Neutral Citation Number: [2023] EWHC 649 (Ch)

Case No: BL-2020-001626

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 23/03/2023

Before :

Jonathan Hilliard KC sitting as Deputy Judge of the High Court

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Between :

KIERAN CORRIGAN & CO LTD	**Claimant**
- and –	
(1) ONEE GROUP LIMITED **(2) BASHIR TIMOL** **(3) DOMINIC SLATTERY** **(4) TIMOTHY JOHNSON**	**Defendants**

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- -

Jonathan Hill (instructed by TLT LLP) by the Claimant

Martin Budworth (instructed by Lawbriefs Ltd) for the Defendants

Hearing dates: **12-16 December 2022**

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Jonathan Hilliard KC sitting as Deputy Judge of the High Court :

Introduction and summary of conclusions

1. This claim is for misuse of information relating to the creation of a possible tax mitigation scheme by the Claimant, Kieran Corrigan & Co Ltd.

2. The claim is that in conjunction with experienced tax counsel, Michael Sherry, the Claimant devised a structure with several variants (the **"Structure"**) using the research and development (**"R&D"**) relief provisions of the Corporation Tax Act 2009 (the **"2009 Act"**), that information relating to this structure was confidential, and that the Defendants have misused this information to their advantage to promote a structure of their own, which I shall refer to as the "Nemaura structure". The Claimant therefore claims relief for (a) breach of confidence, (b) procuring breach of a contract, namely the non-disclosure agreement (**"NDA"**) between the Claimant and a company in the First Defendant's group), and (c) unlawful means conspiracy. The relief sought in the Particulars includes a claim for an injunction and an order for delivery up, but they were dropped at trial, leaving a claim for an inquiry as to damages or equitable compensation, or at the Claimant's option an account of profits, together in either case with an order for payment of all sums found to be due pursuant to the inquiry or account.

3. Master Clark ordered on 18 November 2021 that there should be a split trial, with liability and quantum being decided separately. The hearing before me, which took place on 12 to 16 December 2022, dealt with liability only. I emphasise that and shall return to that point at the end. I asked during the trial for a number of written documents to be prepared, and the parties provided them to me after the conclusion of the trial, including an 11 January 2023 note on the relevant corporate tax analysis. I have carefully taken account of all the written and oral submissions, including the elegant closing submissions of Mr Budworth.

4. In my judgment:

   (1) The First, Third and Fourth Defendants are liable for breach of confidence, but the Second Defendant, Mr Timol is not.

   (2) The First, Third and Fourth Defendants are liable for unlawful means conspiracy in respect of acts committed on or after 5 October 2014. Again, the Second Defendant, Mr Timol is not.

   (3) The Defendants are not liable for procuring breach of contract.

Structure of the judgment

5. I shall deal with the issues in the following order:

   (1) the parties (paragraphs 6 to 10);

   (2) the witnesses (paragraphs 11 to 14);

   (3) summary of other matters dealt with at trial (paragraphs 15 to 17);

   (4) the relevant corporation tax legislation (paragraphs 18 to 48);

(5) the relevant background facts (paragraphs 50 to 148);

(6) my impressions of the witnesses (paragraphs 149 to 164);

(7) my findings on some of the key factual issues (paragraphs 165 to 176);

(8) the legal principles to be applied (paragraphs 177 to 204);

(9) application of the legal principles to the facts (paragraphs 205 to 342);

(10) the correct court fee (paragraphs 343 to 375);

(11) the costs of the application in relation to the re-amended witness statements (paragraphs 376 to 380);

(12) remaining matters to be dealt with within the proceedings (paragraphs 381 to 383).

The parties

6. The Claimant, Kieran Corrigan & Co Ltd, is an Irish company, incorporated on 23 November 1998, that specialises in accountancy and tax advisory services. Its managing director and majority shareholder is Kieran Corrigan, who is a chartered accountant and barrister. He was a lecturer in tax law at Trinity College, Dublin from 1981 to 2007, established the tax course at University College, Dublin, and has written a two volume book on Irish revenue law.

7. The First Defendant, OneE Group Ltd (**"OneE Group"**), is an English company, incorporated on 30 January 1997, that is the parent of a group of companies which collectively develops and markets tax efficient investment products. Three of the subsidiaries of Group, all of which are English companies, are (1) OneE Tax Ltd (**"OneE Tax"**), incorporated on 1 June 2006, which was a party to the NDA referred to above but entered voluntary liquidation on 10 March 2015, (2) OneE Consulting Ltd (**"OneE Consulting"**), incorporated on 20 September 2012, which the Defendants allege developed the Nemaura structure, and (3) OneE Investments Ltd (**"OneE Investments"**), which the Defendants allege promoted the Nemaura structure. Where the evidence does not refer to a specific OneE group company, I shall simply refer to "OneE" in this judgment.

8. The Second Defendant, Bashir Timol, has been a director of OneE Group from 30 January 2007 to date, was a director of OneE Tax from 1 June 2006, was a director of OneE Consulting from 20 September 2012 to 15 July 2014, and was a director of OneE Investments from 16 August 2013 to 1 June 2015.

9. The Third Defendant, Dominic Slattery, has been a director of OneE Group from 4 August 2014 to date, was a director of OneE Tax from 23 March 2011, has been a director of OneE Consulting from 20 September 2012 to date, and was a director of OneE Investments from 16 August 2013 to date.

10. The Fourth Defendant, Timothy Johnson, was a director of OneE Consulting from 1 April 2014 to 15 November 2015, and a director of OneE Investments between the same

dates. Mr Johnson was an inhouse tax expert at OneE from before 2014 until 31 July 2022.

The witnesses

11. Mr Corrigan and the Second to Fourth Defendants all gave evidence before me.

12. The Claimant called one other witness, Michael Sherry, an experienced tax barrister at Temple Tax Chambers. He referred Mr Corrigan to OneE, provided tax advice to the Claimant, and was also approached by OneE Tax in 2013 to provide advice and OneE Investments in 2014.

13. The Defendants called two other witnesses:

    (1) Richard Freeman, a solicitor and chartered tax adviser who worked for OneE as an employee from July 2012 to April 2014 leading its technical team in developing tax strategies for clients across a range of taxes; and

    (2) Adam Owens, who was employed by OneE Group from April 2010 to around 2017. He worked initially as a graduate trainee tax assistant, implementing tax advisory solutions, then from around 2012 in a technical development role, providing research and analysis to help develop new tax advisory solutions. Around one to two years after that his role changed to providing more traditional tax consultancy services to OneE's referral network of accountants.

14. I shall set out my views on the witness evidence after setting out the relevant factual background.

Other points dealt with at trial

15. This is a convenient point to deal with a number of other issues that arose at trial, including in relation to the Defendants' witness statements. Among other things:

    (1) The Defendants' witness statements had all been prepared in a manner that failed to comply with PD57AC in significant respects, and re-amended witness statements had been submitted on 1 December 2022, accompanied by an application for relief from sanctions.

    (2) In their skeleton for trial, the Defendants argued for the first time that, while they had been pleaded to in the defence of 17 March 2021 and featured in the list of issues agreed at the 18 November 2021 case and costs management conference, the Claimant should not be allowed to bring claims (b) and (c) in paragraph 2 above. The Defendants' argument was run on the basis that, while these claims had been included in the Claimant's particulars of claim dated 18 January 2021, such claims had not been included in the original claim form dated 5 October 2020. Mr Budworth was not the Counsel for the Defendants at these earlier stages.

    (3) The Defendants submitted in opening that the Claimant's claim was a money claim rather than, as the Claimant had assumed, a non-money claim for the purposes of calculating the correct Court fee, so the claim should be stayed if the Claimant did not pay the correct fee by the close of its evidence.

16. Therefore, I dealt at trial with these and the other issues that arose. Taking the above questions in turn:

    (1) Exercising the Court's powers under paragraph 5.2 of Practice Direction 57AC, I ordered that (i) permission to rely on the Defendants' original witness statements be withdrawn, and (ii) the Defendants have permission to rely on its revised witness statements. I also granted liberty to the Defendants under paragraph 4.4 of the Practice Direction to dispense with the certificate of compliance in respect of the short witness statements of Richard Freeman and Adam Owens, given that those statements were not prepared with the input of a legal representative, and that it would assist the Court in determining the correct factual position to have those statements in evidence. I received written submissions on costs following the close of the hearing. I deal with that at paragraphs 376 to 380 below.

    (2) As to the argument run in respect of claims (b) and (c), while I understood the point taken by Mr Budworth and that he was not retained at the time of the Defence or list of issues, I considered that having to deal with these arguments in what both parties agreed was already a tight trial timetable might well not allow the trial to be completed. The question also arose as to whether such arguments would need to be dealt with and adjudicated on before the trial would proceed, which, if I permitted these arguments to be run at such a late stage, could necessitate adjournment of the trial. Such arguments could potentially involve arguments as to strike out of the relevant parts of the Particulars of Claim and/or arguments that they were a nullity, and a counter-application by the Claimant for permission to amend the claim form. Such an amendment application could then lead into questions as to whether, and if so how, CPR r.17.4 applied in the circumstances. After the point had been ventilated in opening, and I left the parties to consider overnight what their settled position was on what arguments and applications if any they wished to make, Mr Budworth explained to me on the second morning that the Defendants had taken a litigation decision not to run such arguments. Therefore, both parties proceeded on the agreed basis that the statements of case validly contained claims (b) and (c) and that I should adjudicate on these claims. Any limitation arguments taken by the Defendants were run on the basis that time stopped running on the issue of the claim form on 5 October 2020, rather than, in respect of claims (b) and (c), six years before the date of the Particulars of Claim.

    (3) I received oral submissions at trial on the correct Court fee, and deal with this at paragraphs 343 to 379 below. The Claimant indicated through Mr Hill that if I determined that the claim was a money claim, it would promptly pay the difference. As set out below, I consider that the correct Court fee was paid.

17. Finally, there was also a dispute as to the use of two documents at trial. I deal with that at paragraph 232 below.

The relevant corporation tax legislation

The Corporation Tax Act 2009 (the "2009 Act") as it stood in 2013-2014

18. It is necessary to outline the relevant tax regime in order to explain the relevant tax planning in the present case. I asked the parties during the trial to prepare an agreed note of the tax background (the **"Tax Note"**), because it was not dealt with in the written

openings. A final version was provided on 11 January 2023. There were a number of differences between the parties' positions, summarised at the relevant points, and a copy of Schedule 20 to the Finance Act 2000 (**"the 2000 Act"**) was attached. I have drawn on the Tax Note at appropriate points in the below. Although the legislation is lengthy and fairly complex, it is important to keep one's eye on the most important features for present purposes, which are the provisions in the 2009 Act dealing with sub-contractors, particularly those who are "unconnected" to the company doing the sub-contracting.

19. The 2009 Act, the Corporation Tax Act 2010 (the **"2010 Act"**) and the Taxation (International and Other Provisions) Act 2010 together formed the corporation tax legislation, and were part of the product of the Tax Law Rewrite project. The principal aim of the project was to rewrite tax legislation in a way that was clearer and easier to use. Prior to these acts, there was not a self-contained piece of legislation setting out the corporation tax system. Instead, it was woven into the fabric of the income tax legislation. One of the relevant pieces of predecessor legislation is the 2000 Act, s.69(1) and Schedule 20 of which provided tax relief for expenditure on R&D. I shall return to them in due course as they are relied on by the Defendants in relation to the novelty or otherwise of the work done by Mr Corrigan in relation to the 2009 Act. Given the purpose of the rewrite, the 2009 Act was not intended to make material changes in the law, but the opportunity was taken to make various minor changes. Consistent with this, the preamble to the 2009 Act describes it as "*[a]n Act to restate, with minor changes, certain enactments relating to corporation tax; and for connected purposes*".

20. The basic charge in the 2009 Act is set out in s.2, which charges corporation tax on the profits of companies. The territorial scope of the charge is set out in s.5, which provides in relation to a UK resident company that it is chargeable to corporation tax on income on all its profits wherever arising (subject to the qualifications in Chapter 3A for the profits of foreign permanent establishments, which are not relevant for present purposes).

21. Part 3 of the Act, which commences at s.34, applies the charge to corporation tax to the profits of a trade. The profits of a trade shall be calculated in accordance with general accepted accounting principles (**"GAAP"**) subject to any adjustment required or authorised by law in calculation profits for corporation tax purposes: s.46, and the same rules that apply to calculating profits of a trade shall also apply to calculating its losses, subject to express provision to the contrary: s.47. When calculating the profits of a trade, deductions for expenses not incurred wholly or exclusively for the purposes of the trade or losses not connected with or arising out of the trade are prohibited: s.54.

22. s.87 permits a company carrying on a trade which incurs expenses of a revenue nature on R&D related to the trade and directly undertaken by or on behalf of the company a deduction for the expenses in calculating the profits of the trade. Therefore, a company carrying on a trade could deduct R&D costs so that its profits were reduced by 100% of those R&D costs.

23. Part 13 of the Act, which commences at section 1039, provides *additional* relief for expenditure on R&D. These provisions are central to the present case. s.1039(1) provides that Part 13 provides for corporation tax relief for expenditure on research and development, and s.1039(2) provides that any relief available under this Part is in addition to any deduction given under s.87 for the expenditure.

24. s.1041 defines "*research and development*" by cross-referring to s.1138 of the 2010 Act, which in turn states that the GAAP definition applies, with certain caveats. s.1042 defines "*relevant research and development*" as being R&D relevant to a trade or a trade intended to be carried on.

25. Chapter 2 of Part 13 deals with relief for the costs of R&D incurred by small and medium-sized enterprises (**"SMEs"**). This is the Chapter that we are concerned with. Other Chapters deal with different reliefs for SMEs, for example in relation to R&D sub-contracted *to* the SME (Chapter 3), and reliefs for large companies (Chapter 7). Chapter 2, which starts at s.1043, provides for relief for SMEs on expenditure on "*(a) in-house direct research and development, or (b) contracted out research and development*": s.1043(1). The reliefs available are "*(a) an additional deduction under section 1044, or (b) a deemed trading loss under section 1045*": s.1043(2). The difference is that s.1044 provides a deduction for companies that trade and s.1045 for companies that do not.

26. s.1044 provides that a company is entitled to an additional deduction of 125% of the "*qualifying Chapter 2 expenditure*" in calculating the profits of its trade, as long as it satisfies a number of conditions, one of which is obviously that it has qualifying Chapter 2 expenditure, and another of which is that it trades. Added to the 100% deduction under the standard trading rules in s.87, that produces a figure of 225% of the qualifying R&D spend. As enacted the 2009 Act provided for a 75% additional deduction rather than a 125% deduction: the 125% figure was inserted by the Finance Act 2012 in respect of accounting periods ending on or after 1 April 2012.

27. s.1045 allows an SME which is *not* conducting a trade to elect to claim a deduction of 225% for pre-trading expenditure on "*qualifying Chapter 2 expenditure*". This was originally 175%.

28. s.1046 requires a company making a claim to relief under s.1044 or s.1045 to be a going concern. It cannot be in administration or liquidation.

29. A company's qualifying Chapter 2 expenditure is defined in s.1051 as "*(a) its qualifying expenditure on an in-house direct research and development (see section 1052), and (b) its qualifying expenditure on contracted out research and development (see section 1053).* Section 1053 is particularly important in the present case.

30. In order to constitute qualifying expenditure on *in-house* direct research and development, the expenditure must satisfy each of conditions A, B, D and E set out in s.1052. Those conditions are:

> "*(2) Condition A is that the expenditure is—*
>
> *(a) incurred on staffing costs (see section 1123),*
>
> *(b) incurred on software or consumable items (see section 1125),*
>
> *(c) qualifying expenditure on externally provided workers (see section 1127), or*
>
> *(d) incurred on relevant payments to the subjects of a clinical trial (see section 1140).*
>
> *(3) Condition B is that the expenditure is attributable to relevant research and development undertaken by the company itself.*

> …
>
> *(5) Condition D is that the expenditure is not incurred by the company in carrying on activities which are contracted out to the company by any person.*
>
> *(6) Condition E is that the expenditure is not subsidised (see section 1138).*"

s.1052(7) points to ss.1124, 1126 and 1132 for provision about when expenditure within three of the four categories is attributable to relevant research and development.

31. By s.1053(1), a company's qualifying expenditure on *contracted out* R&D is defined as expenditure "*(a) which is incurred by it in making the qualifying element of a subcontractor payment (see sections 1134 to 1136), and (b) in relation to which each of conditions A, C and D is met*". I shall return later to requirement (a) in the context of s.1136. Taking first requirement (b), Conditions A, C and D are as follows:

> "*(2) Condition A is that the expenditure is attributable to relevant research and development undertaken on behalf of the company.*
>
> …
>
> *(4) Condition C is that the expenditure is not incurred by the company in carrying on activities which are contracted out to the company by any person.*
>
> *(5) Condition D is that the expenditure is not subsidised (see section 1138).*"

32. s.1053(6) states: "*See sections 1124, 1126 and 1132 for provision about when particular kinds of expenditure are attributable to relevant research and development*". I return to this provision below. Subcontractors can be "connected" to the company or "unconnected". One of the questions on which the Claimant sought advice from Mr Sherry was what expenditure a subcontractor, particularly an unconnected subcontractor, had to undertake in order to meet the requirements of Condition A, and what requirements s.1053(6) imposed in this regard.

33. s.1124, 1126 and 1132 are in Chapter 9, which is titled "*Supplementary*", and they set out when expenditure on staffing costs, software or consumable items, and externally provided workers respectively are "*attributable to relevant research and development*". As set out above, Condition A in s.1053(2) requires that the expenditure is "*attributable to relevant research and development undertaken on behalf of the company*" if the company's qualifying expenditure on *contracted out* R&D is to constitute qualifying Chapter 2 expenditure for the purposes of the s.1051 definition and therefore attract the deductions set out in ss.1044 and 1045.

34. Turning to requirement (a) in s.1053, what constitutes a "*qualifying element of a subcontractor payment*" is set out in ss.1134 and 1136. s.1134 deals with payments where the company and subcontractor are *connected*, s.1135 with election to be treated as connected, and s.1136 where they are unconnected. I return to ss.1134 and 1136 below.

35. Between s.1053 and ss.1134-1136 lie the following relevant provisions: (i) s.1084 contains an anti-avoidance provision dealing with artificially inflated claims for relief or R&D tax credits. It provides that to the extent a transaction is attributable to

arrangements entered into wholly or mainly for a disqualifying purpose, it is to be disregarded. Disqualifying purposes include obtaining relief to which the company would not otherwise be entitled or relief of a greater amount than that to which it would otherwise be entitled; (ii) s.1123 defines what costs count as staffing costs; (iii) s.1124 sets out when staffing costs are attributable to relevant research and development; (iv) s.1125 defines what costs count as expenditure on software or consumable items; (iv) s.1126 defines when expenditure on software or consumable items are attributable to relevant research and development; (v) s.1127 defines what counts as qualifying expenditure on externally provided workers; (vi) s.1132 defines when qualifying expenditure on externally provided workers is attribute to relevant research and development.

36. s.1133 defines what is meant by a subcontractor payment, namely a payment made by a company to another person in respect of research and development contracted out by the company to that person. The section also states that ss.1134-1136 apply if a subcontractor payment is made and that those sections apply for the purposes of determining the qualifying element of the payment for the purposes of s.1053(1)(a), but not s.1053(1)(b).

37. Under s.1134, the qualifying element of the sub-contractor payment in a case where the company and sub-contractor are connected is "*(a) the entire payment, or (b) if less, an amount equal to the sub-contractor's relevant expenditure*": s.1134(2). To be relevant expenditure of a sub-contractor, the expenditure must satisfy the requirements of s.1134(3)(a)-(d), which include that the expenditure is "*incurred by the sub-contractor in carrying on, on behalf of the company, the activities to which the sub-contractor payment relates*", is "*incurred on staffing costs, software or consumable items or relevant payments to the subjects of a clinical trial or is qualifying expenditure on externally provided workers*" and that the expenditure "*is not subsidised*" (s.1134(3)(a), (c) and (d)). If the expenditure meets these tests, and the other s.1053 requirements are fulfilled, then the result of this is that 225% relief is obtained on the sub-contractor payment, whether the head company is trading (in which case the 100% deduction in s.87 is added to the 125% provided for by s.1044) or not trading (in which case the full 225% deduction is provided for by s.1045).

38. s.1135 permits, on specified terms, unconnected companies and sub-contractors to elect to be treated as connected.

39. In contrast to s.1134, s.1136 provides that the qualifying element of the sub-contractor payment between a company and a sub-contractor which are not connected and have not elected to be connected is 65% of the sub-contractor payment. Importantly, it does not expressly set out any other requirements as to how the money must be spent by the subcontractor to qualify for the relief. This "*qualifying element of a sub-contractor payment*" then has to be plugged into s.1053(1)(a) before seeing if the conditions in s.1053(1)(b) are met. If the s.1053 requirements are all fulfilled, then the result of this is that if the head company is trading, 181.25% relief is obtained on the sub-contractor payment (namely the 100% deduction in s.87 plus the product of applying the 125% rate provided for by s.1044 to the 65% of the sub-contractor payment that by virtue of s.1136 constitutes the qualifying element of the sub-contractor payment), and if the head company is not trading, then 146.25% relief is obtained on the sub-contractor payment (namely the 225% rate in s.1045 applied to the 65% of the sub-contractor

payment that by virtue of s.1136 constitutes the qualifying element of the sub-contractor payment).

40. s.1140 defines "relevant payments" in relation to subjects of clinical trials.

The 2010 Act

41. s.1138 provides what is meant by "research and development" as being activities treated as such under GAAP, subject to caveats.

The 2000 Act

42. As I have explained above, the R&D relief regime provided by Sched.20 of the Finance Act 2000 was one part of the corporation tax regime as it stood prior to the passage of the 2009 and 2010 Acts. It featured in submissions at two points, both of which I shall return to in more detail below. First, this was the regime used by the Ultra Green structure, which was an opportunity provided to OneE in 2009 but that did not proceed any further with it. The Ultra Green structure was relied on by the Defendants in support of a submission that they already knew of the relevant aspects of R&D relief. Second, it was one of the points prayed in aid by the Defendants in support of their submission that there was nothing novel in the ideas or structure of Mr Corrigan and that it was obvious that s.1053(6) did not seek to add extra requirements for obtaining the additional R&D relief because such extra requirements did not feature in Sched.20 to the 2000 Act.

43. I did not receive during the trial any detailed submissions on Schedule 20 to the 2000 Act or other aspects of the pre-2009 and 2010 Act regime and, reflecting that, Schedule 20 was not included in the authorities bundle. I made clear that the Tax Note was not to be used as a vehicle for doing so but rather should set out a neutral background account. Therefore, while the Tax Note provided to me attached Schedule 20 of the 2000 Act and contains at a number of points competing submissions about the interpretation of the 2000 Act and the comparison of the provisions with the 2009 Act, I shall not attempt a detailed examination of the wording of the pre-2009 / 2010 Act position and the position as it stood after the 2009 and 2010 Acts, and it is not necessary to my decision to do so. I focus below on the 2000 Act as it stood immediately before the 2009 Act.

44. The basic points for present purposes are as follows:

(1) It provided for a company's qualifying R&D expenditure to be deductible for corporation tax purposes: paragraph 1(1)(b).

(2) To constitute qualifying R&D expenditure, the six conditions in paragraphs 3(2)-(7) must be satisfied: paragraph 3(1).

(3) One of the conditions, namely the second condition, is that "*the expenditure is attributable to relevant research and development (see paragraph 4) directly undertaken by the company or on its behalf*": paragraph 3(3).

(4) Another of the conditions, namely the third condition, requires that the expenditure:

"*(a) is incurred on staffing costs (see paragraph 5),*

> *(b) is incurred on software or consumable items (see paragraph 6),*
> *(ba) is incurred on relevant payments to the subjects of a clinical trial (see paragraph 6A),*
> *(c) is qualifying expenditure on externally provided workers (see paragraphs 8A to 8E), or*
> *(d) is qualifying expenditure on sub-contracted research and development (see paragraphs 9 to 12)*"
> (paragraph 3(4)).

(5) The paragraphs cross-referred to in paragraph 3(4)(a)-(c) contain descriptions of what fall within the relevant categories. For example, paragraph 5 defines what the staffing costs of a company are. Some of those sections also explain what costs and expenditure within those categories are *attributable* to relevant research and development (the **"Schedule 20 attributability rules"**) e.g. paragraphs 5(2), 6(3), 6(4).

(6) As the 2009 Act does, Schedule 20 distinguished between situations where the company and sub-contractor are connected persons and situations where they are not. Paragraph 10 deals with the former and paragraph 12 with the latter. It also contained the facility, via paragraph 11, for a company and sub-contractor to jointly elect that paragraph 10 should apply. These provisions are explained in paragraph 9, which states that (i) the provisions of paragraphs 10 to 12 determine the amount of the qualifying expenditure of a company on sub-contracted research and development (paragraph 9(1)), and (ii) a company incurs expenditure on sub-contracted research and development if makes a payment (a "sub-contractor payment") to another person in respect of relevant R&D contracted out by the company to that person (paragraph 9(2)).

(7) It contained within paragraph 10 particular provisions for determining in the case of a connected sub-contractor how much of the sub-contractor payment constituted qualifying expenditure on sub-contracted R&D. It states that if (among other things) all of the sub-contractor's relevant expenditure has been brought into account in determining the sub-contractor's profit and loss for a relevant period, the whole of the sub-contractor payment up to the amount of the sub-contractor's relevant expenditure is qualifying expenditure on sub-contracted R&D: paragraph 10(1). To constitute relevant expenditure of the sub-contractor, expenditure must satisfy four conditions (paragraph 10(2)), one of which is that it falls within four defined categories, namely staffing costs, expenditure on software or consumable items, relevant payments to the subjects of a clinical trial and qualifying expenditure on externally provided workers. These 4 categories therefore mirror those in s.1134(3) of the 2009 Act.

(8) It also provided through paragraph 12 that 65% of the sub-contractor payment to an *unconnected* subcontractor constituted qualifying expenditure on sub-contracted R&D. There was no additional requirement that the expenditure of the sub-contractor fall with any categories.

(9) It drew a distinction between companies that were trading and companies that were not (paragraphs 13 and 14). For companies that were trading, paragraph 13 allowed an uplifted deduction in computing the profits of the trade for qualifying R&D

expenditure as if it were 175% of the actual expenditure incurred. For companies that were not trading, paragraph 14 provided for the company to be able to elect to be treated as if it had occurred at trading loss equal to 175% of the qualifying expenditure on sub-contracted R&D.

45. It is common ground that, with the exception of the overview sections in ss.1039 and 1051 of the 2009 Act, the relevant provisions in the 2009 and 2010 Act had predecessor provisions prior to those Acts and that these were largely contained in Schedule 20 to the Finance Act 2000. In the Tax Note, the Defendants maintain that the predecessor provisions were in the same or similar terms, while the Claimant contends that the structure of the 2009 and 2010 Acts is not the same and significant changes in wording were introduced.

46. In my judgment, while they are similarities between the wording of the two sets of provisions, they are not in the same terms and they are structured in a different way. That is unsurprising given that, as I have explained above, the principal aim of the Tax Law Rewrite Project, of which the 2009 and 2010 Acts formed part, was to rewrite the relevant tax legislation in a way that was clearer and easier to use.

47. I do not need to conduct a detailed comparison of the earlier provisions with those in the 2009 and 2010 Act. It is common ground that the 2000 Act did not require a subcontractor payment to an *unconnected* subcontractor to fall within the four categories set out in paragraph 3(4)(a)-(d) and paragraph 10(2)(a)(iii) of Schedule 20. The Defendants contend in the Tax Note that the reference to *"relevant research and development*" in paragraph 9(2) means that a subcontractor payment to an unconnected subcontractor "*must also have regard to the relevant headers (per paragraphs 5(2), 6(4), 6A and 8A(2)- staff costs, software and consumables and externally provided workers) in order to establish what is and what is not relevant R&D*". I do not agree. Paragraph 4 defines relevant research and development in terms that do not refer to these four categories.

48. In my judgment, the more pertinent point is that, as set out in the Tax Note, paragraph 3(3) provides that the expenditure must be "*attributable to relevant research and development (see paragraph 4) directly undertaken by the company or on its behalf*" (underlining added) if the expenditure is to constitute qualifying R&D expenditure: paragraph 44(3) above. Therefore, the question that raises is whether the Schedule 20 attributability rules are of relevance in determining whether that requirement is fulfilled, even in cases of an unconnected subcontractor. An analogous question arises in relation to s.1053(6) of the 2009 Act, which I deal with at paragraph 242 below.

The relevant factual background

49. The contemporaneous documentary material, particularly that from 2013 to 2014, allows a detailed picture to be built up of the relevant factual background. Therefore, I shall set out the background largely from the contemporaneous documents and the uncontroversial parts of the witness evidence. I shall leave the main factual findings until the following sections.

The relevant work of OneE prior to their dealings with Mr Corrigan

50. What has become the OneE group was founded in or around 2006 as 1st Ethical by Sufyan Ismail. Mr Timol also appears to have been involved in its early days. Mr Ismail was the managing director and 80% shareholder, and Mr Timol the other director and holder of the remaining 20% of the shares. The business provided advice on Sharia-compliant investments and tax advice in relation to the drafting of Sharia-compliant or tax efficient wills. Mr Slattery started work for the business in 2006 as a trainee tax adviser to assist with the drafting of the tax efficient wills.

51. Within a few years, it was trading as OneE and begun to market tax planning products using employee benefit trusts (**"EBTs"**) and Employer-Financed Retirement Benefits Scheme (**"EFRBs"**). The evidence of Mr Slattery before me was that these proved popular and the business turned over a profit of £20m a year at its peak. As a result, by around 2013, the business had grown to around 80 employees in the UK with Bolton and London offices, together with around 10 business development managers who travelled around the UK.

52. In the meantime, in or around 2007, Mr Ismail and Mr Timol had invested in a company called Nemaura Pharma Ltd (**"Nemaura"**), founded by Dr Faz Chowdhury. This is the company at the heart of the R&D relief structure that OneE promoted from 2014 using, the Claimant contends, the Claimant's confidential information. I asked Mr Timol about the relative size of their shareholdings. He could not recall the exact size of either, but thought that he had over 10% and less than 20%, that Mr Ismail had a slightly smaller shareholding, and that the size of their shareholding had been fairly stable over the years. The opportunity came to their attention through one of the accountants who referred them work, who had a client that was looking to raise money to fund some early stage clinical research. Mr Timol's evidence, which I accept on this point, was that he and Mr Ismail felt that the investment was in light with their intended diversification of the business, but that they held no plans at the time as to why they would ultimately do with the shareholding.

53. Over the years that followed, Nemaura's clinical work proceeded in parallel with OneE evolving into a group with various companies: OneE Group at the top, and OneE Tax, OneE Consulting and OneE Investments sitting one rung below in the corporate structure. Between them these companies dealt with tax disputes and investigations, investment, tax avoidance products and consultancy work, with the names of the different subsidiaries indicating the type of work that they did.

54. Another opportunity which was put to OneE during this period, but which was not taken up by it, was Ultra Green. The Defendants rely on Ultra Green as an example of a similar structure to Nemaura that they already knew of before meeting Mr Corrigan. Therefore, I shall spend a little time dealing with it. The contemporaneous documents record the following:

    (1) Following a discussion the same day, Sean O'Connor, director of funding at Ultra Green Group Ltd e-mailed Mr Slattery on 6 February 2009, setting out an opportunity for OneE's corporate clients to invest in the renewable energy industry and as a consequence receive R&D tax relief. He explained that an investment of £200,000 would yield tax relief of £300,000 (which I note reflects the 148.75% relief referred to in the technical summary mentioned below). He provided a video to explain the opportunity further, rather than providing written material, and asked Mr Slattery to suggest some dates for Mr O'Connor to meet with Mr Slattery and

his colleagues. He offered to supply "*the QC opinion*" after meeting with OneE if they would like it and in the meantime attached a one page technical summary. That summary appears to be a document dated 28 January 2009, entitled "*SMEs INVESTING IN ENVIRONMENTAL TECHNOLOGY*". The summary set out at paragraph 1 a diagram of a company investing in a LLP, which was also backed by loan finance from an unconnected lender, and the LLP paying 99% of the funds received to a sub-contractor to undertake research work. Paragraphs 2-6 provided as follows:

> "*2. The payment to undertake the research work will be expensed for accounts purposes (and consequently be tax deductible) when incurred because it could not be said with sufficient certainty that the prepayment would have value to the LLP.*
>
> *3. By virtue of section 118ZA Income and Corporation Taxes Act 1988, the results of the LLP are attributed to the corporate.*
>
> *4. By virtue of section 118ZC Income and Corporation Taxes Act 1988, the loss that is available to the corporate to offset is not restricted to amount [sic] of its capital because it remains liable to contribute to the partnership after the end of the relevant accounting period (see section 118ZC(4)).*
>
> *5. The LLP gets relief for expenditure, including subcontracted research and development (see paragraph 3(3)(d) schedule 20 Finance Act 2000).*
>
> *6. Paragraph 12 [of schedule 20] provides that 65% of the payment is eligible for research and development labs. Paragraph 13 provides that the relief is 175% of the amount. Therefore, for every £100 spent by the LLP, the tax-deductible expense is (£100 x 65% x 175% + 35%)= £148.75.*"

Therefore, the technical summary explained in outline how Ultra Green intended the structure to work from a tax perspective, including the use of R&D relief for subcontractor payments to an (unconnected) subcontractor under schedule 20 to the Finance Act 2000.

(2) Mr Slattery forwarded the e-mail on the same day to four colleagues, namely Mr Ismail, Mr Timol, a Neil Walker and Mr Johnson, stating that the opportunity genuinely seemed too good to be true, and that he would look into it. He then forwarded the e-mail to Mr Johnson separately that evening asking him to look into it.

(3) Mr O'Connor sent a follow-up e-mail to Mr Johnson on 16 February 2009, copying in Mr Slattery, summarising the opportunity again, and saying that he looked forward to meeting that Friday, which was 20 February. It appears from Mr O'Connor's e-mail sent on the afternoon of 20 February that the meeting took place, that Mr Slattery attended as well, and a question about the application of a particular provision of the Income and Corporation Taxes Act 1988, s.118ZC, was raised with Mr O'Connor. Mr O'Connor asked Mr Slattery for more detail on that question by his e-mail. That was one of the provisions referred to in the technical summary that I have mentioned.

