Neutral Citation Number: [2021] EWHC 2639 (Comm)

Case No: E40MA009

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
CIRCUIT COMMERCIAL COURT (QBD)

Manchester Civil Justice Centre
Date handed down: 1 October 2021

Before His Honour Judge Stephen Davies sitting as a High Court Judge
Between :

Phoenicks Limited (formerly Nickleby & Co Ltd)	**Claimant**
- and -	
Bellrock Property & Facilities Management Ltd (formerly SGP Property & Facilities Management Ltd)	**Defendant**

Alexander Wright (instructed by **Lockett Loveday McMahon Solicitors, Manchester**) for the **Claimant**
Andrew Latimer (instructed by **Hill Dickinson LLP Solicitors, Liverpool**) for the **Defendant**

Hearing dates: 5, 6, 7, 8, 9, 12, 13, 14, 15, 20 July 2021
Date draft judgment circulated: 6 September 2021

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APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII. The date and time for hand-down is deemed to be 10 a.m. on 1 October 2021.
I direct that pursuant to CPR PD 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies:

A. Introduction and summary of decision.

1. This is a claim for damages brought by the claimant (**Nickleby**) against the defendant (**SGP**) for alleged breaches of a Business Purchase Agreement (**BPA**) and associated agreements entered into on 14 February 2012. The damages claimed exceed £6 million.

2. Under the BPA Nickleby sold its existing facilities management (**FM**) business and assets to SGP, a larger competitor business then owned by the Johnson Service Group ("**Johnsons**"). The BPA provided for an immediate payment on completion and for further deferred payments, the amount of which was dependent on future events.

3. In this case the amount depended in particular upon the extent to which costs could be saved and to which profits could be increased by adopting what were referred to as Nickleby models. Contingent payments up to a maximum value of £5 million were payable under Schedule 3 to the BPA (**Sch. 3**), dependent on the level of qualifying cost savings achieved and qualifying relevant profits earned over four post-completion financial periods starting 14 February 2012 and ending 31 December 2015.

4. It is common ground that in fact Nickleby received only the very modest sum of £11,693 in contingent payments. Nickleby contends that it is entitled to the maximum contingent payment of £5M, less that £11,693, under seven sub-claims. One is a claim for contingent payment allegedly earned and the others are claims for damages for alleged breach. I shall refer to these claims as the **contingent payment claims**.

5. Nickleby has also brought 6 further subsidiary claims. In the main they allege breaches of the BSA and of the contemporaneous Transitional Services Agreement (**TSA**) which regulated the transition of Nickleby's business into SGP's business post-completion. These claims, which I shall refer to as the **transitional breach claims**, are also vigorously disputed.

6. The case is factually complex, because of the need to investigate the detail of events in relation to each of the individual claims and sub-claims, much of which is disputed. In order to do so it is necessary to unpick the history of the post-completion integration of the Nickleby business into the SGP business and to investigate the reasons why SGP did not, as had clearly been anticipated, proceed to adopt Nickleby models into its own business structures. Inevitably, a large number of contemporaneous documents were disclosed, including voluminous emails. Hence, the length of the electronic trial bundle (almost 14,000 pages, plus a number of detailed spreadsheets), the length of trial (9 days for evidence and 1 day for closing submissions) and the length - I am afraid - of this judgment, which must also address the disputed issues of law and construction which arise.

7. In summary, I am satisfied that although the contingent payment claims for breach of contract fail, the claim for contingent payment due (claim 1(6)) succeeds in the sum of £2,063,861. I am also satisfied that some of the transitional payments claims succeed in the global amount of £191,723.51. The total award is, therefore, £ 2,255,584.51. All consequential issues, including interest and costs, will be determined once this judgment is handed down.

B. The witness evidence.

8. It is necessary to say something about the witnesses who did give evidence and those persons who might have given evidence but did not.

9. All witnesses were honest and intelligent people, familiar with the FM business including business finance and administration. However, they were all operating under the difficulty of having to give evidence about events principally occurring around 8 to 10 years ago. I also bear in mind that most,

although not all, of the witnesses, including some who are no longer employed by or involved with Nickleby or SGP, still hold quite strong views about what they perceive to be the rights and wrongs of what was plainly an unsuccessful business acquisition. Many of the witnesses seemed to be over keen to argue the case, especially in their witness statements, which had been drafted before the Practice Direction on witness statements in Business and Property Court cases came into force. In such circumstances it would be wrong to place too much reliance on the oral evidence of the witnesses without testing their evidence carefully against the contemporaneous documents and my assessment of the inherent probabilities. These observations apply, albeit to varying degrees, to each of the witnesses called.

10. Mr Nicolas Smale is the sole director and principal shareholder of Nickleby. He is a former management consultant who founded Nickleby and subsequently owned and operated it jointly with Mr Holley, initially as a management consultancy and later as a FM business. He strongly believed - and still does - in the Nickleby business models. He also strongly believes in the merit of Nickleby's case. He did not integrate well into the SGP business and his employment by SGP post-completion was terminated by SGP after around 9 months. Since then he has been engaged in a determined campaign to hold SGP financially to account for what he perceives to be its unacceptable conduct in relation to its acquisition of Nickleby.

11. Mr Jonathan Holley has a similar background to Mr Smale but also has significant skills and expertise in IT and software development. He was kept on at SGP because he was better able to integrate himself into the business than was Mr Smale and because his IT skills were highly regarded. He left SGP in August 2013 after it was sold by Johnsons. He had previously sold his shareholding in Nickleby once it became apparent that there would be a conflict of interest as between his position as employee of SGP and part owner of Nickleby. However, under the terms of the sale he retained his interest in any recovery against SGP. He came across to me as rather less partisan than Mr Smale, however I cannot accept his evidence uncritically given that: (a) he still holds a strong view that neither Nickleby nor he was properly treated during the integration process; and (b) he has a significant financial interest in the outcome of the case.

12. Mr Anthony Yelverton worked for Nickleby and transferred over to SGP where, like Mr Holley, he was regarded as a useful addition, in his case due to his abilities in operational management. He clearly believed that SGP could and should have implemented the Nickleby models and was prepared to advocate Nickleby's case, but he came across as less partisan and more reliable in his oral evidence than his witness statement suggested he might.

13. Ms Marcia Boverhoff worked for Nickleby as finance manager pre-transfer, with Sir Jonathan Portal acting as its finance director on a consultancy basis. She had also been, and remained, company secretary of Nickleby, although in practice her role was limited to statutory compliance. She transferred over to SGP to work in its finance and administration department. She was primarily responsible for the financial administration of the Nickleby business post-merger, working - according to an organisation chart produced in March 2012 - under Mr John Cooper (as head of management finance) and Ms Jeanette Lawrence (as head of corporate finance). She did not enjoy the experience, blaming the lack of organisation and support at SGP. She left SGP at the end of September 2012 and subsequently took up working for Nickleby again on a consultancy basis. As with Mr Yelverton, she also came across as less partisan and more reliable in her oral evidence than her witness statement suggested.

14. Sir Jonathan Portal is an independent chartered accountant who has provided accountancy services for Nickleby for many years. He provided services for SGP for a short time post-merger and again for Nickleby subsequently. He had little direct involvement with the business integration or with SGP. He candidly said that Nickleby had proceeded with the BPA against his advice, and he was

scathing of SGP's financial and administrative competence, but he still came across as genuine and reliable.

15. Mr Timothy Morris was Johnsons' group financial controller in 2011 and remains within the Johnsons Group, being now the company secretary and group financial controller of Johnsons. Although Johnsons sold on SGP's business and assets to a private equity venture known as Lyceum Venture Capital (**Lyceum**) in 2013, this claim was hived off from the sale, so that Johnsons is in effect the real defendant to this claim. This came through in Mr Morris' evidence, which seemed to me to be focussed very much on arguing his employer's case, in circumstances where his actual involvement and knowledge was limited, since until September 2012 he had no direct involvement.

16. Mr Kevin Elliott was the managing director of SGP from before Johnsons acquired the business in 2005 until after it sold the business to Lyceum in 2013. He now has a different career and no remaining interest or connection with SGP or its previous or current owners. My overall impression of him is that he started with a positive view of the Nickleby models but by around July 2012, having come to lose faith in Mr Smale's ability to move things forward and having come to see that introducing the Nickleby models into SGP was not going to be as easy as he had anticipated or particularly popular with some of the existing SGP management, he lost interest in the proposals to introduce the Nickleby models. By autumn 2012 he was also becomingly increasingly pre-occupied with the projected sale of SGP, which if successful would enable him to retire and begin a new chapter in his life. He was not a "details" man, nor was he someone who made or kept detailed records. He tended to make rough notes of discussions and to use them to send brief follow-up emails where necessary, either himself or through his PA, Ms Cooling, which tended to be more in the nature of action lists than records of what was discussed or agreed. He made his principal witness statement in 2014, shortly after leaving SGP, whilst his broad recollection of events was still reasonably fresh in his mind. I accept the broad thrust of his evidence as honest and reliable, whilst being unable to accept that he has any real recollection now of the details.

17. Mr Andrew Grant was Johnson's group financial accountant in 2012 and he remains with the Johnsons group. He came across as a reasonably fair minded witness.

18. Mr Richard Singleton was SGP's commercial director for retail, corporate and technical business in 2012. He is no longer employed by SGP or Johnsons. It was clear from his evidence that he was always sceptical about the Nickleby model and disinclined to take any risk of losing the custom of the clients for who he was responsible by introducing the Nickleby models. Again, he was more reasonable in his oral evidence than might have been expected from reading his witness statement.

19. Mr John Cooper was commercial finance manager of SGP then and, uniquely I think, is still employed by SGP under its new owners. He had been persuaded to include some partial comments in his witness statement but was fair minded in his oral evidence.

20. Mr Wright identified four witnesses who, he contended, ought to have been called to give evidence and in respect of certain specific issues he invited the court to draw adverse inferences. The relevant principles and the most recent authorities, including some observations by the Supreme Court, have been recently and comprehensively considered by HHJ Hodge QC (sitting as a High Court judge) in Ahuja Investments v Victorygame [2021] EWHC 2382 (Ch) at [23] - [25] and again at [31] - [33], and I follow his analysis and approach.

21. Nickleby did not notify SGP that this submission would be made until the trial was underway. Upon investigation as to whether the witnesses could reasonably have been called by SGP it transpired that three of the four (Ms Lawrence, Mr Pantling and Mr Askew) had left the employment of SGP some time ago and no longer worked for Johnsons.

22. There was reliable evidence that Ms Lawrence, the former retail account director, would have been an extremely reluctant witness. Her evidence would undoubtedly have been important to some of the issues arising in the transitional breach claims. However, this is not one of those cases where she obviously had key evidence to give on a critical factual issue or issues where the picture did not reasonably appear from the contemporaneous documents. Her absence as a witness meant that SGP had less directly relevant oral evidence to contradict the picture as it appeared from the contemporaneous documents and Nickleby's oral evidence where consistent with that documentary evidence. I do not however consider that it is proper for me to draw specific adverse inferences from her non-appearance as a witness.

23. The same is true of Mr Pantling, the former head of IT, whose evidence would have been important to some of the issues arising both in relation to the contingent payment claims and the transitional breach claims. There was no evidence given in relation either to his unavailability or unwillingness to attend trial. Nonetheless, for similar reasons as given above as regards Ms Lawrence I do not think that this is a case where specific adverse inferences should be drawn against SGP for its failure to call him. Again, however, his absence as a witness means that SGP has limited positive evidence to give from anyone with real expertise in IT in relation to the comparative merits of the IT systems used by Nickleby and SGP or to contradict the other evidence in relation to his role in matters.

24. The third such witness, Mr Askew (the commercial director for healthcare, education and business development), was never likely in my view to have been a significant witness in relation to the key issues in this case and I do not consider that any specific adverse inferences should be drawn in respect of his not being called, even though there was no evidence that he was unavailable or unwilling to give evidence.

25. As regards the fourth, although Mr Carlin is still with SGP I do not consider that the defendant was reasonably obliged to call him to defend itself against some key element of Nickleby's case. Since there is no property in a witness, since his evidence might well have been more favourable to Nickleby than it would have been to SGP, and since there is no suggestion that Nickleby had approached him to give evidence but been rebuffed on the basis that he had been forbidden to or discouraged from co-operating by SGP, there is no basis in my view for drawing any adverse inference against SGP for not calling him as a witness.

C. Overview of relevant facts and events.

26. As relevant to this case, FM is concerned with the maintenance of the facilities within commercial properties of all kinds. This may be **reactive** maintenance, for example someone attending to deal with a broken window, or planned preventive maintenance (**PPM**), for example someone attending to service an air conditioning unit. Many businesses undertake some or all of their FM in-house. Others prefer to contract some or all of it out to a FM operator. Broadly speaking, FM might be outsourced to a company which acts as a principal contractor or as a managing agent. The former agree to undertake agreed items of work for agreed prices, which include their direct and subcontract costs and their overhead and profit, whereas the latter charge an agreed fee for managing the procurement of contractors to do the work, where the contractors charge direct to and receive payment direct from the client. Some clients wish to specify particular contractors for particular facilities, for example to service or repair a specialist pizza oven, and others might wish to specify particular contractors to provide all required maintenance in a particular geographical area or to stipulate for a contractor with nationwide coverage. There are of course any number of variations on the principal contractor and managing agent models. In both cases there may well be joint savings provisions so that, for example, the client may have the right to share in any cost savings achieved by a FM provider, whether by moving from a managing agent to a principal contractor model or by introducing efficiencies such as an automated helpdesk.

27. Historically, SGP had been successful in winning clients predominantly on the basis of a managing agent model. This was particularly so in the case of its retail and hospitality clients. It also provided FM to commercial clients, to healthcare clients and to education clients, the latter two often under PFI projects (which tended to operate on a principal contractor model). Although SGP of course made use of IT in its business, it had a well-established helpdesk staffed by telephone operatives 24/7/365 for clients to contact who would then arrange for contractors to attend and undertake repairs. SGP allocated a dedicated operator team to certain clients.

28. In contrast, Nickleby had become successful in winning clients largely on a principal contractor model. Although it also maintained a telephone helpdesk, its major selling point was its proprietary IT system known as Emergense (**EMS**), developed in collaboration with Somerfield by a team led by Mr Holley. Clients could log in remotely to EMS via an on-line portal, accessible either by the client FM team or by local site based staff, and request a particular service, whether that be a request for reactive maintenance, PPM or simply for a job quotation. These requests would then be automatically directed to a contractor which had been pre-allocated to provide such service(s) to such client(s) in such area(s). For example, if a Somerfield store in London reported a faulty automatic door the contractor with whom Nickleby had contracted to provide such repair services for Somerfield in the London area would be automatically notified and would attend to repair the door. Nickleby's only direct involvement at this stage would arise if for any reason there was a problem, if for example the client was unhappy that the contractor had not attended within an agreed response time.

29. Moreover, the rates and prices which Nickleby had agreed with its clients and with its contractors were entered into EMS, together with bespoke "Job Costing" software. This enabled contractors to submit their job details online, including details of the time spent and plant and materials used, which could then be checked without human input using bespoke "Verify and Allocate" (**V&A**) software, which would result either in the payment application being confirmed as being in order to be processed or being flagged up as requiring further (human) attention. Once approved, a purchase order was generated by EMS. At this point a separate bought-in accounting system, known as Exchequer, was used to enable the contractor to invoice Nickleby and to enable Nickleby to onward invoice its client and through which the payments were made and recorded and the requisite details entered. EMS also had various other useful software modules to assist in relation to such matters as job quotations, PPM, asset tagging and a health and safety document library.

30. Furthermore, since both clients and contractors had their own dedicated access to specified areas and software application within EMS, they could obtain information direct about matters such as the progress of jobs and payment applications. These functions would also enable Nickleby itself or the client, with such assistance from Nickleby as it might request, to obtain information about comparative costs and response times as between different contractors. This information could then be used by Nickleby or the client to manage and improve contractor performance, to negotiate cost savings and also to offer clients savings based on sharing the fruits of such savings.

31. Somerfield was Nickleby's first client to use EMS and became Nickleby's most important client. However in January 2011, following its acquisition by Co-op, a decision was taken by the new owners to dispense with Nickleby's services, apparently with little or no warning.

32. This had three consequences. First, it put an immediate strain on Nickleby's finances due to the sudden loss of turnover. Mr Smale described it as an "existential" threat to Nickleby's survival. Second, it resulted in litigation by Nickleby against Somerfield which was eventually settled on favourable terms but which occupied a good deal of Mr Smale's time both before and after the merger. Third, it resulted in Mr Smale and Mr Holley being more receptive than they might otherwise have been to an approach by SGP in 2011 to acquire Nickleby.

33. SGP was interested in acquiring Nickleby's business for a number of reasons. SGP had experienced a period of stagnating growth and the acquisition of a smaller complementary business, also focussing on the retail sector, would increase both its turnover and its bottom line, the latter especially given the efficiency savings to be expected from a merger. Acquiring Nickleby would remove a competitor from the market. Acquiring Nickleby would also allow SGP to gain access to its IT systems and expertise, and EMS in particular, which could also result in SGP achieving further costs savings and winning further business by employing some or all of Nickleby's business models. There was also the potential for cross-selling services offered by SGP to Nickleby clients and vice versa.

34. It is unnecessary and indeed irrelevant (at least in relation to the construction of the BPA and associated agreements) to rehearse the twists and turns of the process which led from the initial opening of discussions in early 2011 to the entry into the BPA and supplementary agreements on 14 February 2012. For present purposes it is sufficient to note that SGP conducted extensive due diligence investigations into Nickleby, including due diligence in relation to its financial affairs and its IT systems.

35. The former revealed that Nickleby was not making as much profit, post the loss of Somerfield and other adjustments to its management accounts, as had been anticipated. This led to a renegotiation of the commercial terms, with an increased proportion of the consideration being deferred. However, SGP was still willing to proceed, with revisions to the forecast which showed an improved financial position and leading to an improved split as between upfront and deferred consideration.

36. The latter, prepared by Mr Pantling, confirmed - albeit without saying so in terms, not surprisingly since Mr Pantling was doubtless protective of SGP's existing IT systems - that EMS was superior in a number of ways to those systems. It is true that EMS, like any IT system, needed ongoing development in order to ensure that it remained attractive. It is clear from Nickleby's evidence that it had invested heavily in staff for that purpose. I am satisfied that Mr Holley's warning in July 2012 against it becoming market lagging was written because he was concerned about reduced investment in EMS both under Nickleby (which would not have been surprising, given that it was having to deal with the financial fallout of the loss of Somerfield) and under SGP. Nickleby was described by Johnsons' executive chairman, Mr John Talbot, in its financial statement for YE 2011 as having "leading edge unique IT software driven solutions". However, I also note that by 15 November 2012 Mr Holley was saying in an email of that date that SGP was losing business because competitors had a "more up to date and slick product than EMS". It is clear (from p.31 of the presentation made as part of Project Chile - of which more later) that by March 2013 SGP had taken the decision to seek to unify three of its existing IT systems, EMS, Resolve and Focas, into one enhanced system.

37. In terms of the contractual documentation, I have already referred to the BPA and to the TSA. In addition, the parties entered into: (a) a Bare Licence to Occupy, governing the terms on which SGP was to use Nickleby's business premises at Leamington Court, Hampshire; (b) two Service Agreements, under which Mr Smale was to be employed post-merger by SGP as a business value director at a salary of £100,000 p.a., and under which Mr Holley was to be employed as a shared services director at the same salary. The employment of the remaining Nickleby's staff was to be transferred over to SGP under TUPE Regulations (for short "**TUPE'd** over"). However, amongst the identified costs savings were included savings resulting from some of these TUPE'd ex-Nickleby staff being made redundant in due course. Finally, the parties entered into a Side Letter, which was stated to be a letter of comfort without binding legal effect, but which Nickleby contends is still relevant to the construction of the BPA. I will refer to these contractual documents in more detail as necessary when determining the individual claims.

38. Post-merger the parties immediately sought to undertake the successful integration of the two businesses. It is Nickleby's case, disputed by SGP, that due to poor advance planning and decision

making by SGP the process under which there ought to have been a clear demarcation line between the business and consequential invoicing and payment undertaken pre-completion by Nickleby and post-completion by SGP was botched, resulting in chaos and confusion which took months if not years to resolve and which caused Nickleby to incur substantial unnecessary costs. This is referred to by Nickleby as the **wrongful trading claim** and I shall do likewise, whilst noting that SGP deny any such alleged wrongful trading. Nickleby also complains that in the course of this integration process SGP wrongfully used Nickleby's bank account to pay SGP's creditors and also failed adequately to perform its obligations to collect Nickleby's debts and to pay Nickleby's creditors. Nickleby also complains that SGP failed to make the payments due under the licence in relation to Leamington Court. Finally, Nickleby complains that SGP failed to comply with its obligation to allow it access to the records relating to the pre-completion business, specifically those held on EMS, which it contends it was entitled to access remotely, and also failed to update Exchequer. In the main, the claims made by Nickleby under these heads are claims for management costs incurred in dealing with the consequences of these breaches, since it is common ground that a reconciliation was finally agreed in 2014 as to the financial consequences of the integration process. These claims are compendiously the **transitional breach claims**.

39. Post-merger the parties also set about seeking to secure the costs savings and profit increases contemplated by the BPA. They were largely successful in securing the specific cost savings identified in sched. 12, which resulted in the payment of the initial tranche of deferred consideration of £200,000 known as the **merger savings payment**.

40. I address the detail of what happened post-completion in separate sections at F and Q below. The current proceedings were issued in 2018. The case was listed for trial in April 2020 and was one of the (very few) trials proceeding in the Manchester Business and Property Courts which had to be adjourned due to the Covid-19 pandemic. It was relisted to take place this July 2021 when, happily, the parties and all but one of the witnesses were able to be physically present in court. I am grateful to both counsel for their co-operation in enabling the evidence to be completed on schedule and for their excellent cross-examination and submissions and to the respective solicitors for their co-operation in the preparation for and conduct of the trial, in particular - with help from Xbundle - in relation to a very useful electronic trial bundle and an equally useful daily transcription service.

41. I now turn to address the individual claims.

D. Claim 1 - the contingent payment claims.

42. There are seven separate claims still advanced of the eight pleaded in paragraph 22 of the Particulars of Claim.

Claim 1(1) - Par. 22(1): Failure to implement Nickleby Models for reactive maintenance for commercial clients.

Claim 1(2) - Par 22(2): Failure to implement EMS to reduce contractor spend on PFI contracts.

Claim 1(3) - Par 22(3): Failure to provide FM services to William Hill.

Claim 1(4) - Par 22(4): Failure to implement cost savings proposals in respect of helpdesk staff and other costs.

Claim 1(5) - Par 22(5): Failure to realise relevant profits through June 2012 initiatives.

Claim 1(6) - Par 22(6): Failure to pay contingent payment in respect of redundant FM account director and merger savings.

Claim 1(7) - Par 22(7): This claim is no longer pursued.

Claim 1(8) - Par 22(8): Dismissal of Mr Smale.

43. Before I address each sub-claim I must: (a) deal with issues as to the proper construction of Sch. 3 and the relevant legal principles applicable to these claims; (b) make relevant factual findings on matters common to and/or important to the claims.

E. The proper construction of Sch. 3 and the relevant legal principles applicable to the contingent payment claims.

44. A number of issues arise as to the correct construction and effect of Sch. 3 of the BPA. At the heart of the contingent payment claims lies a fundamental dispute as to the way in which the contingent payment provisions of the BPA operate. In resolving this dispute and the other issues which arise I apply what are now settled principles of contract construction. They are those recently referred to and summarised by the Master of the Rolls, Sir Geoffrey Vos, in Britvic plc v Britvic Pensions Ltd [2021] EWCA Civ 867 at [16-21]. Further reference to authority or additional comment from me would be otiose. The same is true so far as the implication of terms is concerned, where the relevant principles have also recently been summarised by Carr LJ in Yoo Design Services Ltd v Iliv Realty Pte Ltd [2021] EWCA Civ 560 at [47-51].

The Overriding Principle

45. In short, Nickleby's case is that at the heart of the mutual obligations imposed by Sch. 3 is what is defined as "the Overriding Principle", which requires both parties to "use all reasonable endeavours to work with each other in a co-operative and collaborative manner, in good faith and in the spirit of mutual trust and respect to maximise the contingent payments payable to Nickleby", and that the detailed provisions of Sch. 3 as to the making of cost savings proposals, as to the operation of the Governance Panel, as to the issue of certificates by the Governance Panel and as to expert determination do not prevent it from making a claim for damages for breach of the Overriding Principle.

46. In contrast, SGP's case is that the Overriding Principle only applies to the operation of the Governance Panel, that making cost savings proposals is key to the identification of cost savings, that the issue of certificates by the Governance Panel is key to the ascertainment of contingent payments, and that the failure to challenge such certificates and the failure to make the instant claims through the expert determination provisions are fatal to the claims.

47. I have found it a difficult task to construe Sch. 3. My strong suspicion is that this is because it is the result of legal over-layering of a document produced by business people, where the legal and the commercial terms are not always happily married up. In the end, however, I have reached the conclusion that the true construction of Sch. 3 lies somewhere between the competing positions adopted by Nickleby and SGP.

48. Sch. 3 must of course be construed as a part of and by reference to all of the relevant terms of the BPA. The BPA contains 29 clauses and 12 Schedules and runs to over 66 pages. The parties were Nickleby (as the Seller), SGP (as the Buyer) and Mr Smale and Mr Holley (as the Covenantors).

49. Clause 1 contained an extensive list of definitions. The "Business" was defined as "the business of facilities management services, consultancy and provision of software, either by sale, under licence or by hosting carried on by the Seller at the Completion Date". The Assets were defined by reference to Sch. 1 and included goodwill, contracts and the IT system. Values were placed against each of the asset classes, but I do not accept that the values ascribed to the separate assets has any particular relevance when considering their commercial value to the parties going forwards. Excluded from the sale were the book debts belonging to Nickleby and cash at bank.

50. Clause 2 was the primary clause which effected the sale and transfer of the business and the assets.

51. The only further clause I need specifically refer to at this stage is clause 19.5, which provides that: "unless specifically provided otherwise, rights arising under this agreement are cumulative and do not exclude rights provided by law".

Sch. 2

52. Sch. 2 was entitled "merger savings payment provisions" and provided for a contingent payment up to £200,000 to be made in the circumstances specified therein. Whilst SGP accepted that the merger savings payment had been earned, so that Sch. 2 is not of direct relevance, it is of some relevance to the cost savings provisions of Sch. 3 because: (a) the definitions used in Sch. 2 and 3 are stated to be common to both; (b) Sch. 2 recorded that specific possible merger cost savings had been identified in Sch. 12 (where 28 such savings were identified (predominantly through getting rid of surplus staff) totalling £1,011,000); (c) Sch. 2 also contained a detailed procedure, similar but not identical to Sch. 3, for other alternative savings to be proposed; (d) Sch. 2 contained a mutual obligation under par. 3.1 to use "all reasonable endeavours to ensure that all actions necessary to deliver [them] are implemented" within that period; and (e) Sch. 2 contained a provision for the Governance Panel to determine whether merger savings had been achieved.

53. A small issue arises as to whether or not a determination by the Governance Panel that a particular saving is a merger saving under Sch. 2 operates as a determination that it is also a cost saving under Sch. 3. I agree with Nickleby that it should, given that there can be no substantive difference between the definition of cost savings in Sch. 3 and the definition of merger savings and alternative savings in Sch. 2, so that an agreement by the Governance Panel that a particular saving is a merger saving or an alternative saving must carry with it an agreement that the same is also a cost saving. Even if that is wrong, there would be an evidential onus on SGP to explain why someone or something which is determined as included for the former purpose should not also be included for the latter purpose.

54. Sch. 3 is entitled "contingent payments". Rather than interrupt the discussion with lengthy extracts I set out the material terms in full in Appendix 1 to this judgment.

Side Letter

55. At the same time as entering into the BPA SGP provided a signed "Side Letter" upon which Nickleby places reliance and which read as follows:

> "We refer to the Business Purchase Agreement made between us and entered into today in relation to our acquisition of the business and assets of Nickleby & Co Limited ("BPA"). Definitions included in the BPA have the same meaning in this letter.
>
> It is the intention of the parties to grow profit and sales of the Buyer. The Seller intends to maximise its Contingent Payment and both parties believe their objectives are mutually compatible. The Buyer recognises and will use reasonable endeavours to support the Seller in achieving its purpose.
>
> The Buyer recognises that the Seller is dependent on the management teams to achieve significant profit increases from prospects and the conversion of existing clients of the Buyer to Nickleby Models. The Buyer will encourage its management team in this regard and will use reasonable efforts to retain David Brooks, Peter Jones and Brent Hopwood as employees throughout the Contingent Payment Period.
>
> It is the Buyer's view that the Seller should be able to achieve a significant part of the Contingent Payment through the delivery of Cost Savings.

> The Buyer acknowledges that the Seller has a valuable interest in pursuing its claims against Somerfield. if the Seller needs additional time to pursue its claims, the Buyer will give proper and reasonable consideration to such requests.
>
> This letter is a letter of comfort only and does not have any binding legal effect."

56. Nickleby acknowledges that it cannot rely on this side letter as imposing legal obligations, but it does contend that it is relevant to the construction of the BPA as part of the admissible factual matrix. In closing submissions Mr Latimer accepted, correctly in my judgment, that it could be relevant to the construction of the BPA. That does not, however, permit Nickleby to treat the statements about SGP: (i) using "reasonable endeavours to support" Nickleby to maximise its contingent payment; or (ii) "encouraging its management team" to achieve profits from prospects and converting SGP clients to Nickleby models as having independent legal effect or as permitting a construction of the Overriding Principle which cannot be taken from the clear words of paragraph 4.1 as properly construed.

57. It seems to me that the side letter has more relevance to issues of breach and causation, insofar as it records SGP's contemporaneous belief that the parties' objectives were not incompatible, its recognition that Nickleby was dependent on the SGP management team and its belief that Nickleby should be able to achieve a significant part of the contingent payment through cost savings.

Cost savings

58. The definition of cost savings in paragraph 1.1.6 raises some difficulties. It is clear that it applies to the whole of SGP's business as constituted post-merger, not just to the former Nickleby business. The core definition is ostensibly simple and straightforward - "cost savings achieved in each financial year … in the [SGP's] businesses (including but not limited to [Nickleby's] business following its acquisition". Importantly, the following words "and including (but not limited to) those arising either as a direct result of SGP introducing Nickleby models in its performance of those contracts of [SGP] which were in existence at completion or other cost savings achieved directly by [SGP] introducing Nickleby models …", make it quite clear in my view that any cost savings achieved in the SGP business are included, even if they do not flow from the introduction of the Nickleby models. No express words setting any limit to the definition of cost savings appear anywhere in paragraph 1.1.6.

59. Despite this, Mr Wright for Nickleby was prepared to accept for the first time in oral closing submissions that the parties must have contemplated that there should be some connection between an individual cost saving and the overall process by which SGP acquired Nickleby's business and combined the respective businesses, took on Nickleby's staff, envisaged adopting its models and envisaged that Mr Smale and Mr Holley would examine the combined business and make cost savings proposals. He accepted that if there was a cost saving which had nothing at all to do with the acquisition and merger and was entirely extraneous then that could not be included as a cost saving which entitled Nickleby to a contingent payment.

60. Mr Latimer submitted that on a proper interpretation the cost savings must flow from cost savings proposals made by Mr Smale and Mr Holley under paragraph 3.1 as relating to the introduction of Nickleby models. He submitted that the absence of any express words in clause 1.1.6 setting a limit is explained because clause 1.1.6 is limited by paragraph 3.1. He submitted that the provision in paragraph 3.1 for Mr Smale and Mr Holley to "make written proposals to the Buyer to make Cost Savings ("Cost Savings Proposals")" refers back to the defined term and makes clear that such proposals must be proposals of the kind expressly identified in paragraph 1.1.6 and, thus, must relate to the introduction of Nickleby models.

61. Mr Wright contended that there is no compelling reason to limit the definition of cost savings to those arising from the process contained in paragraph 3. He asked, rhetorically, why should cost savings which result from initiatives other than those suggested by Mr Smale or Mr Holley, but are otherwise within the scope of the definition, be excluded?

62. After careful reflection I was not convinced by either argument.

63. I strongly suspect that Mr Wright's concession in oral closing submissions flowed from a forensic concern that the court might think it unlikely that the parties could have intended to confer on Nickleby a wide entitlement to share in every cost saving achieved over the 4 year contingent payment period, even if wholly unconnected with Nickleby in any way, and in consequence might therefore be tempted to accept Mr Latimer's even more restrictive definition of cost saving. I understand his concern, but in the end am not convinced that this answer is needed for me to be satisfied that Mr Latimer's argument is unsound.

