Neutral Citation Number: [2022] EWHC 759 (Comm)

Case No: CL-2020-000073

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/04/2022

Before :

NICHOLAS VINEALL QC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

EPOQ LEGAL LIMITED	**Claimant**
- and -	
DAS LEGAL EXPENSES INSURANCE COMPANY LIMITED	**Defendant**

- -
- -

N.D.P Mendoza (instructed by **Mackrell Solicitors**) for the **Claimant**
Louis Weston (instructed by **Beale and Co.**) for the **Defendant**

Hearing dates: 21-23 and 25 February 2022

- -

Approved Judgment

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

.....
NICHOLAS VINEALL QC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

"Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:30 am on 06 April 2022."

NICHOLAS VINEALL QC:

1. The Claimant ("Epoq") is a provider of online services which include automated legal document drafting services and a library of legal advice.

2. The Defendant ("DAS") underwrites legal expenses insurance (LEI), distributed via brokers and business partners, generally as an add-on to primary insurance policies offered by other insurance companies. DAS' core business is the provision of LEI, and the LEI it provides is often bundled up with access to services like those provided by Epoq, which DAS buys in and then, typically, makes available to those whom it insures under LEI policies.

3. The price sought by Epoq depends on the way in which its services are distributed. In general terms, if Epoq services are included in services bolted on to LEI, which is in turn bolted on to some other policy of insurance, Epoq treats this as "Scheme business", attracting relatively low prices. But if the Epoq services are distributed in some other way, Epoq will seek, and says that it will usually obtain, higher prices.

4. The dispute at the centre of this case arises because, from about 2011, DAS provided Epoq's services, together with some services of its own, to a DAS client called Walk the Walk Solutions Limited ("WTWSL").

5. WTWSL trades as BCarm. BCarm's services do not include insurance at all; rather BCarm provides a suite of support services for small and medium sized businesses to help them manage risk and deal with legal issues in a cost-effective way. The upshot was that a BCarm client, who wanted, for instance, a precedent letter for terminating a contract of employment, would go onto the BCarm website and download an appropriate document. That document would have been created in the first place by Epoq, who had sold the access to Epoq's services to DAS, who had in turn sold access BCarm together with some of DAS's own services.

6. This sort of provision of access to Epoq's services would not fall within Epoq's idea of "scheme business".

7. The dispute arises in relation to the price charged by Epoq to DAS for the services that DAS made available to WTWSL. DAS has, since 2011, paid Epoq a fixed fee of £1.03 per customer per year in relation to WTWSL clients. The nub of the dispute here arises because Epoq says that the £1.03 pa charged in relation to BCarm was a rate that was appropriate only to scheme business, which this was not, and, Epoq says, it did not discover until 2019 that this was not scheme business. Its pleaded case is that something of the region of £18 per end user per year would reflect the value of that service.

The contractual Framework

8. There are a series of agreements that feature in the evidence and which are, to varying degrees, important to the issues.

9. The first in time is the original Personal Lines Service Agreement or PLSA dated 23 April 2008. Epoq was engaged to host, maintain and support a dedicated website located at a dedicated URL (the "Personal Site") branded as "DAS Household Law" providing legal document drafting services and information (the "PLSA"). This is really only relevant by way of background.

10. Next in time comes the Commercial Lines Services Agreement or CLSA dated 1 April 2011 and made between Epoq (and Epoq Group Ltd) and DAS. Epoq was engaged to develop, host, maintain and support a dedicated website located at a dedicated URL (the "Business

Site") branded as "DAS Business Law" providing legal document drafting services and access to legal information.

11. The PLSA was renewed on 19 July 2011.

12. On 8 December 2011 an agreement was entered into between DAS and WTWSL. It took effect from 1 April 2011. It was under this agreement that DAS made some of Epoq's services, together with some of its own services, available to WTWSL's clients. The price agreed between DAS and WTWSL was £5 per client per year.

13. The final agreement is an agreement that has been called the Pricing Agreement. By this agreement DAS and Epoq agreed the price that DAS would pay in relation to WTWSL's clients' access to Epoq's services. There is an important dispute between the parties as to whether the Pricing Agreement operates as a variation of the CLSA, or as a free-standing agreement. The Pricing Agreement was never reduced to a single document countersigned by both DAS and Epoq, and the parties are not agreed as to how to characterise the agreement, nor what its terms were, but they do agree that there was an agreement, and that under it the fee per BCarm client was agreed at either £1.02 or £1.03, and that pursuant to this agreement DAS paid Epoq £1.03 per BCarm client right up to 2019.

14. Much later, on 6 August 2019, the Claimant wrote to the Defendant by email alleging that it had recently discovered a potential failure by the Defendant to account for fees or charges due under the Agreements. The potential failure identified at that point related to access to DAS Business Law afforded to insured customers of Direct Line. Then on 15 August 2019, Epoq wrote to the Defendant by email alleging that it had recently discovered that one of the Defendant's clients, BCarm, was offering access to DAS Business Law separately from a DAS policy of insurance, and in respect of which the Defendant only paid the Claimant "Access Fees". Epoq alleges this amounted to a breach of the terms of the Commercial Lines Services Agreement.

15. Epoq gave notice by letter dated 29 August 2019 in accordance with clause 9.12 of both Agreements requesting an audit of the Defendant's records.

16. Until recently these proceedings included a claim for an order that such an audit be carried out, but that claim was discontinued shortly before trial. The claim is now confined to issues arising in relation to the provision of the Epoq's services to DAS's customer BCarm. Epoq contends that since about June 2011, DAS has breached the CLSA by providing BCarm's customers with access to the Business Site despite the fact that such customers were not Insured under a Scheme. In the alternative, if the Defendant has not breached the CLSA by so doing, Epoq contends it has been underpaid for the access to the Business Site because the rate paid by DAS in respect of such access was calculated on the basis that BCarm's customers were Insured under a Scheme and the appropriate rate for "stand-alone" access to the Business site would have been much higher - £18 per Client per year rather than the £1.03 paid, and Epoq raises claims of misrepresentation and mistake.

ISSUES

17. The parties agreed the following list of issues:

    1. Did the Defendant breach the CLSA (a) by allowing customers of BCarm, who were not Insured under a Scheme, access to the DAS Business Site by using a Scheme code; (b) by paying £1.03 per user in relation to such users who were not Insured; or (c) by failing to comply with the provisions of clause 16 of the CLSA in relation to the provision of Client and Insured Services to customers of BCarm?

