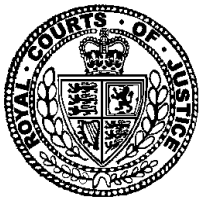

Neutral Citation Number: [2021] EWHC 927 (Ch)

Case No: BL-2020-00578

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 16/04/2021

Before:

MR HUGH SIMS QC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

- -

Between:

MELISSA STONARD	**Claimant**
- and –	
GREEN SHOOTS CAPITAL UK LIMITED	**Defendant**

- -
- -

MARK WARWICK QC (instructed by **JUDGE SYKES FRIXOU LIMITED**) for the **Claimant**
CHERYL JONES (instructed by **DWF LAW LLP**) for the **Defendant**

Hearing dates: 24, 25 and 26 March 2021

- -

APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties and/or their representatives by email and release to Bailii. The date and time for hand-down is deemed to be Friday 16 April 2021 at 10:30AM

Mr Hugh Sims QC:

Introduction – the parties and the issues

1. The Claimant, Mrs Melissa Stonard, had worked in the financial services industry in London, in different roles and positions, prior to entering into a consultancy agreement with the Defendant, Green Shoots Capital UK Limited ("Green Shoots"), on 1 December 2014 ("the Agreement"). Whilst carrying out work for Green Shoots, Mrs Stonard was registered with the Financial Conduct Authority ("FCA") as a "CF30", meaning she was authorised to perform a financial advisory, customer-facing, role. Green Shoots was incorporated on 24 January 2014 and is an investment advisory company ("IAC"). It acted as, amongst other things, third party marketers of liquid alternative investment products. It operated without any fixed office space and instead used, where and when necessary, shared office space provided at, amongst other places, Kemp House, 152 City Road, London EC1V 2NX. At all material times Green Shoots was an appointed representative of Sapia Partners LLP ("Sapia"), a firm authorised by the FCA.

2. The Agreement was partly in writing, as set out in a document dated 28 November 2014 and signed on 1 December 2014, and, for reasons I will explain further below, partly oral, on the basis of a telephone conversation which took place between Mrs Stonard and Mr Sebastian Schaefer, also on 1 December 2014. Mr Schaefer is a German national, resident in Switzerland, and the managing director and ultimate controller of Green Shoots. The principal purpose of the Agreement was for Mrs Stonard to promote investments in alternative investment products, principally hedge funds, to institutional investors. In the event that Mrs Stonard successfully introduced investors to investment managers, as a result of which they made investments in funds which formed part of Green Shoot's network, the investment managers would pay a commission, or "retrocession" as it is often described in the industry, to Green Shoots, or a third party at its direction. In turn Green Shoots would provide a share of that remuneration to Mrs Stonard. It is common ground that Mrs Stonard made some successful introductions, as an intermediary working on behalf of Green Shoots, persuading institutional investors to place capital with hedge fund investment managers, from in or about 2016. As a result she was paid some remuneration by Green Shoots. This is not a case, therefore, which turns on the question of whether or not Mrs Stonard's efforts may be said to constitute an effective cause of the receipt, as sometimes occurs in cases of this nature. It is agreed she is due a sum in relation to investments made by Heartwood and ACPI in hedge funds managed by five investment managers, namely Clinton Group, Stats Investment Management, LCJ Management (Cayman), Cambridge and Universa. It is also common ground the Agreement came to an end, either in the latter part of 2019, or the early part of 2020, after the relations between Mrs Stonard and Mr Schaefer had become strained. The reasons, and any fault for the termination, are disputed.

3. Whilst it was agreed by the parties that Mrs Stonard was to be remunerated on a fee sharing basis, the precise basis on which she is entitled to be paid, whether a specific percentage was agreed, and if so in what amount, are all disputed. The financial consequence of that dispute is potentially very substantial. As a result of a particular introduction in relation to one investor, Heartwood, to a particular investor, Universa, Mrs Stonard claims that, having regard to management and certain performance fees payable, and subject to proper accounts being provided by Green Shoots, she may be entitled to fees as high as £9.274m. This is due to the fact that the amount invested by

Heartwood in Universa is believed by her to be £240m, or more, and this increased in value if there was a market crash, as there was between January and March 2020, potentially by as much as 138%, or £331m. As a result a performance fee (based on an assumed industry standard of 20%) may have become payable in the region of £13.248m, of which an assumed 70% share would be £9.274m. A payment of that order, or a similar order, is believed to have become payable, though to date no disclosure has been provided by Green Shoots as to the precise sums payable. Such disclosure will go to questions of quantum, for determination at a later date. Green Shoots contends that a sum in the region of US$193,765 has already been paid by it to Mrs Stonard during the period of the consultancy, though the precise sum has not been agreed, and forms no part of my determination in this judgment. Green Shoots contends Mrs Stonard has received the full extent of her commission. Its calculation is based on what it perceives is the correct contractual analysis, namely a minimum share of 30% of fees in relation to year 1 of any investment, and subsequent fees, both management and performance, being subject to a discretion which has not been exercised, and is not exercisable. Green Shoots goes further. It claims it has paid Mrs Stonard more than what she is entitled to under the Agreement.

4. This is my judgment following a trial of the following preliminary issue, as directed pursuant to orders of Deputy Master Lloyd dated 3 September and 7 December 2020:

"What is the basis of remuneration due to the Claimant from the Defendant, whilst she was a consultant for the Defendant, and thereafter ("the Issue")? For the removal of any doubt, if the basis of the Claimant's remuneration is to be by way of a quantum meruit, or payment of a reasonable sum, the Issue includes how the same should be calculated".

5. The additional, clarificatory wording, after the definition of the Issue, was included to ensure that by the end of the trial the parties knew what express or implied terms governed the matters in dispute, and so they could move on to questions of breach and quantum. The parties are agreed that the determination of the Issue as defined, and clarified above, does not require me to decide the issues arising in relation to termination. The focus is therefore on a determination of the contractual terms which were expressly or impliedly agreed by the parties in relation to remuneration.

6. By the conclusion of the trial it was agreed that the Issue could be broken down into the following sub-issues (subject to some simplification, adjustments and re-ordering by me for the purposes of this judgment):

    i) Are the parties bound by the terms of the Retrocession Schedule referred to at paragraphs 1 & 7.1 of the Agreement?

    ii) If not, are the parties bound by an oral agreement asserted by Mrs Stonard that a 70:30 split was agreed, or by an assertion of an oral communication of certain minimum and discretionary terms by Mr Schaefer?

    iii) Does some different arrangement apply in relation to performance payments, and, if so, what?

    iv) Does Mrs Stonard's right to payment extend beyond the termination of the contract, having regard to paragraph 7.3(c) of the Agreement?

v) If the parties are not bound by an oral agreement as regards the basis of remuneration, is Mrs Stonard entitled to a quantum meruit or reasonable sum, and, if so, what is the appropriate percentage share?

The evidence and the witnesses

7. The trial was conducted using the Microsoft Teams video platform. I heard evidence from Mrs Stonard from a room in her counsel's chambers in the UK, and from Mr Schaefer from a lawyer's firm's offices in Switzerland. I also heard expert evidence in the field of financial services from Mr Marcus Dodd, called by Mrs Stonard, and Mr Ausaf Abbas, called by Green Shoots. Permission to rely on that expert evidence was given by the Deputy Master in the order made on 7 December 2020, and granted in wide terms, namely to address matters arising from the Issue. The expert evidence was principally directed at the question of what might be considered to be reasonable remuneration payable to Mrs Stonard if no certain agreement had been reached on the basis of remuneration – sometimes called a claim in quantum meruit. There are circumstances where expert evidence may be admissible as to market practice, falling short of trade usage or custom. This is to assist in a full understanding of the factual background for the purposes of ascertaining what was agreed, and interpreting the terms of a contract. This applies whether the contract is wholly in writing or partly in writing and partly oral. The extent to which that evidence will be of assistance will depend on the case: see *Crema v Cenkos Securities plc* [2010] EWCA Civ 1444, [2011] Bus LR 943 at [42]-[48] per Aikens LJ.

8. Before making any findings of fact in relation to any of the contentious issues it is appropriate I should explain the approach I have taken to making those findings, and my overall impressions of the witnesses I heard.

9. The first general point to note is that whereas in a case concerning the proper interpretation of a written contract what the parties said and did after they made the contract will be irrelevant (save for some limited exceptions, such as, for example, where it may be said the contract was varied), this is not so where the contract is partly written and partly oral: *Maggs v Marsh* [2006] EWHC 1058, [2006] BLR 395 at [24]-[26], and *Crema v Cenkos* at [34]. These cases support the conclusion that this "after the event" evidence is admissible in order to assist the court in deciding what was agreed as a matter of fact. They also indicate that, and whilst it may be said to be a very fine line in contracts which are partly oral, such evidence may not be admitted on the question of how a contract should be construed, or interpreted. This is because interpretation of any words used is an objective question to be determined at the time the contract was made and by reference to the meaning of the words used at the time, not later.

10. I also remind myself of the principles to apply in relation to findings of fact and assessment of witnesses, as recently summarised in *Martin v Kogan* [2019] EWCA Civ 1645 at [88]. In this case there is a lack of contemporaneous documentary evidence, such as attendance notes of conversations, as regards the key oral communications which occurred on 28 November and 1 December 2014, and they occurred over 6 years ago. In these circumstances the next best evidence may be said to be documentary evidence which has been produced by either or both of the parties, both before and after the event. That is subject to the qualification that evidence before either of the parties were conscious of a dispute is, in my view, likely to be more reliable. That is because

there is a greater risk that evidence may have been created in a manner which is self-serving when a dispute has arisen, or adversely affected by strained relations.

11. Oral evidence and the manner in which evidence is given orally also has its role to play, though the role played by the demeanour of the witness when giving evidence needs to be approached with some caution as there can be a number of reasons for different demeanours. The greatest focus, so far as oral evidence is concerned, should be on linguistic and analytical consistency, or inconsistency, and the extent to which the oral evidence is corroborated or consistent with the remainder of the evidence.

12. My overall impression of Mrs Stonard's evidence was that she was doing her best to assist the court. She had a good recollection of events, and of the documents in the bundle, though she was also careful to emphasise where her recollections were not precise or certain, such as her inability to say precisely when the key conversation in relation to fees occurred. There were times when she was over-eager to argue her case when giving oral evidence, which has required me to approach her evidence with more caution than might otherwise have been the case if she had restricted herself to giving evidence of her recollections. But I bear in mind that, when she did so, the questions were, on occasion, phrased in an argumentative manner. And also, in my judgment, some allowance must be afforded to a witness who is keen to ensure the court does not overlook relevant documentary evidence, even when they are represented by experienced counsel who would be expected to be able to draw that to the attention of the court independent of the witness. I do not believe it undermines Mrs Stonard's evidence on the key factual issues. I was less certain how reliable Mrs Stonard's evidence was of her knowledge of the going market rate for the services she was going to be providing, at the time of the Agreement, in 2014. I accept the submissions of Ms Jones that caution is required in relation to this aspect of Mrs Stonard's evidence, not least because it was not led in her written evidence and seemed to be informed, to some degree at least, by the expert reports.

13. As for Mr Schaefer, for large parts of his evidence I consider he was also doing his best to assist the court. He was very precise in the answers he gave. Mr Warwick submitted he was so precise, and guarded, that the court should be wary of his evidence. I do not accept that criticism. I bear in mind that Mr Schaefer is a German national whose first language is not English, though he speaks and writes English very well. I accept Ms Jones' submissions that what might have been considered guarded and incomplete answers were, generally, Mr Schaefer being careful to ensure he answered only the question posed. It was indicative of a careful approach. I do not believe this undermines his credibility, and there were verbal indications when he gave careful answers that he was doing so because of the way the question had been put. He also made some sensible concessions in his oral evidence. For example, he accepted that he had probably not made it clear to Mrs Stonard that he intended to charge Mrs Stonard a portion of the regulatory fees which were incurred by Green Shoots as a retrospective deduction from her fees, when those started to flow. In his written evidence he had, wrongly, in my judgment, suggested he had agreed with her that regulatory fees would be deducted from her share.

14. In certain other respects, however, Mr Schaefer's evidence was less reliable, and his recollection of events was not as clear as that of Mrs Stonard. For example the key telephone conversation, which took place on 1 December 2014, was not addressed in his written evidence, and in his oral evidence he confirmed he had no recollection of

what was discussed. In this respect, and also to some extent in relation to the other conversation which preceded it, on 28 November 2014, his evidence was, I find, aspirational: based on what he considers he is likely to have said having regard to the purpose and context of the conversation as subsequently rationalised. I do not believe this provides me with a reliable basis to make any conclusions as to what in fact was said, particularly in relation to what was said before the Agreement was signed. I shall return to this in further detail below, but it means that on most of the key areas of conflict of fact between Mrs Stonard and Mr Schaefer I prefer the evidence of Mrs Stonard over that of Mr Schaefer.

