Neutral Citation Number: [2020] EWHC 3471 (QB)

Case No: QB-2019-00570

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 December 2020

Before :

HUGH MERCER QC
(sitting as a Deputy Judge of the High Court)

- -

Between :

MICHAEL JAMES JOSEPH GROOMBRIDGE	**Claimant**
- and -	
MARCUS GREGORY JOSEPH GROOMBRIDGE	**Defendant**

- -
- -

JOHN BRYANT (instructed by **Taylor Hampton**) for the **Claimant**
PAUL BURTON (instructed by **Taylor Walton LLP**) for the **Defendant**

Hearing dates: 9, 10, 11, 12 November 2020

- -

Approved Judgment

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

HUGH MERCER QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Court and Tribunals Judiciary website. The date for hand-down is deemed to be on 18th December 2020.

HUGH MERCER QC (sitting as a Deputy Judge of the High Court):

1. The Claimant and Defendant in this matter are brothers. Until 2013, through two companies, Joseph Oliver Marketing Limited ("JOML") and Joseph Oliver Meiacao de Serguros Lda ("JOMS") they carried on a business together of investment advisers and wealth managers, focused in particular on the expatriate community in Portugal although a lesser proportion of the business relied on UK clients. Until 2011, the Claimant lived in Portugal and worked from his home office. His main task was to bring in clients. The Defendant lived in the UK but travelled frequently travelled to Portugal. As he has some form of qualification as a financial adviser, the Defendant's main role was to advise the clients and he visited them generally at their homes.

2. As explained later, there came a time when the parties fell out and, apparently to settle their differences and to permit both brothers to continue a similar business, a Settlement Agreement ("SA") was entered into on 18 July 2013 between the Claimant and Defendant. In broad terms, the Claimant was to resign from his directorship of JOML, to receive 50% of the cash reserves of JOML after payment of expenses and the clientele was to be split between the brothers so that the Claimant took some clients and the Defendant took other clients on a basis to which I will need to return.

3. This claim was commenced a short time before the end of the limitation period. It seeks the monies accrued but outstanding in respect of the Claimant's clients (clause 5) and a payment in respect of clients allocated by the SA to the Claimant but who in fact continued to instruct JOML as at 31 December 2013 (clause 8).

4. It was met by a counterclaim which seeks a payment in respect of those clients allocated by the SA to the Defendant (and therefore JOML) but who in fact instructed the Claimant by 31 December 2013 (clause 9). A further counterclaim is advanced by the Defendant in respect of an alleged failure by the Claimant to transfer all physical files and records to the Defendant as required by clause 13 of the SA. Repayment by the Claimant of a Director's loan is also sought by the Defendant.

The Evidence

5. By the agreement of the parties, the evidence and indeed the entire trial was heard remotely on MS Teams. The primary evidence was provided by the brothers although I also heard evidence from Mr Fernandes who is Portuguese and who was employed by JOML/JOMS primarily to sell the smaller forms of insurance such as car or medical insurance. Mr Fernandes explained in evidence that the JOML business model was to use small insurance products such as car and health insurance as a "way in" to new clients with a view potentially to selling insurance products placed in trust to these clients at some later stage. It was common ground that the relevance of such trust products was to avoid the forced heirship provisions of Portuguese law for those expatriates living in Portugal.

6. In addition, there was evidence from clients of JOML in relation to the clause 13 claim.

7. Before coming to the oral evidence, I need to mention the Defendant's witness statement in support of the winding up petition dated 23 May 2013. This witness statement was prepared at a time when, though the brothers were at loggerheads, the

claims in this action had not been formulated. It seems to me that it is likely to be the most reliable evidence in so far as it describes the business of JOML/JOMS.

8. Though the oral evidence focused above all on the period around the SA, I should set out briefly the background to the SA. The business appears to have progressed well until around 2008-9 with, as I have mentioned, the Claimant living in Portugal and the Defendant living in the UK but travelling frequently to Portugal to visit clients. In Portugal the Defendant stayed in a small flat which the Claimant had created within his home. The Claimant gave evidence of the JOML bank account being moved to HSBC in 2008 and the Defendant signing not a joint application with the Claimant but making his wife (who had no role in the business) the joint signatory. The situation remained uncorrected until November 2010. The Claimant also recounts that the Defendant asked for a pay increase in February 2011 and both parties agree that they fell out over the Claimant's claim for relocation costs to move back to the UK in July 2011. Thereafter it is difficult to find evidence of true collaboration between the parties albeit I appear to have only seen a small part of the exchanges between the brothers.

9. On 20 October 2011, the Defendant wrote an email to the Claimant informing him that "I will start setting up my own company and you can do yours later". In the context of a deteriorating relationship between the parties, there is in my judgment no basis whatsoever for the Defendant's criticism of the Claimant for incorporating Abana Ltd and Abana Mediacao de Seguros Lda (together "Abana") in November 2011. In the same email, the Defendant invited the Claimant to provide "A description of the areas you see as your responsibilities".

10. It is apparent from the correspondence that in June 2011 (i.e. shortly before the Claimant moved back to the UK), the Defendant instructed Royal Skandia to change the correspondence address of JOML to his own address without informing the Claimant. On 29 August 2012 at 3.46 pm, the Defendant wrote an email from his gmail account to Friends Provident requesting that they use his gmail account rather than the company email (@joseph-oliver.com) on the basis that: "The above email address is not working". Friends Provident responded at 16.46 pm but copied in the company email and, because the parties shared the company email, the Claimant saw what his brother had done and protested in an email timed 16.33 but which must have followed the Friends Provident email. Two things follow from this exchange. First the Defendant showed no hesitation in telling what I find on the balance of probabilities given the chronology was a lie as to the lack of functionality of the JOML email address in order to exclude his brother from information in relation to what appears to have been by some distance JOML/JOMS' major source of income through commission fee payments. Second, on the evidence, the initiative in seeking to exclude his co-shareholder and co-director from financial information came from the Defendant.

11. A letter of 19 February 2013 from HSBC to the Claimant records a similar move in relation to JOML's bank account. By way of brief summary, a Senior Customer Services Officer records how it was that, despite instructions from the Claimant in December 2012 to remove the cash payment facility on the bank card and a change of address to ensure that both parties received HSBC bank statements, the details were changed so that the Defendant's address became the sole address and the cash facility was reintroduced on the card. The letter further records the practice to accept

instructions if a director verbally confirms that there is agreement from the other. The Defendant was questioned in relation to this letter in cross examination and gave evidence that he did not recall the agreement not to use the card for cash withdrawals, that he instructed HSBC to send statements to him as he was not receiving them and that the HSBC letter was mistaken using the words: "What is written is wrong". I find that that evidence is false and that HSBC correctly recorded the position which was that the Defendant was making cash withdrawals from the HSBC account and that he or someone acting on his behalf had given instructions for statements to be sent only to the Defendant.

12. In or about April 2013, the parties made an agreement which I understand to relate to policies linked to JOMS to change the bank details for what are described as "trail commissions" from HSBC to a Portuguese account. On 5 April 2013, the Defendant, using his gmail account, used the agreement to request Friends Provident to redirect not only trail commissions but also fund adviser fees away from the HSBC account. The Claimant intervened to prevent this. On the evidence, the Defendant's objective was to direct the income stream of JOML from Friends Provident to a new bank account which would exclude the Claimant.

13. The Defendant complains about the Claimant's setting up of Abana but it seems to me that the email of 20 October 2011 which informed the Claimant that he was setting up his own company but that "you can do yours later" needs closer examination. The Claimant's evidence is that the parties discussed setting up their separate companies and I accept that evidence which is supported by that email. It is common ground that in fact the Defendant did not set up a new company but rather traded as "Joseph Oliver". However, in February 2013, having in my judgment incited the Claimant to set up his own company (for that is what the email was in my judgment doing) the Defendant then used that fact, even though Abana was at that time dormant, to seek to exclude the Claimant from JOML because holding a directorship in a competing company (even if dormant) is prohibited under Portuguese law. There is no evidence of when the Defendant discovered that holding a directorship in a competing company was prohibited but first the Defendant knew that he had incited the Claimant to incorporate a company and second this episode makes clear that it was the Defendant who was taking the initiative in seeking to exclude the Claimant.

14. Against that background, I must treat the Defendant's evidence with great caution as I have found his evidence in respect of matters occurring in the period leading up to the SA to be untruthful. I also make findings against the Defendant's evidence in relation to the formation of the SA and the Defendant's schedule served by his solicitors in December 2013. That is not to say that I found him to be wholly untruthful. To take just one example, he accepted readily that the letters in the form of Annex 3 to the SA which the Defendant sent to his "clients" were sent to the natural person known to him as his client and not to the trustees of any trust which had been set up by that client. But my conclusion does mean that I have to be aware that, in considering issues in dispute the Defendant is ready to tell lies. The Defendant's counsel re-examined on the basis that matters in the period of 2011-June 2013 were simply background and did not go to the issues. In certain respects that is correct as this claim arises out of the SA dated 18 July 2013 but I am entitled to examine the Defendant's evidence as a whole and to take account of the matters in the preceding paragraphs on the issue of credit.