(4) While it does not appear from the e-mail correspondence that I have referred to above precisely when this happened, OneE received during the course of that correspondence the "*QC opinion*" referred to in Mr O'Connor's 6 February 2009 e-mail. Those took the form of two lengthy memoranda prepared by Wellden Turnbull LLP, which had been sent under cover of instructions to Jolyon Maughan, a specialist tax barrister then of 11 New Square Chambers, for him to confirm the correctness of the taxation analysis contained in them, which, having provided some amendments to them, he duly did by e-mail. One of the memoranda concerned the tax implications of a company becoming a partner in a partnership developing and profiting from technologies that offer environmental benefits, and the other the tax implications of a company acquiring a subsidiary that starts a trade of developing and profiting from technologies that offer environmental benefits. Both included the following paragraphs:

> "*If the expenditure [by the company or LLP as the case may be] is research and development expenditure which is not capital expenditure, then it may qualify for an uplift of 30% under the provisions of schedule 12 Finance Act 2002 (if it is a large enterprise) or 75% schedule 20 Finance Act 2000 (if it is a micro, small or medium sized enterprise)….*
>
> *[The definition of qualifying R&D expenditure in paragraph 3 of schedule 20 is set out]*
>
> *…Broadly speaking, the above provisions apply to research and development expenditure carried on by employees, by persons provided by third parties, or by work that is subcontracted. In the case of work that is subcontracted only 65% of the amount of the payment is eligible for the uplift (unless the subsidiary and the subcontractor jointly elect that the expenditure of the subsidiary is only deductible to the extent it is matched by payments by the subcontractor and the conditions in paragraph 10(1)(b) Schedule 20 Finance Act 2000 are satisfied). The effect of this would be that 148.75%, rather than 175%, of the expenditure would be deductible for tax purposes.*"

(5) It appears from e-mails sent on 19 March 2009 by Mr Timol that a OneE strategy meeting was to be held at head office on 1 April, and that one of the items was for Mr Slattery to give a 90 minute technical overview on IR 35 and Ultra Green to "*advisers*". For completeness, IR35 is the colloquial name for the legislation relating to the taxation of personal service companies, the name arising from the fact that the legislation stemmed from the 35th press release of the 1999 budget. The final e-mail in the chain from that 19 March is from Mr Slattery to Mr Timol, which gives a picture of how busy OneE was dealing with their EFRBS and EBT work at the time:

> "*Bash,*
>
> *We will not know much about IR35 at this stage and hence it may be advisable not to confuse the advisers.*
>
> *Re Ultra Green- Tim is looking at this but I suspect has not advanced that much as we have been snowed under with EFRBS and ERTs.*

> *I suggest therefore that myself and Tim can discuss IR35 and Ultra Green at the principles level without necessarily going into any specific details.*"

(6) There the trail goes dead. There is no record of any further OneE consideration of the Ultra Green opportunity and no evidence of what if anything happened to Ultra Green.

55. Returning to the chronological narrative, OneE Tax dealt with, as Mr Slattery put it in evidence, "*pretty aggressive forms of tax avoidance*". While HMRC heavily targeted from 2009 tax mitigation structures involving EBTs and EFRBs, OneE Tax continued to promote them for a number of years until July 2013.

56. What appears to have marked an important turning point for the business generally, which is of particular relevance in this case, was the introduction by the Finance Act 2013, passed on 17 July 2013, of a general-anti-abuse rule (**"GAAR"**). The draft legislation was published, along with the draft guidance, in December 2012. The GAAR provides a mechanism for HMRC to counteract abusive tax avoidance arrangements. Therefore, it was necessary for the business as a matter of priority to consider what alternative sources of revenue could be provided.

57. A useful insight into OneE's thinking at the time can be gained from Mr Ismail's e-mail to Mr Slattery and Mr Timol on Friday 29 March 2013, which starts:

> "*As Royal Assent gets closer, notwithstanding my recent e-mail of keeping Lazarus operational alongside TGI, it is dawning on me that we have to get the TGI side in order urgently. I therefore had a chat with Dom on Friday and have listed the 4 key areas we need to create a workable investment offering in…*"

58. One can see from the heading to the e-mail that "*TGI*" is a reference to Tax Geared Investments, which I understand to refer to investments that aim to provide, whether through the investment being accompanied by a loan from an unconnected lender or otherwise, a tax relief on a greater sum than the investor provides.

59. The four key areas included Nemaura and "*Germany Hotel*", which is a reference to the Rehberg project that I shall mention in a moment. Mr Ismail viewed Nemaura as the easiest of the four, "*as we have been financing it for some time, moreover the technology fits well with the TGI concept*". He set out a number of steps to be completed. The third area, "*Germany Hotel*", which was termed "Rehberg" by OneE, seemed to Mr Ismail "*the least attractive of the options financially as our cut [will] be low. Let's leave it till stuff above is excavated properly*."

60. Pausing there, a few days earlier OneE had sent instructions to Mr Sherry about Nemaura, and draft tax advice dated 20 February 2013 had been received on Rehberg from DLA Piper LLP. The intended legal structure of the Rehberg project was that corporate investors would make a capital contribution to a LLP, which would be set up to provide planning, construction, renovation and design services to the Rehberg resort, which was intended to be a 5 star luxury resort and spa in the Harz Mountains in Northern Germany. The intended project timescale was 18 months, allowing the resort to open in 2015, and the operator of the resort was to be Kempinksi hotels.

61. Returning to Nemaura, given that the compilation of the instructions to Mr Sherry was dealt with in cross-examination of Mr Slattery and submissions, I will set out briefly the relevant contemporaneous documents:

(1) On 12 March 2013 at 19:10, Mr Slattery e-mailed Mr Timol, attaching the draft instructions, stating:

> "*At present these are very much draft as I have to:*
>
> *1. Proof read*
>
> *2. Add to the Case Law, Ramsay and GAAR points*
>
> *3. Consolidate questions to counsel*
>
> *In the mean time [sic] if you could read, add the bit in CAPS / highlighted and make any changes you deem appropriate.*"

The reference to "*Ramsay*" is shorthand for the House of Lords decision in *WT Ramsay Ltd v IRC* [1982] AC 300, which held that one must look at the effect of the whole series of steps taken in a transaction entered into as part of a tax avoidance scheme, rather than the tax position of each individual step.

(2) Mr Slattery appears to have asked Mr Freeman, the then head of the technical department at OneE, to look into the relevant case-law in more detail, because Mr Freeman sent three e-mails to Mr Slattery, on 12 and 13 March, setting out the products of his research.

(3) Mr Timol responded the next morning by e-mail, setting out the relevant details of what Nemaura did and its structure, which was what Mr Slattery had apparently invited him to do by "*the bit in CAPS*" referred to in Mr Slattery's e-mail.

62. On 25 March 2013, OneE sent the instructions to Mr Sherry. These were provided by Mr Johnson from a OneE Group e-mail but were stated to come from OneE Tax. They asked various questions about the tax analysis of a new investment structure that OneE Tax was considering for corporate clients who wish to become members of a LLP in order to standard to make a return in years to come and reduce their current year liability to corporation tax. The investment opportunity was referred to as Nemaura Pharma, which was stated to be the trading name given to an early stage group of companies which collectively form part of a multi-platform pharmaceutical business focused on developing and manufacturing transdermal drug delivery and diagnostic products.

63. The instructions contained, among other things, the following information:

(1) OneE Tax was involved as the tax advisor, OneE Investments was the company responsible for raising part of the funding required for the testing and the company that owned the R&D, and OneE R&D Limited (**"OneE R&D"**) was the company responsible for carrying out the testing.

(2) OneE R&D was associated with OneE Tax.

(3) The mechanics of the structure included the LLP entering into a contract with Nemaura Pharma to conduct the testing and that the LLP only received a return if the stage 1 and stage 2 of the testing succeeded. LLP would enter into a contract for services with OneE R&D. The LLP would make two payments: to OneE Tax of 10% of the amount invested in the LLP and to OneE R&D of the other 90% as a one-off payment under the contract for services.

(4) OneE Investments would raise 85% of the funding required for testing by borrowing it from the bank and investing it in the LLP. The third party corporate client would invest the remaining 15%.

64. It was stated that the aim of the planning was primarily to deliver a return to investors but it will also allow a third party investor to claim that 99% of the LLP's current year losses (c.10% on fees and 90% on the contract with OneE R&D) against its own current year profits. That would provide corporation tax relief, of up to 24%, notwithstanding the fact that the investor only put up 15% of the investment (paragraph 6 of the instructions).

65. The tax analysis was stated to be "*relatively simple*" (paragraph 6.3), namely that "*the LLP obtains a current year loss as the tax treatment follows GAAP and [the third party investor] can utilize this loss against its other profits*". The instructions stated that the question was whether there were any other factors, such as the tax legislation, relevant case-law or general anti-abuse rule, could affect the analysis. The instructions then went through those other factors. In its discussion of the legislation, it referred to ss.46 and 54 of the 2009 Act, which deal with the basic calculation of the profits of a trade and the deduction of expenses, but no other provisions. Counsel was asked a number of questions, including whether any of the analysis of the relevant tax legislation was flawed.

66. By a 12 April 2013 document, Mr Sherry asked for further information. In my judgment, the tenor of his questions was that he was sceptical as to a number of apparent features of the structure. To take the first question as an example, his question in respect of the 90% one-off payment of £X to OneE R&D started as follows: "*How will the price of £X be arrived at? Specifically will this be arrived at by a real negotiation between parties acting at arm's length, or by reference to a formula, or by reference to criteria pre-established?*"

67. By 29 May 2013 e-mail, Mr Timol e-mailed Dr Chowdhury, copying in Mr Slattery. He stated, among other things, that:

> "*Based on current deal flow, I would imagine we can generate circa £20M of direct investments monies annually God willing into Tax Geared Investments.*
>
> *…*
>
> *1. We are planning on offering a 'double play' consisting of pharma via Nemaura and building Kempinski hotels via Taurus Finance who we both met with Dom a few months ago. As such deal flow will be shared between the two offerings.*

> *2. Our offering are seasonal. Hence we want to push this in the two month window leading up to the Chancellors Autumn Statement in Nov and then in the new year in the run up to the budget normally delivered in March. Legislative uncertainty precludes us planning beyond these two timeframes…*"

68. There are no other documents relating to Nemaura in the trial bundle until May 2014.

Dialogue between Mr Corrigan and OneE

69. Given the importance of the dialogue to the claim, I shall set it out in some detail.

70. Mr Corrigan stated in his evidence that he developed a R&D corporate taxation structure in 2012-3 with Mr Sherry. This took the form of a number of conversations in person. I accept this. Mr Sherry stated in his oral evidence that to the best of his recollection, the discussions started off at an exploratory level, and that Mr Corrigan was familiar with the use of LLPs and similar structures from film finance projects that he had seen, so given that he had contacts in the pharmaceutical industry, his idea was "*Well, why do we not put those two together to see if we can create something which would allow investors to access the enhanced R&D allowances?*" As I shall return to later, it is this use of the LLP structure in the context of R&D relief that is central to the Claimant's structure and the present claim. Mr Sherry explained in oral evidence that the meetings with Mr Corrigan became more particularised, with Mr Corrigan producing more detail. I accept that evidence. Mr Corrigan refers back to the discussions in his 8 January 2014 e-mail to Mr Sherry attaching the draft instructions, and refers back to them in the instructions itself, so it is consistent with the relevant contemporaneous material.

71. Mr Sherry explained in his witness statement that when the ideas developed by Mr Corrigan with his help reached the point where Mr Corrigan mentioned the marketing of the ideas, Mr Sherry suggested that he talk to OneE. In particular, he mentioned Mr Slattery and Mr Johnson as two people at OneE with whom Mr Sherry had worked and who Mr Sherry considered to have a good technical knowledge of tax generally. Mr Sherry's evidence on this was that he suggested OneE for two reasons. Firstly, he was aware that OneE marketed tax schemes through accountancy firms widely and had been doing so for some time, so that they had an established route to market. Secondly, Mr Sherry was aware that OneE had at least considered marketing a tax scheme or structure based around pharmaceutical research and development. To Mr Sherry's mind, Mr Corrigan's proposed structure was much more robust than the OneE arrangement that Mr Sherry had looked at previously.

72. I accept this evidence. It was the only explanation put to me of how Mr Corrigan and OneE came to meet, it flowed from the discussions between Mr Corrigan and Mr Sherry referred to above, and it is consistent with Mr Sherry's e-mail of 18 November 2014 set out below. This suggestion of Mr Sherry must have been made before 4 December 2013, given what followed.

73. It is common ground between the parties that Mr Corrigan contacted OneE on or around 4 December 2013, and that a meeting took place between Mr Corrigan and Mr Slattery on 10 December 2013 at the Landmark Hotel in London. There is disagreement as to precisely what happened at this meeting, so I shall return to this below. The meeting

came about as a result of Mr Corrigan's 5 December 2013 e-mail to Mr Slattery, which stated:

> "*I enjoyed our chat yesterday. I will be in London Monday and Tuesday of next week and I will probably also be in London Monday and Tuesday of the following week (16th and 17th). It would be great to meet up if that were possible.*
>
> *I look forward to taking you through where I am on the structure at the moment.*"

74. After the 10 December 2013 meeting, Mr Corrigan e-mailed Mr Slattery on 16 December. The subject of the e-mail was "*Follow up*" and the e-mail stated:

> "*I really enjoyed meeting you last week and I look forward to meeting up again in the future to discuss possibilities.*
>
> *I am also really keen in examining the "Irish option".*
>
> *I am in London today and tomorrow. If you were around, we might have a quick further chat. If not, perhaps we could arrange to meet immediately after Christmas.*"

75. On 18 December 2013, Mr Slattery responded by e-mail, copying in Mr Timol and Mr Johnson, suggesting a meeting be arranged in the New Year with Mr Slattery's fellow director Mr Timol:

> "*to further explore Joshua as a potential solution for Irish companies. In this regard, if you would be so kind as to sign an NDA (Anne to provide) then Tim (copied) will furnish you with further details (including the counsel opinion via lock lizard) regarding Joshua.*
>
> *With regards the R&D planning, I think I now understand the logic, my main concern was deal flow; both in terms of R&D and external funding. You mentioned that you are in touch with some Switz firms who have very large capacity as well as Trinity College Dublin who may have some capacity. Could you please furnish me with further information in this regard with a view to discussing further in the new year followed by a meeting with these chaps.*
>
> *I am keen to progress matters and there appears to be a good fit between our two firms.*"

76. The reference to "*Joshua*" was a reference to a scheme to seek to extract money from a company without an income tax charge. The "*Anne*" referred to in Mr Slattery's e-mail was Anne Toone, PA to the executive directors of OneE, whom Mr Slattery copied in to his e-mail. The footer on the e-mail was that of OneE Group, and Mr Slattery e-mailed from a OneE Group address. However, the website in his signature block referred to the website address as "*www.OneEtax.com*".

77. On 19 December 2013, Mrs Toone responded to that e-mail, copying in Mr Corrigan, Mr Slattery, Mr Timol and Mr Johnson. Like Mr Slattery, she had a OneE Group e-mail address. The e-mail stated:

> "*Further to Dom's e-mail below you should have now received our standard NDA via our electronic signature method of Docusign. Should you have any queries with this NDA please let me know. Otherwise, upon signature and return I will ask. Tim to organise the additional Joshua documentation.*
>
> *In terms of a follow up meeting, due to both Bashir and Dom taking holiday in January, the earliest I am able to offer is week commencing 3 February. However, this week does currently have good availability for them both. Would any day this week suit yourself for a meeting in either London or at our Head Office in Bolton?*"

78. By e-mail later the same day, Tess O'Leary of the Claimant, who appears to have been Mr Corrigan's PA, responded to Ms Toone, not copying in the other four persons mentioned above, stating:

> "*Kieran has just reviewed the NDA and would appreciate if the agreement could cover information disclosed in both directions as he will be disclosing information regarding his clients in discussion.*
>
> *Would it be possible for you to make the necessary amendment and return it for signature?*"

79. Mr Toon responded by e-mail the next day, 20 December 2013, stating:

> "*I attach an amended NDA as requested. I will void the one we sent via DocuSign. Could you please ask Kieran to review and sign the attached NDA and then return to me initially by scan so we can release the additional information but also with the original to follow in the post? I will ensure signature at this end and a copy returned to you for your files.*"

80. This NDA was signed by Mr Slattery and Mr Corrigan and a copy has been disclosed. It does not bear a particular date as the space for the date to be inserted has not been filled in, but it had been signed by Mr Corrigan by 17:21 on 3 February 2014 and by Mr Slattery by 11:51 on 4 February 2014. It is stated to be between OneE Tax and the Claimant, the latter of whom is defined in the NDA in the description of the parties as the "Recipient". A number of arguments are run as to its interpretation, so I shall set out the recital and clause 1-4 in full:

> "***INTRODUCTION***
>
> *(A) Each of the Parties to this Agreement (**"the Parties"**) would like to review certain of the other parties [sic] information so that the Parties may investigate a way to develop future products (the **"Purpose"**). This will necessitate the disclosure of information which each Party wishes to protect from unauthorised disclosure and use.*
>
> ***IT IS AGREED** between the Parties as follows:*
>
> *1 Information disclosed to the Recipient under this Agreement will include, but not be limited to, tax planning solutions, commercial, financial, operational or other information in whatever form (including*

*information disclosed orally) which concerns the Purpose or the business and affairs of the other Party and is of a confidential nature, including any such information disclosed prior to the date of this Agreement (**"Confidential Information"**). For the avoidance of doubt, Confidential Information shall include, but not be limited to, all and any analyses, compilations, studies or other documents prepared by the Recipient on the basis of or derived from or otherwise containing the Confidential Information (or any part of it) (**"Derived Information"**).*

2 In consideration of the Parties agreeing to disclose the Confidential Information to each other, each Party (in its capacity as the Recipient) will:

(a) keep in confidence any Confidential Information disclosed to it by the other Party and will not disclose that Confidential Information to any other person (other than, in accordance with clause 2(c), its employees who need to know the Confidential Information in order to carry out the Purpose) without the written consent of the other Party;

(b) use the Confidential Information disclosed to it only for the Purpose;

(c) ensure that all employees (or persons for whom written consent has been obtained in accordance with clause 2(a)) to whom the Confidential Information is disclosed by the Recipient (directly or indirectly) under this Agreement are aware of the terms of this Agreement and shall be responsible to the other Party for any breaches by them of any of the terms of this Agreement;

(d) keep all Confidential Information in a safe and secure place; and

(e) not make copies of the Confidential Information without the prior written consent of the other Party.

3 The Recipient will keep the existence, nature and content of this Agreement confidential, together with the fact that work is taking place concerning the Purpose. Any information developed as a result of the Purpose shall also constitute Confidential Information for the purposes of this Agreement.

4 Clauses 2 and 3 will not apply to:

(a) information which has been published other than through a breach of this Agreement;

(b) information which the Recipient can prove was lawfully in its possession before its disclosure under this Agreement took place;

(c) information which the Recipient can prove was obtained from a third Party who was free to disclose it;

(d) information which the Recipient can prove was independently developed by it;

> *(e) information which the Recipient is required by law (including a regulatory body) to disclose PROVIDED THAT the Recipient has, if it ins lawful to do so, given notice to the other Party of any such actual or anticipated requirement promptly upon becoming aware of it and used reasonable endeavours or co-operate with the other Party regarding timing and content of such disclosure or any action which the other Party may reasonably elect to take to challenge the validity of such requirement; and*
>
> *(f) information which the other Party agrees in writing that the Recipient may disclose.*"

81. The other provisions of the NDA included that the obligations and restrictions would last indefinitely (clause 6), that the Recipient shall indemnify the other Party from and against any liabilities arising from breaches of the NDA by the Recipient (clause 8), that the Recipient acknowledge that damages would not be an adequate remedy for any breach of the confidentiality provisions of the NDA (clause 9), that no variation shall be effective unless in signed writing (clause 11), that for the purpose of section 1(2) of the Contracts (Rights of Third Parties) Act 1999 the Parties do not intend any provision of the NDA to be enforceable by any third party (clause 14) and that the NDA is governed by English law and subject to the exclusive jurisdiction of the English Courts (clause 15).

82. On 8 January 2014, Mr Corrigan e-mailed a detailed set of instructions to Mr Sherry, stating:

> "*I am attaching a draft set of instructions in advance of our meeting on Thursday.*
>
> *When we meet tomorrow we can discuss them in greater detail and I can complete the draft following our discussions. You will note that there are certain issues that will require some further detailed discussion. Obviously until the structure of the investment is decided upon, we will not have available detailed legal documentation for your review.*"

83. The draft instructions were titled "*In the matter of the interpretation and application of Chapter 4 of Part 13 of the Corporation Tax Act 2009 (R&D relief for corporates)*". The introduction is worth setting out in full:

> "*Counsel is asked to advise on a range of taxation issues involving an investment structure which would enable UK corporate investors to invest in a range of projects requiring significant research and development financing.*
>
> *It is intended to make the structure accessible to companies in the United Kingdom in a manner that they would be in a position to take advantage of the relief provided for in Part 13 of Chapter 4 of the Corporation Tax Act 2009 in relation to the additional tax relief that is provided therein for expenditure on research and development.*

> *The legislation deals with different situations where R&D relief can be granted and, in particular, distinguishes between 'large companies' and 'SMEs' in this regard.*
>
> *However, the structure envisages that the UK investor companies would qualify as SMEs within the meaning of the legislation and not as large companies. Accordingly the "Chapter 2" provisions in the legislation which deal with SMEs are the provisions relevant to these instructions.*"

84. After the introductory section, the instructions were divided into three sections: "*LLP Structure*", "*Research & Development and Trading*" and "*Operation of legislative provisions*".

85. In the first section, the LLP structure was stated to be *a* UK LLP, which it was intended would invest in a "*range of projects, thereby spreading risk and greatly increasing the potential for attractive commercial terms thereof*". It was stated that "*[d]iscussions are very advanced with entities which control commercially attractive projects that require R&D finance. Such parties are also prepared to invest alongside these investors in advancing the relevant project. These parties are referred to in this document as 'promoter investors'".*

86. The instructions canvassed the possibility of the promoter investor subscribing for capital in the LLP, or to loan money to the LLP or to arrange for a third party financial institution or group to make a loan to the LLP, and stated that a further possibility being considered was establishing a LLP where the future risk was borne entirely by the UK corporate investors.

87. The questions that Counsel was asked to advise on in relation to "*this proposed structure*" were as follows:

> "*1. That UK corporate investors would be entitled to claim a share of the loss arising in the LLP against the total profits for the relevant corporates. HMRC have issued a guideline, CIRD81220- R&D tax relief: conditions to be satisfied: company as member of partnership, which indicates that this would in face be the position.*
>
> *2. Counsel is asked to advise as to whether or not the loss could be carried back against a previous accounting period. It would appear that this would not be possible in respect of a s1045 loss unless additional R&D relief was claimed in that previous accounting period (see s1048(2)). However, a trading loss under 1044 would appear to be capable of being so carried back, provided the company carried on a similar trade in that period.*
>
> *3. Given the fact that investors would have an entitlement to a genuine commercial upside in the investment and taking into account that the investors would be asked to subscribe by way of capital in the region of 35% of the total expenditure of the LLP, with the promoter investor lending 65% of the total expenditure of the LLP, that the recently introduced general anti-avoidance rules (GAAR) in the UK would not apply to the transaction in question. If it is considered that GAAR may have application, what key commercial criteria should attach to the transaction to minimise the risk of GAAR application.*

> *4. A structure may also be considered that would allow the relevant UK investor company contributing a higher percentage as their capital contribution to the project in return for a higher share of profit participation on the exploitation of the project.*
>
> *5. Would the making of a non-recourse loan by the promoter might carry implications for tax purposes that would not arise if the technology promoter actually invested capital in the partnership.*
>
> *6. What would be the potential implications of the promoter facilitating the non-recourse loan being made to the LLP by a third party financial group?*
>
> *7. What would be the apportionment rules that would apply in relation to apportioning a part of the loss of the LLP against the profits of the accounting period of the relevant corporate?*
>
> *8. Any other issues that arise out of this structure that may occur to counsel and could have taxation implications for the promoter investor or the relevant corporate investors.*"

88. The second section, "*Research & Development and Trading*", asked questions about whether the LLP would be regarded by HMRC as trading. The instructions explained the 225% relief that could be obtained under ss.1044 and 1045 (see paragraphs 26 and 27 above), whether the LLP was trading or not, but explained that "*[i]t is conceivable that the distinction between trading and non-trading could be of particular relevance to tax relief if available. This could be of relevance in particular in the context of payments made to subcontractors which is discussed further…below [in the third section of the instructions]. Furthermore, payments made to the manager of the structure would be deductible as a trading expense but would not be deductible as qualifying R&D expenditure. It therefore follows that it may well be important to establish that the LLP is in fact conducting a trade and is not engaged in pre-trading expenditure*". The instructions then explained the activities that the LLP would likely engage in, and a statement issued by HMRC, before asking whether the LLP would be regarding as trading for the purposes of the relevant tax legislation.

89. The third section of the instructions provided what was described as a "*brief synopsis of the main legislative provisions regarding research and development expenditure relief which are directly relevant*". The sections covered were ss.1041, 1042, 1044, 1045, 1051, 1052, 1053, 1134-1136 and the synopsis was approximately 10 sides in length. In relation to s1136 (paragraph 39 above), Mr Corrigan stated, among other things:

> "*Section 1136- Unconnected parties- 'the 65% rule'*
>
> *Section 1136 deals with a situation where the contractor and the subcontractor are not connected and do not elect to be connected.*
>
> *Section 1136(2) provides that;*
>
> *"the qualifying element of the subcontractor payment is 65% of the subcontractor payment".*

The interaction of s1053 and sections 1136 is of critical relevance and importance.

Section 1053(1) defines qualifying expenditure in the case of a sub-contracted payment as expenditure on what is defined as the qualifying element (s1053(1)(a)) and in respect of which the conditions of the section are met (s1053(1)(b))

In 1053(2), condition A states that the expenditure must be attributable to relevant research and development expenditure undertaken on behalf of the company.

Section 1053(6) then directs us to ss1124, 1126 and 1132 for provisions about when particular kinds of expenditure are "attributable" to relevant research and development. These three sections essentially provide that expenditure on internal staffing costs is only attributable to directors or employees who are directly and actively engaged in research and development (s1124); software or consumable items are only attributable when they are employed directly in relevant research and development (s1126); expenditure on external workers is only attributable if the workers are directly and actively engaged in relevant research and development (s1132).

A critical issue that arises is to what kinds of expenditure must a subcontractor undertake in order to be qualifying expenditure within the meaning of s1053 and in particular Condition A of s1053(1).

In relation to expenditure between connected parties, as discussed above, it is clear that s1134 requires that the subcontractor must expend the monies on the specific categories of expenditure outlined within the meaning of relevant expenditure in s1134(3) and must also comply with the attribution rules outlined in s1123 and s1127-1131 (as referred to in s1053(6)).

In relation to an unconnected contractor within the meaning of 1136, then it would seem clear that to meet the conditions of 1053, and in particular Condition A, the expenditure must be attributable to relevant research and development, taking into account the attribution rules in 1124, 1126 and 1132 (s1053(6)).

It is interesting that 1053(6) directs that 1124, 1126 and 1132 are provisions concerning when particular kinds of expenditure are attributable to relevant research and development. It does not specifically state that these are the only kinds of expenditure that could be regarded as relevant research and development. Indeed, the meaning of relevant research and development is very broad in that it encapsulates all research and development related to a trade carried out by the company (s1042). In other words, expenditure in relation to internal and external staffing costs and computer software costs must only be expenditure that is direct expenditure and not indirect expenditure but that other kinds of expenditure that could be regarded as attributable in a normal use of that word would still be attributable within the meaning of Condition A of s1053(2).

An alternative interpretation is that the only expenditure that can be regarded as attributable is expenditure coming within the meaning of 1124, 1126 and 1132. It is submitted this would make little sense since for instance that would exclude expenditure on patients taking part in a study which is specifically permitted in the context of 1134 when incurred between connected persons. Such an interpretation would also render the 65% formula largely irrelevant since one would be required to examine each and all of the elements of expenditure of the subcontractor which would mean in essence there would be no distinction between the connected persons provision and the non-connected persons provision.

Indeed it is arguable that this interpretation could mean that even if 100% of the money spent by the subcontractor was on direct salary and direct computer software costs, only 65% would be allowable since 65% could only be the qualifying element within the meaning of 1136(2)." (underlining added where the original contained italics; bold added to emphasise particular points.)

90. Having completed the synopsis, the instructions asked the following questions of Counsel:

"*a) Is it correct that in the event that a company is connected with a subcontractor, or where a company and the subcontractor elect to be connected, that the legislative requirements are essentially the same as the requirements in relation to in-house expenditure in determining what constitutes qualifying expenditure for the purposes of the relief?*

b) If, however, the company and the subcontractor are unconnected, what would counsel's view be of how the subcontractor payment would be treated under the legislation? That is to say, must the money be expended in a like manner as if the parties were in fact connected (but excluding payments to patients on a trial) or would 65% of the subcontractor payment be deductible on some other basis? ***In particular, would it be satisfactory that the subcontractor spent the monies on 'relevant' research and development which would include, for instance, patient studies and other attributable research and development but that the attribution rules of ss1124, 1126 and 1132 would apply to certain staffing costs and computer software and consumables***.

Alternatively, is Counsel of the view that by electing not to be connected, even if the subcontractor spends 100% of the monies on generally allowable categories of expenditure, the qualifying amount would be restricted to 65% of the subcontractor payment?

c) Is it Counsel's view that the accounts of the subcontractor, in the event that the parties elect to be connected, would need to be made available to the Revenue for review and audit in order to ensure that the provisions of the legislation be complied with.

d) In the event that the subcontractors were not connected or did not elect to be connected, would the subcontractor's accounts still need to be made available for examination or would invoices issued by the subcontractor to the company

which itemise the services provided by the subcontractor be sufficient evidence for relief to be given?

e) Is the interpretation outlined above in relation to the deductibility of the subcontractor payment correct in that if the payment is made in an accounting period for services provided over a number of future periods that the payment would be deductible in the relevant period provided the subcontractor treated the subcontractor payment as income in its own accounts for the relevant accounting period and also booked relevant expenditure at least equal to the subcontractor payment in its relevant period?

f) Would the legislative provisions permit a company to deduct payments made to a subcontractor where the subcontractor expended part of the sums received on the acquisition of valuable results and information which would assist it in the research programme undertaken on behalf of the company?"

(bold added to emphasise particular points).

91. On 4 February 2014, Mr Corrigan met with Mr Slattery, Mr Timol and Mr Johnson at OneE Group's headquarters in Bolton. As set out below, I consider that the NDA had been signed by Mr Slattery by 11:51 on 4 February, and that Mr Corrigan passed across the draft instructions at this meeting. There was no written note of the meeting before me, so I set out below at paragraph 175 below my findings as to what happened at that meeting.

92. On 25 February 2014, Mr Johnson e-mailed Mr Corrigan, copying in Mr Slattery, stating as follows:

"*Hi Kieran,*

I hope you are keeping well and apologise for the delay in reverting back to you.

Further to our meeting, I have now reviewed the instructions and have the following notes / comments:

1. *Virtually all of our clients are SMEs and so there would be very wide appeal for this type of company.*

2. *What is the LLP solvency / legal position of having losses that are way in excess of the LLP capital. Have you considered or taken advice on this point?*

3. *I believe the same restriction in s.59/s.60 CTA 2010 will apply to this type of LLP and therefore the members would need to remain liable to contributed [sic] additional assets on a winding up. Can you confirm is this is correct [sic] and what the extent of the liability will be?*

4. *Trading point. When will the trade commence? What will the timeframes be for expenditure by the sub-contractors? This could make the number of closings easier to manage.*

5. *Also re trading, the monitoring / management of the LLP is usually key to this- what is envisaged to ensure this is done?*

6. *I note you have laid out your interpretation of the legislation and asked counsel for comment. Have you received the counsel's opinion now (or do you have a timeframe for the same)? Would you be willing for us to review this once it is available?*

Perhaps a call on this would be best? If so please advise of a good time to call.

I also said I would come back to you on the key practical / procedural points that need to be considered for this to work for us. These are:

1. *We would require monthly closes (or at least every other month) to take into account company year ends. This may result in difficulties, particularly from a cash-flow perspective of the R&D companies.*

2. *Provided the LLP is trading then the amount of the relief would be £180k for each £100k of LLP expenditure. We discussed that the LLP would loan £75k and the corporates put in £25k. This would result in a loss of £180k for the LLP fully relievable for the corporate members. At 20% CT this is spending £25k to save £36k. We discussed this was the right ratio for us in terms of a balancing point for what clients would be willing to invest. However, if there is a risk that the LLP is not trading, the relief would be restricted to 65% of £225k= £146k. At 20% this would mean £30k tax relief for a £20k investment. An investment somewhere between 20-25% might be best to cover this risk. It would depend on how counsel advises on the trading point and the other areas of interpretation, as to how big we feel the risk is.*

3. *The management fees / other expenses will need to be covered only where the LLP has funds.*

4. *Regulatory points: this is a UCIS (Kieran to confirm?) and hence we would need to promote carefully and only to the correct people.*

From your point of view, I think the action points were:

1. *Obtain additional and revised term sheets from the various companies / investment houses you have been liaising with. Have you had further meetings / progress in this regard?*

2. *Revert on how you see us best working together. As we discussed in the meeting we hold the internal resource and expertise from similar structures we are currently operating.*

3. *As above, hopefully you have now had the chance to review the documentation / opinion on Joshua? Please do let me know if you have any questions or would like to discuss.*

If you are free for a call to go through this I am relatively free today / tomorrow so please let me know."

93. Mr Corrigan and Mr Johnson spoke on 28 February 2014. That call is referred to in Mr Slattery's e-mail to Mr Corrigan of 3 March 2014. That e-mail stated:

> "*Apologies for the missed calls on Friday. I spoke to Tim today who tells me you spoke on Friday. He mentioned you were still waiting for Sherry.*
>
> *Did you still need to discuss any updates with me?*
>
> *From recollection you were:*
>
> 1. *Looking into the Joshua docs*
> 2. *Speaking with the R&D companies*
> 3. *Finalising with Sherry*
>
> *We were to:*
>
> 1. *Review your instructions to Sherry- done*
>
> *Was there anything else?*"

94. Mr Slattery forwarded his e-mail to Mr Johnson on 7 March 2014 at 12:04. Following a call with him, Mr Corrigan e-mailed Mr Johnson at 13:11 that day, copying in Mr Slattery. I set out the most relevant parts below:

> "*Dear Tim,*
>
> *Following our conversation today, I attach a business plan for Morvus which is a biotech company which intends to go the AIM stock market in London by the end of this year or certainly very early in 2015.*
>
> *…*
>
> *The structure that we discussed on the phone would be that the new LLP would undertake say £3million worth of research which would be spent on qualifying research expenditure within the meaning of the R&D legislation. This would meant that the LLP would elect to be connected to a company with which it would subcontract the research would probably be a new subsidiary of Morvus and therefore all of the expenditure would qualify for the full 225% relief. This would obviate the subcontracting issues that were discussed in the memorandum I submitted to counsel. As part of the commercial arrangements between the LLP and Morvus, the £3million would be regarded as a loan to Morvus…*
>
> *A variation on the structure is that we agree a deal with an underwriter via a stockbroker in London to underwrite the purchase of the loan note in, say, two years time via a put option or a put / call option….I am meeting with two stockbroking firms in London next week to discuss this possibility.*
>
> *…*

> *I am also developing a structure to raise a larger R&D fund within an LLP to invest in a range of companies coming to market, either here or in the United States over the course of the next year. It would then mean that the investors would be able to cross-collateralise their investment in the LLP through a range of projects. It would only require one of these projects to be a flotation success for them to reduce their risk very considerably. If we can attach the underwriting arrangement to it, it would be a very robust structure indeed.*
>
> *As I say, I will be London during the course of next week, meeting with Morvus and the stockbroking firms and I would be interested in your initial response to this idea.*"

As explained in the e-mail, the structure would involve a connected rather than an unconnected subcontractor.