64. Mr Latimer's argument involves reading a linkage between paragraph 1.1.6 and 3.1 which is not expressly to be found in either paragraph. It also involves limiting the definition of cost savings far beyond that expressly found in paragraph 1.1.6. It is either plain contrary to, or at the very least has to be read as significantly qualifying the express statement in paragraph 1.1.6 as to what is included in cost savings to which I have already referred to. Moreover, read literally, the definition of cost savings proposals in clause 3.1 is limited to "changes to lead to reductions in employment costs" through introducing Nickleby models, which would not cover any other types of cost saving, such as contractor costs or consultant costs, plant or materials costs, office costs or IT costs. I do not think that I can simply ignore these express words in paragraph 1.1.6 and in paragraph 3.

65. In the end I am satisfied that the only permissible approach in this case is for me to give each clause the strict literal meaning contained in their express words, because any attempt to read some further limitation, whether implied as suggested by Mr Wright, or through artificially linking them together as Mr Latimer suggests, goes beyond any permissible process of implication or construction in the context of a detailed contractual agreement negotiated between two sophisticated businesses.

66. Mr Wright's suggested implied qualification suffers from the weakness that it is extremely difficult to define the precise nature of the causal connection which would limit the otherwise unlimited scope of paragraph 1.1.6. Moreover, I do not consider that I can confidently conclude, either from the rest of the BPA or any relevant factual matrix, that it was wholly implausible that the parties intended to allow Nickleby to recover 50% of <u>any</u> cost savings achieved by SGP, given that: (a) there is a finite 4 year time limit on sharing in such cost savings; (b) there is a £5 million overall limit on all contingent payments; and (c) by virtue of paragraph 2.4 cost savings cannot duplicate relevant profits. In my view it is not wholly implausible that SGP might have been prepared to assume that the scope for achieving substantial cost savings in the combined business going forwards which were not in some way related to the Nickleby merger was relatively limited anyway, so that it was not giving away too much by agreeing to this wide definition. The definition of relevant profits is carefully limited in a way which the definition of cost savings is not, and I do not see that I can simply ignore this decision to define them differently. Unless I can conclude that both parties could not, objectively, have intended this result I do not consider that it is open to me to rewrite the bargain the parties have chosen to write. I am unable to reach that conclusion and even if the parties did not at the time appreciate that the definition of cost savings would be as wide as it reads, that is not a basis for rewriting the definition.

67. Mr Latimer's argument effectively assumes that the second sentence of paragraph 3.1 has no connection with the first sentence and ought to be read as if it can be cut and pasted into the definition in paragraph 1.1.6 without more. Again, however, I am unable to be satisfied either from

the clauses, read by themselves or in the context of the BPA as a whole or having regard to any relevant factual matrix that both parties must have objectively intended this result.

68. In my draft judgment I had said that SGP could not claim that there was any prejudice in my making this finding, notwithstanding Mr Wright's concession in oral closing submissions, since the proper construction of the contract is a matter of law for me as the judge and since there was no formal concession of any part of this claim 1(6) on the basis of the concession. I did say, nonetheless, that if on receipt of the draft judgment Mr Latimer wished to invite me to reconsider my judgment in this respect I would hear from him and decide whether it was appropriate to do so. He did, and made some further submissions to which Mr Wright responded and which I now address.

69. First, Mr Latimer acknowledged that the court could not be bound by a concession by one of the parties about the construction of a written agreement, since that is a matter of law. Mr Wright referred me to the commentary in The Interpretation of Contracts (7th edition) by Sir Kim Lewison at 4.06 and 4.07 to confirm this. Mr Latimer referred me to the observations of Rix LJ in HLB Kidsons v Lloyds Underwriters [2008] EWCA Civ 1206 at [84] to the effect that the court ought to be cautious before rejecting a concession. Whilst that is undoubtedly wise advice nonetheless, as Mr Wright submits, it is no more than an obiter observation. In any event, as can be seen from the discussion above, I did exercise caution before deciding to depart from the case advanced by both parties. Mr Latimer advanced some forensic submissions as to why I should not reject the concession, which Mr Wright withdrew anyway in his submissions in reply, but I am afraid that I was not convinced by any of them.

70. More significantly, the only further argument advanced by Mr Latimer as regards the proper construction of cost savings seemed to me to be equally unconvincing. He referred me to the opening words of the definition ("cost savings achieved in each Financial Year taken one by one"), where the first financial year starts with the date of completion, and to other references to completion, and submitted that these references make clear that cost savings must be causally connected to the completion of SGP's acquisition of Nickleby's business. However, as Mr Wright retorted, just because cost savings achieved before completion are not covered does not provide any support for a contention that cost savings which are not causally related to the acquisition are not covered, and certainly not when set against the very clear words of paragraph 1.1.6 which are explicit that there is no limitation.

71. It follows from this analysis that there is no need to grapple with the rather artificial debate as to what is meant by and required of a cost saving proposal, since it follows from the express words used in paragraph 3.1 that it must be a proposed change to lead to reductions in employment costs which can be achieved directly by the Buyer introducing the Nickleby Models whilst at the same time maintaining the level and quality of service provided to clients. The level of detail required emerges from the description of what amounts to a cost saving proposal. In such circumstances I agree with Mr Wright's minimal approach that all that is required is that it should be in writing and identify in summary what is proposed, so long as it shows that it fits within what is required of a cost saving proposal.

72. In any event I do not accept Mr Latimer's argument that it must contain sufficient detail to identify to which new or existing clients it is to be targeted and what it involves in sufficient detail to enable a decision to be made as to whether it can and should be pitched to such clients, and what cost savings will be achieved taking into account implementation costs. In my view, Mr Latimer's submission requires too much. It effectively equates the proposal with a worked up pitch to a target client or clients. However, there is no good reason to expect that this would be required at this initial stage, especially not from Mr Smale and Mr Holley, who could not be expected to have the same detailed knowledge of SGP's existing clients as was available to existing SGP staff. In my judgment all that is required is the minimum which SGP would need to know to decide whether or not to accept or to

reject the proposal. Thus it need only identify in broad terms what the proposal is and the anticipated cost savings expected to be achieved. No formality and no unnecessary detail is required. It must be borne in mind that there is a clear and obvious difference between a proposal to make internal cost savings and a pitch to a client to enter into a contract.

73. Finally, Nickleby contends that a failure by SGP to comply with paragraph 3.2, by providing a written statement within 15 business days of receipt setting out its reasons for not implementing cost saving proposals, has the effect of deeming any refusal to implement the cost saving proposals unreasonable. I do not accept this argument. In my view the obvious conclusion is that it simply sets a time limit for Nickleby to invoke the referral to an independent expert under paragraph 3.3. Although Mr Wright submitted that this would allow SGP to breach this time requirement without sanction I do not agree, since there is no reason why the independent expert should not take this failure into account when making their determination.

74. The further questions which arise under paragraph 3 are whether or not the Overriding Principle applies only to the cost savings proposals process and whether or not only the independent expert can determine whether or not the refusal to implement is unreasonable. I shall address these issues below when considering paragraph 4.1.

Relevant profits

75. The definition of relevant profits is also contentious. In particular, the reference to Sch. 11 in sub-paragraph 1.1.10(a) raises a controversy. Sch. 11 is described as a "list of prospects". It is further described as a table which "highlights prospect customers and sectors". The list itself, which runs to over 6 pages and includes a substantial number of clients, is subdivided into "customers with new service prospects" (where the existing services provided to the clients, such as "outsourced managed clients", "reactive works", "helpdesk services" and various EMS services, are highlighted), "new prospects", "previous clients of Nickleby" and "previous prospects of Nickleby". Although not explicitly stated, it is clearly a list of clients produced by reference to their relationship with Nickleby and falling into each of the separate sub-categories. It plainly is not a reference to SGP clients, because it identifies by asterisk those who are also a "current Buyer client".

76. An issue arises in relation to one client, William Hill, who is in the list in the first category as currently being provided only with reactive works and who, says Nickleby, ought to have been signed up by SGP to provide such works to an increased number of stores. SGP contends that this is not covered, because it falls within the bracketed exception at the end of sub-paragraph 1.1.10(b). Nickleby argues that this bracketed exception only applies to section (b) cases and has no application to section (a) cases and, hence, to any of the clients identified in Sch. 11.

77. Whilst it is true that the words in brackets run straight on from the text of section (b), with no indication that they also apply to section (a), in my view such a construction would give undue emphasis to the way in which the paragraph is set out. In my judgment such a construction would deprive section (b) of any real effect, given that section (b) by definition only applies to pre-completion clients of the Seller, which is precisely the purpose of the list in Sch. 11. In my view paragraph 1.1.10 is not particularly clearly worded or set out, since it does not expressly state whether or not Sch. 11 applies only to section (a) cases or also to section (b) cases, and since it also fails expressly to state whether or not the bracketed exception applies to both cases. In such circumstances, it is proper and reasonable to read this definition purposively by reference to Sch. 11, so as to conclude that the bracketed exception must also have been intended to apply to section (a) cases.

78. Mr Wright submitted that the contrary construction was justified by reference to some evidence that there were some existing Nickleby clients who were not on the Sch. 11 list. However: (a) that is not stated anywhere in the contract documents themselves; (b) that is not established by any document

which forms part of the admissible factual matrix to which I have been referred; and (c) the passing references in Mr Smale's witness statement to B&Q and M&S, which are not in the list, as having been Nickleby clients is far from sufficient to make the difference, since it is not a positive statement that they were Nickleby clients as at the date of the BPA.

Ambit of the Overriding Principle

79. The effect and ambit of the Overriding Principle as found in paragraph 4.1 is hotly disputed. Nickleby's case is that it applies to all of the obligations imposed on SGP under Sch. 3 in relation to the contingent payments, whereas SGP's case is that it applies only to the Governance Panel procedure as found in paragraph 4.

80. In closing submissions Mr Latimer accepted that he could not derive support from the fact that it appears under the overall paragraph heading "Governance Panel", because clause 1.2 of the BPA states that "clause, schedule and paragraph headings do not affect the interpretation of this agreement". However, his submission was that the same conclusion could be derived from a combination of factors including: (a) its location within Sch. 3, in a section which deals only with the composition and role of the Governance Panel; (b) the alleged absence of any need for it to apply more widely and, in particular, the absence of any need for it to apply to the cost saving proposals provisions of paragraph 3.

81. Mr Wright contended that the Overriding Principle cannot be so confined, because it is concerned with the parties "ensuring" that relevant profits are maximised and cost savings increased so that contingent payments can be maximised. It cannot be limited to the operation of the Governance Panel, especially where in order to implement cost savings and achieve relevant profits the whole business, including the client facing business development and client account relationship sections, the contractor facing procurement and work management sections, the IT section and the financial and administrative sections would all need to play their part . Nickleby relies in this regard upon the recognition in the Side Letter that Nickleby was reliant on SGP's management as a whole, not just those assigned to the Governance Panel.

82. In my judgment there is less difference in real terms between the parties than might at first appear. That is because of the importance and extent of the functions to be undertaken by the Governance Panel. Although SGP would always have a majority of 3 to 2 at any meeting, Mr Smale and Mr Holley were entitled to attend all such meetings in order for them to be quorate. They were to meet every fortnight unless otherwise agreed. The breadth of the responsibilities imposed on the Governance Panel is vividly seen by the non-exhaustive list at paragraph 4.8, especially when read with paragraph 4.7. In short, as well as being responsible for the integration of the two businesses, they were to ensure that merger savings were achieved, determine how best to direct efforts to achieve cost savings as soon as reasonably practicable, and review and approve all new contracts with prospective clients. Thus, the function of the Governance Panel was intended as much an active executive role as a passive role of determining what merger and cost savings and relevant profits had been achieved, calculating and certifying them. It follows, in my judgment, that the Governance Panel had a responsibility to ensure that all SGP sections did what was directed and required of them. The SGP members of the Governance Panel would need to comply with the Overriding Principle in the performance of these obligations as much as with any others. It would not be sufficient for them simply to say that they had decided what should be done in general terms and then left it to SGP as a whole to implement their decision without taking any responsibility for that implementation.

83. Nonetheless, on balance I prefer Nickleby's wider formulation. There are essentially three reasons for this. First, paragraph 4.1 is not expressly limited to the activities of the Governance Panel nor to the individuals appointed to form the Governance Panel. Second, the stated purpose of the Overriding Principle is to "ensure" that relevant profits and cost savings are maximised and

increased, which is neither the only nor the sole responsibility of the Governance Panel. Third, the recognition in the Side Letter to the need to involve the management teams is an indication that the obligation should not rest solely upon the Governance Panel. Additionally, I do not consider that the particular location of the paragraph within Sch. 3 is of particular significance. Moreover, whilst I can see the force of the argument that on one level the paragraph 3 procedure does not require the parties to comply with the Overriding Principle, because there is recourse to the independent expert procedure, in my view that ignores: (a) the narrow construction and thus impact of paragraph 3.1 when considering the wide variety of potential cost savings and relevant profits; (b) the fact that by complying with the Overriding Principle in putting forward and in considering cost saving proposals the risk of damaging stand-offs and divisive reference to the independent expert is more likely to be avoided in the first place.

84. I must also consider what the Overriding Principle actually requires. Paragraph 20 of the Particulars of Claim appears to suggest that the obligation is to use all reasonable endeavours and to work in a cooperative and collaborative manner in good faith, to realise relevant profits and implement costs savings (underlining added). In fact however as worded it is an obligation to use all reasonable endeavours to work: (i) in a cooperative and collaborative manner; (ii) in good faith; and (iii) in the spirit of mutual trust and respect [in each case] to maximise relevant profits and increase costs savings. The reasonable endeavours reference in the side letter cannot be used in my judgment to justify a construction which imposes an all reasonable endeavours obligation as a free-standing and separate obligation. The words chosen are not the same words as those which appear either in Sch. 2 or in paragraph 3.3 and the difference in wording must be respected.

85. Thus, whilst I accept Mr Wright's submission that "all reasonable endeavours" requires the obligor to take all reasonable steps to achieve a particular outcome, unless it can be said that those steps were unreasonable, or bound to fail, or would have involved prejudice to its own commercial interests, these words still operate as words of qualification to the substantive obligations to work: (a) in a cooperative and collaborative manner; and (b) in good faith; and (c) in the spirit of mutual trust and respect, to maximise relevant profits and increase costs savings, rather than as a separate and additional obligation.

86. As to the obligation to co-operate, I was referred to the oft-cited decision of the House of Lords in Mackay v Dick (1881) 6 App Cas 251 where Lord Blackburn said that: "I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances".

87. As regards the obligation of good faith, I was referred to the rather more recent decision of Pepperall J in Essex County Council v UBB Waste (Essex) Ltd [2020] EWHC 1581 (TCC)at [114 - 116] for his extremely helpful analysis and summary of what is meant by a duty of good faith in the context of a relational contract, by reference to the decisions of Leggatt J in the cases of Yam Sing and Sheikh Al Nehayan. He concluded that: (a) it is an objective test; (b) dishonest conduct will be a breach; (c) conduct which would be regarded as commercially unacceptable by reasonable and honest people will also be a breach; and (d) the answer in any particular case will depend on the contractual and factual context.

88. Since there is no pleaded or expressly advanced case of dishonesty advanced against SGP in this case, the crucial question will be whether Nickleby can establish that SGP's behaviour amounted either: (a) to a failure to co-operate to do what was necessary to maximise relevant profits and increase cost savings; or (b) conduct which would be regarded as commercially unacceptable by reasonable and honest people.

89. I do not think that the obligation to collaborate adds anything of significance to the duty to co-operate or that the duty to act in the spirit of mutual trust and respect adds anything of significance to the duty of good faith.

The certification provisions

90. There is also a dispute about the certification provisions of paragraph 5. Whilst much of this is fact specific, some points of construction also arise. The most significant concern the pre-conditions for a valid certificate. Nickleby submits that there are necessary pre-conditions to the validity of any certificate that: (a) accounts must have been prepared; (b) that is followed by a validly held meeting of the Governance Panel, valid both in accordance with paragraph 5.2 and within the timelines specified in that paragraph; (c) the meeting results in a determination and a decision by the Governance Panel; and (d) that determination and decision is recorded in a certificate signed by the chairman with a copy provided to each panel member. In contrast, SGP contends that all that is required is that there is what appears on its face to be a certificate signed by a representative of the Governance Panel.

91. In my judgment, whilst Nickleby overstates its case to some extent, I accept its essential case that it is a core requirement for a valid certificate that there has been a validly held meeting of the Governance Panel which has resulted in a determination and a decision which is embodied in a certificate signed by the chairman. Nothing less will do. See the analysis in Keating on Construction Contracts (11th edition) at chapter 5 Part B section 5(b) to which I was referred. Here, it is clear from paragraphs 4.2 to 4.6 that there must be a quorum of all 5 members, either those originally appointed or their replacements or appointed representatives, with a validly appointed chairman, and it is also clear that there must be a determination and a decision by such a Governance Panel by unanimity or majority vote with a certificate signed by the validly appointed chairman. I only disagree with Nickleby in that I am prepared to accept that it is not necessary for accounts to have been prepared (although if a decision was taken without them it would almost certainly be in breach of the Overriding Principle) or for the timelines to have been strictly complied with.

92. Furthermore, there is no basis for a submission, if made, that the certificate could be conclusive in relation to a separate complaint or claim made by Nickleby, such as is the case in relation to the majority of the contingent payment claims, that it has suffered loss and damage by reason of the failure by SGP to perform its obligations under the Overriding Principle.

93. As will appear, on the facts of this case this means that none of the certificates relied upon by SGP in this case were valid certificates. It follows that no question of Nickleby having been deemed to accept them as accurate arises.

The independent expert determination provisions

94. The final issue of construction which I must determine is the effect of the independent expert determination provisions of Sch. 3. It appears that SGP argues that this is an exclusive and exhaustive remedy so far as the independent expert determination provision in paragraph 3.3 is concerned, but not in relation to the provision in paragraphs 5.4, 5.5 and 6.

95. In my judgment the answer to the paragraph 3.3 point is that since, as I have found, the Overriding Principle applies to the paragraph 3 process, it is open to Nickleby to contend that SGP was in breach of the Overriding Principle as regards its alleged failure or refusal to implement the cost saving proposals. There is no basis for concluding that the expert determination procedure is intended to extend to claims for damages for breach of the Overriding Principle. Moreover, since paragraph 3.3 is permissive rather than mandatory ("the Seller may" not "the Seller shall"), then I agree that expert determination is not the exclusive and exhaustive avenue for Nickleby to complain about such a breach. That conclusion is fortified by clause 19.5 of the BPA referred to above, which makes clear

that unless specifically provided to the contrary (which it is not) the right to refer to the independent expert does not exclude the right to have the dispute resolved by court proceedings. I was referred to and apply the principles set out (albeit in the field of arbitration) by the Privy Council in Hermes One Ltd v Everbread Holdings Ltd [2016] UKPC 1.

96. If I had not concluded that the Overriding Principle applied to the paragraph 3.3 procedure, then I would have accepted SGP's submission that whilst the independent expert is authorised under paragraph 3.3 to determine whether or not SGP has acted reasonably there would not, in the absence of any relevant express or implied obligation, be any relevant contractual obligation which the court could apply if faced with a complaint by Nickleby that SGP ought to have, but had not, implemented its cost saving proposals. I do not consider that the court could imply any obligation of co-operation or of good faith in such a case, in circumstances where I would have concluded that the express Overriding Principle was not, on its true construction, intended to apply to the paragraph 3 procedure.

97. However, given my conclusion that paragraph 3.1 is of narrow scope anyway, it follows that this limitation would not apply to cost savings generally, let alone to relevant profits.

98. For completeness, for similar reasons I would have been unable to conclude that such duties could be implied in relation to the performance of all of the obligations imposed by Sch. 3, had I concluded that the Overriding Principle only applied to the performance of the obligations imposed by the Governance Panel. The inclusion of a specific provision in relation only to one part of the obligations would have been inconsistent with the implication of such duties in relation to then remainder, especially given my conclusions as to the width of the role imposed on the Governance Panel.

99. Finally and if, contrary to my understanding, SGP is seeking to argue that the independent expert determination provision also provides an exclusive and exhaustive remedy then I am unable to accept that submission. As with paragraph 3.3, the permissive word "may" in paragraphs 5.4 and 5.5, coupled with clause 19.5 of the BPA, militates against any such suggestion. I acknowledge that paragraph 6.1 uses the word "shall", but this in my view only applies to the situation where one or other of the parties had already exercised the option under paragraphs 5.4 or 5.5. In any event it would not apply to a claim for damages for breach of the Overriding Principle.

The proper approach to causation and damages

100. The pleaded case as advanced until shortly before trial in paragraph 23 to 25 was simply that but for SGP's breaches SGP would have realised very substantial cost savings and relevant profits, thus entitling Nickleby to receive contingent payments well in excess of the £5 million cap. Giving credit for the £11,693 actually paid leads to the pleaded claim for £4,988,307.

101. By amendment, for which I gave permission at the pre-trial review, Nickleby claimed in the alternative in paragraph 25A that "but for SGP's breaches there would have been a real and substantial chance" (emphasis added) that the costs savings and relevant profits could have been realised, with the same consequence in terms of its entitlement to receive contingent payments. Particulars were given in support of that allegation which pleaded matters already addressed in the evidence adduced by both parties in response to the existing pleaded case.

102. As explained by Mr Wright in his application for permission to amend, and as addressed again in his written submissions, this alternative case was introduced to enable Nickleby to advance an alternative legal causation argument about which, in the end, there was little if any real dispute. It arises from the legal analysis conducted by Bryan J in his decision in Assetco v Grant Thornton [2019] EWHC 150 (Comm).

103. The essence of the decision as relevant to the present case (which appears in section G.2 of the judgment) is well summarised by the editors of the [2019] Bus LR at 2291 as follows:

> "Where a claimant claimed "loss of a chance" damages, and the causation of the loss suffered by the claimant as a result of the defendant's wrongful act was dependent upon the hypothetical action of a third party, the claimant was required to prove that there was a real or substantial chance, as opposed to a speculative one, of the third party acting in a particular way, and the evaluation of that chance was then part of the assessment of the quantum of damages whatever the probability at the causation stage; that a claimant in such circumstances was not permitted to elect instead to seek to prove the action of third parties on a balance of probability and then to recover 100% of its damages, and whether the court heard from the third party appearing as a witness made no difference."

104. There was no challenge to the correctness of his decision on this point on appeal to the Court of Appeal [2020] EWCA Civ 1151, with none of the members expressing any reservation as to its correctness. Neither Mr Wright nor Mr Latimer sought to persuade me not to follow the approach of Bryan J and I have no hesitation in so doing.

105. One question which may arise is whether, if it is necessary to decide what SGP would have done had it not acted in breach of contract, that question ought to be decided on the balance of probabilities basis or on the real or substantial chance basis. It appears reasonably clear that the question is to be decided on the balance of probabilities: see the view expressed in McGregor on Damages 21st ed. at 10-066 and, albeit obiter, the view expressed by Gross LJ (sitting as a judge of the High Court) in AerCap Partners v Avia Asset Management [2010] EWHC 2431 (Comm) at 76(iii) as follows:

> "Where the outcome of such an event depends on what the claimant, the defendant or someone for whom the defendant is responsible would have done, the claimant must prove on a balance of probabilities that he or the defendant would have acted so as to produce a favourable outcome. By contrast, where the outcome of a hypothetical past event depends on what a third party would have done, the claimant may recover for loss of the chance that the third party would have so acted".

106. Of course any assessment of what SGP would have done in such a hypothetical situation would need to be undertaken on the assumption that it would have acted in accordance with the Overriding Principle and its other obligations under the BPA.

107. That concludes my analysis of the relevant issues of construction and law which arise as regards the contingent payment claims.

F. Factual findings relevant to contingent payment claims.

108. This section addresses what are the key factual issues in relation to this claim generally.

109. Given my general approach to the evidence, there is no compelling purpose to be achieved in my reciting and addressing at length the voluminous evidence given by the witnesses as to their views of the respective positions of the parties pre-BPA or as to why the envisaged cost savings and relevant profits were not achieved. The surest guide, where possible, is to be found in the contemporaneous documents. Where the contemporaneous documents do not provide a sure guide, as is the case in some crucial respects, I must make my determination by reference to such documentation as there is, to the witness evidence and to my assessment of the inherent probabilities.

110. In his closing submissions Mr Wright summarised Nickleby's case in the following terms:

> "Now that the evidence has closed, it is clear that SGP took no real steps to promote the Nickleby business that it acquired in February 2012. Having removed a competitor and substantially boosted the turnover of SGP's sluggish retail division, Mr Elliott already had more

> than half an eye on his planned exit, and Mr Singleton did nothing to dissuade himself from his "*long-standing doubt*" over principal contractors, preferring to continue working in the way in which he was familiar. An abject lack of leadership from senior management meant that, notwithstanding the best efforts of ex-Nickleby staff, projects ran into the sand, before relations completely broke down in the second half of 2012. So far as the Nickleby business was concerned, SGP's watchword was inertia. At best, warm words were given whenever Mr Smale and the other ex-Nickleby staff approached SGP's senior management with proposals to make Cost Savings and Relevant Profits. But there was no real engagement with them on the SGP side, and certainly no attempts to make them a reality."

111. In contrast, in his closing submissions Mr Latimer characterised the position as being one of at best limited, ad hoc and superficial suggestions from Mr Smale pre-July 2012 and inadequate and unrealistic presentations thereafter, which Mr Elliott perfectly reasonably asked Mr Smale to go away and work up into something which could properly be regarded as a proposal, but which he never did.

112. In this section of my judgment I shall test these competing cases against the evidence.

113. The starting point is the first Governance Panel meeting took place on 23 February 2012. An agenda was prepared by Mr Elliott and an action plan was prepared following the meeting. From these documents it is apparent that: (a) the attendees were aware of the matters to be addressed under Sch. 3 at such meetings, including cost savings and relevant profits; (b) the attendees were as envisaged by Sch. 3, save that the soon to depart head of finance Mr Brennan was to be replaced by Mr Cooper and Ms Lawrence; (c) the list of prospects in Sch. 11 was to be added to SGP's "Salesforce" application.

114. Although there was no specific reference to actual proposals at that first meeting, that is not surprising given that it was the first meeting, held within 2 weeks of completion. It is Mr Smale's evidence that he met with Mr Elliott on 20 February 2012 to discuss how implementing EMS could achieve substantial savings and that Mr Elliott used words to the effect "Yeah, Yeah, Yeah! Just crack on!". Although Mr Elliott said in his witness statement that he could not find a record in his electronic diary of any meeting with Mr Smale prior to April 2012, it seems reasonable that such a meeting would have taken place and that Mr Elliott would have said words similar to those recalled by Mr Smale. Information provided by Mr Sherrington confirmed that SGP's annual managed spend on contractors was in the region of £200 million, which Mr Smale reasonably says gave him confidence that substantial savings could be made and profits secured if Nickleby models were adopted.

115. Following this initial go-ahead Mr Yelverton began the process of obtaining data about SGP clients, contracts costs and profits and of undertaking initial reviews in relation to SGP's retail clients, including Thorntons.

116. The second Governance Panel meeting took place on 29 March 2012. There was nothing of relevance discussed so far as Sch. 3 was concerned. The focus of the meeting was on financial, operational and staffing matters. It is also apparent from the email of the same day referred to below that what had already happened was that the process for discussing and implementing proposals for cost savings and increasing profits had been hived off from the Governance Panel and was being dealt with more informally by ad hoc meeting and emails between those who needed to be involved, consistent with Mr Elliott's general management approach.

117. The email referred to was entitled "EMS trials etc" and was sent by Mr Elliott to Mr Smale and was copied widely both to ex-Nickleby staff, including Mr Holley, Mr Yelverton and the three employees named in the Side Letter, and to senior SGP staff including Mr Singleton as commercial director for retail and corporate, Mr Pantling as head of IT, Mr Martyn Sherrington as head of procurement and

the four account directors Ms Toni Klare - retail, Ms Catherine Baxter - commercial, Ms Lisa Brettelle - healthcare and Mr Tony Jones - education. It read as follows:

> "Nick,
>
> As discussed the following contracts are identified as ones that will form the trial for different ways of working utilising emergence etc.
>
> Retail and Hospitality (Toni Klare)
>
> Malthurst[1] (low / no profitability)
>
> Thorntons (need to save monies for the client)
>
> CPW[2] (needs refreshing prior to tender)
>
> Spirit (initially quotes only)
>
> Commercial (Catherine Baxter)
>
> Johnston Press (contractor management / poor profitability}
>
> Healthcare (Lisa Brettelle)
>
> Caresview Hospital, Dundee (low profitability, PFI)
>
> Education (Tony Jones)
>
> Newham Schools (3 schools 1 PFI contract already profitable but how good could it be!")
>
> Timescales - full detailed proposal by end April. Roll out during May. Initial results end June.
>
> Kevin."

118. Although documents pre-dating and explaining the genesis of this email are sparse, it is apparent from the work already undertaken by Mr Yelverton as well as various documents such as: (a) a presentation paper produced by Mr Smale the previous month; (b) emails passing between Mr Elliott, Mr Smale and Mr Carlin in relation to costs savings for PFI contracts in Scotland; (c) internal correspondence relating to poor performance for Johnston Press and discussions about introducing Nickleby models; and (d) a meeting scheduled for 28 March 2012 between Mr Elliott, Mr Smale, Mr Holley, Mr Singleton and Mr Askew entitled "Nickleby / SGP - the Big Picture", that a lot of work was proceeding which had culminated in a decision that there should be a trial process involving the identified clients.

119. The timescales were tight. They required fully detailed proposals to be produced by the end of April. Although the email did not state in terms who was to have overall responsibility for ensuring that this happened it is apparent in my judgment that it was Mr Smale, as the recipient of the email and as the person whose role and experience made him the obvious person to do so. This is confirmed by the subsequent email from Mr Elliott to Mr Smale, copied to Mr Holley and Mr Pantling, stating: "Suggest you get Lee in this loop soonest. I envisage that a variety of IT solutions will present themselves and the sooner Lee and the IT guys start working on this the sooner we can motor". Mr Elliott was plainly putting the organisational onus on Mr Smale. The same is true of an email dated 11 April 2012 from Ms Klare to Mr Pantling, copied to Mr Elliott, Mr Smale, Mr Holley and others, suggesting that they await "Nick's analysis" before making a decision on seeking to move MRH to EMS. A detailed description of the actions which Mr Smale was expected to undertake - including the trial clients and other EMS initiatives - appears from the notes of a directors meeting held on 20

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1 Also known as MRH

2 Carphone Warehouse

April 2012. In cross-examination Mr Holley said that he saw the role of making cost savings proposals as being Mr Smale's role.

120. Subsequent correspondence shows that: (a) Mr Yelverton had asked for and had been provided with further data, in particular in relation to the retail trial clients, and was continuing to analyse such data, so that by 4 May 2012 he had produced data identifying proposed savings which could be made by moving to a Nickleby model in relation to the 4 trial retail clients; (b) Mr Holley had produced a very detailed document (described as an overview) as to what EMS was and what it could do, which he had sent to Mr Singleton for the purposes of a presentation to TGI Friday; (c) one of the retail trial clients, Spirit, had chased Mr Elliott on 12 April 2012 with a request for cost savings to be delivered which he passed on to Mr Smale, after which Mr Yelverton produced a proposal on the same day which he asked Ms Klare to arrange to be checked; (d) Mr Elliott was sufficiently enthused to ask Mr Yelverton to arrange a meeting under the topic "utilising EMS"; (e) by 20 April 2012 a proposal had been developed - it would appear by Mr Yelverton working with Peter Jones (also ex-Nickleby) - for a fixed price reactive cost to be put to Thorntons, which Ms Klare approved and which was sent to Thorntons. It was in the form of a 4 page power-point type presentation which, although far from as detailed as would have been needed to move to a contract, was sufficiently detailed to interest a client sufficiently to want to hear more and take matters further. Nonetheless, it is also clear from a directly expressed email from Mr Elliott of 30 April 2012 that he was only prepared to sanction a move to a principal contractor model if it could be shown to be money making and deliverable.

121. Whilst all this was encouraging, the position nonetheless was that by the deadline for proposals the only concrete proposal which had been produced and provided to a retail client related to Thorntons. It already appears that Mr Smale was not working to Mr Elliott's timetable, and that one major reason was that at his instigation Mr Yelverton had become engaged in what became an extremely detailed but essentially theoretical exercise to seek to prove by close examination of data that Nickleby's historical costs per work item were less than those of SGP. It is not immediately obvious what Mr Smale was doing over the same period.

