Neutral Citation Number: [2024] EWHC 261 (Comm)

Case No: CL-2021-000483

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

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

Date: 9 February 2024

Before :

SIMON BIRT KC
(Sitting as a Deputy Judge of the High Court)

- -

Between :

The Motoring Organisation Limited	**Claimant**
- and -	
Spectrum Insurance Services Limited	**Defendant**

- -
- -

Matthew Morrison (instructed by Brabners LLP) for the Claimant
Lawrence Jones and Kyle Lecuona (instructed on a direct access basis) for the Defendant

Hearing dates: 14-16, 20-23, 28 November 2023

- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00 on Friday 09 February 2024.

Simon Birt KC:

1. The Claimant, The Motoring Organisation Limited ("**TMO**"), brings claims for breach of contract, breach of confidence, breach of fiduciary duty and unjust enrichment against the Defendant, Spectrum Insurance Services Limited ("**Spectrum**") in relation to what is alleged to be Spectrum's wrongful exploitation of certain business opportunities, being:

    (1) An opportunity to provide a particular warranty to the UK dealership that sold vehicles made by the Korean manufacturer, SsangYong (the "**SsangYong Opportunity**"); and

    (2) An opportunity to provide regulated insurance products to certain car dealers ("**the 2020 customers**").

2. This judgment follows a trial of issues of liability in this action. The parties agreed to a split trial in the course of agreeing a consent order dated 29 July 2023. The order, even though it did not expressly order a split trial, assumed in its drafting that this trial would be of liability issues only. There was no controversy about this at the trial – the parties were agreed that this trial would not determine any question of remedy, but only of whether liability was established under one or more of the pleaded causes of action.

3. In this judgment I deal with matters in the following order:

    (1) Factual background.

    (2) The witnesses.

    (3) The claims in respect of the SsangYong Opportunity.

    (4) The claims in respect of the 2020 customers.

    (5) Conclusion.

Factual background

4. The businesses involved in this case were all involved in the selling of insurance and/or warranty products for cars. Some of the relationships between individuals go back a long way.

5. TMO is a warranty and after-sales product provider which, among other services, provides vehicle warranties to dealers to sell on to their end customers. The two principal figures behind TMO were Mr Donald Pinkney and his son, Mr Christopher Pinkney. I will refer to them as Mr Don Pinkney and Mr Chris Pinkney and sometimes together as "the Pinkneys" (which is how they were sometimes referred to in contemporaneous documents and by some of the witnesses at trial).

6. Spectrum, formerly known as Tobell Automotive Limited, is an insurance provider for the motor industry. At the material time, Mr Russel Kitchin and Mr Brian Clarke were directors of Spectrum.

7. Mr Don Pinkney has been involved in the business since the early 1980s, when he joined a business called Warranty Holdings Limited ("**Warranty Holdings**"), based in Sheffield, which had been set up by his father (Mr Frederick Pinkney). This was a successful business, which Mr Don Pinkney said at its high point had been one of the biggest warranty providers for used cars in Europe. Mr Don Pinkney's two brothers, Paul and David, also worked at Warranty Holdings.

8. Some time after his father's retirement from the business in June 1993, Mr Don Pinkney left Warranty Holdings and, in July 1996, set up a new company with his two brothers, called Motorway Direct plc ("**Motorway Direct**"). Motorway Direct was based in Rotherham, and had a similar business to that of Warranty Holdings.

9. In 1993, Mr Kitchin had started to work at Warranty Holdings, first as a claims engineer in Sheffield. It was in that role that he first met Mr Don Pinkney, who was the regional director at the time. Mr Kitchin was promoted swiftly, and in 1995 became a claims manager in charge of a new NW claims office.

10. In 1996, he moved to Motorway Direct when it was set up, and developed its claims and administration systems from the ground up. He came to be, for Mr Don Pinkney, a trusted and key employee.

11. Mr Kitchin was appointed a director of Motorway Direct in October 2005, by which time he held a senior role described as Underwriting Director. Due to ill health, he resigned in September 2006. By that time the annual premium income of Motorway Direct had reached around £35 million. Mr Don Pinkney recalled that he had given Mr Kitchin what he described as a "golden handshake" of £200,000 when he left to help Mr Kitchin given his health issues and to reflect how much he had valued Mr Kitchin's assistance in building up Motorway Direct. Mr Kitchin recalled that it was Simon Tennyson, another of Motorway Direct's directors, who had offered him a sum of money (which Mr Kitchin did not identify). Nothing turns on who offered this. It was clear that Mr Kitchin had contributed greatly to the success of Motorway Direct, and his services and abilities were valued by Mr Don Pinkney. As Mr Don Pinkney said in his oral evidence:

> "Russell [Kitchin] was the prime person that helped me set up Motorway Direct."

12. Motorway Direct's main target clients were dealerships who would sell insurance products to customers when they bought a car. Motorway Direct provided the insurance product, which would be underwritten by an insurer from whom Motorway Direct generally had a form of authority, and would deal with the after sales claims if a claim was made under the terms of the policy.

13. Motorway Direct was regulated by the FCA as a principal, such that it could carry out regulated activity, including the selling of insurance backed warranty products for cars. It had a licence to sell certain warranties under the "AA warranty" brand.

14. In around April 2019, Mr Don Pinkney and his brothers all decided that they would leave Motorway Direct and put the business into run-off. At the trial there were

suggestions from Spectrum that there had been a number of issues at Motorway Direct and some level of disagreement or difficulty had arisen between the three brothers.

15. Having decided to leave Motorway Direct, Mr Don Pinkney wanted to set up a new company with his son, Mr Chris Pinkney, something he had been considering doing for a number of years. At first, they were minded to use a subsidiary of Motorway Direct called AA Mechanical Insurance Services Limited ("**AAMIS**") to do this, and some preparatory steps (such as transfer of some staff) were undertaken with this in mind. Subsequently, by or around August 2019, they decided instead to use TMO. (In a subsequent Motorway Direct board minute, this was described as linked to the decision, in August 2019, to determine the AA warranty brand licence). Although described in the witness statements of Mr Don and Mr Chris Pinkney as a subsidiary of Motorway Direct, TMO was, in fact, wholly owned by Mr Don Pinkney. Nothing, however, turns on that. Mr Chris Pinkney became a TMO director in November 2017, and Mr Don Pinkney was appointed a director on 17 October 2019. Mr Chris Pinkney is the managing director of TMO.

16. The agreement that Mr Don Pinkney appears to have made with Motorway Direct was that he would take the sales business of Motorway Direct and set it up to run within TMO. He took on about 20 staff from Motorway Direct (which no longer required them as it was no longer writing new business).

17. After Mr Kitchin had left Motorway Direct, he and Mr Don Pinkney had fallen out of touch, but had met by chance at an insurance conference at The Armouries in Leeds in 2015. This had led to a resumption of their relationship, and they subsequently met up (also with Mr Chris Pinkney) and talked about working together again at some point in the future. At this point, Mr Kitchin was working at Tobell Automotive Limited ("**Tobell**"), which was another company that sold car warranty products.

18. This led to various discussions from time to time over the subsequent years (between 2015 and 2019) about whether Mr Don Pinkney might buy out or takeover Tobell or find some other way where his business might work with that of Tobell.

19. The other principal at Tobell at that time was Mr Neil Smith. He had also been involved in some of the discussions between Mr Don Pinkney and Mr Kitchin. At some point in the summer of 2019, Mr Smith left Tobell, following which Mr Kitchin renamed the company Spectrum Insurance Services Limited (i.e. the Defendant).

20. This appears to have brought about an opportunity for the discussions about Mr Don Pinkney's business (which was now to be TMO) to takeover or merge with Spectrum to become more serious and focussed.

21. It was evident that both Mr Don Pinkney and Mr Kitchin saw great potential for such a co-joined business. They both explained that they had complementing strengths – Mr Don Pinkney on the sales side (Mr Kitchin said of Mr Don Pinkney "*…there's no doubt that as a salesman in the warranty business I think he's exceptional*"), and Mr Kitchin on the claims and administration side. In his oral evidence, Mr Don Pinkney described it as "*a perfect fit*"; Mr Kitchin in his oral evidence said: "*it was a match made in heaven quite frankly.*"

22. It appears that the discussions about a possible merger or takeover had been increasing during the course of late 2018 and during 2019. These were between Mr Don Pinkney and Mr Kitchin, and sometimes included Mr Chris Pinkney. These were not documented in any way. At the trial there were no notes of these meetings in any sense, and no focus on any documentary record of them e.g. emails between the participants commenting upon a recent meeting. There was no certainty as to precisely when they took place. However, there is no doubt that they did.

23. The nature of the discussions and of the relationship between Mr Don Pinkney and Mr Kitchin is apparent from the following extract from Mr Kitchin's trial witness statement:

> "We met on a number of occasions in this early stage. It is difficult to say how many times we met. As mentioned, this was usually at a coffee shop or at Don's home. Our meetings often included a lot of time spent discussing non-business related matters such as looking at Don's cars, driving around his land on his buggy, discussing various disputes he was having with his brothers about Motorway Direct or their fathers estate or a cruise around New Zealand and Australia he was doing. It was very informal in nature and when we did get to discussing anything about the businesses, it was always against this backdrop. Quite often, he had received a new piece of information or Chris had discovered something and he would call to say words to the effect of "have you got time to talk about this, can you come over?"."

24. Both Mr Don Pinkney and Mr Kitchin recalled a particular meeting which took place at Mr Don Pinkney's house – Mr Don Pinkney thought it was in or around August 2019; Mr Kitchin said it was September 2019. TMO says that Mr Chris Pinkney was also there. This appears to have been a focussed discussion about how a merger or takeover would work. Mr Kitchin had by now taken over Tobell and renamed it Spectrum, and Mr Don Pinkney had broken with Motorway Direct and was ready to move the sales business into TMO. Again, this discussion was not documented at all. According to Mr Don and Mr Chris Pinkney, this was a meeting at which they agreed with Mr Kitchin on the terms of the merger of their respective companies. According to Mr Kitchin, they discussed points relating to how they could work together and started "in loose terms" to talk about the structure of how the combined company might work, but that they would return to the discussions once Mr Don Pinkney had finalised his situation in relation to Motorway Direct and his brothers.

25. Discussions continued after that meeting, and came also to include Mr Brian Clarke, who was Spectrum's Chief Financial Officer, having joined when it was known as Tobell in 2018. The Pinkneys had not previously known Mr Clarke.

26. There was a meeting at Spectrum's offices on 26 November 2019 and another meeting on 3 December 2019 (which dates are reflected in contemporaneous records). On 4 December 2019, Mr Clarke emailed Mr Don and Mr Chris Pinkney with a one-page document entitled "Heads of Terms for Spectrum/TMO agreement in principle" (the

"**HoT**") which was said by Mr Clarke to have been prepared based on what had been agreed at the 26 November meeting. TMO do not agree that that document accurately recorded the state of agreement between the parties, but contend it was an attempt by Mr Clarke (who had not been involved in the original discussions) to recast what had already been agreed in principle by Mr Kitchin.

27. As far as the proposed merger goes, whilst there is disagreement as to certain dates, the terms that had been agreed and whether any provisions were legally binding, it is common ground that at least by September 2019 there were discussions ongoing as to a merger between TMO and Spectrum. The parties' broad positions were as follows. TMO contends that an oral agreement had been reached in September 2019 between the Pinkneys and Mr Kitchin on the terms of the merger, and that although further details were added in subsequent discussions that did not disrupt the fundamentals that had already been agreed. Spectrum contends that final agreement was never reached, but that the HoT accurately set out the principal points on which the parties had reached agreement by the end of November 2019.

28. Neither party pressed me to determine whether or not a legally binding agreement for the merger had been reached. TMO expressly confirmed in its written opening submission that it did not consider that the disputes as to the detail of the merger needed to be determined to resolve the questions of liability before the court at this trial. I agree with that, though the fact that in this period of time the parties were engaged in these discussions and proceeding towards what they intended to be a merger is important to a number of the issues.

29. It is clear that both parties intended, and were keen, to move forward to complete a merger. I have already referred to the synergies that both parties saw in a merger and Mr Kitchin's view that it was a "*match made in heaven*".

30. As to the terms of the proposed merger, at trial the parties agreed that the following did reflect agreement in principle, although as I have noted they disagreed as to when agreement on these points had been reached (and, on Spectrum's case, they were not agreed in any binding way): (1) TMO would become an Appointed Representative of Spectrum; (2) Spectrum would employ four claims engineers to deal with the increased work that TMO would bring to the merged entity; (3) TMO would contribute £25,000 per month to cover costs; (4) Spectrum would be entitled to recharge additional compliance and other costs; and (5) TMO would ultimately take over Spectrum with the merger to complete in May 2020.

31. In addition, TMO contended that it had been agreed (in September 2019) that, after the take-over, TMO would own 90% of the shares in Spectrum (with Spectrum's current owners holding 10%) and that it would pay £1 million for that shareholding.

32. By contrast, Spectrum said it had been agreed on 26 November (as reflected in the HoT) that the post-takeover division of shareholdings in Spectrum would be 60% (TMO) and 40% (Spectrum) and that the price TMO would pay for its shares would be £4.5 million.

33. It is common ground that, as part of the merger discussions, it was envisaged that TMO would be appointed as an FCA Appointed Representative of Spectrum. A number of

the witnesses referred to this as TMO having "AR status". There was a dispute as to whether this was effectively a condition precedent to the merger, but it was certainly envisaged (and was one of the points recorded by Mr Clarke in the HoT).

34. On 22 October 2019, Spectrum informed TMO that TMO had been listed by the FCA as an Appointed Representative of Spectrum (and that, before the position could be finalised, they had to "*appoint an approved person onto your AR status*"). The FCA register confirms the appointment from 21 October 2019.

35. On 28 October 2019, there was a meeting between various TMO/Motorway Direct personnel, including Mr Don and Mr Chris Pinkney to discuss various aspects of the setting up of TMO (the meeting note was headed "*AAMIS/TMO Corporate Structure Finance & Banking Requirements Meeting*"). This stated, at point 3:

> "TMO to determine the Underwriter through which they will place business – Acasta through Spectrum … or La Parisienne through MWD initially, … . Action: DP to meet with Keith Wardell at Acasta, to include Chris Pinkney and facilitated by Russ Kitchin."

I return below to the meeting that took place with Acasta and the effect that had on the merger discussions.

The SsangYong Opportunity

36. Overlapping with the above, in terms of chronology, were the interactions relating to the SsangYong Opportunity.

37. SsangYong is a Korean car manufacturer. It sold cars through dealerships in the UK via the Bassadone Automotive Group ("**Bassadone**"). The manufacturer, SsangYong, provided a manufacturer's warranty for the earlier of a period of 5 years or 60,000 miles (subject to certain other limits in relation to particular components). Bassadone were seeking to sell the cars with a warranty of 7 years and 150,000 miles and therefore required someone to provide the additional cover beyond the manufacturer's warranty.

38. Whilst there was little information at the trial about this, the evidence that was given about it was to the effect that Bassadone had originally found a company known as MB&G to supply the warranty, but that it had transpired that MB&G had purported to write the warranty as insurance-backed whilst not actually doing so. In other words, there was no insurance cover in place for the warranty. This had caused a dispute which led to Bassadone looking for a replacement supplier of the warranty.

39. Bassadone initially (in the later part of 2018) looked for replacement cover itself. However, Bassadone subsequently engaged Mr Graham Mills to find someone to provide that replacement warranty cover. Mr Mills' engagement had not been straightforward as he had previously had some involvement with MB&G, but he had made a personal plea to Mr George Bassadone to retain a role in seeking replacement cover. Mr Mills' witness statement asserted that he was engaged through his company, IMS4U Ltd, but in his oral evidence he sought to correct that by saying it was a personal engagement, that as a sole trader he used the trading style "IMS4U" (or also

"Insurance Marketing Solutions") and that although he owned the company IMS4U Ltd it was dormant. Nothing turns on this for the purpose of the issues I have to decide (although it was said this went to Mr Mills' credibility, to which I return below). I shall simply refer to Mr Mills as the relevant party.

40. Mr Mills had negotiated a £2,000 per month retainer (plus reasonable expenses) from Bassadone for his search for a warranty provider, which was recorded in a short email exchange. He also said in his oral evidence that Mr Bassadone had confirmed orally that Mr Mills could negotiate for himself a commission from the entity that he found to provide the warranty (which Mr Mills did indeed do).

41. Mr Mills explained in his evidence that Bassadone used the trading style "SsangYong GB" and it appeared that SsangYong Motor (UK) Limited was a subsidiary of, or otherwise associated with, Bassadone. The witnesses often appeared to use "SsangYong" and "Bassadone" interchangeably, and often their references to "SsangYong" were to the UK importer /dealer rather than to the Korean manufacturer. In the remainder of this judgment, when referring to SsangYong that is generally a reference to the UK entity (be it SsangYong Motor (UK) Limited or Bassadone – the witnesses generally did not distinguish), rather than to the Korean manufacturer.

42. Mr Mills was engaged to find a replacement warranty provider towards the end of November 2018. He was at pains to say (as was Spectrum in its submissions) that the warranty was difficult to place. In particular this was, he said, because the period of the warranty stretched to 7 years, which he said was relatively unusual in the market at the time.

43. Mr Mills was also someone who had worked in this business for a long time. He had worked at Warranty Holdings some time before this, where he had come across Mr Don Pinkney, and had been CEO of the Corporates and Manufacturers Division of Warranty Holdings from 1992 to 2004.

44. The initial approach to Motorway Direct did not come from Mr Mills, but rather from SsangYong direct. SsangYong met with Mr Steve Reynolds, then head of sales at Motorway Direct in early December 2018, and Mr Reynolds provided the bare bones of the opportunity to his colleague, Tony Saunders.

45. Once Mr Mills was involved he approached a number of potential providers. This included Mr Reynolds by an email on 1 February 2019 to which was attached a document entitled "*Bassadone Motor Group Underwriting Information*" which explained that the warranty would be for 7 years/150,000 miles, had a volume of approximately 4,000 vehicles per annum, and included an agreed labour rate of £60 per hour.

46. He also approached a number of other potential providers around the same time, which he said included MB&G, Allianz, Autoprotect, White Oak Underwriting, WarrantyWise, Defend Insurance (Warsaw), Warranty Management Services (with two different potential underwriters), Car Care Plan and Abraxas. Emails in the trial bundle confirmed the approach to at least some of these other potential providers. Although not recorded in any documentation, Mr Mills and Mr Reynolds in their oral evidence explained that for part of 2019 it had looked as though the warranty was going to be

provided by a supplier called Autoprotect, although ultimately that did not come to fruition.

47. An email exchange between Mr Mills and Nick Laird of SsangYong GB, on 9 September 2019, also suggested that Mr Laird had understood an approach had been made to "Warranty Holdings". That was likely a misidentification of Motorway Direct, given that Warranty Holdings had ceased to trade in this business some years earlier. Mr Mills responded to Mr Laird with a table of those providers who had been approached, and what the responses to date had been. Of the 11 listed in that table, only Motorway Direct (identified in the table as "AA Warranty") and Warranty Management Services (using Covea as underwriter) were still "in discussion", the others having declined for one reason or another.

48. In fact, by this time (September 2019), as explained above, there had been a decision that the sales business of Motorway Direct would be transferred to TMO. Thus from at least September 2019, it was TMO (not Motorway Direct) that was seeking to place the SsangYong Opportunity. Consistently with this, Mr Mills confirmed in his oral evidence that by around 10 September 2019, he had informed SsangYong that it was TMO that was considering the SsangYong Opportunity (rather than Motorway Direct or "AA Warranty").

49. On 9 September 2019, Mr Mills sent Mr Reynolds an email attaching an updated version of the SsangYong Proposal which reiterated certain of the information already provided, and also contained further information, including a revised agreed labour rate of £69 per hour, extracts from the relevant SsangYong policies and details of the standard warranty periods, and a table showing particular levels of cover for various components. Within the body of his email Mr Mills also gave Mr Reynolds various further items of information, including that 90% of the vehicles were diesels, and that the programme would require vehicles to be serviced in line with manufacture service intervals.

50. Mr Mills followed up on 15 September 2019 with an additional email to Mr Reynolds containing a breakdown between the different SsangYong car models, which Mr Mills asked be forwarded to Mr Don Pinkney (as Mr Mills did not have an email address for him). Mr Reynolds said he was seeing Mr Don Pinkney first thing and would make sure he got it, adding: "*Don doesn't really do e-mails unless he asks for them, he checks his in-box regularly every three months!!!*".

51. Mr Mills sent a further email, this time to Mr Chris Pinkney on 9 October 2019, explaining:

> "Our target premium is £300 net to SsangYong + IPT for the extension, that does not include anything for me. In addition to the annual volumes there are approximately 4,000 vehicles that have been delivered during 2018-2019 that have the extension, but currently the liability sits on SsangYong's balance sheet. We would like the insurer to take these immediately as well".

The revised SsangYong Proposal previously sent to Mr Reynolds on 9 September 2019 was also attached to this email.

