Neutral Citation Number: [2020] EWHC 3568 (QB)

Case No: QB-2019-002665

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday the 22nd day of December 2020

Before :

MASTER DAGNALL

- -

Between :

GREGORY JOHN ROLLINGSON

Claimant

- and -

(1) JAMES HOLLINGSWORTH

(2) STEVEN GASSER

(3) MAYA BHATIANI

(4) JOANNE WHEELER

(5) LAURUS LAW LIMITED

Defendants

Richard Leiper QC and Zac Sammour (instructed by **Lewis Silkin LLP**) for the **Claimant**
Adam Solomon QC (instructed by **Brabners LLP**) for the **First, Second and Fifth Defendants**

Hearing dates: 27 and 28 October 2020

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JUDGMENT

MASTER DAGNALL :

Introduction

1. This is my Judgment in relation to the Application of the First, Second and Fifth Defendants ("the Applying Defendants") made by the Notice of Application dated 10th August 2020 ("the Application") seeking to strike-out (under Civil Procedure Rule ("CPR") 3.4(2)), or for reverse summary judgment (under CPR 24.2) in respect of, certain paragraphs ("the Disputed Paragraphs") of the Particulars of Claim.

2. This matter concerns Rollingsons Solicitors Limited ("the Company"); which company, carried on a solicitors' practice, but which, following its making substantial losses, entered into administration on 14 June 2018. The Claimant, a solicitor, was the managing director and controlling shareholder of the Company. The First Defendant is a solicitor who was employed by the Company under a written contract of employment dated 23 July 2010 as head of its Property Department until 9 September 2016, and who was a director of the Company from 11 January 2011 until he resigned on 13 September 2011. The Second Defendant is a solicitor, who was employed as a joint head and then head of the Family Department from June 2015 to 16 January 2017. The Third Defendant is a solicitor who employed within the Company's Family Department from 1 June 2015 to 24 January 2017 under a written contact of employment dated 24 April 2015. The Fourth Defendant is a fellow of the institute of legal executives who was employed in the Company's Property Department between September 2009 and 28 February 2017 under a written contract of employment of August 2009.

3. The Claimant contends that the First to Fourth Defendants (and in conspiracy etc. with them the Fifth Defendant) committed various wrongs including breaches of contract, (in the case of the First and Second Defendants) breaches of fiduciary duty, misuse of confidential information, and economic torts including by: themselves leaving and procuring each other and others to leave the Company and to join the Fifth Defendant; competing with the Company through the Fifth Defendant; and otherwise acting so as to damage the Company. It is alleged that they, or one or more of them, effectively took the Company's Property and Family Departments to the Fifth Defendant; being another company which was to operate and then has operated a solicitors' practice and of which the First and Second Defendants (at least) became directors and substantial shareholders. The Claimant alleges that all this resulted in the Company generating substantial losses instead of substantial profits; and a claim is made for £1,157,000 foregone profits (although not for incurred losses) of the Company and, further and alternatively, an account of profits made by the First and Second Defendants.

4. The Claimant does not claim directly in his own right but as alleged assignee of the Company's (alleged) claims ("the Claims") against the Defendants, he alleging that he was assigned the Claims by Philip Lewis Armstrong and Philip John Watkins, the appointed administrators ("the Administrators") of the Company, by an agreement of 7 March 2019 and a deed of variation of 3 June 2019. The Defendants contest the validity of this assignment ("the Assignment") although I am not clear on what basis. The Assignment followed a bidding process ("the Bidding Process") for the

Claims conducted by the Administrators between the Claimant and the First Defendant, and which itself gives rise to one of the sets of issues before me.

5. The matters has proceeded through the stages of service of Particulars of Claim, Defences and Replies, the Third Defendant and the Fourth Defendant acting by separate representation and filing separate Defences from the Applying Defendants, and also provision of Replies to Requests for CPR Part 18 Further Information by the Claimant and by the Applying Defendants. Directions have been given to a Trial commencing on 12 July 2021. Disclosure had not yet occurred when this matter was heard, but has since taken place.

6. By the Application the Defendants seek to strike-out, or to obtain reverse summary judgments on, 5 paragraphs (6, 8, 80, 92 and 99) and one sub-paragraph (116(f)) of the Particulars of Claim on the bases, in effect, that they offend the rules of pleading (and I use the old-fashioned word "pleading" to describe the rules relating to the contents of statements of case under the CPR and at common-law) and/or have no real prospect of success. Owing to the linkage of their subject-matter, they can be seen to divide into issues ("the Issues") regarding the pleading of: (A) the Bidding Process (paragraph 8); (B) elements of a "Common Design" between some or all of the Defendants (paragraph 80); (C) inference of participation, assistance and/or encouragement by other Defendants of misuse of Confidential Information by the Second Defendant or Third Defendant (paragraph 92); (D) knowledge that the Company would have taken action regarding misuse of Confidential Information (paragraph 99); and (E) the various wrongs having caused the insolvency and foregoing of profits of the Company (paragraphs 6 and 116(f)). Linked to Issue A is a question of whether the First Defendant's engagement in the Bidding Process has attracted and retained "without prejudice" privilege ("WPP") such that it cannot be used by the Claimant in these proceedings ("the WP Issue") and which the parties before me have requested that I should decide at this point as between them in any event.

7. In view of the nature of these applications, and where I had Skeleton Arguments from and then heard over a day's oral submissions from leading counsel, I have probably not referred to every point made to me in submissions in this judgment, but I have borne them all in mind even if I do not refer to them all specifically. The Claimant has submitted that the Application is defective in procedural form (as well as that it should fail in substance) and I will determine that submission as part of this judgment.

<u>The Application by the Claimant for a Further Hearing pending this Judgment</u>

8. While I was in the course of preparing this Judgment, on Saturday 5 December 2020 I was sent a letter from the Claimant's solicitors seeking a further hearing on the basis that they contended that, having now been given disclosure and inspection, they had obtained material which supported their pleaded contentions and demonstrated that the Applying Defendants were simply seeking to stifle on pleading grounds contentions which were fully justified by their now disclosed documents. I sought written submissions

from each side as to what they sought and why (and copied this to the other Defendants whom had been copied into the email to me).

9. The Claimant repeated his position by letter of 11 December 2020. However, the Applying Defendants objected to the course sought on the basis that their Application stood (or fell) on the basis of the existing pleadings which were either good or bad, and that if they were bad then the Application had been properly made and it was for the Claimant to seek to deal with any existing problems by way of amendment.

10. I am concerned as to whether there are tactical aspects to all this where the Court's main objective is to determine the case justly (and at proportionate cost) in accordance with the overriding objective. However, I have decided to finish and produce this Judgment in any event, as:
    a. I wish to accord with the usual rule (which exists for good reason) that Judgments be delivered within 2 months of conclusion of a hearing
    b. There is a trial listed to commence on 12 July 2021. To delay this Judgment could be prejudicial to it and the orderly progress of this Claim in accordance with existing case management orders
    c. There is force in the Defendant's contention that this Hearing was deliberately listed to take place before disclosure and so as not to be affected by it
    d. There is force in the Defendant's contention that the statements of case should be in accord with the Rules
    e. This Judgment was already well advanced, and to postpone it would have involved a waste of judicial resource
    f. In view of what I have decided below in this Judgment, I do not see any particular prejudice as being likely to result to either party. Insofar as the Claimant is going to either have to or to wish to amend, those aspects can be sensibly combined. Insofar as I have identified deficiencies on the Claimant's part, I do not see that the disclosure is likely to make much (if any) difference.

The Statements of Case

11. The Particulars of Claim are 123 paragraphs and just over 50 pages (including a short Prayer for Relief) long.

12. Paragraphs 1-4 deal with the Company and its practice and departments.

13. Paragraph 5 states that it had key "Business Interests" including Goodwill, staff teams, loyalty and relationships, and the preservation and protection of "Confidential Information" defined as:

> "(d)… including but not limited to information relating to Rollingsons':
> i. Corporate plans, strategy and financial performance, including (but not limited to) information concerning business development, business methods, financial reports and the performance of the firm and its individual departments;

ii. Clients and potential clients, including client names, client contacts (including contact details), information on past, ongoing and potential client transactions, clients' own confidential information and information as to fee arrangements; and
iii. Partners, associates and support staff, including as to their abilities, billings, connections with Rollingsons' clients and potential clients, and the terms and conditions of their employment with Rollingsons."

These allegations are not admitted in Paragraph 6 of the Defence of the Applying Defendants and there is no application to them strike-out.

14. Paragraph 6 reads:
"6. As a consequence of the Defendants' breaches of duty as particularised herein, Rollingsons became insolvent and entered into administration on 14 June 2018."
This Paragraph is one of the subjects of the Application.

15. Paragraph 7 deals with the Assignment. It refers to the Administrators as having been members of FRP Advisory LLP ("FRP"). Technically this is irrelevant to their status as administrators (as it is the individuals and not their practising entity who are appointed under Schedule B1 to the Insolvency Act 1986 ("the 1986 Act")) but that explains the references to FRP in Paragraph 8 and elsewhere before me.

16. Paragraph 8 reads:
"8. The First Defendant, Mr Hollingsworth, bid with FRP Advisory LLP in an attempt to have those rights of action assigned to him. His purpose in so doing was to prevent this claim being issued and determined by the Court."
This Paragraph, referring to the Bidding Process, is one of the subjects of the Application.

17. Paragraphs 9 to 51 deal with the various Defendants and their alleged duties to the Company. Paragraphs 11 to 22 deal with the First Defendant, and including allegations of general confidentiality, duty to promote the Company and post-termination non-competition and non-solicitation covenants (Paragraph 19), implied contractual duties of good faith and trust and confidence (Paragraph 20), an equitable duty of confidence (Paragraph 21), and fiduciary duties arising from his statutory company directorship (Paragraph 22). Paragraphs 23 to 31 deal with the Second Defendant, and including allegations of duty to promote the Company, general confidentiality and post-termination non-competition and non-solicitation covenants and implied contractual duties of good faith and trust and confidence (Paragraphs 25 and 28 by reference to those alleged against the First Defendant), a contractual duty of confidence regarding information obtained when he was negotiating to purchase shares in the Company (Paragraph 27), an equitable duty of confidence (Paragraph 29), and fiduciary duties said to arise from his senior role (Paragraphs 30-31). Paragraphs 32 to 37 deal with the Third Defendant, and including allegations of duty to promote the Company, general confidentiality and

post-termination non-competition and non-solicitation covenants, implied contractual duties of good faith and trust and confidence (Paragraph 36), and an equitable duty of confidence (Paragraph 37). Paragraphs 38 to 42 deal with the Fourth Defendant, and including allegations of duty to promote the Company, general confidentiality and post-termination non-competition and non-solicitation covenants, implied contractual duties of good faith and trust and confidence (Paragraph 41), and an equitable duty of confidence (Paragraph 42).

18. Paragraphs 43 to 51 deal with the Fifth Defendant and that it is a company which was originally controlled as an inactive entity by a Mr Addyman, a Mr Gray and a Mr McDougall (all solicitors at the well-known entity Plexus LLP), and that the First Defendant became its managing director and controlling mind by at least 1 February 2017 and subsequently its controlling shareholder, and that the Second Defendant became a director and a significant shareholder by 31 January 2017.

19. Paragraph 52 states that "On dates unknown but which the Claimant presently believes to have been during 2016 and 2017, the Defendants agreed and/or conspired and/or entered into a common design ("the Common Design")… ". The Common Design is then set out in Paragraphs 52 and 53 as being to recruit and divert staff and clients from the Company to the Fifth Defendant and to undermine the Company to benefit the Fifth Defendant, and to use unlawful means in doing so and including by: misusing the Confidential Information; soliciting (by themselves and each other) staff and clients; deleting and destroying Company information and documents; doing so secretly; and concealing all this from the Claimant both passively and by active lies and also by deleting work emails. Paragraph 54 alleges that this involved breaches of contract and duties and misuse of confidential information by and inducements of breaches of contract by the other individual Defendants. Paragraph 56 alleges that the original parties to the Common Design were the Applying Defendants and that they were joined, on dates unknown, in it by the Third and Fourth Defendants.

20. Paragraphs 57 to 108 (being Section IV of the document) set out how the Common Design is alleged to have been carried out by a number of sub-sections. Paragraph 57 says that this is "necessarily part inferential at this stage since the Defendants have deliberately concealed their wrongdoing from Rollingsons, as particularised further below."

21. Sub-Section (a) is in Paragraphs 58 to 63 and is headed "Mr Hollingsworth's removal/retention of Confidential Information". They allege that the First Defendant identified and took various Confidential Information knowingly for his own (including Common Design) purposes and not for the purposes of the Company. Paragraph 60(d) alleges that this included him on 31 May 2016 forwarding to his personal Gmail account an email entitled "New Files" which contained client information, and Paragraph 62 alleges that the First Defendant subsequently, through his solicitors, has returned copies of that Confidential Information. In

Paragraph 52 of the Applying Defendants' Defence, it is denied that that amounted to any admission.

22. Sub-Section (b) is in Paragraphs 64 to 82 and is headed "The Team Move". It alleges that in mid-2016 or otherwise prior to the termination of his employment with the Company, and if not then while the Second Defendant was still an employee of the Company, the First Defendant discussed the future with the Second Defendant and that it is inferred that he encouraged the Second Defendant to come with him and to induce others to come to the Fifth Defendant (Paragraphs 67-69), in return for the Second Defendant receiving employment and shares in the Second Defendant (Paragraph 70). It alleges that the aim was a "team move" i.e. of at least all or most of the Property and Family Departments, from the Company to the Fifth Defendant (Paragraphs 71 to 73), and which then occurred in relation to the individual Defendants and others (Paragraphs 74-78) to the disadvantage of the Company (Paragraph 79).

23. Paragraph 80 reads:

> "80. It is inferred that, at dates unknown, each of the Defendants (or a sub-set of them) discussed and agreed the Common Design and/or each of the matters pleaded at paragraphs 72-78 and in particular (without limitation) discussed and agreed: a) To seek to achieve the matters set out above at paragraphs 72-78; b) That Mr Gasser and Ms Bhatiani would assist in the recruitment of the employees within the Family Department; c) That Mr Gasser and Ms Wheeler would assist in the recruitment of the employees within the Property Department; and d) That each of the Defendants would conceal such recruitment from Rollingsons."

This Paragraph is one of the subjects of the Application.

24. Paragraphs 81 and 82 (which are not subjects of the Application) then go on to read:

> "81. It is further inferred that:
> a) Mr Hollingsworth and Mr Gasser conspired together so as to identify: (i) which employees to approach; (ii) when to approach such employees; and (iii) the terms and conditions to be offered to induce them to accept offers to move to Laurus; and
> b) Each of the Individual Defendants encouraged each other to resign from Rollingsons in order to join Laurus.
>
> 82. Without prejudice to the full range of inferences that can properly be drawn from what transpired and/or prior to disclosure herein Rollingsons will say that the above matters and in particular the Common Design as particularised herein can be inferred from the following facts and matters, in particular:
> a) The matters particularised at paragraphs 65 and 70;
> b) The senior position of Mr Hollingsworth as a Salaried Partner and Director of Rollingsons;

c) The close working relationship between Mr Hollingsworth and Ms Wheeler;
d) The close working relationship between Mr Hollingsworth, Ms Wheeler and the other employees of Rollingsons' Property Department; e) The senior position of Mr Gasser as Head of the Family Department;
f) The close working relationship between Mr Gasser and Ms Bhatiani;
g) The close working relationship between Mr Gasser, Ms Bhatiani and the other employees of the Family Department;
h) The fact that each of the Defendants have resigned from Rollingsons and have since taken up employment with Laurus;
i) The fact that each of the individuals listed at paragraphs 74-76 have resigned from Rollingsons and have since taken up employment with Laurus;
j) The dates and/or co-ordinated nature of each of the acts specified in the preceding subparagraphs (h) and (i) occurred;
k) The content of an email (set out in full below at paragraph 84(e) below) from a client of Rollingsons called Sarah Parry which stated inter alia: "You also told me that if I stayed with Rollingsons I would have my work done by a junior member of the remaining team".Mr Gasser informed Ms Parry that Rollingsons would be forced to use a junior solicitor to carry out work for her, as he well knew that he had solicited all of the senior solicitors within the Family Department;
l) The content of an email (set out in full below at paragraph 85 below) which was sent on behalf of Ms Wheeler to various of her clients, which expressly stated that she "will be leaving Rollingsons at the end of March along with a few colleagues to the same firm, so they are not 'over the moon' about the exodus"
m) The lies told by the Defendants to Mr Rollingson as to their future intentions as set out more fully below at paragraphs 103-107;
n) The steps taken by the Claimants to conceal their unlawful actions; and
o) Ms Wheeler's repeated refusal to answer Mr Rollingson's questions as to whether she had co-ordinated her resignation with other employees."