122. The third Governance Panel meeting took place on 26 April 2012. The focus of the meeting was similar to the last meeting and nothing further of relevance was discussed. It appears reasonably clear that this is because by this stage the position was that the EMS trial had been agreed and that it was proceeding outside of the Governance Panel structure.

123. On 8 May 2012 Spirit - having chased on a repeat basis - complained to Mr Elliott about the lack of response from SGP. It would appear that Mr Smale had not engaged with the writer, Mr Russell, despite Mr Elliott having forwarded him the emails. This produced what was a rather hasty reply from Mr Smale to Mr Elliott, enclosing Mr Yelverton's analysis, and stating "I suggest we move to principal from agent and offer a £450,000 pa (subject to checking with Anthony …) which we should make on core fabric". There was no more detail to the proposal, which is a consistent refrain throughout the chronology.

124. As regards Thorntons, Mr Jones by contrast was diligent and, by 11 May 2012, he had produced a revised and more detailed proposal for Thorntons, proposing a move to a principal contractor model.

125. The position as at mid May 2012 can be seen from an email sent by Mr Elliott on 16 May 2012 to Mr Pantling, copied to Mr Smale, Mr Holley, Mr Yelverton and Ms Klare, entitled "New thinking update". It is apparent that this must have followed a reasonably detailed discussion and, as was typical with Mr Elliott, took the form of a brief action plan update on the initial email of 29 March.

126. In summary, as regards the 4 trial retail clients the position was that: (a) agreement from Thorntons to the revised proposal was awaited, the plan being to move "all to EMS"; (b) as regards CPW and Spirit, work was required from Mr Pantling to amend the helpdesk system to "reflect the cost control

aspects of EMS", with Ms Klare being tasked with organising the co-ordinator and V&A roles and to agree a savings share with the clients; and (c) as regards MRH, Mr Pantling was required to implement another IT change, following which Ms Klare would be able to reduce the helpdesk resource accordingly.

127. As regards the trial corporate client, Mr Smale and Mr Yelverton were "working up an implementation plan" in relation to Johnston Press, which was to be moved to EMS "asap".

128. As regards the education and healthcare trial clients, Mr Smale and Mr Yelverton were to "identify the way forward".

129. It is clear from this email that Mr Elliott was seeking to drive forwards the trial and was assigning responsibilities to do so. It is fair to say that Mr Pantling and Ms Klare were assigned specific responsibilities. It is also fair to say that nothing very concrete had emerged in relation to the three non-retail sectors, where Mr Smale and Mr Yelverton were tasked with producing concrete proposals.

130. On 29 May 2012 Mr Elliott chased Mr Holley for an update as regards the IT system changes required for "MRH, Spirit etc". Mr Holley emailed Mr Smale the same day, saying that he was "not aware that specifics had been agreed yet". In his witness statement Mr Holley said that whilst he and Mr Smale were pleased with this apparent desire to move forwards they were not invited to meetings which Mr Elliott was holding with Mr Singleton, Mr Pantling and Ms Klare to discuss EMS and accounts (by which he meant clients). Although Mr Holley was not cross-examined specifically on this part of his witness statement, if he was intending to suggest that this was part of a campaign to exclude them I am unable to accept any such suggestion, since there is no hint of this in the contemporaneous documents. For example, on 19 June 2012 Mr Holley emailed various people, including Mr Singleton, Mr Pantling and Ms Klare, to arrange a meeting to discuss progress in relation to Spirit and CPW. There is no documentary trail to record whether it took place or not and, if not, why not and what steps Mr Holley took to ensure it did take place. The point however is that if Mr Holley had actually thought that he had been cut out of the loop it appears unlikely that he would have suggested a meeting without reference to Mr Elliott.

131. At the same time Mr Jones was still proceeding with the proposal to Thorntons. It is clear from the correspondence that there was no obstacle internally and that the difficulty was more to do with persuading Thorntons to accept SGP's proposals.

132. Separately, on 1 June 2012 Mr Smale sent to Mr Elliott a presentation, entitled "powering up and cutting down", which is the subject of claim 1(5) claim which I address later.

133. Mr Smale produced what appears to have been the first of his activity lists in June 2012. These appear to have been produced on a regular basis, the intention being to begin an ongoing dialogue with Mr Elliott about his tasks, the members of the core team and those to be kept informed and - pertinently - the timescales and latest activity. The first version ran to three pages and included updates in relation to tasks such as moving all planned maintenance to EMS, moving the Thorntons helpdesk to EMS, moving Johnston Press to EMS, Mr Carlin's proposals and helpdesk calls to customers. However, there was little hard progress to report in relation to any of these proposals. For example on 20 June 2012 Mr Elliott chased Mr Smale for an analysis for the proposal to move Johnston Press PPM to EMS and was told that it was almost ready. No explanation was given for the delay.

134. By June 2012 Mr Yelverton's research, now underway for over 3 months, had resulted in analyses for savings which SGP might achieve by transferring core fabric reactive maintenance for 18 identified commercial clients from its managing agent procurement model to Nickleby's principal contractor model and by adopting EMS for such purpose. This is the basis for claim 1(1) and it is

said that his spreadsheet produced on 26 June 2012 showed that this would result in savings of over £12.5 million and, even assuming that SGP agreed to a 75/25 cost saving split with its clients, would still result in savings exceeding £9 million.

135. Not surprisingly, this was the subject of detailed cross-examination of Mr Yelverton at trial. What Mr Yelverton had done was to analyse the data he had obtained from SGP in respect of the retail clients and extracted data relating to the cost of undertaking standard reactive maintenance work items, which he could then compare with the cost incurred by Nickleby in undertaking the same work items pre-completion for its own clients. He then produced a global analysis of the total comparative cost per client by reference to the overall spend per SGP client on these standard items. His analysis appeared to show that Nickleby's costs for these standard items were significantly less than SGP's, thus intimating a very significant cost saving if SGP could reduce its costs to Nickleby levels. This comparison was then used by Mr Smale as the foundation for his proposal that SGP, by adopting Nickleby's models (i.e. contracting as principal contractor and introducing EMS so as to operate primarily via a virtual helpdesk), could achieve such savings.

136. Mr Yelverton confirmed that this was, essentially, a theoretical desktop analysis in relation to work items for which sufficient data existed to enable a comparison to be made. He accepted that in some cases the data was not as reliable as it might be, so that for example it was not always obvious whether the job description always referred to the same job, and he had to make a decision as to whether or not to include the data as comparable. He accepted that he had taken the SGP gross profit percentage figure without investigating whether or not it included for direct costs associated with the contract (which it did) unlike the Nickleby 20% gross profit figure (which did not). He was not able to compare non-standard work items, for example a chicken takeaway shop would want its chicken fat fryer to be maintained which would not be included in Nickleby's data. Since he was unable to say whether or not the cost of such non-standard work items would be the same under the Nickleby model as under SGP he had to assume that the end result of these items would be cost-neutral. He did not - nor was he asked to - consider whether there were or might be associated expenses associated with moving to a Nickleby model and, if so, to quantify them.

137. Mr Yelverton's primary experience was in procurement, dealing with contractors, rather than in a customer facing role, although - as he said - in a small company such as Nickleby he had client contact as well. Nonetheless, he was not asked to consider whether the particular clients would wish to move to a Nickleby model and nor, realistically, could he have done so given his lack of detailed knowledge of the individual SGP clients. Nor was not asked to nor realistically could he consider whether they might insist that SGP should continue to use their preferred contractors who might be resistant to moving to a Nickleby model. Whilst he had allowed for the client to be offered a percentage saving of the overall cost saving as an incentive for them to switch, he had not been asked to - nor could he - consider whether this was realistic in each case. He had not been asked to consider the existing terms to which SGP and the client were working (to see, for example, whether their agreed response times would lead to higher costs, or whether it made sense to make a proposal for example half way through an already profitable fixed term contract). He had not been asked to - nor could he realistically - consider whether there was a risk of any proposal being made by SGP on the basis of introducing a Nickleby model leading to the client deciding to undertake a competitive tender and SGP being undercut by its competitors.

138. The end result of these limitations was that his analyses did not contain a worked-through proposal as to the financial terms to be offered to the client or what the overall financial saving to SGP would be assuming that they were accepted. Nor could they include any analysis of the risks as well as the opportunities. None of this is intended as any criticism of him personally; they are simply reflective of the essential difference between the desktop analyses which he was asked to undertake on the one hand and a fully worked-up proposal for a specific client on the other, which would have needed

much greater direction from Mr Smale, including pulling together input from the SGP retail account director and from the IT department.

139. Mr Yelverton's evidence in his witness statement at [139] was that he was asked to produce this analysis in the format which he did by Mr Elliott in around late May or early June 2012, that he did so and that he gave him hard copies, to which Mr Elliott's response was "great" and that they were "what he wanted". He does not suggest that he had any further contact or discussion with Mr Elliott concerning them.

140. It is against this background that Nickleby pleads and Mr Smale says that at a meeting between Mr Smale and Mr Elliott on 26 June 2012 Mr Elliott expressed enthusiasm and said words to the effect: "It's great … I just need to make it happen". Nickleby pleads that "for reasons which have never been explained these proposals were never implemented".

141. There are a number of difficulties in my view with Nickleby's factual case about the meeting of 26 June 2012.

142. The first is that there are no contemporaneous documents which record or refer to this being the agreed outcome of the meeting. In his witness statement Mr Smale refers at [67] to the notes for that meeting but, whilst they do confirm that Mr Smale was making a presentation showing what increased sales might be achieved, they do not record that any agreement was reached to the effect that they should be implemented across all 18 clients by Mr Elliott taking control himself. On past form one might have expected Mr Elliott, if he had agreed this, to have sent - either himself or via his PA - a brief email similar to that sent previously, to summarise the actions to be taken and what was expected of each person to be involved. Since there was nothing of that kind, one might have expected Mr Smale to send an email making some reference to what had been apparently agreed and - one might expect - expressing his willingness to do whatever Mr Elliott might wish to progress matters. One might also have expected there to have been some passing reference to it in the Governance Panel meeting held only two days later on 28 June 2012.

143. The second is that of the four trial retail clients identified at the end of March 2012 no concrete results had been achieved in relation to any of them. Whilst the position was most optimistic as regards Thorntons, the client had still not agreed to proceed and little or no progress had been achieved in relation to the other three. The whole point of the trial was to see whether or not Mr Yelverton's theoretical desktop analysis could be made to work in the real world. That had simply come nowhere near being achieved as at 26 June 2012. In such circumstances it is inherently unlikely in my judgment that Mr Elliott would have agreed to just depart from the trial process and proceed to implement the full cohort of retail clients without any comfort that it was worthwhile let alone practicable. These included many of SGP's largest and most important clients and it is inconceivable that Mr Elliott would have been willing to take the risk.

144. The third is that I accept Mr Elliott's evidence that he would not have taken on the responsibility of "making it happen". He was the managing director with any number of responsibilities. There was a well-established chain of command, reporting to Mr Elliott, which was responsible for client contact, procurement and IT. Making it happen would require someone to work closely with all three to produce detailed proposals, make pitches to clients and contractors, and implement the IT and other changes which would be necessary. Mr Smale was the obvious person as the ex-Nickleby managing director and current SGP business value director with freedom to roam to perform this role. Even if Mr Elliott was already beginning to doubt whether Mr Smale had what it took to do so, it is inherently improbable that he would have agreed to take it over himself rather than, for example, to assign the responsibility to someone else such as Mr Holley. His previous emails are consistent with his oral evidence that his management style was to have meetings or discussions to agree a way

forwards and then send a short email allocating responsibility to others for progressing matters. It is inherently implausible that he would have suddenly changed his approach at this meeting.

145. In my judgment what actually happened at the meeting was that the material produced by Mr Smale demonstrated that he was little or no further forward with introducing the Nickleby models than he had been in previous months. I am satisfied that by this stage Mr Elliott was beginning to see that the process of putting the Nickleby models into effect was not as simple or straightforward as he had first believed and that Mr Smale might not be the man for the job in any event. I am satisfied that whilst he was willing to allow Mr Smale to carry on to see if he could achieve results, he would not have countenanced taking on that role himself or allowing Mr Smale and Mr Yelverton to continue endlessly to produce further and more detailed analyses which did not result in concrete proposals which could be pitched to clients.

146. I accept Mr Elliott's evidence that his recollection was that Mr Smale continued to produce proposals which showed a potential substantial saving on paper but which contained no concrete proposals as to how it would be sold to the client or translated into reality, that Mr Elliott would identify the further steps which Mr Smale would need to take and people he would need to speak to in order to produce a worked up proposal, but that this would simply not happen. It only happened when the task was given to Mr Jones as regards Thorntons and - as will be seen - Mr Holley as regards Care UK.

147. I am satisfied that this realisation by Mr Elliott explains the decision, about which Nickleby also complains, which is that shortly before this meeting, on 18 June 2012, Mr Yelverton was transferred from what had effectively become his role as researcher in chief to Mr Smale to a role in the procurement department reporting to Mr Sherrington. Nickleby complains about this as effectively taking Mr Yelverton away from his role in relation to implementing the Nickleby models. However, SGP contends that Mr Yelverton's role at Nickleby had been in procurement, that it was not surprising that he should be assigned to that role, having done as much as he reasonably could over the last 4 months in the task of producing his analyses for Mr Smale, and that since through Mr Sherrington he reported to Mr Holley anyway there would be no difficulty with him undertaking work relating to Nickleby models' implementation if and when that happened.

148. This conclusion is also consistent with the minutes of the fourth Governance Panel meeting which took place two days later on 28 June 2012. Under the heading "systems and processes" reference was made to four of the trial retail clients. It was recorded that Mr Pantling and Ms Klare were working towards facilitating direct calls for MRH, that Mr Sherrington was to update as regards Thorntons' EMS conversion and that Mr Holley was to update as regards CPW and Spirit EMS costs management. There was no statement that Mr Elliott had taken over control of the project. It is true that no specific role was recorded as having been assigned to Mr Smale, but for the reasons I have stated, that is not surprising. Nor is there any record of Mr Smale or Mr Holley complaining that progress was being obstructed through a lack of co-operation from or deliberate obstruction by SGP management such as Mr Singleton or Mr Pantling.

149. The absence of any contemporaneous complaint about a lack of co-operation or obstruction is an important point in my judgment. In cross-examination Mr Holley complained that after the test clients had been identified he had been waiting for the call to start work on project planning but the call never came. He complains that the only person who asked him questions was Mr Smale. However, this is not the picture which emerges from the review of the contemporaneous documents to which I have referred above. Mr Holley was given tasks, as were others and, as I have found, it was Mr Smale's role to drive forward the project. If Mr Smale and Mr Holley had genuinely believed at the time that they were being held back by their fellow managers such as Mr Singleton and Mr Pantling not performing the tasks assigned to them by Mr Elliott it is unlikely that they

would not have raised this, if not at a Governance Panel meeting, at the very least in discussions with Mr Elliott, which would very likely have produced some email traffic.

150. I accept that Mr Smale and Mr Holley would not have wanted to antagonise their fellow SGP managers and would have been wary about being seen to complain about them to Mr Elliott. I also accept that they may have found Mr Elliott's management approach different to their own. However, by June 2012 they had been in place for over 4 months. Mr Elliott had been supportive and had assigned specific tasks to each member of the team. If it really was the case that Mr Smale, Mr Holley and other ex-Nickleby staff had done everything that they had been asked, but had been obstructed or let down by others' failure to complete their tasks, then I would not have expected Mr Smale or Mr Holley simply to accept this without saying something.

151. I do accept that it is possible for members of an organisation to seek to frustrate actions in a low key way, which can make it difficult for them to be challenged. I also accept Mr Holley's evidence that he had a very strained relationship with Mr Pantling, who was extremely unhappy that post-merger he was required to report to Mr Holley rather than direct to Mr Elliott, as he had previously. Mr Elliott agreed as much. Mr Holley complained that Mr Elliott did not do enough to support him in his dealings with Mr Pantling. Mr Elliott disagreed. I suspect it is a matter of impression, but what cannot be gainsaid is that whilst Mr Elliott did get rid of Mr Smale he never even tried to get rid of Mr Holley and, to the contrary, appears to have rated him highly and been keen to retain him. Moreover, there is no hard evidence that Mr Pantling deliberately sought to sabotage the introduction of the Nickleby models so as to undermine Mr Holley. I am satisfied that Mr Elliott would not have allowed him to do so had it come to his attention, which it is likely it would have done had it happened. There is no evidence that Mr Singleton acted in such a way either at this time. In cross-examination Mr Holley did not feel able to say that SGP had acted in bad faith by reneging on a commitment to introduce the Nickleby models, and I am satisfied that there is no basis for such a case.

152. Even in the private communications between Mr Smale and Mr Holley there is no consistent reference to a systemic lack of co-operation or obstruction being the reason why the Mr Yelverton analyses were not translating into positive results. There is one isolated text from Mr Smale on 9 May 2012 to say that "Toni [Klare] and Lee [Pantling] are not helping", but that goes nowhere near enough to prove Nickleby's case that SGP breached the Overriding Principle and that this was the cause of the failure to implement the Nickleby models.

153. I do also accept that there are no contemporaneous emails from Mr Singleton or Mr Pantling expressing any particular enthusiasm for the proposals, and I also accept that Mr Singleton at least had little or none, but I do not accept that either would have dared to frustrate the trials when Mr Elliott was so plainly in favour of them. There is positive evidence that others, such as Mr Sherrington and Ms Klare, were enthusiastic. If Mr Elliott had believed that the trials he had directed should happen and had assigned specific responsibilities for were being obstructed or even just delayed by Mr Singleton or Mr Pantling it is inherently implausible that there would not have followed a terse email from him instructing them to do what was necessary on their part to ensure that the trials could move forwards.

154. In terms of the need for concrete proposals, in mid-July 2012 Ms Baxter asked Mr Yelverton to provide some more detail as regards the Johnston Press PPM proposal. Specifically, she asked whether the proposal was for all PPM or just some specified services and, importantly, what the actual annual saving would be and how soon the changes could be implemented. This is a good illustration of the practical questions which needed to be answered before the client account director believed that the proposal could successfully be pitched to the client. SGP's contract with Johnston Press was already on a principal contractor model, so that there was no difficulty about persuading them to move over from a managing agent model. All that was needed was to persuade them to

move over to EMS. In his witness statement Mr Yelverton said that he "would have answered by email" but no copy has been disclosed and there is no reason to think that it has been suppressed.

155. Mr Yelverton has no recollection of further involvement with Johnston Press and there is no documentation which shows that anything further happened to move the proposal forwards. Although Nickleby seeks to criticise SGP for what was suggested in cross-examination of Mr Singleton was a culture of inertia within SGP, I note that Ms Baxter copied her email to Mr Smale as well as to Mr Sherrington. As I have said, it was Mr Smale who was tasked with the implementation of these proposals and he provides no explanation as to why no further steps appear to have been taken after mid-July 2012. The only reasonable conclusion is that Mr Yelverton was not in a position to move on the proposal at this stage and that Mr Smale, for whatever reason, was unable or unwilling to do so.

156. By way of contrast, at the same time Thorntons had decided to proceed with SGP's proposal as produced by Mr Jones. Mr Jones had produced an action list and Mr Elliott was clearly enthusiastic, as can be seen from his email of 18 July 2012. Although Mr Yelverton had suggested in his witness statement that the approach to Thorntons was only a "half attempt", this correspondence proves him wrong on that point.

157. There was also an eventual notable success in relation to a client known as Care UK, beginning with a decision in June 2012 to tender for its work. Mr Holley was very much involved with this pitch, having a pre-existing contact there, although it was clearly a team effort, with Mr Neil Robinson a business development manager heavily involved in the tender. It included the sale and mobilisation of EMS in August and September 2012, as recorded by Mr Holley in a case study he subsequently produced in January 2013, which showed how SGP had gone on to win further consultancy and estate management work from the client in due course. Nickleby complains that this is to be compared with the lack of success in relation to the trial retail clients identified as long ago as March 2012. However, the amount of detailed work put in for this tender stands in stark contrast to the lack of similar work put into the trial retail clients and this cannot in my view be blamed on a lack of enthusiasm on the part of SGP, which was clearly quite willing to support projects which were properly researched and assembled. Whilst this is much later on, one can see from a further 42 page proposal and fee quotation to Care UK for the provision of managing agent / FM outsourcing services, produced by Mr Holley in around May 2013, just how much detail a credible proposal to a major client for a switch to a different model required. It is also worth noting that the initial tender was made and succeeded on the basis of a managing agent model, which only subsequently transferred to a principal contractor model much later, as appears from subsequent case studies produced by Mr Robinson and the RICS.

158. Apart from Thorntons and Care UK there was little hard progress to report from the first 6 months of post-completion activity. In my judgment it was becoming apparent to all concerned that it was not going to be as easy as might have been envisaged, by Mr Smale in particular, to introduce the Nickleby models to SGP's customers. There is an interesting record of Mr Smale's contemporaneous belief in an email from Nickleby's external accountants Beever & Struthers (**B&S**) of 15 August 2012. In short, it records that in late June 2012 Mr Smale had informed them that in relation to the contingent payment his view of the possible level of success was only 20% (i.e. £1M of the £5M maximum), whereas by August 2012 he appeared to have downgraded the assessment to 12.5% (i.e. £675,000) and had apparently given a number of reasons for this revision, some of which appeared - according to the accountant - to "rest a little too heavily on hindsight".

159. It is true, I accept, that: (a) the context for these discussions was the finalisation of the tax returns for 2011-12, where there was plainly an incentive to depress the assessment, given that tax would be payable on the assessed amount; (b) Mr Smale was not asked about this email in cross-examination and thus was deprived of the opportunity to give any explanation. Nonetheless, since it was an email

recording what he is recorded as having said to Nickleby's own accountants, one might have expected him to address it in his own principal trial witness statement, especially since in that statement he had said at [6] that he had been "confident that the full £5,000,000 could be earned and remained so until at least the end of October 2012". It is difficult to avoid drawing the inference that in fact even at this earlier stage he was conscious that achieving anything like the full £5 million was far from a guaranteed outcome.

160. No Governance Panel meeting took place between 28 June 2012 and 27 September 2012 or thereafter until 30 January 2013. Both parties appear to blame the other for this. Nickleby suggests that Mr Smale tried to arrange a Governance Panel meeting towards the end of August 2012 but was frustrated by its being repeatedly rescheduled and then cancelled by Mr Elliott. Mr Elliott suggested in his witness statement that these gaps were due to a lack of interest and cancellations by Mr Smale. However, there is no objective evidence to this effect. The most important point in my judgment is that at no stage did any representative of Nickleby or SGP seek to call a Governance Panel meeting at this stage for the specific purpose of dealing with issues relating to the implementation (or lack of progress in respect of) Nickleby models. That is however not surprising, since as I have said the Governance Panel meetings had not been the forum for detailed consideration of such issues since February 2012 in any event.

161. I would be loath to criticise Mr Smale or Mr Holley for not seeking to invoke Nickleby's strict legal rights under the BPA at a time when they were both still employed by SGP and hoping to make the relationship work. However, it is worth noting that at around the same time Mr Smale did commission and deploy an advice from external solicitors in relation to the wrongful trading issue. It seems to me that if he and Mr Holley had genuinely believed at this stage that SGP was actively obstructing the implementation of Nickleby models or otherwise acting in serious breach of its obligations under the BPA and that as a consequence Nickleby was looking at not receiving contingent payments of £5M which it was otherwise entitled to, then it is most unlikely that he would not also have taken similar steps or at least made a formal call for a Governance Panel meeting (or asked for a meeting with Mr Elliott and Mr Talbot as chief executive of Johnsons) specifically and expressly to raise this matter. I intend this as no criticism to record that Mr Smale is clearly not someone who is shy of asserting his rights when he considers them to have been breached.

162. Some proposals were still at least being discussed. For example, on 9 August 2012 Ms Fincham emailed Mr Smale, following a discussion about introducing EMS for PPM services to existing SGP clients, expressing interest and suggesting Thorntons and two others as potential triallists. These were additional to Johnston Press. It is apparent that Mr Sherrington was supportive of the proposal.

163. Towards the end of July 2012 Mr Smale had begun to focus on producing a formalised structure for business initiatives. He described this as an SGP value initiative input template, which he branded "SGP Smart". It appears that the first were produced using a Microsoft xls database and later using a FileMaker database developed by a Mr Bracewell, an ex-Nickleby IT employee who had transferred over to SGP. Mr Smale sent the first part completed version to Mr Elliott's PA, Ms Cooling, on 6 August 2012. It involved switching PPM management for retail accounts from the SGP existing system to EMS. This was clearly building on the input referred to above from Ms Fincham and her colleague Ms Ludlow. It suggested that 4 to 5 staff member costs could be saved by doing this, albeit that it would require 2 people working full time for 3 months to train and migrate the contractors. There is a note on the system saying that Mr Smale had discussed the proposal with Mr Elliott on 29 August 2012 and a meeting had been set up to discuss it in September. At around the same time Mr Smale produced a more skeletal draft of a second value initiative in relation to the Thorntons' proposal which he sent to Mr Jones for his input. He also invited Mr Carlin to complete one in relation to some of his suggestions.

164. It is interesting to note that Mr Carlin's initial view was that the form enabled the proposer to present the financial benefits of the proposal, but that more detail would be needed on a separate form about the "specific details of the suggestion and [to] list the benefits". This supports my own assessment, which is that Mr Smale was overly focussed on the process of developing a process and a high level indicator of financial benefits, rather than producing a detailed proposal which showed how the proposal could successfully be pitched to the client and implemented internally, both by the client and by the contractors involved. It seems to me that this reflects his essential strengths and weaknesses and his interests and inclinations.

165. It is also worth noting that the only specific client proposals contained within Mr Smale's updated activity list for this period were the two value initiatives referred to above as well as the Johnston Press proposal and selling additional services to Ann Summers. No reference was made to the other trials agreed as long ago as the end of March 2012. It did not identify ongoing activity on all fronts in relation to making proposals for the widespread adoption of Nickleby models. It must have made less than inspiring reading for Mr Elliott.

166. SGP has contended that Mr Smale spent too much time on dealing with the extant litigation brought by Nickleby against Somerfield. In cross-examination he was taken to an email which he sent to Mr Elliott in the run-up to the BPA in which he indicated that his salary was not listed against operating costs because "my costs are booked against the litigation with Somerfield, which is where I have spent the majority of my time". It is suggested that this continued to be the case after completion. It is clear from Nickleby's accounts for YE 2013 that the claim had not been settled by then. Although Mr Smale contended in an email written in response to Mr Elliott's later suggestion to this effect that he had spent all of his working time on SGP affairs and had needed to devote evenings and weekends and untaken leave to Nickleby affairs, I have no doubt that he was distracted to some extent at least by the Somerfield litigation and the demands on his time following on from the integration of the two businesses and the challenges which that entailed. I am also satisfied that he was hampered more generally by the geographical distance between the ex-Nickleby Basingstoke office where he was based and the Leicester head office, which made it more difficult for him to get a detailed knowledge of SGP's business, his fellow senior employees, SGP's clients and contractors, its ways of working and its existing IT systems.

167. As regards Ann Summers, this was a former Nickleby account, which had transferred to SGP and which had historically been supportive of Nickleby and its business models. On 17 August 2012 SGP received an email from Ann Summers complaining of "serious and unacceptable service failings", with the result that it refused to make further payments and cancelled a meeting arranged for later that month. On 22 August 2012 a similar complaint was received from William Hill and on 20 September 2012 a similar complaint was received from Spirit. Nickleby has complained that these service failures prejudiced its ongoing relationship with Ann Summers and that the negative publicity led to Thorntons not proceeding. Whatever the truth of this, and there is no hard evidence to this effect, Nickleby has failed to plead or substantiate a case that such a failure in itself could amount to a breach of the Overriding Principle and it is difficult to see how it could, since there is no suggestion that this could have amounted to bad faith or a failure to co-operate in relation to cost savings or relevant profits.

168. On 23 August Mr Smale sent Mr Elliott what he described as a worked example of a value initiative, relating to Care UK, saying "I personally am aware of 7 new business streams". This value initiative effectively reflected the work which had already been done in putting the Care UK proposal forward. The 7 further proposals were not identified and no further spreadsheets followed at this stage.

169. Nickleby contends that in total it produced 14 such value initiatives and that, in addition to being maintained in an electronic database, he handed hard copy screenshots to Mr Elliott at a meeting around the end of September 2012. These are summarised in a table produced by Nickleby as part of

its answer to a request for further information made by SGP as follows: 1) Cross-selling SGP Business Rates Service to Nickleby Customers; 2) Selling EMS service to existing Supply Chain; 3) Using EMS V&A in SGP; 4) Selling EMS PPM service to CL for ARlM; 5) Extend CL Service to Oriel; 6) Eliminate SGP Help Desk Function; 7) SGP Clients to EMS and Agent to Principal; 8) Thorntons - A: Reactive Delivery; 9) Materials cost reductions; 10) Bringing sub-contracted works in—house; 11) All Planned Maintenance to EMS; 12) Care UK; 13) Change FM providers for Johnston Publishing and move contractor Management to EMS; 14) Finance Reporting. They are in a variety of different formats. It appears that there were, at least in some cases, a bespoke SGP Smart electronic document produced using FileMaker, behind that sitting various supporting documentation.

170. It is also reasonably clear that some form of electronic exchange and database was maintained as regards these proposals. This is consistent with an email from Mr Holley dated 4 October 2012, which records his contemporaneous belief that the VI's database was operating between Mr Smale and Ms Cooling and a further email from Mr Bracewell, who was made redundant at the end of September 2012, recording that he had been keeping the value initiative database. The Smart database has not, however, been disclosed by SGP, which may indicate either that it did not exist or, more likely I find, that it has been lost or destroyed by SGP. Bearing in mind the process and the documentation which is available, I am satisfied that it would not contain any, or significantly more, detail than is already in evidence.

171. Mr Smale's evidence is that at the meeting where he handed the VI's over Mr Elliott said that he would look at them later when he had more time, but never did so. Mr Elliott had no positive recollection one way or another. There is no reference to these VI's being handed over at this meeting in the contemporaneous documents. Although it is not entirely clear when they were handed over I accept Mr Smale's evidence that they were handed over at a meeting between the two men at some point in autumn 2012. I am also satisfied that Mr Elliott's reaction at this time would probably have been that he would not have been willing to wade through each of these 14 VI's and he would simply have put Mr Smale off by saying that he would look at them later.

172. I have some sympathy for Mr Elliott's view. Whilst the individual VI's are addressed in more detail as necessary later in this judgment, it is fair to observe that they vary widely in detail and content. Some are reasonably detailed, with what appear to be a number of supporting documents, for example the proposal to implement EMS to all PPM works. Others, for example the finance reporting value initiative, are so lacking in detail as to be of no worth whatsoever. Some, such as Care UK, are repeating proposals already made and implemented. From Mr Elliott's perspective, to be presented by Mr Smale with 14 such VI's at a meeting without, so it appears, any prior summary document explaining the nature of each and what Mr Smale was proposing in relation to each was not impressive in the context of the failure from mid-February to mid-September 2012 to achieve any concrete results.

173. Earlier, on 10 September 2012, Mr Carlin was invited to present his proposals, which he had spent the summer working up in consultation with Mr Smale, to senior management. In his email the following day he acknowledged that the meeting was overall positive but his perception was that he had trod on a number of toes in his proposals. That email does not give the impression that SGP had closed its collective mind to any proposals.

174. However, by 19 September 2012 Mr Elliott had also communicated to Mr Holley, in response to a proposal by him to pitch for an opportunity to take over a contract for maintenance work currently being undertaken for a well-known insurance company by a competitor, that "there is an on-going debate over the future of SGP within JSG, this matter is coming to a head and therefore it would not be the correct time to move forward with this opportunity". This was a coded reference to the fact that at around this time a decision had been made at Johnsons group level to market SGP for sale.