15. As regards the Claimant's evidence, I accept his evidence in relation to the Defendant's activities in trying to exclude him from access to the key activities in 2011-2013 and more generally, for the reasons given in specific cases below, I broadly accept his account of the parties' dealings for the period 2008-2013. However, I do not accept the Claimant's evidence that, in preparing his draft of Annex 1, he chose "the clients with which [he] had good continuing relationships". On this aspect, I accept the Defendant's evidence that, at least in part, the Claimant avoided certain clients with whom he had (and still in 2020 appears to have) a good relationship such as the Rowe-Jones and Arnolds discussed further below. The motivation for this otherwise odd choice in my judgment would appear to have been so that the Claimant could try to obtain first several of those clients with closer links to the Defendant through Annex 1 and second certain of the Claimant's own personal contacts who were clients of JOML through those clients moving to Abana in 2014 after expiry of the clause 9 obligation. On the other hand, the Defendant's ambition was for as many of the clients as possible to remain with JOML as possible. Neither approach is in breach of contract, in particular in the light of the express right for both parties to communicate with all clients of JOML in clause 2.

16. The relevance of this is that the SA appears, when looked at in that light, as the basis on which future hostilities were to be conducted rather than a clean break settlement which might be regarded as the more traditional objective of a settlement agreement.

17. I must however return to the Claimant's evidence. He asserted that Mr Fletcher did not join Abana in 2013 but I find against him below on this issue and I recall him being evasive when being asked when he had applied to become a BUPA intermediary. On the other hand, the Claimant volunteered the fact that Ms D'Arcy Rice moved to Abana briefly which I accept and he also freely accepted that clients who moved to Abana would be unlikely to have surrendered their existing policies which again I accept. With regard to the Rowe-Jones and Arnolds, I infer from the brief letters in the documents that the Claimant asked both couples, with whom he was friendly, to sign letters which I find below not to have stated the position correctly. I have no information on whether those letters were signed with an intention to mislead the Court but at the least the Claimant (as the person who I infer requested them) demonstrated a reckless disregard for the truth by not checking the date when these clients instructed Abana.

18. To conclude this appraisal of the parties' evidence, there are serious shortcomings in at least certain aspects of both accounts which means that, where evidence was challenged, I will need to be cautious before accepting uncorroborated evidence and this has led me on some issues in the case to determine the result on the basis of whether a fact is proven or not.

19. With regard to the evidence of Mr Fernandes, in my judgment he gave his evidence clearly and truthfully. The same can be said of the JOML clients who gave brief evidence about the Defendant reconstituting their files.

The Settlement Agreement

20. The relevant clauses of the SA which are as follows:

"1. MG and JG shall sign forthwith letters in the form attached at Annex 2 which will be sent by JG to the clients and advisers listed at Annex 1. MG and JG shall sign letters in the form attached at Annex 3 which will be sent by MG to the existing clients of Joseph Oliver Marketing Limited (JOML). Both letters must be sent between 22 and 24 July 2013 using the usual means of communication with the client in question. The phrase 'existing clients' means all those clients or advisers responsible for income received by JOML or Joseph Oliver Mediacao de Seguros LDA (JOMS) in the quarter ending 30 June 2013 that are not listed at Annex 1.

2. For the avoidance of doubt, MG and JG may continue to communicate with clients and advisers of JOML (whether listed at Annex 1 or not) but may not say anything to them derogatory of the other party or of JOML, JOMS, Abana Ltd or Abana LDA, or anything to contradict the letters at Annex 2 and/or 3.

3. After deducting:

a. legitimate business expenses as set out in the board resolution of 22 June 2013,

b. any fees belonging to any advisers, and

c. the Corporation Tax JOML will need to pay for the period to 30 June 2013; 50% of the cash held in the bank account of JOML as at close of business on 30 June 2013; shall belong to JG.

…

5. Any sums accrued to JOML/JOMS as at 30 June 2013 but which were not paid to JOML/JOMS before that date, and which represent income from clients or advisers listed in Annex 1, shall be paid by JOML to JG by 7 August 2013 and the parties agree to authorise such payment.

…

8. In the event that any of the clients or advisers listed Annex 1 continue to instruct JOML or instruct any other company with which MG is directly or indirectly connected up to and during the quarter ending 31 December 2013 they shall be retained Annex 1 clients. MG will pay to JG a sum, equal to 3 times the annualised income of the retained Annex 1 clients in the quarter ending 30 June 2013, by 20 February 2013.

9. In the event any existing clients leave JOML/JOMS and instruct JG or any firm or company with which he is directly or indirectly connected by 31 December 2013 they shall be additional transferred clients. JG shall pay to MG a sum, equal to 3 times the annualised income of the additional transferred clients in the quarter ending 30 June 2013, by 20 February 2013.

…

13. JG shall transfer all physical files and records relating to JOML, JOMS or its business to MG by 31 July 2013. This shall include client files of the existing clients but not those of the clients listed at Annex 1.

…

16. A person who is not a party to this agreement shall not have any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this agreement but this does not affect any right or remedy of a third party which exists or is available apart from that Act.

17. Each party shall, at its own cost, sign or provide all further documentation or do all reasonable acts that are required to give effect to the terms of this agreement. This shall include, without limitation, the provision of any relevant information that it is reasonable for the other party to request in order for it to service the clients or former clients of JOML.

Annex 1

Clients

Beckman, Darcy Rice, Dawes, Drew, Edlund, Greene, Hatch, Hall, Hogberg, Howard, Hughes, Stephenson, Oshea, Ringborn, Whitcombe

Advisers

Graham White, Richard Fletcher"

21. As regards the relevant principles of interpretation, the Defendant cited the decision of the Supreme Court in *Arnold v. Britton* and, in particular, the judgment of the President, Lord Neuberger at paragraphs 15-21:

> "15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi)

disregarding subjective evidence of any party's intentions. In this connection, see Prenn at pp 1384-1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, Bank of Credit and Commerce International SA (in liquidation) v Ali [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in Rainy Sky, per Lord Clarke at paras 21-30.

16. For present purposes, I think it is important to emphasise seven factors.

17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in Chartbrook, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in Wickman Machine Tools Sales Ltd v L Schuler AG [1974] AC 235, 251 and Lord

> Diplock in Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios) [1985] AC 191, 201, quoted by Lord Carnwath at para 110, have to be read and applied bearing that important point in mind.
>
> 20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.
>
> 21. The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties."

22. What I draw from those paragraphs is that interpretation is a unitary exercise to be carried out on the basis of all relevant material but excluding the subjective intention of the parties. In closing submissions, Mr Burton invited me simply to read the words of the SA as this was a case where the words were clear and interpretation as not necessary. In my judgment, that approach would fail to apply the guidance of the Supreme Court.

23. I make brief comments first on the overall structure of the SA. Clause 1 splits the clientele into the Claimant's clients and the Defendant's clients. Clause 2 effectively permits both brothers to compete for the JOML clients regardless of the split. Clause 3 splits the net cash of JOML into two equal shares for the brothers. Clause 5 ensures that sums accrued but not paid by the insurance companies to JOML as at the end of Q2 2013 in respect of the Claimant's clients are paid to the Claimant. Clauses 8 and 9 effectively award compensation in respect of clients allocated to one party but who in fact instructed the other party by 31 December 2013.

24. Before starting on the issue of interpretation, I must remind myself that my task is not to improve the bargain of the parties. By way of example, it would be unsurprising if the parties considered with hindsight that to place a cut-off of 31 December 2013 on

compensation for clients allocated to one party who in fact joined the other party's business but waited until after 31 December 2013 to do so is not in the spirit of the SA. But the answer to that would be that the parties could have specified for example 30 June 2014 as the cut-off date to catch those clients who had no need to contact anyone for advice before Jan-June 2014 as their contract was in place and needed nothing doing to it. There is no complaint in this case about the cut-off date here but nor could there be as the parties have agreed what they have agreed.

25. The central issue of interpretation is to determine what the parties have agreed by the use of the term "clients" in the phrase "clients or advisers listed in Annex 1" and clauses 1, 5, 8 and 9 as that determines the split of the clientele of JOML.

26. The first piece of evidence is the words of the relevant clauses. At first blush, the word "client" tends to suggest a reference to a specific legal person. For present purposes it is common ground that a natural person is a client but what is the situation if the natural person becomes the settlor of a trust? As a separate legal person, the trust (via its trustees) is also capable of being a client but the question is whether the term "*client*" as used in the SA refers only to the named natural person or to the client account and trusts attached to that client account.

27. In clause 1, the nature of the split is clarified by the definition of 'existing clients'. Mr Burton for the Defendant sought to persuade me that it could not be relevant to determine the meaning of "*existing clients*" because it is only necessary to investigate who is within Annex 1. Such an approach would ignore the context in which term 'clients' is used and also the purpose for which it is being used which is to split the clientele of JOML into two parts. It is in my judgment manifestly relevant to look at the definition of "*existing clients*" which uses the phrase "*all those clients or advisers responsible for income received by JOML … that are not listed in Annex 1*". This indicates that the touchstone for the split between Annex 1 clients and remaining clients is determined by reference to whether the relevant person (natural or legal) would have been understood by a person having all the background knowledge of the Claimant and the Defendant to be responsible for income received by JOML. Clearly if A (listed on Annex 1) and B (not listed on Annex 1) were clients of JOML in Q2 of 2013 and each had set up a trust X and Y respectively, B would not be responsible for income received by JOML from trust X but it might be said that he was responsible for income received from trust Y. Alternatively trusts X & Y might have been regarded as themselves responsible for income received by JOML. To determine which interpretation is correct, it is necessary to examine further relevant evidence.