25. Sub-Section (c) is in Paragraphs 83 to 86, and is headed "Solicitation and Diversion of Clients." It asserts that the First and Second Defendants sought to obtain existing and potential new clients of the Company while they, or at least the Second Defendant, were still at the Company (Paragraph 83). At Paragraph 84 it gives details of what is said to have been done to do this. At Paragraphs 85 and 86 it is said that the Fourth Defendant "and/or any or all of the individual Defendants encouraged and/or procured" one Russell Hunt, a person who had previously referred clients to the Company, to solicit for the Fifth Defendant "so as to further the Common Design" inferring this from a "clandestine" email sent by the Third Defendant to Mr Hunt asking him to contact potential clients on the occasion of her "and a few colleagues'" impending departure from the Company.

26. Sub-Section (d) is in Paragraphs 87 to 92 and is headed "Misuse of Confidential Information by Mr Gasser and Ms Bhatiani".

27. Paragraphs 87 and 88 allege that the Second Defendant had obtained various Confidential Information.

28. Paragraph 89 reads:

> "89. It is inferred that during his employment with Rollingsons and/or since taking up employment with Laurus, Mr Gasser misused the Confidential Information referred to above in order to further the Common Design and/or solicit and/or divert the business of Rollingsons to the benefit of Laurus. Without prejudice to the full range of inferences that can properly be drawn from what transpired and/or prior to disclosure herein, the Claimant say that Mr Gasser's misuse of confidential information can be inferred from the facts and matters listed below:
> a) On 16 December 2016, Mr Gasser emailed to his personal email account, steven_gasser01@hotmail.co.uk, documents entitled TERMS&CONDITIONS.doc and CLIENT01-21.04.2016 CLIENT CARE.doc. Those documents contained Confidential Information relating to the clients of Rollingsons. Mr Gasser had no legitimate reason to email them to his personal email account.
> b) Mr Gasser took away from Rollingsons' offices and thereafter kept at his home until 17 February 2017: i. A correspondence folder relating to Mr Sheeraz; ii. Four trial bundles relating to Ms Vandy; iii. A correspondence bundle relating to Valerie Chester; and
> c) Paragraphs 95 and 97-98 below."

29. Paragraph 90 alleges that an employee of the Company, a Ms Coyle, took files relating to a client and a client enquiry away from the Company to her home until February 2017, and Paragraph 91 alleges that she did so "on the instruction of, alternatively was procured and/or induced to act as aforesaid by, Mr Gasser and/or Ms Bhatiani." This Paragraph is not one of the subjects of the Application.

30. Paragraph 92 reads:

> "It is further inferred that each or any of the Defendants participated in and/or assisted with and/or encouraged Mr Gasser's and/or Bhatiani's misuse of Confidential Information as particularised above."

This Paragraph is one of the subjects of the Application.

31. Sub-Section (e) is in Paragraphs 93 to 96 and is headed "Manipulation of client's terms and conditions and failure to properly record times and bill clients". It is alleged that the Second and Third Defendants failed to record work done and manipulated certain of the Company's client files so that work carried out by the Company would not be billed for by the Company either at all or late and so that the Company would be prejudiced financially or with regard to its relationships with those clients. Paragraph 96 alleges that it is to be inferred that the First Defendant had induced the Second and/or Third Defendants to do this and that the Second Defendant had induced the Third Defendant to do this; although that Paragraph is not a subject of the Application.

32. Sub-Section (f) is in Paragraphs 97 to 98 and is headed "Deletion/loss of documents". It alleges that the Second and Third Defendants caused the Company to lose various client documents.

33. Sub-Section (g) is in Paragraphs 99 to 108 and is headed "Concealment of the Common Design".

34. Paragraph 99 reads:

> "99. Each of the Defendants knew, at all material times, that in the event that Rollingsons discovered or suspected the recruitment and/or solicitation and diversion of its employees and/or clients and/or the failure to properly bill clients and the amendment to clients' payment terms and/or the misuse of confidential information and/or the deletion or loss of documents described in these Particulars of Claim, it would take steps to discourage its employees, clients and potential clients from leaving Rollingsons and/or joining Laurus and/or would seek injunctive relief from this Court."

This Paragraph is one of the subjects of the Application.

35. Paragraph 100 alleges that the First and Second Defendants knew of the importance of the Business Interests to the Company and that it was facing a short-term financial difficulty as a result of the commercial lease of its offices ("the Lease") but where it had the benefit of a break clause.

36. Paragraph 101 alleges that the First and Second Defendants knew of the various Section IV matters and that they were matters of threat to the Company, and Paragraph 102 alleges that they owed duties to disclose them to the Company. Paragraph 103 alleges that they breached those duties both passively by failing to disclose their plans and actions, and by actively lying to the Claimant as to their future intentions. Paragraph 104 alleges that they so concealed their plans in order to further the Common Design and "encouraged" (but without stating whom but presumably each other) to do so. Paragraphs 105 and 106 alleged that the Third, Fourth and Fifth Defendants also knew of the various Section IV matters and that they were matters of threat to the Company, and that it is to be inferred that they encouraged the First and Second Defendants to conceal them. Paragraph 108 states that the Third and Fourth Defendants also intentionally misled the Claimant as to their future plans. Paragraph 109 alleges that it is to inferred that they did this as a result of inducement by the First and/or Second Defendants and concludes that "It is inferred that the Defendants induced and/or procured each other to so conceal their unlawful conduct and/or sought to conceal their actions in furtherance of the Common Design." (although no complaint is made of this by the Application).

37. Section V of the document runs from Paragraphs 109 to 115. Paragraph 109 alleges that each Defendant knew of the various duties owed by each and each other of them. Paragraph 110 alleges that the Common Design and its various actions involved breaches of contract by each individual Defendant. Paragraphs 111 and 112 allege that the pleaded matters involved breaches of

the First and Second Defendants' fiduciary duties. Paragraph 113 alleges procurement and inducement by each Defendant of breaches of contract as particularised above, a conspiracy by each Defendant to carry out the Common Design and use of unlawful means for that purpose, and the infliction of intentional harm on the Company by doing so, and joint and several liability in tort, Paragraph 114 alleges that the First and Second Defendants have dishonestly assisted each other in breaches of fiduciary duty. Paragraph 115 alleges breaches of equitable duties of confidence by each individual Defendant as particularised above.

38. Section VI is in Paragraphs 116 and 117 and is headed "Loss and Damage".

39. Paragraph 116 alleges that the Company suffered loss and damage as a result of the Defendants' breaches of duty. It alleges that the Company had been profitable, and had merger potential, and sets out turnover and profit figures for years leading up to 31 March 2016. It seeks to explain a reduction in profit for the last year due to one-off circumstances limited in time. It then states that the Property and Family Departments had been particularly profitable within the Company and gives the figures for the years to 31 March 2015 and 31 March 2016 as:

    "i. In the financial year ending 31 March 2015, the fee income of the Property Department was £1,566,223, and the fee income of the Family Department was £626,388.

    ii. In the financial year ending 31 March 2016, the fee income of the Property Department was £1,744,717, and the fee income of the Family Department was £487,228."

40. Paragraph 116(f) then alleges:

    "f) Following and in consequence of the Defendants' breaches as aforesaid Rollingsons' revenue and profit declined. In particular:

    i. In the financial year ending 31 March 2017, Rollingsons' turnover was £3,121,186 and it suffered a loss before tax of £631,492. During that year the fee income of the Property Department was £1,200,242 and the fee income of the Family Department was £513,957 (the majority of which had been billed and/or earned before the breaches of duty particularised herein).

    ii. In the financial year ending 31 March 2018, Rollingsons' turnover was approximately £2,862,000. In that at year the fee income of the Property Department was approximately £574,000 and the fee income of the Family Department was approximately £247,600. Prior to disclosure and expert evidence herein (including, where necessary, disclosure from third parties) the Claimant is currently unable to calculate the extent of Rollingsons' losses during this period. However, such losses were substantial."

    This Paragraph is also a subject of the Application.

41. Paragraph 117 then sets out details and calculations of what profits ("the Foregone Profits") the Company would have made if the various wrongs and breaches of duty had not occurred.

42. Section VII and its Paragraphs 118 to 123 claim damages or equitable compensation in the amount of the Foregone Profits (being a total of £1,157,000) and exemplary damages, an account of profits made by the First and Second Defendants and interest. The Prayer for Relief is to the same effect.

43. I will set out the Defences of the Applying Defendants and Replies and Part 18 Information relating to the Paragraphs which are the subject of the Application when I come to deal with them specifically. However, much of the defence of the First and Second Defendants is along the lines that they only took any particular steps following the cessations of their employment with and/or directorship of the Company, and otherwise matters are (relatively simply) denied or not admitted and complaint is made that the allegations against them are not sufficiently particularised for them to be able to respond.

44. However, the Defence of the Third Defendant includes at its Paragraph 65, the following:

> "65. On 19 October 2016 Mr, Gasser introduced Ms, Bhatiani to Mr. Addyman at a meeting which took place in a Public House. Mr. Hollingsworth was also present at that meeting. Mr Gasser, knew that Ms. Bhatiani was unhappy with her current position and suggested the meeting, which she accepted. During the meeting Mr. Addyman set out his background, his ideas for Laurus and confirmed that Mr. Hollingsworth and Mr. Gasser would be directors of the company. Mr. Gasser was only present for part of the meeting. Mr. Addyman also discussed a possible job opportunity for Ms. Bhatiani."

The Claimant relies upon this as evidencing and being both the alleged Common Design and breaches of duty on the part of (at least) the First and Second Defendants, and where the First Defendant was still an employee and director of the Company and the Second Defendant an employee of it.

The Application

45. The Application is made both under CPR3.4(2) and CPR24.2. CPR3.4(2) provides that:

"The court may strike out a statement of case if it appears to the court –
(a) that the statement of case discloses no reasonable grounds for bringing... the claim;
(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
(c) that there has been a failure to comply with a rule, practice direction or court order"

46. CPR24.2 provides that:

"The court may give summary judgment against a claimant...on the whole of a claim or on a particular issue if –(a) it considers that –(i) that claimant has no real prospect of succeeding on the claim or issue... and (b) there is no other compelling reason why the case or issue should be disposed of at a trial"

47. The Application Notice in terms of striking out, simply lists the paragraphs which are sought to be struck-out and refers to reasons given in accompanying witness statements and CPR3.4(2). The witness statement of the First Defendant in support dated 10 August 2020 states, in circular fashion, that the grounds are described in the Application Notice and will be subject to submissions of Leading Counsel. However, he did refer to Paragraph 8 of the Particulars of Claim and his contention that his part of the Bidding Process was "without prejudice", something which he developed slightly in his second witness statement of 15 October 2020. The Applying Defendants also adduced a witness statement of a solicitor, Glyn Lancefield dated 10 August 2020, saying that apart from the application regarding Paragraph 8, the "Application was being made on the basis of the pleadings" and then set out CPR3.4(2).

48. The Application Notice in terms of reverse summary judgment simply refers to "CPR24.2". Mr Lancefield simply recites CPR24.2 and then says "I am not aware of any other compelling reason why the case or issues subject to the Application should be disposed of at a trial."

49. The Claimant adduced a witness statement dated 15 October 2020 which stated that the Application and the grounds for it were opaque, and which gave some explanation of how he had come to learn of details of what the First Defendant had done in the Bidding Process by asking for them from and being given them by the Administrators.

50. This has lead Mr Leiper QC for the Claimant to take two technical points against my dealing with the Application substantively.

51. First, he submits in relation to striking-out that it is unfair for the Claimant to have to respond to a strike-out application without having details of the actual grounds and argument relied upon and with having to wait until counsel's Skeleton Argument before he learns of them. He further relies on CPR23.6(b) which requires an applicant to set out in the Application Notice "briefly, why the applicant is seeking the order" and says that the Application Notice is so terse that there is really no reason given at all; and that this has hampered the Claimant's and his ability to answer whatever points are being advanced by the Applying Defendants. Mr Solomon QC for the Applying Defendants says that, apart from the WP Issue which is well defined between the parties, this is all really a set of issues of examining the statements of case as a matter of law and the CPR and common-law rules of pleading and does not require further elaboration in an Application Notice.

52. Second, he submits in relation to reverse summary judgment that Paragraph 2(3) of the Practice Direction to CPR Part 24 requires the evidence in support to "(a) identify concisely any point of law or provision in a document on which the applicant relies, and/or (b) state that it is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim or issue... and in either case state that the applicant knows of no other reason why the disposal of the claim or

issue should await trial." Mr Solomon accepted that the then witness evidence does not depose to a belief of no real prospect of success but submits either that such is not required where only pleading points and matters are being taken or that any technical breach can be waived and any gap in the technical evidence can be cured.

53. It seems to me that there have been technical breaches of each CPR provision for the reasons given by Mr Leiper. I also consider that the lack of identification of reasons could have caused prejudice to the Claimant in terms of a lack of notice of how to prepare and focus in resisting the Application. However, it seems to me that Mr Leiper has been able to fully argue his case, and with the benefit of an adjournment overnight to a late morning restart, and he has not sought to introduce any supplementary material on the basis of any asserted need to do so. I therefore do not think that there has been any real prejudice. I do and did think and have directed that the Applying Defendants should have to provide a further witness statement deposing to the CPR Part 24 "no real prospect of succeeding" belief as that it an important technical requirement of summary judgment applications and which applications should not be lightly brought without such a belief; and, indeed, that has now occurred. However, I think that it would be a waste of time and cost to adjourn the Application (or to dismiss it, only for it to be brought again) because of these matters, and will waive the non-compliance (subject to have required the further witness statement and any effect, if any, that this aspect may have as to costs).

54. Apart from the WP Issue, the Application seems to me to have been brought on a basis which does not seek to challenge by evidence the factual assertions in the Claimant's statements of case. Accordingly, and subject (which is important) as to whether those factual assertions are properly pleaded, the Application proceeds on the basis that the facts stated will be assumed to be capable of being proved at trial. However, where the law is that a fact, when pleaded, has to be supported by an assertion that the fact is to be inferred from other primary facts (e.g. an assertion of subjective fraud), although those primary facts are to be taken as proved, the court still has to consider whether the inferred fact is, in fact, a fact which is more likely than not to be inferred from those primary facts.

55. The Application has been brought under CPR3.4(2) under a number of bases, being that it is said that:
    a. The matters pleaded do not give rise to reasonable grounds for bringing the relevant underlying claim (i.e. establishing the relevant underlying asserted cause of action) - CPR3.4(2)(a)
    b. The matters pleaded are an abuse of process – CPR3.4(2)(b) - this is particularly said in relation to the WP Issue where it is submitted that the Claimant is improperly seeking to rely upon material subject to without prejudice privilege. However, it may also arise where primary facts cannot justify an inference which is said to arise from them
    c. The pleading is "otherwise likely to obstruct the just disposal of the proceedings" - CPR3.4(2)(b). This may be the case where primary

facts cannot justify an inference which is said to arise from them, but can also be the case where it is simply unclear what exactly is being alleged

d. There has been a failure to comply with a rule, practice direction or court order – CPR3.4(2)(c).

