Neutral Citation Number: [2021] EWHC 1504 (QB)

Case No: QB-2020-004498

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/06/21

Before:

MR JUSTICE CAVANAGH

- -

Between :

(1) CREDICO MARKETING LIMITED **(2) PERDM TRADING LIMITED**	**Claimant**
- and -	
(1) BENJAMIN GREGORY LAMBERT **(2) S5 MARKETING LIMITED** **(3) GILLES JEAN BAUDET** **(4) POWER 21 LIMITED** **(5) INTERACTIVE LIMITED**	**Defendant**

- -
- -

John Mehrzad QC and **Matthew Sheridan** (instructed by **Addleshaw Goddard**) for the **Claimants**
Paul Casey and **Nathan Webb** (instructed by **Brandsmiths**) for the **First and Second Defendants**

Hearing dates: 12, 13, 14, 17, 18, 19 May 2021

- -

Approved Judgment

Mr Justice Cavanagh:

Introduction

1. The First Claimant ("Credico") is a business which provides direct or face-to-face marketing services. These services are provided by sales representatives who are known as Independent Sales Advisors ("ISAs"). ISAs sell to customers through residential door-to-door sales and through the use of pop-up booths at locations such as shopping centres and supermarkets. (Direct marketing can also consist of face-to-face selling to business customers, and telesales, but this case is not involved with these types of direct marketing). There is no direct contractual relationship between the ISAs and Credico. Rather, Credico contracts with Marketing Companies ("MCs") which are based in cities and towns across the United Kingdom, and the MCs then engage and contract with the ISAs, on the basis that they are independent contractors rather than as employees of the MC, to do the actual selling. MCs are invariably owned by an individual who started off as an ISA and who has been nurtured and encouraged by the owner of the MC in which he or she began direct selling until s/he was ready to start up their own MC. MCs and ISAs are remunerated entirely by commission. Credico pays the MC commission for each successful sale or lead obtained by an ISA, and the MC pays the ISA a share of the commission in their turn. In addition, when the owner of an MC has sponsored an individual to spin off their own MC, the first MC owner will receive "override" commission from Credico for the sales achieved by the new MC. Where a new MC owner sponsors someone else to start up a further MC of their own, the first MC owner will receive override commission for the "second generation" or "third generation" etc MC that results. In this way, Credico (and its predecessor, the Second Claimant, "PerDM")

have built up a network of MCs, and successful MC owners have a subsidiary network of their own.

2. As I will explain in greater detail later in this judgment, the principal role of Credico is to find clients who wish to make use of direct marketing services, so as to provide work for MCs and ISAs to do. Credico also provides various other services to MCs, although the exact nature, scope, and value of these services has been in dispute in these proceedings. These other services include providing guidance, advice, and know-how to MCs, along with "back-office" services, such as banking and insurance facilities. Credico imposes a charge upon MCs for some of these services.

3. When an individual is invited to start up an MC, he or she enters into a contract with Credico (and formerly PerDM) in a standard form, known as the Trading Agreement. The Trading Agreement in effect ties in the MC to operate solely as part of Credico's direct marketing network. Though the Trading Agreement does not promise that Credico will offer the MC a particular amount of work, or, indeed, any work, the joint intention at the time that Trading Agreements are entered into is that Credico will provide campaigns for the MCs, which the MCs will fulfil through the use of their ISAs. The Trading Agreement is terminable by either side upon 14 days' notice.

4. The Trading Agreement contains two restrictive covenants, which are at the heart of this case. The first restrictive covenant, at clause 21.1, applies during the currency of the Trading Agreement. It prohibits the MC from carrying out or being involved in any similar type of business as outlined in the Trading Agreement. The second restrictive covenant, at clause 21.2, prevents the MC, during the period of six months following the termination of the Trading Agreement, from carrying out or being involved in any similar business conducted in a similar manner to that contemplated

by the Trading Agreement, within a radius of 10 miles of the principal place of business of the MC during the last six months of the Trading Agreement.