28. Lord Neuberger's second category of evidence is any other relevant provisions of the SA. As Lord Mustill said in *Charter Reinsurance v. Fagan* [1997] AC 313 at 384, "*the words must be set in the landscape of the instrument as a whole*". See also Lord Hoffmann at p. 391 on the importance of context to determine the meaning of words.

29. Clause 5 provides relevant context because it links the split of the clientele to the split of the net cash in JOML which was split 50/50 in accordance with clause 3. Sums of money which accrued to JOML in Q2 2013 in respect of Annex 1 clients are allocated to the Claimant. If the brothers had split the clientele so that the Defendant obtained all the income in respect of the trusts (i.e. "the central part of the JOML's business" in the Defendant's words) and the income from those natural persons not listed in Annex 1, this would mean that well over 50% of the income was being allocated to the

Defendant for sums due for Q2 but paid in Q3 whereas 50% of the income for Q2 and all prior periods was allocated to the brothers on a 50/50 basis. The differential treatment would arise by what would be, for the Defendant, the wholly fortuitous factor of a slight delay in payment of relevant sums. It is possible that this is what was agreed but further evidence must be considered.

30. With regard to clause 5, I also note the use of the phrase "sums … which represent income from clients or advisers listed in Annex 1". The term "which represent income" recalls the words of cl. 1 "clients … responsible for income". The terms are different but then the SA, though drafted by solicitors, is not a sophisticated document. To revert to my example above, the question which arises is whether a sum of money which has accrued in respect of trust X but has not been paid in Q2 would have been understood by a person with the background knowledge of the parties to represent income from A or simply from X.

31. Given the terms of clause 8, "clients … continue to instruct JOML" (see also clause 9, "instruct"), I heard evidence regarding who gave instructions in respect of trusts formed by natural persons who were clients. The Defendant's evidence was that there were occasions when the trustees of trusts did give instructions but did not give examples of which trusts this applied to. He also accepted that settlors continued to provide instructions in respect of trusts they had set up and I note that JOML was a trustee of some trusts so that JOML could not give instructions to JOML in respect of such trust. The Defendant was taken in cross examination to the JOMS client agreement and agreed that such documents were usually signed by the settlor, where an individual set up a trust, and not by the trustees. Though the Defendant was anxious to stress in his evidence that a trust is a "separate legal structure", overall his evidence on this issue was that the original client relationship where a trust investment was made would be with the settlor but that there were occasions when the relationship extended to the trustees and even to beneficiaries. He mentioned the Hughes family in the latter context where the primary client was Mr Hughes and other members of the family became clients for products such as medical insurance. There was certainly no suggestion in the Defendant's evidence that instructions from the settlor in respect of a trust he had set up would be rejected or not followed. On the other hand the Defendant is clearly mindful of his obligation to accept instructions from trustees. I find that the Defendant would have accepted instructions from trustees where instructions were given but that the general position was that the client relationship was with the settlor of a trust and instructions from settlors in respect of the trust would be accepted.

32. This evidence would support a reading of the phrases "clients or advisers listed in Annex 1 continue to instruct JOML" and "existing clients leave JOML/JOMS and instruct [the Claimant]" as in each phrase including the trusts in respect of which clients gave instructions. To revert to the example, if that reading were correct and if A continued to instruct JOML so that the Defendant benefited from A's desire to remain with the Defendant, the Defendant would have to pay compensation fixed by clause 8 not only in respect of the income from products in A's name but also those in trust X's name. The converse would apply to clause 9 so that if B left JOML and instructed the Claimant, the Claimant would have to pay compensation to the Defendant based on the sums representing income from both B and trust Y.

33. I turn then to Lord Neuberger's third class of evidence, the purpose of the clause and the SA. The Defendant submitted that the purpose was limited to settling their differences. Though true to a very limited extent as noted above, it is apparent that there are further purposes. Clause 3 evidences a purpose of splitting the net cash 50/50. The purpose of clause 1 is to split the clientele in circumstances where both parties were to continue in competition and indeed where both parties could continue to communicate with the clients of JOML whether or not they had been allocated to them under the SA. It is possible that the purpose of the split of the clientele was to gift the "central part of the JOML's business" to the Defendant but no words suggest such a gift unless the Defendant's submission were correct that the clients listed in Annex 1 relates to the primary client alone so that any primary client who had set up a trust would leave the trust behind with JOML leading in many instances to the primary client having to deal with both JOML/JOMS and Abana Ltd/Lda.

34. The fourth class of evidence is the facts and circumstances known or assumed by the parties on 18 July 2013. As at this date, the brothers had developed their own business after both being sacked from their father's business, Argent International, in 2003. JOML/JOMS were, in the true sense of the term, a joint venture between the brothers where each contributed according to their abilities. Though there has on the Claimant's evidence been some grumbling from the Defendant that the Defendant, as the only one with some form of financial planning qualification, was doing all the work, the Claimant's principal role on the evidence was as a rain maker, to seek to bring in clients for the Defendant to service, and there is also evidence that he oversaw the activities of financial advisers as well as maintaining records to some degree to which I return below. In the event, there was no serious attempt to depict the situation other than as a business to which the brothers have contributed jointly, at least until the brothers fell out over a claim by the Claimant for relocation expenses when he moved back to the UK in 2011.

35. The best evidence of the nature and extent of the JOML/JOMS business is in my judgment provided by a witness statement of the Defendant dated 23 May 2013 and filed in support of a winding up petition to break the deadlock between the brothers in JOML. This witness statement has the virtue that the SA had not been negotiated at that point and the description of JOML's business has been provided merely to inform the Companies Court of the context in which the petition is brought. There was at that point no incentive to slant the account and both parties appear to accept it so that it is the best evidence of the parties' background knowledge of JOML's business. Given its importance, I quote relevant paragraphs:

> "4. The central part of the JOML's business is to advise and look after insurance products placed in trust for high net worth individuals. This involves speaking to those individuals about their estate planning aims and how much they want to settle. It then involves advising on a suitable insurance product from large insurance companies such as Friends Provident, Royal Skandia and others.
>
> …
>
> 7. This money is collected on our behalf by the insurance company, and the insurance company makes these payments

> directly to JOML through its bank account. These payments are made on a regular basis and represent the majority of the turnover of JOML. These payments vary over the year, but to give some indication of the sums involved, the approximate fees for the four quarters from the second quarter of 2012 to the first quarter of 2013 were as follows: £25,000, £60,0000, £35,000 and £35,000.
>
> 8. In return for instructing us to manage these products on their behalf, the clients of JOML need to have confidence in what we are doing, in the advice that we provide and in our ability to provide the same level of service in the future.
>
> 9. To continue in business, it is necessary for me to see clients regularly. Many of our clients are British expatriates based in Portugal. From 2003 onwards, I have been travelling regularly to Portugal to see clients.
>
> 10. Without going into the issues over the management of the company which are dealt with in the petition, I am the person that currently visits clients in Portugal in order to advise them on their trust structure and assurance products. I have the Financial planning certificate and I am therefore the only person in the company qualified to provide this advice.
>
> …
>
> 14. JOML also makes money in other ways, for example by selling private medical insurance policies, but this is a less important part of the business turnover.
>
> 15. My brother Michael James Groombridge (known to me as James) and I are the directors of JOML and JOMS. JOML currently does not have its own premises, and it is registered at its accountant's offices. It does not employ staff. Traditionally, after paying for its costs and expenses, the company would pay out all its profits as dividends. Historically, the directors were each paid a monthly sum which allowed us to clear our expenses and reflected the dividend declared by JOML each year."

36. The phrases "central part of the business" and "the majority of the turnover" make it clear that it is the insurance products placed in trust which are the mainstay of JOML's business. The reference in paragraph 8 of the witness statement to "these products" is to products in trust. The clients who need to have confidence in JOML are the settlors. It is they in paragraph 9 who are seen regularly and who are visited by the Defendant to advise them "on their trust structure and assurance products". Advising and looking after insurance products "involves speaking to [the settlors] about their estate planning aims and how much they want to settle". In my judgment this statement provides significant support for a broader reading of the term "clients and advisers listed at Annex 1" in clause 1 than simply the individual clients with

whom JOML/JOMS had a relationship. Annex 1 lists clients but it would have been understood in July 2013 by both parties to include any trust which such primary client had set up through JOML/JOMS.

37. I also note the reference in paragraph 7 to JOML alone having a turnover of approximately £155,000 per annum in commission fee income (of which £25,000 for Q2 2012). That accords as a matter of order of magnitude with the Claimant's evidence (on which he was not challenged) that the international portfolio bonds contributed approximately £162,000 per annum in income to JOML; appointed representatives £24,000 per annum; health and general insurance, c. £12,000 per annum. In December 2013, the Defendant's solicitors advised the Claimant's solicitors of the amount due under clause 5 as accrued but not paid in Q2 2013 as being £10,398.47 plus €1127.95. The Defendant says that this document was sent in error but it is common ground that the figures given include the fee income from trusts where the settlor is listed in Annex 1 and there was no suggestion by the Defendant that his approach to whether income from a trust investment was to be aggregated with income from the client settlor of the trust had changed since the time of the SA. The figure of £11,000 odd income for Q2 2013 is to be contrasted with the figure the Defendant contends is due in these proceedings under clause 5 (sums accrued in Q2 2013 but not paid) excluding the income from trusts set up by primary clients listed in Annex 1 as set out in Schedule A to the Defence and Counterclaim in the sum of £1462.36.