56. The Rule which is said to be potentially relevant is CPR16.4(1)(a) which provides that Particulars of Claim must include "a concise statement of the facts on which the claimant relies" together with certain other specific matters including those set out in the Practice Direction to CPR Part 16 ("PD16"). It is submitted, and I agree, that Particulars of Claim are to set out the facts upon which a Claimant relies in order to establish their cause(s) of action upon which they rely and the remedy (including as to quantum) which they seek. However, they are not to set out the evidence upon which they will rely to seek to prove those facts (although they can set out secondary facts from which certain primary facts may be inferred) or a general history (see e.g. White Book notes 16.4.1 and Hague Plant v Hague [2014] EWCA Civ 1609 and paragraph 30 of Portland Stone v Barclays Bank Plc [2018] EWHC 2341 and which I set out in full below), although there is often a tension between assertions that a statement of case is both over-long in terms of including evidential material and over-short in not stating enough to amount to reasonable grounds for the causes of action advanced and remedies sought, and where the Court will afford some latitude to prevent potentially meritorious cases being struck-out on technical pleading grounds.

57. Paragraph 8.2 of PD16 provides that "a Claimant must specifically set out the following matters in his particulars of claim where he seeks to rely on them in support of his claim: (1) any allegation of fraud... (5) notice or knowledge of a fact."

58. However, Mr Solomon also submits, and in my judgment correctly, that there remain various other (and which might be said to common-law) rules of pleading, contravention of which will make the relevant elements of a statement of case vulnerable under one or more elements of CPR 3.4(2) (as meaning that reasonable grounds for a cause of action are not identified or that the statement of case is an abuse or otherwise likely to obstruct the just disposal of the proceedings). In particular, allegations of certain serious matters, including both conspiracy to injure and fraud (and dishonesty), must be clearly pleaded with adequate particularity and allegations of relevant subjective elements (i.e. states of mind) must be supported by allegations of primary facts from which (without anything else) it is more likely than not that an inference of the relevant matter would be drawn. This latter point also applies in a sense to allegations of dishonesty, although, since that is now an objective matter (see Ivey v Genting [2017] UKSC 67), it is the facts from which a reasonable person would consider as to amounting to dishonesty which must be pleaded.

59. I agree with Mr Solomon (and Mr Leiper did not seek to contest) that these and my earlier stated propositions are justified by the authorities and in particular by the following citations.

60. From, Ivy Technology v Martin [2019] EWHC 2510 (Comm) where at paragraph 12 it was held that:

> "12. Conspiracy to injure must be pleaded to a high standard, particularly where the allegations include dishonesty:
> i) Allegations of conspiracy to injure "must be clearly pleaded and clearly proved by convincing evidence" (Jarman & Platt Ltd v I Barget Ltd [1977] FSR 260, 267).
> ii) The more serious the allegations made, the more important it is for the case to be set out clearly and with adequate particularity: Secretary of State for Trade and Industry v. Swan [2003] EWHC 1780 (Ch) §§ 22-24; CPR PD 16 § 8.2 in respect of the obligations on a party pleading dishonesty; Mullarkey v. Broad [2007] EWHC 3400 (Ch), [2008] 1 BCLC 638 §§ 40-47 on the burden and standard of proof for such claims and reiterating the well-established principle that an allegation of dishonesty must be pleaded clearly and with particularity (citing Belmont Finance Corp v Williams Furniture [1979] Ch 250, 268).
> iii) Unlawful means conspiracy is a grave allegation, which ought not to be lightly made, and like fraud must be clearly pleaded and requires a high standard of proof: CEF Holdings v. Mundey [2012] EWHC 1534 (QB), [2012] IRLR 912
> iv) Where a conspiracy claim alleges dishonesty, then "all the strictures that apply to pleading fraud" are directly engaged, i.e. it is necessary to plead all the specific facts and circumstances supporting the inference of dishonesty by the defendants: ED&F Man Sugar v. T&L Sugars [2016] EWHC 272 (Comm).
> v) As to the substantive elements of the tort: "To establish liability for assisting another person in the commission of a tort [common design], it is necessary to show that the defendant (i) acted in a way which furthered the commission of the tort by the other person and (ii) did so in pursuance of a common design to do, or secure the doing of, the acts which constituted the tort.
> …
> The elements of this tort [conspiracy] are a combination or agreement between the defendant and another person pursuant to which unlawful action is taken which causes loss or damage to the claimant and is intended or expected by the defendant to do so (whether or not this was the defendant's predominant purpose)." (Marathon Asset Management LLP v. Seddon [2017] IRLR 503 §§ 132 and 135)."

61. From, Portland Stone Firms Limited v Barclays Bank Plc [2018] EWHC 2341 where at paragraphs 23 to 30 (and which also deal with the court's approach to CPR3.4 and CPR24 applications) it was held that:

> "23. The applicable principles set out in and flowing from CPR 3.4 and 24 are also extremely well known. The summary by Lewison J in Easyair Ltd v Opal telecom Ltd [2009] EWHC 339 (Ch) at [15] was relied upon by all parties as a convenient summary:

"The correct approach on applications by defendants is, in my judgment, as follows:
i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;
ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]
iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman
iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]
v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550 ;
vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63 ;
vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 7252".

24. I adopt and will apply those principles in the present case. I would only add that, where a claim is defective and therefore susceptible to be struck out or subject to summary judgment, the Court should consider whether the defect in question might be cured by amendment and, if it might, should consider whether it is right to give the party in default an opportunity to make the defect good: see Hockin and Ors v RBS [2016] EWHC 92 (Ch) per Asplin J. This is another facet of the Royal Brompton Hospital principle that the Court should not merely look at the materials before it but should take account of what can reasonably be expected to be available at trial. I have borne this approach in mind in reaching my conclusions in the present case.

Proof of fraud and the approach to striking out allegations of fraud
25. Where, as here, a Claimant wishes to amend to plead fraud and the application is opposed, it is material to bear in mind the approach that the Court routinely takes to proving fraud in civil litigation. A sufficient summary for present purposes is provided by Fiona Trust & Holding Corp v Privalov [2010] EWHC 3199 (Comm) at [1438]-[1439] per Andrew Smith J:
It is well established that "cogent evidence is required to justify a finding of fraud or other discreditable conduct": per Moore-Bick LJ in Jafari-Fini v Skillglass Ltd., [2007] EWCA Civ 261 at para.73. This principle reflects the court's conventional perception that it is generally not likely that people will engage in such conduct: "where a claimant seeks to prove a case of dishonesty, its inherent improbability means that, even on the civil burden of proof, the evidence needed to prove it must be all the stronger", per Rix LJ in Markel v Higgins, [2009] EWCA 790 at para 50. The question remains one of the balance of probability, although typically, as Ungoed-Thomas J put it in In re Dellow's Will Trusts, [1964] 1 WLR 415,455 (cited by Lord Nicholls in In re H, [1996] AC 563 at p.586H), "The more serious the allegation the more cogent the evidence required to overcome the unlikelihood of what is alleged and thus to prove it"…
…Thus in the Jafari-Fini case at para 49, Carnwath LJ recognised an obvious qualification to the application of the principle, and said, "Unless it is dealing with known fraudsters, the court should start from a strong presumption that the innocent explanation is more likely to be correct."

26. This summary is consistent with many other decisions of high authority which establish that pleadings of fraud should be subjected to close scrutiny and that it is not possible to infer dishonesty from facts that are equally consistent with honesty: see, for example, Mukhtar v Saleem [2018] EWHC 1729 (QB); Elite Property Holdings Ltd v Barclays Bank [2017] EWHC 2030 (QB); Three Rivers DC v The Governor and Company of Barclays of England (No 3) [2003] 2 AC 1 at [186] per Lord Millett – see below.

27. One of the features of claims involving fraud or deceit is the prospect that the Defendant will, if the underlying allegation is true, have tried to shroud his conduct in secrecy. This has routinely been addressed in cases involving allegations that a defendant has engaged in anti-competitive

arrangements. In such cases, the Court adopts what is called a generous approach to pleadings. The approach was summarised by Flaux J in Bord Na Mona Horticultural Ltd & Anr v British Polythene Industries Plc [2012] EWHC 3346 (Comm) at [29] ff. Flaux J set out the principles in play as described by Sales J in Nokia Corporation v AU Optronics Corporation [2012] EWHC 731 (Ch) at [62]-[67], which included the existence of a tension between (a) the impulse to ensure that claims are fully and clearly pleaded, and (b) the impulse to ensure that justice is done and a claimant is not prevented by overly strict and demanding rules of pleading from introducing a claim which may prove to be properly made out at trial but may be shut out by the law of limitation if the claimant is to be forced to wait until he has full particulars before launching a claim. Sales J indicated that this tension was to be resolved by "allowing a measure of generosity in favour of a claimant." Flaux J continued at [31]:
"[31] This generous approach to the pleadings in cartel claims has been endorsed by the Court of Appeal, not only in Cooper Tire & Rubber Company Europe Ltd v Dow Deutschland [2010] EWCA Civ 864 but most recently by Etherton LJ in KME Yorkshire Ltd v Toshiba Carrier UK Ltd [2012] EWCA Civ 1190 at [32]: "As was stated by the Court of Appeal in Cooper Tire & Rubber Company Europe Ltd v Dow Deutschland Inc [2010] EWCA Civ 864 at paragraph [43], however, it is in the nature of anti-competitive arrangements that they are shrouded in secrecy and so it is difficult until after disclosure of documents fairly to assess the strength or otherwise of an allegation that a defendant was a party to, or aware of, the proven anti-competitive conduct of members of the same group of companies. That same generous approach was for the same reason taken by Sales J in Nokia Corporation v AU Optronics Corporation [2012] EWHC 731 in dismissing an application to strike out or to grant summary judgment against the claimant in proceedings for damages for infringement of Article 101. That approach is appropriate in the present case prior to disclosure of documents."

[32] In the case of applications for summary judgment, it is well established that the court should not engage in a mini-trial where there is any conflict of evidence. The dangers of too wide a use of the summary judgment procedure were emphasised by Mummery LJ at [4-18] of his judgment in Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical [2006] EWCA Civ 661. [5] and [18] of that judgment seem to me particularly apposite to the present case:
"5. Although the test [whether the claim has a real prospect of success] can be stated simply, its application in practice can be difficult. In my experience there can be more difficulties in applying the "no real prospect of success" test on an application for summary judgment (or on an application for permission to appeal, where a similar test is applicable) than in trying the case in its entirety (or, in the case of an appeal, hearing the substantive appeal). The decision-maker at trial will usually have a better grasp of the case as a whole, because of the added benefits of hearing the evidence tested, of receiving more developed submissions and of having more time in which to digest and reflect on the materials.…

18. In my judgment, the court should also hesitate about making a final decision without a trial where, even though there is no obvious conflict of fact at the time of the application, reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case."

[33] The same point was made by Lewison J (as he then was) in Federal Republic of Nigeria v Santolina Investment Corporation [2007] EWHC 437 (Ch), at [4(vi)] citing the Doncaster Pharmaceticals case: "Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.""

28. These are salutary warnings and necessary protections for the Claimants, which I bear in mind. It is, however, to be remembered that the Court's concern in these passages was in large measure based upon a lack of knowledge on the part of the Claimant before disclosure had been given. In the present case, the Defendants have given disclosure based upon wide-ranging search terms relating to multiple custodians. Although the Claimants submit that the Defendants' disclosure is not complete, they have not identified any specific omissions or areas of default that would justify the Court in treating the Claimants as if they were still materially excluded from access to relevant disclosure for present purposes.

29. In any event, if a case alleging fraud or deceit (or other intention) rests upon the drawing of inferences about a Defendant's state of mind from other facts, those other facts must be clearly pleaded and must be such as could support the finding for which the Claimant contends. This is clear from numerous authorities: see Three Rivers District Council v The Governor and Company of Barclays of England (No 3) [2003] 2 AC 1 at [55] per Lord Hope and [186] per Lord Millett. I endorse and adopt the statement of Flaux J in JSC Bank of Moscow v Kekhman [2015] EWHC 3073 (Comm) at [20] that:
"The Claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact "which tilts the balance and justifies an inference of dishonesty." At the interlocutory stage … the court is not concerned with whether the evidence at trial will or will not establish fraud but only with whether facts are pleaded which would justify the plea of fraud. If the plea is justified, then the case must go forward to trial and assessment of whether the evidence justifies the inference is a matter for the trial judge"

> The proper function of pleadings
> 30. It should not need repeating that Particulars of Claim must include a concise statement of the facts on which the Claimant relies: CPR 16.4(1)(a). The "facts on which the Claimant relies" should be no less and no more than the facts which the Claimant must prove in order to succeed in her or his claim. Practice Direction 16PD8.2 mandates that the Claimant must specifically set out any allegation of fraud, details of any misrepresentation, and notice or knowledge of a fact where he wishes to rely upon them in support of his claim. The Queen's Bench Guide provides guidelines which should be followed: they reflect good and proper practice that has been universally known by competent practitioners for decades. They include that "a statement of case must be as brief and concise as possible and confined to setting out the bald facts and not the evidence of them": see 6.7.4(1). A statement of case exceeding 25 pages is regarded as exceptional: experience shows that most cases can be accommodated in well under 25 pages even where the most serious allegations are made. Experience also shows that prolix pleadings normally tend to obfuscate rather than to serve their proper purpose of identifying the material facts and issues that the parties have to address and the Court has to decide.
>
> 31. Where statements of case do not comply with these basic principles, the Court may require the Claimant to achieve compliance by striking out the offending document and requiring service of a compliant one: see Tchenquiz v Grant Thornton [2015] EWHC 405(Comm) and Brown v AB [2018] EWHC 623 (QB). It has always been within the power of the Court to strike out either all or part of a pleading on the basis that it is vague, irrelevant, embarrassing or vexatious."

62. However, and as also made clear in those citations, I accept, as submitted by Mr Leiper that:
    a. The Court will consider, where disclosure has not yet taken place, whether a pleading is sufficient at this point in the light of whether there is a real prospect that it may be "improved" following disclosure, and especially where the defendants are alleged to have engaged in conduct which they have sought to conceal from the claimant (and while the Portland Stone case considered the context of alleged anti-competitive practices, it seems to me that the same considerations should apply in a context of alleged diversion of staff and clients). However, (i) the existing pleading still has to meet a measure of sufficiency including by way of particularised facts which of themselves would justify on the balance of probabilities an inference of fraud and (ii) the prospect of disclosure "improving" matters has to be a real one with a basis, and not a simple hope that something might turn up (i.e. "Micawberism")

    b. Conspiracies are usually inferred as a "victim" is unlikely to be able to prove an express agreement (and give precise particulars of the making of it), although the pleaded facts still have to justify the raising of an inference

c. The Court will also usually give a respondent party whose pleading is defective or deficient an opportunity to apply to correct its defects and deficiencies.

63. I also bear in mind that in Partco v Wragg 2020 EWCA Civ 594 at paragraph 27 there is a warning from the Court of Appeal against seeking to summarily dispose of single issues in a Claim (at least where they are not distinct, and they are not distinct here), where the result may be to lead to overall delay due to appeals etc. in a Claim which is going to go to trial in any event on many matters, and where justice may, in any event, be best served by a fully investigated and informed decision. The paragraph reads:

"27. It seems to me that the following principles are well established, at least as articulated in relation to summary disposal under Pt 24 of the CPR. (1) The purpose of resolving issues on a summary basis and at an early stage is to save time and costs and courts are encouraged to consider an issue or issues at an early stage which will either resolve or help to resolve the litigation as an important aspect of active case management: see Kent v Griffiths (No. 3) [2001] QB 36 at p. 51B–C. This is particularly so where a decision will put an end to an action. (2) In deciding whether to exercise powers of summary disposal, the court must have regard to the overriding objective. (3) The court should be slow to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross examination in any event and/or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action. (4) The court should always consider whether the objective of dealing with cases justly is better served by summary disposal of the particular issue or by letting all matters go to trial so that they can be fully investigated and a properly informed decision reached. The authority for principles (2)–(4) is to be found in: Three Rivers District Council v Bank of England (No. 3) [2003] 2 AC 1 per Lord Hope at paras 92–93, considering Swain v Hillman [2001] 1 All ER 91 at pp.94–95; Green v Hancocks (a Firm) [2001] Ll Rep PN 212, per Chadwick LJ at para.53, p.219, col. 1; and Killick v PricewaterhouseCoopers (No. 1) [2001] Ll Rep PN 17 per Neuberger J at p.23, col. 2, 2–27.2"

I consider that that warning is well applicable in this case where the Applying Defendants are only seeking to attack a very few paragraphs and elements (themselves mainly subsidiary elements, but linked to major elements) in a much larger and extensive case.

