question when I come to consider the claim for breach of Sentence 1 and the claims for breach of confidence. It seems to me however that the question I have just identified is not directly relevant to the reasonableness of Sentence 2, which was concerned with preventing the First Claimant from setting up a rival group of claimants in the proposed group claim. In other words, Sentence 2 was intended to prevent the very thing which has now occurred, with the HS Group. The Defendant and the Claimants are now in direct and acrimonious competition in the Emissions Litigation, in a manner which does not seem to me to be assisting any of the claimants or potential claimants in the Emissions Litigation.

301. [redacted]

302. The Claimants' argument on reasonableness also focuses on the point that, in April 2016, the possibility of consumer claims arising out of the Emissions Events was well known, with the prospect of other firms of solicitors forming their own groups of claimants. As a matter of fact it seems to me that the Claimants are correct on this point. In the course of the trial it came to light that the Defendant's own website was claiming, at least by 29th April 2016, that the Defendant was acting for thousands of clients. It seems to me however that Sentence 2 was not concerned with the preservation of confidentiality in respect of the proposed group claim. Sentence 2 was intended to protect the Defendant from the First Claimant forming its own group of claimants in competition with the Defendant, as has now happened.

303. It seems to me that the Claimants make what I regard as a key point, in paragraph 20.5 of their further Note, which I set out.

> *"Finally, were Sentence 2 to be construed as governing the position only until the parties agreed to collaborate (rather than for the 6 year period specified in clause 7), that again would involve a narrower and more reasonable restriction, which would more obviously protect Your Lawyers' perceived interest. By contrast, a restriction preventing Harcus Sinclair from ever having an involvement in litigation arising out of the emissions scandal self-evidently goes well beyond the reasonable protection of that interest."*

304. It seems to me that the analysis in the first part of this extract does in fact reflect a practical effect of the restriction in Sentence 2. As from their entry into the NDA, the parties were engaged in negotiations over the terms of a collaboration agreement. If the parties had managed to agree the terms of a collaboration agreement it is possible, and the travelling drafts certainly reflected this, that each of the Defendant and the First Claimant would have had their own group of claimants, while acting in concert with each other pursuant to the terms of the collaboration agreement. Even if the parties had forgotten to address this point specifically in such a collaboration agreement, it seems to me that such a collaboration agreement, if and in so far as it permitted the First Claimant to act for its own group of claimants, would have operated as an express permission to this effect, pursuant to Sentence 2, and/or as an implied release of Sentence 2, to the extent permitted by the collaboration agreement.

305. Unfortunately, the parties were not able to agree such a collaboration agreement, and their period of informal collaboration came to an end, in circumstances where the First Claimant, by reason of its work during the period of informal collaboration, was well placed to form its own group of claimants in competition with the Defendant. The restriction in Sentence 2 was, in my view, intended to provide the Defendant with protection from just such a scenario. I find it very hard to see how a restriction which was intended to provide this protection went beyond what was reasonably necessary, as at the date of the NDA, to protect the legitimate interests of the Defendant.

306. It is also important to keep in mind that, by April 2016, the Defendant had expended substantial time and effort in preparing the proposed group action. [redacted] What mattered was that the Defendant had a legitimate interest in preventing the First Claimant from using its position as advisor/collaborator in respect of the Defendant's group of claimants to strike out alone, or in concert with another firm, and set up a

rival group in competition with the Defendant.

307. Questions of this kind were explored in cross examination of Mr. Parker. In cross examination, Mr. Parker accepted that from a commercial perspective, lawyers contemplating bringing a group action do not want there to be other rival groups, and that lawyers contemplating group litigation want to be ahead so that they can obtain the GLO, be lead solicitor and conduct the common costs work. Mr. Parker accepted, albeit reluctantly and with some qualification, that the Defendant had a legitimate interest in preventing Harcus Sinclair from setting up a rival group **[1/50:24-51:12]**.

308. [redacted]

309. As the language of these e mails demonstrates, the making of group claims can be a highly competitive business.

310. It is also difficult to see how Sentence 2 could have been narrower, whilst still protecting the Defendant's legitimate interests. The Claimants' case on the construction of Sentence 2, which I have already rejected, seems to me to render Sentence 2 a dead letter, in terms of protecting the position of the Defendant against a rival group of claimants formed by the First Claimant. If Sentence 2 was to protect the legitimate interests of the Defendant, it needed to have the width which I have construed it to have.

311. Looking at the matter from the point of view of the benefit to the First Claimant, the First Claimant's entry into the NDA, and thus the First Claimant's entry into the restriction in Sentence 2 were what provided the First Claimant with access into a process of collaboration with the Defendant. If that process of collaboration resulted in a collaboration agreement with the Defendant, the First Claimant and the Defendant would be acting together in the proposed group claim, and the First Claimant would enjoy the benefits of that collaboration. If not, the First Claimant would have to accept that it would not be free to set up its own group of claimants, in competition with the Defendant. As I understand the relevant law, it is not appropriate for me, in judging reasonableness, to try to decide whether there was substantial equivalence between the scope of the restriction in Sentence 2 and what the First Claimant received in exchange for entering into the NDA. It seems to me however that the bargain I have described in this paragraph was a perfectly reasonable commercial bargain. It opened the way to a potentially lucrative business opportunity for the First Claimant.

312. Putting the matter another way, the benefits secured to the Defendant, by the First Claimant agreeing to the restriction in Sentence 2, were commensurate with the benefits secured by the First Claimant as a result of entering into the NDA.

313. It seems to me that Mr. Parker recognised this. [redacted]

314. In support of their case on restraint of trade, the Claimants placed considerable reliance upon ICBC Financial Leasing Co. Ltd. v Consultants Group Commercial Funding Corp [2016] EWHC 1683 (Comm). In that case Males J. decided, in an obiter part of his decision, that a clause in a confidentiality agreement which would have prevented a finance company from providing finance in relation to a client was unenforceable as being in restraint of trade. The case was relied upon by the

Claimants as illustrating that very much narrower limitations on a party's right to trade than the restriction in Sentence 2 have been considered unenforceable as being in restraint of trade.

315. In my view the reasoning in the ICBC case is distinguishable from the present case. In ICBC the finance broker was seeking to rely on a restriction which meant that the finance provider could not provide finance to a client save through the broker as an intermediary. The broker sought to rely on the relevant restriction even though the broker had no relationship with the client to whom the finance was to be provided. As such, the broker had no legitimate interest to protect. Males J. put the matter this way, at [157].

> *"It is one thing for a clause to prevent an intermediary from being cut out of a deal which it is arranging pursuant to a request from its customer, thereby depriving it of its opportunity to earn commission. It is something else again for a clause in effect to give CGCF an exclusive status in a transaction for which it does not even have a mandate."*

316. The circumstances in the present case were very different. The Defendant in the present case did have a legitimate interest to protect, namely its own proposed group claim. The purpose of the restriction in Sentence 2 was to ensure that the First Claimant did not set up its own group of claimants in competition with the Defendant's group. The Defendant was not a party which had no connection with claims arising out of the Emissions Events, and which was seeking to prevent the First Claimant from involvement in such claims. The Defendant had a real and substantial interest in such claims, by virtue of its own group of claimants and by virtue of all the work which it had done, prior to the NDA, to prepare the proposed group claim.

317. In summary, I conclude that the Defendant has discharged the burden of justifying the restriction in Sentence 2 as one which (i) was no more than was reasonably necessary, as at the date of the NDA, to protect the legitimate interests of the Defendant, and (ii) was also commensurate with the benefits secured to the First Claimant under the NDA.

318. This leaves the question of whether the restriction in Sentence 2 was contrary to the public interest, the burden in this respect lying upon the First Claimant. I cannot see how the restriction can be said to have been contrary to the public interest.

319. The case of Bridge v Deacons [1984] 1 A.C. 705 confirms that solicitors are not prevented by public policy from agreeing not to act for a certain group of persons. In this case the question was whether a restrictive covenant in a partnership agreement between the partners in a firm of solicitors was enforceable against a departed partner, or whether it was unenforceable as being in unreasonable restraint of trade. The Privy Council decided that the covenant was not in unreasonable restraint of trade. In relation to the question of whether it was contrary to public policy to prevent a person in the position of a departing partner continuing to act for a client, Lord Fraser said this, at 719G-H.

> "*For one thing a solicitor is always (except to some extent in legal aid cases) entitled to refuse to act for a particular person, and it is difficult*

to see any reason why he should not be entitled to bind himself by contract not to act in future for a particular group on persons."

320. This statement seems to me to be directly applicable to the restriction in Sentence 2.

321. Beyond this, the restriction operated to prevent the First Claimant from acting for a group of claimants other than the Defendant's group of claimants in respect of one set of claims arising out of one particular set of events (the Emissions Events). I cannot see what public interest was damaged by an agreement to this effect.

322. Putting the matter the other way round, it seems to me that if a restriction such as the restriction in Sentence 2 was held to be contrary to the public interest, this could create substantial problems for solicitors practising in this area. It seems to me that there is a public interest in firms of solicitors practising in this area knowing that the Court will enforce reasonable restrictions, of the kind found in Sentence 2, which are intended to protect the relevant firm in circumstances where it seeks external advice and assistance in respect of a proposed group claim.

323. The Claimants also sought to argue that it was not in the public interest that Harcus Sinclair, with its experience and expertise in group actions, should be entirely barred from acting in the Emissions Litigation, particularly where it acts for such a large pool of claimants. It seems to me that an argument of this kind is more relevant to the issue of what relief should be granted against the Claimants or either of them, if the First Claimant is found to be in breach of Sentence 2. So far as the public interest was concerned, at the time when the NDA was entered into, it is clear that there were a number of firms willing and able to run group claims arising out of the Emissions Events on behalf of a large number of claimants. Removing the First Claimant from the pool of available firms, in respect of claims arising out of the Emissions Events, does not seem to me to have been contrary to the public interest. In any event the restriction in Sentence 2 did not remove the First Claimant entirely from such claims. Rather, it restricted the First Claimant from doing anything other than acting in concert with the Defendant.

324. I therefore conclude that the restriction was not contrary to the public interest.

325. My overall conclusion is therefore that Sentence 2 is not unenforceable as being in restraint of trade. It also follows that the restraint of trade point is not capable of affecting my conclusions on the construction of the words in Sentence 2.

(v) <u>The construction issues – summary of conclusions</u>

326. It may be helpful if I summarise my conclusions on the construction issues, including the particular issues identified in the relevant section of the agreed list of issues.

(1) Sentence 2 precludes the First Claimant from accepting instructions from or acting for the group of claimants for whom the First Claimant has acted in the Emissions Litigation (the HS Group), or for any other group of claimants in the Emissions Litigation save for the Defendant's group, without the express permission of the Defendant.
(2) The NDA is subject to the Implied Term.
(3) The restriction in Sentence 2 is not unenforceable as being in restraint of trade.

(4) Sentence 2 does not bind the Second Claimant as a matter of contract. In stating this conclusion I leave open the question of whether any relief is available against the Second Claimant, if and in so far as there has been a breach of Sentence 2 on the part of the First Claimant.

(5) It is common ground that Sentence 2 does not bind Mr. Parker, as a matter of contract.

(6) By virtue of the Implied Term, the First Claimant undertakes that the Second Claimant will not do anything that, if done by the First Claimant, would be a breach of the undertakings in the NDA. The First Claimant is therefore precluded from procuring, facilitating or permitting the Second Claimant to do anything which, if done by the First Claimant, would amount to a breach of Sentence 2 by the First Claimant.