38. As a brief parenthesis, I must deal with the Defendant's point that the schedule of sums due under clause 5 put forward by his solicitors in December 2013 was put forward in error. The Defendant's evidence was that his solicitors asked him for several schedules for the purpose of negotiation and that they despatched the wrong one when they sent one which included not only income from the named clients but also income from trusts of which the named clients were the settlors. I do not accept this evidence. I was shown no document from the Defendant or his solicitors which withdrew that schedule. The Defendant maintained that the other schedules he sent were privileged when made and could not be disclosed. Any schedules provided to his solicitors would indeed be privileged but it is difficult to see any harm to the Defendant in waiving privilege on those schedules which, if they exist, related to negotiations in December 2013 as to the implementation of the SA. Above all the correspondence between solicitors is very clear. The Defendant's solicitor wrote to the Claimant's solicitor on 13 December 2013. Later that day, the Claimant's solicitor wrote as follows: "*Please can you set out what your clients belief (sic) was paid under clause 5 as you client had control over the account and can easily calculate what the incoming payments were*". The Defendant's solicitor responded: "*Yes, I'm expecting this … My client has said to me that he will finish it at the weekend, so it will be sent to you early next week*." On 20 December the Defendant's email attaching the clause 5 calculation which included the income not only for individual clients but also for the trusts of which they were the settlors was sent with the following message: "*Here are my client's figures*". There is no witness statement from the Defendant's solicitor explaining that he made a mistake. The Claimant was asking for the clause 5 figures and the Defendant provided them for onward transmission. I reject the Defendant's evidence when he says that the schedule was sent in error.

39. The Defendant putting forward a figure for clause 5 income of Annex 1 clients which included income from trusts of which the Annex 1 clients were the settlors is entirely consistent with the Defendant's reaction to seeing a draft of Annex 1 from the Claimant which was given in the Defendant's solicitors' email dated 11 July 2013 and which was relied on by the Claimant, without objection, as providing evidence of facts known to both parties prior to the contract. The email includes the following sentence: "*[Annex 1] can be agreed, although strictly on my client's calculation these clients contribute more than 50% of the fee income of JOML*". So a few days prior to the SA, the Defendant had calculated the fee income for which the clients in Annex 1 were responsible. In doing that, it can be seen from the figures in the previous paragraph that the Defendant instructed his solicitors on the basis that the reference to the individual clients listed in Annex 1 included the trusts and the fee income from trusts of which the clients were settlors. The Defendant's oral evidence sought to resile from his position stated in his solicitor's email of 11 July 2013 but was wholly unconvincing. He said that he considered the Annex 1 list of primary clients had the potential to provide greater than 50% of the fee income as personal clients without the trusts. First, the Defendant's reference to "*had the potential*" is not what is recorded by his solicitor on 11 July 2013 which was that the Annex 1 clients at that time contributed "*more than 50% of the fee income*". The only basis on which that statement could have been made is if it evidences a common understanding that the list of Annex 1 clients includes the trusts of which those clients were the settlors. Second if the central part of the JOML business was insurance products placed in trust, it cannot be correct that, if as the Defendant contends the clients listed in Annex 1 refers only to the primary client and not to any trust which they had set up, a business based on fee income from car, house and medical insurance would ever rival the fee income from insurance products placed in trust such that it might have the slightest potential to constitute 50% of JOML's then business. I reject the Defendant's evidence on this issue.

40. In addition, I note the Claimant's evidence in his witness statement with regard to the Van den Bergs and the 4 trusts which the family had set up which the Claimant describes as follows: "*These are simply 4 different policies belonging to that client account, written into trust with Friends Provident and have 4 different names*". The relevance of this on the interpretation issue is that it is consistent with the Defendant's treatment of the fee income from policies written into trust which was to aggregate the fee income from the trust with the fee income for the policies of the individual who was the settlor of the trust. It is also consistent with the fact that the listed persons gave instructions both on their own behalf and also in relation to trusts they had set up as well as the fact that the Defendant pursuant to clause 1 and Annex 3 sent letters only to the named primary client and not to the trustees. I find that both brothers operated on the basis of client accounts which would encompass the affairs not only of the individual client but also of trusts set up within that client account. Annex 1 was therefore a list of the names of client accounts.

41. Finally I note that Schedule D to the Counterclaim relating to a clause 13 claim for files which were not delivered up includes no examples of the names of trusts which is itself consistent with a finding that the brothers both considered that any reference to "clients" was a reference to client accounts which both understood to include the trusts settled by those clients.

42. With regard to Lord Neuberger's fifth category of commercial common sense, I do not find that a helpful guide in this analysis. The Claimant could have agreed for his own reasons not to deal with trusts in Abana or he could have decided to gift the central part of the business to his brother. The question is whether he did so or not.

43. As regards the subjective evidence of any party's intentions which I must not take into account, a good example of this is provided by the evidence in the Defendant's witness statement to the effect that, had he known that the Annex 1 list included the trusts of which the individuals listed were the settlor, he would not have agreed to the Annex 1 list. Whether or not one accepts that evidence (which I do not need to determine), in my judgment this is subjective evidence of the Defendant's state of mind and is not relevant to the issue of interpretation.

44. In the light of this material and balancing the indications provided by each part of the material, in my judgment a reasonable person having all the background knowledge which would have been available to the parties would understand the reference to "*the clients and advisers listed in Annex 1*" to be read as a reference to the client accounts bearing the listed names which included those trusts set up by the listed individuals. Accordingly Annex 1 is a list of the client accounts in respect of which the listed individuals provided instructions. It was the listed client accounts bearing the names of those clients which were regarded by both the Claimant and the Defendant at the time of the SA as being responsible for the commission fee income both for insurance/investments entered into as individuals and in the name of trusts which they had set up. The trusts linked to the named client accounts are conveniently summarised in paragraph 51 of the Defendant's witness statement before this Court which I understand to be common ground.

Whether claim pleaded in respect of insurance products placed in trust

45. The Defendant objects that an interpretation of the SA which leads to the conclusion in the previous paragraph is not pleaded and that it is not open to the Claimant to make any claim arising out of that conclusion at this stage.

46. Mr Burton points to a lack of particularity in the pleading and the Claimant's witness statement and argues that no claim is advanced based on fee income from not only the individual names but also the trusts set up by such individuals. With regard to the clause 8 claim for clients allocated to the Claimant but who continued to instruct JOML/JOMS as at 31 December 2013, he argues that the Claimant could have sought pre-action disclosure from the Defendant or disclosure of documents in the hands of a third party (the insurance companies who paid commission to JOML/JOMS).

47. I start with the clause 8 claim. The Particulars in paragraph 15 of the Particulars of Claim plead that the Claimant is unable to identify the retained Annex 1 clients or particulars of the income in Q2 2013. The Particulars concluded with a claim for an account which is not pursued. In order to know the identity of the clients retained by JOML up to 31 December 2013, on the basis of the material before me, the most convincing evidence would be a copy of the Q4 statements of commission fee income from all the insurers with which JOML dealt in 2013. However no statements have been produced at all for Q4 by either side. They are either relevant to support each party's case or because they are adverse to their case by showing which clients instructed them in December 2013. On the face of things, both parties have failed in

their duty of disclosure. But on the pleading issue, the Defendant cannot complain of a lack of particularity for which his own disclosure is at least partially responsible. At all events, I cannot see how the Claimant could have given more particulars and I would not accept the proposition that, even if the Defendant's disclosure is defective, it was proportionate and in accordance with the overriding objective for the Claimant to make applications for third party disclosure against any insurance company which he was aware dealt with JOML/JOMS in 2013. Even had he done so, he could not have known whether he had contacted all relevant insurance companies. In my judgment the clause 8 claim is adequately pleaded.

48. On clause 5, the Claimant's case is that by a combination of clause 5 and clause 17, a total sum of £11,379.30 is due which includes the fee income from trusts attached to the client accounts listed in Annex 1. I take first of all the issue of sufficient particulars. Whilst the Claimant did by his pleading reserve the right to plead that more was due as part of his account pleading, the account has not been pursued before me. In my judgment there is nothing in the point that insufficient particulars have been provided of the clause 5 claim as both the Claimant and Defendant are fully aware that the £11,379.30 claimed includes the clause 5 sums in respect of trusts attached to the Annex 1 client accounts.

The Clause 5 claim

49. The Defendant mentioned in his skeleton but did not press the point orally that the SA agreed that, according to its terms, JOML was going to pay the clause 5 sums claimed so that there was a question as to whether the Claimant could claim that from the Defendant. In any event, the claim is for a failure by the Defendant in breach of clause 17 to procure payment by JOML of the relevant sums by which the Claimant has suffered loss and damage. It follows that the Defendant is liable in damages for those sums which have not been paid in breach of clause 5.