64. I add that various of these principles have been very recently restated in Qatar Airways Group v Middle East News [2020] EWHC 2975 at paragraphs 147-160 and 214, albeit in the context of a jurisdiction challenge. Although this decision was published after I had heard submissions from the parties, I do not regard it as taking matters further than what was already common-ground, and so I have not sought further submissions on it.

65. I have applied these various principles and authorities in and in making my determinations below.

The Issues (where strike-out or reverse summary judgement is sought)

(A) The pleading of the Bidding Process (paragraph 8) and the WP Issue.

66. This element of the Application is made on the basis (see above) that the relevant bid(s) were made "without prejudice" (as well as "subject to contract"). The Applying Defendants say that "without prejudice" privilege ("WPP") attached to the communications and that it has not been waived in a way which is binding upon Mr Hollingsworth, and so that no reference should be made in the litigation to them whether in the Particulars of Claim or otherwise ("the WP Issue"), and which assertions the Claimant seeks to refute. The Applying Defendants say that Paragraph 8 of the Particulars of Claim should be struck-out in particular because the WP Issue should be decided in their favour. Whether or not I strike-out the relevant paragraph 8 of the Particulars of Claim, the parties have urged upon me that I should decide the WP Issue.

67. I remind myself that paragraph 8 of the Particulars of Claim reads:

> "8. The First Defendant, Mr Hollingsworth, bid with FRP Advisory LLP in an attempt to have those rights of action assigned to him. His purpose in so doing was to prevent this claim being issued and determined by the Court."

68. This was responded to by paragraph 8 of the Defence, as follows:

> "8. Paragraph 8 is abusive and should be struck out. The following will be deleted consequent to any such strike out, and no privilege is waived by the inclusion of this information in this document at this stage:
> i. All correspondence sent by Mr Hollingsworth to the Administrators was written expressly "without prejudice". It cannot now be referred to in these proceedings. To do so is an abuse;
> ii. Further, all correspondence sent by Mr Hollingsworth to the Administrators was obviously confidential. It is not known how or by what means Mr Rollingson has obtained this information, and to the extent necessary, disclosure will be sought as to the same;
> iii. Without prejudice to the above, it is denied, as alleged, that the purpose of Mr Hollingsworth's bid was "to prevent this claim being issued and determined by the Court", if the same is a suggestion that Mr Hollingsworth was attempting to stifle any legitimate litigation. It is averred that Mr Hollingsworth stated in correspondence with the Administrators that he saw "no merit" in the claim and would defend any proceedings brought against him, but that he made the offer "to avoid the nuisance of any further legal action". It is averred that the claim now brought is a nuisance and is brought by Mr Rollingson in order to harass his former employees rather than for any commercial purpose, and is not commercially justifiable;
> iv. Mr Hollingsworth's initial offer, indicative of the nuisance value of the claims, was for £15,100. Mr Hollingsworth was encouraged thereafter by the Administrator to make a best and final offer, which he did by email of 1 March 2019, in the sum of £50,000, which was also indicative of the

nuisance value of the claims, and significantly overvalued any potential claim against him."

69. In counter-response, Paragraph 10 of the Reply reads:

"10. Save that no admission is made as to the content of Mr Hollingsworth's letters to the Administrators, paragraph 8 is specifically denied. If it is alleged that marking a document 'without prejudice' makes it subject to without prejudice privilege, then this is denied. The Defendants have failed to identify which privilege they allege pertains or the basis therefor.

70. The evidence as to the Bidding Process was as follows:
    a. Before the Administration, the Company, acting by the Claimant, had threatened proceedings against the Defendants.
    b. Following their appointment, on 15 August 2018 the Administrators wrote to Hine Legal, as acting for the First and others of the Defendants, under the hearing "subject to contract", and stating: that as Administrators they had a duty to realise the Company's assets, and which "may include pursuing rights of action of the Company or effecting an assignment of the same"; that Hine's clients might have an interest in accepting an assignment; and that they invited a "best and final offer for acceptance of the assignment of the Clam" and details of the proposed terms of such an assignment.
    c. On 29 August 2018 the First Defendant sent to the Administrators an email headed "Without Prejudice and Subject to Contract" stating that he saw "no merit in the claim" but wished to make an offer "to avoid the nuisance of any further legal action" and then offered a price for "the assignment of the claim to me" and noted that if the offer were accepted then a draft assignment would be provided.
    d. On 14 February 2019 the Administrators replied to say that they had received an offer from another party and to invite a further offer from the First Defendant.
    e. On 21 February 2019, and a conversation, by an email headed "without prejudice and subject to contract" the First Defendant made a further offer "for the assignment of the Claim to me" on the basis of the Administrators going to provide "a draft assignment to me". The First Defendant referred to the fact that the Administrators had already received an offer from another party and said that he understood that "you will notify the other party of my offer."
    f. By letter of 22 February 2019 from their solicitors, Pinsent Masons ("Pinsents"), solicitors acting for the Administrators, to the First Defendant, and headed "Without Prejudice and Subject to Contract", it was stated that: Pinsents were instructed "in respect of the proposed Assignment of the Company's right of action against you [and others]"; the First Defendant was one of two parties interested in purchasing an assignment; and that to avoid a bidding war a best and final offer was invited, and if accepted then a draft assignment document would be provided.
    g. By email of 1 March 2019 to Pinsents, and headed "Without Prejudice and Subject to Contract", the First Defendant made a

further offer "for the assignment of the claim to me to avoid the nuisance of any further legal action which I will defend," and again said that if this was accepted then he would be provided with a draft assignment.

h. By email of 1 March 2019 to the First Defendant, headed "Without Prejudice and Subject to Contract", Pinsents acknowledged receipt.
i. By email of 8 March 2019 to the First Defendant, Pinsents informed him that his offer had not been accepted and that the Claim(s) were being assigned to the Claimant.
j. During this process the Administrators had informed (in telephone conversations) the Claimant of at least some of the First Defendant's offers.

The Parties Submissions

71. In relation to WPP, Mr Solomon submits that:

a. The reality of the purpose of the communications from the First Defendant was obviously to compromise claims between the Company and the First Defendant. If the First Defendant purchased the claims, then, even if not formally released (and which is how matters could have been structured), they would either cease to exist by way of merger or similar "circuity of action", he being both assignee claimant and defendant, or be no longer practically enforceable (as he would have control of them), and the Company would have the benefit of the negotiated price. There is no material difference between that outcome and a formal release for consideration

b. The general rule is that the fact or content of communications made with regard to achieving a compromise of claims cannot be utilised in litigation of those claims (whether by deployment in a statement of case or otherwise) as long as those communications were made expressly (as here) or impliedly "without prejudice". None of the usual exceptions can apply in this case

c. The general rule is underpinned by there being a very strong public interest in persons being able to render such communications privileged so that a person can safely engage in negotiations to compromise claims safely without fearing that by doing so they may be making damaging admissions or otherwise affecting detrimentally their prospects of success. The public interest is in enabling compromise to be achieved

d. Thus, the reality of these negotiations and communications falls fully within the principle underpinning the WPP rule

e. Further, the Administrators accepted this, themselves, both in person and through their solicitors (Pinsents) writing to the First Defendant "without prejudice", and the Claimant as assignee should be in no better position than his assignors. Mr Solomon QC further submits that the Administrators could not unilaterally have rendered the

communications as not "without prejudice" even if they had not accepted and used that terminology themselves

f. Although the negotiation was actually extended to claims against the other Defendants (and potentially others), if there had been an ordinary negotiation between the Company and the First Defendant, it would have been likely to extend to agreements that (at least) those other Defendants would not be pursued by the Company (in order to avoid the First Defendant being at risk of them being sued and (a) prejudicing his future relationships with them and (b) as I drew to the parties' attention, facing the potential of consequential contribution claims from them, as occurred in (and where it was held that someone in the position of the First Defendant would have to negotiate an express provision in this regard from the Company) Heaton v AXA Equity & Law Life Assurance Society plc [2002] UKHL 15 and, more particularly, Cape & Dalgleish v Fitzgerald 2002 UKHL 16.

72. Mr. Leiper disputes this in relation to WPP. He submits that:
    a. These communications did not seek to compromise a dispute between the Company and the First Defendant. Although it is accepted that claims had been intimated by the Company against the First Defendant and others (effectively through and by the Claimant), this was a question of bids being sought for an assignment, not an attempt to compromise, or even to negotiate a release of the claims

    b. An assignment is something wholly different from a release or compromise. The claim remains fully in existence. I also drew the parties' attention and note that the relevant statutory power (being conferred by paragraph 60 of Schedule B1 to the Insolvency Act 1986 "the1986 Act") which permits Administrators to assign the Company's claims (and so that ordinary rules relating to champerty and maintenance, insofar as they still exist, are irrelevant) is under paragraph 2 of Schedule 1 of the 1986 Act whilst the statutory power to effect a compromise is under paragraph 18 of Schedule 1 to the 1986 Act

    c. The proposed assignment was not restricted to claims against the First Defendant but also to claims against others. I note that if the First Defendant had been assigned them then he would have been technically able to pursue those claims for whatever was the Company's loss even if his own historical involvement might have given rise to a contribution claim against him from those others.

73. Mr Leiper also submits that any WPP has been lost by the conduct of the Administrators, as they passed on the details of the First Defendant's bids to the Claimant in various later oral and written communications, and that the First Defendant failed to prevent them from doing so by imposing a

confidentiality obligation upon them and ensuring it was kept. He submits that this has resulted in a loss of any confidentiality and the matter is now open to be deployed in this litigation.

74. Mr Solomon responds to that argument to contend that:
    a. WPP is only to be waived by the person who is entitled to the privilege and not by others
    b. The Administrators were not authorised to waive the WPP. They may have been authorised to reveal to the fact and levels of the bids to the other bidder (being the Claimant) but not to waive WPP; and, further, by using the words "Without Prejudice" themselves, they were agreeing to maintain or at least recognising known confidentiality.
    c. The Claimant cannot be in a better position than his assignors, i.e. the Administrators, and from whom he derives title.

Authorities

75. In relation to this, the parties have cited various authorities.

76. In Briggs v Clay [2019] EWHC 102 at paragraphs 42 onwards Fancourt J dealt with authorities setting out the extent of the WPP rule and that it extends to both the content and the fact of negotiations, as well that it can only be waived bilaterally and not just by one party to negotiations. Relevant elements of his judgment are as follows:

"42. The arguments of the Lawyer Defendants raise important issues of principle, namely how without prejudice privilege operates and how and when such privilege can no longer be relied upon. Questions such as whether there is a "collateral fact" exception have been considered recently in decisions of the House of Lords. I have heard detailed argument from all parties, both as a matter of principle and based on a line of authority starting with the decision of the House of Lords in Rush & Tompkins Ltd v GLC [1989] AC 1280. It is necessary to refer briefly to that sequence of cases in order to evaluate the arguments that I have briefly summarised above.

43. In Rush & Tompkins, a main contractor sued an employer and a sub-contractor for a declaration that the employer was liable to reimburse any sums payable to the sub-contractor and for a determination of what sums were payable to the sub-contractor on its loss and expense claim. The main contractor settled with and discontinued its claim against the employer but pursued its claim against the sub-contractor. The latter sought disclosure of the negotiations between the main contractor and the employer leading to the settlement of that claim. The House of Lords held that the without prejudice rule made inadmissible in any subsequent litigation concerned with the same subject-matter proof of any admissions made in an attempt to reach a settlement. Lord Griffiths gave the only reasoned speech. He said at p.1299D-1300G:

The 'without prejudice' rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere

more clearly expressed than in the judgment of Oliver L.J. in Cutts v. Head [1984] Ch. 290, 306:
'That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J. in Scott Paper Co. v. Drayton Paper Works Ltd. (1927) 44 R.P.C. 151 , 156, be encouraged fully and frankly to put their cards on the table.... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.'
…… Nearly all the cases in which the scope of the 'without prejudice' rule has been considered concern the admissibility of evidence at trial after negotiations have failed. In such circumstances no question of discovery arises because the parties are well aware of what passed between them in the negotiations. These cases show that the rule is not absolute and resort may be had to the 'without prejudice' material for a variety of reasons when the justice of the case requires it. It is unnecessary to make any deep examination of these authorities to resolve the present appeal but they all illustrate the underlying purpose of the rule which is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement. Thus the 'without prejudice' material will be admissible if the issue is whether or not the negotiations resulted in an agreed settlement, which is the point that Lindley L.J. was making in Walker v. Wilsher (1889) 23 Q.B.D. 335 and which was applied in Tomlin v. Standard Telephones & Cables Ltd. [1969] 1 W.L.R. 1378 .The court will not permit the phrase to be used to exclude an act of bankruptcy: see In re Daintrey, Ex parte Holt [1893] 2 Q.B. 116 nor to suppress a threat if an offer is not accepted: see Kitcat v. Sharp (1882) 48 L.T.64. In certain circumstances the 'without prejudice' correspondence may be looked at to determine a question of costs after judgment has been given: see Cutts v Head [1984] Ch. 290.There is also authority for the proposition that the admission of an 'independent fact' in no way connected with the merits of the cause is admissible even if made in the course of negotiations for a settlement. Thus an admission that a document was in the handwriting of one of the parties was received in evidence in Waldridge v. Kennison (1794) 1 Esp. 142 . I regard this as an exceptional case and it should not be allowed to whittle down the protection given to the parties to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts. If the compromise fails the admission of the facts made for the purpose of the compromise should not be held against the maker of the admission and should therefore not be received in evidence."

44. The effect was therefore that negotiations attempting to compromise a claim in the proceedings were immune from disclosure in the same

proceedings, even when a settlement with one of the defendants had resulted. The reason was that public policy required parties to be able to attempt to settle without fear of any concessions made being subsequently used against them.
45. Although Lord Griffiths referred to the rule that excluded all negotiations aimed at settlement from being given in evidence, the rationale of the rule was explained by reference to admissions against interest. His Lordship was nevertheless willing to accept in principle only a very narrow exception relating to proof of "independent facts" in no way connected with the merits of the cause, i.e. facts unconnected to the substance of the dispute that was being negotiated.

52. There has also been judicial disagreement with the basis for the decision preferred by Swinton Thomas and Leggatt LJJ. The privilege conferred by the without prejudice rule cannot be waived unilaterally by one party only to the negotiations, in the way that the sole owner of legal professional privilege can waive the privilege. There was no suggestion in Muller that the shareholders had expressly or impliedly agreed to give up their privilege. Accordingly, waiver, in its true sense – voluntarily giving up privilege that exists and is protected by the without prejudice rule – could not have arisen: see per Lewison LJ in Avonwick v Webinvest Ltd [2014] EWCA Civ 1436 at [21] and per Newey J in EMW Law LLP v Halborg [2017] EWHC 1014 (Ch); [2017] 3 Costs LO 281 at [62]. It is however clear that both Swinton Thomas and Leggatt LJJ considered it material to their decision that the plaintiff had raised an issue on which the court could not adjudicate unless the negotiations were disclosed.

