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Case No: BL-2018-000016

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST
CHANCERY DIVISION

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 07/10/2021

Before:

MRS JUSTICE FALK

- -

Between:

(1) JAMES RICHARD SCOTT BREARLEY
(2) JRB AUTOMOTIVE LTD
(3) RODGER JOHN DANKS
(4) BLUE SQUARE PENN ROAD LTD **Claimants**

- and -

HIGGS & SONS (a firm) **Defendant**

- -
- -

David Turner QC and **Joseph Sullivan** (instructed by **Freeths LLP**) for the **Claimants**
Michael Pooles QC and **Helen Evans** (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendant**

Hearing dates: 11, 14-17, 21-23, 25, 28-30 June, 2, 5-7, 9, 14-15 July 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 am on Thursday 7 October 2021.

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Mrs Justice Falk

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Mrs Justice Falk:

INTRODUCTION

1. This is my judgment following the trial of a professional negligence claim brought against Higgs & Sons, a firm of solicitors ("Higgs"). The claim relates to an opportunity to develop a Jaguar Land Rover ("JLR") dealership in Wolverhampton (the "Wolverhampton Opportunity"), which the claimants say was lost as a result of Higgs' negligent advice.

2. There are four claimants. The first, James Brearley, has at all material times been engaged in the automotive retail business. From 2008 he led the Stratstone division of Pendragon plc. Pendragon is a substantial automotive dealership group. Stratstone is the division of Pendragon that is engaged in the "premium" market, covering brands that include Jaguar, Land Rover, Mercedes-Benz, Porsche, Ferrari and Aston Martin. Mr Brearley left Pendragon on 31 August 2015 with the intention of pursuing the Wolverhampton Opportunity, having tendered his resignation in April of that year. Since 2016 Mr Brearley has been employed by the Inchcape group, another substantial automotive retailer. He became the CEO of Inchcape UK in January 2017.

3. The second claimant, JRB Automotive Ltd ("JRBA"), is a company that was incorporated on behalf of Mr Brearley as a vehicle through which the Wolverhampton Opportunity would be pursued.

4. The third claimant, Rodger Danks, is a property developer who was also engaged in the pursuit of the Wolverhampton Opportunity. At the time he acted with another investor, Steven (Steve) Smith, who has not participated in these proceedings. Mr Smith was the founder of Poundland and has since developed a number of other business interests.

5. The fourth claimant, Blue Square Penn Road Ltd ("BSPR"), was incorporated on behalf of Mr Danks. It acquired land intended to be used for the Wolverhampton Opportunity.

6. In broad terms, the intention was that BSPR would act as the property owning company ("Propco") and would develop the land by constructing the required buildings with a view to a disposal of the completed development to an investor. JRBA would act as the operating company ("Opco"). It would operate the dealership once the development was completed, under a lease of the property from Propco or its successor in title.

7. Mr Brearley involved another senior Pendragon employee, Stephen (Steve) Venables, in the proposal. At the relevant time Mr Venables was the financial director of Stratstone and worked closely with Mr Brearley, sharing an office with him in Wolverhampton.

8. The claimants say that they entered into a retainer with Higgs in late January 2015 pursuant to which Higgs would provide all necessary legal advice in connection

with the Wolverhampton Opportunity. Higgs dispute the scope of the retainer, and also deny that they owed any duties to Mr Danks individually.

9. Prior to instructing Higgs, preparatory steps had been taken by the claimants in connection with the Wolverhampton Opportunity. The precise extent of those steps has been a matter of significant dispute. The claimants' case is that they only started to pursue the Wolverhampton Opportunity in early October 2014, after Pendragon had decided not to do so itself.

10. In September 2015 Mr Brearley received a "cease and desist" letter from Pendragon regarding his pursuit of the Wolverhampton Opportunity, threatening proceedings unless undertakings were provided. Pendragon alleged that Mr Brearley had taken steps to pursue the Wolverhampton Opportunity for his own benefit. Pendragon further alleged that Mr Brearley took steps to dissuade it from pursuing the Wolverhampton Opportunity itself.

11. Mr Brearley sought advice from Higgs. No undertakings were provided at that stage and Pendragon commenced proceedings against Mr Brearley, JRBA and also Mr Venables (who became separately advised). Interim undertakings were subsequently provided. Higgs continued to represent Mr Brearley and JRBA until February 2016, at which point Higgs terminated the retainer and another firm, The Wilkes Partnership LLP ("Wilkes"), was instructed. A settlement was agreed with Pendragon in March 2016 in which, among other things, Mr Brearley agreed not to pursue the Wolverhampton Opportunity. A JLR dealership was eventually developed on the proposed site by another dealership chain, Jardines, and opened in October 2018. For ease of reference, references to the "Pendragon proceedings" in this judgment encompass both the litigation initiated by Pendragon and the preceding correspondence commencing with the cease and desist letter.

12. The claimants allege that Higgs was negligent in a number of respects, including failing to advise that Mr Brearley's contractual obligations and other duties to Pendragon could preclude him from pursuing the Wolverhampton Opportunity, and wrongly advising him not to give the undertakings requested in the cease and desist letter. Higgs denies acting negligently and (as already mentioned) disputes the scope of the retainer. It further alleges that Mr Brearley failed to provide complete and accurate instructions about his activities. In particular, Higgs asserts the truth of allegations made in the Pendragon proceedings that Mr Brearley was involved in Pendragon's own assessment of the Wolverhampton Opportunity and took steps to dissuade Pendragon from pursuing it. Higgs also maintains that Mr Brearley was not concerned about the provisions of his service contract and took the view that JLR would exert pressure on Pendragon to ensure that he was permitted to pursue the Wolverhampton Opportunity.

13. The claimants maintain that, but for Higgs' breaches, they would have successfully pursued the Wolverhampton Opportunity. They claim substantial lost profits and wasted costs in respect of the Pendragon proceedings. (An additional claim for costs in respect of the Wolverhampton Opportunity was not pursued in closing submissions.) Higgs' position is essentially that, even if a breach of duty were established, the chain of causation is broken. The claimants

have failed to establish on a balance of probabilities that a different course of action would have been adopted if different advice had been given, or that in that event there would have been a real and substantial chance of the Wolverhampton Opportunity coming to fruition. There is also a significant dispute about the potential returns available from the Wolverhampton Opportunity.

14. The trial was conducted during the Covid-19 pandemic largely on a “hybrid” basis (having been delayed from 2020 for pandemic related reasons), with the advocates and a limited number of additional members of the legal teams present in court, and the parties and their other legal representatives participating remotely. The most significant witnesses, Mr Brearley and Mr Danks for the claimants, and Adrian Cutler and Damian Kelly for Higgs, gave evidence in person. Other witnesses generally gave evidence remotely. Identified members of the public and press were able to access the proceedings via a link provided by my clerk, use of which was monitored. I am grateful to the legal teams, led by David Turner QC for the claimants and Michael Pooles QC for Higgs, for their assistance throughout.

15. The Appendix to this decision sets out a dramatis personae, to assist the reader.

THE EVIDENCE

Documentary evidence

16. In broad terms there were two main categories of significant documentary evidence. The first was evidence relating to the advice that Higgs provided, or allegedly failed to provide, including material indicating what information was available to them for that purpose. The second, most of which predated the first chronologically, was evidence on which Higgs sought to rely relating to the development of the Wolverhampton Opportunity by Mr Brearley and others prior to Higgs’ involvement, and the consideration of that opportunity by Pendragon. A further strand of documentary evidence related to the Pendragon proceedings.

17. In relation to the first category, a notable feature is a lack of documentary evidence of the advice given, or alleged to have been given, in the first few months of Higgs’ involvement. Although there were generally detailed notes of meetings at which advice was given following the cease and desist letter, there were no contemporaneous attendance notes of meetings and calls between January and April 2015, when Mr Brearley alleges that Higgs was negligent in advising (or, as the case became, failing to advise) about his obligations to Pendragon. My conclusions in respect of that period are therefore based on an assessment of the witness evidence together with the limited contemporaneous documentary evidence that is available.

18. There were also issues about the extent of the documentary evidence in respect of the second category, the development of the Wolverhampton Opportunity. Very limited material was obtained from the claimants in respect of the work they had been involved in. Such evidence as is available was largely obtained from third parties, in particular from Mr Smith and from Smith & Williamson, who

advised on the project, and only following an application for specific disclosure. In Mr Brearley's case this appears to have been at least partly the result of a deletion of significant amounts of electronic material after receipt of the cease and desist letter. In Mr Danks' case there is no clear explanation for the lack of evidence. Whatever the reason, however, there are material gaps in relation to documents produced in respect of the Wolverhampton Opportunity in the form in which they would have existed during 2014, and in particular before October 2014 (by which time the Wolverhampton Opportunity was no longer pursued by Pendragon). As discussed below, I have not accepted the claimants' case as to the state of the documents during that period.

Witness evidence (factual): claimants

19. Disregarding evidence in respect of procedural matters, there were six witnesses of fact for the claimants. In addition to Mr Brearley and Mr Danks they comprised Mr Venables, Andy Goss (then of JLR), Iain Lownes (a partner at Smith & Williamson) and Richard Roberts (who until February 2021 managed the JLR dealership that Jardines built at Wolverhampton).

James Brearley

20. Mr Brearley was an unsatisfactory witness. During the course of a lengthy cross-examination he accepted that a number of previous statements that he had made were lies. However, my assessment is that he did so where there was little realistic option to do otherwise, and that overall a number of aspects of his evidence remained incomplete and, in some important respects, inaccurate. There were also a number of inconsistencies. Other than in relation to his knowledge of the automotive retail industry (which is obviously extensive), I found much of what he said to be unconvincing.

21. My assessment is that Mr Brearley is prepared to tell untruths, and certainly to be careless with the truth and to withhold information, where he perceives it to be in his interests to do so. He appears to have significant self-belief. He accepted that he acted disloyally to Pendragon during the last 18 months of his employment. He failed to provide full and accurate information not only to Higgs, but subsequently to Wilkes and (at least when first instructed in these proceedings) to his current solicitors, Freeths.

22. In his witness statements Mr Brearley sought to downplay his role at Pendragon, maintaining that it was of an operational rather than a strategic nature, no doubt to support his case that he did not materially participate in the decision making process that led to it not pursuing the Wolverhampton Opportunity. His evidence about the nature of his role was contradicted by the entry in respect of him on Inchcape's website, which Mr Brearley claimed was incorrect in its description of his prior role at Stratstone as one involving "strategic responsibility for a wide range of premium brands, including JLR…", but which Mr Venables agreed was accurate. It was also contradicted by comments that Mr Goss made in cross-examination, in which he said that he was assuming that there had been a disagreement about strategy between Pendragon's then CEO (Trevor Finn) and Mr Brearley, whom he described as people at a "very senior level". Mr Goss's

understanding is consistent with the JLR document dated April 2015 referred to at [187] below. Mr Goss also referred to Mr Brearley as "one of the triumvirate who effectively ran Pendragon for 20, 25 years". Mr Finn depicted Mr Brearley as the "nearest thing to a director".

23. Mr Brearley was not an ultimate decision maker at Pendragon, but he clearly had a very senior role which extended to strategic matters. He also accepted in cross-examination that he was involved in strategic decision making. He was responsible for profitability at Stratstone, which would be significantly affected by the choice and nature of Stratstone's sites as well as the way in which they were run. Mr Venables' witness statement confirmed that decisions to acquire or close sites were made in meetings between Mr Finn, Mr Brearley and Malcolm Bailey, Pendragon's development director. I also accept Mr Venables' evidence that Mr Brearley was trusted to run Stratstone with very little interference. Importantly, of the executives at Pendragon it was Mr Brearley who had the closest and deepest relationship with JLR, and in that respect particular reliance was placed on him for information and advice.

24. It was also of concern that, during the course of the trial, it became apparent that in making a claim for loss of earnings Mr Brearley had failed to make proper disclosure of his equity incentive arrangements at Inchcape, apparently after having interpreted a question about share options in a narrow way (Mr Brearley's equity incentives are not strictly in the form of share options). Details emerged after Higgs' legal team noticed an apparent inconsistency between Mr Brearley's loss of earnings claim and a note of a meeting he had had with Smith & Williamson in June 2017 about his personal investment position. The position was made worse by Mr Brearley seeking to suggest in cross-examination that the Smith & Williamson note was inaccurate in a number of respects and that the value involved was limited. (I should clarify that I do not accept that evidence, and am also unconvinced by a later explanation that Mr Brearley had the "book cost" rather than market value of his incentives in mind when he indicated that the value was limited.) The information in the note led to an analysis of publicly available information by Higgs' accountancy expert and an application for the admission of additional evidence, which was rightly not resisted. As a result, Mr Brearley's claim for personal losses was withdrawn by the stage of closing submissions.

25. More detailed findings are made below, but by way of summary my conclusions in respect of Mr Brearley's behaviour include:

    a) that he took steps with a view to pursuing the Wolverhampton Opportunity from no later than March 2014 onwards (albeit accepting that his ability to do so was dependent on Pendragon not proceeding with it), and that proposals in respect of it were more advanced during 2014, in particular the first nine months of 2014, than Mr Brearley has been prepared to admit;

    b) that he was well aware that he was acting disloyally to Pendragon and that there would be potential legal issues with his service contract, but he delayed seeking legal advice for some months, only starting to engage at the point that he wanted input on his resignation letter in April 2015, and

then only to a limited extent, because he was confident that any legal restrictions to which he was subject would not be an impediment to his plans;

c) when the dispute with Pendragon started Mr Brearley initially continued to hold this view;

d) the reason for Mr Brearley's confidence was a mistaken belief about the commercial position, in that he believed that the level of JLR's support for him, and the importance of the JLR relationship to Pendragon combined with a lack of appetite on Pendragon's part for a serious dispute, would have the effect that Pendragon would not take steps to interfere, or that if it did then JLR would persuade it to back down; and

e) as it became apparent that Pendragon were prepared to pursue action against him, and JLR did not intervene (or at least did not do so with any success), Mr Brearley started to form the view that he had been let down by his lawyers.

26. I make a number of references below to Mr Brearley's first witness statement. This was his main witness statement for trial. A total of three additional witness statements were provided that covered specific areas.

Rodger Danks

27. Mr Danks is a property developer, describing himself in the witness box as a "bricks and mortar" man. He has been involved in the construction industry throughout his career. His focus in relation to the Wolverhampton Opportunity was clearly on the acquisition and development of the land with a view to a profit. He had previously developed some sites in partnership with Mr Smith, and a similar approach was no doubt envisaged in relation to the Wolverhampton Opportunity.

28. Mr Danks' position at the trial was not an entirely easy one. He had clearly not fully appreciated the extent of Mr Brearley's lack of candour in dealings with others, including to some extent Mr Danks himself as well as Higgs and others. He made a number of corrections to his witness statements at the start of his evidence, two of which were material, and in some respects those witness statements were less than complete. In particular, the impression given was that Mr Brearley's pursuit of the Wolverhampton Opportunity was not discussed until October 2014.

29. However, my assessment is that on the whole Mr Danks sought to give honest evidence in the witness box, and although at times he needed to be pressed to give frank answers in cross-examination he generally did so. This included instances where the result was to give a rather different impression to that in his witness statements, in a way that was unhelpful to the claimants' case.

30. For example, as well as accepting deficiencies in Mr Brearley's behaviour in respect of the Wolverhampton Opportunity, Mr Danks supported the evidence of Ashley Brough (see below) that Mr Brearley had indicated at a meeting in

February 2015 that JLR would assist if there were difficulties with his service contract, which Mr Brearley denied having said at the time. In addition Mr Danks described Mr Smith's particular interest in opportunities in Wolverhampton (consistent with Mr Brearley's own acceptance of that in cross-examination) and confirmed that the possibility of a dealership in that location was discussed at the first meeting in March 2014 (see below). He also assisted in relation to the circumstances of the disposal of the land to Jardines, although ultimately this was not of central relevance and I do not need to make findings about it.

31. One part of Mr Danks' evidence that it is convenient to address now is a suggestion he made that he would have been content to acquire and develop an existing dealership location, rather than develop a new one as contemplated for the Wolverhampton Opportunity. Whilst from a development perspective there might not be much of a difference because of the radical nature of the development required to meet JLR's standards, other features are different and it is clear that Mr Brearley in particular had them well in mind. In particular, a) the acquisition of an existing business would generally involve a payment for goodwill, and b) the Wolverhampton Opportunity offered a unique opportunity to locate a new dealership geographically close to a new JLR engine plant, as discussed further below.

Steve Venables

32. Mr Venables is not a party to the proceedings and does not appear to have any financial interest in it. He was a defendant in the Pendragon proceedings, which obviously proved very difficult for him. However, he found employment as head of retail finance at Marshall Motor Group relatively shortly after the proceedings concluded, and remains in that role. Marshall is another major automotive retailer.

33. Whilst Mr Venables was involved in Mr Brearley's pursuit of the Wolverhampton Opportunity from an early stage, it is quite clear that as between the two of them Mr Brearley was very much the leader. Mr Venables appears to have trusted Mr Brearley's judgement, in particular his confidence that Pendragon would not take steps to prevent the opportunity being pursued because of the relationship it had with JLR, who would support Mr Brearley.

34. Whilst in general I do not think Mr Venables sought to lie in his oral evidence, I did not find him to be an impressive witness. Questions were generally answered but often in a rather brief, and sometimes apparently rushed, manner. Whilst a failure of recollection, especially after a lengthy period, is entirely understandable, at times Mr Venables' stated inability to recall gave the impression of being a convenient answer to a difficult question. It was apparent that at least initially he had been less than straightforward with Shoosmiths, who had advised him in the Pendragon proceedings. His initial defence in those proceedings was clearly inaccurate in important respects. His witness statement in these proceedings had material omissions and some inaccuracies.

35. On occasion I got the impression that Mr Venables may have agreed rather too readily to what was being asked in cross-examination with a view to getting the process over with as quickly as possible, or that he resorted to answers such as "if

you say so" or "I can understand how you would say that" rather than being completely straightforward.

36. One important part of the documentary evidence was the financial projections produced by Pendragon in respect of the Wolverhampton Opportunity on the one hand, and those produced by or on behalf of the claimants on the other. Mr Venables confirmed that he would have approved the former, and was clearly heavily involved in the latter. As discussed below I did not find his explanation of the differences between the two, and in particular the substantially higher turnover figures in the latter, to be convincing.

37. However, Mr Venables did provide useful evidence in a number of areas, and in assessing it I have taken into account the lack of any obvious vested interest in the outcome. This included evidence about discussion of the Wolverhampton Opportunity at meetings in March and July 2014, a lack of advice about service contracts at some early meetings with Higgs between January and April 2015, Mr Brearley's confidence that JLR would assist in the event that there was any difficulty with Pendragon, and the nature of Mr Brearley's role at Pendragon.

Andy Goss

38. At the relevant time Mr Goss was a main board director of JLR, and was its global sales director. He therefore had overall strategic responsibility for JLR's relations with dealerships. He has since left JLR and is now the chairman of a substantial retail group.

39. Because of the significance of the Pendragon relationship Mr Goss had some direct involvement with it, including meeting with Mr Finn (along with Jeremy Hicks, another senior JLR executive who reported to Mr Goss) after the commencement of Pendragon's dispute with Mr Brearley.

40. Mr Goss's oral evidence was consistent with his witness statement, and there was no issue with his credibility. His answers were at times somewhat combative, however. He clearly has strong negative views about Mr Finn's management of Pendragon and about Pendragon "dragging their heels" over new investment, and he thought that Mr Finn and Mr Brearley should have reached an agreement. But it is also apparent that Mr Goss was not aware of the extent of the steps taken by Mr Brearley in relation to the Wolverhampton Opportunity while he was still employed by Pendragon, including the discussions he had with other employees of JLR and the JLR comfort letter he obtained, referred to at [184] below.

41. Mr Goss also had a clear view that it was JLR that took Wolverhampton off the table as far as Pendragon were concerned, but I am not persuaded that it was that straightforward. The decision that Pendragon would not pursue the Wolverhampton Opportunity was taken at a meeting or meetings that Mr Goss did not attend. Further, although he made it clear that JLR was seeking to reduce its exposure to Pendragon, Mr Goss denied the existence of any 10% "cap", which as discussed below appears to have played a part in that decision. At the least, the existence of such a cap was asserted to Pendragon by JLR employees as representing JLR's position.

42. It was clear from Mr Goss's evidence, as it in fact transpired, that JLR would ultimately not be prepared to intervene in a dispute between Mr Brearley and Pendragon. However, this did not prevent Mr Goss meeting with Mr Finn in the early stages of the Pendragon proceedings to discuss the possibility of a consensual solution. Mr Goss was also clear that, if he had been asked whether JLR would have been prepared to wait 18 months following Mr Brearley's departure from Pendragon to open in Wolverhampton, he would have supported that. However, this assumes that Mr Brearley would have been at liberty to approach JLR prior to that point.

Iain Lownes

43. Mr Lownes is a partner at Smith & Williamson in Birmingham. Smith & Williamson was engaged in the project to provide corporate finance advice, and in particular assistance with fundraising. Mr Lownes became involved after his partner Philip Moody was contacted by Mr Smith to put Mr Moody in touch with Mr Brearley.

44. Mr Lownes gave straightforward and clear evidence to the best of his ability. The focus of his cross-examination was the first meeting he attended, on 15 July 2014. Understandably, he could only speak to his personal involvement in the project which effectively started on that date, rather than any earlier work that might have been done by Mr Moody. However, the available documentary evidence indicates that although Mr Brearley might have been introduced by Mr Smith to Mr Moody as early as April 2014, there is unlikely to have been substantive work prior to the July meeting.

Richard Roberts

45. The aim of Mr Roberts' evidence was essentially to discredit parts of the evidence of Higgs' motor industry expert Robert Jones. The aim failed.

46. Mr Jones had visited the Jardines dealership in Wolverhampton while Mr Roberts was the manager of it and attributed certain comments to him in his first report. Mr Roberts' statement made various criticisms of what was said in the report. In cross-examination, none of Mr Roberts' criticisms stood up to real scrutiny. It was apparent that what Mr Roberts really wanted to make clear was that trading performance in the first year had been in line with expectations, and also that there had been success in obtaining custom from employees of the JLR engine plant in Wolverhampton.

47. Neither of these points rendered the content of the report, which included reference to there being a "significant" loss in the first year of trading and to the number of factory employee related sales in that year, incorrect. Although Mr Roberts thought that there had been a higher number of employee-related sales than the number relied on in Mr Jones' report (85), he could not confirm the number without access to documents. Significantly, references to 85 factory sales and also to there having been a significant loss were recorded by Mr Jones in handwritten notes made in his car immediately after his meeting with Mr Roberts, before leaving the site. I accept that the notes were accurate.

Witness evidence (factual): defendant

48. The defendant called 10 witnesses of fact. These included five who were partners of Higgs at relevant times, Mr Cutler, Mr Kelly, Carl Garvie, Nicholas (Nick) Taylor and Cherry Elliott, and one Higgs employee, Zahra Farooq. The other witnesses were Ashley Brough, at one stage a potential investor in the Wolverhampton Opportunity, Trevor Jones (associated with one of the expert witnesses – see further below), and Trevor Finn and Hilary Disney (formerly Hilary Sykes). As already indicated, Mr Finn was at the relevant time the CEO of Pendragon plc. Mrs Disney was its company secretary and corporate services director (and also a solicitor by profession). There were no witness statements for the trial in these proceedings from Mr Finn or Mrs Disney, both having been the subject of a witness summons, but witness summaries were produced and in the case of Mrs Disney the court was asked to read a witness statement that she had produced in the Pendragon proceedings.

Adrian Cutler

49. Mr Cutler is a corporate finance partner at Higgs, and was the initial recipient of the introduction made to Higgs in connection with the Wolverhampton Opportunity by Mr Lownes. Mr Cutler believes that he was identified because of his previous professional relationship with Finance Birmingham, a proposed provider of quasi-equity finance to the project. At the time Mr Cutler was a fixed share partner.

50. Mr Cutler's involvement in the Wolverhampton Opportunity reduced from 6 May 2015, when he left Higgs to join a private equity backed business, albeit with an ongoing consultancy arrangement which resulted in some continuing involvement in dealings with clients to allow a handover to other partners. Mr Cutler re-joined Higgs in September 2016 as a partner.

51. There was no challenge to Mr Cutler's credibility. I am satisfied that Mr Cutler sought to recall events accurately, and that he gave considered answers to the best of his ability. There were a number of significant pauses which I consider indicated that he was thinking carefully about his responses. I did not consider this to be surprising in the circumstances, but I have taken account of it in my assessment. Mr Cutler openly accepted some failings, in particular in not turning his mind to the question of breach of fiduciary duty and the potential consequences of such a breach.

52. Mr Cutler confirmed that it is not his practice to take notes of calls or meetings with clients. However, I accept his evidence that his practice is to follow up any legal advice he gives with an email.

Damian Kelly

53. Mr Kelly was at relevant times a partner at Higgs, specialising in employment law. His initial conversation with Mr Brearley was by a phone call on 22 April 2015, the details of which are disputed. Mr Kelly became heavily involved following receipt of the cease and desist letter.

54. Mr Kelly is experienced in his specialist area, but has not worked outside that area since qualifying. My impression is that his work has a relatively narrow focus and that his experience of or familiarity with transactional work beyond any specific employment aspects is limited. Mr Kelly was certainly not involved in the transactional role that Higgs had in respect of the Wolverhampton Opportunity. At the outset of the dispute with Pendragon he also appears not to have been familiar with matters of civil procedure.

55. Mr Kelly's probity was challenged by the claimants. In my view Mr Kelly sought to be an honest witness in his oral evidence, and I accept his evidence in many respects. He was understandably nervous and that, together with concerns about how his answers would be interpreted, may have contributed to a marked number of requests for questions to be repeated. However, there were areas where Mr Kelly's witness statements and evidence in cross-examination were not satisfactory, and in some instances I have concluded that Mr Kelly's recollection does not reflect what is most likely to have occurred, as opposed to what he may have persuaded himself to have occurred. The most significant instance of this relates to the precise content of the call in April 2015.

56. My assessment of Mr Kelly's evidence takes particular account of matters that are discussed between paragraphs [303] and [330] below, relating to disclosure and document preservation and Mr Kelly's reaction to Mr Brearley's initial complaints about Higgs' advice, that were relied on by the claimants in challenging Mr Kelly's honesty. That evidence does indicate that Mr Kelly did not take action that he should have taken to identify and alert others to the existence of potential professional conduct difficulties and a possible negligence claim, as well as demonstrating what I conclude was an overly narrow approach to the tasks for which he was responsible that did not involve ensuring that his colleagues had all the information that they might require.

Carl Garvie

57. Carl Garvie is a very experienced litigator who is dual qualified as a solicitor and barrister. At relevant times he was a partner at Higgs, but he has since left to practice at the bar, primarily as a mediator.

58. Mr Garvie was an impressive and straightforward witness, whose professional expertise was apparent. I am content that he did his best to assist the court and I accept his evidence.

Zahra Farooq

59. Ms Farooq is a solicitor at Higgs, now specialising in commercial property work. Ms Farooq joined Higgs as a trainee on 7 September 2015, and her first "seat" after her induction training was in the employment department, where she worked with Mr Kelly. Ms Farooq acted as notetaker for a number of relevant meetings and calls, of which two, on 16 September and 13 October 2015, gave rise to points of particular contention.

60. Ms Farooq's evidence was clear and straightforward. I am satisfied that it was given to the best of her recollection. Ms Farooq was clearly very inexperienced at the time but I nonetheless got the impression of a methodical, careful person who was doing her best to do a good job. I accept her evidence.

Nick Taylor

61. Mr Taylor's area of practice is corporate work, where he has a broad range of experience. At relevant times he was head of Higgs' business services (formerly corporate) department. He is now the firm's managing partner.

62. Mr Taylor had an initial involvement in an introductory call from Smith & Williamson about the project in December 2014. He then became involved again when he took over responsibility for the corporate work on the Wolverhampton Opportunity from Mr Cutler in May 2015, when Mr Cutler left the partnership.

63. Mr Taylor's experience was apparent from his evidence. My overall assessment of his evidence is that he was a clear, sensible and careful witness who was doing his best to give full and accurate evidence, whilst recognising the limits of his recollection of some events. I agree with Mr Turner's submission that Mr Taylor's evidence was less impressive in relation to a meeting on 16 September 2015 (immediately following the cease and desist letter), and I have taken that into account in my conclusions about that meeting. Nevertheless, I prefer Mr Taylor's evidence to that of Mr Brearley, in particular in relation to Mr Brearley's level of confidence and his desire for a robust response to the letter.

Cherry Elliott

64. Ms Elliott is a partner specialising in commercial property work. She is head of the property department at Higgs.

65. The most significant aspect of Ms Elliott's evidence related to her attendance at part of the initial meeting with Mr Brearley and Mr Venables in January 2015. Her evidence in relation to that was straightforward, and in my view given to the best of her recollection. In other respects her evidence was of limited assistance and I do not place weight on it.

Ashley Brough

66. Mr Brough, together with his brother Miles Brough, are businessmen who control a Midlands-based business that manufactures and supplies aluminium, including to JLR. Mr Brough is a personal friend of Mr Cutler and has been a client of Higgs. Mr Cutler contacted him about the possibility of investing in the project, which led to a meeting in February 2015 attended by Mr Brearley. Mr Brough's evidence was principally relevant to what was alleged to have been said at that meeting. (The Broughs chose not to proceed with the investment.)

67. Mr Brough gave his evidence in a confident and straightforward manner. He distinguished between areas where his recollection was clear and where it was not. He has no financial interest in the outcome of the case. I accept his evidence.

Trevor Jones

68. Trevor Jones is the father of Robert Jones, Higgs' motor industry expert witness. To minimise confusion I will refer to Robert Jones as Mr Jones and Trevor Jones by his full name.

69. Trevor Jones founded ASE plc, the company of which Mr Jones is now CEO. It specialises in providing consulting, audit and taxation services to automotive manufacturers and retailers. Trevor Jones recently stepped down to a consultancy role, leaving Mr Jones and another son in charge of the business.

70. Trevor Jones attended the meeting that Mr Jones had with Mr Roberts, because both he and his son were on their way to another meeting. He observed the meeting rather than taking an active part.

71. Trevor Jones' evidence was clear, but it strayed into opinion evidence and into a commentary on the evidence that he had seen that Mr Roberts had given. To the extent that it comprised factual evidence about his own recollection of the meeting I do not need to place material weight on it, given my findings about Mr Roberts' evidence. For what it is worth, however, my assessment is that Trevor Jones did have a reasonable recollection of the meeting. In particular he was clear that Mr Roberts had provided specific information about JLR employee related sales and about first-year losses, confirming the information used in Mr Jones' report.

Trevor Finn

72. At the relevant time Mr Finn was the CEO of Pendragon plc. He held that post for 29 years, until March 2019. Mr Finn had not been prepared to provide a witness statement, so he was examined in chief as well as cross-examined.

73. Mr Finn answered questions fully and with an impressive level of recollection. Overall I found him to be a convincing witness, who provided helpful context to his description of events and the individuals involved in them. He has no interest in the current litigation and I had no concerns about his credibility.

74. Mr Finn's views about Mr Brearley have obviously been affected by the circumstances of Mr Brearley's departure from Pendragon and the events (or alleged events) that led to the Pendragon proceedings. Mr Turner, for the claimants, submitted that this should affect my assessment of Mr Finn's responses to questions about what his reaction would have been if Mr Brearley had disclosed his plans in early 2015. I discuss this below.

Hilary Disney

75. Mrs Disney, then known as Hilary Sykes, was the corporate services director and company secretary of Pendragon until she retired in 2017. She is a solicitor by profession. Mrs Disney was the primary contact for Pendragon's solicitors in the Pendragon proceedings, and also provided a detailed witness statement on 2 October 2015 in support of its application for an interim injunction. Mrs Disney provided a short witness statement at an interlocutory stage of these proceedings

confirming that she had signed the statement of truth on both the original and amended particulars of claim and on her witness statement in the Pendragon proceedings, but was not prepared to provide a further witness statement for these proceedings. Like Mr Finn Mrs Disney was therefore examined in chief as well as cross-examined.