(XVI) Did Sentence 2 cease to have effect as a result of the discussion between the parties at the April Meeting?

327. I can take this issue very shortly, as the answer to this question follows from the findings which I have already made in respect of the April Meeting. I repeat my relevant findings.

(1) The NDA and the restrictions contained therein were not discussed or considered at the April Meeting.

(2) No agreement was reached between the parties, as a result of the discussion between the parties at the April Meeting, which either had any effect upon the restrictions in the NDA, or was capable of having any effect upon the restrictions in the NDA.

328. Accordingly I conclude that Sentence 2 did not cease to have effect as a result of the discussion between the parties at the April Meeting.

(XVII) Did the Defendant give express permission to the Claimants to act for the group of claimants for whom they act in the Emissions Litigation?

329. Mr. Parker accepted, in his oral evidence, that he was not saying that there was any specific permission for him to form a group of claimants with S and G **[1/108:8-10]**. This evidence was not surprising, and I accept it. As is pointed out in paragraph 137 of the Defendant's Note in Closing, Mr. Parker did not at any stage understand that *"Harcus Sinclair"* needed to obtain the Defendant's permission to act for its own group of claimants, and thus did not actively seek any such permission.

330. The reason why Mr. Parker never sought such permission, and indeed was unaware that such permission was required, was because, as Mr. Parker said, and as I have found, Mr. Parker neither read, nor gave any thought to the NDA when he signed it.

331. The Claimants however argue that such express permission can be found in the dealings between the parties. The Claimants also argue that such permission must be deemed to have been given because, so it is submitted, it would have been manifestly unreasonable for the Defendant to have refused to permit the Claimants to act for their own clients in the Emissions Litigation. It is submitted that, in relation to the giving of such permission, the Defendant had a discretion which could not be exercised irrationally.

332. In my judgment it is clear that no express permission was given by the Defendant to the Claimants or either of them to act for the group of claimants for whom they act in the Emissions Litigation (which I am referring to as the HS Group). I say this for the following reasons.

333. It seems to me that the reference to express permission in the NDA means what it says; that is to say an express permission to act for the group of claimants other than the Defendant's group of claimants. It does not seem to me that this reference to express permission is sufficiently wide to include an implied permission, spelt out of a course of dealing. It is clear from Mr. Parker's evidence that no such express permission was either sought or obtained.

334. If I am wrong about this, and such express permission could be implied from a course of dealing, I do not think that there was any such course of dealing between the parties. I refer back to my findings of fact in respect of the dealings between the parties, between April 2016 and January 2017. As I have already found, those dealings all took place in the context of an intended collaboration between the parties (the First Claimant and the Defendant) in respect of the proposed group claim arising out of the Emissions Events. The question of what would happen if the parties failed to agree the terms of a collaboration agreement was simply never addressed between the parties, either expressly or impliedly. There was a good reason for this. Mr. Parker assumed, in ignorance of the terms of the NDA, that he and the First Claimant would be free to act as they wished in this event, and Mr. Johal assumed that the position would be governed by the terms of the NDA.

335. So far as the argument that permission should be deemed to have been given is concerned, this argument strikes me as simply misconceived. The Defendant accepted that, in deciding whether or not to give permission pursuant to Sentence 2, the Defendant could not act irrationally or perversely. I can therefore see that, if Claimants or either of them had sought permission to act for their own group of claimants, and if such permission had been refused irrationally or perversely, there might be grounds for an argument that such permission should be deemed to have been given. These circumstances never however arose. No such permission was sought or obtained. Indeed, if such permission had been sought, and refused, I have some difficulty in seeing how the refusal of such permission could have been irrational or perverse.

336. It seems to me that the restriction in Sentence 2 was a perfectly legitimate one. If the Defendant had been asked for permission to act for another group of claimants by the Claimants or either of them, it seems to me that, in principle, the Defendant would have been quite entitled to require that the restriction remain place. In saying that, I am of course assuming a set of circumstances which never arose. This however seems to me to bring out the point that, in circumstances where permission never was sought or obtained, it is impossible to find that permission should be deemed to have been granted. The conduct of the Defendant which might have provided the foundation for such an argument, namely an irrational or perverse refusal of permission, never occurred.

337. I therefore conclude that the Defendant did not give express permission to the Claimants, or either of them to act for the group of claimants for whom they act in the

Emissions Litigation (the HS Group). I also conclude that no such permission can be deemed to have been given.

(XVIII) Are the Claimants or either of them in breach of Sentence 2?

338. I find that the First Claimant was, and is in breach of Sentence 2, as follows.

339. First, in accepting instructions for the HS Group, and in acting for the HS Group until the change of representation in the Emissions Litigation on 25th January 2017, I find that the First Claimant was in continuing breach of Sentence 2 until 25th January 2017 when the notice of change of solicitors was filed in the Emissions Litigation.

340. In my judgment there was no breach of Sentence 2, when the First Claimant accepted instructions to act on behalf of Ms. Gabrel or the Parkes. I have found that the Defendant acquiesced in the Claimants or either of them acting for these individuals, on the basis that this was part of the continuing process of informal collaboration between the Defendant and the First Claimant. Accordingly, it seems to me that the breach of Sentence 2 which I have identified in my previous paragraph commenced at the point when the First Claimant first accepted instructions to act for a party other than Ms. Gabrel and the Parkes. According to the list of clients which I have seen, instructions to act for claimants other than Ms. Gabrel and the Parkes were first accepted by the First Claimant on 29th September 2016. It seems to me therefore that the breach of Sentence 2 which I have identified in my previous paragraph commenced on 29th September 2016.

341. Second, I find the First Claimant has been in continuing breach of the Implied Term since at least 25th January 2017 because, since that date, the Second Claimant has been acting for the HS Group in the Emissions Litigation. In so acting, the Second Claimant has been doing something which, if it had been done by the First Claimant, would have been a breach of Sentence 2. The First Claimant, in continuing breach of the Implied Term, has taken no steps to prevent the Second Claimant from so acting. This breach of the Implied Term is continuing.

342. It seems to me, if the point matters, that it may be possible to date the commencement of the breach of the Implied Term to a date earlier than the change of representation on 25th January 2017. I say this because, as I have found, the First Claimant and the Second Claimant operated pretty much interchangeably. I have, earlier in this Judgment, left open the question of whether the Second Claimant started to accept instructions from members of the HS Group, as from 29th September 2016. If and in so far as this did occur, it would have placed the First Claimant in breach of the Implied Term as from a date earlier than 25th January 2017. Given that there is to be a separate hearing on quantum, I leave open, for determination at the quantum hearing, the question of whether the breach of the Implied Term, which I have found, commenced on a date earlier than 25th January 2017.

343. The breach of the Implied Term may, more correctly, be described as a breach of the NDA, rather than Sentence 2 specifically. It is however convenient to make my findings as to breach of the Implied Term in this section of the Judgment.

344. Whether or not I am right in my decision on the Implied Term, I should add that I also consider that the First Claimant has been, and remains in continuing breach of

Sentence 2, since at least 25th January 2017, even without the Implied Term. I say this because those who have been acting for claimants within the HS Group in the Emissions Litigation are the members and employees of the First Claimant. The services of those members and employees have been provided and are being provided to the Second Claimant by the First Claimant pursuant to the secondment arrangements between the two firms. It seems to me that the First Claimant has been acting and continues to act, through its relevant members and employees, for the HS Group, in breach of Sentence 2.

345. I can explain my reason for this last decision by reference to Mr. Parker. Mr. Parker continues to act for the HS Group. So far as the involvement of the Second Claimant is concerned, Mr. Parker wears his hat as a director of the Second Claimant. Mr. Parker is however also a member and partner of the First Claimant. While I accept that Sentence 2 did not refer in terms to the First Claimant as including its members and employees, I do not think that Sentence 2 had to spell this out. It seems to me that Sentence 2 did take effect as a restriction upon the First Claimant acting for the HS Group, either by itself or by its members and employees. I find it impossible to separate out, for this purpose, Mr. Parker in his capacity as director the Second Claimant, and Mr. Parker as member of the First Claimant. It seems to me, that in continuing to act for the HS Group, Mr. Parker is, in reality, still acting in his capacity as a member of the First Claimant. The same seems to me to be true for other members and employees of the First Claimant, who are seconded to the Second Claimant for the purposes of acting for the HS Group.

346. I have said that this last breach of Sentence 2, which I have identified immediately above, commenced as from 25th January 2017. I again leave open, for determination at the quantum hearing, the question of whether this last breach of Sentence 2, which I have found, commenced on a date earlier than 25th January 2017.

347. Turning to the Second Claimant, I find, as Mr. Coleman QC conceded in his closing submissions, that the Second Claimant is not, itself, in breach of Sentence 2 because it was not, and is not, in its own capacity, bound by the restriction in Sentence 2.

348. The concession made in closing submissions seemed to me to reflect the reality of the position. I can understand how the First Claimant is in breach of Sentence 2, by virtue of the activities of the Second Claimant and, by the contractual routes set out above, I have found that the First Claimant is in breach of Sentence 2 by virtue of the activities of the Second Claimant. I can also understand how, by virtue of these findings, the Defendant is entitled to seek discretionary relief from the Court, to the effect that the First Claimant take action to prevent the Second Claimant from continuing to act for the HS Group. In the absence however of a piercing of the corporate veil, it seems to me that the Second Claimant could not, itself, be in breach of Sentence 2.

349. In his closing submissions Mr. Coleman argued that, by procuring the Second Claimant to act for the HS Group, the First Claimant had actively prevented the restriction in Sentence 2 from having effect. Reference was made to Lewison, The Interpretation of Contracts (6th Edition), at pages [344]-[347], and to the principle that both parties to a contract are taken to contract on the footing that they wish the contract to be performed, and accordingly must be taken to have agreed that neither will actively prevent performance.

350. I cannot see that this principle is engaged or, for that matter, needs to be engaged in the present case. The Defendant's argument seems to me to confuse two separate situations. First, a party to a contract may act in such a way as to prevent itself from performing its obligations under a contract. In such a situation the party preventing itself from performing its obligations under the contract will be in breach of contract. This is not however the present case. In the present case the First Claimant has not acted in such a way as to prevent itself from complying with the restriction. Rather the First Claimant has breached the restriction in Sentence 2 in the ways in which I have set out above. Second, a party to a contract may cease, itself, to act in such a way that it is in breach of contract. That is effectively what has happened in the present case, albeit only in the limited sense that the First Claimant ceased to act directly for the HS Group as from 25th January 2017. Thereafter the First Claimant has been in breach of the NDA, but not because it has prevented itself from complying with the NDA. Rather, by reason of the Implied Term and by reason of my findings on the secondment arrangements between the First Claimant and the Second Claimant, the First Claimant did not in fact cease to be in breach of the NDA when it transferred the conduct of the Emissions Litigation (on behalf of the HS Group) to the Second Claimant.

351. I therefore conclude as follows.

(1) The First Claimant has been (since 29th September 2016) and remains in breach of Sentence 2, and has been (since at least 25th January 2017) and remains in breach of the Implied Term.
(2) I leave open, for determination at the quantum hearing, the question of whether the breach of the Implied Term and one of the breaches of Sentence 2 which I have found commenced earlier than 25th January 2017.
(2) The Second Claimant is not, itself, in breach of Sentence 2 because it is not directly bound by the restriction in Sentence 2.

(XIX) Has the Defendant lost the right to enforce Sentence 2 as a result of acquiescence, waiver or estoppel?