95. On 11 March, Mr Johnson e-mailed Mr Slattery in the following terms under the subject title "*stuff to take a back seat*":

> "*Hi Dom,*
> *As discussed I have listed some items that I would put on the backburner for the time being:*
> 1. *Instructing on s.175A planning*
> 2. *Kieran Corrigan stuff*
> 3. *S.131 schemes*
> 4. *Drip drop / EBT Extraction*
> 5. *Pension solution*
> 6. *Joshua / Extraction with Marc Ainscough*
> 7. *School fees Planning*"

96. On 13 or 14 March 2014 a meeting took place between Mr Corrigan and Mr Slattery, also attended by Lizanne Senior of the Claimant. The Claimant alleges that the structure and the structure with Morvus were discussed. Mr Corrigan's notes of the meeting state that the following topics were discussed: (1) "*Discussion of upcoming budget issues relevant to business*"; (2) "*One E have been focused on the Rayburg [sic] deal (Margolies and Taurus)*"; (3) *The key question regarding DOTAS is whether the tax advantage is the primary driver*"; and (4) "*KC presented Morvus proposal to DS*".

97. Expanding on (4), the conclusion was that

> "- *DS concluded that it would have to be geared in order for him to sell it to clients. The investment must be less than the tax so that it is cash flow rich*
>
> - *Concern from KC that this would make it more DOTAS-able*"
>
> - *DS recommends Simon Gough from DLA Piper for seeking opinions…*
>
> - *KC to send through proposal for further review, and the pending opinion from counsel*"

I understand that "*DOTAS*" refers to the requirements to disclose to HMRC tax avoidance schemes.

98. Those notes of Mr Corrigan also suggest that a meeting took place with Mr Sherry around that time, seemingly after the meeting with Mr Slattery given that it is later in the notes. These notes include the following:

> "*- KC outline of structure with [redacted]*
>
> *- [redacted]*
>
> *- If 225% relief, split should be 1/3 to 2/3*
>
> *- If 65% rule: split should be 25% to 75%*
>
> *- LLP structure for R&D investments (ex: Morvus)*
>
> *…*
>
> *- Main query: is the structure impacted by GAAR or DOTAS? Key is if the primary objective is the investment in Bio Tech and NOT the tax advantage.*
>
> *…*
>
> *- KC to send MS confirmation of final structure from [redacted]*
>
> *- Comprehensive view on the commercial arrangements*
>
> *…*
>
> *- MS proposes potential partner in [redacted]*
>
> *- MS will set up an introduction, if we can prepare a presentation to be sent to them*"

99. There was also a further meeting with an AIM broker and adviser, where the proposal was put in similar terms to the above.

100. Mr Corrigan's notes also refer to a meeting with an investment company at which he "*presented [an] opportunity on R&D allowances for corporates*" in the following terms:

> "*- 225% relief on stipulated expenditure*
>
> *- opinion pending from Michael Sherry, Queen's Counsel*
>
> *- New LLP structure: no gearing, only investment, fund listing to AIM*
>
> *- Example: Bio Tech Co. with 4 cancer drugs (Morvus)*
>
> *- Right to convert loan in to [sic] equity on flotation*
>
> *- Estimate initial listing at £40m*
>
> *- 70% of PAR on a put option*

> *- Proposal: raise fund of £10-20m for a selection of investments and therefore manage risk with a portfolio approach*"

101. On 20 March, Mrs Toone e-mailed Mr Corrigan, stating:

> "*Further to your meeting with Dom he has asked if you are kindly able to forward the further information about Pre-IPO? ....*"

102. On 2 April, Mr Corrigan met with Mr Gough of DLA Piper as suggested by Mr Slattery, and also met with Morvus and Tim Coffman of ZAI Research. As set out in the e-mail extracted in the next paragraph, ZAI were involved in another project called Fast Track Pharma.

103. That day, Ms Senior e-mailed Mr Slattery at 14:44, stating that she would be sending through later in the day some documentation from Mr Corrigan regarding a company called Fast Track Pharma. She asked for a meeting for her and Mr Corrigan with Mr Slattery early the following week, saying that "*[t]he project is progressing quite quickly and so we want to present the full opportunity to you in good time for your consideration*" and offering to travel to Bolton if more convenient. She duly sent across the documentation as an attachment to her 17:30 e-mail, thanking Mr Slattery for agreeing to an appointment at 4pm on Tuesday 8 April and for sending across the appointment details. The e-mail included the following passage:

> "*As the roadshow will commence with ZAI next week, this is now a straight issue for shares as opposed to the convertible loan note we originally discussed. There can be no differential in the funds being raised concurrently, as I am sure you appreciate. The £1m being raised through the R&D LLP structure will be subject to the enhanced tax relief of 225% which gives a tax benefit of 47.25%.*
>
> *We strongly believe this is an attractive proposition for One E to pursue and look forward to discussing it with you in further detail.*"

104. By 9 April e-mail, Mr Corrigan e-mailed Mr Slattery, copying in Ms Senior, and reattaching the note that Ms Senior had sent via her second 2 April e-mail, and setting out a number of points about how he saw the Fast Pharma structure as working. They included the following passage:

i) "*1. I would like to summarise some aspects of the financial analysis. It is assumed that £1 million is invested by the relevant corporate investors in the new LLP.*

ii) *2. In this same period, the LLP will then pay £1 million over to the sub-contract vehicle to carry out the sub-contracted research. It is assumed that the sub-contract vehicle will be under the control of Fast Track Pharma. However, the expenditure to be incurred by the subcontract vehicle will have to be pre-approved by the representative of the LLP to ensure that it qualifies as a qualifying expenditure under the relevant R&D legislation.*

iii) *On the basis that it is qualifying expenditure, then 100% of this expenditure will qualify for R&D relief. This would provide a net benefit of 47.25% as outlined in the net benefit analysis.*

iv) *The LLP would be in a position to claim tax relief on the payment of the sub-contract amount to the subcontractor.*

v) *This derives from an analysis of the legislation that provides for a full deduction where parties are connected, or elect to be connected, of the full amount of the subcontractor payment, provided the payment is taken into account by the subcontractor company in its 'relevant period' and that 'relevant expenditure' is also included in the accounts of the subcontract for the relevant period. This is based on what is regarded as a reasonable interpretation of the R&D legislation, as outlined in my instructions to counsel on the tax effects of the transaction (copy attached- see pages 9 to 14 in relation to connected persons).*"

vi) The e-mail concluded by asking whether a time could be arranged to discuss the e-mail. Again, this particular structure would use a connected subcontractor.

105. On 15 April, Mrs O'Leary of the Claimant e-mailed Mr Slattery, saying that Mr Corrigan would like to speak to Mr Slattery at some stage today if possible and asking Mr Slattery to call Mr Corrigan at his convenience. Mr Slattery responded by e-mail the same day, saying that he was on leave that day but would be back the next day and that Mrs Toone, who he copied in, can arrange a suitable time to discuss.

106. By 28 April e-mail, Mr Slattery forwarded Mr Corrigan's 9 April 2014 e-mail to Mr Johnson and also to Adam Owens, senior tax consultant at OneE, copying in Mr Corrigan. The e-mail stated:

"*TJ / Adam,*

As you are aware, I have be wen [sic] speaking with Kieran RE potential planning ideas surrounding R&D reliefs. Some are purely investment based with enhanced tax benefits given the RD credits) and some are to be both enhanced investments AND geared.

The attached is pure investment based with enhanced relief only (no gearing)- Can you please conduct some DD on the attached p provided Kieran confirms the opportunity is still available.

Kieran, please confirm where you are with Sherry opinion, Joshua DD & talks with the Swiss investors?"

107. By 1 May e-mail, Mr Corrigan e-mailed Mr Slattery, stating that he had tried to get him on the phone earlier and asking whether it would be possible to schedule a catch-up.

108. On 6 May, Mrs Toone e-mailed Mrs O'Leary of the Claimant contact details for Abby Tax, a provider of fee protection insurance, referring to a conversation between Mr Corrigan and Mr Slattery earlier that day.

109. The next day, 7 May, Mrs Toone e-mailed Mrs O'Leary again, saying that Mr Slattery had asked her to set up a call with Mr Corrigan, himself and OneE's contact at DLA Piper, saying that she believed Mr Corrigan and Mr Slattery had discussed this on the telephone the previous day, and asking what time would suit Mr Corrigan best on Friday

9 May after 10am. Mrs O'Leary responded the same day saying that 10am would be best. Mrs Toone responded the next day, 8 May, stating that Mr Slattery "*had asked me to put this on hold for now as something has cropped up. I'll be in touch*." Mrs O'Leary responded later in the day asking whether the call the next day was going ahead, and Mrs Toone responded the same day, saying "*Hi Tess, I'm sorry if I wasn't clear. This call is on hold now. I will let you know if we need to rearrange.*"

Events after 8 May

110. On 13 May, Mr Slattery e-mailed Mr Johnson and Mr Owens, with the subject line "*Instruction to DLA Piper*", stating:

> "*TJ,*
>
> *I have very quickly put these instructions together. I have not even proof read them yet but thought I'd get them out to you guys ASAP.*
>
> *Can you please review and pay close attention to the tax analysis.*"

111. Mr Johnson responded by e-mail on 16 May, stating:

> "*Hi Dom,*
>
> *You said you were sending through a revised version of this. I should get round to reviewing this afternoon so will you be sending the revised doc and should I wait for it until reviewing?*"

112. Mr Johnson e-mailed again on 3 June, stating:

> "*Hi Dom,*
>
> *See attached with my notes on the instructions. I was going to go through these with Adam but didn't get chance before his holiday.*"

113. Mr Slattery responded the same day by e-mail, saying that he had further amended the instructions and asking Mr Johnson to have one last reading before sending it off to DLA Piper for a quote.

114. The instructions were addressed to Mr Gough at DLA Piper. They related to Nemaura. The instructions started by explaining that OneE Investments had previously instructed Mr Gough in relation to the Rehberg investment and that OneE Investments now wished to explore an alternative investment structure, "*which shares many of the same concepts as Rehberg*". The sections on the tax structure and analysis included the following. I take this from the first draft of the instructions attached to Mr Slattery's 13 May e-mail.

> "*The Tax Structure*
>
> *14. It is envisaged that corporate clients of OneE (the Investors), who will all be SMEs, will invest (the Investment Amount) into a UK LLP (the LLP).*
>
> *15. The LLP will provide the Investors with both income and caapital rights*

16. An independent investor (Loan co) will then provide a loan to the LLP (the Loan Amount). The Loan will be non-recourse.

17. Loan co will borrow the Loan Amount from a bank.

18. The LLP will then make a sub-contractor payment (as defined in s1133(1) CTA 2009) to an SPV (the SPV) controlled by Nemaura.

19. The SPV will not be connected with the LLP and hence the payment should fall under s1136 CTA 2009.

20. Although, in accordance with generally accepted accounting principles, the SPV will commit the sum of the Investment Amount and the Loan Amount to 'Research and Development' (R&D) as defined by s1138(2) CTA 2009, in the short term, the SPV will make a loan (the Subsequent Loan) to Loan co so that Loan co can repay the bank.

21. In the short term, the SPV will use the Investment Amount to pursue the R&D. once those funds are exhausted, Loan co will be called upon to repay the Subsequent Loan, thus providing the SPV with the remaining finance to finish the R&D.

22. It is envisaged that both the Loan Amount and the Subsequent Loan will be on commercial terms.

23. Should the R&D prove successful, the Loan Amount will be repaid plus a significant windfall. The Investors will, via the LLP agreement, be entitled to the remainder, which nis expected to be very commercial.

24.Should the R&D prove unsuccessful, Loan co will be nothing, as the loan is non recourse and, in turn, the Investors will get nothing.

Tax Analysis

25. For the purposes of Part 13, Chapter 4 Corporation Tax Act 2009, the LLP will be treated as a company as all its partners are corporate.

26. The LLP will make a subcontractor payment as defined by s 1133(1) CTA 2009

27. As the payment is to an unconnected company, one is not required to 'look through' to the unconnected company and establish whether that company expends the payment amount in accordance with s1123, 1127-1131 & 1138 CTA 2009.

28. The payment must simply be made in respect of 'Research and Development'.

29. Research and Development is defined in s1138 CTA 20010 [sic] as 'activities that fall to be treated as research and development in accordance with generally accepted accounting practice'. Thus provided the SPV validly

treats the payment as R&D in accordance with GAAP, that is all that is required.

30. S1136(2) then permits 65% of the usual 125% as an enhanced relief.

Worked Example

31. The Investors invest £100,000 into the LLP

32. Loan Co lends £100,000 to the LLP

33. The LLP makes a subcontractor payment to the SPV of £200,000

*34. The Investors are entitled to 100% relief on the £200,000 PLUS ((65%*125%)*£200,000) providing a total relief of £362,500.*

35. This amount can then be offset against any other profits of the Investors.

Opinion Sought

36. DLA are requested to provide their view as to the efficiency, or otherwise, of the above structure and tax analysis.

37. DLA are requested to consider all the potential tax downsides as they did for the Rehberg opinion (e.g. the General Anti-Abuse rule, the Disclosure of Tax Avoidance Scheme rules, relevant case law, etc.)"

Mr Slattery had commented on paragraph 25 that "*This requires further research*".

115. Mr Johnson added his notes on the instructions and returned them on 3 June, and Mr Slattery returned them by e-mail the same day with further amendments, asking Mr Johnson to have one last read and then send them to DLA Piper for a quote.

116. On 25 June 2014, which was a Wednesday, Mr Johnson e-mailed Mr Corrigan about a missed call from the latter, saying that he was tied up until Tuesday but asked whether they could have a discussion then. Mrs O'Leary of the Claimant responded the same day asking whether 2.30 on Tuesday would suit, but on 30 June, Mr Corrigan e-mailed Mr Johnson, copying in Mrs O'Leary, stating that Mr Corrigan had had to travel to New York urgently so would have to reschedule the call the following day. Mr Johnson replied the next day, 1 July, saying that this was not a problem. The call does not appear to have taken place.

117. DLA do not appear to have advised on OneE's instructions set out above. Rather, the instructions were sent by Mr Johnson by 1 August 2014 e-mail to 15 Old Square Chambers for Rory Mullan to provide a quote and timescale to advise on. Mr Johnson e-mailed the same instructions, together with some instructions entitled "*A Strategy to Access Cash from a Limited Company*", to Mr Sherry's clerk at Temple Tax Chambers on 4 August 2014, again asking for a timescale and quote for Mr Sherry to produce the opinions.

118. Mr Sherry does not appear to have accepted the instructions. He produced for the Claimant a note on Research and Development Reliefs on 28 August 2014. The note

stated that Mr Sherry had had the benefit of a number of conferences with Mr Corrigan, during which various structures and arrangements had been discussed, and that the purpose of the note was to deal with four specific key problems that had been identified in those discussions. Those four issues were:

(1) What the relevance of s.1053(6) of the 2009 Act was.

(2) When expenditure was incurred for that purpose.

(3) What is the necessary minimum for an entity to be carrying on a trade?

(4) In the context of DOTAS, GAAR and the tax avoidance caselaw, what degree of gearing is acceptable and what degree of risk is necessary.

119. He explained that the exact details of any specific arrangement would be arrived add when particular research and development products were under considerations, but that he understood the likely structure to be as he set out in paragraph 6.1 of his note.

120. Issue (1) of the above four issues concerned whether the wording in s.1053(6) imposed restrictions on the purposes for which an unconnected subcontractor must use the payment made to it in order for the payment to it to attract R&D relief under s.1035. Mr Sherry explained in the course of his analysis that in his view the apparent reason for the 65% limit was that "*the contractor cannot be expected to be able to substantiate how the subcontractor has carried out the research*", so that the legislation did not impose any "*explicit requirement that the expenditure falls within the four limited categories mentioned above in relation to in-house expenditure*" (paragraph 7.4). Mr Sherry's conclusion was that s.1053(6) had been included in error and was of no effect. As he put it, "*[i]t appears to have been erroneously attached to section 1053 as part of the process of the Tax Law Rewrite project when the relevant provisions from Schedule 20 to the Finance Act 2000 were written as Part 13 of the 2009 Act*" (paragraph 7.8). His reasoning was as follows:

(a) Paragraph 3 covers before R&D conducted by the company itself and R&D conducted on its behalf.

(b) Paragraph 3(4)(a) of Schedule 20 to the 2000 Act, which sets out the third condition for expenditure to constitute qualifying R&D expenditure, referred to paragraphs 5, 6, 6A and 8A-8E: see paragraph 44(4) above.

(c) Paragraphs 5, 6, 6A and 8A-8E both set out what falls within the relevant categories of costs or expenses, *and* when such costs or expenses will be attributable to relevant research and development. Since those paragraphs fulfil that dual function, and the reader has been referred to them by paragraph 3(4)(a), there is no need for a *further* provision at the end of paragraph 3 referring the reader to those paragraphs to determine when particular expenditure is attributable to relevant R&D.

(d) In contrast, under the 2009 Act, what was in paragraphs 5, 6, 6A and 8A-8E have now been split into two sets of provisions. Taking paragraph 5 of Schedule 20 as an example for this purpose, its contents have now been divided between s.1123 of the 2009 Act, which defines what staffing costs of a company are, and s.1124,

which sets out when a staffing cost are attributable to relevant research and development. Therefore the 2009 Act does not contain provisions fulfilling the dual function referred to in (b). The consequence of that is that it is necessary to have in s.1052 *two* sets of references to other provisions. Taking what was paragraph 5 of Schedule 20 to the 2000 Act as an example, it is now necessary to have a reference in s.1052(2)(a) to s.1123 and in s.1052(7) to s.1124. That, Mr Sherry suggests, explains why there is a need for a supplementary provision at the end of s.1052, namely s.1052(7).

(e) s.1052 deals with connected subcontractors and therefore it is necessary to refer the reader to ss.1123 and 1124. However, Mr Sherry considered that there is no equivalent need in s.1053 because categories like the staffing costs referred to in ss.1123 and 1124 are not relevant in the case of unconnected subcontractors. Accordingly, the insertion of s.1053(7), which refers to s.1124, was in error.

121. In relation to issue (2), he considered that the contractor would incur qualifying expenditure when it rendered itself liable to pay the subcontractor, which would normally be when it entered into a contract with the subcontractor even if the date for payment under that contract fell some time subsequent to the contract (paragraph 8.6).

122. The conclusion in relation to issue (3) was that what amounts to trading is necessary fact dependant (paragraph 11.3).

123. In relation to issue (4), Mr Sherry's conclusion was that "*[i]f the arrangements are too aggressive, e.g. they are geared so as to leave investing companies cash positive on their investment after tax relief, they will be within DOTAS and will be vulnerable to GAAR and to recharacterization by reference to their substance, likewise if expenditure is "incurred" too far in advance of payment or of work being done*" (paragraph 11.4). He was of the view that "*a combination of a high level of gearing taken together with limited recourse will increase risk*" in relation to whether the expenditure was incurred by the partnership at all, whether the arrangements were abusive for the purposes of GAAR, and whether they fell within the scope of DOTAS as having tax advantages as a main expected benefit (paragraphs 10.4 to 10.5).

124. Turning to the advice provided to *OneE*, following telephone calls with Mr Johnson, Mr Mullan set out in his 5 September 2014 e-mail an outline of what he understood the relevant facts to be on which OneE based their instructions. On 26 September 2014, Mr Mullan provided his first opinion on the Nemaura structure. Among other things:

(1) Mr Mullan identified a number of concerns about whether the structure would work from a tax perspective. A number of these arose from the limited recourse loan that was used to "gear" the structure and enhance the level of tax relief. As recited in paragraphs 10 and 11 of his instructions, the LLP was to borrow an amount that was three times what it had raised on investments, so if investors raise £1m, the LLP will borrow a further £3m giving a total of £3m. The borrowing would be from a company which is likely to be connected with Nemaura would be on limited recourse terms, although the payment terms would be such that it is on commercial terms. The full £4m would be paid down to the (unconnected) subcontractor, thereby increasing the amount of the potential R&D relief available on the subcontractor payment compared to if only the sum raised by investors, namely the £1m in the above example, was paid down by the LLP to the subcontractor.

Taking one example of Mr Mullan's concerns stemming from this and linked features of the arrangement, he identified that "*[a]n immediate issue which arises from the proposed arrangements concerns the treatment of the monies borrowed by the LLP from Loanco on limited recourse terms. Such arrangements will inevitably arouse HMRC's suspicions and are likely to lead to intense scrutiny of the arrangements*" (paragraph 27). He considered it critical in that regard "*that the R&D Payment is committed to be fully expended on research and development (or alternatively returned to the LLP if not spent). If HMRC are in a position are in a position to show that sums paid to the Subcontractor are not in fact spent on research (and are not returned) but are funnelled back to Loanco then it is likely that such sums would be disregarded in any analysis of the tax consequences of the arrangements*" (paragraph 34). "*If, however, it can be shown that those parts of the R&D Payments funded by the limited recourse loans are ultimately to be spent on research, regardless of the outcome of the initial research on any drug, then I consider that it would be much more difficult for HMRC to argue that the sums funded by such loans are to be disregarded. In that case, the effect of the Loan is to enhance the relief available to the Investors at the expense of the Loanco, but the total amount of the relief will reflect the amounts spent on research*" (paragraph 35).

(2) As to whether the LLP was trading for tax purposes, he opined that "*[a] complicating factor in the instant case is where the activity is carried on in a context of tax planning*", because "*a question which can sometimes arise is the extent to which the tax planning colours the nature of the activity which has been carried on*", which "*is exacerbated by the fact that the tax relief is likely to remove all risk from the Investors*" (paragraph 47). Therefore, he considered "*that it would be preferable if the extent of the Repayment were increased so that there is some risk to the Investor*".

(3) In relation to the application of s.1053, he raised two specific points. The first was whether, under the Nemaura structure, the full £4m paid down by the LLP could be said to be incurred on a sub-contractor payment for the purposes of s.1053(1)(a) in circumstances where on the facts put to him it was not known at the outset that £3m of the £4m would be spent on R&D, as this would be contingent on the outcome of the result of the first stage of the testing of the relevant drug.

(4) The second, which is of more relevance for present purposes, is whether the amount expended in paying the subcontractor was "*attributable to relevant research and development*" for the purposes of s.1053(2) (Condition A). Mr Mullan stated as follows at paragraphs 139-140:

> "*139. As regards the requirement that the research is "attributable" to relevant research and development, I understand that the costs and what they relate to are to be explicitly set out in the agreement with the Subcontractor. Sections 1124, 1126 and 1132 CTA 2009 contain provisions for attributing staffing costs, software or consumable items and external workers.*
>
> *140. At present I have insufficient information to advise on whether this aspect of the agreement will be satisfied, but clearly the agreement with the Subcontractor will have to be carefully drafted to ensure that the entirety of the*

> *R&D Payment [the sum paid to the Subcontractor] can be said to be attributable to relevant expenditure.*"

Accordingly, in short, Counsel had some concerns about the limited recourse element of the structure and the structure being set up in a manner that meant that investors could not lose out. Moreover, unlike Mr Sherry, he considered that the attribution provisions in ss.1124, 1126 and 1132 of the 2009 Act *were* relevant in the case of an unconnected subcontractor, because s.1053(2) required the expenditure to be attributable to relevant R&D conducted on behalf of the company.

125. Despite the less than clean bill of health provided for the proposed structure by Leading Counsel by that point, the structure was promoted by OneE at its 7 October 2014 conference at the Lowry Hotel in Manchester, entitled "*Investing in the future of tax planning: what is permissible and what is not?*" The papers for the conference included a paper on Nemaura's business and a presentation on how the structure would work. The latter included a slide "*Tax Treatment For Corporates*" which stated that:

> "*- The corporates are entitled to 100% of the 181.25% relief, provided*
>
> *- The LLP is trading and R&D valued correct:*
>
> *- all money is spent or will be spent regardless of success,*
>
> *- the R&D qualifies as R&D under the Guidelines,*
>
> *- the LLP's sub-contractor payment is deductible under GAAP,*
>
> *- qualifies as a sub-contractor payment under s 1133(1) CTA 2009 and*
>
> *- relief not prevented by s. 1084 CTA 2009 or case law*"

A slide entitled "*Tax Treatment Legislation*" provided among other things "*S 1136- additional relief of 81.25%*". The 81.25% represents 65% of 125%.

126. The same day, Mr Johnson e-mailed Mr Mullan, setting out some points to clarify. In respect of paragraph 139 (one of the paragraphs extracted above), the following comment was made:

> "*Last sentence of 139- not sure why this is relevant as the LLP and subco are not connected hence there is no need to consider 1124 etc? (falls under 1136- not connected hence 65% but don't need to consider 1124 etc.)*"

Therefore, Mr Johnson was taking what Mr Corrigan had regarded in his draft instructions as the better view on the point.

127. Mr Mullan dealt with these points through a supplemental opinion of 20 October. In respect of the question on paragraph 139 of his first opinion, he opined as follows:

> "***Last sentence of paragraph 139- not sure why this is relevant as the LLP and subco are not connected hence there is no need to consider 1124 etc? (falls under 1136- not connected hence 65% but don't need to consider 1124 etc.)***

> *16. These provisions are relevant in determining whether expenditure is qualifying expenditure on contracted out R&D for the purposes of section 1053.*
>
> *17. Although the fact that the companies are connected is relevant to the calculation of the qualifying element of a sub-contractor payment (section 1053(1)(a) and 1036 CTA 2009) there is an additional requirement that expenditure is "attributable to relevant research and development" in section 1053(2) CTA 2009. It is in determining whether this condition is satisfied that section 1124, 1126 and 1132 are relevant (see in this respect section 1053(6) CTA 2009).*
>
> *18. I do not consider that the fact that the parties are connected obviates the need to show that expenditure is attributable to relevant research and development in order to satisfy the conditions in section 1053 CTA 2009.*"

I think that the reference to "*connected*" in paragraph 18 of the supplemental opinion is intended to be a referenced to *unconnected* parties, because that is the question being asked in the heading to the section.

128. Mr Johnson e-mailed on the opinion to Mr Slattery on 28 October 2014 with his comments, which included the following on the passage from paragraphs 16-18 extracted above:

> "*A key component of our original instructions was that where the subcontractor payment was to an unconnected party, there is no need to 'look through' to the subcontractor to see whether the money is attributable to relevant R&D. The question is why anyone would not elect to be connected if the same obligation exists to spend the money on relevant R&D. I think the answer might be that we have to show that the LLP payment is attributable to relevant R&D, but the subcontractor does not have to demonstrate the same and also spend the money within a specific timeframe. I will look into this further before our meeting.*"

129. Following a further call with Mr Mullan, Mr Johnson then e-mailed him on 4 November 2014, copying in Mr Slattery, about this point. The e-mail included the following:

> "*Further to our call, the point we need to get comfortable on is the importance of connection between the LLP and the subcontractor, and what expenditure of the LLP will qualify for enhanced R&D relief.*
>
> *The starting point is that we have based our previous discussion on the assumption that the LLP and subcontractor will <u>not</u> be connected. That is because we assumed that there would not be as high a threshold compared to when the LLP and subcontractor are connected.*
>
> *<u>If the LLP and subcontractor are not connected</u>*
>
> *As summarised in paragraphs 114 to 144 of your opinion, s.1044 gives relief for "Qualifying Chapter 2 Expenditure". This is then given by s.1051 and s.1053 which ultimately requires us to ensure that the expenditure is "attributable to relevant research and development", and hence we must consider ss 1124, 1126 and 1132.*

> *For the avoidance of doubt please can you confirm that only expenditure that falls under 1124, 1126 and 1132 will be available for relief for enhanced R&D relief. If this is the case then the contract between the LLP and subcontractor will have to stipulate the relevant R&D being within the categories of staffing costs, software or consumables or external workers. Should this be the case, there may be difficulty in how the licence between Nemaura and the LLP is drafted, because we want to ensure that all expenditure of the LLP qualifies for enhanced R&D relief.*
>
> *Comparing s.1052(7) and s.1053(6), it may be that s.1053(6) directs us to ss.1124, 1126 and 1132 to make clear when expenditure is attributable to R&D, e.g. expenditure has to be directly applied to relevant R&D and must be apportioned where the expenditure can be split. It may not necessarily be directing us to those specific types of expenditure.*
>
> *I also note that HMRC imply that the R&D need not necessarily be within these categories CIRD84200. HMRC state that "qualifying expenditure includes payments made to another person subcontracted to carry out activities that are part of the company's relevant R&D CIRD81400...*"

Mr Johnson also explained in the e-mail that they had considered the possibility of the LLP and subcontractor being connected, but that it was not attractive, because the application of s.1134 would mean that (i) the work could not be further subcontracted, whereas OneE intended that the work would be further subcontracted, and (ii) the subcontractor would need to incur the relevant expenditure within 12 months of the end of the LLP's accounting period, which would not be the case for all the R&D expenditure as the project may last for up to four years. Therefore, Mr Johnson stated, "*it seems clear that we will need the subcontractor and LLP to be unconnected*". The e-mail concluded by asking Mr Mullan to comment on the key points in the e-mail, continue to work on the implementation documents to be ready by 20 November, and amend the opinion in line with their discussions and send them a final version.

130. On 6 November, Mr Johnson e-mailed Mr Slattery asking for a conversation about the e-mail, and Mr Slattery replied that he was in the boardroom. I do not have a copy of any response from Mr Mullan or further e-mails on this point. There is a further e-mail from Mr Johnson to Mr Mullan on 14 November 2014 relating to a different point in Mr Mullan's opinion, and a dialogue that day between the two of them, but nothing on the unconnected subcontractor points above.

131. On 20 November, Mr Mullan e-mailed the suite of implementation documents, and stated that he would provide an amended version of his opinion in the next day or two. However, I do not have any further e-mails or documents in the chain that include the revised opinion.

132. In the meantime, while this dialogue with Mr Mullan was taking place, Mr Corrigan became aware that the Nemaura structure had been presented to investors at the 7 October 2014 event at the Lowry Hotel through a meeting with a Mr Guy Surtees at Taurus, who specialised in raising funds in London and who Mr Corrigan had presented his structure to previously. Mr Surtees subsequently provided Mr Corrigan with a copy of the presentation. Mr Corrigan states in his witness statement that it was very clear to him from the presentation, particularly the overall structure, the subcontractor

provisions and the statutory uplift in the relief offered, that OneE had used his structure in that presentation and in the context of Nemaura and had deliberately excluded him from all aspects, so he was extremely shocked and immediately contacted Mr Slattery.

133. On 23 October 2014, Mr Corrigan e-mailed Mr Slattery asking Mr Slattery to give him a call on his mobile as a matter of urgency. Mr Corrigan appears to have sent a previous message, as Mr Slattery responded the same day saying that they could discuss "*our Nemaura R&D planning*" properly on Monday and that he was on honeymoon in Dubai, which suggests that he was aware that Mr Corrigan wished to discuss Nemaura. Mr Corrigan responded the same day asking for a copy of the Nemaura structure in advance of the meeting, and Mr Slattery refused by further e-mail the same day, saying "*No, let's discuss first*".

134. By 27 October 2014 e-mail, Mrs Toone sent from a "*1st ethical*" e-mail address to Mr Johnson and Mr Slattery a copy of the NDA, stating:

> "*Tim, Dom,*
>
> *Kieran Corrigan signed NDA attached. Please note this was amended from our standard NDA by Richard to cover exchange of information both ways.*"

135. Mr Johnson responded the next day to Mr Slattery, not copying in Mrs Toone, stating:

> "*Just looking at the attached, the recipient is described as Kieran Corrigan and so it is not very well drafted to cover exchange of information both ways. Is it worth getting Anne to see what exactly was agreed in the e-mails at the time. The trail below just says 'as discussed'.*"

136. Returning to the dialogue between Mr Corrigan and Mr Slattery, Mr Corrigan sent a further e-mail to Mr Slattery on Tuesday 28 October in the following terms:

> "*Dear Dominic,*
>
> *Further to our phone conversation last week, I had hoped that we would speak yesterday but I didn't hear from you.*
>
> *I am very anxious to discuss the Nemaura structure with you as a matter of great urgency. I have been working flat out on this project for some months now and have just now finalised our own structure with Michael Sherry.*
>
> *As you will imagine, I am deeply concerned about the structure you are now marketing in the context of all of our discussions to date.*
>
> *Will you please let me know when it will be possible to have a call to discuss this. I will be tied up for most of this afternoon but I could speak to you later this morning or tomorrow morning.*"

137. A heated telephone call between the two of them took place on 30 October. Following that, Mr Slattery sent an e-mail later that day saying that had just called and left a message, and Mr Corrigan responded the same day by e-mail apologising that the conversation got so heated, and explaining his extreme disappointment given the time, effort and expense he had put into the project. Mr Slattery in turn responded by e-mail

the same day stating that the offer was there for a meeting at their London offices and that he did not want any bad feeling, saying that nothing untoward had happened.

138. Mr Corrigan e-mailed Mr Slattery on 4 November in the following terms:

> "*Dear Dominic,*
>
> *I have to say, I remain deeply disappointed in what has occurred.*
>
> *I find it extraordinary that, under a confidentiality agreement, I would provide you with every piece of information, including my submission to Counsel and that you are not prepared to provide me with the structure that you are now marketing.*
>
> *I have reflected on the fact that you may have communicated with Michael Sherry. It is clear that this is really none of my business and none of my concern. What you discuss with Michael is a matter between yourself and Michael.*
>
> *The issue that arises is a matter between the members of your organisation and the members of my organisation in relation to information flows under the signed confidentiality agreement.*
>
> *I will obviously be taking advice on my situation and we shall see where we go from there.*"

139. Mr Slattery responded the same day, stating:

> "*It continues to frustrate me that (1) you seem to believe my company has done anything untoward when I have explained fully the situation and (2) that you continue to say that I am not prepared to show you our structure. I have confirmed both verbally and in writing that I am prepared to show you the details of our structure provided you do so at one of our offices without taking the information away with you.*"

140. On 18 November 2014, Mr Sherry e-mailed Mr Corrigan, having been called by David Wilson, a lawyer who had introduced Mr Corrigan to Mr Sherry in the first place. Mr Sherry reassured Mr Corrigan that he had not advised anyone else on any R&D structure since Mr Corrigan first instructed him, and that the reason he suggested Mr Corrigan talk to OneE was "*because I was asked to quote in respect of an R&D scheme last year (before I think the GAAR was introduced). That arrangement was nothing like the arrangement we have bee[n] discussing and developing.*"

141. On 10 March 2015, OneE Tax, the company that was the party to the NDA, entered voluntary liquidation.

142. The chronological run of documents also included a Nemaura presentation that is described as "*March seminars*" in the index but undated, so I do not know whether it dates from March 2015 or 2016 but I do not consider that matters for present purposes. It seems unlikely that it dates from March 2017 because the evidence is that Nemaura had been fully subscribed by then. The slide dealing with the "*qualifying element of a contractor payment*" (for the purposes of s.1053(1)(a) of the 2009 Act) states:

> "*- If the parties are unconnected, the enhanced R&D relief is 65% of the normal 125%*
>
> *- Where the parties are connected, the relief is not restricted however only expenditure on staff, software, consumables and externally provided workers will qualify.*
>
> *- It must also be spent by the sub-contractor within the relevant period- generally 2 months from the end of the accounting period in which the sub-contractor payment is made.*
>
> *- Where the parties are not connected the above restrictions will not apply.*"

143. On the next slide, under the heading "*Attributable to relevant R&D*", the second bullet provides:

> "*- Does s.1053(6) gives [sic] provision for particular kinds of expenditure being attributable to relevant R&D. This means expenditure on staff, software and consumables must be carefully monitored, but a more general approach will be taken for all other expenditure, provided it qualifies as R&D.*"

144. At a meeting on 8 July 2015 between the two of them, Mr Slattery relayed to Mr Corrigan that he had legal advice from Foot Anstey stating that any claim by Mr Corrigan was unlikely to succeed.