76. I found Mrs Disney to be an able and convincing witness, who was obviously very aware of her obligations under oath. Like Mr Finn, she was able to provide helpful context, for example in relation to Pendragon's approach to restrictive covenants in its executive employment contracts. Mrs Disney confirmed that, subject to an immaterial correction, she believed her witness statement dated 2 October 2015 to have been true when it was given and (although she had not given it much thought) had not become aware of anything since then that made it untrue. She also confirmed that Pendragon had considered its amended particulars of claim in the Pendragon proceedings to have been accurate.

Expert evidence

77. The following expert evidence was provided in relation to quantum:

a) Evidence of motor industry experts to assess the likely profitability of the Wolverhampton dealership, being Paul Daly for the claimants and Robert Jones for Higgs. Mr Daly is a partner at UHY Hacker Young Manchester LLP. He is a chartered accountant specialising in the motor retail sector. He previously worked at ASE plc. Mr Jones is the CEO of ASE plc and is also a chartered accountant.

b) Evidence of accountancy experts, being Sara Fowler for the claimants and Nicholas Good for Higgs. Ms Fowler is a senior adviser to (and previously a partner at) Ernst & Young LLP. Mr Good is a partner at KPMG LLP. The role of the accountancy experts was, in broad terms, to translate the figures produced by the motor industry experts into a calculation of losses suffered by the claimants.

c) A valuation report prepared on behalf of Higgs by Peter Nicholas, a partner at Rapleys LLP, providing certain valuations of the two sites acquired for the Wolverhampton Opportunity, including a valuation of the main site in December 2018 on the assumption that a JLR dealership had been constructed. In the event it was not necessary to call Mr Nicholas for cross-examination, and in closing submissions the claimants did not seek to rely on a higher valuation that Knight Frank had provided for the completed development in June 2015, which Ms Fowler had taken into account in her assessment of BSPR's loss.

Both the motor industry and accountancy experts produced initial reports in 2019 and supplementary reports in 2021, following the delay to the trial.

FACTUAL FINDINGS

Mr Brearley's employment at Pendragon

General

78. Mr Brearley joined Pendragon in 1991. In 2006 he was appointed as one of two divisional directors of Stratstone, and in 2008 was appointed as the head of Stratstone under the title of "Managing Director". He held that post until he left. He was not a statutory director of Pendragon plc. During the relevant period he was a director of a subsidiary, although that company appears not to have been active. At the relevant times the formal structure was that Mr Brearley reported to Martin Casha, the COO and a statutory director of Pendragon plc, and Mr Casha reported to Mr Finn. However, whilst these were the technical reporting lines, in some important areas Mr Brearley worked directly with Mr Finn and in practice reported to him.

79. Through his role with Pendragon, Mr Brearley sat on the Jaguar Dealership Council for approximately 12 years, including 6 years as chairman. The Jaguar Dealership Council is a group of representatives of various dealerships with relationships with Jaguar. Among other things, dealership councils have a role in the negotiation of franchise contracts and are a forum through which manufacturers introduce innovations or changes in their retailing strategy.

80. Mr Brearley became well known to a number of senior JLR executives. These included Mr Goss and another main board director, Adrian Hallmark (whom he had known since the 1980s and was also a personal friend), together with Jeremy Hicks. Mr Hicks was the managing director of JLR UK, and reported to Mr Goss. Mr Hicks had responsibility for dealer franchising in the UK. Another senior JLR employee who knew Mr Brearley was Sarah Nelmes. Ms Nelmes was the network development manager for JLR UK, within Mr Hicks' area of responsibility.

Mr Brearley's employment contract

81. At material times Mr Brearley's terms of employment were governed by a service contract dated 1 August 2001, which had appointed him as a "Franchise Group Leader". The contract required six months' notice by either party. Clause 3 required, among other things, that during business hours Mr Brearley should:

> "... devote the whole of his time, attention, skill and abilities to the business of the Company or of any Associated Company and to the performance of his duties hereunder. Without prejudice to clause 5.2 the Executive shall not undertake any work or employment other than for the Company or any Associated Company and may not without the prior written consent of the Company be interested or concerned either directly or indirectly in any business or organisation." (Clause 3.2.)

Clause 3 also required that Mr Brearley:

> "... will use his best endeavours to promote and protect the interests of the Pendragon Group, and will not take any deliberate step which is calculated or intended to harm the interests of the Company or the Pendragon Group." (Clause 3.3.)

82. Clause 5 set out the restrictions that were placed upon Mr Brearley during the course of his employment, which were stated to be without prejudice to any fiduciary duty or implied contractual duty of fidelity. These included that, without prior consent, he would not:

> "(i) be employed or engaged by or be directly or indirectly interested or concerned in, any business, organisation or undertaking which does business of any kind with the Company or any Associated Company or which is similar to or competes with the business of the Company or any Associated Company; or
> (ii) take any steps to set up a business, organisation or undertaking which will be similar to or will compete with the business of the Company, or any Associated Company, or by way of preparation for the setting up or operation of such a business, organisation or undertaking." (Clause 5.1(a).)

In the event of a breach of these obligations, clause 5.1(b) provided that Mr Brearley was liable to account for any resultant income or benefits.

83. Clause 5.1 also included non-solicitation provisions in respect of Pendragon employees, customers, clients and suppliers. Clause 5.2 permitted investment in a competing business, supplier or customer, but generally only with prior written consent.

84. Clause 19 contained restrictive covenants. Clause 19.1 and 19.2 provided as follows:

> "19.1 The Executive agrees that in the course of his employment he will;
> (a) have dealings with customers; and
> (b) have access to Confidential Information; and
> (c) have influence or potential influence over other employees;
> and he hereby undertakes with the Company that he will not without the prior written consent of the Company whether by himself his employees or agents or otherwise howsoever and whether on his own behalf or for any other person, firm, company or organisation, directly or indirectly:-
> (i) for a period of twelve (12) months after the termination of his employment in competition with the business of the Company or any Associated Company in which he was materially involved during the last twelve (12) months of his employment, deal with any person, firm, company or organisation with whom he has had personal dealings within the period of twelve (12) months preceding the termination of his employment and who or which at any time during the period of twelve (12) months immediately preceding the date of

> termination of his employment was a client or customer or supplier of the Company or any Associated Company; or
>
> (ii) for a period of twelve (12) months after the termination of his employment solicit or entice away from or endeavour to solicit or entice away from the Company or any Associated Company for the purpose of being employed in or engaged by, or interested or concerned in a business or concern (or part thereof) which competes with the business of the Company or any Associated Company in which the Executive was involved during the last twelve (12) months of his employment any executive or employee employed in a senior managerial, sales or technical capacity who is employed by any such Company or any Associated Company at the date of termination and with whom the Executive had personal contact or dealings in the last twelve (12) months of his employment whether or not such person would commit any breach of his or her contract with the company by reason of leaving the service of the Company or any Associated Company; or
>
> (iii) for a period of thirty six (36) months after the termination of his employment in competition with the business of the Company or any Associated Company carrying on the business of vehicle leasing, contract hire or similar, in which he was materially involved during the last twelve (12) months preceding the termination of his employment ("the Contract Hire Business") solicit or accept business orders from, or canvass or facilitate the soliciting or canvassing or acceptance of business or orders from, any person, firm, company or organisation who or which at any time during the period of twelve (12) months immediately preceding the date of termination of his employment was a client or customer of the Contract Hire Business and with whom the Executive had personal dealings.
>
> 19.2 While the restrictions contained in this Clause are considered by the parties to be reasonable in all the circumstances (and in particular without limitation, the restriction in Clause 19.1(iii) has been agreed with particular reference to the prevailing cycle of contract renewals in the contract hire and leasing business) it is agreed that if any such restrictions, by themselves, or taken together, shall be adjudged to go beyond what is reasonable in all the circumstances for the protection of the legitimate interests of the Company or any Associated Company but would be adjudged reasonable if part or parts of the wording thereof were deleted or amended or qualified or the periods thereof were reduced or the range of products or area dealt with thereby were reduced in scope it is agreed that the relevant restriction or restrictions shall apply with such modification or modifications as may be necessary to make it or them valid and effective."

85. It is convenient to address here one aspect of Mr Brearley's evidence regarding his service contract, namely that he was not familiar with his own service contract and did not consider its potential impact on his plans before involving Higgs. I do not accept this. Not only had he clearly looked at the contract before he sent the email on 13 February 2015 referred to at [216] below, but he was sufficiently

familiar with its terms to be able to identify that the version relied on in the cease and desist letter was not the latest version, because he had agreed to the removal of a provision under which Pendragon could require him to relocate and had agreed to a six month notice period. (The version that was initially provided with the cease and desist letter was signed in 2000 rather than 2001 and included a three month notice period.) Mr Brearley appeared to me to be quite able to understand the key terms of the agreement. I also note that Freeths' letter of claim, written presumably on Mr Brearley's instructions in September 2016, referred to Mr Brearley being alive at his first meeting with Higgs to his status as a senior employee and to the possibility that the terms of his service agreement might govern his departure and the position following termination. That reference is obviously inconsistent with Mr Brearley's evidence.

Pendragon's approach to restrictive covenants

86. Mrs Disney explained in her evidence that a new form of service contract for executives had been created in around 2000, following a recognition that restrictive covenants in pre-existing contracts were quite weak, or in some cases non-existent. The version included in Mr Brearley's contract, and in the earlier contract he had signed in 2000, was obviously the revised one.

87. Mrs Disney explained that Pendragon's approach to restrictive covenants in its executive service agreements was that it was very protective of its own interests, whilst being realistic about the difficulty of and value in pursuing lower level employees. In cases where there was perceived to be a sufficient threat, letters would be sent to the new employer and to the individual reminding them of the obligations to which the individual was subject. Mrs Disney described letters being sent as a matter of routine where Mr Finn or Mr Casha considered there to be a threat. She also believed that the strength of the revised contracts affected the behaviour of certain individuals after they left Pendragon. However, prior to the departure of Mr Brearley Pendragon had not engaged in litigation seeking to enforce the covenants.

88. Given Mr Brearley's role as a senior executive with responsibility for a significant number of employees including other executives, and the fact that he signed revised contracts in 2000 and 2001, I conclude that he must have been aware at least in general terms of Pendragon's revised approach.

89. Mr Brearley's evidence included examples of individuals whom he said had been allowed to acquire and run dealerships after they left Pendragon. However, in two cases the dealerships involved were Toyota franchises, which I am not satisfied was a brand that Pendragon had material dealings with at the time. In relation to the third case (which related to a Mercedes-Benz franchise) I am satisfied based on Mr Finn's evidence that the individual left at a time when the revised contracts were not in place. The individual also purchased an established dealership from another operator. That is different to developing a new dealership, and doing so (as discussed below) in an area in which Pendragon had previously operated, and indeed still operated.

The 10/10 scheme

90. In 2005 Pendragon put in place a share incentive scheme known as the “10/10 scheme”, under which senior staff purchased shares in Pendragon using their own funds and funds lent by Investec. The idea was that interest on the loans would be covered by dividends on the shares. However, the financial crisis that followed in 2007-2008 had a disastrous effect on Pendragon’s share price, and interest was no longer covered by dividends. Mr Brearley has a number of complaints about the 10/10 scheme, including about restrictions that he claimed were placed on early discharge of the loan, and about pressure that he claims was applied to take a further loan to acquire additional shares at the time of a rights issue that Pendragon undertook in 2011. Mr Brearley’s evidence was that his desire to leave Pendragon developed well before the Wolverhampton Opportunity arose, and the principal reason for it was Pendragon’s handling of the 10/10 scheme. One aspect of Mr Brearley’s claim against Higgs was an allegation that it failed properly to investigate his complaints about the 10/10 scheme and advise him that he had at least an arguable claim against Pendragon which could be deployed as a bargaining chip. As discussed below, this was ultimately not pursued.

Successor to Mr Finn?

91. Mr Finn explained that he had hoped that Mr Brearley would become CEO of Pendragon in succession to Mr Finn once he stepped down from that role, which he planned to do. He discussed the idea at meetings with Mr Brearley and Mr Casha in around February 2015. Mr Finn’s evidence was that (although it was not in his gift) he encouraged Mr Brearley but was surprised that Mr Brearley did not appear excited by the prospect. Mr Brearley also raised the subject of the 10/10 scheme. Mr Finn explained that he was left feeling uncomfortable because he thought that Mr Brearley was not engaged. Following this he held back some share options. When Mr Brearley tendered his resignation in April 2015 Mr Finn was not surprised.

92. Mr Brearley also gave evidence that there was a meeting in February 2015 at which the subject of succession to Mr Finn was raised. He said that by that time he had already decided to leave because of his experience of the 10/10 scheme, that he queried how Mr Finn could propose such an arrangement when it was a matter for the Board and shareholders, that he thought the discussion had soured Mr Finn’s view of him and that it was that souring that had motivated Mr Finn’s pursuit of the Pendragon proceedings.

93. I accept Mr Finn’s evidence about this meeting. In relation to Mr Brearley’s evidence, whilst he clearly did feel aggrieved about the 10/10 scheme and that may well have prompted him to consider other options, his plans for his next steps related to the Wolverhampton Opportunity, and I conclude that it was that project that determined the timing of his departure and his lack of interest in the CEO role. I also do not accept that the Pendragon proceedings were motivated by annoyance or disappointment on the part of Mr Finn in relation to Mr Brearley’s unwillingness to consider that role.

Pendragon and JLR

Introduction and the 10% "cap"

94. In 2011 Pendragon had approximately 45 Jaguar and Land Rover outlets. At the time individual dealerships tended to deal with one or other brand but not both. Pendragon's outlets were split relatively evenly between the two brands. It had a Jaguar dealership in Wolverhampton, a separate Land Rover outlet having closed in 2008. A Land Rover service centre remained but closed in 2013.

95. In May 2011 Mr Brearley and Mr Finn attended a meeting with JLR executives at which they were informed of a plan that no franchisee should hold more than 10% of the JLR dealership network. (This appears not to have been the first discussion: there are handwritten notes of a meeting held on 18 March 2011 between Mr Brearley and Ms Nelmes' predecessor Jennie Mitchell which also refer to 10%, rather weakening Mr Brearley's suggestion in his first witness statement that he attended the meeting in May "with the sole purpose of taking notes".)

96. JLR were also looking to have combined dealerships, and by 2013 had developed the "Arch concept". This was a specification for a dealership that would house both Jaguar and Land Rover showrooms on either side of a common entrance way, or arch. During 2014 JLR informed franchisees of a target date of 2018 to convert dealerships to the new concept (a date that was not in fact achieved). In May 2014 it also gave notice to Pendragon (and, as I understand it, to other dealers) to terminate existing franchises on 31 May 2016, with a view to allowing the new structure to be put in place. Comfort letters were provided in respect of some sites, but not in respect of Wolverhampton. Pendragon's Jaguar dealership in Wolverhampton was therefore due to close on that date, and in fact did close around that time.

Pendragon's pursuit of the Wolverhampton Opportunity

97. Minutes of Pendragon property meetings show that by May 2013 it was considering re-establishing a Land Rover dealership in Wolverhampton, and was exploring possible sites. Mr Brearley was involved in the discussions. Architects were engaged, a firm called Unwin Jones Partnership. By July 2013 a site adjacent to the Waitrose store on Penn Road was preferred (the "Penn Road" site), and by 1 August 2013 an offer of £2 million had been made for it. By a letter dated 25 September 2013 Mark Kuzminski of JLR, the regional franchise manager who worked with Ms Nelmes, wrote to Mr Brearley at Pendragon confirming that JLR had approved the proposed re-establishment of a full Land Rover operation at the Penn Road site and expressing a preference for a joint JLR facility using the Arch concept. It is also clear from an email Mr Brearley sent on 30 September 2013 to Mr Bailey that Mr Brearley was JLR's primary contact in respect of the proposed dealership. The email asked Mr Bailey to "get a scheme asap" for a joint facility.

98. In early November architects' drawings were sent to JLR, and on 10 December 2013 Pendragon's Board considered an investment appraisal for the proposed

Land Rover development. This referred among other things to Land Rover's heavy investment in the area through the construction of a new engine plant in Wolverhampton and to the potential for increased sales as a result, and to Land Rover being a key brand in the Stratstone portfolio. On 16 December JLR gave formal approval for the Penn Road site for Land Rover, subject to suitable relocation of the Jaguar outlet.

99. The proposals clearly changed quite quickly thereafter. On 9 January 2014 Ms Nelmes wrote again to Mr Brearley confirming support in principle for establishing a combined JLR operation at Penn Road. Available email correspondence following this includes correspondence between Mr Brearley and Unwin Jones about the scale of the development required, and notes from Ms Nelmes about a strategy discussion she had with Mr Brearley which included discussion of the Wolverhampton project.

100. The driver for the change appears to have been the identification of a possibility of acquiring additional land on a site opposite the Penn Road site, referred to in these proceedings as the "Graiseley Hill" site, as a "prep centre", allowing sufficient space overall for a combined dealership. By early February 2014 solicitors were instructed in respect of Penn Road and by mid April terms were agreed for the acquisition of the Graiseley Hill site for £550,000. Minutes of corporate development meetings on 14 March and 6 June 2014 refer to getting on with the "prep centre acquisition" and to a combined Land Rover and Jaguar operation on the Waitrose site. Correspondence was ongoing with planning authorities during July, and minutes of a property meeting on 1 August 2014 report that the contract for the Graiseley Hill site had been agreed. The contract in respect of the Penn Road site took longer, but was close to final agreement by mid September. In the meantime revised construction drawings were sent to JLR. By 26 September 2014 Pendragon's solicitors were holding signed contracts for the purchase of the Graiseley Hill site and had received agreed contracts for signature in relation to the Penn Road site. From a property perspective they were therefore in a position to exchange contracts.

The impact of the 10% "cap"

101. The impact of JLR's 10% "cap" (or apparent cap) was a matter of some dispute. The claimants' position was that this would allow a dealer to have no more than 9 Jaguar and 12 Land Rover dealerships. This was based on the number of outlets when the cap was set in 2011. The practical effect of that for the Wolverhampton project was that Pendragon would have to give up another location in order to pursue it, because it would otherwise have 10 Jaguar and 13 Land Rover dealerships.

102. That raises the question why Pendragon appeared to be pursuing the project during 2013 and 2014. The claimants' position on that was, essentially, that Mr Finn was hoping to persuade JLR to allow Pendragon to have 10 and 13, rather than 12 and 9, dealerships, and would only be prepared to proceed with Wolverhampton if that was case.

103. Mr Finn's evidence was not consistent with this, and having considered that and the available documentary evidence I have concluded that the position is not as straightforward as the claimants suggest.

104. One important piece of documentary evidence is a list, of uncertain date, of Jaguar and Land Rover dealerships held by Pendragon, with different sub-headings. The typed list appears in three versions, each with additional handwritten notes in what I understand to be Mr Brearley's handwriting. Importantly, under a subheading "Remaining long term", there is a list of 10 Jaguar and 13 Land Rover dealerships, which in each case includes Wolverhampton. None of the handwritten comments alter that, but what I take to be the later ones do indicate "new site" next to Land Rover Wolverhampton and "move by mid 15" next to Jaguar Wolverhampton. That suggests that those later annotations were added at a time when the Wolverhampton project was being actively considered, so during 2013 and/or the first part of 2014. That estimate of timing is also supported by other annotations, in particular some ticks in later versions which indicate that the whole of the sites earmarked as "Done or to go by end May 2013" had been disposed of, together with at least two of the sites earmarked for disposal by the end of May 2016.

105. These lists strongly indicate that Pendragon, including Mr Brearley, were working on the basis of being allowed to retain 10 Jaguar and 13 Land Rover dealerships at least during 2013. I prefer to rely on these lists rather than an undated document that was presented in the documentary evidence both separately and as the first page of a single document containing these lists, and which indicated a cap of 12 and 9 and that Wolverhampton would be disposed of. The genesis and date of that further document are unclear.

106. This is consistent with Mr Finn's evidence. His evidence was that JLR "moved the goalposts" by indicating that it was reducing the number of dealerships that Pendragon would be permitted to have from 13 and 10 to 12 and 9. He recalled it clearly because it contributed to a shaking of Pendragon's confidence in the relationship with JLR.

107. Mr Finn could not recall exactly when this occurred, but it was clearly fairly late in the process. There are handwritten notes of a property related meeting that Mr Bailey attended with JLR on 6 June 2014 which referred to "our position 13 + 10" and "theirs 12 + 9". Based on Mr Finn's evidence I think it more likely than not that Mr Bailey reported to him that this was what JLR was saying following the meeting, and this was the point at which Pendragon became aware that this was JLR's position.

108. Notwithstanding Mr Goss's insistence in cross-examination that there was no 10% cap, it is relatively clear that the position of the JLR executives who were dealing directly with Pendragon at the end of September 2014 (and in particular at the meeting on 30 September referred to at [129] below) was that Pendragon should have a maximum of 12 Land Rover and 9 Jaguar sites.

109. Mr Finn was also cross-examined about whether Pendragon would have proceeded with the purchase of the sites in Wolverhampton without a contractual

commitment from JLR. His evidence, which I accept, was that Pendragon would have been prepared to proceed with a "green light" in terms of a business decision, without waiting for a formal contract.

The Pendragon Investment Appraisal Commentary

110. On 21 August 2014 Mr Venables sent an "Investment Appraisal Commentary" in respect of JLR Wolverhampton to Mr Brearley. The author shown on the document was a member of Mr Venables' team. What appears to be an identical document was then sent by Mr Venables to Mr Bailey on 27 August, apologising for the delay, saying that Mr Brearley had "asked us to put together an investment appraisal", that they had used the JLR modelling tool and had incorporated property assumptions from the property manager and other "assumptions from our own businesses". On 25 September the same document was sent again by Mr Venables to Mr Brearley. This document projected turnover and profit at materially lower levels than those projected for the Wolverhampton Opportunity on behalf of JRBA. It is worth noting that 25 September was very shortly before a decision was taken that the Wolverhampton Opportunity would not be pursued by Pendragon: see below. There is no indication that Mr Brearley raised any issue in respect of the projections at the time. Instead he sought to suggest in cross-examination that Pendragon would not have used them for any appraisal.

111. I do not accept the evidence of either Mr Brearley or Mr Venables in respect of this document. Mr Finn confirmed that he would have seen the investment appraisal. The explanation given by Mr Venables was that he (Mr Venables) would have approved the document but that he was always given a steer by Mr Bailey as to the desired outcome, that the figures reflected that and that he felt under no obligation to point out to management that better results could be anticipated. For a senior employee who was head of finance at Stratstone I cannot accept that. There was an obvious conflict of interest. Further, the 27 August email indicates that it was Mr Brearley, not Mr Bailey, who asked for the work to be done. This is consistent with the amended particulars of claim in the Pendragon proceedings, which refer to Mr Brearley having commissioned Mr Venables to produce the appraisal and Mr Venables having done so using JLR's modelling tool. Mr Venables' evidence also contradicts that of Mr Finn, who confirmed that such documents were usually originated by the operations team (in context, Stratstone) and sense checked by the group finance director, Tim Holden. Further, Mr Finn's description of Mr Bailey's role, as the person who dealt with securing properties, developing and upgrading them, did not really fit with Mr Venables' account. Likewise, Mrs Disney's evidence was that Mr Bailey would not take action in relation to Stratstone projects that Mr Brearley was not on board with as managing director. I accept that evidence and that the description in the amended particulars of claim in the Pendragon proceedings was accurate.

112. In cross-examination Mr Brearley suggested among other things that he cannot have considered the document because it had an obvious error, in that it appeared from the text of the commentary that it had omitted sales of new Jaguars. This does not explain the delay in Mr Venables sending it to Mr Bailey, after first sending it to Mr Brearley. Mr Brearley also accepted that Mr Venables would have sent the commentary to him for approval.

113. As well as the error in respect of new Jaguars, no particular account appears to have been taken of the effect of the new engine plant in Wolverhampton, with the associated expectation of increased sales to employees and suppliers. Instead, comparisons are made to the prior performance of the existing Stourbridge dealership and more broadly to average dealership performance. In contrast, for JRBA it was projected that Wolverhampton would be in the top 25% of dealers in performance terms.

114. As discussed further below, the available investment appraisal in respect of JRBA (entitled, and referred to below, as the "Investment Opportunity" document) is dated no later than mid January 2015, a relatively short time after the appraisal was prepared for Pendragon. This included financial projections from 2016 to 2020, with turnover rising from around £55m in 2016 to around £72m by 2018 and then stabilising in that region in 2019 and 2020, and profit before tax increasing from around £0.6m to around £2.5m by 2018, before again broadly stabilising. This can be contrasted with the Pendragon Investment Appraisal Commentary. The period covered by the projections in that document is 2015 to 2019. Turnover is shown as rising from around £39m in 2015 to about £50m in 2018 and £52m in 2018, with profit before tax rising from about £0.02m to around £0.86m in 2018 and £1m in 2019.

115. Leaving to one side the error in respect of new Jaguars, I do not accept Mr Brearley's suggested explanation for the obvious disparity in numbers. This was that it was only as discussions later progressed with his own pursuit of the Wolverhampton Opportunity that the impact of the new factory was recognised, together with the effect of new product lines becoming available. The likely impact of the factory, at least, should already have been apparent when the Investment Appraisal Commentary was prepared. The potential impact of it was referred to in the investment appraisal considered by Pendragon's Board in December 2013: see [98] above.

116. I should clarify that I do not make any finding that Mr Brearley or Mr Venables took any deliberate action to manipulate or alter the content of the Investment Appraisal Commentary. No such allegation was pleaded or advanced in cross-examination. However, Mr Brearley was asked to comment on the difference between the two sets of figures and I find his explanations to be inadequate. I am driven to conclude that he did not take steps that, on the face of it, should have been taken to ensure that Pendragon were provided with full and accurate information about financial projections before it took a decision not to proceed, and I do not accept his evidence to the contrary. Mr Brearley also accepted that he took no steps to inform Pendragon of the improvement in prospects for Wolverhampton that he said occurred after that decision was taken – an improvement that he was effectively saying took place over a period of around four months.

The decision not to proceed with Wolverhampton

117. In the Pendragon proceedings Pendragon claimed that Mr Brearley discouraged it from proceeding with the Wolverhampton Opportunity with a view to pursuing it on his own account. Its position was that it had relied on Mr Brearley to appraise

and advise it about the potential acquisition, and that given his position within Pendragon and the relationships he had built over many years with JLR personnel including senior decision-makers, he was a key and authoritative conduit of information. Pendragon placed heavy reliance on his interpretation of JLR's conduct and wishes.

118. Pendragon specifically alleged that at a meeting on 26 September 2014 Mr Brearley had "discouraged Pendragon's Executive Board" from pursuing the Wolverhampton Opportunity because JLR had their own plans for the area, and had said that due to the vicinity of the factory JLR would demand an over-engineered (and therefore expensive) site and that Pendragon would be better advised to concentrate on other sites. Mr Brearley denied this and said that he never attended Executive Board meetings. More generally he denied taking any steps to divert or steer away the Wolverhampton Opportunity from Pendragon.

119. As already indicated, in her evidence Mrs Disney specifically confirmed that she had believed the amended particulars of claim and the witness statement she gave in the Pendragon proceedings to have been true. Mr Finn explained that Wolverhampton had been a "logical keeper" for Pendragon in deciding which sites to dispose of or retain: it was a big market, in an area in which Pendragon had been long established. He had also thought that the relationship with JLR was good. However, there was a "very strange phase" that started with JLR "moving the goalposts" over the number of dealerships that Pendragon would be allowed to have. At the same time Pendragon started to get "very odd messages" from Mr Brearley about other things JLR were planning. These included the concept of "beacons", being some form of supercentre to showcase the brand, particularly in areas where there was factory representation. Mr Finn thought that the project was called Lighthouse. Pendragon came to believe that JLR might be planning that sort of facility adjacent to the new engine plant in Wolverhampton. There was a suggestion that Listers, a competitor, could be brought in to manage a dealership on that site on behalf of JLR. This gave rise to concerns that Pendragon's own development would have to be carried out to a very high specification if the factory was also involved in selling or servicing cars.

120. In closing submissions Mr Turner objected to a case being put that Mr Brearley had put Pendragon off Wolverhampton with the suggestion of a "Lighthouse" centre operated by Listers, on the basis that the allegation had not previously been raised, had not been put to Mr Brearley in cross-examination and was not supported by evidence from Mr Bailey or Mr Casha. He referred to *Mullarkey v Broa*d [2007] EWHC 3400 (Ch) at [44] and [45], confirming the need to plead dishonesty clearly and distinctly and put any charge of dishonesty squarely to a witness.

121. In fact, Mr Finn's evidence is consistent with the allegations made in the Pendragon proceedings, including detail included in an Eversheds letter dated 24 September 2015 to which Mrs Disney cross-referred in her witness statement dated 2 October 2015. Higgs' amended defence in this claim adopted the relevant part of Pendragon's pleaded case, expressly averring that Mr Brearley had dishonestly and/or in bad faith stated that JLR had its own plans to invest in property for a franchised site in Wolverhampton, and would require the Penn

Road and Graiseley Hill sites to be over-engineered and expensive. Mr Finn's references to Lighthouse and to Listers add further detail to the suggestion that JLR was itself planning to open a franchised site. So the allegations raised there were pleaded. They were denied in the claimant's re-amended reply, which asserted that Mr Brearley provided no substantive input into Pendragon's decision. In his first witness statement Mr Brearley denied attending any relevant meeting on 26 September or that he made any of the statements attributed to him by Pendragon.

122. Mr Brearley was challenged in cross-examination about Pendragon's diversion claim, and specific reference was made to the reference to over-engineering and to the allegation that he had told Pendragon that there was a risk that JLR would build a dealership on the factory site. Mr Brearley denied the allegations and stated that Pendragon was deliberately misstating the position, suggesting that Mrs Disney had not known the full facts.

123. I am entitled to, and do, prefer the evidence of Mr Finn and Mrs Disney to that of Mr Brearley where it conflicts. In particular, I do not accept that Mr Brearley made no statements to Pendragon about JLR's own plans and the risk of over-engineering, or his more general denial in cross-examination of taking any steps to discourage Pendragon from the Wolverhampton Opportunity. Further, I would point out that it is not necessary for me to reach a concluded view on whether and to what extent Mr Brearley actually made dishonest comments to Pendragon about JLR's own plans for the area, over-engineering or other matters. What is more significant in this case is Pendragon's perception of the position. Mr Finn's evidence is of particular assistance in that respect.

124. JLR's apparent change of mind as regards the number of dealerships, plus the apparently mixed messages being received from JLR about its own plans and requirements, led to concern and to increasing doubt on the part of Mr Finn and Mr Casha about whether the proposed investment should be made. In an attempt to understand better what was going on Mr Finn asked Mr Bailey to "stick his nose in" more directly in Mr Brearley's dealings with JLR (beyond the property related meetings that he had previously attended), initially because he thought Mr Brearley might be being bullied or pushed around. As a result Mr Bailey attended a "Stratstone review meeting" with Mr Brearley and JLR representatives on 23 September 2014. Wolverhampton was on the agenda as part of an "update on outstanding proposals". The notes of the meeting, prepared by Mr Brearley and sent to JLR, referred to an "outline scheme and financials" being submitted to JLR for Wolverhampton, and to Paul Brittan (a JLR executive) to advise of any further information that was required. It is clear that at this stage Wolverhampton was still "on the table".

125. As already mentioned, Mr Brearley denied the specific allegation in Pendragon's amended particulars of claim about a meeting on 26 September 2014. In his first witness statement he denied attending any relevant meeting on 26 September, or indeed any internal Pendragon meeting concerning the Penn Road acquisition. In cross-examination Mr Brearley did not dispute that he had attended a monthly Operating Board (or "Ops Board") meeting on that date, as his diary indicates that he did (he had previously denied attending Operating Board meetings).

Handwritten notes prepared by Ms Sykes in respect of that meeting, which were partly redacted, also indicate Mr Brearley's presence. However, whilst the available notes record a discussion of strategy they do not evidence a specific discussion about Wolverhampton.

126. Based on the diary entry and the clear evidence of Mr Finn, I have concluded that there were three potentially relevant meetings on 26 September. These were a meeting of the Operating Board (which Mr Brearley attended), a meeting of the Executive Board (which he did not attend) and further meeting between Mr Finn, Mr Casha and Mr Brearley.