Spectrum's involvement in the SsangYong Opportunity

52. It is clear that, at some point around late September or early October 2019, TMO informed Spectrum (through Mr Kitchin) of the SsangYong Opportunity. The precise details as to the terms on which it was communicated are controversial. In brief, TMO contends that Spectrum agreed that it would remain TMO's opportunity, and that Spectrum was only to benefit if and to the extent that the merger completed; Spectrum denies there was any such agreement. That dispute is at the heart of the claims in relation to the SsangYong Opportunity, and I deal with it later on in this judgment.

53. The initial discussion about the SsangYong Opportunity was between Mr Don Pinkney and Mr Kitchin. Mr Clarke's witness statement had stated (without reference to any document) that the SsangYong Opportunity had been communicated by Mr Reynolds to Mr Kitchin. This, however, was not only not supported by Mr Kitchin's witness statement, but was also contradicted by Mr Reynolds' own witness statement (served by Spectrum for the trial), which did not say he had passed the opportunity to Spectrum, but rather that he believe Mr Chris Pinkney had done so. Mr Kitchin, in his oral evidence, confirmed that "*nobody disputes that the connection to Graham [Mills] came via Don [Pinkney].*"

54. Following the discussion between Mr Kitchin and Mr Don Pinkney, information about the SsangYong Opportunity was conveyed to Spectrum by TMO:

    (1) As set out above, on 9 October 2019, Mr Mills sent Mr Chris Pinkney details of the premium SsangYong was willing to pay and disclosing the existence of the opportunity to provide warranties for 4,000 additional vehicles registered in 2018-2019. On the same day, Mr Mills forwarded to Mr Chris Pinkney the emails he had previously provided to Mr Reynolds on 9 and 15 September 2019, together with the version of the SsangYong Proposal that had been attached to the 9 September email.

    (2) Mr Chris Pinkney then forwarded these emails to Mr Kitchin shortly afterwards on 9 October 2019. On 15 October, Mr Kitchin forwarded the emails to Mr Clarke.

55. Mr Mills then continued to communicate with TMO over the next few weeks, and TMO continued to communicate with Spectrum, and in turn Spectrum with their proposed underwriter, including the following:

    (1) Mr Mills sent a further email on the evening of 9 October, asking Mr Chris Pinkney for his "mobile contact details so we can chat about anything else you need".

    (2) On 14 October 2019, Mr Kitchin sent a text message to Mr Don Pinkney updating him on discussions that Mr Clarke had been having with Spectrum's proposed underwriter, Mr Beekmeyer, and promising further updates after a further conversation had taken place between Mr Clarke and Mr Beekmeyer.

    (3) Mr Mills sent a text message to Mr Chris Pinkney on 15 October 2019 asking how "the meeting has gone today with the underwriter".

(4) Mr Mills sent Mr Chris Pinkney an email on 16 October 2019 listing the limitations in the warranty cover for particular components.

(5) On 17 October, Mr Clarke sent to Mr Kitchin drafts of a written insurance proposal to send to Mr Beekmeyer. The document was then sent by Mr Clarke to Mr Beekmeyer later on 17 October 2019 described as "*details of the SsangYong deal we have discussed.*" The content of the proposal included large amounts of text which had been lifted from the emails and their attachments that Mr Chris Pinkney had previously forwarded to Mr Kitchin. In the text that Spectrum had added was an explanation of how Spectrum saw the premium being dealt with, which included:

> "45% would be paid back to Spectrum to cover administration costs on the scheme including all policy set-up, handling and claims costs and also including commission payable to The Motoring Organisation for introduction of the scheme and ongoing customer relations."

It also proposed that there would be a profit share of 80% for the scheme administrator and 20% for the insurer.

(6) On 18 October 2019, Mr Clarke and Mr Kitchin exchanged drafts of an update of the discussions that had been held with Mr Beekmeyer to go to Mr Don Pinkney. The resulting email was sent by Mr Clarke to Mr Don Pinkney (with Mr Kitchin in copy) later that day:

(a) There was a clear intention to manage the message that was being sent to the Pinkneys (Mr Kitchin modified the message with the intention there was "*a slight lean towards a "half full" glass, rather than "half empty"*), and Mr Clarke and Mr Kitchin even liaised as to the time at which the message would be sent – Mr Clarke emailed Mr Kitchin at 12:25pm to say that he would send it at about 2pm "*to give you [Mr Kitchin] time to be out of the loop*", and then when it was sent, the email to Mr Pinkney ended by saying that Mr Kitchin was off so it was Mr Clarke who Mr Pinkney should call to discuss.

(b) The message itself explained that the underwriting was being done by Newpoint Capital (Mr Beekmeyer's company), but that it would be fronted by Ocean Re, described as "*an A-rated insurer based in Barbados*" so as to "*satisfy SsangYong as to surety of Insurer.*"

(c) It explained that the slip would be prepared in the name of Spectrum "*(because we are the authorised principal)*" and then went on to explain that the insurers were only prepared to do it for a greater share of the premium than had been proposed, saying that the insurer wanted a 50/50 split rather than an 80/20 profit share.

(d) Much of the email was taken up with what was effectively a "pitch" to Mr Pinkney to accept the deal that was being offered by insurers, even though it was less advantageous than he had previously suggested.

(e) It concluded by saying that Mr Pinkney should "*take some time to go over it*", "*Take some time to digest this*" and that he should call Mr Clarke if he wanted to discuss but "*we need to move on with it*". Although not expressly stated, the implicit request was for Mr Pinkney to confirm he was content with what was proposed.

(7) On 22 October 2019, Mr Kitchin sent to Mr Chris Pinkney an email (which had been reviewed and revised by Mr Clarke earlier that day) explaining the proposed reinsurance arrangement and the flow of funds that it would entail.

(8) Mr Mills sent text messages to Mr Chris Pinkney on 22 and 25 October asking for an update so he could send something to SsangYong.

(9) Mr Clarke sent a further email to Mr Don and Mr Chris Pinkney on 24 October 2019 which reported on a conversation he said he had had with Mr Beekmeyer:

> "…I spoke about the profit share and he [Mr Beekmeyer] does not want to move the goalposts on this so it is 50/50 or nothing. They will discuss early payout on this after a year but that can wait for now. Also and more importantly following yesterdays discussion about TMO doing the deal with Ssangyong he is categoric that it must go though Spectrum only. He is only giving us the deal because of our connections and trust over the years, he knows we will not get it elsewhere but has still given us a deal which will give us a lot of profit.
>
> Also Ocean will only allow it with Spectrum as a principal FCA regulated company as the administrators and claims administrators - they have to have a regulated principal company as the coverholder - that is categoric and cant be changed or amended. TMO cant do it as they are not a principal and Keith will only deal via Spectrum. After the discussion he sent me an e-mail as below
>
> Dear Brian
> Further to our discussion its important note that the administrators and claims administrators must be the principal FCA authorised company of Spectrum Insurance Services Limited for this facility to be granted. A policy will be issued by Ocean and they will only agree a cover slip if all administration is with Spectrum Insurance Services Limited, and their known management team of Brian Clarke and Russel Kitchin
> I trust that you find this to be in order.
> Best Regards
> Keith D Beekmeyer
> Co-CEO, Deal Architect & Structured Products
>
> So fortunately we can still do the deal provided you accept it in its current form. If that's the case then we need to get together to

> finalise how we deal with SsangYong, the Slip, Policywording and of course the money flow … . So assuming we can proceed on this basis, get back to me and let's get on with it".

(10) The email from Mr Beekmeyer that Mr Clarke had cut and pasted into the middle of his own email had, in fact, been the subject of exchanges with Mr Beekmeyer earlier that day in which Mr Clarke had provided the text of the email he wanted Mr Beekmeyer to send to him. Mr Clarke's email to Mr Beekmeyer had:

(a) Stated that "*SsangYong have said they want to proceed as they have no other alternatives, but the lead, as you know came from Don Pinkney via his company The Motoring Organisation so he has said he wants it to go via his company – this will mean payments etc go via them which is totally unacceptable for you and us.*"

(b) Then asked "*Can you do me an email along the following lines*", setting out text which Mr Beekmeyer then sent back to him in a fresh email some 9 minutes later.

(c) Finished by saying he needed the email "*to keep the Pinkneys under control…*".

56. At this point in time, there was no direct communication between Mr Mills and Spectrum. There were no documents showing Mr Mills providing any information and documentation to Spectrum about the SsangYong Opportunity or otherwise having any direct dealings with Spectrum prior to TMO introducing and providing information about the SsangYong Opportunity to Spectrum in October 2019, and it was confirmed at trial that nothing had been so provided directly by Mr Mills to Spectrum in that period.

57. The first contemporaneous documentation showing any form of direct interaction between Mr Mills and Spectrum is an email dated 29 October 2019 from him to Mr Clarke attaching a draft contractual liability insurance policy ("**CLIP"**) that had been previously negotiated with AutoProtect in respect of the SsangYong Opportunity. This draft CLIP had already been sent by Mr Mills to Mr Chris Pinkney earlier that same day (without anyone at Spectrum in copy), with Mr Mills adding in the body of the email that he had provided it to Mr Chris Pinkney "*so you have a clear idea of what will be acceptable and what might cause problems*", and that he wished to discuss the terms with Mr Chris Pinkney "*to see if anything screams at you as a likely issue*".

58. Around the middle of November, there was a meeting, between Mr Mills (who had arranged the meeting), TMO (Mr Don and Mr Chris Pinkney), Spectrum (Mr Clarke and Mr Kitchin) and SsangYong (including Mr Laird) discussing matters relating to operations and administration. (Mr Don Pinkney gave evidence about this in his witness statement, and Mr Mills confirmed the accuracy of his account, but neither of them put a date on the meeting. However, it seems likely to have been shortly before the email exchange referred to below on 15 November).

59. Mr Clarke emailed Mr Laird of SsangYong on 15 November referring to the draft policy (which was being reviewed by SsangYong's lawyers). It appears that Mr Clarke had told Mr Laird something about the anticipated merger because Mr Laird emailed Mr Clarke asking:

> "Given the impending corporate activity/merger/coming together you mentioned with Motorway Direct, in whose name will this contract be written?"

Mr Clarke in turn responded to Mr Laird saying that it had to be placed with Spectrum, but that

> "Don Pinkney introduced this deal to us via Graham Mills, as they could not place it, but via our facilities we can, and we will involve the Pinkneys in the operation…".

These exchanges were not copied to the Pinkneys.

60. It appears that on 9 December 2019, Spectrum provided revised contract wording to SsangYong, and on 11 December 2019, Mr Burrows, of SsangYong, emailed Mr Clarke and Mr Mills (cc Mr Kitchin) with comments on the contract. Mr Mills forwarded that on to Mr Chris Pinkney (saying he did not "*seem to have Dad's email*", suggesting that was why he had not also forwarded it to Mr Don Pinkney).

61. On 18 December 2019, Mr Clarke emailed Mr Beekmeyer (copied to Mr Kitchin) stating they had now "*reached final agreement with SsangYong on terms and wordings etc.*" They described the revisions to what had been agreed relating to premium on vehicles for which the warranty was already in place, and noted that "*We have to maintain the 5% to the introducer [i.e. Mr Mills] and the Pinkneys.*"

62. The formal documentation providing the cover provided by Ocean Re to SsangYong was executed on 30 and 31 December 2019. This included an insurance slip and a policy (referred to in the slip as the "CLIP"). Both were in a form prepared by the broker Sinoasia (UK) Limited ("**Sinoasia**"). Under the terms of the slip, Spectrum was appointed as Claim Administrator.

The continuation of discussions relating to the merger

63. The insurer for which Spectrum generally wrote business was Acasta European Insurance Company Limited ("**Acasta**"). The plan for the merger had been that, at least for an initial period (of around 6 months), TMO would sell products as an Appointed Representative of Spectrum, business that would be underwritten by Acasta. This is what was recorded in the first line of the HoT: "*TMO to become an Appointed Representative of Spectrum giving them access to Spectrum's underwriting facilities with Acasta Insurance.*" This required a discussion with Acasta, and Mr Clarke's 4 December 2019 email to the Pinkneys, which attached the HoT, stated: "*To move things on with the AR status and operations we are seeing Acasta (with Don) next Tuesday.*"

64. However, it became apparent during the course of December 2019 that there was an issue between Acasta and Motorway Direct which would present real issues for TMO.

65. This first reared its head at a meeting on 10 December 2019 between Acasta's chairman, Mr Keith Wardell, and Mr Kitchin, Mr Clarke and Mr Don Pinkney.

66. The issue was that Acasta was owed money by Motorway Direct. Whilst all of the details were not clear from the evidence at trial, it appears that the issue related to a previous arrangement Motorway Direct had had with the insurer AmTrust, under which Motorway Direct provided underwriting and administration of motor warranty and GAP insurance schemes. The underwriting of this business had been transferred from AmTrust to Acasta, with Motorway Direct continuing to provide the administration services, and Motorway Direct had anticipated relying on the release of profit commission and other debt from Amtrust in order to continue to pay claims on the policies. Motorway Direct's position was that AmTrust did not release the funds it should have done (or released them more slowly than Motorway Direct felt it should have done), with the result that Motorway Direct found themselves using funds that would normally have been transferred to Acasta in order to pay claims. Mr Don Pinkney agreed that this was the background to the issues that Motorway Direct were facing with Acasta, though he also believed that Acasta were charging Motorway Direct too much, which he saw as the real root of the problem.

67. The bottom line was that, at the meeting on 10 December 2019, Mr Wardell told Mr Don Pinkney that the debt Motorway Direct owed to Acasta had to be paid, which stance Mr Don Pinkney described in his evidence as "quite reasonable".

68. Mr Don Pinkney said he felt ambushed by the 10 December 2019 meeting, as he had not known in advance that Mr Clarke and Mr Kitchin were meeting with Mr Wardell before Mr Don Pinkney arrived. However, I do not think it particularly surprising that Mr Clarke and Mr Kitchin met with Mr Wardell first in circumstances were Acasta was providing Spectrum's main underwriting capacity, and Spectrum was appointing TMO as an Appointed Representative to sell Acasta products – they would have wanted to bring Mr Wardell up to speed about what was happening with Spectrum and its business.

69. Mr Don Pinkney said that, after the meeting, he went to speak to the Chairman of Motorway Direct, Mr David Antcliff, who promised to sort the situation out. Mr Don Pinkney said in his evidence that the problem was then sorted out and funds were transferred to Acasta, but there was no documentary support provided for that and, as set out below, and as appears from the further communications from Acasta that I set out below, Acasta continued to state it had not been paid. There was not full disclosure in relation to the dispute between Motorway Direct and Acasta (neither of whom are parties to these proceedings) and I cannot come to a view on the rights and wrongs of the positions that were being asserted. But it is clear from the evidence available at the trial that there was bona fide dispute and that Acasta believed it continued to be owed money by Motorway Direct.

70. There was a Spectrum Board meeting on 17 December 2019. The minutes included the following matters:

(1) That there were "*unresolved issues with Motorway Direct*" and that "*TMO cannot be set up until Motorway Direct's debt to Acaster [sic] is resolved*". This issue was said to be deferred until February 2020 (when another board meeting was planned).

(2) In relation to the "*Business Plan*", the "*3 year BP needs revisiting, based on scenarios with and without TMO. (BP current includes TMO assumed AR).*"

(3) It identified under "*New Business*" the SsangYong deal, noting that the originator of the business was "*Don Pinkney*".

(4) It also identified potential new business if Acasta left Motorway Direct, giving figures both on the basis "*if TMO comes across*" and "*if TMO don't come*".

71. It was clear from this minute that Spectrum understood by this point in time that there was a potential issue with the proposed merger. They were starting to think about what the future might look like both with and without TMO. Given what had transpired at the meeting with Mr Wardell on 10 December 2019, that is hardly surprising (and does not itself, contrary to the suggestion of TMO at trial, necessarily suggest a malign intent on the part of Spectrum).

72. The issue with Acasta was not resolved. As recorded in a subsequent Motorway Direct Board minute (dated 11 February 2020), on 21 December 2019 Acasta served notice of termination on Motorway Direct cancelling what was described as their dealer network's ability to sell Acasta underwritten products. In response, Mr Antcliff reported Acasta to the FCA. The board minute described Acasta as "*extremely aggressive, threatening, and their position is non-negotiable.*"

73. On 23 December 2019, Mr Wardell emailed Mr Clarke and Mr Kitchin as follows :

> "Unfortunately, we have an issue with your proposed AR, TMO. I understand Don Pinkney is a director of TMO and unfortunately in view of the position with another company with which he is involved, we cannot at this time accept any business with which he is connected."

74. Later the same day, Mr Clarke sent the Pinkneys an email:

> "…following specific instructions from our Insurance capacity providers, we cannot grant [TMO] approval to sell Spectrum products or use our policy wordings or hold out to represent Spectrum in any way. We will therefore have to suspend all dealings in this respect until such time as our underwriters agree that they will sanction TMO operating as our Approved Representative. … We had hoped that following recent discussions you could resolve the situation involving previous dealings with the underwriters, but as this has not been done as yet, we cannot move on at present."

75. This put the brakes on the merger preparations because the parties had anticipated the first stage of the process being TMO selling products as an Appointed Representative of Spectrum using the Acasta underwriting facility.

76. The position between Motorway Direct (and hence TMO) and Acasta then seems to have worsened, not improved.

77. On 3 January 2020, Mr Wardell of Acasta sent an email to Mr Kitchin and Mr Clarke referring to the on-going problems that Acasta was facing with Motorway Direct and its failure to pay Acasta the outstanding debt. Mr Wardell made it clear that Acasta did not want to deal with Motorway Direct at all going forward, if it could be avoided, and anticipated transferring the administration of existing business to Spectrum:

> "We continue to receive excuses rather than cash in respect of business written by MWD.
>
> As a result, unless they pay us all outstanding monies by 9th January, we will enforce a winding up petition.
>
> Don is aware of the position but apart from advising me that he pays us too much, has done nothing. Antcliffe has advised us that he knows we may consider using a third party to obtain business (presumably Spectrum) and thinks this may affect the smooth (!!) administration of the run off.
>
> Clearly we do not now want to deal with MWD at all going forward if it can be avoided. I expect sometime after the 9th we will transfer administration to Spectrum.
>
> Again, obviously given Don Pinkney's lack of action and complicity in the actions of MWD, we would not want to have him selling any Acasta products and we would prefer our agents and administrators to give him and his company a wide berth."

78. On the same day Mr Clarke sent an email to Mr Kitchin referring to this email from Mr Wardell saying: *"Perfect email to enable you to sever all ties with Don, unless he pays up. Plus, we get the run-off and a crack at all of the accounts"*.

79. On 15 January 2020, Mr Clarke informed Mr Don and Mr Chris Pinkney that:

> "…further to recent discussions and in view of the requirements of Acasta Insurance, we write to confirm that unfortunately we are now unable to support TMO as an Appointed Representative of Spectrum so will amend the FCA records to this effect."

80. This chain of events presented a serious problem for the merger and forms an important part of the context for the claims relating to the 2020 customers.

The 2020 customers

81. At some point in January 2020, TMO gave to Spectrum the details of a number of customers (i.e. car dealerships) – the 2020 customers – for which it had been providing regulated products, namely Guaranteed Asset Protection ("**GAP**") insurance cover so that Spectrum could now provide that cover. The circumstances in which, and the terms (if any) on which, these were provided is controversial between the parties, and underlies the second part of the claims brought by TMO against Spectrum.

82. TMO contends that these were provided so that Spectrum could deal with these customers on behalf of TMO, because TMO was temporarily prevented from providing regulated products as an Appointed Representative of Spectrum, and that the customers were to remain customers of TMO (not Spectrum) and that Spectrum was only to benefit from the transferred business if and to the extent that the merger went ahead.

83. Spectrum, on the other hand, contends that the details were provided so that Spectrum could provide the GAP product (which, as a regulated product, Spectrum could provide but TMO could not) to assist with TMO continuing to provide non-regulated products to the same dealers. In other words, Spectrum was asked by TMO to step in to provide the GAP product, so that the customers did not have to approach any other provider for GAP insurance, which could have led to that other provider also taking the non-regulated business that TMO wanted to keep for itself.

84. There were a number of text messages exchanged between Mr Chris Pinkney and Mr Kitchin relating to the transfer:

    (1) In a sequence of text messages between Mr Chris Pinkney and Mr Kitchin between 23 and 27 January 2020, Mr Pinkney sent documents to TMO containing information about the identity of the customers being introduced, the nature and pricing of their policies and the volume of business that was being written with them.

    (2) On 31 January 2020, Mr Kitchin provided an update to Mr Chris Pinkney by text message in which he said that Spectrum had by now contacted all the dealers except one.

    (3) Mr Kitchin sent a further text message to Mr Chris Pinkney on 5 February 2020 with a short further update on one dealer.

    (4) On 12 February 2020, Mr Kitchin sent a text message to Mr Chris Pinkney telling him *"All is settling down (I think) in terms of the gap switch, so hopefully there will not be too many difficulties for you with the dealers now"*.

    (5) For completeness, I should add that the response text message from Mr Chris Pinkney, after making a comment about the GAP business, also asked the question: "*Any update on ssangyong?*"

85. I will return to the circumstances of the transfer of the 2020 customers in considering the claims arising in relation to them below.