2. Did the Claimant and Defendant reach an agreement in 2011, or by conduct thereafter, as to the appropriate rate to be paid by the Defendant in respect of access by customers of BCarm to the DAS Business Site? If so: (a) When and how was such agreement made; (b) Was such agreement vitiated by any misrepresentation by the Defendant or by a mistake (whether common to the parties or unilateral); (c) Did such agreement relate to all customers of BCarm or only such customers who were Insured under a Scheme?

3. If no such agreement was reached or if such agreement applied only to customers of BCarm who were Insured, is the Claimant entitled to a reasonable charge to be paid by the Defendant in respect of access by non-Insured BCarm Clients to the DAS
Business Site? If so, what is that reasonable charge?

4. By paying £1.03 to the Claimant in respect of the use by non-Insured BCarm Clients of the DAS Business Site, was the Defendant unjustly enriched at the expense of the Claimant? If so, what was the value of the benefit received by the Defendant and should the Defendant be required to make restitution of the same to the Claimant?

5. Is the Claimant's claim for £18 (or any other sum in excess of £1.03) per BCarm customer justified? Would it in fact have been paid. What if anything is the lost opportunity arising from any breach of contract by the Defendant?

6. Are any of the Claimant's claims excluded by the exclusion clauses within the CLSA?

7. Are any of the Claimant's claims statute-barred, wholly or in part?

8. Is the Claimant entitled to damages and, if so, what is the quantum of the Claimant's claim by reason of any breach of contract or misrepresentation on the part of the Defendant?

18. I think it may be clearer to approach the issues in a slightly different order and I therefore propose to deal with the factual and legal issues as follows:

(1) The express terms of the CLSA

(2) The relevant chronology of events

(3) The contractual analysis

(4) The breach of contract claim

(5) The mistake claim

(6) The misrepresentation claim

(7) Other issues including quantum.

19. I heard evidence from five witnesses called by Epoq. Mr Cohen is a founder of Epoq and its Chairman. He is a solicitor. At times, both in his witness statements and when giving evidence, he tended to argue the case. Mr Horwitz has been Epoq's CEO since February 2013. He gave evidence going to quantum which strayed well into the sort of territory appropriate only for an expert. Nevertheless for the most part their factual evidence (as opposed to their interpretation of events) was unchallenged, and the very few issues of primary fact I have to deal with are explained in the chronological section below. I also heard from Mr Saffron, a former solicitor, who is Group Counsel, and from Mr Gerber who has

worked for Epoq since 2006, working his way up from call centre manager to his present position of Director of Strategic Partnerships. I accept their evidence. Finally, Mr Jones was an Epoq sales executive between April 2007 and July 2019. I found his evidence to be entirely convincing and given without any apparent desire to favour one side or the other.

20. The only DAS employee who was called was Mr Stagg, who joined DAS in 2016 and whose involvement therefore post-dated all the relevant agreements. DAS also called the founder of WTWSL, Mr Williams, who seemed to me to be a straightforward witness with no axe to grind and I accept his evidence in its entirety.

(1) The Terms of the CLSA

21. The terms of the CLSA were drafted by Epoq and had developed over time. In the CLSA Epoq is referred to as ELL

22. Under "Background", the contract records that

> (5) DAS wishes to procure the Service and to engage ELL to develop, host and maintain the DAS Site in order to facilitate the provision of Client and Insured Services to Clients and Insured, and ELL has agreed to permit Clients and Insured access to the Client and Insured Services subject to the conditions contained herein and to provide Technical Support to DAS, Clients and Insured in respect of the Software, Service and the Client and Insured Services respectively in accordance with this Agreement.
>
> (6) In consideration of ELL providing the Service and the Client and Insured Services to Clients and Insured, DAS agrees to pay ELL the Access Fees in accordance with clause 9.1 and such of the Additional Charges, Affiliate Marketing Charges, ELL Referral Fee and the Use Charges when they are incurred in accordance with clause 9.7.

23. I note that payments by DAS to Epoq might therefore be either Access Fees, or additional charges of various kinds, including Affiliate Marketing Charges.

24. By the definitions section:

> "Access Fee" means the sums plus VAT calculable in accordance with Part 1 of Schedule 1 in respect of the provision of Client and Insured Services to Insured;
>
> "Affiliate Marketing" means the provision of Client and Insured Services on a white label branded basis, in conjunction with or at the request of Customers and Commercial Customers;
>
> "Affiliate Marketing Charges" means the charges detailed in Schedule 1;
>
> "Client(s)"means an individual who has access to the Client and Insured Services and/or who has been referred by DAS to a My Lawyer Network firm for the provision of legal services in respect of a Case;
>
> "Client and Insured Services" means the services referred to in Section 3 of Part 2 of Schedule 2 provided to a Client or Insured;
>
> "Commercial Customer (s)" means DAS business partners who are the Insured's primary insurers, the legal expenses provision of which is administered or underwritten by DAS
>
> "Customer(s)" means a third party, including any bank, building society, organisation, association, broker, broker network, charity, authority insurer, provider of financial services

> Commercial Customer or other body providing goods, products or services to consumers and/or businesses;
>
> "Insurances" means any commercial legal expenses insurance provided by DAS to an Insured under a Scheme;
>
> "Insured" means any policyholder declared to and/or accepted by DAS under an Insurance;
>
> "Rate" means the sum per Insured per year exclusive of VAT referred to in Part 1 of Schedule 12 and a specifically negotiated rate for customers of Aviva Insurance Limited who are Insured referred to in Part 2 of Schedule 12 as may be varied by the Parties in accordance with paragraph 4 of Part 1 of Schedule 1 calculated cumulatively by band.
>
> "Scheme" means any Insurance under which a group of or several small to medium size enterprises are provided with mandatory access to Client and Insured Services and which for the avoidance of doubt expressly excludes any Insurance provided on a standalone basis;

25. Pausing there, one can see that "Insurances" is in fact limited to LEI insurance provided by DAS under a Scheme, and a Scheme is an arrangement under which end users are provide with "mandatory" access to Client and insured Services.

26. Epoq submit, and I accept, that mandatory in this context means automatic rather than elective, in other words that access to Epoq services comes as part of a package for an overall price, rather than being something that end users opt into for payment of a separate fee.