127. Mrs Disney explained that the typical attendees at Operating Board meetings comprised all four executive directors, namely Mr Finn, Mr Casha, Mrs Disney and Mr Holden, together with Mr Brearley as a core attendee and one or more other executives. So it is possible that the amended particulars of claim in the Pendragon proceedings were referring to a discussion with the members of the Executive Board that occurred at the Operating Board meeting. However, although Mrs Disney thought she recalled such a discussion, as already indicated the available handwritten notes do not specifically cover Wolverhampton.

128. In contrast, Mr Finn gave clear evidence that there was an Executive Board meeting on that date, which Mr Brearley did not attend, and at which Mr Finn updated other executives about the position with Wolverhampton. This was immediately followed by a meeting between Mr Finn, Mr Brearley and Mr Casha which Mr Finn described as the "go or no go" meeting in relation to the project, referring to significant pressure that Pendragon was then under from the seller of the Penn Road site. Mr Finn's reference to a "go or no go" meeting following the Executive Board meeting was consistent with Mrs Disney's evidence that she did not think she was present at the meeting at which the decision was made.

129. Four days later, on 30 September 2014, Mr Finn and Mr Brearley met with Mr Hicks and Ms Nelmes. Mr Brearley's evidence was that he attended purely as note taker. Given the significance of his relationship with JLR and his seniority in the Pendragon business, this is not credible. The meeting was clearly an important one, to make formal decisions about the franchises available to Stratstone and their redevelopment.

130. The notes of the meeting, prepared by Ms Nelmes, record that it was agreed that Stratstone would have a maximum of 12 Land Rover and 9 Jaguar outlets, and that in the light of that agreement Wolverhampton was no longer "allocated" to Stratstone. As a result the Land Rover "open point" became available and Stratstone would add Jaguar Wolverhampton to its disposals list.

131. On 2 October 2014 John Hobbs, head of the property team at Pendragon, emailed Mr Brearley to say that the owner of Penn Road, who had given a deadline the previous day, was chasing for an answer. Mr Hobbs asked if Mr Brearley could "let me know if JLR want to do this, or if I need to give him some bad news". Mr Brearley responded later in the day saying:

> "Post our meeting earlier this week, I don't think this will feature in our plans going forward, but suggest you check with Trevor just before you give them bad news."

In fact, by this stage Mr Hobbs had already spoken to Mr Finn and reported to the agent that "it was not possible to agree terms with JLR", so Pendragon could not go ahead with the acquisition of either site.

132. On 9 October Mr Hicks sent Mr Finn the minutes of the meeting on 30 September, which he said had been agreed with Mr Brearley. Mr Finn commented during re-examination that it was very unusual to receive minutes in this way, and so long after the meeting. With the benefit of hindsight, he thought that the meeting was a staged event. Given that he was the only one at the meeting who was not aware of Mr Brearley's consideration of the Wolverhampton Opportunity on his own account, it is hardly surprising that he formed that view.

133. My assessment of the evidence is that Pendragon's decision not to attempt to proceed with the Wolverhampton Opportunity was really made on 26 September. At that point Pendragon did not entirely rule the possibility out, in case it transpired that there was missing information or a new development that had not been taken into account. But Mr Finn did no got to the meeting on 30 September with a view to making a serious attempt to persuade JLR that Pendragon should be allocated the Wolverhampton franchise, whether by seeking to be allowed to have 13 Land Rover sites and 10 Jaguar sites (as opposed to 12 and 9), or by choosing to dispose of another site or sites so that it could proceed with Wolverhampton even with the lower limit on total sites.

134. My assessment is that, although he was not an ultimate decision maker, Mr Brearley's advice and input had a material impact on the decision making process. That assessment is based on my understanding of his role in Pendragon (informed by the evidence of Mr Venables, Mr Finn and Mrs Disney, as well as by the documentary evidence), Mr Brearley's obvious deep and close relationship with JLR and my assessment of the conflicting evidence about the relevant meetings, where overall I prefer the evidence of Mr Finn to that of Mr Brearley. In reaching that conclusion, I also note that Mr Venables confirmed in cross-examination that Mr Brearley had been part of the discussions that led to Pendragon abandoning the Wolverhampton Opportunity and that he had not been particularly comfortable about the failure to disclose Mr Brearley's personal interest.

135. Mr Finn was challenged as to why Pendragon did not choose to dispose of a poorly performing site in order to be able to proceed with Wolverhampton. Swansea, a relatively small business, was specifically mentioned. The notes of the meeting on 23 September had been annotated to include summary figures for other sites, apparently to allow a financial comparison. The answer to this lies in assessment of risk. Wolverhampton required a big investment, and the perceived uncertainties about JLR's approach led to a loss of confidence. It appeared to involve a much greater level of risk than retaining Swansea.

136. Mr Finn was also challenged about evidence from Mr Goss suggesting that it was JLR that decided that Pendragon should not be permitted to pursue the

Wolverhampton Opportunity. I accept Mr Finn's evidence that, even if that was the case, it was not apparent to Pendragon during the relevant period. More fundamentally, however, Mr Brearley accepted in cross-examination that Pendragon could have taken on the Wolverhampton franchise if it had given up another one. He, and not Mr Goss, was in the relevant meetings with the JLR executives who were making decisions about individual franchise awards, which Mr Goss confirmed were operational matters that he did not deal with. Mr Brearley's evidence, together with the fact that Pendragon clearly pursued the Wolverhampton Opportunity seriously for a lengthy period without any indication from JLR that it would not be allowed to have it, mean that I do not accept Mr Goss's evidence insofar as it might be taken to relate to the position at any point before 30 September 2014. In fact, my understanding of his evidence on this point is that it was directed to the decision taken on that date, rather than any earlier decision that Pendragon should not be awarded the Wolverhampton franchise.

137. What is clear is that Pendragon did seriously pursue the Wolverhampton project, and got very close to acquiring the sites. Although it was concerned about the level of investment required it is not the case that it would never have been prepared to go ahead with the project. Rather, it had been prepared to do so in principle but it became increasingly concerned about the level of risk and scale of expenditure that JLR might seek to insist upon, and the executive directors ultimately decided not to proceed. That decision was influenced by Mr Brearley.

The claimants' pursuit of the Wolverhampton Opportunity: up to October 2014

138. Mr Brearley had known Mr Smith socially for some years and was first introduced by him to Mr Danks in 2012.

139. Mr Danks' evidence was that he spoke to Mr Brearley in January or February 2014 about the possibility of developing a dealership for Pendragon at the former Eye Infirmary site in Wolverhampton, and that Mr Brearley put him in touch with Mr Bailey, with whom he had a discussion shortly afterwards. Although Mr Danks believes that these events occurred in 2014 I think it more likely that they took place in mid 2013, the time suggested by Mr Brearley, since by the summer of that year Pendragon was progressing its plans for the Penn Road site.

140. It is unclear exactly when the idea of pursuing the Wolverhampton Opportunity outside Pendragon was first discussed between Mr Brearley and Mr Smith or Mr Danks. A presentation produced for proposed investors in June 2015 referred to Mr Brearley and Mr Venables approaching Mr Smith and Mr Danks to "fund/construct a new JLR building/s" in February 2014. Mr Brearley said that he first had an informal discussion with Mr Smith about the possibility of opening his own business in or around January 2014, and that Mr Smith raised the possibility of developing a JLR dealership.

141. Whatever discussions were had led to a meeting on 14 March 2014 between Mr Brearley, Mr Smith and Mr Danks, which was also attended by Mr Venables. It is clear that the focus of the meeting was the possibility of developing a JLR dealership. Mr Brearley took with him, and shared, copies of JLR "composites"

showing the range of performance of Jaguar and Land Rover dealerships nationally (including top and bottom quartile, and national averages).

142. Although Mr Brearley claimed that it was a generic conversation, I am also satisfied that at this meeting the possibility of opening a JLR dealership in Wolverhampton was specifically discussed. Mr Danks accepted this in cross-examination, as did Mr Venables. I accept that other possibilities, in particular Shrewsbury and Ludlow, may well have been referred to as well, and that Mr Brearley would have recognised that pursuit of the Wolverhampton Opportunity was subject to Pendragon not pursuing it. However, it was clear from the evidence that Mr Smith was particularly keen both on the JLR brand and on undertaking developments in Wolverhampton. In my view, taking account of those factors, together with Mr Brearley's own local links with Wolverhampton (he has lived in the area for many years and his office whilst at Pendragon was located there), his strong relationship with JLR and the attractive prospect of developing a dealership close to the new engine plant, the Wolverhampton Opportunity would have been the natural focus of the discussion.

143. Mr Brearley contacted Mr Hicks at JLR shortly following this call. Mr Brearley's evidence was that he explained that he had a party interested in funding the property side of a development and asked if there was a site available, and was told that Mr Hicks would involve Ms Nelmes. Mr Brearley also accepted in cross-examination that around this time he spoke to Mr Hallmark.

144. Mr Brearley says that he heard nothing more until a Jaguar Dealer Council meeting in May 2014, when Ms Nelmes approached him and suggested they speak after the meeting. He says she explained that there would need to be a formal approval process before any specific opportunities could be considered, and that she suggested a formal meeting. That meeting occurred on 17 July 2014. Mr Brearley and Mr Venables attended and met Mr Hicks, Ms Nelmes and Chris Newitt, the sales director. Mr Brearley's evidence was that he presented his and Mr Venables' background and experience in general terms, and that there was some discussion about potential sites, with Shrewsbury and Ludlow being mentioned. In addition, Mr Smith introduced Mr Brearley to Mr Moody at Smith & Williamson.

145. In my view Mr Brearley's account is not complete and accurate. Based on the limited available documentary evidence and my assessment of the witness evidence I conclude that not only was the possibility of the Wolverhampton Opportunity discussed with JLR in July 2014 (albeit with recognition that it would be subject to Pendragon not proceeding with it), but that Mr Brearley's pursuit of the Wolverhampton Opportunity was materially more developed by that time than the claimants have accepted.

146. There are four particularly telling pieces of documentary evidence. They comprise the Investment Opportunity document (see [114] above), and in particular a timeline included in it, an email from Ms Nelmes to Mr Brearley dated 27 June 2014, an email from Lloyds dated 10 July 2014 about a working capital facility, and an email dated 20 July 2014 from Mr Moody at Smith & Williamson.

147. The metadata for the Investment Opportunity document shows that it was first created, by Mr Brearley's PA, on 11 June 2014, and was last modified on 15 January 2015, by Mr Venables. The only version available is the last version. It is in a slide format, clearly intended for a presentation, and in that final version comprised 30 slides. The final slide has a timeline that reads as follows:

"Next Steps

• Secure funding- land & property -Initial working capital	-30th June
• Secure smaller site on Penn Road	-ASAP
• Secure contract with JLR	-30th July
• Agree site layout	-15th Sept
• Apply for planning	-30th Sept
• Award contract	-30th Nov
• Building completion	-31st Oct 15
• Trading	-1st Nov 15"

148. Unless there has been a mistake, the only rational interpretation of this timeline is that the dates shown without are a year were dates in 2014, allowing an 11 month period for construction between November 2014 and October 2015. Further, the timeline must logically have been prepared in advance of 30 June 2014 (the first target date for "Next Steps"), suggesting that this slide was included in the original presentation and not altered later.

149. Neither Mr Brearley nor Mr Venables could produce a convincing alternative explanation for this slide. It clearly does not relate to Pendragon's own plans because Pendragon did not need to secure funding, and it had also agreed terms to acquire both sites for the project by April 2014. It is a simple document and, taken together with the other evidence, I do not consider that there was a mistake when it was originally produced. The mistake lay in not updating the dates subsequently.

150. The drawings included in the Investment Opportunity document are also relevant, and consistent with earlier work being undertaken on the proposal than Mr Brearley was prepared to accept. Rather than copying a version of the plans that had been produced for Pendragon in July 2014 (which Mr Brearley had emailed to himself on 7 October, see [171] below) or a further updated version produced in August 2014, the version used was one that had been produced in January 2014. I do not accept Mr Brearley's explanation that he used whatever plans were available to him. Among other things, Mr Brearley was one of the recipients of the email attaching the August version of the plans (along with Mr Bailey and Mr Hobbs).

151. In contrast, the information pack produced by Smith & Williamson that was provided to Higgs in January 2015 (see [198] below) included plans that were closer to the final version produced for Pendragon. Further, the proposed timeline in that document anticipated securing Propco funding between January and March 2015, planning permission being applied for in February 2015, securing a contract with JLR between May and July 2015, completion of building work at the end of 2015 and commencement of trading on 1 January 2016. Effectively, this involved a compressed timescale compared to the earlier timeline, which among other things did not delay construction until after formal JLR agreement was reached.

152. As with the timeline, it appears that the plans in the Investment Opportunity document were not updated. In contrast, it is clear that some of the figures were updated. This is because the available version of the document includes figures for Stratstone's financial performance for the whole of 2014.

153. The email from Ms Nelmes dated 27 June 2014 was sent in advance of the meeting which took place on 17 July. The email stated that it was being sent "in reference to our meeting for your prospective partner meeting with the JLR UK Board". Ms Nelmes suggested an agenda comprising a 45 minute presentation from "yourself and Steve" (obviously Mr Venables) followed by 45 minutes for questions and answers. This was followed by a recommendation of topics that Mr Brearley should consider covering, as follows:

> "• Background to the new company proposal
> • Management Structure – particularly the strength of the management team you will have around you.
> • Financial structure including proposed balance sheet and working capital – go into some detail here, including the property company and investors overall.
> • External funders – including bank, black horse etc.
> • Customer satisfaction – performance, focus, strategy for continuous improvement
> • Ambition – growth aspirations, investments etc
> • Proposed navigation through current relationship."

154. Mr Brearley's evidence was that he made it clear to Ms Nelmes in advance of the meeting that it would not be possible to provide this information, and that at the meeting he and Mr Venables simply provided a presentation about themselves and their experience. However, I have concluded that Ms Nelmes must have produced the list with a more specific proposal in mind. For example, it is clear that she envisaged a separate property company and identified funders. No balance sheet could sensibly be produced without a specific proposal. The reference to "navigation through current relationship" is also a clear reference to potential issues with Pendragon.

155. The email from Lloyds dated 10 July 2014 is an email from a business development director at Lloyds commercial banking which was sent to Mr Venables and Mr Brearley and copied to Mr Danks. It was disclosed by Mr Smith, having been forwarded to him at the time by Mr Danks. The email, stated to be

sent ahead of "your meeting with JLR next Thursday", thanks Mr Venables and Mr Brearley for the "excel financial model" and for personal wealth statements that they had also provided. It advises that there had been "positive discussions" about the provision of a working capital facility, and stated what further information was required to progress credit approval. That information included confirming the "legal entity and shareholder structure" and the "property lease terms and conditions", together with a draft day 1 balance sheet for "trading newco" and a "sensitised financial model" to take account of delayed opening and underperformance against forecast market share.

156. It is obvious from this that a relatively detailed proposal, with a financial model, had previously been provided to Lloyds. It is also clear from the email that the focus of attention was on a working capital facility for the Opco. When shown the email in cross-examination Mr Venables also confirmed that he recalled meeting with Lloyds in early July 2014 and, whilst saying that he did not recall what was presented, ultimately agreed that "you could assume" that the proposal would have related to Wolverhampton. (This should be contrasted with an earlier denial that any business plan had been prepared for Wolverhampton in July 2014, a denial that I do not accept in view of his later statement.)

157. Further, it is apparent that the email was produced with a view to Lloyds' potential involvement being discussed with JLR. The reference to an excel model also suggests that, contrary to Mr Brearley's evidence, he and Mr Venables were in a position to discuss the proposed project in some detail with JLR in mid July.

158. In closing submissions Mr Turner objected that the allegation that the excel model showed that plans were further ahead in July 2014 than the claimants admitted was not put to Mr Brearley or Mr Danks.

159. Mr Brearley was asked about the model referred to in the 10 July email. His response was that it was representative of a typical JLR dealership (rather than specific to Wolverhampton) and that he thought it was put together by Mr Venables. His response was not challenged. However, that response conflicts with the evidence of another witness for the claimants, Mr Venables, who is also the individual who produced the model. I prefer Mr Venables' evidence.

160. Mr Danks was also asked about the email from Lloyds, which he had forwarded to Mr Smith. His evidence, when asked about what it demonstrated about the stage the process had reached, did not assist. He said that the matter was being dealt with by Mr Smith rather than himself.

161. Although the Lloyds email was not specifically pleaded, the essential fact relied on by Higgs, namely that material steps to pursue the Wolverhampton Opportunity were taken before it was abandoned by Pendragon, was clearly in issue and was put squarely to both Mr Brearley and Mr Danks. The email forms part of the documentary evidence relevant to that issue, and I can fairly take it into account.

162. The email from Mr Moody dated 20 July 2014 was sent as a follow-up to a meeting that he and Mr Lownes had with Mr Brearley and Mr Venables on 15

July 2014. It is a relatively detailed email which covers how Smith & Williamson could assist with the project. Its content demonstrates that Mr Brearley's depiction of the meeting was, at least, incomplete. Mr Brearley's evidence in his first witness statement was that it was a tentative discussion to see what Smith & Williamson could offer, and that a number of sites for a JLR franchise were discussed.

163. It is clear that the entire focus of the email was the Wolverhampton site. The first paragraph reads as follows:

> "Iain and I enjoyed our meeting on Tuesday, and we were impressed by the business proposition that you presented. Clearly, the key is in securing the site and establishing whether or not Stratstone wish to pursue this. Until that point, you clearly both have a conflict of interest which needs to be addressed to the satisfaction of Stratstone to avoid your premature departure from that company, and thus a significant increase in your own personal risk exposure to this project."

164. The email also refers to funding the property, noting that Mr Brearley and Mr Venables had indicated "a capital spend of circa £7m" and referring to alternatives including selling the property to an institution once developed. It further refers to it being "important to Steve [Smith] to secure the second site bordering the Waitrose land" (a clear reference to Graiseley Hill).

165. Mr Lownes' evidence was that other sites were discussed in addition to Wolverhampton, although Wolverhampton was the preferred opportunity and, because it was a "greenfield" site, it offered the possibility of a greater return than other sites (albeit with increased risk). He recalled it as a generic discussion, but he had not seen the excel model that had been provided to Lloyds and was surprised at its apparent existence. He also recalled, and I accept, that Mr Brearley made it clear that Pendragon would have to decide not to proceed with Wolverhampton before the opportunity could be pursued by him. Both Mr Brearley and Mr Venables also accepted that Wolverhampton was discussed at the meeting with Smith & Williamson. I do not accept Mr Brearley's portrayal of the meeting as Mr Moody being particularly keen on Wolverhampton, reflecting Mr Smith's own keenness on Wolverhampton, and Mr Brearley making it clear that it was not an option. In reality Wolverhampton was the location that Mr Brearley wanted, if he could secure it. Mr Moody's email strongly indicates that the discussion concentrated on the Wolverhampton Opportunity, and I conclude that whilst other sites were referred to Wolverhampton was the real focus, and not only from Mr Moody's perspective.

166. The reference in the email to a conflict of interest is also noteworthy, given that the initial meeting with Higgs occurred over six months afterwards. Mr Venables agreed in cross-examination that Smith & Williamson advised that solicitors should be involved as soon as possible.

167. In the light of the documentary evidence, and the clear focus of the discussion with Smith & Williamson, I have concluded that (contrary to the claimants' case

in opening) the Wolverhampton Opportunity was discussed with JLR at the meeting on 17 July 2014, two days after the meeting with Smith & Williamson.

168. Mr Venables accepted in cross-examination that Wolverhampton was discussed with JLR at that meeting, although he said the focus of the meeting was for Mr Brearley and Mr Venables to explain their credentials, rather than to discuss a single site. I accept that it would have had to have been recognised that the position with Pendragon needed to be resolved first, and that alternative sites are likely to have been mentioned as well, but it is more likely than not that the focus would have been on Wolverhampton. In particular, although Shrewsbury and Ludlow (being the locations referred to in Mr Brearley's first witness statement as having been raised at the meeting) may well have been mentioned as possibilities, there is no indication that they were seriously considered. The business proposition would also have been very different, in particular because there were existing dealerships in those locations (on this, see [31] above). Mr Brearley accepted in cross-examination that Mr Smith and Mr Danks had not looked at those alternatives. Further, and as already mentioned, Ms Nelmes' email of 27 June is consistent with the focus being on a specific proposition.

169. The next material relevant piece of documentary evidence is an email from Mr Moody to Mr Danks on 11 September 2014 referring to a conversation two weeks previously in which Mr Danks had mentioned that he would like to meet to discuss "the JLR dealership", and suggesting a meeting in the week commencing 22 September, following Mr Moody's return from holiday. I infer that this would have been a meeting about Wolverhampton rather than about generic opportunities. It is notable that there is no reference to this in Mr Danks' witness statement, which gave the clear impression that there was no discussion about Wolverhampton until after Pendragon had decided not to proceed.

170. It is also worth noting the metadata information for an excel spreadsheet setting out detailed financial information in respect of the Wolverhampton Opportunity. The version available of this document shows that it was last modified on 11 February 2015 by (I infer) an employee of Smith & Williamson. However, it was first created by Mr Venables on 16 May 2014. Mr Venables' evidence was that because he did not wish to use a Pendragon model he wrote the business plan model from scratch. I therefore conclude that he started work on the model on 16 May 2014, somewhat earlier than he recalled in cross-examination, where he said that he thought he started work on it around the time of the meeting with JLR in July 2014. I also conclude that the model was sufficiently advanced to be shown to Lloyds in early July 2014: see [155] above. Smith & Williamson subsequently took this document over and "held the pen".

171. Mention should also be made of evidence relied on by Pendragon in the Pendragon proceedings of Mr Brearley sending information relevant to Wolverhampton from his Pendragon email address to a private email address. Mr Brearley explained that Pendragon executives regularly did this when working outside the office, because of practical difficulties in accessing the relevant systems remotely. However, I was shown examples that are in my view more likely to be explained by their potential relevance to Mr Brearley's own pursuit of the Wolverhampton Opportunity. For example, Mr Brearley sent an early

version of Pendragon's plans for the Wolverhampton site (dating from November 2013) to a private email address in the middle of the afternoon on a day in May 2014 when Mr Brearley's diary indicated that he was in the office, and could presumably have considered them there. I did not find his suggestion that he may have wanted to print them at home convincing. Mr Brearley also sent himself a detailed JLR "Retail Corporate Identity" document covering the Arch concept on 6 June 2014. Again, I did not find his suggested explanation convincing. Mr Brearley sent more up to date plans for the Wolverhampton site to himself on 7 October 2014. On the same day he also sent himself an email containing some details about the contractual position on the sites, which he forwarded on to Mr Danks the next day to provide details of whom he should contact.

The claimants' pursuit of the Wolverhampton Opportunity: from October 2014

172. Following Pendragon's decision not to proceed, the claimants' own plans proceeded apace. An offer was made for the Graiseley Hill site on 9 October and an offer was made for the Penn Road site on 27 October, in each case for the same price that Pendragon had offered. Agreement was reached for the acquisition of the Penn Road site, subject to contract, by 12 November. BSPR was incorporated on 19 November. Email correspondence on that date indicates that discussions were ongoing with Lloyds about financing for the property company (although ultimately Barclays, rather than Lloyds, became the proposed bank lender). Mr Brearley also accepted in cross-examination that he had numerous conversations with Ms Nelmes and Mr Kuzminski in late November and early December 2014.

173. Also on 19 November Mr Brearley emailed Mr Danks, Mr Smith and Mr Venables to report on a conversation he had had with Ms Nelmes (whom he described as "very supportive"), in which he had "brought her up to speed" with both parcels of land having been "secured", and told her that a planning application would be submitted before Christmas in the name of BSPR. He said that she would "circulate a story that a developer has submitted planning on [JLR's] behalf" as JLR was yet to appoint a dealer, and explained that Ms Nelmes had volunteered to look over the plans with Mr Kuzminski so as to "shorten the contract process in April". The email added that Mr Brearley would ask JLR for a letter confirming that it was happy with the scheme once it had been reviewed, "to help with the bank funding". Mr Brearley also referred to an email just received from Lloyds and commented that the detailed business cash flow and profit plan which had been requested "are immediately available" and would be sent by Mr Venables. Mr Brearley also asked Mr Danks to send detailed drawings from the architect as soon as they were completed.

174. The architects also sent drawings on 19 November. The architects engaged were the same firm that had been used by Pendragon (Unwin Jones) and indeed the first version received still included Pendragon's name. Mr Danks explained that Unwin Jones had obtained consent from Pendragon before acting, but this was obviously without Pendragon becoming aware of Mr Brearley's involvement.

175. On 25 November Mr Brearley sent a further email to Mr Danks and Mr Smith confirming that he would provide £10,000 to cover a non-refundable deposit on Penn Road, as he had previously done for Graiseley Hill, commenting that he was

happy "to stand the risk on both of these plots of land" on the basis that Mr Danks and Mr Smith funded the planning application. He repeated that he would be requesting a letter of comfort from JLR to assist with obtaining funding from Lloyds.

176. Also on 25 November Mr Brearley sent an email updating Mr Moody and Mr Lownes at Smith & Williamson. That email referred among other things to the drawings having been finalised, to having "a commitment from JLR that they will ('behind closed doors') pre approve the layout of the scheme", to Mr Venables "finalising the detailed balance sheets out to 2020" in a format acceptable to Mr Lownes, and to Mr Brearley having "validated the volumes with the latest information we have from JLR". The email also explained that Mr Brearley had sold his Pendragon shares to cover the loan and interest outstanding (a reference to the 10/10 scheme), giving him "flexibility to exit from the end of 2014 if necessary", although his intention was to leave at the end of March to help him find working capital. (This was a reference to staying at Pendragon long enough to receive the bonus payable in March 2015.) He also commented that JLR were aware of the timing, and gave some details about the proposed arrangements between shareholders in the venture.

177. It is worth mentioning here that Mrs Disney was cross-examined about reliance placed in the Pendragon proceedings on the fact that Mr Brearley had sold shares in November 2014 as supporting an allegation that he had been taking steps to raise finance for the Wolverhampton Opportunity. This was criticised on the grounds that the 10/10 loan was repayable in December 2014 such that a sale was required in any event to fund the repayment. I accept Mrs Disney's response that what was being relied on was the sale of more shares than was required to repay the loan. The available evidence indicates a net receipt of the order of around £38,000, which Mrs Disney said was not an amount that she regarded as inconsiderable. Particularly in the context of the two amounts of £10,000 that Mr Brearley appeared to be paying or offering at the time, that is a fair comment.

178. On 27 November, following a meeting with them the previous day, Mr Brearley sent "amended drawings" to Ms Nelmes and Mr Kuzminski. The email referred to proposed dates for exchange on the Graiseley Hill site at the end of January 2015 and, following planning consent, the Penn Road site at the end of February. The email added that Mr Kuzminski would be sent a "full 5 year plan and balance sheet" once Smith & Williamson was happy with it, probably during the following 14 days.

179. On 18 December 2014 Mr Brearley sent a letter to Ms Nelmes. Although the document refers to attachments, there are none available.

180. The letter described itself as a formal application for the Jaguar and Land Rover franchises for the Wolverhampton area. It referred to the proposed sites and provided other details of the proposal, some of which were inaccurate. For example, it inaccurately referred to JRBA as having been incorporated. It stated that planning permission was anticipated between the end of February and March, with construction planned to occur by the end of January 2016. The letter referred to attachments comprising detailed drawings together with a five year business

plan. Mr Brearley denied that any attachments had in fact been sent with the letter. This seems unlikely. In any event drawings had already been sent on 27 November: see above.

181. A contract for the acquisition of the Graiseley Hill site was entered into on 23 December. JRBA was incorporated on 6 January 2015, with an accountant acting for Mr Brearley as the initial sole director and shareholder (Mr Brearley was only registered as a director on 29 July 2015). In an email sent on the same date to Mr Danks in answer to concerns he had expressed about the proposed fee arrangements with Smith & Williamson, which was copied to Mr Smith and Mr Venables, Mr Brearley stated that they now held "an option" on both plots of land, referred to planning consent being a "formality" and to now having possession of a letter from JLR "confirming they want the site and development for both brands, that creates the VALUE!". Mr Brearley also referred to an idea, which had been discussed with Mr Danks, of including units for rental on the Graiseley Hill site which would significantly increase the value of the developed site, suggesting that Mr Venables and he could buy the site using their pension funds. The email also included the following comment:

> "…groups are paying 6 and 7 times earnings for JLR businesses…the cheapest way to acquire, is to find an open point and build one, not buy it…there is one open point for the franchise in the UK! we have it!... would therefore, another listed/quoted motor group be happy to pay a significant premium for a ready made site/dealership, on the basis it is a lot better to capitalise property than goodwill for a PLC, you bet they would…"

He added that there was "no risk" as regards the sites.

182. What Mr Brearley was pointing out was what he perceived to be the attractiveness of the Wolverhampton Opportunity. "Open point" meant a franchise area that had not been allocated by JLR, such that it was not necessary to purchase an existing business. Any such purchase was likely to require a payment for goodwill, which Mr Brearley was saying gave rise to a less attractive accounting treatment for a listed group. This is relevant to the assessment of the claimants' evidence as to the lack of specific discussions about Wolverhampton earlier in the year. As also pointed out by Mr Lownes (see [165] above), a "greenfield" site was a different proposition to one involving an established business.

183. Also during this period Smith & Williamson were progressing discussions about funding, including with Finance Birmingham. There were also discussions with planning consultants.

184. On 9 January 2015 Ms Nelmes provided the expected letter of comfort, addressed to Mr Brearley at BSPR (the year is incorrectly stated in the letter as 2014). The letter stated that JLR had reviewed the proposal for representation in Wolverhampton and could "confirm we are supportive of the principle and suitability of the site at Penn Road, adjacent to Waitrose, for establishing a full Jaguar and Land Rover operation in the town". There was a reference to working to develop "detailed and final plans for the trading business over the coming

months". Mr Brearley forwarded it to Mr Danks, Mr Lownes and Mr Venables, asking that his name be removed from the header before it was circulated further.

185. The final version that is available of the Investment Opportunity document discussed from [147] above was produced on 15 January 2015.

186. Developments in the project after this point overlap in time with Higgs' involvement and are generally less relevant to the matters in dispute. In summary (and insofar as not covered in the following sections), planning permission was applied for on 27 January and granted on 1 May 2015. Contracts were exchanged on the Penn Road site on 28 January. BSPR completed the acquisition of the Graiseley Hill site on 2 February for £680,000. Finance Birmingham offered to provide funding in March 2015. Work continued thereafter on seeking additional funding. It is clear that this took longer than anticipated.

187. A draft JLR document dated April 2015, apparently produced or updated following Mr Brearley handing his notice into Pendragon on 24 April (see below), recommended approval of Mr Brearley as the "preferred partner" for Wolverhampton. The paper referred to Mr Brearley's role as managing director of Stratstone with "overall responsibility for Jaguar and Land Rover" and as recently being "pivotal in helping JLR reduce their exposure to Stratstone through the mutual relinquishment of various JLR businesses whilst managing Stratstone's overall performance". It further indicated that Mr Venables would also shortly hand in his notice to join the venture.

188. On 21 July 2015 the Graiseley Hill site was transferred to the trustees of personal pension plans (SIPPS) established by Mr Brearley and Mr Venables, subject to a lease to JRBA. Mr Danks explained that the difference between the £900,000 paid by the SIPPs and the £680,000 paid by BSPR was intended to make a contribution to the cost of the work on the sites.

189. Mr Brearley left Pendragon on 31 August 2015, having agreed that he would do so without serving his full notice. Mr Venables resigned the following day, giving three months' notice (although in fact he was suspended on the grounds of suspected gross misconduct on 22 September and then sent a letter in which he sought to resign with immediate effect on 25 September). The timing of Mr Venables' resignation was linked to his six monthly bonus, payable in August. Completion of the Penn Road acquisition occurred on 4 November 2015, with funding from Finance Birmingham as well as certain other investors including Mr Smith and Mr Danks.

190. It is apparent that Finance Birmingham proceeded to fund the acquisition with the benefit of advice from their solicitors (coincidentally, Freeths) about the then ongoing litigation with Pendragon, broadly to the effect that it was unlikely that BSPR would be subject to an injunction application and that any injunction against Mr Brearley would not extend beyond 31 August 2016. A memorandum produced by Finance Birmingham, apparently dated October 2015, also indicates that it understood that if required Mr Brearley would "sit in the background" (without a connection to BSPR as shareholder or director) whilst Mr Danks

ensured that BSPR undertook the development, and that JLR had provided a letter of support to BSPR on 12 October 2015.