Further communications relating to the SsangYong Opportunity

86. On 5 February 2020, Mr Clarke sent Mr Beekmeyer an email in respect of an invoice received from SinoAsia as the agent of Ocean Re. This commenced by confirming the economics of the deal, including an express confirmation that "*Profit share was agreed at 50%*" and "*we cannot now change this as all monies are now paid and allocated*". It went on to state that "*We have to pay the introducer Graham Mills and the Pinkneys who are parties to the deal*". Mr Clarke also made reference at the end of this email to the potential for future profits for Newpoint and Spectrum from the "*rest of the Bassadone Group business which will be over 3 times bigger than this, which again will be through the introducing agent but not the Pinkneys*".

87. Mr Beekmeyer responded threatening to cancel the risk rather than be dictated to: "*I do not like the tone of your language I rather cancel the risk then be dictated too [sic]. Remember who you are talking to.*"

88. Mr Clarke then replied on 6 February 2020 with a detailed breakdown of the treatment of the initial premia from SsangYong of £1,332,866.08 of which Spectrum was to retain £362,697.47, with Mr Clarke then adding "*but the Pinkneys are expecting 60% of this*".

89. Mr Clarke sent a follow-up email the next morning (on 7 February) stating: "*Just to clarify, the amount "expected" by the Pinkneys was never agreed or accepted – this has been reviewed to now be £30 per case, so of the original 3,316 cases we are to pay them £99,480*".

90. Mr Clarke also emailed Mr Smith, of SinoAsia, on 7 February 2020 in relation to a claims administration reserve, in which he stated "*we also have the Pinkney's position to be considered*". Mr Smith emailed back, referring to the initial proposal that had been sent by Spectrum (which had referred to commission payable to TMO) and ending with "*I would appreciate you speaking to Russ and Don today and reverting soonest.*"

91. The above emails (among others) are relied on by TMO in support of their case that Spectrum knew that TMO retained an interest in the SsangYong Opportunity, and that Spectrum was not entitled to benefit from the SsangYong Opportunity to the exclusion of TMO. I will return to them, and what Spectrum says about them, below.

92. There then followed a conversation that included Mr Kitchin and Mr Beekmeyer, which Mr Kitchin followed up with an email to Mr Beekmeyer on 8 February 2020 "*to correct any misconceptions surrounding SsangYong and the administration fees*". He stated:

> "Initially the intention was to set up a JV company to run this scheme with the Pinkneys, however, following their issues with Acasta and matters unfolding around their business we have divorced ourselves from dealings with them and are no longer undertaking any business with them, and so none of the money earmarked for administration will be due to them. Just to be clear, Spectrum ONLY will be the administrator and receive this money".

93. Mr Beekmeyer responded to that email about 35 minutes later, noting that he and Mr Kitchin had agreed the way forward:

> "With this in mind I have agreed the following:
> 1. Graham Mills will be paid £59531.73.
> 2. £362,697.47 split as follows
>
> a. 60% less GBP 25,000 to be paid and retained by Newpoint Re
> b. 40% plus GBP 25,000 to be paid in full to Spectrum.
> c. Spectrum will refund by Friday 14th GBP 25,000 Loan advance by Newpoint Capital
> d. Confirmation that the Pinkneys are [no] longer involved with Spectrum
> e. Confirmation that if needed we will support Spectrum against any request for money from the Pinkneys.
> …"

(I have included the "[no]" in d. as it is obvious that was what was intended).

94. TMO contended at trial that this email evidenced a deal that had been struck between Spectrum and Mr Beekmeyer whereby, in effect, Mr Beekmeyer took a larger slice of the premium (which Spectrum could live with if they cut out TMO) in return for supporting Spectrum in attempting to fend off any request for money from TMO. Mr Clarke and Mr Kitchin sought to deny such a deal had been done, but that was unconvincing. Not only were there the terms of the email set out above, but also:

(1) After Mr Clarke had sent to TMO an email on 20 February 2020 (dealt with in more detail below) effectively denying TMO had any entitlement to funds from the SsangYong Opportunity, he then (on 15 April 2020) forwarded that on to Mr Beekmeyer.

(2) It appears that in March 2021, Mr Beekmeyer wrote to at least one commercial counterparty (Car Giant) at Spectrum's behest (and quite possibly in terms ghostwritten by Mr Clarke), suggesting that TMO's claims against Spectrum were baseless.

(3) In 2023, another company related to Mr Beekmeyer – Newpoint Financial (Europe) Limited – lent £140,000 to Spectrum to pay legal costs, which Mr Clarke and Mr Kitchin confirmed at trial were sums loaned to fund the costs of Spectrum's defence in these proceedings.

Termination of the merger and breakdown of the relationship

95. On 20 February 2020 Spectrum informed TMO that it would not be proceeding with the merger in an email which Mr Clarke had previously shared in draft with Mr Kitchin and then sent to Mr Don Pinkney in these terms:

"Dear Don, It is necessary to confirm the position with regard to any relationship between our respective companies.

We were looking to forge a relationship so that in the future the companies could be merged and the respective business relationships and clients form a larger powerful company. It transpired that due to the emergence of the difficulties of the trading experience of Motorway Direct where you are a director & shareholder, that we were unable to continue with any proposed relationship with any present or future company with which you are involved.

Despite our best efforts to try to broker a deal for you to repair the broken relationship your company had with our main capacity provider, you chose to take your own actions, which has lead to us being advised that we cannot continue to deal with any organisation with which you are involved or our capacity would be withdrawn.

You were aware of this and that we had deleted the application for your company The Motoring Organisation to become an Appointed Representative of Spectrum.

At the end of January, when The Motoring Organisation was trying to retain clients, you requested that we contact some of your dealers to provide Insured products as you had no facilities to provide them, and you wanted to retain non-insured products, but could not do so unless the dealers had a facility for insured products. We agreed to do this only on the basis that we dealt direct with these dealers as Spectrum, and we have provided terms to them even though the past performance was poor and compliance and acceptance of the Financial Guidance 19 perameters [sic] questionable. This was done for your benefit to allow you to retain some business from these dealers, so this clarifies the position on these dealer accounts.

Turning to SsangYong, the size and quality of the business as described has reduced considerably, and the risk to underwriters has increased. Faced with the mutual embarrassment of advising SsangYong we could not assist them, we have been forced to accept different terms from the Insurers which dictate that they receive an increased premium and we have a minimal accrued admin fee allowed for us to set up operational and claims facilities for the scheme, and to also declare a long term commitment from the board of the company to independently oversee the scheme for them . There are no commissionable funds available, and in any event in the absence of any formal agreement there are no payments due to The Motoring Organisation. Capacity has been provided by partners to Ocean reinsurance and their respective companies who also advised they would not continue with cover if there was any involvement in any form with The Motoring Organisation or yourselves individually.

> We trust this clarifies the position and that there are no current or ongoing business relationships between Spectrum Insurance Services Limited and any of the businesses you are involved with
>
> Irrespective of the above, we wish you well in your future endeavours."

96. TMO contends that this email was written in a self-serving way and, in a number of important respects, contained a false narrative. Mr Don Pinkney's evidence was that he was furious on receiving it, and felt he had been "strung along" by Spectrum. Mr Chris Pinkney described parts of it as "outrageous".

97. There followed, on 16 March 2020, a meeting at the request of the Pinkneys between the Pinkneys and Mr Clarke and Mr Kitchin at a branch of Costa Coffee in the Meadowhall shopping centre in Sheffield. It is clear that the meeting either started out or became antagonistic, though accounts differed as to the details. Mr Chris Pinkney said that Mr Kitchin had his head in his hands saying he was "*stuck between a rock and a hard place*" (which Spectrum denied). Mr Clarke said Mr Don Pinkney made threats of physical violence (which TMO denied). TMO said Mr Clarke told them that if they wanted anything, they would have to take Spectrum to court. The Pinkneys asked to see copies of the communications with Ocean/Newpoint evidencing what Spectrum has said was their stance against TMO, which Spectrum (in an email sent by Mr Clarke on 31 March 2020) refused to provide, stating that those communications were confidential to Newpoint Capital and therefore could not be disclosed.

98. A letter before action followed from TMO's then solicitors on 28 July 2020.

99. The upshot is that Spectrum exploited the two business opportunities – the SsangYong Opportunity and the 2020 customers – and have earned revenue from both. For how long they exploited them, what they earned and what profit they have made are not issues to be determined in this judgment. Spectrum has not paid TMO anything in relation to either opportunity. The overarching dispute at the trial was whether, as Spectrum contends, Spectrum was entitled to act in that way or rather whether, as TMO contends, Spectrum's actions render it liable to TMO for one or more of the causes of action pleaded.

The Witnesses

100. At trial, the parties relied on evidence from the following witnesses, all of whom were cross-examined. TMO called Mr Don and Mr Chris Pinkney. Spectrum called 4 witnesses: Mr Graham Mills, Mr Steve Reynolds, Mr Brian Clarke and Mr Russ Kitchin.

Mr Don Pinkney and Mr Chris Pinkney

101. Both Mr Don Pinkney and Mr Chris Pinkney gave their evidence in a clear and straightforward manner. Whilst Spectrum, in its closing submissions, suggested that some parts of their evidence were not accurate, Mr Jones (who appeared with Mr Lecuona for Spectrum) made it clear in his oral submissions that he was not suggesting any dishonesty in their evidence. Rather, he advocated caution in attaching too much

weight to parts of their evidence that he described as reconstruction, noting potential flaws in memory.

102. I found them both to be honest witnesses whose evidence was generally credible. Whilst Mr Don Pinkney appeared to have to work hard to keep his temper in check on occasion, and was sometimes clearly frustrated at being asked similar questions on the same documents on a number of occasions during his cross-examination, leading him to the occasional (clearly) sarcastic answer, this never entirely boiled over, and it did not detract from his evidence. Once or twice he made what were clearly errors in relation to dates or time periods when things had taken place, but that generally did not undermine the key points on which his evidence was clear.

103. Spectrum criticised Mr Don Pinkney's evidence that he felt that Spectrum had engineered the situation with Acasta to provide a reason to exclude TMO from the merger. As I mention elsewhere in this judgment, there was a bona fide issue between Acasta and Motorway Direct (which for Acasta also meant with Mr Don Pinkney and TMO), and although nothing ultimately turns on whether this was engineered by Spectrum, I think it unlikely that it was (though once in to 2020, Mr Clarke at least seems to have been content to use the Acasta issue to close down the merger as a prospect). However, it is understandable why Mr Don Pinkney might have got that impression, and I do not think it undermines his credibility that he believed, or said, so.

104. Mr Chris Pinkney's recollection was, on occasion, not perfect. He had made certain factual errors in his first witness statement for trial which had to be corrected in a subsequent statement (as had Mr Don Pinkney), in relation to what had been had said about the transfer of business from Motorway Direct to TMO, and in relation to whether or not TMO had been an Appointed Representative of Motorway Direct during 2019 (before becoming an Appointed Representative of Spectrum). Their first statements had said it had been, which was subsequently corrected, because TMO had, in fact, ceased to be an Appointed Representative of Motorway Direct in October 2015. These were unfortunate errors, but did not affect the central themes of their evidence. The errors were explained in the subsequent statements as caused by the witnesses not having reviewed a complete set of documents relevant to these issues when preparing their first witness statements, an explanation which was not really challenged in cross-examination, and there was no real suggestion that this was part of any deliberate attempt to mislead. This does, however, act as a reminder to be cautious about witnesses' recollections when unsupported by documentation.

105. Mr Chris Pinkney distanced himself from matters of which he did not have direct knowledge (such as the Motorway Direct Board meeting which he did not attend and about which he was cross-examined at some length) but that is not a matter of criticism, and he generally sought to assist the court in giving his evidence.

Mr Mills

106. Mr Mills' main involvement in the facts of the case was that he was retained by SsangYong to find a warranty provider. He accepted that he was not able to give any evidence about what had been agreed between TMO and Spectrum, but did have evidence about the background as well as number of the factual issues between the

parties, including about SsangYong's requirements and the process for placing the cover.

107. It is also relevant that he had worked at Warranty Holdings at a much earlier stage, and also that he now is engaged by Spectrum in the role of "consultant director" (for which he is currently paid a retainer of £2,000 per month). It became apparent during Mr Mills' oral evidence that there is historic animosity between him and Mr Don Pinkney. He explained that "*Mr Pinkney and I have never seen eye to eye, we are certainly not friends*" and that, during their mutual time at Warranty Holdings, he felt that Mr Don Pinkney had been seeking to undermine his position by offering Mr Mills' customers cheaper warranties for his own (Mr Pinkney's) commission. Thus "*there has never been any love lost between Mr Pinkney and myself…*". I am in no position to resolve any question of the rights and wrongs of the historic relationship between the two whilst at Warranty Holdings (not least because what Mr Mills said was not put to Mr Pinkney), but Mr Mills' view was clear.

108. Mr Mills' evidence about how he provided his services was unsatisfactory. He stated in the first sentence of his witness statement that he was the Managing Director and 50% shareholder in "IMS4U Ltd" and then stated clearly, in various places in his witness statement, that he had provided his services through his company, on one occasion expressly stating "*through my own company IMS4U Ltd*". He then sought in chief (after TMO had provided Companies House documents to Spectrum which it intended to put to Mr Mills in cross-examination) to correct his evidence to say that he had always provided his services as a sole trader, and that the company IMS4U Ltd was dormant. If that was the case, it was not clear how he had come to make the written statement that he had. His explanation that the word "company" could be used equally well to describe an individual sole trader as it could to describe a limited company was unconvincing. His evidence that he never traded through the company IMS4U Ltd was also difficult to square with the facts that (i) the contract for his introduction commission with Spectrum was made between Spectrum and IMS4U Limited (identifying the company by name at the top of the agreement and by reference to its registered address and its company number, and he signed it above the words "Graham Mills on behalf of IMS4U Limited") and (ii) the company IMS4U Ltd invoiced Spectrum for commission on 16 January 2020 in the sum of £59,531.73 (asking for "*Bacs payment to IMS4U Ltd*"). Although he said in his oral evidence that the payment had not in fact been made to the company and that his accountant had advised him not to trade through the company, that did not explain why he had set out matters as he had in his witness statement.

109. In any event, whether paid to himself or to his company, Mr Mills accepted that he received about £150,000 from Spectrum by way of commission in relation to the SsangYong Opportunity and has been receiving a monthly retainer from Spectrum (originally £1,000, increased to £2,000 per month from the start of 2023). That he was not a witness who was entirely detached or independent from the parties was also confirmed by the facts that he had been involved in providing a witness statement at the stage when Spectrum applied for summary judgment, in relation to which he said he had read the pleadings and the disclosure. Part of that evidence was (rightly) criticised by Mr Morrison (who appeared for TMO), in particular when Mr Mills had said in that statement that after Spectrum was introduced he and Spectrum "*continued without the input of TMO*", which was not correct.

110. Mr Mills also sought to suggest in his evidence that it was a requirement of SsangYong that the warranty be backed by an "A rated" insurer. However, in none of the contemporary documents that were disclosed in which Mr Mills set out the requirements for the cover that was sought was such a requirement mentioned. In fact, in an approach to John Colinswood (of WMS Group) on 6 September 2019, Mr Mills said SsangYong would "*seek to work with <u>any</u> potential carrier*" (underlining added), with no suggestion of restriction by rating. In addition, as explained further below, the insurance provider was changed from Ocean Re to Newpoint Re, an unrated insurer, in August 2022, without any apparent consternation on the part of SsangYong. Whilst there was a reference to Ocean Re being an "A-rated insurer" to "*satisfy SsangYong as to surety of insurer*" in Mr Clarke's email of 18 October 2019 to Mr Don Pinkney, that does not mean that SsangYong required an A-rated insurer, simply that they would want to be satisfied as to the security of the insurer (not surprisingly). Whilst, no doubt, SsangYong were interested in the security of the insurer with whom they would be contracting, and other things being equal may well have preferred an "A-rated" insurer, it does not seem to me likely given the lack of any documentary corroboration that having an "A-rating" was a formal requirement of SsangYong.

Mr Reynolds

111. Mr Reynolds had known the Pinkneys for a long time, having previously worked for Mr Don Pinkney and had known Mr Chris Pinkney since the latter was about 8 years old. Mr Reynolds held a position as Head of Sales at Motorway Direct from May 2018 (before subsequently being transferred to TMO).

112. On 24 February 2020 (a few days after Mr Clarke's email of 20 February 2020 making it clear the TMO / Spectrum relationship was over) Mr Reynolds commenced work at Spectrum as Head of Motor Finance, where he still works, along with his wife (who is head of HR and a personal assistant to the directors of the company); his son has also worked at Spectrum as an accounts assistant whilst he has been at university. Mr Reynolds was not, therefore, an entirely disinterested witness. In giving his oral evidence, Mr Reynolds said there was one overriding factor in his decision to leave TMO – he said: "*Don [Pinkney] had told me I wasn't worth what he was paying me and I was useless, and he cut my wages in half.*" In this, and other parts of his evidence, there was the sense that he bore something of a grudge towards Mr Don Pinkney.

113. Mr Reynolds' witness statement was short and his evidence was largely peripheral to the issues I have to decide. The only part of his evidence on which Spectrum really relied was the evidence in his statement that "*[a]t the end of September/beginning of October* 2019" Mr Don Pinkney had said to Mr Reynolds words to the effect of "*I don't know why you're wasting your time with that [the SsangYong Opportunity], pass it on to Russ [Kitchin] and see if he can do anything with it*" (which Mr Don Pinkney denied having said), with Spectrum suggesting that showed Mr Don Pinkney did not value the SsangYong Opportunity. In relation to that:

    (1) Mr Reynolds' evidence on this must be seen in light of the fact that a large part of his witness statement dealing with this period was clearly inaccurate and/or

incomplete. Mr Reynolds sought in his statement to suggest that the first approach had been made by Mr Mills in September 2019, and that the SsangYong Opportunity had almost immediately been rejected by Mr Don Pinkney and passed on to Spectrum. This wholly ignored the period from December 2018 when Mr Reynolds himself had worked to progress the Ssangyong Opportunity, with Mr Reynolds expressly confirming in his oral evidence that Mr Don Pinkney had been very interested in pursuing the opportunity at that time. There was no good explanation why he had omitted that from his witness statement. His attempt to explain the omission with "*I am not very good on dates*" was unimpressive.

(2) Even if Mr Don Pinkney had said to Mr Reynolds something along the lines alleged, that does not suggest that he did not think the SsangYong Opportunity was worth pursuing. Mr Reynolds says the remark was made at the end of September / beginning of October 2019. By that time, on TMO's case, Mr Don Pinkney had already made the agreement in relation to the SsangYong Opportunity with Mr Kitchin, so it would be entirely consistent for him to have told Mr Reynolds that it should be passed to Mr Kitchin.

(3) Therefore, even if something was said along the lines Mr Reynolds suggested, that would not suggest that Mr Don Pinkney did not value the SsangYong Opportunity.

Mr Clarke

114. Mr Clarke is a director of Spectrum. He was not party to the discussions in which TMO alleges the two oral agreements were reached with Spectrum (through Mr Kitchin) in relation to the SsangYong Opportunity and the 2020 customers, nor to the earlier discussions relating to the merger. However, he sought to give evidence relating to almost all the issues in the case (including where he did not, in truth, have first-hand knowledge).

115. In cross-examination and in closing submissions (both in writing and orally) TMO made a sustained attack on Mr Clarke's honesty across a number of issues. Mr Jones did not deal with all of the points made against Mr Clarke in closing, but did accept that in at least one respect (which I will deal with further below) Mr Clarke had acted at the time in a way that could be described as dishonestly, though Mr Jones was careful to say he did not accept that Mr Clarke had given any dishonest evidence at trial.

116. The first point to note is Mr Clarke's evidence seeking to explain his various emails to Mr Beekmeyer in which (in various formulations) he referred to TMO being party to the deal relating to the SsangYong Opportunity and as entitled to be paid something in respect of it. In his witness statement, he sought to disown the accuracy of some of these comments and said he had chosen to say this to Mr Beekmeyer in order to "*stop [Mr Beekmeyer] from taking increasing shares of the profit*" and to "*reduce pressure from Mr Beekmeyer*." He said he accepted that this was "*not the right thing to do*". In his oral evidence he gave a similar explanation (and in fact used it to cover some of the other communications, including what had been said about a TMO commission in the original proposal sent to Mr Beekmeyer). In other words, Mr Clarke's evidence was

that he had set out to (and continued to) mislead Mr Beekmeyer about TMO's entitlements in order to maintain a larger share of the profit for Spectrum. I deal below (in considering these documents in the context of the dispute as to whether a contract was made in relation to the SsangYong Opportunity) with whether or not I accept that explanation. But, even on his own evidence, the explanation Mr Clarke gave for what he said to Mr Beekmeyer in these documents about TMO does him little credit.

117. There were a number of other aspects of Mr Clarke's conduct and evidence which I found unsatisfactory. Some of this related to his relationship with Newpoint Capital, which I should explain in a little more detail.

118. I have set out above the insurance arrangement that was put in place by Spectrum in respect of the SsangYong warranty. It took the form of insurance placed with Ocean Re, through its intermediary Sinoasia, and in turn this was reinsured with Newpoint Capital. I was not shown any of the documentation between Ocean Re and Newpoint Capital, but the gist of the explanation given by Mr Clarke was that it was, essentially, a fronting arrangement. All of the material discussions and negotiations in relation to the terms of the cover (including the premium) appear to have taken place directly with Mr Beekmeyer of Newpoint Capital. Mr Beekmeyer was painted by Spectrum as a very forceful character.