27. Schedule 2 defined the Service. Under part 1 there were three services identified.

28. The first was "Content and Precedents" defined as "The development, hosting and maintenance of DAS Site populated with such ELL Content and ELL Precedents as DAS shall require for use by Clients and Insured initially in accordance with the Specification and this Agreement and varied throughout the term as required by DAS." The third was "Affiliate Marketing". This is important because DAS say that it was under this limb of the Services that the WTWSL websites were provided. Affiliate Marketing was defined as "Subject to clause 16, the provision of reasonable assistance to DAS to provide Affiliate Marketing to third parties, including the development, hosting and maintenance of Affiliate Marketing sites."

29. Clause 8 was entitled Marketing by DAS and under it DAS was permitted, subject to various provisos, to market the client and insured Services including for Affiliate Marketing purposes.

30. Clause 16 was entitled Affiliate Marketing. By clause 16.1 DAS and ELL were to "work together to market to and submit proposals for the provision by ELL of Client and Insured Services to Customers or Commercial Customers of DAS, on a white label or co-branded basis for the benefit of that Customers or Commercial Customers own customers." Pausing there, and remembering that the definition of Customers is very widely drawn indeed (see above), one can see that Affiliate Marketing might, **without there being any breach of the terms of the agreement**, lead to services being provided via DAS to end users who were not themselves Insureds within the meaning of the contract (that is to say having LEI) or indeed were not insured in any way.

31. Clause 16.2 provided that any request by DAS in respect of a cobranded or white labelled site was to be treated as a change, triggering the change control process in clause 5. It also provided that ELL would not unreasonably refuse to provide Affiliate Marketing save in certain defined circumstances.

32. Clause 16.3 set out a series of provisions which restricted the Clause 8 right to market. Clause 16.3.2 provided that all Affiliate Marketing arrangements were to be subject to consultation with ELL and consideration of and approval by ELL.

33. Schedule 5 set out the "specification for DAS Site". It recorded that what would be provided in Phase 1 would be based on the existing DAS Householdlaw service. That reflected the fact that all that was happening was that DAS were replacing their old content provider, and did not want the look or feel of their site to change.

34. Schedule 5 also contained a provision about Co-brands, and said

> "The site will have three co-brands (Fusion, Towergate and Aviva) wherein upon registration the site header will change to include the business partner's logo. Epoq to provide mock ups of these for DAS to agree with their respective business partners

35. Finally under "Site Design" Schedule 5 provided that

> "The underlying design of the new site will be based on the template of the existing Householdlaw site. … The site will essentially be a PAYG [pay as you go] site but also allow policyholders to gain access to a pre-defined subscription depending on their policy number. Each policy number can have a set of free documents, … however policyholders will be able to view and purchase all PAYG documents, again at fixed price and service level set by DAS."

36. The rates were set out in Schedule 12. For Aviva clients the rate was 15p per client per year for up to 400,000 clients. For everyone else the rate was 25p per client per year, until a threshold of 150,000 clients was reached when the rate started to decline.

37. So, focussing on the terms of CLSA as executed, the position can in my view be summarised as follows:

    (1) Epoq would provide a service to DAS based on the old DAS Household law service;

    (2) Insofar as services were provided through the main DAS site, they would be provided only to end users who were part of Scheme business;

    (3) in relation to the three co-branded sites then contemplated, that is to say Aviva, Towergate and "Fusion", it was clearly contemplated that the end users would all at least be "policyholders";

38. Did the CLSA strictly require that all end users of the three co-brand sites identified in schedule 5 had to be Scheme Business users? I am satisfied that both parties anticipated that as a matter of fact they would be, and I think that the better construction is that this was indeed a contractual requirement. I reach that conclusion because

    (1) the co-brand sites then anticipated had *not* arisen as a result of affiliate marketing;

    (2) the definition of "Rate", which clearly applies to all the services to be provided, is expressed as a sum per "Insured" per year, and by the definitions "Insured" imports the definition of "Insurance", and "Insurance" is limited to Scheme business.

39. Finally I must record some important provisions of clause 22 of the CLSA which purport to restrict the availability of certain remedies:

> 22.3 This Agreement together with the Schedules sets out the entire understanding of the Parties in relation to the matters with which it deals and supersedes and invalidates all previous agreements and understandings in relation to those matters.
>
> 22.4 Each of the Parties acknowledges that it has not relied upon, or been induced to enter into, this Agreement by any representation other than a representation expressly set out in this Agreement, and neither party shall be liable to the other in equity, contract, tort, under the Misrepresentation Act 1967 or in any other way for any representation not expressly set out in this Agreement, provided that nothing in this Agreement shall affect a party's liability in respect of any fraudulent misrepresentation.
>
> 22.5 Any amendment to this Agreement shall be in writing, signed by an authorised representative of each of the Signatories and expressed to be for the purpose of such amendment.
>
> 22.9 The terms of this Agreement are agreed between the Parties to be reasonable but if any Clause or part thereof of this Agreement becomes or is declared by any court of competent jurisdiction to be invalid or unenforceable in any way, such invalidity or unenforceability shall in no way impair or affect any other Clause or part thereof all of which will remain in full force and effect.

(2) The Chronology of Events

40. Before embarking on a chronology it is necessary to any something about the relationship between a business, called Fusion Insurance Services Limited ("FISL"), and Walk the Walk Solutions Limited ("WTWSL") and the services which they provided. In 2010 and 2011 there was, perfectly understandably, a great deal of confusion amongst Epoq employees as to which legal entities were involved in services branded in a way which used the word "fusion", but there is no dispute, now, as to what the true position in fact was.

41. Prior to 2007, FISL provided insurance, with which it also provided a suite of "risk management services", which included legal support and DAS' LEI cover. It was common ground before me that at around this time insurance companies increasingly began to bundle non-insurance services together with insurance. The attraction to insureds was that in return for their premium they not only got insurance, which they might or might not call upon depending on whether they had a claim, but they also got something which was available as a service – so the insureds felt they were always getting at least something for their money.

42. The risk management package which FISL provided to its insureds was branded as "Fusion Thinking".

43. In 2007 FISL decided to make its risk management service available for sale direct to clients, so that it was made available without being attached to insurance provided by FISL.

44. In 2009 there was a management buy-out whereby WTWSL acquired a part of FISL's business. The part it acquired was the risk management service.