Interactions with Higgs prior to the Pendragon proceedings

Introductory call and pitch meeting

191. Higgs' first involvement in the project was on 10 December 2014, when Mr Cutler and Mr Taylor received an email from Mr Lownes explaining that Smith & Williamson was looking to do a deal in Wolverhampton and had been asked by the clients to recommend a good local law firm. The email noted that there was an element of confidentiality "because of the individuals involved". This led to a telephone conversation between Mr Lownes, Mr Cutler and Mr Taylor on 11 December. Helpfully, Mr Taylor's relatively detailed handwritten notes of the call survive.

192. I accept Mr Taylor's evidence that it was a "one-sided" call, with Mr Lownes providing information and Mr Taylor and Mr Cutler listening. Mr Lownes explained that his firm was advising on a new opportunity to establish a JLR dealership in Wolverhampton, where a new JLR plant was also located. The four proposed shareholders were named, with Mr Brearley being described as the managing director of the JLR dealership chain at Pendragon and Mr Venables as the finance director. It was said that they would resign from Pendragon and set up the dealership. The notes record that Mr Cutler and Mr Taylor were told that there were "no covenants". A six month notice period was referred to, together with a proposal to resign at the end of January and exit in April. Although Mr Brearley denied being the source of the "no covenants" comment it is hard to see from whom Mr Lownes would have obtained his understanding about Mr Brearley's contractual position other than Mr Brearley (whether directly or though Mr Danks or Mr Smith).

193. There was reference to the acquisition of the two sites, to fundraising requirements, and to separate entities owning the site and operating the dealership, with different shareholding proportions. It was said that JLR would "sign off" the project and that employee sales from the plant would go through the proposed dealership. It was planned to open on 1 January 2016.

194. There was some discussion of the legal work likely to be required, with reference to finance documents, shareholder agreements for Propco and Opco, and employment contracts. The involvement of another solicitors firm, Gateley PLC, in the property work was referred to. A meeting was proposed for January 2015. Confidentiality was emphasised. Neither Mr Cutler and Mr Taylor consciously linked that to Mr Brearley's or Mr Venables' employment at Pendragon, as opposed to the general nature of the project, including JLR's involvement and (at least in Mr Cutler's case) that of Mr Smith.

195. The notes also refer to "commercial tension", and under that to "10% market share (Pendragon)" and to "would have to sell others". This must refer to a comment to the effect that Pendragon could not pursue the opportunity unless it

made another disposal, due to a 10% cap on JLR dealerships. This accords with Mr Taylor's recollection.

196. Later the same day, Mr Cutler emailed Mr Brearley and Mr Venables, as well as Mr Lownes and Mr Taylor, to introduce himself and to suggest a meeting in early January. In fact, the first meeting only took place on 27 January 2015, having been deferred from 19 January to allow Mr Venables to attend. The attendees were Mr Brearley, Mr Venables, Mr Cutler and, for part of the meeting, Ms Elliott. Mr Taylor was unable to attend due to a firm management meeting. Higgs' evidence also suggested that Mr Danks attended, but Mr Danks gave contrary evidence. I conclude that he did not attend.

197. The meeting was a "pitch" meeting, the primary aim being to allow the Higgs participants to introduce themselves and explain what they could assist with. It was also an opportunity to find out a bit more about the project. Like other meetings that Mr Brearley and Mr Venables attended with Higgs, it took place during the working day. The meeting lasted around an hour, with Ms Elliott attending for the second half of it. (Mr Cutler explained the normal approach that Higgs adopted with pitch meetings, which was to aim for a 15 minute client introduction and then 45 minutes for a presentation by Higgs.)

198. Prior to the meeting, on 22 January, Mr Lownes sent an email to Mr Cutler attaching a copy of a Smith & Williamson document entitled "Blue Square Penn Road Limited Information Pack" (the "Information Pack"). The covering email from Mr Lownes indicates that it was sent to Mr Cutler to allow him to send it on to potential investors who might be interested (the investors Mr Cutler had in mind being Ashley and Miles Brough), but Mr Cutler also sent it to Ms Elliott and Mr Taylor on 26 January, in preparation for the meeting the following day. Mr Cutler's evidence, which I accept, was that he read the summary part of the document to understand what the project was, but did not review it in detail because the main purpose of the meeting was to explain what Higgs could offer. Ms Elliott looked at it briefly in relation to property aspects. Mr Taylor also did not review it in any detail.

199. The Information Pack was a relatively detailed 36 page document about the project, prepared for potential investors in BSPR. It included a description of the project, financial projections for both Propco and Opco and a copy of the 9 January 2015 comfort letter from JLR. (I refer here to the January 2015 version of the Information Pack: later versions were also produced.) The summary pages of the Information Pack refer to JLR's investment in the engine plant and to JLR approaching "two experienced motor industry professionals" to discuss the opportunity to develop and manage a new flagship dealership. There is a reference to discussions with JLR and to the letter of comfort. The summary outlines the position in relation to the acquisition of the sites, and indicates that construction was targeted to commence in May 2015, with the business commencing trading in January 2016.

200. At the meeting Mr Brearley (and to a lesser extent Mr Venables) gave a general outline of the project. In line with the statement in the Information Pack, this included a comment that JLR had approached them about the possibility of a new

dealership in Wolverhampton, with reference to the new engine plant. There was reference to the identification of the sites and potential sources of funds, and to a letter of intent regarding the project from JLR. At the end of the meeting a further meeting was arranged for the following Monday, 2 February 2015, subject to confirmation that Higgs was to be instructed.

201. Neither Mr Cutler nor (while she was present) Ms Elliott recalled any discussion of service contracts. In cross-examination Mr Venables recalled no advice being given about employment contracts (in contrast to his witness statement which stated that Mr Cutler gave initial advice that there was nothing to worry about in the service agreements), but thought that there was a discussion about providing service contracts to Higgs. In fact, I have concluded that the latter discussion occurred at the second meeting on 2 February, a meeting which Mr Venables did not recall as a separate meeting: see below. As to whether any advice was given, I accept Mr Venables' evidence in cross-examination.

202. Mr Brearley's evidence about this meeting was in my view unreliable, as well as somewhat inconsistent. In cross-examination he accepted that the purpose of the meeting was to determine whether he and Mr Venables wished to instruct Higgs, rather than to obtain legal advice. However he maintained that the topic of service contracts was discussed, that Mr Brearley asked for his and Mr Venables' service contracts to be reviewed, and that whilst Mr Cutler indicated that he would get the position checked by the employment team he gave a very strong impression that Mr Brearley's contract was not enforceable due to its age and the different role he held at the time, or at least that there was no cause for concern.

203. Mr Brearley's evidence is not supported by that of anyone else present at the meeting, and I do not accept it. Whilst broadly consistent with an allegation in the particulars of claim it is inconsistent with the detailed letter of claim, written in September 2016, which referred only to a request being made at this meeting that the contracts be reviewed. It is also inherently unlikely that Mr Cutler would have made any such comments, not only because I accept his evidence that he would not have been prepared to give advice on a matter outside his area of expertise, but also because such advice would so obviously have been incorrect to anyone with Mr Cutler's level of legal experience. In reality, if anyone had formed the view that Mr Brearley's service contract was no longer relevant because of its age and the different role he now held, it was Mr Brearley himself. I note that Mr Cutler was also not cross-examined on the basis that he had given advice that Mr Brearley's service contract was unenforceable, but rather on the basis that he failed to appreciate the need for prompt employment law advice.

204. I conclude that the meeting on 27 January was simply a pitch meeting at which no retainer was created and no legal advice was provided. The question of service contracts and restrictive covenants was not discussed. Confirmation that Higgs was being instructed was only provided the following day (28 January) in a phone call from Mr Brearley and Mr Venables to Mr Cutler. I also accept Mr Cutler's evidence that it was agreed that the precise scope of any retainer would be determined once funding documents were available for review. It is the case however that when he emailed Ms Elliott and Mr Taylor to confirm that they had been instructed he referred to instruction "on a full service basis" covering

"property, HR, commercial, regulatory and corporate". I conclude that to some extent Mr Cutler was anticipating the scope of the work in which Higgs would be involved, but the email is relevant because it supports a conclusion that it was understood that Higgs was engaged to provide general legal support for the project, rather than work only on discrete tasks.

Letter of Intent and 2 February 2015 meeting

205. On 29 January Mr Brearley sent Mr Cutler and Ms Elliott his draft of an outline agreement between Mr Brearley, Mr Venables, Mr Danks and Mr Smith, reflecting the commercial discussions they had had. He asked for this to be turned into a document that the four of them could sign the following day, albeit he appreciated that there was insufficient time to make it fully encompassing. The urgency appears to have been the imminent completion of the purchase of Graiseley Hill. Mr Cutler involved an associate to turn Mr Brearley's draft into a slightly more formalised and expanded (but non-binding) "Letter of Intent" between the four individuals.

206. Apart from a meeting at short notice on 30 January at which Mr Brearley and Mr Venables sought Higgs' assistance in witnessing some finance documents with which Higgs were not involved, the next meeting took place on 2 February (as arranged at the first meeting). The Letter of Intent was signed at this meeting, it being understood that Higgs were not giving advice about its substantive content. It is clear that Mr Brearley, Mr Venables and Mr Danks were present at the meeting. The evidence does not indicate that Mr Smith was there, although he must have signed the Letter of Intent at some point, either at this meeting or outside it.

207. Leaving the Letter of Intent to one side, Mr Cutler described the aim of this meeting as "signposting", allowing issues to be identified in more detail and work to be directed to the relevant departments within Higgs. The project was discussed, with no reference to Mr Brearley having become aware of the opportunity in his capacity as a Pendragon employee, or to the fact that Pendragon had itself been interested in it. Rather, it was said that JLR approached Mr Brearley and that he had contacted Mr Danks, who had identified the land. Fees and the scope of the retainer were also discussed, with Mr Cutler explaining that he could not provide further detail until the finance documents were received from Finance Birmingham for review, and there would be no charge for work done to date. Mr Cutler did not open a file because, despite his earlier email to Ms Elliott and Ms Taylor, he had not formed the view that Higgs had a general retainer in respect of the Wolverhampton Opportunity. He understood that Higgs' advice would be required on the Finance Birmingham documents as and when discussions were sufficiently progressed with them. At the time he was expecting finance documents shortly, but in the event there was a material delay.

208. The question of service contracts was raised. I accept Mr Cutler's evidence that it was at this meeting that he raised the fact that Mr Lownes had said that there were no restrictive covenants, and that after some discussion Mr Brearley acknowledged that they existed but did not matter as the agreement was old and did not relate to his current role at Pendragon. I also accept that Mr Cutler queried

that, and was then told by Mr Brearley that even if the covenants were enforceable Pendragon would not seek to enforce them because of its relationship with JLR, a critical business partner of Pendragon, and that JLR (who held power in the relationship) would exert pressure. Mr Cutler recommended that Mr Brearley have his agreement reviewed by a member of Higgs' employment team, reminding him that Mr Cutler was not an employment lawyer. I further accept Mr Cutler's evidence that Mr Brearley appeared very confident of his position and disinterested in discussing his restrictive covenants, although he acknowledged that it would be sensible to have the contract reviewed. It was left that Mr Brearley would let Mr Cutler know when he was ready for that to occur, at which point Mr Cutler would arrange for him to meet with Higgs' employment team.

209. Mr Cutler's evidence is broadly consistent with that of Mr Venables and Mr Danks. Mr Venables could not recall Mr Cutler giving any advice regarding service contracts at any stage, other than recommending getting copies of his and Mr Brearley's contracts across to Higgs and referring the matter to Higgs' employment department (see also [201] above). Mr Danks' evidence was that he was not present when Higgs provided advice in relation to service contracts or restrictive covenants, as that was personal and confidential to Mr Brearley and Mr Venables, although he accepted in cross-examination that there was some discussion about service agreements in the meeting on 2 February. Rather, Mr Danks' oral evidence was that Mr Brearley had said to him that Mr Cutler had told Mr Brearley that his service agreement was old and unenforceable (in contrast to Mr Danks' witness statement, which suggested that his understanding was that Higgs was satisfied that the restrictive covenants in both contracts were not enforceable). Mr Brearley did not rely on advice having been given at the 2 February meeting but denied that Mr Cutler had said that he had been told that there were no covenants and the discussion that Mr Cutler said had followed that. I do not accept this denial, and in particular as discussed below do not accept that Mr Brearley only formulated the view that JLR would come to his assistance once the dispute started with Pendragon.

Meeting with Ashely Brough

210. Mr Cutler's evidence about Mr Brearley's views at this time is strongly supported by the evidence of Mr Brough, and by the evidence of Mr Danks and Mr Venables in cross-examination.

211. On 19 February 2015 Mr Brearley, Mr Venables and Mr Danks met with Mr Brough at his offices to discuss the investment proposal, accompanied by Mr Lownes. I accept Mr Brough's evidence that he was very interested in the history of Mr Brearley, whom he had been told was going to be the "front man" for the business. Mr Brearley told him that he was the CEO or managing director of a large retailer. Mr Brough had had previous experience of litigation concerning an anti-compete clause in an employee's contract, and asked Mr Brearley about that. Mr Brearley's response was to acknowledge that a clause existed but that he was unconcerned about it. He said very confidently that he had a very strong relationship with senior executives at JLR. He did not expect his employer to object to him setting up the proposed dealership, but indicated that if there was a problem he would expect JLR to assist if that was required.

212. In his witness statement Mr Danks said that his recollection of the meeting was that, when asked about restrictions, Mr Brearley explained that his contract had been reviewed by Mr Cutler who had advised him that the restrictions would be unenforceable. In cross-examination his evidence modified. Mr Danks recalled Mr Brearley saying that Mr Cutler was looking at the contract but also that Mr Brearley said that JLR would assist "if the situation worsened". Mr Danks' evidence also indicated that this was Mr Brearley's view throughout, based on his "great relationship" with JLR. Mr Venables also confirmed in cross-examination that Mr Brearley's stance during this period was that JLR would solve any problem: the JLR relationship was too important to Pendragon for it to want to damage it, and if necessary JLR would apply pressure, manufacturers being "all-powerful" for franchise holders such as Pendragon.

213. In his first witness statement Mr Brearley's account of the meeting with Mr Brough refers to Mr Brearley having said that he had given Mr Cutler a copy of his service agreement and that they were working on an exit strategy. Initially in cross-examination Mr Brearley claimed that Mr Brough's account of the meeting was totally incorrect, and he alleged that he told Mr Brough that Mr Cutler had assured him there was no problem. He then withdrew that and reverted to what he had said in his witness statement about giving Mr Cutler a copy of his contract. When Mr Pooles challenged this by reference to what Mr Brearley later told Higgs, Mr Brearley accepted that he had been convinced, or at least reasonably confident, that JLR would help given his relationship with senior JLR executives.

214. To the extent that Mr Brearley was saying that he only formed (or indeed expressed) the view that JLR would assist at a later stage than January or February 2015, I do not accept it. I accept Mr Brough's evidence that Mr Brearley expressed confidence that JLR would assist, and I also conclude that he in fact held that view at the time he expressed it.

Events following the 2 February meeting

215. Returning to Higgs' involvement, Mr Cutler contacted Mr Kelly shortly after the meeting on 2 February to advise him that a review of service agreements would be required. There was no detailed discussion of the project, and Mr Cutler did not pass on the Information Pack. Mr Cutler believed that he did tell Mr Kelly that Mr Brearley was a senior ranking individual at Pendragon who had been approached by JLR to set up a dealership, that he had restrictive covenants that needed to be reviewed and that the project was confidential.

216. On 13 February Mr Brearley sent an email to Mr Cutler, with a postscript saying that there was "no urgency" but he had a copy of his service agreement and Pendragon's standard compromise agreement, that it was "worth a run through over the next few weeks", that he could not see any "major hurdles" but "better to be on the front foot". Mr Cutler replied asking him to scan them through to him. I accept Mr Cutler's evidence that he also reminded Mr Brearley thereafter to provide dates and times when he could meet with Mr Kelly, but that Mr Brearley did not consider this to be a priority. The last point is entirely consistent with Mr Brearley's email, and indeed with the delay in instructing solicitors in relation to any aspect of the project. Mr Cutler also understood from a

conversation with Matthew Pearson at Smith & Williamson in mid-to-late February 2015 that there were delays in the project due to a lack of sufficient equity funding. Mr Cutler's attempts to contact Mr Brearley for an update and to put him in contact with Mr Kelly failed.

217. There was a dispute about when a copy of Mr Brearley's service contract was first provided to Higgs. Mr Brearley's evidence was that he arranged for a driver used by Pendragon to drop a copy off at Higgs' offices in February 2015, following the email exchange on 13 February. Mr Cutler cannot recall receiving it and thinks it more likely that he only received a copy in April 2015 at the meeting discussed in the following paragraphs. I agree and so conclude. If Mr Cutler had received it I would have expected him to pass on a copy to Mr Kelly, which he did not do until after that later meeting. Mr Cutler's evidence is also more consistent with statements recorded as having been made by Mr Brearley during phone calls in early 2016 referred to at [326] to [329] below. It is in any event reasonably clear that even if Mr Cutler received the contract earlier, or Mr Brearley believed that he had, Mr Cutler was not prompted by Mr Brearley to get on with a review of it. On the contrary, Mr Cutler understood that the project was in any event not progressing and his attempts to speak to Mr Brearley failed.

Meeting on 14 April 2015

218. Apart from those attempts and some emails about setting up the meeting with the Brough brothers, no further work was done by Higgs on the project until 13 April. On that date Mr Cutler managed to speak to Mr Brearley, who said that the project was ready to proceed and that he wanted to update Mr Cutler about funders. They agreed to meet for breakfast the following day at a coffee bar in Birmingham, Home Deli. In Freeths' letter of claim it was alleged that on this call Mr Cutler advised that the covenants were unenforceable based on the age of the contract, Mr Brearley's role and "current legislation". The particulars of claim also averred that Mr Cutler repeated his view, first expressed on 27 January, that the restrictive covenants were unenforceable. Mr Brearley's written evidence also asserted that Mr Cutler gave that advice on the call. However, during the trial that was withdrawn and it was not Mr Brearley's evidence that advice was given on the call on 13 April. I conclude that none was.

219. The meeting at Home Deli on 14 April was attended by Mr Brearley, Mr Venables and Mr Cutler. Mr Cutler intended it as an informal catch up rather than a meeting at which legal advice would be given. Given the public nature of the setting, this must be right. At the meeting Mr Brearley and Mr Venables handed over the original copies that they held of their respective service agreements. Mr Cutler also became aware during the discussion that Pendragon had previously considered the Wolverhampton Opportunity, but was told that it was not interested in the project and could not have pursued it. Mr Brearley again expressed his confidence that JLR's support for Mr Brearley would deal with any opposition by Pendragon.

220. Mr Venables gave clear evidence in cross-examination that Mr Cutler did not give advice about the service contracts at this meeting. That evidence, which I accept, contradicted his witness statement where he stated that Mr Cutler did not seem at

all concerned about the restrictions and "simply provided his previous advice", but added that he would pass the service agreements to his employment team.

221. In his first witness statement Mr Brearley said that Mr Cutler repeated his view that there was nothing to be concerned about but he would discuss the position with his employment partner again and ask him to contact Mr Brearley directly should he have any issue beyond the advice already provided by Mr Cutler. In cross-examination Mr Brearley initially agreed that no advice was given at the meeting but said that Mr Cutler explained that he had already consulted Mr Kelly, would compare the two contracts and get input on Mr Brearley's resignation letter. At a slightly later point in his cross-examination Mr Brearley asserted that Mr Cutler had again told him that his service contract was unenforceable. (Each of these versions differed from the letter of claim, which indicated that at the meeting Mr Cutler repeated advice that the covenants were unenforceable but would discuss the position "again" with his employment partner and ask him to contact Mr Brearley directly if there were any further issues. A broadly similar allegation was made in the particulars of claim, although it was not indicated that the employment team had already been involved.) I prefer Mr Brearley's initial evidence in cross-examination to the effect that no advice was provided, save that it is clear from the documentary evidence that Mr Kelly's input had not previously been obtained.

222. I accept Mr Cutler's evidence that he told Mr Brearley that he should discuss the position with Mr Kelly. Mr Brearley agreed to do so and said he would also send over his resignation letter so that it could be reviewed at the same time. It is clear that Mr Cutler did not himself review Mr Brearley's (or Mr Venables') service contract either before or at this meeting. He tried and failed to see Mr Kelly afterwards, and subsequently arranged for Mr Kelly to collect the service agreements from Mr Cutler's desk.

Events of 21 and 22 April 2015: call with Mr Kelly

223. On 21 April Mr Brearley sent a draft letter of resignation to Mr Cutler, saying that it was the letter that he intended to "use on Friday" (this was 24 April, the date on which Mr Brearley in fact resigned). Mr Brearley asked whether it should be amended. Mr Cutler immediately sent the letter on to Mr Kelly. Later in the day, having tried to speak to him, Mr Kelly emailed Mr Cutler. The material part of the email reads as follows:

> "The resignation letter itself seems fairly innocuous though obviously I don't know the background or what his endgame is. I'd query his stating at this stage that he is staying in the sector though not with a rival – though he may have a good reason for being upfront on this?
>
> Also a quick look at his service agreement shows a non solicitation covenant lasting 3 years – almost certainly unenforceable in an employment agreement. There doesn't appear to be any pure non compete covenant as such – maybe the Company works on the basis that the other restrictions will effectively keep him out of the sector in practice?"

224. Mr Cutler spoke to Mr Kelly after this email to explain that the relevance of Mr Brearley stating that he was remaining in the industry was because he was setting up a JLR franchise, and to suggest that Mr Kelly contact Mr Brearley quickly as he was looking to resign shortly. He reiterated what he had said in February about Mr Brearley being a senior individual in Pendragon, and having been headhunted by JLR. Mr Cutler did not give a full briefing to Mr Kelly because he believed that the conversation at the Home Deli covered the need for Mr Brearley to explain the "bigger picture" to Mr Kelly. It is not apparent that he told Mr Kelly that Pendragon had previously considered the relevant opportunity.

225. Mr Kelly emailed Mr Brearley early the following morning, 22 April, to introduce himself and suggest that they spoke "to help formulate a strategy – and ensure your letter works best for you". He explained that he was in client meetings that morning but could speak later. They arranged to speak at 2.30pm. Mr Kelly was in his car on the way back from Nottingham, but broke his journey to have the call.

226. The content of the call, of which there is no contemporaneous note, was heavily disputed. Overall I prefer the substance of Mr Kelly's account of it, but subject to qualifications. In particular, I do not consider that the discussion of restrictive covenants is likely to have been as detailed as Mr Kelly now recalls.

227. Mr Brearley's account, according to his first witness statement, can be summarised as follows. He said that he and Mr Kelly spoke at length about Mr Brearley's position and the most appropriate strategy for leaving Pendragon. Mr Brearley understood that Mr Kelly had been fully briefed by Mr Cutler. They discussed the age of the service contract and the difference between Mr Brearley's current role and the role referred to in the agreement, and Mr Kelly seemed "very dismissive" of the contract given those features. The restrictive covenants were "nothing to worry about". Mr Kelly focused more on the content of the resignation letter, and seemed relaxed about the entire process, not suggesting that there would be anything to stop Mr Brearley from pursuing the Wolverhampton Opportunity. Mr Kelly did not say, as alleged in Higgs' amended defence, that enforceability of covenants depended on reasonableness, and that Mr Kelly was not in a position to advise in detail but that some of the covenants appeared to be enforceable.

228. This account contrasts with the letter of claim and the particulars of claim. The former simply asserted that Mr Kelly confirmed that he had discussed the matter with Mr Cutler, had reviewed the service agreement and did not raise any concerns about the restrictive covenants. The particulars of claim contain quite a detailed description of the content of the call, including reference to the 10/10 scheme, the resignation letter and what it should say about Mr Brearley's plans. In relation to the service contract, it alleged that Mr Kelly stated that the contract was old and that he did not give any advice that contradicted Mr Cutler's advice that he was not precluded from pursuing the Wolverhampton Opportunity, with Mr Brearley understanding that Mr Kelly agreed with Mr Cutler's previous advice because he had been told that he would be informed if there was any disagreement with that advice. I also note that Mr Brearley's second witness statement appears to differ from his first about the level of detail provided about

his plans, suggesting that he made Mr Kelly aware of the "broad outline" and that Mr Kelly may not have been as aware of the detail as his partners were.

229. In cross-examination Mr Brearley's evidence was both internally inconsistent and inconsistent with his witness statement. As I understood that evidence, it was that he understood that Mr Kelly expressed the confident view that the entire service contract was unenforceable, or at least that there was nothing in the service agreement that worried him.

230. Mr Kelly's account of the call is that it was a relatively short discussion in which Mr Brearley wanted to focus on the terms of his resignation letter and indicated no interest in discussing his restrictive covenants. They did not discuss Mr Brearley's role at Pendragon or future plans in any detail. Mr Kelly had limited information at the time. However, Mr Kelly told Mr Brearley that his contract contained restrictive covenants which could impact his freedom to pursue business activities, that whether they were enforceable depended on whether they were judged reasonable, which would turn on a range of factors, and that he needed more detailed information to advise fully but that at least some of the covenants appeared to be capable of being enforced, although the three year non-solicitation clause was almost certainly not enforceable. He also said that, regardless of covenants, Pendragon was likely to respond negatively if it felt threatened by what Mr Brearley might do next. He recommended that Mr Brearley should consider agreeing a deal with Pendragon to vary his covenants, offered to provide further advice and said that he could assist him with a settlement agreement. It was an informal discussion and he did not regard himself as retained to provide formal advice. Mr Brearley seemed very relaxed about his ability to proceed with the Wolverhampton Opportunity.

231. I am entirely satisfied that Mr Kelly did not advise that the entire service contract was unenforceable, or at least that there was nothing in the service agreement that worried him, whether because of the age of the contract, the change in role or otherwise. That would be entirely inconsistent not only with my assessment of Mr Kelly's knowledge and experience as an employment lawyer but also with his email to Mr Cutler on 21 April. I also conclude (as his email of 21 April also indicates) that Mr Kelly had only had a limited briefing from Mr Cutler and did not obtain sufficiently detailed information from Mr Brearley during the call to be in a position to give any definitive advice about the restrictions in the contract, although he was aware that he held a senior position at Pendragon. Further, the focus of the call was on the resignation letter, which Mr Brearley wanted to concentrate on given his plan to send it that week.

232. I am satisfied that there was some discussion of restrictive covenants on the call and that Mr Kelly recommended further consideration of them, and in particular that consideration should be given to reaching agreement with Pendragon about them. This is strongly supported by emails that Mr Kelly sent to Mr Brearley on 2 July 2015, the first asking generally, "Is all ok with your own position" and the second, in response to Mr Brearley saying that he had agreed his exit date and payment arrangements, asking, "Have you agreed anything re restrictions?". That second question only makes sense in the context of a prior discussion that referred to restrictions, and in circumstances where Mr Kelly had some concerns about

the absence of any agreement, rather than having said that there was nothing to worry about. Whilst, as Mr Turner suggested, an agreement might be prudent in practice to gain certainty even if covenants were thought to be unenforceable as a legal matter, I am satisfied that Mr Kelly did not hold that view in respect of all the covenants to which Mr Brearley was subject.

233. It is clear from the last sentence of Mr Kelly's email to Mr Cutler on 21 April that, with the exception of the 36 month covenant in clause 19.1(iii), he did not take the view at the time that the restrictive covenants were simply unenforceable. The reference to there being no "pure non compete" was to there being no covenant that dealt simply with competition. Rather, the non-dealing provision in clause 19.1(i) included a competition element. Mr Kelly clearly had in mind that there were restrictions that could "keep him out of the sector". In context this must have been a reference to clauses 19.1(i) and (ii). I am satisfied that Mr Kelly did not give advice that entirely contradicted this, as Mr Brearley alleges.

234. I also consider it more likely than not that Mr Kelly indicated that he would need more information to provide definitive advice, and expressed his willingness to do so. I accept his evidence that he could not recall a situation where he had not expressed the importance of obtaining detailed instructions before giving definitive advice in this area.

235. In addition, I am satisfied that Mr Brearley gave Mr Kelly the impression of being relaxed about being able to proceed with his plans.

236. There is more of a question as to whether Mr Kelly clearly communicated to Mr Brearley the risk that at least some of the covenants could be enforceable, as he now believes that he did, and that a more detailed assessment was required. My overall assessment is that he was not as clear as he now believes that he was. This was Mr Kelly's first call with a potential client from whom he was trying to elicit a retainer to advise on his termination arrangements. Mr Kelly would naturally have been guided by what his (prospective) client wished to discuss, which was his resignation plans. I conclude that the fact that Mr Brearley seemed unconcerned about the terms of his contract and uninterested in discussing it influenced how much Mr Kelly said on that topic.

237. The fact that the dynamics of the call were largely led by what Mr Brearley wanted at the time is supported by Mr Kelly's brief email sent the following day to Mr Cutler, in which he reported that he had spoken at length with Mr Brearley and "answered all the questions he has for now". This is also apparent from the particulars of claim, which give the clear impression that the focus of the call was Mr Brearley's planned resignation and the content of the resignation letter.

238. It is clear that Mr Brearley's questions on the call did not include a request for Mr Kelly's advice about restrictions in his service agreement, and further that no such advice was requested by Mr Brearley from Mr Kelly before Pendragon's cease and desist letter. Mr Venables also asked for no such advice before mid-September 2015. What Mr Kelly did manage to say on the subject on the call on 22 April was what he volunteered, rather than something that was requested. I

have concluded that the primary reason for the failure to request advice was Mr Brearley's confidence in JLR's support and its influence on Pendragon.

239. Mr Kelly confirmed in cross-examination that he did not advise Mr Brearley to do nothing further, and in particular not to resign or to delay his resignation, until he had received definitive advice. Mr Brearley sent his resignation letter on 24 April. The letter was written in a positive manner, stating that Pendragon could be "assured of my focus" during the notice period and that the business was "in great shape". It referred to the failure of long term incentives and Mr Brearley's loss from the 10/10 scheme as reasons for his decision to determine his own income, and said that Mr Brearley would be "engaged in the sector but will seek no employment with a rival group".

240. Mr Kelly was challenged during cross-examination about references he made in December 2015 and early 2016 to not having given any advice to Mr Brearley before receipt of the cease and desist letter. This is discussed further from paragraph [313] onwards. Although I understand Mr Kelly's explanation that he recalled the call on 22 April but that what he was referring to was formal advice under a retainer, which he had not given, I agree with the claimants that the existence of the references do not support Mr Kelly's current recollection about the level of detail he went into on the call about the enforceability of restrictions. However, I also agree with Higgs that the fact that it was not until December 2015 that Mr Brearley made any complaint about having previously received advice that the contract or covenants were unenforceable, and in particular that he did not raise the issue when negative advice was received on 25 September (see below), supports its case that Mr Brearley did not receive the advice that he claims to have received in the earlier part of the year, including on the call on 22 April. The lack of complaint is more consistent with Mr Brearley not having previously received advice.

241. It is obviously very unfortunate that Mr Kelly took no note of the call on 22 April, either by way of attendance note or follow up email to confirm what was said, and it does not assist Higgs' case. If clear advice had been given about the potential enforceability of the restrictive covenants, but Mr Brearley wanted to proceed with his resignation regardless, then that would be an obvious case where a competent solicitor would create a written record of the advice, and would wish to ensure that the client saw it.

Events after 22 April 2015

242. Following the call, Mr Kelly attempted to follow up with Mr Brearley on a number of occasions with a view to setting up a meeting at which formal advice could be given. He was clearly keen to obtain the instruction. He attempted to telephone Mr Brearley but without success. He also sent Mr Brearley an email on 11 May asking how things were progressing and offering a further chat. He emailed again on 10 June offering his assistance, and sent the further email on 2 July referred to at [232] above. Mr Brearley did not respond.

243. In the meantime, instead of asking for advice about his own contract, Mr Brearley referred another senior Stratstone employee, Claire Price, to Mr Kelly to give her

advice about her own position. Mr Brearley paid Higgs' fees for the advice on behalf of Ms Price.