175. An issue arose as to when the discussion about the future of SGP within the group started and when the decision to market SGP for sale was made by Johnsons. Nickleby's case is that this affected the approach of SGP management to implementing the Nickleby models. Mr Elliott was cross-examined on an email sent by him in August 2013, when the sale completed, saying that it is what he had been working towards over the last 2 years. He was also cross-examined on the terms of the agreed reference he was given by SGP, which referred to Johnsons having carried out a strategic review at the beginning of 2012 and having decided to refocus the business on textile services and consequently disposing of SGP. I do not however regard the comment in a casual email as having been intended to refer to a precise date when the decision to dispose of SGP was made and there is no evidence which indicates that the decision to acquire Nickleby was taken by SGP or sanctioned by Johnsons with this potential sale in mind. Nor do I consider that the reference shows that by early 2012 a decision had already been taken to dispose of SGP. However, in the absence of disclosure from SGP as to when this decision was taken, I am satisfied that by summer 2012 Mr Elliott must have known that it was likely that SGP was going to be sold and that this must, to some extent at least, have affected his willingness to take any risks in relation to the business going forwards. I am also satisfied, notwithstanding Mr Morris' rather evasive answers in his evidence about the reason why he was brought in as finance director in September 2012, that the decision to sell SGP was one reason he was brought into the SGP business as seconded finance director at this time. I am satisfied that by September 2012 the Johnsons' board was becoming concerned that the wrongful trading issue and the potential contingent payments liability would present potential obstacles to a sale and that Mr Morris was brought in to work alongside Mr Elliott in resolving these and other financial issues and generally putting SGP's affairs in a fit state for marketing, due diligence and sale.

176. In relation to the potential contingent payment liability, on 19 September 2012 Mr Elliott sent Mr Smale an email saying that he wanted to bring the "contingent payment" to a head. This, as Mr Elliott admitted in cross-examination, was a reference to a proposal made by him to buy off the contingent payment liability under the BPA. As he also admitted, he would not have made this proposal without the sanction of the Johnsons board.

177. SGP challenges Nickleby's case that by autumn 2012 the attention of SGP management was firmly upon the proposed sale with the consequence that they had no more interest in Nickleby's proposals going forwards, even if they had any interest previously. SGP argues that if Mr Elliott and other senior management had believed Nickleby's proposals were sound they would have taken them up in their own self-interest as well as for the good of the company because: (a) under the terms of their bonus schemes they had a direct financial interest in increasing SGP's profits; and (b) under the terms of specific bonus schemes relating to the sale of SGP they had a direct financial interest in maximising the sale price. I accept that the senior SGP management had a direct and, especially as regards the most senior management, a substantial financial interest in implementing convincing proposals promising short term results. However, the senior SGP management would also have had an incentive not to take risks in implementing proposals which did not promise short terms results or which contained any element of risk and I am satisfied that the Nickleby proposals fell into these categories.

178. Returning to the end of September 2012 it was being reported at the board / senior management meeting that Thorntons was not progressing with the EMS model. In cross-examination Mr Smale said that his understanding was that Thorntons had brought in a procurement consultant who was focussed only on achieving price savings and it was his input which led to Thorntons adopting a different route. There is no basis, therefore, in the evidence for any suggestion that the reason why Thorntons did not proceed was due to any breach by SGP of the Overriding Principle.

179. It is also common ground that none of the other three trial retail clients chose to move to the Nickleby models. There is no hard documentary evidence as to why not.

180. In relation to Spirit there appears to be nothing of relevance after the fourth Governance Panel meeting on 28 June 2012 until a brief exchange of emails in September 2012 in which Spirit recorded its dissatisfaction with the service it was receiving and then again in late November 2012, when Spirit emailed asking for a definitive update on a number of matters including "integration of systems" and "IT tweaks". Mr Holley's internal response email was to say that he would take no action unless his input or support was wanted. He was clearly not asked for input, since Mr Singleton's response contained various references to various improvements being worked on and proposed a meeting, but included no proposal to move to Nickleby models. Mr Holley refers to these various emails in his witness statement but does not give any explanation as to how it came to pass that nothing had happened from 28 June 2012, when he had been tasked with updating on EMS cost management, to November 2012, when he appeared to have accepted that he was no longer involved and had nothing to add.

181. None of this is really addressed in SGP's witness evidence either. SGP's case appears to be that Spirit was a large client which was committed to the managing agent model, where it could use its own preferred contractors, who tended to be larger and more able to provide a national service than Nickleby's smaller, more local networks, so that there was never any realistic prospect of moving Spirit over to a Nickleby model. In his evidence Mr Singleton made a number of references to Spirit not being prepared to consider moving from a managing agent model to a principal contractor model, but produced no hard evidence whatsoever to back this up. This suggestion by SGP that Spirit was always known to be a non-starter seems to me to be inconsistent with it being included by Mr Elliott in the trial project (unless one concludes, which I do not, that Nickleby was simply being set up to fail) and also at odds with Spirit's clearly and repeatedly expressed contemporaneous desire to explore options for achieving cost savings.

182. However, what is clear is that there is simply no evidence that at any time was a specific, detailed proposal produced for the purposes of making a pitch to Spirit to transfer to a Nickleby model. By reference to the conclusions I have already reached I am unable to conclude that this was due to any breach by SGP of the Overriding Principle. Instead, it was due to the failure of Mr Smale and subsequently Mr Holley to translate the Mr Yelverton analysis into a specific, detailed proposal. It may be that they were not assisted by the scepticism and lack of interest from Mr Singleton and the protectionist and hostile approach of Mr Pantling. However, that does not amount to a breach by SGP of the Overriding Principle, in circumstances where there is no reliable evidence that Mr Smale or Mr Holley ever reported to Mr Elliott as managing director or to the Governance Panel as a whole that Nickleby's attempts to progress cost savings proposals or achieve relevant profits was being obstructed and that action needed to be taken to overcome this obstruction.

183. I reach essentially the same conclusion in relation to CPW and MRH. There is no evidence of any specific, detailed proposals being made in respect of these clients and no evidence which could lead me to conclude that the failure to do so was due to any breach of the Overriding Principle by SGP.

184. The Governance Panel meeting held on 27 September 2012 recorded no significant process in relation to Mr Smale's proposals.

185. Returning then to the meeting at which Mr Smale handed Mr Elliott the 14 VI's, I am satisfied that by this stage Mr Elliott had decided that he was no longer interested in taking up any more of his or other's time with Mr Smale's proposals in the absence of any success with any of the trial proposals over an extended period and in the absence of a package of thoroughly researched proposals. There is no evidence that he considered the individual proposals after the meeting to see which, if any (a) could be put to clients as they stood and without taking up more time in further preparation and; (b) could be implemented if accepted on the same basis; and (c) showed a clear and substantial saving with no concomitant risk of failure and making things worse.

186. In my judgment it is difficult to criticise Mr Elliott for taking the overall view which he did, given the history of events which I have recounted. In my judgment the question for me to consider is whether or not it can be said, by reference to any one of these proposals, insofar as advanced by Nickleby in this claim, that they so clearly met the criteria identified above that it was a breach of the Overriding Principle for SGP not to do so.

187. Returning to the chronology, as autumn 2012 progressed, and as the sale to Lyceum was agreed in principle and was proceeding into the due diligence stages, it is clear that SGP's senior management had less time and attention to devote to the non-core aspects of the SGP business. The amount of time and effort required is well illustrated by an email from Mr Morris to senior SGP staff on 13 November 2012, seeking information from them to pass on as part of the due diligence process. In cross-examination Mr Elliott said that he fronted the sale process to allow other senior management to focus on running the business, so that it obviously had a particular impact on him. I have no doubt that Mr Smale's proposals were seen by this stage as non-core.

188. In advance of a meeting scheduled between Mr Elliott and Mr Smale for 13 November 2012 Mr Smale prepared and sent a document entitled "SGP-Nickleby issues" which made various complaints about SGP's handling of the merger in relation to financial matters but did not make any similar complaints in relation to its handling of the contingent payment process. On 12 November 2012 Mr Elliott responded, refuting the complaints and asking for an update as to whether it would be possible to agree a figure for the contingent payment claim to be bought out. It is apparent that this possible buy-out was the only issue which was interesting Mr Elliott at that point, since he said that if Mr Smale did not have a figure at present then the meeting should be deferred for a week.

189. It is common ground that Mr Elliott offered to buy out the contingent payment claim for £300,000. It is alleged by Nickleby that he increased this offer to £600,000. Mr Elliott could not recall this. However, support is found is the due diligence addendum report produced by PWC for Johnsons in March 2013 which records at p.7 that the management was prepared to buy out the contingent payment claim for £500,000.

190. It is clear by this stage that Mr Elliott did not see any real prospect of SGP achieving any specific cost savings or relevant profits as a result of introducing Nickleby models or taking up Mr Smale's proposals. In contrast Mr Smale was still proceeding - at least ostensibly - on the basis that the process was still live, because in his email of the same day he promised that his "list of value initiatives will be available tomorrow". However, there is no indication that he did in fact produce one, and the meeting appears to have concluded with mutual frustration, as an exchange of emails on 19 November 2012 reveals, with Mr Elliott believing that Mr Smale was not spending sufficient time on SGP business and Mr Smale countering that this was only because he was forced to waste time dealing with Nickleby affairs.

191. The meeting the following week was no more successful, as appears from the subsequent exchange of emails on 20 November 2012, from which it is reasonably clear that the writing was on the wall as regards Mr Smale's continued employment by SGP. On the following day Mr Smale emailed a proposal for SGP to buy out a part of the contingent payment which prompted an angry reaction from Mr Elliott, stating bluntly that: "the amounts you think the earn out will deliver is frankly farcical. Did you not hear the part of the discussion [at the meeting] where I said we are now 10 months into the period and NOTHING has been delivered, how the hell do you arrive at these numbers, are you in touch with reality!" This is a blunt assessment of Mr Elliott's contemporaneous view of the proposals produced by Mr Smale.

192. The first five proposals identified in Mr Smale's email are those referred to in paragraph 22(8)(b) of the Particulars of Claim as proposals on which Mr Smale was working at the time of his dismissal and the annual profits claimed in the Particulars of Claim are those stated in the letter. The

remainder include claim 1(1) (moving from managing agent to principal contractor) and five identified cost savings. The total costs savings and relevant profits amount to £9,580,000 of which Nickleby's half share amounted to £4,790,000, just under the £5,000,000 cap. In such circumstances it is at first blush a little surprising that Mr Smale was willing to offer to transfer Nickleby's right to 40% of such claim (£1,916,000) for only £400,000 although doubtless he would say that this reflected the difficult financial position which Nickleby found itself in at the time.

193. At the Johnsons board meeting held on 22 November 2012 Mr Elliott was instructed to deal with the outstanding debt to SGP and Mr Smale's lack of attention to SGP's business as a matter of urgency, taking whatever steps or actions were necessary. It is clear in my judgment that he was being given the green light to dismiss Mr Smale if that did not happen. A contemporaneous note taken by Mr Smale of a subsequent telephone call with Mr Elliott on 26 November 2012, whilst partisan in its recording of what was said, makes that sufficiently clear in my view. Since Mr Smale was not prepared to agree this, the inevitable happened and at a meeting on 30 November 2012, confirmed by letter dated 3 December 2012, his employment was terminated on six months' notice on the stated basis that his position had "become untenable". The letter confirmed that he would not be required to work his notice other than in relation to the "resolution of certain issues and to manage a handover of certain projects" and also that he had a right of appeal to Mr Talbot as Johnsons' executive chairman.

194. It is common ground that apart from attending Governance Panel meetings Mr Smale in fact had no further involvement with SGP and that although he did exercise his right to appeal, for reasons which I do not need to rehearse that appeal did not proceed to a conclusion.

195. It is also common ground that an Employment Tribunal subsequently determined – not surprisingly in the circumstances – that Mr Smale's dismissal was procedurally unfair. It is also common ground that, since he was dismissed on 6 months' notice in accordance with the terms of his Service Agreement, SGP did not seek to rely on clause 11 which would have justified his summary dismissal for conduct such as material or persistent breach. Insofar as material, I am satisfied that SGP had no basis for so acting.

196. The real issue for me is whether or not the dismissal amounted to a breach of the Overriding Principle. I address this below under claim 1(8) and for the reasons I give at that point I am satisfied that it did not.

197. As to the impact of his dismissal is concerned, in his principal witness statement Mr Smale said at [7] that "After [my dismissal] there was no one to push forward the proposals that had been put by me or ex-Nickleby staff". That however ignores the fact that Mr Holley remained employed by SGP after Mr Smale's dismissal. Even though I accept that, unlike Mr Smale, his role was not solely or predominantly focussed on introducing Nickleby models, he was clearly available on request to assist with any proposals already underway or proposed in the future, whether by him or anyone else. It also ignores the fact that, as I have found, Mr Smale was not undertaking any activity of real value by this stage in terms of presenting or driving forward proposals which were sufficiently developed to present to any client.

198. The Governance Panel meeting held on 30 January 2013 was - unsurprisingly - a fairly formal affair. Mr Smale had produced points for discussion in advance of the meeting which identified issues to discuss, including the reconciliation, creditors and debtors and "the earn out proposals' status". The minutes record that: (a) for the future Sir Jonathan Portal was to attend in place of Mr Holley, who had agreed to resign as director of Nickleby and sell his shareholding and thus to drop out of this forum because of the potential conflict between his position with Nickleby and his continuing position with SGP; (b) the reconciliation was to be progressed; (c) arrangements were made to deal with creditors and debtors; (d) Mr Smale was to discuss his relationship with SGP in terms of the

earnout with Mr Talbot; and (e) that for future meetings Mr Morris should compile a "list of current items giving rise to earnout for discussion".

199. A further meeting took place on 22 February 2013. The minutes record that only ARIM was on the earnout list but otherwise are silent in relation to any proposals.

200. Mr Singleton was not present at either of these two meetings, which is a fairly clear indication that SGP still did not see this as a forum for discussion of proposals any more than had been the case through 2012. It is apparent that the attention of SGP's management was largely upon the sale to Lyceum which, by March 2013, had proceeded to due diligence stage.

201. Governance Panel meetings planned for March and April 2013 were cancelled, so far as can be discerned because the reconciliation process was still outstanding and it was thought better to defer until the reconciliation process was completed.

202. In the meantime, Nickleby had instructed its current solicitors who produced and sent a pre-action protocol letter before action on 12 June 2013. It is unnecessary to refer to it in any detail. It made an overriding assertion that SGP had acted in extensive and manifest breach of the agreements under numerous heads of claim, the principal heads of claim being identified as: (a) deliberate and systematic conduct calculated to "totally undermine" the contingent payment provisions; (b) a failure to act upon any of the recommendations made by Mr Smale and Mr Holley; (c) a failure to implement or assist Mr Smale and Mr Holley in implementing (and SGP managers deliberately obstructing) its proposal to implement the Nickleby procurement strategy which had been demonstrated would reduce contractor costs by some 20%, three specified examples being Spirit, Johnston Press and William Hill; (d) a failure to accept or act upon cost savings proposals for (unspecified) individual clients ; (e) the dismissal of Mr Smale thereby rendering the prospect of any substantial contingent payments being achieved practically impossible. The letter also made reference to the "wrongful trading" and other transitional breach claims. It claimed the "full maximum consideration" due under the BPA of £5,950,000 less sums paid to date.

203. In response, SGP instructed solicitors who sent a letter of reply dated 8 July 2013. This complained - with some justification - about the lack of detail in the letter of claim. A point made by Nickleby is that whilst it asserted that Mr Smale's "recommendations were considered by SGP and where appropriate rejected" it did not contend, as it now does, that such recommendations did not amount to cost savings proposals within the meaning of the BSA.

204. The sale by Johnsons of its shareholding in SGP to Bell Rock Bidco Ltd as the buyer company was formalised into a Sale and Purchase Agreement dated 7 August 2013. It contained provisions in relation to Nickleby in part 3 of schedule 10 under which Johnsons was to retain exclusive conduct of the current claims and to indemnify Bell Rock against any liability arising thereunder.

205. The reconciliation had still not yet been concluded. On 19 November 2013 Nickleby wrote to SGP, referring to the relevant provisions of Sch. 3 of the BPA and making the first ever demand for a Governance Panel meeting to take place and for SGP to produce the necessary financial and other information in advance. The letter did not identify any specific matters which Nickleby wanted the Governance Panel to discuss, although the reference to paragraph 4.7 of Sch. 3 was clearly a reference to cost savings, as was understood by SGP at the time.

206. A meeting was arranged for and held on 19 December 2013, which the preceding internal emails show that SGP wanted to ensure discussed the minimum necessary to comply with its contractual obligations. At the meeting it was agreed, at Mr Smale's request, that the matters forming part of the ongoing legal action would be treated "without prejudice". There was an update on contingent payments which recorded that SGP stated that nothing was due save for the 50% share due on the

sale to TGI Fridays of an EMS software licence. It stated that nothing was due in respect of ARIM, since the contract had been loss-making.

207. A further meeting was arranged for and held on 18 June 2014. In advance of such meeting and seemingly prompted by the agreement reached in relation to the reconciliation (addressed in more detail below in respect of the wrongful trading claim) Mr Elliott prepared and signed a certificate dated 12 June 2014 which purported to confirm that a contingent payment of £11,693 was due relating to the period from 14 February 2012 to 31 December 2013 inclusive (i.e. the first two years) and that the payment made under the reconciliation included such sum. The minutes recorded under the heading "contingent payment update" that "Payment for year ended Dec 12 and Dec 13 of £11,693 was included within the reconciliation (see point 5 below). A certificate confirming this fact was given to Mr Smale at the conclusion of the meeting (copy attached)". There is no suggestion that there was any discussion at the meeting about any of this, let alone any agreement or a vote and, as appears from the minutes, the purpose of the certificate was to ensure that the inclusion of the contingent payment amount accepted by SGP as due in relation to TGI Fridays in the reconciliation was recorded.

208. The minutes also recorded that a client (CP Bigwood) had been identified as a sch. 11 client in respect of which a modest small profit and been secured and - hence - 50% of such profit would be payable if and when the relevant work was completed and client paid.

209. This was Mr Elliott's last involvement as after this he left SGP.

210. The next meeting took place on 25 September 2014. Apart from an update on CP Bigwood, discussion revolved around other matters.

211. In April 2015 SGP was working to complete the contingent payment process for the YE 2014, which was a straightforward task since nothing of significance had taken place in that year in terms of cost savings or relevant profits so far as SGP was concerned.

212. On 16 June 2015 and without proper Governance Panel or other meeting, consultation or warning, SGP issued a certificate signed by the newly appointed finance director, a Mr Andrew Chater, which stated as follows: "With reference to Schedule 3 of the above agreement this certificate is to confirm that no contingent payment is due relating to the period from 1 January 2014 to 31 December 2014 inclusive (Year 3)".

213. The final meeting took place on 2 November 2015. The minutes record that "there are currently no 'relevant profits' this year" and some matters of some relevance to individual elements of the claim, but otherwise nothing of relevance. That this remained the position post year-end was confirmed by email dated 15 April 2016 and another certificate, produced in the same circumstances as in the previous years, was issued on 19 April 2016. This produced a response in the form of a dispute notice from Nickleby dated 4 May 2016 contesting the "validity, content [and] accuracy" of the certificate. SGP responded, asking Nickleby to provide detailed reasons for disagreement. There is no suggestion that it did.

214. That concludes my analysis of the evidence relevant to the contingent payment claims generally and I now turn to deal with the individual claims.

G. Claim 1(1) - par. 22(1): Failure to implement Nickleby Models for core fabric reactive maintenance for commercial clients.

215. By reference to my findings as to the ambit of the Overriding Principle and the detailed findings made in the preceding Overview section I am satisfied that SGP did not act in breach of the Overriding Principle as regards these proposals.

216. In summary, that is because in my view it was entirely sensible and reasonable to identify four retail clients to take forwards as a trial and then to make a decision based on the results of that trial. By the summer of 2012 none of the four clients had proceeded to any implementation at all, let alone a successful implementation. Nickleby has failed to prove that this was due to any breach by SGP of the Overriding Principle. It is apparent that Mr Elliott was enthusiastic at the outset. Others within SGP were also enthusiastic. Some, particularly Mr Singleton and Mr Pantling, were not as enthusiastic. However, there is no hard evidence that it was any conduct on their part, deliberate or otherwise, which led to the failure of the trial proposals. Instead, I am satisfied that the trials did not proceed because: (a) Thorntons changed its mind late on in the process; and (b) no proposals which could sensibly be put to Spirit, CPW and MRH ever materialised. As to (b), I am satisfied that this occurred because Mr Smale was unable or unwilling to move forwards from Mr Yelverton's analysis to a properly researched and detailed proposal which could be put to the client. On balance I am satisfied that this is due to a number of reasons, being that: (i) he was distracted by the litigation against Somerfield; (ii) he was distracted by the problems to do with the integration which form the subject of claim 2 and the wider financial problems experienced by Nickleby; (iii) he was not prepared to embed himself in SGP's Leicester office to obtain a sufficiently detailed knowledge of the details of the SGP operation and to build up a sufficiently close working relationship with the existing SGP team, from Mr Elliott downwards; and (iv) without the involvement of someone like Mr Jones he was incapable of forming and keeping on track a team to produce the type of proposal which was required for each client.

217. In the circumstances, I am satisfied that SGP cannot reasonably have been expected to pursue the same proposals in relation to all of the remaining 14 clients included in Mr Yelverton's list despite the failure of the trial and despite the lack of detailed proposals in relation to those other clients. It might have been different had Mr Smale identified the problem and come up with a further suggestion for a further focussed trial which explained why it had not been possible to move forwards with the initial trial and identified a small number of further trial clients with detailed proposals for moving forwards as regards each. Simply to throw the results of Mr Yelverton's analysis of 18 clients at Mr Elliott and expect him to take over the implementation of this difficult and time-consuming project was wholly unrealistic. Nor could it seriously have been expected that Mr Elliott should have been required to delegate the task to some other member of SGP's senior management. Mr Singleton as commercial director was perhaps an alternative candidate, but he had other substantial responsibilities and was not given his lack of enthusiasm obviously the right person. Mr Smale had rightly been identified as the appropriate candidate and if he was unable or unwilling to do what was needed it cannot be argued that SGP's duty under the Overriding Principle extended to delegating the task to someone else. I do not think that SGP was obliged to instruct Mr Holley to take over this task either - his role included supporting Mr Smale with these proposals and he had not conspicuously succeeded in that role either.

218. In my judgment Mr Yelverton's analyses cannot properly be described as cost saving proposals, since they are not proposals leading to reductions in employment costs within the meaning in clause 3.1. Even if I was wrong about this, this is not a case where on my findings SGP's response at the time they were submitted in late June 2012 was that it did not wish to implement them. Instead Mr Elliott was willing to allow Mr Smale the opportunity to develop them further. He never did so. At no time subsequently did Nickleby formally request that SGP implement the Mr Yelverton analyses as if they were proposals, whether before or after Mr Smale's employment was terminated. Again, even if I am wrong about all this and Mr Yelverton's analyses can be regarded as cost savings proposals which SGP refused to implement, I am satisfied for the same reasons as above that this refusal cannot be said to amount to a breach of the Overriding Principle.

219. At this point I should address an issue which was addressed by most of the witnesses called and was investigated in some detail, which was SGP's case that the majority of their clients would never have

contemplated moving from their existing managing agent fully supported helpdesk model to the Nickleby principal contractor remote initial contact helpdesk model and that SGP was justified in not even approaching its clients to discuss this as a proposal because of the risk that even to do so might prejudice their relationship with their clients.

220. In my judgment Nickleby is right to point to the fact that this case and this evidence runs clean counter to one of the significant reasons why SGP was so keen to acquire Nickleby's business, which is that it believed that introducing Nickleby models was both entirely feasible and potentially very profitable. Mr Elliott admitted as much in his evidence and this is, of course, consistent with the whole tenor of the Side Letter. SGP already had some clients who were happy to contract on the principal contractor models. There was evidence that some clients or former clients, such as Boots, Superdrug and Care UK, moved from one model to another. SGP had a wide variety of clients and, whilst I am perfectly happy to accept that some were very happy with the existing managing agent model and valued the personal telephone contact with assigned SGP helpdesk employees, I simply do not accept that this was the case amongst all of their existing managing agent model clients.

221. I am also satisfied that SGP's witnesses tended to exaggerate the potential reputational damage which might flow from an approach to change from the previously recommended managing agent model to the principal contractor model. As Nickleby's witnesses said, no sensible client was ever likely to object to a proposal which promised a better service at less overall cost. There would have been no difficulty in putting forward the proposal on the basis that the introduction of EMS allowed SGP to do what it could not, without EMS, have confidently done before. Moreover, as Nickleby's witnesses also said, it is wrong to categorise this as some binary option, when it would be possible to seek to ascertain, by meeting with the client, whether it would be prepared to move away from the managing agent model and, if so, to a fully principal contractor model or to some intermediate hybrid model to suit the client's specific requirements, or whether even if not it would be prepared to move away from a full service managed helpdesk model to a fully remote helpdesk model or would be prepared to consider some hybrid trial scheme.

222. However, I accept that SGP was entitled to be concerned about the risk that if the proposal as pitched to the client was poorly researched and presented then that in itself might reflect badly on SGP and affect its reputational relationship with the client, especially next time the contract with the client came up for renewal.

223. I also accept that SGP was entitled to be concerned about the further risk that if the client was to accept the proposal and moved to a principal contractor virtual helpdesk model, but was dissatisfied with the service because the implementation had not been properly planned and undertaken, then the client might well end up moving to an alternative provider.

224. SGP can plainly not be criticised for being cautious about both these risks when deciding whether or not to make a pitch to a client without any properly researched and detailed proposal, given the potentially serious consequences of getting it wrong. I accept that at times in its evidence SGP's witnesses rather overstated the risk, but it was nevertheless something which it was, and was entitled to, have in mind. In the circumstances I am satisfied that SGP was not in breach of the Overriding Principle in not simply approaching the clients without any such proposal.

225. Given those conclusions it is not necessary for me to go on to consider issues of causation or quantification. Moreover, given the conclusions which I have reached as regards breach, it is difficult for me to express any firm views as to such issues on some alternative hypothetical basis. The most that I can sensibly do is to indicate what I would have decided had I found that SGP was in breach of the Overriding Principle in failing to take up the Mr Yelverton analyses and on the hypothesis that SGP was obliged to act in accordance with the Overriding Principle by working up the analyses into proposals which it was then obliged to pitch to the 18 individual clients.

226. In closing submissions Mr Wright contended that there was a real and substantial chance that all of the 18 clients would have migrated over to Nickleby models, save for Thorntons who he realistically accepted, given the evidence as to its actual decision, would not have done.

227. I have already said that I do not accept SGP's case that many, if not all, of the remaining clients would not have been willing under any circumstances to transfer away from the managing agent model to the principal contractor model or transfer from the fully manned dedicated helpdesk model to the EMS remote helpdesk model. I am not satisfied that there is specific evidence in relation to any of the clients which shows that there was never any real and substantial chance that they would have been prepared to move to a Nickleby model, in whole or in part. Thus, for example, as regards Pizza Hut and KFC Mr Smale was cross-examined on the basis that they had specified contractors who would maintain specialised equipment such as ovens and that they would not be prepared to allow SGP to choose its own contractors for this work. Whilst I accept that evidence, as Mr Smale and Mr Yelverton said that was not an obstacle to them accepting the Nickleby proposals as regards the general range of standard FM work.

228. Furthermore, although in his closing submissions Mr Wright had identified specific percentage prospects of success to individual clients reflecting such factors as whether they were already operating a principal contractor model or whether they had already expressed an interest in cost savings or the like, I am unable to accept that it is possible on the limited evidence before me to conclude that I can confidently allocate any significantly different percentage prospect to different clients on such a slender basis. Mr Wright had started with a default 50% assessment which he had then either increased or decreased according to particular features identified as relevant to each client. Whilst I accept that this was a perfectly reasonable approach, I am unable to accept either the starting point or - as stated - the basis for upwards or downwards adjustments.

229. Instead it appears to me that based on the evidence before me, both the specific evidence in relation to the success and failure of the proposals which went forwards and those which did not and the general evidence as to the factors which might persuade clients to change or not, the best I can do is to adopt an overall assessment of the prospects as no more than 25% overall. It would be idle to say that this is anything more than an overall high level assessment taking into account the available evidence.

230. However, that is not the end of the assessment, because I also have to consider the accuracy of the annual cost savings asserted which are based on the hypothesis that: (a) Mr Yelverton's analyses are accurate; (b) each client would have accepted a 25% share of savings, thus allowing SGP to keep 75% of the savings; (c) the savings were implemented in full by the end of year 1 for the 4 initial trial candidates and by half way through year 2 for the remainder and would have continued thereafter for the remainder of the 4 years.

231. There are a number of objections to this approach. First, as Mr Yelverton agreed in cross-examination, his figure was towards the top end of his initial analysis, which showed a savings range of between £4.2 million and £12.6 million. Given the uncertainties and vicissitudes involved in a change of this magnitude, it is difficult to see how the savings identified in the desktop analysis could all have been achieved and maintained in full over the full period. Moreover, basing the comparison on Nickleby's assumed gross margin of 20% is unlikely to have been accurate or achievable given that it did not take into account all direct costs as well. Second, as regards the 25% cost saving share, as Mr Yelverton had said the proposal in relation to Spirit assumed a 50% cost saving share, because of the history of Spirit's insistence on SGP securing substantial cost savings, and there is no reason to believe that a significant number of the other commercially savvy clients would not have been able to secure a similar share. Third, the claim as pleaded (and largely still maintained in closing submissions) assumes that the clients would all have been approached and agreed to transfer to the full Nickleby model at the same time whereas, as Mr Yelverton agreed in

cross-examination, in reality it would always have been a phased approach, in that it would have been impossible for SGP to have contemplated transferring all retail clients over to a full Nickleby model in one operation. I accept Mr Elliott's assessment that it might have taken as long as 18 months in some cases from the start of the process to presenting the proposal to the client and obtaining its agreement, which might well have proceeded first to a pilot and then to a full implementation.

232. In the circumstances I would only have allowed 25% of 25% of the full value of the claim as advanced. The full value claim is around £6.5 million, excluding Thorntons. Applying those discounts would have produced a net valuation of just over £500,000, which seems to me to be a realistic overall valuation of what is, on any view, a speculative claim.

H. Claim 1(2) - par. 22(2): Failure to implement Emergense verification software to reduce contractor spend on PFI contracts.

233. This claim as pleaded recounts the various steps taken by Mr Carlin to persuade SGP management to take up his proposals for cost savings. As with claim 1(1) it contends that at the meeting between Mr Smale - who had taken up and supported Mr Carlin's proposals - and Mr Elliott on 26 June 2012 "Mr Elliott reacted positively". It is then said that although Mr Carlin continued with his work in preparation for a presentation planned for September 2012, he was subsequently instructed by Mr Sherrington to "stop working on this project and focus on his job" and that thereafter the project was "simply shelved".

234. As recorded in the Overview, on 29 March 2012 two of the PFI sites, Carseview Hospital and the Newham school, were included in the trial, and it is clear that Mr Smale and Mr Carlin were tasked with taking forward these proposals. There is no record on the contemporaneous documents that they ever worked up these proposals beyond what was produced by Mr Carlin. It is also clear that all that Mr Smale did in putting forwards these proposals as VI's was to adopt, without critical analysis, the proposals put forwards by Mr Carlin. There is no evidence from the contemporaneous documents which shows that these proposals were discussed as alleged at the meeting on 26 June 2012 and, most significantly, there is no hint in Mr Carlin's post-presentation email of 11 September 2012 or subsequently that he had been told to stop working on this project. In the circumstances the factual basis for the pleaded breach of the Overriding Principle is not made out.

235. In any event, the first proposal was to appoint preferred materials suppliers, direct contractors to source materials from them, then obtain a rebate from the supplier on all orders. In order to bring the proposal to fruition would clearly have involved a significant amount of work by the procurement team in identifying suitable willing suppliers and obtaining contractor agreement, as well as deciding how far to make the client aware of and agree to what was planned and, if appropriate, agreeing a share in any rebate secured.

236. The second proposal was to bring some currently sub-contracted works in-house. Again, in order to bring the proposal to fruition would clearly have involved a significant amount of work to ensure that in the existing in-house works department was ready, able and willing to take over the tasks and to perform them to the satisfaction of the client. Again, it would have required a decision as to how far to involve the client.

237. The financial side of the proposals was far from detailed, perhaps not surprisingly given Mr Carlin's role and experience. However, there is no evidence that Mr Smale, whether himself or by asking Mr Yelverton, conducted a detailed analysis of the financial benefits and risks. There is no evidence that he discussed the proposals with Mr Askew as the senior manager in charge of PFI contracts. There is no evidence that he ever worked up a detailed proposal which he presented to Mr Askew or to Mr Elliott or to any monthly management meeting. He never raised this in any Governance Panel

meeting. He did not treat this as a cost saving proposal which, having been rebuffed, he sought to take to the independent expert determination stage under the Sch. 3 procedure.