145. Mr Slattery's evidence was that at some point after OneE Tax's entry into liquidation, Mr Ismail retired, and Mr Slattery acquired the shareholding in the group. I do not need to go into the detail of that, because it is not relevant to the matter before me. Similarly, while the cross-examination of Mr Slattery elicited that the OneE directors, including him and Mr Timol, were sued by someone who took an assignment of causes of action from the OneE Tax liquidators, that the basis of the claims was that the schemes they were involved with had caused loss to OneE Tax, and that they each paid various sums under a settlement of that action, I do not see the relevance of that to the present matter.

146. Mr Corrigan stated in his witness statement that when OneE launched the Nemaura structure, in his view they did significant irreversible damage to his ability to further implement his structure in the UK, because they immediately assumed first mover advantage and anything that he would have done subsequently would have been perceived by the investment community as copying OneE and Nemaura. He amplified this orally by explaining that the Nemaura structure would be more attractive to investors because it claimed to provide via its gearing a higher rate of tax relief. He also referred briefly in his statement to having run his structure past HMRC subsequently to the launching of the Nemaura structure. He was asked about this in cross-examination, He explained that he and Mr Sherry submitted to HMRC what was essentially the Fast Track Pharma structure (which was a structure with a connected subcontractor). He stated that they raised the issue of s.1053(6) (which, as explained above, relates to unconnected subcontractors) and they eventually received confirmation in around January 2017 that HMRC accepted the analysis of s.1053(6) put forward by Mr Sherry, namely that it was a drafting error. When asked why he had continued to engage with HMRC, he stated that he had put a lot of energy into it and was interested by their reaction, and said that "*maybe, depending on what ultimately happens with money and*

HMRC and how that pans out [which I took to be a reference to HMRC inquiries into Nemaura, with its geared structure], there would be room again for something else". In other words, he considered that there might be room on the market for another R&D relief structure. I do not need for the purposes of this judgment to decide whether Mr Corrigan's views and evidence set out in this paragraph is correct or not, but I include it to record his view.

147. There were a number of references in the evidence, both written and oral, to how much money the OneE group and the Defendants had made from Nemaura. Mr Johnson explained in his statement that he had analysed the accounts and considered that OneE Investments received fees for introducing investors of c.£8.7m and OneE Consulting received fees for providing tax advice and defence support of c.£1.4m, but that total direct costs and apportioned overheads of the companies resulted in a net overall upfront profit of c.£329,000. He also asserted that he "*earned not a single penny of commission, bonus or benefit from the Nemaura (or Rehberg) structure*". Mr Slattery made the same assertion in his statement in identical language. Again, I do not need to decide for the purposes of this judgment whether this is correct or not.

148. Mr Corrigan states that funding difficulties prevented him from issuing a claim at that stage. The claim form in the present proceedings was issued on 5 October 2020, just under 6 years from the date of the OneE presentation at the Lowry.

My impressions of the witnesses

149. I consider that Mr Corrigan was an honest witness, with a pretty good recollection of the events of 2013-4 given the time that had passed. He had an impressive grasp of the tax legislation and was able to recite a number of the provisions. An important difference of approach from OneE was that he saw his structure as not having to use gearing and non-recourse or limited recourse loans, which were not features that he considered attractive. He evidently felt strongly about what had happened, and had a tendency to argue his case or resist on occasions points that he should have accepted, such as in relation to the features of the Ultra Green material, which, contrary to what he asserted, does deal with the position of an unconnected subcontractor. I have considered carefully the submissions made by Mr Budworth about his evidence. I agree that Mr Corrigan's witness statement did not mention that Mr Slattery wished there to be a NDA and that the first mention of it in the e-mails came from OneE, so in my judgment the witness statement did not provide the full picture in this regard. Further, Mr Corrigan's current intentions in relation to his own structure did not come through from his witness statement. However, I reject the broader submission of Mr Budworth that Mr Corrigan should be considered more generally "*an unreliable historian*" (day 5, page 774 of the transcript):

    (1) His evidence that OneE gave the impression at the February 2014 meeting that they had not come across a structure that combined an LLP with enhanced R&D relief is consistent with the contemporaneous documents from 2013 and 2014, as I set out at paragraph 165 below.

    (2) He provided detailed and convincing evidence of the different features of the Structure, his analysis of them at the time, and his development of them in conjunction with Mr Sherry.

(3) His general evidence as to the development of the structure tallies with that of Mr Sherry.

(4) His strong reaction to finding out that OneE had promoted the Nemaura structure using unconnected sub-contractor R&D relief tallies with his belief that he had provided the idea to OneE and that they were previously unaware of it.

Therefore, generally I accept his first-hand evidence as to what happened at the relevant times.

150. Mr Sherry's evidence was careful and measured. He did not have a detailed memory of many of the events, but he answered the questions fully and stated where he did not have a clear recollection. He explained among other things that he had not seen another structure that used a LLP structure to obtained enhanced R&D relief, or any discussion of the merits of seeking to use the 65% unconnected subcontractor relief and whether the underlying expenditure had to relate to the same specific categories as did the expenditure of a connected subcontractor. He had worked for OneE in the past, had made the suggestion that Mr Corrigan speak to OneE, and felt that OneE had, to use the language of his statement, betrayed his integrity by what he understood to be their subsequent actions. I do consider that it would have been better for him to have mentioned that he might receive a proportion of any recoveries in the litigation that Mr Corrigan might make, but his witness statement makes clear that it has been prepared by answering questions presented to him by the Claimant's solicitors, which I assume did not include such a question. In any event, the Defendants did not argue that his testimony should be disregarded or downgraded on that ground, and had they done so, I would have rejected that submission.

151. Mr Slattery was central to the dialogue with Mr Corrigan and the development and promotion of Nemaura. He was a fluent and quick witness. The impression I gained of him was that he had at the time of the relevant events a very busy professional life, and perhaps due to that did not have much recollection of the detail of what happened in 2014, as he made clear in his witness statement. Like Mr Corrigan, he tended to argue his case, and mounted a forceful defence of OneE's position, particularly as to its entitlement to generate a tax mitigation scheme that sought to use the R&D relief expressly provided for in statute.

152. However, I consider that a number of key elements of the substance of his testimony, which he put forward with some vigour, did not tally with the contemporaneous documents, such as (i) the suggestion that the 2013 instructions to Mr Sherry in relation to Nemaura were simply a cut and paste job from the Rehberg instructions, or (ii) that the draft instructions to DLA Piper in May 2014 were simply the result of him and Mr Johnson sitting down and having time to consider the use of R&D relief themselves, independently from the ideas put to them over the first half of 2014 by Mr Corrigan. I reject those elements of his testimony and deal with them in considerably more detail below in the next section given their importance.

153. Therefore, taking the above together, I consider that I should exercise significant care before accepting his evidence on factual matters in dispute to the extent that they cannot be verified from the contemporaneous documents.

154. Mr Johnson was in respect of a significant proportion of his testimony a good witness who listened to the questions put and answered them precisely. He also gave a number of answers against the interests of OneE, such as confirming that after the instructions to Mr Sherry in 2013, as far as he could recall nothing happened internally in relation to Nemaura before the dialogue with Mr Corrigan begun. He made clear in his witness statement that his memory of the relevant events was vague at best and that among other things he could not recall any specific detail of the 4 February 2014 meeting.

155. However, and this a significant qualification, in relation to the substantive *content* of his evidence, there are four important areas of his evidence that I found unconvincing and therefore deal with specifically here. His answers on these points in oral evidence were more defensive and vague.

156. The first is in relation to Ultra Green. His witness statement did not include any first-hand testimony on this point and instead based itself on the documents. The most important passage stated that "*it is very clear from the full counsel opinion and bundle of correspondence that OneE had with Ultra Green in 2008 [in fact it was 2009]…that OneE were already fully aware of this type of structure and how it could work to achieve the "tax geared investment" outcome needed for it to be marketable to its clients*" (paragraph 36). The implication of this, taken in the context of the statement, was that OneE was fully aware of this at the time of receiving Mr Corrigan's ideas. However, he accepted in cross-examination that Rehberg, which was in 2012-2013, was the first tax geared investment structure OneE promoted, that he was unable to recall doing any analysis on Ultra Green himself at the time and thought that the reason that OneE probably did not progress with Ultra Green was because they were busy with EBTs. He accepted that he did not remember Ultra Green in 2014, explaining that OneE did not have a central bank of past know-how that they could draw on (day 4, p.558 of the transcript), and accepted that no other R&D relief based structures had been offered to OneE before Mr Corrigan entered the scene. He also stated that, putting to one side the scheme in the *Vaccine Research* case ([2012] UKFTT 073 (TC)), which did not involve R&D sub-contractor relief, the only R&D relief based structure he was aware of now was Nemaura. When pushed in cross-examination on whether he was really aware of how R&D tax-geared investment structures would work prior to Mr Corrigan's approach, his answer was far from emphatic, and he ultimately stated that he would not necessarily agree that he was not personally aware. In light of the points mentioned above in this paragraph and for the reasons explained in the next section, I reject the suggestion in his witness statement that OneE were "*already fully aware of this type of structure*" in the sense of having to mind at the time that Mr Corrigan approached them a LLP structure that used sub-contractor R&D relief.

157. Second, and tied to that, I reject the assertion in his witness statement that "*there is no evidence…that the brief correspondence we had with Kieran Corrigan in early 2014 had any connection with the development of the Nemaura structure in mid to late 2014*" (paragraph 27). I shall deal below with the question of where the inspiration for the use of subcontractor R&D relief in the May 2014 instructions came from. In my judgment, it came from Mr Corrigan's communications to OneE.

158. The third area was in relation to the preparation of the 2013 instructions to Mr Sherry. His answer as to why those instructions made no mention of subcontractor R&D relief was that they were trying to deal with the basics of how such a structure would work

before coming onto the details of the R&D relief. Again, I reject that, for the reasons set out in the next section.

159. Finally, Mr Johnson was also questioned at some length about the interactions with Mr Mullan and the tone of them. His responses suggested that he did not see a particular problem with what he considered to be Mr Mullan's interpretation of s.1053(6). However, his 28 October and 4 November 2014 e-mails mentioned above (at paragraphs 136 and 138) suggest that there was concern on his part about the construction being adopted. Therefore, I shall proceed on the basis of the contemporaneous documents in this regard.

160. The general conclusion I took from the four points above was that Mr Johnson lacked independent recollection of the detail of the dialogue in 2014 or development of Nemaura and that I should not, in light of the contemporaneous material and Mr Corrigan's testimony, accept his assertions about how the use of unconnected sub-contractor R&D relief in the Nemaura structure came about.

161. Mr Freeman was a straightforward witness who answered the questions put to him clearly. He accepted in his statement that he did not have a clear recollection of the events from 2013-4. Given this and that he left OneE in April 2014 before the events complained of, I consider that his witness evidence is of limited relevance to the case. The research he did in March 2013 is of relevance to the genesis of the 2013 instructions to Mr Sherry in relation to Nemaura, but that evidence comes from the written documents rather than his witness evidence. He accepted orally that the wording of the points in the first three of the four subparagraphs in the main paragraph of his witness statement (paragraph 8) had originally been put to him, rather than being a reflection of his own words, but stated that he had read them carefully and amended them as appropriate.

162. Similarly, I consider that Mr Owens answered the questions honestly and, with one exception relating to paragraph 11.3 of his statement, directly. In relation to the documents mentioned in his statement, he was copied in on the product of Mr Freeman's research in 2013 but did not add to it, and did not comment on the draft instructions to DLA Piper in 2014 because he was going on holiday, so in my judgment his evidence is of limited relevance. He was asked in cross-examination about the wording of one of the sub-paragraphs of the main paragraph of his statement (paragraph 11.3), which stated that had OneE decided to copy third party intellectual property, there would have been little need for him to be instructed to undertake the independent research that he was instructed to and ultimately did conduct. He accepted that the original wording had been put to him by Mr Slattery, but stated that he thought he had changed it to his own wording. He queried whether the paragraph was important and stated that the work he did was a long time ago. It was put to him that he had not in fact produced any work product in relation to the matters referred to in the exhibited documents, and his answer was that he believed that he probably did some work on Nemaura at some point but he did not appear to me to be certain and he was unable to pinpoint when. Therefore, while, unlike Mr Freeman, he was working for OneE in May 2014 and for a number of years after that, I do not consider that he has any reliable first-hand evidence to give of what happened in May 2014.

163. Mr Timol made clear in his statement that he had no recollection of having liaised directly with Mr Corrigan. He was not a technical expert, and left detailed tax matters to his colleagues. I found him a straightforward and direct witness.

164. Finally, I make two more general points. First, particularly on the Defendants' side, the witnesses had little detailed first hand recollection of the relevant even so given that and the time that has passed since the relevant events, I will naturally give heavy weight to the documents in establishing what has happened. Second, I was concerned, particularly in light of the breaches of PD57AC in their preparation, by the fact that a number of the statements contain identical or similar passages at important junctures. I return to this at the end of the judgment in relation to the costs of the application to adduce the re-amended witness statements. The important point for now is that I have treated the common paragraphs with particular care in evaluating the weight to be given to them.

My findings on some of the key factual disputes

165. Before dealing with the relevant legal principles, it is helpful to deal with a key factual dispute, which was where the inspiration for the Defendants' use of sub-contractor R&D relief in the Nemaura structure came from. In my judgment, it is clear that it came from Mr Corrigan on behalf of the Claimant, rather than being something that the Defendants reached themselves, for the following reasons:

(1) Mr Corrigan explained his thoughts on sub-contractor R&D relief to Mr Slattery, Mr Timol and Mr Johnson (the **"OneE attendees"**) at the 4 February 2014 meeting.

(2) There are no documents before that meeting relating to Nemaura containing any reference to using sub-contractor R&D relief.

(3) There was nothing to suggest that there was work done by OneE prior to that meeting to explore the possibility of sub-contractor R&D relief for Nemaura.

(4) On the contrary, the 2013 instructions to Mr Sherry in relation to Nemaura used a different structure that did not involve sub-contract R&D relief, and, as I set out below, the explanations given as to why the instructions were framed as they were in this regard were unconvincing. Further, Mr Johnson confirmed in oral evidence that no further work was done on Nemaura internally after the March 2013 instructions before meeting Mr Corrigan.

(5) When Mr Sherry responded with significant further questions on his instructions, OneE did not proceed further with the instructions at that stage.

(6) Mr Corrigan's evidence, which I accept on this point, was that the possibility of using sub-contractor R&D relief in the Nemaura structure was raised by the OneE attendees at the 4 February 2014 meeting as part of their reaction to him explaining how sub-contract R&D relief could be used.

(7) There is no documentary evidence before me of the Ultra Green structure, and in particular its use of sub-contractor R&D relief, being considered by the Defendants in the course of setting up the Nemaura structure. On the contrary, Mr Johnson's

evidence was that he did not have Ultra Green to mind in 2013 to 2014 when working on Nemaura. In my judgment, this is readily explicable given the following:

(a) Ultra Green was not an opportunity that was taken up by OneE Group.

(b) It had been presented to OneE a number of years previously.

(c) As one can see from a contemporaneous 19 March 2009 e-mail, it was presented to OneE Group at a time when OneE was busy with its EFRBs and EBT products. In that e-mail, Mr Slattery says to Mr Timol that "*Re Ultra Green- Tim is looking at this but I suspect has not advanced that much as we have been snowed under with EFRBS and ERTs*". ERTS are Employment Retirement Trusts, which I understand to be another way of referring to an EBT.

(d) Mr Johnson explained in his oral evidence, OneE Group had no formal knowledge bank that collected together past tax planning structures, thoughts and other material.

(8) There were not documents before me containing any analysis by the Defendants of the use of subcontractor R&D relief for Nemaura before 13 May 2014, when Mr Slattery circulated internally the draft instructions on Nemaura. This is consistent with Mr Slattery's and Mr Johnson's evidence that OneE were busy in the first half of 2014, which I accept, and that they did not get round to considering in detail again the Nemaura structure until May 2014.

(9) The use of subcontractor R&D relief had been put by Mr Corrigan to the Defendants four times: at the 4 February 2014 meeting, in the draft instructions to Counsel that he provided at that meeting, in the Morvus e-mail and in the Fast Track Pharma e-mail.

(10) The tone of the first numbered paragraph of Mr Johnson's 25 February 2014 e-mail, "*[v]irtually all of our clients are SMEs and so there would be very wide appeal for this type of company*", is that the Claimant's idea was a new one to OneE that they had not previously thought of for their clients and could be very attractive to them. While the penultimate paragraph states that "*we hold the internal resource and expertise from similar structures we are currently operating*", I take that to be principally a reference to Rehberg as there were no structures involving R&D sub-contractor relief that OneE were then operating.

(11) When sitting down to draft the OneE instructions in May 2014, which related to a company doing R&D, an obvious source of ideas on which to draw on would have been Mr Corrigan's ideas, including his draft instructions, other e-mails and explanation at the 4 February 2014 meeting.

(12) The Fast Track Pharma e-mail was forwarded by Mr Johnson to Mr Owens on 12 May 2014, the day before Mr Slattery circulated internally the draft instructions. While Fast Track Pharma sought to use a connected subcontractor, the obvious explanation for forwarding on the e-mail, which I consider is the correct one, is that this was to assist in reviewing or preparing the draft instructions. Mr Johnson

and Mr Owens were the two recipients of Mr Slattery's e-mail attaching the draft instructions, and in circumstances where, per Mr Johnson's e-mail, the dialogue with Mr Corrigan had been put on the back burner, in my judgment the explanation for the 12 May e-mail cannot have been an interest in considering further the Fast Track Pharma proposal. Mr Owens confirmed in his oral evidence that he was asked to go over the Fast Track Pharma proposal for the purposes of Nemaura.

(13) While the instructions do not mention s.1053(6) of the 2009 Act, they expressly engage with whether there are restrictions on how the subcontractor expends the money paid to it, and suggest that there are not, beyond the payment being made in respect of research and development.

166. I have taken carefully into account all points that could be argued to point the other way. These include: (i) the expertise of Mr Johnson and Mr Slattery in tax matters, (ii) Mr Johnson's testimony that OneE were busy dealing with the official ceasing of EBT business in mind-2013 and that this continued into 2014, which tallies with Mr Slattery's suggestion that they did not have time at that stage to turn back to Nemaura, (iii) what the Defendants contend is the obviousness of the availability of subcontractor R&D relief, and (iv) the fact that the May 2014 instructions prepared by OneE Investments did not specifically mention the competing arguments that Mr Corrigan had raised on s.1053(6) of the 2009 Act. However, in my judgment they are clearly outweighed by the above. I will return in a little more detail to point (iii) below in the context of whether the information provided by Mr Corrigan was confidential. For present purposes, it suffices to say that OneE did not see the availability of subcontractor R&D relief in 2013, Mr Corrigan did not think that the operation of s.1053 was straightforward, and the three-stage dialogue with Mr Mullan over his interpretation of s.1053, namely through his initial opinion, his follow-up opinion dealing among other things with a question raised by Mr Johnson about the initial s.1053 reasoning, and then a further e-mail by Mr Johnson about the follow-up opinion, does not suggest that the interpretation of s.1053(6) was straightforward either.

167. I am not ruling out the possibility that Mr Slattery did some thinking of his own in the days before 13 May 2014 on the R&D relief. However, in my judgment the inspiration and principal thinking behind the use of the sub-contractor R&D relief came from Mr Corrigan.

168. In relation to the 2013 material, Mr Slattery stated in oral evidence that they were simply a cut and paste from earlier Rehberg instructions because they were very busy working on Rehberg at the time, and that was why he and Mr Johnson "*had not sat down and applied ourselves to an R&D based scheme as opposed to a hotel development scheme*" like Rehberg (day 3, p.338 of the transcript).

169. The 2013 instructions are detailed and paragraph 6.3, which sets out the tax analysis, states:

> "*The tax analysis relatively simple: the LLP obtains a current year loss as the tax treatment follows GAAP and Investor 2 [the corporate investor] can utilize this loss against its other profits (or carry back the loss 12 months, or carry forward the loss against profits of the same trade in future years). The question is whether any other factors could affect this analysis…*"

That produces a significantly different calculation of what amount the investor could set off against his profits to if sub-contractor R&D relief is used.

170. There is therefore no hint of the possibility of sub-contractor R&D relief in the instructions, and on the contrary the instructions that the relief that OneE have in mind is a simple trading deduction. Accordingly, prior to their dealings with Mr Corrigan, there is no sign of the Defendants having considered sub-contractor R&D relief for Nemaura.

171. Further, while I do not have the Rehberg instructions themselves before me, I firmly reject the contention that the March 2013 instructions were just a cut and paste from the Rehberg ones. This is inconsistent with Mr Slattery's own 12 March 2013 e-mail of 19:10, in which he says that one of his remaining tasks is to "*[a]dd to the Case Law, Ramsay and GAAR points*". He then commissioned Mr Freeman to do this work. Mr Freeman, who led the OneE technical team at the time, duly researched on 12 and 13 March a number of the cases that were dealt with in some detail in the March 2013 instructions. Consistent with this, Mr Slattery stated in evidence that he had asked Mr Freeman to look into some cases as part of other team members "*do[in]g some research on R&D*" for him (day 3, p.341 transcript). Therefore, the instructions were the product of some work on OneE's part, rather than just being a cut and paste.

172. In closing, Mr Budworth submitted that Mr Slattery's evidence was that there was no point asking Counsel what was already known about subcontractor R&D relief (day 45, p.790 transcript), and that therefore the instructions focused on seeking to understand the implications of the recent case-law like the *Vaccine Research* case. I reject that explanation, because the instructions were clear at paragraph 6.3 what the intended relief was, and that it was intended to use a simple trading deduction, coupled with gearing, to obtain the relief.

173. Similarly, in my judgment, the substance of Ultra Green was not recalled or used by Mr Slattery or Mr Johnson at the time of preparing the May 2014 instructions. As explained above, Mr Johnston accepted this in cross-examination (day 4, p.558 transcript). He said "*that is not how we operated. We did not have a sort of bank of all the many…structures that we had been sent over the years and we did not develop things using…those structures*". It was Mr Johnson in 2009 who was asked to do the detailed work on Ultra Green.

174. One question that arose in cross-examination was whether Mr Slattery had seen Mr Corrigan's draft instructions to Mr Sherry. While Mr Slattery was candid in his witness statement that his recollection of 2014 eight years on was not clear, he suggested in his oral evidence that he had not think that he had seen Mr Corrigan's instructions before these proceedings. This is not central to the questions above, because in my judgment he was aware of the points that Mr Corrigan had made orally how the structure worked. However, in my judgment he would have seen them at the 4 February 2014 meeting, for the following reasons:

(1) Mr Corrigan's evidence, which I accept, was that the instructions were handed over at the meeting.

(2) Once the NDA had been signed, they could be provided without delay. The e-mails from the time show that the NDA was signed by Mr Corrigan on or around 3

February 2014 and by Mr Slattery by 11.51 on 4 February, which appears to have been just before the meeting, or at the start of the meeting, as Mr Corrigan had flown over from Dublin to Manchester in the morning.

(3) There was a logic in handing them over at the meeting so that they could be discussed during that meeting. Therefore, while a detailed review of them by OneE would need to be done after the meeting, I consider that the content of them would have been explained at the meeting.

(4) There is no e-mail sending them over before or after the meeting, but they had been provided before 25 February 2014 because Mr Johnson sets out some comments on them in his e-mail of that date. Further, they were provided some time before 25 February because Mr Johnson starts his e-mail by apologising for the delay in reverting to Mr Corrigan.

(5) Mr Johnson's 25 February 2014 e-mail can itself be read as suggesting directly that they were provided at the meeting, because he states "*Further to our meeting, I have now reviewed the instructions*", and there is no reference to any interaction with Mr Corrigan since the 4 February meeting.

175. Consistent with my findings in paragraph 165 above, I also find that Mr Corrigan's general account of the 4 February 2014 meeting was an accurate one. The following are the important aspects for present purposes:

(1) Mr Corrigan explained that at the meeting, his proposed structure was worked through in detail on a whiteboard, and that in the course of this the key technical and commercial issues were identified and discussed. That included his views on the subcontractor R&D relief and how it would work, and his and Mr Sherry's intention to take the structure to HMRC for their views on key technical matters and approval of the structure overall. It also included relaying Mr Sherry's views to date, recognising that Mr Sherry had yet to provide a written opinion.

(2) It was explained to Mr Corrigan that executives in OneE had a private investment in Nemaura, a biotech company and the OneE attendees asked if Mr Corrigan's proposed structure could be used to introduce funds into Nemaura. He explained that he had no difficulty with this provided that he was fully informed as to the background and activities of Nemaura.

(3) The impression given by the OneE attendees was that they were interested in progressing the structure with him, and that they had not considered the possibility of using R&D subcontractor relief. There was some difference in the competing cases before me and the oral evidence of Mr Corrigan and Mr Slattery as to the extent to which OneE's main interest lay in Mr Corrigan marketing Project Joshua to Irish companies, rather than in progressing the R&D planning that Mr Corrigan had put forward. The Defence put the argument as high as that the Defendants were from meeting Mr Corrigan not interested in any proposed structure from Mr Corrigan for the UK market as they were well aware of such structures. I certainly consider that Mr Corrigan was keen to progress the R&D planning, as one can see from his follow up e-mails and sending on the e-mails relating to Morvus and Fast Track Pharma. The e-mails do also suggest there OneE wanted Mr Corrigan to move faster in relation to his work items in relation to the R&D planning, such as

obtaining Mr Sherry's opinion. However, in my judgment, there were interested in pursuing the R&D planning. That tallies with (i) Mr Slattery's 18 December 2013 e-mail, which after mentioning both Joshua and the R&D planning, stated "*I am keen to progress matters and there appears to be a good fit between our two firms*", (ii) the testimony of Mr Johnson, who accepted that the R&D work of Mr Corrigan was of interest and that was one of the reasons they met with him (transcript day 4 p.575), (iii) Mr Johnson's 25 February 2014 e-mail stating that there could be "*very wide appeal*" for their clients for the type of structure set out in the draft instructions, (iv) the requests to Mr Corrigan for information about the R&D planning work, such as the opinion of Mr Sherry, and (v) the fact that the R&D subcontractor relief could be used in Nemaura but had not been considered by OneE prior to meeting Mr Corrigan.

I pause to note that while the evidence of Mr Slattery was that once the OneE technical team, including him, sat down to consider the appropriate structuring of Nemaura, they alighted on using R&D sub-contractor relief, there was no suggestion that this occurred in February 2014 rather than around May 2014 when the instructions to DLA Piper were formulated.

(4) They discussed fees and Mr Corrigan explained he believed it should be a full joint venture and that he would be entitled to participate in all capital profits made by companies exploiting the proposed structure, including Nemaura in the event that his proposed structure was used in relation to it.

176. I do not need to get into precisely what discussion there was at the meeting of other issues discussed in the dialogue between Mr Corrigan and OneE like "Joshua", a tax mitigation structure that OneE had been marketing in England, because they are not directly relevant to the present point.

Relevant legal principles

177. I shall set these out in outline, and deal with any more detailed legal points in the course of applying the law to the facts. I shall leave the principles governing limitation to that section.

Breach of confidence

178. The basic requirements were not in dispute.

179. The requirements of breach of confidence are:

(1) the information must have the necessary quality of confidence about it;

(2) the information must have been imparted in circumstances importing an obligation in confidence; and

(3) an unauthorised use of that information to the detriment of the person communicating it

(*Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 47, adopted in *Racing Partnership Ltd v Done Bros Ltd* [2021] Ch 233 (CA) at [44] per Arnold LJ).

Arnold LJ also suggested in *Racing Partnership* at [45] that there was a further requirement that was often not mentioned, no doubt because on the facts of many cases the condition was not raised, that the unauthorised use of the information was without lawful excuse. However, in the present case, if requirements (1) to (3) above are satisfied, so in my judgment will the further requirement, because there is no public interest defence in issue, so I shall not deal with it further.

The necessary quality of confidence

180. As Arnold LJ explained in *Racing Partnership Ltd v Done Bros Ltd* [2021] Ch 233 (CA) at [46], the doctrine of misuse of confidential information concerns the control of information and misuse of confidential information is a species of unfair competition. The basic attribute which information must possess before it can be considered confidential is *inaccessibility*: [48]. Specifically, "*the claimant in a case of this kind must demonstrate that it has sufficient control over the information to render it relevantly inaccessible*": [72]. While Arnold LJ was in the minority on the result of the appeal, there is nothing in the other judgments that casts doubt on these principles.

181. On the contrary, the principles were put in similar terms in *CF Partners (UK) LLP v Barclays Bank plc* [2014] EWHC 3049 at [124], where Hildyard J explained that:

> "*The basic attribute or quality which must be shown to attach to the information for it to be treated as confidential is inaccessibility: the information cannot be treated as confidential if it is common knowledge or generally accessible and in the public domain. Whether the information is so generally accessible is a question of degree depending on the particular case. It is not necessary for a claimant to show that no one else knew of or had access to the information.*"

182. Reference was made in submission to the decision of HHJ Hacon in *Trailfinders Ltd v Travel Counsellors Ltd* [2020] EWHC 591. The Judge explained that in his view the best guide to the distinction between information that is confidential and that which is not is now to be found in the definition of trade secrets in regulation 2(1) of the Trade Secrets (Enforcement, etc.) Regulations 2018 (the **"2018 Regulations"**): [29]. The definition is:

> "*…information which-*
>
> *(a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among, or readily accessible to, persons within the circles that normally deal with the kind of information in question,*
>
> *(b) has commercial value because it is secret, and*
>
> *(c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret*"

183. I consider that a little care is needed with the proposition put forward by the Judge. First, as HHJ Hacon explained at [8], the Government considered that English law already provided through the doctrine of breach of confidence the substantive protection required by the Trade Secrets Directive on the protection of trade secrets

(2016/943/EU) (the **"Trade Secrets Directive"**) so that it was unnecessary to implement through the 2018 Regulations those provisions granting such protection. Rather the provisions implemented through the 2018 Regulations were those relating to remedies. Reg.3 of the 2018 Regulations accordingly makes clear that the protection offered by that doctrine is maintained. Therefore, the law of breach of confidence as it stood in English law prior to the 2018 Regulations is expressly and deliberately retained, so the previous cases retain their relevance. Indeed, in *Trailfinders* the Judge went on to consider the relevant case-law.

184. Second, it does not seem to me that the commercial value requirement in limb (b) of the definition is necessary for breach of confidence. *CF Partners* explains at [123] that while confidentiality does not attach to trivial or useless information, *"the measure is not its commercial value".* Similarly, I do not consider that the requirement in limb (c) is a requirement of a breach of confidence. Therefore, it appears to me that the doctrine of breach of confidence extends beyond circumstances where the information amounts to a trade secret for the purposes of the 2018 Regulations.

185. Third, consistent with the foregoing, there is no suggestion in the Court of Appeal decision *Racing Partnership*, which post-dates the first instance decision in *Trailfinders*, that the test for breach of confidence is now the reg.2(1) trade secret test.

186. However, I consider that limb (a) is a useful guide, and it was this limb which was relied on by the Defendants in their skeleton. It tallies with the test set out by Arnold LJ and the approach in *CF Partners*, and helpfully brings out the relevant category of people to which attention is being directed in determining whether the information is readily accessible or not.

187. In any case, on the present facts, as I shall explain, I consider that the information both amounts to confidential information and a trade secret, so the point is not determinative.

188. Where there is a contract that places limits on the confidentiality obligations that apply, those limits are normally respected by the doctrine of equitable breach of confidence (*Vercoe v Rutland Fund Management Ltd* [2010] EWHC 424 (Ch) at [329]-[330]), but not always (*CF Partners* at [132]-[133]). I shall return below to the relationship between the contractual provisions here and the scope of the equitable duties of confidence on the Defendants.

Imparted in circumstances importing an obligation in confidence

189. The test regarding the defendant's appreciation of whether the information was confidential, is objective in the sense that it requires the claimant to show that the defendant *ought* to have appreciated that it was confidential, irrespective of her actual state of mind: *Trailfinders* at [42] at first instance, and [14] in the Court of Appeal ([2021] EWCA Civ 38); *Racing Partnership* at [79] per Arnold LJ, adopted by Phillips LJ at [170] and Lewison LJ. In applying this, "*[i]f the reasonable person would make enquiries, but the recipient abstains from doing so, then an obligation of confidentiality will arise*": *Trailfinders* CA at [28], although this may only apply in cases of primary rather than secondary liability: [29].

Unauthorised use of that information to the detriment of the person communicating it

190. A person who owes an equitable obligation of confidence is liable for acting in breach of that obligation even though he is not conscious of doing so: *Primary Group (UK) Ltd v Royal Bank of Scotland plc* [2014] EWHC 1082 (Ch) at [244], relying on the Court of Appeal decision in *Seager v Copydex Ltd* [1967] 1 WLR 923.

The 2018 Regulations

191. The 2018 Regulations came into force on 9 June 2018: reg.1(1). They apply to proceedings brought before a court after the coming into force of the Regulations, in respect of a claim for the unlawful acquisition, use or disclosure of a trade secret, and for the application of measures, procedures and remedies provided for under the Regulations: reg.19.

192. Where the Regulations apply, then on the application of an injured party, a court must order an infringer, who knew or ought to have known that unlawful acquisition, use or disclosure of a trade secret was being engaged in, to pay the trade secret holder damages appropriate to the actual prejudice suffered as a result of the unlawful acquisition, use or disclosure of the trade secret: reg.17(1). A Court may award such damages on the basis of either reg.17(3) or (4): reg.17(2).

193. The Claimant pleaded that the reg.17 damages regime only applies to breaches of confidence committed from 9 June 2018 onwards (paragraph 61 of the Particulars). The Defendants did not contest this proposition, and I consider it is correct. Reg.17 only applies where the infringer knew or ought to have known that unlawful acquisition, use or disclosure of a trade secret was being engaged in: reg.17(1). Therefore it can only apply to acts after the 2018 Regulations came into force and created the statutory concept of a trade secret for these purposes.

194. However, the Claimant submitted that the 2018 Regulations impose a specific statutory limitation period for breaches of confidences that amount to unlawful acquisition, use or disclosure of a trade secret, whether or not those breaches occurred on or after 9 June 2018. I shall deal with that submission in the section on limitation below.

Joint liability

195. The principles governing joint liability, unlawful means conspiracy, and inducing a breach of contract were not in dispute, so I can conveniently take them from the Claimant's skeleton.

196. As set out in *Fish & Fish Ltd v Sea Shepherd UK* [2015] AC 1229, to establish joint liability on this basis, three conditions must be satisfied (see eg at [21], [37], [49], [55], [57], [100]):

    (1) The defendant must have assisted the primary tortfeasor to commit a tortious act (such assistance being more than trivial).

    (2) The assistance must have been provided pursuant to a common design between the defendant and the primary tortfeasor that the act be committed.

    (3) The act must constitute a tort as against the claimant.

197. While *Fish & Fish* concerned tortious wrongdoing, the same principles apply to breach of confidence, albeit that the requirement in a claim for breach of confidence that conscience be affected means that the common design must involving sharing that feature of the wrong. See *Vestergaard Frandsen v Bestnet* [2013] UKSC 31 at [33]-[35].