244. Ms Price had a marketing role at Stratstone and had a grievance concerning Mr Finn's daughter Victoria Finn, who also had a marketing role in the Pendragon group. Mr Brearley was Ms Price's line manager. Mr Kelly advised Ms Price in connection with the termination of her employment with Pendragon, which resulted in a settlement agreement. Mr Kelly sent an email on 8 June 2015 advising Ms Price about the restrictive covenants in her agreement, which Mr Brearley saw and relied on in his first witness statement. The covenants were evidently in similar terms to Mr Brearley's, but importantly clause 19.1(i) had been struck out, and Mr Kelly pointed out that the "poaching" restriction in clause 19.1(ii) might not be of concern to Ms Price. Mr Kelly's email stated that the position on restrictive covenants "looks good", and specifically pointed out that:

> "The restriction on your soliciting or dealing with customers (19.1(i)) has been struck out and apparently initialled by both parties – so we will assume it doesn't apply."

245. It is worth bearing in mind that by this stage Mr Brearley had clearly looked at his own service agreement (see his email to Mr Cutler dated 13 February, referred to at [216] above). His version of clause 19.1(i) was not struck through. I infer from the fact that he encouraged Ms Price to obtain formal advice but did not do so himself is that he believed that Ms Price could benefit from assistance that he did not require. In Ms Price's case this may well have been mainly with a view to her securing a financial settlement rather than as a result of direct concerns about restrictive covenants. However, I conclude that the specific advice that had clearly been requested in respect of restrictive covenants was given with a view to Ms Price being potentially free to work in the new business that Mr Brearley proposed to establish. Mr Brearley accepted in cross-examination that he had spoken to Ms Price about the project, the business plan for which allowed for a full time marketing executive. I conclude that Mr Brearley saw no need for such advice on his own account, because of the strength of his relationship with JLR and the influence that he believed that JLR had with Pendragon.

246. During May 2015 Finance Birmingham requested copies of Mr Brearley's and Mr Venables' service agreements in order to review the restrictive covenants, as part of the due diligence it was conducting. Mr Kelly provided copies to Mr Pearson at Smith & Williamson on 15 May. A Finance Birmingham report dated 9 July 2015 stated that Finance Birmingham and Freeths had reviewed the contracts and were comfortable that there was "nothing that precludes management from becoming directors of Opco/Propco". Also during May Smith & Williamson produced a revised Information Pack which was copied to Mr Cutler. The cover email (dated 22 May) made clear that Mr Brearley had tendered his resignation to Pendragon but had not disclosed his involvement "at this stage".

247. Prior to the Pendragon proceedings no engagement letter was issued by Higgs that covered advice in respect of Mr Brearley's employment position. Two engagement letters were sent on 9 July 2015, one addressed to BSPR and JRBA covering corporate and shareholder documentation, and the other addressed to

BSPR covering its funding arrangements. Both letters set out the proposed work in detail. They did not specify advice in respect of Mr Brearley's or Mr Venables' employment position at Pendragon. Higgs carried out work in accordance with these engagement letters between late June (when a draft engagement letter was first circulated) and September 2015.

248. I accept Mr Cutler's evidence that the delay in the issue of engagement letters was linked to the timing of receipt of finance documents (see [207] above). I conclude that, despite Mr Brearley's belief that the project was ready to move forward when he resigned in late April, funding remained to be secured thereafter, with the project effectively continuing largely in abeyance from Higgs' perspective until June 2015. During June funding documents were received from Finance Birmingham and Barclays, Higgs' property department were instructed to deal with the transfer of the Graiseley Hill site to the SIPPs, and towards the end of the month Mr Taylor started to become involved in discussions about a shareholders' agreement. Ms Elliott was also asked in early July 2015 to prepare a draft lease from BSPR to JRBA, and Higgs' property department did some other limited work between July and September.

The Pendragon proceedings

249. From approximately July 2015 Pendragon started to develop concerns about Mr Brearley's plans, based on aspects of his behaviour and comments he was making about what he might do next. This prompted a search of Companies House which identified the existence of JRBA, but nothing further was identified.

250. The immediate prompt for an investigation was an email sent by Mr Brearley to Mr Venables and to Ms Price at her Pendragon email address, checking availability for a meeting. Ms Price had already left the company and her inbox was being monitored by Ms Finn. Mr Venables had resigned but had not yet left. The investigation revealed information about JRBA, BSPR and their activities in relation to Graiseley Hill and Penn Road.

251. Mr Finn approached Mr Hicks and challenged him at a meeting, making clear his view that Mr Brearley was in breach of his contract and could not be allowed to pursue the project. Mr Hicks initially adopted a "no comment" approach but opened up to some extent, suggesting that there was nothing in writing and that Mr Brearley had indicated that his contract would not be problematic. I have concluded that it is most likely that this meeting took place on Saturday 12 September 2015.

Cease and desist letter

252. On 15 September 2015, Eversheds sent Mr Brearley by email a cease and desist letter on behalf of Pendragon. Mr Brearley forwarded it to Mr Kelly and Mr Taylor. In his fairly lengthy covering email he speculated as to the source of the leak, saying that he believed it came from Barclays, and referred to Mr Finn having approached JLR a few days earlier to try to dissuade it from dealing with Mr Brearley. He expressed concern about potentially having to disclose the situation (this would have been to potential investors) "if we cannot nip it in the

bud". He asked Mr Kelly to review the letter, commenting that it appeared to be "bluff and bluster" to him, and suggested a discussion the following day. He referred to the 10/10 scheme and being asked to sign a disclaimer document before he left, he thought in connection with that, and then said the following:

> "It strikes me that it may be sensible to hit back hard. The group has no real stomach for a fight with me which would involve JLR at a high level (we can make reference to involving them, given they have made it clear they have spoken to them)."

The email went on to refer to the content of Mr Brearley's resignation letter and to complaints about the 10/10 scheme and other remuneration arrangements. He suggested copying the Pendragon chairman directly into the response, on the basis that he was "very risk averse", and referred to a threatened complaint to the Financial Conduct Authority in respect of the 10/10 scheme.

253. The cease and desist letter alleged that there had been a number of "significant and extremely serious" breaches of Mr Brearley's employment contract both during and after his employment, including setting up his own business, being involved in discussions with JLR with a view to entering into competing business, and approaching current employees (specifically Mr Venables). Various clauses were referred to and there was also specific mention of misappropriation and retention of company information and of breach of fiduciary duty. The letter demanded delivery up of all of wrongly retained information and an undertaking to comply with all restrictive covenants and ongoing duties in respect of confidential information.

254. Mr Brearley attempted to speak to Mr Finn. In an exchange by text, Mr Finn said that he was happy to have a discussion but the undertakings were required first. I accept Mr Finn's evidence that from his perspective the aim of the discussion would not have been to allow discussion of a possible accommodation which could allow Mr Brearley to proceed with the project. Rather, at this stage Pendragon were playing "catch up". The aim of any meeting would be to try to find out in more detail what was going on. There was also hope that Pendragon might be able to pursue the Wolverhampton Opportunity itself. Mr Finn had raised that possibility with Mr Hicks at their meeting a few days earlier. He did so again in an email sent on 17 September, which referred to Pendragon's wish to "revisit our retention of the Wolverhampton market", to having asked Mr Bailey to "refresh our thoughts" and to being "confident we can provide a great solution". Mr Finn requested a meeting to discuss it.

255. The emails indicate that, initially, Mr Hicks did encourage a dialogue between Mr Finn and Mr Brearley. However, on 25 September JLR sent letters to both parties adopting the approach of refusing to have discussions with either party until the dispute was resolved.

256. Despite these letters, a dinner that happened to have been pre-arranged with Mr Finn for (it seems) 28 September was also used by Mr Goss to try to encourage a consensual resolution, and it appears that there was a further meeting a few days

later. I accept Mr Finn's evidence that he communicated Pendragon's view of the seriousness of the situation to both Mr Hicks and Mr Goss.

Meeting on 16 September 2015

257. Mr Brearley met Mr Kelly and Mr Taylor, with Ms Farooq in attendance as notetaker, the following day. Ms Farooq's typed notes were available (which she prepared later on the same day) together with the handwritten note that she took at the meeting. Ms Farooq sent her typed notes, which she described as a "draft note", to Mr Kelly early the following morning saying, "I'm aware this one might need editing, just let me know". There is no evidence of any comments being made on the note, and I conclude that Mr Kelly did not in fact get round to reviewing it at the time. That is unfortunate. Ms Farooq's independent recollection of the meeting was extremely hazy. She also gave evidence that she thought that this was the first significant meeting she had attended as a trainee.

258. Mr Brearley's evidence in cross-examination was to the effect that he was relying on his solicitors to advise as to the next steps, in particular as to whether the requested undertakings should be given, and that he did not have or express any confidence that JLR would stop Pendragon. He believed that the meeting notes were generally a fair record (although he accepted that it was difficult to recall the meeting). He said that Mr Kelly was confident and gave what Mr Brearley understood to be positive advice.

259. In most respects I prefer the account of the meeting provided by Mr Kelly and Mr Taylor to that provided by Mr Brearley. In particular, the focus of the meeting was to determine how to respond to Eversheds' letter. Mr Brearley's clear instructions (consistent with his email of 15 September) were to prepare as robust a response as possible. He was confident that, if they played for time, the matter would be dropped. In the meantime the response should include whatever arguments could be included, even if the arguments were weak. It is noteworthy that Ms Farooq's notes include a sub-heading "Points James would like covered in a response to Eversheds". The points covered under this sub-heading in the notes include Pendragon's focus on the used car business in contrast to Mr Brearley's own focus on premium new cars, Pendragon's failure to invest in Wolverhampton, and a reference to JLR being kept informed about the matter, the last of these being with a view to making Pendragon "wary of damaging their profitable relationship with JLR".

260. Mr Brearley's confidence that Pendragon would back down is entirely consistent with the views he expressed earlier in the year to Mr Brough, with my conclusions about his reasons for not seeking advice about his service contract earlier and with Mr Venables' understanding of Mr Brearley's views. The fact that he expected JLR to intervene if required is consistent with the fact that he was clearly in contact with senior JLR executives to discuss the position. The email of 21 September referred to at [270] below, sent to Mr Goss, Mr Hallmark and another executive, illustrates this. It set out Mr Brearley's perspective on the position in detail and was obviously sent with a purpose.

261. I do not accept Mr Brearley's evidence in cross-examination that he did not express confidence to Higgs. It is also noteworthy that the discussion at the meeting, as evidenced by Ms Farooq's notes, is not consistent with Mr Brearley's evidence that he was previously advised that his (entire) service contract was unenforceable.

262. Although the meeting was a lengthy one, the time was spent obtaining instructions as to the factual position, which included Mr Brearley's own complaints about Pendragon's treatment of him in respect of the 10/10 scheme and his remuneration for 2015, and deciding on the immediate next steps. The function was not to provide considered legal advice about the strength or otherwise of Mr Brearley's case, and Mr Brearley did not ask for such advice at the time. Time was also spent on addressing the need to disclose the issue that had arisen with Pendragon to prospective funders. Mr Brearley expressed confidence that investors would not be deterred given that he could confirm JLR's support.

263. It is also the case that Mr Brearley did not give full and accurate information to Higgs. For example, he indicated that Pendragon lost the ability to purchase the Penn Road site by missing a deadline imposed by the seller and that it chose not to proceed due to the cost of development. Importantly, he also maintained that Pendragon's strategy of investing in the volume used cars business meant that JRBA would not be in competition. He could see no commercial gain for Pendragon in pursuing the allegation. There was also no proper explanation of the degree to which Mr Brearley had been involved in the Wolverhampton Opportunity and the steps taken while he was still employed by Pendragon, or any real indication of his involvement in Pendragon's decision not to pursue it.

264. The fact that the purpose of the meeting was not to provide formal advice, and Mr Brearley's confidence at the time, are both supported by email exchanges between Mr Kelly and Mr Taylor. On 18 September Mr Kelly raised the question of opening a separate employment file for Mr Brearley in his personal capacity and asked whether Higgs should prepare a "separate note of advice to James on this setting out our best advice on the legal position", noting that he did not want to incur unnecessary costs but "if this is going to be necessary to keep investors onside it's something we should do". Mr Taylor responded on 21 September (the following Monday) agreeing to a separate file, saying that Mr Brearley had not raised the question of a note of advice and adding:

> "…but I do think this is going to be necessary Damian and short notice (probably the next two days). James is confident in the position and this letter therefore important as I am not sure the extent to which we have fully set out the position to him and any risks/concerns/issues. The [correspondence with Eversheds] has now been sent to numerous lawyers/funders and I expect them to ask for a copy of our advice."

265. Mr Kelly responded a couple of hours later, following a meeting with Mr Brearley, to say that he had raised with him "the issue of us providing formal advice to him on his legal position" and that "he understood and agrees".

266. Mr Kelly and Mr Taylor were challenged about the reference to keeping investors "onside". I am satisfied that Mr Kelly made the comment without really thinking through exactly what the content of the advice would be and whether it might in fact have the opposite effect on investors, and that Mr Taylor did not apply his mind to the point either at that stage. The comment would be more pertinent in relation to the proposed robust response to Eversheds. As far as Mr Kelly was concerned Mr Taylor rather than he would determine exactly what investors needed and when. If Mr Kelly was at all sanguine at the time it would have been because of Mr Brearley's confidence about the position in practice and, as regards the legal position, because he understood from Mr Brearley that it would be possible to pursue an argument that JRBA would not be competing with Pendragon. Mr Taylor's views were affected by what he perceived to be Mr Brearley's "supremely confident" view that the issue would go away.

267. The most contentious parts of the notes of the 16 September meeting are a statement attributed to Mr Kelly in the typed version that the covenants in clause 19 are "not as much of a concern as Eversheds' letter suggests" and another comment that "DK advises the clauses in question appear unenforceable anyway". In the handwritten version the latter is accompanied by a reference to "unenforceable contract, business as usual", which appears to be directed to the content of the proposed response.

268. I accept that the first of these statements may well have been made or intimated. However, I am satisfied that, despite the apparently clear statement in the notes (and Ms Farooq's undoubted care in attempting to record the meeting in detail), Mr Kelly would not simply have said that the covenants were unenforceable, as opposed to saying that the 36 month covenant in clause 19.1(iii) was probably unenforceable or that it might be put to Pendragon that they could not enforce the provisions on the facts. Apart from not being the recollection of either Mr Taylor or Mr Kelly, legal advice that the covenants were unenforceable would be inconsistent with, among other things, Mr Kelly's email of 21 April which referred to Mr Brearley being kept out of the sector, the advice that he gave to Ms Price, Higgs' response to the cease and desist letter (see [275] below), the draft advice to Mr Brearley that Mr Kelly prepared a few days later (also discussed below) and the lack of reaction to that by Mr Taylor, the advice Mr Brearley received on 25 September and his reaction to that advice (see below), and more generally my assessment of Mr Kelly's knowledge and experience as an employment lawyer. The handwritten version in particular, with its "unenforceable contract, business as usual" reference, is also explicable as a note about the content and presentation of the proposed response.

269. It is also hard to reconcile the statement with an earlier section of the note. This referred in the typed version to the non-dealing clause (that is, clause 19.1(i)) as the "most relevant" but said that in the absence of a definition of dealing "James can argue that his discussions with JLR do not amount to dealing". This is followed by a reference to Mr Brearley arguing that Pendragon were in breach of contract such that the covenants "fall away". There is then a reference to the period for which restrictions would run "[if] the twelve-month restrictive clauses are enforceable". I conclude that there is simply an error in the later part of what is a lengthy note.

270. Mr Turner relied on the fact that an attendance note of a meeting that Mr Kelly had with Mr Brearley on 21 September records that Mr Brearley showed him a copy of an email he had just sent to senior JLR executives. That email referred to Mr Brearley having "sought several legal opinions" in relation to his contractual position and being "absolutely happy that I have no personal liability". There is no evidence that Mr Kelly queried these references. He did not recall the email when shown it in cross-examination, but did recall that the meeting with Mr Brearley was very brief. However, his attendance note suggests that he at least scanned the email when he prepared the attendance. I conclude that the most likely explanation is that he did not spot the reference, which he clearly did not recall.

271. I conclude that the content of the meeting on 16 September, and the stance adopted by Mr Kelly and Mr Taylor, would have been significantly influenced by Mr Brearley's level of confidence and by his firm instructions, as well as by the impression he gave that JRBA would not be operating in competition. Whilst Mr Kelly and Mr Taylor both gave evidence that the relative strength of different arguments were discussed, the fact that Ms Farooq gained the impressions reflected in her notes indicates that the legal risks were not spelt out clearly. Mr Kelly accepted in cross-examination that he could not recall advising Mr Brearley in terms at this meeting that he was likely to lose. However, it is also important to bear in mind the relevance of the impression given by Mr Brearley that JRBA would not be competing with Pendragon, given the competition element included in the key covenant in clause 19.1(i) (as to which see the comment in the draft advice referred to at [286] below), and a lack of appreciation of the extent of Mr Brearley's involvement with the Wolverhampton Opportunity while he was at Pendragon.

272. The fact that Ms Farooq's note was not entirely accurate is not surprising. This meeting occurred very shortly after she started her training contract and the note was not reviewed by anyone else. There can be no criticism of her, and rightly none was suggested.

273. A further observation to make is that it does not appear that there was any discussion of potential exposure to breach of fiduciary duty or to a potential liability to account for profits (whether under the terms of the contract or otherwise). By this stage, Eversheds had alleged breach of fiduciary duty: see [253] above. Instead, Mr Kelly appears to have indicated that Pendragon could struggle to show substantial loss from a breach of the restrictive covenants, because by the time trading started there would only be a month or two to which the non-dealing covenant could apply.

274. It is also the case that Higgs did not advise Mr Brearley at this meeting that he should give the undertakings that Pendragon were requesting. However, it is apparent from the draft advice produced on 24 September (discussed below) that it was discussed at the meeting. That draft advice lists it as one of the available strategic options in the following terms:

> "Give the requested undertakings and cease discussions with JLR until the expiry of your restrictive covenants. For the reasons discussed, this will obviously be a highly unattractive option for you."

(The other options raised were, in summary, either to await further correspondence from Eversheds or to approach them on a without prejudice basis with a view to reaching agreement, possibly on the basis of not operating JLR dealerships other than Wolverhampton.)

Response to cease and desist letter

275. Higgs responded to the cease and desist letter on 18 September, refusing to give the undertakings. Higgs' letter alleged a repudiatory breach of contract by Pendragon in relation to Mr Brearley's remuneration for 2015. It also asserted that Mr Brearley was not in breach of clause 19.1(i), asserting that Pendragon distinguished manufacturers from suppliers, with only the latter being caught by the restriction, and stating that in any event the clause did not cover discussions with JLR about possible future business interests as opposed to actually transacting business (which Mr Brearley had not done), the former not being within the scope of the prohibition on dealing in clause 19.1(i). The letter also asserted that there was no breach of clause 19.1(ii), stating that it did not prohibit Mr Brearley from having contact with employees and would be unenforceable if it did so. There is no hint of a suggestion that either of these clauses were simply unenforceable.

276. The letter went on to make comments about Pendragon's business strategy, in contrast to that of Mr Brearley, to its lack of investment in JLR dealerships and to a decision of its Board ("not including our client") not to proceed with Wolverhampton, stating that Pendragon had demonstrated that it had no legitimate business interest in the project so that it was difficult to see what losses Pendragon could sustain. It also referred to Pendragon's continuing relationship with JLR and to Mr Brearley's proposal that he "keep JLR informed of developments". The 10/10 scheme was mentioned.

277. Eversheds sent a brief holding response the same day, but also requesting that by the following Monday (21 September) Higgs confirm that Mr Brearley had returned all company property in accordance with his service agreement, and that he did not hold any of Pendragon's confidential information. Higgs (via Mr Kelly) replied on 21 September reiterating that the undertakings would not be given but also stating that Mr Brearley had confirmed that he "holds no Company property or other confidential information belonging to the Company and that he has retained no copies or extracts therefrom". (See further below in relation to this.)

17 to 24 September 2015: other work

278. During the period immediately following the 16 September meeting Higgs' corporate team continued working on the Wolverhampton Opportunity. For example, there was a project meeting with Smith & Williamson on 17 September attended by Mr Taylor and another Higgs solicitor, and which was also attended

by Mr Brearley, Mr Venables, Mr Danks and Mr Smith. The agenda indicates that the topics covered included updates on funding and the completion of the Penn Road acquisition, and structuring and tax advice work in relation to BSPR and JRBA. Mr Taylor's unchallenged evidence was that Mr Brearley updated attendees about the receipt of the cease and desist letter but expressed his confidence that the matter would "go away" and that work should continue to progress, indicating that he had been given comfort to that effect by his contacts at JLR. It was agreed that the correspondence would need to be disclosed to funders, but they would first be spoken to by Mr Pearson at Smith & Williamson and by Mr Brearley.

279. There was also a conference call on 18 September with Mr Brearley and Mr Danks to discuss the funding documents. An email from Mr Taylor to Smith & Williamson on that date records that there was a discussion of "the need to disclose the position to the funders and how best to manage that process". It attaches the correspondence with Eversheds and the correct version of Mr Brearley's service contract (the version referred to in Eversheds' first letter being the superseded version signed in 2000).

280. Some work continued thereafter, including (on 21 September) the adoption of new Articles of Association for each company. Ms Elliott was also asked to prepare an agreement for lease between BSPR and JRBA, which was required by Barclays.

281. Mr Taylor was cross-examined as to why work continued if Mr Brearley's account of the 16 September meeting was incorrect and Mr Kelly had not in fact advised that the covenants were unenforceable. I accept his explanation that Mr Brearley was clear that he wanted matters to continue to be progressed. Given Mr Brearley's degree of confidence at the time it is understandable that his instructions were followed. If Mr Brearley had proved right then an unnecessary cessation of work, contrary to his wishes, would no doubt itself have been a basis for criticism.

Draft advice

282. During the early evening of 24 September Mr Kelly sent a draft email of advice to Mr Taylor for his review. Mr Kelly subsequently received a message that the advice should not be sent to Mr Brearley. I accept Mr Taylor's explanation in cross-examination that this message was sent because he had not at that stage had a chance to review the advice. However, it is also clear that Mr Taylor wanted to think through whether there was a conflict of interest between Higgs' clients (an email he sent later that evening indicates recognition of a likely need to obtain the agreement of Mr Smith and Mr Danks to address the potential conflict). In fact, the draft advice email was never sent and the position was instead discussed at a meeting the following day, as explained below.

283. I agree with Mr Kelly's observation that it would have been preferable if formal written advice had been provided. Mr Brearley would then have had a clear record. I deal with the aspects of the draft advice that dealt with the strength of Mr Brearley's legal position (as opposed to court process, fees and strategic

options) in some detail below not because Mr Brearley saw the email at the time, but because in my view it supports Mr Kelly's and Mr Taylor's account of the meeting on 16 September, it gives an indication of the lack of information Higgs had about relevant facts, in particular Pendragon's own position regarding Wolverhampton and the extent of Mr Brearley's prior involvement, and because it also provides a good indication of the advice that would actually have been given to Mr Brearley at the meeting the following day, discussed below. I should also clarify that, although Eversheds responded to Higgs' letter during the afternoon of 24 September, it is clear from the content of the draft advice email that it was at least largely prepared without reference to the response. This is consistent with Mr Kelly's evidence that he started work on the advice on or around 22 September.

284. The draft advice referred to parts of clauses 3 and 5 of Mr Brearley's employment contract as well as clause 19 and the provisions dealing with the return of company property and confidential information. It noted that Higgs lacked detailed instructions regarding Mr Brearley's activities during his employment and indicated that, whilst based on the information available there had been certain breaches in incorporating JRBA and having some discussions with JLR, Pendragon might have difficulty in establishing loss. As regards the restrictive covenants, the draft advice addressed weaknesses in the argument about repudiatory breach by Pendragon and then went on to say that clauses 19.1(i) and (ii) were "both capable of being enforced" insofar as they protected legitimate business interests, and that Pendragon would have "good prospects" of demonstrating that a non-dealing clause was justified given Mr Brearley's close personal connection and deep business relationship with JLR over many years.

285. The draft advice also explained that the argument raised in correspondence about discussions with JLR not amounting to "dealing" was worth including based "on your instructions to submit as strong a response as possible" but that "we consider it would fail". In relation to solicitation, it explained that the position in relation to Mr Venables would depend on whether Mr Brearley took active steps to persuade him to leave Pendragon. It also referred to the argument in correspondence that JLR was a "manufacturer" rather than supplier, saying that again this was worth including but "from a legal perspective, we consider it has little prospect of success".

286. The draft did refer to a "potentially strong argument" that clause 19.1(i) could not apply to prevent Mr Brearley operating the Wolverhampton dealership "on the grounds that Pendragon, by its own actions and statements, have themselves indicated that they do not wish to operate this dealership beyond May 2016" and had indicated that they were "no longer interested" in the Wolverhampton site. The argument that JRBA would not be in genuine competition was described as "your strongest argument". However, possible counter-arguments were noted, including in relation to potential expansion beyond the Wolverhampton site or competition with other Pendragon dealerships within a certain radius of Wolverhampton, and it was stated that if Pendragon was able to present strong arguments that JRBA was competitive then "they would have good prospects for enforcing the non dealing covenant against you". The overall summary was that

"from a purely legal perspective" Pendragon had a "potentially strong case" under clause 19.1(i) and (ii).

Eversheds' response of 24 September

287. Eversheds sent a detailed and robust response to Higgs' letter on 24 September. This included a specific refutation of the argument that Pendragon would not be damaged competitively on the basis of an (incorrect) assertion that its strategy was to focus on the volume used car business. There was a detailed description of Pendragon's consideration of Wolverhampton, an assertion that but for Mr Brearley's influence it would have decided to proceed with the project, and a claim that it was inconceivable that Pendragon would not be very significantly damaged by a diversion of the franchise. The letter set a deadline of Monday 28 September for the provision of undertakings, failing which it would issue proceedings and seek injunctive relief.

288. Eversheds' letter prompted a decision by Mr Garvie and Mr Kelly that counsel should be instructed. Marc Delehanty of Littleton Chambers was selected and instructed the following morning.

Meetings on 25 September

289. On 25 September there were a series of meetings at Higgs' offices, which both Mr Brearley and Mr Venables attended. These comprised an initial meeting with Mr Kelly, with Ms Farooq in attendance, a wider meeting including Mr Taylor and Mr Garvie, a telephone conference with Mr Delehanty and a short follow-up to that. Detailed notes were taken by Ms Farooq.

290. It is not necessary to describe the content of the discussion at the meetings in detail. My material conclusions are:

a) It was clear that the aim was to provide formal advice on Mr Brearley's position, including by assessing the impact of Eversheds' letter if taken at face value, and to discuss Mr Brearley's options, including giving undertakings or negotiating a settlement.

b) When he joined the meeting, Mr Taylor advised that draw down of funds be delayed. I conclude that he did not reach this view as a result of a change of legal advice by Higgs (as suggested in cross-examination) but instead that it was a view that he had developed on consideration of the position, taking account of the advice that Higgs was providing and Eversheds' robust response. Mr Brearley was reluctant to accept this advice. He did not want a delay in acquiring Penn Road because it risked losing the support of Waitrose, and he also wanted to keep funders on board.

c) It was made clear to Mr Brearley (even before the discussion with Counsel) that his legal position was weak, including that there was no repudiatory breach, that the dealing covenant looked enforceable and the manufacturer/supplier distinction would not withstand scrutiny, and that the strongest legal argument was that the business would not compete. Mr Garvie raised the question of breach of fiduciary duties and exposure to an

account of profits remedy. It is undisputed that neither fiduciary duties nor the account of profits remedy had previously been discussed with Mr Brearley.

d) Counsel confirmed that the relevant covenants were enforceable, and that the arguments about a manufacturer/supplier distinction and Mr Brearley's conduct not amounting to dealing would not work. Whilst it could be argued that an injunction was unnecessary because Pendragon did not intend to use the Wolverhampton site, Counsel was concerned about the allegation that Mr Brearley had breached his fiduciary duties by diverting a business opportunity, such that he was exposed to an account of profits. The difficulty in calculating that would be a reason for Pendragon to push for an injunction. It also had a very strong case for an interim injunction, whatever the position at trial.

e) There was a significant amount of discussion with Counsel about the role of JLR, in particular a strategy of getting it to apply commercial pressure, and seeking to delay proceedings while that happened. Counsel suggested that JLR's potential exposure to a dishonest assistance challenge could be a trump card because Pendragon would not wish to prejudice its relationship.

f) There was discussion of various possible compromises, including not dealing with JLR except in relation to Wolverhampton, or giving undertakings and not taking steps until they expired. Counsel advised offering contractual undertakings in the short-term while seeking a negotiated settlement.

g) Mr Brearley did not express surprise at the advice he received and did not give any indication that he had previously received contrary advice.

291. I conclude that throughout the meetings on 25 September Mr Brearley remained very confident that the matter could be resolved with JLR's influence. He also indicated that he believed that Mr Finn was acting without support of other members of Pendragon's Board and that they were likely to take a different view once appraised of the position. He suggested that Mr Finn was acting out of spite. Mr Brearley wished to continue to respond robustly and was against providing any concessions, including any commitment not to expand beyond Wolverhampton. His level of confidence was confirmed by all of the Higgs attendees, including Mr Garvie and Ms Farooq (the credibility of neither of whom was challenged to any extent by the claimants). Mr Garvie's evidence was that he tested Mr Brearley firmly on the point, expressing a concern that Mr Brearley was "putting all his eggs in one basket" in relying on JLR to exert pressure, and he did not waver. Mr Brearley's confidence continued following receipt of Counsel's advice.

292. I do not accept Mr Brearley's evidence that the atmosphere wholly changed with Counsel's advice. That advice was broadly consistent with what he had been told prior to the discussion with Counsel. I also do not accept the evidence in his second witness statement that Mr Brearley did not understand the strength of the

advice provided on 25 September. That position was not maintained in oral evidence, where he referred to being advised in stark and pessimistic terms, and where he accepted that following the meetings on that date Higgs' very clear view was that Mr Brearley should try to reach a settlement with Pendragon, consistently with Counsel's advice. I conclude that Mr Brearley understood the legal advice that he was receiving but remained confident that in practice the problem would go away and he would be able to proceed with the Wolverhampton Opportunity. In particular, I do not accept his suggestion that he relied on Higgs to formulate a strategy which he simply followed. I note that an allegation made in the particulars of claim about failure to appreciate the pessimism of the advice was not maintained in closing submissions.

293. Mr Brearley's attempt in cross-examination to portray himself as an observer rather than participant in the discussions with Counsel, and as wholly reliant on Higgs' advice as to what he should do, was not persuasive. Mr Brearley is an experienced businessman, was paying for the advice, and in my view would be far from being a passive recipient of legal advice who did not appreciate its significance. He would also have asked questions if he was not grasping the key elements of what was being said. I also note that the detailed note of the discussion with Counsel indicates participation by Mr Brearley, including in providing information (some of which was inaccurate or misleading).

294. Following the meeting Mr Taylor updated Mr Pearson at Smith & Williamson. In an email exchange Mr Pearson asked whether Mr Smith and Mr Danks were aware of the developments (which would have included Eversheds' latest letter and the legal advice that Mr Brearley had received from Higgs and Counsel). Mr Taylor responded "James was going to speak to them tonight/tomorrow". It is reasonably clear from this that Higgs were proceeding on the basis that Mr Brearley would update Mr Smith and Mr Danks. In fact, it is apparent from Mr Danks' evidence that Mr Brearley did not accurately brief them about the negative legal advice he had received, either at this stage or for some time afterwards. Mr Danks' oral evidence was that he only understood that Mr Brearley was concerned that he could not do the Wolverhampton project during December 2015, although it appears that by then Mr Danks had already started discussions with other potential bidders for the site, including Jardines.