352. The Claimants contend that the Defendant has lost the right to enforce Sentence 2 as a result of acquiescence, waiver or estoppel. I take this reference to Sentence 2 to include the Implied Term, which I have found to be part of the NDA. In referring to the right (or not) to enforce Sentence 2 in this section of the Judgment, I am also referring to the right (or not) to enforce the Implied Term.

353. It is convenient to deal with estoppel first. The Claimants contend that they are entitled to rely upon three forms of estoppel, namely estoppel by convention, estoppel by acquiescence, and, although I think that this is correctly characterised as a subsidiary point on estoppel, promissory estoppel.

354. The relevant law, in terms of estoppel by convention and estoppel by acquiescence can be found stated in the speech of Lord Steyn, without dissent or qualification from the other members of the House of Lords, in Republic of India v India Steamship Co. Ltd (No. 2) [1998] AC 878.

355. In relation to estoppel by convention, Lord Steyn stated the applicable principles in the following terms, at 913E-F.

"The plaintiffs rely in the alternative on estoppel by convention and estoppel by acquiescence to defeat the applicability of the bar created by section 34. A general review of the requirement of these estoppels is not necessary. It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption: K. Lokumal & Sons (London) Ltd. v. Lotte Shipping Co. Pte. Ltd. [1985] 2 Lloyd's Rep. 28 ; Norwegian American Cruises A/S v. Paul Mundy Ltd. [1988] 2 Lloyd's Rep. 343 ; Treitel, The Law of Contract , 9th ed. (1995), pp. 112-113. It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention."

356. In relation to estoppel by acquiescence, Lord Steyn stated the applicable principles in the following terms, at 913H-914B.

"That brings me to estoppel by acquiescence. The parties were agreed that the test for the existence of this kind of estoppel is to be found in the dissenting speech of Lord Wilberforce in Moorgate Mercantile Co. Ltd. v. Twitchings [1977] A.C. 890. Lord Wilberforce said, at p. 903, that the question is:

> *"whether, having regard to the situation in which the relevant transaction occurred, as known to both parties, a reasonable man, in the position of the 'acquirer' of the property, would expect the 'owner' acting honestly and responsibly, if he claimed any title in the property, to take steps to make that claim known . . ."*

Making due allowance for the proprietary context in which Lord Wilberforce spoke, the observation is helpful as indicating the general principle underlying estoppel by acquiescence."

357. In the later case of ING Bank NV v Ros Roca SA [2011] EWCA Civ 353, in which Carnwath LJ cited the above extracts from the speech of Lord Steyn as a succinct statement of the modern law, Rix LJ also identified how, in circumstances giving rise to an estoppel by convention or acquiescence, promissory estoppel might also be engaged. At [85] Rix LJ said this.

> *"85 I am more than content to adopt Lord Justice Carnwath's solution in terms of estoppel by convention. However, I also consider that the same solution can be found in the doctrine of promissory estoppel, and is supported by a duty to speak. This should not perhaps come as a surprise since what we are concerned with is an estoppel which alters the effect of a contract by preventing a party from making an assertion or claim contrary to a position adopted mutually between its*

parties. Although a shared assumption may be lacking from many situations, a representation which is relied upon to the detriment of the representee includes many of the critical aspects of the doctrine of estoppel by convention. Moreover, in a situation in which it is plain that, internally, ING did not share the assumption concerning transaction costs which externally and objectively , it affected and purported to share, there is, to my mind, good sense in considering the matter through the eyes of an estoppel by representation."

358. In terms of what was required, by way of a representation to found a promissory estoppel, Rix LJ said this, at [100].

> *"100 As for the representation in question, I have dealt with this above. It seems to me that the agreement on €4 million necessarily meant that ING's fee would not be charged at a rate which involved the use of EBITDA 2006. On any view, that was sufficiently certain, for otherwise ING's fee alone would have exceeded €7 million. I agree with Carnwath LJ that, when the terms of a representation can be found, its meaning and effect is for the court, even though it is possible to argue about that, as in the case of so many a contractual provision. The requirement of sufficient certainty, or, as is often said of representations in general, that they should be clear and unequivocal, is that the corpus of the representation should partake of that requirement. Here the parties were agreed, or appeared to each other to be, that the estimate of €4 million covered all the transactional costs. It does not matter whether that agreement was intended to be precise or approximate, conservative or otherwise: it could not accommodate what ING intended to charge, what ING was entitled to charge under the contract as I would construe it. It was necessarily inconsistent with ING's construction (and, as it turns out, albeit not in the opinion of the judge, what is in my judgment the true construction). That was sufficient for present purposes. Mr Phillips was constrained to accept in the course of argument that the agreed figure was inconsistent with ING invoicing and recovering its €7.3 million figure (Day 3.35)."*

359. In the course of his closing submissions, Mr. Butcher made a number of other points to me on the operation of these types of estoppel, all of which I accept, which were as follows.

(1) Estoppel by convention requires communications to pass across the line (which I understand to mean between the relevant parties), but such communication can be effected by conduct of one party, known to the other.

(2) The true meaning, or content of the relevant assumption is to be determined by the Court.

(3) The relevant assumption or understanding can relate to future events; see Carnwath LJ in ING Bank at [64(i)].

(4) The relevant assumption or understanding is not precluded from arising because the case is one where the parties have forgotten the relevant contractual rights; see Blindley Health Investments Ltd v Bass [2015] EWCA Civ 1023, where Hildyard J. said this, at [79].

> *"79 It may be that most cases of estoppel by convention arise from a mistake made by the parties or a mistake made by one party and acquiesced in by the other. But the authorities do not suggest that the principle is confined to cases of mistake. Moreover, a mistaken recollection is not, to our minds, legally different from a state of forgetfulness. The essence of the principle is that the parties have conducted themselves on a conventional basis which is, wittingly or unwittingly, different from the true basis. Whether the true state of things has been misappreciated, misremembered or forgotten should make no difference to whether the parties have in the event mutually adopted a common assumption."*

(5) Depending upon the facts of the case, a so called duty to speak can arise, on the part of the party who subsequently seeks to enforce the contractual rights which are said to be the subject of the relevant assumption or understanding which founds the estoppel in respect of those contractual rights. As Blair J. explained, in Starbev GP v Interview Central European Holdings BV [2014] EWHC 1311 (Comm) at [128]-[129], the duty arises in the following circumstances.

> *"128 A duty to speak may arise where the relationship between the parties is one of good faith, as in the insurance context, or by way of a contractual term, express or implied. Neither of these is relied on by Starbev. It relies on authority which shows that a duty to speak may also arise where, having regard to the situation in which the transaction occurred as known to both parties, a reasonable person would expect the other party, acting honestly and responsibly, if he had a claim, to take steps to make that claim known. The reasonable person for these purposes is a person in the position of the party who seeks to rely on the estoppel. This is the test in the dissenting speech of Lord Wilberforce in Moorgate Mercantile , as cited in The Indian Endurance , and effectively approved in Ros Roca (ibid, at [60], and [92]-[94]).*
>
> *129 In such a case, the duty to speak arises because "a reasonable man would expect the person against whom the estoppel is raised, acting honestly and responsibly, to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights and obligations" (The Lutetian [1982]*

2 Lloyd's Rep 140 , 157, Bingham J; Ros Roca , ibid, at [93]-[94], Rix LJ)."

(6) In the case of an estoppel by convention, at least, detrimental reliance is not necessarily required before it can become unjust or unconscionable for one party to resile from the relevant assumption or understanding. This was explained by Akenhead J. in the following terms, in Mears v Shoreline Housing Partnership Limited [2015] EWHC 1396, at [51(d)].

"(d) A key element of an effective estoppel by convention will be unconscionability or unjustness on the part of the person said to be estopped to assert the true legal or factual position. I am not convinced that "detrimental reliance" represents an exhaustive or limiting requirement of estoppel by convention although it will almost invariably be the case that where there is detrimental reliance by the party claiming the benefit of the convention it will be unconscionable and unjust on the other party to seek to go behind the convention. In my view, it is enough that the party claiming benefit of the convention has been materially influenced by the convention; in that context, Goff J at first instance in the Texas Bank case described that this is what is needed and Lord Denning talks in these terms."

360. With the above guidance in mind, I turn to the facts of the present case.

361. The alleged shared assumption upon which the Claimants rely is identified in the following terms, in paragraph 173 of the Claimants' Note in Closing.

"Throughout the period from mid-2016 to the start of 2017, Harcus Sinclair were patently proceeding on the assumption that there was nothing to prevent them from acting for their own clients in the VW Litigation. In other words, Harcus Sinclair conducted their affairs on the basis that they were entitled to recruit for and act on behalf of their own clients in the VW Litigation."

362. It seems to me that there are two essential difficulties with the Claimants' assertion of, and reliance upon, this shared assumption.

363. First, it seems to me that there are difficulties in saying that this shared assumption existed at any time during what I regard as the relevant period. In referring to the relevant period I am referring to the period which commenced with the April Meeting, and came to an end with the exchanges between Mr. Johal and Mr. Parker in early January 2017.

364. I think that, for the purposes of considering this part of the Claimants' case, it is convenient to divide the relevant period, as I have identified the same, into two sub-periods, with the first sub-period ending on 20th October 2016, and the second sub-period ending in early January 2017.

365. So far as the first sub-period is concerned, the Defendant was only aware, prior to Mr. Parker's e mail of 20th October 2016, that the First Claimant was acting for three clients of its own. The Defendant accepted this position on the basis which I have identified earlier in this Judgment, namely that this was part of the informal process of collaboration. The existence of these three clients seems to me to come nowhere near a shared assumption that the First Claimant was entitled to have its own clients in the proposed group claim.

366. I would accept that, during this first sub-period, there were repeated occasions and documents in which reference was made to the First Claimant having its own clients. I would accept that there was a shared assumption to this effect. This shared assumption must however be properly identified. It was not an assumption that the First Claimant would be entitled to have its own clients, without more. It was an assumption that, as part of the intended collaboration which was to take place between the parties, pursuant to a formal collaboration agreement, the First Claimant would be entitled to have its own group of clients within the combined group of claimants in respect of which the parties would be collaborating. The basis of the assumption was there would be a formal collaboration.

367. More importantly, the assumption did not address the question of what the position would be if the parties failed to agree on the terms of a formal collaboration agreement, and went their separate ways.

368. Turning to the second sub-period it can be said that the Defendant was aware, following Mr. Parker's e mail of 20th October 2016, that the First Claimant was acting for its own group of claimants; namely the HS Group. This however has to be put into its proper context. The parties were still dealing each other on the basis of an informal process of collaboration, and the parties were still dealing with each other on the basis of a shared intention to enter into a formal collaboration agreement, or at least a shared possibility of entering into such a formal collaboration agreement.

369. As with the first sub-period, the question which was not addressed between the parties was what the position would be if the parties failed to agree on the terms of a formal collaboration agreement and went their separate ways.

370. In summary, it does not seem to me that the Defendant and the First Claimant dealt with each other on the basis that there was nothing to prevent the First Claimant, or the Second Claimant from acting for their own clients. Nor does it seem to me that there was any representation to that effect, either express or to be implied from the dealings between the parties. The shared assumption was a narrower one, namely that the First Claimant would be entitled to have its own group of clients within the combined group of claimants in respect of which the parties would be collaborating. The basis of the assumption was there would be a formal collaboration.

371. This leads on to the second, and related difficulty which exists in this part of the Claimants' case. The shared assumption which the Claimants assert is unqualified in its reference to the Claimants having their own clients. It seems to me however that if the claim in estoppel is to succeed the Claimants have to demonstrate one or more of the following.