5. Clause 16 of the Trading Agreement provides that the owner of the MC will sign a document ("the Guarantee") under which he or she personally guarantees the obligations of the MC under the Trading Agreement. A standard form Guarantee is appended to the Trading Agreement. Clause 10 of the Guarantee states that "I agree that Clause 21 of the Agreement shall apply to me as though for reference to "the Company" in the first line there was substituted a reference to myself."

6. The Trading Agreement also contains a standard form ISA Agreement which MCs are required to use. A central feature of the ISA Agreement is that it is drafted with a view to ensuring, so far as possible, that ISAs are not employees of MCs. Indeed, it is a key aspect of the business model of Credico that MC owners are not employees of Credico but run their own separate businesses, and that ISAs are not employees of the MC for which they work. This is designed to minimise costs, and also to place a distance between Credico and the activities of MCs and ISAs in the Credico network. The guidance that is provided by Credico to MCs about how they should run their businesses constantly stresses that MCs should make clear that ISAs are free to act as they wish and, for example, that MCs should not instruct ISAs to go to particular streets or locations to do the direct marketing.

7. The First Defendant, Mr Lambert, was the owner and sole director of S5. He entered into a Trading Agreement on S5's behalf, and signed the Guarantee on his own behalf, on 4 August 2010. Prior to that, in 2009, he had started as an ISA and had then risen swiftly through the ranks until he was offered his own MC. At the material times for the purposes of these proceedings, S5 was operating out of an office in

central Manchester. Mr Lambert was successful, and was one of the few MC owners to have been granted Regional Consultant status by Credico. He managed a large team of ISAs, and by 2020 there were approximately 19 other MCs is his network which had been started by former ISAs whom he had sponsored.

8. In these proceedings, the Claimants allege that, in November and December 2020, S5 and Mr Lambert acted in breach of the restrictive covenants in the Trading Agreement by encouraging and assisting S5 ISAs to conduct door-to-door sales campaigns for a client called Novibet, and then for a rival to Credico called Energy Sales Marketing ("ESM"). The ESM campaign was called the "60 Second Challenge". Mr Lambert and S5 do not deny that S5 ISAs carried out work for Novibet and then for ESM. Mr Lambert said that he arranged for this work to be done because Credico was failing to provide any work for S5 and its ISAs to do, and he needed to find a source of income for his ISAs in the run-up to Christmas. Mr Lambert and S5 dispute, however, that the two restrictive covenants in the Trading Agreement are enforceable, on the basis that (1) the Trading Agreement was entered into between S5 and PerDM, and PerDM ceased trading on 1 January 2016 and there was no novation of the Trading Agreement to Credico; (2) in any event, neither restriction is enforceable because it goes further than reasonably necessary to protect Credico and/or PerDM's legitimate business interests (if any). Mr Lambert also contends that, even if the restrictions in the Guarantee would otherwise be enforceable, they are rendered unenforceable because they are in breach of the Statute of Frauds. Still further, Mr Lambert says that the dealings that he had with Novibet and ESM did not breach either of the restrictive covenants. He said that he did the work with Novibet with the agreement and permission of Credico. As for the 60 Second Challenge, he said that this was not within the terms of the restrictive covenants, because ESM was not engaged in a

similar type of business to that contemplated by the Trading Agreement, as ISAs working for ESM did not carry out door to door sales themselves: rather, they approached householders with a view to obtaining leads which would then be followed up by telephone sales advisers. He also contends that much of the dealings that he had with ESM did not amount to competitive activity with Credico.

9. On 3 December 2020, the Claimants wrote to Mr Lambert and S5, requesting that they sign draft undertakings ("the Undertakings") that were enclosed with the letter, and warning that if Mr Lambert and S5 failed to do so, the Claimants would terminate the Trading Agreement and would apply to the court for injunctive relief. The draft undertakings broadly mirrored the restrictive covenants in the Trading Agreement. On 7 December 2020, Mr Lambert signed and returned the Undertakings on his own behalf and on behalf of S5, but only after deleting the wording in the draft Undertakings which referred to the consideration that had been given by the Claimants in return for the Undertakings. He did not draw the attention of the Claimants to this deletion.