119. Mr Clarke did not disclose in his witness statement, nor did he disclose to TMO or to SsangYong, that he was a director of Newpoint Capital at the time of placing the insurance (he held that position from 22 July 2011 to 1 March 2021) and was a shareholder in Newpoint Capital until 1 January 2020 (although in his oral evidence he was at pains to say it was, by this point in time, a very small shareholding). It also became apparent when he was cross-examined that he was (and remains) a 30% shareholder in a company called Sky Capital Partners Limited and is company secretary of another company called Suisse Capital Limited, both of which are companies connected to Mr Beekmeyer.

120. In his oral evidence he sought to distance himself from Newpoint Capital, saying that his shareholding was small, but he confirmed that he had performed some administrative duties for them up until about 2020 or 2021. In fact, Mr Clarke had a Newpoint Capital email address (which he used for at least one of his exchanges relating to the SsangYong Opportunity) and had the authority to operate a bank account which he identified in cross-examination as Newpoint Capital's.

121. It appeared from the documents put to Mr Clarke in cross-examination that, through his operation of the bank account, he caused various payments to be made, on behalf of Newpoint Capital, out of what appeared to be funds paid by SsangYong as premium and IPT, to fund trading expenses, legal fees, personal expenses and payments to Sky Capital Partners Ltd and Suisse Capital Ltd. It was not clear whether any of this was revealed to Sinoasia (the intermediary to whom the premium should have been paid under the slip terms), and at least one email from Mr Clarke to Mr Beekmeyer (dated 23 November 2020) suggested it was not. Various back-dated documents appear to have been put in place ex post facto to seek to justify at least some of the transfers, and an email from Mr Clarke to Mr Beekmeyer dated 3 June 2021 referred to payments that were "not compliant" and the potential for an FCA breach.

122. It is not necessary for the purposes of the issues I have to decide to go into any great detail about these payments and the various reasons given for them. Mr Clarke's evidence was not consistent, and he was clearly uncomfortable with his position. He referred to having "*colluded with Mr Beekmeyer about the payments not going to the correct entity*" and his consistent theme was that Mr Beekmeyer "*is a very strong character*" who "*can impose on us a lot of terms*". Once everything had been put to him, he accepted that the premium had not been paid to the agent of the insurer in accordance with the original insurance contract, and what he had done was inconsistent with the regulatory regime.

123. In their written closing submissions, Spectrum acknowledged that Mr Clarke's conduct was irregular and improper. In his oral closing submissions, Mr Jones described the conduct as "wrong" and "not that which one would describe of a person being fit and proper" and that it could be described as "dishonest", but emphasising (as Mr Clarke had done in his evidence) that Mr Clarke was effectively forced into it by Mr Beekmeyer.

124. A further aspect of Mr Clarke's evidence that TMO criticised related to the fact that he appears to have allowed the insurance with Ocean Re to lapse on 30 November 2020. In cross-examination, he denied it had lapsed, and there was a dispute about the effect of the contractual terms in the Ocean Re slip, but in a series of email exchanges over the period November 2020 to June 2022, Mr Clarke and others (including Neil Smith, who, by June 2022, was acting for Newpoint Insurance Brokers Ltd) obviously believed it had lapsed. For example, on 23 November 2002, Mr Clarke wrote that "*the contract expires on 30th November*"; and in June 2022, Mr Smith wrote "*As there was no cover in place I have added an Addendum to cover the vehicles sold by SsangYong during the period 1 December 2020 to 30 June 2022)*". Ultimately the contractual position was dealt with by Newpoint Re (an unrated insurer) providing the insurance in a contract dated 3 August 2022, which included an addendum retrospectively covering the position from 1 December 2020. Despite the fact that he understood cover was not place between 1 December 2020 and 3 August 2022, Mr Clarke does not appear to have informed SsangYong / Bassadone of that fact (and Mr Mills' evidence was that neither he nor SsangYong was ever informed that cover had lapsed), and continued to collect premium and IPT. He insisted those payments were paid on to the "insurer", but was frequently unclear about who he was referring to and generally, in his evidence on this topic, he was evasive and inconsistent.

125. Further, Mr Clarke's presentation of the profit and loss made by Spectrum from the SsangYong Opportunity appeared to have been prepared on an incorrect basis. Calculations he had prepared for his trial witness statement and in a witness statement (dated 18 July 2023) in response to a TMO disclosure application used a basis that Spectrum had not actually used at the time and was not the basis on which Spectrum prepared its own accounts. The methodology Mr Clarke put forward to the court suggested a substantially lower profit than the methodology actually used by Spectrum. Whilst the issue of profit is not one that arises at this trial of liability issues, it is clear that the way Mr Clarke presented this was not straightforward.

126. Mr Clarke was, therefore, in a number of ways an unsatisfactory witness and someone whose conduct in relation to the funds he handled for Newpoint Capital was accepted to be irregular and improper, as well as capable of being described as dishonest. These

matters do not mean that I cannot accept anything he said in his evidence, but I treat what he said with some caution. His evidence in relation to the key factual issues (such as the making of the oral agreements) was often, in any event, indirect rather than first-hand.

Mr Kitchin

127. Mr Kitchin is also a director of Spectrum, and was party to the discussions which TMO contends led to the agreements concerning the SsangYong Opportunity and the 2020 customers. He had a longstanding relationship with Mr Don Pinkney and, to a lesser extent, Mr Chris Pinkney. It was clear from Mr Kitchin's oral evidence that he had a great deal of respect for Mr Don Pinkney's skills as a salesman.

128. Mr Kitchin's evidence, and conduct, was not as unsatisfactory as that of Mr Clarke. It was not clear, for example, what level of knowledge, if any, Mr Kitchin had of Mr Clarke's arranging for the various payments on behalf of Newpoint Capital. To some extent, it appeared that Mr Kitchin was willing to defer to Mr Clarke, including when it came to giving evidence – in his witness statement he cross-referred a number of times to Mr Clarke's statement, saying he would not repeat it. In fact, one unsatisfactory aspect of Mr Kitchin's evidence was that, despite his statement cross-referring to Mr Clarke's witness statement a number of times and saying he would avoid repetition (including statements that "*I have seen that Brian has provided a detailed summary of…*" and "*Brian has provided a breakdown of …* [which] *appears to me to be correct*"), in his oral evidence he consistently said he had not in fact read Mr Clarke's statement before signing his own.

129. Mr Kitchin also went along with Mr Clarke's explanation of the emails with Mr Beekmeyer referring to entitlements of the Pinkneys/TMO to commission – an explanation which involved Mr Clarke having deliberately lied to Mr Beekmeyer. Mr Kitchin was involved with a number of these documents at the time. He saw (on 17 October 2019) at least two drafts of the proposal before it was sent to Mr Beekmeyer which Mr Clarke sent him to comment on (and which both included the language referring to commission to TMO), was copied on the 18 December 2019 email from Mr Clarke to Mr Beekmeyer, and was also forwarded the 6-7 February exchange between Mr Clarke and Mr Beekmeyer as well as the 7 February 2020 exchange between Mr Clarke and Mr Smith. It seems that Mr Kitchin was either content with the dishonesty being presented to Mr Beekmeyer at the time, or thought at the time that those emails were accurate but then sought to join in with a dishonest explanation of them at trial.

130. In general, TMO's suggestion that it may have been Mr Clarke who initiated much of (what TMO described as) the manoeuvring against it, and that Mr Kitchin went along with it, carries the ring of truth, as does Mr Chris Pinkney's description of Mr Kitchin holding his head in his hands at the Costa Coffee meeting in March 2020. During his evidence, there were occasions where he was clearly not happy with how things had turned out.

The SsangYong Opportunity

131. I will first deal with the claims brought by TMO in respect of the SsangYong Opportunity, and then the claims in relation to the 2020 customers. In relation to both, TMO brings claims for (i) breach of contract (in each case based upon an alleged oral agreement); (ii) breach of fiduciary duty; (iii) breach of confidence; and (iv) unjust enrichment.

Breach of contract

132. The key issue at trial in relation to the breach of contract claim was whether the alleged oral agreement had been reached between TMO and Spectrum relating to the SsangYong Opportunity.

133. The agreement that TMO alleged was reached in respect of the SsangYong Opportunity was one said to have been reached orally between Mr Don Pinkney and Mr Kitchin in or around September 2019. TMO alleged (as set out at paragraph 24 of the Particulars of Claim) that:

    (1) Mr Don Pinkney and Mr Kitchin agreed that "*the SsangYong Opportunity would remain with TMO. Spectrum was only to benefit if and to the extent that the takeover proceeded, and in accordance with the takeover terms agreed by this point in time (as pleaded at paragraph 12 above).*" (Paragraph 12 of the Particulars of Claim had set out the terms that TMO alleged had been agreed "by September 2019" in respect of the merger).

    (2) There was the requisite intention to create legal relations and that consideration was found in "*Spectrum's potential prospective entitlements to: (1) indirectly benefit from the SsangYong Opportunity if the takeover was achieved and its current owners retaining a 10% shareholding in Spectrum; and (2) receive a payment in respect of the costs set out at sub-paragraph 12.3 above and the ability to recharge compliance and insurance costs as set out at sub-paragraph 12.4 above if and to the extent that it provided claims services in connection with the SsangYong Opportunity subsequent to the takeover.*"

    (3) It was an express, alternatively an implied, term of the agreement that if the merger did not take place, Spectrum and its owners would not be entitled to enjoy any part of the benefits derived from the SsangYong Opportunity, and that the same would be exclusively enjoyed by TMO.

134. Spectrum, on the other hand, contended that there was never any agreement made with TMO (or any other entity related to the Pinkneys) in respect of the SsangYong Opportunity, but rather that the SsangYong Opportunity was passed by Mr Don Pinkney to Mr Kitchin, for Spectrum to deal with on its own behalf (albeit in the context of the potential merger).

135. I should make it clear that the only issue between the parties in relation to whether there was a contract was the factual one as to whether the alleged oral agreement was reached between Mr Don Pinkney and Mr Kitchin. There was no further or alternative point taken by Spectrum such as, for example, whether any agreement that was reached was

lacking in legal enforceability because of want of intention to create legal relations, of consideration, or of sufficient certainty. Nor was any point taken about whether Mr Don Pinkney had the authority to make the agreement on behalf of TMO (even though he was not formally appointed as a director until October 2019). That may have been because Mr Chris Pinkney (who was a director) had authorised his father to make the agreement: Mr Chris Pinkney's evidence in his statement was that he and his father had discussed the matter before Mr Don Pinkney had had the discussion with Mr Kitchin about the SsangYong Opportunity and that Mr Don Pinkney acted on behalf of TMO in doing so. In any event, as I say, the only issue between the parties was whether the agreement was reached as a matter of fact.

136. There was a broad consensus between the parties as to the approach to be taken in determining whether there was such an agreement. Whether or not contractual agreement is reached is determined objectively, by reference to the words and conduct of the parties: *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH* [2010] 1 W.L.R. 753, Lord Clarke at paragraph 45.

137. Both parties relied upon the following passage from the judgment of Eyre J in *Mansion Place Ltd v Fox Industrial Services Ltd* [2021] EWHC 2972 (TCC) where the Judge said (at paragraph 55) that he had to:

> "…look at the witnesses' evidence through the prism of the contemporaneous documents; of their subsequent actions; of those events which are accepted or clearly demonstrated to have happened; and of inherent likelihood. The impression made by the demeanour of a witness must be set against those matters and to the extent that the contemporaneous documents in particular show a picture different from that depicted by a particular witness it is the former and not the latter which I should regard as more likely to be an accurate account of what happened."

138. In identifying and construing the terms of a contract:

(1) In addition to the words used by the parties, it is appropriate to take account of the context in which the words were used, and the conduct of the parties at the time the agreement was made: *Devani v Wells* [2020] AC 129, Lord Briggs at paragraphs 59-62. TMO also relied upon the following passage from Lord Kitchin's judgment in *Devani* at paragraph 33:

> "…I do not accept that there is any general rule that it is not possible to imply a term into an agreement to render it sufficiently certain or complete to constitute a binding contract. Indeed, it seems to me that it is possible to imply something that is so obvious that it goes without saying into anything, including something the law regards as no more than an offer. If the offer is accepted, the contract is made on the terms of the words used and what those words imply."

(2) "…in the case of a contract which is entirely oral or partly oral, evidence of things said and done after the contract was concluded are admissible to help decide what the parties had actually agreed": *BVM Management Limited v Roger Yeomans* [2011] EWCA Civ 1254, Aikens LJ at paragraph 23.

139. The parties also reminded me of, and I keep well in mind when considering the witnesses' evidence on this issue, and in relation to the other issues on which it bears, what was said by Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Limited & Anor*. [2013] EWHC 3560 (Comm), [2020]1 CLC 428 at paragraphs 15 to 22. Spectrum placed particular weight on paragraph 22:

> "… the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

140. Bearing the above in mind, I summarise what the witnesses said at trial on the question of the making of the alleged agreement:

(1) Mr Don Pinkney's evidence was clear. He explained in his witness statement that Mr Kitchin agreed that Spectrum was being asked to source the insurance cover for TMO, and that Spectrum would not get any value out of the SsangYong Opportunity unless and until the companies had merged. He was equally clear in his oral evidence, explaining that he said to Mr Kitchin "*The deal is our deal, not your deal, and you will earn only if we get the merger through.*" As set out above, I found Mr Don Pinkney generally to be an honest and credible witness.

(2) It is right to say that during this part of his questioning, when asked when this conversation took place, he referred to it being late 2019 or very early 2020, and certainly the latter could not have been correct given the chronology. However, I do not find this indicates any unreliability in his recollection of the discussion he had with Mr Kitchin or the agreement he reached. This was said during a passage when he was clearly annoyed with the questioning (and had said so), and was clearly trying to restrain himself from an outburst, and obviously made a mistake in referring to "very early 2020" for the discussion in which the SsangYong Opportunity was passed to Mr Kitchin (which did not fit either party's case, the documents or the chronology more generally).

(3) That evidence was supported by the evidence of Mr Chris Pinkney who, although he was not involved directly in the discussion in question with Mr Kitchin, was discussing these matters with his father at the same time.

(4) Mr Kitchin denied that he had made such an agreement. His evidence on the point was relatively short – he said in his statement that the SsangYong Opportunity was "*never the subject of any agreement, written or otherwise*" and said he did "*not have the impression that I was acting as TMO's 'go between' or being given instruction by TMO.*" He said the Pinkneys' focus was on the merger rather than the SsangYong Opportunity. He maintained the denial in his oral evidence. I have referred above to some features of Mr Kitchin's evidence that were not entirely satisfactory. That does not, of course, of itself mean that nothing he said can be relied upon. However, it is something to bear in mind as I assess the weight to be given to his denials.

(5) Mr Clarke also denied that there was any agreement with TMO relating to the SsangYong Agreement. He, however, was not alleged to have made the agreement or to have been present when the agreement was made. I have already made some comments about Mr Clarke and his evidence above. In addition to those general comments, his evidence about the SsangYong Opportunity was unsatisfactory. For example, his witness statement introduced it by saying that Spectrum contacted Mr Mills around the beginning of October 2019 to obtain full details of the risk and cover requirements and that the Pinkneys had suggested that Mr Mills contact Spectrum to assist in placing the cover he was seeking. As the evidence at trial showed, that was incorrect. Mr Mills had contacted Motorway Direct and, in due course, spoke to Mr Chris Pinkney. It was TMO that passed the information about the SsangYong Opportunity to Spectrum, and Spectrum took matters forward in seeking to find an underwriter before Spectrum had any contact with Mr Mills. I treat what Mr Clarke says about the SsangYong Opportunity and the lack of agreement about it with TMO with a great deal of caution.

(6) Neither Mr Mills nor Mr Reynolds had any direct evidence to give about the existence or otherwise of the agreement TMO alleges it made with Spectrum in relation to the SsangYong Opportunity.

141. TMO also relied upon the following matters in relation to the likelihood of the agreement it alleged having been made:

(1) The SsangYong Opportunity was perceived, in the period September to October 2019, to have substantial value, and was seen as being potentially profitable by all concerned. Although, in their written evidence, Mr Mills, Mr Clarke and Mr Kitchin had sought to suggest there appeared little value in the opportunity at that time, the documents they had themselves produced undermined what they had said. For example, the documents emphasised that the cost per vehicle was likely to only be £50 against a premium of £310, and that the restrictions on the warranties and likely usage and ownership of the vehicles, as well as servicing and ownership notification requirements, meant that there would likely be few claims. It was not a worthless piece of business that Mr Don Pinkney would have been content simply to give away.

(2) Mr Don Pinkney did not, as Spectrum suggested at trial, have no interest in it nor did he think it had no value. I have already dealt with the evidence given by Mr Reynolds in his witness statement as to what Mr Don Pinkney was alleged to have said to him in late September / early October ("*…pass it on to Russ…*" etc) and why that does not suggest that Mr Don Pinkney thought it had no value. Mr Don Pinkney's continued interest in it is also confirmed by his discussion with Spectrum of the terms to offer to underwriters, and his insistence on certain matters being part of the deal (for example, in cross-examination both Mr Kitchin and Mr Clarke confirmed that the proposed cost to the insurer of £50 per case and the profit share of 80% that appeared in the proposal sent to Mr Beekmeyer were included at the behest of Mr Don Pinkney). These were not the actions of someone uninterested in this opportunity or who saw no value in it.

(3) Mr Don Pinkney continued to be kept in the loop by Spectrum on the negotiations, and is recorded in the Spectrum email of 24 October 2019 as having said that he wanted the contract to go via his company (i.e. TMO). That is inconsistent with Spectrum's case that Mr Don Pinkney had passed the opportunity over to Spectrum at the outset.

(4) This is underlined by the evidence that was given about Mr Don Pinkney's character. The evidence of Mr Clarke and Mr Kitchin was that Mr Don Pinkney was aggressive, controlling and determined to extract maximum profit from any opportunity. He was not the sort of character to let a business opportunity escape his clutches. For example, Mr Kitchin referred to Mr Don Pinkney's desire to "*TMO everything, it's the only brand we will be using*". Whilst this comment was made in the context of Mr Kitchin's understanding of Mr Don Pinkney's views relating to the potential merger around the time of the meeting on 26 November 2019, it is indicative of Mr Don Pinkney's position generally.

142. I find that all of those points were well made. The opportunity was indeed perceived as having substantial value, and Mr Don Pinkney is unlikely to have handed it over to Spectrum as, effectively, a gift. He was keen to keep control where he could, and to keep the business as TMO's. He was content to use Spectrum to source underwriting for TMO in respect of the SsangYong Opportunity and indeed considered it a good opportunity for them to do so given the anticipated merger (referring to it in his evidence as "*an absolute catalyst*" for the merger). But he would not have handed it over to Spectrum for them to do with it what they liked.

143. Against this, Spectrum suggested there had been occasions in the past when opportunities were passed between Mr Kitchin and Mr Don Pinkney without charge or commission. Mr Kitchin gave two examples in his witness statement. Very little was said about these, and it is difficult to place much weight upon them, particularly because Mr Jones (as he acknowledged in his oral closing submissions) did not put either of the two examples to either Mr Don or Mr Chris Pinkney, and nor did Mr Morrison ask any questions about them of Mr Kitchin. In any event, both examples appear from Mr Kitchin's statement to be examples of Mr Kitchin providing something to the Pinkneys (in one case some assistance, and in another an introduction for some business), not Mr Don Pinkney providing anything for free to Mr Kitchin.

144. Spectrum's main submission in relation to the oral agreement was that there was no document of any description to support it. If there had been any such agreement, argued Mr Jones, there is bound to have been a contemporaneous written record of it. He also pointed to the lack of a written reaction to the 20 February 2020 email from Mr Clarke stating that TMO had no entitlements in relation to the SsangYong Opportunity.

145. An argument along those lines may well be a good submission in many cases, particularly in a commercial setting. However, whether it is or not depends upon the circumstances and context and requires considering what inference, if any, can be drawn from the lack of written record of the alleged oral agreement or other written communication.

146. Here, as I have already set out, many of the dealings between these parties were not recorded in writing. In particular, the Pinkneys did not tend to deal in lengthy written communications. This was not confined to the Ssangyong Opportunity.

147. It was clear that the Pinkneys and Mr Kitchin had had many discussions and meetings relating to the proposed merger stretching back over months and, indeed, years. There was no dispute about that. There was next to no written record of them. Even as the matters came close to agreement in relation to the merger, there was little that was reduced to writing. Once Mr Clarke became involved, there was a marked increase in more detailed emails and, of course, the HoT. However, all of the detailed communication came from the Spectrum side – there was nothing of any length from the Pinkneys in writing on any topic.

