Neutral Citation Number: [2021] EWHC 42 (Ch)

Case No: BL-2018-000832

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Double-click to add Judgment date

Before :

Mr Stephen Houseman QC sitting as a Deputy Judge of the High Court

- -

Between :

YJB PORT LIMITED **Claimant**

- and -

Defendants

(1) M&A PHARMACHEM LIMITED
(2) CD MEDICAL LIMITED

- -
- -

Paul Sinclair QC (instructed by **Links Legal**) for the Claimant
Paul Mitchell QC and **Tom Shepherd** (instructed by **Setfords Solicitors**) for the Defendants

Hearing dates: 9, 10, 11 & 21 December 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic. The date and time of hand-down is noon on 12 January 2021.

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MR STEPHEN HOUSEMAN QC

Mr Stephen Houseman QC Sitting as a Deputy Judge of the High Court:

INTRODUCTION

1. This is my judgment following a short trial conducted remotely on 9-11 December with separate oral closing submissions on 21 December 2020.

2. This action was commenced in April 2018. This phase of the proceedings concerns quantification of damages and other final relief, pursuant to a split trial order made on 4 December 2018. The trial of the "*liability phase*" was heard by Miss Elizabeth Jones QC (sitting as a Deputy Judge of the High Court) during 23-26 July 2019, resulting in a reserved judgment dated 31 July 2019 with neutral citation [2019] EWHC 2117 (Ch) ("**Judgment**"). I am indebted to Miss Jones QC for her clear analysis of and discrete findings on the issues in that phase of the proceedings. Without intending any discourtesy, I will refer to her in this judgment as the "first trial judge".

3. The claim arises out of an exclusive manufacturing and distribution agreement dated 1 December 2014 between the Claimant ("**YJB**") (as Supplier) and the First Defendant ("**M&A**") (as Distributor) ("**Agreement**"). It concerned a starch-based medical thickening compound known as "*ThickenAid*" used in the treatment of dysphagia. By its express terms, the Agreement was due to expire (at earliest) on 1 December 2019. As found by the first trial judge, it was terminated on 6 February 2019 when YJB accepted M&A's repudiation.

4. Two claims remain live in this second phase of the proceedings. First, a claim for damages for M&A's specific breaches of clause 3(f) of the Agreement during mid-late 2017 as found by the first trial judge (**"Competition Claim**"). Secondly, a claim for final injunctive relief to restrain the Defendants' use or disclosure of certain confidential information as so characterised by the first trial judge ("**Confidentiality Claim**"). There is no claim for damages or compensation for breach of confidence, whether contractual (clause 15 of the Agreement) or equitable. There is no live claim for breach of any other provision of the Agreement.

5. The Second Defendant ("**CDM**") is closely related to M&A. It operated at all material times, in effect, as the sales and distribution function or division of a homogenised business operation run by the same management team. Save as necessary and in accordance with the approach and findings of the first trial judge, I deal with M&A and CDM together. The Confidentiality Claim is pursued against them both. The Competition Claim lies only against M&A as contracting party. The sole basis of damages available and sought in the latter context is the alleged loss in capital value of the relevant business of YJB, measured as at February 2019, as directed by the first trial judge.

6. The Competition Claim throws into sharp focus the court's approach to causation in circumstances where (a) only *specific breaches* of a contractual anti-competition covenant are found to have been committed, (b) those specific breaches concern internal *preparatory* steps rather than commercial production or actual competition in the relevant market, (c) the actual breaches of contract occur in conjunction with

threatened future breach or breaches of the same anti-competition covenant and/or threatened future *lawful* competition, (d) such threatened future breach(es), i.e. anticipatory breach at common law, form part of a matrix or continuum of repudiatory or renunciatory conduct which has been found to justify termination of the relevant contract by the innocent counterparty and/but (e) the contract-breaker would always have become free to compete *lawfully* at a future point in time after expiration of the relevant covenant. This final feature looms large over any counterfactual analysis when approaching causation for breach of clause 3(f) of the Agreement.

7. The court's approach to this causation issue is potentially complicated or compromised by certain procedural matters. The split trial order referred to "*issues of liability*" and the Judgment concerns and covers the "*liability phase of a split trial*" (Judgment, paragraph 1). Despite this, the first trial judge was asked to determine certain other aspects of the Competition Claim, namely (i) whether M&A's breaches of clause 3(f) caused *no loss* or *some loss* to YJB; and (ii) if the latter, the basis and date of assessment of any loss. The Judgment covers both points in a way that is said by YJB to prevent or preclude this court from concluding that *no loss* was caused by the proven breaches.

8. The Defendants' position at this further trial is that *no loss* was caused by its proven breaches of clause 3(f) of the Agreement, as distinct from threatened future breach(es), notwithstanding the first trial judge's answer to the specific issues identified above. Whilst this position may at first glance appear to contradict the findings of the first trial judge, I am satisfied given the circumstances and focus of inquiry at that stage in the proceedings that such findings do not preclude me from reaching such conclusion at this stage.

9. For the reasons set out below, I conclude without hesitation that YJB suffered no loss by reason of such specific breaches of clause 3(f) on the part of M&A.

RELEVANT BACKGROUND

10. The relevant factual background and contractual matrix is set out in the Judgment at paragraphs 2 to 22. It is also summarised in other judgments in these proceedings, including: the judgment of David Halpern QC (sitting as a Deputy Judge of the High Court) dated 29 June 2018 ([2018] EWHC 1654 (Ch)) refusing interim injunctive relief; and the judgment of Miss Penelope Reed QC (sitting as a Deputy Judge of the High Court) dated 30 July 2020 ([2020] EWHC 2239 (Ch)) granting YJB permission to amend the causation basis of the Competition Claim in this second phase of the proceedings.

11. The determination of the issues before me at this trial does not require a full recitation of such background. I identify salient points below, including some important aspects of the procedural history.

12. The key contractual provision is clause 3(f). It prohibited M&A, without prior written consent, from being directly or indirectly involved in "*the manufacture, production, promotion or sale of any goods which compete or are likely to compete with any of the Products [i.e. ThickenAid] during the term of this agreement or for a period of 6*

months following termination". This covenant contains a series of distinct (but potentially overlapping) negative promises. It expressly survives termination of the Agreement by a prescribed period of time. It is accepted as enforceable as a matter of law.

13. As summarised below, the first trial judge found that M&A breached clause 3(f) in three specific ways during mid-late 2017 (together, "**Proven Breaches**"). It did so, operating together with CDM at all material times and in all material ways, by taking meaningful preparatory steps towards launching a gum-based thickening compound (to be) known as "*Simply Thicken*" which, if ever launched, would have competed with *ThickenAid*. As matters turned out, such rival product has still not been launched and may well never be launched. There has been no actual competition, lawful or otherwise. For convenience I refer to these putative rival products as 'TA' and 'ST'.

14. YJB's discovery in around late October or early November 2017 of M&A's plan to develop and launch ST coincided with YJB's proposed sale of the TA business to a third party, Aymes International Limited ("**AIL**"). Once the cat was out of the bag, so to speak, AIL's appetite to purchase TA rapidly diminished. An initial offer of £425,000 was removed from the table by AIL. Immediately upon termination of the Agreement on 6 February 2019, i.e. the very next day, YJB and AIL entered into a distribution agreement and a separate purchase option agreement in respect of TA. The business valuation applicable under that option agreement is, I am told, a fraction of the original offer price.