238. The lack of financial analysis is apparent from the Particulars of Claim, where it is pleaded at paragraph 23 that "but for SGP's breaches SGP would have realised cost savings of … about £1 million in respect of the PFI contracts". When asked, Mr Smale said that this was an "extrapolation" from Mr Carlin's figures.

239. Having read through a great many of the communications and proposals sent by Mr Carlin to Mr Smale and others throughout 2012, it is clear that he believed with a passion in his ideas and vociferously expressed his frustration that - as he saw it - they were being ignored by management.

240. Even after Mr Smale had been dismissed Mr Carlin continued to pitch his ideas to Mr Elliott in January 2013, again without success, and to the new owners in August 2013. They initially showed some interest, and the new chief executive seemed to think that it was "appalling but not surprising" that his proposals had been ignored. Nonetheless, when Mr Carlin, suitably encouraged, returned to the subject in November 2013 he was given what can only be described as a polite brush off, with the chief executive stating that he was not interested in the proposal insofar as it involved the agreement of rebates with contractors, which was of course an important part of what had been suggested.

241. The first issue is whether or not these value initiatives could properly be described as cost savings proposals within Sch. 3. I am satisfied that they do not, since they are not proposals leading to reductions in employment costs. Moreover, even allowing for the relatively modest hurdle which I have found is all that is required for a proposal to qualify as such, I am satisfied that these discursive reports, which did not contain any clear or firm proposal, could not qualify as such.

242. The second question is whether or not SGP's decision not to take them forward was in breach of the Overriding Principle. In my judgment it plainly was not. SGP was entitled in my view to reach the conclusion that it was not interested in undertaking a large scale exercise to introduce these proposals unless or until it was apparent from the trials that they would work. However, matters never reached to the point where a proposal was produced which could be pitched as regards these trials. There is no basis for finding that this was due to a lack of co-operation or obstruction by SGP which itself amounted to a breach of the Overriding Principle. Again, it cannot reasonably be argued that SGP was obliged to undertake the risks and the time and effort of pressing on with the proposal as a whole when the trial had not produced any concrete result. It is relevant to my overall assessment that the subsequent owners of SGP, who clearly started with no predisposition to ignore Mr Carlin's proposals, in the end had no enthusiasm for taking them up.

243. The third question is whether or not, even assuming I was wrong and there was a cost saving proposal within Sch. 2 and/or that SGP was in breach of the Overriding Principle, Nickleby can show that there was a real and substantial chance that the proposals could have been implemented. Here, there is simply no evidence as to the response of the materials suppliers, the contractors or the clients to such proposals. That is not surprising, since there is no evidence that any of them were ever approached or that there was any analysis as to their likely reaction to the proposals. In the circumstances, and given my assessment of these proposals, I am not satisfied that Nickleby has surmounted this - albeit relatively low - hurdle.

244. The final question is, assuming I am wrong in relation to causation, there is sufficient evidence from which I can assess any award of damages. Again, I am satisfied that there is simply insufficient hard evidence for me to even begin to do so, whether as to the likely actual savings if the proposals could have been implemented or as to the likelihood of them being implemented. The paucity of evidence is demonstrated by the fact that in his closing submissions the best Mr Wright could do was to assert that the opportunity was worth £1 million p.a., that it had a 50% prospect of success, that it followed

that Nickleby was entitled to a 50% share of this cost saving, and that as a result the overall claim over three years is worth £750,000.

245. In short, and in summary, I am satisfied that this claim is too speculative at every level to succeed on any basis. That is not surprising when, as I have said, it really amounts to no more than an attempt to piggyback on Mr Carlin's proposals, without Mr Smale having ever conducted any independent analysis as to whether or not they were capable of being implemented and, if so, producing hard proposals to put before Mr Elliott.

246. Finally, and for completeness, I should record that one point made by Nickleby in response to an argument advanced by SGP to the effect that the Nickleby models were inherently unsuitable for PFI projects due to the heightened security requirements for places such as prisons, hospitals and schools, is that SGP had been able to secure business from Care UK through adopting Nickleby models, notwithstanding that it operated a number of care homes with their own security needs. I accept this argument and agree that SGP's focus on security is largely a red herring, so that I would not have relied on this point in reaching my decisions on this claim other than to observe that it was plainly a point which SGP would have needed to address in its proposals to put to its PFI clients.

I. Claim 1(3) - par. 22(3): Failure to provide facilities management services to William Hill.

247. William Hill was included on the list of prospects in Sch. 11 as an existing client of Nickleby. It provided reactive works for around 900 stores in the southern region but there had for some time been ongoing negotiations for expansion to cover around 2,300 stores across a wider area.

248. The pleaded case is that a proposal, which had been agreed by William Hill, for this additional business to be provided by SGP was not taken forwards because SGP erroneously believed that the existing work was loss-making and, when the error was pointed out through an analysis conducted by Mr Yelverton, it declined to reverse its decision.

249. On the basis of my conclusion as to the correct construction of Sch. 3 it must follow that this claim cannot succeed anyway, because it is clear that a proposal to extend the number of stores maintained falls within the bracketed exception in the paragraph 1.1.10 definition of relevant profits.

250. Assuming, however, that the contrary is reasonably arguable, I am satisfied that the claim fails on the merits by reference to the following factual findings.

251. On 3 September 2012 Mr Elliott emailed Mr Smale to say that an analysis undertaken by Mr Cooper had showed that the William Hill contract was "heavily loss making" and asked for his views. There was no immediate response, seemingly because Mr Smale had asked Mr Yelverton to investigate. Towards the end of the month there was an email chain begun by Mr Jones, expressing his concern that William Hill was complaining about the service it was receiving, with Mr Holley stating that the client has been "de-prioritised" by Mr Elliott because it was loss-making but that Mr Smale was going to speak to Mr Elliott to demonstrate that it was in fact profitable.

252. I accept that Mr Holley's contemporaneous email is more likely to be accurate. Although "de-prioritisation" sounds quite dramatic, in fact as explained by Mr Yelverton it simply means that the number of helpdesk staff assigned to answer William Hill calls was reduced so that some calls would have gone into the general pool and thus have been answered less quickly. It thus reflected in a worse service, but not a dramatically worse service.

253. Initially, there was a discussion between Mr Smale and Mr Elliott as to whether gross profit should include the direct costs of proving the maintenance services. Mr Smale argued that it should only include the direct contractor costs, whereas Mr Elliott argued that it should also include internal direct costs, with which proposition Mr Smale duly agreed. However, Mr Yelverton then produced a revised analysis of Mr Cooper's figures which, whilst accepting the principle about deducting the

proportion of direct costs incurred, took issue with the proportions allocated, his revised analysis thereby converting an actual annual loss of c. £42,000 into: (i) an actual annual profit of c. £14,000; (ii) an estimated annual profit of c. £52,000, assuming identified efficiency savings made; and (iii) an estimated annual profit of c. £124,000, assuming the contract was extended from the existing 900 stores to 2,300 stores.

254. In a contemporaneous email of 2 October 2012 Mr Holley recorded that Mr Elliott was having Mr Yelverton's figures checked and would reprioritise William Hill if they were proved to be right.

255. It is common ground that there was then a discussion between Mr Yelverton and Mr Cooper about which they unfortunately disagree. Mr Yelverton's evidence is that Mr Cooper was persuaded to agree with his revised analysis and Nickleby's case is that as a result the service was reprioritised but, nonetheless, "the decision not to take up the William Hill opportunity was not reversed". Mr Cooper's evidence is that he did not agree with Mr Yelverton's revised analysis and matters were left on that basis.

256. I have found it difficult to draw a clear conclusion as to who is right, in circumstances where both came across as honest and reliable witnesses and where there is no clear contemporaneous documentary evidence trail which provides a conclusive answer. There is however a text message from Mr Smale to Mr Holley which states that Mr Yelverton had texted to say that Mr Cooper had "signed off the logic and numbers for William Hill" and was "just running it past [Ms Klare] when she is available next". However Mr Cooper said, persuasively and consistently with my assessment of his character, that if he had accepted Mr Yelverton's analysis he would have produced a revised calculation and that he was meticulous about saving such documents.

257. Ultimately, whilst I am satisfied that the contemporaneous text is likely to be accurate, it does not by itself show that Mr Yelverton and Mr Cooper ever reached complete agreement. That is not particularly surprising, since much of the difference between them boiled down to an analysis of what proportion of direct costs could properly be allocated to William Hill, which is not something which they could definitively resolve since it required Ms Klare's input. In the absence of evidence that Ms Klare ever challenged Mr Yelverton's analysis it seems likely that it was implicitly accepted. This is consistent with the evidence that what SGP actually decided to do was to reprioritise the service and allow the William Hill contract to run on for a year on the existing basis to see whether or not in fact it could be made profit making - if it was not already profit making - and then to make a decision what to do. Mr Smale accepted in cross-examination both that this is what he thought had happened and that it was not an unreasonable decision to take. Indeed, as recorded in an SGP trading update from 15 November 2012, it "issued a proposal to William Hill regarding the management of their entire estate".

258. In the circumstances, although there is no evidence as to why the proposal was not accepted, I am not satisfied that on the basis of the pleaded case or this evidence it can be concluded that SGP acted in breach of the Overriding Principle in relation to William Hill.

259. The claim is, in any event, a relatively modest one compared to the previous two, with a claim over three years of only £155,000 odd, assuming that the analysis is accurate and a 50% prospect of success.

J. Claim 1(4) - par 22(4): Failure to implement Cost Savings Proposals in respect of helpdesk staff and other costs.

260. This claim is pleaded as involving three separate initiatives, all related to the adoption of EMS by SGP's clients and contractors, which it is complained were not "carried through to completion", namely:

> "(a) Mr Yelverton's analysis of the William Hill account showed that potential further savings could be made by adopting Nickleby's model of allowing contractors to receive and log initial calls themselves, rather than SGP's model of using a dedicated helpdesk. Nickleby's model had been used successfully with Somerfield, and with Capper (a chain of Spar wholesalers). The net savings for this one account were calculated to be £37,922.70 (or 28.64%) which if extrapolated across SGP's total helpdesk head count spend of £1,640,206.56 (plus overheads of c. 40%) would have amounted to savings of £657,766.52 per annum.
>
> (b) In or around mid-July 2012, Mr Smale presented to Mr Elliott "SGP Smart", a database system he had developed with Paul Bracewell that identified savings that could be made to SGP's costs including PPM by adopting the Emergense software (and, in particular, the Job Costing module). Mr Elliott was receptive to the idea and in late July or early August 2012 Mr Smale met with Alex Ludlow and Joanne Fincham to discuss the migration of SGP's PPM management process. Implementation of the migration would have allowed SGP to reduce head count by four or five people, which plus overheads of c. 40% would have meant an annual saving of £139,365.80.
>
> (c) The "SGP Smart" system also recorded that implementation of the Emergense Verify and Allocate modules would have allowed a reduction in SGP's Accounts Payable and Cost Management head count by five or six, with an estimated saving of £200,000 per annum."

261. As regards (a), Nickleby has produced and relies upon a value initiative apparently dating from 16 May 2012 which, without further supporting detail, is described as a "proposal to eliminate SGP help desk functions (client by client) and direct calls to contractors using EMS (e.g. Capper)". It was suggested that a saving of £1,100,000 could be achieved by reducing the actual annual cost of £1,650,000 by two thirds.

262. Mr Smale was cross-examined on the basis that this was only the beginning of a longer process, which would include the need to consider the opportunity and the risks and the willingness of the client and the contractors to adopt EMS. This was clearly correct and Mr Smale did not seriously disagree.

263. In the same way as with the claim 1(1), in the circumstances I am satisfied that it cannot be said that SGP acted in breach of the Overriding Principle as regards this proposal. The prospect of moving clients over to EMS was something which was a fundamental part of the trial process. That process did not proceed to fruition, for reasons which cannot be laid at SGP's door. In the circumstances, SGP cannot reasonably have been expected to pursue the same proposal across the board in such circumstances or to be held in breach of the Overriding Principle in declining to throw good time and effort after bad. That is particularly so, given that the actual proposal was so lacking in detail and would have required so much time and effort to bring to fruition. Mr Smale never proceeded beyond this first stage himself. As SGP emphasise, in the same way as with the claim 1(1) proposal, in addition to working up the proposal so as to be confident that it could have been implemented internally, it would also have involved persuading the client and the contractor to agree to implementing this new system and their staff being trained on how to do so. If things went wrong, there was the risk of losing the client either at pitch stage or as a result of an unsuccessful introduction.

264. I am satisfied, therefore, that Nickleby's claim cannot succeed in relation to this claim.

265. If, contrary to that finding, there was a breach of the Overriding Principle I am satisfied that for reasons which are essentially the same as those arrived at in relation to claim 1(1) that, whilst there was a real and substantial chance of moving some clients over to EMS had a fully researched and detailed proposal been put to them, the prospects of doing so in relation to all clients and in relation to the whole period and of achieving the projected savings across the board are so affected by the

considerable risks and uncertainties that it would not have been possible to have awarded more than 10% of the total claim, which amounts to £165,000 (£1.1 million x 10% over 3 years with an entitlement to a 50% share). I have chosen a higher overall percentage of 10% only because I do accept that the prospects of selling this more limited move were rather higher than the prospects of persuading all 18 retail clients to move to a full Nickleby model.

266. In relation to the value initiative referred to at (b), in closing submissions Mr Wright submitted that this was a detailed proposal extending over five pages, giving a start date and implementation lead time, detailed calculations showing how the savings had been calculated, an analysis of how the existing spend could be reduced and implementation cost estimates.

267. Mr Smale was cross-examined on the basis that this assumed all clients would be moved to EMS. He disputed this, claiming that he had factored in a proportion which would not have moved. There is no evidence of what proportion this may have been. He was also cross-examined on the basis that the costs of movement were far more substantial than he had allowed. In the absence of a detailed counter-analysis from SGP, whether produced at the time or in the course of this case, I am not persuaded that his assessment was wholly unrealistic. I do however accept that this was very much an outline proposal, rather than a detailed proposal with a full analysis of what would be involved operationally and cost-wise to make it work. I am also satisfied that, even as an outline proposal, it would have brought home to any reader the amount of time and effort which would need to be invested into the process to bring it to fruition.

268. As with claim 1(1), the fundamental difficulty with this proposal is that it was clearly connected with the Johnston Press trial referred to in the overview section above. As I have found in the Overview section, that trial did not proceed further after July 2012, in circumstances where that was not attributable to any breach of the Overriding Principle by SGP.

269. Moreover, it is to be noted that this proposal was successfully introduced in January 2013 in relation to the Care UK contract, as reported by Mr Belton in an email dated 31 January 2013. This shows that there was no objection within SGP to introducing EMS as such, so long as the proposal was properly prepared and planned and won the support of the client.

270. As investigated at trial, the question of moving PPM to EMS was raised again in early 2013. At this time an external consultant, a Mr Hill, had been instructed to advise on a PPM improvement project and had produced some initial observations which recommended further work, which was duly instructed, and in February 2013 he produced a full systems analysis which convincingly concluded that EMS was far superior to the alternative existing SGP Resolve system and firmly recommended that it be introduced.

271. On 25 February 2013 Mr Holley emailed to say that it had been agreed to undertake a pilot of running EMS PPM with one client - identified as Marstons. On 26 February 2013 Mr Hill confirmed that this had been agreed at the meeting with Mr Elliot, and that SGP's IT department was to provide an estimate of the work necessary to interface EMS to existing systems. It thus appears that even after Mr Smale's departure Mr Elliott was willing to approve a further trial in March 2013.

272. Mr Singleton, who may not have been at the meeting, responded negatively, emailing on the same day to say that the report did not investigate the options which would exist if EMS was not available or whether adopting EMS was insufficiently beneficial compared, for example, to seeking to integrate EMS and Horizon. It is fairly clear from this email, and nothing in Mr Singleton's evidence changes this perception, that he had no desire whatsoever to spend time and effort on this proposal. Indeed, there is evidence from an email sent to Mr Holley and Mr Cooper on 22 March 2013 that at around this time Mr Singleton was seeking to persuade the existing EMS using clients to move them over to a new model.

273. Nonetheless, it was reported at the senior management meeting held on 28 February 2013 that the Marstons project was to proceed in March 2013. There is no documentary or witness evidence from either party as to why this did not proceed further, other than Mr Holley simply recording the exchange noted above and saying that Mr Singleton was against the idea and did not want to use EMS. There is no evidence that Mr Holley discussed this pilot further with Mr Elliott or that he attempted to drive the pilot project through notwithstanding Mr Singleton's objections. There is no suggestion for example that Mr Singleton had some right of veto in relation to the pilot proposal. It appears that the project simply died a death because it had already been overtaken by developments on the IT front and, so it would appear, because Mr Holley was not prepared in such circumstances to invest time and effort in seeking to push through the trial.

274. In the circumstances, whilst one might justifiably criticise Mr Singleton for his negative approach to the pilot and to EMS generally, that cannot be elevated into a conclusion that SGP as a company was in breach of the Overriding Principle.

275. Accordingly, this claim must fail. As with the previous claim, if I was wrong about that I would have concluded that there was a real and substantial chance but not have felt able to award the full claim, which is based on a 100% prospect of success. I would have allowed one third of the total claim to reflect the risks and uncertainties, and thus have awarded £75,000 on a rounded up basis. I have chosen a higher percentage assessment because I accept that this ought in principle to have been an easier sell than the other two and because it was supported by the analysis of Mr Hill.

276. In relation to the value initiative referred to at (c), this is embarrassing in its lack of detail, with the initiative description being described as a "proposal to save costs by using EMS V&A for SGP Accounts payable. Approx. head count reduction 20", giving a potential saving of £400,000. It was not pursued in closing submissions, not surprisingly since Mr Smale was unable to explain the detail behind this proposal in any way I found convincing.

K. Claim 1(5) - par. 22(5): Failure to realise Relevant Profits through June 2012 initiatives.

277. This is pleaded as being referable to the presentation sent by Mr Smale to Mr Elliott in June 2012 entitled "powering up and cutting down" which is said to be the genesis of two initiatives, namely: (a) raising £1 million through charging SGP's contractors to participate in the EMS software; and (b) organic growth of £1 million per annum through cross-selling additional services to existing customers.

278. The complaint is that these initiatives were not taken forwards and, in particular, that meetings arranged between Mr Elliott and Mr Smale to discuss them were all postponed or cancelled by Mr Elliott.

279. As regards selling EMS service to the existing supply chain, this involved persuading SGP's existing contractors to pay for licences to use EMS in their business. The proposal was wholly lacking in any detail. Under cross-examination Mr Smale's evidence was that since Nickleby had successfully sold EMS licences to its Somerfield contractors there was no reason to think that SGP could not do likewise with its own contractors.

280. However, it seems to me that there are two significant differences, namely that: (a) Nickleby's contractors knew that they would need to use EMS to work for Somerfield, so they were a captive market; and (b) Nickleby's contractors were under contract with Nickleby who, therefore, had a direct commercial relationship and thus leverage, whereas most of SGP's contractors were only under contract to the clients and, hence, no particular interest in paying good money for EMS unless the clients had decided to move to EMS and required the contractors to do so as well.

281. In closing submissions I suggested to Mr Wright that this claim was really parasitic on successful claims under paragraph 22(1) and 22(4), i.e. that being able to sell EMS licences to contractors was

an additional benefit of persuading clients to move to EMS, because contractors would have to follow. Whilst he did not accept that this was necessarily so, I am satisfied that Nickleby has failed to establish a claim on a separate basis. That is because in my judgment it cannot be said that SGP breached its duties of co-operation or good faith in not taking active steps to investigate and actively pursue this opportunity as a separate freestanding proposal. Although Nickleby relies on the fact that Mr Holley did manage to sell a licence to a client in 2012 whilst employed by SGP, as SGP ripostes he was plainly the best person to negotiate and conclude such sales anyway. There is no basis for any suggestion that he was prevented from or obstructed in doing so or that the fact that he did not have a specific sales role would have prohibited him from doing so; it plainly did not when the opportunity arose.

282. Again the lack of detail behind the claim is evident in the fact that it is valued in closing submissions on the basis of a round £1 million assumed sales, with a round 50% prospect of success, producing an annual loss of £250,000. Even had I been wrong in my conclusion on liability I would only have been prepared to award £150,000 in total to reflect the considerable risks and uncertainties.

283. As regards cross-selling additional services, the only service identified in the value initiative was selling SGP business rates service to Nickleby customers. The evidence shows that SGP offered a service to its clients whereby it sought to obtain rates rebates on behalf of clients in respect of time periods when their business premises were empty, due to events such as road closures, flooding damage, planned shopfitting or similar, on the basis that any savings would be split between SGP and client.

284. The proposal contains virtually no detail in terms either of identifying potential clients other than Toyota or of costing the potential savings, save that if an average rebate of £500 per site per annum was obtained for approx. 8,000 sites that would produce a claim going back for 6 years of £200,000 p.a. which, net of the fee earner's apportioned salary costs, would result in a profit of £1,690,000.

285. The only hard evidence which Mr Smale could give was that one of his longstanding contacts, Mr Webster of Toyota, was interested and willing to agree a 50/50 split and that he introduced him to SGP, but that nothing was done to take it further. In cross-examination he said that little detail was required, since it was really an extremely simple proposition for Mr Elliott to agree that Ms Causer, the SGP employee responsible for business rates services, should liaise with Mr Smale to identify suitable clients and then arrange for her team to target them.

286. Although Mr Elliott had claimed in his witness statement that SGP had never successfully cross-sold additional services, that evidence was contradicted by his own contemporaneous email dated 22 January 2013, which showed a number of such cross-sales including five rating service cross-sales.

287. In his principal witness statement Mr Smale referred at [92] to a presentation produced by SGP in May 2012 which recorded that it had achieved £20 million savings for its existing clients in this respect. This however is the figure which includes all historical savings for all rate savings of all kinds; the total figure for rate savings for clients last year was stated to be £6,000,000.

288. Of course that is different to revenue earned by SGP. In a report prepared in connection with the sale to Lyceum actual average revenue from rating services amounted to around £250,000 in FY 2010 and FY 2011 with an average margin of around 40%. The projected revenue for FY 2012 was greater, but revenue was projected to fall to below previous levels in FY 2013, according to Mr Elliott because of forthcoming rule changes limiting the opportunities to make successful claims.

289. Although Mr Smale's evidence is sparse, SGP has failed to adduce any evidence, documentary or otherwise, as to what if any attempts it made to sell such services to Nickleby's existing clients. In cross-examination Mr Elliott said for the first time that he recalled Ms Causer telling Mr Smale that she had met Toyota, who had said that what they wanted was a rates valuation service, which was

not the service which SGP provided. In his witness statement he had simply suggested at [17] that he "expected" that this was the only service which was "relevant for Toyota".

290. This is the only sub-head of claim 1 where I have come close to being satisfied on the basis of the available evidence that Nickleby has made out its case as to breach of the Overriding Principle. It may have been a simple suggestion but it was, as Mr Smale said, one which was extremely easy to put into effect with no downside. However, on balance I am not satisfied that Nickleby has made out its case in this respect either. There is and can be no suggestion of breach of the duty of good faith in that there is no evidence that SGP deliberately and consciously chose not to take up this proposal. Furthermore, on the available evidence it is not possible for me to be satisfied that there was a breach of the duty of co-operation. Mr Smale does not suggest that Mr Elliott or anyone else at SGP actively refused to agree to Nickleby's clients being approached. If Mr Smale's evidence about what he was told by Mr Webster was right, then it is simply inconceivable in my judgment that he did not raise this with Ms Causer, or raise it with Mr Elliott if he obtained no good explanation, or raise it in Governance Panel meetings. Nor is there any evidence that he personally produced a detailed proposal which resulted from him having made contact (directly, or through the TUPE'd over Nickleby staff) with the contacts at the clients to ascertain who might be interested and the person to contact. Had he done so, and given it to Mr Elliott or Ms Causer, and had they sat on it, then I would have been satisfied as to breach. On the evidence before me, I cannot be so satisfied.

291. If I had reached a different conclusion I would have been satisfied that on the available evidence there must have been a real and substantial prospect of achieving some work from Nickleby's clients. I accept that it was a competitive market and that many, if not most, clients would not have been interested for one reason or another. But given the evidence as to SGP's success with its own clients and the evidence that at least one Nickleby client expressed interest, it cannot seriously be challenged that there was a real and substantial prospect.

292. The quantification of that prospect would have presented great difficulty in the absence of hard evidence one way or another. The assessment in closing submissions is typically lacking in detail, with a claim being made on the basis of profits of £1 million p.a. and a 25% chance of success.

293. In my judgment the best evidence comes from a document put to Mr Elliott in cross-examination, which is a part of the vendor due diligence report produced for the sale to Lyceum, which at p.11 identifies SGP total sales from retail for FY 2011 at around £5M, compared to around £4M for Nickleby, although that of course represents contractor spend as well as Nickleby's margin, whereas SGP's figure is mostly its own managing agent charges. On a rough and ready basis, if Nickleby's margin was around 20%, the comparable is £800,000, i.e. around 15%. If one assumes the projected revenue for FY12 and FY13 for rating sales of around £530,000, with a margin of 40% producing around £210,000, then 15% of that is £31,500 of which Nickleby's 50% contingent payment share would be £15,750. Multiplied by three the claim would only have been worth £47,250, hence significantly less than the £375,000 claimed.

L. Claim 1(6) - par. 22(6): Failure to pay Contingent Payment in respect of redundant facilities management account director and/ or Merger Savings.

294. This claim is different from the preceding claims, in that it is a claim made in respect of cost savings which Nickleby contends were actually achieved, rather than in respect of cost savings which Nickleby says could and should have been achieved had SGP acted in accordance with the Overriding Principle.

295. The claim has evolved, in that post disclosure it has been refined into a claim which was re-pleaded by amendment and the details set out in a schedule attached to Mr Smale's sixth witness statement. The pleaded case is that savings of £2,475,648 were made which, net of the £1 million in respect of

which the merger savings payment was made, leads to a saving of £1,475,648 p.a. which, divided equally and multiplied for years 2, 3 and 4, produces a claim of £2,213,472.

296. It raises the question as to whether each saving is a relevant cost saving. As I recorded above under my consideration of the proper construction of Sch. 3, it is not necessary in my judgment to show that the cost saving must flow from cost savings proposals made by Mr Smale and Mr Holley under paragraph 1.1.6. Nor is it necessary to show that there is any causal connection between the acquisition and merger process and the cost saving, although I will consider the question on this basis in any event.

297. The list of savings is a list which updates the list produced at the time when the merger savings payment was agreed, and includes a number of individuals which were not on that list and which are the subject of dispute, as well as a number of individuals who were on the list and included in the merger savings as agreed by the Governance Panel, but who SGP now seeks to say are not included within the definition of cost savings.

298. As regards Mr Brennan, it is common ground that he was removed from his role as finance director shortly after completion of the merger and a new structure put in place under which existing employees were appointed to fulfil the role as head of profit and loss (Mr Cooper) and head of balance sheet (Ms Lawrence). In effect, the position of finance director was made redundant. Although I accept that there is no suggestion that this was as a result of any proposal made by Mr Smale or Mr Holley, that is irrelevant as I have said. Although SGP has contended that this change had nothing to do with the Nickleby merger, I am not persuaded that this is the case, given the close temporal connection between the merger and the redundancy and the consequential re-organisation of the finance team. SGP has given no other explanation and produced no documentary evidence to support its case. It seems entirely plausible to me that as part of the acquisition and merger process there was a reconsideration as to what roles were necessary in the new organisation and a decision taken that Mr Brennan's was no longer necessary.

299. Finally, given my conclusion as to the proper construction of the scope of clause 1.1.6 Nickleby is entitled to succeed even if there is no causal connection.

300. Moreover, it is also common ground that as at the end of September 2012 Mr Morris was seconded to SGP as finance director in September 2012. He remained in that position until after the August 2013 sale of the SGP shareholding, when he was replaced by the incoming finance director Mr Wilton. There is no evidence as to whether or not the salary of either man was recharged by the parent company which, it would appear, continued to employ him in each case. He had been included in the schedule prepared by SGP's solicitors of employees who had not been replaced. In the circumstances, and on the evidence before me, Nickleby is entitled to succeed under this head on the basis that the cost saving continued throughout the whole contingent payment period.

301. As regards the 5 "leavers", they include the "Faldo FD role" which, it is common ground, is a reference to Sir Jonathan Portal who was not retained by SGP post completion. He was included in the list in Sch. 11 and, it seems to me, is rightly included in this list as well, on the basis that there was clearly a linkage between the acquisition and the merger on the one hand and the saving on the other.

302. The same is true of the other leavers, including Mr Smale himself. So far as he is concerned, whilst it is clearly the case that it was not intended that he should have been made redundant at the time of completion, the fact is that he was made redundant approximately 9 months later and there is a sufficient causal connection between the acquisition and the merger and the termination of his employment by the merged business less than a year later. The reality is that his employment was terminated because it became apparent to Mr Elliott that there was no need for someone to fulfil the role which he filled, in circumstances where Mr Elliott was not persuaded that Mr Smale was adding

sufficient value to the merged business to be retained. Again, and in the alternative, on my analysis of paragraph 1.1.6, Nickleby is entitled to succeed on this ground even without any such link.

303. It is agreed that item 64 was included in error and should be disregarded and that has been done on the revised schedule produced with closing submissions.

304. Finally, there are a number of individuals whose inclusion on the list is challenged by Mr Grant on the basis set out in paragraphs 6 and 7 of his principal witness statement. He identifies four employees who had already been scheduled to leave SGP before the BPA was completed and says that there was no connection between their departure and the completion of the deal. He also identifies another three who were employed by Nickleby after due diligence was completed and then made redundant.

305. As with Mr Brennan, however, there is a clear temporal connection between the departure of the first four and the acquisition and merger. Indeed, three were included in the schedule of agreed merger savings and one had been included in the list prepared by SGP's solicitors as those who had been redundant and whose role had not been replaced. I am not satisfied that SGP has given a sufficient explanation to establish that, notwithstanding this temporal connection and the lack of a replacement there was no such connection. In the circumstances I am satisfied that Nickleby has made out its case if it needs to show a causal link and in any event based on the proper construction of paragraph 1.1.6.

306. As regards the latter three, since the evidence shows that they were employed by Nickleby pre-completion and made redundant thereafter as part of the costs savings proposals, with no basis for any suggestion that this was some form of sham transaction, they would also be included on either analysis.

307. A further claim relates to a former SGP employee, Ms Bretelle, as to which the relevant correspondence and evidence shows that she was one of four dedicated sector account directors, responsible for healthcare. By 18 July 2012 the activity list for Mr Smale showed that the task of "account directors to customer service directors" had been assigned to Mr Smale and Mr Berwick. I accept Mr Smale's evidence that this involved a proposal to re-organise these roles in a way which could lead to cost savings. I also accept that at around the same time Mr Berwick and Mr Askew met with Ms Bretelle, after which on 26 July 2012 Mr Askew wrote to her to begin a process of obtaining medical evidence as regards her ability to perform her role. It is reasonably clear in my judgment that the question as to whether there should be a restructure was separate at this stage from whether or not Ms Bretelle was able to continue performing her role. By August 2012 there were discussions involving Mr Elliott, Mr Smale and Mr Berwick about restructuring the current arrangement of 4 account directors so as to change their role. It is reasonably clear that both Mr Smale and Mr Berwick were putting together the proposals and presenting them to Mr Elliott. On 10 September 2012 Mr Askew emailed to advise that Ms Brettelle was leaving the business and her accounts would be re-allocated. Finally, an announcement was made by Mr Askew in November 2012 that "following a re-organisation of the FM Account Director structure … Lisa Brettelle is leaving the business due to redundancy".

308. Nickleby's claim in relation to Ms Bretelle was raised at the Governance Panel meeting in November 2015 and addressed in a subsequent reply from Mr Grant which, rejecting the claim, suggested that: (a) the proposal was to redefine the role rather than to reduce the number; (b) SGP did not recall a causal connection between the proposal and the departure of Ms Bretelle, which was in fact a compromise agreement rather than a redundancy, which is how it was "explained to the business".

309. In my judgment SGP cannot credibly contend that Ms Bretelle's position did not in fact become redundant, which is why she was not replaced, so that this was indeed a cost saving. I reject the suggestion that this was simply a question of business presentation. On my analysis of paragraph

1.1.6 that is an end of the matter. Even if that was wrong, the question in my judgment is whether or not prior to 10 September 2012 Mr Smale had made a written cost saving proposal within clause 3.1 to the effect that the existing complement of 4 account directors could be reduced to 3, which is what happened. In my judgment the evidence identified above discloses that he had, and it is irrelevant that it was a joint proposal made with Mr Berwick.