198. I shall deal with the position of directors in the course of applying the law to the facts.

Unlawful means conspiracy

199. The law on unlawful means conspiracy was recently reviewed by the Court of Appeal in *Racing Partnership*, with Arnold LJ giving the principal judgment for the majority on the issue of conspiracy. In light of that judgment and earlier authority such as *Kuwait Oil Tanker Co SAK v Al-Bader* [2000] 2 All ER (Comm) 271 (at [108]), the requirements can be summarised as being:

(1) a combination or understanding between two or more people;

(2) an intention to injure the claimant. The intention to injure does not have to be the sole or predominant intention. It is sufficient if the defendant intends to advance its economic interests at the expense of the claimant;

(3) unlawful acts carried out pursuant to the combination or understanding; and

(4) loss to the claimant suffered as a consequence of those unlawful acts.

200. As regards the combination or understanding, this need not amount to an agreement of a contractual kind, but it does require a combination and common intention to carry out the acts complained of. The conspirators need to share a common intention to carry out a particular activity. Given the Court of Appeal's ruling in *The Racing Partnership* (at [139] and [171]), they do not need to know that the activity is unlawful to become liable.

201. Turning to intention to injure, it was held in *Lonrho v Fayed* [1992] 1 AC 448 that it need not be the alleged wrongdoer's predominant intention to injure the claimant where the means employed was unlawful. As Lord Nicholls set out in [167] of *OBG v Allan* where the injury is the obverse side of the coin to the wrongdoer's gain, such the gain and the loss are inseparably linked, the requisite intention to injure would be present. It is not sufficient that the loss to the claimant is merely foreseeable: *OBG* at [166] as explained by Briggs J in *Bank of Tokyo-Mitsubishi UFJ v Sanayi* [2009] EWHC 1276 at [831]-[832]. While *OBG* was a case about inducing a breach of contract and causing loss by unlawful means, these dicta about intent to injure apply equally to unlawful means conspiracy: *Bank of Tokyo-Mitsubishi UFJ* at [833].

202. As for the unlawful means, breach of contract and misuse of confidential information may constitute unlawful acts on which the tort is founded: see *The Racing Partnership* at [168] and [173].

203. The last requirement, that loss be caused by the unlawful means, raises the issue of the "instrumentality" of the means. This was discussed by Arnold LJ in *The Racing Partnership* at [148]-[156]. At [154], after distinguishing the issue from that of the intent to injure, he held that the issue was one of causation, saying that *"[t]he unlawful*

means must have caused loss to the claimant, rather than merely being the occasion of such loss being sustained."

Procuring breach of contract

204. The requirements of this tort were set out by the House of Lords in *OBG Ltd v Allan* [2008] 1 AC 1 per Lord Hoffmann at [8] and [39]–[44] and per Lord Nicholls at [168]–[193]. The wrongdoer must knowingly and intentionally procure or induce a third party to break his contract to the damage of the other contracting party without reasonable justification or excuse.

Applying the law to the facts

Breach of confidence

(i) Necessary quality of confidence

205. The first question to consider is whether the information has the necessary quality of confidence and what information one is considering. The fact that the inspiration for some of the Nemaura structure may have come from Mr Corrigan's idea does not itself mean that there is specific information that is confidential, imparted in circumstances importing an obligation of confidence and that has been misused so as to satisfy the three-part *Coco v Clark. Racing Partnership* contains, as Mr Budworth submitted, a salutary warning against finding too readily that broadly or vaguely framed categories of information are confidential.

The legal principles in more detail

206. When one is considering information that is by its very nature confidential, like highly price-sensitive information only known to one person, that it is plainly not information that is "*readily accessible*" to the relevant category of persons (or to use Arnold LJ's phrase, "*relevantly accessible*"). The holder of the information is entitled to control the use of that information.

207. Where the information contains the explanation of (a) how something in the public domain is made or (b) (as here) is constructed out of materials in the public domain, one needs to look a little more carefully at the information in order to judge whether it satisfies that test, but the test is the same.

208. For example, in the case of design drawings, which are pieces of information that provide the recipe for how to construct something that is in the public domain and therefore falls within (a) above, the question is, as Arnold J put in *Force India* [2012] RPC 757 at [222], whether the features could *readily* be *ascertained* from publicly accessible examples of the article. This analysis was not disturbed on appeal. That is another way of putting the question of whether the information is readily *accessible*. Given that the ordinary process of seeking to get to the information involves working out from publicly accessible examples how they are constructed, it is natural to describe this as *ascertaining* the information in such a context, and one examines how easy or difficult it is to get to that information. A good example of this reasoning in operation is the judgment of Lord Greene MR in *Saltman Engineering Company Ltd v Campbell*

Engineering Company Ltd (1948) 65 RPC 203, one of the cases followed in *Coco v Clark* in devising the first limb of the three-stage test.

209. A similar sentiment underlies the springboard doctrine, namely that someone who obtains information from a private source should not be in a better position than someone who obtains it from a public source. As Lord Denning explained in *Seager v Copydex* [1967] 1 WLR 923 at 931, if someone saves a significant amount of trouble by obtaining information from documents, instead of sourcing the information from public sources, that is enough:

> "*When the information is mixed, being partly public and partly private, then the recipient must take special care to use only the material which is in the public domain. He should go to the public source and get it: or at any rate, not be in a better position than if he had gone to the public source. He should not get a start over others by using the information which he received in confidence. At any rate, he should not get a start without paying for it.*"

210. Megarry J also explained in *Coco v Clark* about how to deal with situations in category (b) above, where raw materials in the public domain are combined to produce the information:

> vii) "*[S]omething constructed solely from materials in the public domain may possess the necessary quality of confidentiality…But whether it is described as originality or novelty or ingenuity or otherwise, I think there must be some produce of the human brain which suffices to confer a confidential nature upon the information.*" ([1969] RPC 41, 47)

211. Such formulations readily put one in mind of tangible materials in the public domain being combined to create a product, but the same is true of any materials. Such combination is what is being done when a tax scheme is created. One is taking common legal concepts, like trusts, loans, company and LLPs, and using one's interpretation of another material in the public domain, namely legislation, to generate ideas that lead to towards a product that can be used to save tax. As Mr Hill put it in his skeleton, the fact that the statutory provisions exist is not barrier to confidential information arising. Rather, "*it is how to make use of and the analysis of the statutory provisions that constitutes the confidential information*".

212. The test of ready accessibility focuses attention in such a context to whether these are ideas that others can readily come up with or not, and if so with what degree of effort or expenditure. The concepts of how novel the idea is, what skill it involves to come up with it and, in some cases, how valuable it is may all be relevant to answering how accessible the information is, but they are not tests in themselves.

213. Taking some examples of this in practice, (a) in *Ocular Sciences v Aspect Vision* [1997] RPC 289, a booklet setting out the dimensions of contact lenses was held not to be confidential. Laddie held that the compilation of public information did not involve "*the product of the skill of the human brain*" (374), but was a "*mere non-selective list of publicly available information*" (375), so that the fact that time and effort had to be expended in producing it was not sufficient; and (b) in *Fraser v Thames Television Ltd* [1983] 2 All ER 101, which related to an idea for a television series, the Court considered that the content of the idea needed to be "*clearly identifiable, original, of*

potential commercial attractiveness and capable of reaching fruition" (122a-b), and that the on facts before it that test was satisfied.

214. The fact that others can come up with the idea or product does not prevent it being confidential. There may be a pool of inventors who can invent a particular product, but if one does so and then shares it with someone else to help him market it, who in turn publishes it without the inventor's consent to make a profit for himself, the marketer cannot answer a breach of confidence claim by saying that it might have been possible with cost and effort to obtain it from another inventor. Nor in my judgment is it itself an answer to say that he could with effort have done it himself, as would be the case where an inventor shares an idea or product with another inventor.

Applying the legal principles to the facts

215. Turning with that all in mind to the present case, the creation of tax planning schemes involves significant skill, such as (i) familiarity with the relevant legal concepts like LLPs, trusts, companies and contracts, (ii) the ability to interpret technical and lengthy legislation, (iii) an appreciation of the relevant accounting principles, (iv) the ability to think creatively to use (i) to (iii) in order to come up with potential structures, and (v) the ability to ascertain whether the product will have appeal in practice to a relevant segment of the population of possible clients. There are therefore a particular group of professionals, such as tax planning silks, solicitors and accountants who operate in that sphere. The skills that they have make their services of financial value.

216. The need for the application of such skill, combined with the effort to use those skills to generate tax planning ideas and structures, necessarily makes that information far more likely to be confidential than a mere list of publicly available information, or ideas or a combination of ideas that are relatively easy for a member of the public to come up with. It is information which is considerably less accessible than those categories of information.

217. Consistent with that, the Defendants here plainly regarded the information that they provided to Mr Corrigan in relation to one of their own tax mitigation structures, codenamed "Joshua", as confidential, because they required him to sign the NDA before they provided details of it to him in February. Similarly, to take an easy example, it is clear that a complex tax scheme involving components that no-one had yet thought of would be a confidential document. Therefore, there is no difficulty with the proposition that a tax planning scheme can be confidential. The question is whether the particular tax planning ideas that Mr Corrigan imparted were.

218. The first task is to be clear what the relevant information under consideration is.

219. In my judgment the relevant information comprises, as the Claimant contends, the proposed structure set out in the draft instructions (the Structure referred to in paragraph 2 above), the proposed Morvus structure and the proposed Fast Pharma structure (together the **"Information"**), for the following reasons:

(1) That is the information which was provided to OneE.

(2) The information in the draft instructions was not provided as discrete parts, either as matter of form or substance. As a matter of form, the draft instructions were

handed over in their totality and then talked through at the 4 February meetings, and the Morvus and Fast Pharma structures were set out in e-mails. As a matter of substance, the draft instructions were provided as a means to put together a tax mitigation structure, and the Morvus and Fast Pharma structures were presented as investment opportunities, so they were necessarily provided to OneE as whole structures.

(3) Putting the point another way, the *purpose* of the information was to generate tax mitigation structures. Therefore, each of the (i) proposed structure in the instructions, (ii) the Morvus structure and (iii) the Fast Pharma structure were necessarily intended to be considered as a whole structure, because only then would one have something which could fulfil the aim of the structure.

(4) The work done by Mr Corrigan in conjunction with Mr Sherry was on a number of aspects of these structures, and was to seek to put together this work into possible structures.

220. In my judgment, whether one phrases the touchstone as ready accessibility (the 2018 Regulations) or ascertainability (Arnold J in *Force India*), relevant accessibility (Arnold LJ in *Racing Partnership*) or general accessibility (Hildyard J in *CF Partners*), they all amount to much the same thing and it is clear that the information here was not sufficiently accessible or ascertainable whichever wording is chosen, for the following reasons:

(1) It was compiled over a significant period of time, namely 2012-2014, by a specialist and experienced tax lawyer, Mr Corrigan, with the benefit of input from a very experienced and specialist tax barrister, Mr Sherry. Therefore, it was the product of significant specialist skill and effort, and was not the sort of proposal that was simple to come up with from scratch. As explained in paragraph 215 above, a creation of one or more potential tax planning structures involves significant skill in the respects set out above.

(2) Reflecting the work set out in (1), the information involved a number of technical aspects, such as (a) the interpretation of the subcontractor R&D relief provisions in the 2009 Act, including s.1053(6), (b) the tax treatment of LLPs, (c) an appreciation of the relevant accounting principles, (d) consideration of the GAAR and DOTAS legislation and the case-law on tax avoidance, and (e) consideration of the likely attitude of the Inland Revenue. Taking s.1053(6) as a prime example of the above, it is not necessarily obvious at first glance what it is intended to mean in the context of s.1053, and generating a firm answer to that question requires one to evaluate the role of s.1053(6) and s.1053 more generally in the subcontractor R&D relief provisions, the purpose of the distinction between relief for connected subcontractors and unconnected contractors, the relevant backdrop to the 2009 Act provisions, including the 2000 Act and the purpose of the 2009 Act, and the different constructions that one can give to s.1053(6) in light of the foregoing.

(3) The ability to use structures like the one set out by Mr Corrigan was not generally known. There was no suggestion before me that there any other subcontractor R&D relief schemes based on the 2009 Act were on the market at the time, some 4-5 years after the 2009 Act was passed, or had been previously. The Claimant's idea was to broaden those who could access the relief beyond those businesses that typically

involved themselves in R&D and through the use of unconnected subcontractors allow the broadest range of R&D expenditure within the structure. I return to that below.

(4) The use of sub-contractor R&D relief for corporate investors rather than companies normally involved in R&D was not in my judgment a point that OneE, themselves specialists in the field, arrived at themselves. I have found above that they used Mr Corrigan's idea in this regard.

(5) The dialogue back and forth between OneE Investments and Rory Mullan also suggests to me that the application of s.1053(6) is not a straightforward question. The issue led to a number of exchanges between those parties and he did not suggest just reading down s.1053(6) in the way that Michael Sherry did.

(6) Significant expenditure of thought, coupled with originality, was needed to get from the basics to the structures proposed, which is why such structures necessarily held commercial value: they were structures that people might pay significant sums to use.

(7) The confidentiality of tax planning solutions was reflected in the use of an NDA which covered information provided by both parties designed to protect the confidentiality of such solutions. It was pleaded by the Defendants, but not raised orally at trial, that the definition of Confidential Information in clause 1 of the NDA (extracted at paragraph 80 above) only covered information provided by OneE to Mr Corrigan. That is not the case: (i) the opening paragraph of cl.2 makes clear that the parties are disclosing Confidential Information to each other, so that the definition of Confidential Information applies to information passed either way between the parties, (ii) the opening wording of cl.2 reinforces this by stating that either party can be the Recipient, and (iii) the rest of cl.2 is premised on it being possible for Confidential Information to pass both ways. Therefore, the NDA applies evenhandedly to information passed either way between the parties to it, as the correspondence exchanged on 19 and 20 December 2013 in amending it envisaged (see paragraphs 77 to 79 above).

221. Therefore, it is in my judgment plain that Mr Slattery could not just walk outside the 4 February 2014 meeting and publish the draft instructions that Mr Corrigan had imparted, or a top and tailed version of them. Nor could Mr Corrigan walk out of the meeting and publish the Project Joshua material with which he had been provided.

222. There was significant focus in all elements of the Defendants' case on the fact that R&D relief is a widely used statutory relief. However, in my judgment this misses a key point. The possible structure put forward by Mr Corrigan did not involve pharmaceutical or other companies that normally engage in R&D claiming standard R&D tax relief, as I understand Nemaura itself had done before Mr Corrigan met OneE. Rather Mr Corrigan's possible structure allowed companies who would not otherwise involve themselves with R&D being able to take the advantage of the R&D tax relief regime, using the relief relating to sub-contracted R&D. It combined the use of those provisions with an LLP structure to allow the investors in the LLP to obtain such relief, rather than the person doing the R&D work. By fitting these features together, Mr Corrigan had come up with a possible structure that was not then on the market.

223. As Mr Sherry put it orally in giving evidence of his explanation to the Revenue of how the structure devised by Mr Corrigan was meant to work, "*the point of this was to encourage genuine availability of funds for R&D expenditure and to allow the persons providing the funds or providing the risk finance at the edge to benefit from the reliefs, which in the paradigm case would not be available, would not be something which could be utilised by the enterprise that was actually doing the research*" (day 3, p.308 of transcript). Mr Sherry explained in his witness statement that Mr Corrigan was aware that while the statutory R&D tax credits were generous, they could not be used by smaller pharmaceutical enterprises because they had insufficient profits to use up the credits. Therefore the funding of clinical trials, particularly the later stages of such trials, represented a difficulty for such smaller enterprises. Equally many highly profitable small or medium sized enterprises had surplus cash that could be used to finance such research and make use of the enhanced R&D tax deductions.

224. Mr Corrigan was considering in the draft instructions both variants of the structure that had an unconnected sub-contractor and those that had a connected sub-contractor. He explained in his oral evidence that his view was that smaller schemes, like Fast Pharma, could use the connected provisions, because it was feasible to restrict and monitor the categories of sub-contractor expenditure. However, this would not be feasible for a large fund of say £100m, where the research might for example be carried out all over the world, which would need to use the unconnected sub-contractor provisions. Therefore, it was important to his thinking that the unconnected sub-contractor provisions could operate in a way that would not restrict the categories of intended sub-contractor expenditure, as long as the money was to be expended on R&D.

225. The next question is whether it makes a difference that (a) the Nemaura structure as it stood prior to OneE meeting Mr Corrigan had a number of the features of the Structure, and (b) OneE added a number of features that Mr Corrigan's structure did not have. What OneE did was not to seek to use the Structure as a whole but rather to use some components of it.

226. At my request, Mr Corrigan's legal team produced a table comparing what they contended were the features of the different relevant tax planning proposals and structures before me that Mr Corrigan and/or OneE were involved in, and the Defendants' legal team then responded to this by producing an amended table. The two versions are appended to this judgment. The proposals and structures that they compare are (i) Mr Corrigan's proposals / structure, (ii) the final version of the Nemaura structure (**"Nemaura (2014)"**), (iii) the Nemaura structure disclosed by the 2013 instructions to DLA Piper (**"Nemaura (2013)"**), (iv) Rehberg and (v) Ultra Green. I have found this exercise a useful one, because it highlights in an accessible form the features of the different proposals, the differences between them and the aspects that they have in common.

227. The comparison brings out that the main feature present in the Claimant's Structure that was not in Nemaura 2013 but which was used in Nemaura 2014 was the R&D sub-contractor relief. Much of the rest of the earlier Nemaura structure was similar to the Structure.

228. Mr Corrigan also placed some emphasis in his evidence and in the Particulars on the fact that the Structure allowed through the operation of the 2009 Act a payment to an unconnected subcontractor to qualify in full for deduction in the year of payment.

Specifically that operated through the use of the word "*incurred*" in s.1053(1). However, it does not appear to me that Nemaura 2014 used the reasoning in the last sentence, because paragraphs 34 to 41 of the final version of the Nemaura instructions prepared in May 2014 and the 7 October 2014 presentation both suggest that the reasoning used by OneE was that the payment was deductible under GAAP rather than relying on the statutory wording.

229. Therefore, the most important feature of the Structure for the purposes of the present claim was the use of R&D sub-contractor relief, including the reasoning on s.1053(6). However, as I have explained above, that feature is not to be taken in isolation. Rather Mr Corrigan's key insight for the purposes of the present claim was that that one could build an R&D sub-contractor structure with an LLP at the top. Further, one could build it in a way that the LLP was unconnected to the subcontractor, which would (if the LLP traded) attract R&D relief of 181.25% on the sub-contractor payment (paragraph 39 above), and would do so without the need for the expenditure of the subcontractor to be limited to the categories of expenditure on staff, software, consumables and externally provided workers that formed the subject matter of ss.1124, 1126 and 1132. Those categories were also reflected in s.1134 in relation to connected subcontractors, together with payments to subjects of clinical trials. As part of the insight above, the Claimant provided legal reasoning for its view that the limits that I have just mentioned did not apply. Mr Corrigan explained in his witness statement the perceived restrictive nature of these categories, because they exclude for example overhead or management costs, the costs of the patenting process and the costs of non-human trials.

230. The question is whether these elements of the Structure in isolation are sufficient to amount to confidential information. In my judgment, they plainly are. Many of the reasons in paragraph 220 above hold good in relation to this material. Specifically:

(1) It took time and effort on Mr Corrigan's part in conjunction with Mr Sherry to work out how the R&D subcontractor relief applied.

(2) It required specialist skill to do so.

(3) It was not something used in a structure on the market at time.

(4) It was not something that OneE spotted on their own, despite considering how to structure Nemaura in 2013.

(5) It was not a structure that Michael Sherry had come across before.

(6) The dialogue back and forth between OneE Investments and Rory Mullan also suggests to me that the application of s.1053(6) is not a straightforward question.

(7) It was a central part of the Structure. To use the language of Mr Corrigan from his cross-examination, the frame of the Structure is an LLP because that is a convenient and quite common taxation method that allows the profit and losses to be attributed to the partners, but the engine that powered the structure was the R&D sub-contractor relief.

(8) It allowed R&D relief to be claimed if the unconnected subcontractor's expenditure extended beyond the categories set out in ss.1124, 1126 and 1132, or indeed beyond those in s.1134.

231. The insight about subcontractor R&D relief under the 2009 Act, particularly using unconnected sub-contractors, and using it in a LLP structure that corporates could invest in, could in theory have been achieved by someone else with sufficient time, effort and skill, as evidenced by the opportunity that Ultra Green came up with based on the 2000 Act. That may well be relevant to the remedies for the breach of confidence, but it does not prevent the information being confidential. It is true that in one sense it is a simple idea, and one that under the 2000 Act had been put forward by Ultra Green in their e-mails to OneE, but it is not one that appears on the evidence before me to have previously been done by others or under the 2009 Act. Like many simple ideas, it was the product of significant preparatory work, which in my judgment helps to explain why others had not come up with it.

232. I was provided with little direct material from which to evaluate how well-known the relevant aspects of the operation of the R&D sub-contractor relief provisions were at 2013-4, particularly those relating to unconnected sub-contractors and particularly their use in an LLP structure, and what discussion they provoked in the area. However, there were two particular documents that were put before me midway through the trial that I need to mention. I do not understand either of the two documents to deal with the question of the use of R&D sub-contractor relief *within a LLP structure with corporate investors so as to allow the corporate investors to claim the benefit of the relief*, so they do not provide me with evidence of the sort of structure that the Claimant proposed being present in the market. In any event, I reject the Defendants' submissions as to how I should deal with them, for the detailed reasons below.

(1) There was a dialogue on a website called "Accounting web" from 2012 that discussed the claiming of R&D relief for 65% of the payment made to an unconnected sub-contractor. Mr Slattery in cross-examination asserted that his present belief was that there was widespread knowledge of such relief. It was put to him that he was lying about this and in answering that, he stated that he had recently conducted a search of the internet to see what material from 2012 on subcontractor relief was available and had come across it. The Defendants submitted at the end of the third day, after Mr Hill had concluded his cross-examination of Mr Slattery, that it should be adduced in evidence in order to show that Mr Slattery was not lying as to his present belief. The Claimant objected to this, submitting that such evidence could and should have been adduced sooner and that they may have wished to deal with it in evidence themselves if it had been. In my judgment, while it would make no difference to my substantive conclusions, such evidence should not be admitted. It is for the Court to decide whether the information was sufficiently accessible at the time, so I do not need to get into whether Mr Slattery does or does not currently hold particular views on that substantive issue. Further, I am very reluctant to allow in on a piecemeal basis one piece of material from 2012 on R&D relief provided midway through the trial, particularly without giving the Claimant a further opportunity to put in evidence on the state of knowledge in 2012.

(2) The second was the passage in what the Defendants contend is the relevant Inland Revenue manual from the time that dealt with R&D subcontractor relief, namely

CIRD84200 of the Corporate Intangibles Research and Development Manual, which stated among other things that "*a company can claim R&D tax relief on 65 per cent of the payment it makes to the sub-contractor*". The relevant points are as follows:

(a) Mr Sherry mentioned in his October 2014 opinion that his conclusion that the conditions that applied to expenditure by connected subcontractor did not apply to expenditure by unconnected sub-contractors tallied with Revenue practice, citing the manual. Further in cross-examination Mr Slattery referred to the manual in contending that the subcontractor R&D relief was well-known at the time.

(b) At the start of the Defendants' closing, the Defendants submitted that the passages in the manual should be put before me and set them out in a note, whether on the basis that (i) they had to be included because they had been referred to in oral evidence and in the documentary evidence, as set out in (a) above, (ii) I should take judicial notice of them, (iii) I should accede to an application to admit them as late evidence or (iv) I should allow the defence to be amended so as to allow the Defendants to plead the manual in support of their public domain defence.

(c) It was common ground that I could and should look at the passages, not least because they were referred to in other evidence. However, the Claimant objected to them being adduced as evidence as to how well-known and understood the subcontractor relief provisions were at the time, arguing that (i) no case had been pleaded to the effect that the manual meant that the document was accessible and/or in the public domain, (ii) no proper explanation had been given or existed as to why this was adduced and raised so late, and (iii) had this been adduced earlier, (a) they would have wanted to consider whether to deal with it in evidence, (b) it could have been put to witnesses orally, and (c) they would have wished to consider whether to seek to adduce expert evidence dealing with the knowledge of the details of R&D subcontractor relief at the time. The Claimant also stated that it would need to confirm that the manual pointed to is the one from the time and whether there were other provision from the manual that they would wish to refer to.

(d) In my judgment, the passage in the manual does not affect my substantive conclusion. The versions referred to in the note do appear to me to be the ones from the relevant time. One would expect the Revenue to deal with the position in their manual given that the relief is set out in the legislation. CIRD84200 is one page in a long manual, and the passage on unconnected sub-contractors one short passage in it without reasoning or elaboration. In the circumstances in the last sentence I cannot draw any reliable positive conclusion from this that the sub-contractor R&D relief provisions and their detailed operation were well-known at the time or anything close to it, particularly those relating to unconnected sub-contractors. Still less can I draw reliable positive conclusions about the use of the sub-contractor R&D relief provisions in a LLP structure as it does not deal with that. I am doubly reluctant to draw such conclusions given that I did not receive any detailed substantive submissions from either side about what I could draw from the passage in the manual and why, or

placing it in the context of the manual and other sources available at the time. Further, given the manual contains no reasoning, and a manual does not purport to be legally binding, it does not demonstrate that the information put in the draft instructions about how one could reach legally sustainable conclusions about the conditions required by the unconnected sub-contractor R&D relief provisions, were accessible or in the public domain.

(e) However I do not consider that I should allow it in evidence as evidence of how well-known and understood the sub-contractor relief provisions were are the time. Taking in turn the four ways that the matter was put by Mr Budworth as set out in (b) above:

(i) The fact that it was referred to in oral or documentary evidence does not itself mean that the document itself becomes part of the evidence at trial.

(ii) The organising concept behind the doctrine of judicial notice at common law is that it covers matters so notorious or clearly established or susceptible of demonstration by reference to a readily obtainable or authoritative source that evidence of their existence is unnecessary: *Phipson on Evidence* (20th ed, 2021) at [3-01]. Therefore, notice can be taken of the existence and content of public statutes, to take a simple example. That is very different from taking judicial notice of how well-known and understood a particular document like a Revenue manual of, and more specifically, how well-known and understood particular discrete passages of the manual are. That is not the sort of matter that can be simply demonstrated without formally putting in evidence on the point, because that question would likely be a hotly contested one.

(iii) A public domain defence was pleaded in the defence on the basis that as such a scheme had to comply with particular statutory provisions, it was necessarily in the public domain. Following two requests for further information, the latter backed by an order of Deputy Master Dray, the Defendants set out which statutory provisions they relied on. They did not mention at any point in this process that they relied on particular provisions of the Revenue manual in support of their public domain argument, and nor were they disclosed or put in evidence in any other way before trial. Therefore, in my judgment it is far too late to adduce it now in evidence, in circumstances where the point has not been pleaded and the Claimant would not have a proper opportunity to adduce evidence in response as to how Revenue manuals were used in the market and what people knew about these provisions in them.

(iv) In my judgment, the oral application to amend the defence should also be rejected for the same reasons as in (iii). In reaching that conclusion, I apply the summary of principles set out by Carr J in *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm) at [38]. The application is late, the Defendants have had a number of opportunities to raise the point before so there is not a good reason for the delay, and

allowing the amendment would prejudice the Claimant in the manner set out above.

233. I shall deal with the question of what features OneE *added in* under the heading of misuse, having dealt first with whether the information was imparted in circumstances of confidence.

234. This is a convenient point at which to deal with the other arguments that the Defendants put against the proposition that the information was confidential.

235. First, it was argued that clauses 4(a)-(d) of the NDA applied to the information, through a combination of (i) the features of the Rehberg (and Nemaura 2013) structures, and (ii) the presence of the Ultra Green structure. Clauses 4(a)-(d) set out situations in which the confidentiality restrictions in the NDA will not apply.

236. In my judgment, there is nothing in clause 4 that would allow the Defendants to disregard the confidentiality that would otherwise attach (i) to the Structure as a whole (what I have termed the "Information" above) or (ii) to the more specific insight about the use of sub-contractor relief under the 2009 Act in a LLP structure, particularly using unconnected sub-contractors, that I have set out in more detail at paragraph 231 above. That is unsurprising given that the NDA is intended to protect confidential information. Taking the application of clause 4(b)-(d) to Ultra Green as an example, the information provided in respect of Ultra Green cannot be said to be the same as the information provided by Mr Corrigan, and it was the latter information that the Defendants were using in relation to developing Nemaura, not the former, so clause 4(b)-(d) provide no assistance to the Defendants.

237. My detailed reasons for the conclusion at the start of the last paragraph are as follows:

(a) Clause 4(a): Starting with the period prior to the NDA, the confidential information about R&D sub-contractor relief under the 2009 Act and its place in the LLP structure was not published during this period. Neither Rehberg or Ultra Green contained such information, quite apart from the question of whether they were published. Rehberg did not include any information as to R&D sub-contractor relief. Ultra Green related to the 2000 Act, not the 2009 Act. Further, I have no evidence before me that details of Ultra Green were published, and the originating e-mail about Ultra Green from Mr O'Connor contains a footer stating that it is confidential. I would also have expected the disclosure of the Counsel-endorsed tax law advice in relation to Ultra Green and the summary structure, even putting the terms of the footer to one side, to have been provided on a confidential basis given their content and the privilege that would attach to Counsel's advice. Therefore, I infer that they were. Nor was the Structure as a whole published during this period. Even putting to one side the question of whether Rehberg and Ultra Green were published, the Structure is not identical either to Rehberg or Ultra Green. It has a number of different features from both. For example, the Defendants' table appended to this judgment sets out a number of differences, beyond the fact that Ultra Green was prepared on the basis of the 2000 Act. Therefore, even if Ultra Green for example had been published, this would not amount to publication of the Structure.

Turning to the period after the NDA, details of the Nemaura structure, which, as I set out below, contained some of and was derived in part from the Claimant's confidential information, were provided to investors at the Lowry conference, and I infer, to investors on subsequent occasions. However, in my judgment this does not engage clause 4(a). The Lowry materials were provided on confidential terms, as set out expressly on the second page of those materials ("*The information contained in this document and any communication or documents or other materials distributed at or in connection with this document (together, the "Presentation") is confidential*"), and I infer that the same is true of their provision to investors on subsequent occasions. Mr Hill contended in closing that the Defendants' argument on this point was unpleaded and not open to them to take. However, I do not need to resolve this because the argument is in my judgment incorrect. Moreover, if contrary to this, the Claimant's confidential information had been published, this would have ultimately stemmed from OneE Tax's passing of the information in breach of the NDA, and therefore would in my judgment would engage the qualifying wording at the end of clause 4(a) so that clause 4(a) would in any event not apply.

(b) Clause 4(b): OneE Tax did not have the relevant information in its possession (other than through its provision by the Claimant) prior to disclosure under the NDA taking place. Again, Rehberg did not include any information as to R&D sub-contractor relief at all. Ultra Green (i) related to the 2000 Act, and (ii) the information provided by Mr Corrigan was different in other respects to Ultra Green, both the substantive elements of the structure and the fact that the draft instructions provided by the Claimant contained significant analysis that Ultra Green did not, such as whether there were any restriction on the categories of R&D expenditure that needed to be abided by if 65% of the payment to the subcontractor was to qualify for the relief in the case of an unconnected subcontractor.

(c) Clause 4(c): OneE Tax did not obtain the relevant information from a third party, for the same reasons as in (b) above.

As set out in paragraph 270(8) below in the section on misuse, none of this restricted the Defendants from using the information that they did actually in their possession other than that received from the Claimant.

(d) Clause 4(d): OneE Tax did not independently develop the information about R&D subcontractor relief. Rather the idea and information came from Mr Corrigan, as I have found above.

238. Second, it was argued by the Defendants that the category of information was too vaguely identified to constitute confidential information and that the ideas contained it were too inchoate and far from a finished product to be confidential.

239. I reject both those arguments. The need for particularity in what information is said to be confidential is obviously important, not least because of the practical point that a finding that information is confidential can lead to the grant of an injunction, and the defendant must be able to tell clearly what is and is not permitted by that injunction. However, here:

(1) The proposed structure was clear from the draft instructions.

(2) The fact that the instructions were exploring a number of options for an investment structure does not make those options too vague to be confidential, as having options does not itself make each of those options vague ones.

(3) The elements in the draft instructions were capable of being used to generate particular investment structures. As Mr Sherry put it in his note, the exact details of any specific arrangement would be arrived at when particular research and development products were under consideration. While there were certain issues that required further detailed discussion, hence the instructions to Counsel, they were far more than just general ideas: the advice sought in the instructions was as to *an investment structure*.

(4) Consistent with this, the possible structure had reached a sufficient point of development for Mr Corrigan to be ready to consider the marketing of the ideas, and having discussed it with Mr Sherry, to take the possible structure to OneE.

240. The different components of the structure are set out in the Appendix and are relatively close to common ground between the parties, as can be seen from a comparison between the left hand column of the Claimant's and Defendants' versions. The only substantive differences that the Defendants put forward to the version submitted by the Claimant are as follows.

(1) The Defendants state in their version that Mr Corrigan favoured a structure using a connected subcontractor. However, in my judgment that does not appear from the draft instructions and the important point is that the draft instructions deal with both a connected and unconnected sub-contractor. I have explained above at paragraph 224 that Mr Corrigan saw practical applications for both variants. The analysis in the instructions is, by virtue of the ambiguity identified in relation to it, lengthier in relation to an unconnected subcontractor. It is true that the Morvus e-mail of 7 March 2014 refers to it using a connected sub-contractor, that "*[t]his would obviate the subcontracting issues that were discussed in the memorandum I submitted to counsel*", and that it was assumed in relation to the Fast Track Pharma structure that the sub-contractor would be under the control of Fast Track Pharma. However, the draft instructions catered, as I have explained above and as the Morvus e-mail makes clear, for both connected and unconnected sub-contractors, and, importantly, explained the Claimant's thinking on why the requirements for R&D sub-contractor relief might be less demanding in relation to unconnected sub-contractors. What the Morvus and Fast Pharma structures do show is that the elements in the draft instructions could be used in respect of specific products as and when they came along.

(2) The Defendants state that the structure mentioned in the draft instructions was of a LLP intended to invest in a range of projects. That is correct. The Defendants go on to state that there is "*[n]o mention of a license agreement for the unconnected subcontractor payment structure. Insofar as the structure relates to a payment to an unconnected subcontractor, no specific detail is provided as to what the R&D is for, how the funds will be used and what the specifics of any commercial agreements are*". The Claimant states in the equivalent row of its table that "*[t]he LLP enters into a license agreement with a Pharma Company which owns the intellectual property of the compound to be researched*". The draft instructions state that "*the type of the activities that the LLP will engage in are likely to be as follows: 1.*

Entering into arrangements with the main promoter of the technology to fund the research programme designed for the technology. This would mean providing funds under a subcontracted basis to engage key personnel and to purchaser consumables and if necessary to pay subjects of a clinical trial in the case of biotechnology research". Therefore: (i) the Claimant did mention entering into arrangements with the promoter of the technology, albeit that it did not go quite as far as referring to a license agreement with a Pharma Company owning the intellectual property of the compound to be researched, and (ii) it is correct that the Claimant did not go into the specific detail of what the R&D is for, how the funds paid to the subcontractor would be used, other than spent on R&D, and what the specifics of any commercial agreements would be. Rather the Claimant dealt with the subcontracting structure at a level of principle and focused on the conditions that it would need to fulfil.

(3) Tied to (2), the Defendants state that there is "*[n]o [s]pecific mention of the subcontractor agreement and how the money will be spent or what happens in the event not all funds are required for R&D*". It is correct that the detail of the subcontractor agreement was not dealt with or what happened if not all funds were required for R&D.