50. The Defendant's case on the one page schedule of sums accrued but not paid in Q2 2013 supplied to the Claimant's solicitors under cover of an email dated 20 December 2013 ("the Schedule") was that the schedule was "of no evidential value". This relates to the evidence that it was served in error which I have already rejected.

51. In any event, whether or not the Schedule was served in error goes to a different point which was whether or not the Defendant understood in December 2013 that the client accounts which had moved to the Claimant included the trusts both parties understood to belong to that account. It was not suggested by either party that the sums stated in the Schedule were not correctly stated on the assumption that fee income from trusts formed part of the income from the client accounts listed in Annex 1. In the circumstances and following my determination on the interpretation of "*the clients and advisers listed at Annex 1*" the Schedule is an admission of sums due and the Defendant could, by reference to the statements from insurance companies for Q2 2013 have submitted that the figures in the Schedule were erroneous but did not do so. Accordingly, even if the Schedule had been sent in error, by reason of my conclusion in relation to the interpretation of which clients had been transferred by the SA to the Claimant, I can proceed on the basis that the Schedule correctly sets out the sums due to the Claimant under clause 5 and I find that it does do so.

Claimant's clause 8 claim

52. This claim is in respect of clients allocated by the SA to the Claimant but who "continue to instruct JOML … up to and during the quarter ending 31 December 2013".

53. The Claimant's case was that all but Whitcombe from Annex 1 continued to instruct JOML by 31 December 2013. I consider first Mr Fletcher, one of the two advisers allocated to the Claimant.

54. The Claimant's evidence was that the FCA register evidenced the fact that Mr Fletcher did not instruct Abana until 2014. However Mr Fletcher was the subject of many complaints with regard to the subject matter of his advice which led to the Financial Ombudsman Service decision which is undated but bears the reference DRN6679217 ("the Decision"). It is a complaint by a Mr R who records that he was approached in 2013 by a person associated with Mr Fletcher who represented himself as being associated with Abana and that Abana did not have the relevant permissions to advise in relation to the switching of personal pensions into a SIPP. In the Decision, p. 4 records that the FCA register is not determinative of whether Mr Fletcher was acting as Abana's authorised representative. The Decision also records a letter dated 18 November 2013 from Abana to a third party, Westerby, confirming bank details for its authorised representatives and sub-agents. This document has not been disclosed by the Claimant in these proceedings even though it is clearly relevant to the position of Mr Fletcher. The Decision records both that Mr Fletcher's details were included in the Abana letter and that a 6 December 2013 letter from Westerby recorded that 5% adviser fees charged on the transaction with Mr R were to be paid into Mr Fletcher's sub-account as notified by Abana.

55. The Claimant's oral evidence in re-examination was that Mr Fletcher was the authorised representative of JOML and that he never made the transition into Abana as the Claimant had doubts about what Mr Fletcher was doing and that he considered Mr Fletcher to be a 'rogue adviser'. This account is undermined by the Decision which records that Mr Fletcher was a minority shareholder in New Beginnings which is listed by the FCA as an authorised representative of Abana from March 2014 to February 2015. I was shown a contract signed by Mr Fletcher with JOMS dated 1 July 2012 which had a six month non-compete covenant but that would not prevent Mr Fletcher from instructing Abana even if it were a breach of Mr Fletcher's contract with JOMS.

56. My conclusion on this issue is that on the balance of probabilities Mr Fletcher instructed Abana in 2013 as found in the Decision. It may well be that, as asserted by the Claimant in evidence, Mr Fletcher had already advised the clients and that commission fee income had gone to JOMS or JOML but the Decision clearly records receipt of income by Abana on account of Mr Fletcher. Whether Mr Fletcher had already given the relevant advice to the client would be an important element for the Financial Ombudsman Service but is not the relevant trigger for clause 8 to operate. The relevant trigger is instructing Abana in 2013 which I find that Mr Fletcher must have done for Abana to send the letter to Westerby in November 2013 including Mr Fletcher's account details. It follows that I reject the Claimant's evidence that Mr Fletcher never joined Abana.

57. Several of the clients who subsequently instructed Abana did so in respect of BUPA health insurance cover. The Claimant became an Overseas Intermediary of BUPA on 28 January 2014. He was cross examined about whether he applied to BUPA for this appointment soon after the SA but appeared evasive on the date of application. The date of application is not however the relevant trigger for the SA. The question is whether clients instructed Abana by 31 December 2013 or whether they continued to instruct JOML/JOMS.

58. On that issue, the Claimant was cross examined on the basis that particular clients did not surrender their BUPA policies but the fact that they are not likely to have surrendered their policies does not help me in relation to the SA. The likelihood is first that clients did not surrender their BUPA policies but second that clients would only seek advice at a time other than renewal if they needed specific assistance in relation to their policy. There is no evidence of such specific assistance being sought.

59. I turn therefore to the individual clients who are in issue. Schedule B to the Defence helpfully identifies six clients which it alleges did not continue to instruct JOML (of which one, Whitcombe, is common ground) but admits that eleven clients did continue to instruct JOML. As regards those admitted to have continued to instruct JOML, the income from trusts attached to the client accounts bearing the names of those clients (and of any further clients I find to have continued to instruct JOML) will need to be added to the sums admitted in Schedule B once the clause 8 formula of 3 x the annualised commission has been applied.

60. As regards Mr White, the other adviser who was allocated by the SA to the Claimant, the FCA records indicate that he joined Abana on 20 March 2014 albeit that, from the experience of Mr Fletcher considered above, that is not definitive. There is a new element for Mr White in the form of an invoice from JOMS dated 11 November 2014 which billed Mr White for the administration services provided by JOMS from in or about October 2013 to November 2014. As fairly acknowledged by the Defendant in evidence this invoice is problematic for the Defendant's case as regards Mr White. The invoice strongly suggests that Mr White continued with JOMS in 2013 and well into 2014 and I find that he did so.

61. At this point, I should say a word about the burden of proof. The starting point under the SA is that all clients are with JOML/JOMS. However the SA seeks to allocate clients as between the brothers. It seems to me that the starting point is that this allocation was implemented unless there is material to show otherwise or unless I can infer, under clause 8, that that did not occur. In terms of the relevant material to show that a person was instructing one party or the other, it would not be sufficient to show contact between the party and a client as such contact is permitted by clause 2 whether or not a client is instructing the relevant party. I must also bear in mind that both parties have failed to disclose commission statements for Q4 2013 which would provide strong evidence of which client was with which party as at the critical date of 31 December 2013.

62. It seems to me that the BUPA appointment of January 2014 does provide such relevant evidential material. The Claimant agreed that individuals did not in all likelihood surrender their policies but he was firm that we would not accept instructions in respect of a BUPA policy until he was authorised to do so. Whilst the timing of any application to BUPA could (and I make no finding on that) have been

timed to seek to ensure that BUPA clients would be unable to instruct the Claimant until after 31 December 2013, such a tactic would also have represented a certain risk that the Defendant would get there first and persuade the client to remain with JOML. At all events, there is no contractual undertaking given to ensure that the Claimant did apply forthwith to become an intermediary of BUPA and I find that, had any client with a BUPA policy needed assistance prior to the date of the Claimant's appointment in January 2014, the only available source of assistance was JOML and that those clients with BUPA policies therefore continued to instruct JOML.

63. Ms. D'Arcy Rice renewed her BUPA policy in August 2013 and the commission fee income accrued to JOML. She was not able to instruct the Claimant for BUPA until January 2014. However the Claimant gave evidence that she did instruct Abana briefly in September 2013 (it is not clear as to which policy) and then "cancelled and returned to JOML in 2013". This evidence has a ring of truth to it. It would be easier for a person not looking to tell the truth to deny that Ms D'Arcy Rice moved at all. I accept both that evidence and the evidence that Abana did not receive commission fee income from Ms. D'Arcy Rice in either 2013 or 2014. In my judgment Ms. D'Arcy Rice continued to instruct JOML as at 31 December 2013. I am fortified in this conclusion by the fact that there is no evidence that Ms. D'Arcy Rice's trust, Tiffany Trust, left JOML. It is still recorded as being a JOML client by Friends Provident at the end of Q3 2013 and nothing to indicate that it transferred to Abana. It follows that the D'Arcy Rice client account is within clause 8.

64. As regards Mr Hatch, he is also recorded as being a JOML client by Friends Provident at the end of Q3 2013. He is an Annex 1 client. Therefore he is only relevant under cls 8 and 9 if he continued to instruct JOML as at 31 December 2013. The Claimant relies on an admission in the letter before action dated 25 July 2018 in which the Claimant's solicitors gives credit under clause 9 for Mr Hatch. This is manifestly an error as Mr Hatch is an Annex 1 client. Schedule C to the Counterclaim correctly makes no claim in respect of him. However, even though made in error, giving credit for Mr Hatch suggests that he was a client of Abana and did not therefore continue to instruct JOML. This point is clarified in the Claimant's witness statement which states that he did transfer to Abana in 2014 but not before. Doing the best I can in the absence of the Q4 Friends Provident commission statement, I accept the Claimant's evidence and find that Mr Hatch was a clause 8 "retained Annex 1 client".

65. As regards the final person alleged to have remained with JOML, Mr Hall, JOML is recorded as receiving commission income from Skandia in respect of his investment in Q4 2012. There was no evidence before me that he instructed Abana, whether in 2013 or 2014 and I find that he continued to instruct JOML.