148. In their written closing submissions, Spectrum produced a list of about 20 emails appearing in the trial bundle which they said demonstrated there was regular written communication between Spectrum and TMO. However, given the matters that were being discussed between the parties (including a prospective merger and obtaining FCA approval), and the period of time over which these identified written email communications stretched (some 5 months), this was not a particularly large amount of emails. Most of them came from the Spectrum side, and of those from the Pinkneys they were mainly from Mr Chris Pinkney, and those tended to be short – typically a one line response or a simple forwarding on of another message. In the emails identified by Spectrum, only two were sent by Mr Don Pinkney – one sending his passport details to Spectrum for the purpose of the application for AR status; the other was not a communication with Spectrum at all but an email from Mr Don Pinkney to Mr Chris Pinkney (in October 2020) with no text and appearing to attach some of the emails previously received from Spectrum. All of this supported the evidence given by all of the witnesses that Mr Don Pinkney was just not a man who generally dealt with things in writing, and generally "did not do email".

149. Similarly, whilst Mr Chris Pinkney and Mr Kitchin exchanged text messages from time to time, again Spectrum were not able to point at a large number of these over the period in question (their list in closing submissions covered some 14 months). The details of the 2020 customers were communicated by text message, but otherwise the messages were (unsurprisingly) often short. (I also add that, among the texts was the message dated 12 February 2020 which ended with Mr Chris Pinkney asking Mr Kitchin: "*Any update on ssangyong?*", for which there was no real explanation if Spectrum's case was correct.) The fact that there was no express reference in one of

those text messages to the agreement alleged to have been reached in relation to the SsangYong Opportunity is of no real weight in determining whether such an agreement was reached.

150. In addition, it was clear that there was a long-standing relationship between the Pinkneys, in particular Mr Don Pinkney, and Mr Kitchin. They had known each other a long time, and had previously worked with each other. They had been discussing potential merger for some years, and Mr Don Pinkney obviously trusted Mr Kitchin. It is clear that, having made an agreement orally, Mr Don Pinkney would not have thought (and did not think) it necessary to record it in writing or to follow it up in writing in any way. Not only was that not the way he worked, but in particular with Mr Kitchin it would never have crossed his mind that it might be advisable to do so (and Mr Kitchin agreed that their relationship was not one in which it was essential formally to record everything in writing).

151. As for the suggestion that substantial weight can be placed on the lack of written response to the 20 February 2020 email, that does not seem to me to be a powerful point here. The Pinkneys generally did not engage in long email traffic. In response, they sought a meeting, which was their preferred method of communication, which led to the meeting at Costa Coffee in Meadowhall, which was clearly acrimonious and it is obvious the Pinkneys were not content. The fact that their response was given in a meeting, rather than in writing, is of no relevance.

152. In the circumstances, the fact that there is an absence of email (or other written) correspondence directly supporting the existence of the alleged oral agreement and the fact that there is an absence of immediate reaction by email (or by other written means) to communications like Mr Clarke's 20 February 2020 email is of little weight, in the context of this case, when considering whether or not the parties reached an oral agreement regarding the SsangYong Opportunity.

153. Spectrum also sought to rely on the fact that there was no mention of the SsangYong Opportunity in the HoT. However, that does not appear to me to assist. The HoT (which was not in any event an agreed document) was dealing with the proposed terms of the merger, and not with the agreement that it was alleged had already been reached in relation to the SsangYong Opportunity. It did not deal in any detail with any of the business that it was envisaged would be written or transferred. It dealt with big picture points as to how the operation would be carried out and structural points on the proposed merger. Moreover, on both parties' cases, it was intended that the SsangYong Opportunity would benefit the merged entity, if the merger went ahead successfully, so it is no more surprising that there is no mention of it in the HoT if TMO's case were correct in respect of the SsangYong Opportunity than if Spectrum's case were correct on that issue.

154. The position is similar in respect of Spectrum's reliance upon the fact that, during his cross-examination when he was being pressed on the fact that there was no mention of the SsangYong Opportunity in the HoT, Mr Don Pinkney said "*So what? That's nothing to do with the merger*". He was clearly referring to the fact that the points relating to the merger that were being discussed (and appeared in the HoT) were of the type I have described above – how the operation would be carried out and various structural issues as to how the merger might be effected – not details of the business

they would seek to provide, and the agreement in respect of SsangYong did not affect the proposed merger terms. This was not a statement, as Spectrum in its closing submissions sought to characterise it, to the effect that it was not a condition of Spectrum's benefiting from the SsangYong Opportunity that the merger would be successful.

155. Spectrum's case that there was no agreement at all with TMO and that TMO and the Pinkneys had no entitlements in respect of the SsangYong Opportunity is inconsistent with their own documents, which consistently recognised that TMO had an entitlement in at least some respect:

(1) In the initial written presentation that Spectrum put together (drafts having been sent to Mr Kitchin for comment in advance) and that Mr Clarke sent to Mr Beekmeyer on 17 October 2019, it was clearly set out that the part of the premium that would be paid back to Spectrum would not only cover the administration costs, but also the "*commission payable to The Motoring Organisation for introduction of the scheme and ongoing customer relations.*"

(2) On 24 October, Mr Clarke sent to Mr Kitchin the draft of an email to the Pinkneys in which he was planning to say "*we can agree the split of commission/fees etc soonest*". This was clearly a reference to Spectrum and TMO agreeing a split of "*commission/fees*", recognising TMO's entitlement but suggesting a split, no doubt because (as Mr Clarke was also planning to set out in the email) he was saying Spectrum would have to conduct the administration (including claims administration). When the email was sent to the Pinkneys, some 25 minutes later, these words had been replaced with reference to finalising "*how we deal with … the money flow*", which was slightly more cryptic, but still suggesting the "*money flow*" was something to do with TMO.

(3) Spectrum's board minute dated 17 December 2019 identified Don Pinkney as the "*originator of the business*" in respect of the SsangYong Opportunity.

(4) In an email dated 18 December 2019 to Mr Beekmeyer and Mr Bye (copied to Mr Kitchin), Mr Clarke discussed the agreement reached with SsangYong in respect of premium for vehicles registered between 1 June 2018 and 31 July 2018 (when the warranty given had offered enhanced cover), and explained that they would "*have to maintain the 5% to the introducer [ie Mr Mills] and the Pinkneys.*"

(5) In his email to Mr Beekmeyer dated 5 February 2020, Mr Clarke stated "*We have to pay the introducer Graham Mills and the Pinkneys who are parties to the deal …*".

(6) There then followed the series of emails between Spectrum and Mr Beekmeyer/Mr Smith where Spectrum unilaterally watered down the amount they were saying the Pinkneys were owed and whether they had any entitlement at all (none of which was communicated to TMO or the Pinkneys at the time):

(a) On 6 February, Mr Clarke wrote to Mr Beekmeyer: "*That leaves Spectrum with £362,697.47 but the Pinkneys are expecting 60% of this.*"

(b) On 7 February, he wrote to Mr Beekmeyer: "*the amount "expected" by the Pinkneys was never agreed or accepted – this has been reviewed to now be £30 per case, so of the original 3316 cases we are to pay them £99,480.*"

(c) Subsequently on 7 February, Mr Clarke wrote to Mr Neil Smith acknowledging that "*we also have the Pinkneys position to be considered*".

(These emails were forwarded to Mr Kitchin on 7 and/or 8 February 2020).

156. These documents clearly suggested that Spectrum understood at least that TMO retained an interest in the SsangYong Opportunity and were owed at least a percentage of the monies that Spectrum received. They were inconsistent with Spectrum's case that TMO had no interest in the SsangYong Opportunity in any respect, and were owed nothing in relation to it. In seeking to maintain their position that TMO had no such interest and no such entitlement, Mr Clarke and Mr Kitchin had no convincing answer to these documents. The explanation supplied by Mr Clarke in his witness statement was given in relation to the February 2020 emails to Mr Beekmeyer, and was to the effect that he was looking for points to persuade Mr Beekmeyer from taking an increased share of the profit. In other words, he said that he had deployed the Pinkney's "entitlement" to a percentage, even though (he says) they had no such entitlement, in order to identify to Mr Beekmeyer how much Spectrum would have to pay away from what it ended up with from Mr Beekmeyer. Mr Clarke said in his witness statement that this was not the "right thing to do" and acknowledged in his oral evidence that, on his own account, he was telling untruths to Mr Beekmeyer.

157. Mr Clarke sought also in his oral evidence to extend this explanation back in time to the 17 October 2019 proposal, suggesting that his inclusion in it of reference to commission due to TMO was a prophylactic measure aimed to stop Mr Beekmeyer from eroding Spectrum's commission at the outset. That was not an explanation he had advanced in his witness statement to explain that document.

158. This was not a convincing explanation in relation to any of these documents. It was clear that Mr Clarke had worked with Mr Beekmeyer for a number of years, and that they were both directors at Newpoint Capital, and as I have set out above Mr Clarke managed various payments for Mr Beekmeyer and/or Newpoint Capital. There was clearly a substantial degree of trust and confidence between them. It is difficult to conceive that Mr Clarke (and Mr Kitchin who saw drafts of the proposal before it was sent) would have decided, from the very outset, to lie to Mr Beekmeyer about TMO's role and entitlement in this way.

159. More likely is that Mr Clarke and Mr Kitchin knew that Spectrum had to pay TMO, and felt they had to include reference to that, and to TMO, in the document to Mr Beekmeyer – indeed, they were probably content to do so, not least because they would no doubt have wanted to maintain as much margin as they could – but were not willing to admit to Mr Beekmeyer that this was really TMO's deal that Spectrum was placing. Hence the presentation to Mr Beekmeyer as a "commission" rather than a recitation of the agreement they had reached with TMO. They perhaps convinced themselves that what they were saying was at least partially true - money would be due to TMO, and the reference to splitting the funds may have been a reflection of their thinking, at that time, at least in rough terms that this was how things were likely to pan out in terms of

the ultimate position post-merger. In any event, what was clear from these documents was that at these points in time Spectrum considered TMO to have an interest in the deal, inconsistently with its case that this had become entirely Spectrum's deal in relation to which it owed nothing to TMO.

160. Other communications between TMO and Spectrum also support TMO's case on this issue:

(1) Spectrum kept TMO updated on the discussions they were having with Mr Beekmeyer (e.g. by text from Mr Kitchin to Mr Don Pinkney on 14 October 2019). Similarly, Mr Mills continued to liaise with TMO by sending information (e.g. by email from Mr Mills to Mr Chris Pinkney on 16 October 2019), and seeking progress updates (e.g. by texts from Mr Mills to Mr Chris Pinkney on 15 and 22 October 2019).

(2) In their oral evidence, both Mr Clarke and Mr Kitchin stated that the proposed cost to the insurer of £50 per case and profit share of 80% in the proposal sent to Mr Beekmeyer on 17 October 2019 was included at the behest of Mr Don Pinkney.

(3) On 18 October 2019, Mr Clarke sent an email to Mr Don Pinkney outlining where he had got to in discussion with Mr Beekmeyer. He said that the insurance would be arranged "*by preparing a slip in the name of Spectrum Insurance Services (because we are the authorised principal)*". If the agreement, arrangement or understanding between TMO and Spectrum had always been that, once the introduction had been made, this would be Spectrum's deal (as Spectrum contends) there would have been no need to say that the slip would be in Spectrum's name, or to give a reason for it. This is more consistent with the agreement having been, as TMO contends, that the deal would remain TMO's deal, with Spectrum sourcing the insurance, and Spectrum now in this email explaining how the practicalities would have to work.

(4) Also in this email, Mr Clarke (having set out the various details) sought to persuade Mr Don Pinkney that it was a deal worth taking, asking him to "*Take some time to digest this*" and to call him if he wanted to discuss it, but emphasising that they needed to move quickly. The sense was not that this was simply information being provided (as Spectrum suggested at the trial), but rather that approval or agreement was being sought from Mr Don Pinkney.

(5) Similarly, on 22 October 2019, Mr Kitchin sent an email to Mr Chris Pinkney explaining that the premium would have to be passed to Spectrum ("*as FCA authorised Principal and agreement holder*")*.* As above, the need to provide such an explanation is inconsistent with Spectrum's case.

(6) It appears that the Pinkneys did not immediately accept that the arrangements should be put in place with Spectrum. In his email of 24 October 2019, Mr Clarke explained to Mr Beekmeyer that Mr Don Pinkney wanted the business to go via TMO. Again, that is inconsistent with TMO having agreed, back in September, that the business would be Spectrum's, but rather consistent with TMO's case

that the deal remained TMO's, with Spectrum simply seeking to place the business for TMO.

(7) In his 24 October 2019 draft email to the Pinkneys (referred to above), as well as referring to the "*split of commission/fees*", Mr Clarke explained that the deal had to go via Spectrum (copying into the text of his email the message he had procured Mr Beekmeyer send to him to that effect) and pressing the Pinkneys to accept that the deal is "*all we can get*", and asking them to "*confirm we have to move on as it is*", following which they could get together "*to discuss how we run it*". The sense was that the Pinkneys needed to agree to the deal as thus presented. The text was revised in the emails as sent to the Pinkneys, but it continued to refer to the need for the Pinkneys to agree it – "*we can still do the deal provided you accept it in its current form*" – and asking them to get back to Mr Clarke.

161. In summary, the documents, whilst not providing a direct record or similar direct evidence of the agreement TMO alleges was made, are broadly consistent with it. They are certainly more consistent with TMO's case than with that of Spectrum, and in some instances inconsistent with Spectrum's case, which is no doubt why Spectrum was at pains at the trial to seek to explain the emails they sent to Mr Beekmeyer referring to TMO's commission as false (an explanation which I have rejected above).

162. Spectrum also suggested that the fact that Mr Mills (and not TMO) was the one in contact with SsangYong, and the fact that Mr Mills did not know or, or approve, the alleged agreement between TMO and Spectrum, is inconsistent with the existence of the alleged agreement. I do not accept that. Even though TMO had not secured any entitlement to provide the warranty to SsangYong, there was nothing to prevent it making the agreement it alleges with Spectrum in terms of seeking to find the means of providing the warranty and of regulating the consequences if they were successful in being able to place the warranty on terms acceptable to SsangYong.

163. Taking into account all of the above, I find that TMO (through Mr Don Pinkney) and Spectrum (through Mr Kitchin) did make an oral agreement in around September 2019 along the lines alleged by TMO. The evidence of Mr Don Pinkney was persuasive (as was that of Mr Chris Pinkney although, as I have noted, of less direct relevance). As I have explained, the lack of direct or contemporaneous written record of the oral agreement is not at all surprising in the context and circumstances of this case. Moreover, Spectrum's own documents are more consistent with TMO's case that with its own (and Mr Kitchin and Mr Clarke did not have a satisfactory explanation for those documents consistent with their case). Further, the SsangYong Opportunity is not one that Mr Don Pinkney would have been willing entirely to let go of. He perceived it of (at least potentially) substantial value, and whilst he saw it as a good opportunity to be developed in the context of the anticipated merged business, he very much saw it going into that merged business from TMO's side. He would not have been willing to hand it over to Spectrum to do with it what it liked for its own account.

164. I find that Mr Don Pinkney told Mr Kitchin that TMO had been sent the SsangYong Opportunity and wanted to see if Spectrum could place it for TMO. No doubt he explained that the advantage from Spectrum's side would be that once the businesses merged, the placement of the SsangYong Opportunity would be to the benefit of them both. I find that Mr Kitchin agreed to see if Spectrum could place the SsangYong

Opportunity with an underwriter, for TMO, in the anticipation that it would ultimately become part of the merged business, but in the knowledge (and with the agreement) that the opportunity would not cease to be TMO's opportunity (at least unless and until the merger was complete).

165. I find it probable that they also expressly agreed that Spectrum would not participate in any profit from the SsangYong Opportunity unless the merger completed (and, then, through what would become the holding of Spectrum or its principals in the merged entity). However, even if that itself had not been expressly agreed, it would have been implied from the express agreement that Spectrum was to place the opportunity for TMO and that it was to remain TMO's opportunity.

166. TMO also contended that the agreement was that Spectrum would benefit, if the merger completed, in accordance with the merger terms as agreed by this point in time (i.e. September 2019). The suggestion that there had been an agreement on merger terms by this point in time was said, at trial, by TMO not to be crucial, and was not pressed hard. For the avoidance of doubt, I find there was no binding agreement on merger terms by this time. There had been many discussions, and no doubt a number of key terms had become clear, but there was no final agreement, in particular on the percentage shareholdings that the two parties would ultimately hold or on the price that TMO would pay. However, that does not affect the fact that the parties agreed in the manner and on the terms I have found they did, above, in relation to the SsangYong Opportunity. They made the agreement they did in relation to the SsangYong Opportunity in the belief that the merger looked likely to take place, but always in the knowledge that ultimately it might not do so.

167. TMO recognised that, if the merger completed, Spectrum would also receive a sum to cover its costs of placing or administering TMO business. TMO did not specifically and separately allege that Spectrum would receive anything to cover its costs in relation to the SsangYong Opportunity if the merger did not complete. However, it must have been implicit in the agreement that Mr Don Pinkney and Mr Kitchin reached that Spectrum, although (in the absence of a completed merger) not able to participate in the profits from the SsangYong Opportunity, would also not be out of pocket because of their placement of, or other involvement in, the business. In other words, they would be entitled to recover from any revenue from the SsangYong Opportunity their reasonable costs of placing the business (or, if called upon to perform any administration services, their reasonable costs of doing so).

168. Pursuant to the agreement, it may well have been the case that TMO was originally anticipating the contract being in its name (if it had been able to obtain any relevant regulated status by the time required) and, at least to some extent, administering the contract once it was placed. As set out in the exchanges I have identified above, during the course of the negotiations with the insurers, Spectrum informed TMO that the contract would have to be in Spectrum's name and that Spectrum would be administering it. TMO, after initially appearing to raise questions about this, ultimately went along with it given it was presented as the only available option. Neither of the parties suggested that these points changed the agreement –Spectrum because it said there was never any agreement between the parties (and it ran no alternative case that, if there had been an agreement these exchanges constituted any variation of it) and TMO ran no case of variation – and in any event, for the purposes of TMO's case, there

would be no need to find that the exchanges, and TMO's acceptance that Spectrum's name would be on the contract and they would provide administration for it, varied the essential agreement between TMO and Spectrum. The parties had agreed it was TMO's deal, and that remained the case even once they had agreed that it be, effectively, "fronted" through Spectrum.

169. As a result, TMO succeeds in its case on the existence of the contract. TMO's case was that Spectrum was in breach of the contract in pursuing the SsangYong Opportunity for its own benefit. Spectrum did not contend otherwise, and I so find. Beyond that, there was no separate argument at trial about the consequences of Spectrum's conduct in terms of breach of contract, and the question whether Spectrum owes TMO money under it and, if so, how much requires an assessment of revenue and costs in relation to the SsangYong Opportunity which will only be undertaken at the quantum stage.

170. There was one further issue of fact between the parties relating to the matters I have dealt with above which I will say something about before moving on to the next issue. The parties disagreed as to whether Spectrum acting as administrator was a requirement of the insurer (and/or re-insurer), as Spectrum contended, or rather a situation which Spectrum engineered and which they persuaded the insurer/reinsurer (in reality, Mr Beekmeyer) to adopt. However, ultimately nothing crucial turns on this. It is clear that Spectrum and Mr Beekmeyer were liaising closely about it, and appear to have had a common intention to cause TMO not to appear on the contractual paperwork, but rather have Spectrum inserted into the deal. Whether that was first prompted by Spectrum or by Mr Beekmeyer does not seem to me to matter. TMO agreed to Spectrum acting as administrator only because TMO had been told that was a requirement of the insurer – effectively a technicality which would not change the fundamental dynamics between TMO and Spectrum. As I have said above, it is not suggested that this had any impact on any agreement that had previously been reached between Spectrum and TMO.

171. For completeness, I should also add that, in relation to this particular factual dispute about whether it was a requirement of the insurer/re-insurer that Spectrum act as administrator, in his oral closing submissions, Mr Morrison asked me to draw an adverse inference from Mr Beekmeyer's absence from the trial as a witness. He referred to *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324 and *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm).

172. As is well known, in *Wisniewski*, Brooke LJ stated (at page 2973):

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the

> court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified".

173. In *Magdeev*, Cockerill J noted (at paragraph 150) that:

> "… the tendency to rely on this principle in increasing numbers of cases is to be deprecated. It is one which is likely to genuinely arise in relatively small numbers of cases; and even within those cases the number of times when it will be appropriate to exercise the discretion is likely to be still smaller."

174. At paragraphs 151-152, Cockerill J confirmed (referring to the Court of Appeal's decision in *Manzi v King's College Hospital NHS Foundation Trust* [2018] EWCA Civ 1882) that there was no obligation to draw an adverse inference where the four principles identified in *Wisniewski* are engaged, but rather there is a discretion to do so, and, at paragraph 153, that matters such as proportionality may give rise to a valid reason for a witness's absence. She then (at paragraph 154) explained her reasoning in the case before her, starting with the following points:

> "i) This evidential "rule" is, as I have indicated above, a fairly narrow one. As I have noted previously ([2018] EWHC 1768 (Comm) at [115]), the drawing of such inferences is not something to be lightly undertaken.
>
> ii) Where a party relies on it, it is necessary for it to set out clearly (i) the point on which the inference is sought (ii) the reason why it is said that the "missing" witness would have material evidence to give on that issue and (iii) why it is said that the party seeking to have the inference drawn has itself adduced relevant evidence on that issue.
>
> iii) The Court then has a discretion and will exercise it not just in the light of those principles, but also in the light of:
>
> a) the overriding objective; and
>
> b) an understanding that it arises against the background of an evidential world which shifts - both as to burden and as to the development of the case - during trial. …"

I note that the Supreme Court in *Efobi v Royal Mail Group Ltd* [2021] 1 WLR 3863 (at paragraph 41) also warned against making the process "*overly legal and technical*" and stated that: "*Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances.*"

175. Here, the point on which it was suggested by TMO that an adverse inference should be drawn was that it was not a requirement of the insurer that Spectrum be the administrator on the insurance relating to the SsangYong Opportunity, but rather that it was a situation engineered by Mr Clarke. TMO's case on this point arose from the documents between Spectrum and Mr Beekmeyer, including the email of 24 October 2019 in which Mr Clarke sent to Mr Beekmeyer a draft of the email that he wanted sent back to him, stating that the administration had to be with Spectrum. That may, based upon those documents themselves, not have been a particularly strong case, but it did raise at least a case to answer.