15. Given the focus in these proceedings upon the 'lost opportunity' to sell the TA business to AIL upon discovery of M&A's conduct during autumn 2017 and thereafter, it is tempting to infer that no claim for damages would have been pursued by YJB in respect of the Proven Breaches but for such perceived 'lost' sale. This appears to have operated as a motivating force in the pursuit of damages by YJB in this case and, I have to say, as something of a distraction.

16. As summarised below, the first trial judge rejected YJB's claim based upon loss of opportunity, finding instead that any claim for loss must be based upon the diminution in capital value of the TA business as at February 2019, subject to proof of causation. Expert evidence was adduced by the parties and received by the court at this trial dealing with such capital valuation. Such valuation only matters, however, if one or more or all of the Proven Breaches can be shown to have been an *effective cause* of some capital diminution. The first trial judge did not investigate that issue or decide it or pre-judge it.

17. Shortly before the liability trial in mid-2019, YJB obtained permission to amend its pleaded claim so as to rely upon M&A's repudiatory conduct - including threatened future breach(es) of the Agreement, i.e. as and when it would launch ST in competition with TA - in support of a claim for breach of clause 14.2 of the Agreement upon termination (as it contended) on 6 February 2019. That claim succeeded at the liability trial, as summarised below. The parties compromised the quantum of damages for breach of clause 14.2 in advance of this second stage trial, so I need say no more about that aspect of the case.

18. On the first day of the liability trial, YJB sought and obtained permission to further amend its claim as to the basis for calculating damages on the Competition Claim by

introducing an alternative case based on diminution in capital value of the TA business. As noted above, the original pleaded basis of damages was loss of opportunity based upon the putative sale to AIL. Permission was granted by the first trial judge for this amendment, but with the express proviso that "*issues of causation*" could be raised by M&A at the quantum stage of these proceedings, if arising. This proviso is alluded to in paragraph 101 of the Judgment.

19. The two pleaded bases of calculation of damages are referred to in the Judgment by their paragraph numbers in the Re-Amended POC then before the court, namely paragraph 23(1) (for convenience, "**Loss of Opportunity**" claim/basis) and paragraph 23(2) (for convenience, "**Diminution in Value**" claim/basis): see Judgment, paragraphs 79 to 101.

20. The liability trial appears to have been a hard-fought affair. The Defendants denied liability altogether. The first trial judge's findings were made by reference to the position pertaining in July 2019. I am required to determine the issues before me by reference to the current position, some 17 months later. This further trial was no less hard-fought by the parties.

Material Findings in the Judgment

21. The discrete issues put before the court at the liability trial are set out in paragraph 23 of the Judgment. Those issues are then addressed thematically rather than mechanically in the remainder of the Judgment.

22. The first trial judge addressed the Competition Claim at paragraphs 29 to 47 of the Judgment. She concluded without hesitation that ST was obviously likely to compete with TA, notwithstanding that the former would be gum-based and the latter was starch-based (paragraphs 31 to 33). She then set out the 13 separate steps or acts relied upon by YJB as breaches of clause 3(f) on the part of M&A, acting by itself or with/through CDM, spanning the period from February 2017 through to May 2018: paragraph 35, sub-paragraphs (i) to (xiii).

23. After some analysis as to the meaning of "*manufacture*" and "*production*" as appearing in clause 3(f) of the Agreement, the first trial judge concluded that just three of those 13 separate identified steps/acts constituted a breach by M&A (paragraphs 46 and 47), namely:

    (1) M&A producing sufficient quantities of ST during mid-2017 in order to carry out patient acceptability trials prior to CDM submitting an application to the Advisory Committee on Borderline Substances ("**ACBS**") for product approval on 18 September 2017: see paragraph 46 (first and second sentence) and sub-paragraph (a) in paragraph 47. I refer to this for convenience as '**Breach#1**'. It occurred during mid-2017. It cross-refers to the step(s) or act(s) identified in paragraph 35(vi) of the Judgment.

    (2) M&A agreeing, prior to the date of the ACBS application, to manufacture ST: see paragraph 46 (third and fourth sentences) and sub-paragraph (b) in paragraph 47. I refer to this for convenience as '**Breach#2**'. The first trial judge found that it must have taken place by 19 September 2017 at the latest, although it appears that the ACBS application was made on 18 September

2017, according to paragraph 35(vi) to which this breach, like (1) above, also relates.

(3) M&A or CDM ordering 480kg of Xanthan Gum from Danisco, a subsidiary of Dupont, during December 2017 for the intended production of ST: see paragraph 46 (fifth to eighth sentences) and sub-paragraph (c) in paragraph 47. I refer to this for convenience as '**Breach#3**'. It cross-refers to the step(s) or act(s) identified in paragraph 35(x) of the Judgment.

24. I have defined these three breaches of clause 3(f) collectively above as the Proven Breaches. Each of them involved a discrete act or set of acts. They all occurred during mid-late 2017. As can be appreciated from the summary in (1) and (2) above, Breach#1 and Breach#2 were aspects of the same substantive step or activity, namely initial production of ST for patient acceptability trials as a precursor to seeking ACBS approval in mid-September 2017. None of the Proven Breaches involved *actual* competition or in any meaningful sense touched or interfered with the business of YJB. The Proven Breaches concerned preparatory steps relevant to intended future (unlawful or lawful) competition.

25. The first trial judge made two separate additional findings in the remainder of paragraph 47 of the Judgment, one negative and the other positive. She stated in the second sentence that none of the other identified acts/steps constituted a breach of clause 3(f). She then found in the third/final sentence of the paragraph that by stating an intention to promote and sell ST during the term of the Agreement, which intention was first stated in late October 2017 and repeated thereafter, the Defendants "*clearly threatened a material breach of clause 3(f)*". As noted below, this latter finding as to *threatened* breach ("**Threatened Breach Finding**") became relevant in the context of the termination dispute and YJB's contingent claim for damages for breach of clause 14.2 of the Agreement, but not otherwise.

26. There is some overlap between the negative finding and positive finding in paragraph 47 of the Judgment, as described above. Sub-paragraph (xiii) of paragraph 35, referring to a passage from a witness statement filed on behalf the Defendants in the context of YJB's injunction application in May 2018, referred to an intention to launch ST within two months, i.e. well within the duration of the Agreement. That stated *intention* could not, on any view, be an *actual* breach of clause 3(f). The first trial judge implicitly confirmed this in her negative finding in paragraph 47, as I read the two findings together. Such behaviour was presumably embraced within the Threatened Breach Finding.

27. It is noteworthy that the other identified steps or acts which the first trial judge found were <u>not</u> a breach of clause 3(f) included an original (later withdrawn) and revised application to register a trademark in respect of ST during May and August 2017, respectively (paragraph 35, sub-paragraphs (iv) & (vii)). Likewise, the consideration given to obtaining a CE mark for ST in early 2018 was also considered <u>not</u> to be a breach of clause 3(f): paragraph 35(xi).