(4) The Defendants state that "*[o]ne of Mr Corrigan's proposed structures provided for security and a buyback option, which was to be a function of the value of the technology. The full amount paid under the subcontractor payment would be fully discharged on R&D by the subcontractor.*" Mr Corrigan put forward in the draft instructions a number of options for funding the LLP structure, one of which included the promoter investor arranging for a third party to make a loan to the LLP secured by a deposit or security provided by the promoter investor, and the promoter investor would also be given an option to purchase ant rights owned by the LLP.

241. Subject to the points in (2)-(4), I accept the Claimant's version of the characteristics of the Structure. The Claimant's version focuses largely on the draft instructions, but the confidential information also includes the Morvus and Fast Track Pharma e-mails from the Claimant, because these set out specific confidential investment opportunities based on the thinking embodied in the draft instructions.

242. This is a convenient point at which to deal with the relevance of the slightly different views expressed at different points in the chronology of how s.1053(6) of the 2009 Act worked:

(1) The draft instructions suggest that (a) the attribution requirement in Condition A of s.1053 could be satisfied without the expenditure of the subcontractor being limited to the particular categories of R&D expenditure in ss.1124, 1126 and 1132, namely staffing costs, costs incurred on software and consumable items, but rather (b) s.1053(6) is explaining that *where* the category of R&D expenditure was one of those categories, such as staffing costs, the particular staffing costs must be those set out in the relevant section out of ss.1124, 1126 and 1132. In the case of staffing costs, the relevant requirement is that in s.1124(2) is that the payments are to directors and employees directly and actively engaged in relevant research and development.

(2) As Mr Corrigan stated in his evidence, Mr Sherry took a slightly different view, in an opinion that was not, of course, ultimately supplied to the Defendants in 2014.

He reached the same conclusion as in (a) above but on the basis that s.1053(6) was simply a drafting error and should be ignored, and I understand that this was ultimately accepted by HMRC. While I understand that view, it does not expressly engage with what the Condition A attribution requirement in s.1053 *does* require and what rules of attribution would apply for costs like staffing costs if not those in s.1124.

(3) Mr Mullan took a slightly different view again. He appears to me to have considered that the attribution requirement in s.1053(2) were focusing on the terms of the arrangement between the LLP and the subcontractor because the section was focusing on the payment made by the LLP *to* the subcontractor. The view in the Claimant's draft instructions had been focusing more on the subcontractor's expenditure itself. Mr Mullan's 20 October 2014 opinion does not regard s.1053(6) as a dead letter, but rather as referring to attributability requirements relevant to satisfying the Condition A attribution requirement. While Mr Johnson was concerned in his 4 November 2014 e-mail that Mr Mullan was ruling out the possibility of subcontractor expenditure outside the categories in ss.1124, 1126 and 1132, and Mr Corrigan suggested in oral evidence that he read Mr Mullan in the same way, I do not read Mr Mullan as going so far, and therefore I consider that this advice was also consistent with proposition (a).

(4) Finally, the ultimate Nemaura structure was based, as the March notes explain, on the assumption that s.1053(6) does require the application of ss.1124, 1126 and 1132 to staffing costs, costs incurred on software items and so forth, but does not exhaust the categories of permissible costs.

243. In my view, the above differences do not matter for present purposes. They do not alter the fact that the Claimant had come up with the insight that I have referred to above that a LLP structure could be built with an unconnected sub-contractor that would satisfy the requirements of R&D subcontractor relief, and that it would not be necessary for the sub-contractor's payments to be limited to the categories in ss.1124, 1126 and 1132. The latter point was part of the reasoning underlying the Nemaura structure.

244. Finally, the fact that there was in the Defendants' e-mail records a description of the Ultra Green structure under the 2000 Act does not alter my conclusions on confidentiality, for two reasons, either of which suffices: (i) Ultra Green was disclosed under conditions of confidentiality itself, and (ii) it was not under the 2009 Act.

245. The question of whether the Defendants could use individual components of the structures necessarily takes one into what the confidentiality status is of structures produced by the Defendants using one or more of those components. I shall deal with that under head (iii) of the *Coco v Clark* test, namely whether the information was misused.

(ii) Whether the Information was imparted in circumstances importing an obligation in confidence

246. In my judgment, the Information was imparted in circumstances importing an obligation in confidence.

247. The Information was imparted on a number of occasions:

(1) critically, at the 4 February 2014 meeting;

(2) in e-mails following it, namely the 7 March 2014 e-mail about Morvus and the 9 April 2014 e-mail about Fast Pharma; and

(3) as explained below, later in 2014 to Group.

248. Care is needed about which of the Defendants it was imparted to and when.

249. There is also a question as to whether confidential information was imparted at the 10 December 2013 meeting and if so, the consequences of that.

250. Starting with Mr Slattery, Mr Johnson and Mr Timol, my reasons are as follows in relation to the information imparted at the 4 February 2014 meeting:

(1) The nature of the information, namely information that Mr Corrigan had generated about tax planning solutions in conjunction with Mr Sherry, using their specialist skill. I accept that Mr Corrigan would have run through the material set out in the instructions and the structures which those instructions point to: (a) the instructions were provided at the meeting, (b) the meeting was a lengthy one that Mr Corrigan flew over from Ireland for, and (c) the obvious course in circumstances where the instructions had just been provided would be run through them and what Mr Corrigan saw as their importance.

(2) To the extent that it was developed in conjunction with Mr Sherry it would involve his legal advice, which would typically be privileged and confidential. Even putting Mr Sherry's role to one side, it was also information involving legal views on statutory provisions, which would have been privileged and confidential when provided to the Claimant by an outsider.

(3) The information was, as the recipients knew, information that could be of commercial value as part of such a tax planning solution.

(4) It was also information that one would not expect to be known by those who might invest in tax planning solutions. Given (2) and (3) the Claimant had an obvious interest in desire in his ideas and Structure being kept confidential.

(5) The fact that a NDA had been signed before Mr Corrigan provided the information, and that, in my judgment, Mr Slattery, Mr Johnson and Mr Timol knew of that.

(6) The fact that tax planning solutions passed by the OneE attendees of the 4 February 2014 meeting, namely that codenamed "Joshua", was provided under the NDA.

251. Expanding on point (5), Mr Slattery plainly knew of the terms of the NDA. Mr Johnson and Mr Timol were aware, for example from the 18 December 2013 e-mail from Mr Slattery, that an NDA was being signed for the 4 February 2014 meeting. I infer that given their roles in OneE they would know of the contents of the standard OneE NDA and, given that the instructions were handed over at the meeting, and the NDA signed at or shortly before it, they would have appreciated that the information provided by Mr Corrigan at the meeting was pursuant to the NDA. Mr Johnson accepted in cross-examination that he would probably have known at the time that the NDA signed by Mr Corrigan covered information imparted by Mr Corrigan (day 4, p.572 transcript). I

would expect Mr Timol to as well, whether because it was signed at the start of the meeting or (if it was signed just before the meeting) it would have been mentioned before or at the start of the meeting. As for OneE Group, I deal below with when the relevant information was passed to it. I consider it was in August 2014. In my judgment, OneE Group also knew at this point of the terms of the NDA and that the information had originally been passed to OneE Tax under it, because Mr Slattery was a director of OneE Group by this point and Mr Timol was too. Therefore, in my judgment, their knowledge can be attributed to OneE Group. In any event, OneE Group plainly had been passed the information by 7 October 2014, when it presented the Nemaura structure at the Lowry, and therefore by this point they had knowledge of the above through Mr Slattery, who knew that the Nemaura structure had been developed using the information provided by the Claimant.

252. I do not consider that the relevance of the NDA to the basis on which the information was imparted is removed by the fact that Mr Corrigan's PA Ms O'Leary requested in her 19 December 2013 e-mail that the NDA be amended to cover information flowing in both directions as "*he will be disclosing information about his clients in discussion*" (underlining added). In my judgment, it is plain that the provision of 17 sides of detailed tax instructions was just the sort of document that was intended to be caught by the NDA and its reference in cl.1 to tax planning solutions.

253. The Defendants contended that Mr Corrigan provided key material about sub-contractor R&D relief at the 10 December 2013 meeting, that this was not imparted in circumstances of confidence, and that this prevented the information about the relief and its use in the Structure being confidential. The conclusion of this argument was that this stopped the information provided on 4 February 2014 being imparted in circumstances of confidence in the manner that I have suggested above that it was. The way that it was put by Mr Budworth was that the reading down of s.1053(6), which he described as the "*kernel of the idea*", must have been volunteered on 10 December because on Mr Corrigan's case it was that which gave the opportunity to make money, and the information was volunteered between parties with no pre-existing relationship. Mr Corrigan stated in his witness statement that at the 10 December meeting he outlined the Structure to Mr Slattery in very high-level terms, including the statutory uplift, but the detailed technical analysis and instructions to Michael Sherry were not provided until a confidentiality agreement was signed.

254. I reject the Defendants' contention that anything said at the 10 December 2013 meeting by Mr Corrigan prevents details of the sub-contractor R&D relief and its use in the Structure being subject to an obligation of confidentiality, for the following reasons:

(1) I have explained above why I consider that this information was plainly confidential in nature: paragraph 230. In my judgment, it would therefore reasonably appear to someone receiving information such as this from Mr Corrigan that it was imparted in circumstances of confidence, whether it was first imparted on 10 December 2013 or 4 February 2014. It was confidential information about a tax structure being imparted by the tax specialist who had devised it. I do not consider that the relevant informality of the meeting on the 10 December, or of the "*quick further chat*" suggested by Mr Corrigan in his 16 December e-mail (which did not take place) detract from that. That simply reflects the characters involved and the way that they did business and expressed themselves.

(2) In any case, the NDA covers confidential information disclosed prior to the date of the NDA, so OneE Tax would have been obliged to keep this information confidential whether it had first been disclosed on 10 December 2013 or 4 February. I consider that the same is true of the equitable obligation of confidence that the Defendants would be under. Mr Slattery would not be able to walk outside of the 4 February meeting and publish the information any more than OneE Tax could, irrespective of when the information had first been disclosed to him. Rather, OneE Tax was choosing through signature of the NDA to receive any confidential information imparted by Mr Corrigan at the 4 February 2014 meeting on terms that the confidentiality of any prior confidential information imparted to OneE Tax by him (including any confidential imparted to Mr Slattery on behalf of OneE Tax on 10 December) would be respected. The same obligation should attach via the equitable duty of confidence to those attending the meeting on behalf of OneE Tax, who, as I have said above, knew of the NDA.

(3) In any event, I would not have expected Mr Corrigan to have explained the use of connected and unconnected subcontractors, or the specific operation of statutory sections such as s.1053(6) or s.1136 and Mr Corrigan's views on them, the following reasons. (i) That would be important, but detailed technical information, and I would have expected that to form the subject of a longer future meeting after the 10 December 2013 meeting. (ii) Taking this into account, and also my views set out above on the relative credibility of Mr Corrigan's and Mr Slattery's oral evidence on the key issues, I accept Mr Corrigan's evidence in this respect. (iii) Contrary to Mr Budworth's submissions, I do not think it would have been necessary to go this far to attract Mr Slattery's interest or that Mr Corrigan would have thought it would be necessary to do this. It is clear from Mr Slattery's 18 December 2013 e-mail that Mr Slattery was interested in exploring the use of Joshua for Irish companies, quite apart from the R&D planning, so it is plain that Mr Slattery was interested in working with Mr Corrigan for a number of reasons, and considered that there was a good fit between them, as he stated in that e-mail.

(4) In my judgment, Mr Corrigan probably did mention sub-contractor relief in general terms. That may be slightly further than he suggested in his evidence that he went, depending on how one takes the reference to a very high level explanation. The 5 December 2013 e-mail from him to Mr Slattery stated that "*I look forward to taking you through where I am on the structure at the moment*". However, I do not consider that he would have gone into the detailed technical analysis of the structure. That would more naturally be something left to a fuller, more formal meeting.

255. While Mr Budworth submitted that Mr Slattery's reference in his 18 December 2013 e-mail to now understanding the logic and deal-flow must be a reference to Mr Slattery understanding Mr Corrigan's specific reading of s.1053(6), in my judgment this reads far too much into that e-mail. That e-mail simply reflects Mr Slattery understanding the general logic behind the structure. There is no reference to s.1053(6), unconnected sub-contractors or even sub-contractors.

256. The next question is which OneE company the information was imparted to on 10 December 2013 and 4 February 2014. In my judgment, it was OneE Tax. That was the company that signed the NDA. I consider that to be the surest guide to the capacity in which the OneE attendees at the 4 February meeting were attending and in which Mr

Slattery had the 10 December 2013 meeting. That tallies with Mr Slattery referring to Mr Timol as his "*fellow Director*" in circumstances where Mr Slattery was a director of OneE Tax rather than OneE Group at that time. That also tallies with the fact that while Mr Slattery sent e-mails in December 2013 with a OneE Group heading at the bottom, the fine print stated that "*OneE Tax Limited (VAT No. 884 7600 88) is a wholly owned subsidiary for OneE Group Limited*" and the website link in the e-mail was to www.OneEtax.com . More broadly, it also makes sense that the OneE entity with "tax" in the title would be the company dealing with tax schemes.

257. Given that the First Defendant is OneE Group rather than OneE Tax, the question that leads to is whether the information imparted on 10 December 2013 and 4 February 2014 was imparted to OneE Group, and if so when in what circumstances, given that, as explained below, the 7 October 2014 conference at the Lowry at which the Nemaura structure was presented was a OneE Group event. The Claimant contends in its pleaded case that all of the Defendants misused the information in, among other things, developing and taking advice on the Nemaura structure and then disclosing it to investors (paragraph 54 of the Particulars), so it is necessary to analyse when OneE Group received the information.

258. In my judgment, at some point between 8 and 13 May 2014, the information was passed to OneE *Investments*:

(1) The 13 May 2014 instructions came from OneE Investments. Therefore, I consider that at some point between 4 February 2014 and 13 May 2014 the information was passed to OneE *Investments*. In my judgment the explanation of this is that despite the different corporate identifies of OneE Group, Tax and Investments, there was a free flow of information between them in practice, at least in relation to tax planning solutions like the confidential information in the present case.

(2) Further, at some point around May 2014 OneE Tax dropped out of the picture before its passage into voluntary liquidation in March 2015 as a result of the legacy issues from the EBTs and EFRBS that it promoted, because it is not mentioned in documents after that point, and the Nemaura work is taken forward by OneE Investments. In the first RFI response, the Defendants stated that it was OneE *Consulting* who took forward the development of the structure, but the May 2014 instructions come from OneE Investments.

(3) I find that the most likely time at which the information became available to OneE Investments was in the first half of May 2014, most likely between 8 and 13 May 2014, when Mr Slattery was preparing the OneE Investments instructions to DLA Piper. At that point, I have found that Mr Slattery was using the confidential information in preparing the instructions, so effectively at that point he was transferring the information into the possession of OneE Investments.

259. I consider that it was passed to OneE Group on or around 4 August 2014, but not before, for the following reasons:

(1) Mr Slattery became director of Group on 4 August 2014. I do not have any evidence that he held a role at Group before that point.

(2) Mr Johnson's 4 August 2014 e-mail attaching the instructions to Mr Mullan has a OneE Group footer, as does his 14 August 2014 e-mail summarising his call with Mr Mullan that day. Given Mr Slattery's role at Group by this point and Mr Johnson's e-mail, I find that by this stage OneE Group had the information.

(3) OneE Group was the entity that was to conduct the Lowry conference in October 2014, two months later.

(4) Therefore, I find that through Mr Slattery the information entered OneE Group's possession in or around 4 August 2014. It was available to and in the possession of OneE Group from that point, and then used in the Lowry presentation.

260. I have taken into account the Claimant's submission that as Mr Timol and Mr Slattery themselves conducted the searches for disclosure purposes rather than lawyers, I should infer that there are internal documents generated by OneE in 2014 discussing the material provided by Mr Corrigan that have not been disclosed. However, in my judgment, there is nothing to suggest that Group was involved in consideration of the material before August 2014, which is the important point for present purposes.

261. That leaves the information in the Morvus and Fast Track Pharma e-mails. The 17 March e-mail in relation to Morvus was sent to Mr Slattery and Mr Johnson and the 9 April 2014 was copied to Mr Slattery, who in turn passed it to Mr Johnson by 28 April e-mail. In my judgment, the Morvus and Fast Track Pharma information was imparted in such circumstances to them, for reasons (1)-(6) in paragraph 250 above. Both Mr Slattery and Mr Johnson were attendees at the 4 February meeting and should have understood the confidentiality of information about potential tax schemes imparted by Mr Corrigan. I have not seen direct evidence that the information about Morvus and Fast Track Pharma was passed to the Second Defendant Mr Timol, so I find that it was not.

262. I consider that it was imparted to OneE Group on or around 4 August 2014 for the reasons set out above.

263. It is pleaded in the Defence that the information was only imparted to the individual defendants as servants and agents and that therefore it is to be treated as imparted to the relevant companies that they were acting on behalf of rather to them individually: paragraph 36(a). I reject that argument. The fact that they received that while acting in the course of their roles in OneE does not absolve from equitable duties of confidence. For example, if Mr Slattery had sought to use the information to generate a scheme himself outside his role at OneE Group and market it himself, that would be plainly be a breach of confidence.

264. I will deal below with the question of Derived Information and its dissemination.

(iii) whether the confidential information was misused by the Defendants

265. The Claimant alleges that the Defendants breached their equitable duty of confidence in six respects, namely when they (a) developed the Nemaura structure, (b) disclosed the Nemaura structure at the October 2014 conference and distributed the documents at the conference and, it is inferred, on other occasions, (c) provided information regarding the Nemaura structure at other events and on other occasions, (d) disclosed the Nemaura

structure to legal advisors when taking advice on its efficacy, (e) disclosed the Nemaura structure to insurers, and (f) implemented the Nemaura structure and conducted fundraising using it. I shall take each in turn.

266. Taking the matter chronologically, by 13 May 2014 Mr Slattery was using the material in preparing instructions on behalf of OneE Investments. Therefore, at some point between 8 May and 13 May 2014, Mr Slattery misused the confidential information and Mr Johnson first misused it at some point between 16 May and 3 June when he commented on the instructions before returning them to Mr Slattery. Those events are set out in paragraphs 111 to 115 above. The information was used in preparation of the Nemaura Structure without the consent of the Claimant, which was plainly not consistent with the purpose for which it was transmitted by the Claimant to OneE Tax, and Mr Slattery and Mr Johnson should have known that. While the possibility of using such information in relation to Nemaura was canvased at the 4 February 2014 meeting, and Mr Corrigan had no objection to it as long as a suitable fee arrangement was reached, no such agreement was reached on fees.

267. Further, the preparation of these instructions, which were ultimately sent to Mr Mullan's clerk on 4 August, itself involved a misuse of confidential information by Mr Slattery and Mr Johnson. Mr Johnson and Mr Slattery were both involved in the development of the Nemaura structure in those instructions and in the lead up to the October presentation at the Lowry.

268. The remaining alleged breaches concern the disclosure of the *Nemaura Structure*. Therefore, as foreshadowed at paragraph 233 above, they raise the question of the correct treatment of information produced by using some of the confidential information. The Nemaura Structure used some of the confidential information, such as the information about R&D relief for unconnected subcontractors, but it used it in conjunction with information already held by the Defendants through the previous work done on Nemaura and added to by other features of the structure developed after May 2014. For example, as explained above, OneE had already considered the use of the LLP structure. Similarly, the elements dealing with what happens in the event that the investment is unsuccessful were independently devised by OneE. There were a number of elements that fell into this category.

269. The Claimant put its argument that the use of the Nemaura structure by any of the Defendants, such as for marketing and fundraising purposes, constituted a breach of confidence in two ways. First, that there is significant confidential information of the Claimant that is reflected in the Nemaura structure. In other words, the Nemaura structure was sufficiently closely related to the structures in the material provided by Mr Corrigan for it to be said that it contains and embodies confidential information and therefore use of it with the Claimant's permission constitutes misuse of confidential information. Second, the Nemaura Structure was Derived Information for the purposes of clause 1 of the NDA and that this in turn meant that it was binding on the Defendants because of their knowledge of the NDA and its terms.

270. In my judgment, the Claimant is correct in its first argument, although I do not accept its second.

271. Taking the first, depending on the extent and importance of the confidential information used in a product, the use of the product can itself constitute a continued misuse of the

confidential information. As explained in *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289 at 404:

> "*It is not every derived product, process or business which should be treated as a camouflaged embodiment of the confidential information and not all ongoing exploitation of such products, processes or business should be treated as continued use of the information. It must be a matter of degree whether the extent and importance of the use of the confidential information is such that continued exploitation of the derived matter should be viewed as continued use of the information.*"

272. Here, in my judgment, the use of the Nemaura Structure should be viewed as continued misuse of the information:

(1) The use of R&D relief for unconnected sub-contractors, was a fundamental part of the Nemaura Structure: the frame of the LLP structure with the engine of R&D unconnected subcontractor relief.

(2) The structure would not work without it, and it was the R&D relief for unconnected subcontractors that generates the tax saving, magnified in the case of Nemaura by the gearing. I refer back to paragraph 229 for a more detailed account of this element.

(3) I note that Mr Johnson stated in his witness statement that "*[i]t was of fundamental importance to the OneE structure that the LLP and subcontractor were unconnected*" (paragraph 30).

(4) The use of R&D relief for unconnected sub-contractors was fundamental to the change from the Nemaura structure in 2013 to the structure ultimately offered in 2014. Therefore, its incorporation into the 2014 structure was a very significant one.

(5) None of the above precluded the Defendants using individual components of the structure that they already had come across themselves. Accordingly, for example it did not preclude them using a LLP structure to generate other tax savings outside a R&D setting, as OneE had sought to do with Rehberg. Nor did it preclude them from using a LLP structure to generate an ordinary trading loss, whether on a geared or non-geared basis, within a R&D setting as Nemaura 2013 sought to do. But it did prevent them using a LLP structure with R&D relief for unconnected subcontractors.

273. As to the second argument:

(1) To constitute Derived Information, the analysis, compilation, study or document must be produced by the Recipient, here OneE Tax.

(2) OneE Tax ceased to have any active role in relation to dealing with the information at some point between 8 May and 13 May 2014 when it passed it to OneE Investments, for the reasons set out above. Mr Johnson's 17 March 2014 e-mail to Mr Corrigan was sent with a OneE Tax footer and Mrs Toone's 8 May 2014 e-mail to Mrs O'Leary stating that the meeting with Mr Corrigan was on hold bore the same footer. After that, there is no mention of OneE Tax that I can see in the

documentation, save for a short footer to a Mr Johnson's 5 September 2014 e-mail forwarding on to a number of OneE individuals an e-mail of the same day from Mr Mullan, which footer appears to have been produced by Mr Johnson's mobile phone.

(3) The 13 May 2014 instructions were prepared on behalf of OneE Investments, rather than OneE Tax, who had prepared the March 2013 instructions.

(4) This leaves open the possibilities that (a) the Nemaura structure set out in the May 2014 instructions was produced by OneE Tax and passed to OneE Investments, (b) produced by OneE Investments or (c) produced by both OneE Tax and OneE Investment. In my judgment, (b) is the correct position. There is no evidence of OneE Tax being in active operation between 8 and 13 May 2014 and the product of the instructions is sent out by OneE Investments, so it natural to infer that OneE Investments produced their own instructions.

(5) The consequence of this is that the Nemaura structure set out in the May 2014 instructions, ultimately sent to Counsel in August 2014, was *not* Derived Information within the terms of the NDA.

274. Turning in light of that to allegations (b) to (f) in paragraph 265 above, I conclude as follows. Taking (b) to (d) first, OneE Group did disclose the Nemaura Structure at the October 2014 conference and distributed documents containing details of it at the conference. I infer that they also disclosed it at other subsequent events and on other subsequent occasions, and distributed documents relating to it at such events occasions. As explained above, I do not consider that the dissemination of the material at the October 2014 conference amounted to publication. The presentation document relating to it expressly states that it is confidential. In relation to (d), the advice in August 2014 was sought by OneE Investments rather than OneE Group. Therefore, OneE Group's misuse was in relation to (b) and (c).

275. As for the individuals involved, Mr Slattery was responsible for the acts in (b) and (c). He presented the structure at the October 2014 conference and I infer that the same would have been true of the other events and occasions on which the material was distributed. Mr Johnson thought he (Mr Johnson) was not there, and I accept that evidence. His work lay in assisting in generating the structure in the first place. My impression was that Mr Slattery would front the project by presenting the structure to people outside OneE. As to (d), both Mr Slattery and Mr Johnson were responsible for instructing Mr Mullan. Mr Johnson commented on the instructions and sent the instructions that Mr Slattery had originally produced, and it was Mr Slattery's name at the bottom of them.

276. As for (e), I have not seen any evidence of the Nemaura structure being disclosed to insurers, so I reject that allegation.

277. As for (f), I do not have direct evidence as to who implemented the structure and conducted fundraising using it, other than that it appears that the Nemaura structure has been put into effect through a company called NPL FC Limited. That company was incorporated under the name Nemaura FC Ltd on 5 December 2014 and is registered at OneE's address. I infer from its role in the October 2014 conference, coupled with the fact that Mr Johnson's e-mail dialogue over the Mullan advice included e-mails with a

Group footer that OneE Group would have been involved in both fundraising and implementing, and Mr Slattery would too. Given his technical expertise and role in the instructions, I infer that Mr Johnson would have been involved in the implementation of the structure but not the fundraising.

278. The fundraising appears to have ceased in 2017.

279. Lastly, I deal with Mr Timol's role in relation to (a) to (f). The Claimant's case was that, while not as blameworthy as the other Defendants, he was still liable. Mr Timol was on the board of OneE Group, and was one of the two most senior people in the group, along with Mr Ismail. He had attended the 4 February 2014 meeting and therefore, while his expertise was commercial rather than legal, he would have in my judgment understood in broad terms what the structure being put forward by Mr Corrigan was. Mr Timol accepted in evidence that he would have been part of the team of people who would decide whether a particular product should be offered, so I accept the Claimant's submission that he would have been involved in signing off the decision to implement and market the Nemaura Structure. I do not consider that he would have needed to sign off the work done from May 2014 to obtain Counsel's opinion. Rather, as he explained in his evidence, he would have had brought to him potential projects, they would have been explained to him in very broad terms, and he would have wished to check that those bringing them to him were satisfied that they were robust.

280. Mr Hill put to him in cross-examination that Mr Timol would not have known of how Nemaura was, prior to the creation of the Nemaura Structure, actually claiming R&D relief itself, and Mr Timol accepted that he would not profess to know the details of how the relief was claimed (day 4 page 523 of the transcript). His evidence was that the way the Nemaura Structure would have been put to him was that "*it is technically viable, it works as per the legislation and it is something that would pass muster*" (day 4 page 538 of the transcript). I accept that evidence, which to my mind is consistent with the fact that he would not previously have got into the detail of how Nemaura was claiming R&D relief previously. Given this, I do not consider that he should have realised that the Nemaura Structure contained significant confidential information provided by the Claimant. It was not put to him or suggested that he would have been told explicitly that this was the case, and if it was not, then I do not consider that he should have guessed that.

281. There is no documentary evidence of what he would have been told at the meeting. Therefore, I must work from what I can safely infer from the circumstances, taking into account my view of his witness evidence generally. He would have signed off the decision six months after the meeting with Mr Corrigan, in circumstances where he had not been involved on the tax side in developing the proposals, and I accept his evidence that his interest would have been in ensuring that the structure was likely to be a commercial success rather than the precise way that it worked from a tax perspective as long as it was considered robust by those with tax expertise in OneE. Therefore, I do not consider that he misused confidential information in signing off the structure. It was submitted by the Claimant that he should have asked sufficient questions to be able to tell that it had been based on Mr Corrigan's idea, but I do not consider that it was incumbent on him to probe the details of the tax treatment or how they had been arrived at given his role lay on the commercial side.

282. It was also argued by the Claimant that given that Mr Timol received confidential information at the 4 February 2014 meeting, he would be liable for signing of the use of the Nemaura structure because it contained or had been based on the Claimant's confidential information, even if he should not have realised that the structure was linked to the Claimant's confidential information, on the basis that liability for misuse is strict once the defendant should have known that the information was imparted to him in circumstances of confidence. I reject that argument. To found liability, there must be use by the defendant of the information given to *him* in confidence. By signing off the Nemaura, structure Mr Timol was not using the information given to him *personally* at the 4 February 2014 meeting. He was unwittingly signing off the use of confidential information that had been given to others and used to develop the Nemaura structure. It is the fact that a defendant should know that particular information given to him is imbued with confidentiality that should cause him to treat that information as such. That is why liability is strict if that information is then used contrary to the purpose for which it was provided.

283. I have considered carefully the statement in paragraph 17.2 of his witness statement that he "*was already well aware of the availability and qualifying requirements for the purposes of taking advantage of R&D relief*". He explained in evidence that what he meant by that was that he was aware that R&D relief existed, that companies conducting R&D could claim a reduction in their corporation tax bill if they applied for the various reliefs, and that there would be certain requirements in place to claim that, but the details of claiming that relief would have been conducted through the relevant finance individual. I accept that evidence. I have also considered whether it is plausible that one of the two senior individuals in the group signing off the project would not ask or be told how the tax relief worked in outline terms or that part of it had come from Mr Corrigan's information. However, in my judgment I do not have sufficient information that he should have inferred this, and it was not put to him or submitted that he would have been told expressly of this.

Whether the confidential information constitutes a "trade secret" for the purposes of the 2018 Regulations

284. As explained above, the 2018 Regulations only apply to breaches of confidence committed from 9 June 2018 onwards. Given that the marketing of the Nemaura Structure stopped before 9 June 2018, once the structure was filled, in my judgment there are not any breaches that fall into this category.

285. Nevertheless, given that it was argued that the statutory limitation period for unlawful acquisition, use or disclosure of trade secrets applies to proceedings brought before a Court on or after 9 June 2018, whenever those wrongful acts occurred, I will decide whether the breaches of confidence that I have found above constituted the unlawful acquisition, use or disclosure of trade secrets.

286. In my judgment, they do. I have set out the definition of trade secret in paragraph 182 above. Taking requirements (a), (b) and (c) in turn:

    (a) The information was not readily accessible to the persons within the circles that normally deal with the kind of information in question, for the reasons set out above in relation to breach of confidence.

(b) In my judgment, the information does have commercial value by virtue of being secret, as (i) it would take time, cost and specialist skill to generate the ideas set out in the information, and (ii) the information was capable of being turned into a readily marketable structure.

(c) The Claimant took reasonable steps to keep the information secret by procuring that the NDA was signed.

287. Acquisition, use and disclosure of a trade secret is unlawful where the acquisition, use or disclosure constitutes a breach of confidence in confidential information: regulation 3(1). Therefore, here there was unlawful use and disclosure of a trade secret in respect of each of the breaches of confidence that I have found above.

Unlawful means conspiracy (legal requirements set out at paragraphs 199 to 203 above)

288. This, together with the procuring breach of contract and joint liability claims, was shortly pleaded at paragraph 56 of the Particulars and the earlier parts of the pleading referred to in that paragraph.

289. Mr Hill stated in closing that this element of the claim was not run against Mr Timol, as it was not contended that he had an intention to injure the Claimant. He put his argument against the other Defendants very simply, namely that they had a common design to develop the Nemaura structure, so that it could be marketed and used to generate fees. They had, he submitted, an intention to injure the Claimant because what they were doing was inherently at his expense, as the presence of the Nemaura structure in the market would damage the pitch for him, and in any event it was using his confidential information without charge which is itself a loss, as the case-law on negotiating damages recognises.

290. I accept Mr Hill's submissions. In my judgment, Mr Slattery, Mr Johnson and OneE Group are liable for unlawful means conspiracy, subject to any limitation defence. From May 2014, Mr Slattery and Mr Johnson embarked on the development of the Nemaura structure, having turned their attention back to it. There was a common design at this point to do so in order to generate fees from it. It is clear from Mr Slattery's 13 May 2014 e-mail asking Mr Johnson to comment on the instructions that they must have discussed the instructions previously because the e-mail proceeds on the basis that Mr Johnson will know what Mr Slattery is sending Mr Johnson, and the 16 May 2014 e-mail that follows refers to Mr Slattery having indicated in the interim to Mr Johnson that a revised version would be coming, which confirms that such discussions must have occurred. Mr Johnson would have known from this that they were moving forward with the development of the Nemaura structure. OneE Group only joined the common design from 4 August 2014, when Mr Slattery became a director there and Mr Johnson used their footer in his e-mails. Failing that, they joined the design by 7 October at the latest.

291. They acted on this common design. OneE Group hosted the 7 October 2014 conference, provided material about the structure to potential investors at that conference, and would have done the same on other occasions. Mr Slattery was involved at all stages: in the generation of the structure, the obtaining of legal advice about it, and its presentation to investors. Mr Johnson was involved in the development of the structure, obtaining legal advice about it and, I find, in implementing it.

292. In my judgment Mr Slattery and Mr Johnson had an intention to injure the Claimant in the sense that phrase is used for the purposes of unlawful means conspiracy, which is explained at paragraphs 199(2) and 201 above. This is more than a case where loss to the Claimant was merely foreseeable. I shall take in turn the two ways that Mr Hill put the relevant intent to injure. (i) In my judgment they knew that they were using the Claimant's idea without recompense, to generate fees by developing the product. Use of the Claimant's idea was part of the means to that end. They knew that the idea for using sub-contractor R&D relief came from Mr Corrigan, so they knew they were using the Claimant's idea without recompense and therefore necessarily damaging the Claimant in that respect. (ii) They also knew that there was no product on the market that used a LLP structure with sub-contractor R&D relief, so Nemaura would be the first. Therefore, by developing a product that would get there first, they would inevitably be damaging the Claimant's ability to make money from any similar product he put out. The flipside of getting there first, starting with the instructions rapidly produced by Mr Slattery, was that the Claimant would not there first. Further, they were getting their first with a product that would include non-statutory gearing, and therefore provide if it worked a higher tax saving than the Claimant's. In relation to both (i) and (ii), I consider that they were developing Nemaura to generate fees. The harm to the Claimant was the inevitable flipside of the fees that would generate from the product. Either of points (i) and (ii) suffice on their own. I emphasise again that I am not finding that loss was caused. That is a matter for the second stage. I am dealing here with the relevant *intention* to injure.

293. I have considered particularly carefully whether Mr Johnson shared the intention to injure, given that it was Mr Slattery who dealt with the commercial side. Mr Johnson stated in cross-examination that he did not consider that a relationship with Mr Corrigan was being left to one side in mid-May 2014 because he was not dealing with the commercial relationship with Mr Corrigan, that the fact that OneE was moving forward with Nemaura using sub-contractor R&D relief did not rule out other projects with Mr Corrigan based on his structure, and that he sought to return a call from Mr Corrigan in June 2014 (day 4, pages 582-583 of the transcript). Further, he stated that he was not sure what Mr Corrigan was being "*cut…out of*" because he did not think that they had discussed what they were going to "*cut him in on*" (day 4, page 584 of the transcript). However, I have found that Mr Corrigan stated at the 4 February 2014 meeting, which was attended by both Mr Slattery and Mr Johnson, that he was content for the Defendants to use his proposed structure in relation to Nemaura as long as he received a share of the fees generated. Mr Slattery and Mr Johnson both knew this. While Mr Slattery might deal with the commercial side, there was no information that Mr Johnson had which could have led him to conclude in mid May 2014 that Mr Corrigan was going to receive a fee for the development of Nemaura, and I do not consider that Mr Johnson believed that Mr Corrigan was going to receive any such fee. Therefore, as explained above, while no commercial deal had been struck for a particular fee for use of Mr Corrigan's ideas in Nemaura, I find that Mr Johnson knew that Mr Corrigan's idea was being used without recompense. Similarly, the absence of any formal deal on this does not affect the potential damage to the Claimant that developing Nemaura would necessarily cause.