10. The Claimants' solicitors, Addleshaw Goddard, sent Mr Lambert and S5 a letter before action on 10 December 2021. Mr Lambert responded the following day by giving notice of termination of the Trading Agreement, which therefore expired on 25 December 2020. On 17 December 2020, the Claimants issued a claim form and an application for injunctive relief to enforce the restrictions in the Trading Agreement (and for ancillary relief). Mr Lambert and S5 consented to the injunctive relief sought, and, in an order made by consent on 22 December 2020, Jacobs J granted the injunctive relief and gave directions for a speedy trial of the claim. As a result of the interim injunction, neither Mr Lambert nor S5 has traded since December 2020.

11. The speedy trial was heard before me over six days from 12-20 May 2021. Pursuant to an order of Mr Geraint Webb QC, sitting as a Deputy High Court Judge, dated 29 January 2021, I am to determine issues of liability and of injunctive relief. If and in so far as issues of damages arise, they will be dealt with at a later stage.

12. The Claimants added the Third to Fifth Defendants to the proceedings in January 2021, essentially to claim that the Third to Fifth Defendants had induced Mr Lambert and S5 to breach their contractual obligations towards the Claimants. Proceedings against the Third to Fifth Defendants were stayed by Master Thornett on 22 April 2021, pursuant to a Tomlin Order that had been agreed between the Claimants and the Third to Fifth Defendants on 9 April 2021. In other words, the proceedings between the Claimants and the Third to Fifth Defendants have been settled. The Third to Fifth Defendants have, therefore, played no part in the speedy trial.

13. On 23 April 2021, the Claimants applied to re-amend the Amended Claim Form so as to add claims of unlawful means conspiracy and unlawful interference against Mr Lambert and S5. By consent, Hilliard J ordered that this amendment application would be heard as a consequential matter upon handing down of the judgment after the speedy trial, and that the speedy trial would not deal with the unlawful means conspiracy and unlawful interference allegations.

14. The period of the post-termination restriction will expire on 25 June 2021, approximately a month after the end of the hearing of the speedy trial. I have, therefore, endeavoured to prepare my judgment as soon as possible after the speedy trial, bearing in mind that I have heard five days of oral evidence, very detailed legal submissions, and I have been provided with a bundle of documents which was several thousand pages long, and a bundle of authorities consisting of over 50 authorities.

15. The hearing before me took place as a remote hearing on MS Teams.

16. I have heard evidence on behalf of the Claimants from Ms Debbie Shaw, Credico's Financial Operations and Events Manager, Mr James Pollard, Head of Channel, with ME Expert Limited ("ME Expert") a group company of Credico Holdings Ltd, of which Credico is the UK Subsidiary, Mr Joshua Cote, National Consultant, who oversees sales for Credico in the UK (but who is not an employee of Credico), and Ms Jenny Linney, the Global Chief Financial Officer of Credico. On behalf of the Defendants, I have heard from Mr Lambert, and from Mr Ashley Allen, the sole shareholder and director of ESM, and a director of The Interactive Outsource Ltd ("Outsource"), and from Mr Leepaul Scroggins, who is sales manager of ESM and a director of Outsource.

17. A considerable amount of the documentary evidence before me was included in one of two Confidentiality Rings which were established pursuant to the order of Griffiths J dated 9 April 2021. When the contents of documents in the Confidentiality Rings were referred to during the course of the oral evidence, they were shown to the judge, the witness, and counsel, but were not shown to others in the virtual courtroom. In this judgment, I have endeavoured to avoid referring directly to any material that is contained within the documents in the Confidentiality Rings, unless that material was referred to, without objection by the parties, during the course of the hearing.

18. The Claimants have been represented before me by Mr John Mehrzad QC and Mr Matthew Sheridan, and Mr Lambert and S5 by Mr Paul Casey and Mr Nathan Webb. I am grateful to all counsel and the parties' legal teams for their excellent submissions, both written and oral, and for the high standard of case preparation, that was carried out in a relatively short time.

19. I will first set out my findings of fact in somewhat greater detail than in the factual summary set out above. I will also set out the relevant terms of the Trading Agreement, the Guarantee, and the Undertakings.