45. After the 2009 buyout WTWSL continued to provide the risk management service branded as "Fusion Thinking", both to FISL (so that FISL's clients continued to have access to the service) and to direct clients. WTWSL also offered the same service, but branded as BCarm. BCarm stands for Business Continuity and risk management.

46. The Fusion Thinking and BCarm products, now provided by WTWSL, included a range of services, with some choice available to customers as to what they paid for. Some of those services were bought in from DAS, and some were not. And amongst the services bought in

from DAS was a legal document service provided by DAS' previous content provider. So the old supplier's services were a subset of the services bought in from DAS, which were themselves only part of the BCarm or Fusion Thinking product.

47. WTWSL took the view that an important and valuable feature of the package that it offered was that there should be a single sign on (or "SSO") which allowed its clients on to a website from which the entire suite of services could then be accessed without the need for any further sign-in, or password, or access code.

48. So, by the time DAS and Epoq were negotiating for Epoq to replace the old supplier as the source of the legal documents service provided by DAS, WTWSL limited was already buying in a suite of DAS services which it provided on a SSO basis to end users, and those end users often took the WTWSL service as an add on to insurance provided by others (including FISL), but sometimes acquired it on the basis of a direct purchase from WTWSL

49. FISL had historically paid DAS a rate of £5 (plus VAT) per end user per year for the package of DAS services which it took, and that rate stayed the same after the 2007 MBO, from which date it was WTWSL, rather than FISL, that purchased the package from DAS.

50. I now turn to recount the events giving rise to the claim.

51. The Epoq/DAS relationship dates back to April 2008, when Epoq started to provide its services to DAS for packaging up and selling on as part of insurances taken by private individuals: the agreement was called the PLSA which I described in the introduction.

52. I infer that DAS were happy with the Epoq service, because in late October 2010 DAS asked Epoq to tender to supply its services for DAS commercial customers.

53. Agreement in principle was reached at a meeting at DAS' offices on 28 January 2011.

54. Mr Jones of Epoq followed up that meeting with an email which recorded that the household law service would continue for a new three year term, and that Epoq would provide DAS with a new DAS business law service "for a 3 year term at a unit price of 25p each for the existing book of 150,000 units and 15p each for the existing Aviva book of 400,000 and with a MIG (minimum income guarantee) of £97,500." The new DAS Businesslaw service was to "comprise a core service with 3 co-brands (Fusion, Towergate and Aviva)". It was envisaged that the core service would "operate in a similar manner to DAS Householdlaw in that it will offer document services at a retail price for discrete consumption by anyone with appropriate access codes (scheme code or voucher) will be able to obtain specific documents for free (or at a discount)." Mr Jones explained that the aim would be to exclude the higher value documents from the inclusive service in order to provide the best opportunity for upsells.

55. Mr Gerber worked on drawing up a specification, which he finalised on 2 February 2011. It became incorporated later as Schedule 5 of the CLSA.

56. Following the meeting Mr Cohen sent heads of terms to Mr Ling of DAS.

57. On 4 February 2011 Mr Ling of DAS explained to Mr Gerber that "Fusion" had a "quirk" which allowed users to log in through the "fusion portal" and stay logged in when they went through to DAS Businesslaw. He asked Mr Gerber if that could be accommodated. On 8 February Mr Gerber said it could be done, but not in Phase 1 of the project. He and Mr Ling were happy that it could be done in Phase 2.

58. Then there was a further development. On 11 February 2011 Mr Ling sent Mr Gerber and Mr Jones an email entitled "Fusion Cobrand". He said that "things have changed for Fusion

somewhat and that the branding would need to be based on the existing BCarm website", to which he provided a link. He said that DAS would try to persuade Fusion that they only needed one site – removing the need for the "fusionbusinesslaw site", but that they might be unsuccessful.

59. There followed direct contact directly between Epoq and WTWSL. WTWSL shared technical information on 16 March 2011.

60. Mr Williams, the MD of WTWSL was keen to explain to Epoq that all that he wanted was for his company's service to continue as it always had done, and that he needed single sign-on ("SSO"). On 17 March 2011 Mr Williams emailed Mr Jones of Epoq. He explained that "WTWSL is the company that provides the BCarm/Fusion Thinking product". He explained that the BCarm/Fusion thinking system acted as a synchronisation portal for a number of risk management systems, of which the Business Law product was a minor part, representing, he said, some 5% of their system usage, the other systems all being business systems (rather than libraries) with a significant number of businesses and their employees using them on a daily basis. He made the point that WTWSL had not asked DAS to change its legal library provider, and that WTWSL was the ultimate customer, and he made plain that he expected Epoq to make its system fit in with the single portal model used by WTWSL, as opposed to WTWSL having to fit in with changes caused by DAS' decision to use Epoq.

61. Mr Williams therefore made clear to Mr Jones of Epoq that the corporate entity providing the BCarm and Fusion branded services was WTWSL. But Mr Jones told me, and I accept, that at no stage did he realise that the "Fusion" branded service, and the similar BCarm service, had become detached from FISL. It is unsurprising that Mr Jones did not register this detail, for there is no reason for it to have seemed particularly important to him. His role was to try to ensure that the deal – between Epoq and DAS - did not founder because of difficulties providing the service in a form acceptable to those who ran the "Fusion" and BCarm websites – whoever they might be.

62. Nothing said by Mr Williams in his 17 March email would have given Epoq the impression that all of WTWSL's end users were purchasers of insurance from DAS, and it was not suggested to Mr Williams in his cross-examination that he had any time said anything that might lead (or mislead) Epoq into thinking that the WTWSL services had the features which Epoq treat as constituting scheme business.

63. Because WTWSL was keen to ensure that the range of documents available free matched its previous offering, it was subsequently agreed that the suite of documents provided free of charge via the BCarm and Fusion Thinking sites would be rather more extensive than the suite of Epoq documents provided free via the DAS Business law site.

64. On 22 March 2011 Mr Williams of WTWSL, Mr Ling of DAS, and Mr Jones of Epoq met together. Mr Jones' follow up email recorded that Fusion was unhappy about having been bounced into the changes by DAS, and wanted an SSO. They agreed a way forward: the BCarm site would go live on 1 April but with no Epoq documents, but a SSO would be introduced soon, with a target of 1 May, and an extended suite of free documents would be available – extended, that is, beyond what DAS was providing to its other customers.