294. I take into account that Mr Johnson was asked in cross-examination what he thought that Mr Corrigan would have said if told on 13 May 2014, when the first draft of the instructions had been prepared for Nemaura, that OneE was going ahead with Nemaura

with a structure based on R&D relief using an unconnected sub-contractor, but was doing so without Mr Corrigan. Mr Johnson's answer as that "*[h]e would not have been happy about that*" (day 4, page 583 of the transcript). I agree. The reason that he would not have been happy is because he would have considered that he was losing out as a result, and I find that Mr Slattery and Mr Johnson knew that.

295. It may be that Mr Corrigan was, as the Defendants contended, slow in addressing requests for information and that this formed at least part of the reason for not progressing work together with him. However, that does not prevent the requirements of unlawful means conspiracy being satisfied. Similarly, the focus in oral closing of the substantive counter-argument put in closing by Mr Budworth was they did not recognise that what they were doing was unlawful (day 5, pages 826-827 of the transcript), but that does not provide an answer to an unlawful means conspiracy claim either, as Mr Budworth ultimately accepted in that passage of closing. See the legal principles set out in paragraph 200 above.

296. Through Mr Slattery's directorship, the intention to injure is attributable to OneE Group.

Procuring a breach of contract (legal requirements set out at paragraph 204 above)

297. The pleaded claim here is that the Defendants, knowing of the terms of the NDA, procured OneE Tax to pass the confidential information to OneE and others for reasons other than the permitted purpose set out in the NDA. As in the case of unlawful means conspiracy, Mr Hill made clear in closing that this head of claim was not pursued against Mr Timol.

298. I have found above that there was a breach of contract by OneE Tax at some point between 8 and 13 May 2014 by passing the confidential information to OneE Investments.

299. I have found that this was brought about by Mr Slattery. In my judgment, he knew that this was in breach of OneE Tax's obligations because he was aware of the terms of the NDA and knew that in compiling the instructions on behalf of OneE Investments he was using information provided under the NDA contrary to the purposes for which it was provided, because it was being used to generate advice for OneE to develop Nemaura. Therefore he knew that transferring that information to OneE Investments was contrary to the NDA. Accordingly, he is liable for inducing a breach of contract, subject to any limitation defence. However, as explained below, I find that this claim is time-barred.

300. As for OneE Group, in my judgment it is not liable for procuring a breach of contract. It did nothing in May 2014 to bring about a breach by OneE Tax. As I have found above, it was only involved from August 2014.

301. Similarly, in my judgment Mr Johnson did not procure the breach itself in May 2014. It is true that he commented by 3 June 2014 on the draft instructions prepared by Mr Slattery, but by that time OneE Tax had passed across the information to OneE Investments and so the breach by OneE Tax of the NDA had already occurred.

Joint liability (legal requirements set out at paragraphs 195 to 197 above)

302. The joint liability claim was pleaded both in respect of the breach of confidence and inducing a breach of contract: paragraph 57 of the Particulars. However, given that I have found that only Mr Slattery was involved in inducing a breach of contract, it is only joint liability in respect of breach of confidence that is relevant. In my judgment, Mr Slattery, Mr Johnson and OneE Group are jointly liable but Mr Timol is not.

303. In my judgment there was a common design between the Defendants to produce, implement, and generate fees from, the Nemaura Structure through marketing it. This was signed off by Mr Timol at some point before the October 2014 conference at the Lowry, as explained above.

304. The First, Third and Fourth Defendants all acted on this common design, as set out above in the section on unlawful means conspiracy, and they knew that the Claimant's information was being used in this process. While Mr Timol will only have signed off the product part way through the process, namely after it had been developed and legal advice obtained on it, the fact that he only became a party to the common design at that point would not itself prevent him being liable as a joint tortfeasor from that point on.

305. A director will not be jointly liable if his role was limited to exercising control through the constitutional organs of a company, such as by voting at a board meeting: *Lifestyle Equities CV v Ahmed* [2021] EWCA Civ 675 at [49]. This is intended to be narrow exception. While a director, Mr Slattery's role went well beyond a constitutional one and therefore the fact that he is a director does not prevent him being jointly liable. As for Mr Timol, his role extended beyond simply a bare constitutional role. As Mr Hill put it in closing, it is not suggested that he was a merely carrying out the act of a board member in voting at a board meeting. He was actually involved in the executive decision as to whether the product was an appropriate one to sign off. Therefore, I consider that his role as a director would not itself prevent him being liable.

306. However, I have found above that Mr Timol did not realise that the Nemaura structure was using confidential information of the Claimant and that a reasonable person in his position would not have done so: paragraph 280. Given this, I do not consider that he can be jointly liable either. The requirement in a claim for breach of confidence that conscience be affected means that the common design must involve sharing that feature of the wrong, and here Mr Timol, as was the case with Mr Sig in *Vestergaard*, lacked the necessary state of knowledge or notice. The doctrine of joint liability may allow liability to attach to a defendant where their acts would otherwise on their own not be sufficient to amount to a wrong, but it does not, at least in the case of breach of confidence, allow a defendant to be found liable where their conscience was insufficiently affected to make them liable on their own. As explained above in relation to the claim for breach of confidence, I do not consider that the fact that he had received confidential information of his own previously changes this analysis: paragraph 282.

Limitation

Breach of confidence and trade secrets

(i) The relevance of the limitation period under the 2018 Regulations

307. The 2018 Regulations introduce a statutory limitation period.

308. Reg.4(1) provides that "*[p]roceedings may not be brought before the court in respect of a claim for the unlawful acquisition, use or disclosure of a trade secret and for the application of measures, procedures and remedies provided for under these Regulations – (a) in England and Wales and Northern Ireland, after the end of the limitation period for the claim*" and reg.4(2) provides that the limitation period referred to in reg.4(1)(a) is that determined in accordance with regs.5, 6 and 8. Reg.4(3) provides that s.36 of the Limitation Act 1980 does not apply "*in relation to proceedings in respect of a claim for the unlawful acquisition, use or disclosure of a trade secret*".

309. That limitation period is six years (reg.5(1)), beginning "*with the later of (a) the day on which the unlawful acquisition, use or disclosure that is the subject of the claim ceases, and (b) the date of knowledge of the trade secret holder*" (reg.6(1)). The date of knowledge of the trade secret holder means that "*day on which the trade secret holder first knows or could reasonably be expected to know (a) of the infringer's activity, (b) that the activity constitutes an unlawful acquisition, use or disclosure of a trade secret, and (c) the identity of the infringer*" (reg.6(2)). The 2018 Regulations, and therefore the limitation period in regulations 4-6, applies "*only to proceedings (a) brought before a court after the coming into force of these Regulations, (b) in respect of a claim for the unlawful acquisition, use or disclosure of a trade secret, and (c) for the application of measures, procedures and remedies provided for under these Regulations*" (reg.19). The 2018 Regulations come into force on 9 June 2018.

310. Mr Hill submitted that the result of this is that the Regulations impose the six year statutory limitation period for breaches of confidence that amount to unlawful acquisition, use or disclosure of a trade secret (skeleton paragraph 163). I understood that submission to be that this is the case whether or not the breach of confidence occurred on or after 9 June 2018.

311. It should be recalled that the pleaded claim only seeks remedies under the 2018 Regulations for breaches of confidence *committed on or after 9 June 2018* (Particulars paragraph 61). I have found that there were breaches of confidence, that they amounted to unlawful acquisition, use or disclosure of trade secrets, but that all such breaches occurred before 9 June 2018.

312. In my judgment, the limitation period under the 2018 Regulations only applies to claims "*for the application of measures, procedures and remedies provided for under these Regulations*": reg.4(1). That reflects article 8(1) of the Trade Secrets Directive, which provides that "*Member States shall, in accordance with this article, lay down rules on the limitation periods applicable to substantive claims and actions <u>for the application of the measures, procedures and remedies provided for in this Directive</u>*" (underlining added).

313. Here, the claim in respect of pre-9 June 2018 breaches of confidence is not for "*for the application of measures, procedures and remedies provided for under these Regulations*". Rather it is for an account of profits or damages at common law. The 2018 Regulations do not introduce a statutory limitation period for such claims.

314. This is as one would expect. Otherwise, the 2018 Regulations would have the effect of barring claims sought for ordinary common law remedies for breach of confidence. I do not think that was intended.

(ii) The limitation period for breaches of confidence

315. Accordingly, it is necessary to consider whether there is a limitation period for breaches of confidence claims outside the 2018 Regulations.

316. Mr Budworth submitted in his skeleton and orally that the six year period under s.2 of the Limitation Act 1980 should apply to the breach of confidence claim by virtue of s.36 of the Act. There was some suggestion in opening that Mr Budworth was seeking to argue in the alternative that the six year contractual limitation period in s.5 should apply by analogy, but it was clarified in closing that the argument was founded on s.2 (e.g. day 5, p.819 transcript). I pointed out that the defence only referred to s.2 and not s.36. Mr Budworth submitted that this was broad enough to capture his argument, but that if he was wrong on that, he asked for permission to amend to argue for the application of s.2 by analogy, contending that it was a legal argument that did not require any factual evidence to meet. He also appeared at one point in his oral closing to suggest that breach of confidence might be a tort and therefore s.2 capable of applying to it directly, so I shall deal with that submission below.

317. As to the s.36 argument, I consider that the original defence is not strictly broad enough to capture this argument, because it only refers to s.2, but that permission should be granted to amend to run this defence. I apply the principles set out by Carr J in *Quah* at [38] (see paragraph 232(iv) above). The reasons for my decision are that (1) it is a pure legal argument, (2) the argument that the s.2 limit applies by analogy is very closely related to an argument that it applies directly, and could on one reading be taken to be included within the pleading that the claim is time-barred by s.2, (3) it does not require any factual evidence to meet, (4) it raises arguable points, and (5) I gave Mr Hill an opportunity to consider which arguments he wished to run in response. Accordingly, I need to deal with the question of whether the six year limitation period for tort in s.2 applies by virtue of s.36 to breach of confidence.

318. In my judgment, the s.2 limitation period for tort does not apply directly to breach of confidence, or by analogy under s.36.

319. The starting point is that, while there is some room for debate as to its precise origins and the extent of the role of the Court of Chancery in its development, breach of confidence is treated in the modern case-law as having an equitable basis. Some of the discussion of its nature in the case-law is in the context of explaining that it can arise outside the context of a contract. It is this that explains the doctrine's application where there is no contractual relationship between the parties or in applying to a third party recipient of information. In *Seager v Copydex*, Lord Denning MR stated that rather than depending on an implied contract, "*[i]t depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it*" ([1967] 1 WLR 923, 931E-F). In the *Spycatcher* decision, Lord Keith termed it "*an independent equitable principle of confidence*", Lord Griffiths called it an "*equitable remedy*" and Lord Goff stated that "*it is well settled that a duty of confidence may arise in equity independently of such [contractual] cases*" (*Attorney General v Guardian Newspapers (No 2)* [1990] 1 AC 109 at 255, 268 and 281 respectively).

320. While the House of Lords in the later decision in *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457 decided that the wrong of misuse of information, which had developed from breach of confidence, was itself a tort, there was nothing to disturb the equitable basis of breach of confidence. On the contrary, Lord Nicholls for example stated that "*[t]he common law, or more precisely, courts of equity have long afforded protection to the wrongful use of private information by means of the cause of action which became known as breach of confidence*" (at [13]).While in the minority in the application of the law to the facts in the case, there was no disagreement from the other Law Lords on the legal principles. More recently still, Lord Neuberger described it in *OBG Ltd v Allan* [2008] 1 AC 1 as an "*equitable principle*": [257], Arnold J described it as "*not strictly speaking a tort*" in *Force India* at [388] at first instance and Lewison LJ as "*[t]he equitable remedy for breach of confidence*" at [70] in the Court of Appeal ([2013] RPC 36), and Lord Neuberger, giving the judgment of Court in *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] UKSC 31, cited with approval the statement of Megarry J in *Coco v Clark* that "*[t]he equitable jurisdiction in cases of breach of confidence is ancient; confidence is the cousin of trust*": [22].

321. Subject to one qualification, it appeared to be common ground between the parties in oral submission that rather than being a tort for the purpose of s.2 of the Limitation Act, it is a claim for equitable relief. The one qualification is that in closing Mr Budworth contended at one point that it could be a tort, relying on the fact that one chapter of Clerk & Lindsell on Torts (23rd ed, 2020) has a chapter on breach of confidence and privacy. That is chapter 26. However, while [26-04] states that there is growing judicial support for the recognition of the action for *misuse of private information* as a tort, it also states that "*the most favoured basis for [a non-contractual breach of confidence claim] to date is that of an equitable principle of good faith*", footnoting *Seager* and *Vestergaard*. Therefore, I do not consider that Clerk & Lindsell provides support for such a contention, and in any event the case-law provides as set out above.

322. While it may be regarded as a historical accident, and the phrase "*an action founded on tort*" in s.2 should be widely construed, the fact remains that breach of confidence is, for the reasons above, not a tort. Therefore, in my judgment a breach of confidence claim does not fall within the wording of s.2, any more than a mortgagee's equitable duty to obtain proper advice when selling mortgaged property did so in *Raja v Lloyds TSB Bank plc* (2001) 82 P.&C.R. 191 despite its closeness to the tort of negligence.

323. Its equitable nature should not mask the fact that breach of confidence is sufficiently close to a tort to command a chapter in Clerk & Lindsell, and, consistent with that, it can attract joint liability in the same way that a tort can: *Vestergaard* at [33] (Supreme Court), and it sounds in damages as a tort would. Therefore, given my conclusions on s.2, I must examine whether the six year period under s.2 can apply by analogy through the application of s.36.

324. Under s.36(1), a number of time limits under the 1980 Act, including "*(a) the time limit under section for actions founded on tort*", "*shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any such time limit may be applied by the court by analogy in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1st July 1940*".

325. In my judgment, for the reasons set out above, a breach of confidence claim is a claim for "*equitable relief*" within the terms of s.36(1).

326. Prior to 1 July 1940 the time limit for tort claims was six years. Therefore, one must ask whether before 1 July 1940 a court of equity would have applied by analogy that six year limitation claim to a claim for breach of confidence not founded on a contract.

327. In *P&O Nedlloyd BV v Arab Metals Co* [2007] 1 WLR 2288, Moore-Bick LJ stated, in examining the practice of a court of equity prior to 1 July 1940, that "*if a statutory limitation provision, properly interpreted, applies to the claim under consideration, equity will apply it in obedience to the statute, as indeed it must*" (at [38]). In other words, if statute sets a limitation period for a claim, then that should be applied whether the remedy sought is equitable or at common law. Here, as breach of confidence is an equitable claim, statute does not apply to the claim under consideration, so this obedience principle does not apply.

328. That does not, however, exhaust the situations in which equity applied by analogy a statutory limitation period. Waller LJ went on to explain that "*even if the limitation period does not apply because the claim is for an exclusively equitable remedy, the court will none the less apply it by analogy if the remedy in equity is "correspondent to the remedy at law". In other words, where the suit in equity corresponds with an action at law a court of equity adopts the statutory rule as its own rule of procedure*" ([38]).

329. To understand when the Court would regard the remedy in equity as being correspondent to the remedy at law, it is helpful to take some examples from the cases. The cases in (1) and (2) are discussed in *P&O Nedlloyd* itself from [37]-[43].

    (1) In *Paragon Finance plc v D B Thakerar & Co* [1999] 1 All ER 400 at 415, Millett LJ explained that "*[a] claim for an account in equity, absent any trust, has no equitable element; it is based on legal, not equitable rights*", so that "*[w]here the agent's liability to account was contractual equity acted in obedience to the statute*" but (and this is the relevant scenario for present purposes) "*[w]here, as in Knox v Gye, there was no contractual relationship between the parties, so that the liability was exclusively equitable, the court acted by analogy with the statute*".

    (2) As the latter example given by Millett LJ illustrates, the Courts can look at how closely the two claims correspond in practice. The vivid example put by Mr Jules Sher QC sitting as a Deputy High Court Judge in *Coulthard v Disco Mix Club Ltd* [2000] 1 WLR 707, 730, is a good illustration of this: "*one could scarcely imagine a more correspondent set of remedies as damages for fraudulent breach of contract and equitable compensation for breach of fiduciary duty in relation to the same factual situation, namely the deliberate withholding of money due by a manager to his artist. It would have been a blot on our jurisprudence if those selfsame facts gave rise to a time bar in the common law courts but none in the court of equity*." That involves examining how closely related the facts relied on in support of the common law claim are to the equitable claim, and how similar in substance the relief is: see *Cia de Seguros Imperior v Heath (REBX) Ltd* [2001] 1 WLR 112. In that case, Waller LJ held that equity would have taken the view that it should apply the statute by analogy to a claim for damages or compensation for a dishonest breach of fiduciary duty, because "*what is alleged against Heaths as giving rise to the dishonest breach of fiduciary duty are precisely those facts which are also relied*

on for alleging breach of contract or breach of duty in tort. It is true that there is an extra allegation of 'intention' but that does not detract from the fact that the essential factual allegations are the same. Furthermore, the claim is one for 'damages'. The prayer for relief has now been amended with our leave to add a claim for 'equitable compensation', but the reality of the claim is that it is one for damages, the assessment of which would be no different whether the claim was maintained as a breach of contract claim or continued simply as a dishonest breach of fiduciary duty claim" (121). Clarke LJ put it in similar terms, namely that "*[a]s Waller LJ has pointed out, and as the judge demonstrated by a detailed analysis of the points of claim, the essential nature of the pleaded case is the same whether it is put as damages for breach of contract, damages for breach of duty or damages (or compensation for breach of fiduciary duty. The only additional element is the defendant's alleged intention, which on the facts here adds nothing of substance to the claim for damages. Indeed, it would be quite unnecessary to include this claim if it were not thought necessary to do so in order to advance the time bar argument*" (125).

(3) Another example of this in practice is *Raja v Lloyds TSB Bank plc* (2001) 82 P.&C.R. 191, where it was held that while a mortgagee's duty to obtain proper advice when selling the mortgaged property was an equitable duty, its content was the same as a duty in negligence, so that the six year limitation period for negligence claim under s.2 of the 1980 Act should apply by virtue of s.36: [32].

330. In my judgment, the examples above are considerably removed from the present case. The Courts have been reluctant to allow a claimant to use a claim for breach of fiduciary duty to outflank time-bars that would apply to a tort or contract claim based on identical or near identical facts. As Waller LJ put it in *Cia de Seguros*, "*there is no reason why, if the claim for damages for breach of contract and tort are time barred, the claim for damages for breach of fiduciary duty should not be time barred also*" because "*the relevant equitable rules should accord with the comparable legal rules*" (126, extracted in *P&O Nedlloyd* at [42]). Put in a slightly different way by Moore-Bick LJ in *P&O Nedlloyd*, commenting on both the breach of fiduciary duty cases and the treatment of claims to an account in *Paragon Finance*, "*[i]n each case the same facts give rise to a claim, whether at law or in equity, and the same kind of relief is obtainable*": [43], and see his further elaboration at [45].

331. Similarly, where an equitable claim is the equitable analogue of a comparable species of common law claim, even if that common law claim is not available on the facts, the limitation period for the corresponding common law claim should apply. *Raja*, where the mortgagee's duty arose in equity alone, is an example of this, as is the analogy drawn in *Coulthard* between equitable compensation for breach of fiduciary duty and damages for fraudulent breach of contract on the factset before the Judge. There is no requirement that the claim could actually have been brought at common law on the facts, even putting to one side the time bar that would exist to the common law claim.

332. However, in the matter before me there is no common law claim with which to draw an analogy. There is no corresponding common law claim to the breach of confidence claim that is pleaded or that otherwise exists. While I can see the logic in having a common limitation period for breach of confidence and tort, I do not consider that it is sufficient for the purposes of section 36 that an action of breach of confidence shares

similarities with torts generally by virtue of constituting a civil wrong that can generate a damages award. Therefore, in my judgment the statutory time limit for a claim in tort should not apply by analogy.

333. It is notable that Counsel did not put before me any suggestion in any breach of confidence case to date that a six-year period did apply by analogy with the period for torts.

334. In any case, had the tort period applied, I would have found that the publishing and marketing of the Nemaura Structure from the 7 October 2014 Lowry conference onwards, were within time.

335. As explained above, it was not pleaded or argued that the *contractual* limitation period should apply by analogy with the period that would have applied against OneE Tax for a breach of contract claim. Therefore I do not need to consider it further.

Unlawful means conspiracy

336. A six year period applies under s.2 of the 1980 Act.

337. The common design and the acts pursuant to it started well before 5 October 2014. Further, in my judgment, the Claimant started to suffer loss when the act of developing the Nemaura Structure using the Claimant's confidential information began. At that point, the Claimant's information was being wrongfully used, and the Claimant was therefore suffering loss, whether one analyses that loss by reference to a reasonable fee for that use under the user principle, or one applies a different measure of loss.

338. Accordingly, more than six years have passed since that point and the unlawful means conspiracy claim is time-barred in respect of the acts before 5 October 2014, such as the initial disclosure of the material in May 2014 and its use to obtain legal advice, as set out in paragraph 266 and 267 above. However, in my judgment the conspiracy claim is not barred in respect of the unlawful acts after 5 October 2014, such as the dissemination of the Nemaura structure material at the Lowry conference on 7 October 2014. I have not been referred to any authority on the topic, but in my judgment this accords with principle. Those acts are capable of having caused a separate loss, and they are not to be regarded as one combined act or course of conduct for the purpose of limitation. Take the example of an unlawful means conspiracy where the unlawful means was tortious and therefore were a number of successive breaches of duty, some generating losses within the 6 year limitation period. One would not expect the unlawful means conspiracy claim to be barred for all those acts, some of which might have caused loss shortly before the claim form was issued, if a freestanding tort claim for them would be in time.

Procuring a breach of contract

339. This is a separate tortious wrong from the breach of contract that is induced. Therefore, again, a six year period applies under s.2 of the 1980 Act.

340. Here, I have found that the original act of inducing took place well before took place in May 2014, by the dissemination then of information by OneE Tax to OneE Investments. It does not matter for this purpose whether one treats the transfer of information to

OneE Group in August 2014 as conducted by OneE Tax or OneE Investments, because in either case it was more than six years before 5 October 2020. In any event, I consider the more natural analysis to be that it was OneE Investments who passed the material to OneE Group in August 2014 because it was OneE Investments who had been dealing with it in preparing instructions, not OneE Tax. Accordingly, the only breach of contract occurred in May 2014.

341. In my judgment, the Claimant suffered loss at this point through the wrongful dissemination of his information, and through the wrongful consequent use of his information to start developing the Nemaura Structure. For the reasons set out in paragraph 337 above, I considered that the Claimant started to suffer this loss well before 5 October 2014 and accordingly the claim for inducing a breach of contract is time-barred.

Joint liability

342. A defendant who is jointly liable for assisting in or procuring the wrongful act of the primary actor is liable, not for the act of assistance but for the primary actor's wrongful act: *Fish & Fish* at [38] per Lord Sumption. Accordingly, for the purposes of joint liability for breach of confidence, the limitation position is the same as set out above, so the claim is not time-barred.

The correct court fee

Summary of the application (the "Application") and my conclusion

343. As explained below, the substantive point underlying this application turns whether an account of profits, coupled with an order for payment of all sums due upon the taking of the account, is a money claim so as to attract a higher court fee than the Claimant has paid to date.

344. By application notice issued on the afternoon of 12 December 2022, the first day of the trial, the Defendants contended that the claim should be stayed because the Claimant has not paid the necessary Court fee for "*proceedings….to recover a sum of money*" (a **"money claim"**) within the meaning of paragraph 1.1 of the table (the **"Table"**) at Schedule 1 to the Civil Proceedings Fees Order 2008 (the **"Fees Order"**). The Claimant, they contended, had wrongly proceeded on the basis that its claims are currently "*proceedings for any other remedy*" under paragraph 1.5 of the Table (a **"non-money claim"**), which attract a lower Court fee. The Defendants submitted in their application notice that I should stay the claim unless the Claimant paid the higher fee by the close of its evidence, which was due to occur in the afternoon of the second day of the trial, 13 December.

345. While the Application was made during the trial, the Claimant's Counsel, Mr Hill, was able to deal with it, and took me through the relevant authorities.

346. The relevant aspect of the claim seeks an inquiry as to equitable compensation / damages, or at the Claimant's option an account of profits, and an order for payment of all sums found to be due pursuant to the foregoing inquiry or account.

347. The Application is put on three alternative bases:

(1) An inquiry as to equitable compensation or damages is a money claim, so seeking such an inquiry as one of the Claimant's options makes the claim a money claim. The first part of the proposition is uncontroversial, so the question is whether the second is correct.

(2) The fact that the Claimant seeks in paragraph 61 of its Particulars damages under the 2018 Regulations for any post-8 June 2018 breaches of confidence makes the claim a money claim.

(3) A claim for an account of profits and order for payment of sums due on the taking of the account is itself a money claim.

348. Therefore, the issues on the Application are (i) whether I should entertain it given its lateness, (ii) if so, the answer to the above questions (1)-(3), and (iii) if the Defendants are right on one or more of (1)-(3), what the consequence should be.

349. On (i), as explained below, despite the lateness, I consider that I should deal with it for the following reasons: (a) the importance of ensuring that the correct Court fee is paid; (b) it could have been raised at a later date, for example if and when the Claimant sought an account of profits (at which stage the Claimant would not on its logic have paid the higher Court fee), so it is sensible to resolve it now given that I have heard substantive argument on it and am in a position to do so; (c) it raises a short legal point and that the Claimant was able to deal with it; and (d) the Claimant indicated through Counsel that it would pay the higher sum if I found it should be paid, so this is not a situation where a judgment that the higher Court fee is payable will lead to the Claimant having the proceedings stayed.

350. On (ii), in my judgment, the key underlying question is the third: whether a claim for an account of profits and order for payment of sums due on the taking of the account is a money claim, given that it a claim that seeks to obtain the payment of money to the claimant. Hildyard J held in *Page v Hewletts Solicitors* [2013] EWHC 2845 (Ch) that such a claim was a non-money claim, this was followed by Master Clark in *Lifestyles Equities CV v Sportsdirect.com Retail Ltd* [2016] EWHC 2902 (Ch), and the Court in *Lappet Manufacturing Company Ltd v Basil Ibrahim Rassam* [2022] EWHC 1412 (Ch) took this to be a conventional approach.

351. On (iii), in my judgment, on the authorities, a claim for an account of profits is not a money claim, and I consider that I should follow those decisions.

352. I explain below how I reach this conclusion and how the question arises in the present case.

The Fees Order

353. By s.92(1) of the Courts Act 2003, the Lord Chancellor may with the consent of the Treasury by order prescribe fees payable in respect of anything dealt with by, among other things, the Senior Courts which include the High Court. An order may contain provision in respect of the scales or rates of fees: s.92(2). Fees payable under this section are recoverable summarily as a civil debt: s.92(8).

354. The Lord Chancellor made the Fees Order in exercise of his powers under s.92 (together with powers under two provisions of the Insolvency Act 1986 that are not relevant for present purposes).

355. By article 2, the fees set out in column 2 of Schedule 1 are payable in, among other things, the Senior Courts of England and Wales in respect of the items described in column 1.

356. The table in Schedule 1 includes the following. I shall use the figures as they stood at the date of issue here, namely 5 October 2020.

Column 1	*Column 2*
Number and description of fee	*Amount of fee*
1 Starting proceedings (High Court and County Court)	
1.1 On starting proceedings…to recover a sum of money where the sum claimed:	
(a) does not exceed £300;	*£35*
(b) exceeds £300 but does not exceed £500;	*£50*
(c) exceeds £500 but does not exceed £1,000;	£70
(d) exceeds £1,000 but does not exceed £1,500;	£80
(e) exceeds £1,500 but does not exceed £3,000;	£115
(f) exceeds £3,000 but does not exceed £5,000;	£205

(g) exceeds £5,000 but does not exceed £10,000;	£455
(h) exceeds £10,000 but does not exceed £200,000;	5% of the value off the claim
(i) exceeds £200,000 or is not so limited.	£10,000
…	
Fee 1.1	
Where the claimant does not identify the value of the claim when starting proceedings to recover a sum of money, the fee payable is the one applicable to a claim where the sum is not limited.	
…	
1.4 On starting proceedings for the recovery of land:	
(a) in he High Court;	£480
…	
1.5 On starting proceedings for any other remedy (including proceedings issued after permission to issue is granted):	
In the High Court;	£528
…	

Where a claim for money is additional or alternative to a claim for recovery of land or goods, only fee 1.4 or 1.5 is payable.	
Fees 1.1 and 1.5.	
Where more than one non money claim is made in the same proceedings, fee 1.5 is payable once only, in addition to any fee that may be payable under fee 1.1.	
…	

(emphasis added)

The relevant background

357. The relevant background to the application is as follows:

(1) By its 5 December 2020 claim form, the claimant brought a claim for breach of equitable duties of confidence, and sought (i) an injunction prohibiting future use of information, (ii) an order that all records of confidential information retained by any of the Defendants be delivered up and destroyed, (iii) an account of profits or at the Claimant's election an equity as to equitable compensation, (iv) an order for payment of all sums due upon the taking the account or holding the inquiry, together with interest under s.35A of the Senior Courts Act 1981 or the Court's equitable jurisdiction, (v) costs, and (vi) further or other relief.

(2) The claim form stated that the value of the claim was to be assessed and that "*[a]t present the Claimant has not yet elected to pursue a money claim (it seeks either an account or equitable compensation, and to elect between them following judgment on liability): see Lifestyles Equities v Sportsdirect.com Retail Ltd [2016] EWHC 2092 (Ch). If, following judgment on liability, the Claimant does elect to pursue a money claim, it undertakes to pay the appropriate Court fee for such a claim.*"

(3) By the 18 January 2021 particulars of claim, the breach of confidence claim had widened to claims for (i) breach of confidence (ii) unlawful means conspiracy (the unlawful means being breach of confidence), (iii) procuring a breach of contract (namely the NDA under which the allegedly confidential information was supplied), together with (iv) a joint tortfeasance claim in respect of the breach of confidence and (v) the payment of damages under regulation 17 of the Trade Secrets (Enforcement, etc.) Regulations 2018 in respect of any breaches of confidence that occurred from 9 June onwards. The prayer seeks "*(3) [a]n inquiry*

as to damages / equitable compensation or, at the Claimant's option, an account of profits" and "*(4) [a]n order for payment of all sums found to be due pursuant to the foregoing inquiry or account*".

(4) The application sought a stay if the higher Court fee was not paid by close of the Claimant's evidence later on the 13 December. I reserved judgment on the point and sought the parties' submissions as to what the consequence should be if I accepted the Defendants' submissions as the Court fee payable, given that the end of the Claimant's evidence would have long since come and gone. The Defendants left the matter in the Court's hands, stating that its concern was that the correct fee was paid, and the Claimant explained that if the Court considered that a higher fee should have been paid, it would pay it.

The previous case-law

358. In *Page v Hewetts Solicitors* [2013] EWHC 2845 (Ch), the question arose of when a claim against the defendants for dishonestly procuring or assisting in an innocent breach of the trust by the first claimant, an administrator of an estate, in advising him to sell the deceased's home at an undervalue to an entity associated with the second defendant (the **"secret profits claim"**), was brought for limitation purposes.

359. The claim form comprised claims for damages for breach of contract and negligence, and also in equity. The prayer for relief sought damages for the common law claims, equitable compensation for breach of fiduciary duty and/or dishonestly assisting in a breach of trust, and an account of the profits made by the defendants from their retainer over a particular period: [47].

360. Hildyard J considered that the question of whether the claim had been brought in time turned on whether the correct Court fee had been paid: see [44]. The Court fee originally paid had been calculated on the basis that the claim was simply a claim to recover a sum of money. The damages claim for breach of contract and negligence was plainly a claim to recover a sum of money. However, the Judge considered that the key question was the claims in equity, and especially the claim for an account, were in fact non money claims, because if they were then an additional fee should have been paid to reflect this *on top of* the fee paid for the money claim: [48]-[49].

361. The Judge concluded that the claim for included both a claim for money, namely the damages and equitable compensation claims, and an additional non-money claim, namely the claim for an account of profits so that the wrong Court fee had been paid: [54]. His reasons for this conclusion were as follows:

(1) "*a claim for an account is a separate and discretionary equitable remedy, calling for an additional assessment and inquiry by the court and the exercise of an additional and discretionary equitable jurisdiction: there is an analogy, as I see it, with a claim for an injunction, for which an additional fee to that payable for a claim for money would be payable*": [55];

(2) as argued by the defendants, "*an assessment of damages is necessarily ancillary or appendant to a claim for damages; whereas a claim for an account may be (and indeed commonly is) self-standing*": [50], accepted at [55];

(3) as also argued by the defendants, "*an account may be ordered regardless of whether or not sums of money are said to be owing, and the outcome of an account may lead to the assertion of a proprietary remedy rather than a pecuniary one*", which reflected the fact that "*account is not simply an assessment of loss or a claim for money; it is a procedure, or in other words, as stated in Ultraframe (UK) Ltd v Fielding & Ors [2005] EWHC 1638 (Ch) at paragraph 513: "The taking of an account is the means by which a beneficiary requires a trustee to justify his stewardship of trust property.*": [50], as accepted at [55].

362. Reason (1) is a reason that focuses on the fact that the claim for an account was quite separate to the damages and equitable compensation claims and therefore added something important to them. That reflects that the question before the Judge was whether there was an *additional* non-money claim on top of the money claims, which is a slightly different context to the present, which is whether the claimant is seeking a non-money claim as an *alternative* to a money claim at the election of the claimant. However, the reasoning in (3) is squarely applicable in the present case.

363. In *Lifestyles*, the central question before Master Clark was whether the correct court fee had been paid. The claim was for registered trade mark infringement and/or inducement of breach of contract: [2]. The claimants paid the court fee for a non-money claim. The defendants applied to stay the proceedings on the basis that the court fee for a money claim should have been paid instead. Master Clark allowed the application. The following points should be noted:

(1) In that case the relevant relief recited at [6] of the judgment consisted of two elements: subparagraph (3) which sought an inquiry as to damages suffered by the claimants caused by reason of the act of inducing WCC to breach the contract, and subparagraph (4) which sought "*an enquiry as to damages suffered by the Claimants and each of them by reason of the aforesaid acts of trade mark infringement, alternatively at the Claimants' option, an account of profits accrued to the Defendants or any of them by such acts.*" Therefore, subparagraph (3) was a freestanding inquiry for damages suffered by reason of inducement to breach of contact, and subparagraph (4) sought relief in the alternative at the Claimants' option, one of which was an account of profits for the infringement.