310. It follows in my judgment that Nickleby has established an entitlement as regards all of the disputed personnel within the list.

311. In my draft judgment I stated that I was therefore satisfied that Nickleby has made out its claim in this regard in the sum total of £2,157,809. This was the sum claimed in Sch. 2 to Mr Wright's closing submissions, which corrected certain recognised errors in the schedule attached as NS6 to Mr Smale's sixth witness statement which formed the basis of the claim at trial (see paragraph 295 above).

312. In post-draft judgment submissions Mr Latimer invited me to reconsider the quantification of this claim, submitting that: (a) NS6 itself only emerged shortly before trial, giving SGP insufficient time properly to scrutinise it; (b) in oral evidence in examination in chief and again in cross-examination Mr Smale acknowledged there were errors in NS6; (c) NS6 erroneously claimed an uplift for NI contributions on all salary (rather than salary over the threshold limit) and - in some cases - on payments such as redundancy payments; (d) whilst Sch. 2 corrected some errors, including item 64 (see paragraph 303 above) and the inclusion of redundancy payments, ex gratia payments and payment in lieu of notice, it did not correct other errors; (e) given the pressure on SGP and its advisers to read and respond to Nickleby's closing submissions, including three separate schedules, in the day before the court resumed for oral submissions, it is not unsurprising that these remaining errors were not picked up and addressed in oral closing submissions; and (f) it was only on receipt of the draft judgment that these remaining errors were identified and now sought to be corrected.

313. The uncorrected errors were said to be twofold, namely: (i) taking Mr Smale's remuneration as £150,000 rather than his agreed salary of £100,000; (ii) applying NI to the full salary of each employee (rather than only above the threshold) and to items such as bonus and car and travel expenses, rather than only salary. It was said that the end result of correcting these errors is to reduce the claim by almost £200,000.

314. In his submissions in response, Mr Wright submitted that: (a) there was no basis for allowing SGP to make further submissions on the quantification of the claim, given that: (i) NS6 had been produced by Mr Smale from information disclosed by SGP itself; (ii) SGP had been given and had taken the opportunity to respond to it; (ii) Sch. 2 did no more than remove the missing item 64; (iii) SGP had the time and the opportunity and expertise to consider and respond to NS6 and Sch. 2, both in closing submissions and - had it wished - after oral closing submissions whilst the court was engaged in producing its written judgment; (b) nonetheless, Nickleby recognised that SGP was right to say that NI was not payable on salary under the threshold and was prepared to reduce its claim to £2,063,861 to reflect this admitted error; (c) NI was correctly added as payable on the bonuses and benefits in kind; (d) the annual cost savings of £150,000 for Mr Smale came from a document produced by SGP itself, which SGP had every opportunity to explain before or at trial, but had failed to do so, so that there was no basis for revisiting this decision; (e) there were disputes as to the remuneration of other employees, in circumstances where Nickleby's calculations were taken from an agreed schedule, whereas SGP's were not and were not explained in evidence, so that SGP cannot complain if the court accepted and preferred Nickleby's figures.

315. In my judgment Mr Wright's submissions on this point are to be preferred. Save for the correction of the admitted error in including NI on pre-threshold salary, there is no proper basis for allowing SGP a second bite at the cherry and seeking to re-argue points which it chose not to argue or to

support by evidence at trial in circumstances where the answer to those points is far from clear or obvious in its favour even after it has now advanced its best case.

316. In the circumstances I am satisfied that Nickleby is entitled to £2,063,861 under this head.

M. Claim 1(7) - par. 22(7): Dismissal of former Nickleby staff.

317. As I have said, this allegation is no longer pursued.

N. Claim 1(8) - par. 22(8): Dismissal of Mr Smale.

318. It is pleaded that under his Service Agreement Mr Smale was entitled to 6 months' notice save where there was cause to dismiss, which was not said to be the case, and that his removal "significantly hampered the implementation of any Costs Savings and/ or realisation of Relevant Profits", with specific cases being identified in relation to ARIM, CP Bigwood, Zurich and NFU (through Cunningham Lindsey).

319. In my judgment this argument conflates two separate and distinct questions. The first is whether it was a breach of the Overriding Principle to terminate the employment of Mr Smale in the circumstances existing at the time. The second is whether his dismissal had the consequences identified. It would not be sufficient in my judgment simply to argue, as is pleaded, that his dismissal without notice and without cause was a breach of his Service Agreement and/or amounted to a statutory unfair dismissal, because that in itself would not necessarily be a breach of the Overriding Principle.

320. Thus I must consider whether his removal was a breach of the duty of good faith or a breach of the duty of co-operation. In my judgment it was neither. The continued employment of Mr Smale was not essential to SGP's performance of its duties under Sch. 3. Whilst Nickleby and SGP plainly anticipated that Mr Smale would become and remain a valuable member of the SGP management team and drive through the adoption of Nickleby models so as to achieve cost savings and relevant profits, SGP was not committing to doing so even if it came to believe - as Mr Elliott plainly did - that Mr Smale was not performing as anticipated. There is no basis for any suggestion that SGP cynically chose to dismiss Mr Smale either because he was not willing to have the contingent payment claim bought out or because it wished to be free from any obligation to perform its obligations under Sch. 3. I am satisfied that Mr Elliott, with the sanction of the Johnsons board, dismissed Mr Smale because he did not believe that his contribution justified his retention, as well as because he was frustrated that Mr Smale was - based on my findings correctly - taking an entirely unrealistic stance as to the valuation of the contingent payments claim based on the prospects of introducing Nickleby models. He may have been right or he may have been wrong as regards his assessment of Mr Smale's contribution, although again on my assessment he was right, but even if he was wrong that does not mean that this was a breach of the duty of good faith.

321. In case I am wrong, I shall go on to consider the other principal issue, namely whether his dismissal had the consequences identified.

322. The background is that Nickleby had developed a good relationship with Cunningham Lindsey and identified opportunities to secure business for SGP through that connection. It is clear that SGP was positive about this opportunity; for example on 27 June 2012 Mr Yelverton was reporting to Mr Smale and Mr Holley the outcome of a positive meeting with Cunningham Lindsey, attended by Mr Elliott, at which there is no hint of any lack of enthusiasm on the part of Mr Elliott. He also reported on a successful meeting with ARIM.

323. In my judgment this claim fails at the first causation hurdle in terms of the pleaded case, because there is clear evidence that in fact it was not Mr Smale's dismissal which led to these proposals not being taken up. Before Mr Smale's dismissal, Mr Holley had already sent an email on 13 November

2012, raising a query about whether issues about service delivery on existing work had been resolved and asking who was responsible for selling SGP's services to Cunningham Lindsey. Ms Klare and Mr Sherrington both responded the same day, saying that in their view SGP did not have the contractor capacity to undertake this extra work, so that if a decision was taken to pursue the work it would be necessary to "source a wide range of new suppliers … more suited to insurance jobs and to involve Mr Singleton in the discussion. Mr Holley replied that he was concerned that the extra business on offer from Cunningham Lindsey could not be secured without a positive decision being taken to do the work necessary to agree and implement a strategy. Mr Singleton's email later the same day agreed that that a discussion and decision was required as to whether the approach had sufficient value to be viable. There is no evidence that this was taken further, whether by Mr Smale before his dismissal (he was copied into the last email) or anyone else before or afterwards.

324. In short, these emails do not in my view indicate any positive intention on SGP's part to block the approach. They were pointing out, perfectly reasonably, that until it was known how profitable the work would be and unless SGP had established that it could source the resource to undertake the work it was not possible to make a decision whether or not to pitch for the work.

325. There is no evidence that this was taken up either by Mr Holley as the remaining employed covenantor after Mr Smale's dismissal or by Mr Smale, either by writing to Mr Elliott to make a formal complaint or to request a Governance Panel meeting to consider the matter.

326. As before, Nickleby's essential case is that SGP was obliged to follow through every proposal which was submitted by Mr Smale, no matter how lacking in detail and no matter how much time and effort was required to bring a proposal even to the point whether a considered decision could be taken to seek to implement the proposal, or how much time and effort would be needed to pitch the project to a client and/or how much time, effort, cost and risk would be involved in implementing the proposal. As before, I reject that submission. There is no evidence of a breach of the Overriding Principle causing any loss in this respect.

327. Further, as regards ARIM, it is common ground that the project proceeded and was completed, apparently successfully. However, there was a problem discovered in March 2013, as explained in Mr Singleton's email of 3 May 2013 when it transpired that ARIM was alleging that the work had been done badly by the contractor used by SGP and that SGP should have to bear the remedial costs.

328. On 31 May 2013 Mr Singleton produced and sent a detailed reply which confirmed that the contractor selected by SGP (previously used by Nickleby) was specialist, approved and accredited and that there was "every reason to believe that the overwhelming majority of this work has been carried out robustly". Some isolated errors were noted and accepted and were being resolved by the contractor. A meeting was arranged to discuss and resolve. Given the unqualified tenor of this letter, even allowing for an element of defensive position taking, it was surprising to hear Mr Singleton and others suggesting that in some way the problem was all due to Mr Yelverton making a poor selection of contractor on the basis only of cost or of Nickleby in approving this contractor before it was taken over by SGP.

329. Nonetheless, given that the evidence shows that as a result of the remedial costs incurred this contract was not in the end profit making the claim cannot succeed. Nor can it be said that the lack of expansion of the service provided to ARIM as referred to in Mr Smale's principal witness statement at [117] was due to anything other than the unfortunate problems encountered with the provision of this service.

330. Further, as regards Bigwood the evidence of Mr Morris, which I accept as supported by contemporaneous documents, is that in the event a modest contract was obtained but no payment was ever received so that no profit share is due.

331. In the circumstances, and even if I was wrong in my above conclusions, I would have not been satisfied that Nickleby had established a loss of a real and substantial chance or that there was sufficient evidential material to justify an award of damages.

O. The certificate and expert determination defences.

332. For the reasons I have already summarised in relation to the relevant legal principles, the certificate and the expert determination defences cannot apply here.

333. As regards the paragraph 22(6) claim, in relation to the certificate of 12 June 2014 there was, as I have already recorded in the Overview, no discussion at the meeting about, let alone any agreement or a vote upon, the amount properly due by way of contingent payment. As appears from the minutes, the purpose of the certificate was to ensure that the inclusion of the contingent payment amount accepted by SGP as due in relation to TGI Fridays in the reconciliation was recorded. In those circumstances, it would not be a valid certificate for any purpose.

334. As regards the subsequent certificates the position is even worse, since there was not even a Governance Panel meeting, let alone a discussion or agreement or vote.

335. It also follows that in the absence of a valid certificate the trigger for the invocation of the expert determination procedure under clause 5 does not arise, which is a further and separate reason for rejecting the defence in this respect.

336. Finally, on any view these defences do not and could not have applied to the claims for damages for breach of the Overriding Principle.

P. The transitional breach claims - the BSA, the TSA and the Bare Licence and relevant factual findings.

337. As indicated, there are 6 further and separate claims comprised within the transitional breach claims.

338. The first four are all generally concerned with allegations that SGP mismanaged the "run off" process for dealing with Nickleby's financial affairs post-merger. The fifth alleges breach of the bare licence to occupy and the sixth alleges breach of the TSA in relation to Nickleby's right to access relevant business records post-completion.

339. In a similar way to in relation to the contingent payment claims it is most convenient to begin by identifying the relevant contractual requirements and then to make factual findings relevant to these claims, including some general findings in relation to the quantification of the claims: (a) the BPA; (b) the TSA; (c) the Bare Licence; (d) relevant factual findings; (e) the quantification of the claims.

(a) The BPA.

340. Under clause 2 of the BPA Nickleby agreed to sell to SGP: (a) the business; (b) the assets; (c) the goodwill; and (d) the records (all being defined terms). Expressly included from the sale were: (a) Nickleby's cash in bank; and (b) the book debts (defined as all debts owed to Nickleby at completion in respect of the business). The goodwill as defined included the right to carry on the business under the "business names", which as defined included "Nickleby" and other associated names but not the actual limited company name of "Nickleby & Co Ltd". The assets included the IT system, which under the wide definition of that term and pursuant to Sch. 9 undoubtedly included the EMS software and all related databases in their totality. They also included the contracts, which as defined included the IT contracts which, under Sch. 9, included the Exchequer system, as reaffirmed under Sch. 10

where the software licences included Exchequer[3]. The records were defined as including the books and accounts and all other documents, paper and records relating to the business.

341. Under the other operative provisions of the agreement: (a) clause 7 provided that collection of book debts and payment of creditors (defined as debts and accrued charges owed by Nickleby as at the completion date) should be dealt with as provided in the TSA; (b) clause 8 made provision for the apportionment of periodical charges and outgoings and for advance payments for services to be provided after completion to belong to SGP; (c) clause 9.1 required SGP to indemnify Nickleby against various post-completion liabilities, including under 9.1.3 "all debts liabilities and obligations incurred by the Buyer in connection with the operation of the Business after Completion"; (d) clause 9.2 required Nickleby to pay its creditors "as soon as reasonably practicable after completion"; (e) clause 12 provided for the contracts to be assigned to SGP; (f) clause 25.2 required Nickleby to assign licences to use third party software (as defined, being software subject to a licence to Nickleby to use in the business).

342. Schedule 4, entitled "Completion", contained in paragraph 2 a list of actions and obligations after completion, including: (a) mutual obligations to issue a statement to customers and suppliers informing them of the business transfer; (b) a specific obligation on SGP's part to "give to the Buyer reasonable access during business hours to the books, accounts, records and returns of the Seller relating to or in connection with the Business as the Buyer may require (including the right to take copies and extracts on reasonable advance notice) and shall keep them in good order".

(b) The TSA.

343. The TSA contained a number of separate provisions of which those of relevance to this case include the following.

344. Clause 3.1: "The Seller shall not, save with the prior written consent of the Buyer, transfer, use or dissipate the Completion Payment or the Merger Savings Payment to such extent or in any way which would hinder the payment in accordance with their terms of the Creditors." In other words, these payments were to be used so as to enable Nickleby to perform its obligation under clause 9.2 of the BPA (above).

345. Under clause 4 Nickleby agreed not to make payments exceeding £2,500 from its bank accounts during year 1 without the authority of SGP's finance director or head of corporate finance, who should be added to the mandate. This clause was obviously intended to police clause 3.1. By clause 11 Nickleby was entitled to have the mandate changed again upon payment in full of the creditors.

346. Under clause 6.2 SGP was obliged to use reasonable endeavours to collect all Nickleby's book debts and pay them into its bank account. By clauses 6.4 and 6.5 this did not extend to taking steps to enforce payment or answering detailed queries or challenges to the book debts other than by request and agreement. There was a further provision in clause 6.8 for further action to be taken by both before any legal proceedings were to be issued. Clause 6.3. provided a procedure for allocating payments made where the debtor owed monies to Nickleby and to SGP. Clauses 6.6 and 6.7 provided for each to hold on trust for the other any payments received by it which were properly due to the other. Clause 6 was therefore intended to provide a detailed and compendious code for the collection by SGP of Nickleby's debts, whilst recognising that debtors might make mixed payments and that Nickleby might also receive payments of amounts due to SGP.

347. Under clause 7.2 SGP was obliged to "direct sufficient of its staff" (including staff transferred over from Nickleby) and "make sufficient resources available for sufficient time" to "procure that Nickleby paid from its bank accounts each of the creditors within the relevant time agreed for each

[3] In his note dated 10 December 2012 Mr Grant appears to have suggested that Exchequer remained the property of Nickleby, but it is apparent that Nickleby was able to and did give SGP the right to use Exchequer post-completion.

debt". This obligation was not subject to similar limitations as appeared in clause 6, so that for example SGP was not entitled to abdicate to Nickleby responsibility for dealing with disputed debts, although there was no express provision as to how and by whom debts which did not appear on the aged list required to be provided under clause 6.1 should be dealt with. Clause 7.3 provided that any question as to who should be paid first if Nickleby did not have sufficient funds to pay all of its creditors should be referred to a panel for determination.

348. Under clauses 8.1 and 8.2 SGP was required to provide monthly reports of cash paid in from debtors and cash paid out to creditors and a monthly statement as to book debts collected.

349. Clause 8.3: "The Buyer shall permit the Seller access to the Records relating to the period before Completion, including the right to take copies, and use of the Assets PROVIDED ALWAYS that the Seller shall use all reasonable endeavours to limit disclosure of any confidential information or any other commercially sensitive information."

350. The proper ambit of clause 8.3 has caused some difficulty. It is common ground and I am satisfied that access to the records included an obligation to provide access to EMS and Exchequer. However, there is a dispute as to whether or not this obliged SGP to provide such access: (a) remotely, from premises other than SGP's business premises; (b) for an unlimited time period.

351. Clause 2.6 of Schedule 4 to the BPA assists in making explicit what I am satisfied would be implicit anyway, which is that the access must be reasonable.

352. Since the question as to what was provided complied with this contractual obligation is a fact-sensitive question I shall address it in relation to the specific sub-claim where it arises later in this judgment.

353. It can be seen from the list of IT service contracts in Sch. 9 to the BPA that a business known as Eircom managed hosting services for EMS. The servers were located in Eircom's premises in Dublin. Given the wide definition of assets it is clear that Nickleby was entitled to access EMS and Exchequer in order to have access to the records insofar as held on EMS and Exchequer.

354. Clause 10 dealt with Leamington Court, providing by clause 10.1 for the parties to enter into the Bare Licence and by clause 10.3 for SGP to reimburse Nickleby for "rent, insurance rent, service charge and dilapidations or for any damage or loss arising under the Lease, and rates due to the local authority, other than liabilities arising from the actions of the Seller, arising from Completion up to the end of the contractual term". The Lease was not defined in the TSA or the BPA but was defined in the Bare Licence (see below).

355. Finally, clause 15.1 stated that: "Unless otherwise provided, all costs and expenses in connection with the negotiation, preparation, execution and performance of this agreement, and any documents referred to in it, shall be borne by the party that incurred the costs".

356. Mr Wright submits, and I accept, that this would not operate to exclude any liability on the part of SGP for damages for breach of the obligations assumed by SGP under the TSA. It follows, however, that a claim by Nickleby for management time or other expenditure has to amount to a valid claim for damages for breach of contract to be recoverable.

(c) The Bare Licence.

357. By clause 2.1 Nickleby permitted SGP to occupy "the Space" as a bare licensee, by clause 2.2 paying a licence fee equal to all rents payable by the tenant under the Lease.

358. The Space was defined as a part of the Property, itself defined as that demised under the Lease, which was the lease under which Nickleby was tenant of the relevant premises of Leamington Court.

359. Under clause 2.3 SGP covenanted that it should observe and perform all tenant covenants in the Lease and indemnify Nickleby against all "costs, expenses, damages, proceedings and losses suffered or incurred by the Seller arising from any breach, non-observance or non-performance of the tenant covenants in the Lease (other than the covenants relating to payment of the rents and alienation) by the Buyer its agents servants invitees or employees".

360. Finally, under clause 2.4 the licence was terminable by 3 months' written notice by either party.

(d) Relevant factual findings.

361. It must have been, and was, obvious to Nickleby and SGP that the integration of the Nickleby business into the SGP business was capable of causing problems, and that the scope for problems would be exacerbated unless the integration was carefully planned and carefully implemented. The relevant provisions of the BPA and the entire TSA represented the parties' attempts to address anticipated problems.

362. The strategy, as appears from these contractual provisions, was for SGP to take over the entire business from completion date and to deploy its staff (including the TUPE'd over Nickleby staff) to collect the Nickleby book debts and deal with the payment of Nickleby creditors (albeit that actual payment would need to be made from the Nickleby bank account by authorised mandate holders) and with apportionments and also to provide regular updates to Nickleby on progress and to allow it access to the relevant records on a continuing basis. It was not anticipated that payments made by clients for work done post completion should need to be paid into Nickleby's bank account, however the risk that this might happen nonetheless was anticipated and the legal consequences provided for by imposing a trust over any such monies. Since, I infer, it was not contemplated that SGP should pay its creditors from Nickleby's bank account no express provision was made should that happen. It was anticipated that there might be Nickleby's book debts which were contested and thus could not readily be collected and that in such circumstances the responsibility for collection would pass back to Nickleby. No similar provision was made in relation to any difficulties which might be experienced in paying creditors, no doubt because no particular difficulty was anticipated.

363. As I have already indicated, Nickleby needed to use EMS and Exchequer operating together in order to ensure that its financial administration worked smoothly. However, although SGP was granted the right by the BPA to use both, and did so, it plainly decided - for perfectly understandable reasons - to use its own financial software package, **Coda**, to deal with payment of contractor invoices and with client invoicing in relation to work undertaken post-completion which was its contractual responsibility and for which it was entitled to payment. It ought, however, to have been obvious to SGP that for this to work smoothly from day one post completion: (a) its IT department would need to undertake advance planning to satisfy itself that EMS and Coda would operate compatibly from day one; and (b) its finance and administration department would need to undertake advance planning to satisfy itself that VAT and other issues were properly addressed from day one, for example by giving thought to how post-completion work would be ordered and invoiced and by seeking to ensure, so far as practicable, that contractors and clients were made aware of the transfer and began addressing their invoices and payments to the correct entity.

364. However, SGP has adduced no evidence, documentary or otherwise, which indicates that any or any sufficient thought was given to these issues or that sufficient advance planning was undertaken. Whilst I have already found that it would not be appropriate for me to draw adverse inferences against SGP for not calling Mr Pantling or Ms Lawrence, nonetheless the fact is that neither gave evidence and no documentary evidence has been disclosed which indicates that any advance analysis or planning took place.

365. Mr Latimer sought to deflect blame for this by relying on an email from Mr Holley to Mr Elliott dated 22 March 2012 in which he said "I have an integration plan".

366. However, there is no suggestion or evidence that Mr Elliott had previously tasked Mr Holley with this specific role. Whilst it is apparent from his job description as shared services director that he had the lead role in the integration of the two businesses, there is a difference in my view between an integration plan which addresses the integration of the two businesses at a high level and one which addresses the detail of the planning and implementation of the financial and administration aspects of the integration, as specified in detail in the TSA. The latter was more obviously a matter for Ms Lawrence to risk assess as part of the overall integration plan, as Mr Holley said in cross-examination. I accept Mr Holley's evidence that he put together a draft plan at this stage because he was concerned that Mr Elliott, who had said that he would lead the transition, had not produced anything himself or asked anyone else to do so. As he said, the plan he produced was a high level plan containing a number of different activities, not just finance and accounts.

367. In any event, it was not a job which was Nickleby's responsibility as a company to perform. It could not have been delegated to Mr Holley in his capacity as representative of Nickleby. It was an SGP obligation, which could only be performed by individuals, including ex-Nickleby individuals, acting in their capacity as SGP employees. As Mr Smale said in cross-examination, Nickleby could not undertake the planning and implementation since it did not, as a company, know how SGP planned to integrate the financial and administration sides of the business.

368. The picture reveals that SGP did not undertake any proper advance planning nor did it implement the financial and administration integration so as to minimise the problems some of which were, I accept, inevitable in such an integration.

369. Thus on 13 March 2012, in response to a request from Ms Lawrence, Mr Holley had asked for invoices to be produced through Coda with a covering letter which contained information at the bottom making clear that the invoice was rendered by and should be paid to SGP t/a Nickleby. However it became clear that it was not possible for EMS and Coda to operate compatibly without further detailed input from the IT department. This process took a prolonged period to be achieved, so that it was not until around 21 May 2012 that data for work recorded in EMS was being sent to Coda and not until 31 July 2012 that invoices for such work were also being sent to Coda: see Mr Grant's report of 10 December 2012. In the meantime, neither Mr Holley's sensible suggestion nor some other suitable alternative was taken up.

370. In an email sent on 15 March 2012, after being chased by Ms Lawrence (who herself had been chased by Ms Boverhoff), Mr Sherrington said that only earlier that week had contractors had been informed that Nickleby's business had been purchased but that the contractors should follow the same invoicing process. Thus, invoices were still being sent in to Nickleby without the contractors being asked to separate the invoices out into pre-completion work to be addressed to Nickleby and post completion work to be addressed to SGP t/a Nickleby.

371. I accept Ms Boverhoff's evidence that she suggested an alternative to Ms Lawrence, which was for SGP to create a temporary separate ledger within Exchequer through which it could connect with EMS, thereby allowing post-completion contractor orders and invoices to be processed and paid and post-completion client invoices to be sent out and accounted for separately from Nickleby. Neither Ms Lawrence at the time nor SGP in its witness evidence for this case has explained why it was not possible to adopt Ms Boverhoff's suggestion. In cross-examination Mr Grant suggested that without a detailed investigation he did not know whether this would have worked but, with respect to him and notwithstanding his familiarity with operating Exchequer, that evidence seemed to me to be no more than surmise, especially when: (a) his suggestion that the difficulty might arise from the difficulty between differentiating between the treatment of pre and post-completion work would always have arisen whichever system was being used; and (b) SGP had the benefit of the knowledge and skills of the ex-Nickleby staff, particularly Ms Boverhoff of course, in that regard.

372. It may very well be that Ms Lawrence believed that the IT department would resolve the lack of interface between EMS and Coda sooner than they did, although there is no contemporaneous documentation to this effect, but nonetheless the fact remains that there was - I am satisfied - a perfectly practicable solution which was not taken up, in circumstances where there is no evidence that the issue as to whether there would be difficulties with Coda interfacing with EMS or, if not, whether there were any useful short term alternative solutions, was investigated by SGP as part of any pre-completion integration exercise, notwithstanding that it is clear that Mr Pantling was given access to EMS as part of the due diligence process in order to assess its capabilities.

373. On 21 March 2012 Ms Lawrence had emailed Mr Elliott saying "the key is that we get EMS talking to Coda so that supplier invoices can be uploaded" and "until then we have to continue allowing suppliers to bill Nickleby". Her completed version of Mr Holley's integration plan, which she sent to him on 28 March 2012, shows that the plan was dependent on EMS being able to interface with Coda. On 18 April 2012 Ms Lawrence emailed, saying that the problem of the lack of interfacing between EMS and Coda still remained.

374. An email from Mr Holley to Ms Lawrence dated 26 July 2012 is reliable contemporaneous evidence, which I accept, that until recently he had been unaware that his suggestion as to how invoicing should be worded going forwards had not been taken up. Ms Lawrence's response suggested that the difficulty was a VAT issue and that it had been resolved with effect from 1 May 2012 by invoices being entered into Coda. I accept that by early May 2012 the problem had largely been resolved going forwards, with the first invoice being sent out on SGP heading through Coda on 9 May 2012, albeit with a number of continuing invoices slipping through the net subsequently

375. Although it follows that this period of invoicing in the name of the wrong company was of less than 3 months' duration, given the scale of the business - involving hundreds of separate jobs going through each week with approximately £1 million of invoice values and thousands of lines on the eventual reconciliation spreadsheet - it did have substantial consequences in terms of seeking to resolve the problem going forwards, as will be seen.

376. It was suggested to Mr Smale, Mr Holley and Ms Boverhoff than in their capacity as officers of Nickleby they had acquiesced in this arrangement. I do not accept this. Mr Smale was not really involved. Mr Holley only became involved in his new role as shared services director at SGP because he was concerned that there was no integration plan and no-one at a sufficient high level dealing with matters. Ms Boverhoff was acting as employee of SGP under the direction and control of Ms Lawrence. They were not asked in their capacity as officers of Nickleby to endorse this arrangement, nor did they do so. That would have been a subject for a Governance Panel meeting, not the informal discussions which actually took place.

377. Nonetheless I accept that an email from Ms Lawrence to Ms Boverhoff dated 17 July 2012 and a further email from her to Mr Holley and others the following day show very clearly in my view that she was seeking to progress the Nickleby account reconciliation in an effective and a fair way, with a view to ensuring that an internal audit planned for the following week worked well and enabled the £200,000 merger savings payment to be made to Nickleby. Her approach was endorsed by Mr Elliott by email on 19 July 2012.

378. An email from Sir Jonathan Portal to Mr Holley and Mr Smale the next day shows that they were aware that if the Nickleby account was used to pay everything that was due to SGP (by which he meant the payments into the Nickleby account which represented payments for post-completion work) there would be insufficient left to pay Nickleby's creditors.

379. These emails are illuminating, in that they show that it was known and accepted on both sides that: (a) the Nickleby bank account comprised a mixed fund, including payments due both to Nickleby and to SGP; (b) it was necessary to undertake a reconciliation in order to separate out pre-completion

and post-completion receipts and payments, and that this was being progressed; (c) due to the imbalance between payments due to Nickleby and SGP, compared to payments out to Nickleby creditors and other Nickleby payees, there was insufficient funds in the account to enable Nickleby to pay what it owed and to pay SGP what it was due; (d) the only way of "squaring the circle" was to allow the £200,000 merger savings payment to be credited against what was due to SGP. There is no sensible basis in my view to criticise SGP in the way it was seeking to address these problems which were however, as I have said, substantially of its own making.

380. By 27 July 2012 the SGP employee who had undertaken the internal audit was reporting that in excess of £200,000 had been paid into and remained in the Nickleby account as representing monies due to SGP. A meeting was held on 30 July 2012 involving Mr Elliott, Mr Holley, Mr Smale and Ms Lawrence to discuss this issue, which recorded that Nickleby had already received the benefit of £107,000 of SGP monies to pay Nickleby debts, so that only a further £93,000 of the £200,000 merger savings payment could be made available to Nickleby. This was not challenged nor could it sensibly have been.

381. In August 2012 Mr Smale asked for and received written advice from a firm of solicitors as regards Nickleby's concerns that SGP was wrongfully trading post-completion business through Nickleby and was in breach of its debt collection obligations. The advice as regards the former was that Nickleby should take prompt steps to ensure that this ongoing trading did not continue and Mr Smale duly sent the advice through to Mr Elliott.

382. There was some debate in September 2012 as to whether it was necessary or appropriate to "unwind" the transactions under which Nickleby had ostensibly invoiced and been paid for SGP contracts, both for VAT purposes and for the wider purpose of any prospective contractual or other liability. I can see that this would have been the best solution; however I can also understand the practical obstacles to so doing. In particular there was understandable nervousness about the risk of opening up a can of worms as regards submitting revised VAT returns. Further, it would have been necessary either for SGP to give Nickleby suitable indemnities against any liabilities arising from this wrongful trading or obtaining the agreement of the contractors and the clients to a retrospective assignment. In my judgment, it was not unreasonable for Nickleby to be disinclined to go down this route.

383. As regards chasing debtors, Mr Smale was cross-examined on the aged debtors report as at November 2011 which had been printed out by Mr Holley post-completion. This showed a total outstanding of some £1.2 million at that point, of which some £160,000 was more than 4 months' old. He accepted that most of this older debt would be hard to collect, although he also made the point that some clients, for example Vinci, had negotiated extended payment terms so that not all of the older debt was necessarily uncollectable.

384. On 7 September 2012 Mr Holley emailed Mr Elliott's PA and others, updating the position as regards debtors. His only concern appeared to be the need to assign someone to chase Carillion for payment in the absence on holiday of one of SGP's staff with responsibility for that task. That isolated concern is not indicative in my judgment of a more widespread concern of some systemic failure by SGP in relation to book debt collection.

385. The same is true later in the month, when there was a contretemps because Ms Lawrence complained that Ms Boverhoff had paid a Nickleby debt without agreement and Ms Boverhoff responded that it had to be paid because it was the subject of a court judgment. In an exasperated email Mr Smale suggested that the Nickleby debts should be collected in order to provide funds so that Nickleby could pay its creditors. In a more measured email Mr Holley said that he wanted to tell Ms Lawrence to "get on with collecting our cash", describing the position as "like a Kafka novel". Ms Lawrence replied in a conciliatory and constructive way, saying that staff were working on the debt and that she was willing to meet to go through the list of debtors. On the same day Mr Elliott

emailed to say he would take it up with Mr Morris. This exchange is indicative of a contemporaneous frustration but again does not in my view amount to an assertion from Nickleby, let alone an acceptance by SGP, that SGP was systemically failing to perform its contractual obligations as regards debt collection.

386. As at the end of September 2012 Ms Boverhoff left SGP's employment. It is clear from her evidence that SGP was aware from early August 2012 that she was fed up and wanted to leave and it had been agreed that if she stayed until the end of September 2012 she would be made redundant.

387. After Ms Boverhoff left it appears that primary responsibility as regards payment of creditors was allocated to Ms Jenny Taylor, a client finance manager. There are a number of emails from her, for example one dated 12 October 2012, which indicates that she was undertaking that task at that time in what appears to have been a reasonably diligent and organised manner.