15. There is one further point which arises in relation to Mr Schaefer's evidence which it is important to mention here. Mr Schaefer was giving evidence from lawyer's offices in Switzerland. During the course of his evidence he was asked some questions about contracts entered into by, and receipts coming into, an associated Green Shoots entity - Green Shoots Capital LLC, a Swiss company also controlled by Mr Schaefer. This was because it emerged during the course of evidence that, according to Mr Schaefer, not only was there no written agreement between Universa and Green Shoots (as had been confirmed in writing before trial), but the contract entered into with the third-party investment manager, Universa, was entered into by Green Shoots Capital LLC, not Green Shoots. Mr Schaefer was reluctant to answer all these questions in relation to the Swiss company, and as to monies received by the Swiss company, and the rights enjoyed under that contract. This was because, according to his evidence, he believed, as a result of some communications he had with Swiss lawyers, whose offices he was using to give evidence, that Swiss law might prohibit him from disclosing the details of such a confidential contract involving a Swiss entity.

16. Mr Warwick, for Mrs Stonard, indicated that he would be inviting the court to draw adverse inferences from Mr Schaefer's unwillingness to give evidence in relation to these matters, and as a result I permitted Mr Schaefer, whilst he was giving evidence, to discuss this discrete issue with his counsel, Ms Jones, over the short adjournment. After receiving that advice it was apparent that Mr Schaefer remained concerned as to what the position was under Swiss law, and he had not been able to receive any advice so as to enable him, via Ms Jones, to draw my attention to the relevant legislation, or any expert evidence on Swiss law which could be submitted to me for consideration. In Mr Schaefer's oral evidence, and in closing, it was confirmed that he was not suggesting because the Swiss company, instead of Green Shoots, may have entered into the contract with Universa, or that monies came in via the Swiss company, made any difference to the entitlements of Mrs Stonard in relation to Green Shoots. It was accepted that for the purposes of determining the issues before me the contract with Universa and Cambridge could be viewed as falling into the same category, and in the same manner, as the other distribution agreements set out and considered in paragraph 7 of the joint report of the experts. This refers to the provisions which are evident from the 3 other agreements, which were entered into between the investment managers and Green Shoots, in the UK, and which had been disclosed. Ms Jones submitted, in closing, that in those circumstances no adverse inferences should be drawn from Mr Schaefer's reluctance to give evidence on the point, and the court could not and should not do so without any expert evidence on the issue.

17. So far as the relevant legal principles are concerned, the best starting point where a court is invited to draw adverse inferences is *Wisniewski v Central Manchester Health*

Authority [1998] PIQR 324, which establishes that in certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give. It has recently been emphasised however that this is a discretion, not a rule or requirement: *Manzi v King's College Hospital NHS Foundation Trust* [2018] EWCA Civ 1882; and Cockerill J in *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm). In the latter case, at [154], Cockerill J stated that the onus is on the party inviting the court to draw an adverse inference to show the point on which the inference is sought, and why the silence or absence of evidence on the point is material to that issue (a possible third requirement is not relevant here). It is only then that the court has a discretion, to be exercised in accordance with the overriding objective, and having regard to a shifting evidential framework during trial. In short, the principle operates narrowly.

18. Having regard to the concession made that the Universa and Cambridge contractual entitlements were to be treated no differently than the agreements which had been disclosed, and bearing in mind the potential – and I put it no higher than that, having regard to the fact that Mr Schaefer is also in control of the Swiss company – that Swiss law might operate to require Mr Schaefer to tread carefully where confidential information in relation to a Swiss company is concerned, I accept the submissions of Ms Jones that I should not draw an adverse inference in these circumstances. Indeed it may be said there is no need to do so because the point is rendered immaterial by the sensible concessions made. I should stress that my acceptance that there is no need to draw an adverse inference on this point does not mean that I accept, or make any findings, as to whether the contract with Universa was made with the Swiss company, or not. I consider it would be unwise to do so until the relevant documentation has been disclosed. Overall it is not necessary for my determination. I shall turn to consider the extent to which this evidence may be said to feed into more general concerns as regards evasive conduct, as Mr Warwick would put it, in relation to Green Shoots, and Mr Schaefer's evidence, further below.

19. I can deal with my impression of the experts in brief: I found them to be professional and objective in their evidence. They had sufficient experience of the relevant market sector to provide helpful opinions, and skilled factual evidence, as to the market practice in relation to fees to be charged. The differences between their relevant evidence was relatively minor in substance. I shall address the differences further below. I set out first, here, the agreed section of their joint report. This provides useful background evidence, which is admissible, and I accept as being relevant, more generally, on the question of what was agreed by the parties, as well as on the question of what a reasonable reward is (if there was no certain or enforceable agreement reached on that issue by the parties). References in this extract below to "MD" are to Mr Marcus Dodd and "AA" to Mr Ausaf Abbas:

Compensation of Investment Advisory Companies by Investment Managers

1. Investment Advisory Companies (often referred to as Third Party Marketers where that activity constitutes a major part of their business) can comprise a range of entities, from a single individual to companies with an extensive network of employees and consultants. While they can undertake various activities to support their marketing effort, they are evaluated and compensated primarily on their ability to raise capital.

2. Investment Advisory Companies are usually paid by Investment Managers from the fees that they earn by managing Investors' assets, and not directly by the Investors themselves. The role of an Investment Advisory Company is therefore often considered a "free" service to Investors.

3. Such companies may assist in identifying particular Investment Managers for specific investment strategies, highlight strengths and weaknesses of different managers, as well as providing consulting advice about overall trends in the investment management industry.

4. Various arrangements are used by Investment Managers to remunerate Investment Advisory Companies in the Institutional Market, the terms of which are set out in a Distribution Agreement. Typical elements of remuneration arrangements in such agreements, with specific reference to hedge funds, are set out below:

a) Investment Managers charge a management fee to manage assets invested in their Investment Products. In the past the annual management fee for hedge funds used to be a standard 2% of assets under management, but increased competition has reduced this to between 1%-2% today;

b) Paying a portion of this management fee to the Investment Advisory Company is the most common form of compensation used by hedge fund managers; this payment is called a "retrocession". The typical retrocession is 10%-20% of the management fee;

c) The payment of retrocessions may last for just one year, several years or for as long as the capital remains invested with the Investment Manager. In the event of the Distribution Agreement being terminated, retrocession payments usually survive such termination and continue to be paid over the agreed term;

d) Hedge funds often charge their Investors a performance fee based on specified criteria and subject to various hurdles. This fee can be shared with Investment Advisory Companies as well. Historically performance fees were set at 20% of the gains achieved by the fund each year. Recently some very successful funds have managed to increase this 20% figure due to the high demand for their products;

e) Occasionally remuneration can be a percentage share of the initial capital invested, although this is much less common in recent years. For hedge funds the fees can be around 0.25%-0.50% of the initial capital invested;

f) Additional capital, invested after the initial tranche in the same fund is sometimes compensated on less favourable terms, on the grounds that this "top-up" investment usually has more to do with the performance and service of the Investment Manager, rather than the Investment Advisory Company;

g) Sometimes Investment Advisory Companies need to meet certain targets before any fees become payable (e.g. a minimum amount of capital has to be raised in a defined period), or they are paid varying rates depending on the actual quantum of capital raised;

h) There is some form of recovery mechanism for fees, to cover any capital withdrawn by Investors in a defined period; and

i) The treatment of Investment Advisory Company's expenses, which may or may not be reimbursable.

5. The actual terms agreed in a Distribution agreement will depend on the relative negotiating position of the Investment Manager and the Investment Advisory Company. Relatively new Investment Managers with a limited track record and small sums under management, will likely have to offer better terms than larger well established managers, who can attract more capital based on their reputation and performance. Similarly Investment Advisory Companies which can demonstrate a consistent track record of successfully raising large sums of capital, or can provide additional services and access to a good client list, will be in a better position to extract more remunerative terms from the Investment Manager.

What would the Claimant be entitled to be paid?

6. Generally, Consultants to an Investment Advisory Company do not receive a fixed salary or consulting fee, and remuneration is based strictly on success in securing investments from their clients. Most Consultants would expect their remuneration terms to reflect the arrangements between the Investment Advisory Company and the Investment Manager, so that payments made to the former are then shared with the Consultant at a fixed percentage and for a specified period, as set out in the Consultancy Agreement between the two parties. Since payments are made on a "success-only" basis, discretionary payments are very uncommon in such cases. The actual fee split is a matter of negotiation between the two parties.

7. During her five years as a consultant with the Defendant, two of the Claimant's clients invested in five different hedge funds on the Defendant's platform. AA has reviewed the Distribution agreements between the Defendant and three of the five investment managers, namely Clinton Group, Stats Investment Management and LCJ Management (Cayman). Neither AA nor MD have seen the agreements with the other two managers, namely Cambridge and Universa. The three agreements reviewed include provisions whereby:

(i) The payment of retrocessions continues for as long as the capital remains invested with the Investment Manager

(ii) In the event of the agreement being terminated, retrocession payments survive such termination and continue to be paid as long as the capital remains invested

(iii) Additional capital invested by a client is compensated at the same rate as

the initial tranche, not at a lower rate.

20. So far as the differences between the experts, and in summary here, Mr Dodds' view was that there was an industry standard, or norm, in relation to the fee split, and that was 2/3 to the consultant and 1/3 to the Independent Advisory Company (IAC) or Third Party Marketer (TPM). This was, in his view, irrespective of experience, and solely contingent on success. Mr Abbas' view was that there was a range within the market which applied, from 35 to 75%, and the amount paid did depend on the experience of the consultant in question and the number of contacts they had in the field and their relationships with those contacts. He also considered the type of product had a role to

play. In relation to the investment products in question in this case, and having regard to his assessment of the experience of Mrs Stonard, Mr Abbas' view was that the market would value Mrs Stonard's share at 40-45%.

21. Mr Abbas also mentioned Mr Schaefer's perception that in the months prior to termination of the Agreement Mrs Stonard was not active or contributing in relation to the relationship with Heartwood. However, in closing, both counsel concurred that I should be focussing on an assessment of the value of the service/role as at 1 December 2014, by reference to a percentage split which should apply for the whole period in which those services were provided. In view of this I consider, unless it might be said subsequent conduct shed any light on the role/service in contemplation and Mrs Stonard's suitability for it on 1 December 2014, the extent to which Mrs Stonard was active or successfully contributing to the relationship with Heartwood in (say) 2019 is irrelevant to my determination of the Issue.

The facts – and my findings as to what was agreed orally on 1 December 2014

22. On 12 November 2014 Mr Schaefer caused Green Shoots to advertise a job on eFinancialCareers with the title "Hedge Fund Sales UK/Germany". The advert suggested Green Shoots was looking for a "Senior Hedge Fund Sales" role, according to the application letter submitted by Mrs Stonard online, though the original copy of the advert has not been located. Mrs Stonard responded to the advert on 25 November 2014, expressing an interest, and referring to her experience in hedge fund sales and contacts in this field, and attaching her CV. There was some dispute between the parties as to whether or not Mrs Stonard's previous work experience qualified her for this senior sales role, and which was said to be material on the question of what terms were agreed, or should apply, in relation to her remuneration. This requires me to consider her experience in a little more detail here, though I would note that it is the market value of the agreed sales role which is the main focus for my assessment, not Mrs Stonard's experience. For reasons which I will explain further below I do not consider whether or not the label "senior" is added to that role makes a material difference.

23. The CV of Mrs Stonard was not initially disclosed in these proceedings, but Mrs Stonard gave evidence as to her experience, and I was provided with a copy of the CV after she gave her evidence. It was not suggested by either counsel that she needed to be recalled to be questioned on the contents of it, but bearing in mind the lateness of its production I do not place any significant reliance on it other than to check that it appears broadly consistent with her written and oral evidence, which I have concluded that it is.

24. Mrs Stonard was educated to A-level standard and had her first job at the age of 19 at Garrett & Co, part of Arthur Anderson accountants, where she was a general administrative assistant. In 1996, she moved to Macfarlanes working in the human resources department. She then moved into banking, working in Deutsche Bank in structured finance in 1997. She worked in the financial markets from 1999. She took her registered representative exam (CF30) with the FSA (now FCA) in December 2001, provided by the Chartered Institute for Securities and Investment ("CISI"), and passed the exam in relation to regulations, securities and derivatives. She was registered as a CF30 from 2001 to 2007. She began her role as a sales trader on the hedge fund desk at Charterhouse Securities (latterly acquired by ING Barings), for about 3 years. She subsequently worked for a UK broker (City Equities), trading small-capital equities (AIM listed stocks). She then took a career break in 2007 to spend some time with her

children, working from home for the investment magazine 'Money Week' as a financial journalist. In this role she researched stocks, conducted interviews (such as of relevant CEOs) and wrote articles. She also recommended a buy or sell on these stocks to the readership. Once her children were a little older, she decided to try a change of career, and after successfully sitting the WSET (Wine and Spirit Education Trust) exam in 2011, she embarked upon a career in the wine industry as ambassador to Montes and Kaiken. This was short lived, as the travel requirements abroad increased significantly and Mrs Stonard wished to spend more time at home with her family. In 2013 she returned to ING as a financial researcher, where she wrote articles on macro and behavioural economics for a retail audience. She missed a client-facing role however, and, after a year, she began to seek a new role, specialising in hedge funds, that would be flexible to enable her to spend time with her children. This led to her expression of interest in the Green Shoot's advertised role.