(2) The first argument by the defendants in *Lifestyles*, recited at [10] of the judgment, relied on "*the fact that the claimants are, in addition to making the trade mark infringement claim in which they claim an account of profits, making a free-standing claim for inducing breach of contract in which they claim an inquiry as to damages*". The trade-mark infringement claim was the one set out in para (4) of the prayer for relief. The claimants contended that a claim for an inquiry as to damages was not a money claim until the quantum phase of the claim: [11]. The Court accepted the defendants' argument at [12] on the basis that the fact that there is to be an inquiry does not preclude the claim being a money claim. In my judgment, that logic is not applicable in our case. In *Lifestyles* there was a freestanding claim in respect of which only an inquiry was sought. That is not the case here, where the relief sought in para.(iii) in the brief details of claim in the claim form is an account of profits or at the Claimant's election an inquiry as to equitable compensation.

(3) The defendants' second argument in *Lifestyles*, that a claim to an account is a money claim, was rejected at [14]. The Master agreed with Hildyard J that "*an account is not simply an assessment of loss or a claim for money*". Rather "*it is a process by which the court investigates whether the defendant has in fact made any profits from his wrongdoing to which the claim is entitled. The result of the process may be a finding that the defendant holds no profits and no monies are payable.*"

(4) The defendants' third argument in *Lifestyles* was that the fact that the claim included a money claim as an alternative, namely the claim for an inquiry as to damages, made the claim a money claim for which the higher fee is payable: [15]. The Court rejected that argument, holding that "*I also agree with the claimant's counsel that it would be anomalous if a claimant with sufficiently early information about the defendant's activities to enable it to elect for an account of profits in its claim form could pay only the fee, but a defendant without that information must pay the higher fee. Further, the two forms of relief are not mere alternatives, but are mutually exclusive, and it is not until a claim elects for an enquiry (which it may not do) that it can be said that its claim is to recover money*".

364. The final relevant case is *Lappet*, which concerned a claim for trade mark infringement. In that case, like the present, the claimant sought an inquiry as to damages or in the alternative at the claimant's election an account of profits: [8]. No objection was taken at the hearing before the Judge to the claimant having paid the court fee for a non-money claim, and the Judge set out at [11] what he understood to be the conventional justification for this approach on the basis of *Page* and *Lifestyles*.

365. The issue before the Judge was whether the action should be transferred from the High Court, Business & Property Courts, Intellectual Property List to the Intellectual Property Enterprise Court: [5]. The defendants made two applications seeking to have it so transferred. The first, which is the relevant one for present purposes, sought a declaration that the High Court did not have jurisdiction over the claim: [6]. The parties agreed in the course of the debate on this application that the claim was not a claim for money: [27]. The Judge dismissed both of the defendants' applications.

366. At a consequentials hearing, the defendants sought permission to appeal, by seeking to argue for the first time that a trademark infringement action which includes a claim for an account of profits will invariably be a claim for money, and that *Page* and *Lifestyles* had failed to make a distinction between the remedy of an account generally (which may not be a claim for money) and the remedy for an account of profits (which always will be): [2022] EWHC 2158 (Ch) at [23]. The Judge refused permission, because he did not immediately see the validity of the distinction the defendants sought to draw, which was not explored before him, and he did not think it appropriate to give permission in respect of a point which was not, but could have been, argued: [24].

Applying the law to the present facts

367. Starting with the Defendants' first argument, the logic of [15] of *Lifestyles* is clear: if a claimant states that it claims an account of profits or at the option of the claimant an inquiry as to damages, that is not at that stage a money claim. It is only if and when the claimant elects for an inquiry, that it brings a claim to recover money. This is further

made clear by [16], where the Court stated that "*[i]f, therefore, this claim has been only for trade mark infringement, then I would have held that the appropriate fee had been paid*". The trade mark infringement claim was the one at sub-para 4 that sought an account of profits or at the claimant's option an inquiry. The Court was stating that if this sub-para 4 claim had been the only claim brought and there was no freestanding sub para 3 claim, then the lower court fee was payable.

368. I agree that the mere fact that a monetary remedy is sought as one of the two alternatives does not make the claim a money claim prior to the election between them. It is true that Schedule 1 to the Fees Order states after paragraph 1.5 of the Schedule that where a claim for money is alternative to a non-money claim, only the fee in paragraph 1.1 is payable, and that the fee in paragraph 1.1 is the fee for a money claim. However, the logic of *Lifestyles* is that where the alternatives are sought *at the election of the claimant*, this a different matter, because the money claim may never be pursued by the claimant. Therefore, the Defendants' first argument should be rejected. I leave until later the question of whether it is right that an account of profits is not a money claim.

369. I also reject the Defendants' second argument. It is clear from the relief sought in the prayer that a damages remedy under reg.17 of the 2018 Regulations is part of the damages remedy being sought at the Claimant's election as an alternative to an account of profits, rather than the reg.17 remedy being sought come what may. Mr Hill also made this clear in oral submission.

370. Therefore, that leaves the third argument, that a claim for an account of profits coupled with an order for payment of all sums found to be due pursuant to such an account, is a money claim for these purposes.

371. The succinct argument on this point by Mr Budworth was that an account of profits coupled with an order for payment of sums due on the taking of account was a claim that sought one thing, namely the payment of money, so that the only natural reading of the Fees Order was that it was a claim to recover a sum of money. This argument has raised doubts in my mind as to whether the previous decisions referred to above are correct on the point, given the following line of argument against them:

    (1) The starting point, which underlies Mr Budworth's submission on this, is that someone who seeks an account of profit coupled with an order for payment over of any sums due on taking the account is seeking to obtain a Court order that will require the payment of money from the defendant.

    (2) An account for profits and order to pay the sum on the taking of it is not simply a process. It is, if one uses the language of process, a process to seek to recover money. Put another way, it is a process that seeks the disgorgement of the defendant's profit by the defendant paying a sum equivalent to that profit.

    (3) A claimant typically elects for an account of profits where it will provide a greater sum of money than damages, so there might be thought to be an oddity in describing a damages claim as a money claim while describing something that will provide a *greater* monetary sum as a "non-money" claim that then results in a lower court fee.

(4) The election for an account of profits is not as of right. As explained in *Vercoe* at [333]-[345], the Court determines whether it is appropriate that the claimant should be able to recover the profits rather merely damages for the loss caused. Therefore, the Court asks what the appropriate remedial response in such a case. This emphasises how closely intertwined the two remedies are.

(5) The apparent purpose of requiring greater court fees for large money claims is that those bringing claims with a significant financial value, and therefore potentially recovering significant sums, should be expected to pay larger sums for the use of the Courts to do so.

(6) There is a limit to the closeness of the analogy in *Page* with an injunction for the purposes of determining whether the proceedings to recover a sum of money, because an injunction does not lead to the payment of money.

(7) Similarly, the fact that there are actions for account that do not seek a payment of money at the end of them, but rather a proprietary remedy, is not necessarily decisive for all forms of account. A claim for an account of profits coupled with an order for payment of sums due is a claim that seeks a payment of money. Similarly, the fact that an action for an account is the means by which a trustee justifies its stewardship of trust property does not of itself tell you whether it is a money claim or not, particularly in a context considerably removed from the trust context.

(8) The argument in *Lifestyles* [14] that the account may reveal that no sum is due might not be considered decisive. A claim for damages may fail on the basis that no loss has been suffered. That does not prevent a claim for damages or equitable compensation being a money claim. Nor does it stop a claim like the present that seeks an *inquiry* as to damages or equitable compensation being such a claim. The reason for this is that the categorisation of the claim is determined by what its stated aim is, not whether it succeeds or fails. If a claim seeks an account of profits and order for payment of sums found to be due, and it is found that no sums are due, then while in one sense the claimant has obtained what he sought: the taking of the account and the payment of any sums due, which happen to be zero, in every practical sense the claimant has failed. He has not obtained the relief that he wanted. The taking of the account is not an end in itself for the claimant.

372. However:

(1) The point has been considered in three previous cases, if one includes *Lappet*, including two decisions of High Court judges, and in each one the conclusion was an account of profits was not a money claim.

(2) There were no cases put before me expressing a contrary view to these cases.

(3) The point was the subject of considerably more detailed argument in *Page* with reference to a number of authorities, and more detailed argument in *Lifestyles*, than the brief argument I received on the point.

(4) There are clearly arguments that it is not a money claim, for the reasons in those cases set out above.

(5) As set out in *Lappet* and as submitted by Mr Hill, the form of relief sought here, namely an inquiry as to damages or at the claimant's election an account of profits, is a common one in intellectual property claims, and it appears to be conventional in light of *Page* and *Lifestyles* to proceed on the basis that the Court fee payable is that for a non-money claim.

(6) The proposition that such a claim is a non-money claim was important in *Lappet* in a different context, namely when a claim should be commenced in the High Court. Further, as noted in the substantive judgment in *Lappet*, CPR r.16.3 uses the similar terminology of a claim for money, and this is of relevance under CPR r.16.3(5)(a) to when a claim should be issued in the High Court: [37]. Therefore, the correct answer may have broader implications beyond the present context.

(7) It is undesirable to have differing views on the issue at first instance given that a claimant has to decide at the outset of proceedings what court fee it should pay, getting it wrong can have serious consequences, and the issue here can have the broader implications set out in (6) above.

373. Accordingly, I consider that in the interests of judicial comity and deployment of judicial resources, the appropriate course is for me to conclude that despite my doubts I am not convinced that the previous three cases are wrong, and accordingly I follow those cases on this point.

The appropriate relief

374. For these reasons, I dismiss the Defendants' application.

375. Had I reached the opposite conclusion, I would have found that the appropriate relief is simply that the Claimant should pay the difference between the fee that it has currently paid and the fee for a non-money claim. There are situations where a failure to pay the Court fee amounts to an abuse of process, such as in *Atha & Co Solicitors v Liddle* [2018] EWHC 1751 (QB) at [18], where the statement of value used was not a genuine assessment of the value of the claim. However, here the Claimant has followed the guidance in earlier cases and cannot be faulted to do so, and has indicated that it will pay the difference if the Court considers that a higher fee is payable, so unlike in *Atha* I do not consider that the Claimant could be faulted in any way. Therefore, it is plain to me that the limit of the relief would be as above.

The costs of the application in relation to the re-amended witness statements

376. As set out in paragraphs 15(1) and 16(1) above, the costs of the Defendants' application for relief from sanction in respect of its failure to put in witness statements compliant with PD 57AC fall to be dealt with.

377. In my judgment, the breaches of the Practice Direction were serious, so the Defendants should pay the Claimant 100% of the Claimant's costs, to be assessed on the indemnity basis, for the following reasons:

(1) The statements contained significant passages of common text on substantive points. While a letter was provided to the witnesses with general advice on witness statements and a skeleton statement to assist, the witnesses generated their own

drafts, which were close to the final drafts eventually signed. Given the common passages of text in a number of the statements that I have referred to above, it seems to me that there necessarily must have been a degree of coordination between some of the witnesses in generating their statements. I note that Mr Owens, for example, stated in his oral evidence that Mr Slattery had suggested some wording in relation to his statement (day 3, p.494 of the transcript), and it was Mr Slattery who carried out the initial document search (Mr Timol's evidence: day 4, p.515 of the transcript).

(2) Therefore, in my judgment at some elements of the statements are not in the witness's own words. Taking some examples of the common text, paragraphs 6 to 10, 12, 14 to 15, 16, 17 and 19 of Mr Johnson's witness statement is identical to paragraphs 6 to 10, 12, 14 to 15, 17, 18 and 20 in Mr Slattery's statement. There are a number of further passages of common text later on in those two statements. For example, the entirety of the section of Mr Johnson's witness statement on the differences between Mr Corrigan's structure and the Nemaura structure (paragraphs 29 to 32) is the same as paragraphs 33 to 36 of Mr Slattery's statement save for the addition of an extra sentence at the end of paragraph 36, and paragraphs 48 and 49 of Mr Slattery's witness statemen are repeated in Mr Johnson's witness statement at paragraphs 40 to 41 with the addition of an extra sentence at the start of paragraph 41. Similarly, there is a marked resemblance between paragraphs 9 to 11.2 of Mr Owens' statement and paragraphs 6 to 8.2 of Mr Freeman's.

(3) The statements were not originally accompanied by certificates of compliance, as required by paragraph 4.3 of PD57AC. I understand that such a certificate was sent separately shortly after exchange. Further, the certification stated incorrectly that PD 57AC had been complied with. It had not been, because:

(a) The statements did not include the right statement of truth or witness's confirmation, as required by PD57AC paragraph 4.1, or a list of the documents the witness had been referred to as required by PD57AC paragraph 3.2, and the statements exhibited documents contrary to PD57AC paragraph 3.4, which requires the Statement of Best Practice to be complied with and paragraph 3.4 of that Statement cautions against such exhibiting.

(b) There were significant passages of common text, as set out in (1) above, and irrelevant material and argument, as set out in the 8 November 2022 letter from the Claimant's solicitors at section 3.

(c) When re-amended witness statements were served, the Defendants' solicitors accepted that they could not certify two of the statements, namely those of Messrs Freeman and Owens, because they had not been involved in their preparation.

(4) The statements referred to a common bundle that included significant material that the witness had not seen at the time, which is in my judgment contrary to paragraph 3.4 of the Statement of Best Practice. It risks contaminating the witness's recollection with the views expressed by others. The 10 November 2022 letter from the Defendants' solicitors explained that Mr Slattery, Mr Timol and Mr Johnson had all been through the full common bundle.

(5) The failings above are not merely procedural ones. They go to the reliability of the evidence, which PD57AC is concerned to protect. The prejudice to the Claimant caused by the statements not being prepared properly in the above respects cannot be undone, because it gives rise to the danger that the Defendants' evidence is unreliable in respects that it may not be possible for the Court to detect from the oral and written evidence of the witness.

378. I do not think it is necessary to go through the detailed chronology of dealings over the witness statements, because the above failings are serious ones that merit a 100% costs award on the indemnity basis, as the case is well outside of the norm. I also note and take into account that the Defendants' suggestion in their 10 November 2022 letter that the replication of text just related to bland factual statements was not correct.

379. The Defendants' solicitors ultimately on 1 December 2022 issued an application for relief from sanctions. It was correct to put this matter before the Court so that it could form its own view on how to deal with this witness evidence. As I explained above, I would regard the Court's jurisdiction engaged here as being that under paragraph 5.2, but the precise way that it was brought before the Court is not critical, and paragraph 5.2 gives the power to make a costs-order against the non-complying party.

380. The Defendants in their written submissions criticise the Claimant for still contending after submission of the 1 December 2022 application that there were unremedied defects, and submit that this must have given rise to costs that should be awarded against the Defendants. The Claimant's stance was that they did not oppose the application, but they asked a number of questions and made a number of comments through their solicitors by letter dated 7 December 2022, including asking for disclosure of certain documents relevant to what explanation had been given to the witnesses about the preparation of their evidence by the Defendants' legal team. However, (a) in my judgment they were fair questions to ask in the circumstances, (b) the Claimant took the pragmatic stance of not opposing admission of the evidence despite the serious failings, and (c) and in any event this point is in my judgment outweighed by those above in deciding whether to make a 100% costs order on the indemnity basis.

The remaining matters to be dealt with in the proceedings

381. In my judgment, the Claimant is entitled to an inquiry as to damages, because there is prima facie evidence of loss here, for the following reasons. First, the Claimant has not received any fee for the use of its confidential information in developing the Nemaura Structure, and therefore has a prima facie argument that it has lost the opportunity to bargain for a reasonable fee for the use of its proposed structure. Second, while I take into account the time that it took the Claimant to run its structure successfully past the Revenue, the Claimant has a prima facie argument that its ability to bring any structure it produces based on R&D subcontractor relief to market in a successful manner has been lost by the Nemaura Structure being brought to market first, or failing that it has been made significantly more difficult for them to do and the money that they might generate from doing so has been restricted by the fact that OneE has got there first.

382. I have not dealt with in this judgment with whether the Claimant would be able to elect for an account of profits, because beyond brief reference to this in the Claimant's oral submissions in response to my question I have not heard argument on this, and *Vercoe*

emphasises the importance of carefully evaluating whether the Claimant should be entitled to such an account, particularly in the context of commercial dealings between two parties. Therefore, I will receive written submissions on this and hear oral submission.

383. The analysis above reflects the wealth of points that each side has prayed in aid against the other at trial. The second stage of the proceedings is likely to be similarly hard fought, with the costs that entails. The Defendants have already laid down a marker that they contend that they have made no profit from the arrangements, and there will no doubt be significant argument at the second stage about how what effort it would take to have come up with Mr Corrigan's relevant ideas, given that for example the Ultra Green opportunity involved the use of R&D sub-contractor relief under the 2000 Act. Therefore, I would encourage the parties to be realistic in considering their respective positions on the second stage and any scope for narrowing the ground between them.

Appendix

Tables comparing features of different structures (paragraph 226 of the judgment)

Claimant's table

The Claimant Structure	Nemaura (2014)	Nemaura (2013)	Rehberg (2013 / 2012)	Ultra Green[1] (2008)
Formation of LLP and investment by corporate entities (no individual investors).	Formation of LLP and investment by corporate entity (no individual investors)	Formation of LLP and investment by corporate entity (no individual investors)	Formation of LLP and investment by corporate entity (no individual investors)]	Formation of LLP and investment by corporate entities
The LLP and investors are SMEs.	The LLP and investors are SMEs.	Not relevant	Not relevant	The LLP and investors are SMEs.
The LLP engages a subcontractor to conduct R&D	The LLP engages a subcontractor to conduct R&D	The LLP engages a subcontractor to conduct (some of the) R&D	LLP engages a subcontractor to construct a building but with a complex arrangement of sub-subcontractors (some of which are connected to the developer which appears to control the LLP)-	LLP engages a subcontractor in relation to conducting R&D in alternative energy

[1] These features are only apparent from the Ultra Green detailed documents. The summary conveys very much less.

The carrying out of R&D through the subcontractor is claimed to be a trade and therefore the LLP claims a 100% trading deduction and uplifted relief 125% as an additional deduction under s.1044 CTA 2009, giving total relief of 225%.	The carrying out of R&D through the subcontractor is claimed to be a trade and therefore the LLP claims a 100% trading deduction and uplifted relief 125% as an additional deduction under s.1044 CTA 2009, giving total relief of 225%.	The full contractor payment is claimed as a trading deduction with no R&D uplift relief.	The full contractor payment is claimed as a trading deduction with no R&D uplift relief.	The carrying out of R&D through the subcontractor is claimed to be a trade and therefore the LLP claims a 100% trading deduction and uplifted relief 75% as an additional deduction under schedule 20 of the Finance Act 2000, giving total relief of 175%.
If this trading status was to be challenged by HMRC then relief would be claimed as pre-trading expenditure as provided for by s1045 CTA 2009 of 225%	If this trading status was to be challenged by HMRC then relief would be claimed as pre-trading expenditure as provided for by s1045 CTA 2009 of 225%	Not relevant	Not relevant	Not mentioned in the Ultra Green documents.
The Structure is open for investment for non-R&D entities, that is to say third party corporates who are not already involved in R&D themselves.	The Nemaura Structure is open for investment for non-R&D entities, that is to say third party corporates who are not already involved in R&D themselves.	Not relevant	Not relevant	The Nemaura Structure is open for investment for non-R&D entities, that is to say third party corporates who are not already involved in R&D themselves.
UK LLP engages in qualifying R&D expenditure for the purposes of UK R&D	UK LLP engages in qualifying R&D expenditure for the purposes of UK R&D tax	Not relevant	Not relevant	UK LLP engages in qualifying R&D expenditure for the purposes of UK R&D tax

tax relief under Part 13 of CTA 2009.	relief under Part 13 CTA 2009			relief under schedule 20 of the Finance Act 2000.
LLP utilises statutory corporate R&D tax relief scheme in respect of expenditure incurred by it which entitles the LLP to claim relief at 225% of the expenditure and not 100% of the expenditure. The uplifted amount of 125% will be deducted as expenditure "incurred" under Section 1053(1) CTA 2009.	LLP utilises statutory corporate R&D tax relief scheme in respect of expenditure incurred by it which entitles the LLP to claim relief at 225% of the expenditure and not 100% of the expenditure. The uplifted amount of 125% will be deducted as expenditure "incurred" under Section 1053(1) CTA 2009.	Not relevant	Not relevant	LLP utilises statutory corporate R&D tax relief scheme in respect of expenditure incurred by it which entitles the LLP to claim a trading deduction at 175% of the expenditure (but there is no provision regarding incurred expenditure unlike with the CTA 2009 regime).
The loss in the LLP is attributed to the corporate investors based on their percentage profit share in the LLP. This allows them to set their share of the loss arising in the LLP against other taxable profits in the investing company in that same accounting period.	The loss in the LLP is attributed to the individual corporate investors based on their percentage share in the LLP. This allows them to set their share of the loss against other taxable profits in the investment company in that same accounting period .	The loss in the LLP is attributed to the individual corporate investors based on their percentage share in the LLP. This allows them to set their share of the loss against other taxable profits in the investment company in that same accounting period .	The loss in the LLP is attributed to the individual corporate investors based on their percentage share in the LLP. This allows them to set their share of the loss against other taxable profits in the investment company in that same accounting period .	The loss in the LLP is attributed to the individual corporate investors based on their percentage share in the LLP. This allows them to set their share of the loss against other taxable profits in the investment company in that same accounting period .
The Structure itself has "internal statutory gearing", so to speak,	This scheme introduces an element of gearing in that a third party ("the	This scheme introduces an element of gearing in which a third party	This scheme introduces an element of gearing in which a third party	This scheme introduces an element of gearing in which a third party

built into the uplifted deduction. However, the Structure also provides for additional potential gearing by means of equity by other investors into the LLP or loans made by third parties to the LLP. The gearing, especially in the case of non-recourse loans, would need to be of a level that would be in compliance with the GAAR requirements, thereby potentially avoiding intensive HMRC scrutiny.	funding consortium" as described in the Nemaura document) contributes additional funding to the LLP which will further increase the expenditure incurred by the LLP and therefore the tax relief available to the corporate investors. This has could lead to intensive HMRC inquiry and may not comply with GAAR.	contributes additional recourse funding to the LLP which will further increase expenditure available to the LLP for loss relief purposes and therefore for tax relief available to the corporate investors. This could lead to intensive HMRC inquiries and noncompliance with GAAR.	contributes additional recourse funding to the LLP which will further increase expenditure available to the LLP for loss relief purposes and therefore for tax relief available to the corporate investors. This could lead to intensive HMRC inquiries and noncompliance with GAAR.	contributes additional recourse funding to the LLP which will further increase expenditure available to the LLP for loss relief purposes and therefore for tax relief available to the corporate investors. This could lead to intensive HMRC inquiries and noncompliance with GAAR.
The LLP enters into a license agreement with a Pharma Company which owns the intellectual property of the compound to be researched.	The LLP enters into a license agreement with Nemaura Pharma which owns the intellectual property of the compound to be researched.	The LLP enters into a license agreement with Nemaura Pharma which owns the intellectual property of the compound to be researched.	Not relevant- LLP entered into construction contract and did not acquire IP	The LLP enters into a license agreement with Ultra Green which owns the intellectual property of the alternative energy technology to be researched.
The LLP then engages with an unconnected research company who would be subcontracted to carry out the R&D research on behalf of the LLP. The "qualifying	The LLP then engages with an unconnected research company who would be subcontracted to carry out the R&D research on behalf of the LLP. The "qualifying	The LLP engages with a connected research company who would be contracted to carry out the R&D research on behalf of the LLP. R&D	The LLP engaged with what appears to be a connected subcontractor to construct the building.	The LLP then engages with an unconnected research company who would be subcontracted to carry out the R&D research on behalf of the LLP. There is no

element" of the subcontractor payment as defined in s1136 CTA 2009 would qualify for relief under s1053 CTA 2009.	element" of the subcontractor payment as defined in s1136 CTA 2009 would qualify for relief under s1053 CTA 2009.	relief was not relevant to this structure.		"qualifying element" definition. The unconnected contractor payment qualifies for relief under para 12, schedule 20 of the Finance Act 2000.
Under the R&D legislation, where a payment is made to an unconnected subcontractor, then 65% of the uplifted amount i.e. 125% is deductible in addition to the 100% actual amount paid. This provides an additional 81.25% tax relief in addition to the 100% available on the actual trading expenditure, giving total relief of 181.25%.	Under the R&D legislation, where a payment is made to a subcontractor, then 65% of the uplifted amount i.e. 125% is deductible in addition to the 100% actual amount paid. This provides an additional 81.25% tax relief in addition to the 100% available on the actual expenditure, giving total relief of 181.25%.	Not relevant	Not relevant	Under the R&D legislation, where a payment is made to a unconnected subcontractor, then 65% of the uplifted amount i.e. 75% is deductible in addition to the 100% actual amount paid. This provides an additional 48.75% tax relief in addition to the 100% available on the actual trading expenditure, giving total relief of 148.25%.
The subcontractor payment may be expended by the subcontractor on "relevant research and development" as defined in Section 1042 CTA 2009 and is not restricted to 4 specific	The subcontractor payment may be expended by the subcontractor on "relevant research and development" as defined in Section 1042 CTA 2009 and is not restricted to 4 specific categories of	Not Relevant	Not relevant	The subcontractor payment may be expended by the subcontractor on "relevant research and development" as defined in para 4 of Sch 20 Finance Act 2000 and is not restricted to 3

categories of expenditure (s1053 and s1136) as is the case with “inhouse R&D” (s1052) and connected subcontractor R&D (s1053 and s1134).	expenditure (s1053 and s1136) as is the case with “inhouse R&D” (s1052) and connected subcontractor R&D (s1053 and s1134).			specific categories of expenditure set out (paras 12 and 20 of Sch 20), as is the case with “in-house R&D” (para 3) and connected subcontractor R&D (para 10)
s.1053(6) would not operate to confine the relief to the 4 specific categories of R&D expenditure.	s.1053(6) would not operate to confine the relief to the 4 specific categories of R&D expenditure.	Not relevant	Not relevant	Schedule 20 of the Finance Act 2000 does not present this difficulty.
The full amount paid under the subcontractor payment would be fully discharged on R&D by the subcontractor.	If the technology fails then the Nemaura Structure provides for a refund of a percentage of the unspent investment. Also circular nonrecourse loans, also means expenditure may not necessarily be incurred in the research programme.	Non-recourse loans suggest that significant element of expenditure in R&D may not actually be incurred.	Non-recourse loans / LLP funding support a significant amount of construction funding to be incurred.	Commercial loans with rolled up interest are said to support the gearing. Not clear on whether non-recourse.
The Structure provided for security and a buyback option, which was to be a function of the value of the technology.	The LLP would take security over the technology and Nemaura have an option to buy back at 5 times the investment .	Not clear.	Not clear.	Not clear.

Defendants' table

The Claimant Structure	Nemaura (2014)	Nemaura (2013)	Rehberg (2013 / 2012)	Ultra Green[2] (2008)
Formation of LLP and investment by corporate entities (no individual investors).	Formation of LLP and investment by corporate entity (no individual investors)	Formation of LLP and investment by corporate entity (no individual investors)	Formation of LLP and investment by corporate entity (no individual investors)]	Formation of LLP and investment by corporate entities
The LLP and investors are SMEs.	The LLP and investors are SMEs.	Not mentioned	Not mentioned	The LLP and investors are SMEs.
The LLP engages a subcontractor to conduct R&D. The subcontractor is either connected or unconnected	The LLP engages an unconnected subcontractor to conduct R&D	The LLP engages a subcontractor to conduct 90% of the R&D. No decision yet on whether subcontractor is connected or unconnected. Focus is on whether structure can overcome the reasons for the failure in *Vaccine Research* case.	LLP engages a subcontractor to construct a building but with a complex arrangement of sub-subcontractors. The subcontractor is unconnected.	LLP engages an unconnected subcontractor in relation to conducting R&D in alternative energy
UK trading LLP engages in qualifying R&D expenditure and makes a payment for 'relevant research and development' through a subcontractor and claims a 100% trading	UK trading LLP engages in qualifying R&D expenditure and makes a payment for 'relevant research and development' through an unconnected subcontractor and claims	UK trading LLP makes a subcontractor payment to Nemaura R&D company and claims a 100% trading deduction. Whilst an R&D uplift may apply in these circumstances, there is	UK trading LLP makes a subcontractor payment to Hotel construction company and claims a 100% trading deduction. R&D reliefs not relevant because the structure is	UK trading LLP engages in qualifying R&D expenditure and makes a payment for 'relevant research and development', through an unconnected subcontractor.

[2] These features are only apparent from the Ultra Green detailed documents. The summary conveys very much less.

deduction and uplifted relief 125% as an additional deduction, giving total relief of 225%. The uplift is restricted by 65% in cases where the subcontractor is unconnected. Uncertainty over whether consolidated 2009 legislation (s.1053(6)) creates an issue over whether one has to look at the subcontractor's accounts (the 4 specified categories) in determining its expenditure. Concludes that the better analysis is one does not need to look through. Largely irrelevant however as Claimant favours a structure with connected subcontractor (both Morvus and FastTrackPharma showing connected)	a 100% trading deduction and uplifted relief 125% as an additional deduction, giving total relief of 225%. This relief is restricted by 65% as the subcontractor is unconnected. No question over whether one has to look into subcontractor's accounts (the 4 categories) for the 65% restriction to apply. Relevant R&D legislation mentioned; Part 13 of CTA 2009, s.1044, s1136, s1053, s1133	no specific mention of the R&D legislation; the engagement with Mr Sherry was for answers to the specific questions raised upon which OneE requested specialist input.	not being applied in an R&D setting.	No mention of any uncertainty over whether 65% restriction applies. 3 categories of R&D expenditure in FA 2000 rather than 4 per the CTA 2009. Relevant R&D legislation mentioned; schedule 20 Finance Act 2000,

Relevant R&D legislation mentioned; Part 13 of CTA 2009, s.1044, s1136, s1134, s1053, s1052, s1042, s.1053(6), s1053.				
If the trading status was to be challenged by HMRC then relief would be claimed as pre-trading expenditure as provided for by s1045 CTA 2009 of 225%	Not Mentioned	Not mentioned	Not mentioned	Not mentioned
The Structure is open for investment for non-R&D entities, that is to say third party corporates who are not already involved in R&D themselves. The Promoter could also subscribe for capital in the LLP.	The Nemaura Structure is open for investment for non-R&D entities, that is to say third party corporates who are not already involved in R&D themselves.	The Nemaura Structure is open for investment for non-R&D entities, that is to say third party corporates who are not already involved in R&D themselves.	The Rehberg Structure is open for investment for non-construction entities, that is to say third party corporates who are not already involved in construction/hotel development themselves.	The Ultra Green Structure is open for investment for non-R&D entities, that is to say third party corporates who are not already involved in R&D themselves.
The loss in the LLP is attributed to the corporate investors based on their percentage profit share in the LLP. This allows them to set their share	The loss in the LLP is attributed to the individual corporate investors based on their percentage share in the LLP. This allows them to set their share of the loss	The loss in the LLP is attributed to the individual corporate investors based on their percentage share in the LLP. This allows them to set their share of the	The loss in the LLP is attributed to the individual corporate investors based on their percentage share in the LLP. This allows them to set their share of the	The loss in the LLP is attributed to the individual corporate investors based on their percentage share in the LLP. This allows them to set their share of the

of the loss arising in the LLP against other taxable profits in the investing company in that same accounting period.	against other taxable profits in the investment company in that same accounting period .	loss against other taxable profits in the investment company in that same accounting period .	loss against other taxable profits in the investment company in that same accounting period .	loss against other taxable profits in the investment company in that same accounting period .
The Structure provides for additional potential gearing by means of equity by other investors into the LLP or loans made by third parties to the LLP. The gearing, especially in the case of non-recourse loans, would need to be of a level that would be in compliance with the GAAR requirements, thereby potentially avoiding intensive HMRC scrutiny.	Gearing is a core component of this scheme. A third party ("the funding consortium" as described in the Nemaura document) contributes additional funding to the LLP which will further increase the expenditure incurred by the LLP and therefore the tax relief available to the corporate investors. This has the potential for HMRC inquiry and allegation of non-compliance with GAAR.	Gearing is a core component of this scheme. A third party contributes additional recourse funding to the LLP which will further increase expenditure available to the LLP for loss relief purposes and therefore for tax relief available to the corporate investors. This has the potential for HMRC inquiry and allegation of non-compliance with GAAR.	Gearing is a core component of this scheme. A third party contributes additional recourse funding to the LLP which will further increase expenditure available to the LLP for loss relief purposes and therefore for tax relief available to the corporate investors. This has the potential for HMRC inquiry and allegation of non-compliance with GAAR.	Gearing is a core component of this scheme. A third party contributes additional recourse funding to the LLP which will further increase expenditure available to the LLP for loss relief purposes and therefore for tax relief available to the corporate investors. This has the potential for HMRC inquiry and allegation of non-compliance with GAAR.
The LLP invests in a range of projects. No mention of a license agreement for the unconnected subcontractor payment structure. Insofar as the structure relates to a payment to an	The LLP enters into a license agreement with Nemaura Pharma which owns the intellectual property of the compound Transdermal Patch to be researched.	The LLP enters into a license agreement with Nemaura Pharma which owns the intellectual property of the compound Transdermal Patch to be researched.	Not relevant- LLP entered into construction contract and did not acquire IP	The LLP enters into a license agreement with Ultra Green which owns the intellectual property of the alternative energy technology to be researched.

unconnected subcontractor, no specific detail is provided as to what the R&D is for, how the funds will be used and what the specifics of any commercial agreements are.				
No Specific mention of the subcontractor agreement and how the money will be spent or what happens in the event not all funds are required for R&D.	The structure was developed so that if the R&D fails, the agreement provides for a refund of a percentage of the unspent money. The agreement also provides for a multiple molecule approach to testing, ensuring, as best as possible, that all funds will be spent should, for example, testing fail for one molecule.	Agreement to conduct 'all or nothing testing' for 5 molecules through stages 1 and 2. Caters for situations where testing fails and/or molecule is sold.	Subcontractor services for construction of hotel. Agreement drafted granting wide discretion to subcontractor.	LLP enters into a non-refundable contract with research company for the research company to conduct research in areas in which it is envisaged will bring the most benefit.
One of Mr Corrigan's proposed structures provided for security and a buyback option, which was to be a function of the value of the technology. The full	The LLP would take security over the technology and Nemaura have an option to buy back at 5 times the investment.	The LLP would enter into an agreement with Nemaura Pharma to conduct testing. No further details regarding this agreement.	The LLP enters into an agreement with construction company. No further details regarding this agreement.	The LLP enters into an agreement with subcontractor. No further details regarding this agreement..

amount paid under the subcontractor payment would be fully discharged on R&D by the subcontractor.				
Not mentioned in instructions.	The restriction under Section 59, CTA 2010 (Relief for LLP members) does not restrict losses, by extending the liabilities the corporate members of the LLP liability on a winding up beyond their original capital contribution.	The restriction under Section 59, CTA 2010 (Relief for LLP members) does not restrict losses, by extending the liabilities the corporate members of the LLP liability on a winding up beyond their original capital contribution.	The restriction under Section 59, CTA 2010 (Relief for LLP members) does not restrict losses, by extending the liabilities the corporate members of the LLP liability on a winding up beyond their original capital contribution.	The restriction under Section 59, CTA 2010 (Relief for LLP members) does not restrict losses, by extending the liabilities the corporate members of the LLP liability on a winding up beyond their original capital contribution.
Several possible gearing options – not clear if structure has gearing or not	Funded by 26% capital, 74% loan	Funded by 15% capital, 85% loan	Funded by 14.5% capital, 85.5% loan	Funded by 25% capital, 75% loan.
Not clear	1 month accounting periods for the LLP to ensure 'loss' coincides with corporate investors' accounting periods.	Not clear	Not Clear	Not Clear

2.