(1) A shared assumption between the parties, in their dealings together during the relevant period, that the Claimants or either of them would be free to act for their own group of claimants in the proposed group claim, in the absence of a collaboration agreement between the parties and without the express permission of the Defendant.

(2) Circumstances in which, having regard to the dealings between the parties, a reasonable man in the position of Mr. Parker would have expected Mr. Johal, acting honestly and responsibly, to point out to Mr. Parker that the Claimants were not free to act for their own group of claimants in the proposed group claim, in the absence of a collaboration agreement between the parties and without the express permission of the Defendant.

372. It seems to me that neither of the above can be demonstrated, on the facts of this case. I refer back to my account of the dealings between the Defendant and the First Claimant between April 2016 and January 2017, and my findings of fact in respect of those dealings. What was never addressed in those dealings was what the position would be if the formal collaboration agreement failed to materialise. As I have already found, there was a very good reason for this. Mr. Parker assumed that, in these circumstances, he would be free to act as he wished. Mr. Johal assumed that, in these circumstances, Mr. Parker would not be free to act for another group of claimants, in competition with the Defendant, because the First Claimant would be bound by the NDA.

373. The Claimants' argument, echoing the protest of Mr. Parker in his e mail of 7th January 2017, is that it was for Mr. Johal to point out to Mr. Parker that he, Mr. Parker, was mistaken in his belief that he was free to act for another group of claimants in the proposed group claim, if the terms of a formal collaboration agreement could not be agreed between the parties.

374. This argument seems to me to be unsustainable on the facts of this case. The First Claimant is a firm of solicitors, and Mr. Parker is a solicitor who, as was made known to the Defendant in April 2016, was willing to sign a non-disclosure agreement and had considerable experience in group claims. It seems to me that Mr. Johal was quite entitled to assume, during the relevant period, that Mr. Parker had read and understood the restrictions to which the First Claimant had signed up when it entered into the NDA. I cannot see any basis on which Mr. Johal was required to remind Mr. Parker of the restrictions his firm had signed up to.

375. Looking at the matter from Mr. Parker's point of view, Mr. Parker had neither read nor given any thought to the restrictions in the NDA. Mr. Parker did not however inform Mr. Johal of this fact. Instead, Mr. Parker left Mr. Johal to make what seems to me to have been the natural assumption, namely that Mr. Parker understood the restrictions on his freedom of action in the NDA. It seems to me perverse to say that Mr. Johal was required to correct Mr. Parker's ignorance of the restrictions in the NDA. If there was any obligation on anyone to point anything out, it seems to me that it was for Mr. Parker to alert Mr. Johal to the fact that he, Mr. Parker, was unaware of the restrictions in the NDA.

376. I can see that the above position might have been different if, say, Mr. Parker had informed Mr. Johal, in the final months of 2016 that the First Claimant was involved in detailed negotiations with S and G over a collaboration agreement. I say might

because I have my doubts, even on this hypothesis, that there would have been sufficient grounds to raise an estoppel for two reasons. First, this hypothesis begs the question of how Mr. Parker would have presented this information to Mr. Johal. It might have been presented to Mr. Johal on the basis that an inclusion of the Defendant in this collaboration would still be feasible, rather than being presented as the First Claimant formally striking out in separate collaboration with S and G, in direct competition with the Defendant. Second, I have my doubts that the final months of 2016 would have constituted a sufficient period for an estoppel of the kind contended for by the Claimants to have arisen. The short point is however that Mr. Parker did not let Mr. Johal in on his negotiations with S and G. Right through to the end of 2016, and whatever the reality of the position, in terms of the prospect of collaboration, Mr. Parker continued to conduct himself with Mr. Johal on the basis that collaboration might be achieved.

377. The problems with the Claimants' case on estoppel do not however end with the absence of a shared assumption or understanding or representation sufficient to found the estoppel. There is also the question, central to estoppels of the kind relied upon the Claimants, of whether the Defendant is acting unconscionably in now seeking to enforce the restriction in Sentence 2. In closing submissions Mr. Butcher urged upon me the points that the First Claimant carried out, at its own expense, a substantial amount of work and had recruited, by January 2017, a large group of claimants.

378. I have not had any specific evidence as to the total expenditure of the Claimants or either of them, either in terms of the First Claimant's use of its own legal resources, or in terms of disbursements such as the fees of Mr. Campbell and Mr. Heppinstall, which I understand were paid by the First Claimant. I am quite prepared to accept that, during the relevant period, the First Claimant did a substantial amount of work, and incurred significant expenditure in working on the proposed group claim. [redacted]

379. I also accept the evidence of Mr. Parker that, if he had been aware of the restriction in Sentence 2, he would never have agreed to it. Mr. Parker's evidence in this respect was striking. In cross examination **[1/66:5-13]** he referred to Sentence 2 as *"a kill switch"*. By this I took Mr. Parker to mean that the restriction in Sentence 2 meant that it was open to the Defendant, at any time during the relevant period and during the negotiations over the formal collaboration agreement, to terminate the informal process of collaboration, and to bring the negotiations over the formal collaboration agreement to an end.

380. What I do not accept is that responsibility for all this, either in a legal or in a more general sense, can be laid at the door of the Defendant. I have already set out the reasons why this is so. Mr. Parker's ignorance of the restrictions in the NDA was, as I have found, the result of his failing to read the NDA. It did not derive from, and was not encouraged by anything done by the Defendant. I also take into account that Ms. Morrissey did read the NDA. I have already found that Ms. Morrissey read and considered the NDA and, subject to her minor revisions, (i) regarded the NDA as an agreement which it was acceptable for the First Claimant to enter into, and (ii) regarded the restrictions in the NDA as restrictions to which it was acceptable for the First Claimant to become subject. Indeed, it seems to me that it would be most unfair to Ms. Morrissey, from whom I have not heard, to make any finding to the effect that she did not understand what the First Claimant would be signing up to in the NDA.

381. In summary, it seems to me that the First Claimant took a commercial risk when it signed the NDA. If the informal process of collaboration resulted in a formal collaboration agreement, the First Claimant could look forward to a leading role in the proposed group claim, in collaboration with the Defendant. So far as expenditure incurred prior to the formal collaboration agreement was concerned, Mr. Parker confirmed in his oral evidence **[1/65:16-20 and 1/155:11-17]** that if Therium had been willing to fund the collaboration, the expenditure of the First Claimant prior to the formal collaboration agreement would have been covered by the funding.

382. If however the informal process of collaboration did not result in a formal collaboration agreement, and the parties went their separate ways, the commercial risk would not have paid off. In that event the First Claimant would have been unable to act for its own group of claimants in the proposed group claim, without the express permission of the Defendant.

383. In the circumstances set out above, I see nothing unconscionable or inequitable in the Defendant now enforcing the restriction in Sentence 2, leaving aside the absence of a shared assumption or acquiescence of the kind required to found an estoppel of the kinds contended for by the Claimants.

384. The Claimants' Note in Closing also made reference to what was referred to as waiver by estoppel, which appeared to be additional to the Claimants' reliance on estoppel by convention, estoppel by acquiescence, and promissory estoppel. Acquiescence is also referred to in the formulation of this agreed issue, as an apparently free standing concept. So far as any independent case on waiver and/or acquiescence is advanced, it seems to me that it fails for the same reasons as I have set out above.

385. I therefore conclude that the Defendant has not lost the right to enforce Sentence 2, or the Implied Term, or any other restriction in the NDA, as a result of acquiescence, waiver or estoppel.

(XX) <u>Did the First Claimant use any information that was confidential to the Defendant for a purpose other than provided for in Sentence 1, without first obtaining the written agreement of the Defendant?</u>

386. This statement of the agreed issue is not entirely accurate, as matters have developed. The counterclaim for breach of confidence is more complicated than this, and requires some introductory explanation.

387. First, there is Sentence 1. The Defendant's case is that the Claimants have acted in breach of Sentence 1. Although this claim is put against both of the Claimants, I do not see how it can be sustained against the Second Claimant. The Second Claimant was not a party to the NDA, and it is no longer contended that the corporate veil can be pierced. So it seems to me that the question becomes whether the First Claimant has used *"the Confidential Information"* for any purpose outside that permitted by Sentence 1, without first obtaining the written agreement of the Defendant.

388. I have found that the NDA was subject to the Implied Term. I can therefore see that if the Second Claimant used the Confidential Information for any purpose outside that permitted by Sentence 1, without first obtaining the written agreement of the Defendant, that would place the First Claimant in breach of the Implied Term.

389. Second, there is the claim for breach of confidence, which is made against both the Claimants, and is based upon the duty of confidence which, in equity, they are said to have owed to the Defendant. There are however, as pleaded, essentially two aspects to this non-contractual claim. The first claim is that the relevant confidential information has, in breach of the duty of confidence, been passed to various parties, identified as the Second Claimant, counsel instructed by Harcus Sinclair, and S and G. The second claim is that, in breach of the duty of confidence, the Claimants have misused the relevant confidential information.

390. In a very helpful Note on the Confidential Documents, produced as part of their closing submissions, counsel for the Defendant identified the relevant confidential information in a Schedule, attached to the Note. The Schedule includes [redacted] the Defendant's Note which was contained in the Litigation Pack, Mr. Goodhead's [redacted] draft Particulars of Claim [redacted].

391. I understood Mr. Butcher, for the Claimants, to have accepted that the documents in this Schedule all comprised confidential information. In any event it seems clear to me that the documents in the Schedule had the necessary quality of confidentiality about them. I will refer to the documents in this Schedule, collectively, as "the Confidential Documents".

392. It also seems clear to me that, independent of Sentence 1, the Confidential Documents were provided to the First Claimant by, or on behalf of the Defendant during the informal process of collaboration, in circumstances which gave rise to a duty of confidentiality on the part of the First Claimant. It seems to me that the Confidential Documents were provided to the First Claimant subject to a reasonable expectation of confidence on the part of the Defendant, and in circumstances where the First Claimant knew that the information was confidential. I therefore find that the First Claimant was subject to a duty of confidence, in respect of the Confidential Documents, in addition to its obligations under Sentence 1.

393. The question which then arises, taking the First Claimant first, is whether the First Claimant misused the Confidential Documents, in breach of its non-contractual and equitable duty of confidence. The Defendant's case is that it did so. The essential argument of the Defendant is that the First Claimant has used the information in the Confidential Documents to develop the case which is now being pursued, on behalf of the HS Group, in the Emissions Litigation.

394. In determining what amounts to a misuse of confidential information I have adopted the guidance given by the Court of Appeal in Saltman Engineering Co. v Campbell Engineering Co. Ltd [1948] 65 RPC 203, by Roskill J. in Cranleigh Precision Engineering Ltd v Bryant [1965] 1 WLR 1293, and by the Court of Appeal in Seager v Copydex [1967] 1 WLR 923.

395. In Seager Lord Denning MR provided the following summary of what amounts to a breach of duty of confidence, at 931C-F.