25. I find that the summary provided by Mrs Stonard in her application form, when expressing an interest in the role advertised, is broadly accurate and reflected her suitability for the role, albeit with some caution being necessary in relation to the usual adjectives (which I have inserted square brackets around below) you might expect from someone seeking to sell their virtues and experiences:

"I have [excellent] sales and trading experience in hedge fund sales gained from an investment bank.

I also have [good] market knowledge of the AIM market dealing and managing portfolios of high net worth individuals.

I am currently looking to return to institutional sales specialising in hedge funds. I still have [many] contacts in this field."

26. On 27 November 2014 Mr Schaefer responded to Mrs Stonard's interest, using an email sign off from Green Shoots Capital LLC, the Swiss company also controlled by Mr Schaefer. In it he stated that Mrs Stonard had an interesting background which was potentially very suitable for what Green Shoots did, even though her background was viewed by him as being less of a hedge fund sales to institutions background. I believe this is also a substantially accurate description. In short Mrs Stonard had some experience in sales to hedge fund investors, though it is more debatable whether it may be said she had sufficient experience to be said to be qualified for a senior hedge fund sales role. However, I find Mr Schaefer was not overly concerned about that, as he saw the potential in Mrs Stonard. He said in his evidence he was not overly focussed on labels. Even if objectively she might be viewed as having limited, and somewhat dated, sales experience in relation to selling hedge fund investments, managed by investment managers, to institutional investors, she clearly had sufficient experience and potential to become an effective salesperson. This was a, if not the, main purpose of the recruitment.

27. It is important to remember that the role was not a salaried one, and many people were put off by this, according to Mr Schaefer's evidence. For this reason Mr Schaefer was keen to stress in his email, in response to Mrs Stonard's application, that remuneration would be on a fee sharing basis, without a base salary, and that if Mrs Stonard was still interested having regard to this, then he would be happy to agree a time to speak with her. By email sent by Mrs Stonard on the same day she confirmed she was still

interested, and a telephone meeting was set up for the next day, at 09:30am GMT on Friday 28 November 2014. That conversation took place on 28 November 2014 and both Mrs Stonard and Mr Schaefer gave evidence as to their recollections of it, though neither took a contemporaneous note of it.

28. Mrs Stonard's evidence as to what was discussed on the telephone on 28 November 2014 was as follows:

"In our call of 28 November 2014, Mr Schaefer explained that it would be hard work, but equally very rewarding from a monetary aspect. He explained that I would need to build a client base, and that once I had built some trust with those investors, they might invest. He spoke about the management fees which Green Shoots would receive upon investment and explained that they were mostly paid on a quarterly basis. He then spoke about Green Shoots receiving a share in performance fees too. These fees would be paid by the hedge fund which the client would invest in upon Green Shoot's introduction. Mr Schaefer then told me that there was a possibility that I could earn over $200,000 per annum, if I were [sic] prepared to put the time and the effort in. He explained that I could work as many hours as I liked and understood why I needed that type of flexibility. He said that it would be like running my own business under the legal umbrella of Green Shoots. Mr Schaefer also told me that there were 35 partner hedge fund companies with more than 50 different funds that Green Shoots worked with, so the choice of investment products for clients was large and most strategies were covered. We discussed that I would need to re-sit the regulatory part of my earlier regulatory part of my exam (now called CF30 exam), as there was new legislation that had been passed following the market crash in 2008. In the meantime, Mr Schaefer said that I should start to contact people that I knew within the industry to find out their interest in liquid alternatives (hedge funds). Mr Schaefer advised that I should discuss client types and categories first with him, as there were a large number of products available (35) and it would help to narrow the correct type of client down to the most interesting product for them."

29. When this account of events was put to him Mr Schaefer agreed with most of it as being an accurate record of what he said, or is likely to have said, to Mrs Stonard. I find this is an accurate summary of what was said by both Mrs Stonard and Mr Schaefer in this first conversation. Mr Schaefer also gave some evidence about his recollections in relation to fees in more detail, though was unable to say whether that was necessarily said on this call, or in the conversation on the 1 December 2014. I shall return to consider his evidence as regards fees when making findings in relation to what was said in the 1 December conversation.

30. On 28 November 2014, shortly after the telephone discussion on the same day, Mr Schaefer wrote to Mrs Stonard stating as follows:

"Dear Melissa

it was a pleasure to speak with you today and I am glad that you already got excited about the opportunities a Green Shoots role can offer you. I am confident that we will be able to make this work for you. It will not be easy, but smart and hard work will always lead to success in one form or another.

As promised and discussed today, please find attached the Agreement for your review. If you agree, please print, sign, scan and email back to me.

Once signed, we can start the FCA registration and Due Diligence process, and while this is ongoing, I will provide you with the first set of documents relating to some of the Green Shoots managers. But as discussed on the phone, it would be best to discuss client types and categories first, in order to reduce the suitable product range to a minimum, otherwise you will spend a lot of time on things that might not even be applicable and useable once you start speaking with clients. With more then [sic] 50 different funds and products to choose from, pre-selection is not only important for clients but also for Sales people that start fresh.

All the best

Sebastian"

31. The draft Agreement enclosed was on Green Shoots' headed paper and is dated 28 November 2014. In it Mrs Stonard is defined as the Consultant and the Defendant company as "Green Shoots". The recital to it states:

"Green Shoots wishes to appoint Mrs. Melissa Stonard to perform certain functions in relation to the referral of possible investors (''Investors'') in the partner companies as well as products of Green Shoots and assist Green Shoots in its advisory activities, and Mrs. Melissa Stonard has agreed to accept such appointment, on the terms and subject to the conditions hereinafter contained. Work may only commence once the Consultant has been approved by the UK FCA and registered as a CF30 under the Green Shoots umbrella."

32. Paragraph 1, headed "Interpretation", contains the following first three paragraphs:

"The following Terms and Conditions form part of, and are to be read in conjunction with, the Agreement pursuant to which Green Shoots has appointed you to act as a Consultant. The Terms and Conditions describe the basis upon which you may act as a consultant of Green Shoots and the obligations that you are under as a consultant of Green Shoots.

These Terms and Conditions should be read in conjunction with Green Shoots's [sic] most recent Retrocession Schedule, a copy of which is available to you upon written request.

The Retrocession Schedule contains a number of provisions, which explain the basis upon which retrocessions are to be paid (i.e. calculation and payment periods) and those provisions should be read and construed as forming part of these Terms and Conditions. Save in respect of the section headed 'Remuneration' below, should there be a conflict or inconsistency between any of the provisions contained in the Retrocession Schedule and any of the below provisions, the relevant provision in the Retrocession Schedule shall prevail."

33. No Retrocession Schedule was enclosed with the draft Agreement. The first time Mr Schaefer provided Mrs Stonard with a copy of the Retrocession Schedule was as an attachment to an email dated 30 August 2019, by which time the relationship between

Mrs Stonard and Mr Schaefer had become strained. In that email Mr Schaefer stated as follows in relation to the Schedule:

"I also added the retro schedule, which is part of the overall agreement as stated therein. As far as my records go, I believe we never officially submitted a schedule, but since this is the only valid form of confirming terms as per the agreement, I wanted to do that now to have a valid one reflecting status quo until further notice. In a situation where I would no longer be running or owning Green Shoots Capital, you would have nothing legitimate to push for payments otherwise. Nothing to do here and this is solely an updatable agreement appendix and you can be notified about term changes whenever there is need to do so."

34. The Retrocession Schedule enclosed with that letter indicated retrocession rates "*applicable for sales of the following Investment Products, assuming standard fees as per the usual managers terms at the time of indication via this schedule…"* and it identified certain rates for products with investment managers called (in abbreviated form) LCJ, Universa and Stats at certain minimum rates in year 1 and then it being wholly discretionary after year 1.

35. In a letter written on behalf of Green Shoots by Keystone Law on 8 January 2020 it was also referred to in this way:

"Ms Stonard was entitled to be remunerated based on Green Shoots' most recent Retrocession Schedule, a copy of which was available upon written request. Ms Stonard was not interested in understanding how the payments to her were calculated, although Green Shoots paid her in accordance with the Retrocession Schedule in force."

36. A conventional reading of this letter is that a Retrocession Schedule existed during 2014 to 2019. In paragraphs 4 to 6 of the Defence it was initially pleaded, in summary, that whilst the Defendant did not provide a copy of the Schedule, the Claimant did not make a request in writing for it, and

"the Claimant was at all times remunerated in line with the Agreement and the Retrocession Schedule which provides that the Defendant may:

a) Make payments higher than the minimum set out in the Retrocession Schedule during the First Year after investment; and

b) Make payments at a higher or lower rate than that set out in the Retrocession Schedule for the Second and following years of the investment. Such payments may be as low as zero if there is little or no servicing required and/or provided."

37. After this, and in response to requests for further information ordered by the Deputy Master on 3 September 2020 Green Shoots admitted, in a document signed by Mr Schaefer on 24 September 2020, that the document sent on 30 August 2019 did not come into existence until on or about 29 August 2019, the day before. It also confirmed that there were no earlier schedules held on file.

38. The Defence was subsequently amended, on 30 December 2020, to state as follows in paragraph 4:

"The Defendant provided the document on 29.8.2019. It is admitted that there was no document produced prior to 29.8.2019 as the Claimant did not make any request in writing in accordance with Paragraph 1 of the Agreement. No information as to the minimum percentages awarded to the Claimant was available until calculated after each sale was concluded. The minimum first year sums would be calculated based on the percentage of management fees charged by the manager and the work performed by the Claimant in connection with that particular sale."

39. This, and other parts of Green Shoots' case, suggested that the amount to be paid to Mrs Stonard was therefore unascertainable until after any investments had closed, and depended on Green Shoots' assessment of the work performed by Mrs Stonard in relation to it. Mr Schaefer suggested in his witness statement that Mrs Stonard *"never asked for the terms of the Retrocession Schedule, but the terms had always been in place and had been conveyed to her verbally."* I shall return to consider this part of his evidence further below, but I note here that Mr Schaefer confirmed in his oral evidence that there was no physical or electronic Retrocession Schedule in existence applicable to Mrs Stonard before 28 August 2019. He stated he did not believe the letter of 8 January 2020 was misleading in this respect, and what he meant by "in force" was a reference to the terms which would have been conveyed to Mrs Stonard verbally, and which could be confirmed by the issue of a schedule some time later. It was unfortunate that the position was not made clearer, earlier, by Mr Schaefer and Green Shoots. The short point to return to here, however, before returning to the sequence of communications at the end of November 2014, is that contrary to what is suggested on a natural reading of the draft Agreement (as I find, as set out further below), there was no Retrocession Schedule in existence and able to be provided to Mrs Stonard at her written request.

40. The interpretation paragraph in the draft Agreement defines the "Agreement" as being "*references to the agreement by which Green Shoots has appointed you to act as a consultant, incorporating these Terms and Conditions and incorporating the provisions in the Retrocession Schedule*". However it was common ground between Mrs Stonard and Mr Schaefer that, at least so far as a written separate agreement was concerned, there was no other document than the draft Agreement. This is another example of the oddity of the drafting involved and suggested to me it may have been subject to some cut and pasting.

41. The Retrocession Schedule is defined to mean "*the latest 'retrocession schedule' issued by Green Shoots from time to time in which details of the standard retrocessions payable by Green Shoots in relation to various Investment Products as part of the Green Shoots network are described*."

42. There is a linked definition of "'Investment Products' in the same paragraph of the draft Agreement which defines this to mean "*investment products where member(s) of the Green Shoots Group and the Green Shoots Capital UK Ltd network of managers provide services as investment manager, investment adviser, marketing adviser or in some other capacity whether now or in the future*".

43. Green Shoots Group is defined as being the "*companies and divisions comprising Green Shoots Group Group [sic] of Companies from time to time*". However there is no such thing as the Green Shoots Group, as that concept is recognised in the law of England and Wales. It is tolerably clear, however, having regard to paragraph 9.9 of the

draft Agreement that it was intended that Green Shoots Capital LLC, the Swiss entity, would be viewed as being part of it. This is relevant because "Green Shoots" is defined to include references not simply to "*Green Shoots Capital UK Ltd*" but also as including "*any other member of the Green Shoots Group (as the context may require*)". Thus even if an investment product may be said to be linked to the Swiss company, rather than the UK one, then under the terms of the draft Agreement a fee entitlement would (or may) arise. This is consistent with the concession made in relation to the Universa agreement, as above.

44. Before leaving the definitions section I should note that "Terms and Conditions" is also defined as "*these standard terms and conditions dated 1 June 2010 (as amended from time to time)*". 1 June 2010 was before the Defendant company was incorporated. Given the date mentioned, I infer that the drafting has evolved from earlier documents, drafted from 2010, involving different entities, and which contemplated a wider range of products than simply hedge fund products. As confirmed in the oral evidence of Mr Schaefer, but by reference to some different wording, which I shall return to below, the draft Agreement appears to have been created based on earlier precedents, including those used by the Swiss company, and also possibly dating back to Mr Schaefer's time at the Man Group plc. This point further reinforces my view that the draft Agreement was not the product of a careful read through, and there are some difficulties in its application to the facts of this case.