176. Mr Beekmeyer would no doubt have had relevant evidence to give on that point. The only explanation given by Mr Jones in his oral closing submission as to why Mr Beekmeyer had not been called was that Spectrum had not considered calling him, and he confirmed that he had nothing to say about the fact that Spectrum's pleading had stated (on this point) "*The insurers and re-insurers will confirm that they would only deal with the Defendant*." I also note that (through one of his companies) Mr Beekmeyer was funding the defence of these proceedings, and had agreed with Spectrum that he would support them "*against any request for money from the Pinkneys*".

177. Notwithstanding those points, however, this does not seem to me to be an appropriate case for drawing an adverse inference on the issue in question from Mr Beekmeyer's absence:

    (1) The issue in question is not a central one that I need to decide in order to determine whether TMO has succeeded in demonstrating Spectrum's liability to it under one or more of the causes of action it advances. It is a point that goes to the story of the case that TMO wanted to present, in seeking to cast Spectrum in something of a bad light, but it is not on the critical path.

    (2) I also bear in mind the question of proportionality. By the standards of cases in the Commercial Court, although quantum is still at large, this is likely to be at the lower end of the value scale, and even without Mr Beekmeyer Spectrum called four witnesses of fact (each with evidence to give which was relevant to issues I have had to decide) and the trial lasted 8 sitting days.

    (3) In those circumstances, and despite what had been said in the Defence (which is perhaps not the clear statement that Spectrum intended to call a witness from the insurer/reinsurer at trial that TMO suggested it was), I can understand why no real consideration was given to calling Mr Beekmeyer as a witness (as Mr Jones said was the position). Consistently, it was not flagged in TMO's opening submissions (written or oral) that Mr Beekmeyer was a notable absentee from the trial, or that TMO would seek the drawing of an adverse inference. It was only at the end of Mr Morrison's oral closing submission that this was suggested.

Fiduciary Duty

178. TMO contends that the circumstances in which Spectrum was provided with the information in respect of the SsangYong Opportunity gave rise to fiduciary duties owed to TMO on the part of Spectrum.

179. TMO relied upon a number of authorities relating to the circumstances in which a fiduciary duty arises. These included:

(1) Millet LJ's definition of a fiduciary in *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18A, as "*someone who has undertaken to act for on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence*".

(2) *Vivendi SA v Richards* [2013] EWHC 3006 (Ch) in which TMO suggested that Newey J, at paragraph 139, held that the fact that a defendant subjectively did not intend to assume fiduciary obligations to the claimant, or did not believe that they were subject to fiduciary obligations, would not prevent that defendant from being subject to any such obligations which arise as a matter of fact and law.

(3) *Glenn v Watson* [2018] EWHC 2016 (Ch), where Nugee J, at paragraph 131), summarised the principles applicable when identifying whether a fiduciary duty is owed. TMO relied in particular on the confirmation (at paragraph 131(1)) that the relationship between an agent and their principal is one of a number of "*settled categories*" of fiduciary relationship, as well as the summary Nugee J gave at paragraph 131(7).

180. The passage relied upon from *Glenn* is best seen in the context of the whole of paragraph 131:

> "130. … I do not intend to discuss the authorities at length, but will try and summarise what I understand the principles to be.
>
> 131. Those are I think as follows:
>
> (1) There are a number of settled categories of fiduciary relationship. The paradigm example is that of trustee and beneficiary; other well-settled examples are solicitor and client, agent and principal, director and company (subject to the impact of the Companies Act 2006), and the relationship between partners: *Snell's Equity* (33rd edn, 2015) at §7-004.
>
> (2) Outside these settled categories, fiduciary duties may be held to arise if the particular facts warrant it. Identifying the circumstances that justify the imposition of fiduciary duties has been said to be difficult because the courts have consistently declined to provide a definition, or even a uniform description, of a fiduciary relationship: *ibid* at §7-005.

(3) Fiduciary duties will not be too readily imported into purely commercial relationships. That does not mean that fiduciary duties do not arise in commercial settings – indeed they very frequently do, as the example of agency illustrates – but that outside the settled categories, this is not common, it being normally inappropriate to expect a commercial party to subordinate its own interests to those of another commercial party: *ibid*.

(4) A joint venture is not one of the settled categories of relationship giving rise to fiduciary duties between the joint venturers. Although at first sight the analogy with a partnership might suggest that it would be, it is clearly established that the phrase "joint venture" is not a term of art either in a business or in a legal context, and each relationship which is described as a joint venture has to be examined on its own facts and terms to see whether it does carry any obligations of a fiduciary nature: *Ross River Ltd v Waveley Commercial Ltd* [2013] EWCA Civ 910 ("Ross River") at [34] per Lloyd LJ.

(5) The default position is that no such fiduciary duties arise. In the absence of agency or partnership, it would require particular and special features for such fiduciary duties to arise between commercial co-venturers: *Crossco No 4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619 at [88] per Etherton LJ. Examples of cases where, exceptionally, fiduciary duties have been held to arise are the decision in *Ross River* itself; that of Etherton J in *Murad v Al-Saraj* [2004] EWHC 1235 (Ch) ("Murad") (appealed, but not on this point: [2005] EWCA Civ 959 at [4]); and that of Peter Smith J in *J D Wetherspoon plc v Van de Berg & Co Ltd* [2009] EWHC 639 (Ch) ("Wetherspoon"). In *Wetherspoon* one director of the defendant company was found to have owed a fiduciary duty but the other two not, and it was said by Lloyd LJ in *Ross River* at [37] to be a good illustration of the proposition that the existence of a fiduciary duty in such a case is very fact-sensitive. With these can be contrasted two recent cases in which fiduciary duties have been held not to arise between co-venturers: *Baturina v Chistyakov* [2017] EWHC 1049 (Comm) (Sue Carr J), and *Cullen Investments Ltd v Brown* [2017] EWHC 1586 (Ch) (Barling J) ("Cullen"), a case coincidentally involving Mr Watson.

(6) What then are the particular factual circumstances that will lead to the Court finding that fiduciary duties are owed? This can best be elucidated by a number of citations:

(a) In his well-known classic judgment in *Bristol & West Building Society v Mothew* [1998] Ch 1 ("Mothew") at 18A, Millett LJ said:

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence."

(b) In *Arklow Investments Ltd v Maclean* [2000] 1 WLR 594 at 598G, Henry J, giving the judgment of the Privy Council, said:

> "the concept encaptures a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal."

(c) In *F&C Alternative Investments (Holdings) Ltd v Barthelemy (No 2)* [2011] EWHC 1731 (Ch) at [225], Sales J said:

> "Fiduciary duties are obligations imposed by law as a reaction to particular circumstances of responsibility assumed by one person in respect of the conduct of the affairs of another."

(d) In another case involving Ross River Ltd, *Ross River Ltd v Cambridge City Football Club* [2007] EWHC 2115 (Ch) (cited by Lloyd LJ in *Ross River* at [56]-[58]), Briggs J referred at [198] to:

> "well known badges or hallmarks of a fiduciary relationship, such as … [if] the plaintiff entrusts to the defendant a job to be performed, for instance, the negotiation of a contract on his behalf or for his benefit."

(e) In *Ross River* at [51]-[52] Lloyd LJ cited with approval a passage from *Bean, Fiduciary Obligations and Joint Ventures* (1995) (itself referring to *Finn, Fiduciary Obligations* (1977)), which is too long to set out in full but the essence of which is as follows:

> "[Fiduciary] office holders are entrusted with power to act for the benefit of another, but are not under the immediate control and supervision of the beneficiary… Finn's rationale is that the fiduciary who has freedom to determine how the interests of the beneficiary are to be served requires the supervision of equity. Indeed, it is the fiduciary's autonomy in decision-making that requires equity's supervision and this is required whether or not the autonomy is created under a contract between the parties or is inherent in the office."

(7) Without in any way attempting to define the circumstances in which fiduciary duties arise (something the courts have avoided doing), it seems to me that what all these citations have in common is the idea that A will be held to owe fiduciary duties to B if B is reliant or dependent on A to exercise rights or powers, or otherwise act, for the benefit of B in circumstances where B can reasonably expect A to put B's interests first. That may be because (as in the case of solicitor and client, or principal and agent) B has himself put his affairs in the hands of A; or it may be because (as in the case of trustee and beneficiary, or receivers, administrators and the like) A has agreed, and/or been appointed, to act for B's benefit. In each case however the nature of the relationship is such that B can expect A in colloquial language to be on his side. That is why the distinguishing obligation of a fiduciary is the obligation of loyalty, the principal being entitled to "*the single-minded loyalty of his fiduciary*" (*Mothew* at 18A): someone who has agreed to act in the interests of another has to put the interests of that other first. That means he must not make use of his position to benefit himself, or anyone else, without B's informed consent.

(8) This analysis also explains why fiduciary duties will not readily be found in commercial settings. In commercial dealings the relationships are (usually) primarily contractual; and it is of the essence of commercial contracts that each party is (usually) entitled, subject to the express and implied constraints of the contract, to seek to prefer his own interests, and is not obliged to put the interests of the other party first.

(9) So far as joint ventures are concerned, fiduciary duties may in particular be found to arise where one party has control of assets which are to be exploited for the joint benefit of both. Thus for example in *John v James* [1991] FSR 397 at 433 Nicholls J said of a publishing agreement:

> "The copyrights were to be assigned to the publisher, and to become its property, but with the intention that they would be exploited by the publisher, which would have complete control over the method of exploitation, not for its benefit alone but for the joint benefit. Thus, commercially, the arrangement was in the nature of a joint venture, and the writers would need to place trust and confidence in the publisher over the manner in which it discharged its exploitation function."

And in *Ross River* Lloyd LJ (who said at [62] that *John v James* was the most useful and compelling analogy) described it at [55] as:

> "a clear and instructive example of a transaction in the nature of a joint venture where the relevant assets belong

> legally and beneficially to one party, whose task it is to exploit them, but they are to be exploited for the common benefit of both parties, and where fiduciary duties arose from the situation despite the fact that the operator had its own personal interest in the exploitation to which it was entitled to have regard."
>
> (10) Even if a party is held to have owed a fiduciary duty to another party, the nature of the fiduciary obligations owed is itself a fact-sensitive enquiry, to be determined by considering the particular relationship between the parties: *Ross River* at [64]. Thus for example in *John v James* the defendants were not disposed to dispute that the publisher owed a fiduciary obligation to account for royalties received, but it was disputed, and had to be decided, whether it owed a fiduciary obligation in respect of exploitation of the copyrights; in *Ross River* Morgan J had found that the defendants owed fiduciary duties in certain respects but not others, and the Court of Appeal found that the duties were more extensive."

181. TMO also made the point that a fiduciary can be in breach of duty for diverting an opportunity even if (contrary to TMO's case in respect of the SsangYong Opportunity) it is unlikely that the principal would be able to secure the opportunity for itself, referring to *IDC v Cooley* [1972] 1 WLR 445 and *Recovery Partners GP Ltd v Rukhadze* [2018] EWHC 2918 (Comm) at paragraph 62.

182. Spectrum, for its part, emphasised that a fiduciary relationship is a serious one, and it is not lightly found (referring to paragraphs 47-48 of the judgment of Cockerill J in *Recovery Partners v Rukhadze* (above)), and the obligations of fiduciaries are important and impose a significant number of duties upon them. The fact that the principal is entitled to the single-minded loyalty of its fiduciary is, said Spectrum, inconsistent with the facts of this case, where TMO viewed Spectrum as a competitor, and Spectrum stressed that there was no written document for the appointment of Spectrum as a fiduciary or agent.

183. Spectrum also contended that there was no basis for TMO's suggestion that it had appointed Spectrum as its agent. Mr Jones relied on Bowstead & Reynolds on Agency (23rd ed.) at Article 1(1) to say that for an agency relationship, it was necessary that the agent should have the power to affect the principal's relations with third parties, but that here TMO did not contend that Spectrum had been given any authority to sign a contract binding TMO. In response to this point, TMO contended that Bowstead also makes clear (at paragraph 1-001) that a person may also be called an agent where he acts on behalf of that person but has no authority to affect the principal's relations with a third party, and (at paragraph 1-020) that it is not necessary that an agent has authority to make a contract for the principal, and agency can be limited to negotiating and settling all the terms of a contract without authority to complete the formalities.

184. In the circumstances of this case, there was (as I have found) an express agreement between Spectrum and TMO relating to the SsangYong Opportunity. That is what

shapes the parties' relationship in relation to the SsangYong Opportunity. The fact that it was not an agreement in writing does not mean that a fiduciary relationship cannot exist (and I have dealt with the absence of any written documentation setting out the parties' relationship in this respect above when dealing with the case on the existence of the oral contract).

185. What was envisaged by Spectrum and TMO, and as a consequence of the agreement that they reached in relation to the SsangYong Opportunity, was a default position (i.e. the position that would obtain unless there was an agreement finally concluded in relation to the merger) that Spectrum would be seeking to place the business on behalf of TMO. Spectrum may not have seen themselves as formally acting as "agent" for TMO, and Spectrum certainly did not have power to bind TMO to any contractual arrangements (though that is not necessarily a requirement of a fiduciary relationship), but they had agreed that the business would remain with TMO such that they were, in effect, looking after TMO's business opportunity for TMO. Whether or not the relationship can properly be characterised as one of "agency" is not determinative. The agreement between the parties had the result that it was not Spectrum's opportunity to deal with for its own account.

186. Applying what Millet LJ said in *Mothew*, Spectrum was, in relation to the SsangYong Opportunity, someone who had undertaken to act for or on behalf of someone else – TMO – in circumstances which gave rise to a relationship of trust and confidence. Similarly, as put in *Arklow*, TMO had a legitimate expectation that Spectrum would not utilise its position with respect to the SsangYong Opportunity in such a way which was adverse to the interests of TMO. TMO had entrusted to Spectrum a job to be performed (see *Ross River v Cambridge*), namely the identification of an insurer to provide the warranty and the negotiation of the terms for the benefit of TMO.

187. TMO did not have the ability to immediately control or supervise Spectrum, but the agreement between the parties was that it was TMO (and not Spectrum) that was to benefit from the SsangYong Opportunity (in the absence of a concluded merger agreement, in which case it would be the merged entity that would benefit, but in any event not Spectrum to the exclusion of TMO or of the merged entity). TMO was dependent upon Spectrum to act for its benefit in relation to the SsangYong Opportunity where TMO could reasonably expect Spectrum to put TMO's interests first (before those of Spectrum). As a result of their agreement, TMO could expect Spectrum to be "on its side" in relation to the SsangYong Opportunity. The case fits the description of the circumstances in which fiduciary duties have been held to arise articulated by Nugee J in *Glenn v Watson* at paragraph 131(7).

188. I bear in mind that fiduciary duties are not readily to be found in commercial settings, but as articulated by Nugee J (in *Glenn v Watson* at paragraph 131(8)) that is generally because in commercial dealings each party is (usually) entitled to seek to prefer its own interests, and is not obliged to put the interests of the other party first. But here the terms of the agreement between the parties in relation to the SsangYong Opportunity did not allow Spectrum to prefer its own interests, for example in taking the opportunity for itself to the exclusion of TMO.

189. The fact that TMO saw Spectrum as, generally speaking, a competitor does not mean that no fiduciary relationship can arise. In relation to the SsangYong Opportunity, they

were not competitors. Given the agreement Spectrum had reached with TMO in relation to it, they could not be.

190. The examples given of joint venture situations where fiduciary duties have been found are also instructive (see the citations from *John v James* and *Ross River* in the quotation from *Glenn v Watson* above). Where one party has control of assets which are to be exploited for the benefit of both, fiduciary duties may be found. Here, as I have found, practical control of the SsangYong Opportunity had been handed to Spectrum, but it was to be exploited for the benefit of TMO, a stronger case than the joint venture example. But even if one was to regard the case as one where the SsangYong Opportunity was to be exploited for the benefit of both parties (it being anticipated that the merger would, at some point, complete) by analogy with those joint venture examples fiduciary duties would still be owed by Spectrum in relation to the SsangYong Opportunity.

191. There was much said about "trust and confidence" in evidence, and as I have already noted it was clear that there was a long-standing relationship between, in particular, Mr Don Pinkney and Mr Kitchin, in which they trusted each other. That, however, is not sufficient to find a fiduciary relationship, as Nugee J explained in *Glenn v Watson* at paragraph 134. Parties can trust each other without there being any fiduciary relationship (contracting counterparties often being an example). What is meant, as Nugee J identified, is "*where one party places himself, or is placed, in the position where he trusts and confides that the other party will act exclusively in the first party's interests.*" That was the position here. TMO trusted and confided that Spectrum would act in TMO's interests in relation to the SsangYong Opportunity, and exclusively so because of their agreement that the opportunity would remain that of TMO (and that Spectrum would not benefit from it except through the merger, if an agreement as to the merger was successfully concluded).

192. I conclude, therefore, on the basis of the above that there was a fiduciary relationship between Spectrum and TMO in respect of the SsangYong Opportunity. The terms of the agreement reached between the parties had that effect.

193. Spectrum did not address detailed argument to the content of those duties were I to find that a fiduciary relationship existed, but it is clear that they would (among other matters) include duties to act in the best interests of TMO and not to profit personally from its position at the expense of TMO, in relation to the SsangYong Opportunity. If further exploration of the content of the duties is required, that can be undertaken at the subsequent stage of this litigation (which will be primarily dealing with remedies). Suffice to say for present purposes that Spectrum was in breach of the duties identified. As I have noted above, it is irrelevant to the claim for breach of fiduciary duty whether or not the principal would have been able to secure the opportunity for itself.

194. This is not a finding that Spectrum owed fiduciary duties to TMO in any other respects. It only related to the SsangYong Opportunity. There was no fiduciary relationship between the parties, for example, in respect of the merger negotiations, in relation to which they were potential contractual counterparties who were still seeking to agree terms. However, the fact that they remained in discussions about the merger, does not prevent fiduciary duties arising in relation to the SsangYong Opportunity.

195. TMO also relied upon an additional point, contending that, as Spectrum was an authorised principal under PRIN 2.1 of the FCA Handbook, and owed obligations under that regime, that was also relevant to establishing the existence of a fiduciary duty to TMO. It relied on what was said by Henry J, giving the judgment of the Privy Council, in *Arklow* at 600, where he said (having rejected the existence of a fiduciary relationship in that case): "*Evidence of practice and accepted standards of professional conduct may be of assistance in determining what is essentially a question of law, but it cannot be determinative.*" I have reached the conclusions set out above without reliance on this point, which does not seem to me, at least in the circumstances of this case, to add to the analysis. It was not contended by TMO that the duties held by Spectrum as an authorised principal were owed to TMO, or that the relationship between them was subject to the regulatory regime in any sense. But rather, more generally, that Spectrum was an authorised principal under the regulatory regime, and could therefore be expected to conduct itself in compliance with those duties. That may, to an extent, be fair, but it does not say anything about the relationship between TMO and Spectrum, or what role was adopted by Spectrum in relation to TMO and the SsangYong Opportunity or what duties it accepted in relation to the placing of that business. This sort of point may plausibly be of relevance in identifying the existence of fiduciary duties in other contexts, but in the circumstances of this case it does not seem to me to assist.

Breach of confidence

196. TMO also contended that Spectrum had acted in breach of confidence in relation to the SsangYong Opportunity. Given the conclusions I have reached above, this may not materially add to TMO's claims.

197. There was no controversy that the requirements of a claim for breach of confidence are those identified by Sir Robert Megarry V-C in *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415 at 419 (see for a recent confirmation that these remain the requirements, *Ensign House Limited v Ensign House (FEC) Limited & Ors* [2023] EWHC 1563 (Ch) Leech J at paragraph 568): (1) that the information has the necessary quality of confidence; (2) that the information in question must have been imparted in circumstances importing an obligation of confidence; and (3) that there has been an unauthorised use of the information in question to the detriment of the party who communicated it.

198. In relation to the first of those criteria, as it falls to be considered on the facts of this case, TMO relied upon the following, which I accept:

    (1) Publicly available information in and of itself may lack the necessary quality of confidence, but confidential information may be created "*solely from materials in the public domain*" through the "*skill and ingenuity of the human brain*" (*Coco* at 420). See for example *CF Partners (UK) LLP v Barclays Bank plc & Anor* [2014] EWHC 3049 (Ch), Hildyard J at paragraph 125:

> "A special collation and presentation of information, the individual components of which are not of themselves or individually confidential, may have the quality of confidence: for example, a customer list may be composed of particular

> names all of which are publicly available, but the list will nevertheless be confidential";

and at paragraph 126:

> "…pieces of information which individually might appear to have limited value and marginal secrecy, in combination in particular hands, might have special composite value and confer on the recipient a considerable advantage".