59. The without prejudice rule was considered further by the House of Lords in Ofulue v Bossert [2009] UKHL 16; [2009] 1 AC 990. The issue in that case was whether an offer to buy real property, made in without prejudice negotiations in a first set of possession proceedings, was admissible as an acknowledgment of title in subsequent proceedings between the same parties. The Court of Appeal had held that the offer was inadmissible and the House of Lords by a majority dismissed the appeal. It held that there was no principle of law limiting the without prejudice rule to identifiable admissions. Much of the speeches is concerned with the particular nature of an acknowledgment for the purposes of the Limitation Act 1980 and the relationship between an acknowledgment and an admission, however their Lordships made a number of more general observations about the function of the without prejudice rule and the ambit of the exceptions to it.
60. Lord Hope said:
"Sometimes letters get headed 'without privilege' in the most absurd circumstances, as Ormrod J observed in Tomlin v Standard Telephones & Cables Ltd [1969] 1 WLR 1378, 1384. But where the letters are not headed 'without prejudice' unnecessarily or meaninglessly, as he went on to say at p 1385, the court should be very slow to lift the umbrella unless the case for doing so is absolutely plain. The principle which the court should follow was that expressed by Romilly MR in Jones v Foxall (1852) 15 Beav 388, 396. If converting offers of compromise into admissions of acts prejudicial to the person making them were to be permitted no attempt to compromise a

dispute could ever be made. The basis for the rule has been explained more fully by Oliver LJ in Cutts v Head [1984] Ch 290, Lord Griffiths in Rush & Tomkins Ltd v Greater London Council [1989] AC 1280 and Robert Walker LJ in Unilever plc v The Procter & Gamble Co [2000] 1 WLR 2436. With the benefit of those explanations it may be re-stated in these terms. Where a letter is written 'without prejudice' during negotiations with a view to a compromise, the protection that these words claim will be given to it unless the other party can show that there is a good reason for not doing so. I think that the public policy basis for not allowing anything said in the letter to be used later to her prejudice provides Ms Bossert with all she needs to defeat the argument that the implied admission that it contains can be used as an acknowledgement against her in these proceedings. The essence of it lies in the nature of the protection that is given to parties when they are attempting to negotiate a compromise. It is the ability to speak freely that indicates where the limits of the rule should lie. Far from being mechanistic, the rule is generous in its application. It recognises that unseen dangers may lurk behind things said or written during this period, and it removes the inhibiting effect that this may have in the interests of promoting attempts to achieve a settlement. It is not to be defeated by other considerations of public policy which may emerge later, such as those suggested in this case, that would deny them that protection."

64. Accordingly, the decision in Ofulue v Bossert offers no support for the proposition that there is a general exception to the without prejudice rule where a without prejudice statement is being relied on to prove something other than the truth of the statement made or something unconnected to the issues in the case. On the contrary, the general tenor of the speeches is that exceptions to the rule should be strictly limited, in order to uphold the policy underlying the rule. It is clear that when leaving open the question of whether a statement "in no way connected" with the issues in the case might be admissible, Lord Neuberger is referring to the very limited exception identified by Lord Griffiths, namely that in certain cases "an 'independent fact' in no way connected with the merits of the cause" is admissible: see the expression "wholly unconnected with the issues between the parties to the proceedings" in para [91] of Lord Neuberger's speech. That is clearly not to be equated with proof of a statement that did relate to the issues between the parties but which is being relied upon to prove a fact other than the truth or falsity of the statement.

(1) Waiver

77. The first question is waiver of "privilege" (or the benefit of the without prejudice rule). So far as this is concerned, it is important to note that waiver of without prejudice "privilege" cannot be partial or limited: Somatra Limited v Sinclair Roche & Temperley [2000] 2 Lloyd's Rep 673. If Aon is taken to have waived its privilege, the whole of the without prejudice communications with the Claimants become admissible in evidence (since the Claimants have expressly waived their privilege), not only to prove whether Aon was involved in discussions about the settlement with the representative beneficiaries but to prove any relevant fact. Thus, any express or implied admissions made by Aon would be admissible and the

court could not redact documents to limit the material put in evidence at trial.

78. It is for that reason that an implied waiver of the privilege attaching to without prejudice negotiations is not lightly inferred: see Sang Kook Suh v Mace (UK) Ltd [2016] EWCA Civ 4. In that case, a landlord had sought to deploy without prejudice material in correspondence before trial and the tenant engaged in debate about the substance of the without prejudice negotiations and admissions that had been made in them. Vos LJ refused to make comparison with the issue of waiver of legal professional privilege or waiver of the right to forfeit and held that:
"…the issue of waiver in the circumstances of this case requires an objective evaluation of the tenants' conduct, in the context of the purpose of the without prejudice privilege. That evaluation should be aimed at determining whether it would be unjust, in the light of the tenants' conduct, for them to argue that the admissions made in the interviews were privileged from production to the court at the trial."

In the Avonwick case, Lewison LJ considered that there would have been no waiver even by stating in evidence that a good offer had been received.

80. These cases establish that when a party to without prejudice negotiations deploys the content of without prejudice negotiations as evidence on the merits of the claim, even for a limited purpose, he thereby waives his right to insist on the protection of the rule in relation to those negotiations if the counterparty accepts that the negotiations may be referred to. (The counterparty can of course instead seek to restrain the unauthorised deployment of the material.) But where the content of negotiations is not deployed in that way (e.g. where reference is made to the negotiations in correspondence, or where only the fact of them is referred to in evidence) the court must ask itself whether, given the purpose of the rule, any reference to the negotiations is such that it would be unjust for that party to insist on the protection of the rule at trial. On Clarke LJ's analysis in the Somatra case:

> "The essential point in a case like the present case is, in my judgment, that it would be unjust to allow one party to deploy the material for its benefit on the merits in one part of the litigation without allowing the other to do so too in another."

In the only other English case relied on by the Lawyer Defendants in support of their case on waiver, Re Sunrise Radio Ltd [2010] 1 BCLC 367, one party had sought to rely on the negotiating stance of the other party in the without prejudice negotiations themselves and the judge held that she had waived her right to the protection of the without prejudice rule (paras [34], [35]).

81. Ms Joanna Smith QC on behalf of Counsel argues that a waiver can be implied in other circumstances, namely where A makes allegations against B to which facts in without prejudice negotiations between A and C are relevant. In those circumstances, she argues, A will be taken to have waived its right to privilege in those communications, and cannot object to the admissibility of those facts if C also agrees to waive privilege. For that proposition Ms Smith relies on the Muller case (on the reasoning of Swinton Thomas and Leggatt LJJ, at least) and on an interpretation of the rationale of that case advanced by John Martin QC sitting as a Justice of Appeal in the Court of Appeal of Guernsey in a case called *Barclays Wealth Trustees (Guernsey) Ltd v Alpha Development Ltd* (Judgment 19/2015, dated 9 March 2015). Martin JA addressed the difficulty previously identified in treating the basis of the Muller decision as being one of waiver and observed that:

> "The solution may well lie in the fact that, in a three-party situation such as that at issue in *Muller* – where the person seeking to use the without prejudice communications was not a party to the negotiations so that the implied contract basis for the protection
> could not apply – the public policy basis will not necessarily require the consent of both parties to the negotiations before the communications can be examined. If one party to the negotiations has chosen to put in issue against a third party an aspect of his own conduct in those negotiations, he can hardly at the same time rely upon the confidentiality of those negotiations. The interests of the other party to the negotiations can if necessary be protected in other ways, for example by redaction; and the fact that the use of the documents might involve a breach of an implied contract is unlikely to be determinative. If necessary, therefore, I would take the view that *Muller* can be supported by reference to the waiver rationale …"

The judge went on to say that its application in the case under appeal was doubtful as it was not clear that the plaintiffs had put the question of reasonableness of conduct in issue.

82. Martin JA was not accepting that in Muller the privilege in the without prejudice negotiations with the shareholders had been waived, since that would have required waiver or consent by the shareholders too. The reference to redaction having a part to play shows that he was not considering waiver properly so-called. What he was addressing the possibility of analysing and justifying the Muller exception to

the without prejudice rule on the basis of a deemed unilateral waiver of the basis of the deemed unilateral waiver of the right to insist upon protection, where the policy underlying the rule would not be infringed by the limited use to be made of the negotiations without the consent of the other party.

83. In the current claim, Aon have not deployed any of the content of the without prejudice negotiations between them and the Claimants. Aon have put in issue the reasonableness of the Approved Settlement, the negligence of the Lawyer Defendants in failing to raise the Participating Employer Argument, the question of whether that negligence should be treated as the only effective cause of the Claimants' loss and, if not, the extent to which the Lawyer Defendants rather than Aon should be held responsible for the Claimants' loss. All of those issues are independent of the fact or content of the parallel negotiations being conducted between Aon and the Claimants. The most that can be said, in my judgment, is that the content of the negotiations may be relevant to an assessment of whether the Lawyer Defendants were grossly negligent, the true effective cause of the Claimants' loss and the fair apportionment of responsibility between Aon and the Lawyer Defendants.

Relevance of the Fact of "without prejudice" Communications
126. I observed at the outset of the argument on this application – which took three full days in court – that it appeared to be a case where a fair solution was for appropriate admissions by Aon to be drafted, summarising briefly the extent of Aon's involvement in discussions with the Claimants but without referring to the content. That appeared to me to be fair on the basis that –
(a) there was admissible evidence in any event that Aon had been involved;
(b) some evidence of the extent of involvement would probably emerge in any event at trial;
(c) in the circumstances of this case a judge would expect that Aon were probably involved, so there would be no prejudice to Aon in admitting that there were without prejudice discussions at the time of the negotiations with the representative beneficiaries;
(d) there was no dispute in any event that neither Aon nor the Lawyer Defendants had raised the Participating Employer Argument; and
(e) it would avoid any risk of unintentional misleading of the trial judge, and any further issues about waiver or abuse of privilege at trial.

127. It will be evident that the parties were unable to agree that approach. It seems that Aon wishes to exclude from the evidence at trial, to the fullest extent that is proper, any involvement with the negotiations with the representative beneficiaries, and the Lawyer Defendants wish not only to maximise any involvement of Aon in that regard but refer to some of the actual words used (other than any admissions or implied admissions).

I am sceptical that either the precise extent of Aon's involvement or the words used in certain communications would make any real difference to the evaluation of the Defendants' liability at trial, though I can understand why the parties think that they may do.

128. The Lawyer Defendants submitted that even if I decide that the content of the communications is inadmissible, the fact of the negotiations is not inadmissible and that I should so determine. Ms Smith QC referred me to the statement in the current edition of Passmore on Privilege at para 10-002: "there is no privilege over the fact that such communications have occurred, rather the privilege is limited to the contents of such communications". She also referred to statements to similar effect by Knox J in Independent Research Services Ltd v Catterall [1993] ICR 1 at p. 7C-D; by Judge Havelock-Allan QC in RWE NPower plc v Alstom Power Ltd [2009] 12 WLUK 734 at [54], and the judgment of Lindley LJ in Walker v Wilsher (1889) 23 QBD 335, all of which support the conclusion that it may be perfectly proper to refer to the fact of without prejudice communications even when the content is protected by the rule.

129. In my judgment, the fact of without prejudice communications can properly be referred to where that fact is relevant to an issue in the case. If irrelevant to the resolution of any issue, the fact is inadmissible for that reason. In the RWE NPower case, the issue was whether a dispute had crystallised by a particular date; in the Walker case, the issue was whether there had been discussions between the plaintiff and the defendant that provided an explanation for the plaintiff's apparent delay, in the context of a defence of laches. It is obvious why the fact of the communications was relevant in those cases.

131. There can be a fine line between referring to the fact that communications took place and seeking to infer that particular matters were discussed. On balance, I consider that the fact of the without prejudice communications is admissible because it will enable the Lawyer Defendants to establish that there were communications between Aon and the Claimants at the time when the Claimants were seeking to reach a compromise with the representative beneficiaries, which fact may be relevant to the new intervening act issue and the apportionment of responsibility. More particularly, it will prevent the trial judge from being inadvertently misled about the extent of the contact during that period by relying on the open correspondence alone. But the Lawyer Defendants may not tell the trial judge what the without prejudice communications were about."

77. Mr Leiper QC took me to a passage in Hollander : Documentary Evidence : 15th Edn in which it is stated under the title of "Loss of Confidentiality" that:

"23-01 In order to understand the principles of waiver of privilege, it is necessary to understand the distinction between loss of confidentiality and loss of privilege. It is a precondition of a claim to privilege that the documents in question are confidential. If particular

documents are no longer confidential, then privilege cannot be claimed. Not all confidential documents are privileged but all privileged documents are confidential. If a document enters the public domain, it ceases to be confidential and no claim for privilege can be maintained. But otherwise, the question always arises in issues of confidentiality: confidential between whom? If A is entitled to, or is given, access to privileged documents of B, it may be said that there is no confidentiality between A and B so that no claim for privilege could be maintained by B against him documents. But so long as the document remains a confidential document, it would still be possible for the client to claim privilege against others.
Footnotes 1 See City of Gotha v Sothebys [1998] 1 W.L.R. 114 CA; see also Franchi v Franchi [1967] R.P.C. 152 at 153; Prudential Assurance v Fountain Page [1991] 1 W.L.R. 756 at 770; CC Bottlers v Lion Nathan Ltd [1993] 2 N.Z.L.R. 445."

78. Both parties took me to authorities cited or said to be relevant to the Hollander passage and including Prudential v Fountain Page 1991 1 WLR 756 relating to WPP being preserved where documents have been produced under compulsion (being with a contempt sanction).

79. In that decision there was a discussion from pp771A to 772B as follows:
"The third example, which is perhaps the most pertinent, is the situation which arises from without prejudice communications. Here again the rationale is similar. It is the policy of the law to permit, and indeed encourage, confidential negotiations to take place to further the settlement of disputes and the law accordingly recognises that there shall be a restriction upon the use that can be made by the recipient of any such communication. The recent decision of the House of Lords in *Rush & Tompkins Ltd. v. Greater London Council* [1989] A.C. 1280 establishes the wide ambit of the restriction that arises from communications being without prejudice. The restriction affects not only the party who received the communication but also any other party and the principle "once privileged always privileged" will apply to subsequent litigation as well as the actual litigation in relation to which the without prejudice communication was made.
The rule is described in the *Rush & Tompkins* case as one of the admissibility of evidence but this, as the decision in that case demonstrates, does not cover the full scope of the rule. Also, the without prejudice communication is, ex hypothesi, a communication which, were it not privileged, would be admissible in evidence; typically it will be an admission against the interest of the party making it. It would be admissible and relevant evidence were it not for the fact that there is a restriction upon the use that the recipient of the communication, or any other person, can make of that piece of evidence. The restriction includes the embargo upon putting it in evidence. The scope of the rule is wider because it includes a right not to reveal the communications to others, which was the actual point of decision in the *Rush & Tompkins* case; they set aside an order that had been made by the Court of Appeal that discovery of the documents should be given to other parties in the action.

> The without prejudice principle is normally referred to as a head of privilege. However, as between the parties to a without prejudice communication, it is privilege in a rather different sense from that which is normally used when talking about discovery—hence the use of the word "admissibility" in the *Rush & Tompkins* case. In *Webster v. James Chapman & Co.* [1989] 3 All E.R. 939, Scott J. considered the relationship of confidentiality and privilege. In the course of his judgment he said, at pp. 943-944:
>
> "1 think it is important to notice the different principles on which protection of confidential documents on the one hand and privileged documents on the other hand are based. Once a privileged document or a copy of a privileged document passes into the hands of some other party to the action, prima facie the benefit of the privilege is lost: the party who has obtained the document has in his hands evidence which, pursuant to the principle in *Calcraft v. Guest* [1898] 1 Q.B. 759, can be used at the trial. But it will almost invariably be the case that the privileged document will also be a confidential document and, as such, eligible for protection against unauthorised disclosure or use. The reverse is not true. There are a variety of types of confidential information which have nothing whatever to do with legal privilege; but I cannot envisage a case of legal privilege attaching to documents which did not contain confidential material."
>
> Scott J. is referring to the privilege against being required to disclose a document. Accordingly once the document has passed into the possession of another the privilege lacks subject matter. But where one is dealing A with a privilege which can be treated as analogous to the privilege that attaches to without prejudice communications then it can be seen that the fact that relevant material has been disclosed to another party is not the moment at which the right ceases to exist but is the moment at which it comes into existence. If the analogy is apt the communication of a witness statement or a report to another party, although it may be the moment at which the waiver of the privilege against disclosure occurs, may be the moment when a right to restrict the use that can be made of the document arises."

The Pleading Issue

80. It seems to me, and as I canvassed with counsel, that there is a simple route to the question of whether the Bidding Process can be referred to in the statements of case which does not, of itself, involve a need to determine the WP Issue.

81. Under CPR16.4(1)(a) and as made clear in the White Book notes to which I refer above, the function of Particulars of Claim is to set out the facts on which the Claim is based and which are said to give rise to the cause of action and remedy sought. They are not to plead evidence as such, although they can plead facts from which other relevant facts are said to be inferred.