45. Paragraph 6 of the draft Agreement defines the term of the Agreement as starting on the date of signature and confirms that it will continue, under paragraph 6.2, unless and until terminated by either party giving not less than three calendar months' notice in writing expiring at any time. There are also other provisions in paragraph 6 dealing with fault termination. I mention these provisions, not because I intend to make any findings as regards the rights and wrongs as to termination, but to note that a reasonable reader would have realised that they were not necessarily committing themselves, either way, to a long-term contract, in view of the ability to terminate, without cause, on giving 3 months' notice. Equally, an objective bystander with the knowledge of the parties would have had in mind that this is not a long period of time, or protection, if fee entitlements might be said to be significantly altered or impacted on termination.

46. Paragraph 7, entitled "Remuneration", and that part under the heading "General", is worth stating here, as it is central to the dispute between the parties (though I have omitted some passages which do not require to be stated):

"7.1 As remuneration for your services under the Agreement you shall be entitled to receive retrocession with respect to the shares, bonds and/or units in Investment Products held by your Investors at the applicable rates, at the time and in the manner set out in the Retrocession Schedule. At no point in the future will you be remunerated via fixed salary or consulting fee nor will you request Green Shoots to pay you one.

7.2 The retrocessions can comprise two elements, the first being retrocession paid on a frontend load basis and the second being retrocessions paid on a trailing basis. The former are to compensate you for the expenses incurred in alternative investment consulting and promoting investment interest in the relevant Investment Product to the Investor, with the latter being to compensate you for the ongoing costs of complying with your obligations under the Agreement and servicing your Investors' needs with regard to Investment Products.

7.3 Further to the explanation in paragraph 7.2 above, and as a result:

(a) retrocession payable on a front-end load basis shall only be payable to you to the extent that the relevant investment represents new business for Green Shoots. Whether or not an investment constitutes 'new business' for the purposes hereof shall be determined at Green Shoots's reasonable discretion with the general objective that new business will increase the revenue of Green Shoots with respect to funds under management and is not derived from the switching of investments for the purposes of artificially enhancing retrocession payments;

(b) should the Agreement be terminated upon not less than three calendar months' notice in writing (in accordance with paragraph 7.2 above) and, prior to the termination date, application(s) are received for shares, bonds and/or other units in any Investment Products which leads to applicant(s) becoming Investor(s) after the termination date, then you shall be entitled to receive (i) details of such Investor(s) including the amount invested and (ii) retrocession on a front-end load basis in respect of such investments on the same basis as if the Agreement had not been terminated;

(c) Retrocessions payable on a trailing basis in respect of each Investment Product shall continue to be payable to the Consultant after the termination date in respect of the investments made by Clients as at the date of termination for as long as these investments are not redeemed and Green Shoots continues to be remunerated for such investments by the investment manager in charge. Retrocession shall only be payable (i) for so long as Green Shoots obtains or continues to obtain (as the case may be) a financial return or benefit from or in relation to such Investment Product substantially similar to that obtained by Green Shoots at the time the investment upon which such retrocession is being paid was made. In the event that Green Shoots's return or benefit is reduced the obligation to pay retrocession shall be reduced proportionately by an amount to be reasonably determined by Green Shoots and which shall be notified to you in writing and (ii) to the extent that you continue to satisfactorily service the Investor making the investment in that Investment Product. Green Shoots may determine, acting reasonably, whether such service obligation has been duly satisfied; and (d) should you cease to be bound by any of the material terms of the Agreement, especially concerning the servicing of Investors' needs with regard to the Investment Products, or should there be a change in the law and/or regulations in a given territory or jurisdiction which Green Shoots, acting reasonably, believes necessitates the cessation of retrocession payments (whether in any particular territory or territories and whether to any particular class or classes of persons) then you shall be informed thereof by Green Shoots and you shall cease to be entitled to retrocessions in relation thereto (save for any retrocession which (i) has accrued due up to the date of cessation but which remains unpaid; or (ii) is payable pursuant to paragraph 7.3(b) above). [the remainder of paragraph 7.3 has been omitted as it is irrelevant]"

47. I shall return to consider below how much of this may be said to be part of the Agreement reached, and sufficiently certain and enforceable, given the absence of any Retrocession Schedule, and the centrality of that document for the purposes of ascertaining remuneration under paragraph 7. In this respect it should be noted that the draft Agreement contains a severance clause, in paragraph 9.3, in the following terms:

"should any provision of the Agreement become illegal, or be held by any court or administrative body of competent jurisdiction to be invalid or unenforceable in whole

or in part, the legality, validity and the enforceability of the other provisions of the Agreement and the remainder of the provision in question shall not be affected or impaired and shall remain in full force and effect. If any provision of the Agreement is so found to be illegal, invalid or unenforceable but would be legal, valid or enforceable if some part of the provision were deleted, the provision in question shall apply with such modification(s) as may be necessary to make it legal, valid and enforceable."

48. The draft also contains an entire agreement clause, in paragraph 9.6.

49. Mrs Stonard responded to the email attaching the draft Agreement on the same day, on the afternoon of Friday 28 November 2014, indicating she would consider it over the weekend and send it back the following week.

50. Upon reading the draft Agreement Mrs Stonard was mystified as to how and when she was to be paid and that paragraph 7 of the Agreement headed "Remuneration" made little sense to her. That is unsurprising to me, as it makes no sense without either the Retrocession Schedule, or some further clarification as to the basis on which she would be entitled to her fee share.

51. On Sunday 30 November 2014 Mrs Stonard sent a further email to Mr Schaefer in relation to the draft Agreement asking for a time to speak about it on Monday as she stated she had a few questions she would like to ask. Mrs Stonard was not able to be certain whether those questions related to fees, but given the absence of the Retrocession Schedule, and an inability to understand the remuneration provisions without it, I find that her questions did relate to the proposed remuneration, or fees, and that this was a, if not the sole, subject discussed by them during their next call.

52. Mr Schaefer responded in the morning of Monday 1 December 2014 suggesting a call at 2pm GMT and the parties then spoke at or about that time. Neither of them made a contemporaneous note of what was discussed on this call either. However, for reasons I have already explained, I find this was the call when the remuneration and fees provisions were discussed, and a fee share in relation to the products which are in issue in this case was agreed orally. Mrs Stonard's pleaded case is that a confirmation, or representation, as to the fee split, was made orally between her and Mr Schaefer in or about December 2014. This shows she was not entirely clear when this conversation occurred or its precise terms. Mrs Stonard's evidence in relation to what was said during this conversation is as follows:

"To the best of my recollection, I recall having a conversation with Mr Schaefer about my fee payments however I cannot remember when it was. It may have been during this subsequent call on 1 December 2014 or at a later time. Mr Schaefer explained that, out of the fees that Green Shoots would be paid from the hedge fund on the introduction of my client, Green Shoots would pay me 70% of those fees and Green Shoots would retain 30%. He explained that the 30% would cover regulatory costs and other matters for me being under the Green Shoots' umbrella, and 70% went to the salesperson to recognise the fact that it was a difficult job, and that there was no salary. I agreed to sign the Agreement and give the role a go – I knew it would be challenging, but I understood that the rewards for hard work would be great."

53. Ms Jones sought to attack this evidence by reference to, not only the evidence of Mr Schaefer, but also by considering the absence of a reference to a fee split of 70:30 in

any document before the Particulars of Claim, signed off in April 2020. She pointed to the absence of any mention of it in correspondence provided by two firms of solicitors acting for Mrs Stonard. Indeed, she submitted, this pre-action correspondence contained a positive assertion and reliance on the terms of the Agreement, in writing, and the Retrocession Schedule. She placed particular reliance on the following passage in a letter dated 17 February 2020 sent by the employment lawyers on Mrs Stonard's behalf:

"Our client was not paid a salary but, under the terms of the CA, was entitled to remuneration for her services in line with a Retrocession Schedule. No Retrocession Schedule was provided to our client until September 2019 and she was not paid anything at all on the commencement of her engagement until she was able to introduce her first Investor. We have advised her that this was unlawful; as a worker she is entitled to receive at least the National Living Wage. Once she found her first Investor, Ms Stonard was paid regularly each quarter by Green Shoots Capital UK and those payments were made by reference to "credit notes". She was not provided with full transparency as to how the sum paid was calculated, but assumes they were made on the basis of some form of retrocession document. We require sight of that document so that we can verify that all payments due to our client have been made correctly and we reserve her rights in respect of unpaid sums due to her."

54. Ms Jones said this is significant because Mrs Stonard was positively relying on the Retrocession Schedule and Mr Schaefer had, by this date, sent the Retrocession Schedule to Mrs Stonard, on 29 August 2019, so she could see from it that it did not contain any reference to the 70% split. These points are accurate, but they only take Green Shoots so far.

55. It must also be recognised that the correspondence made clear that Mrs Stonard was not willing to agree, and did not agree, the terms of the Retrocession Schedule sent to her on 29 August 2019, or the notion that her fee entitlement would be curtailed on termination. This is confirmed in the subsequent letter, dated 27 February 2020, which stated that Mrs Stonard did not accept that the Retrocession Schedule sent in 2019 was of any contractual effect. I also have regard to the fact that a central thrust of the employment lawyer's correspondence was an attempt to try to get Green Shoots to recognise that Mrs Stonard was an employee, with employment rights, and this contention has, rightly in my view, not been pursued since by her litigation lawyers. It is right that the lawyers did not, before the drafting of the Particulars of Claim, articulate the claim that a 70% fee split had been agreed. In the first letter from Judge Sykes Frixou, sent on 27 February 2020, the focus was more on Mrs Stonard's concern to ensure that any alleged termination did not affect her rights to be paid a commission and to find out more information about what that commission might be. I can also understand that a lawyer might adopt a strategy of not saying too much at this time when the position in relation to the Retrocession Schedule was unclear. And this correspondence is not positively inconsistent with the notion that a 70:30 fee split in relation to capital raised for single managed funds was agreed.

56. By the time of this pre-action correspondence Mrs Stonard had become wary as to Mr Schaefer's conduct and motives, and with some justification. She remained vulnerable to the contention by Green Shoots that a Retrocession Schedule which affected her remuneration did exist, and she had not obtained it. I also bear in mind that the main concern of Mrs Stonard, as articulated in this correspondence, was to ensure her accrued

rights to a fee, as she saw it, was not curtailed on termination, not a concern to establish her right to a 70% fee.

57. I accept Mrs Stonard's evidence that the suggestion that a 70:30 fee split is not a recent fabrication on her part. I do not consider the fact that it was not articulated until her first pleaded case is a reason to reject it.

58. I recognise there may be questions as to how reliable Mrs Stonard's oral evidence is 6 years after the event, as to what was said in relation to a fee sharing agreement being reached in 2014 in the terms she now suggests. And to be fair to her she was not offering up her evidence on the basis she could be certain, since she recognised the conversation she relies on may have occurred sometime later. But looking at the documentary evidence overall I find that her evidence is, supported and not contradicted, and is to be preferred to that of Mr Schaefer.

59. As I have already noted above, Mr Schaefer had no specific recollection of this conversation on 1 December 2014, however in paragraph 5 of its Defence Green Shoots denied that at any time Mrs Stonard was told she would be paid 70% of the fees. The Amended Defence went on to state in the same paragraph of the Defence that:

"… at all times the Defendant through Mr Schaefer made it clear that the fees would vary depending on the fund in question and that the Claimant's lack of seniority and experience, lack of rolodex of contacts and need for a great deal of support from the Defendant and Mr Schaefer in particular would result in the Defendant retaining the larger share of the payments."

60. This was based on Mr Schaefer's written evidence as follows:

"Melissa never requested sight of that document and said she would be happy with anything I would pay her, but the terms and things taken into consideration regarding payouts was explained to her at the time as the arrangement provided for costs such as Regulatory expenses, conference fees, insurance premiums, flight expenses being deductible depending on the overall situation. She never asked for the terms of the Retrocession Schedule, but the terms had always been in place and had been conveyed to her verbally."

61. I reject, as inherently implausible, the notion that Mrs Stonard would have stated that she would be happy with anything that Mr Schaefer would pay her. In my judgment any acceptance of a discretionary fee structure was only in relation to an investment which required, in order to earn fees, ongoing advisory work in order to earn the fee, and which might not be capable of being assessed purely on a commission basis. This was a category of work Mrs Stonard may have become involved in for Green Shoots. It was work she might have done separate from the sales work it was agreed she would be doing in relation to raising funds for investment into managed hedge funds. I also consider, as Mr Schaefer suggested in his evidence, that it is likely there was some brief discussion about the fees varying depending on the fund in question. This is because the fees payable by the investment managers varied. But I do not accept this meant that the Green Shoots' fee share with Mrs Stonard, in relation to investments into managed investment funds, and in particular single managed hedge funds, which are the investments which were closed by Mrs Stonard, and which this dispute is about, was intended to be varied.