It is not necessary to show that "*all of the individual components*" of a particular package of information or of a business proposition or opportunity "*…were inaccessible, novel or inherently confidential*" (*CF Partners* at paragraphs 919-920 and 946-959).

(2) A claimant does not need to show that no one else knew of or had access to the information in question in order to have standing to bring a claim for breach of confidence (*CF Partners* at paragraph 124).

(3) Information or insight about demand, present or future, actual or prospective, and perceptions of value can constitute confidential information (*CF Partners* at paragraph 920).

(4) Information is not property. There is no principled reason why a right to enforce confidence should be treated as analogous to the enforcement of property rights (*Matalia v Warwickshire County Council* [2017] EWCA Civ 991; [2017] E.C.C. 25, David Richards LJ at paragraph 26).

199. It is right to say that some of the information passed to Spectrum could have been obtained from public sources. However, it was not all publicly available, and Mr Mills confirmed that he had put together the proposal (which he had sent to Mr Chris Pinkney, who then passed it on to Spectrum) on the basis of information he had received from SsangYong/Bassadone. In particular, the information about the premium that SsangYong was prepared to pay and the anticipated level of demand for the particular warranty (which Mr Mills said was based on SsangYong's internal analysis of what it expected to happen in the market in the next year) was not publicly available information. In addition, the information that an additional 4,000 pre-registered vehicles would form part of the opportunity is something Mr Mills accepted was not publicly available, as he did in respect of the SsangYong projection for the mix of models of vehicles that they anticipated selling.

200. That was all important and valuable information for someone seeking to provide the warranty cover, comprising particular insight about demand and perception of value. Further, the fact of the opportunity and this particular compilation of information was not publicly available information.

201. Moreover, this is supported by the fact that, in a witness statement served in support of a summary judgment application, Mr Clarke had referred to information about the premium SsangYong was prepared to pay and the level of demand for the warranty to

be "commercially sensitive" information. Whilst not being determinative, that is a clear indicator of how the parties saw this information at the time.

202. Spectrum contended that none of the information was confidential because it had been provided to others within the warranty market, with (so it contended) Mr Mills being content for anyone to be provided with it. In fact, although Mr Mills sought to maintain in his written evidence that he was content for anyone to be provided with the information, it was clear from his oral evidence that controlling the communication of this information was important to him, not least because he needed to keep his position as conduit so as to be able to secure commission for himself from the warranty provider who was ultimately chosen. He had identified particular warranty providers to approach (his table to Mr Laird on 9 September 2019 listed 9), of whom most had dropped out by the time TMO passed the opportunity to Spectrum, but the information was not disseminated more widely than to those whom he had identified (which had not included Spectrum until after TMO had passed on the information and made the introduction). The fact that the information had been provided to specific other potential warranty providers does not prevent it from remaining confidential, and capable of protection as confidential against disclosure to others (see *CF Partners* at paragraph 124, referred to above).

203. Mr Jones drew my attention to, and relied upon, the following passage from *Jones v IOS (RUK) Ltd* [2012] EWHC 348 (Ch), a decision of HHJ Hodge QC (sitting as a Judge of the High Court), in which the court was concerned with the pricing and tendering process for the supply of photocopy, printing and scanning devices to Bombardier:

> "[…] confidential information is not strictly "property"; although it is "property-like", and it is not inappropriate to include it as an aspect of "intellectual property". Thus, in my judgment, and in the context of the present case, the appropriate inquiry should be directed to considering whether the claimant has demonstrated that CMP had made a sufficient contribution to the creation of the relevant confidential information, in the furtherance of its own commercial interests, to justify the imposition of a duty, recognised by the courts, and owed to CMP (and thus to the claimant), to keep that information secret, and entitling them to restrain its unauthorised use. I accept Mr Vanhegan's submission (at paragraph 214 of his written closing) that valuable confidential information which CMP has generated as a result of its own skill and labour, and from its own audits and relationship with Bombardier, such as the choice of devices, their location and contact information, and customer-specific device and service pricing information, is capable of constituting CMP's confidential information."

204. Mr Jones pointed out that, in that case, the confidentiality of the information was derived from CMP's own skill and labour and with reference to its own relationships, and the provision of this information was in the furtherance of its own commercial interests. In the present case, he said, the situation was different because information

was simply passed on by TMO, which did little more than act as a conduit through which documents passed in the early stages.

205. To an extent, this was a fair point. However, it seems to me to miss the additional fact that TMO had its own interest in keeping the parts of the information that were not widely known confidential and out of the public domain. Although the business had been difficult to place, TMO did not want additional potential providers of the warranty coming on to the scene and potentially taking the business. This was not a case where TMO was merely the conduit for the information. It was passing the information on to Spectrum for a reason of its own, namely for Spectrum to place the business for it (TMO).

206. Moreover, in *Jones* HHJ Hodge QC was making it clear, in the passage quoted above, that the inquiry he found was appropriate was one in the context of the particular case before him. A point that was emphasised by the Court of Appeal n *Matalia* (at paragraph 28). In addition, immediately before the passage that Spectrum relied upon, HHJ Hodge QC had explained that what was required was that the claimant had "*to show that he has sufficient interest in the information to entitle him to maintain an action to restrain its unauthorised dissemination or use*." Here, TMO clearly had such an interest, as I have identified.

207. Accordingly, I am satisfied that the information I have identified at paragraphs 199-200 above had the necessary quality of confidence.

208. The second necessary element of the claim is whether the information was communicated by TMO to Spectrum in circumstances imposing an obligation of confidence. There certainly was not (and was not said to be) any express imposition of confidentiality upon Spectrum, but it was said that the circumstances imposed an obligation of confidence.

209. It was clear that the route by which Spectrum received the information was that it was passed to it by TMO. There was no documentary evidence to support any suggestion that it was passed independently by Mr Mills to Spectrum. Spectrum could no doubt (once it had been introduced by TMO) have obtained it from him, but that is irrelevant: "*It is not a defence to a claim for breach of the duty of confidence that the defendant could have obtained the information elsewhere, if he did not in fact do so*" (*CF Partners* at [135]; *Force India Formula One Team Limited v Aerolab SRL* [2013] EWCA Civ 780, [2013] RPC 36 at paragraph 72).

210. In relation to the second question, Sir Robert Megarry V-C in *Coco* said (at 420 – 421):

> "…if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence."

It was put in a similar way in *Matalia* (at paragraph 29):

> "Whether a duty of confidence arises in favour of a claimant will always depend on the precise circumstances of the case, but if

> confidential information is imparted by A to B in circumstances where B knows or ought to know that it is imparted in confidence, that may and often will be sufficient to affect the conscience of B in equity so as to impose on him in favour of A a duty to keep the information confidential."

211. In *Coco*, Sir Robert Megarry V-C went on also to say (at 421) that where commercial information is given on a "*business-like basis and with some avowed common object in mind, such as a joint venture …, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence.*"

212. The information passed to Spectrum fulfilled that description, with the result that Spectrum faces that heavy burden. It was not able to point to anything here in the facts to discharge it. It is right that none of the emails passing the information stated in the main body of the text that Spectrum should keep the information confidential, but they did contain what appears to have been a standard Motorway Direct footer, referring to information in the email being confidential. That footer itself was not relied upon as a basis for the duty of confidentiality (among other things, perhaps because it referred to Motorway Direct and not TMO) but it is an indicator of the business context of the emails (if one was needed).

213. In circumstances where the information was being communicated pursuant to the agreement that I have found was made between TMO and Spectrum, the latter could not have considered it was free to use the information on an unrestricted basis or for whatever purpose it liked. I therefore find the information was communicated by TMO to Spectrum in circumstances imposing an obligation of confidence.

214. The third question is whether Spectrum used the confidential information in an unauthorised way. It did. The use of the information which was permitted was the placing of the warranty cover with an insurer for TMO's ultimate benefit, or for the benefit of a merged business. The agreement pursuant to which the information was communicated to Spectrum did not permit Spectrum to use the information to place the cover for its own account in a way which meant that TMO would not benefit at all.

215. Accordingly, the three requirements of the breach of confidence are satisfied here. That claim also therefore succeeds.

Unjust Enrichment

216. The final claim brought by TMO in respect of the SsangYong Opportunity was a claim for unjust enrichment. This was brought in the alternative to the claims for breach of contract and breach of fiduciary duty and, in light of the conclusions I have reached above in relation to those claims, does not strictly need to be considered. Indeed, the fact that I have found that there is a contract in place that governs the passing of the SsangYong Opportunity to Spectrum and the financial consequences of it means that it is the contract that governs the issues of those financial consequences, and not the law of unjust enrichment (see, as a matter of general principle, Goff & Jones, the Law of

Unjust Enrichment (10th ed., 2022) at paragraph 3-12; and *Benedetti v Sawiris* [2014] AC 938 at paragraph 91).

217. Moreover, the unjust factors relied upon by TMO are closely related to the contract which it alleged (and which I have found was made):

(1) First, TMO relied upon failure of basis. In its written opening TMO identified the relevant basis as follows:

> "…the evidence set out above clearly demonstrates that a reasonable person in the parties' position would have understood that Spectrum was only entitled to pursue the SsangYong Opportunity … on the basis that it would benefit if the merger went ahead, alternatively that Spectrum was not entitled to benefit from these opportunities to the exclusion of TMO."

(2) Second, TMO relied upon mistake. It contended that it only allowed Spectrum to pursue the SsangYong Opportunity on the basis of its belief that Spectrum would only benefit if and to the extent that the merger went ahead, alternatively on the basis of its belief that Spectrum would not be entitled to benefit to the exclusion of TMO.

218. Given my findings and conclusions on the claims for breach of contract and breach of fiduciary duty, there was no such failure of basis and the belief identified by TMO was not mistaken. That is not surprising where the unjust enrichment claim was pursued only in the alternative.

219. In the circumstances, where this claim does not arise (or would fail, for the above reasons) on my findings of fact, I do not consider it further, and I do not address the other requirements that such a claim would have to meet (including whether the enrichment was at the expense of TMO). Related points arise on the claim in respect of the 2020 customers, which I deal with below.

The 2020 customers

220. I have explained above who the 2020 customers were. The central issue of fact in relation to the 2020 customers was as to the basis upon which the information relating to them was passed from TMO to Spectrum. TMO alleged that there was an agreement between it and Spectrum in relation to the 2020 customers along similar lines to that alleged in respect of the SsangYong Opportunity. TMO contended that the agreement was that Spectrum was only entitled to approach the 2020 customers directly on the basis that ultimately all business thereby secured would be for the benefit of TMO.

221. Spectrum denied there was any such agreement, contending that it had been asked by TMO to see if Spectrum could provide the existing regulated business to the 2020 customers (which TMO was no longer able to provide given the loss of its regulated status) so that TMO could continue to provide the non-regulated business to the same customers.

222. By the time of the alleged agreement in relation to the 2020 customers, things had moved on in material ways. Therefore before considering the causes of action pursued in relation to the 2020 customers, I will set out a little more of the factual context leading up to the circumstances in which the details of the 2020 customers were passed from TMO to Spectrum (which took place on around 23-24 January 2020).

223. The key point was that, by this time, issues had arisen in relation to the proposed merger between TMO and Spectrum, as I have already noted above. These included:

(1) On 23 December 2019, Mr Clarke sent the Pinkneys an email stating that Acasta had given instructions that TMO could not "*sell Spectrum products or use our policy wordings or hold out to represent Spectrum in any way*". Spectrum would have to "*suspend all dealings in this respect until such time as our underwriters agree that they will sanction TMO operating as our Approved Representative*". It went on to say: "*We had hoped that following recent discussions you could resolve the situation involving previous dealings with the underwriters, but as this has not been done as yet, we cannot move on at present.*"

(2) On 3 January 2020, Mr Wardell of Acasta sent an email to Mr Kitchin and Mr Clarke referring to the on-going problems that Acasta was facing with Motorway Direct and its failure to pay Acasta outstanding debts. Mr Wardell made it clear that Acasta did not want to deal with Motorway Direct at all going forward, if it could be avoided. He also said:

> "Again, obviously given Don Pinkney's lack of action and complicity in the actions of MWD, we would not want to have him selling any Acasta products and we would prefer our agents and administrators to give him and his company a wide berth."

(3) On 15 January 2020, Mr Clarke informed Mr Don and Mr Chris Pinkney that:

> "…further to recent discussions and in view of the requirements of Acasta Insurance, we write to confirm that unfortunately we are now unable to support TMO as an Appointed Representative of Spectrum so will amend the FCA records to this effect."

(4) In reality, this went beyond the question of status as Spectrum's Appointed Representative – it is not obvious that the parties had envisaged a merger with the two companies using an underwriter other than Acasta or with TMO being authorised other than as an Appointed Representative of Spectrum. That does not mean it could not necessarily have been done, but the parties' discussions to date had not been based upon any other model. At one point in his cross-examination, Mr Don Pinkney accepted that TMO having "AR status" was essential to the merger.

(5) Some important matters were also recorded in the Motorway Direct board minute of 11 February 2020. It appeared that the meeting proceeded by reference to a

board report dated 3 January 2020 (which was not itself part of the material produced for the trial), and the minutes took the form, in respect of each item in this report, of setting out first the discussion of what was in the report, following by a section headed "update as at 6th February 2020". The suggestion is that the material in the first section under each item reflected what had been in the 3 January report, or at least the discussion about what had been in the 3 January report, though some caution is needed given that the report itself was not made available.

(a) I have already referred above to this minute in relation to the dispute with Acasta, including the fact that Acasta had sent notice of termination to Motorway Direct on 21 December 2019, which had caused Mr Antcliff to write to the FCA.

(b) The minutes, in a section dealing with the 3 January 2020 board report, also referred to the transfer of business from Motorway Direct to TMO, and the regulatory requirements of Mr Don Pinkney's new business:

> "He [Mr Don Pinkney] has looked to Spectrum for Appointed Representative status, involving a merger of TMO and Spectrum. It is understood that this is not now proceeding."

There was a dispute at trial whether what this was referring to as "*not now proceeding*" was the merger, or just the fact that TMO might have Appointed Representative status from Spectrum. It seems to me that the more natural reading is the former (and that is also supported by the use of the past tense in an earlier reference in the minute to "*a merger [Don Pinkney] was proposing with Russel Kitchin*"), though it is difficult to put too much weight on it given the absence of the report itself and the difficulty in working out whether this was a comment only made at the meeting (in February) or apparent from the report itself (on 3 January).

224. For Spectrum, the position was clear. As Mr Kitchin put it in his oral evidence: "*Acasta wouldn't deal with us if we were working with them [TMO]*" and proceeding with the merger with TMO at that point in time "*would have been business suicide for us because Acasta would have switched us off immediately*".

225. The upshot of the above was that, by the time the details of the January customers were passed over to Spectrum, even if the merger was not entirely dead, it was clearly facing considerable obstacles. Spectrum had not expressly said to TMO "it's over", but TMO must by this point have realised that if there was to be any merger, it would have to be on a different basis to the one thus far discussed and agreed, and that a serious amount of further thought and discussion would need to be given to it. Although Spectrum had not directly forwarded to TMO Mr Wardell's 3 January email, TMO knew that their own relationship with Acasta (through Motorway Direct) had broken down (in a sufficiently serious way that a letter had been written to the FCA) and that the souring of that relationship had caused Spectrum first to suspend, and then to withdraw, TMOs' status as their Appointed Representative.

226. There was oral evidence from Mr Don Pinkney that there was a conversation after Appointed Representative status had been withdrawn in which Mr Kitchin said Acasta would not be a problem, and that "*there are many ways to skin a cat*" (a phrase that had also appeared in Mr Chris Pinkney's witness statement). Mr Kitchin said that was not his phrase, and that what he had said to the Pinkneys was that he would approach Acasta to ensure they would be content with Spectrum taking over the GAP business for the 2020 customers. Mr Kitchin explained in his statement that he did so approach Mr Wardell, who said he was content on the basis that it was Spectrum's business, and that TMO should not receive any fiscal benefit from the Acasta bound risks. Even if Mr Kitchin did use such a phrase, it does not suggest he was telling TMO he would be content to go behind Acasta's back – he would not be. As he explained in his oral evidence, all Spectrum's products were insured and Acasta was Spectrum's underwriting facility – Acasta was crucial to Spectrum's business and Mr Kitchin would not have been prepared to jeopardise that relationship. Certainly anything said along those lines by Mr Kitchin could not have meant that everything with the merger was going to go ahead as planned, because it could not.

227. I should note that (whilst saying their case did not depend upon it) TMO contended that Spectrum "manufactured" the situation whereby Acasta refused to deal with TMO and Mr Don Pinkney. TMO relied in support on what it described as the evidence in relation to similar manipulation by Spectrum in relation to Mr Beekmeyer and the SsangYong Opportunity, and the email from Mr Clarke to Mr Kitchin (which followed on from Mr Wardell's 3 January email) in which Mr Clarke described Mr Wardell's email as a "*Perfect email to enable you [Mr Kitchin] to sever all ties with Don, unless he pays up*." Whatever the position in relation to Mr Beekmeyer and the SsangYong Opportunity, the evidence does not support TMO's case on this point relating to Acasta's attitude. In fact, the evidence was to the effect that there was a dispute between Motorway Direct and Acasta in which money that was owed to Acasta had not been paid, that Mr Don Pinkney had been informed about the problem and had understood that it would need to be resolved, but that it was not. Acasta had perfectly reasonable grounds for not wanting to deal further with Motorway Direct, or with TMO, and there is no evidence to suggest that Mr Wardell's email did not reflect his own view or was in some way contrived in concert with Spectrum.

228. TMO also contended that their position in this respect was supported by emails suggesting that Spectrum was manoeuvring to take from Motorway Direct the administration of existing policies that were written by Acasta. However, this was in the context of Acasta having asked Spectrum whether it would be able to take over the Motorway Direct run off, and there is no reason why Spectrum should not have done that, at Acasta's behest. Moreover, Spectrum was asked to do it in early November 2019, at which point the merger was still very much on, with the result that in the long run this would not have been (or been seen as) taking anything away from TMO.

Breach of contract

229. The key issue is whether or not there was the oral agreement in relation to the 2020 customers that TMO alleged. I have already set out above, in broad outline, the parties' positions in relation to this.

230. TMO's particulars of claim did not identify between which individuals it alleged the oral agreement relating to the 2020 customers had been made, and nor did the written opening make this clear. In evidence, it appeared that the discussion was said to have taken place between Mr Kitchin and Mr Chris Pinkney.

231. Like the alleged agreement in relation to the SsangYong Opportunity, there is no written record of the alleged agreement, and it is not reflected in any communications at the time or in the immediately following period. None of the documents passing over the details of the 2020 customers refer to the alleged agreement. As with the SsangYong Opportunity, however, this is not itself a determinative point, in particular because of the tendency of the Pinkneys not to commit very much to writing.

232. However, unlike the SsangYong Opportunity, where there was a series of subsequent communications suggesting the parties continued to act on the basis that the opportunity was TMO's, or at least that TMO continued to have a monetary interest in the opportunity, there is nothing falling into the same sort of category in relation to the 2020 customers. Also, as I have set out above, the position in relation to the potential merger had changed very substantially by the end of January 2020 compared to the time at which it was alleged the agreement in relation to the SsangYong Opportunity was made. The merger idea had by now run into real difficulties.

233. Moreover, in relation to the 2020 customers, there was a clear business rationale for TMO passing the business to Spectrum on the basis that Spectrum contended, that basis being that it would give TMO a greater chance of retaining for itself the non-regulated business with the dealers concerned (which Spectrum said it would not seek to take). If TMO had had to go to those dealers and tell them TMO did not have regulated status, that it could not supply the regulated products, but that it would continue with the non-regulated products, there would have been a good chance that the dealers would have gone elsewhere to someone who could supply all its warranty and insurance products (both regulated and unregulated). However, the ability to tell the dealers that TMO had still managed to keep the "package" in place, albeit that the regulated business would now be supplied by Spectrum, would mean the dealers would not have to look elsewhere for the regulated business, and so were more likely to stay put with the TMO and Spectrum combination.

234. TMO contended that there would have been no sense in it passing business to Spectrum (a competitor) if the merger was not going ahead, and Mr Chris Pinkney said in his oral evidence that if he had not thought they were still merging, TMO would have just withdrawn their regulated product and allowed any other rival provider to take the business. I do not accept that. The rationale for TMO providing the regulated business from the 2020 customers to Spectrum was clear, as I have set out above, and TMO would not have wanted another rival provider to take the 2020 customers' GAP business because that would have given that rival a foothold also to take the non-regulated business.