> *"I start with one sentence in the judgment of Lord Greene M.R. in Saltman Engineering Co. v. Campbell Engineering Co . 2 :*
>
> > *"If a defendant is proved to have used confidential information, directly or indirectly obtained from the*

> *plaintiff, without the consent, express or implied, of the plaintiff, he will be guilty of an infringement of the plaintiff's rights."*
>
> *To this I add a sentence from the judgment of Roxburgh J. in Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd.3 which was quoted and adopted as correct by Roskill J. in Cranleigh Precision Engineering Ltd. v. Bryant 4 :*
>
> > *"As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a spring-board for activities detrimental to the person who made the confidential communication, and spring-board it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public."*
>
> *The law on this subject does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent."*

396. To much the same effect is the following statement of the law, by Lord Greene MR in Saltman, at page 215.

> *"I think that I shall not be stating the principle wrongly if I say this with regard to the use of confidential information. The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.*
>
> *What the Defendants did in this case was to dispense in certain material respects with the necessity of going through the process which had been gone through in compiling these drawings, and thereby to save themselves a great deal of labour and calculation and careful draughtsmanship. No doubt, if they had taken the finished article, namely the leather punch, which they might have bought in a shop, and given it to an expert draughtsman, that draughtsman could have produced the necessary drawings for the manufacture of machine tools required for making that particular finished article. In at any rate a very material respect they saved themselves that trouble by obtaining the necessary information either from the original drawings or from the tools made in accordance with them. That, in my opinion, was a breach of confidence."*

397. Applying this guidance to the present case I do not think that the First Claimant did misuse any of the information in the Confidential Documents, in breach of the non-contractual duty of confidence to which it was subject. I say this for the following reasons.

398. In their Note on the Confidential Documents the Defendant's counsel have sought to demonstrate how the information in the Confidential Documents has been used by the First Claimant and its counsel (meaning the Claimants' counsel in the Emissions Litigation) in formulating the claim which is now being pursued on behalf of the HS Group. Putting the matter another way, the Defendant's counsel seek to demonstrate that the Confidential Documents have indeed acted as the springboard for the claim which is now pursued on behalf of the HS Group.

399. On the other side the Claimants deny that the Confidential Documents or any of them played any material part in the development of the claim now being pursued on behalf of the HS Group. The Claimants say that there was no springboard.

400. I do not intend to follow the same course as the parties in their closing submissions, and set out a detailed analysis of the material in the Confidential Documents, comparing and contrasting that material with the details of the case now being advanced on behalf of the HS Group. I have carried out the same exercise of comparing and contrasting, but, following my own carrying out of that exercise, I proceed straight to my conclusions. I take this course for two reasons.

(1) The carrying out of this exercise involves the consideration of acutely sensitive material. In my view it is not desirable, or necessary to set out the details of the exercise itself in this Judgment.
(2) [redacted] The critical question seems to me to be whether the information in the Confidential Documents, or any of it did or did not act as a springboard for the case now being pursued on behalf of the HS Group.

401. On the basis of the evidence which I have read and heard, and on the basis of the submissions which I have read and heard, I am satisfied, and I find that none of the information contained in the Confidential Documents has been used by the First Claimant in such a way as to breach the duty of confidence owed by the First Claimant in respect of the Confidential Documents. I find that the Confidential Documents have not acted as any kind of springboard in the formulation of the claim which is now being pursued on behalf of the HS Group.

402. Subject to the limitation which I have placed on myself in carrying out the exercise referred to above, I can summarise my reasons for the finding set out in my previous paragraph relatively shortly. I have already found that the April Meeting was followed by a lengthy process of informal collaboration between the First Claimant and the Defendant. During that process the First Claimant did a great deal of work of its own on the proposed group claim, as did counsel instructed by the First Claimant. It seems to me that the claim which is now being pursued on behalf of the HS Group derives from the First Claimant's own work and the work of the First Claimant's counsel, not from the Confidential Documents.

403. [redacted]

404. This conclusion is reinforced by the evidence which I had from Mr. Campbell and Mr. Heppinstall, which I accept, explaining that the Confidential Documents did not assist them in formulating their own views on how the proposed group claim should be presented. [redacted]

405. The present case seems to me to have been analogous to a case where a lawyer receives a set of documents, with instructions to advise, or settle Particulars of Claim. The documents may contain advice from a previous lawyer involved in the case, or a previous set of draft Particulars of Claim. If however the lawyer is to do his or her work properly, the work of previous lawyer does not provide a short cut. The lawyer must read all the documents, carry out his or her own research, and formulate his or her views in order to provide the required advice or to draft the required Particulars of Claim. The previous advice or previous draft Particulars of Claim may be of some initial use in providing a signpost to matters which require to be considered, but the advice or Particulars of Claim are the product of the lawyer's own work. In the present case Mr. Parker was experienced in dealing with group claims, and he advised his own specialist counsel to advise and draft proceedings. It seems to that the claim being advanced on behalf of the HS Group is the product of the work of the First Claimant and its instructed counsel. It is not the product, in any relevant sense, of the Confidential Documents.

406. In a sense this may be said to demonstrate why the NDA, in addition to the confidentiality restrictions contained therein, also needed to contain the restrictions in Sentence 2 and the Implied Term. When the Defendant embarked on a process of collaboration with the First Claimant, there was the risk that the First Claimant would do sufficient work of its own to be able to achieve a head start in the proposed group claim, without having to rely upon or use any confidential information provided by the Defendant. Putting the matter another way, the First Claimant would secure an advantageous position as a result of being invited to collaborate with the Defendant, and as a result of collaborating with the Defendant, not as a result of having access to confidential information. If the risk of that advantage being exploited by the First Claimant was to be avoided, the NDA required Sentence 2 and, in the particular circumstances of this case, the Implied Term.

407. I therefore conclude that the First Claimant has not misused the information in the Confidential Documents, or any of that information in breach of its non-contractual duty of confidence to the Defendant.

408. The next question which arises is whether the First Claimant has breached Sentence 1, by using the information in the Confidential Documents for any purpose other than obtaining legal advice on behalf of the Claimants. It will be noted that, in framing the question in this way, I am assuming that the Confidential Documents were within the expression *"the Confidential Information"*, as that expression is used in Sentence 1. In my view they were, so that the user restriction in Sentence 1 applied to the Confidential Documents.

409. I do not think that the claim for breach of Sentence 1 is sustainable. I have already explained and set out my conclusion that the First Claimant has not made use of the information in the Confidential Documents in breach of its non-contractual duty of confidence to the Defendant. On the basis of the same reasoning I do not think that it can be said that the First Claimant has used, or is using the information in the

Confidential Documents for a purpose not authorised by Sentence 1. In my view there has been, and is no such use.

410. I can see that it might be said that most of the Confidential Documents were provided to counsel instructed by the First Claimant, during the informal process of collaboration, for purposes which were not confined to the obtaining of legal advice on behalf of the Defendant. I cannot see however that a claim of this kind can be made. Those of the Confidential Documents which were provided to counsel instructed by the First Claimant were provided as part of the informal process of collaboration between the parties. I do not see that the Defendant can object to the provisions of any of the Confidential Documents to counsel instructed by the First Claimant, as an unauthorised use of the Confidential Documents, where this was part of the informal process of collaboration between the parties.

411. I therefore conclude that the First Claimant has not breached the user restriction in Sentence 1.

412. This seems to me to leave the following questions, so far as claims for breach of duty of confidence are concerned.

(1) Did the First Claimant pass the Confidential Documents to any other party, in breach of its non-contractual duty of confidence? In my view the simple passing of the Confidential Documents to a third party, as opposed to their use, would not have constituted a breach of the user restriction in Sentence 1.

(2) Has the Second Claimant made use of the information in the Confidential Documents in breach of a non-contractual duty of confidence which it owed to the Defendant, or in such a manner as to place the First Claimant in breach of the Implied Term?

413. So far as the first of these questions is concerned, Mr. Parker did send one of the Confidential Documents to Ms. Young of S and G, by his e mail of 9th November 2016. The document in question was the third draft Particulars of Claim prepared by Mr. Goodhead. This was done without the permission or knowledge of the Defendant, and I find that it was a breach of the non-contractual duty of confidence owed by the First Claimant.

414. In cross examination **[2/360/19]** Ms. Young gave evidence that she could not remember paying any heed to the third draft Particulars of Claim [redacted]. I accept that evidence. [redacted] I do not think that any of this evidence alters the fact that the First Claimant did not, itself, have permission to send the third draft Particulars of Claim to S and G. It does however demonstrate that this was not a breach of the duty of confidence which had, or could have had any material consequences.

415. Although the Defendant's pleaded case alleges that confidential information was provided to counsel instructed by Harcus Sinclair in breach of confidence, I do not think that this claim is sustainable. I have already found that the Confidential Documents were provided to counsel instructed by the First Claimant as part of the informal process of collaboration, in circumstances where the Defendant could have no right to object.

416. This leaves the more difficult question of whether the Confidential Documents were, in breach of the First Claimant's duty of confidence, provided to the Second Claimant. This particular question generated a good deal of complex argument over the circumstances in which knowledge of the Confidential Documents could be attributed to Mr. Parker, in his capacity as a director of the Second Claimant.

417. I do not think that this question is as complicated as was presented in the closing submissions. I agree with the point made in paragraph 50 of the Claimants' Further Note in Closing, to the effect that the principles of agency and vicarious liability are sufficient to determine the relevant rights and obligations of the Second Claimant, as opposed to having to have resort to some special rule of attribution.

418. Approached in this way I see the question of attribution of Mr. Parker's knowledge as a relatively simple one. Mr. Parker was, at all material times, a director of the Second Claimant. Following the NDA there was no information barrier put in place, as between the First Claimant and the Second Claimant, in order to protect the confidentiality of the information provided to the First Claimant by the Defendant. As I have already found, the First Claimant and the Second Claimant tended to be treated interchangeably.

419. So far as the informal process of collaboration was concerned, the involvement of the Second Claimant in that process is evidenced in a number of ways. Examples of this are as follows.

(1) The letter of retainer to Ms. Gabrel, dated 2nd June 2017, was sent by the Second Claimant.
(2) The letter of claim on behalf of the Parkes was sent by the Second Claimant, on 1st September 2016.
(3) The letter of 27th September 2017, which explains the relationship between the Claimants and the circumstances of the transfer of the conduct of the claim on behalf of the HS Group, and the attachments to that letter demonstrate that, as early as late August 2016, the Claimants were considering whether the proposed group claim should be conducted by the Second Claimant. Those considerations continued thereafter and, as the letter explains, the decision to transfer conduct had effectively been taken by 25th November 2016.

420. The Claimants contend that Mr. Parker was not acting as the agent of the Second Claimant, when working on the proposed claim, in late August and early September 2016, and had no authority, on behalf of the Second Claimant, to send the letter of claim for Mr. and Mrs Parkes. Indeed, the Claimants contend that this letter of claim was *"inadvertently"* sent on the notepaper of the Second Claimant.

421. While I would agree that Mr. Parker tended to treat the First Claimant and the Second Claimant as interchangeable, I do not think that it follows that Mr. Parker did not have authority to act on behalf the Second Claimant, both when he wrote letters on the notepaper of the Second Claimant, or when the question came to be considered of the Second Claimant's involvement in the proposed group claim. In my judgment, and in relation to such activities, Mr. Parker was acting in his capacity as a director, just as much as he was acting in his capacity as a member and partner in the First Claimant.

422. It follows, in my judgment, that, at least from the beginning of June 2016, if not earlier, information contained in the Confidential Documents was, in the absence of an information barrier, coming to Mr. Parker in his capacity as a director of the Second Claimant, as well as in his capacity as a member and partner in the First Claimant.

423. I therefore conclude that, at least from the beginning of June 2016, information in the Confidential Documents which was provided to Mr. Parker was, in breach of the First Claimant's duty of confidence, being provided to the Second Claimant.