Higgs' response on 28 September 2015 and the commencement of proceedings

295. Higgs responded to Eversheds on Monday 28 September, setting out what were said to be material inaccuracies and misunderstandings in Eversheds' previous letter, maintaining Mr Brearley's position and offering a meeting but no undertakings. Mr Brearley had been asked the previous evening to comment on a draft of Higgs' response. The content of that draft obviously reflected his detailed instructions given on 25 September, in a discussion of which there is a separate note and which apparently took place before the discussion with Counsel. It is apparent from that note that there were a number of inaccuracies in Mr Brearley's instructions, for example to the effect that he was not involved in the Pendragon investment appraisal and did not request it, and more generally that he had no significant influence on strategy and was not closely involved in the decision not

to proceed in Wolverhampton. In a short response on 29 September Eversheds confirmed that they had been instructed to issue proceedings.

296. It is clear from Higgs' response that Mr Brearley was not prepared to make concessions at this stage. It is undeniable that by this stage he had been advised that his legal position was weak and that he was also exposed to a claim for breach of fiduciary duties, including an account of profits remedy. As already mentioned, he also accepted in cross-examination that following the meetings on 25 September Higgs' view was that Mr Brearley should reach a settlement with Pendragon. That was an approach that was consistent with Counsel's advice. Rather, Mr Brearley said that his criticism of Higgs' actions in September 2015 was that they did not give this advice immediately after receipt of the cease and desist letter.

297. I conclude that at this stage Mr Brearley continued to believe that his relationship with JLR, together with JLR's influence on Pendragon and his view that proceedings would not command the support of the rest of Pendragon's Board, would be sufficient to allow him to proceed with the Wolverhampton Opportunity. It is worth noting that at the meetings on 25 September he made references to the dinner that Mr Goss was due to have with Mr Finn on 28 September (see [256] above), obviously hoping that that would produce a favourable result.

298. My conclusion that Mr Brearley was not prepared to make concessions at this stage despite the legal advice that he was receiving is supported by an email that Mr Kelly sent to Mr Taylor and Mr Garvie on 30 September, attaching Eversheds' latest letter. This email stated that Mr Brearley's latest instructions were that JLR had told Mr Finn that he had to come up with a proposal for "sorting this dispute out by Thursday pm when they are due to meet again". The email went on to say:

> "[Mr Brearley] still believes, based on his conversations with JLR, that Trevor will be called off and that he will be free to operate Wolverhampton, albeit possibly on condition of paying a sum to Pendragon in respect of goodwill."

299. Pendragon issued proceedings on 2 October 2015, seeking injunctive relief and damages against Mr Brearley, Mr Venables and JRBA. A hearing was fixed for 8 October. An email from Mr Brearley to Mr Kelly dated 4 October indicates that, based on a conversation with Mr Goss, he still had confidence that Pendragon would be persuaded to back down and that JLR was "fully supportive". The email refers to there having been two previous meetings with Mr Finn and another one planned. Mr Brearley continued to wish to defend the claim robustly. I also note that Mr Brearley sent a further email to Mr Goss and Mr Hicks on 6 October updating them on the undertakings that he was then proposing to give and continuing to express confidence that the project could be recovered if Pendragon "see sense", and referring to likely adverse publicity if Pendragon pushed ahead to trial. His recommendation that JLR's press office be briefed was, I conclude, not simply included as a courtesy to JLR.

300. Following discussion, agreement was reached on the terms of undertakings which were given to the court on 8 October, pending a full interim relief hearing. It is clear from an internal email sent by Mr Kelly following the court hearing that Mr Brearley wished to avoid having to serve a witness statement before 15 October, a date on which he believed Pendragon would be meeting with JLR and at which he thought that JLR would want confirmation that Pendragon would permit Mr Brearley to proceed with the Wolverhampton Opportunity. The email stated that Mr Brearley remained of the view that JLR would ultimately prevail on Pendragon to "withdraw their troops" and leave him free to proceed, but that he recognised that this was not guaranteed. It is also clear from the email that risks had been discussed with Mr Brearley, including the likelihood of losing at the interim relief hearing and/or at trial, and his exposure to significant costs. The email recorded that, whilst currently committed to the Wolverhampton project, Mr Brearley accepted that he might be forced to rethink.

301. By around mid-October 2015 Mr Brearley's confidence had diminished, and by 21 October he was telling Mr Kelly that he did not think he could save the Wolverhampton Opportunity, because he was likely to lose the funding opportunity. He started engaging in settlement possibilities with Mr Kelly, recognising the potential difficulties of trying to do so in a way that allowed the Wolverhampton project to be deferred until his covenants expired but not lost. It is clear that JLR had not intervened, or at least had not done so with any success, and that Pendragon was determined to proceed. By 30 October Mr Brearley was prepared to offer to walk away from the Wolverhampton Opportunity in order to settle the claims and be released from his restrictive covenants.

302. It is not necessary to set out a detailed summary of the events that followed, much of which is not material to the issues that I need to decide, but I will deal with certain specific matters that are of some relevance and were the subject of material dispute.

Disclosure, provision of information and document destruction

303. One area of contention related to disclosure. There are several strands to this.

304. The first point is that, following Eversheds' letter of 18 September (see [277] above), Mr Brearley sent an email to Mr Kelly, copied to Mr Taylor, in which he said that he would examine all emails sent from his Stratstone email address to his private address over the course of the weekend and delete them all, so that the requested confirmation could be provided. Mr Brearley should have been advised not to take this action, but that advice was not given. At his meeting with Mr Kelly on 21 September ([270] above) Mr Brearley confirmed that he had retained no hard copy files except in relation to the 10/10 scheme and had deleted all soft copy files. On the same day Mr Kelly sent the letter to Eversheds referred to at [277] above, confirming that no documents were retained. (In fact, the deletions were not complete and some material was retained.)

305. The claimants rightly criticised the failure to advise about the need to retain documents of potential relevance to the Pendragon proceedings, as well as an apparent failure to bring the matter to the attention of Higgs' head of compliance.

The failure to give the correct advice at the time appears to have been attributable to (although not excused by) Mr Kelly's lack of relevant civil litigation experience and the non-involvement at that stage of Mr Garvie or another experienced litigator. Nonetheless, it ought to have occurred to Mr Kelly that there was a potential difficulty, and the issue should certainly have been flagged up, once Mr Kelly did become aware of the need to preserve relevant documents. He clearly was so aware by 8 December, when he had a conversation with Mr Brearley reminding him not to destroy relevant documents and when later the same day Mr Delehanty sent Mr Kelly an extract from *Hollander on Documentary Evidence* on the subject of document destruction and solicitors' obligations in respect of that. On 10 December Mr Kelly also sent Mr Brearley a copy of a generic Higgs advice note about disclosure obligations in litigation, which included a section on document preservation. Mr Kelly's explanation that disclosure would be handled by someone else in the firm with appropriate expertise, and suggestion that he did not apply his mind to the possibility that Mr Brearley could have destroyed documents relevant to the Pendragon proceedings, was unsatisfactory. He should at least have briefed Mr Garvie so that those dealing with disclosure could address the issue. Rather, what appears to have happened is that Mr Delehanty was informed during October that Mr Brearley had destroyed emails before Pendragon issued its claim (and before Higgs sent its letter of 21 September confirming that no confidential information was retained) but it was not made clear that Mr Kelly had previously discussed that with Mr Brearley.

306. However, it is not apparent to me that the deletions have caused real difficulty for Mr Brearley either in the Pendragon proceedings or indeed in this litigation. Indeed, Mr Brearley's approach to deletions appears to have gone well beyond deleting Pendragon confidential information, to deleting documentation that would have been unhelpful to his case in this litigation. One example of this appears to be the email from Smith & Williamson dated 20 July 2014 referred to at [162] above.

307. The second issue relates to the development of concerns on the part of Higgs that Mr Brearley did not provide all relevant documents in his possession, and more generally did not provided accurate information. This gave rise to concerns about Higgs' professional duties. A key focus of this was the proposal letter sent to JLR on 18 December 2014, which Higgs say was not supplied to it during the Pendragon proceedings despite requests for it.

308. In relation to this, I conclude that, consistent with Higgs' case and in particular the evidence of Ms Farooq, the proposal letter was shown by Mr Brearley to Ms Farooq at a meeting on 13 October 2015 but was not left with her with other documents. The letter was disclosed by the claimants, not Higgs, in these proceedings. Ms Farooq provided a clear description, which I accept, of the careful way in which she collated documents for retention or copying, and I conclude that the proposal letter was not included in documents handed over at the meeting.

309. Ms Farooq's evidence was challenged on the basis that the notes of the 13 October meeting state "JB provides letters of December 2014 and January 2015".

However, her account is supported by the first email she sent after the meeting requesting the document, following a request by Counsel to see it. That email was sent on 26 October (so within two weeks of the meeting), referred to Mr Brearley producing the letter at the meeting and added, “I believe you retained that letter”.

310. I conclude that immediately following the meeting, when Ms Farooq prepared her notes, she may not have recalled that the documents she had been left with did not include the proposal letter. However, at least by 26 October she realised that she had seen it but did not have it. As concerns developed about inaccurate or incomplete information she thought further about what had happened. Ms Farooq recalled being specifically asked about the letter by Mr Kelly and Mr Garvie together, probably after Counsel chased again for the document in mid-November. I conclude that she then thought further about what had happened and realised or remembered that Mr Brearley had slid the document across the table to show her and must then have taken it back.

311. Mr Brearley’s position in relation to the proposal letter was inconsistent. When first asked for a copy of it on 26 October he described it with some specificity in his reply email but said that he was not at home so could not access it. After further chasing he eventually claimed that there was no written proposal at all. This was inconsistent with what he had said at the meeting on 13 October, where Ms Farooq’s notes record him saying that he formally wrote to Ms Nelmes on 18 December 2014 to request allocation of the Wolverhampton site, and with his reply to the email of 26 October. The claim that there was no written proposal was obviously repeated to Wilkes, because it was reflected in a witness statement signed by Mr Brearley on 14 March 2016 in response to an order for specific disclosure that expressly extended to the proposal to which Ms Nelmes’ letter of 9 January 2015 responded. Mr Brearley’s position during these proceedings appeared to be that he had provided the proposal letter to Higgs in October 2015, rather than just showed it to Ms Farooq, and had then forgotten that it existed. Given the importance of the letter the latter is not credible.

312. More generally, Mr Brearley failed to provide to Higgs full and accurate details of the extent of his involvement in the Wolverhampton Opportunity while he remained at Pendragon, including before Pendragon decided not to proceed with the project. For example, when asked by Mr Kelly in December 2015 to provide a chronology Mr Brearley represented that he was not involved in any discussions with Mr Smith and Mr Danks about Wolverhampton until December 2014, and that the discussions that followed were about the possibility of establishing a used car showroom and workshop. He also represented that he had not received or used confidential information from Pendragon relating to Wolverhampton.

Allegations about earlier advice

313. In December 2015 and January 2016 Mr Brearley raised allegations about advice that he said he had previously been given about his employment contract. Both parties relied on aspects of the documentary evidence recording this, the claimants primarily in support of their allegation of a lack of probity on the part of Mr Kelly, and Higgs to support its case that Mr Brearley’s allegations as to what had occurred were inconsistent and unreliable, and to make the point that

no earlier reference had been made to previous advice despite the receipt of negative advice on 25 September. The claimants also relied on concerns raised by Mr Delehanty when he first appreciated that Higgs had been involved prior to the Pendragon proceedings.

314. On 15 December 2015 Mr Brearley sent an email in response to questions raised by Mr Delehanty in connection with the preparation of the defence to Pendragon's amended particulars of claim. One of the questions related to whether Mr Brearley had told Pendragon of his plans before he left, and how he thought Pendragon would have reacted if he had. Mr Brearley's response said that he did not tell Pendragon "for the simple reason JLR refused to engage with me in anyway until after I left employment" (which I note is an obviously inaccurate statement), and added that when he started discussions with JLR in October they were still considering options such as to whether to acquire the dealership themselves. However, he then added:

> "I also had very clear advice that said the employment contract was unenforceable."

315. At this stage there was no specification of who gave the advice. This was the first time that Mr Brearley made any allegation of this nature, despite what he understood was negative advice on 25 September. Higgs' position is that the point was only raised once Mr Brearley had lost hope that JLR would successfully intervene.

316. Mr Kelly spoke to Mr Brearley on 16 December. The attendance note of the call reflects Mr Brearley's frustration with the amount of work he was having to do in responding to requests for information. Mr Kelly referred to the allegation, said he was concerned to read it and asked Mr Brearley when he received the advice. The attendance note refers to Mr Brearley pausing but then referring to giving his service agreement to Mr Cutler. It continues:

> "I confirm that I personally never gave any advice to James as to the enforceability of its terms."

The note goes on to say that Mr Kelly reminded Mr Brearley that on more than one occasion he contacted him to see if Higgs could give any advice and check on progress, as Mr Kelly had been aware that he was proposing to resign. The note refers to an email trail, and to reminding Mr Brearley that he had resigned from Pendragon "without us being instructed to give, or giving any advice on the enforceability of his restrictions".

317. Mr Brearley responded that could not remember who gave the advice but that it "may have been" Mr Cutler. Mr Kelly indicated that he would be surprised if Mr Cutler gave advice on the enforceability of restrictive covenants since he was not an employment lawyer. The note went on to say:

> "Whilst I gave no such advice, I confirm that had I done so, it is inconceivable that I would have advised that the Covenants were enforceable. First, I would not have done so without going in to some

> detail with James as to the prevailing circumstances and the nature of the relationships concerned. Secondly, even without that detail, on an initial reading of the Covenants, they are clearly well drafted and therefore on the face of it would appear to have a good chance of being enforceable (this is with the exception of the 36 month Covenant but that has never been an issue in this case as Pendragon do not seek its enforcement).
>
> James notes this and there is a further pause, but he says he is sure he received some advice from someone. He cannot remember the details. He goes on to say that he is pretty sure, thinking about it, that there would not be any emails of advice as he did not receive any advice in writing. I note this but recommend to James that he checks this because it remains a cause of concern for me if he believes he received advice that the Covenants were unenforceable."

The reference to "enforceable" at the end of the first sentence in the first paragraph is obviously a typographical error and should read "unenforceable".

318. The note concludes by recording that Mr Brearley remained on the call in a far friendlier and more conciliatory mood than the tone of his email suggested, and went on to discuss the terms of a draft settlement offer.

319. Higgs obviously relies on this conversation as showing that in December 2015, much closer to the events in question than Mr Brearley's written or oral evidence in this trial, Mr Brearley could not recall who was giving the advice, although he thought it might have been Mr Cutler. The recollection was also that the advice was that the contract was "unenforceable".

320. The claimants rely on the email exchange and attendance note in their challenge to Mr Kelly's honesty on the basis that he neither referred to the allegation about previous advice when he communicated the substance of Mr Brearley's answers to Mr Delehanty, nor did he inform Higgs' head of compliance, Mr Taylor or Mr Garvie. Although Mr Kelly's second witness statement stated that he advised Mr Taylor and believed he would also have spoken to Mr Garvie, there is no electronic record of a communication. Mr Garvie's evidence was relatively clear that he was not informed at this stage. Mr Taylor could not recall exactly when in December 2015 or January 2016 he became aware of the allegation, but accepted that on becoming aware of it he would expect that he would have involved the firm's head of compliance. There was no evidence that that was done in December 2015. I therefore conclude that it is more likely than not that Mr Kelly did not inform his partners of Mr Brearley's allegation in December 2015. He should have done so. It is also apparent that he did not speak to Mr Cutler at this stage. Higgs' insurers were also not informed.

321. The claimant also rely on the note of the telephone call on 16 December in two other respects. First, they compare the note with the way it is summarised in Mr Kelly's second witness statement, which they say contains a highly material gloss and material omissions. The witness statement fails to refer to two out of three references in the note to Mr Kelly not giving advice, and the reference that was

included stated "I personally did not give him any definitive advice", rather than "never gave any advice".

322. Whilst the witness statement is not satisfactory, I do not consider that there was an intention to mislead. The relevant paragraph in the witness statement specifically refers to the note of the call to point out and correct the typographical error already referred to. It must have been obvious that any judge was highly likely to pay particular attention to the relevant contemporaneous documentary evidence, which was the attendance note. It was certainly unnecessary and inappropriate to set out the entire content of the note, including what are effectively repetitions, in the witness statement (irrespective of fact that the witness statement was provided before the introduction of PD 57AC). It is however unfortunate that Mr Kelly did not explain in his witness statement what he meant by "definitive advice" and why he considered the attendance note should be interpreted in that way, rather than in accordance with its literal terms.

323. Secondly, the claimants compare the note of the call on 16 December, recording the advice that Mr Kelly would have given if he had given advice and written after Mr Kelly first prepared detailed advice in late September, with the evidence that Mr Kelly now gives about the advice that he said he gave on 22 April 2015. There is some force in this, and I have taken it into account in reaching the conclusions I have about the call in April 2015. However, for the reasons already discussed I do not accept that the points made were not apparent to Mr Kelly in April.

324. The claimants also rely on a note of a call on 6 January 2016 between Mr Kelly and Mr Delehanty. The note was taken by another trainee, Hannah Bollard. It records Mr Delehanty explaining that he had not previously appreciated that Higgs had been involved prior to the Pendragon proceedings, and flagging that it was possible that Higgs should have advised Mr Brearley that he may have been breaching his fiduciary duties and employment contract. Mr Delehanty referred to his professional duty to notify Mr Brearley of any potential negligence claim, but wanted a fuller understanding of the facts first. Mr Kelly is recorded as saying he did not know the scope of the corporate team's role but "confirmed that the employment department did not give any advice to JB".

325. There is no evidence that Counsel's concerns were reported to Mr Garvie, Mr Taylor or Higgs' head of compliance, or to Higgs' insurers, or that Mr Kelly investigated what the corporate team had been doing. Action should have been taken. Further, Mr Kelly's statement that the employment department gave no advice was at least incomplete.

326. On 29 January Jamie de Souza, a solicitor in Higgs' dispute resolution team who was dealing with disclosure in the Pendragon proceedings, met Mr Brearley, with Ms Bollard again taking notes. Relevant extracts of the note read as follows:

> "JB confirmed that Damian had said that he had never advised him on his service agreement, but he definitely did. JB said that he did ask Damian to advise on service agreement and that there are emails in the lever arch files which show this… One particular email was that

> with Adrian Cutler (AC) on 13 February 2015. JB recalled bringing both his and Steve Venables' service agreements into Higgs' office and recall that around April 2015, Damian had asked him to call him and that Damian had also advised him on his resignation letter. JB commented that as you go through the files you can see that someone did advise and he asked Higgs to advise, and Finance Birmingham had asked us as well.
>
> …
>
> JB said that he has been taken aback by Higgs' suggestion that Higgs did not advise him on his service agreement…. He noted that having gone through his emails, he was sure that Damian had advised him on the service agreement. JB also recalled the Finance Birmingham had questioned the enforceability of them and had raised this with Smith & Williamson."

327. This note is interesting in a number of respects. For example, it refers to Mr Kelly advising Mr Brearley about his resignation letter but contains no clear allegation that Mr Kelly gave advice about the service agreement at the same time. It makes no allegation about Mr Cutler. It also gives no specific indication about what the advice was, although the note of the call discussed in the following paragraph indicates that it related to enforceability of the covenants. In addition, it suggests that Mr Brearley's service agreement was first provided to Higgs with Mr Venables', rather than separately as now alleged.

328. The meeting on 29 January led to a further call between Mr Kelly and Mr Brearley on 1 February. There are two notes of the call, one concerning settlement. The other note referred to a clear recollection by Mr Brearley that he brought his and Mr Venables' service agreements into Higgs to Mr Cutler, that Mr Venables was with him and that this occurred in January or February. He said that there were a number of meetings where service agreements were discussed, and referred to Mr Cutler, Mr Venables and Mr Danks as being present at relevant meetings. Mr Kelly responded that he had not spoken to Mr Cutler but "[Mr Kelly] confirmed that he knows he never advised JB on his Service Agreement", referring to three occasions when he asked Mr Brearley by email whether he needed help or advice and received no reply.

329. The note of the call records Mr Brearley saying that he "talked about the Service Agreement with [Mr Kelly] around the time that they were discussing the resignation letter", and refers to having asked Higgs to look at the service agreement via Mr Cutler on several occasions. When asked by Mr Kelly what Mr Cutler had said, Mr Brearley responded that "he remembers distinctly being advised that the Covenants were in part unenforceable". He did not give the service agreements to Higgs "for them to do nothing with them". He thought he had asked for advice, and that if someone had thought there was a problem they would have raised it. He also repeated that Mr Venables was there when he handed his service agreement to Mr Cutler, and said he recalled that when he was introduced to Higgs he was told that they would look after all of his and Mr Venables' needs. He reiterated that he believed that Higgs definitely did advise him on his service agreement.

330. Higgs rely on the fact that in this call Mr Brearley asserted that the advice was that the covenants were "in part" unenforceable.

Higgs ceases to act/settlement

331. Higgs terminated their retainer on 5 February 2016. The reasons for this were explained in a letter sent by Mr Garvie on 8 February. They related to a conflict of interest between Mr Brearley and JRBA on the one hand and BSPR on the other, following a refusal by Mr Danks to agree to the disclosure of certain documents on behalf of BSPR.

332. The Pendragon proceedings concluded by a consent order dated 30 March 2016, in which Pendragon received nominal damages but obtained undertakings that went beyond the terms of the restrictions in Mr Brearley's service agreement. Mr Brearley was also subject to a material adverse costs order.

LEGAL PRINCIPLES

333. The relevant legal principles were, for the most part, non-contentious.

Mr Brearley's duties to Pendragon

334. Mr Brearley's pleaded case against Higgs was that, consistent with Pendragon's claim in the Pendragon proceedings, he owed fiduciary as well as contractual obligations to Pendragon. That was admitted by Higgs. This reflects the established principle that in appropriate circumstances an employee can owe fiduciary duties even if he or she is not a statutory director: *Nottingham University v Fishel* [2000] IRLR 471 ("*Fishel*"). In that case Elias J said this at [97]:

> "… in determining whether a fiduciary relationship arises in the context of an employment relationship, it is necessary to identify with care the particular duties undertaken by the employee, and to ask whether in all the circumstances he has placed himself in a position where he must act solely in the interests of his employer. It is only once those duties have been identified that it is possible to determine whether any fiduciary duty has been breached…"

335. This statement was approved by Moses LJ in *Helmet Integrated Systems Ltd v Tunnard* [2007] IRLR 126 (CA) ("*Tunnard*") at [37] and considered again by Lewison LJ in *Ranson v Customer Systems plc* [2012] IRLR 769 ("*Ranson*") at [41]. In that case Lewison LJ also emphasised at [25] the need to focus on the contractual obligations to determine not only the existence but the scope of fiduciary obligations.

336. Fiduciary duties, where they arise in an employment context, are owed in addition to implied duties of good faith and fidelity. The scope of the obligation of fidelity will depend on the facts, including the seniority of the employee: *QBE Management Services (UK) Ltd v Dymoke* [2012] EWHC 80 (QB) at [169], per Haddon-Cave J. Again, the content of the (express) contractual obligations will be highly material: *Ranson* at [34] and [35].

337. A key distinction between a duty of fidelity and a fiduciary duty is that, as the passage from Elias J's judgment indicates, a fiduciary cannot place himself in a position where his duty and interest may conflict. He must subjugate his own interests to those of the employer. This single-minded or exclusive duty of loyalty goes beyond the duty of loyalty generally owed by an employee, which requires the employee to have regard to the interests of the employer: *Fishel* at [95]. To the extent that a fiduciary relationship exists and the action in question comes within its ambit on the facts of the case, it would not only prevent the diversion of a business opportunity which the employer could have undertaken but also an opportunity which it could not undertake: see *Industrial Developments Ltd v Cooley* [1973] 1 WLR 433, where an order for an account of profits was made even though it was unlikely that the employer could have secured the relevant opportunity itself. As explained in that case, this was an application in an employment context of a longstanding principle dating back to *Keech v Sandford* (1726) 25 ER 223.

338. Nevertheless, the distinction between the duty of fidelity and fiduciary duties can be overstated, bearing in mind that the scope of both will depend on the facts, including the express contractual obligations. In this case, for example, Mr Brearley was subject during the course of his employment to express contractual prohibitions on undertaking other work (clause 3.2) or being interested in or taking steps to set up or prepare to set up a competing business (clause 5.1(a)), and there was an express obligation in clause 5.1(b) to account for profits. He was also subject to non-solicitation obligations in respect of Pendragon employees, customers, clients and suppliers. Further, the nature of his senior managerial role would clearly be a relevant factor in determining the scope of his duties, whether contractual or fiduciary.

339. Where a fiduciary has placed himself in a position of actual or potential conflict, he is liable to an account of profits unless the consent of the principal is obtained. In contrast, the remedy of an account of profits will not generally be available in the absence of a breach of fiduciary duties – although, again, the existence of an express contractual obligation to account for profits will narrow the extent of the difference in practice.

340. Any consent obtained by a fiduciary will only be valid if it is obtained on an informed basis, that is after disclosure of all material facts. Indeed, the duty of loyalty owed by a fiduciary may encompass a positive requirement to disclose misconduct: *Item Software v Fassihi* [2004] IRLR 928 at [41]-[44].

341. Some "preparatory" steps to establishing a competing business are not necessarily breaches of the duty of fidelity or fiduciary duty: *Foster Bryant Surveying Limited v Bryant* [2007] IRLR 425 (CA) ("*Foster Bryant*") and *Tunnard*. There is no clear dividing line between what is legitimate and what is not, and simply describing activities as preparatory does not make them legitimate: *Tunnard* at [28] and [32], per Moses LJ. *Foster Bryant* emphasises (in the context of a claim for breach of fiduciary duty) the need for a fact-sensitive and merit-based enquiry: see Rix LJ's judgment at [76]. Obviously this will extend to the contractual terms, which in this case included specific provision in respect of preparatory steps. Further, where fiduciary duties are owed preparatory steps are more likely to give rise to

a breach of duty than in a case where only a duty of fidelity is owed, because of the requirement to act solely in the employer's interest (*Tunnard* at [33]).

Solicitors' duties: existence, scope and standard

342. The basic principles were again common ground. The basis of a solicitors' duties is the retainer, which may be written, oral or implied from conduct. The starting point, therefore, is to determine the scope of the retainer, that is, what the solicitor has been engaged to do. In relation to matters within the scope of the retainer, solicitors owe their clients a duty to exercise reasonable care and skill, both in contract and tort: *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145. The standard of that duty is "what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession": *Midland Bank v Hett, Stubbs & Kemp* [1979] Ch 384 at p.403B, per Oliver J ("*Midland Bank*"). Where, as here, specialisms are involved the standard is one of a reasonably competent practitioner specialising in the relevant field of law: see for example *Agouman v Leigh Day (A Firm)* [2016] PNLR 32 at [83], per Andrew Smith J.

343. The importance of the scope of the retainer was emphasised by Oliver J in *Midland Bank* at pp.402-403A:

> "The extent of [the solicitor's] duties depends upon the terms and limits of that retainer and any duty of care to be implied must be related to what he is instructed to do.
> Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practising a highly skilled and exacting profession, but I think that the court must beware of imposing upon solicitors … duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests, take it upon himself to pursue a line of inquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession…."

344. The general principles applicable to determining the scope of the duty were discussed by Jackson LJ in *Minkin v Landsberg* [2016] 1 WLR 1489 at [32]-[39]. He summarised them at [38] as follows:

> "(i) A solicitor's contractual duty is to carry out the tasks which the client has instructed and the solicitor has agreed to undertake.
> (ii) It is implicit in the solicitor's retainer that he/she will proffer advice which is reasonably incidental to the work that he/she is carrying out.
> (iii) In determining what advice is reasonably incidental, it is necessary to have regard to all the circumstances of the case, including the character and experience of the client.
> (iv) In relation to (iii), it is not possible to give definitive guidance, but one can give fairly bland illustrations. An experienced

> businessman would not wish to pay for being told that which he/she already knows. An impoverished client will not wish to pay for advice which he/she cannot afford. An inexperienced client will expect to be warned of risks which are (or should be) apparent to the solicitor but not to the client.
> (v) The solicitor and client may, by agreement, limit the duties which would otherwise form part of the solicitor's retainer. As a matter of good practice the solicitor should confirm such agreement in writing. If the solicitor does not do so, the court may not accept that any such restriction was agreed."

345. One of the authorities referred to by Jackson LJ was *Credit Lyonnais SA v Russell Jones & Walker* [2003] Lloyd's Rep PN 7. He expressly approved a passage in Laddie J's judgment in that case (at paragraph [28]) where he made the point that a solicitor "is not a general insurer against his client's legal problems" and that he is "under no general obligation to expend time and effort on issues outside the retainer", albeit that he has a duty to inform the client of a risk of which he becomes aware in the course of doing work for which he is retained. This does not involve the solicitor in doing extra work or operating outside the scope of the retainer: *Lyons v Fox Williams LLP* [2019] PNLR 9 at [41]-[42].

346. In this case there is also a dispute about the persons to whom Higgs owed relevant duties, and whether and in what respect they extended beyond Mr Brearley. Higgs' position was that any relevant duty owed prior to the receipt of the cease and desist letter was owed only to Mr Brearley personally, and that its duties during the Pendragon proceedings were owed only to Mr Brearley and JRBA.

347. In determining to whom duties are owed, the first question will again be to determine whether a (contractual) retainer existed, and if so whether it extended to the matter in question. That second point is clearly relevant to BSPR and JRBA, with whom Higgs undoubtedly had retainers at least by July 2015. In the case of Mr Danks the question arises whether an implied retainer existed with him as a shareholder or director: see for example *RP Howard v Woodman Matthews & Co* [1983] BCLC 117 and *Caliendo v Mishcon de Reya* [2016] EWHC 150 (Ch) ("*Caliendo*") at [679]-[682], per Arnold J. In *Dean v Allin & Watts* [2001] PNLR 39 (CA) Lightman J stated the relevant principle as follows at [22]:

> "As a matter of law, it is necessary to establish that A&W by implication agreed to act for Mr Dean: an implied retainer could only arise where on an objective consideration of all the circumstances an intention to enter into such a contractual relationship ought fairly and properly to be imputed to the parties."

348. As Lightman J went on to indicate, such an implication should be so clear that the solicitor ought to have appreciated it. Further, the circumstances to be taken into account would include any assumption of liability for fees and whether any contractual relationship had existed in the past.

349. In *Caliendo* Arnold J considered *Dean v Allin & Watts* and the general principle that contracts are implied from conduct only where there is a necessity to do so

to explain the conduct. He concluded that there was no inconsistency between that principle and what had been said in *Dean v Allin & Watts*, and at [682] adopted Counsel's summary of the test as being whether there was "conduct by the parties which was consistent only with Mishcon de Reya being retained as solicitors for the Claimants".

350. In circumstances where no contract exists, the Supreme Court decision in *Steel v NRAM* [2018] 1 WLR 1190 makes clear that the foundation for determining whether a duty of care is owed is the test of voluntary assumption of responsibility (combined with reasonable reliance and foreseeability).

Primary and secondary causation

351. The claimants' claim in respect of the Wolverhampton Opportunity is for a loss of a chance. The law as to loss of a chance was recently considered by the Supreme Court in *Perry v Raleys Solicitors* [2020] AC 352, where the approach set out by the Court of Appeal in *Allied Maples Group Limited v Simmons & Simmons* [1995] 1 WLR 1602 was approved by Lord Briggs in a judgment with which all other members of the court agreed.

352. There are two parts to the legal test to be applied, which were referred to in submissions as "primary causation" and "secondary causation" respectively. I will adopt the same labels. They were summarised by Lord Briggs as follows at [20]:

> "20. For present purposes the courts have developed a clear and common-sense dividing line between those matters which the client must prove, and those which may better be assessed upon the basis of the evaluation of a lost chance. To the extent (if at all) that the question whether the client would have been better off depends upon what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of probabilities. To the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation."

353. The first part of the test (primary causation) therefore requires the claimant to prove on the balance of probabilities what he would have done if the breach of duty had not occurred, in this case if competent advice had been received. This is an ordinary application of the balance of probabilities test and involves an "all or nothing" outcome (*Perry v Raleys* at [23]).

354. The second part of the test (secondary causation) applies to the extent that, rather than being dependent on what the claimant would have done, causation of any loss depends on what one or more third parties would have done. To that extent, damages will be assessed by reference to the chance that the third party would have acted in a way that would have conferred the alleged benefit. The chance is typically expressed as a percentage of the potential benefit, and in order for damages to be awarded that chance must be more than negligible or de minimis (often expressed as "substantial" or "real and substantial"). In respect of

secondary causation it is generally inappropriate to conduct a trial within a trial (*Perry v Raleys* at [31]).