82. I cannot see how what happened in the Bidding Process can be said to be a fact upon which a cause of action or remedy is based. The Claims made in this litigation by the Particulars of Claim are in relation to conduct pre-dating the Bidding Process. No Claim is made for the price which the Claimant had to pay for the assignment; and the Claimant is suing simply as assignee and not for any wrong done to him, or loss suffered by him, personally. The Bidding Process is simply irrelevant to the causes of actions and the relief claimed.

83. It is true that Paragraph 8 states that the First Defendant engaged in the Bidding Process in order to seek to stifle the Claims now made. However, that is irrelevant to the Claims themselves which stand or fall on their own facts.

84. While the Claimant does rely on various material to justify his assertions of inferences of certain facts, at no point does he seek in the Particulars of Claim to rely upon the fact that the First Defendant entered into the Bidding Process in order to justify an inference.

85. Mr Leiper QC has submitted in response to this that Paragraph 8 of the Particulars of Claim merely anticipates Paragraph 7 of the Defence which states that the price paid by the Claimant for the Claims was (a) uncommercial and (b) surprising compared with the damages of over £1million now paid and so that (c) the price which the First Defendant was prepared to pay (but not to raise) is relevant by way of anticipating a defence. However, it does not seem to me that Paragraph 7 is necessarily a proper Defence at all (as it does not plead any "fact" but merely "notes" matters with no specific indication of their relevance to the Claims themselves), but in any event that does not justify references to the Bidding Process in the Particulars of Claim, and at most (if at all, which I am not presently deciding) could justify a reference in the Reply.

86. It therefore seems to me that Paragraph 8 should be struck out (and so that there would also go with it the relevant paragraphs of the Defence and the Reply), on each of the two bases that:
    a. Under CPR3.4(2)(c) as it contravenes CPR16.4(1)(a) as not stating facts upon which the Claim is in any way based; and
    b. Under CPR3.4(2)(b) as it is likely to obstruct the just disposal of the proceedings, and especially in view of the consequential pleading, application and argument which has already flowed from it.

<u>The WP Issue</u>

87. However, the parties before me have invited me to decide the WP Issue in any event, and whether or not I decided (as I have done above) to strike-out Paragraph 8 of the Particulars of Claim on pleading grounds. They say that (i) it has been argued out fully in front of me (ii) it is a pure question of law and (iii) if I do not decide it now, it will have to be decided at some point in the proceedings, possibly at an eventual trial, and it will be a waste of court resource and will create undesirable uncertainty if I do not decide it now.

88. I have had considerable doubts as to whether it is appropriate to decide the WP Issue at this point, and including because:
    a. It might be capable of affecting the other Defendants. However, they have chosen not to take part in this hearing, their Defences either say that the matter is irrelevant (Paragraph 20 of the Third Defendant's Defence) or merely "noted" (Paragraph 10 of the Fourth Defendant's Amended Defence); and I notified them of this aspect and the request for me to decide it in the post-hearing

correspondence and to which they first did not reply and then stated that they did not wish to be involved. Moreover, if there is WPP then it belongs to the First Defendant and it is for him to assert and defend it

b. It is not a fact on which the Claim is based or which is directly relevant to it (see above). At most it seems to me to be, at most, something of a cross-examination point; although, at first sight, one of uncertain weight in view of the fact that even the Claimant's successful bid was for a small sum in the context of the amounts claimed and the likely costs of this litigation, and so that the First Defendant's bids have an obvious commercial purpose to avoid the "nuisance" of this litigation whatever its merits. On the other hand, the point is going to arise at the point of cross-examination if not before and is going to have to be decided
c. This is a question of some considerable importance in the context of insolvencies, where assignments of causes of action are common and have the sanction of the legislation. I have been told that there is no authority in point. It is thus deserving of full argument and the Court should be very careful of deciding abstract questions of law without full exploration of the facts where the matter could in any way be fact-sensitive. However, the parties submit, and in my view correctly, that I have all the relevant facts before me, and which are essentially the documents to which I refer above, and that there is no relevant dispute of fact as between them, and that they have fully argued the matter with full citation of authorities
d. Deciding this issue, although it is discreet, could lead to appeals which could affect the Trial. However, there seems to me to be sufficient time before Trial for any urgent appeal(s) to be determined; and it is better for this matter to be resolved before the Trial so as to provide certainty.

89. It therefore seems to me that, on balance, it is more consistent with the overriding objective in CPR1.1 (and also CPR1.4 and 3.1) to decide this issue now. I have the facts, it is a pure question of law, it will have to be decided, and to require it to be re-argued (and conceivably appealed) at a later stage, and where it has already been fully argued out, would seem to be more likely to result in waste of time, cost and court resource.

90. The first question is as to whether the Bidding Process communications attract WPP at all (the second being as to whether, if they do, it has been waived).

91. It is clear that parties cannot simply impose WPP by heading their documents "Without Prejudice". The privilege is created by the satisfaction of both of two conditions being (1) that the communication is made for the purpose of seeking to resolve a dispute by agreement and (2) that the communicating party intends (expressly or impliedly) the material to not be capable of being used outside that (alternative) dispute resolution process. The second condition is satisfied here in any event by the use of the heading "without prejudice".

92. The issue, at this point, before me is with regard to whether the first condition is satisfied in this context of bids for an insolvency process assignment. The touchstone test is stated in Briggs v Clay at paragraph 43 citing first Cutts v Head and then Rush & Tompkins, as being whether the communication is made "in the course of negotiations for settlement", the underlying public policy purpose of WPP being said in the citation from to "protect a litigant from being embarrassed by any admission [which includes an offer] made purely in an attempt to achieve a settlement". It is also clear that parties cannot satisfy the first condition simply by heading a communication "without prejudice", it has to be with some sort of a view to a compromise – see the citations from Rush & Tompkins at paragraph 60 of Briggs v Clay and where the test was expressed as to whether the communication was made "during negotiations with a view to a compromise" and the underlying policy was stated, in effect, as the desirability of promoting attempts to compromise with a statement that if the rule were otherwise then "no attempt to compromise would ever be made", although it was there accepted that the condition would not be satisfied where the "without prejudice" heading was used "unnecessarily or meaninglessly".

93. The difficulty here is that the communications were made in the context where the Administrators were not, at least expressly, seeking or using a statutory power to effect a settlement. That is and always was clear from the various letters which refer very clearly to "assignment" and a process of assignment; and which clearly refer to the statutory assignment power and not to the statutory compromise power. If the matter is to be treated purely as one of "assignment" then the first condition for WPP could not be satisfied.

94. However, Mr Solomon QC submits forcefully that where, as here, the putative assignor markets the assignment of a claim to a person against whom it would be made, and that person makes a bid for the assignment, then this is in reality a settlement negotiation as the claim would then be resolved (probably but certainly, at least in this case, in practice) if the assignment to that person took place. Therefore, he says, the public policy of not obstructing settlement is the same, and the putative defendant should not be discouraged from seeking to resolve the dispute by a lack of availability of WPP in this context.

95. I have taken all of the parties' submissions into account and my mind has wavered on the point but it does seem to me that this is not a "settlement negotiation" or "[with a view to a] compromise" context and that the first condition is not satisfied. This is for the reasons advanced by Mr Leiper QC (above) but also and in particular as:
    a. The context here is an exercise of a statutory power of assignment and which is not the statutory power of compromise or release which is in a different paragraph of Schedule 1 to the 1986 Act and can attract different considerations

b. An assignment is a different matter and concept from a compromise or a release. It leaves the cause of action in existence and does not affect the cause of action in itself, unlike a release which ends it or an agreement not to sue which renders it impossible for it to be pursued into a judgment which is equivalent to an ending of it. It is a mere preliminary to the bringing of the claim, and not, as such, in any way a "settlement" of either the claim or the underlying cause of action. Although the cause of action may be ended as a result of the assignment, that is, to my mind, a product of the doctrine of merger (rather than circularity of action which involves claims cancelling each other out) and which is one of the assignee's intention (the assignee can, for example, seek to keep the assigned matter in existence e.g. by granting a security over it) and separate from the assignment itself. A negotiated compromise can have other consequences e.g. giving rise to entitlements against others under the Civil Liability (Contribution) Act 1978 whereas an assignment is difficult to fit into its framework

c. The process of bidding for an assignment is also wholly different from that of compromise. There was no attempt here, and no suggestion that there should be an attempt here, by the First Defendant to seek to persuade the Administrators that the Claims were or no, or little, worth. The merits of the Claims were not being investigated or debated at all as that was not relevant to the Bidding Process. The nature of the Bidding Process was that the Administrators were asking for bids and no more, and on the basis that they would assign to the highest bidder, and not that any Claims should be settled and finally resolved either at all or on the basis that the Administrators should be persuaded that a payment of a limited amount by the putative defendant(s) would be a good deal. If no bids had been forthcoming, or the Administrators had considered that any were simply not acceptable, then the Administrators might then have sought to compromise the claims but that would have been a wholly different process

d. It would have been open to the First Defendant to have sought to negotiate or to make offers in relation to releases or compromises had he wished to do so, and to say that such an offer should be accepted in preference to any bid which had been made for an assignment. However, he did not. His emails were sent on the basis of bidding for an assignment. It would have been possible to have had a bidding process between bids for a release/compromise and bids for an assignment but that did not happen

e. The assignment did extend to claims against not just the First Defendant. Although those claims, or rather an agreement to release or not to pursue them, could have been made part of an agreement to release/compromise (see the Fitzgerald case); an assignment of them does not fit easily into the concept of without prejudice negotiations and resultant privilege in relation to the claims against the First Defendant. It is somewhat difficult to see why the underlying policy of WPP should prevent the Claimant cross-examining the First Defendant on his preparedness to pay for an assignment of claims

against others, although this was in the context of also seeking to resolve claims against himself

f. If a Bidding Process in an assignment context can attract WPP then that will produce an imbalance depending upon who is the bidder. If it is the person against whom the claims could be made then they will have WPP protection, but others (such as a Claimant – and the Applying Defendants are seeking to use the level of his bids against him – see Paragraph 7 of the Defence) will not. That would again suggest that assignment is a different matter from settlement.

96. I do see the force in Mr Solomon QC's submissions that this conclusion is a triumph of form over substance, and that the Administrators were themselves prepared to write with headings of "Without Prejudice". Nevertheless, it seems to me, although only on balance, that this is not properly to be seen as a bid to compromise but rather, as the communications say, a bid for an assignment, and that that is different in nature and consequence.

97. I have borne well in mind the importance of the public policy underlying the WPP principles as set out in Briggs v Clay (and its citations from both Rush & Tompkins and Ofulule), and in particular the importance of promoting settlement and enabling parties to make offers and "put their cards on the table" without fear that their doing so will then be used against them if settlement is not achieved. However, that has to be in the context of a true settlement negotiation, and an assignment is something which is conceptually different (see above).

98. I have asked myself a further question of whether the Administrators' (on behalf of the Company) effective acceptance of the heading "Without Prejudice" (which they themselves adopted) would prevent the deployment of the relevant communications in this litigation by their (or rather the Company's) successor in title, the Claimant. However, I do not think that it does, as:

a. The case-law appears to make clear that the fact that parties have headed documents "Without Prejudice" does not, of itself, satisfy the first condition. If the fact that they had both used those words was sufficient to render the communications inadmissible, even if the communications were not for the purpose of compromise, then I would have expected there to be case-law saying so

b. It might be possible for parties to seek to attempt to make a contract (or possibly to generate an estoppel) to the effect that particular material should not be deployed in litigation between them or their privies. However:

i. The First Defendant has not sought to argue such a point

ii. The situation does not fit well with contract or estoppel as a considerable amount of implication would be required

iii. Any such contract or estoppel might well be invalid on public policy grounds being that in an absence of privilege, parties should be able to deploy any relevant material in litigation

subject to powers such as in CPR32.1 for the court to control evidence.

99. In consequence, as the first condition is not satisfied, and although I accept that the Claimant should be in no better position than his assignor Administrators, I conclude that there is no WPP and accordingly determine the WP Issue in favour of the Claimant so that he can seek to use the Bidding Process communications from the Defendant if and insofar as he may otherwise be entitled to do so (but subject to an order ever made under CPR32.1) but that he has advanced no good reason for them to appear in his Particulars of Claim.

100. I have also considered a point raised by at least Mr Solomon QC (although only to seek to dismiss it) as to whether even if the actual amounts offered by the First Defendant were privileged then the fact that amounts had been offered might not be privileged. However, as to this:
    a. It does not now arise in view of my conclusion that the communications are and were simply not subject to WPP
    b. Mr Leiper QC did not seek to rely on it
    c. I, in any event, accept that this is not the sort of case where the mere fact of the communication is relevant to an issue in the case as it was held to be (and so that the fact was admissible notwithstanding the existence of applicable WPP) in Briggs v Clay at paragraphs 129 and 131. They do not impact on any substantive issue in any way which has so far been identified. I suppose that they might explain why the Claimant paid as much as he did, but I have not had explained to me how that is particularly relevant and, in any event, it would be the party (the First Defendant) who seeks to maintain that the documents are inadmissible who would be wishing to rely upon them as demonstrating that the Claimant only paid as much as he did because the First Defendant was driving up the price.

101. The second question as to whether WPP has been waived by the First Defendant accepting that the communications could and would be passed by the Administrators to the Claimant (the other bidder) does not arise in the light of my conclusion that no WPP existed in the first place.

102. However, I would not have accepted the Claimant's submission that there had been waiver.

103. Mr Leiper QC's submissions focussed on the question of confidentiality and were effectively that:
    a. WPP only exists in relation to confidential communications
    b. The First Defendant had waived confidentiality by allowing the communications to be passed on to the Claimant
    c. Therefore any WPP has ceased to exist.

104. It seems to me that this misunderstands the nature of WPP and perhaps also certain distinctions between it and legal professional privilege (in its various forms). If a document attracts WPP then the main rule is that it

cannot be deployed in litigation, although there is also a second rule (as stated in Prudential v Fountain, and which was the actual subject-matter of Rush & Tompkins) that a person cannot be compelled to disclose it. That is why in paragraph 77 of Briggs v Clay Fancourt J described waiver in this context as being of the benefit of "the without prejudice rule"; and why in paragraph 80 onwards he referred to the fact that once a party who has the benefit of the WPP in relation to the document or the negotiations deploys them (or at least their content) in the litigation then "he thereby waives his right to insist upon the protection of the rule in relation to those negotiations".

105. There is no necessary confidentiality in a letter marked "without prejudice" (although, of course, it may also be confidential), and such letters are often provided directly or indirectly to others involved or interested in the litigation (or, for example, by a recipient to their bank). However, they attract the benefit of the rule because they are part of a settlement negotiation (and also expressly or impliedly stated not to be capable of being deployed in litigation) thus attracting the relevant public policy and the benefit of "the without prejudice rule".

106. Thus the main without prejudice rule is that without prejudice communications made for the purposes of negotiations as to settlement cannot be used in litigation, but that this can be waived by the relevant person actually deploying the negotiations (or the communication itself) in the litigation.

107. It seems to me that this main rule (as opposed to the subsidiary rule that a person cannot be forced to disclose a WP communication; the Rush & Tompkins rule) has little to do with confidentiality. Generally the other party to the litigation will actually have the documents (and in fact will have been their recipient) and it is that sending and receipt which itself generates the application of the rule (see Prudential v Fountain). They may well have been authorised to use (or at least not prevented from using) them elsewhere. However, that does not amount (without more) to a waiver of the benefit of the sender's right for them not to be used in (relevant) litigation.

108. The position may be different in relation to either the subsidiary WP rule to the effect that disclosure of the WP communications cannot be forced (which is itself a rule of confidentiality) or, generally, legal professional privilege. Legal professional privilege attaches to confidential (which they generally are) communications regarding legal advice i.e. a particular category of confidential communications, and is likely to be lost if the document ceases to be confidential. That, and that type of privilege, is what it seems to me that the Hollander passage and the case-law referred to in it is dealing with.