Defendant's clause 9 claim

66. This claim is the mirror image of the Claimant's clause 8 claim as it is in respect of clients allocated by the SA to the Defendant but who "instruct" the Claimant by 31 December 2013. In other words, these are clients whose names are not on Annex 1 but who instructed the Claimant. The Defendant's claim is summarised by Schedule C to the Counterclaim.

67. The first point is that, in order to qualify as an "existing client" and therefore allocated to the Defendant, income had to be received by JOML in Q2 2013. The Claimant

submits that there was no evidence of income to JOML in Q2 2013 in respect of the Van den Berg family. The Defendant refers to a letter from Mrs Van den Berg recording that the family trusts were transferred to Abana on 18 June 2013. However the relevant test to qualify as an existing client is whether the client was "responsible for income received by JOML" in Q2 2013. I have no evidence in support of such a submission either in relation to Mrs Van den Berg or in relation to the family trusts. I find that the Van den Berg client account was not an existing client and therefore that the trusts belonging to that account (the Spindrift, Fleur de Mer, Claremont and Mocha Trusts) were also not an existing client.

68. Schedule C provides for each client alleged to have instructed Abana by 31 December 2013 a date of leaving JOML at various mainly precise dates in July, August, November and December. I was urged to find that if clients left JOML, they must have instructed Abana because otherwise another financial adviser would have contacted JOML to ask for their files. This is one possible scenario but another is that the new financial adviser did not request the file or that the client only instructed Abana after 31 December 2013. On the date of such inferred instructing of Abana, I was urged to find that in the febrile environment of summer 2013 both brothers would have been rushing to contact clients and receive instructions. I do not find that suggestion proven. If anything the evidence suggests that the Claimant waited so that a maximum number of clients would only instruct him after 31 December 2013. In a civilian system of law, that might be regarded as an argument in favour of lack of good faith but there is no such general principle in the English law of contract. For each alleged clause 9 claim, in my judgment I must look at the evidence and only draw an inference if I consider that the evidence justifies it.

69. *Saddlers Consultancy* – In connection with a request to transfer all Saddlers business from JOML to Abana, Friends Provident on 18 September 2013 requested a copy of the letter to clients informing them of the transfer. This active step must in context have been taken by Abana. Against that, the FCA did not record Saddlers as an AR of Abana until 11 March 2014 but that does not prevent Saddlers already having instructed Abana. I find that Saddlers had instructed Abana prior to 31 December 2013.

70. *Mr Kilburn* – He was listed by the FCA with Abana as from 12 March 2014 and the Claimant's evidence was that he did not join Abana until 2014. The Defendant relies on Mr Kilburn's resignation letter dated 22 November 2013. The Claimant's disclosure of only the signature page of Mr Kilburn's agreement dated 12 March 2014 with Abana tends to corroborate the FCA date though the Defendant criticises the absence of the balance of the agreement and the possibility that the agreement was in respect of a relationship which pre-dated March 2014. However I do not feel that I can infer that that is the case. The presence in disclosure of the signature page is equally consistent with Mr Kilburn having just sent the signature page of the agreement on the date of signing or alternatively with the Claimant having only conserved that page. I find that the clause 9 claim in respect of Mr Kilburn is not proven.

71. *Mr Townsend* – the clause 9 claim in his regard was not pressed by the Defendant in closing. I was shown a letter dated 13 November 2019 which recorded that he worked for JOML as an AR from April 2011 to July 2012. He did not give evidence but there was no contrary evidence. Indeed the Defendant's witness statement records

that he understands from a conversation with Mr Townsend that Mr Townsend joined Abana in January 2014. I find the clause 9 claim in respect of Mr Townsend not proven.

72. *CD Futuro Trust* – this is Mr Whitcombe's trust. In the light of my earlier finding, this trust is part of an Annex 1 client account and in principle should not be able to form the basis of a clause 9 claim. The Defendant relies on the fact that the status of this trust as a clause 9 claim is definitively determined by the Claimant's admission of this clause 9 claim in the Defence to Counterclaim. I accept that submission. Pleadings are formal documents and, if a mistake has been made, in particular as to an admission, permission must be sought in accordance with the rules.

73. *IPS* – this was a corporate BUPA account. It is said to have left JOML on 30 July 2013. In fact it renewed its BUPA policy on 26 July 2012 and logically its BUPA policy would have come up for renewal in July 2013 but there is no evidence of income from IPS to JOML at any time except Q3 2012. Indeed the Defendant's witness statement relies on the fact that a fee for IPS' renewal in July 2013 but the inference to be drawn from that is that IPS was not a client in July 2013. The brothers did not agree that, in the event of annual renewals, the income would be apportioned over Q1-4 so that in Q2 of 2013 JOML could be deemed to receive income from the IPS. Accordingly the IPS does not qualify as an existing client within clause 9.

74. *Mr & Mrs Jones* – The Claimant's evidence was he recalled them having no contact and that they left the country in 2012 and wanted to cancel their policy. The Defendant argues that the Claimant was friendly with this couple and that it can be inferred that they instructed Abana. The difficulty is that there is no evidence that Mr and Mrs Jones ever instructed Abana. They appear to have had only BUPA health insurance which they renewed in January 2013 and so any desire to cancel cannot have been prior to January 2013 but equally they would be unlikely to have instructed Abana, even if they did renew for 2014 until January 2014. I find this clause 9 claim not proven.

75. *Mrs Wallis* – No document is relied upon as supporting a date of leaving JOML of 30 July 2013. She is recorded as joining Abana on 3 February 2014 through a request to BUPA to appoint Abana as her intermediary. Her BUPA policies of early 2013 expired in January and February 2014 which is consistent with her instructing Abana in early 2014 to ensure renewal of her policies. The clause 9 claim is not proven.

76. *Mr Coutts* – The Claimant admits a clause 9 claim in respect of one policy of insurance but not the other. The Defendant submits that admission that an existing client instructed Abana before 31 December 2013 in respect of one policy brings them within clause 9 not only for that policy but for other policies of insurance whenever that particular policy was moved to Abana. I accept that submission. The test is whether an existing client instructs Abana, not whether an existing client instructs Abana in respect of policy A, B or C. Mr Coutts is a clause 9 client in respect of whom the Defendant's counterclaim is proven for both policies listed in Schedule C to the Counterclaim.

77. *Mr Kent* – The Claimant submitted that there was no evidence of commission received by JOML in Q2 2013 and that therefore Mr Kent did not qualify as an existing client. Although I note an email from Mr Kent dated 20 May 2013 which

may or may not be confused as to whose client he was in 2013, he can only be an existing client if he was responsible for income received by JOML in Q2 2013. As to that, there is no evidence and the clause 9 claim is not proven.

78. *Mrs Allen* – This client would appear to be in the category of clients described by the Defendant's counsel in response to a question from the Court as whether the Defendant was dropping certain clause 9 claims as follows: "*It is likely that not all Schedule C clients are relevant*" which I understood to mean that counterclaims were not pursued in respect of all Schedule C clients. The adversarial approach does not exclude assisting the Court to the degree to which counsel are able. In this context, that includes identifying which the clients in respect of whom there is no arguable clause 9 claim on the evidence. As it is, certain clients listed in Schedule C were not mentioned by the Defendant's counsel in closing and this is one of them. Furthermore no income for which Mrs Allen is responsible in Q2 2013 has been identified despite the entry in Schedule C and she cannot qualify as an existing client. The policy dated 15 July 2013 was renewable annually and logically would have only needed to be renewed in July 2014. This clause 9 claim is not proven.

79. *Mr & Mrs Rowe-Jones* – They did not come to give evidence but did send a letter dated February 2020 confirming that they had not instructed the Claimant or his companies by 31 December 2013. They are recorded by the Defendant as leaving JOML on 5 July 2013 and an email dated 18 November 2013 records that Friends Provident informed JOML that it was no longer the "servicing agent". That strongly suggests that a third party had told Friends Provident that they were the new servicing agent and, in the light of other correspondence, Friends Provident would have asked to see at least some communication to the client. The Defendant relies on the Claimant's friendship with Mr & Mrs Rowe-Jones and urges me to draw the inference that Mr & Mrs Rowe-Jones instructed the Claimant or his companies before 31 December 2013. The Claimant gave evidence that the February 2020 note to say that they did not instruct the Claimant in 2020 was given to him on the occasion of collecting his children from their house. In my judgment there is a serious risk that they were mistaken in writing that note. I do draw the inference in this case as I believe it to be justified on the evidence already referred to, in particular the Friends Provident email combined with the evidently close relationship with the Claimant. The clause 9 claim in respect of Mr & Mrs Rowe-Jones is, in my judgment, proven.

80. *Mr & Mrs Arnold* – The Defendant relied on another Friends Provident email informing JOML that they were no longer the servicing agent and on the close personal relationship of the Claimant and Mr & Mrs Arnold. In the light of my conclusion in respect of Mr & Mrs Rowe Jones where I have not believed the Claimant's assertion and in particular of the Friends Provident email, I also entertain serious doubts as to whether Mr & Mrs Arnold are correct in their assertion in a short letter handed to the Claimant on the event of a party at their home in February 2020 that they did not instruct the Claimant or his companies in 2013. I also accept Mr Burton's submission that both couples could have come to give brief evidence in particular where a third party's document apparently contradicts their "statement" in their letter. I find the clause 9 claim in respect of Mr & Mrs Arnold proven.