65. Meanwhile the CLSA was finalised, and it was eventually signed on 1 April 2011. It will be recalled from the terms of the CLSA that I set out above, that no special or different price was agreed for "Fusion": it was only the Aviva cobranded site that attracted a special rate. Indeed, more generally the CLSA drafting had not caught up with the special arrangements being discussed in relation to the WTWSL site.

66. Confusion remained within Epoq as to who or what exactly BCarm was. Mr Jones emailed Mr Gerber on 24 May 2011 telling him (correctly) that Steven Williams was a BCarm person and that BCarm was the service they provided, but he said – and he was wrong about this – "their company name is Fusion".

67. In the event the extended suite of documents made available to WTWSL was provided on the SSO BCarm site from 1 June 2011.

68. At around the same time Mary-Ann Cooper, an in-house lawyer at DAS, was tasked with drawing up terms of the agreement between DAS and WTWSL. Adopting the terminology of the CLSA she referred to this as a "co-branded supplier agreement".

69. On 27 May 2011, within an email chain with Mr Cohen that had begun with exchanges about the PLSA renewal terms, she said she was preparing a draft co-branded supplier agreement, saying she would be most grateful for any assistance Mr Cohen could provide in respect of the technical details to be included in it. Mr Cohen replied on 27 May 2011, saying Ms Cooper should send the draft and he could have "a look to see where/what technical language you can insert." He asked her to remind him who the co-brand customer was, and said he would do a proofread the following week.

70. Ms Cooper sent her draft agreement to Mr Cohen within ten minutes: "As advised, please find attached my initial draft of the above agreement. As I have not been involved on the technical side of this arrangement your assistance is confirming the services to be provided on a cobranded site would be most welcome". Ms Cooper did not name the cobrand customer but it was obvious who it was from the attachment, which provided in its opening paragraphs as follows:

> THIS AGREEMENT is dated 1st May 2011
>
> PARTIES
>
> (1) WALK THE WALK SOLUTIONS LIMITED incorporated and registered in England and Wales with company number 6675662 whose registered office is at Enterprise House, 21 Buckle Street, London, E1 8NN ("XXXX").
>
> (2) DAS LEGAL EXPENSES INSURANCE COMPANY LTD incorporated and registered in England and Wales with company number 103274 whose registered office is at DAS House, Quay Side, Temple Back, Bristol BS1 6NH ("Supplier").
>
> Together "the Parties".
>
> BACKGROUND
>
> (A) XXXX is providing a range of risk management services to its insurance clients.
>
> (B) BCarm (as defined below) is a new product development to supply such services without an insurance product.
>
> (C) The Supplier has entered into an agreement with Epoq Legal Limited for the provision of certain services which form part of the packaged product on the terms set out below.
>
> (D) In consideration of the Supplier providing the Services XXXX agrees to pay the Supplier fees in accordance with this Agreement.

71. On the same page BCarm was defined as "XXXX's product offering of goods and services for the provision of risk management of which the Services form an integral part, which also trades under the names BCarm and Business Continuity and Risk Management.

72. It would therefore have been immediately obvious to anyone who opened and read this attachment that DAS was proposing to provide Epoq's services to WTWSL on (at least in part) a non-Scheme basis.

73. On 9 June 2011 Mr Gerber and Mr Cohen discussed internally what they might charge DAS for a "standalone" product, but it is not clear on the evidence whether or when this was communicated to DAS. Nevertheless it interesting that at about this time Epoq were considering standalone pricing, by which they meant pricing for non-Scheme business.

74. On 5 July 2011 Mr Cohen replied to Ms Cooper. He apologised for the delay and said he had "not reviewed your master agreement as yet but plan to do so soon." The same day Ms Cooper sent him a more recent version of the same document for him to review. Like the first version, it was clear from the first page of his agreement that what was anticipated included the provision of DAS' services (including Epoq's services) without an insurance product.

75. Mr Cohen never did revert to Ms Cooper with any comments on the DAS/WTWSL agreement in either its specific or generic form.

76. So the position, as things were left on the correspondence, was that:

- DAS had sent Mr Cohen emails which attached draft DAS/WTWSL contracts
- those drafts made clear that DAS would be providing DAS' services, incorporating Epoq services to end users, without an insurance product (ie on a non-Scheme basis)
- Mr Cohen had received the emails which attached those documents
- Mr Cohen had told Ms Cooper that he would review them.

77. Mr Cohen said in his witness statement that he did not, in fact, look at either draft agreement at any time. I shall revert to this point later.

78. In July 2011 (and therefore *after* Epoq had received the draft DAS/WTWSL contract), agreement was reached about the price at which Epoq would provide DAS with the services, including the extended suite of documents, which DAS would make available to one of its clients via the BCarm website. It will be appreciated from what I have already described, that at least some people at Epoq were labouring under the misapprehension that this was about the provision of services to FISL clients as end users, whereas DAS knew that what was in fact going to happen was that the services would be used by WTWSL.

79. This misunderstanding was the fault of Epoq. The true position in terms of corporate personalities had been explained clearly by WTWSL in Mr William's email of 17 March 2011. And, whether or not Mr Cohen had read it, that was also clearly communicated in the attachment to Ms Cooper's emails, attachments which Mr Cohen had said that he would read. Furthermore, those attachments also set out in express terms, that WTWSL was distributing the DAS services to clients who had no insurance.

80. The culmination of the negotiations as to the price of provision for the extended suite of documents are contained in a series of email between Mr Ling and Mr Jones between about 18 and 27 July 2011.

81. Mr Ling wanted a price for the "Fusion" documents and Mr Jones gave him a price in an email of 26 July of £1.02. Mr Jones told him he had reached the price by adding the fee for the additional documents to the "base fee" of 25p, and then applying discount, and he also indicated that the price would be the same for BCarm, EIG, and another business called Aspen.

82. EIG and Aspen were insurers, so that their business would probably have been scheme business.

83. DAS in fact thereafter paid £1.03 per end user (rather than £1.02) in respect of the WTWSL business. That seems to have been simply an error, but if it was spotted by Epoq they did not correct it.

84. No formal document was ever signed by both parties, but later in the year Mr Cohen and Mr Saffron drafted a formal side letter which Mr Cohen sent to Mr Ling, saying "If it's agreed, I can sign it and send it to you for signature."