28. Jumping ahead in order to keep the points in sequence for present purposes, the first trial judge dealt with the termination of the Agreement in paragraphs 63 to 71. She rejected the Defendants' contention that YJB had affirmed the Agreement and concluded that YJB had by its solicitor's letter dated 6 February 2019 validly

accepted M&A's repudiation of the Agreement (paragraphs 69 & 70). The conduct said to amount to such repudiation included M&A's continued assertion "*that they were entitled to and intended to manufacture and distribute a product which I have found competed with [TA]*" (paragraph 70, sixth and seventh lines); in other words, M&A's threatened future breach of clause 3(f) (paragraph 47, final sentence; see also paragraph 91, fourth sentence) formed a component of its repudiatory conduct. The Threatened Breach Finding formed a key component of repudiatory or renunciatory behaviour on the part of M&A which entitled YJB to terminate the Agreement.

29. The only relevance and purpose of the finding as to termination ("**Termination Finding**") was to trigger the contingent claim made by YJB under clause 14.2(a) of the Agreement in respect of so-called 'termination stock', as noted in paragraph 17 above. There was and is no pleaded claim for damages for *loss of bargain* upon termination, i.e. the lost benefit to YJB of the extant or executory primary obligations upon termination on 6 February 2019 as compared with expiration of the Agreement (at earliest) on 1 December 2019. Nor is there any pleaded claim for damages representing any *unfair advantage* or *accelerated competition* by reason of M&A having taken unlawful preparatory steps towards actual future competition prior to expiration of clause 3(f).

30. In paragraphs 72 to 76 of the Judgment, it was found that M&A breached clause 14.2 upon termination by failing to inform YJB how much stock was available. As noted above, YJB's claim for damages for this breach was compromised before the present trial. I need not therefore rehearse the first trial judge's conclusions as regards causation in respect of this distinct head of claim (paragraphs 102 & 103).

31. Termination of the Agreement on 6 February 2019 left in place the protection of clause 3(f) for a further six month period, according to its own clear and enforceable language. Clause 3(f) therefore expired on 6 August 2019. If the Agreement had expired on its fifth anniversary (1 December 2019) as contemplated in the absence of an appropriate extension, clause 3(f) would have run until 1 June 2020.

32. In paragraphs 78 and 100 of the Judgment, the first trial judge concluded that the Proven Breaches did cause YJB to suffer *some* loss, as distinct from *no* loss, thereby answering the binary gateway question posed by the parties at that trial ("**Causation Gateway Finding**"). The basis of this finding was the reduction of AIL's offer following the "*discovery*" that M&A/CDM "*intended to produce*" or "*launch*" ST in future. The purpose of this question was to determine whether there needed to be any quantum stage in these proceedings in respect of the Competition Claim, including (as appropriate) issues of causation in respect of the newly-admitted Diminution in Value basis of claim.

33. The first trial judge went on to consider two consequential matters flowing from the Causation Gateway Finding: the permissible or appropriate basis of assessment and the date of such assessment. As to these two matters:

    (1) **Basis of Assessment.** The first trial judge rejected the original/primary pleaded claim based on Loss of Opportunity (Re-AmPOC 23(1)): Judgment, paragraphs 81 to 92. This left only the alternative claim based on Diminution in Value as introduced by late amendment on the first day of the trial (Re-AmPOC 23(2)): see paragraph 18 above. This head of claim was duly accepted as the appropriate

basis for calculating loss: Judgment, paragraphs 99 to 101. I refer to this for convenience as the "**Basis of Assessment Finding**".

(2) **Date of Assessment.** Having made the Basis of Assessment Finding, the first trial judge concluded that the appropriate date of assessment for the diminution in capital value of the TA business - i.e. "*the bundle of rights in [TA] which YJB would have been able to sell at the end of the [Agreement]*" - was when the Agreement came to an end, i.e. 6 February 2019. (Nothing appears to have turned on the precise date in February for this purpose, so the month of February was used - although this appears to have created some uncertainty in terms of assumptions made by the expert witnesses.) I refer to this for convenience as the "**Date of Assessment Finding**".

34. Earlier in the Judgment, at paragraphs 48 to 62, the first trial judge dealt with the Confidentiality Claim. In short, YJB's claims were dismissed save in respect of "*contact information directly provided by [YJB] to the defendants (and which was not collected by the defendants separately)*" (paragraph 60) (together, "**Confidential Information**"). The first trial judge observed that this was likely to be a "*fairly limited set*". I refer to this as the "**Confidentiality Finding**". It forms the basis of the injunction sought by YJB on the Confidentiality Claim. The parties agreed that such injunction claim would be determined at the quantum trial (paragraph 62).

35. In paragraph 61 of the Judgment, the first trial judge found as a matter of inference that there was "*a real desire on the part of the defendants to use such lists or contacts in order to promote [ST]*". That was the position in late July 2019, at a time when it appeared that M&A/CDM may still proceed to launch ST in the near future. The trial before me took place 17 months later. It is apparent, based on the evidence I heard, that M&A/CDM have no current intention or obvious wherewithal to market or launch ST, notwithstanding that clause 3(f) expired on 6 August 2019. I address the Confidentiality Claim below on the basis of matters as they stood before me on 21 December 2020.

Causation Gateway Finding: Status & Effect

36. The Defendants sought permission to appeal in respect of the order made by the first trial judge pursuant to the Judgment. There were four targets/findings identified in this context, namely: (1) Proven Breaches; (2) Causation Gateway Finding; (3) Date of Assessment Finding, and (4) Confidentiality Finding. At my request, I was provided with a copy of the Appellants' skeleton argument seeking permission to appeal as well as the Respondent's short note objecting to such permission.

37. Permission to appeal was refused by Males LJ by order dated 9 December 2019 ("**Males Order**"). The Males Order contains succinct reasons for refusal of permission by reference to each of the four distinct grounds/findings outlined above. In relation to the Causation Gateway Finding, Males LJ stated as follows:

"*the judge was entitled to find that the breach caused some damage. Thus, the claimant will be entitled to at least nominal damages. Great care will need to be taken at the quantum stage to ensure that the damages recovered are limited to those caused by the specific acts which have been found to amount to breaches of clause 3(f). The directions given by the judge for pleadings should enable the parties and the*

court to focus on this question. This will be a matter for the quantum trial and is not (at this stage) an appropriate matter for an appeal to this court."

38. There was a dispute before me as to the status or effect of these words in the Males Order. At the very least they are a clear indication from an experienced and eminent commercial judge, having reviewed the Judgment, as to the scope and effect of the Causation Gateway Finding. Males LJ underscored the need for a high degree of care to be taken by the court at this further trial to identify the precise causal mechanism between each of the Proven Breaches and any alleged diminution in value of the TA business, measured at 6 February 2019 in accordance with the Date of Assessment Finding.