62. Nor do I accept a fee share was incapable of being agreed, or ascertained, before that work commenced, or a product deal closed off. The fee could be agreed by reference to a percentage of the entitlement or receipt of Green Shoots, as indeed is the usual market practice in this area. The IAC, or third party marketer, would become entitled, in accordance with market norms (though it may not be said this was an invariable or uniform practice), as confirmed by the experts in the agreed section of their joint report, to a percentage of the management fee and performance fees. The IAC, in this case Green Shoots, had a relatively low cost base. Any fees brought in by work carried out by the consultant was a benefit to it without an associated substantial cost. It could therefore safely agree a percentage figure with the consultant, or sub-agent, in this case Mrs Stonard. The difficult task of raising substantial investments from institutional investors, of which there are no more than a few hundred key targets in the UK, into hedge funds, of which there are many thousands, meant that neither Green Shoots nor Mrs Stonard could sensibly afford to have a high cost base. And neither of them did so.

63. I also reject, as inherently improbable, that Mr Schaefer would have said anything to Mrs Stonard about her lack of experience or contacts at this time. I consider it probable that Mr Schaefer would have been wishing to encourage Mrs Stonard to be attracted to the potentially high rewards associated with being paid the greater share of any fees arising as a consequence of her sales efforts in a contract which was wholly commission based. It must be remembered that at this time Mrs Stonard had not yet signed the Agreement, and so Mr Schaefer had a pitch to make to her, a pitch which he was unlikely to want to spoil by suggesting she would get the lesser share.

64. Indeed in Mr Schaefer's evidence, and in questions put to Mrs Stonard, it was accepted by Mr Schaefer and Green Shoots that it was mentioned to Mrs Stonard she could aspire to achieve a 70% share of the fees. Mrs Stonard rejected the idea that 70% was referred to as being a mere aspiration. But it is noteworthy that even on Mr Schaefer's own evidence the figure of 70% was mentioned as a possibility. He, and Ms Jones on behalf of Green Shoots, stressed it was not an agreed figure or a certain figure, and would only be applied to someone more senior and experienced than Mrs Stonard, and to a consultancy which could be said to be more developed than Mrs Stonard's. I think this involves an element of after the event rationalisation on Mr Schaefer's part, as the main concern of Mr Schaefer at the time was securing an effective salesperson to raise capital to earn fees. If Mr Schaefer considered there was a greater element of risk with Mrs Stonard, that greater risk was small, and it was one he was willing to take. Her role in assisting to raise substantial amounts of capital since then, even if Mr Schaefer views it as including an element of luck, has vindicated that decision.

65. So far as the question of Mrs Stonard's alleged lack of contacts, for similar reasons I reject the notion, again as inherently improbable, that Mr Schaefer would have emphasised Mrs Stonard's alleged lack of contacts. Mrs Stonard had stated in her application form that she had many contacts in the hedge fund field. It is unlikely Mr Schaefer would have been seeking to pour cold water on Mrs Stonard's enthusiasm for the role at the time, even if he considered she was somewhat more junior and with less contacts than his ideal consultant. It must be remembered in this respect, as Mr Schaefer's own expert pointed out, as long as the proposed consultant appears to be reasonably competent, and is unlikely to do harm to the reputation of the IAC, there is not much to be lost in taking on a new consultant on a commission only basis. I think it is more likely Mr Schaefer would have been encouraging rather than discouraging.

66. Again, for similar reasons, I do not accept Mr Schaefer is likely to have suggested that Mrs Stonard required a great deal of support and this justified paying her less than he might otherwise have been willing to do. Again this would be antithetical to the idea of encouraging Mrs Stonard, which I find is much more likely to have been Mr Schaefer's mindset at this time. The suggestion of a minimum fee of only 30%, and much of Mr Schaefer's evidence, is coloured by how he may now perceive the time he needed to spend on assisting Mrs Stonard after the Agreement was signed, and in order to justify the position Green Shoots is now taking on the fees split.

67. Mr Schaefer stated that he would have provided Mrs Stonard with an illustration or explanation of the sorts of fees she could have achieved and expect to receive. He said he ran through with prospective consultants a simple target and explained to them if they managed to raise a capital investment of, say, US$20 million, then they could expect a management fee share income of, say, US$25k, and if they managed to reach a target of US$150 million then they would receive US$180k. Mr Schaefer suggested this supported the notion that prospective consultants, such as Mrs Stonard, would know that they would only be getting a split of only c. 30%, since typical management fees ran at 2% and the amount paid by the investment manager to the IAC was typically 20%. This example made no mention and did not cater for performance fees. Even assuming that Mr Schaefer gave such an example to every prospective consultant, and I make no such finding, I am not convinced that Mr Schaefer's example would have been sufficient to make clear the prospective consultant's share. That would have involved three different potential percentages of varying amounts (the management fee, which was between 1 and 2%, the IAC's share of management fee, which was between 10 and 20%, and the consultant's share of that). In closing submissions neither counsel suggested to me I should or could draw too much from such calculations, or indeed other competing calculations which Mrs Stonard had referred to.

68. In summary, and conclusion, I find that that a fee split in relation to investment capital raised by Mrs Stonard in relation to hedge fund sales was discussed and agreed on 1 December 2014. Mr Schaefer, wishing to encourage Mrs Stonard to sign up, explained to her she would be entitled to 70% of the fees which Green Shoots would be paid from the hedge fund manager on the successful introduction of investors by Mrs Stonard, and that Green Shoots would retain 30%. An objective bystander would also have concluded from the words exchanged that what Mr Schaefer meant was a split of all fees which the investment manager viewed as being payable to the IAC, both management and performance fees. Mr Schaefer also explained to Mrs Stonard that the 30% to be retained by Green Shoots would cover regulatory costs and Green Shoots' other costs. Mrs Stonard agreed to all of this.

69. My conclusion on the percentage split agreed is supported by my consideration of the subsequent conduct of both Mrs Stonard and Mr Schaefer, which I will refer to further below. I find that both Mrs Stonard and Mr Schaefer considered that the Retrocession Schedule, if one was provided, would apply to set out standard rates which might subsequently apply in relation to certain, or other products, and this might affect future fees. But until such time as such a Schedule was drawn up the fee remuneration was to be based on what had been discussed and agreed orally. And I do not consider Mrs Stonard was agreeing to Mr Schaefer being able to create a Schedule, and apply a different share, with retrospective effect. This is highly improbable, and I reject such a suggestion.

70. The absence of a Retrocession Schedule, however, meant that there was some uncertainty for Mrs Stonard, potentially, in relation to the sales work she was carrying out in relation to investments into hedge products, since she was vulnerable to efforts by Green Shoots to introduce variations to what had been discussed, and issuing her with a Retrocession Schedule which could impact on future fees (I shall return to this point below). It might even have been contended that if Green Shoots created a Schedule this would apply from the date it was created, though this is moot because one was not created until 28 August 2019, long after the relevant introductions had been made. This uncertainty may explain the lack of any communication on Mrs Stonard's part, before proceedings were issued, as to her receiving a certain figure or split. There was also a greater uncertainty or risk for Mrs Stonard in relation to other types of advisory work or products. This was an uncertainty she was willing to accept given that she clearly did not insist on receiving a written Retrocession Schedule before she signed up, and also because it was not likely to be the main area of work she was going to be performing. In relation to investments which went into something more unusual or complex than investors placing capital with a single investment manager, as a result of which a fee was payable to Green Shoots, something would have had to be agreed in that respect, or a quantum meruit might have applied, or Mrs Stonard might have had to accept a greater element of discretionary decision making by Green Shoots.

71. I am fortified in my conclusions in this respect, and that the agreement, and mutual expectation, was that Mrs Stonard would receive a 70% share in relation to single invested capital investment raising, by the fact that Mr Schaefer was not able to recruit very many consultants on commission terms. He was unable to confirm when the first consultant was recruited by him, and nor were any other terms agreed with them disclosed. But I noted that Mrs Stonard was not recruited until 1 December 2014, and Green Shoots had been incorporated for almost a year. Mr Schaefer indicated he had already tried earlier informal marketing efforts before placing the advert which Mrs Stonard responded to. Mr Schaefer did confirm that during the course of the 5 year period from 2014 to 2019 only half a dozen or so consultants had been signed up. So far as recruitment of consultants are concerned, this suggests to me this was not a market where the IAC had the upper hand.

72. I am also fortified in my findings in relation to the fee share split being agreed at 70:30, by such, albeit limited, written communications there were in relation to Mrs Stonard's fee entitlements in the period 2017 and 2018. I discount 2019 because there are the signs of tension and dispute by then. I shall mention the relevant pieces of documentary evidence in this respect further below, when they arise in the chronology of events.

73. After the telephone call on the 1 December 2014 Mrs Stonard indicated by email she would send over the signed Agreement by fax as her scanner had stopped working. At 15:47 on the same day Mr Schaefer confirmed safe receipt of the fax and attached a countersigned version of the Agreement, and confirmed he was looking forward to working with Mrs Stonard. He went on to state:

"You requested the following client name approvals in general:

United First Partners

Bank of America

McLaren Securities

North Square Blue Oak

Raymond James

There is no overlap regarding these names and you are approved to deal with them once you are fully set up at the FCA. I am speaking with Merrill Lynch on the UCITS platform side but no relation to BoA directly.

You will receive a few more emails from me regarding other matters."

74. Ultimately Mrs Stonard was not successful in raising any funds from these contacts which she asked to be identified on Green Shoots' records as approved for her to pitch to, but that is not the point when considering the position as at 1 December 2014, when the Agreement was signed off. Mrs Stonard confirmed in her evidence that this list of names was included on the draft Agreement, which was then signed, as I have described it above.

75. On 2 December 2014 Mr Schaefer sent through to Mrs Stonard a set of documents for her to complete in relation to FCA requirements, including an appointed representative questionnaire provided by Sapia Partners LLP. This was completed and signed by Mrs Stonard on 3 December 2014 and provides corroborative evidence as regards her career background which I have already referred to above. She was set up on Green Shoot's IT systems with an email on 5 December 2014 and asked by Mr Schaefer to add a sign off to her emails indicating her role as being "Director". This did not mean she was becoming a de jure or de facto director of Green Shoots and it was simply to assist her in her marketing efforts for Green Shoots, to the mutual advantage of Mrs Stonard and Green Shoots. I do not consider it material either way in my assessment of the role Mrs Stonard undertook. She re-sat the necessary examinations in January 2015, passed, and began to contact clients.

76. It is common ground that it took Mrs Stonard some time to secure investments: notwithstanding the hard work she put in, no investments were secured until the end of the first 2 years. Mr Schaefer was complimentary about her persistence and determination. It eventually paid off.

77. At a Deutsche Bank conference in December 2015, Mrs Stonard met Mr Alan Sippetts, Investment Director at Heartwood, and Green Shoots arranged for her to send across some material on some of the managers that he was interested in finding out more about. Heartwood is a household name in the UK wealth management industry. Mrs Stonard asked Mr Schaefer for approval to put Heartwood in her name as an investor she could seek to work on. Mr Schaefer told her that, prior to this, no-one had gained any traction with Heartwood. Mr Schaefer's evidence was that no matter how hard Green Shoots had tried, the man in charge did not show any interest in the managers Green Shoots had presented over the years. He explained that when the name was assigned to Mrs Stonard the person in charge left shortly afterwards and Heartwood hired a new person who was given the mandate to buildout an entity allocating to a wide range of hedge funds. He described this as a game changer. His perspective on it was that he had assigned Mrs Stonard to a close to dormant relationship, simply to ensure they were not left uncovered, and then "profited from the personal changes at the firm rather than her

actions or influence, although I acknowledge that Melissa was persistent in all her interactions."

78. Mrs Stonard's perspective was somewhat different, but it is not in issue that Heartwood had been assigned to her and as a result of her efforts fees were generated. She explained the matter in somewhat different terms to that of Mr Schaefer as follows:

"Shortly after my meeting with Mr. Alan Sippetts, he unfortunately went on permanent sick leave, and Charu Lahiri joined the team, in his place. I introduced myself to Charu, and went to their offices to meet, and discuss how I could help them to build out their alternatives (hedge fund investments) business, which was a brand-new project for them. I built a good relationship with her, and she trusted me. I asked Mr Schaefer to approve a number of hedge fund managers (Mr Schaefer always asked the hedge funds for approvals for particular clients) for Heartwood for me – I got approvals on most of the managers that would be of interest for her. Particularly to note, that I requested Universa (Universa is the manager where Heartwood has an investment of $240m that I raised) to be approved – there is also an email (which Green Shoots have not disclosed) stating that Universa were once approved for Heartwood but they did not get anywhere with it, and so handed the name back to Universa (this was before my time at Green Shoots)."