85. The draft side letter was in these terms

> "I refer to the discussions that have taken place between us concerning proposed variations to the Commercial Lines Services Agreement dated 29 March 2011 made between (1) Epoq Legal Ltd ('ELL'); (2) Epoq Group Ltd ('EGL'); and (3) DAS Legal Expenses Insurance Company Limited ('DAS') ('the Agreement'), and to the arrangements made thereunder.
>
> Expressions defined in the Agreement shall have the same meaning in this letter.
>
> EGL and ELL propose the amendments to the Agreement indicated below:
>
> The definition of 'Rate' in clause 1.1 of the Agreement shall be replaced with the following:
>
> "Rate" means the sum per Insured per year exclusive of VAT referred to in Part 1 of Schedule 12 and the specifically negotiated rates for customers who are Insured of the organisations referred to in Part 2 of Schedule 12 or any additional organisations agreed in writing between the parties; in any case as may be varied by the Parties in accordance with paragraph 4 of Part 1 of Schedule 1 and calculated cumulatively by band (where applicable);
>
> Part 2 of Schedule 12 to the Agreement shall be amended by the addition of the following:
>
> For Ecclesiastical Insurance Group ("EIG"): Unit price: £1.02
>
> For Fusion Thinking trading as BCarm ("BCarm"): Unit price: £1.02
>
> In all other respects, the Agreement shall remain in full force and shall continue to have full effect.
>
> For the avoidance of doubt, the Rate applicable to EIG and BCarm has been agreed on the basis that their customers have been provided with access to an extended range of ELL Precedents.
>
> Details of this extended range are set out in the attached spreadsheet entitled 'Extended document suite for EIG and BCarm'.

> The amendments set out herein shall be deemed to have taken effect from 1 June 2011 in the case of BCarm, and from 16 September 2011 in the case of EIG.
>
> If these proposed amendments are acceptable to you, please would you arrange for the enclosed copy of this letter to be signed by an authorised representative of DAS and returned to me. …

86. I draw two factual conclusions from the terms of this side letter. First, Epoq (or at least Mr Cohen and Mr Saffron) were still confused about the relationship between WTWSL, BCarm and "Fusion". Second, they still had not realised that BCarm was distributing Epoq products to end users who were not themselves Insureds. In my view they would not have proffered the amendment in these terms had they realised either of those two things.

87. Mr Ling emailed on 23 November 2011 to say that the terms were agreed subject to review by DAS's lawyers, but there is no evidence that any such review ever happened, and there things seem to have been left, with no formal agreement ever being drawn up to record what had been agreed. Neither party has been able to find any further follow up or response to the proffered side letter. It seems to have been forgotten about on both sides.

88. In May 2012 there was some further correspondence between Ms Cooper and Mr Cohen. DAS was seeking some amendments to the PLSA and CLSA. Mr Cohen said he would not accept the amendments, and, again, the matter seems to have been left at that, with no agreed amendments drawn up or signed off.

89. Between 2011 and 2019 DAS paid Epoq £1.03 per user for what was referred to as BCarm business, and also for EIG business. Epoq were provided on a regular basis with reports which showed how often their services were accessed via the BCarm website, and Epoq never raised any complaint that their services were being accessed more often than they would have expected had this been scheme business.

90. In June 2019 DAS, terminated the CLSA on notice. It is common ground they were entitled to do so.

91. In August 2019 Mr Cohen emailed Mr Horwitz and others within Epoq and told them that he had found out "quite by chance that BCarm who have circa 5000 units is a standalone scheme with no policy against which it is attached. This has been going on for some time and [Mr Gerber] is investigating to make sure we did not know this, Its news to all of us. If its correct then they will have to pay a standalone rate of between £5-10 not £1.03 they have been paying for years."

92. In correspondence between the parties which ensued, DAS referred to the sending of DAS/BCarm draft agreement in 27 May 2011. Epoq's reply, in a letter from its in-house solicitor and General Counsel Mr Paul Saffron, said that Mr Cohen had no recollection at all of the correspondence and, Epoq having searched both its hard copy and soft copy files, no trace of it could be found, nor of any the related correspondence.

93. I need to resolve a question of fact. Did Mr Cohen in fact read the attachment to the Cooper emails? I find on the balance of probabilities that he did not. He told me that he generally opened emails, but that he did not open these or read their attachments, but I place no weight on this assertion. I find that Mr Cohen now has no direct or reliable recollection about exactly what he did and did not read in 2011. A letter written on his instructions in 2019 said that he had no recollection of receiving the Cooper emails. If it was true that he had no recollection of receiving the emails (which he obviously did in fact receive – because he replied to them), I do not see that he is likely, even with the aid of seeing the contemporaneous documents, now to remember whether in fact he opened or read their attachments. Instead I reach my

conclusion by inference from the contemporaneous documents. I think that Mr Cohen would have responded in vigorous terms had he realised the BCarm website was not scheme business, and in fact he did not react at all; and I do not think Mr Cohen would have sent out the draft side letter in the form he did had he thought the BCarm website included non-scheme business.

94. This complex sequence of events, and the resulting misunderstandings between the parties, can be summarised as follows:

(1) From about 2008 DAS provided a package of services to WTWSL, and that package remained essentially the same before and after Epoq became involved as DAS' supplier. At all times, DAS charged WTWSL £5 per user.

(2) DAS and Epoq agreed that Epoq would become DAS' new supplier of source of online legal documents.

(3) DAS and Epoq agreed that for Epoq documents within the service that DAS would provide to BCarm, a fee of £1.02 per end user would be paid.

(4) Epoq never in fact understood that WTWSL was providing the DAS bundle of services to some end users who were not insured by DAS. There were two elements of that misunderstanding. First, Epoq never understood the role played by WTWSL, and thought that the BCarm website was somehow linked to FISL; secondly, and partly as a result of that, Epoq thought that their product was being distributed only to Insureds, that is to say as Scheme business.

(5) Epoq would have understood the status of WTWSL if they had read carefully what they had been told; and Epoq would have understood that WTWSL was not entirely scheme business if Mr Cohen had done as he said he would, and read the draft agreements sent to him by Ms Cooper, but he did not in fact open or read the attachments to those emails and continued under a misapprehension that this was all Scheme business.