The Assignment Issue

81. The Counterclaim relies on losses in fact incurred by JOML and in consequence an assignment dated 26 March 2019 ("the Assignment") is pleaded. This was only disclosed at the end of the first day of the trial which gave rise to a separate judgment in which I gave the Defendant permission to rely on the Assignment subject to certain costs consequences. The Assignment is entered into by JOML/JOMS in favour of the Defendant as assignee. After the recitals it provides as follows:

> "The Assignors hereby assign absolutely to the Assignee:
>
> (a) All and any debts or other sums of money owed to the Assignors by [the Claimant] whether arising under the Settlement Agreement or generally;
>
> (b) All of the Assignor's rights in, arising under and/or incidental to the Settlement Agreement and any and all causes of action for breach of the Settlement Agreement."

82. The relevant claims said to be assigned are JOML's: a) Losses caused by the alleged failure of the Claimant to comply with clause 13 regarding the delivery to the Defendant of physical records; b) Losses caused by the extra time taken for JOML to deal with complaints by dissatisfied clients against Mr Fletcher, an adviser, by reason of the alleged absence of client files; c) Claim for repayment of a director's loan taken out by the Claimant.

83. Taking first claim c), paragraph (a) expressly assigns such obligations, the Claimant realistically conceded that, if any money was due, the assignment is effective to assign the right of action and I find that it is an effective assignment of JOML's right.

84. With regard to claims a) and b), the Defendant submits first that as the Defendant incurred the management time, the Defendant can himself claim for the time spent. Second the Defendant submits that unless claims a) and b) can be asserted by the Defendant, there is a right under Clause 13 without a remedy. Third the Defendant submits that JOML had a cause of action in conversion, or breach of a director's duty and/or a duty to avoid conflicts of interest which survives the termination of the directorship.

85. The Claimant responds that it is the assignors' rights in the plural (as opposed to "the assignors or each of them") which are assigned and that any causes of action of the companies in respect of the files not delivered up are not joint but individual corporate causes of action. I reject this point. Interpreting the terms of the assignment, the same point would apply to the debts in paragraph (a) whereas this would be to interpret the document against the facts and circumstances known to both parties, i.e. that the Claimant may owe monies to JOML and/or JOMS but would be unlikely to have incurred a joint debt with both parties.

86. The Claimant argues that the Defendant does not have a personal claim through having carried out the work. I accept this point. The Defendant carried any work as director of JOML/JOMS and not on his own account. The loss is that of the

companies and the Defendant is in no better position than the shareholder of any company.

87. As regards subparagraph (b) of the Assignment, the words include any causes of action for breach of the SA. But JOML's cause of action in conversion for example is not a cause of action for breach of the SA but rather a cause of action in tort. It does however seem to me to be feasible to argue that a cause of action in conversion might be regarded as "incidental to the SA". The SA requires the Claimant to transfer all physical files relating to JOML to the Defendant. Assuming for the present breach by the Claimant, JOML cannot assert a right under the SA due to an express term excluding such a right (clause 16). However given that the Assignment was entered into the day before service of the Defence and Counterclaim, the facts and circumstances known to the contracting parties would, I infer, have included knowledge of the three claims sought to be assigned by the Assignment. Thus although claims a) and b) can exist wholly independently of the SA, in the context of this Assignment, in my judgment they can be regarded as being incidental to the SA. Accordingly the Defendant has a basis in law for asserting the three claims.

Defendant's clause 13 claim

88. Clause 13 relates to physical or hard copy records. Clause 10, in respect of which no claim for breach is advanced, relates to soft copy records in the form of the "online portal, forum".

89. It became apparent in the Defendant's response to questions from the Court that the Defendant until 2013 did not use electronic records. His modus operandi until 2011 was to keep at least some hard copy records in a filing cabinet at the Claimant's home where he stayed when he visited Portugal. He would call at the Claimant's home and then visit clients from there which enabled him to collect hard copy client files with which to hold client meetings mainly at their homes.

90. The extent of such files in Portugal is more difficult to ascertain. The Defendant worked approximately half his time in the UK and much of that time was spent working on Portuguese files. It was clear from his evidence that he did not use the digital copies of the files. I do not accept his evidence that he did not keep any documents in the UK. On the balance of probabilities, some files were kept in Portugal and at least some copies of some key documents which the Defendant needed to do his work were kept in the UK at the Defendant's home. I recall in this regard that when the Claimant later was returning to the UK, the Claimant recalled that the Defendant was reluctant not to have any access to hard copy client files in the month or so when the files were in transit. It seems highly improbable that the Defendant kept no documents in the UK with which to assist him in carrying out his work.

91. I have to take into account in this regard that I have found that over the period 2009-2013 the Defendant sought to exclude the Claimant from the HSBC bank account, then the Royal Skandia statements followed by the HSBC account and then the Friends Provident account. This would appear to be a consistent course of conduct designed to exclude the Claimant from JOML. The existence of that conduct suggests that the Defendant would have sought to protect his position in the event that his strategy was successful and the Claimant were excluded. In that scenario, in my

judgment the Defendant would have been aware of the need not to find himself without essential client documents if he successfully excluded the Claimant. That evidence makes it more likely that the Defendant increased the volume of documents which he kept in the UK during this period 2009-2013 and I come below to the issue of what happened to client files around the time of the Claimant's move back to the UK in July 2011.

92. The evidence of the Defendant's attempts to exclude the Claimant from access to the financial information of JOML also makes it more likely that the Defendant would not have been seeking to enforce any obligation on the Claimant's part to keep hard copy records as the Defendant's intent from blocking the Claimant's access to the various JOML accounts was to exclude the Claimant from JOML's business. Even had the Defendant done so, I find from the Claimant's wider conduct which is in evidence and from the tension in their relationship which the Claimant described, that from around 2009 (i.e. when the Defendant blocked the Claimant's access to the HSBC account) the Claimant would not have been receptive to requests from the Defendant to ensure that hard copy records were kept. It is not sufficient for clause 13 that the Claimant had a legal obligation as a director of JOML or otherwise to keep such records but, even assuming that he did have such an obligation, I have to consider whether it is proven and if so, to what extent, that he did keep such records and if so what happened to such records as were kept.

93. As regards the Claimant's approach to record keeping, he made extensive use of electronic records at all material times. The Defendant's witness statement recorded that the Claimant kept digital records on the computer and the client portal and contact with the client was noted on the file and the client portal. Letters relating to a client would be scanned to add to the computer and the client portal. Insurance company valuations would be scanned and skyped to the Claimant with an intent at least on the Defendant's part that they be placed in the filing cabinet and uploaded onto the computer and client portal.

94. In so far as that evidence relates to the use of digital media, I accept it. It is moreover supported by Mr Fernandes' evidence that "Electronic copies of the files were to my knowledge kept on the computer system maintained and administered by [the Claimant] and I understood these were routinely backed up". Some complaint was made in evidence about difficulties accessing the digital media and/or the Claimant blocking such access but the contemporaneous correspondence does not support this and no claim was advanced on this basis. The fundamental issue in 2011-2013 was that the Defendant was not digitally aware and wanted to use physical files, not the electronic media, as he had always used physical files albeit he has, since 2013, changed to use electronic files. The Defendant sought to suggest in evidence that a friend had found the digital media not to be accessible but his evidence was extremely vague given the claim which is put forward on the basis effectively of breach of cl. 13 through failure to deliver up records combined with lack of access to electronic records thus necessitating the reconstruction of records. The friend did not attend to give evidence and the fact that the Defendant did not appear himself to have tried to use the login details supplied to him or to take up the Claimant's offer through solicitors of assistance. If reconstituting files was going to costs tens of thousands of pounds, it would be reasonable to expect significant efforts to be devoted to accessing

the digital files which Defendant agrees existed but he seems to have made very limited and vague efforts to access them.

95. The Defendant's counsel argued that the Defendant would scarcely have carried out repeat work if he could have avoided it by accessing the digital records. This does not necessarily follow. The description of the repeat work appears to relate principally to the Financial Fact Find. It is not in my judgment a necessary inference from the repetition of the fact-finding exercise that the electronic media were not accessible. It is plain on the evidence that in 2013 the Defendant was himself not prepared to get to grips with digital records – he preferred hard copies. Also the SA expressly preserved the right of both parties to contact JOML clients. Repetition of the Financial Fact Find would in my judgment have given an opportunity to the Defendant to cement the relationship with those clients, thereby maximising the prospects of the clients remaining with JOML. In addition, though his evidence was that most of the time with the clients was spent on the Financial Fact Finding, he accepted that the meetings also gave at least a brief opportunity to consider the client's then current needs.

96. As regards hard copy client files up until July 2011, I find that such files as were located in Portugal were kept in a filing cabinet at the Claimant's home. The Claimant gave evidence that he "did not maintain any significant hard copy files". I recall in this regard that, when the Claimant attended a discussion with RSM Tenon to claim £214,144.68 in expenses, he did so without, on the evidence, supplying any documents whatsoever to RSM Tenon. In short, the "file" for each client account was, so far as the Claimant was concerned, maintained digitally. He did not print documents out.