79. I accept that what Mrs Stonard described in this respect is correct. Heartwood made their first investment in a hedge fund called LCJ in the Autumn of 2016, investing around £2.4m. They subsequently invested in a fund called Cambridge at around £2.5m and in Clinton at £1m. The £2.4m investment in LCJ is confirmed in an email from Mr Schaefer to Mrs Stonard dated 16 February 2017 when he confirmed that upon receipt of the monies, to be transferred to Switzerland that week, the money would go to the UK from where Mrs Stonard would be paid.

80. The documentation which was sent to Mrs Stonard accompanying the payments made to her did not make it easy to work out what percentage share she was being paid. She was sent a document from Green Shoots, in many instances and before the end of 2018, called a credit note, which confirmed the amount of fees being remitted to her and (usually) the name of the associated investment manager. However these did not confirm the amounts which Green Shoots had received and the percentage share which Mrs Stonard was receiving.

81. Mrs Stonard has, however, produced a copy of a photograph she took, I infer on her mobile telephone, of what appears to be the first investment she closed, in relation to Heartwood, which has been referred to in the paragraph above and which was closed in 2016. She sent this via Whatsapp, to her sister, in October 2006, and stated "He says I get 70% of this, as 30 goes to GS. This was from my first investment x". This was clearly a reference to Mr Schaefer telling Mrs Stonard that she would be getting 70% of this fee too, as he recognised in his oral evidence. Mr Warwick relied on this message as supporting the notion that it had been agreed that the split would be 70:30. On the other hand it might be said if it had been agreed that there would be a 70:30 split Mrs Stonard would not have needed Mr Schaefer to have said that she was to get 70% of this fee. This language, in my judgment, does lend some support to the notion that Mrs Stonard was not entirely sure, at this time, that she had a firm and clear entitlement to 70%. But I find this was so because of the continued absence of any Retrocession Schedule, and because over 2 years had passed since the initial conversation in relation

to fees, and because Mrs Stonard was not 100% sure of when the conversation in relation to fees occurred. I also believe Mrs Stonard, having not raised funds for 2 years, was likely to approach the matter with Mr Schaefer cautiously. Overall I conclude the message is supportive of the notion that it was agreed Mrs Stonard would be entitled, or "get", 70% of the fees on capital raised in this way. I note there is no suggestion in the language used to suggest it was discretionary.

82. The picture was also complicated by the fact that, as recognised by Mrs Stonard in her own evidence, it was not entirely clear that Mrs Stonard had been paid 70% of this sum due to the haphazard manner in which she received remittances. Mrs Stonard is more likely to have been focussed on trying to build on her successes than pushing Mr Schaefer for more information.

83. Mr Schaefer sought to explain these higher payments in his written evidence as follows:

"In each deal, Melissa was paid a greater sum than the minimum because I took the view that, although inexperienced and requiring a great deal of support from us, she had been brave and persistent over the previous no deal years, following leads and chasing up the investors. I was under no obligation to pay her as much. She was made aware of such overpayments and never complained at any point in time throughout the years regarding her remuneration received."

84. His calculations, or revised calculations, suggested that overall he had caused Green Shoots to pay Mrs Stonard somewhere in the region of 40-45% from 2017 to 2019, though, as noted in the expert report of Mr Abbas, the numbers were not easy to reconcile and had been subject to some alteration: part of the explanation for this may be currency calculation differences, which was also something Mrs Stonard had to grapple with.

85. There may be some truth in Mr Schaefer's explanation that he did not consider he was under a firm or binding obligation to pay Mrs Stonard 70%. This is because of the way in which he came to consider the Retrocession Schedule might work, with him being entitled to issue a document and it having retrospective effect. I find below, however, that it did not work in the way he may have believed it could work. Insofar as Mr Schaefer's explanations are relied on to support the contention it had been agreed there would be only be a minimum entitlement of 30%, there is no written contemporaneous evidence to show that there was only a minimum 30% entitlement, or that Mrs Stonard was made aware that Green Shoots considered it was overpaying her. Or indeed any expression of delight on the part of Mrs Stonard that Mr Schaefer had been so generous.

86. In his oral evidence Mr Schaefer suggested that he paid Mrs Stonard higher sums than she was entitled to because he did not wish to quell her enthusiasm and wished to encourage her hard work. These are substantially the same factors I have already noted above when concluding he would similarly have been willing to state, and did state, that Mrs Stonard would be entitled to 70% of fees generated for Green Shoots by her introductions in relation to the funds which are in issue in this case. Indeed, the reason for offering up that expectation before Mrs Stonard had signed up was even greater.

87. Mr Schaefer also sought to suggest that all material meetings with Heartwood were conducted by and in his presence. However the written evidence does not support that. I note that in an email sent by Mr Schaefer, to an investment manager, on 19 September

2017, Mr Schaefer stated that "Melissa has been working hard on Heartwood and following yet another meeting she had with the head of alternatives today". As Mr Warwick submitted, this last comment not only testifies to Mrs Stonard's hard work, but shows that she was not passive, contrary to Mr Schaefer's statements. Soon after this Mr Sebastian sent Mrs Stonard a message stating: "*10mln!! :-) Super Melissa. You deserve every bit of it with your tireless devoti…*". This truncated message was clearly indicating that Mr Schaefer considered Mrs Stonard deserved the rewards for her tireless devotion.

88. To the extent it is relevant, I find that the majority of the work, meetings and contacts with Heartwood, and other investors for which she was given approval, were conducted by Mrs Stonard on her own. She was expected to do the bulk of the work, and she did the bulk of the work. I also consider it is likely at this time both Mr Schaefer and Mrs Stonard were working effectively together, and there were meetings where Mr Schaefer assisted, as was in the mutual interest of Mrs Stonard and Green Shoots.

89. The second reference to a 70:30 fee split occurred some-time later, in an email from Mrs Stonard to Mr Schaefer on 5 March 2018, which stated as follows:

"Hi Sebastian,

I have been paid £4141.35, is this for STATS?? As Heartwood invested 11m. And I got paid £6.600 for the other three funds last quarter which was for $8 invested?

Can you explain? What are the rates for each fund, then I can work it out myself.

Thanks,

Melissa"

90. Mr Schaefer replied as follows:

"Hi Melissa

Yes, this is for STATS. See attached our invoice to STATS. You get 70% of that. Your invoice is attached as well.

Performance fee is only paid to STATS from the funds in May 2018 when the performance year ends. So the fee shares are management fee only.

Regards

Sebastian"

91. The invoice he was referring to is dated 8 February 2018, and refers to an invoice raised by Green Shoots against the Japanese investment manager called Stats Investment Management Co Ltd, in relation to direct investments made in it by Heartwood. This is the only invoice in the trial bundle which shows the corresponding invoice to the sum paid to Mrs Stonard. As noted in the email exchange above, as confirmed by Mr Schaefer, Mrs Stonard was stated to "get" 70% of the sum. Again, Mr Warwick submitted, this is consistent with the original agreement being for a 70:30 fee split. I agree, and again the language does not suggest discretion on the part of Green Shoots.

As before, the fact that Mrs Stonard needed to ask the question lends some support to the conclusion that she did not consider there was any certain fee sharing split which applied to all of the items in question. But, as before, this is partly explained on the basis that she did not wish to make waves. It is also partly explicable on the basis that her position did remain precarious without having sight of a written Retrocession Schedule, as I have already referred to above.

92. I also note, before moving on from the March 2018 email exchange referred to above, that the reason why performance fees are not included in the payments to be made to Mrs Stonard is because they are paid later in the year. It is not suggested there is any other reason to differentiate them from management fees. I find that there is no good reason to differentiate between the two, and there was no differentiation between them agreed or intended in relation to the oral agreement made on 1 December 2014. I shall return to this point below in relation to my conclusions on the Issue and the sub-issues identified above.

93. A third, after the event, document of some relevance was an email sent by Mr Schaefer to Mrs Stonard on 19 September 2018. This contains references to Mrs Stonard's share of fees from the investment/s made by Heartwood in a product managed by Universa. In it Mr Schaefer stated:

"As far as I know, this will be more than 90.000 USD per year in management fees for you and in a crash with 100% return more, this might yield more than 1mln. No guarantee on this, so don't hold me to it, as Universa has all decision power regarding mandates and fees.

Universa pays monthly and performance fees are annual, either at year end or 12 months after mandate start. So lets see the first month and then you can extrapolate."

94. I consider this email is also illuminating because it undermines the notion that the amount of any fees which Mrs Stonard might receive was dependent on any discretionary decision making by Green Shoots. Instead the element of uncertainty being emphasised by Mr Schaefer was in relation to any decision making by Universa.

95. This email is also instructive as to the sorts of fees which Mrs Stonard and Mr Schaefer contemplated might flow to Mrs Stonard from the investment. Mr Schaefer accepted that the reference to a yield of more than 1 million, in a crash, was most likely a reference to his assessment of Mrs Stonard's share of the fees, and that Green Shoots might be entitled to as much as £4.5m on a £150m investment. This tail hedge, or "insurance", or "asymmetric" investment strategy, in relation to a crash, could provide for very lucrative performance fees for the investment manager, which would be shared with the introducer too.

96. Universa, a fund based in Miami, had developed three separate equity derivatives protection mandated strategies, given the name of "Black Swan Protection Protocol" or variations of the same. I infer they were given that name after the book, The Black Swan: The Impact of the Highly Improbable, written by Nassim Taleb (Penguin, 2008). As the title suggests, this book considers the impact of rare and unpredictable events. Mr Taleb was visiting London in 2019 and Mrs Stonard wrote a blanket email advertising this fact, but also mistakenly included wording which might suggest that Heartwood, included in the blanket email, needed an introduction to Universa, which

was obviously not the case. Mr Schaefer referred to this email error, and the alleged inaction on the part of Mrs Stonard in relation to Heartwood in 2019, as did his expert, as examples of the inexperience of Mrs Stonard. I reject those suggestions. I am not required to make any findings in relation to where the fault lies in relation to termination, but I should note that, insofar as it is relevant to the issues I have to decide, on the question of experience and capabilities, I reject the idea this evidence shows that Mrs Stonard was inexperienced or incapable in December 2014. On the contrary, if anything, this email episode, save for what might be described as imperfect execution, shows that Mrs Stonard was capable of combining her relevant experience and interest in behavioural economics with her sales role.

97. Mr Schaefer's attempt to latch on to the imperfect execution of this email was affected by what had become a distrustful working relationship. Mr Schaefer had ceased to provide Mrs Stonard with a meaningful breakdown of information from about October/November 2018. Mrs Stonard enjoyed the role, and did not want to rock the boat. She was also increasingly concerned that the credit notes did not explain how her payments were calculated, and she sought some details. Mr Schaefer, in an email sent to Mrs Stonard on 28 June 2019, expressed annoyance that Mrs Stonard's requests were causing him "extra time", and stated: "You should simply produce your own invoices with the payments you receive for the consulting services you provide so that your personal booking requirements can be satisfied". Mrs Stonard responded explaining *"I'm not asking for invoices. I'm simply asking to be told which payment comes from which manager, so that I can keep a record of things myself (there have been incidences, where payments have become stuck for example). This is a very normal request – I am not sure why you are trying to make me feel bad for asking? … I wouldn't be working for Green Shoots if I wasn't prepared to put the effort in – there is no point in working in sales, if you are going to do nothing. I really like what I do, and enjoy my job and interaction I have with clients – and I will continue to make every effort to make this a huge success."*

98. Shortly after this, on 29 August 2019, Mr Schaefer sent Mrs Stonard an email headed "Housekeeping/updates/task list". It enclosed amendments to the Agreement and this is also the email which attached the Retrocession Schedule I have already referred to above, and which was only created the day before. Mrs Stonard perceived that these amendments, if accepted by her, would be detrimental. She was concerned that Green Shoots were removing her entitlement to fees if the Agreement was terminated, and she believed this was in order to deprive her of the benefit of substantial management and performance fees in relation to capital which had already been introduced by her. She took legal advice. Mr Schaefer did not wish lawyers to become involved, writing, on 28 October 2019: *"Sorry for the tone of this email in advance, but… I need to make this clear: This is why I don't [sic] like lawyers to get involved and get upset when they are, since it makes things unnecessarily complicated and creates loads of back and forths which costs time I don't [sic] have and don't want to allocate….I set the remuneration terms of sales people as per the retrocession schedule and as per the quality of work that is being done. Payments beyond termination can be agreed in special circumstances, but are not a standard and would still require satisfactory client cover..You have been paid handsomely – I would even say overpaid – for the work done … I am tired of spending precious time on things that just upset me and that don't benefit the business".*

99. Mrs Stonard was unwilling to accept that, or the changes to her Agreement. On 8 November 2019 Mrs Stonard sent an email to Mr Schaefer stating as follows: *"Yesterday my emails from 2015 to February 2019 disappeared from my email account. These are on the Green Shoots server, and I wondered if it was possible to get them back?"*. Mr Schaefer responded on 11 November 2019 stating: *"Until we have cleared this up and made a decision if and how to proceed, access to company tools has been removed or restricted. Do not use your email account for any outside communications. Emails are company property and may not be deleted or moved".*

100. Mr Schaefer's action of turning off Mrs Stonard's access to Green Shoots' emails had the consequence that she no longer had access to her historic Green Shoots emails, though she does appear to have retained some emails, or recovered them from other media. And some emails have been disclosed by Green Shoots in these proceedings. It was suggested on her behalf that, despite the best efforts of Mrs Stonard and her advisors, it has proved very difficult to obtain proper disclosure of emails and other documents from Green Shoots.