388. There was a further email complaining about a lack of activity from SGP in relation to debt collection from Mr Smale dated 24 October 2012. In my judgment this is likely to be an accurate reflection of a change of approach following the departure of Ms Boverhoff and the involvement of Mr Morris - as exemplified by the latter's email of the same day where he complained - albeit in the context of dealing with a claim by Cunningham Lindsey as a creditor of Nickleby - that he was "becoming increasingly concerned that Nickleby is now taking up a disproportionate amount of SGP resource".

389. Consistent with this email and Mr Smale's evidence there are a number of standard form emails from Jenny Taylor from the end of October 2012 onwards simply redirecting chasing emails from contractors to Mr Smale. In my judgment this demonstrates that SGP had taken the decision not to spend any more time than could be avoided dealing with Nickleby creditors and instead simply to redirect all such correspondence to Nickleby.

390. It is clear from the contemporaneous communications that this had the practical consequence of putting the onus onto Mr Smale, Sir Jonathan Portal and Ms Boverhoff (who had agreed to assist Nickleby after leaving SGP) to deal with creditors. However, SGP makes a good point, which is that since Nickleby did not have enough of its "own" money in its account to pay its creditors by this point, it was inevitable that some negotiation with creditors in terms of agreeing payment terms would have needed to be done by Nickleby anyway.

391. As regards debtors, I am also satisfied that by the end of October 2012 the decision had been taken by SGP not to take any positive steps to chase the outstanding debtors. In early November 2012 Mr Smale produced and sent a document headed "SGP-Nickleby issues", which set out Nickleby's principal concerns arising from what he summarised as the trading position between them being "a mess". This included a complaint about the failure to collect in Nickleby's debt. Mr Elliott responded to Mr Smale by email dated 12 November 2012, in which he asserted that at a recent meeting between Mr Elliott, Mr Smale and Tim Morris it had been shown that "SGP have collected over £1M of Nickleby debt, there is less than £100,000 outstanding" save in relation to what was a clear reference to an invoice to Cultural Capital Limited, which I will address below.

392. Neither Mr Smale nor any other Nickleby witness was able to gainsay this statistic, which was confirmed by Mr Elliott in his evidence. Although I accept Ms Boverhoff's evidence that she had probably been responsible for collecting in most of this debt before she left SGP, nonetheless the fact remains that she did so as an SGP employee, paid by SGP as such, so that Nickleby cannot complain about that. Although Mr Smale suggested that there might have been other pre-completion work items entered into within EMS for which invoices had not even been sent, let alone collected, that seems to me to be pure speculation, in circumstances where ex-Nickleby personnel including Ms Boverhoff had been working as SGP employees with access to EMS for over 6 months post-completion and had continued to have access to EMS for a considerable time thereafter. I am

satisfied that this evidence does show that SGP had indeed collected in the vast majority of the Nickleby debts before the time when it effectively disengaged from the debt collection process.

393. Nickleby has failed to identify any specific debtors which it contends that SGP could and should have collected had it continued to perform its obligations under the BPA and TSA. It has produced a schedule of outstanding debtors as at September 2015, which records less than £25,000 as outstanding. Nickleby has not identified any of these debts as ones which could and should have been collected by SGP, nor has it identified any which have been written off as a result of any breach of duty by SGP. Nickleby cannot with any credibility simply contend that all debts could and would have been collected on this basis. Any such argument is undermined by the contemporaneous comment made by Ms Boverhoff to Sir Jonathan Portal, recorded in his email of 25 July 2012, that some of Nickleby's debts will be "very difficult".

394. I do accept that, as demonstrated in cross-examination of Mr Grant, Nickleby had – through Ms Boverhoff's endeavours I am satisfied – collected in a further £90,000 of debt in round terms from October 2012 to February 2013. I am satisfied that this justifies a finding that Nickleby had to use Ms Boverhoff's services post September 2012 to undertake work which ought to have been done by SGP before or during this same period.

395. The most substantial outstanding book debt related to a company known as Cultural Capital Ltd ("**Cultural**"). It appears that Nickleby had entered into a contract with Cultural on 6 February 2012 which granted it a license to use and to re-sell EMS for a term of 5 years from 1 January 2012 in return for a payment of £300,000 plus VAT, with a 30% deposit payment of £90,000 being due within 90 days and the balance of £210,000 by 1 May 2012. These amounts are shown on the aged debt list. Cultural is a company which is owned by a Mr Bowles, to whom Mr Holley sold his shareholding in Nickleby and who has had a longstanding connection with Mr Smale. By July 2012 Mr Holley was expressing his concern to Mr Smale that the balance needed to be collected. There was no reply from Mr Smale which would have been consistent with his evidence, given for the first time orally in cross-examination, that the reason why the debt was not paid by Cultural was that the software was not delivered by SGP. I am unable to accept this as the explanation, given the complete absence of contemporaneous or indeed any evidence to support it. In any event, there is no pleaded or other case advanced pre-trial against SGP that the reason why Cultural did not pay this invoice was due to SGP's culpable failure to deliver the software, so that SGP could have come to trial prepared to answer any such case.

396. In the circumstances, it is impossible in my judgment for Nickleby to prove either that specific debts were not collected sooner than they should have been, or that specific debts were not collected when they could and should have been, or that - save for the time spent by Ms Boverhoff from October 2012 onwards- Nickleby was compelled to commit significant time resource as a response to any failure by SGP to perform its contractual obligations.

397. The relationship in relation to the financial reconciliation also deteriorated sharply at the end of October 2012, when Mr Elliott came under pressure from the Johnsons board to obtain payment from Nickleby of an amount of some £170,000 which, according to Mr Grant, was due as at that time by way of the reconciliation work which both he and B&S were undertaking. Mr Elliott emailed Mr Smale on 30 October 2012 to ask, in a rather brusque manner, when that sum would be paid. In turn Mr Smale emailed on the following day to say that he had just discovered that Ms Lawrence had made payments from the Nickleby account to pay SGP liabilities without authority - this is addressed in more detail below as claim 3, but it is apparent that it was a major further source of friction.

398. In around November 2012 B&S produced an interim report to Nickleby on the transitional arrangements. They identified in their summary at 1.2 the failure to adhere to the transitional framework as envisaged by the BPA and TSA and the consequential difficulties. They did not

criticise the approach taken by Mr Grant in his spreadsheet but noted that it required updating to cover the period post 31 August 2012 and to complete the reconciliation process in relation to certain outstanding issues. It identified that there were over 10,000 transactions occurring in the period from completion to 31 August 2012, underscoring the scale of the task.

399. In an email sent to Mr Smale on 7 November 2012 B&S reported that subject to some small points they agreed Mr Grant's analysis and their conclusion was that as at 31 August 2012 SGP was owed just under £100,000 by Nickleby even after giving credit for the £200,000 merger savings payment. This is significant because it shows that the effect of the "wrongful trading" was not to deprive Nickleby of funds in its bank account but to increase the funds in the account substantially beyond those which would have been there but for the intermingling. Whilst it may be that Mr Smale took false comfort from this balance increase and made payments from the account for Nickleby purposes which left the balance insufficient to allow SGP to be paid what it was due, I am satisfied that he cannot lay the blame for this at SGP's door. It ought to have been possible for him, assisted with Ms Boverhoff, to ensure that he was aware - at least in round terms - as to how much of the account represented Nickleby funds and to use the account accordingly.

400. On 10 December 2012 Mr Grant produced a report into the post-completion accounting which appears to be a detailed and balanced analysis of what happened and why and with what consequences. The only omissions are any investigation as to why it was not possible either for Coda to be aligned with EMS from the start or as to why it was not possible to adopt Ms Boverhoff's workaround, although I am prepared to accept that this was not Mr Grant's concern at that point in time anyway.

401. In around January 2013 the relevant members of the finance team were asked to set down what tasks they had performed on behalf of Nickleby. This is relied upon by SGP as demonstrating the time and effort it put in to dealing with Nickleby matters, but in my judgment if anything it does the opposite. Ms Griffiths appears to have dealt with ongoing invoicing issues, but gives little hard detail and no assessment of how much time she spent or with what results, and I accept Ms Boverhoff's evidence that she was unable to spend very much time on this role given that she also acted as PA to a Mr Hall. Ms Marten-Hale appears to have acted as little more than a conduit for creditor calls which she passed to Jenny Taylor, who described her role as "agreeing and investigating supplier statement and queries", but gives no more detail, and the same is true of the reference to "credit control" in "chasing outstanding debt list supplied by Nickleby".

402. In my judgment the problem was that even though SGP had been aware since early August 2012 that Ms Boverhoff would be leaving at the end of September 2012 they were unable or unwilling to invest the time and money to ensure that she was replaced by staff who she could show how the Nickleby system worked via EMS and Exchequer and, thus, handle the queries which continued to arise as a result of the post-completion Nickleby invoicing.

403. At the Governance Panel meeting in January 2013 a revised reconciliation was referred to. The details as shown in the version emailed on 1 February 2013 show that the amount due from Nickleby to SGP had correspondingly reduced as time passed and rent payable by SGP to Nickleby was credited off the amount. In short, the longer that time went on the less the amount due would be, leaving aside any other adjustments.

404. At the Governance Panel meeting in December 2013 SGP handed Mr Smale a letter setting out its current position as regards the reconciliation exercise, which was ongoing, and it was agreed that Mr Grant and B&S would continue their work.

405. By March 2014 agreement had been reached in principle. Mr Smale was keen to ensure there was clarity as to the scope of the agreement, stating on 28 March 2014 that whilst he was happy that the agreement covered all items considered in the audit process undertaken by Mr Grant and B&S he did

not want Nickleby to be "estopped from pursuing claims you have rejected". Following this exchange it was agreed which items were covered by the reconciliation and the agreed payment of £46,662.33 was made by SGP to Nickleby. I accept therefore that there is no factual basis for any submission that the agreement of the reconciliation in some way also amounted to a compromise of the claims which are advanced in these proceedings.

(e) The quantification of the claims.

406. I must also make some findings about the quantification of the claims made by Nickleby under the transitional breach claims. They all comprise, either solely or in addition to specific money claims (which I will address under each separate claim), claims for "management time and professional fees", totalling £847,511 and particularised as follows: (a) Mr Smale - £429,511; (b) Sir Jonathan Portal (3,312.5 hours @ £100 per hour) - £331,250; (c) Ms Boverhoff - £37,915; (d) B&S - £49,050. They also include office overheads of £160,000 on the pleaded basis that "As a result of the administrative burden placed on Nickleby due to SGP's breaches, Nickleby also had to maintain an office and thus incurred overheads of £160,000 between January 2013 and December 2017 inclusive".

407. As regards the claim for management time and professional fees, in its Further Information Nickleby said that it was impossible to provide a precise breakdown in relation to each separate claim because the issues were "dealt with concurrently", but that its estimated breakdown was that 75% related to claim 2 and 5% each related to claims 3 - 7. In his witness statement Mr Smale acknowledged that he did not record the time he spent on individual activity due, he said, to the administrative burden required, and that the apportionment of his time was his "best estimate". There is no apportionment from Sir Jonathan Portal or Ms Boverhoff either, which is not surprising since they would have been unaware of any need to do so.

408. It is sensible to begin by summarising the relevant legal principles, as to which there is no real dispute. A company such as Nickleby may incur the cost of employing third parties in order to undertake work to seek to deal with the consequences of a breach of contract or other legal wrong by a defendant. Alternatively, a company may divert its own employees to undertake such work. In the former case, subject to the usual need for proof that: (a) the work was reasonably necessary; (b) the work was instructed; (c) the work was undertaken solely or principally for that purpose; and (d) the work was paid for or there is a genuine liability to pay for it, no particular difficulty in claiming or recovering these costs arises. The claim would be true where the company incurs the cost of obtaining the use of some property for the same purpose. More difficulties may arise where the work is undertaken by an employee or by a director employed under some form of consultancy agreement to perform a number of duties, where it is said that the employee or director had to divert their time and attention from their normal duties to undertake the work the subject of the claim. Again, the same is true where the company uses property which it already owns. As to such cases, the legal principles are now reasonably settled and are helpfully summarised in Keating on Construction Contracts 11th edition at [9-030] as follows:

> "The expenditure of managerial time in remedying an actionable wrong done to a trading concern can be claimed as special damages, but the extent to which the trading routine was disturbed must be proved by reference to, for example, records of the time spent by managerial staff on particular projects. Where wasted managerial time is claimed it is not necessary to prove that the claimant has incurred additional expenditure or that it has suffered a loss of revenue or profit as the result of the diversion of management resources. A claimant must however prove that the expenditure of management time in question was caused by the wrong relied upon. In *Aerospace Publishing v Thames Water* [2007] 110 Con LR 1 the Court of Appeal reviewed earlier authorities and concluded that a claimant may fail under this head of loss if it fails to adduce evidence which it would be reasonable to expect it to advance including that the event

> caused significant disruption to its business. Unless the defendant can establish to the contrary, it is reasonable to infer from the disruption that had the relevant staff not been diverted in the manner alleged, they would have generated revenue for the claimant in an amount equal to the cost of employing them."

409. In this case three of the four claims are made to seek to recover the time costs of third parties, namely B&S, Sir Jonathan Portal and Ms Boverhoff. Apart from issues of causation and quantification and (in the latter two cases, proof of the contractual agreement to pay and payment) no particular issues of principle arise.

410. As regards Mr Smale, the position is more complicated. That is because although the claim is advanced as a claim for management time, in fact on examination at trial it became clear that this was an inaccurate statement of the true position. After completion of the BPA, whilst Mr Smale remained a director and shareholder of Nickleby there is no suggestion that he remained employed or engaged or paid by Nickleby for any work done for Nickleby, and instead he was employed full time and paid on that basis by SGP. It was known that he would continue to be involved in the pursuit of the claim by Nickleby against Somerfield and there was no objection to that, but it was expected that this would be done in his own time. There is no suggestion that he continued to be employed or engaged by Nickleby in relation to the pursuit of this claim or that he was entitled to be or was paid in respect of his time under some other arrangement. There is no suggestion that Nickleby intended to or did carry on a different non-competing business after completion or that Mr Smale continued to be employed or engaged or paid by Nickleby in that respect either.

411. A breakdown of his claim has been provided in the total sum of £429,511. This is claimed on the basis of the package which Mr Smale received from SGP before his employment was terminated, namely £100,000 pa plus employer's NI, pension contribution, car allowance and private health, total £128,000. It is stated: "Nickleby salary taken as SGP rate". This amount is claimed in full for the period from the termination of his employment with SGP in December 2012 to the end of December 2015 on the basis that he devoted his full time and attention to resolving the consequences of the transitional breach claims for that period and for a further 2 years at 5% on the basis of Mr Smale's estimate that he spent 1 day per month on matters the subject of these claims over that further period.

412. In cross-examination Mr Smale admitted that he had simply taken his SGP package as a comparator even though he had not been employed by Nickleby post December 2012 on any package, let alone the package he was receiving from SGP. He accepted that he had not kept any records of the time actually spent on Nickleby's affairs in relation to matters resulting (on its case) from the transitional breach claims. He accepted that the claim was advanced on the basis that the essence of his complaint was that he had been required to work full time and then part time over these periods on these affairs as if he had been an SGP employee tasked with resolving them, so that it was reasonable to claim on the same basis. In my judgment that is plainly an impermissible basis for making a claim, in the absence of any evidence that the value of Mr Smale's time to Nickleby can be equated with his financial package from SGP, which in my judgment it plainly cannot be, since there is no suggestion or evidence that what he was doing for Nickleby was comparable with the role he was engaged to perform for SGP.

413. Towards the end of his evidence, in answer to questions from me and supplemental questions from counsel, he confirmed that he had not entered into any new contract with Nickleby post December 2013 under which he was entitled to or was paid for his time spent on Nickleby affairs either in general or in relation to SGP related matters in particular. He said for the first time that he had agreed with Mr Holley in January 2103 that Nickleby could not afford to make any payments to him and that he would not take any money out of Nickleby until its claims against Somerfield and SGP had been crystallised. He did not suggest that any more specific agreement had been reached. It seems to me that this may have been a simple agreement between shareholders not to take any

dividend out of Nickleby until there was sufficient funds to do so. There is certainly no suggestion that it was an agreement for some form of directors service contract on the same financial terms as his SGP contract but providing for deferred payment. Nor is there any suggestion that it was agreed that he should be engaged by Nickleby under some form of consultancy agreement to undertake work for Nickleby in relation to its two claims.

414. In answer to a supplemental question from Mr Wright he was referred to note 7 to Nickleby's financial statements for the PE 30 September 2018 which, to summarise, recorded that it owed £738,000 to "certain suppliers and creditors" (which Mr Smale said meant himself, Sir Jonathan Portal and Ms Boverhoff) which they had agreed not to claim until it could afford to pay them. However, he was not asked to explain on what basis this note had been prepared and approved. There was no such note in Nickleby's previous years' accounts at the time it is said that Mr Smale was working full time on the transitional breach claims. There is no documentary evidence to establish the basis for this liability. If there had been a considered decision by Mr Smale at some specific point in time that his company, Nickleby, should engage him on a paid basis for services provided in relation to its affairs with SGP it is inconceivable that this would not have been recorded and time records kept.

415. In the circumstances, I am satisfied that there was no such agreement and that this is simply a retrospective accountancy device to seek to regularise the position once this substantial claim had been made against SGP and once it was belatedly appreciated that, since it was claimed to be a Nickleby liability, provision would have to be made for it in the company accounts.

416. In cross-examination Mr Smale also agreed that within the period of his claim he had taken, for reasons of personal health, a 3 month sabbatical from work. He argued that it was reasonable to include that within his claim because he would have been entitled to be paid by SGP had he remained employed over that period. Whilst that may very well be true, there is no proper legal basis in my judgment for including this in a claim for management time.

417. Mr Smale also agreed that after his employment had been terminated by SGP he had been involved in pursuing Nickleby's claim against Somerfield, which was not resolved until 2014/2015. Given that he did not suggest that the time he spent on dealing with SGP matters post December 2012 had been separately recorded and allocated as against the time he spent on dealing with the Somerfield litigation, it seems to me to be impossible for Nickleby to recover management time on the basis claimed without Nickleby effectively obtaining payment from SGP for time spent by Mr Smale advancing an entirely separate claim against a third party.

418. In a similar vein, it also emerged from the evidence of Mr Yelverton that after he left SGP in around April 2013 he went to work for another business run by Mr Smale known as Updraft, in which Mr Smale and a small group of other ex-Nickleby employees were also working. Again it must follow that Mr Smale cannot have been working solely on SGP related matters for Nickleby over this period.

419. The absence of any contemporaneous documentary evidence of the time spent and of credit being given for time spent on matters unrelated to the subject of this claim is even more striking, given that by March 2013 Mr Smale had in mind to make these claims, since they were referred to in (and rejected) by Mr Grant in an email and attachments on 28 March 2013. The point which may fairly be made is that by this date, if not before, Nickleby through Mr Smale must have known that it would be necessary to be able to substantiate these claims, both in terms of Nickleby being able to demonstrate a legal basis to recover them and to record the time spent and cost incurred going forwards. It is clear however that Mr Smale has made no serious attempt to do so as regards Nickleby's claim for his own time.

420. The claim for his time is an extremely substantial claim for £429,511. In the circumstances Nickleby clearly cannot credibly assert a claim for all of it. The question is whether Nickleby can assert a claim for some part of it. Leaving aside any need for apportionment as between the individual transitional breach claims, and leaving aside any time which would have been spent dealing with SGP related matters even if there was no breach, the particular difficulty in relation to Mr Smale's claim is that there is, as stated, clear evidence that substantial time was spent by him over this extended period in relation to completely unrelated matters. The complete failure to seek to record and apportion his time is not explained and cannot be justified. Whilst the court has the discretion to make some reasonable rough and ready estimate in a proper case, where it has the material to do so and where the claimant cannot be criticised for not providing more evidence, that simply does not apply here. In the circumstances I am satisfied that it would be unjust to SGP to allow any claim to be made by Nickleby for Mr Smale's time.

421. As regards Ms Boverhoff, Mr Smale's first explanation for seeking to recover her time costs in the attachment to his email of 30 April 2013 was that: "SGP has a specific contractual liability to keep the Exchequer system up to date (Ref the TSA para 8.1 "The Buyer shall provide weekly reconciliations of the Seller's bank accounts, and monthly reports to Seller showing cash received in respect of the Book Debts and monies paid to Creditors and shall update the Seller's Exchequer Accounting system"). SGP's placement of new business through Nickleby and Co Ltd might have stopped but the accounting and updating of the Exchequer system has not. SGP refused to come to an arrangement with Marcia post her exit; Nickleby had to instead. SGP has a straightforward liability to Nickleby to make good the position."

422. She has produced a schedule of the time spent by her on Nickleby work and her expenses from 9 October 2012 through to 5 March 2016 in the total sum of £38,523.84, of which the vast majority (over £36,000) comprise her (entirely reasonable) daily and hourly time charges and the remainder is divided between (equally reasonable) travel costs and a monthly broadband connection cost from April 2014 which, according to her, she claimed because she only took out a broadband connection due to her need for remote access to the IT systems to perform her services in relation to Nickleby's affairs.

423. In cross-examination she said that she had been paid around £27,000 in respect of these claims and had agreed to wait for the remainder. She said that she only had an oral agreement with Nickleby for payment but that she had submitted invoices from which this schedule had been completed. Despite the absence of the invoices or proof of payment I have no reason to doubt the genuineness of this evidence. The sums are modest and there is no reason why Ms Boverhoff would have agreed to give up her time, which it is apparent that she spent from the contemporaneous documents, for free over an extended period.

424. She was cross-examined on the basis that even if the merger with SGP had gone through smoothly there would still have been a need for her to ensure to spend time in ensuring that Nickleby properly accounted for VAT and filed accounts and paid tax as required in relation to the PE 31 March 2012. This is clearly true. It is also true that regardless of these claims Nickleby has in fact carried on some (albeit modest) business through to March 2016 and continuing and has continued for example to rent out the premises at Pepperbox, all of which transactions need to be accounted for. She agreed, but suggested that this work would have been minimal but for the problems connected with the reconciliation which she reckoned had occupied around 95% of her time before she left SGP. I accept this evidence as reasonable and realistic.

425. In my judgment there is no need for me to seek to further subdivide her time between the individual transitional breach claims. The reality, I am satisfied, is that the vast majority of her time was dealt with the reconciliation, with updating and with collecting payment from the remaining debtors. The

documentary evidence shows that she had very limited involvement in dealing with creditors, which seems to have been what Mr Smale and what Sir Jonathan Portal primarily did.

426. In the circumstances I am satisfied that I have the material to make a reasonably accurate assessment of the amount which Nickleby has either paid or will pay referable to her time and expenses on dealing with the transitional breach claims insofar as they are separate from other work which was unconnected with SGP or would have needed to have been done in any event. I assess the amount as being **£32,500**.

427. As regards Sir Jonathan Portal, Mr Smale's first explanation in the same document as above as regards Ms Boverhoff was that: "I have discussed this with KE and A; agreement was reached for SGP to pay the major part of JP's costs. JP's costs relate to his efforts spent managing the financials around the trade through Nickleby & Co Ltd. If SGP hadn't traded through Nickleby & Co Ltd his costs wouldn't have been incurred."

428. In his witness statement Sir Jonathan Portal said that "since 14 February 2012 I have spent approximately 473 days helping the directors wind down the finances of Nickleby" [17]. The details of the calculation appear from the document he has prepared, headed "time spent", which contains a breakdown of the hours spent in each calendar year from 2012 to 2015 inclusive on Nickleby business, with a series of reductions for time spent on matters unrelated to SGP and with a further reduction for time invoiced to and paid by SGP. The balance amounts to the 3,312.5 hours claimed (equating to 473 7 hours days) charged at a (reasonable) £100/hr.

429. In cross-examination he confirmed that he had not provided any assistance in relation to the Somerfield claim. He also confirmed that he had not invoiced for most of this time, explaining that financially he did not need to do so and confirming that if Nickleby could not afford to pay for his time then he would not invoice for it. He confirmed that whilst he had a written general retainer from Nickleby he did not have a specific retainer in relation to the work done the subject of this claim, although he did have an oral instruction from Mr Smale in relation to the work he did for Nickleby after SGP ended his retainer. He confirmed that he did not complete timesheets, paper or electronic, stating that the document represented his "honest guess" based on the time spent on Nickleby's affairs.

430. It was suggested to him that the majority of the work in relation to unwinding the affairs of Nickleby from SGP had been completed by the end of 2014. Although he demurred, he was taken to Nickleby's own claim for rent on Pepperbox (see below) which is advanced on the basis that only 50% of the rent is claimed from the end of 2014 because the majority of the work had been done by then. Since the reconciliation had been agreed in principle by March 2014 it is difficult to see how much more work could have been required post the end of that year other than in relation to dealing with the remaining creditors. This is also consistent with his note to 2015 where he records that for 4 months that year he was managing the business whilst Mr Smale was on his sabbatical.

431. It is readily apparent from the above that making any assessment in respect of Sir Jonathan Portal's time is more challenging than in relation to Ms Boverhoff's time. It is clear, I am satisfied, that after March 2014 the majority of his time cannot have related to the reconciliation or any of the other transitional breach claims for which damages are recoverable. It is also plain that even for the period from completion to March 2014 there must have been very significant time spent on dealing with matters which are not SGP's responsibility. It is plain that regardless of the wrongful trading claim Sir Jonathan Portal would always have been required to "manage the financials" in relation to payment of the Nickleby creditors, in circumstances where the state of Nickleby's finances was such that it was unable simply to pay them in accordance with the invoices as rendered and agreed or normal payment terms.

432. Although more challenging, I am satisfied on Sir Jonathan Portal's evidence that his estimate of time spent is reasonable and that his charges are both also reasonable and recoverable by Nickleby, notwithstanding that as he readily accepted he would only seek payment if Nickleby recovered damages for them. I am just about satisfied that I have the material to make a reasonably accurate assessment, taking a conservative approach to avoid unfairness to SGP, and I asses the amount as being **£100,000**.

433. As regards B&S, on 10 September 2012 Mr Smale and Mr Holley proposed that to save their time B&S should be instructed at SGP's cost to complete the reconciliation process. By an email of 11 September 2012 Mr Elliott confirmed that he had agreed this. He did not qualify this in any way by stating that he had not agreed that the cost should be borne by SGP. It is not pleaded or suggested however that this resulted in a contractual commitment. At the January 2013 meeting SGP agreed to contribute a maximum of £10,000 in respect of the B&S report and on 7 February 2013 did so in order to obtain the release of the B&S report.

434. In my judgment it is reasonable for me to find that the totality of the costs incurred in relation to B&S are related to the reconciliation and that they were reasonably incurred by Nickleby given the complications caused by the wrongful trading. I therefore allow them in full in the sum of **£49,050**, which already gives credit for the £10,000 already paid.

435. As regards the claim for office costs, these relate to office premises at Pepperbox in Hampshire, which are premises which are owned by S&H Properties, which is a partnership between Mr Smale, Mr Holley and their respective spouses. When Nickleby was initially founded it occupied those premises, paying rent to S&H, but as it expanded it moved to Leamington Court, which it occupied under a tenancy agreement with an unconnected landlord, as explained above and in more detail below.

436. Nickleby's case appears to be that after completion it still needed office space because it had to deal with the consequences of SGP's breaches and that it incurred rental costs over 4 years at £40,000 pa. Under cross-examination Mr Smale asserted that but for this need Nickleby would not have incurred this expense and S&P would have been free to relet the property. I am unable to accept that Nickleby reasonably required to rent this property at this rental figure due to the need to deal with the consequences of the transitional breach claims. I am satisfied that this was a decision taken by Mr Smale for a number of reasons, but that if the only outstanding issue as at autumn 2012 was the need to resolve the transitional breach claims the Pepperbox premises would not have been kept on had they been leased from a commercial landlord. It follows that I do not allow this claim.

437. Having rather put the cart before the horse, I must now state, albeit that I can do so reasonably briefly, my conclusions in relation to the transitional breach claims.

Q. Claim 2 - pars. 26 - 30: SGP's wrongful trading through Nickleby.

438. It is pleaded that under the BPA SGP had no right to trade using Nickleby's name. This is true in relation to the specific company name "Nickleby & Co Ltd" although, as I have said, SGP was entitled under the BPA to trade under the name "Nickleby".

439. It is pleaded that in breach of the BPA SGP wrongfully traded the business using the Nickleby company name, such trade amounting to over £1 million in sales to clients and over £500,000 in orders from contractors and over £100,000 in relation to overheads. It is also pleaded that insofar as SGP purported to act as agent for Nickleby in entering into these contractual commitments it is liable at common law for any loss caused to Nickleby in consequence.

440. The pleaded consequence is that Nickleby personnel had to expend considerable time on arranging for an inter-company reconciliation, that Nickleby also had to engage Sir Jonathan Portal as interim

Finance Director and then in October 2012 B&S, to work on the reconciliation (and other matters) and had to re-hire Ms Boverhoff once she was made redundant by SGP on 30 September 2012.

441. Having already addressed the factual allegations, it is necessary to scrutinise the legal basis for this claim. In the absence of some express or necessary implied provision in the BPA prohibiting SGP's use of the Nickleby company name it might be argued that, strictly speaking, SGP's use cannot properly be described as a breach of the BPA. Nor am I convinced by the alternative agency argument, given that Nickleby's case is predicated on the basis that SGP was never authorised to use the Nickleby name. It seems to me that the claim ought more accurately to be analysed as a claim for passing off, in that the necessary ingredients of the tort (see the summary in Clerk & Lindsell on Torts 23rd ed. at 25-03) are met in circumstances where SGP mispresented itself as the Nickleby company rather than as a separate company entitled to use the Nickleby name, in circumstances where Nickleby had a reputation as a company and has been damaged in its business as a result of the foreseeable consequences of that breach. This is so notwithstanding that there is no evidence of damage to goodwill going forwards (in that Nickleby was not allowed to trade in a competing business going forwards) because it is sufficient that there is damage to its reputation due to the confusion caused as to who was conducting the business over the relevant period and who was liable for the service and who was liable for payment of the contractor's invoices.

442. There is no injustice in the claim being upheld on this alternative legal basis to that claimed. That is because the pleaded claim for breach of the BPA is in substance the same as the tort passing off claim, since it is clear that the absence of a contractual right to trade as the Nickleby company is the key basis of the wrong and the defence of consent by Nickleby is the key issue raised by way of defence.

443. For the reasons I have already given in the relevant factual findings section above, I am satisfied that Nickleby has established this claim. SGP plainly did wrongly and without good cause, whether under the BPA or TSA or otherwise, pass itself off as Nickleby post-completion without authorisation, express or implicit. This did, I am satisfied, lead to the need for a reconciliation which was far more extensive and complex that anything which would have been required had SGP undertaken a proper pre-completion analysis or had it followed the sensible suggestions of Mr Holley and Ms Boverhoff.

444. I agree with the Nickleby assessment that this exercise constituted by far the greatest amount of time expended by Ms Boverhoff and Sir Jonathan Portal and that it was the sole cause of the time expended by B&S. It is for these reasons, fleshed out in my factual findings above, that I have determined that Nickleby is entitled to recover a substantial proportion of Ms Boverhoff's costs, a reasonable proportion of Sir Jonathan Portal's costs and all of B&S' costs.

R. Claim 3 - Pars. 31 - 35: The unauthorised withdrawals from Nickleby's bank accounts.

445. It is pleaded that pursuant to clause 4 of the TSA the mandate was changed in February 2012 so as to permit payments in excess of £2,500 only when authorised by a representative of Nickleby and a representative of SGP.

446. It is pleaded that although Ms Lawrence was an authorised signatory, she logged onto and obtained online access to the Nickleby bank account on 30 October 2012 and then upgraded her permissions to make online transfers totalling £30,604.74 to five contractors who had undertaken work for SGP post-completion under orders placed through Nickleby. It is pleaded that thereafter she continued to divert funds payable to Nickleby to SGP, netting them off against the inter-company balance. It is admitted that these payments were accounted for in the reconciliation but pleaded that they caused Nickleby to lose further management time and incur further professional fees.

447. As to this complaint, it is clear that by late September 2012 there was increasing irritation on both parties in relation to the other's approach to the operation of the Nickleby bank account. Mr Smale was irritated by what he saw as Ms Lawrence's unwarranted attempts to restrict Nickleby's ability to pay its creditors from the funds in the account which, in his view, was a direct consequence of SGP's wrongful trading using Nickleby's name and account. For her part, Ms Lawrence was increasingly annoyed that Nickleby was still using the bank account to pay off creditors notwithstanding what she believed was an agreement that no further payments should be made until the reconciliation had been completed. Moreover, since Ms Lawrence did not have authorisation to make payments by herself, she was not in a position to make unilateral payments from the account.