97. The timing of the Claimant's keeping of files was not explored in the evidence but I consider that to be an important feature because of the Defendant's action in seeking to exclude the Claimant from the financial information of JOML which commenced in 2009. Up until that time, I am satisfied that the Claimant did file in client files documents of which he had a hard copy, which seems to have been only a small proportion of the documents in fact included in the electronic files, but that only gives me limited help with regard to what hard copy client files were kept in the period 2009-2011, still less for the period 2011-2013.

98. In his evidence, though he accepted that he maintained digital copies of client files, the Claimant was very resistant to the notion that he was in charge of the back office of JOML dealing with the paperwork. He saw his main role as being to find new clients from the schools his children attended, from the golf courses close to his home and other sources and I have already noted that the Defendant remarked on his success in this. Such resistance in evidence could have been designed to fend off the counterclaim for reconstituting files but in my judgment that is not the case. I accept that, though he did add hard copy documents which came into his possession to the client files up until at least 2009, he did not see this as the relevant filing task which was to keep the digital client file.

99. The period after his equal joint venture brother (the Defendant) decided not to use the HSBC bank mandate which the Claimant had prepared but authorised a third party (the Defendant's wife) to be the co-signatory on the JOML bank account was in my judgment a clear opening of hostilities. The evidence was that this was sometime in 2008. The fact that this situation was finally modified in November 2010 so that the

Claimant became a co-signatory with his brother does not change that fact nor re-establish trust following the Defendant's obstructiveness on the financial aspects of JOML in which the Claimant as co-director of JOML was equally entitled to participate. This conduct is in my judgment likely to have made the Claimant less inclined to carry out tasks for the convenience of the Defendant.

100. I find it not to be proven that the Claimant continued to maintain hard copy client files in 2009-July 2011.

101. Mr Fernandes could not recall precisely whether there were one or two filing cabinets and accepted that there might only have been one. There is also the Claimant's unchallenged evidence that the filing cabinet also housed a significant volume of the Claimant's personal papers which would leave only modest space for client files. Mr Fernandes expected there to be hard copy client files in the filing cabinet but there is no suggestion that he checked the extent of the files and he would be unlikely to need for example a Financial Fact Finding document in order to sell house insurance or car insurance and in any event he often met the Claimant/Defendant at a local hotel. It is also suggested that maintaining physical files in Portugal was a regulatory obligation albeit the Claimant's evidence was that a durable medium was the requirement. Even if I assume that a physical file was a requirement of Portuguese law, I find that the Claimant did not accord importance to the physical files because, so far as he was concerned, the files were kept digitally.

102. A critical event which was only touched on in the evidence was that sometime in early 2011 the Claimant decided to relocate to the UK and the Claimant left Portugal in July 2011. The Defendant's evidence was that after July 2011 the JOML/JOMS registered offices were at the offices of their accountant. After July 2011 the Claimant lived in Winchester and the Defendant continued living in Hertfordshire. There is no evidence to suggest that the Defendant called at Winchester to collect files before catching flights from Luton to Portugal and that would have been impractical in any event. Accordingly, if the files were critical to the operation of the Defendant's business, he would have had to have had access to them from July 2011 and would be likely to have taken steps before and after date to have secured access to the files as far as possible.

103. Although the Defendant was anxious in evidence to portray the Claimant as the person who kept physical client files and Mr Fernandes is clear that some physical client files were kept at the Claimant's home, neither addressed the situation after the Claimant left Portugal. The Defendant asked the Claimant on 20 October 2011 for "*A description of the areas you see as your responsibilities*". On 9 August 2012, the Defendant complimented the Claimant on the work he was bringing in whilst I have already found that the Defendant was, behind the Claimant's back, trying to cut the Claimant out of JOML's communications with Royal Skandia and Friends Provident as well as the HSBC bank account. The purpose of the compliment appears to be at the end of the email: *"... please do not forget though that we still need to keep a copy of the fact-finds being done*". There is no evidence of the Claimant accepting either to keep these documents or other physical files in the period after July 2011. To the extent that fact-finds were not retained, it is possible that this exercise would need to be repeated for regulatory purposes but, though that is a possible breach of duty by the Claimant (if he had such an obligation), it does not establish that the Claimant did retain such fact-finds. On the balance of probabilities, I find that he did not do so.

104. After July 2011, I do not find it proven that the Claimant was keeping even a basic form of hard copy client files. So far as he was concerned, what files he had been keeping were for the Defendant's benefit. The Defendant clearly hoped that he was keeping such files and expected him to do so. It is quite possible that the Claimant had an obligation to JOML/JOMS to keep paper copy files and, if he did have such an obligation, he could well have been in breach of that obligation but that is not the question before me. The relevant question is whether the Claimant was maintaining hard copy files after July 2011 and I do not find this to be proven. It was around this time that the Defendant frequently asked the Claimant what he was doing in the business. I find that the premise for that question was that the Claimant had in the past stored client documents which came to him in hard copy and organised them into client files but was not now doing so and so the Defendant was at a loss to know what the Claimant was contributing to the business.

105. The result was that any limited hard copy client files held by the Claimant in 2013 were essentially of historic documents which was part of the complaint which the Defendant made against the Claimant in respect of the box of documents delivered to the Defendant in September 2013. The fact that what files were forwarded in September 2013 contained out of date documents supports my conclusion that it is not proven that the Claimant was maintaining hard copy client files once the relationship came under strain from 2009. The other part of the complaint related to allegedly missing files with which I deal below.

106. On the documents, there is silence on the issue of client files in what I find to be the critical period which is immediately before and after July 2011. If the reality was that at that time that the client files were essential for the Defendant to carry on the JOML business, he would have said so and insisted or tried to insist on having access to them. In contrast he tried to cajole the Claimant into keeping physical files whilst also trying to exclude the Claimant from the business. The lack of contemporaneous complaint also supports a finding that the Defendant found a workable solution for the client file issue in 2011.

107. I note that the Claimant instructed his solicitor in February 2014 that he had given many files since 2011 to the Defendant and the remainder in 2013. The Defendant's evidence was that the files were stored in Portugal but that cannot be the case after July 2011 unless they were transferred to the custody of a third party and neither party suggests that that is the case. The Claimant's solicitor also asked the Defendant to identify which files he was lacking and I have been shown no evidence that the Defendant did so. The Claimant gave evidence that, prior to his move back to the UK, the Defendant did not want such files as there were to spend a month being shipped back to the UK. On the Defendant's evidence, the Claimant's evidence is credible as the Defendant says he liked to pick up the hard copy file before visiting clients. The date is disputed by the Defendant but it is common ground that the Defendant was making regular trips to Portugal and I find that the Defendant did take possession of files before the Claimant moved back in 2011. The Defendant explained that because of the tension between them, he made less frequent visits to Portugal which therefore increased the need for the Defendant to have some client files available to him whether or not they were in fact kept in the UK. In making that finding, I am mindful that I have found both parties to have been untruthful in part but on the balance of probabilities I accept the Claimant's evidence that the Claimant did

transfer client files to the Defendant in the periods both before and after the Claimant's return to the UK in July 2011 and sent the remaining files to the Defendant in September 2013. It follows that in my judgment the Claimant is not in breach of clause 13. His obligation under clause 13 was not to maintain physical files but to transfer all physical files and records which must be read as being those within his possession or control on 18 July 2013. I find that he discharged this obligation.

Claimant's Director's Loan

108. This is a counterclaim in the sum of £8,865 for a director's loan alleged to be outstanding for the Claimant with JOML. The Defence to Counterclaim alleges that this was taken into account by RSM Tenon in assessing expenses.

109. RSM Tenon were engaged to determine the respective expenses claims of the brothers against JOML in order to determine the net cash in the bank account of JOML for the purposes of the 50/50 share under SA clause 3. Their letter of 29 August 2013 refers to claims for school fees being dealt with in 2 possible ways: payment by the company followed by a debit to the Claimant's loan account to be settled by a declared dividend or payment of monies to the Claimant to settle fees. In both cases, the view of RSM Tenon was that it was not the custom and practice to settle the costs as an expense of the company. That paragraph is considering a claim for over £20,000 in school fees, not any existing director's loan account.

110. However, when adjusting the Claimant's claim for £214,144.68, the first item deducted from that is £8,865 in respect of the director's loan account. A further item deducted is £24,000 odd for school fees. The two items are different however. In claiming £24,000 for school fees, the Claimant is claiming reimbursement of a personal payment or liability. The £8,865 would only be a director's loan if the company had paid that sum. Accordingly RSM Tenon's conclusion is that it is not reimbursing as an expense either the £8,865 which JOML has paid but recorded as a director's loan or the sums which the Claimant either has paid or is due to pay.

111. The Claimant relied on the Defendant's solicitor's subsequent statement that RSM Tenon was not competent to deal with a director's loan but this does not in my judgment assist. RSM Tenon had refused to reimburse as expenses any sums paid or payable in respect of school fees. In my judgment that left the director's loan outstanding and I reject the Claimant's submission that the RSM Tenon letter had dealt with the director's loan. It follows that, in the light of the Assignment, the Defendant is entitled to judgment in respect of the director's loan which I find still to be outstanding.