39. Mr Sinclair QC for YJB submitted that this court is bound by the Causation Gateway Finding in the sense that M&A is precluded at this stage from contending that only nominal damages are recoverable in respect of the Proven Breaches and it is an abuse of process for M&A to contend otherwise. I disagree. As the Males Order makes clear, the Causation Gateway Finding embraces the possibility that only nominal damages are recoverable. Whilst this may not be unequivocally clear on the face of the Judgment, it makes sense when it is recalled that the first trial judge was not concerned with and did not investigate any causal mechanism or thesis in respect of any of the Proven Breaches. That was all left over for the second stage trial.

40. As noted above, all "*issues of causation*" were expressly reserved for this stage of the proceedings as the quid pro quo for the late amendment by which the Diminution in Value claim was admitted on the first day of that trial. This undermines any preclusive effect of the Causation Gateway Finding and renders the suggestion of abuse of process untenable, in my view.

41. As paragraphs 78 and 100 of the Judgment show, the first trial judge was concerned to answer the binary gateway question presented to her under the heading of causation, namely whether the Proven Breaches caused "*some loss*" to YJB. Strictly speaking, this question demanded and expected no more than a monosyllabic response such that the first trial judge could not have been criticised for answering it in such simple terms if so minded. An affirmative answer would operate as a gateway into a damages (including causation) inquiry in a further and distinct phase of these proceedings with its own fresh and focal statements of case.

42. In answering this question in the affirmative and proceeding to determine the two consequential matters identified above, the first trial judge was not intending to pre-judge any aspect of the second phase of these proceedings nor make any findings with preclusive effect at this stage, save for the Basis of Assessment Finding and Date of Assessment Finding. This much is confirmed by the Males Order, as quoted above.

43. Further, it is clear from paragraphs 78 and 100 of the Judgment that the first trial judge based the Causation Gateway Finding on AIL's decision to reduce its offer price for the TA business following "*discovery*" of M&A's plan to launch a competing product. This was referred to as "*good evidence that loss has been suffered*" and "*good prima facie evidence of loss being caused*". The basis for this conclusion was, however, not investigated at the first trial. The Judgment contains no

findings, beyond a passing summary of events in paragraph 8, as to the state of knowledge of AIL or indeed the factors operating upon its commercial judgement between autumn 2017 and early 2019 as regards purchasing the TA business from YJB and, if so, for what price. All these matters were left over for the second phase of this action, in so far as relevant. They are addressed in the statements of case and witness evidence filed/served in this second phase of the proceedings. They were not investigated during the liability trial and are not considered in the Judgment.

44. Further and so far as necessary, I interpret the first trial judge's finding as to the existence of "*some loss*" to embrace the theoretical existence of loss equivalent to (if not formally the same thing as) nominal damages or, at any rate, not exceeding such amount in practice. The first trial judge was simply not concerned with any aspect of causation or quantum, only with the essentially procedural question of deciding whether there needed to be a damages inquiry or not in respect of the Competition Claim. The first trial judge identified a legally available and sustainable head or basis of loss, but did not determine causation still less quantification.

45. In the circumstances, I find that the Causation Gateway Finding has no preclusive effect for present purposes. M&A remains free to argue all aspects of causation as well as valuation (if arising) during this second phase of the proceedings. I am not bound to find that anything other than nominal damages should be ordered for the Proven Breaches. I proceed on that basis.

Quantum Phase Statements of Case

46. In accordance with directions provided by the first trial judge, as varied thereafter, the parties filed and served fresh statements of case in the quantum phase of these proceedings. Both sides naturally relied on findings or other statements contained in the Judgment.

47. YJB's Points of Claim in phase two of these proceedings made no reference to any "*threatened*" breaches on the part of M&A. As noted above, the only relevance of such matters during the liability phase of these proceedings was in the context of the termination dispute, as reflected in the sixth and seventh lines of paragraph 70 of the Judgment. The Threatened Breach Finding appears in paragraph 47 (final sentence) and the distinction between "*a breach of contract and a threatened breach of contract*" is made clear in paragraph 91 (fourth sentence) of the Judgment.

48. YJB subsequently applied for permission to amend to introduce references to "*threatened*" breach(es) by M&A as part of its causation case in this phase of the proceedings. (Pausing there, it might be observed that YJB also thereby accepted all "*issues of causation*" as live in this second stage of the proceedings, notwithstanding the Causation Gateway Finding.) YJB's application was resisted by the Defendants on two distinct bases: first, that such additional case would be an abuse of process because it had not been advanced at the first trial; secondly, that such allegation had no real or reasonable prospect of success at the quantum trial. In a judgment dated 30 July 2020, Miss Penelope Reed QC (sitting as a Deputy Judge of the High Court) granted permission to amend, noting that it would be open to M&A to argue all points of law at trial and to contend that YJB must be confined to the findings made by the first trial judge.

49. Amongst other matters, YJB's Amended POC in this second phase of the proceedings pleads as follows in paragraph 10:

> "*The Judge found that the Claimant's loss is to be calculated by reference to the difference between: (i) the capital value of the bundle of rights in ThickenAid ("**the Asset**") which the Claimant would have been able to sell at February 2019 if the Defendants had not acted in breach of the 2014 Agreement and/or threatened material breach of the 2014 Agreement ("**the No Breach Value**"); (ii) the capital value of such rights as at February 2019 given that the Defendants did act in breach and/or threatened a breach ("**the Breach Value**").*"

50. The underlined words in the above quotation are as they appear in the Amended POC, denoting the amendments made pursuant to the permission granted by Miss Reed QC by an order made upon her judgment described above. Paragraph 8 of the Amended Defence denies that the first trial judge made any such findings as regards any "*threatened*" breach(es) on the part of M&A. The Amended Reply does not respond to this paragraph of the Amended Defence, but it contains several references to what it describes as a "*textual analysis*" of the Judgment contained in the Amended Defence.

51. I am concerned by this pleaded allegation on the part of YJB. It finds no support in the Judgment. It is contrary to the terms of the Judgment. As noted above, the first trial judge was careful to distinguish between her findings of actual breach (i.e. Proven Breaches) and parallel threatened future breach(es) on the part of M&A. The latter were relevant at the first trial only in relation to the Termination Finding, which in turn mattered only for the clause 14.2 damages claim, as made clear in the Judgment. The Males Order is based on a similar close reading of the Judgment. In so far as this involves a "*textual analysis*" of the Judgment, that is the correct and appropriate way of ascertaining its meaning and effect, in my judgment.

52. YJB nevertheless runs a case at this quantum trial that it is the *combined* effect of the Proven Breaches and the separate threatened future breach(es) of the Agreement that caused a diminution in the capital value of the TA business as at February 2019. YJB is free to make that argument, but not on the basis that it finds any support in the Judgment. The relevance, if any, of the Threatened Breach Finding in the context of the causation analysis applicable to the Proven Breaches is one of the central issues for my consideration.

WITNESS EVIDENCE

53. I should say something about the witnesses who gave evidence at the present trial. This can be brief. There are no material disputes of fact between the parties at this stage. The expert evidence concerns "*asset valuation in the pharmaceutical / quasi-pharmaceutical market*" and does not touch on the prior question of causation. None of this evidence ultimately assists in determining whether any of the Proven Breaches was an effective cause of any diminution in value of the TA business measured in February 2019, in my view.