355. As Lord Briggs explained in *Perry v Raleys*, the distinction between the two parts of the test is essentially based on fairness. A claim in negligence requires proof that loss has been caused by the breach of duty. The question whether the claimant would have taken the relevant action is fundamental, and there is no reason in principle or justice why either party should be denied the benefit of an adversarial trial in respect of it (paragraphs [19] and [24]). In contrast, demonstrating what third parties would have done in a hypothetical situation may be problematic. For example, the lost chance might relate to litigation with an uncertain prospect of success, or it may be significantly more difficult to obtain relevant documentary or witness evidence in relation to persons who are not party to the proceedings (paragraphs [17] and [18]).

The requirement for honesty in primary causation

356. *Perry v Raleys* related to an alleged lost opportunity to make a claim for a services award under a government compensation scheme for miners suffering from vibration white finger. The judge at first instance dismissed the claim on the basis that an honest claim could not have been made. This was because the claimant had not established that he was in fact able to meet the conditions for the award, namely that he could no longer perform certain domestic tasks without assistance.

357. One of the issues in dispute in the Supreme Court was whether there was in fact a requirement for honesty. The court concluded that there was, but the nature of that requirement and its impact on the facts of this case, which of course relates to a business opportunity rather than a legal claim, was the subject of some dispute in closing submissions.

358. Lord Briggs said this at [25] to [31]:

> "25. …the principle that the client must prove on the balance of probabilities that he would have taken any necessary steps required of him to convert the receipt of competent advice into some financial (or financially measurable) advantage to him means that Mr Perry needed to prove that, properly advised by Raleys, he would have made a claim to a services award under the Scheme within time. To this the judge added that it would have to have been an honest claim. He made this addition upon the basis of a concession to that effect by counsel on Mr Perry's behalf, from which Mr Watt-Pringle QC for Mr Perry (who did not appear at the trial) invited this court to permit him to resile, so that the question whether the honesty of the claim was a requirement of Mr Perry's cause of action could be properly argued.
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> 26. Having heard commendably concise argument on the point, I consider that the concession was rightly and properly made. In *Kitchen v Royal Air Force Association* [1958] 1 WLR 563 the plaintiff's husband, a member of the RAF, was electrocuted and

killed in the kitchen of his house. His widow lost the opportunity to bring a claim under the Fatal Accidents Act in time due to the negligence of the defendant solicitors. In a leading judgment on the evaluation of the loss of a chance, Lord Evershed MR said this, at p 575:

> "I would add, as was conceded by Mr Neil Lawson, that in such a case it is not enough for the plaintiff to say: 'Though I had no claim in law, still, I had a nuisance value which I could have so utilised as to extract something from the other side and they would have had to pay something to me in order to persuade me to go away.'"

If nuisance value claims fall outside the category of lost claims for which damages may be claimed in negligence against professional advisors, then so, a fortiori, must dishonest claims.

27. That simple conclusion might be thought by many to be too obvious to need further explanation, but it may be fortified in any of the following ways. First, a client honestly describing his condition to his solicitor when considering whether to make a personal injuries claim would not be advised to do so if the facts described did not give rise to a claim. On the contrary, he would be advised not to waste his own money and time upon the pursuit of pointless litigation. Secondly, the court when appraising the assertion that the client would, if properly advised, have made a personal injuries claim, may fairly presume that the client would only make honest claims, and the client would not be permitted to rebut that presumption by a bald assertion of his own propensity for dishonesty. Thirdly, the court simply has no business rewarding dishonest claimants. The extent of dishonest claims for minor personal injuries such as whiplash (which are difficult to disprove) in road traffic accident cases is already such a blot upon civil litigation that Parliament has considered it necessary to intervene to limit that abuse.

28. Applied to the present case, Mr Perry could only have brought an honest claim for a services award if he believed that: (a) he had, prior to developing VWF, carried out the six tasks, or some of them, without assistance, (b) after developing VWF, he needed assistance in carrying out all or some of those tasks, and (c) the reason for his need for that assistance was a lack of grip or manual dexterity in his hands, brought on by VWF.

29. While the question whether a perceived lack of grip or manual dexterity on his part was caused by VWF might be said to be a matter of expert medical opinion, the presence or absence of all the other elements necessary for making an honest claim to a services award fell squarely within Mr Perry's own knowledge. He would not, for example, need a doctor to tell him whether he needed assistance in changing the sparking plugs on his car engine and, if he did, whether

> his difficulty arose from lack of ability to grip or manipulate the requisite spanner, or rather from chronic back pain.
>
> 30. Simple facts of that kind, plainly relevant to the question whether Mr Perry could have brought an honest claim if competently advised, do not in themselves fall within either of those categories of futurity or counterfactuality which have traditionally inclined the court to adopt a loss of a chance type of assessment. They are facts about Mr Perry's actual physical condition at the relevant time (that is when he could have made a claim for a services award under the Scheme if properly advised), and about his habitual patterns in going about the six types of domestic task. Furthermore, it is the common understanding of medical experts that VWF, once developed, is a relatively stable condition. It gets neither worse nor better once the miner ceases to use vibrating machinery. If one asks without reference to authority whether there would be any unfairness subjecting his assertion that he would have made a claim for a services award to forensic analysis including questions about his then manual grip and dexterity and about the extent to which he was assisted in the performance of the relevant domestic tasks, the answer would be no. Nor would it be, on the face of it, unfair to subject his oral evidence about those matters, and that of his alleged family assistants, to a searching comparison with other evidence about his own concerns about his medical condition at the relevant time, to be derived from GP records.
>
> 31. The question remains however whether any of the authorities relied upon by counsel for Mr Perry on this appeal, or by the Court of Appeal in its conclusion that a forensic investigation of that kind at a trial was contrary to principle, really establish any such proposition, where the facts being investigated are relevant to the issue, to be proved by the claimant on the balance of probabilities, whether he would have taken the essential step of bringing an honest claim, upon receipt of competent advice. On analysis, they establish no such proposition. All they do show is that, where the question for the court is one which turns upon the assessment of a lost chance, rather than upon proof upon the balance of probabilities, it is generally inappropriate to conduct a trial within a trial."

Lord Briggs went on to consider the authorities to which he had just referred.

359. I have set out the relevant passage at some length because there was a dispute in closing submissions about the effect of what Lord Briggs said. Mr Pooles submitted that the effect of *Perry v Raleys* is that the claimant must prove that he *would* have acted honestly in taking the relevant action. Specifically in this case Mr Brearley would need to demonstrate that, if he had received competent advice about his fiduciary duties and the requirement for informed consent from Pendragon in order to be able to proceed with the Wolverhampton Opportunity, he would have acted honestly in disclosing to Pendragon all material facts. Higgs' position is that he is unable to prove that.

360. The claimants conceded in oral opening submissions that the effect of *Perry v Raleys* was that a requirement for honesty applies, such that causation must be determined on the basis of full disclosure to Pendragon rather than incomplete or inaccurate disclosure. However, in closing submissions Mr Turner submitted that what that meant in this case was that causation needed to be assessed by reference to the likelihood of Pendragon providing informed consent *on the assumption that* full disclosure had been made. He referred to the second of the three points made by Lord Briggs at [27], that the court may fairly presume that any claim would be an honest one, and to references in the judgment to whether Mr Perry "could" rather than "would" have made an honest claim.

361. I have no doubt that Mr Pooles' submission is correct. The starting point is the basis for Lord Briggs' approach to the division between primary and secondary causation, that is, one of fairness. The claimant is not subject to any unfair disadvantage in being required to demonstrate what he would have done if he had received competent advice. The nature of that requirement clearly involves "would" rather than could: see paragraph [20], set out at [352] above. References in the judgment to "could" rather than would reflect the underlying facts: Mr Perry was in fact not able prove that it would have been possible for him to make an honest claim. It is worth noting that Lord Briggs used both terms in his summary at [41]:

> "41. It was not, therefore, wrong in law or in principle for Judge Saffman to have conducted a trial of the question whether Mr Perry would (or indeed could) have brought an honest claim for a services award, if given competent advice by Raleys. That was something which Mr Perry had to prove on the balance of probabilities, and which Raleys were entitled to test with all the forensic tools available at an ordinary civil trial, and by proof or challenge of alleged facts relevant to that question, even if the same facts would have formed part of the matters in issue, either at a trial of the underlying claim, or upon its adjudication or settlement pursuant to the Scheme."

362. Clearly, not all of the reasoning set out by Lord Briggs at [27] applies to a business opportunity in the same way as a legal claim. However, analogous reasoning can be applied. The obvious analogy to the first point (pointless litigation) is that any consent given by Pendragon other than on a fully informed basis would be vulnerable to challenge. As regards the second and third, whilst a court would fairly start with a presumption of honest behaviour, it cannot be right that honesty must continue to be presumed in favour of a claimant whom the court is satisfied after the rigours of a full trial would, in fact, have behaved dishonestly. That would certainly not be fair. It would allow a dishonest claimant to escape from what the court is satisfied would in fact have been dishonest behaviour. That would not properly reflect the effect of the Supreme Court' decision that the claimant must demonstrate what he *would* have done, and it would be wrong as a matter of principle and justice since it is a matter that can fairly be tried: see Lord Briggs' judgment at [24].

Assessment of evidence

363. It is not necessary to address this topic in detail. I was reminded of the guidance in Leggatt J's decision in *Gestmin SGPS S.A. v Credit Suisse (UK)* Limited [2013] EWHC 3560 (Comm) at [15]-[22] about the unreliability of memory, but I would also note the Court of Appeal's more recent reminder in *Kogan v Martin* [2019] EWCA Civ 1645 at [88] of the importance of making findings by reference to all the evidence. In my assessment of the evidence I have obviously paid particular attention to documentary evidence, but I have also made assessments of the witnesses and had regard to their interests and to inherent probabilities.

364. I have also borne in mind that, in a loss of chance claim, the court is to a material extent considering a hypothetical or counter-factual, namely what the claimants would have done if certain advice had been given, and the likelihood of third parties acting in a particular way. Mr Turner referred me to an observation by Colman J in *North Star Shipping v Sphere Drake Insurance* [2005] 2 Lloyd's Rep 76 at [254], in the context of underwriters' evidence, that:

> "…hypothetical evidence by its very nature lends itself to exaggeration and embellishment in the interests of the party on whose behalf it is given. It is very easy for an underwriter to convince himself that he would have declined a risk or imposed special terms if given certain information. For this reason, such evidence has to be rigorously tested by reference to logical self-consistency, and to such independent evidence as may be available."

LIABILITY – DISCUSSION

Whether there was a breach of duty by Higgs

The claimants' case

365. As put in closing submissions, the claimants' case as to breach of duty was as follows. It was alleged:

    a) that Higgs failed to advise the claimants that Mr Brearley was likely to be breaching his fiduciary and contractual duties by pursuing the Wolverhampton Opportunity whilst he remained employed by Pendragon and should cease pursuit of it, and only proceed if Pendragon's informed consent was obtained;

    b) that Higgs failed to advise the claimants that restrictive covenants in Mr Brearley's employment contract would be likely to prevent him from pursuing the Wolverhampton Opportunity until 12 months after he ceased employment (unless he reached an alternative agreement); and

    c) that on receipt of the cease and desist letter Higgs failed to advise Mr Brearley that Pendragon's complaints were very likely to succeed and that accordingly he should provide the undertakings requested, and instead

advised that the undertakings were probably unenforceable and that he should reply to the letter aggressively.

366. As already indicated, the claimants' case as to breach of duty altered during the course of the dispute. The alterations included confining the allegations relating to the period prior to the receipt of the cease and desist letter to failure to advise rather than providing incorrect advice, and (by the stage of closing submissions) not pursuing any allegation in relation to Mr Brearley's ability to use the 10/10 scheme as leverage against Pendragon.

367. Most significantly, although the particulars of claim (unlike the letter of claim) did include an allegation of failure to advise that Mr Brearley owed fiduciary duties, the consequences of that as now relied on by the claimants were not identified. The pleaded claim was to the effect that the advice that should have been given was that there was a risk that the claimants could not proceed with the Wolverhampton Opportunity until after 12 months following Mr Brearley's departure from Pendragon, unless he came to an alternative arrangement. The thrust of the claimants' case as now put is that the advice should have been that it was not simply a question of waiting 12 months. Rather, because of the nature of the duties breached, the only way in which the Wolverhampton Opportunity could be saved would be by obtaining the informed consent of Pendragon, and that Higgs negligently failed to give advice to that effect in early 2015.

368. The claimants say that from the point that Mr Cutler and Mr Taylor were first briefed by Mr Lownes in December 2014 (and certainly with the further detail contained in the Information Pack sent in advance of the meeting in January 2015) it should have been obvious to any reasonably competent solicitor that there was a serious risk that Mr Brearley and Mr Venables were acting in breach of duty. Higgs, and in particular Mr Cutler, should have appreciated that the risk extended to breach of fiduciary duty, and that the exposure to an account of profits remedy risked precluding any successful pursuit of the Wolverhampton Opportunity even after any restrictive covenants expired unless full disclosure was made to Pendragon and its consent obtained. As discussed below, the claimants' position is that if Pendragon had been approached in the early part of 2015 there was a substantial chance that its consent could have been secured.

Position prior to 22 April 2015

369. I conclude that the earliest point at which any form of retainer was created with Higgs was on 28 January 2015, the day after the first meeting, when Mr Brearley and Mr Venables called Mr Cutler to confirm that Higgs was being instructed. Prior to that, the only relevant events were a briefing call from Mr Lownes about the possible work and the meeting on 27 January, which I have found was a pitch meeting at which it was clear that Higgs had not yet been instructed to carry out any work. No advice was given and there was no duty to provide it.

370. Once Higgs were instructed on 28 January, the precise scope of its role remained to be determined but the understanding was that it would encompass general legal support for the project: see [204] above. Consistently with this, one purpose of the meeting on 2 February was to direct work to relevant departments in Higgs

([207] above). In my view that was the first occasion on which Higgs could reasonably have been expected to raise any issue in respect of Mr Brearley's employment position. At the meeting Mr Cutler correctly identified the need to have Mr Brearley's service contract reviewed by a specialist. That was not something that Higgs had specifically been asked to do, but it was appropriate advice about a risk that would have been apparent to any competent solicitor in Mr Cutler's position.

371. The claimants' position is that Mr Cutler had enough information at this stage to appreciate the risk of breach of fiduciary duty, and should have given advice to that effect and about the need for Pendragon's informed consent in order to proceed. The information he had included knowledge of the senior roles that Mr Brearley and Mr Venables still held at Pendragon (as managing director and financial director respectively), the fact that Pendragon had a chain of JLR dealerships, the fact that confidentiality had been emphasised, and the fact that there had been contact with JLR about the Wolverhampton Opportunity. He also knew that meetings with Mr Brearley and Mr Venables were occurring during the course of the working day. The claimants say that when Mr Brearley's service agreement was not received shortly after the email exchange on 13 February ([216] above) Mr Cutler should have chased for it without delay.

372. I accept, as Mr Cutler did in cross-examination, that if he had put the information together that was available to him at the time of the meeting on 2 February then he would have been in a position to conclude that there was a real risk of breach of fiduciary duty, with the consequences contended for by the claimants. Mr Cutler even accepted in cross-examination that he should have applied his mind to a possible difficulty with fiduciary duties. However, I do not consider that he fell below the standard of a reasonably competent solicitor in doing what he in fact did. He was not provided with the Information Pack for the purpose of reviewing it or providing advice. He pointed out the need for specialist advice. Mr Brearley, who must fall in the category of a sophisticated client, accepted that advice was required but at the time of the meeting on 2 February was clearly not yet ready to obtain it ([208] and [216] above).

373. In reaching this conclusion I also take into account that, whilst Higgs could have identified the risk of a potential breach of fiduciary duty, it was not in possession of information that made that risk leap out to such an extent that a need for immediate action should have been apparent to a reasonably competent corporate lawyer in Mr Cutler's position. In particular, Higgs did not understand that Mr Brearley had become aware of the opportunity during the course of his employment, and still less that Pendragon had considered it for itself or might want to pursue it, that Mr Brearley had any involvement in that process or that he may have made use of Pendragon's confidential information. Higgs was also not told that Mr Brearley had taken steps to involve Mr Venables or that it was Mr Brearley who had also solicited JLR. Rather, Higgs was told that they had both been headhunted by JLR. The risk that Mr Brearley would be accused of diverting the opportunity, or that there was clear wrongdoing, was not immediately apparent. The legal point that exposure to breach of fiduciary duty can arise even if the principal could not exploit the opportunity, or the point that it may make no difference which party made the first approach, are not so obvious that they

should have been immediately apparent to someone who was not a specialist employment lawyer or litigator, and who was in any event making it clear that specialist advice was required.

374. I also do not agree that any failure on the part of Mr Cutler to chase for Mr Brearley's service contract when it was not received after 13 February fell below the standard of a reasonably competent solicitor. I have accepted Mr Cutler's evidence that he did try to ensure that contact was made with Mr Kelly, but he also understood that there were delays to the project ([216] and [217] above). It would not have been apparent to him that it would make an appreciable difference if immediate action was taken, as opposed to giving advice once Mr Brearley was prepared to inform Higgs that he was ready to receive it. Higgs was doing no other work on the project at the time and Mr Cutler understood that it was not progressing.

375. At the next meeting on 14 April, Mr Cutler correctly reiterated the need for specialist advice, and following it arranged for Mr Kelly to get in touch with Mr Brearley. The additional potentially material piece of information received at this meeting was that Pendragon had previously considered the Wolverhampton Opportunity: [219] above.

376. I do have a concern that, although he did promptly pass on the service contracts and (once received) Mr Brearley's draft resignation letter, Mr Cutler did not adequately brief Mr Kelly so that he was properly prepared for the call on 22 April. Whilst Mr Cutler understood that he had conveyed to Mr Brearley the need for him to explain the position in full to Mr Kelly when they spoke (see [224] above), there is no record of that and I cannot assume that Mr Brearley fully appreciated it. It appears that the information available to Mr Kelly was less than that available to Mr Cutler. For example, whilst Mr Kelly was aware that Mr Brearley had a senior role at Pendragon and had been told that he had been headhunted by JLR, he did not receive a copy of the Information Pack describing the project, Mr Venables' involvement may not have been apparent and there is no indication that Mr Kelly understood that Pendragon had previously considered the project. I conclude that greater consideration should have been given by Mr Cutler to what Mr Kelly should have been told about information already available to the firm and which Mr Brearley might reasonably expect would have been included in the briefing that Mr Cutler gave to Mr Kelly. Although Mr Cutler was not himself an employment specialist it would have been part of his responsibility as the corporate partner coordinating Higgs' work on the project to ensure that his colleagues had the information that they required.

Call on 22 April 2015

377. I have concluded that Mr Kelly should have done more in the call on 22 April to convey to Mr Brearley the potential extent of the legal risks that he was running. Even though Mr Brearley did not expressly ask for advice about restrictions in his service contract he had in fact provided it to Higgs for review. The instruction in his email of 13 February that it was "worth a run through over the next few weeks" had not been withdrawn. He had agreed with Mr Cutler that his service agreement should be discussed alongside his resignation letter ([222] above). Mr

Kelly had a copy of the service agreement and had clearly looked at it before the call.

378. Mr Kelly should have been able to ascertain from even a fairly cursory review of the contract that Mr Brearley was subject to material provisions that applied during the course of Mr Brearley's employment (including a specific prohibition on preparatory activity, an express reference to an account of profits remedy and a statement that the obligations were without prejudice to the existence of any fiduciary duty), as well as restrictive covenants that potentially applied after he left. Further, although Higgs had certainly not been properly briefed about the extent of Mr Brearley's activities in relation to the Wolverhampton Opportunity whilst he was still employed by Pendragon, it did have some critical information, including that there had been some discussion with JLR. At least collectively, Higgs held enough information for a risk to be identified that was not limited to a potential difficulty with restrictive covenants.

379. I accept that Mr Kelly needed significant additional information to give full advice about the extent of the risks, and that he expressed willingness to advise on receipt of it, but any warning that he managed to convey was limited to the possible impact of the restrictive covenants, and also did not extend to any suggestion that Mr Brearley should delay his planned resignation or cease work on the Wolverhampton Opportunity pending further advice. In my view a reasonably competent employment specialist, armed with the information that Higgs had, would have alerted Mr Brearley to the potential risk that he was in breach of the duties to which he was subject during the course of his employment, and give some indication of the possible consequences, including in particular the potential exposure to an account of profits. Further, the recommendation that Mr Kelly in fact gave that consideration should be given to reaching agreement with Pendragon (see [232] above) would have been made in stronger terms. This is so despite Mr Brearley being apparently relaxed about being able to pursue his plans in practice. Higgs' role was to point out the legal risks. Given the express terms of the contract, whether those obligations were contractual or fiduciary in nature (or both) is not particularly significant in this context. The fact was that a legal risk was readily identifiable from the terms of the contract and the information held by Higgs.

Advice following the cease and desist letter: 16 September 2015 meeting

380. My conclusions as to what occurred following the receipt of the cease and desist letter are set out in detail above. In summary, Mr Brearley's clear instructions at the meeting on 16 September were to prepare as robust a response as possible, because he wanted to play for time. Although giving the requested undertakings was discussed as an option, Mr Brearley did not wish to do so. The function of the meeting was not to provide considered legal advice, and it was only subsequently that Mr Brearley agreed that Higgs should do so. (See in particular [259] to [265] and [274] above.) However, I have also found that the legal risks were not spelt out clearly, although it is also the case that Mr Brearley did not provide an accurate portrayal of the factual position ([263] and [271] above).

381. I conclude that Higgs should have done more at this meeting to point out the potential legal risks, in particular in relation to the exposure to an account of profits remedy (see in particular [271] to [274] above).

To whom duties were owed

The parties' positions

382. Higgs' case was that, to the extent that a duty was owed by it to any of the claimants before Mr Brearley resigned, it was to Mr Brearley alone. Higgs had done no work for JRBA or BSPR. Its interactions with Mr Danks were minimal. Apart from any advice to Mr Brearley about his employment position, the only work that it had done was to formalise the Letter of Intent referred to at [205] and [206] above, in relation to which it did not give any substantive advice to any of the signatories.

383. In relation to the period after receipt of the cease and desist letter, Higgs accepted that it owed a duty to both Mr Brearley and JRBA in respect of the Pendragon proceedings, since both were its clients. However, its position is that it did not act for BSPR in the litigation and had no dealings with Mr Danks about the claim.

384. The claimants' position was that, consistent with the email Mr Cutler sent on 28 January 2015, Higgs undertook a "full service" offering ([204] above), and that for those purposes its clients were both the natural and legal persons who had approached it. Further, it was apparent that advice about Mr Brearley's employment status had the potential to impact not merely on him but on the opportunity as a whole. Apart from its work on the Pendragon proceedings, which it was accepted was undertaken only for Mr Brearley and JRBA, the remainder of the work was consistent with the provision of a full service to the claimants. This work included the shareholders' relationships with each other, Mr Brearley's and Mr Venables' employment contracts, and funding for BSPR and JRBA. There was no indication that, for example, Higgs had disclaimed responsibility to Mr Danks.

JRBA and BSPR

385. I have concluded that, from the date on which it was first instructed on 28 January 2015, Higgs' clients in relation to the project were JRBA and BSPR. In addition, it acted for Mr Brearley personally in respect of his employment contract and proposed resignation and subsequently (and as not disputed) for Mr Brearley and JRBA in relation to the Pendragon proceedings.

386. Higgs was instructed on 28 January 2015, creating an oral retainer on that date to provide general legal support in relation to the project ([204] above). The detail of what would be required remained to be worked out, but it was clearly anticipated to include funding, corporate and commercial work and some property work. The obvious clients were BSPR and JRBA: it was they who would need the funding, and would develop and operate the sites. There would have been no doubt in anyone's mind that bills would be addressed to, and payable by, them rather than anyone else. Prior to formal retainers being created Higgs made

itself available to BSPR and JRBA to perform tasks requested of them in relation to the project.

387. The advice that Mr Cutler gave at the meeting on 2 February that specialist employment input was required (advice given in the presence of Mr Venables and Mr Danks, and possibly Mr Smith as well) was not simply advice addressed to Mr Brearley personally. It was reasonably incidental to what Higgs had been retained to do by BSPR and JRBA, and flagged up a risk of which Mr Cutler became aware in the course of Higgs' retainer (see [344] and [345] above).

388. Although Mr Kelly spoke to Mr Brearley about his personal position on 22 April, the legal risks that he should have done more to alert him to were risks that were clearly also relevant to JRBA and BSPR. For so long as Higgs continued to act for JRBA and BSPR its obligation to alert its clients to risks of which it became aware remained.

389. Once negative advice was given on 25 September it was similarly Higgs' responsibility to ensure that BSPR was properly informed. In fact, it relied on Mr Brearley to inform Mr Danks and Mr Smith (see [294] above). It does not make a difference to the outcome of this case whether Higgs was entitled to do so and I did not receive submissions on the point, so I do not reach a conclusion about whether it was open to Higgs to rely on Mr Brearley in this way. I note however that (a) Mr Brearley had previously been providing instructions on behalf of BSPR and JRBA as well as himself, with no suggestion that he was not authorised to do so, and (b) at this stage Higgs would have had no clear reason to doubt that Mr Brearley would properly update his co-venturers. Further, there is no indication that either Mr Smith or Mr Danks requested an update from Higgs, even though they knew that there was a dispute with Pendragon, would have known that draw down of funds was delayed, and subsequently must have been involved in the arrangement referred to at [190] above for BSPR to acquire and develop the Penn Road site without Mr Brearley's active involvement. Mr Danks specifically confirmed in cross-examination that he was content to rely on the feedback that he received from Mr Brearley.

Mr Danks

390. I have concluded that Higgs had no retainer with Mr Danks, and that it otherwise assumed no responsibility to him.

391. Mr Danks had never previously instructed Higgs. He accepted in cross-examination that he had never personally been a client of Higgs, but maintained that he thought he was covered by the "full service agreement". He accepted that the firms of solicitors that he normally engaged for property matters acted only for the relevant property company and not for him personally.

392. Based on an objective consideration of all the circumstances I cannot conclude that any intention to enter into such a contractual relationship ought to be imputed to Mr Danks and Higgs. It is not necessary to explain any conduct on the part of either. On the contrary, Mr Danks' attendance at meetings and involvement generally is entirely explicable by reference to his capacity as a director and

shareholder of BSPR. There is no indication that he ever sought advice about his own position or ever assumed any responsibility for any part of Higgs' fees. There is no suggestion that he queried the formal retainers when they were issued to BSPR and JRBA and not to him. The mere fact that Mr Danks had an economic interest in the project, or that Higgs did not expressly disclaim responsibility, cannot be sufficient to require a retainer to be implied or mean that Higgs must be taken to have assumed a duty of care in tort.

Causation

Primary causation

393. The claimants' case is that, if they had been advised in January or February 2015 that Mr Brearley and Mr Venables were breaching their duties in pursuing the Wolverhampton Opportunity whilst still employed by Pendragon, or that Mr Brearley would probably be in breach of his restrictive covenants if he did so within 12 months of his departure, they would have ceased their pursuit of the opportunity and Mr Brearley would have sought to reach an agreement with Pendragon.

394. The claimants also maintain that it is highly unlikely that, if properly advised, they would have been able to continue to pursue the opportunity without first approaching Pendragon and securing its agreement, because they required Higgs' assistance to do so, and Higgs would have recognised that to provide such assistance would involve it in assisting in breaches of contract and fiduciary duty.

395. I have concluded that there was no breach of duty until 22 April 2015, when Mr Kelly should have done more to convey the extent of the legal risks (and for which purpose he should also have been better briefed by Mr Cutler). I need to assess what Mr Brearley would have done, on the balance of probabilities, if Mr Kelly had provided an adequate warning of the legal risks.

396. The first point to make is that any reasonably competent adviser would have made it clear that full factual details were required to advise on the extent of the legal risks, and would also have urged Mr Brearley to provide that additional information so that properly considered advice could be given. In the meantime, such an adviser would have explained that proceeding to resign and continue work on the Wolverhampton Opportunity as Mr Brearley was planning to do, without having engaged with Pendragon on the subject, was likely to involve material legal risk.

397. I then need to consider what Mr Brearley would have done with that advice.

398. Mr Brearley would in my view have been reluctant to take or follow additional advice. He had been planning and working on the project for a number of months before any approach was made to Higgs. The issue of conflict of interest with Pendragon was flagged as early as July 2014 by Smith & Williamson (although in my view Mr Brearley was well aware of it in any event), see [163] above. When Higgs was finally instructed Mr Brearley delayed engaging on the subject of his employment position until he was on the point of resigning. His focus on the call

on 22 April 2015 was on his resignation letter and how to finesse that. Thereafter, he failed to provide the additional instructions that Mr Kelly had invited to allow Mr Kelly to advise him properly on his restrictive covenants, despite arranging (at his expense) for such advice to be given to Ms Price ([243] to [245] above). He also did not take up the suggestion that Mr Kelly made to seek an agreement with Pendragon about his restrictions.

399. It is noteworthy that the plans that were being discussed with investors at this stage involved the dealership operating during a period when Mr Brearley would on the face of it still be subject to contractual restrictions. I have concluded that he must have been aware in general terms of Pendragon's revised approach to restrictions in its executive employment contracts and that he was not wholly ignorant of the terms of his own contract (see [85], [88], [211] and [216] above). The May 2015 version of the Information Pack for BSPR envisaged commencement of trading in May 2016. Mr Brearley's resignation letter was written on the assumption that he would work his notice period (see [239] above). Even if he thought that any restrictions would not apply before trading commenced, trading would commence within 12 months (and certainly within 36 months) of the likely date of cessation of employment.

400. As already discussed, the primary reason for this behaviour was Mr Brearley's confidence about his relationship with JLR and the influence that he believed it would have with Pendragon. But it is also clear that Mr Brearley did not want to approach Pendragon because he was concerned about its reaction. Steps had been taken to limit the chances of his involvement (and that of Mr Venables) becoming known. For example, the Information Pack did not provide their names, and Mr Brearley's name was removed from the copy of the JLR comfort letter included in it. Confidentiality was emphasised. When asked in cross-examination why he did not inform Mr Finn of his own proposal to pursue the Wolverhampton Opportunity after Pendragon decided not to proceed with it he agreed that Mr Finn "would find it unacceptable".

401. Despite Mr Brearley's disinclination to do so, I am prepared to conclude that he would, reluctantly, have engaged in obtaining further legal advice, as he agreed to do in September 2015 (see [265] above). However, his actual behaviour indicates that he is likely to have provided incomplete and in some respects inaccurate information to his adviser. This is what he actually did to Higgs throughout the period that it was instructed, to Wilkes and (at least initially) to Freeths. It is also what he did in certain respects to prospective investors, to JLR and to his co-venturers (see [199], [180] and [294] above respectively), and what I have concluded that he has done to this court. I conclude, based on Mr Brearley's actual behaviour, that it is more likely than not that inadequate information would have been provided to Higgs.

402. As to what that information would have been, the obvious answer lies in what actually happened following the cease and desist letter. I find that Mr Brearley would have provided the information that he was in fact prepared to provide to Higgs when he finally engaged it to provide detailed advice in September 2015, save that (at this stage at least) Higgs would not have been assisted by the content of any correspondence from Eversheds.

403. Mr Turner suggested that I conclude that, notwithstanding Mr Brearley's failure to provide accurate information to Higgs, a competent adviser would recognise that the advice that Mr Brearley needed to receive was that all material facts needed to be disclosed to Pendragon in order to obtain its informed consent, effectively whatever those facts were and whether or not Higgs was aware of them. I see that in theory, but in practice it gives rise to a difficulty. In reality a solicitor will advise by reference to what his client informs him is the factual position, unless he has a reason to doubt what he is being told. In practice, competent advice would cover the way in which Pendragon would be approached and, most importantly, what would in fact need to be said, rather than leaving it to the client to determine what may or may not be material from a legal perspective.