448. Mr Morris, who became involved at this point, made a proposal in his email of 16 October 2012, following a discussion between Mr Smale and Mr Elliott, whereby payments to creditors would be made on the following day from the account in respect of identified debts of both Nickleby and SGP. One of the SGP creditors was a business known as BAR Electrical ("**Bar**") which was owed some £29,713.48. Mr Holley responded the next day to ask that he wait until the proposal could be checked by Sir Jonathan Portal the following day. On 18 October 2012 BAR's solicitors sent a notice of intention to present a winding-up petition against Nickleby if payment of a sum of £37,752.10 was not made by 25 October 2012. It appears that the difference between that amount and the £29,713.48 represented a Nickleby pre-completion liability. Following a discussion between Mr Morris and Sir Jonathan Portal it was agreed that the Bar invoice should be discussed at a meeting fixed for 23 October 2012. However, there is no contemporaneous documentary evidence that this meeting resulted in any agreement as regards this particular payment - the email from Mr Smale to Mr Morris the following day does not suggest that it was. In the meantime, however, BAR's solicitors continued to threaten winding-up proceedings.

449. On 31 October 2012 Ms Lawrence emailed her internal finance colleagues, copying in Ms Boverhoff, to say that 5 suppliers had been paid, including £29,503.48 to Bar, which represented the payment of SGP's share of the overall liability[4]. It also appears from an email sent by Nickleby's solicitors to Bar's solicitors the same day that Nickleby had sent Bar a cheque for its share.

450. It is clear in my judgment from the absence of any contemporaneous evidence of consent and from the manifestly genuinely aggrieved tenor of Mr Smale's immediate protest and Mr Elliott's reply the next day that no consent had been given for this payment to be made by Ms Lawrence in the way that it was.

451. I therefore am satisfied that it was a breach of the BPA and the TSA for Ms Lawrence to use the Nickleby bank account in this unauthorised way and for this unauthorised purpose. It does not avail SGP to argue that it was entitled to funds in the account which exceeded the value paid out, under the trust created by the TSA. That is because even though I accept that as at 31 October 2012 it was entitled to funds exceeding the amount paid out, nonetheless it was still not entitled to "raid" the Nickleby bank account without Nickleby's consent in a way which contravened the terns of the BPA and TSA to use those funds for its own purposes.

452. However the question raised is what, if any, recoverable loss has been sustained by Nickleby.

453. Nickleby does not advance a claim for the value of the payments because it accepts that these payments have been accounted for in the reconciliation. It seeks 5% of its total management time claim and professional fees. However, no proper basis had been identified in my judgment for making such a claim. Mr Smale and Mr Holley were still employed by SGP at the time and there is no basis for any suggestion that Nickleby suffered any measurable loss of their time as officers in

[4] There is a small discrepancy in the amount, but nothing turns on this.

relation to this breach, either at the time or subsequently. Any time spent by Sir Jonathan Portal and Ms Boverhoff in relation to this issue was minimal.

S. Claim 4 - pars. 36 - 38: SGP's failure to arrange for the payment of Nickleby's creditors.

454. This is a claim for damages for breach of clause 7 of the TSA which, as indicated above, required SGP to make sufficient resource available for sufficient time to procure that Nickleby paid its creditors. It is alleged that SGP failed to do so and further failed in breach of clause 8.3 of the TSA to permit Nickleby access to the records to enable it to do so. It is pleaded that in addition to incurring management time and professional fees Nickleby also incurred court fees, costs and interest to 4 specific creditors who issued proceedings against Nickleby to secure payment, Meridian Cooling, MD Building Services, LBS and Survey Roofing.

455. For the reasons I have already given I am not satisfied that SGP was in breach until the end of October 2012. I am satisfied that it was reasonable to give Ms Boverhoff the primary responsibility for this task, given her detailed knowledge. I do not doubt that she was not given as much support as she would have wanted to deal with all of the responsibilities which she was given and all of the problems which were caused by the difficulty caused by the continued invoicing to and by Nickleby post-completion. However, I am not satisfied that this is proof of breach of the BPA and TSA. I am also satisfied that at first it was reasonable for SGP to transfer primary responsibility to Jenny Taylor, who appears to have performed the role reasonably well until the end of October when, as I have found, she was instructed to do no more than the absolute minimum and to seek to transfer all responsibility to Mr Smale.

456. I do however accept Mr Smale's evidence, consistent with his contemporaneous complaint in his document entitled "SGP-Nickleby issues", that transactions were not being recorded properly in Exchequer after Ms Boverhoff left SGP.

457. I am not satisfied however that this did lead to the situation where claims were brought by the four contractors identified in the Particulars of Claim.

458. Nickleby contends that these claims were not sufficiently brought to Nickleby's attention and that this led to the liabilities referred to being incurred. Mr Holley was cross-examined about his witness statement at [138] where he gave evidence in relation to one such contractor, MD Building Services, that the problem was caused because the court documents had been served at the SGP Leicester office where they had been "sat on". However, it appeared from Mr Smale's application to set aside judgment that the explanation he had given at the time was that the claim had been received but that his response form had been sent to the wrong email address through no fault of Nickleby. He admitted that his assumption in his witness statement was wrong.

459. Mr Smale only gave evidence in very general terms in relation to these four contractors in his principal witness statement at [135]. Sir Jonathan Portal also referred to Survey Roofing in his witness statement at [159] and [160] in terms which indicated that it was Nickleby's inability to pay, rather than non-notification, which was the problem.

460. I am not satisfied on the balance of probabilities therefore on the evidence adduced that but for the pleaded breaches these liabilities would not have been incurred.

461. I am however satisfied that the contemporaneous documents from November 2012 onwards support Nickleby's case and evidence that Mr Smale, Sir Jonathan Portal and Ms Boverhoff had to spend considerable time and effort in managing and resolving these ongoing creditor claims.

462. However, apart from Ms Boverhoff's time, which I accept was not related to Nickleby's financial pressures, I am not satisfied that Sir Jonathan Portal had to spend significant time dealing with

creditors other than by reason of Nickleby's financial pressures, which I accept cannot be laid at SGP's door.

463. Nickleby argued that it would have had sufficient funds if it had been allowed free use of the funds in its bank account. However in my judgment Nickleby was not entitled to have free use of the funds in its bank account insofar as they represented funds which were paid in respect of contracts undertaken by SGP post-completion.

464. Nickleby also argued that the reason it had insufficient funds was because of SGP's breach of contract as regards its collection of Nickleby's book debts. However, since Nickleby cannot show for the reasons already given that a proper performance of that duty would have resulted in sufficient funds coming in to enable them to pay all of their creditors on time, no causal link is established between any breach in that respect and any loss suffered by Nickleby under this head.

465. It follows that I allow Ms Boverhoff's costs, which are included in my overall assessment, but not otherwise.

T. Claim 5 - Pars. 39 - 42: SGP's failure to exercise reasonable endeavours to collect the Book Debts.

466. This claim fails for the reasons set out in the factual findings section above, save insofar as I allow Ms Boverhoff's time in collecting in a good proportion of the remaining debtors from October 2012 to February 2013.

467. Otherwise, there is no basis for allowing Nickleby to recover any sums in this respect.

U. Claim 6 - pars. 43 - 46: SGP's failure to pay the Leamington Court licence fee.

468. This is a claim for damages for breach of the TSA and Bare Licence, pleaded on the basis that SGP did not reimburse Nickleby within a reasonable time for rent payable under the lease between Nickleby and its landlord for the five quarters beginning December 2012 until July 2014, when they were included in the reconciliation. It is pleaded that as a result Nickleby had to pay its landlord additional charges and interest in the sum of £11,013.51 and also incurred lost management time and professional fees.

469. Whilst there appears to be some issue as to precisely what happened, it is common ground that in August 2013 SGP vacated the premises. On 20 August 2013 Nickleby wrote to SGP to say that notwithstanding this departure it remained liable under the bare licence for the rent. On 27 September 2013 SGP's solicitors wrote to Nickleby alleging that Nickleby had changed the locks in the w/c 24 August 2013 and that this amounted to a peaceable re-entry which brought the licence to an end. This argument however was not proceeded with at the Governance Panel meeting in December 2013 and it was agreed that SGP remained liable for items under the TSA notwithstanding the departure.

470. However, SGP refused to reimburse Nickleby the rent payable under the lease on the basis that it considered that overall Nickleby was indebted to SGP due to the payments of "SGP money" into the Nickleby bank account to be brought into account under the reconciliation. As Mr Grant somewhat reluctantly conceded in cross-examination, this remained the position even in January 2014 once it became apparent that there would be a balance payable in Nickleby's favour.

471. In my judgment it is not open to SGP to contend that it was entitled to refuse to indemnify Nickleby against these payments in circumstances where: (a) there is no contractual basis for setting off sums payable under the eventual reconciliation under the BPA / TSA with sums payable under the Bare Licence, and especially where (b) the fundamental reason why the reconciliation took so long to conclude was SGP's own breach in failing to ensure that it took reasonable steps to minimise the complications caused by the need to separate pre-completion and post-completion trading.

472. The details of the claim for £11,013.51 are contained in a document produced by Nickleby for the purposes of this claim, which identifies six separate items as comprising "fees/interest" without giving further details. However, the tenant ledger report prepared by the landlord records that the first two items had been cancelled by credit note, and Mr Smale was unable to explain this. In closing submissions Mr Wright was prepared to concede these two claims for £840.

473. Otherwise the claims were maintained and having listened to the cross-examination of Mr Smale and having noted the detailed evidence of Sir Jonathan Portal in his witness statement at [88] - [99] I am satisfied that these costs were incurred and do result from the failure by SGP to reimburse rent as and when required.

474. It was suggested to Mr Smale that SGP could not be held responsible for these claims in any event, since Nickleby had a contractual obligation to pay rent and other sums due to its landlord anyway and ought to have done so on time regardless of any delay by SGP in paying them to Nickleby. It was suggested that insofar as the reason was Nickleby's impecuniosity that could not be laid at the door of SGP. Mr Smale accepted that the reason Nickleby could not pay was its lack of funds. It seems to me that if SGP did not pay on time and if Nickleby could not pay because it did not have funds then it would be entitled to make these claims - if otherwise valid - on the basis that they are ordinary foreseeable consequences of that breach.

475. I do however accept that there is no basis for recovering any management time under this head, since I am satisfied that it must have been relatively speaking insignificant, certainly so far as Ms Boverhoff and Sir Jonathan Portal are concerned.

476. Thus the claim succeeds as to **£10,173.51**.

V. Claim 7 - pars. 47 -52: SGP's breaches of clause 8 of the TSA.

477. Nickleby's case and complaint is that in breach of clause 8 of the TSA: (a) SGP failed to provide weekly bank account reconciliations and monthly reports of cash received from debtors and cash paid to creditors or to keep Exchequer updated; and (b) notwithstanding that, on a proper construction of clause 8.3 or through implication, it was entitled to remote access to EMS, SGP has refused to allow such access and insisted on Nickleby's representatives physically attending its Leicester office to log on from there.

478. In addition to claiming damages for lost management time and professional fees, Nickleby also originally sought a decree of specific performance and a mandatory injunction going forwards. However, that element of the claim was compromised during the course of the trial.

479. As regards the first aspect of the claim, I am satisfied that following the departure of Ms Boverhoff SGP did not provide this information or keep Exchequer updated. I do not accept SGP's case as put to Mr Smale in cross-examination that it was unnecessary to keep Exchequer updated since all information was entered onto Coda, since SGP did not allow Nickleby access to Coda. I do not accept that there is any factual basis for the further suggestion as put to him in cross-examination that Nickleby in some way assented to or acquiesced in the non-provision of this information or the non-updating of Exchequer.

480. The position as regards the second claim is as follows.

481. The issue appears to have originated following the sale of SGP, after which the new owners refused to allow Nickleby access to EMS, which it had enjoyed on an unrestricted basis previously. At the Governance Panel meeting in December 2013 Mr Smale raised this and it was agreed that SGP would provide Mr Smale with information to assist in collecting outstanding Nickleby debts. However, on 7 February 2014 Mr Cooper succinctly stated that "we are obligated to provide information from EMS, but not to provide access to the system". Information was provided, but Mr

Smale asserted in the Governance Panel meeting in June 2014 that he required access to EMS to obtain information to chase c. £60,000 of debtors and contest a similar amount from alleged creditors.

482. By this stage SGP's new owners were keen to "switch EMS off" (by which they meant terminate the contract under which SGP paid the relevant host provider for continued remote access to EMS) on the basis that it was no longer being used as a live system by the business. They suggested creating a duplicate copy, deleting the post-completion data and provide Nickleby with a copy. Mr Smale said that he needed access for orders placed up to 8 October 2012, which he believed was the last time an order was placed through Nickleby. SGP's IT programme manager reported that it was not possible to restrict access by date other than by undertaking a time-consuming process which would still involve maintenance going forwards, which SGP's new owners did not wish to do given that a decision had been made to close down the system by the end of 2014. He stated that the only other option appeared to be to copy the relevant data and provide a copy to Nickleby which, however, would be unlikely to be meaningful without access to the system as well, although it might be possible to create a database diagram which could be used to extract data.

483. On 16 July 2014 SGP offered Nickleby live access to EMS only by visiting the Leicester office by prior arrangement. On the same day Mr Smale accepted, but under protest and on the basis that he would claim the cost of doing so against SGP. Access was arranged for the following week for Mr Yelverton who attended and produced a visit record which made it clear that the travel requirement was pointless, given that he had no different access from that which he could have had from any non-network connection, and given that he was not physically supervised and had simply been allocated a temporary password for that day only. Mr Smale argued the case to be allowed unrestricted access as previously, but this was refused by the new owners.

484. At the September 2014 Governance Panel meeting Mr Smale explained that the difficulty was that he needed to access EMS and Exchequer at the same time to make progress with particular questions and was unable to do so because he could not access Exchequer remotely. However, this did not change the mind of the new owners, whose concern appeared to be that they could not monitor what was accessed remotely, notwithstanding that this had not caused a problem since 2012.

485. Nothing further happened until 24 September 2015, when SGP gave three months' written notice of its intention to cease supporting EMS and proposing four options, ranging from novating the hosting contract to Nickleby (cost c. £50,000 p.a. plus support) to downloading the EMS data to files for transfer without guarantee that all functionality would be available (costs c. £1,500).

486. At the same time Mr Smale was emailing a contractor (known as Dale Building Maintenance), which was chasing for payment of invoices and which had been passed by SGP to Nickleby on the basis that these were pre-completion liabilities, saying that without SGP's assistance in providing remote access to EMS, so that it could interrogate Exchequer and EMS simultaneously, it was unable to confirm whether or not any of Dale's invoices were its responsibility. He copied this email to SGP in December 2015.

487. This issue was discussed at the Governance Panel meeting in November 2015, following which on 16 November 2015 Nickleby responded, asserting that it had an "indefinite" right to access the EMS system and use the systems hosting it, and rejecting each proposal on the basis that it would require Nickleby to incur a cost which it was not obliged to bear. In this letter Mr Smale said that he had explained at the meeting that SGP was no longer concerned about commercial sensitivity going forwards, because by the end of December 2015 the last remaining client to use EMS (Care UK) would have ceased doing so, so that it would no longer be required going forwards by SGP. This statement was not contradicted and his threat of legal action led to SGP delaying action.

488. When asked, on 8 January 2016 Mr Smale identified three specific contractors whose outstanding claims could not be resolved without access to EMS.

489. Instead of contesting Nickleby's assertion that it did require remote access to allow it to access EMS and Exchequer at the same time, Mr Cooper was prepared to spend his own time working through the details provided by Mr Smale to seek to address whether or not the invoices were SGP's responsibility. However, he was clearly unable to do so conclusively and had to engage in further detailed correspondence with Mr Smale over a lengthy period to seek to clarify Dale's outstanding claims, rather than allow Nickleby remote access to EMS. Moreover, when Mr Smale repeated his request for remote access, he was allowed it by email dated 10 June 2016, shortly before the date when SGP had decided to cease supporting EMS.

490. In the face of a threat from Nickleby's solicitors to seek injunctive relief, SGP notified Nickleby on 24 June 2016 that it had decided to move the servers from the host company premises to its Leicester offices and, after reactivating them, to provide a "one time copy of the 'Records' held via the EMS system" before deactivating the system. Nickleby's solicitors responded, providing a detailed explanation as to why this was not a technically acceptable solution. However, without replying to this response, SGP unilaterally carried through its decision to move the servers to Leicester, so that Nickleby was no longer able to access the servers in any way unless and until they were successfully activated which, as it transpired, they never were.

491. However, it was not until August 2017 when Mr Smale asked for an update as to when Nickleby could obtain access. The lack of any request for access in the meantime is a good indication in my judgment that Nickleby did not need it for any obviously urgent purpose in the intervening period. When he was asked to give the purpose for access, he was unable or unwilling to specify any reason. On 29 August 2017 SGP responded to say that it did not consider it was obliged under the TSA to provide reactivated access and there matters rested.

492. In my judgment, on a proper construction of the BPA and TSA, SGP was obliged to provide Nickleby with reasonable access to EMS for such time period as it reasonably had need to access EMS free of cost.

493. I do not accept that there was an unqualified obligation either to provide access by whatever method or means Nickleby might seek or to provide access indefinitely. The touchstone of both is that of reasonableness, especially when in my judgment it must have been contemplated that there might come a time when SGP no longer needed to maintain EMS for its own purposes, because it must have been obvious to the parties that over time EMS, like any other system, would become obsolete and would be replaced[5].

494. In my judgment it was reasonable for Nickleby to be provided with remote access to EMS, for two reasons. The first is that at the time of the agreements all access had to be remote, in the sense that the servers were hosted by a third party in Dublin, so that direct access to a server physically situated within SGP's offices was impossible. Thus the only question was whether it was reasonable for SGP to insist on the remote access only being afforded from the Leicester office. In my judgment it was not, for a number of reasons. First, that had never been asserted until July 2014, with no suggestion of any improper or unauthorised usage in the meantime. Second, there was an express confidentiality obligation in clause 8.3 of the TSA which gave SGP sufficient comfort against wrongful usage of information which did not relate to Nickleby's business. Third, once EMS was no longer in use going forwards any risk became nil or minimal anyway. The second is because I accept that it was reasonable for Nickleby to require simultaneous access to Exchequer in order to deal with issues as

[5] I accept that when this might happen would depend on a number of unknown future developments, including for how long it would be possible to upgrade EMS to allow it to meet SGP's continuing needs, but the need for eventual replacement was inevitable, the only questions being when and with what.

and when they arose, and it was unreasonable to expect a Nickleby representative to have to schedule a specific trip to Leicester each time the need arose.

495. I am also satisfied that the offer to provide a copy of the data extracted from EMS would not be a reasonable alternative, because I accept the evidence of Mr Smale and Mr Holley, which is consistent with SGP's own contemporaneous documents, to the effect that access to the data alone without access to the live system from which data could be searched, extracted and worked on, was insufficient for Nickleby's reasonable purposes.

496. I am satisfied therefore that SGP was and remained in breach of clause 8 of the TSA from July 2014.

497. I have considered whether it could be said that Nickleby reasonably needed access from summer 2016 in the absence of hard evidence as to any reasonable purposes for which it was needed. However, on reflection it seems to me that it was reasonable for Nickleby to require access until at least October 2018, being 6 years from the latest date when even on Nickleby's case invoices bearing the Nickleby company name were rendered so that - arguably at least - Nickleby might need access to EMS to address any queries or claims arising from such contracting. Whether it was reasonable to insist on unrestricted access after that time, on the basis that beyond that it is likely that provision of a copy of the data alone was all that was needed, I think open to doubt, however I do not need to decide that question since the claim for injunctive relief is no longer a live one.

498. I do not allow any management time however, given my conclusions in relation to Mr Smale's time, and save and insofar as Ms Boverhoff may have needed to spend more time updating Exchequer and working less efficiently without ongoing remote access to EMS that is included in my assessment of her recoverable cost.

W. Appendix 1: relevant provisions of Sch. 3 BSA.

1. Interpretation.

…

1.1.6 **Cost Savings:** cost savings achieved in each Financial Year[6] taken one by one after deduction of Implementation Costs (but excluding interest, tax, depreciation and management charges not charged before Completion by the Buyer's Group Companies) in the Buyer's businesses (including, but not limited to, the Business following its acquisition hereunder) and including (but not limited to) those arising either as a direct result of the Buyer introducing Nickleby Models in its performance of those Contracts of the Buyer which were in existence at Completion or other cost savings achieved directly by the Buyer introducing Nickleby Models, but ignoring for the purpose of this calculation, whether or not the Merger Payment is achieved, the first £1,000,000 of Merger Savings achieved (or deemed to be achieved in accordance with the provisions of Schedule 2) and, for the avoidance of doubt, whether or not identified in Schedule 12 to the extent that such Merger Savings continue to be achieved in each Financial Year.

1.1.7 **Implementation Costs:** any costs or expenses directly incurred in achieving Cost Savings except once-off implementation costs;

1.1 .8 **Merger Savings:** shall have the meaning given in paragraph 2.1 of Schedule 2;

1.1.9 **Nickleby Models:** services, systems and/or other practices which were carried on by the Seller in relation to the business before Completion including, but not limited to, the provision of consultancy services, hosted software services and facilities management including the Seller's "Managing Contractor" Model;

1.1.10 **Relevant Profits:** the gross profits of the Buyer (which are used to determine the operating profits shown in the audited accounts of the Buyer) which are attributable to the aggregate of the following:-

(a) the gross profits received from contracts entered into by the Buyer with any or all of those clients whose names appear on the list of prospects set out in Schedule 1 1 ; and/or

(b) the gross profits received in respect of new business on amended or new contracts with clients who were clients of the Seller at the Completion Date and who have contracted for an additional type of service (differing from that which they were receiving before Completion). (For the avoidance of doubt, if such a client simply increases the number of stores maintained under a contract or otherwise increases the volume of business of a similar type to that already being provided to it by the Seller before Completion, this will not count towards the calculation of Relevant Profits); and/or

(c) additional gross profits made, after Completion, from Buyer Clients[7] as a result of such Buyer Clients moving to or contracting for a Nickleby Model and for this purpose, additional gross profit is the difference between the gross profit which could reasonably be expected to have been generated if those Buyer Clients had not effected such changes (based inter alia on the gross profit margin for such Buyer Clients for the period immediately prior to Completion or if a Buyer Client is only on the Buyer's pipeline as at Completion, the anticipated additional gross profit deriving from the Nickleby Model) and the gross profit actually generated after implementation of the changes; and/or

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6 Defined as Year 1 (completion to 31.12.12), Year 2 (YE 31/12/12), Year 3 (YE 31/12/14) and Year 4 (YE 31/12/15).

7 Buyer Clients are defined as "clients of the Buyer at the Completion Date and clients of the Buyer who have been identified within the Buyer's sales pipeline as at the Completion Date and who, within 12 months after the Completion Date, enter into contracts with the Buyer for the purchase of services".

(d) the gross profits arising as a result of sales to clients who were clients of the Buyer at the Completion Date and who subsequently purchased additional services (including but not limited to consultancy services and sales of hosted software services) not previously available to them from the Buyer and now available to them from the Buyer as a result only of the Transaction.

and it is hereby agreed that "gross profit" in respect of any contract shall mean in the case of a contract for the provision of a maintenance or similar service the gross invoice value thereof less the internal cost and external cost of providing such service.

…

2. Contingent Payments.

2.1 In respect of each Financial Year, the Contingent Payment is the amount which is equal to the aggregate of:

2.1.1 50% of Relevant Profits for that Financial Year; and

2.1 .2 50% of the amount of the Cost Savings achieved;

(each a "Contingent Payment" and together the "Contingent Payments").

2.2 The aggregate of the Contingent Payments for the whole Contingent Payment Period is capped at £5,000,000. The Contingent Payments are payable in accordance with paragraph 5 below.

2.3 ...

2.4 For the avoidance of doubt there shall be no double counting and savings included in the calculation of Cost Savings shall not be included in the calculation of Relevant Profits.

3. Reduction in Operating Costs.

3.1 The Covenantors undertake to examine the Buyer's workforce and activity of the combined Business and business of the Buyer and propose changes to lead to reductions in employment costs which can be achieved directly by the Buyer introducing the Nickleby Models whilst at the same time maintaining the level and quality of service provided to clients. From time to time, the Covenantors will make written proposals to the Buyer to make Cost Savings ("Cost Savings Proposals").

3.2 If the Buyer does not wish to implement the Cost Savings Proposals, it must within 15 Business Days of receipt provide the Covenantors with a written statement setting out its reasons for not implementing them.

3.3 If the Covenantors consider the Buyer is acting unreasonably in not wishing to implement the Cost Savings Proposals then, provided the Cost Savings Proposals which the Buyer does not wish to implement exceed £10,000 per item per annum or the aggregate of items in the same Cost Savings Proposals which the Buyer does not wish to implement exceed £10,000 per annum, the Seller may refer the Cost Savings Proposals to an Independent Expert who shall determine whether or not the Buyer behaved reasonably in refusing to adopt the Cost Savings Proposals. If the Independent Expert determines that the Buyer was not behaving reasonably in its refusal to recommend implementation of the Cost Savings Proposals, then with effect from the Independent Expert's determination, such Cost Savings Proposals shall be deemed to take effect (but do not need to be put into effect) and the calculation of the Cost Savings shall take account of such Cost Savings Proposals as if they had taken effect.

4. Governance Panel.

4.1 The Contingent Payments are recognised to be a valuable part of the Purchase Price payable for the Business and Assets and with a view to ensuring that the Relevant Profits are maximised and Cost Savings increased so that the Contingent Payments payable to the Seller are maximised, the Seller and the Buyer shall use all reasonable endeavours to work with each other in a co-operative and collaborative manner in good faith and in the spirit of mutual trust and respect ("**Overriding Principle**").

4.2 A Governance Panel **("Panel")** of 5 members will be established initially comprising Kevin Elliott (as Chairman), Nicolas Smale, Jonathan Holley, Richard Singleton and Morgan Brennan **("Panel Members").** All Panel Members other than the Covenantors will be appointed by the Buyer. Members of the Panel will not necessarily be statutory directors.

4.3 The Buyer shall be entitled to replace any of the Panel Members (except either of the Covenantors) and to determine which of its Panel Members is the Chairman. For the avoidance of doubt the Covenantors shall be entitled to be Panel Members (representing the Seller) during the whole of the Contingent Payment Period (and any period thereafter during which the determination of the final Contingent Payment due in respect of Year 4 remains outstanding). The Covenantors shall be entitled to replace any of its Panel Members.

4.4 Each Panel Member shall be entitled to one vote.

4.5 The meetings of the Panel shall take place after Completion fortnightly (unless otherwise agreed between the parties) and not less than 2 Business Days' notice of meetings shall be given to each Panel Member. The Chairman shall decide time and date of such meetings. Panel members who are unable to attend a meeting may appoint a representative who shall be entitled to attend and vote in his stead.

4.6 The quorum for meetings of the Panel shall be 5. If the Chairman of the Panel is not present at the meeting, Panel Members appointed by the Buyer who are present at that meeting shall appoint one of their number to be Chairman of that particular meeting.

4.7 The Buyer shall as soon as reasonably practicable provide Panel members with all financial information which is required to enable Panel members to determine how best to direct efforts so as to achieve the Cost Savings as soon as reasonably practicable.

4.8 The Panel shall be responsible, amongst other things for:-

4.8.1 reviewing the financial information provided in paragraph 4.7;

4.8.2 production and agreement of an integration plan;

4.8.3 ensuring that the Merger Savings identified in Schedule 12 or any other reasonable Alternative Savings as defined in Schedule 2 are achieved;

4.8.4 determining whether the cost savings identified in Schedule 12 or otherwise in accordance with Schedule 2 have been achieved;

4.8.5 calculating the Cost Savings, the Merger Savings, the Alternative Savings, the Relevant Profits and the Contingent Payments;

4.8.6 review and approval of new contracts with prospective clients listed in Schedule 11; and

4.8.7 ensuring the sharing of information relevant to achievement and calculation of the Merger Payment, the achievement and calculation of Contingent Payments and approach to prospective clients listed in Schedule 11.

5. Procedure for Making Contingent Payments.

5.1.1 in respect of each Financial Year, provided the cash in respect of 100% of each of the Relevant Profits or Cost Savings is collected or saved, the Buyer shall pay to the Seller:

(a) The Quarterly Contingent Payments…

(b) The Annua! Contingent Payments …

5.1.2 …

5.2 Within 35 Business Days of the end of each Financial Year, the Buyer will prepare accounts similar to management accounts for that Financial Year. At the next meeting of the Panel (which must take place within 45 Business Days after the end of the Financial Year) the Panel shall determine the Contingent Payment due to the Seller in respect of that Financial Year and record its decision in a certificate signed by the Chairman ("Certificate"). Each Panel member is entitled to a copy of the Certificate.

5.3 The Seller shall, within 10 Business Days of receiving the Certificate, give written notice to the Buyer if it does not accept the accuracy of the Certificate ("Dispute Notice"). If the Seller does not give a Dispute Notice, it is deemed to have accepted the Certificate as accurate at the end of the 10 Business Day period.

5.4 If the Seller serves a Dispute Notice, the Seller shall within 10 Business Days of receipt of the Dispute Notice ("Dispute Period") give written notice to the Buyer of the dispute, giving detailed reasons why it does not agree with the certified amount of the Contingency Payment. If the parties do not resolve the dispute within 10 Business Days of delivery of the Dispute Notice, either party may refer the calculation of the Contingent Payments for the relevant Financial Year to the Independent Expert.

5.5 If the Panel does not produce a Certificate within 50 Business Days after the end of a Financial Year, the Seller may by written notice demand a meeting with the Buyer to agree the amount of the Contingency Payment. If the parties do not agree the amount within 10 Business Days of that meeting (or if a meeting is proposed but not held, within 10 Business Days of the date of the proposed meeting), either party may refer the calculation of the Contingent Payment for the relevant Financial Year to the Independent Expert.

5.6 Subject to any right to make deductions under this agreement, in relation to each Financial Year within the Contingent Payment Period, the Buyer shall make the Annual Contingent Payment due to the Seller on the earlier of 30 April following the end of the relevant Financial Year and 5 Business Days following determination of the Annual Contingent Payment.

5.7 If the amount of the Contingent Payment is partly disputed and partly not, then the Buyer shall pay the undisputed part on the date due for payment.

5.8 The Buyer must pay interest at 2 points over RBS base rate on any part of a Contingent Payment that it has not paid to the Seller which shall accrue from the date which starts 5 Business Days after the amount due has been agreed between the parties or otherwise determined under this agreement.

5.9 ….

5.10 Save as otherwise provided in this Schedule, the parties shall each bear their own costs incurred in the preparation of the certificate and the agreement of the Relevant Profits and Merger Savings Payments.

6. Independent Expert.

6.1 An Independent Expert shall be appointed in accordance with paragraph 5.4 to resolve a dispute arising in relation to the calculation of any Contingent Payment.

6.2 The Independent Expert is required to prepare a written decision and give notice (including a copy) of the decision to the Buyer and the Seller within a maximum of 5 weeks of the matter being referred to him having regard amongst other things to the Overriding Principle.

6.3 …

6.4 The Buyer and Seller are entitled to make submissions to the Independent Expert including oral submissions and shall provide or procure that others provide the Independent Expert with such assistance and documents as the Independent Expert reasonably requires for the purpose of reaching a decision.

6.5 To the extent not provided for by this paragraph, the Independent Expert may, in his reasonable discretion, determine such other procedures to assist with the conduct of the determination as he considers just or appropriate, including (to the extent he considers necessary) instructing professional advisors to assist him in reaching his determination.

6.6 Each of the Buyer and the Seller shall, under the direction of the Independent Expert and with reasonable promptness, supply the other with all information and give each other party access to all documentation and personnel as the other reasonably requires to make a submission under this paragraph 6.

6.7 The Independent Expert shall act as an expert and not as an arbitrator. The Independent Expert shall determine the amount of any Contingent Payment, which may include any issue involving the interpretation of any provision of this agreement, his jurisdiction to determine the matters and issues referred to him or his terms of reference. The Independent Expert's written decision on the matters referred to him shall be final and binding on the parties in the absence of manifest error or fraud.

6.8 Each party shall bear its own costs save that the Independent Expert's fees and any costs properly incurred by him in arriving at his determination (including any fees and costs of any advisers appointed by the Independent Expert) shall be borne by the parties equally or in such other proportions as the Independent Expert directs.