424. This then leads on to the question of whether the Second Claimant has misused, in breach of its own non-contractual duty of confidence, the information contained in the Confidential Documents. I can take this question shortly. I do not think that the Second Claimant has done so, for the same reasons as I have relied upon in concluding that the First Claimant has not misused this information in breach of confidence. As I have already explained, my finding is that the claim which is now being pursued on behalf of the HS Group is not one which derives, in any material or relevant sense, from any information contained in the Confidential Documents.

425. It follows from what I have said in my previous paragraph that I do not think that the Second Claimant has made use of the Confidential Documents in such a way as to place the First Claimant in breach of the Implied Term.

426. I should mention that I have not included, in my consideration of the contractual and non-contractual claims for breach of confidence, clause 3 of the NDA, which imposed obligations, subject to certain qualifications, to keep the Confidential Information secure and not to disclose it to any third party. Clause 3 was referred to in the Defendant's Note on the Confidential Documents. It was not clear to me whether clause 3 was relied upon as an obligation which the Defendant was alleged to have breached. Clause 3 is not pleaded in paragraph 74 of the Re-Amended Defence and Counterclaim, where the particulars of the contractual and non-contractual breaches of confidence are pleaded. The point does not seem to me to matter, because I do not see that clause 3 would have added anything to the claim for breach of confidence. I have found that the First Claimant did pass confidential information to S and G and to the Second Claimant, in breach of its non-contractual duty of confidence.

427. I note that in their Note in Closing, the Claimants did seek to rely upon their arguments in estoppel, waiver and acquiescence in answer to the claims for breach of confidence. To the limited extent that I have found that there were breaches of confidence, it does not seem to me that the Claimants are able to say that the Defendant conducted itself in such a way as to have lost its right to enforce these breaches of confidence, on the basis of estoppel, waiver or acquiescence.

428. I therefore conclude as follows, in relation to the claims for breach of confidence.

(1) The First Claimant did not breach the user restriction in Sentence 1.
(2) The Second Claimant did not breach the user restriction in Sentence 1, and could not have done so because it was not bound by the NDA.
(3) The First Claimant breached its non-contractual duty of confidence in (i) providing Mr. Goodhead's third draft Particulars of Claim to S and G on 9th

November 2016, and (ii) providing, at least from June 2016, the information in the Confidential Documents to the Second Claimant.

(4) The Second Claimant has not breached its non-contractual duty of confidence; not having made use of the confidential information provided to it in breach of confidence by the First Claimant. The Second Claimant has not made use of the Confidential Documents in such a way as to place the First Claimant in breach of the Implied Term.

(XXI) What relief should be granted?

429. In this section of the Judgment, for the avoidance of doubt, I deal with the last two of the agreed issues, as well as the general question of what relief should be granted.

430. The Defendant is entitled to recover damages in respect of the First Claimant's breaches of Sentence 2 which I have found. The Defendant is also entitled to recover damages in respect of the First Claimant's breaches of the Implied Term which I have found. The determination of the quantum of these damages, if and in so far as loss can be proved, will be for the quantum hearing. Also for the quantum hearing will be the determination of the two questions, which I have left open, relating to the commencement date of the breach of the Implied Term and the commencement date of one of the breaches of Sentence 2 which I have found.

431. The extent to which these damages are recoverable will also depend upon my decision upon the Defendant's claims for specific performance/injunctive relief in respect of these breaches, to which I shall come shortly.

432. In theory the Defendant is entitled to financial relief in respect of the First Claimant's breaches of its non-contractual duty of confidence which I have found. Since I have also found that the breaches were confined to the wrongful provision of confidential information to S and G and the Second Claimant, and did not extend to the wrongful use of this information, it is not clear to me what financial relief could be claimed in respect of these breaches of the duty of confidence. Strictly speaking however, this is a matter for the quantum hearing, and I make no findings in this respect.

433. In terms of declaratory relief there are the claims for declaratory relief made by the Claimants in their Details of Claim. The position in that respect seems to me to be as follows.

(1) It has been established that the undertaking in Sentence 2 is not subject to the supervisory jurisdiction of the Court, although not for the reason identified in paragraph 7.1 of the Claimants' Details of Claim. Subject to receiving submissions from the parties on the question of what declarations I should make, it seems to me to be sensible that there should be a declaration that the undertaking in Sentence 2, as an undertaking given by the First Claimant and not (as I have found) by Mr. Parker in his personal capacity, is not subject to the supervisory jurisdiction of the Court.

(2) So far as the claim for a declaration in paragraph 7.2 of the Claimants' Details of Claim is concerned, this seems to me to have become redundant by the trial date. If the supervisory jurisdiction had been available, as against the First Claimant and/or Mr. Parker, there could have been no objection to its exercise following the full Part 7 trial which has taken place.

434. The Defendant also seeks, in its pleaded case, a declaration in relation to its breach of contract counterclaim. I am not convinced that any such declaratory relief is required, but I am prepared to hear the parties on the question of what declarations I should make, consequent upon this Judgment, and leave that question, on both sides, open for further argument.

435. This leaves the question of whether I should grant what is referred to as specific performance of the obligation in Sentence 2. I have found that the First Claimant has been and remains in breach of this obligation, as a matter of contract. I take the claim for specific performance to include the claim to enforce the Implied Term. I have found that the NDA was subject to the Implied Term, and I have also found that the First Claimant has been and remains in breach of the Implied Term.

436. As I understand the Defendant's case, the claim for specific performance is a claim for injunctive relief, in the form of an order or orders preventing either of the Claimants from acting further for the HS Group. It follows from my earlier findings and conclusions that such an order could only be made against the First Claimant. I say this however subject to the point that, by reason of the Implied Term and by reason of my findings as to the relationship between the Claimants, it seems to me that I do have the ability to make an order requiring that the First Claimant procure that the Second Claimant cease acting for the HS Group.

437. An order or orders of the kind set out in my previous paragraph would constitute the grant of equitable relief. I am not bound to grant such relief. The question for me is whether I should grant such relief, in the exercise of the Court's discretion.

438. Before coming to my decision on this question there is one other point, relating to the question of relief, which I should mention. In relation to its claims for breach of confidence, the Defendant did seek injunctive relief to protect the confidential information in the Confidential Documents. The Defendant's Note on the Confidential Documents confirmed however, at paragraph 53, that the injunction sought in this respect was injunctive relief restraining the Claimants from acting in the Emissions Litigation. It therefore follows that the question of whether there is an entitlement to such injunctive relief, by reason of the breaches of confidence which the Defendant has established, can conveniently be considered alongside the question of whether there is an entitlement to such injunctive relief by reason of the breaches of Sentence 2 and the Implied Term which the Defendant has established.

439. Although this is not, in strict logic, the correct starting point for my consideration of this question, I do start by recording the position in respect of one matter which is highly relevant to this question.

440. In their Note in Closing (paragraph 191), it was said by the Claimants that it would be impossible for the Claimants to comply with an order which required the Claimants or either of them to cease acting for the HS Group, on the basis that instructions had already been accepted from the claimants in the HS Group, and on that basis that the undertaking in Sentence 2 could not be complied with. It was not clear to me whether this was a pure legal point, namely that, conceptually speaking, the Claimants could not comply with an obligation which had already been breached, or whether it was a practical point, namely that it would be legally impossible for the Claimants or either of them now to cease acting for the HS Group, because this would place the

Claimants in breach of obligations owed to S and G and/or the HS Group and/or some other party. In oral closing submissions however I understood Mr. Butcher to accept that it was not impossible for there to be compliance with an order which required the Claimants or either of them to cease acting for the HS Group **[4/696:3-7]**.

441. This acceptance was, in my view, entirely proper. There was in fact quite a lot of evidence before me that compliance with such an order would not be impossible.

(1) At the hearing before me on 24th August 2017, written Outline Submissions on behalf of the Claimants were put before me, prepared by Mr. Phillips QC, the leading counsel who represented the Claimants at that hearing. In paragraph 10(2) of those submissions it was stated that if the Court was to decide that Sentence 2 was a solicitor's undertaking, and if the Court was to decide that it should direct that Harcus Sinclair should cease acting, then Harcus Sinclair would be in a position to go to its clients, inform them of what had happened, and cease acting once alternative representation had been found.

(2) Such alternative, or more accurately existing representation is available. In paragraph 13 of her witness statement Ms. Young confirmed that S and G were *"fully willing and able to continue acting for our joint clients* [the HS Group] *alone"*, although I should add that Ms. Young also made it very clear, in the same paragraph, that she did not believe this to be in the best interests of the HS Group. This was confirmed by Ms. Young's oral evidence, in which she confirmed that if Harcus Sinclair were prevented from acting, S and G would continue to act in the best interests of their clients (the HS Group) in compliance with SRA principle 4 and SRA principle 5 **[2/364:11-365:7]**.

(3) I have seen two recent letters from the Second Claimant. The first is dated 6th September 2017 and was sent to the Defendant. The second is dated 11th September 2017 and was sent to Freshfields. Both letters were written in connection with the GLO Application. In the first letter the Second Claimant made it quite clear that if it was prevented from acting, it would be perfectly possible for S and G to act alone. The points were made that S and G had the requisite experience and expertise to pursue the claims, and that third party funding would still be available. The letter to Freshfields said much the same thing.

(4) I have seen joint terms of business of the Second Claimant and S and G, relating to the terms and conditions on which the two firms would be acting for their joint clients (the claimants in the HS Group). Those joint terms of business contain provisions which make it clear that the Second Claimant could stop acting for a client at any time.

442. The evidence which I have referred to above should not however be allowed to obscure the point which was made by Mr. Parker, Ms. Young, Mr. Strawson (to whose evidence I shall come), and, in submissions, by the Claimants' counsel, namely that it was highly undesirable and not in the best interests of the claimants in the HS Group that the Second Claimant should be prevented from acting in the Emissions Litigation.

443. Having established that this is not a case where it is impossible to comply with an order to cease acting, I return to the question of whether such an order should be made.

444. The starting point is that where a contract is negative in nature, breach of it may be restrained by injunction. In such a case it has been said that an injunction to restrain the relevant activity is normally granted as a matter of course.

445. This point is illustrated by Doherty v Allman (1878) 3 App Cas 709, at 720, where Lord Cairns LC identified the relevant principle in the following terms.

> *"My Lords, if there had been a negative covenant, I apprehend, according to well-settled practice, a Court of Equity would have had no discretion to exercise. If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury—it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves."*

446. The same point has been confirmed by the Court of Appeal in the more recent case of Araci v Fallon [2011] EWCA Civ 668, which concerned a claim for an injunction to enforce a contract with a jockey, pursuant to which the jockey had agreed to ride a particular horse in races when requested to do so and, when requested to do so, not to ride any other horse in the relevant races. The jockey had been requested to ride a particular horse in the Derby, but intended to ride a rival horse. The claimant, a racehorse owner and the party with whom the jockey had entered into the contract, sought an interim injunction to prevent the jockey riding the rival horse. The Court of Appeal, overturning the decision of the first instance judge, decided that the appeal should be allowed, and an interim injunction was granted.

447. In his judgment, at paragraph 33, Jackson LJ accepted the formulation by the first instance judge of the relevant principles, governing the jurisdiction to grant an interim injunction, which had been put in the following terms.

> *"33 The crucial section of the judge's judgment begins with a recitation of paragraphs 21-051 and 21–052 of Treitel on the Law of Contract (12th edition, 2007). The judge accepted these paragraphs as accurate and he derived the following four propositions from them:*
>
> > *"1. First, where there is a negative stipulation, breach may be restrained by injunction, as a matter of course, to restrain future breaches. It applies only to prohibitory injunctions; and that is this case.*
> > *2. Secondly, the balance of convenience test applies to applications for interim injunctions, except where there is a clear or uncontested breach of a covenant not to do a particular thing. In my judgment, that also applies here.*
> > *3. Third, where the granting of the injunction amounts in substance to a final determination at the interim stage, the court will take into account*

the strengths and weaknesses of the respective cases, and the likelihood of the claimant's eventual success at trial. I interpolate that is in effect something I have already done, in examining Mr Fallon's evidence.