95. I turn now to the contractual analysis.

96. If I have correctly understood Epoq's position it is that the CLSA was amended by the terms of the side letter (POC #46), that the contract therefore only specified a rate for an *Access Fee*; that since an Access Fee only applies to BCarm customers who were insured, there was no rate agreed for those customers who were not, and that a term must be implied that the Defendant would pay a reasonable charge for access by non-insured BCarm clients (POC #47.3).

97. DAS' primary position is that the extended suite of documents was made available to CLSA pursuant to a free-standing agreement made by way of the email exchanges that agreed a price for the service provided to "BCarm" and that all that was agreed was (a) what was to be provided (namely the extended suite of document) (b) who it was to be provided to (namely the entity which ran the BCarm and Fusionthinking websites, that is to say, WTWSL) and (c) that the price would be £1.02 per end user. Although Mr Weston submitted that this was a free standing agreement, he contended in the alternative it would operate as an amendment to the CLSA.

98. I was not addressed on the proper approach to construction but I have reminded myself that, as set out in Chitty at 4-002, in deciding whether the parties have reached agreement, the courts normally apply the objective test. Under this test once the parties have to all outward appearances agreed in the same terms on the same subject-matter, then neither can, generally,

rely on some unexpressed qualification or reservation to show that they had not in fact agreed to the terms to which they had appeared to agree. Such subjective reservations of one party therefore do not prevent the formation of a contract.

99. It seems to me quite clear that the parties both intended that their overall relationship was to be governed by the CLSA, and I reject DAS' suggestion that either of them intended that there be a separate and free standing agreement just to deal with BCarm and EIG. The right analysis in my view is that what was agreed in relation to BCarm and EIG operated as an amendment to the CLSA. The harder question is how that amendment should be construed.

100. I do not consider that the parties were ad idem about the terms that were recorded in the side letter. The detail set out in those terms was entirely new when proffered by Mr Cohen, and the only response from DAS was expressly subject to review by DAS' lawyers, which never happened.

101. I find that all that was expressly agreed by way of variation was that the extended suite of documents would be provided to whoever BCarm was, for "BCarm" to distribute under its existing business model, at a price of £1.02 per end user. That was the result of the July 2011 exchanges and the parties' conduct thereafter.

102. I further find that, on an objective construction of the contract, the parties agreed that, save insofar as inconsistent with that express agreement, the terms of the CLSA would apply to that provision of documents.

103. On that construction, what was agreed included express agreement that BCarm/WTWSL would have access for £1.02 per end user per year. There was nothing in the amendment that limited that access to scheme business, and if and insofar as the CLSA terms were inconsistent with that, the terms of the amendment would override the CLSA terms. I am not in fact persuaded that there is an inconsistency, because, as I noted above the CLSA clearly contemplates the possibility that fees might be paid under the CLSA for non-Scheme business.

(3) Breach of Contract

104. I can now deal with the Epoq's breach of contract case.

105. Four breaches are pleaded. First (POC #41.1) it is said that DAS permitted BCarm's customers to access the business site by means of Scheme Code access. On the facts this is wrong – access was by an SSO. And anyway the access that was provided was exactly as contemplated by the amended agreement. Secondly (#41.2) it is alleged that "the Defendant only paid the Claimant Access fees in relation to BCarm's customers who were not Insured". DAS paid the agreed fee of £1.03 for every client who was permitted access, so there is no breach of this sort. If this rather cryptically pleaded allegation is really intended to be the core criticism of permitting access to end users who were not Insured, it fails because on my construction of the contract there was no such restriction on the BCarm end users. Third (#41.3), that the Defendant did not work together with the Claimant to market and submit proposals for the provision by Epoq of Client and Insured Services to customers of BCarm in accordance with clause 16. This misses the point. There was an agreement as to how access was to be provided to (all) BCarm customers, so there can have been no breach of the type alleged. Finally (#48) it is alleged there was breach of an implied term that DAS would pay a reasonable fee for access by BCarm's non-Insured clients. But there is no room for such an implied term given that I have found express agreement of the rate at which BCarm's customer should have access.

106. The breach of contract claim therefore fails.

(4) Mistake

107. I now need to deal with Epoq's mistake case, which is pleaded on the contingency that, as I have just decided, the effect of the amendments was to create an agreed rate under the CLSA in respect of non-Insured BCarm clients.

108. I have already found that the parties were not subjectively ad idem about the issue – which was undoubtedly important to Epoq – of whether "BCarm", that is to say WTWSL, was distributing only to Insureds, in other words, whether this was scheme business. Epoq (incorrectly) thought it was, and DAS (correctly) knew that it wasn't.

109. Epoq seek to avoid the "agreement represented by the amendments" on the basis of either a mutual mistake or unilateral mistake, contending that Epoq would not have agreed the amendment, and particularly the rate of £1.02, had it known that access to was being provided to BCarm clients on a non-Scheme basis.

110. There is no mutual mistake here. By the time the terms of the amendment were agreed in July 2011 it was entirely clear to DAS that WTWSL's BCarm business was not scheme business. DAS very properly made that clear in the draft agreements which they sent to Epoq's Mr Cohen for his consideration.

111. There was, however, subjectively, a mistake on the part of Epoq. Epoq thought this was all going to be scheme business, but in fact it wasn't. This, then, is a case of unilateral mistake.

112. The circumstances in which unilateral mistake can give rise to a remedy on the part of the party acting under a misapprehension are limited. It was common ground between the parties that a mistake as to the terms of the contract, if known to the other party, may affect the contract. It may also be sufficient, as a matter of law, if the non-mistaken party ought to have known that their counterparty was labouring under a mistake, but whether that is sufficient in English law is not entirely clear, although the balance of authority seems to suggest it would be enough: see Chitty 5-023 and the cases there cited.

113. But I do not need to decide this potential point of law because I find on the facts that that DAS neither knew, nor ought to have known, that Epoq was under a misapprehension. Mr Mendoza's submission on this point was that DAS' Mr Ling must surely have appreciated that the BCarm business was not pursuant to a scheme. But that is irrelevant. That merely establishes that the mistake was not mutual. The critical point is that it was perfectly reasonable for DAS to assume that Mr Cohen would do what he had told Ms Cooper said he would do, and review the DAS/WTWSL contract, and had he done so he would have known that this was not all scheme business.