54. YJB called two witnesses of fact: Mr Yogendra Patel, its Managing Director; and Mr Patrick Eraut, who was Executive Chairman of AIL during relevant events until his departure in April 2019. Both Mr Patel and Mr Eraut gave evidence, from different sides of the putative business sale transaction, as to the basis of valuation of the TA business in the context of AIL's proposed acquisition of such business since 2015. AIL's valuation involved a multiplier of just less than three applied to the last three years' sales data for TA.

55. Mr Eraut gave some evidence as to AIL's state of knowledge about M&A's (inferred) violation of clause 3(f) of the Agreement during the period between the discovery by YJB in autumn 2017 and subsequent contractual upheaval in early February 2019. The most significant thing to emerge from Mr Eraut's oral evidence, in my judgment, was that his real concern at the time was M&A's potential use of YJB's confidential information once it (i.e. M&A) started marketing ST in competition with TA. This prospect was commercial poison to AIL's interest in purchasing the TA business, because such confidential information would (post-acquisition) belong to AIL and any unlawful misuse of it by M&A would be directly adversarial and prejudicial to AIL.

56. Mr Eraut also accepted during cross-examination that the legal dispute between YJB and M&A/CDM, building through correspondence from late 2017 to commencement of these proceedings in April 2018, was something in which AIL preferred not to become embroiled. This also disincentivised him in terms of acquiring the TA business from YJB. Ultimately, none of this is directly relevant to the issues I have to determine, but it operates as a useful proxy for the causation analysis.

57. The Defendants called one witness of fact: Mr Benjamin Miller. Mr Miller is a qualified solicitor, described as a consultant solicitor with Setfords Solicitors, the law firm on the record for the Defendants in these proceedings. He also became CEO of both companies in February 2020. His involvement in their commercial and operational activities stretches back over a decade. His witness statement ran to 69 paragraphs and contained a great deal of analysis, submission and commentary on documents.

58. In terms of meaningful factual evidence, Mr Miller had little to contribute save to confirm that the parlous state of the Defendants' current business makes it highly improbable that they will market or launch ST. As regards the Confidential Information, he confirmed that the Defendants have no access to it or use for it. He referred to damaged or destroyed company servers (preventing access to such information) and subsequent restructuring of the public health care procurement regime, through introduction of Clinical Commissioning Groups (CCGs) and use of approved formulary lists of products, which was said to have rendered such contact information stale, otiose and valueless to M&A or CDM at the present time or in future.

59. As regards experts: Dr Walton of Oxford Expert Opinion Limited gave evidence on behalf of YJB and Mr Charles Lazarevic of Vero Consulting Limited gave evidence on behalf of the Defendants (strictly speaking, M&A). Both were cross-examined at trial. Cross-examination was mostly designed at undermining various assumptions each had made. Their evidence revealed the difficulties inherent in the process of seeking to assess the capital value of the TA product/business both on the *actual* basis (pleaded and referred to as the 'Breach' value or scenario) and the *counterfactual*

basis (pleaded and referred to as the 'No Breach' value or scenario). In particular, the assumptions made in each scenario - especially in the Breach scenario - were somewhat fraught by reason of the need to attribute to a hypothetical purchaser in February 2019 direct or inferred knowledge of certain matters, some factual and others legal. The hypothetical purchaser became an unwitting subject or object of adversarial manipulation through ingenuities and imperatives of the forensic process, perhaps inevitably given the nature of the exercise involved.

60. As matters turned out, it did not become necessary for me to resolve the conflicts between the two experts' assumptions, methodologies or calculations. As stated above, their evidence assumed (as it must) that the Proven Breaches were an effective cause of any capital value diminution during the relevant period. This is a question of fact or at any rate a matter outside the scope of their expertise. It is a precursor to any valuation assessment.

LEGAL PRINCIPLES

Causation: Breach of Contract

61. It has been noted on occasion that there are few areas of law more difficult than causation. It is one thing to state the test; another thing to apply it in practice.

62. The established general formula for causation in a claim for damages for breach of contract is whether the relevant breach is an "effective" or "dominant" cause of loss suffered by the innocent party, rather than merely creating the occasion or opportunity for the relevant loss to be sustained by such party: *Monarch Steamship Co. Ltd. v. Karlshamns Oljefabriker AB* [1949] AC 196; *Quinn v. Burch Brothers (Builders) Ltd.* [1966] 2 QB 370; *Galoo Ltd. v. Bright Grahame Murray* [1994] 1 WLR 1360 at 1374G-H.

63. The cases which focus upon and distinguish the mere creation of an occasion or opportunity for loss to be sustained mostly concern supervening conduct or decisions on the part of the claimant (e.g. *Quinn*, *Galoo*). In such context it is important to determine whether the defendant's breach or the claimant's own subsequent behaviour in response to the breach or its consequences is responsible for the latter's loss. That situation does not arise in the present case, because there is no suggestion that YJB's own post-breach or indeed post-discovery-of-breach behaviour caused or contributed towards any diminution in capital value of the TA brand/business during the relevant period.

64. The indefinite article in the basic formulation is potentially important. Where the breach of contract is one of two causes "*both cooperating and both of [approximately] equal efficacy*" that suffices to establish causation as a matter of law and the court need not choose between competing causes or decide which is the more effective: *Banque Keyser Ullman SA v. Skandia (UK) Insurance Co. Ltd.* [1990] 1 QB 665 at 717; see also *Chitty on Contracts (33rd Ed.)* at 26-076. The classic illustration of this situation concerns separate wrongs committed by the defendant and a third party (as in *Banque Keyser* itself; see also *Bank of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) Ltd.* [1992] 1 A.C. 233) which does not arise in the present case. The parties nevertheless agreed that the same general approach applies

to disentangling parallel operative causes such as actual and threatened breaches of the same contractual term.

65. In certain situations, it may be appropriate for the court to apportion the causal effect of a proven wrong - for example, where the cause of a claimant's personal injury or illness cannot be shown to be wholly attributable to a particular defendant's wrongdoing (e.g. successive employers) or the defendant's actionable as opposed to (prior) non-actionable behaviour or time-barred wrongdoing: e.g. *Allen & others v. British Rail Engineering Ltd. & another* [2001] EWCA Civ 242; [2001] ICR 942. Although citing such authorities, YJB correctly did not seek such apportionment in the present case.