4. *Fourth, this is all subject to discretion, an injunction being an equitable remedy. Although, I emphasise the basic rule that an injunction in the circumstances described will be normally granted as a matter of course. But injunctive relief may be refused if it is oppressive to the defendant or cause him particular hardship, although it would not be oppressive merely because burdensome or little prejudice to the claimant."*

448. Jackson LJ added however that this formulation of the relevant principles was subject to the following qualification.

> *"39 I would therefore accept the judge's formulation of the four relevant principles, subject to one qualification which emerges from authorities not cited to the judge. Where the defendant is proposing to act in clear breach of a negative covenant, in other words to do something which he has promised not to do, there must be special circumstances (e.g. restraint of trade contrary to public policy) before the court will exercise its discretion to refuse an injunction."*

449. In considering the question of whether damages would be an adequate remedy, Jackson LJ said this, at paragraph 42.

> *"42 I shall use the phrase "adequate remedy" as that is a convenient shorthand. Nevertheless, as is pointed out in chapter 27 of Chitty on Contracts (30th edition, 2008), that phrase is not entirely appropriate. The real question is whether it is just in all the circumstances that the claimant should be confined to his remedy in damages."*

450. In agreeing with Jackson LJ, Elias LJ added the following, at paragraph 70.

> *"70 So the question becomes whether the injunction should be granted following a trial. There were two reasons relied upon by the judge why it should not. First, he considered that damages would be an adequate remedy. However, that is not generally a relevant consideration when the injunction restrains the breach of a negative covenant. The court is by granting the injunction simply enforcing what the parties have agreed: see the discussion in Chitty on Contracts, 30th Edition, para 27-060. Exceptionally an injunction may be refused if it would be oppressive to the defendant to grant it, but it can hardly be said to be oppressive to prevent Mr Fallon from acting in cynical disregard of the obligations he has voluntarily undertaken."*

451. In the present case therefore, if the injunction sought by the Defendant is to restrain the breach of a negative stipulation, an injunction should be granted, in the absence of some special circumstances of the kind referred to by Jackson LJ and Elias LJ in Araci.

452. If however the injunction is in fact a mandatory injunction, requiring the First Claimant to undo a breach which has already occurred, different considerations apply. On that hypothesis the question of whether such an order should be made is subject to the test of balance of convenience. Such an order can be refused if the prejudice suffered by the defendant to the claim for the injunction, in having to restore the original position, heavily outweighs the advantage which will be derived from such restoration by the claimant; see Chitty on Contracts, 32nd Edition, at 27-065. Where the injunction, although negative in form, resembles a mandatory injunction, the court will take into account the adequacy of damages in determining whether to grant the injunction.

453. In the present case therefore, I have to decide whether the injunctive relief sought by the Defendant, which is intended to prevent both Claimants from continuing to act for the HS Group, is the enforcement of a negative stipulation, in the Doherty v Allman sense, or the grant of what is in reality a mandatory injunction, requiring the First Claimant to undo a breach of contract which has already occurred.

454. In my judgment, the answer to that question is clear in the present case. Sentence 2 contains a negative stipulation. It is a restriction on acting for any group of claimants other than the Defendant's group of claimants. It is framed in negative terms and, in my view, it is a negative stipulation.

455. I can see the argument that an injunction of the kind sought by the Defendant is, in reality, a mandatory injunction, because it can be said to look both forward and backward. It requires that the Claimants should not, looking forward, act for any claimants in the Emissions Litigation, without the express permission of the Defendant, for the period of six years stipulated in the NDA. It also requires that the Claimants undo their existing retainers with their existing clients in the HS Group, as the HS Group is currently constituted.

456. I am not convinced that the injunctive relief sought by the Defendant is, in reality, a mandatory injunction. It seems to me that this is a classic case of the enforcement of a negative stipulation, in the Doherty v Allman sense. So far as Sentence 2 is concerned, the First Claimant is simply being required to cease acting, by its members and employees, for the claimants in the HS Group. I do not think that an injunction to enforce this requirement falls into the same category as, say, an injunction requiring a defendant to pull down a building erected in breach of a restrictive covenant.

457. In their Note in Closing the Claimants argued that Sentence 2 prevented the acceptance of instructions, and that such instructions had been accepted from the claimants in the HS Group. I can see how this point can be deployed to say that the Defendant is not seeking to enforce a negative stipulation, but this seems to me to make the mistake of concentrating upon one part only of Sentence 2. Sentence 2 also prohibits acting for the relevant group of claimants. The First Claimant is, as I have found, acting for the HS Group through its members and employees, and the Second

Claimant is acting for the HS Group as joint solicitors with S and G. It is these continuing activities which the Defendant is seeking to restrain.

458. In saying this I keep in mind that the Defendant is not simply seeking to enforce the restriction in Sentence 2. The Defendant is also seeking to enforce the Implied Term. An order enforcing the Implied Term does require the First Claimant to take action to procure that the Second Claimant cease acting for the HS Group. This seems to me however to be a distinction without a difference. The Implied Term simply means that the First Claimant must procure compliance with Sentence 2 on the part of the Second Claimant. That seems to me, in reality, to be part and parcel of the enforcement of the negative stipulation in Sentence 2. Given that the Second Claimant is, as I have found, the corporate vehicle through which the First Claimant conducts group litigation, it seems to me to be unrealistic to separate out an injunction to enforce the restriction in Sentence 2 and an injunction to enforce the Implied Term. In my view both injunctions involve the enforcement of negative stipulations, in the Doherty v Allman sense.

459. If my reasoning thus far is correct, it follows that the injunctive relief sought by the Defendant should be granted, unless there are special circumstances of the kind identified in Araci.

460. I turn next to the various matters relied upon by the Claimants as reasons why I should not grant injunctive relief. In doing so however, I will adopt a twofold approach. I will consider whether those matters amount to the required special circumstances which are required to avoid the grant of injunctive relief to enforce a negative stipulation. I will also however, in case I am wrong in the conclusion at which I have just arrived, consider how those matters stand if the correct test is the balance of convenience test identified in Chitty as applicable to a claim for a mandatory injunction.

461. The Claimants contended that if Harcus Sinclair were required to cease acting, this would cause significant logistical difficulties for the conduct of the Emissions Litigation. The evidence seems to me however to point in the opposite direction. If the Claimants cease to act for the HS Group, S and G is willing and able to act for the HS Group. This was confirmed by Ms. Young in her evidence.

462. I appreciate that Ms. Young also said, very clearly, that this was not in the best interests of the claimants in the HS Group, but I have difficulty in seeing why this is so. I accept that Mr. Parker is a solicitor with considerable experience and expertise in group claims of this kind. I accept that the same goes for the First Claimant, acting by itself or through the corporate vehicle of the Second Claimant. It seems to me however that the same goes for Ms. Young. I had the advantage of hearing Ms. Young give evidence. She struck me as extremely competent and well able to conduct a group claim of this kind. In cross examination Ms. Young accepted that S and G was the largest consumer firm in the UK, and a leading firm for large scale group litigation. In summary, I find it difficult to accept that the claimants in the HS Group will suffer any real prejudice if, from this point on, they are represented by S and G alone.

463. In terms of the disruption of the Emissions Litigation, it seems to me, from the evidence which I have seen, that this dispute is currently having a considerably

disrupting effect on the Emissions Litigation in general, and on the GLO Application in particular. In the course of hearing the trial of this action, and in the course of the three pre-trial hearings which I dealt with, I was provided with a good deal of material from the Emissions Litigation, principally comprising evidence filed in respect of the GLO Application. That evidence is for Senior Master Fontaine to consider, and it is neither necessary nor desirable that I should go into that evidence in this Judgment. The only point which I regard myself as entitled to take from that evidence is that this dispute has had and continues to have a considerably disrupting effect on the Emissions Litigation in general, and on the GLO Application in particular. Indeed, that is the principal reason why this dispute was brought to this Court in the way in which it was.

464. In my view, and given that I have concluded that the First Claimant is in breach of the NDA, nothing would be more disruptive than to allow the Claimants to remain as solicitors in the Emissions Litigation. It seems to me that existing arguments between the parties, in the context of the GLO Application, would simply continue, with the Defendant protesting that the First Claimant was in breach of Sentence 2 and the Implied Term, and the Claimants protesting that this Court had declined to order them to cease acting.

465. In this context the evidence of Mr. Strawson was also urged upon me. Mr. Strawson is the chairman of the claimant committee, which has been formed to manage the claims being made by the HS Group. Mr. Strawson is a claimant in the HS Group. [redacted]

466. I did not form any unfavourable impression of Mr. Strawson, and I accept that his evidence reflected his genuine views and those of his committee members [redacted]. I think however that the limitations of Mr. Strawson's evidence must be kept in mind. It emerged in cross examination that Mr. Strawson was not appointed to his role by the claimants in the HS Group, and that he could not be removed from his role by these claimants **[2/372:24-373:5]**. The question of whether Harcus Sinclair should continue to act was not one which had been canvassed with all the claimants in the HS Group. Indeed, it would probably not be feasible to do so. In my judgment, it would not be right to treat Mr. Strawson or the committee as the representatives, in a real sense, of the views of 43,000 or so claimants in the HS Group.

467. This leads me to a further point which seems to me to be relevant in the present case. The Emissions Litigation is being conducted on behalf of thousands of claimants. The firms of solicitors acting for these claimants are not able, necessarily, to interact with these clients in the way that a solicitor would interact with a client in the case of an individual instruction. The administration of each retainer necessarily has to be impersonal, and conducted online. As such, and without in any way denigrating the way in which such group claims are, necessarily, conducted, it seems to me that requiring a solicitor to cease acting on a retainer, in the circumstances of the joint retainers which exist in the case of the HS Group, is not as serious a step as it might be in a case where a particular firm of solicitors, instructed by a particular client for reasons based on the experience and expertise of that particular firm, was required to cease acting in the middle of substantial litigation for that client.

468. The Claimants have also argued that the Defendant brought this situation upon itself, by failing to bring Sentence 2 to the attention of the Claimants until January 2017. I

see no merit in this argument, for all the same reasons which caused me to reject the Claimants' case on estoppel, waiver and acquiescence.

469. The Claimants also sought to raise a clean hands argument, on the basis that the Defendant had routinely recorded telephone calls without the permission of the participants, and had made improper threats in an e mail sent to Mr. Parker on 26th June 2017 (12:08). I do not think that there is anything in this point. I am not in a position to make findings as to whether telephone calls should have been recorded or not, and I make no findings in this respect. I do not regard a matter of this kind as providing any foundation for a clean hands argument. The e mail of 26th June 2017 was sent once relations between the parties had well and truly broken down. I make no findings on whether the e mail contained improper threats or not. Again, I do not regard a matter of this kind as providing any foundation for a clean hands argument.

470. Finally the Claimants make direct reference to the balance of convenience test. They point to the hardship which will be caused to Harcus Sinclair if injunctive relief is granted. They point to the inconvenience and unfairness to the HS Group if injunctive relief is granted. They assert that damages would be an adequate remedy for the Defendant. They assert that the hardship caused to Harcus Sinclair will outweigh any advantage to the Defendant. The Defendant, it is said, will have only the satisfaction of having *"blown up"* the role of Harcus Sinclair in the Emissions Litigation.