235. There was some suggestion from Mr Don and Mr Chris Pinkney that, had they not passed the business to Spectrum, TMO could have acquired Appointed Representative status from Motorway Direct and written the regulated business itself. However:

(1) The Pinkneys were clearly not keen on that. In his supplemental witness statement, Mr Chris Pinkney explained that he and his father "*were keen to cut ties with [Motorway Direct]*" and they had reached the view that the transitional arrangements they had in place through Motorway Direct for these customers "*would need to come to an end by the time the AA contract had terminated at the end of February.*"

(2) Moreover even if obtaining Appointed Representative status from Motorway Direct was a possibility, that was not something that could have been achieved immediately. The Motorway Direct board minute of 6 February 2020 referred to TMO needing Motorway Direct to act as principal for regulatory purposes, which would have given David Antcliff "*responsibility for Don's selling activities*", but the minutes go on to suggest that would take some time ("*it will be a matter of time before [Mr Antcliff] and Don are at odds on some regulatory issue*" which in context was clearly intended to say "*of the same mind*" or something similar rather than "*at odds*"). Nor is it something that TMO actually did following the cessation of relations with Spectrum. Moreover, the process of getting Appointed Representative status with the FCA would not necessarily have been a speedy one, and (as Mr Chris Pinkney explained in his supplemental witness statement) TMO had limited time in which to find an alternate home for this business, such that TMO would have needed a different solution in the interim even if obtaining regulated status through Motorway Direct had been their ultimate intention.

(3) Similarly, it would not have been straightforward to find another underwriter for TMO, at least at short notice. The Motorway Direct Board minute of 6 February 2020 records that Motorway Direct had been in discussion with La Parisienne about providing underwriting facilities for what remained of its business, but in respect of TMO: "*The problem is that all of LP's due diligence has been directed at Motorway Direct PLC and it is the Company [Motorway Direct] and its team that has secured an offering. Introducing Don, and his start-up [ie TMO] at this stage would be an issue for Don …*". It also appears from the same minute that La Parisienne "*prefer the non-regulated product*". So suggesting that they could be parachuted in as underwriter for TMO's GAP business at short notice was not realistic.

The upshot is that TMO did not have another ready alternative in order to continue to providing the 2020 customers with GAP insurance and there was no realistic prospect that it would have written the GAP business itself had it not passed it to Spectrum.

236. Key from Spectrum's point of view was Acasta's position, and Mr Wardell's clear view was not only that he did not want Acasta products sold by Mr Don Pinkney, but also he had suggested that Spectrum give Mr Don Pinkney "*a wide berth*". Acasta were Spectrum's capacity provider for their general business and Spectrum could not afford to upset them. The result was that Spectrum were not prepared to go behind Acasta's back and "front" for TMO, such that Spectrum's name was on the paper but that, through a side-agreement, this remained TMO business. I find that Mr Kitchin and Mr Clarke would not have been prepared to do that, and to risk Spectrum's relationship with Acasta in the process. I also reject any suggestion that Mr Kitchin told either Mr Don or Mr Chris Pinkney that Spectrum was prepared to do this.

237. It was Mr Kitchin who TMO's evidence suggested had made the oral agreement relating to the 2020 customers, and his evidence was clear about this. He explained that, once it had become clear that Acasta would not work with TMO, TMO decided to pursue what was described as the "discretionary warranty" route, in other words non-regulated products that were not insurance backed. Explaining to dealers that their previously supplied AA Warranty branded product was being changed to a TMO branded discretionary warranty would be a challenge at least in relation to some dealers, but it would be made even more difficult if TMO had to say "*you're on your own for the GAP because we can't provide it*". For TMO to be able to say that they had sorted out the GAP product by arranging for it to be provided by Spectrum would provide at least a short term solution on that point. The advantage for TMO was being able to retain the discretionary warranty part of the business with these dealers, which is what TMO was really interested in, and knowing that Spectrum would not be trying to use their provision of the GAP business to leverage an opportunity to try also to take the discretionary warranty business.

238. TMO contended that there were a number of documents showing that Spectrum recognised that it was dealing with the 2020 customers on behalf of TMO.

(1) In a sequence of text messages between Mr Chris Pinkney and Mr Kitchin from 23 to 27 January 2020, Mr Chris Pinkney passed over TMO's documents containing confidential information about the identity of the customers being introduced, the nature and pricing of their policies and the volume of business that was being written with them. However, there is no dispute that these details were passed over. This was all information that was just as necessary on Spectrum's case. There is no text in any of the messages suggesting the existence of the TMO-alleged agreement. Mr Chris Pinkney's text on 23 January stated:

> "I've told premier car supermarket and v12 that the gap is switching to you [Spectrum] and both accepted.
>
> Told both that they will have a separate registration platform (ready next week) and they will be contracted to you."

If anything, this is more consistent with Spectrum's case on this issue than that of TMO.

(2) On 31 January 2020, Mr Kitchin provided an update to Mr Chris Pinkney by text message [TB/164/p.972] in which he said that Spectrum had

> "…seen or contacted all bar 1 dealer now and the lads have kept 'on message' throughout. Reaction varied, but we've done our best, including rewriting part of our system overnight so that V12 could have it 'their way' (well 85% their way, for now)."

There was nothing in this message to support TMO's alleged agreement. It seems unlikely Spectrum would have gone to the trouble of rewriting part of their system overnight to accommodate part of the business if (as TMO alleges) they might not be getting anything out of it.

(3) Further short text messages were exchanged between Messrs Kitchin and Mr Chris Pinkney on 5 February 2020 in which Mr Kitchin explained what he was doing with one of the other dealers, but again there is nothing in them that suggests the agreement that TMO alleges.

(4) On 12 February 2020, Mr Kitchin sent a text message to Mr Chris Pinkney telling him "*All is settling down (I think) in terms of the gap switch, so hopefully there will not be too many difficulties for you with the dealers now*". That does not support the TMO alleged agreement and is at least equally consistent with Spectrum's case that it had taken on the regulated (GAP) business, so that TMO could (hopefully) keep its existing non-regulated business with these dealers.

239. TMO contended that it was the clear and consistent evidence of both Mr Don and Mr Chris Pinkney that Mr Chris Pinkney went to the dealers comprising the 2020 customers and specifically told them (1) that the merger was going ahead; and (2) that for this reason they should move to Spectrum so that they would, in effect, remain with TMO when the merger was complete. There was no written record of such communications, and in fact Mr Chris Pinkney's oral evidence was very slightly different. He said that he had explained to the dealers that "*for a short period they would be with Spectrum but we were in the process of merging with Spectrum and they would come back to TMO.*"

240. If Mr Chris Pinkney did explain it in that way, that does not seem to me to assist TMO. One can well see that Mr Chris Pinkney may well have said this to the dealers, as an explanation to them why the regulated business was moving to Spectrum. That may have been more palatable than saying to them that TMO had no regulated status but was hoping to persuade the dealers to keep their non-regulated business with TMO such that they had persuaded Spectrum to take on the regulated business. It may also be that the Pinkneys thought there remained some prospect of a merger – as I have said, the prospect was not entirely dead. But fundamentally what he was telling the dealers was that their regulated business would now (even if only for a short time) be with Spectrum. He does not say he suggested that even if on Spectrum paper, the business would remain TMO's. His account of these conversations does not assist TMO in proving that it had made an agreement with Spectrum that, if the merger did not go ahead, Spectrum would not profit from the business it was writing for these customers.

241. In giving his oral evidence Mr Don Pinkney said that he was prepared to allow Spectrum products to go into some of the bigger clients TMO was to acquire from Motorway Direct because "*although the products bear the name Spectrum, we would be Spectrum and that was in January*". However, this was (at best) wishful thinking on Mr Don Pinkney's part. As at January 2020, there were clearly difficulties with the merger, and the basis on which the parties had been proceeding that it would start to be effected (namely, TMO being an Appointed Representative of Spectrum, using Acasta as underwriter) was now a non-starter. As Mr Don Pinkney acknowledged in an exchange in his evidence shortly after this, Spectrum was trying to help TMO out of a difficult situation.

242. In fact, it was far from clear that Mr Don Pinkney was interested in keeping the GAP business. In a passage of his cross-examination when being asked about the purpose of the merger, he said that once the merged business had been set up, "*We would probably*

decide not to sell GAP insurance". This was consistent with other evidence given during the trial that Mr Don Pinkney's real interest was in the discretionary warranty business. Mr Kitchin says that Mr Don Pinkney had told him that "*they were going totally discretionary*". Similarly, the Motorway Direct board minute of 11 February 2020 recorded (based on the discussion of a board report dated 3 January 2020) that "*Don has a plan to move to non regulated administration schemes*" and "*Don's plan is to move to non-regulated sales*".

243. The final point to mention in relation to this issue is some evidence that Mr Clarke gave towards the end of his cross-examination. He said that it had been agreed that if TMO subsequently obtained FCA regulated status (such that TMO was able to sell GAP insurance) and asked for the 2020 customers back, Spectrum could transfer that business back to TMO. This was characterised by Mr Morrison as a "*remarkable concession*" that undermined Spectrum's case on the 2020 customers. However, I do not think that is correct. First, Mr Clarke was not the one that had made the alleged agreement with TMO – that was Mr Kitchin, and Mr Kitchin said he did not think there had been any discussion about that, and indeed he thought it unlikely there would have been consideration of such a point because he had understood from Mr Don Pinkney that TMO was going to deal entirely with discretionary warranties (i.e. not regulated products). Second, in any event, even if what Mr Clarke said about the customers potentially being returned under the circumstances he identified was correct, that would not undermine Spectrum's case on this issue. It may not have been something Spectrum had expressly pleaded, but it was consistent with Spectrum's case that, by taking the GAP business, it was seeking to assist TMO who could not provide it (but wanted to otherwise keep these customers for the non regulated business). The fact that Spectrum might have also said that it would be content to transfer the business back to TMO if and when TMO was able to, and wanted to, sell such policies does not undermine that. It does not suggest that the business was always agreed to remain TMO's business (even though TMO could not sell GAP insurance) but rather that the transfer may end up being a temporary arrangement. It does not suggest that Spectrum agreed to front this business for TMO or otherwise to account to TMO for money it made from this business. Any re-transfer of the customers if and when TMO was able to, and wanted to, sell GAP insurance would look only to the future, and would not constitute a retrospective reallocation of the business that, by then, would already have been sold by Spectrum to the 2020 customers. (I should also add that no claim was made by TMO based upon any such agreement for such a "re-transfer" of these customers on these or similar conditions).

244. In all the circumstances, taking into account the various points set out above, it is clear that there was no oral agreement, as alleged by TMO, between TMO and Spectrum in relation to the 2020 customers. The circumstances in which details of those customers were passed to Spectrum were as alleged by Spectrum. There are clear differences between the circumstances pertaining at the time of this alleged agreement compared to those at the time of the oral agreement in relation to the SsangYong Opportunity, not least that by the time in January 2020 this agreement was alleged to have been made, it was clear that the merger as originally conceived would not be going ahead (or at least not without revisions, and a great deal of further work and time) and that Acasta would not deal with TMO, write business sold by TMO and would prefer Spectrum (who, in commercial terms, could not afford to jeopardise its relationship with Acasta) not to have anything to do with TMO. In their oral evidence on this topic, it seems to me that

the Pinkneys were, to an extent, seeking to transpose on to this set of circumstances a similar agreement to that which had been made in respect of the SsangYong Opportunity, and it may be that over time the two situations have been blurred in their minds. But on this issue, Spectrum's evidence (in particular that of Mr Kitchin, who was alleged to have made the agreement) was clear, and given the context and circumstances, including the lack of any documentary support for the alleged agreement, I prefer it.

245. As a result, TMO's claim for breach of contract in relation to the 2020 customers fails.

Breach of fiduciary duty

246. I have already addressed what the parties said about the law on this topic earlier in this judgment, and do not set it out again here.

247. The facts as I have found them above mean that, in relation to the 2020 customers, Spectrum did not owe any fiduciary duty to TMO.

248. There was, as I have found, no agreement between TMO and Spectrum relating to the 2020 customers to the effect alleged by TMO. Spectrum did not agree that the 2020 customers would remain "TMO's customers" in respect of the GAP business or that Spectrum would not benefit from their business. What was envisaged by Spectrum and TMO was that Spectrum would act for its own account in writing the business.

249. It was alleged by TMO that Spectrum was acting on TMO's behalf and as TMO's agent in providing the GAP cover to the 2020 customers. That was not established on the facts, and is inconsistent with the basis on which I have found the information about the 2020 customers was provided to Spectrum. There was no express appointment as agent in any sense, and there was nothing suggesting that Spectrum would be acting on behalf of TMO. There is nothing in any of the documents supporting such a contention. This was not a case of Spectrum seeking to place business for TMO or in any other sense looking after TMO's business opportunity. In respect of the 2020 customers, TMO had passed the opportunity to Spectrum, for it to deal with on its own account, and it had become Spectrum's opportunity to deal with.

250. This was not a situation where TMO had put its interests in the hands of Spectrum. It had passed the opportunity to Spectrum for Spectrum to deal with; but it did not do so for Spectrum to deal with it on TMO's behalf, or for TMO's benefit. Contrary to TMO's case, there was no agreement or understanding that in default of the merger proceeding Spectrum could not benefit from the opportunity. There was nothing in the circumstances in which the opportunity was passed to Spectrum which gave TMO grounds to reasonably expect that Spectrum would put TMO's interests first (before those of Spectrum).

251. Further, in relation to the 2020 customers, this was not akin to a joint venture situation. Spectrum had not been appointed, and was not seeking, to place the business on a joint basis. Moreover, the 2020 customers were not passed to Spectrum in anticipation of a merger, and Spectrum did not deal with those customers for the purposes of an anticipated merger. Once the 2020 customers had been passed to Spectrum, there was

no agreement or intention that the opportunity that their GAP business represented be exploited for the benefit of both TMO and Spectrum. Spectrum was free to act in its own interests.

252. The claim based on fiduciary duties also therefore fails in respect of the 2020 customers.

Breach of confidence

253. Again, given the facts as I have found them in relation to the 2020 customers, the claim for breach of confidence in relation to this part of the claim must also fail for two reasons:

(1) Although a list of customers is capable of constituting confidential information, there was no agreement as to the imposition of confidentiality, and there was nothing in the communications between TMO and Spectrum when the information about the 2020 customers was passed to Spectrum to suggest that an obligation of confidence was being imposed. TMO was passing the opportunity over so that Spectrum could seek to place the business with an insurer, for Spectrum's own account.

(2) Second, in any event, the information was passed by TMO to Spectrum for the very purpose for which Spectrum then used it, namely for providing GAP cover for those customers. Even if (contrary to the first reason above) the information had been passed to Spectrum on a restricted basis, Spectrum did not use the information in an unauthorised way. There was no breach of any obligation of confidentiality.

Unjust enrichment

254. There was no controversy about the requirements of the claim for unjust enrichment:

(1) The claimant is required to show that: (1) the defendant has been enriched; (2) at the claimant's expense; (3) that an unjust factor exists; and (4) that no restitutionary defences apply (*Benedetti v Sawiris* [2014] A.C. 938, Lord Clarke at paragraph 10).

(2) If a claimant satisfies requirements (1) to (3), the burden of proof is on the defendant to raise and prove a restitutionary defence (see *Samsoondar v Capital Insurance Company Ltd* [2020] UKPC 33, Lord Burrows at paragraph 18).

Here, Spectrum did not plead or otherwise raise any restitutionary defence. Therefore, only requirements (1) to (3) fall to be considered.

255. First, TMO contends that Spectrum was enriched by the fact of the introduction of, and/or the facilitation of the provision of business to, the 2020 customers by TMO to Spectrum.

256. I should note that the pleading of the unjust enrichment claim by TMO referred to the passing of "confidential information" to Spectrum. However, in opening Mr Morrison explained that this was not intended to connote that the claim was premised on the information being "confidential" in a technical sense or that it was contingent upon the claim for breach of confidence succeeding. Rather, it was a shorthand for describing the information and business opportunity that had been passed from TMO to Spectrum. Although Spectrum had picked up in its written opening that the claim had been pleaded by reference to "confidential information", following Mr Morrison's explanation no point was taken about this by Spectrum in closing.

257. It was noted by TMO, and not disputed by Spectrum, that the introduction and/or facilitation of the pursuit of a business opportunity has been held to be capable of constituting relevant enrichment (whether alone or as part of other enrichment) in a number of cases. The examples Mr Morrison identified included *Tahar Benourad v Compass Group Plc* [2010] EWHC 1882 (QB), *AMP Advisory & Management Partners v Force India Formula One Limited* [2019] EWHC 2426 (Comm), and *Premia Marketing Limited v Regis Mutual Management Limited* [2021] EWHC 2329 (QB). I do not need to deal with this point further because, here, Spectrum did not contend that it had not been enriched by the introduction of the 2020 customers to it for the purposes of providing their GAP insurance cover.

258. However, the central problem with the unjust enrichment claim is that TMO is unable to establish an unjust factor such as to make the enrichment of Spectrum unjust. The information was provided by TMO so that Spectrum could provide the GAP cover to the 2020 customers for Spectrum's own account. TMO's case suggested two unjust factors:

    (1) Failure of basis:

        (a) TMO pointed out that the basis may be implicit, and is to be identified objectively by reference to what a reasonable person in the position of the parties would have understood, appraised against the objective features and context of the relevant transfer, relying on *Guardian Ocean Cargoes Ltd v Banco do Brasil SA (Nos 1 and 3)* [1994] 2 Lloyd's Rep. 152, Saville LJ at 158-159; and Goff & Jones: The Law of Unjust Enrichment (10th ed., 2022) at 13-04 & 13-07).

        (b) In light of that, TMO contended that a reasonable person in the parties' position would have understood that Spectrum was only entitled to deal with the 2020 customers on the basis that it would benefit if the merger went ahead, alternatively that Spectrum was not entitled to benefit from these opportunities to the exclusion of TMO. However, the findings I have made as to the circumstances in which, and the reasons for which, the 2020 customers were passed to Spectrum mean that must fail. That was not the basis for the transfer.

    (2) Mistake: TMO contended that TMO only allowed Spectrum to deal with the 2020 customers on the basis of its belief that Spectrum would only benefit if and to the extent that the merger went ahead, alternatively on the basis of its belief that Spectrum would not be entitled to benefit to the exclusion of TMO. Again, those

> propositions are inconsistent with the findings that I have made above. TMO had no such belief. It had passed the information to Spectrum knowing the merger was likely now not going to take place, and with no belief that Spectrum would not be entitled to benefit to the exclusion of TMO. It was content that Spectrum benefited from the provision of GAP cover to the 2020 customers.

259. It is not, therefore, necessary to consider whether (if an unjust factor had been established) the enrichment of Spectrum was at the expense of TMO. However, for completeness, I also provide my views on that issue.

260. TMO relied on *Investment Trust Companies v Revenue and Customs Commissioners* [2018] AC 275 where, at paragraphs 43 to 45, Lord Reed held that the purpose of the "at the expense of" requirement is to determine whether there has been a transfer of value between the claimant and the defendant. In other words, whether the claimant has suffered some kind of loss through providing the benefit (or enrichment) to the defendant. In this sense, "loss" does not have the same meaning as it does when used in the law of damages. As explained by Lord Reed at [45]:

> "The loss to the claimant may, for example, be incurred through the gratuitous provision of services which could otherwise have been provided for reward, where there was no intention of donation. In such a situation, the claimant has given up something of economic value through the provision of the benefit, and has in that sense incurred a loss."

261. TMO contends that it is not necessary for the "at the expense of" inquiry for it to prove that, if it had not passed the GAP business for the 2020 customers to Spectrum, it could and would have pursued it for itself, but it says, in any event, that it could and would have.

262. Spectrum contended that Spectrum's enrichment was not at the expense of TMO because (1) the 2020 customers were passed to Spectrum as part of the bargain struck whereby TMO, in doing so, was able to continue to provide un-regulated services to those same customers, and (2) TMO was unable to write regulated business, so was not able, itself to provide the GAP cover business that was passed to Spectrum.

263. In my view, the enrichment of Spectrum was not "at the expense of" TMO. The quotation from Lord Reed's judgment in the *Investment Trust* case, above, is express in stating that the loss to the claimant may be incurred through the provision of services "*where there was no intention of donation.*" Here, as I have found, TMO did intend to give, or to donate, the GAP business for the 2020 customers to Spectrum (albeit for its own commercial reasons). It did so with no expectation of reward from Spectrum.

264. I should also add that, in light of the matters I have set out above and my findings that there was no realistic prospect of TMO being able to provide the GAP business itself (at least within the time available to it), the opportunity of providing the GAP business to the 2020 customers was not something of economic value to TMO that it had given up. If this was a realistic possibility, there is no good reason why TMO would not have taken steps to provide that business itself at the time. The reason TMO gave why it had not done that was because it considered it was going to merge with Spectrum in the near future. However, I have found that cannot have been TMO's understanding in late

January 2020. There was no realistic possibility that, if it had not passed the GAP business to Spectrum, TMO would have provided that cover itself. For that additional reason, the "at the expense of" requirement is not fulfilled here.

265. Accordingly, the claim in unjust enrichment fails in relation to the 2020 customers.

Conclusion

266. The result is that TMO has succeeded in establishing liability for breach of contract, for breach of fiduciary duty and breach of confidence in respect of the SsangYong Opportunity, but does not succeed in its other claims (including all its claims in respect of the 2020 customers).

267. The parties asked me not to go any further than dealing with the question of liability, and in particular to say nothing about any issue of quantum or of remedy. In due course, it will be necessary for directions to be made to deal with those points.