101. In this respect Mr Warwick focussed in particular on the lack of disclosure of the agreements with Universa and Cambridge, which had not been provided to the experts (as recorded in paragraph 7 of the joint report). This overlaps with the point I have already discussed above in relation to adverse inferences. I do not consider this is an area where adverse inferences should be drawn on any particular point, for the reasons I have already given. I do however agree with Mr Warwick that the failure on Green Shoots' part to be up front about the position in relation to Universa, in advance of trial, was unfortunate, and does not reflect well on Green Shoots.

102. It is Mrs Stonard's case that the lack of information and the decision to remove her from servicing the relationship with Heartwood was the reason she caused lawyers to be instructed. She initially retained an employment lawyer, who wrote seeking to secure employment status for Mrs Stonard, amongst other things. She later instructed litigation lawyers. Both sides sought to draw points out of this pre-action correspondence. Green Shoots relied on it for the failure on Mrs Stonard's part to refer to the 70% fee split agreement - I have already addressed this above. Mrs Stonard relied on the failure on Green Shoots' part to give a substantive response to the letter before action sent by the litigation lawyers, Judge Sykes Frixou, before proceedings were issued. I bear in mind however that there had already been a response from Green Shoot's lawyers, Keystone Law, and the time frames involved were relatively short and at a time when lawyers were beginning to get to grips with the first COVID-19 lockdown (at the end of March). I do not consider these points carry particular force in terms of my assessment of the evidence either way. Suffice it to say here that they did not result in any resolution, and proceedings were issued on 2 April 2020, which has ultimately led to the trial of the Issue.

Analysis and conclusions on the Issue and the sub-issues

103. I will now state my conclusions and reasoning on the sub-issues, in order to provide a determination of the Issue, having regard to the findings of fact made above.

Sub-issue i: are the parties bound by the terms of the Retrocession Schedule?

104. The first sub-issue to resolve is, are the parties bound by the terms of the Retrocession Schedule referred to at paragraphs 1 & 7.1 of the Agreement?

105. Paragraph 1 stated that the terms should be read in conjunction with the "*most recent*" Retrocession Schedule, a copy of which "*is available to you upon written request*."

106. This was defined to mean "*the latest 'retrocession schedule' issued by Green Shoots from time to time in which details of the standard retrocessions payable by Green Shoots in relation to various Investment Products as part of the Green Shoots network are described*."

107. Paragraph 7.1 stated that "*As remuneration for your services under the Agreement you shall be entitled to receive retrocession with respect to the shares, bonds and/or units in Investment Products held by your Investors at the applicable rates, at the time and in the manner set out in the Retrocession Schedule. At no point in the future will you be remunerated via fixed salary or consulting fee nor will you request Green Shoots to pay you one*."

108. Relying on these provisions it was submitted by Green Shoots that there was no reason why a separate document could not be incorporated by reference (relying on cases such as *Thompson v London Midland & Scottish [1930] 1 KB 46*). It was submitted that it was not suggested that the terms were unreasonable, onerous or unusual as to require "red finger" notification (as discussed in cases such as *Interfoto Picture Library Ltd v Stiletto Visual Programmes* [1989] QB 433). It was immaterial whether or not Mrs Stonard had read them (relying on *Parker v South Eastern Railway* (1877) 2 CPD 416).

109. In my judgment, however, all these points, and cases, presuppose that there are terms which exist to be incorporated by reference. So I do not derive any great assistance from them. Nevertheless, Green Shoots submitted that it is irrelevant that the specific Schedule sent by Green Shoots to Mrs Stonard did not exist at the time. It was submitted this was, by its nature, a document which changed over time, and it was the latest Schedule from time to time which prevailed. Green Shoots was unable to find any authority in support of the proposition that parties could agree to be bound by terms which did not exist at the time the contract was entered into by them. This raises an interesting question as to whether this is conceptually possible. I am tentatively inclined to the view, though I do not decide, that it may be possible if there is a sufficiently certain way in which such terms can be machined without requiring further agreement. I note that it is possible for a party to agree to give one side a discretion to set those terms and the court may respect this; see the decision of the Privy Council in *Kofi Sunkersette Obu v A Strauss & Co Ltd* [1951] AC 243, where the basis and rate of commission was left to the discretion of the principal. Thus, for example, parties would be competent to agree to incorporate terms which were to be produced in the future by one of them under a discretion conferred on them. I also note in *Re Bank of Credit and Commerce International SA (No 8)* [1998] AC 214 Lord Hoffmann rejected the notion that it was conceptually impossible for a bank to grant a charge over sums owed by a customer to a bank. The courts are generally willing to permit the parties freedom of contract in a commercial setting, and drafting ingenuity should not be underestimated.

110. There is, however, a logically anterior question which arises in this case, which is as follows: Can it be said this is what the parties were objectively agreeing to on a proper interpretation of the Agreement?

111. Starting first with the written terms, the written terms overwhelmingly point to the conclusion that the parties were intending to contract on the basis of a Retrocession Schedule which existed at that time. I say so, in particular, having regard to the following matters:

i) All references to the Retrocession Schedule are in the present tense and point to the conclusion it does exist and is "*available*" on request – but if the Schedule did not exist it could not be said to be "*available*" on request;

ii) It is stated in paragraph 1 that "*The Retrocession Schedule contains a number of provisions, which explain the basis upon which retrocessions are to be paid (i.e. calculation and payment periods) and those provisions should be read and construed as forming part of these Terms and Conditions*." This is the language of a document which exists, since it describes a document which "*contains*" provisions" "*which explain the basis upon which retrocessions are to be paid*". This is not describing a document which does not yet exist, and nevertheless is to be binding in the future, notwithstanding that it does not yet exist or set out the basis on which retrocessions are to be paid;

iii) The definition of the "Retrocession Schedule" contemplates a document which contains "*details of the standard retrocessions payable*" – again this contemplates a document which exists and contains details of the standard retrocessions payable – not a document to be created in the future and which did not contain any such details at the time;

iv) It was Mr Schaefer's own evidence that there were no standard retrocessions in place which could be objectively ascertained on 1 December 2014 for Mrs Stonard, and which he could have explained with any degree of certainty or specificity;

v) It would require very clear language indeed to support the notion that the parties were agreeing to such an unusual provision. They would be agreeing to an unknown, which is an unusual thing to do.

112. Secondly, dealing with the oral terms agreed on 1 December 2020. I have found that the parties agreed on certain fee sharing terms in relation to introductions made by Mrs Stonard. In particular they did so on terms which included a 70:30 split in relation to the investments which were closed by Mrs Stonard, and are the subject of dispute in these proceedings (namely investments into single managed funds which did not require further work in order to justify the fees). The parties intended those terms to apply, at least until such time as the Retrocession Schedule was created for Mrs Stonard. None was created until 28 August 2019, after the material introductory work was done by Mrs Stonard. I have already rejected the notion that Mrs Stonard agreed that this could or would apply with retrospective effect. That would be commercial suicide.

113. In conclusion, therefore, the parties did not agree that they would be bound by a document to be created in the future. Instead, they intended such terms as they had agreed to be binding for the time being and at least and until such a document had come into existence. It was not enough for Mr Schaefer to have the details in his head as to the terms he wished to apply. Mrs Stonard did not agree to such an arrangement. It is a moot point as to whether or not Mrs Stonard would be bound from the date of creation,

if Mr Schaefer had created a schedule, but had not notified her of it. It is moot because he did not do so until 28 August 2019, and this cannot have affected any accrued entitlements. Those entitlements accrued after the introduction had been made, and which was causative of the investment, even if top up investments occurred after, and even if management or performance fees came later.

114. My conclusion on the first sub-issue therefore is that the parties were not bound by the terms of the Retrocession Schedule referred to at paragraphs 1 & 7.1 of the Agreement because: (i) this contemplated a document in existence, and none existed until 28 August 2019; and (ii) the parties agreed a certain fee sharing arrangement which would be in place, at least until such time as the Schedule was created.

115. Before moving to the next sub-issue I should note that, whilst not contained in its pleading as a defence, in Green Shoots' opening submissions some reliance was placed on the entire agreement clause, in paragraph 9.6 of the Agreement. However, as I noted in closing, if there was no applicable Retrocession Schedule, neither side's case could easily rest on the notion that the Agreement embodied the entire understanding because both Mrs Stonard and Mr Schaefer relied on what they say was orally agreed and communicated in relation to fees before the Agreement was signed on 1 December 2014. Mrs Stonard relied on it for her 70:30 case, and Mr Schaefer relied on it in support of his case that he had verbally communicated certain remuneration terms to Mrs Stonard. If all of that evidence had to be ignored, because of an entire agreement clause, then it could not be said there was any agreement in relation to the remuneration. During closing, however, neither Ms Jones nor Mr Warwick relied on the entire agreement clause, if I rejected the notion that a Retrocession Schedule was incorporated and applied at the material times, and Ms Jones disavowed her previous reliance on it in those circumstances. So it is not necessary for me to dwell on how the entire agreement clause might be addressed legally and conceptually, but I simply record here it may have required me to consider what the entire agreement clause covered (having regard to the ambiguity in the definition of "the Agreement", mentioned in paragraph 40 above) and potentially also constructional, or other types of, rectification. But, as I have said, given by the end of trial neither side was relying on it, and no pleading or case was advanced before me, I do not consider it further here.

Sub-issue (ii): parties bound by oral agreement and the terms of the same?

116. As already stated above, the parties are, at least in relation to fee entitlements arising from introductions made before 28 August 2019, bound by an oral agreement in substantially the same terms as asserted by Mrs Stonard, namely that of a 70:30% split in her favour. I reject any suggestion that the fee split was a minimum of 30% to Mrs Stonard, limited to 1 year, and then became discretionary. I refer to my findings as summarised in paragraphs 68 to 70.

Sub-issue (iii): a different regime for performance payments?

117. In opening submissions Ms Jones submitted that a different arrangement applied in relation to performance payments. She suggested this conclusion might be arrived at, if the Retrocession Schedule was not treated as being incorporated, by severance, and a blue-lining approach to the rest of paragraph 7 (and in this respect she referred to the severance clause, in paragraph 9.3 of the Agreement). However, such a distinction was not supported by the evidence of Mr Schaefer, who accepted that such documents as

referred to performance fees did not seek to make any distinction between these fees and management fees, or indeed any other name given to fees to be paid by the investment manager by way of retrocession to the IAC. In view of this, in closing submissions Ms Jones did not press any positive case that a difference should apply in relation to performance payments, and simply confirmed that Green Shoots put Mrs Stonard to proof that something was orally agreed in relation to performance payments. As I have found above, the oral agreement was for a split of fees payable by the investment manager to the IAC, and that included management fees and performance fees. I am fortified in making this finding by also noting that this is in accordance with the standard industry practice, according to both experts, and the distribution agreements all contemplate that the IAC would be paid a retrocession in relation to both. There is no logic or justification for a conclusion that there should be a carve out for performance fees, and I find that performance fees are included.

Sub-issue (iv): fee entitlement survives termination?

118. Green Shoots did maintain a positive case however that Mrs Stonard's right to payment did not extend beyond the termination of the contract, having regard to paragraph 7.3(c) of the Agreement.

119. The particular part of paragraph 7.3(c) relied on is in the following terms (and in particular the part underlined by me below):

> *"Retrocession shall only be payable (i) for so long as Green Shoots obtains or continues to obtain (as the case may be) a financial return or benefit from or in relation to such Investment Product substantially similar to that obtained by Green Shoots at the time the investment upon which such retrocession is being paid was made. In the event that Green Shoots's return or benefit is reduced the obligation to pay retrocession shall be reduced proportionately by an amount to be reasonably determined by Green Shoots and which shall be notified to you in writing and (ii) to the extent that you continue to satisfactorily service the Investor making the investment in that Investment Product. Green Shoots may determine, acting reasonably, whether such service obligation has been duly satisfied;"*

120. The context for this term is important to have in mind. It sits within paragraph 7 and follows paragraph 7.1, which refers to a Retrocession Schedule which did not exist. In my judgment this renders paragraph 7.1 meaningless, at least until a Retrocession Schedule exists, and is to be ignored (*cf. Nicolene Ltd v Simmonds* [1953] 1 QB 543). As I have found above, until such time as Retrocession Schedule was in place, the material terms for the basis and terms of remuneration were agreed orally. That gives rise to the question, however, as to how much of the remainder of paragraph 7 was intended to apply, or is sufficiently certain and capable of being enforced. I raised with the parties as to whether or not in those circumstances I should be looking at principles as regards severance, in order to determine this question. Ms Jones submitted I should not be, and drew my attention to the fact that Mrs Stonard had not pleaded or advanced such a case. Indeed, Mr Warwick's opening submissions positively relied on paragraph 7.3(c) as supporting a claim for continued, as he relied on the following words, which are stated just before the part I have quoted in the paragraph above (i.e. an earlier part of paragraph 7.3(c)):

"Retrocessions payable on a trailing basis in respect of each Investment Product shall continue to be payable to the Consultant after the termination date in respect of the investments made by Clients as at the date of termination for as long as these investments are not redeemed and Green Shoots continues to be remunerated for such investments by the investment manager in charge."