109. It seems to me that this analysis is reinforced by the analysis in the Prudential v Fountain decision albeit that that analysis is conditioned by the actual issue in that case. The reasoning effectively records the two rights

which attach to without prejudice material being (1) a right for the document not to be deployed in litigation (being relevant to admissibility) and (2) a right for it not to be possible for another person to compel it to be disclosed to them (being relevant to disclosure). The mere fact that right (2) is waived in whole or in part by a document ceasing to be confidential does not mean necessarily that right (1) has been waived.

110. Therefore, I do not think that a mere waiver of confidentiality amounts to a waiver of the main WPP right that the document or negotiations cannot be deployed in litigation. The document and negotiation, if "without prejudice", simply has that status and consequence i.e. that it cannot be deployed in litigation against the person who has the benefit of that right without their consent. Confidentiality is not in point; what is required is a waiver of the right not to have it deployed against them in litigation.

111. I would add that it is also difficult to see how on the facts of this case an agreement that the document (or its contents) could be disclosed to the Claimant could amount to a sufficient waiver. The Claimant would only have (as he has turned out to have) the ability to prosecute the Claims if he was the successful bidder. At first sight, he should simply stand in the shoes of his assignor, and thus the same position as regards these communications, as the Administrators.

112. I would also add that the Claimant would quite likely see the documents anyway in the course of the Administration itself, and to which course the First Defendant would find it hard to object (as Administrators have statutory duties to keep creditors, and potentially shareholders, informed; and to seek directions which can only be given after production of appropriate information).

113. Therefore, if I had held that WPP existed, I would not have held that the benefit of the non-admissibility rule had been waived.

(B) The pleading of a "Common Design" between some or all of the Defendants (paragraph 80).

114. The Applying Defendants next seek to strike out or for reverse summary judgment on Paragraph 80 of the Particulars of Claim. This reads:
"80. It is inferred that, at dates unknown, each of the Defendants (or a sub-set of them) discussed and agreed the Common Design and/or each of the matters pleaded at paragraphs 72-78 and in particular (without limitation) discussed and agreed: a) To seek to achieve the matters set out above at paragraphs 72-78; b) That Mr Gasser and Ms Bhatiani would assist in the recruitment of the employees within the Family Department; c) That Mr Gasser and Ms Wheeler would assist in the recruitment of the employees within the Property Department; and d) That each of the Defendants would conceal such recruitment from Rollingsons."

115. A Request for CPR Part 18 Information was made as to "full particulars of the factual basis for the allegations" to which a response was given (by reference to a Response to Request 19) as follows:

"The Claimant's case is adequately pleaded. The Claimant relies upon all of the facts and matters alleged in Section IV of the Amended Particulars of Claim. For the reasons set out at paragraph 57, the Claimant is unable to provide further particulars prior to disclosure and the provision of further information."
The reference to paragraph 57 seems to be a reference to alleged deliberate concealment by the Defendants of their activities.

116. This is responded to in Paragraph 67 of the Defence of the Applying Defendants which reads:
"The inferences asserted at paragraphs 80-82 are wrong and baseless. It is improper to plead a case of unlawful conspiracy to cause economic loss without any factual basis at all. Without prejudice to the aforesaid, there was no conspiracy or Common Design to conduct the alleged team move."

117. This is counter-responded to in Paragraph 37 of the Reply which reads:
"The denials at paragraphs 67-69, and the assertions that the Claimant's claims are improper, are unsustainable in light of the admissions made in the Defence and in the Defence of the Third Defendant."

118. The reference to the Defence of the Third Defendant is, I am told, to its Paragraph 65:
"On 19 October 2016 Mr, Gasser introduced Ms, Bhatiani to Mr. Addyman at a meeting which took place in a Public House. Mr. Hollingsworth was also present at that meeting. Mr Gasser, knew that Ms. Bhatiani was unhappy with her current position and suggested the meeting, which she accepted. During the meeting Mr. Addyman set out his background, his ideas for Laurus and confirmed that Mr. Hollingsworth and Mr. Gasser would be directors of the company. Mr. Gasser was only present for part of the meeting. Mr. Addyman also discussed a possible job opportunity for Ms. Bhatiani."

119. As is evident from the sections cited above, Paragraph 80 of the Particulars of Claim is also said to be justified, by way of inference from the matters set out in Paragraph 82 of the Particulars of Claim.
"82. Without prejudice to the full range of inferences that can properly be drawn from what transpired and/or prior to disclosure herein Rollingsons will say that the above matters and in particular the Common Design as particularised herein can be inferred from the following facts and matters, in particular:
a) The matters particularised at paragraphs 65 and 70;
b) The senior position of Mr Hollingsworth as a Salaried Partner and Director of Rollingsons;
c) The close working relationship between Mr Hollingsworth and Ms Wheeler;
d) The close working relationship between Mr Hollingsworth, Ms Wheeler and the other employees of Rollingsons' Property Department; e) The senior position of Mr Gasser as Head of the Family Department;
f) The close working relationship between Mr Gasser and Ms Bhatiani;

g) The close working relationship between Mr Gasser, Ms Bhatiani and the other employees of the Family Department;
h) The fact that each of the Defendants have resigned from Rollingsons and have since taken up employment with Laurus;
i) The fact that each of the individuals listed at paragraphs 74-76 have resigned from Rollingsons and have since taken up employment with Laurus;
j) The dates and/or co-ordinated nature of each of the acts specified in the preceding subparagraphs (h) and (i) occurred;
k) The content of an email (set out in full below at paragraph 84(e) below) from a client of Rollingsons called Sarah Parry which stated inter alia: "You also told me that if I stayed with Rollingsons I would have my work done by a junior member of the remaining team".Mr Gasser informed Ms Parry that Rollingsons would be forced to use a junior solicitor to carry out work for her, as he well knew that he had solicited all of the senior solicitors within the Family Department;
l) The content of an email (set out in full below at paragraph 85 below) which was sent on behalf of Ms Wheeler to various of her clients, which expressly stated that she "will be leaving Rollingsons at the end of March along with a few colleagues to the same firm, so they are not 'over the moon' about the exodus"
m) The lies told by the Defendants to Mr Rollingson as to their future intentions as set out more fully below at paragraphs 103-107;
n) The steps taken by the Claimants to conceal their unlawful actions; and
o) Ms Wheeler's repeated refusal to answer Mr Rollingson's questions as to whether she had co-ordinated her resignation with other employees."

120. Part 18 Information has been provided in relation to Paragraph 82 although it is limited in nature.

121. In his submissions, Mr Solomon QC explained the basis of his applications being
    a. It is inference on inference; and, for example, paragraphs 65 and 70 themselves contain statements of inferences
    b. There is an absence of particularisation as to dates
    c. The allegation of Common Design is said to be between "each of the Defendants (or a sub-set of them)" and with a multiplicity of possibilities
    d. There is nothing which is necessarily inconsistent with there having been a legitimate or eventual legitimate set of agreements
    e. Many of the matters relied upon as justifying inferences are trivial.

122. Mr Leiper QC responded to say that:
    a. The relevant dates (as against the Applying Defendants) are unknown dates but which were before the relevant individuals left the Company
    b. The Claimant does not know precisely who was in concert with whom when but from the first relevant date it would have been at least two relevant defendants

c. The inferences are justified at first sight as, on the material pleaded and assuming that it is established, being more likely than not
d. The Third Defendant has effectively said that steps were being taken to recruit her by the Applying Defendants before they left the Company and that this must have been part of a Common Design between, at least, the Applying Defendants
e. The relevant "lies" were from each of the First and Second Defendants as to their future intentions and are particularised in paragraphs 103-107.

123. I have found the structure of the elements of the Particulars of Claim and including Paragraph 80 as being unhelpful and confusing, although ultimately it has become more clear after hearing submissions.

124. It does seem to me that the structure of Paragraph 80 itself obscures the difference between pleading (1) the primary facts which are relied upon as giving rise to the cause of action and remedy sought, and (2) other secondary facts from which it is said that those primary facts should be inferred. It seems to me that Paragraph 80 should be reconstructed to make clear the difference and which will probably, at least, require the removal of its opening words (making clear that these are actual alleged facts and which the signer of the document's statement of truth believes), and then the inclusion of a sentence to the effect that these facts are to be inferred from other (identified) paragraphs.

125. It seems to me that this will remove some of the sting of the "inference upon inference" submission. However, in any event, a pleading of inference upon inference is not necessarily objectionable. If facts C enable an inference of fact B, I do not see why necessarily fact A should not be inferred from fact B (with or without other facts). It all depends on the circumstances and, in particular, the apparent potential strength of the chain of inference.

126. With regard to the points being made about the multiplicity of allegations of which Defendants combined together at particular points in time, it does not seem to me that that is necessarily objectionable. A party who cannot be sure as to which of possible alternative cases (each of which would justify the same or a similar outcome) they wish to advance, is generally entitled to advance a primary case with secondary versions (see White Book 16.4.6 and cases there cited), although this should be made clear and the statement of truth framed accordingly. It would seem wrong and unjust that a Claimant should suffer a detriment because they cannot be sure who joined in and when even if they say that all eventually became part of the alleged Common Design. It does seem to me:

a. That the Claimant's alleged scenario of senior personnel having combined in a scheme to move substantial elements of their departments to the Fifth Defendant is something where it is unlikely that a person in the position of the Claimant will be able to say with particularity that particular individuals joined in at particular dates. It is a scenario which, if it exists, is likely to involve secrecy. Prior

to disclosure (at least) it is unlikely to be capable of full particularisation (although there still do have to pleaded underlying facts which are capable of justifying relevant inferences). I therefore do not regard it as objectionable as such

b. But that it could usefully and should be made more clear that what the Claimant is actually alleging (if this is the case) that all the Defendants combined together from a particular start (and where some particularity can be given as to when that start was; and including as to whether it was before relevant Defendants left the Company), and that if it was not all of them then it was some of them and others joined as matters went on. If the Claimant's case is that it was some Defendants initially and others later on then that should be set out. The present pleading is confusing and those matters should be made clear in any event. In view of the fact that disclosure has now been provided, it seems to me that it is probably that more can and should be done at this point, and the Claimant has already indicated a desire to amend.

127. In all these circumstances, I do not think that there is any sufficient breach of the rules to justify striking-out. The deficiencies which I have identified are not that great and can be dealt with by amendment.

128. The Applying Defendants say, however, that Paragraph 80 is still wholly inadequate (failing to disclose reasonable grounds or obstructing the just disposal of the case) and lacks real prospects of success. I do not think that this is the case as:

a. The Applying Defendants are not actually seeking to strike-out or for summary judgment on the allegations of the Common Design themselves, which are in Paragraph 52 of the Particulars of Claim. It seems incongruous that they are only seeking to attack Paragraph 80 when Paragraph 52 will remain. The relevant factual material is going to be deployed and argued out anyway at tried. The Partco decision warnings against striking-out or summarily determining subsidiary matters related to other (more major) allegations which will remain to be determined seem to me to be very much in point

b. The facts set out in Paragraph 80 are actually said (although in a confusing way which needs to be clarified) to be justified inferences from the facts referred to or stated in Paragraph 82

c. Paragraph 82 with the Part 18 information and the Reply does plead numerous (alleged) facts and matters which can be roughly divided into (i) the Third Defendant has said (and the Claimant says this is correct) that there was a meeting with regard to her possible recruitment with the First and Second and Fifth Defendants prior to the Second Defendant leaving the Company (ii) the First and Second Defendants did leave with the Third and Fourth Defendants leaving relatively soon thereafter to join them in the Fifth Defendant and with others members of their departments also doing so (iii) various steps were taken to secure Confidential Information of the Company prior to the First and Second Defendants leaving, this to be inferred from some pleaded events but otherwise from that Confidential

Information having been in the Applying Defendants' possession later (iv) the First and Second Defendants positively lying (rather than just saying nothing) about their intentions before their leaving. It seems to me that together those matters could of themselves (if proved, and which I have to assume) and in the absence of anything else justify the inferences sought (and where the test is only balance of probabilities, and I do not assume any evidence or facts in answer as all I have are bare denials), and this is not merely fanciful

d. The matter is at a distinctly early stage. It is reasonable to expect that material may well be produced on disclosure which could support the claims and enable them to be better particularised (and in fact the Claimant has said that this has actually occurred). This does not seem to me to be pure "Micawberism". Ultimately that is a matter of impression. However, in this situation the relevant material will be held by the Defendants and who have not even pleaded a case along the lines of stating that all staff and individuals were first spoken to on dates after the First and Second Defendants left; and I do not see these allegations as being simply vague and speculative.

129. Therefore, while in its present state I do require some alteration to be made to this Paragraph 80, I would not propose to strike it out or to grant reverse summary judgment. As the Claimant seems to want to amend it (and Paragraph 82) anyway following disclosure, it may be most appropriate to consider a composite proposed amended version then, but I can consider that following the handing down of this judgment.

(C) The pleading of an inference of participation, assistance and/or encouragement by other Defendants of misuse of Confidential Information by the Second Defendant or Third Defendant (paragraph 92).

130. The Applying Defendants next seek to strike out or for reverse summary judgment on Paragraph 92 of the Particulars of Claim. This reads:
"92. It is further inferred that each or any of the Defendants participated in and/or assisted with and/or encouraged Mr Gasser's and/or Bhatiani's misuse of Confidential Information as particularised above."

131. This was the subject of Request 58 for Part 18 Information, and to which the Claimant responded as follows:
"Request 58. Please provide full particulars of the allegation(s) including, without limitation, which of the defendants is alleged to have so "participated and/or assisted and/or encouraged" and in the case of each such defendant, how, when and in what circumstances.
Response… The allegation is pleaded against each defendant to the claim. In support of the inference pleaded, the Claimant relies upon all of the matters listed in Section IV of the Amended Particulars of Claim and the admissions made by the Defendants as summarised in paragraph 3(a)-(e) of the Reply and the admissions made at paragraph 65 of the Defence of the Third Defendant. For the reasons set out in paragraph 57, the Claimant is

unable to provide further particulars prior to disclosure and the provision of further information."

132. The relevant paragraph of the Defence is Paragraph 77 which reads: "77. The assertion at paragraph 92 that Mr Rollingson infers that "each or any of the Defendants" encouraged the alleged misuse of the Confidential Information is so vague and unparticularised as to amount to an abuse. In any event, and without prejudice to the above, the same is denied."

133. There is no specific response in the Reply; but paragraphs 3(a)-(e) read: ",.. the Defence: a) admits that Mr Hollingsworth provided Mr Addyman with a spreadsheet containing management information relating to the running of the Property Department which disclosed the source of work and average fees of the Property Department's clients; b) admits that Mr Addyman used that information for Laurus' purpose and benefit, in particular in assessing the prospect of Laurus employing Mr Hollingsworth; c) admits that, whilst an employee of Rollingsons, Mr Gasser took steps to recruit at least one of Rollingsons' employees on Laurus' behalf (that employee being Ms Charlotte Coyle); d) admits that, whilst an employee of Rollingsons, Mr Gasser solicited Rollingsons' clients on Laurus' behalf; e) admits that Mr Gasser provided client files relating to Rollingsons' clients to Laurus;"

134. Mr Solomon QC submitted in relation to Paragraph 92 that:
    a. It was wholly unclear with regard to how many of the Defendants were involved and as to when they were involved
    b. It was unparticularised with regard to what was being said that the Third Defendant (Bhatiani) had done which another Defendant(s) was said to have participated in and/or assisted with and/or encouraged. If it was what is stated in Paragraph 91, being "It is to be inferred that Ms Coyle [took away and kept client files as set out in Paragraph 90] on the instruction of, alternatively was procured and/or induced to act as aforesaid by [the Second Defendant] and/or [the Third Defendant." then there was no factual basis for that inference
    c. This was all inference upon inference.

135. Mr Leiper QC responded by concentrating upon the closing words of Paragraph 92 "as particularised above" and saying that:
    a. Paragraphs 87 to 89 particularised the Second Defendant having sent himself Confidential Information
    b. Paragraph 89(c) regarding the Second Defendant referred to inferences being drawn from Paragraphs 95 and 97-98 and which referred to specific instances of the Second Defendant having failed to carry out, record or bill client work and the Second and Third Defendants having misused, misplaced or destroyed client documents
    c. It was sufficient to rely upon material in or referred to in the Reply without having to amend Paragraph 92.