66. In other circumstances the court may resolve evidential difficulties in favour of the innocent party under what is known as the 'fair wind' principle: see, for example, *Browning v. Messrs Brachers* [2005] EWCA Civ 753 at [204]-[210]; *Parabola Investments Ltd. v. Broweallia Cal Ltd.* [2010] EWCA Civ 486; [2011] QB 477 at [22]-[24]. But there are limits to such evidential latitude or leniency. As Lord Leggatt JSC (as he has since become) stated in *Marathon Asset Management LLP & another v. Seddon & others* [2017] EWHC 300 (Comm); [2017] 2 CLC 182 at [165]: "*These principles […] may give a claimant a fair wind, but not a free ride.*"

67. The court is ultimately required to apply common sense in ascertaining whether a breach of contract operates as an effective cause of the loss claimed. This does not involve the appliance of science. It may embrace imprecision or imperfection. The ultimate goal is to avoid or minimise relative injustice, bearing in mind the moral asymmetry where one party is at fault and the other an innocent victim of wrongdoing. As Devlin J (as he then was) stated in *Heskell v. Continental Express Ltd.* [1950] 1 All E.R. 1033 at p.1048: "*Common sense is a blunt instrument not suited for probing into minute points…*"

68. The bitter truth for an innocent party is that some breaches by its counterparty, however unscrupulous or unethical, result in no loss that can be recovered by an award of compensatory damages; cf. injunctive relief or gain-based damages. Damages are awarded for the breach itself not the *manner* of the breach: per Lord Steyn in *Malik v. Bank of Credit and Commerce International SA* [1998] A.C. 20, 51. Damages are not recoverable for a *risk* of injury: see *Marathon Asset Management* (above) at [154]-[167].

Anticipatory Breach

69. It is common ground and trite law that no damages are recoverable for a threatened (i.e. anticipatory) breach of contract *per se*. Put another way, there is no cause of action for anticipatory breach without more.

70. Where a contract is terminated for repudiation or renunciation at common law, including (as here) through threatened future breach or breaches, the contracting parties are discharged from their extant or executory primary obligations - save in so far as surviving such termination - and each is entitled to claim damages for any accrued breach of contract by the other as at the point of termination. The innocent/terminating party is (also) entitled to claim damages representing the lost value to him of the remaining primary obligations which are discharged by

termination, i.e. so-called 'loss of bargain' damages. This separate claim for damages arises upon termination at common law. It is a distinct cause of action.

71. The fact that a threatened breach forms the basis of a repudiation or, more accurately, renunciation that leads to termination of the relevant contract does not alter the fundamental proposition that damages are not recoverable in respect of such threatened breach itself. The cause of action is not the future breach, it is the renunciation which (if accepted) creates the claim for damages for wrongful termination at common law: see *Chitty* at 24-023.

72. In the absence of a claim for 'loss of bargain' damages, as here, the court needs to be vigilant not to allow the Termination Finding to corrupt or obscure the causation analysis applicable to the Proven Breaches in light of or by reference to the Threatened Breach Finding. A threatened breach is not actionable. It has no independent causative relevance even when coinciding or resonating with an actual breach of the same contractual promise.

73. The role of M&A's threatened breaches in the present causation inquiry involves the co-existence of *parallel potential causes* of the same assumed or alleged loss: what might be called an 'actionable cause' (actual breach) and a 'non-actionable cause' (anticipatory breach) forming part of a continuum of behaviour on the part of the defendant and/or the commercial matrix within which the quantification of loss falls to be assessed. In this context of alleged mixed causes, YJB nevertheless has the burden of showing that one or more or all of the Proven Breaches was/were an *effective cause* of some diminution in capital value of the relevant business between mid-late 2017 and the valuation date in February 2019. YJB must show this on the balance of probabilities.

74. The Defendants submitted that the present case is analogous to *Quinn v. Burch* (above) in the sense that the breach of contract creates a foreseeable risk that the claimant (Mr Quinn, the plaintiff in that case) then takes steps which themselves result in loss (using a folded trestle to climb up in the absence of the ladder which should have been provided by the defendant). I do not find the analogy particularly helpful in this case. There is no supervening behaviour of YJB itself that is said to have been or become an (or the more dominant) effective cause of any diminution in capital value of the TA business during the relevant period. If anybody's supervening behaviour is in play, it is AIL's - but, as noted above, the first trial judge rejected the Loss of Opportunity basis of claim. The relevance of AIL's subjective decision-making and commercial appetite is tangential to the objective causation inquiry.

COMPETITION CLAIM

75. The Proven Breaches occurred during mid-late 2017. Each of them was internal to M&A, in the sense of being invisible to YJB when occurring and not interfering with YJB's business until disclosed. The Proven Breaches involved preparatory steps relevant to an intended future launch of a competing product contrary to clause 3(f). Following revelation of such intended future competition in late October or early November 2017, AIL's interest in acquiring the TA business from YJB evaporated rather quickly.

76. These events touched and troubled YJB in a very real sense, undoubtedly. But that is not the same thing as saying or indeed finding that the Proven Breaches themselves were an *effective cause* of any diminution in the capital value of the TA business over the ensuing 15 months or so. The fact that AIL lost enthusiasm to purchase the TA business from YJB was, as acknowledged by Mr Eraut, because it was concerned about the threat of future competition from M&A/CDM and in particular the perceived risk that misuse would be made of confidential information (e.g. key customers and purchasing profiles) when launching such competing business in a saturated and intimate market: see paragraphs 55 and 56 above.

77. In so far as the attitude of AIL is relevant to the causation inquiry in this case, I find on the balance of probabilities that AIL's subjective devaluation of the TA brand/business following its discovery (via YJB) in autumn 2017 of M&A/CDM's intended future launch of a competing product was based primarily on the concerns outlined above. Whilst AIL may have inferred from what it was told at the time that M&A must have taken some preparatory steps, and may therefore have already breached clause 3(f) in a way similar to the first trial judge's subsequent findings of breach, this was not the main demotivating factor in AIL's commercial appetite to purchase the TA business from YJB at/after such time. What mattered most was the threat of actual future competition, whether *unlawful* (during the currency of clause 3(f)) or *lawful* (after clause 3(f) had expired) coupled with the specific threat of unlawful misuse of confidential information in the context of such commercial launch.

78. AIL's position is, of course, subjective and arguably idiosyncratic. It provides an imperfect analogue or proxy for the objective assessment of any diminution in the capital value of the TA business during the relevant period, despite the superficial or perhaps even seductive attraction of such analogy as reflected in paragraphs 78 and 100 of the Judgment. AIL's commercial evaluation does not inform the question for this court as to whether any (or all) of the Proven Breaches were an *effective cause* of any such loss measured as at 6 February 2019. That is an objective inquiry to be answered by the application of judicial common sense.

79. There is evidence suggesting that the market for medical thickeners was contracting or declining during the relevant period. Newer gum-based products were taking market share from more traditional starch-based products, as found by the first trial judge in paragraph 31 of the Judgment. AIL was itself planning to launch its own new gum-based thickener and saw the acquisition of the TA brand/business as helpful as part of that commercial strategy, i.e. buying an established brand, associated goodwill and customer base to use for the benefit of its own new gum-based product once launched.

80. Although the market for starch-based thickeners was dwindling, there is evidence to suggest that TA was bucking that trend due to its 'low cost' proposition within this specialist market. Measuring this is complicated by the fact that there were stock-related issues during 2018 that impacted sales (and, therefore, profit) figures for TA. There is no pleaded dispute about such stock-related issues and, as such, the position was not interrogated at the liability trial or to any satisfactory conclusion before me at this quantum trial. It suffices to say that the sales/profit figures for 2018 appear to have been impacted by stock-related issues, although that cannot be said or assumed to have been the responsibility of M&A and the extent of it (or its consequences)

remains unknown given its peripheral or penumbral role in the present dispute. Mr Miller's denial of (his awareness of) the existence of any stock-related issues for TA during 2018 was not convincing given the objective sales data.