121. Mr Warwick submitted that the management fees and/or performance fees were payable on a "trailing basis" and therefore this supported the notion that they should be paid. I have my doubts about this. I note that paragraph 7.2 introduces the notion of retrocessions as comprising two elements in the following terms:

"7.2 The retrocessions can comprise two elements, the first being retrocession paid on a frontend load basis and the second being retrocessions paid on a trailing basis. The former are to compensate you for the expenses incurred in alternative investment consulting and promoting investment interest in the relevant Investment Product to the Investor, with the latter being to compensate you for the ongoing costs of complying with your obligations under the Agreement and servicing your Investors' needs with regard to Investment Products."

122. The Agreement thus uses the language of retrocessions being based on two elements, being fees paid on a "frontend load basis" and "on a trailing basis". As noted by Mr Dodds in his report, and which I accept, the percentage fee paid to the Third Party Marketer will be a percentage of the management fees and of performance fees, if they exist. On open ended funds (e.g. unit trusts) there may be a fee due on the front end load (a fee which is payable by the Investor upfront) and trailing fees (usually referred to as the trail or trail fee). Front end load fees do not exist for hedge funds and trail fees usually refer to sales of unit trusts and not hedge funds as such (the later normally being referred to as retrocession in hedge funds). The reference to front end load in paragraph 7 is therefore misguided.

123. Mr Dodds thought that the reference to "trailing fees" might be rationalised as simply fees paid afterwards. If this is correct they might be said to apply to or include management fees and/or performance fees. Mr Schaefer's evidence was that trail fees were typically to do with the situation where further advisory work was required to justify the fees, at least historically, and at the time the terminology set out in the draft Agreement was likely to have commenced. It is notable that there is no reference to trail fees in the Distribution agreements with the investment managers, nor indeed in any of the contemporaneous documentation in the trial bundle.

124. This court therefore ends up in the unusual situation that both sides are seeking to use an expression in an agreement, for different purposes, in circumstances where it is far from obvious the parties intended it to apply. Ignoring the doubt I have about that, however, given the position adopted by both parties in their submissions, I will assume the fees in question here do fall within paragraph 7.3(c), as being or falling within the definition of "trailing fees", in the sense that they simply come later as part of a "trail". Making that assumption, in my judgment Green Shoots' reliance on paragraph 7.3(c) as providing a potential justification for declining to pay management fees or performance fees after termination is misplaced and I reject it. I should stress it is put no higher than a "potential" justification, because whether or not Mrs Stonard satisfactorily serviced an investor, or was able to do so, did not form part of the Issue for me to determine at this trial.

125. My reasons for rejecting this contention are three-fold. First, I conclude that the oral agreement in relation to entitlement to fees was expressed in such a way that it was not limited by reference to such fees being curtailed if the Agreement was terminated, and there is no basis to conclude the parties impliedly agreed such a restriction on it. Secondly, on a proper interpretation of the provisions of paragraph 7.3(c), it only applies where in order to justify the fees payable from the investment manager to the IAC further servicing or advisory work was required. However in this case the experts are agreed, and the distribution agreements with the investment managers confirm, that no such further servicing or advisory work was required to justify payment of the servicing or advisory work. The share in the fee entitlement of the IAC, from the investment manager, did not depend on that, and there is no logical reason why the position should be different between the consultant and the IAC. I reject any suggestion, based on paragraph 7.3(c), that there was. It seems to me the submissions of Green Shoots in this respect prove too much: the logical conclusion of their argument is that in relation to all fees, unless an agreement is reached with Green Shoots (such as for example setting up some form of other authorised agency or relationship), Green Shoots will be able to decline to pay fees. This takes me to the linked third aspect of my reasoning, which is that the paragraph 7.3(c) wording does recognise that Green Shoots may only determine whether or not the servicing obligation has been duly satisfied subject to the restraint that they acted reasonably. I cannot envisage a situation in which an accrued fee right, which does not require servicing for it to be obtained, might reasonably be determined as requiring servicing and therefore provide a ground to reject fees after termination. I think this wording supports my first and second reasoning above, but to the extent necessary I consider that Green Shoots could not be acting reasonably, in this context, to reject a fee entitlement where the fee did not require further servicing or advisory work to become due. It is quite a different matter concerning the desire to service a client to try to prevent redemptions, or grow the relationship, and I note that Green Shoots have not suggested that they were unable to do this after the Agreement terminated.

126. Insofar as reliance is also placed on the provision in paragraph 7.3(d) by Green Shoots, to a similar end, I also reject that submission, for the same reasons as stated above.

Sub-issue (v): quantum meruit applicable and if so on what basis or percentage?

127. Strictly speaking my findings above render it unnecessary to proceed with a consideration of whether or not a quantum meruit is applicable and if so on what terms. However in case the matter should go further and because I have received full submissions on the matter I shall make findings below on the assumption that the parties are not bound by an oral agreement as regards the basis of remuneration. I do so on the basis that whilst 70% may have been mentioned as a figure which could apply, as Green Shoots accepted was the case, the nature of the discussion was such that nothing sufficiently certain was agreed on 1 December 2014.

128. It is well established that in a contract for services if no scale of remuneration is fixed the law imposes an obligation to pay a reasonable sum, sometimes referred to as a quantum meruit; see *Way v Latilla* [1937] 3 All ER 759. More recently in *Benedetti v Sawiris* [2014] AC 938 it was confirmed by Lord Clarke at [9] that it is important to distinguish between contractual quantum meruit cases and a quantum meruit based on unjust enrichment, since a different approach and principles apply:

"It is common ground that the correct approach to the amount to be paid by way of a quantum meruit where there is no valid and subsisting contract between the parties is to ask whether the defendant has been unjustly enriched and, if so, to what extent. The position is different if there is a contract between the parties. Thus, if A consults, say, a private doctor or a lawyer for advice there will ordinarily be a contract between them. Often the amount of his or her remuneration is not spelled out. In those circumstances, assuming there is a contract at all, the law will normally imply a term into the agreement that the remuneration will be reasonable in all the circumstances. A claim for such remuneration has sometimes been referred to as a claim for a quantum meruit. In such a case, while it is no doubt relevant to have regard to the benefit to the defendant, the focus is not on the benefit to the defendant in the way in which it is where there is no such contract. In a contractual claim the focus would in principle be on the intentions of the parties (objectively ascertained). This is not such a case."

129. I have also derived assistance from a recent decision of Morgan J in *ACLBDD Holdings v Staechelin* [2018] EWHC 44 (Ch). This refers to *Benedetti v Sawiris*. It does not make any express reference to *Way v Latilla* but I do not discern any conflict between *Way v Latilla* and *Benedetti*: the latter considered and referred to *Way v Latilla* but was focussed more on unjust enrichment principles. *ACLBDD Holdings v Staechelin* was also a dispute in relation to a commission. The claimant relied upon an express agreement (as to $10m). At [158] Morgan J stated, obiter, the legal principles to be applied in a case where there is a contract of services, but no express agreement was reached. The three main ones stated by him there, I usefully adopt here, with some minor modifications of my own:

i) In a contract for services to be provided, but where no price for the services is agreed, it will be an implied term that the provider of the services will be paid reasonable remuneration for those services;

ii) in considering what is reasonable remuneration, the court asks what a reasonable person in the position of the defendant would have had to pay for the services;

iii) what a reasonable person in the position of the defendant would have to pay for the services is to be judged objectively, usually by reference to the objective market price for the services.

130. I would also add to this that in assessing the value, the court is entitled and indeed required to have regard to the actual negotiations or discussions between the parties at the time, even if they fell short of an agreement. This is emphasised by the decision in *Way v Latilla* in the speech of Lord Atkin in the following terms:

"..In such cases, if the amount of the commission has not been finally agreed, the quantum meruit would be fixed after taking into account what would be a reasonable commission, in the circumstances, and fixing a sum accordingly. This has been an everyday practice in the courts for years. But, if no trade usage assists the court as to the amount of the commission, it appears to me clear that the court may take into account the bargainings between the parties, not with a view to completing the bargain for them, but as evidence of the value which each of them puts upon the services. If the discussion had ranged between 3 per cent on the one side and 5 per cent on the other, all else being agreed, the court would not be likely to depart from somewhere about those figures, and would be wrong in ignoring them altogether and fixing remuneration

on an entirely different basis, upon which, possibly, the services would never have been rendered at all."

131. I conclude, having regard to the above principles, that:

i) Even if no oral agreement was reached, it is clear there was a contract for services and those services were provided;

ii) It follows a term should be implied that reasonable remuneration is payable;

iii) That remuneration is to be assessed objectively and by reference to the market price or value for the services, which were freely accepted and which Green Shoots derived a benefit from, and accordingly any subjective views on the part of Green Shoots, or indeed Mrs Stonard, as to worth, is to be ignored, but

iv) The court may take account of the discussions in relation to fees which took place between Green Shoots and Mrs Stonard, as well as to the expert evidence as to the market practice.

132. It remains for me to decide what is the objective market value or price and in this case my task is made easier by the following.

133. First, the experts are agreed that the market values the consultancy services in question here on a percentage split basis.

134. Mr Dodds suggests that there is an industry standard, or market norm of a 2/3: 1/3 split in favour of the consultant, whereas Mr Abbas suggests the potential range is in the order of 35-75%.

135. It is accepted by Green Shoots that a percentage of 70% was something that Mrs Stonard could aspire to, albeit it is suggested this was not agreed.

136. I do not accept that there was anything in the nature of a certain industry standard as suggested by Mr Dodds in his written evidence, and in his oral evidence he recognised that this was on the assumption that something different had not been negotiated. Mr Abbas sought to emphasise that it was all really a matter of and for negotiation, and I accept that evidence. However, I do think that Mr Abbas was influenced in assessing the percentage split at 40-45% by one irrelevant and one incorrectly assessed factor. The irrelevant factor is the perceived performance of Mrs Stonard in the last few months of the consultancy, in 2019. Ms Jones accepted my focus should be on a hypothetical fee negotiation and agreement being reached and assessed as at 1 December 2014. The incorrectly assessed factor is that I believe that looking at the alleged lack of significant or recent experience of Mrs Stonard for the advertised role was given too much weight by Mr Abbas. The essential feature of the role for which remuneration was being obtained was a sales role where remuneration was being obtained for introductions secured. I reject the notion that any perceived lesser or historic experience on the part of Mrs Stonard would have greatly affected a market value assessment of the services she was providing. I also do not consider Mrs Stonard was not qualified for the job, even if it might be said she could not be said to have performed a senior hedge fund sales role in the past. Her previous experience was promising, if not established. In short whilst I do not accept Mr Dodds' evidence on this point, namely that experience

was not a relevant factor, I do accept it should not be viewed as being a weighty factor, especially when the cost base associated with taking on a consultant was very low. I am also influenced in this respect by the evidence of Mr Schaefer who also did not look to labels, whether it was "director", a "senior hedge funds sales" person or simply "hedge funds sales person" – the important point and overriding factor was that they brought in sales. In this respect I consider he reflected the industry norm.

137. Having regard to these points, the reasonable buyer and seller of these services would have been looking at paying the consultant the larger share of the fee, since the role contemplated they would be doing most of the hard work, without any salary, and the IAC would not be required to incur any significant increased cost by signing them up. I am entitled to take into account and do take into account that at the time in question Green Shoots was a new company and had not been trading for long. It was looking for new consultants and previous informal marketing efforts had not been particularly successful. The market was not a strong one for the IAC: there was a limited pool of people like Mrs Stonard who were willing to work for nothing, and on a commission only basis, accepting the risk that she might take many months if not years before any fees would become paid.

138. I see no reason in these circumstances to conclude that the market value of the services would have been very much different from the 70:30 split which I have found was agreed, but in this context is to be treated solely as a split to aspire to. I note that Mrs Stonard submitted I should assess the amount as being 2/3:1/3, based on Mr Dodds' evidence. I conclude that, if a quantum meruit were to apply, I would have assessed the market value at a 60:40 split. This is to make some allowance for the perception on the part of the reasonable buyer of the services, Green Shoots, that some limited additional work might be required on its part to get Mrs Stonard up and running, and so therefore the amount of the overheads which needed to be considered as attributed to her in supporting her in the initial period might be a little bit higher than might otherwise have been perceived to be the case. I also find that this would be applied to all fees received, or receivable by Green Shoots (irrespective of whether it was in fact paid to Green Shoots), and would have been payable irrespective of whether or not the fee was received before or after termination. The market would have factored in Green Shoots paying any regulatory fees out of its share when arriving at this split.

139. I invite the parties to agree an order in the light of the above rulings. In the event that there is any disagreement in that respect I will decide on any matters in dispute, and consequential issues, at a hearing to be listed following hand down.