404. I have considered and describe below three possible courses of action that Mr Brearley could have pursued if he had agreed to obtain, and obtained, competent legal advice, based on the information that I conclude that he would have been prepared to disclose to Higgs. I should stress that, of these, only my conclusion on the second course of action (full disclosure to Pendragon) is determinative of the primary causation issue in respect of the loss of the Wolverhampton Opportunity. The others were not explicitly explored at the trial. However, I have found them helpful to consider, not least because the obvious question that arises in determining whether Mr Brearley would have chosen a particular course of action is what alternatives would have been available, since they would inevitably influence the choice that he would have made. The course of action chosen could also affect the claim for wasted costs in respect of the Pendragon proceedings.

405. The first possible course of action is that Mr Brearley could have concluded that the prospect of seeking fully informed consent from Pendragon was so unattractive, or so unlikely to succeed, that he would not attempt it and would abandon pursuit of the Wolverhampton Opportunity. If that is what would have occurred (on the balance of probabilities) then there could be no claim against Higgs for the lost opportunity, but there could potentially be a claim for wasted costs in respect of the Pendragon proceedings.

406. However, in my view this is not what would have occurred. For Mr Brearley the Wolverhampton Opportunity was a once in a lifetime opportunity. As demonstrated by what in fact occurred after receipt of the cease and desist letter he would not readily abandon it, at least without a fight. He was confident that JLR's influence would make any legal problems disappear.

407. The second course of action would be to follow the legal advice to the letter by approaching Pendragon and making a full disclosure. The outcome would then depend on whether there was a substantial chance of Pendragon allowing Mr Brearley to pursue the Wolverhampton Opportunity, a question of secondary causation which is discussed below. If there was no such chance then there could still be a claim for wasted costs in respect of the Pendragon proceedings.

408. However, I am unable to conclude on the balance of probabilities that Mr Brearley would, in fact, have been prepared to approach Pendragon and make an honest and full disclosure.

409. I have already referred to the practical difficulty that Mr Brearley would have discussed with Higgs what he should say to Pendragon, based on what he was prepared to tell Higgs. That would not amount to the required full disclosure. Mr Turner submitted that I could nonetheless conclude that Mr Brearley would have made such a disclosure because he would have understood that it was in his interests to do so, because only a consent on a fully informed basis would not be susceptible to challenge. I disagree. Mr Brearley has consistently failed to provide accurate and complete accounts of what occurred. He appears to have a perception of what is in his interests that differs from what many would consider to be the norm. I suggest that most people would appreciate that it could not, ultimately, be in their interests to fail to provide accurate information to their own lawyers. If Mr Brearley was not prepared to provide full information to Higgs then I cannot see that he would have been prepared to take a different approach with Pendragon.

410. The previous paragraph discusses whether full disclosure would have been made to Pendragon. But there is a logically prior question as to whether Mr Brearley would have approached Pendragon at all. In addressing that question it is critical to bear in mind not only Mr Brearley's confidence about JLR but his perception that Pendragon, and specifically Mr Finn, would find his proposal unacceptable (see [400] above). He would not have believed that Pendragon would welcome the proposal. It is sufficiently clear from the evidence that he was anticipating some level of resistance when Pendragon found out that he was involved, albeit that (no doubt due to JLR's influence and the view he clearly had that Pendragon would not have the stomach for a fight, see [252] above) he did not envisage anything like the scale of the dispute that in fact occurred.

411. If Mr Brearley had not been concerned about Pendragon's reaction then he would not have taken the steps that he did to seek to ensure that Pendragon did not find out about his involvement (for example, asking for his name to be removed from the JLR comfort letter of 9 January 2015 and placing a particular emphasis on confidentiality). He also accepted in cross-examination that he thought that there was a real possibility that he would have been sacked by Pendragon if it was shown the proposal letter of 18 December 2014. I conclude that Mr Brearley would not have considered that a straightforward approach to Pendragon to seek consent would have best served his interests.

412. The third course of action available to Mr Brearley would have been neither to cease work nor to make a straightforward approach to Pendragon, but instead to continue to seek to pursue the Wolverhampton Opportunity as he in fact did, including following the cease and desist letter. My conclusion from all the evidence is that this is what, on the balance of probabilities, would have occurred. I do not need to determine precisely what Mr Brearley would have attempted to do, but (again taking account of what occurred following the cease and desist letter, see in particular [190] above) I would expect it to have involved an attempt to stand "behind the scenes" while BSPR, represented by Mr Danks, completed the acquisition of the Penn Road site and pursued the development, relying on support from JLR to persuade investors that the franchise would be granted. Consistent with his actual attempts to keep his involvement confidential for as long as possible, Mr Brearley would be likely to have formed the view that the

further he could progress the project towards completion without Pendragon becoming aware of his involvement, the less willing JLR might be to see the project fail, and the chances of having a dealership in place in Wolverhampton in the near future disappear. This could in turn increase pressure on Pendragon not to pursue any objection. I therefore conclude, on the balance of probabilities, that Mr Brearley would not have approached Pendragon for consent at all. This is so even on the basis of partial disclosure. Mr Brearley would have anticipated that any level of disclosure of his plans would lead to an immediate investigation, as in fact occurred once Pendragon became aware of the project.

413. Mr Turner submitted that Mr Brearley would not be able to proceed with the project without Higgs' assistance, which (acting competently) it would recognise that it could not provide, because that would involve Higgs assisting in breaches of duty, contrary to professional duties and (potentially) involving tortious acts. As I understood the submission, this was used to support the argument that Mr Brearley would in fact have made full disclosure to Pendragon, because he would have had no other option available.

414. I do not find this argument convincing. It is worth bearing in mind that Higgs' involvement in the project at this stage (April 2015) was extremely limited. The claimants were not obliged to have Higgs, rather than another firm, act for them. Higgs would not be at liberty to disclose its advice to interested parties (such as potential funders) who were not its clients. Mr Brearley has demonstrated that he was prepared to misinform his co-venturers about the legal advice he received in September 2015, and I am not persuaded that he would have done otherwise earlier in the year. Mr Brearley obviously took the lead in instructing Higgs on behalf of BSPR and JRBA (as well as himself) following the pitch meeting, and would similarly have been in a position to dis-instruct Higgs and then brief his co-venturers in whatever manner he chose.

415. I am also not persuaded that other parties involved in the project would have formed their own views that there was a difficulty with Mr Brearley's (or Mr Venables') employment position which would prevent their participation. Finance Birmingham received copies of the service agreements in May 2015 and did not raise a difficulty ([246] above). The fact that more than one legal team appears to have looked at the contracts may well have been behind Mr Brearley's reference to "several legal opinions" in September 2015 (see [270] above).

416. In summary, I am not persuaded on the evidence that Mr Brearley would have allowed Higgs to prevent his continued pursuit of the Wolverhampton Opportunity, when he believed that his ability to do so would not be determined by a legal analysis of his employment position but instead by the commercial reality of JLR's influence and the impact of that on Pendragon. Instead, he would have sought to continue to pursue it. In those circumstances, and as actually happened a few months later, Pendragon would still have been in a position to bring legal proceedings, with the consequences that the Wolverhampton Opportunity would have been lost and costs of those proceedings would have been incurred. Fundamentally, Mr Brearley misjudged both the level of JLR's influence and Pendragon's tenacity. The same misjudgement would have been

made if he had been given appropriate advice by Higgs in April rather than September 2015.

417. I have considered what the position would have been if I was wrong about the date of breach of duty, and (contrary to what I have concluded) Mr Cutler should have advised of the risk of a breach of fiduciary duty at the first meeting at which advice was given, on 2 February 2015. I cannot see that this would make any difference to my conclusions on primary causation. The analysis remains the same.

418. I have also considered the implications for primary causation of my conclusion that Higgs should have done more at the meeting on 16 September 2015 to point out the potential legal risks, in particular in relation to exposure to an account of profits remedy. I find that this breach of duty made no difference, either in relation to any possibility of pursuing the Wolverhampton Opportunity or in relation to the claim for costs of the dispute with Pendragon.

419. As discussed at [380] above, Mr Brearley's clear instructions at the meeting on 16 September were to prepare as robust a response as possible, because he wanted to play for time. He did not wish to give the requested undertakings. The reasons for his confidence lay in his belief in JLR's influence and Pendragon's lack of stomach for a fight: see above. The fact that competent (negative) advice would have made no difference on 16 September is amply illustrated by the robust response sent on 28 September, after negative advice was received (see [295] to [298] above).

Secondary causation

420. Given my conclusions on primary causation, I do not strictly need to assess the chances of Pendragon giving informed consent to the pursuit of the Wolverhampton Opportunity if it had been approached following the receipt of competent advice in the first part of 2015. However, the issue was fully addressed at the trial and I think it is preferable to deal with it.

421. I am mindful in reaching my conclusions on this question that even a relatively low chance of success may be treated as substantial. For example, in *Thomas v Albutt* [2015] PNLR 29 Morgan J suggested at [461] that the case law supported a threshold of 10%. However, at this stage in the process the legal burden remains on the claimants to establish a substantial chance of success. It is only if a substantial chance is found to exist that the prospects should be evaluated in a way that tends towards a generous assessment in the claimants' favour: see *Mount v Barker Austin* [1998] PNLR 493 at p.510-511 per Simon Brown LJ, applying (at that later stage) the principle in *Armory v Delamirie* (1722) 1 Stra. 505; 93 ER 664.

422. Mr Turner submitted that, if Pendragon had been approached in February or April 2015, there was a substantial chance that the outcome would have been very different to what happened in September of that year. By that point concerns had been developing since July, culminating in the meeting with Mr Hicks (see [249] to [251] above). The emails discovered suggested that Mr Brearley was working

together with Mr Venables and with Ms Price. Pendragon was completely blindsided. Planning permission had already been obtained and plans for the construction phase were well advanced. The later that Mr Finn was informed the crosser, and more entrenched, he would be. Approached earlier, Pendragon would have made a commercial assessment of what was perceived at the time to be in the best interests of Pendragon's shareholders. Whilst there would have been an unwillingness to be seen to reward Mr Brearley for his actions, this would be tempered by other considerations.

423. Mr Turner submitted that these other considerations were, first, that the claimants' pursuit of the Wolverhampton Opportunity could have been stalled for the duration of Mr Brearley's notice period plus a further 12 months in accordance with the covenants in his contract (on the assumption, as was the case in the Pendragon proceedings, that no reliance was placed on the 36 month covenant). Secondly, JLR was an important supplier to Pendragon, and Mr Turner submitted that its wishes would have carried greater weight than they did in September 2015, because of the different circumstances in which Mr Finn became aware of what had been going on. Thirdly, Mr Brearley had close relationships with a number of different manufacturers in the premium sector, and Pendragon would have regarded it as desirable to negotiate an increase in the periods of restriction to which he was subject with respect to other manufacturers (as it actually did in the consent order disposing of the Pendragon proceedings, which included restrictions running up to 2019). Pendragon could also have sought restrictions preventing Mr Brearley from expanding beyond a single dealership, which might be preferable to having a major competitor operating in Wolverhampton. Negotiated concessions by Mr Brearley to that effect would have had real value.

424. I am not persuaded that there would have been any substantial chance of Pendragon permitting Mr Brearley to pursue the Wolverhampton Opportunity if its consent had been sought following the receipt of competent advice on or shortly after 22 April 2015, or indeed in February of that year. In reaching that conclusion I bear in mind the need to be cautious in assessing hypothetical evidence ([364] above), particularly that of Mr Finn when asked in cross-examination about what Pendragon would have done if its consent had been sought at an earlier stage (to which the very clear response was that consent would not have been provided). However, Mr Finn's robust and clear evidence, combined with that of Mrs Disney, also helpfully clarified what Pendragon's actual thinking was in the Pendragon proceedings. The fundamental concerns that it had would, in my view, have existed in the same way if its consent had been sought earlier in the year, and indeed either in April or in February. Its approach to the proceedings was not prompted by anger or indeed spite as suggested by Mr Brearley (see [93] and [291] above) but by what it perceived to be its commercial interests. There is nothing to indicate that those interests might have been different a few months earlier.

425. Mr Finn explained that, when Pendragon became aware that Mr Brearley was pursuing the Wolverhampton Opportunity, it wanted to revisit the numbers itself and tried to re-engage with JLR. The fact that it did so is reflected in Mr Finn's exchanges with Mr Hicks in September 2015 (see [254] above) and also in a text

message that Mr Finn sent to Mr Hicks as late as 26 January 2016, which stated "…as you know, we are still keen to secure the Wolverhampton franchise…". I would comment that, if anything, the possibility of Pendragon obtaining the franchise might have been a more realistic prospect earlier in 2015 rather than later, when the claimants' own plans were more advanced. I cannot see that the prospect would have been worse at that earlier stage.

426. This conclusion is reinforced by Mrs Disney's evidence. Pendragon had been on the verge of acquiring the sites and its plans for the development were well advanced. It could have acquired the sites, as it planned to do before 26 September 2014, and could have presented an attractive proposition to JLR that would have led to the dealership opening substantially earlier than it in fact did. Mrs Disney's evidence described the "fancy footwork" that went on in dealings between manufacturers and franchisees during the process of awarding franchises, with a number of different factors at play including the availability of sites and investors. A dealer who may appear to be the favourite to get a particular franchise from the manufacturer's perspective might lose it, for example because the vendor of the property pulled out, and that could allow another dealer to step in. Although the manufacturer would wish to have certainty at an early stage, ultimately everyone would look after their commercial interests.

427. Further, I cannot see any reason to conclude that JLR's wishes could have had a greater impact on Pendragon earlier in the year than they did in September and October, when it is clear that JLR's preference was made apparent to Pendragon. At both points JLR was an important supplier. The commercial driver of JLR's influence on Pendragon was the same.

428. Mr Finn explained that Pendragon's perception was that it had been deceived by Mr Brearley in its own decision making process in respect of Wolverhampton. In its view he had diverted a business opportunity. It wanted to send a very clear message to others that the sort of behaviour that it believed that Mr Brearley had engaged in was not acceptable and that Pendragon would take action against it. Otherwise the company could be seriously threatened and undermined. This affected its approach to the Pendragon proceedings. The prospect of a compromise, whether through mediation or otherwise, that did not meet all of Pendragon's demands was unacceptable. Pendragon could not be seen to facilitate Mr Brearley's behaviour. The settlement ultimately arrived at met all of Pendragon's demands. Mrs Disney gave evidence to similar effect. An approach that allowed Pendragon to delay, but not prevent, Mr Brearley's pursuit of the Wolverhampton Opportunity as suggested by Mr Turner could not and would not properly address this.

429. Mrs Disney's evidence in the Pendragon proceedings also emphasised the reliance placed by dealers on the role of senior staff in developing and maintaining strong relationships with manufacturers, and the particular importance of those representatives focusing exclusively on the dealer's interests where, as with JLR, there were planned changes in the dealership network, given the significant ability they had to affect the fortunes of the dealer. Mr Brearley occupied a senior position and was trusted with the JLR relationship during a sensitive period when JLR was seeking to reduce its exposure to Pendragon.

430. However adeptly Mr Brearley managed to present the facts to Pendragon, he would be unable to avoid at least the perception that he had made use of the position he had been placed in by Pendragon and had diverted the opportunity. His involvement in the decision making in relation to Wolverhampton without disclosure of his own pursuit of it, and his access to confidential information in relation to it, was ultimately undeniable.

431. A further relevant factor was Mr Venables' involvement. Mr Venables had been involved in preparing Pendragon's investment appraisal (see [111] above). Learning of his involvement with Mr Brearley's proposals (which Pendragon would have done if its informed consent had been sought) was what Mr Finn described in his oral evidence as a "red flag". Again, Mr Finn's evidence is supported by documentary evidence, in the form of emails sent to Mr Hicks about the dispute in late September and October 2015. The combined involvement of both the managing and finance director of Stratstone could only have increased Pendragon's concern about the message that it would send if they were allowed to proceed with an opportunity that they had clearly become aware of during the course of their employment, and which Pendragon had seriously considered pursuing. Although Mr Finn made his comment about "red flag" in the context of Mr Venables' resignation in close proximity to that of Mr Brearley, and with reference to allegations that Pendragon made against Mr Brearley of financial irregularity, the underlying point about the impact of a perception of two senior executives, who worked closely together, being allowed to pursue a business opportunity apparently derived from their work, and which they would appear to have colluded to obtain, remains. Realistically, Pendragon could not stand by and permit that.

432. Mr Finn also made very clear that Pendragon's approach was not simply his own. It reflected the Board's view. In Pendragon's view any compromise would have encouraged others to undertake similar behaviour. As Mr Finn said rather pithily, "What is the point in having this protection against springboarding, if we just turn a blind eye to it?".

433. I also conclude that there was no real prospect that the possibility of obtaining longer restrictions in respect of other manufacturers would have changed Pendragon's approach. The springboarding concern it had related to JLR and specifically Wolverhampton. The risk of being seen to allow that to proceed would have well outweighed any potential advantage in respect of other manufacturers.

434. Two further points are worth a mention. As already indicated, in the Pendragon proceedings allegations were made of financial irregularity. In addition, in correspondence during those proceedings Mr Brearley raised issues about the 10/10 scheme. The allegations of financial irregularity were not ultimately pursued by Pendragon, and with one exception were not put to Mr Brearley in these proceedings. The claimants are also not pursuing any allegation against Higgs in respect of the 10/10 scheme. However, both are of potential relevance in assessing secondary causation, because the question arises whether either or both might have made Pendragon less ready to compromise than it would have been earlier in the year.

435. In my view the clear answer to this question is no. Any approach to Pendragon for consent – and indeed whether on the basis of full or partial disclosure – would inevitably have led to an investigation of Mr Brearley's conduct, because (even if it accepted that Mr Brearley was now being honest) Pendragon would have felt that it had previously been deceived and would wish to satisfy itself as to exactly what had occurred and whether there were any other issues of which it should be aware. If there were concerns about possible financial irregularities they would still have emerged. In relation to the 10/10 scheme I have no doubt that Mr Brearley would have been unable to resist raising it as a bargaining chip in seeking Pendragon's consent (noting among other things that it was specifically raised in his resignation letter, sent on 24 April – see [239] above). This would have included making the threat he in fact ultimately carried out of attempting to initiate regulatory action in respect of the scheme (Mr Brearley approached the Financial Conduct Authority and later the Financial Ombudsman Service, without success).

436. In summary, I am not persuaded that there would have been a substantial chance of Pendragon permitting Mr Brearley to pursue the Wolverhampton Opportunity.

QUANTUM

437. In view of my conclusions on liability, it is not necessary to address quantum, and indeed I would make the comment that it would have been preferable in terms of costs and court resources if questions of quantum had been deferred until the issue of liability had been determined.

438. However, I heard and reviewed a material amount of expert evidence in relation to quantum during the course of the trial. It would not be a good use of resources to address that evidence in detail, but I have decided to include some relatively brief observations for the benefit of the parties and witnesses, by reference to the points that were the focus of closing submissions. These comments are limited to the positions of JRBA and BSPR. Mr Brearley's own claim for personal losses was withdrawn (see [24] above) and I have concluded that Higgs owed no relevant duty to Mr Danks.

Motor industry expert evidence

Start date and maturity date

439. Mr Daly (for the claimants) assumed a start date for the business in May 2017, whereas Mr Jones (for Higgs) assumed a start date in January 2018. In my view the former date is unrealistic. The claimants' case as put in closing relied among other things on the fact that, when providing consent, Pendragon would have been able to stall the project for the duration of Mr Brearley's six month notice period and a further 12 months (see [423] above). If it is assumed that Mr Brearley resigned during April 2015, that 18 month period would run to October 2016. Even with planning permission already in place, construction would not then be able to start overnight. Funding would have to be secured and preparations made for the work. Taking account of that and the likely time needed for construction

(which I conclude, having regard among other things to Mr Brearley's own evidence in cross-examination and to the actual build time in Wolverhampton, was unlikely to be less than around 12 months), an opening date of January 2018 is more realistic.

440. The difference in dates has an obvious impact on the numbers because of the delayed start date and absence of trading during 2017, but it also has an impact on the likely maturity of the business at the commencement of the Covid-19 pandemic. I accept Mr Jones' evidence that this would have an adverse impact on the time required for the business to achieve a "steady state" of maturity. Mr Daly's view that this would occur in 2022 (based on a 1 May 2017 start date) is in my view unrealistic. However, doing the best I can with the evidence before me I would also not have accepted Mr Jones' evidence that a post-pandemic recession is likely which would follow the pattern of previous recessions (for example, the one that followed the 2007-2008 financial crisis), such that the business would only have achieved maturity between 2028 and 2030. But another factor is that, as well as the more general disruption caused by the pandemic, the motor industry is currently particularly affected by a shortage of semiconductors for new vehicles, the impact of which looks likely to continue into next year. The positive impact that this is having on the used car market and on margins for new vehicles (due to scarcity of supply and to JLR's response to the shortage of focusing on the production of higher margin vehicles) would not fully offset the difficulties caused by the shortage, given that new vehicles would have formed the major part of the business's sales operations. If it was necessary to reach a conclusion I would have determined that it was more likely that the business would achieve maturity in 2024 or 2025, the dates suggested by Mr Jones in oral evidence if he was wrong about his conclusion that there would be a recession.

Turnover

441. For volumes of new car sales Mr Daly took as his starting point figures in the business plan produced by the claimants which was approved by JLR, but subject to some adjustments. In his first report Mr Jones adopted a similar approach, but subject to a higher negative adjustment than Mr Daly had made to allow for a "ramp up" period as the business developed, and subject to some additional negative adjustments. However, by the date of Mr Jones' supplemental report national composite information was available for the sub-set of "Arch" dealerships (as well as composites covering all JLR dealerships), and he decided to adopt average volume figures taken from the Arch sub-set. This resulted in a significant reduction in projected turnover.

442. Mr Daly calculated used car sales volumes as a ratio of new sales volumes, using the ratio applicable to an average top 25% JLR dealer, subject to adjustments for the ramp up period and subject to a sense check against used car numbers stocked by Jardines at Wolverhampton. Having adopted Mr Daly's approach in his first report (subject to some deductions) Mr Jones again adopted a new approach in his supplemental report, using average volume figures for an Arch dealer.

443. There is some substance in the claimants' challenge to Mr Jones' change of approach. In his first report his "steady state" turnover assumption was £100m

per annum, compared to £62m in his supplemental report, being Arch average performance. The difficulty with the composites is that they show average turnover. They do not show the range of turnover, and therefore do not indicate what a larger business (which the claimants say that Wolverhampton would have been) would achieve. Further, for composite purposes business are ranked not by overall profitability but by return on sales ("ROS"), expressed as a percentage. A small business would therefore rank higher than a large business if its margins were greater.

444. It appears not to have been in dispute that the Wolverhampton dealership would be relatively large, would have a significant number of service bays and would be located in a sizeable conurbation and that, due to the proximity to the factory, employee-related car sales were also expected to be a material factor. The subsequent closure by Pendragon of its Stourbridge site was another potentially relevant factor that could be expected to lead to some additional custom.

445. Although there is validity in the claimants' criticisms, it does not follow that I would simply adopt Mr Daly's approach. Whilst he did make some material adjustments to the claimants' business plan I would not have been readily persuaded that they would have been sufficient. As he accepted, the figures in that plan were overly optimistic. This must be all the more so once Mr Daly had added in the employee-related car sales that he said had been omitted. Whilst the figures – presumably with employee-related sales omitted – had been reviewed by JLR, the opening volumes that Mr Daly assumed would have been contracted to be supplied by it were not in fact committed. JLR was also not prepared to accept the potential legal exposure involved in confirming to Barclays (as lenders to the project) that the figures that it had reviewed were in line with its expectations. Mr Brearley's own evidence in the Pendragon proceedings was that he had had relatively low involvement in determining likely sales volumes. The impact of the delayed start and maturity dates also need to be taken into account: see above. I have also accepted Mr Jones' evidence about his meeting with Mr Roberts, which included that the 85 employee-related sales achieved in the first year referred to by Mr Roberts fell materially short of the 125 anticipated by Mr Daly. That has an impact on the subsequent years, because later figures are extrapolated from that starting point. In relation to Stourbridge, I accept Mr Jones' evidence that Mr Finn had explained that its figures had been artificially increased by its use as a base for fleet and management car activity.

446. I accept Mr Jones' evidence that the claimants' business plan was prepared at a time of greater optimism about JLR's continued growth. I understood Mr Daly to accept this at least to some extent. There are also particular concerns about Jaguar, with indications that it may be repositioning itself as an ultra-luxury brand, implying lower turnover than anticipated.

Profitability

447. Mr Daly's assessment would have resulted in a rapid increase in profitability to around £1.9m by 2022 and an assumption that the business would have then been among the top quartile in ROS terms (subject to adjustment for a higher cost base). Mr Jones' assessment was that performance would be in line with the Arch

average and result in steady state profitability (on his turnover projections) of £600,000 per annum. It is more likely that the appropriate figure lies between these two extremes.

448. Both experts agreed that the quality of the management was highly relevant to performance. This must be the case as regards profitability but also at least to some extent as regards turnover. I would have preferred Mr Jones' evidence that Mr Brearley's proposed role in the business would not have been sufficient to justify an assumption of top quartile as opposed to average performance, at least initially.

449. The relevant factors here include the available information about the performance of Stratstone whilst Mr Brearley ran it, the fact that Mr Brearley had not himself run an individual dealership for a number of years, and the fact that the business plan in any event envisaged that a full time manager would be recruited to run the Wolverhampton dealership (a factor which, together with provision for a full time marketing executive, also indicates costs at a level that would not be justifiable for a single dealership operation). Whilst Mr Brearley no doubt has good contacts and significant experience, that does not automatically justify a conclusion that he would secure a manager who would rapidly achieve top quartile performance in a new business. The fact that Jardines, a well established group, appear to have experienced trading difficulties in the first year despite the use of an experienced manager supports this. The subsequent likely effect of the pandemic on what would still have been a new business reinforces the point. However, against this Mr Brearley did have close relationships with JLR and a detailed knowledge of the automotive retail business both nationally and locally in the Wolverhampton area (Mr Goss described him as a "local hero" for JLR). These factors would no doubt have assisted the business.

450. It is also worth making the observation that the experts' calculations take no account of any account of profits remedy available to Pendragon, including the sort of arrangement that Mr Brearley suggested at one stage in cross-examination under which (in exchange for consent to pursuing the Wolverhampton Opportunity) a commission arrangement could be entered into to protect Pendragon in the event that Stourbridge customers transferred their business to Wolverhampton.

Accountancy evidence

451. By the time of the trial there was relatively little difference of opinion between the accountancy experts (Ms Fowler for the claimants and Mr Good for Higgs). Both agreed that the proper approach to valuation of the Wolverhampton Opportunity was to apply a discounted cash flow methodology, under which future cash flows would be discounted to arrive at a net present value. The discount rate reflects the time value of money and investment risk. The claimants also accepted that the appropriate rate of interest to apply to any award of damages was 2% above LIBOR (consistent with Higgs' position and in line with Mr Good's approach) rather than the 8% judgment rate referred to in Ms Fowler's calculations.

452. The main point of difference related to forecasting risk. Ms Fowler used a forecasting risk of 0.5% throughout, reduced from 1.5% in her first report. Mr Good assumed no forecasting risk up to 2020, to reflect the fact that we now know how JLR dealerships and the economy have performed. From 2021 he assumed a forecasting risk of 1.5%, consistent with Ms Fowler's first report.

453. As the name suggests, forecasting risk is intended to address the risk that a forecast will not be achieved. It is added to the discount rate, the effect being that the higher the percentage allowed for forecasting risk the lower the net present value.

454. I would have preferred Mr Good's evidence to that of Ms Fowler on this point. I found his explanation convincing. Risk could sensibly be eliminated for the period that has already elapsed, because we now know how the sector and wider economy have performed. Risk remains for the future. Whilst Mr Good accepted that the level of that risk would reduce as a business becomes established, it was not possible to say as at the chosen valuation date that the business would in fact have become successfully established by 2021. Ms Fowler's revised rate of 0.5% would not allow sufficiently for the risk, particularly bearing in mind the later start date for the business than the claimants contended for and the likely impact on it of the pandemic.

455. The accountancy experts also disagreed about capital expenditure (capex) assumptions. Mr Good concluded from assumptions in Mr Daly's first report that, intangible assets aside, capex would on average need replacing every seven years. Ms Fowler adopted an approach based on a conversation with Mr Daly which did not feature in his reports of assuming a refurbishment costing £500,000 every 10 years. Again, I would have preferred Mr Good's approach, which was based on material in Mr Daly's report.

CONCLUSIONS

456. In conclusion:

a) There was a breach of duty by Higgs in failing to provide adequate advice on 22 April and 16 September 2015.

b) Higgs owed relevant duties to BSPR, JRBA and Mr Brearley, but not to Mr Danks. However, Mr Brearley's claim to personal losses has been withdrawn.

c) The claimants have not established their case as to what Mr Brearley would have done if he had received competent advice. The effect of my findings is that the surviving claims (being that of BSPR and JRBA) fail both in respect of the Wolverhampton Opportunity and in respect of the costs of the Pendragon proceedings.

d) In any event the claimants have not demonstrated that there would have been a substantial chance of Pendragon permitting Mr Brearley to pursue the Wolverhampton Opportunity.

457. The claim is therefore dismissed.

APPENDIX: DRAMATIS PERSONAE

Individuals

Name	Company	Role
Malcolm Bailey	Pendragon plc	Development Director
Hannah Bollard	Higgs & Sons	Trainee Solicitor (Employment)
James Brearley	Claimant	
	Pendragon plc	Managing Director of Stratstone Division until August 2015
Paul Brittan	Jaguar Land Rover	Franchise Manager
Ashley Brough	JBMI Group Ltd	Commercial Director
Miles Brough	JBMI Group Ltd	Chief Executive Officer
Adrian Cutler	Higgs & Sons	Partner (Business Services) until May 2015 Consultant from May 2015 to September 2016 Partner (Business Services) from September 2016
Rodger Danks	Claimant	
	Shareholder and director of various companies	
Jamie de Souza	Higgs & Sons	Associate (Dispute Resolution) until April 2018
Marc Delehanty	Littleton Chambers	Barrister (specialising in employment law)
Hilary Disney (nee Sykes)	Pendragon plc	Company Secretary and Corporate Services Director until March 2017
Cherry Elliott	Higgs & Sons	Partner (Property)
Zahra Farooq	Higgs & Sons	Trainee Solicitor (Employment)

Trevor Finn	Pendragon plc	Chief Executive Officer until March 2019
Carl Garvie	Higgs & Sons	Partner (Dispute Resolution) until 31 October 2017
Andy Goss	Jaguar Land Rover	Former Global Sales Operations Director
Adrian Hallmark	Jaguar Land Rover	Group Strategy Director
Jeremy Hicks	Jaguar Land Rover UK	Managing Director
John Hobbs	Pendragon plc	Head of Group Property
Trevor Jones	ASE plc	Consultant Former Chief Executive Office and Chairman
Damian Kelly	Higgs & Sons	Partner (Employment)
Mark Kuzminski	Jaguar Land Rover	Franchise Manager
Iain Lownes	Smith & Williamson	Corporate Finance Partner
Philip Moody	Smith & Williamson	Chairman and Corporate Finance Partner
Sarah Nelmes	Jaguar Land Rover	Network Development Manager
Matthew Pearson	Smith & Williamson	Director
Claire Price	Pendragon plc	Head of Marketing of Stratstone Division until August 2015
Richard Roberts	Jaguar Land Rover Jardine Wolverhampton	Former Head of Business
Steven (Steve) Smith	Investor in Blue Square Penn Road Limited	
Nicholas (Nick) Taylor	Higgs & Sons	Partner (Business Services)

Steve (Steve) Venables	Pendragon plc	Financial Director of Stratstone Division until September 2015

Other entities

Entity	Role
Blue Square Penn Road Limited (BSPR)	Claimant Intended property holding company for the Wolverhampton Opportunity
JRB Automotive Limited (JRBA)	Claimant Intended operating company for the Wolverhampton Opportunity
Pendragon PLC	Former employer of James Brearley and Steve Venables
Smith & Williamson	Business / financial advisers to James Brearley, Rodger Danks, Steve Venables, Blue Square Penn Road Limited and JRB Automotive Limited
Unwin Jones Partnership	Architects (engaged separately by Pendragon plc and Blue Square Penn Road Limited / Rodger Danks)
Wilkes Partnership LLP	Solicitors instructed by Mr Brearley in the Pendragon proceedings after Higgs terminated its retainer