81. With these considerations in mind, I turn to ask the important questions in respect of the Proven Breaches. I do so bearing in mind both the general authoritative direction to apply common sense when addressing causation and the specific direction given by Males LJ in the present case. I regard these as consistent directives or objectives in the present context.

82. **Has YJB discharged its burden of showing that Breach#1 was an effective cause of any diminution in capital value of the TA brand/business during the relevant period?** In light of the above, the answer to this must be No. The non-commercial production of modest quantities of ST for the purposes of conducting patient acceptability trials prior to 18/19 September 2017 was an internal preparatory step. It had no impact upon YJB's business. It caused no diminution in the capital value of the TA brand or business at the time it took place or when it was discovered by YJB or at/by 6 February 2019. The expert evidence is not relevant to this question. The answer is plain and obvious as a matter of common sense.

83. **Has YJB discharged its burden of showing that Breach#2 was an effective cause of any diminution in capital value of the TA brand/business during the relevant period?** In light of the above, the answer to this must - by definition - also be No. Breach#2 is an aspect of or precursor to Breach#1. It cannot be said M&A's *agreement to produce* modest quantities of ST for use in patient acceptability trials caused any diminution in the capital value of the TA brand or business in circumstances where the *actual production* of such quantities (Breach#1) did not have such causal effect. This position is inescapable and accords with obvious common sense.

84. **Has YJB discharged its burden of showing that Breach#3 was an effective cause of any diminution in capital value of the TA brand/business during the relevant period?** In light of the above, the answer to this must also be No. There is no sustainable basis for finding that the *mere act of ordering* some Xanthan Gum in December 2017 caused any diminution in the capital value of the TA brand or business at the time it took place or when it was discovered by YJB or at/by 6 February 2019. The expert evidence is not relevant to this question. It is, once again, plain and obvious as a matter of common sense.

85. **Is the answer any different if all three of the Proven Breaches are amalgamated or accumulated into a composite causation inquiry?** I consider not. Their causative potency is not enhanced in this way - assuming it were a permissible approach, including in light of the Males Order. Whilst YJB sought to combine the Proven Breaches into a single composite violation of clause 3(f), that is not how the first trial judge approached her analysis and it is not a legally sound approach to the present analysis. The Proven Breaches were isolated preparatory steps. Although reprehensible, and in other circumstances capable of forming the basis for grant of appropriate injunctive relief, such unlawful conduct did not cause any diminution in the capital value of the TA brand or business at the time it took place or when it was discovered by YJB or at/by 6 February 2019. Put another way: zero plus zero plus zero equals zero. This is plain and obvious as a matter of common sense.

86. **Is the causation inquiry affected by the co-existence of threatened future (i.e. non-actionable) breaches of clause 3(f) on the part of M&A?** I consider not, both as a matter of law and as a matter of fact:

(1) As a matter of law, this is so because such threatened future breaches are not actionable *per se* and must therefore be discounted for these purposes: they cannot operate to enhance or augment the causative quality or potency of the Proven Breaches, as already analysed. The authorities which address parallel potential causes of the same loss, as noted above, deal with a situation where a non-actionable or extraneous causal component may be said to supplant or relegate the proven breach as an effective cause of the relevant loss. The same cannot be *exploited* to enhance or augment the causative power of such breach, if not sufficient on its own. Indeed, it is ironic and telling that a claimant should seek to introduce a parallel potential cause in this way, when that would ordinarily be in the interests of a defendant seeking to diminish the causative effect of his own breach.

(2) As a matter of fact, this is so because - in so far as relevant by way of analogy, as submitted by YJB - the threatened future breach of clause 3(f) and suspected future breach of clause 15 are what operated most powerfully on the decision-making of AIL as commercial suitor for the TA business at such time, as I have found to be the case above. Such concerns eclipsed the Proven Breaches in terms of AIL's subjective appreciation and risk-assessment. This accords with commercial sense: it is the prospect of *actual* competition that concerns a rational businessman with a stake in the relevant market. It is impossible to assume or conclude that M&A's threatened future breach (aka 'non-actionable cause') was an "*approximately equal*" cause in this context; on the contrary, it was - if anything - the dominant cause of any diminution in capital value of the TA business at the relevant time.

(3) On proper analysis, the Threatened Breach Finding adds nothing to the causation analysis. YJB added this to its pleaded case by way of amendment in this second phase of the proceedings so as to bulk out the Proven Breaches for causation purposes (see paragraphs 48 to 51 above). M&A's concurrent threatened breach is, excusing the metaphor, no more than a legal thickener in this context. YJB relies on it as a form of catalyst to intensify the causative effect of the Proven Breaches. This is both legally impermissible and factually inaccurate, in my judgment.

(4) Threatened breaches are not relevant to the causation inquiry, irrespective of the findings in the Judgment. Whilst the Proven Breaches only made sense in commercial terms as a precursor to actual future competition, whether unlawful and/or subsequently lawful, by adding credibility to such threat or prospect, that does not mean that they gain causative traction through being understood in such commercial context or business dialogue at the relevant time. The same can just as easily be said of other conduct on the part of M&A that was found <u>not</u> to have breached clause 3(f) at the relevant time, such as the application(s) to register a trademark for ST (see paragraph 27 above). The causation test remains the same. YJB's analysis attempts to make bricks from straw by mixing in M&A's threatened future breach or breaches of clause 3(f).

(5) As directed or advised by Males LJ when refusing permission to appeal in this context, the function of the court at the present trial is to identify loss "*caused by the specific acts which have been found to amount to breaches of clause 3(f)*" and nothing else. The reason why "*great care*" is needed in conducting such analysis is precisely because extraneous matters (in particular, concurrent threatened future breaches of the same provision) have the potential to muddy the waters. Whilst common sense may be a blunt instrument, it does not justify soft focus or air-brushing at the expense of analytical precision and integrity. The Proven Breaches are the only causative protein in this particular mix.

87. The purpose of damages for breach of contract is, of course, to put the innocent party so far as monetarily possible into the position *as if* the guilty party had performed the relevant promise in the way and to the extent that he is found to have broken it. No compensation is required to put YJB into the position *as if* none of the Proven Breaches had occurred. None of those breaches on the part of M&A caused any loss to YJB at the time or by February 2019. The position is analogous to the misappropriation (by copying) of confidential information addressed in *Marathon Asset Management* cited above. The wrongful act deprived the claimant of nothing and caused it no compensatable loss.

88. If damages were awarded in this context that would put YJB in a *better position* than if M&A had not committed the Proven Breaches. It would compensate YJB for putative breach or breaches of clause 3(f) that never occurred or, worse still, for the mere prospect or threat of future *lawful* competition. As matters have turned out, such lawful competition has still not occurred.

89. There is no scope for invoking the so-called 'fair wind' principle to alter this conclusion: cf. paragraph 66 above. This is not a case of evidential uncertainty or difficulty being resolved in favour of an innocent claimant rather than a culpable defendant. Such modifications to the evidential burden or standard of proof have no application in a case like the present. YJB cannot get a 'free ride' this way.