136. Mr Solomon QC in reply:
    a. Repeated that this was all very unspecific
    b. Stated that "particularised above" meant in Sub-Section (d) (i.e. back to Paragraph 87) at most and no further
    c. Said that there was no pleaded assertion of "misuse of Confidential Information" by the Third Defendant.

137. It seems to me again that Paragraph 92 and its associated material is pleaded in, at least, a confusing and an unhelpful manner. Having heard counsel, it seems to me that:
    a. The allegations of participation etc. are allegations of primary primary fact. They should be pleaded as such and then with a statement that they are to be inferred from other identified facts
    b. The intention was to plead as a primary case that all of the other Defendants (but if not all then as a secondary case all but some of them) participated in etc. the misuse of Confidential Information by (a) the Second Defendant and (not "and/or") (b) the Third Defendant. As I have said above, I regard that as a potentially legitimate form of pleading in a case of this nature, although more should be said, if possible, as to dates and in particular whether it is being alleged that Defendants so acted when they were still at the Company
    c. The relevant misuse of Confidential Information were those set out in Paragraphs 87-91. The words "as particularised above" refer to the "misuse" not the basis of the inference
    d. The relevant misuse of Confidential Information by the Third Defendant was that identified in Paragraph 91 being her having instructed etc. Ms Coyle to act as Ms Coyle did. However, if that is to be alleged then Paragraph 91 should read "by, Mr Gasser and Ms Bhatiani and if not by both of them (which is the Claimant's primary case) then by one of them."
    e. Paragraph 92 itself was initially defective because it failed to identify the secondary facts from which the primary facts alleged were to be inferred. However, that has now been cured (to a degree) by Response 58 to the Part 18 Request, albeit that is somewhat concerning as identifying a totality of allegations rather than particular specific secondary facts
    f. Some degree of amendment is required in any event.

138. In all these circumstances, I do not think that there is any sufficient breach of the rules to justify striking-out. The deficiencies which I have identified are not that great and can be dealt with by amendment.

139. However, again, I do not think that this Paragraph 92 should be struck out (as not disclosing reasonable grounds or so obstructing the just disposal of the claim) or that the Claimant does not have a real prospect of success; and in particular because:
    a. The alternative cases approach can be a legitimate one as is the concept of inference upon inference as I have stated above. It is to be expected in a case of this nature

b. The Applying Defendants are not seeking to strike-out or have summary judgment on:
    i. the allegations regarding the existence or nature of Confidential Information (indeed they admit it at least to an extent) or any of Paragraphs 87-91. It is thus, at least, somewhat incongruous that they are seeking to strike-out Paragraph 92. The relevant factual material is going to be deployed and argued out anyway at tried. The Partco warnings against striking-out or summarily determining subsidiary matters related to other (more major) allegations which will remain to be determined seem to me to be very much in point
    ii. the allegations of Common Design, and where I am not going to remove Paragraph 80. It would seem inconsistent to strike out the core allegation within Paragraph 92 which is simply a facet of the alleged Common Design. The relevant factual material is going to be deployed and argued out anyway at tried. The Partco warnings against striking-out or summarily determining subsidiary matters related to other (more major) allegations which will remain to be determined seem to me to be very much in point
c. The admission by the Third Defendant in Paragraph 65 of the Defence does support the Claimant's case that there was a Common Design (at least involving her and the Applying Defendants)
d. Ms Coyle's alleged conduct in terms of removal of client material is set out in Paragraph 90 and is not sought to be struck out. It would seem perfectly arguable that Ms Coyle was in some way procured to do so, and at first sight would seem to involve potential wrongdoing as against the Company. It is alleged in Paragraph 91 that this procurement was by both or one of her superiors, the Second and Third Defendants. Those Paragraphs would seem arguable, and more than fanciful, and are not sought to be struck out. Paragraph 92 really simply seems to extend this to be part of the Common Design with the other Defendants, and that would seem arguable, and more than fanciful, assuming (as is pleaded and not sought to be or to be struck-out or summarily determined) that such existed
e. The material referred to in Response 57 would all seem to afford some support to the Claimant's case
f. I repeat that the matter is at a distinctly early stage. It is reasonable to expect that material may well be produced on disclosure which could support the claims and enable them to be better particularised (and in fact the Claimant has said that this has actually occurred). This does not seem to me to be pure "Micawberism". Ultimately that is a matter of impression. However, in this situation the relevant material will be held by the Defendants and who have not advanced any positive alternative case of Ms Coyle having acted as alleged for other reasons.

140. Therefore, while in its present state I do require some alteration to be made to this Paragraph 92, I would not propose to strike it out or to grant

reverse summary judgment. As the Claimant seems to want to amend it anyway following disclosure, it may be most appropriate to consider a composite proposed amended version then, but I can consider that following the handing down of this judgment. It seems to me that the Part 18 Response renders it strictly unnecessary for that material to be included in the Particulars of Claim, but, if there is going to be amendment then it would be sensible just to have one composite paragraph.

(D) The pleading of knowledge that the Company would have taken action regarding misuse of Confidential Information (paragraph 99).

141. The Applying Defendants next seek to strike out or for reverse summary judgment on Paragraph 99 of the Particulars of Claim. This reads:
"99. Each of the Defendants knew, at all material times, that in the event that Rollingsons discovered or suspected the recruitment and/or solicitation and diversion of its employees and/or clients and/or the failure to properly bill clients and the amendment to clients' payment terms and/or the misuse of confidential information and/or the deletion or loss of documents described in these Particulars of Claim, it would take steps to discourage its employees, clients and potential clients from leaving Rollingsons and/or joining Laurus and/or would seek injunctive relief from this Court."

142. This was the subject of Request 78 for Part 18 Information, and to which the Claimant responded as follows:
"78. In respect of each of the defendants, please provide full particulars of the factual basis for the allegation as to the state of mind of each such defendant.
Response… The matters alleged at paragraph 99 would have been obvious to each Individual Defendant as a matter of common sense and commercial reality and in light of their respective roles within Rollingsons; their knowledge of Rollingsons' business and their knowledge of the steps taken by Rollingsons to prevent its former employees soliciting its clients and/or staff in breach of their legal duties, including in particular:
1. securing injunctive relief to prevent the same in respect of Christina Pieri, a solicitor formerly employed in Rollingsons' Family Department, and;
2. instructing solicitors to write to Darren Mendel, a former director of Rollingsons and head of its Defendant Personal Injury Department, threatening an application for injunctive relief in order to prevent his solicitation of Rollingsons' clients and staff."

143. The relevant paragraph of the Defence is Paragraph 84 which reads:
"84. As to paragraph 99, it is improper to make such unparticularised allegations. In any event, the allegations made at paragraph 97 are wrong and denied. Further, it is denied that any of the Defendants knew that Rollingsons would seek injunctive relief as alleged, and noted that at no point did Rollingsons ever do so."

144. There is no specific response in the Reply.

145. Mr Solomon QC submitted in relation to Paragraph 99 that:
    a. It lacked the necessary material from which inferences of the alleged knowledge are sought to be drawn
    b. The Part 18 Information was insufficient as it did not identify when the cited instances occurred or who knew of them (and when)
    c. It was unreal with regard to at least some of the alleged wrongdoing (e.g. failure to fully record work on time-sheets) to suggest that the Claimant would spend money on seeking injunctions.

146. Mr Leiper QC responded by submitting:
    a. This was all just common-sense; a solicitors' practice such as the Company would take serious action if there was serious wrongdoing
    b. There are further matters set out in Paragraphs 100 and 101 which reinforce that the Company would have taken the relevant wrongful acts seriously
    c. Response 78 does identify specific matters.

147. It does seem to me that:
    a. If knowledge is to be alleged then particulars have to be given of why it should be found to be the case whether it is objective (a reasonable person would have had knowledge) or subjective (it was in a particular person's mind) knowledge; and as stated in the case-law cited above
    b. The allegations in Paragraph 99 are somewhat "rolled-up" and should be separated out. The first allegation logically is that the Company would have acted in certain ways had it learnt of certain facts. The second, and consequential, allegation is that each Defendant knew that to be the case
    c. The allegations in Paragraph 99 fail to distinguish between objective and subjective knowledge, and if these allegations are important then they should do so
    d. I am not at all sure as to what Paragraph 99 actually adds as a matter of law to the Claim itself; and which I suspect rather more depends on what each Defendant engaged in and agreed and knew about the alleged wrongful conduct rather than what they knew or thought about how the Company might react to learning of it. However, Paragraph 99 is not being attacked on that basis.

148. It further seems to me that:
    a. Paragraph 99 is defective in not particularising facts from which the relevant knowledge (of whichever type) is to be found or inferred
    b. However, Request 78 does perform that function
    c. But that Request 78 is defective in failing to identify in relation to its specific historic matters when they occurred and which Defendant is said to have known of them and when. If it is all of the Defendants then that can be said. However, here the matters are within the Claimant's knowledge and should be specified against each Defendant as it is not clear to me that that is being alleged against each of them in this instance.

149. In all these circumstances, I do not think that there is any sufficient breach of the rules to justify striking-out. The deficiencies which I have identified are not that great and can be dealt with by amendment.

150. However, again, I do not think that this Paragraph 99 should be struck out (as not disclosing reasonable grounds or so obstructing the just disposal of the claim) or that the Claimant does not have a real prospect of success summary as not disclosing reasonable grounds; and in particular because it is difficult to see why in the event of a serious wrongdoing it cannot be sensibly contended that (1) the Company would not wish to stop it and (2) senior staff (themselves solicitors) would not appreciate that both objectively and subjectively. This does not seem to me to be remotely merely "fanciful".

151. Therefore, while in its present state I do require some alteration to be made to this Paragraph 99 and Response 78, I would not propose to strike it out or to grant reverse summary judgment.

(E) The pleading of the various wrongs having caused the insolvency and foregoing of profits of the Company (paragraphs 6 and 116(f)).

152. The Applying Defendants finally seek to strike out or for reverse summary judgment on Paragraphs 6 and 116(f) of the Particulars of Claim. These read:
"6. As a consequence of the Defendants' breaches of duty as particularised herein, Rollingsons became insolvent and entered into administration on 14 June 2018." And
"116…f) Following and in consequence of the Defendants' breaches as aforesaid Rollingsons' revenue and profit declined. In particular:
i. In the financial year ending 31 March 2017, Rollingsons' turnover was £3,121,186 and it suffered a loss before tax of £631,492. During that year the fee income of the Property Department was £1,200,242 and the fee income of the Family Department was £513,957 (the majority of which had been billed and/or earned before the breaches of duty particularised herein).
ii. In the financial year ending 31 March 2018, Rollingsons' turnover was approximately £2,862,000. In that at year the fee income of the Property Department was approximately £574,000 and the fee income of the Family Department was approximately £247,600. Prior to disclosure and expert evidence herein (including, where necessary, disclosure from third parties) the Claimant is currently unable to calculate the extent of Rollingsons' losses during this period. However, such losses were substantial."

153. This, of course, follows other elements of Paragraph 116, which, as I have cited above, alleges that the Company suffered loss and damage as a result of the Defendants' breaches of duty. It alleges that the Company had been profitable, and had merger potential, and sets out turnover and profit figures for years leading up to 31 March 2016. It seeks to explain a reduction in profit for the last year due to one-off circumstances limited in time. It then

states that the Property and Family Departments had been particularly profitable within the Company and gives the figures for the years to 31 March 2015 and 31 March 2016 as:

"i. In the financial year ending 31 March 2015, the fee income of the Property Department was £1,566,223, and the fee income of the Family Department was £626,388.

ii. In the financial year ending 31 March 2016, the fee income of the Property Department was £1,744,717, and the fee income of the Family Department was £487,228."

154. Further material was provided in the Part 18 Response under Request and Responses 4 and 84 which read:

"Request 4. Please set out each and every factual basis on which it is to be maintained, for each alleged breach and for each Defendant separately, how it is to be alleged that any breach caused Rollingsons to enter administration on 14 June 2018.

Response… This request serves no purpose. Paragraph 6 does not purport to particularise any breach of duty: it summarises the nub of the Claimant's case, and expressly provides that the allegations in support of that case are particularised within the Amended Particulars of Claim. As set out at paragraph 57, the Claimant is unable to set out each and every factual basis on which his claim is made prior to disclosure and/or the provision of further information owing to the surreptitious nature of the breaches of duty committed by each defendant to the claim."

"84. Please provide full particulars of the basis on which the Claimant alleges that the decline in Rollingsons' financial performance in the years ending 1 March 2017 and/or 31 March 2018 was "in consequence of" the actions of the Defendants, specifying which actions of which Defendants is relied upon for any given "consequence". Response The Claimant's case is adequately pleaded. As a consequence of the Common Design and the Defendants' actions pursuant to the same Rollingsons lost two of its most profitable departments to a competitor at a time when it was facing short term (and, but for the Defendants' breaches of duty, remediable) financial difficulty. The level of particularity sought by the Defendants is not necessary to enable them or the Court to understand the Claimant's case."

155. Paragraph 6 of the Defence alleges that: the Company was badly run; the Company was losing money and engaging in forced redundancies; and the Defendants' actions were unrelated to the eventual entry into Administration which took place some time later. Paragraph 94 of the Defence repeats that the Company was in severe financial difficulty and failing to pay its debts anyway, and was not a concern, but otherwise the Defence simply not admits and denies Paragraph 116 of the Particulars of Claim.

156. Paragraph 6 of the Defence is challenged generally in Paragraph 8 of the Reply.

157. Mr Solomon QC submitted that these Paragraphs of the Particulars of Claim:
    a. Made no attempt to distinguish between the various wrongs, and
    b. Were simply bald assertion, and
    c. Failed to relate the occurrence of the Administration sufficiently to the alleged wrongs.

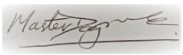
158. Mr Leiper QC submitted that:
    a. A sufficient chain of causation was made out between the alleged wrongful acts, their alleged consequences in terms of loss of staff and clients, and the resultant financial consequences in terms of loss of profit and forced cessation of business via an insolvency process (here Administration)
    b. It was the overall effect of the wrongs which caused those losses rather than individual losses related to individual wrongs
    c. And that it was only lost profit which was being claimed and not sustained losses or expenditures
    d. And this should all be left up to expert evidence in the ordinary course.

159. I can see no reason why these Paragraphs should be struck out (or why they do not identify reasonable grounds or why they would obstruct the just disposal of the proceedings) or why they do not have a real prospect of being established or why they can be said to be in breach of the rules. I accept Mr Leiper QC's submissions and, further:
    a. They actually plead considerably more than is usual in cases of this nature at this early stage
    b. It seems perfectly arguable, and not merely fanciful, that if there were wrongs (as I must assume would be proved) which resulted in substantial elements of relevant departments and clients leaving the Company (which I must again assume) that failures to generate expected profits (which seem potentially reasonable when compared to past history) would be caused by such wrongs, and that an insolvency process would be the end result
    c. In any event, the questions whether or not this is unreal can only be tested on the basis of evidence, and there is none adduced by the Applying Defendants which impacts on this
    d. No damages claim is made for the Administration itself. The Claim is for the lost profits. Thus the question whether the Administration was due to the wrongs is of somewhat limited importance although, of course, related to the fact that future profits were not generated. It will remain open, if pleaded (which it may be) for the Defendants to contend that the future profits would never have been generated even if any wrongs (assuming that they are proved) were committed.

160. I therefore refuse to strike-out or to grant summary judgment in relation to these Paragraphs.

Conclusion

161. I therefore:
    a. Strike-Out Paragraph 8 of the Particulars of Claim (and the responsive elements of the various other statements of case)
    b. Determine the WP Issue in favour of the Claimant in that the Bidding Process and the First Defendant's communications in it may be deployed in this litigation (if relevant and subject to CPR32.1)
    c. Refuse to strike-out or grant summary judgment in relation to Paragraphs 80, 92 and 99 of the Particulars of Claim but require them to be altered in various respects, and which it seems to me could best be done as part of the wider amendment process in which the Claimant seems to wish to engage
    d. Refuse to strike-out or to grant summary judgment in relation to Paragraphs 6 and 116(f) of the Particulars of Claim.

 22.12.2020