(5) Misrepresentation

114. I turn to the misrepresentation case.

115. Epoq contends that at all material times DAS represented that "BCarm was associated with a Scheme" and then pleads a series of matters which I take to be intended as particulars of the representation. On analysis there is no pleading of an express representation that BCarm "was associated with a Scheme" and it seems to me that case advanced is really one of implied rather than express representation.

116. I will take the pleaded points in turn but I have to say that the pleaded case (which Mr Mendoza inherited) lacks clarity.

117. First, it is said that in the invitation to tender document provided on 3 December 2020 DAS "repeated its requirement (and thereby represented) that the services to be provided by Epoq would match existing arrangements and would therefore include access pursuant to Scheme or Schemes." This is very vague. But in any event the services provided did *include* access pursuant to Scheme business, so there is no falsity. Even if the intended allegation is that it was represented that there would be no non-Scheme business, the pre-existing arrangements with WTWSL did include non-Scheme business.

118. The second pleaded allegation (#37.1) does not make grammatical sense. But it is directed at things said in January 2011 long before the WTWSL/BCarm requirements were discussed, and so could not possibly support the overarching representation which is alleged. The same applies to the third allegation at #37.2.

119. #37.3 does not plead a representation at all. #37.4 says that "the Defendant has throughout paid Access Fees". That is question-begging and there was never an agreement that what would be paid for WTWSL access was to be strictly treated as an Access Fee. #37.5 refers to "post contract documents". Since they not only post-date the CLSA but post date the amendment of the CLSA, they cannot assist the Claimant.

120. I therefore reject the overarching representation, which is that DAS represented that BCarm was associated with a scheme.

121. The misrepresentation claim is in my view bound to fail in any event because of Clauses 22.3 and 22.4 – the entire agreement and non-reliance clauses set out above.

122. Although the point is not pleaded, Mr Mendoza sought to rely on section 3 of the Misrepresentation Act 1967 (as amended) which provides that

> "If a contract contains a term which would exclude or restrict—
> (a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or
> (b) any remedy available to another party to the contract by reason of such a misrepresentation,
> that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act 1977; and it is for those claiming that the term satisfies that requirement to show that it does."

123. I can see no grounds on which it could realistically be said that these clauses, freely negotiated by commercial parties with the benefit of lawyers on both sides, were unreasonable. Quite apart from that, the parties expressly agreed that the terms were reasonable: see CLSA clause 22.9.

124. Accordingly the misrepresentation claim fails (a) because the alleged representation was not made and (b) because of the effect of clauses 22.3, 22.4 and 22.9.

125. The claim therefore fails.

(6) Quantum and Other Issues

126. In case I am wrong, it seems appropriate that I indicate briefly what findings I would have made on some of the other issues which might arise on other outcomes, and to record some key points from the evidence.

127. Had I been required to find what *loss* had been sustained by Epoq because its services were made available to end users who were not Insureds, and assuming that the proper approach

was to determine what sum of money would place Epoq in the position it would have been in had the contract been performed, I would have found that there was no loss. There was no evidence of any additional "on-cost" to Epoq as result of its documents being accessed (say) fifty times, rather than once. So Epoq's position is the same whether access is made available to an infrequent "insured" user use or a frequent standalone end-user.

128. If the question had been the rather different question of what would have happened if Epoq had understood that what was being proposed was making its services available, via DAS, to end users who were not, or were not all, Insureds, I would have considered the following evidence and factual findings to be important.

129. First, I have no doubt that Mr Cohen and his colleagues would, perfectly reasonably, have sought a higher fee.

130. Whether they would in fact have obtained a higher fee is more difficult, and on that issue the following facts seem to me to be particularly relevant:

(1) In 2011, Epoq, as DAS' new provider, was stepping into an arrangement that was already in place under which DAS charged WTWSL £5 per user per annum for a suite of documents which it provided to a mix of insured and standalone clients.

(2) Mr Williams of WTWSL told me, and I accept, that the price of £5 has continued as between WTWSL and DAS to the present day, and that when, in 2019 DAS terminated Epoq's services and found a different provider, the legal document suite from DAS' new provider was better than Epoq's, but the whole package was still £5 per user per annum.

(3) Mr Williams told me that he would not have been prepared for WTWSL to pay more than £5 to DAS for the same service. He explained that the DAS package was only a small, and little-used, part of the BCarm package, and he provided data showing that only a very small percentage of BCarm's end users actually accessed these services.

(4) Accordingly, if anything more was going to be paid to Epoq it would in my view in practice have had to have come out of the £5 per end user that DAS was receiving from WTWSL.

(5) Epoq's negotiating position would not have been particularly strong in relation to this subset of the DAS business since DAS was in a position to continue with its old content provider, and because the price as between DAS and WTWSL was already in place.

(6) Although there was no specific evidence led on the point, I am inclined to accept Mr Stagg's assessment that he thought that, as between DAS and WTWSL, there was little if any profit for DAS.

131. Doing the best I can I consider that the most likely outcome is that DAS would ultimately have been prepared to pay a little more to Epoq in relation to WTWSL's non-Insured customers. My best estimate of where the parties would have come down is £2.50 pa for each of WTWSL's non-Insured customers.

132. According to figures provided by Mr Williams the numbers of WTWSL's non-Insured customers is quite modest. The total number of BCarm *direct* clients that bought DAS business law as part of a bundle were, for 2011 to 2019 respectively, 32, 43, 76, 59, 50, 45, 38, 35 and 31. That is total, by my calculation, of 409 customer years. I do not overlook that far larger numbers of units (peaking at 7834 in 2017) were purchased by BCarm for clients

who had BCarm embedded in an insurance offering, but I do not see any realistic likelihood that DAS would have been prepared to pay anything more in relation to those users, because whether or not that is strictly "Scheme business" in Epoq's terms, it is fundamentally like scheme business because the DAS service is embedded in another insurance offering.

133. It follows that even if the claim had succeeded, and it had fallen to be assessed on the basis of what would have been negotiated had Epoq realised that some of WTWSL's clients were non-Scheme clients, the quantum would have been very modest. Further, and as Mr Mendoza conceded, because the claim is so stale, any cause of action accruing before 11 February 2014 would be statute-barred. Given my findings on liability issues I do not think it is necessary to express any view on the question of whether any claim would be excluded by Clause 14.5 (which excluded liability for loss of profits, good will or any type of indirect or consequential loss), and I prefer not to do so because the answer might depend on exactly what cause of action gave rise to the claim.