90. This conclusion was arguably inevitable after YJB failed to obtain injunctive relief in early/mid-2018 and then failed on the Loss of Opportunity claim for damages at the liability trial. YJB was thrown a lifeline by the first trial judge allowing the amendment at trial to introduce the alternative basis of claim (Diminution in Value) and, regrettably or mistakenly, given false hope through the Causation Gateway Finding. YJB appears to have sensed the frailty of its own causation position by amending to rely upon the Threatened Breach Finding to augment the causative relevance of the Proven Breaches. This approach, whilst telling in itself, was doomed for the reasons set out above.

91. **Can YJB recover 'loss of bargain' damages consequent upon its termination of the Agreement on 6 February 2019?** This head or basis of claim is not available to YJB on the pleadings. It is barred by the Basis of Assessment Finding and inconsistent with the Date of Assessment Finding in the Judgment. Mr Sinclair QC nevertheless submitted that such a claim was open to YJB in the sense that the lost benefit of clause 3(f) due to premature termination of the Agreement on 6 February 2019, as compared with expiration on 1 December 2019, was part and parcel of the capital value of the relevant business and/or something that a hypothetical buyer of such business in February 2019 would factor into its purchase price on the 'Breach'

hypothesis. I reject that submission. Whilst it is correct that YJB thereby lost the benefit of clause 3(f) for the corresponding period, approximately 6 August 2019 to 1 June 2020, there is no evidence or allegation to the effect that M&A did anything in that 'lost period' that would have constituted a breach of clause 3(f) if still on foot, or indeed since 1 June 2020. There is nothing in this claim, even if it had been available to YJB as a matter of pleading and despite its preclusion by the findings in the Judgment.

92. Further and finally, YJB has no claim to the effect that M&A (or CDM) has stolen a march by undertaking unlawful preparatory steps during the applicability of clause 3(f) so as to launch sooner than it might otherwise be able to upon expiration of that covenant on (as matters turned out) 6 August 2019. YJB sought injunctive relief in early/mid-2018 to prevent further breaches of clause 3(f), but such relief was denied on the basis that damages would be an adequate remedy. As already noted, the Defendants did not launch ST upon premature expiration of clause 3(f) and they still have not launched ST or taken any known steps towards such launch.

93. In light of the above, I conclude that none of the Proven Breaches was an effective cause of any diminution in capital value of the TA brand or business during the period from mid-late 2017 to 6 February 2019. This assumes, for the purposes of the causation analysis, that there was any such diminution in capital value for whatever reason, although that itself is moot.

94. Before leaving this head of claim, I should say something more about the expert evidence. As already noted, the premise and focus of the expert evidence appears to have assumed that it was for the expert witnesses to answer the essentially factual question of causation. This has been done through the comparison of actual (so-called 'Breach' scenario/value) and counterfactual (so-called 'Non-Breach' scenario/value) involving corresponding information or intentions attributed to the hypothetical buyer of the relevant brand/business in February 2019. I did not find this expert evidence particularly coherent or helpful given the slipperiness of the assumptions and matters attributable to the hypothetical business purchaser, as observed above. There were extraneous factors at play in the market that may have impacted the capital value of the TA brand/business in February 2019. The expert evidence could not and did not assist the court in determining the objective causation issue at the heart of the Competition Claim.

CONFIDENTIALITY CLAIM

95. As noted above, this claim for final injunctive relief is confined to the Confidential Information as so characterised in paragraph 60 of the Judgment.

96. In practice this comes down to the names of and contact details for a handful of individuals who communicated by email with YJB during the period February-April 2014 or (in the case of two of them) in September 2015 and whose details were provided *directly* by YJB to M&A or CDM at around the same time. These individuals were or said they were speech and language therapists (SLTs for short) at the relevant time.

97. Nothing more is known about any of them at the present time - for example, whether they are still in practice as SLTs or have any decision-making influence or authority

as regards procurement of medical thickeners in the current health service - save for references to the current *LinkedIn* profiles of some of them. (I note that one of the individuals now appears to be a Reiki therapist.) It is not even known if any of these individuals ever purchased any TA after making their initial contact and, if the case, receiving any samples via M&A/CDM. In so far as YJB's opening written submissions referred to these individuals as "*customers*", I will put that down to forensic exuberance.

98. This is not promising territory for final injunctive relief. Mr Miller gave evidence about the destruction or corruption of one or more company servers, meaning that there are no means of access to these emails. In so far as the emails (and hence the sender's name and contact details) have been provided through disclosure in these proceedings, their collateral use by either M&A or CDM is governed by the CPR, giving YJB adequate legal protection against misuse.

99. YJB does not suggest that M&A or CDM has made any use of or disclosed any of these (or any other) names or their contact details at any time. The claim for injunctive relief is based entirely on an inference that such risk exists in the future, fuelled by the inference drawn by the first trial judge in paragraph 61 of the Judgment as noted in paragraph 35 above.

100. I was not moved by the Defendants' suggestion that the relevant information had lost the character or quality of confidentiality by reason of reference having been made to some of the relevant emails in open court during the liability trial. This point was taken on behalf of the Defendants in closing submissions at that trial. I read paragraph 60 of the Judgment to be an implicit rejection of such point. Ultimately, this line of defence was not pressed before me.

101. Looking at how matters now stand, I am not persuaded that there is a real risk of misuse or disclosure of any of these contact names/details on the part of M&A or CDM in future. Any such risk seems fanciful and theoretical given the current and prospective position. I have the benefit, if that is the right word, of seeing what has happened - or, more accurately, what has *not* happened - in the 17 months since the Judgment. M&A/CDM appear to have taken no meaningful steps towards launching ST. Whether or not that is because they are awaiting the outcome of this quantum trial is not entirely clear, although I understand YJB's scepticism in this regard.

102. My overriding concern, however, is to avoid a situation in which injunctive relief has been denied at this trial and YJB later finds itself faced with the commercial launch of ST, then facing an abuse of process objection if it moves for injunctive relief afresh to protect the Confidential Information. After sharing my concerns with counsel in closing submissions, Mr Mitchell QC was able to offer an undertaking on behalf of the Defendants that adequately protects YJB's interests and, therefore, obviates the need for me to reach a final decision on this aspect of the case. Such undertaking is offered and accepted without prejudice to arguments as to costs relating to the Confidentiality Claim.

DISPOSITION

103. For the reasons given above:

(1) I conclude that YJB suffered no recoverable loss by reason of the Proven Breaches, analysed individually or collectively, and is therefore entitled to nominal damages only. I assess such damages in the sum of £3, representing £1 for each proven breach, notwithstanding the overlap between Breach#1 and Breach#2 as observed above.

(2) In light of the undertaking proffered on behalf of the Defendants during oral closing submissions without prejudice to costs arguments, it is not necessary for me to determine the residual remedial aspect of the Confidentiality Claim.

104. I will hear submissions as to matters consequential upon the issuance of this judgment once approved. Without pre-judging the matter, and subject to any constraints upon my discretion as to costs that are outside my current knowledge, I will need persuading that it is appropriate for the Defendants to recover any costs in respect of the witness statement of Mr Miller. The reasons for this pre-indication should be apparent from paragraph 57 above.