471. I do not think that the balance of convenience, if the balance of convenience test applies, favours the refusal of injunctive relief. So far as the HS Group is concerned, I have already dealt with their position. I do not accept that inconvenience and unfairness will be caused if the Claimants cease acting for the HS Group.

472. I can see that if the Claimants are required to cease acting they will lose the benefit of being able to act in what is clearly substantial group litigation, and will also lose the existing investment made by the Claimants in the Emissions Litigation, dating back to April 2016. This is however a reflection of the commercial risk which the First Claimant took when, by Mr. Parker, it signed the NDA. If the First Claimant had been able to agree terms for a formal collaboration agreement with the Defendant, all would have been well and the First Claimant and/or the Second Claimant could have taken a lead role in the Emissions Litigation, jointly with the Defendant. If such terms could not be agreed, the First Claimant's investment in the proposed group claim would be lost, and the Claimants would have to walk away. While I accept that there will be hardship caused to the Claimants if injunctive relief is granted, I am concerned with the exercise of an equitable jurisdiction. I see nothing unfair in holding the Claimants to the consequences of the commercial risk which the First Claimant decided to take when, by Mr. Parker and following consideration of the terms of the NDA by Ms. Morrissey, the First Claimant signed the NDA.

473. Turning to the position of the Defendant I do not think that it is fair to say that injunctive relief will achieve no more than blowing up (as the Claimants put it) the role of Harcus Sinclair. As I have already said, the removal of the Claimants from the Emissions Litigation will have the desirable effect of putting to an end the current dispute between the Defendant and the Claimants, as that dispute is affecting the Emissions Litigation and the GLO Application. Beyond that it seems perfectly

reasonable to me that the Defendant should be able to act in the Emissions Litigation without the competition from the Claimants which the NDA was intended to prevent.

474. Beyond that, I do not think that it is right to say that damages will be an adequate remedy for the Defendant. It strikes me that it may be no easy task to quantify what damage will have been caused and will be caused to the Defendant by the First Claimant's breaches of Sentence 2 and the Implied Term. It seems to me that the present situation is just the kind of situation in which an injunction is required, in order to ensure that the restrictions in the NDA are observed, and in order to ensure that the Defendant will not be left to what may well be an inadequate remedy in damages.

475. Finally, I have a substantial concern that, in a case of this kind, a firm of solicitors should be held to the restrictions in a non-disclosure agreement which it has signed. It is clearly desirable, from the point of view of consumers, that firms of solicitors considering group actions should collaborate in the same way as the Defendant and the First Claimant did, albeit informally, in the present case. Where such collaboration occurs it is also important that firms of solicitors should know where they stand, in terms of difficult matters such as confidentiality and future competition. Such matters are best dealt with by a written agreement, which sets out what restrictions apply. In the present case the Defendant had the good sense to require such an agreement, and the First Claimant was prepared to sign the agreement. It seems to me that it would be a regrettable state of affairs if the Court was unwilling now to hold the First Claimant to its obligations under that agreement.

476. It seems to me that none of the matters raised by the Claimants, in support of their argument that injunctive relief should not be granted, amount to the special circumstances which would be required to prevent the grant of injunctive relief, if I am right in regarding the present case as being subject to the principle set out in Doherty v Allman.

477. If however I am wrong in regarding the present case as one to which Doherty v Allman applies, and the test is the wider one applying to claims for mandatory injunctions, requiring consideration of the balance of convenience, it seems to me that none of the matters raised by the Claimants is sufficient to avoid the grant of injunctive relief. If there is a balance to be applied, it seems to me that it comes down firmly in favour of the Defendant and in favour of the grant of injunctive relief.

478. I reach the above conclusion without considering whether the Defendant is entitled to this injunctive relief on the basis of my findings that the First Claimant breached its non-contractual duty of confidence by providing confidential information to S and G and the Second Claimant. The question of whether I would have been willing to grant the same injunctive relief on the sole basis of the First Claimant's breaches of confidence (as I have found them) is not one which arises, given the above conclusion. I do not think it necessary or helpful to consider that hypothetical question.

479. It does however strike me as inherently unsatisfactory that the Second Claimant is in possession of a good deal of confidential information which, on my findings, it should not have received. I have also found that the Second Claimant has not, itself, misused this confidential information. Nevertheless it strikes me that it would be inherently

unsatisfactory for the Second Claimant to continue acting in the Emissions Litigation, in competition with the Defendant, while in possession of confidential information belonging to the Defendant which the Second Claimant should not have. In my view, and at the least, this is a factor which goes to support the grant of the injunctive relief which I have already concluded should be granted.

480. I therefore conclude that the Defendant is entitled to the grant of injunctive relief, (i) requiring the First Claimant to cease acting, by its members and employees, for the HS Group in the Emissions Litigation, and (ii) requiring the First Claimant to procure that the Second Claimant cease acting for the HS Group in the Emissions Litigation, and (iii) ensuring compliance with the restrictions in Sentence 2 and the Implied Term for the future. It seems to me that such injunctive relief should run for the period of six years specified in the NDA. The precise terms of the required order or orders, if they cannot be agreed, are a matter on which I will hear the parties.

(XXII) Conclusions

481. I can summarise my principal conclusions as follows.

(1) The undertaking in Sentence 2 did take effect as a solicitor's undertaking given by the First Claimant. As the supervisory jurisdiction of the Court is agreed not to be available against the First Claimant, this conclusion does not assist the Defendant, as against the First Claimant. It follows that the claim for compensation against the First Claimant, pursuant to the Court's supervisory jurisdiction, falls away.

(2) The undertaking in Sentence 2 did not take effect as a solicitor's undertaking given by the Second Claimant, independent of the point that the supervisory jurisdiction of the Court would not have been available against the Second Claimant in any event.

(3) So far as Mr. Parker is concerned, the supervisory jurisdiction of the Court is not available against Mr. Parker, in his personal capacity, in respect of what I have found to be the solicitor's undertaking in Sentence 2. The reason for this is that Mr. Parker gave the undertaking in Sentence 2 expressly on behalf of the First Claimant. It follows that the claim for compensation against Mr. Parker, pursuant to the Court's supervisory jurisdiction, falls away.

(4) My conclusions on the construction issues, including the particular issues identified in the relevant section of the agreed list of issues, are as follows.

(i) Sentence 2 precludes the First Claimant from accepting instructions from or acting for the group of claimants for whom the First Claimant has acted in the Emissions Litigation (the HS Group), or for any other group of claimants in the Emissions Litigation save for the Defendant's group, without the express permission of the Defendant.

(ii) The NDA is subject to the Implied Term.

(iii) The restriction in Sentence 2 is not unenforceable as being in restraint of trade.

(iv) Sentence 2 does not bind the Second Claimant as a matter of contract.

(v) It is common ground that Sentence 2 does not bind Mr. Parker, as a matter of contract.

(vi) By virtue of the Implied Term, the First Claimant undertakes that the Second Claimant will not do anything that, if done by the First Claimant, would be a breach of the undertakings in the NDA. The First Claimant is therefore precluded from procuring, facilitating or

permitting the Second Claimant to do anything which, if done by the First Claimant, would amount to a breach of Sentence 2 by the First Claimant.

(5) Sentence 2 did not cease to have effect as a result of the discussion between the parties at the April Meeting.

(6) The Defendant did not give express permission to the Claimants, or either of them, to act for the group of claimants for whom they act in the Emissions Litigation (the HS Group). No such permission can be deemed to have been given.

(7) In terms of breach, and subject to the questions which I have left open for determination at the quantum hearing, my conclusions are as follows.

(i) The First Claimant has been and remains in breach of Sentence 2 and in breach of the Implied Term.

(ii) The Second Claimant is not, itself, in breach of Sentence 2 or the Implied Term because it is not directly bound by the restriction in Sentence 2 or by the Implied Term.

(8) The Defendant has not lost the right to enforce Sentence 2, or the Implied Term, or any other restriction in the NDA, as a result of acquiescence, waiver or estoppel.

(9) In relation to the claims for breach of confidence my conclusions are as follows.

(i) The First Claimant did not breach the user restriction in Sentence 1.

(ii) The Second Claimant did not breach the user restriction in Sentence 1, and could not have done so because it was not bound by the NDA.

(iii) The First Claimant breached its non-contractual duty of confidence in (i) providing Mr. Goodhead's third draft Particulars of Claim to S and G on 9th November 2016, and (ii) providing, at least from June 2016, the information in the Confidential Documents to the Second Claimant.

(iv) The Second Claimant has not breached its non-contractual duty of confidence; not having made use of the confidential information provided to it in breach of confidence by the First Claimant. The Second Claimant has not made use of the Confidential Documents in such a way as to place the First Claimant in breach of the Implied Term.

(10) The Defendant is entitled to the grant of injunctive relief, (i) requiring the First Claimant to cease acting, by its members and employees, for the HS Group in the Emissions Litigation, and (ii) requiring the First Claimant to procure that the Second Claimant cease acting for the HS Group in the Emissions Litigation, and (iii) ensuring compliance with the restrictions in Sentence 2 and the Implied Term for the future. Such injunctive relief should run for the period of six years specified in the NDA. The precise terms of the required order or orders, if they cannot be agreed, are a matter on which I will hear the parties.

482. In terms of the Claim, the Counterclaim and the Additional Claim, the consequences of my findings and conclusions in this Judgment are as follows.

(1) The Claim succeeds, to a limited extent.

(i) It has been established that the undertaking in Sentence 2 is not subject to the supervisory jurisdiction of the Court, although not for the reason identified in paragraph 7.1 of the Claimants' Details of Claim.

(ii) So far as the claim for a declaration in paragraph 7.2 of the Claimants' Details of Claim is concerned, this seems to me to have become redundant by the trial date. If the supervisory jurisdiction had been available, as against the First Claimant and/or Mr. Parker, there could have been no objection to its exercise following the full Part 7 trial which has taken place.

(2) The Counterclaim succeeds in the following respects.

(i) The Defendant has established that the First Claimant was, and remains in breach of Sentence 2 and in breach of the Implied Term.

(ii) The Defendant has established a right to the grant of an appropriate order or orders to restrain these breaches.

(iii) The Defendant has established the right to damages in respect of these breaches, for the period during which these breaches have continued, if and in so far as such damages can be proved at a quantum hearing.

(iv) The Defendant has established breaches of the non-contractual duty of confidence owed to the Defendant by the First Claimant, in that the First Claimant provided confidential information, in breach of this duty, to Ms. Young of S and G and to the Second Claimant. In theory, there is a right to financial relief in respect of these breaches of confidence. Given that I have not found any misuse of confidential information, but only the wrongful provision of confidential information to S and G and the Second Claimant, I do not know whether any loss, or unauthorised profit could be demonstrated in respect of these breaches. I do not decide this point. This will be a matter for the quantum hearing.

(v) So far as the grant of injunctive relief, in respect of the breach of confidence claim, is concerned, the Defendant has established that it is entitled to be granted the injunctive relief sought in respect of the breach of confidence claim. That entitlement derives however principally from the breaches of Sentence 2 and the Implied Term which the Defendant has established, in respect of which the same injunctive relief has been sought.

(3) The Additional Claim fails, and falls to be dismissed.

483. I will hear the parties on the precise terms of the order which should be made consequential upon the above findings and conclusions (including the question of whether any declaratory relief should be granted), and on all other consequential matters arising (including costs), if and in so far as such matters cannot be agreed between the parties.