20. I will then deal with the issues that arise in this speedy trial in the following order:

The parties to the Trading Agreement and the Guarantee in 2020

(1) Was there a novation of the Trading Agreement in 2016, so that Credico is entitled to take proceedings with a view to enforcing the restrictive covenants?;

(2) Alternatively, is there an estoppel by convention which prevents Mr Lambert and S5 from disputing that Credico should be treated as if it was a party to the Trading Agreement?;

(3) Was the Guarantee part of the Trading Agreement and/or was it novated so that Credico can rely upon it? This raises the question whether the Guarantee cannot have been novated because the requirements of the Statute of Frauds 1677 were not complied with in 2016. Alternatively, does estoppel by convention apply so that Mr Lambert and S5 are prevented from denying that Credico should be treated as a party to the Guarantee?;

(4) If there was no novation or estoppel by convention, so that, in 2020, the contracting parties to the Trading Agreement and the Guarantee were still PerDM, S5, and Mr Lambert, are the restrictions unenforceable because PerDM ceased trading in 2016?;

The enforceability of the restrictive covenants

(5) What is the applicable test and what is the level of scrutiny that should be applied to the enforceability of the covenants in clause 21.1 (if the doctrine of restraint of trade applies to it at all) and clause 21.2 of the Trading Agreement?;

(6) What is the meaning of phrase "any similar type of business", and "any similar business", in clauses 21.1 and 21.2 of the Trading Agreement, respectively?;

(7) What is the meaning and effect of the 10 mile geographical restriction in clause 21.2 of the Trading Agreement?;

(8) Does the doctrine of restraint of trade apply to the restriction in clause 21.1 of the Trading Agreement?;

(9) If the doctrine of restraint of trade applies to it, does the restriction in clause 21.1 of the Trading Agreement/the Guarantee go no further than reasonably necessary to protect the Claimants' legitimate business interests? (This issue, and the next one, encompasses the question as to which, if any, of the Claimants' legitimate business interests are engaged.);

(10) Does the post-termination restriction in clause 21.2 of the Trading Agreement/the Guarantee go no further than reasonably necessary to protect the Claimants' legitimate business interests?;

The Undertakings

(11) Did the Undertakings given by Mr Lambert on 7 December 2020 constitute a binding contract between the Claimants, on the one hand, and himself and S5, on the other?;

(12) If so, are the restrictions in the Undertakings enforceable under the doctrine of restraint of trade?;

Breach of the covenants

(13) If the covenants in the Trading Agreement, the Guarantee and/or the Undertakings are enforceable, did Mr Lambert and/or S5 act in breach of them?;

Misuse of confidential information/know-how

(14) Did Mr Lambert and/or S5 misuse and/or disclose confidential information and/or know-how belonging to the Claimants in breach of the implied contractual duty and/or equitable duty of confidence?;

Delivery up of documents

(15) Did Mr Lambert and/or S5 fail to deliver up all documents provided to them under the Trading Agreement on termination of the Trading Agreement, in breach of Clause 20.1.4 thereof and/or the injunction granted on 22 December 2020?;

Declaratory relief

(16) Is Credico and/or PerDM entitled to declarations that (a) the restrictions in clause 21 of the Trading Agreement and/or the Undertakings are enforceable; and (b) they were entitled to interim relief against Mr Lambert and S5 in the terms of the injunction?;

Injunctive relief

(17) If the post-termination restraint in clause 21.2 of the Trading Agreement and/or the post-termination covenant in the Undertakings are enforceable, should the

court exercise its discretion to grant an injunction to enforce them until they expire on 25 June 2021?; and

(18) Should the court grant injunctive relief to restrain misuse and/or disclosure of confidential information and/or know-how belonging to the Claimants, and to address Mr Lambert and/or S5's alleged failure to deliver up documents?

Findings of fact

Introduction

21. A very great deal of evidence was placed before me, in the form of detailed witness statements and voluminous documentary evidence, running to many thousands of pages. In particular, the way in which Mr Lambert's MC was operated, and the extent to which Credico provided him and S5 with support, guidance, and know-how, was explored in very great detail. I have taken all of this evidence into account in the findings of fact that I make in this judgment. I will summarise the way that the businesses operated, and will deal with some parts of the evidence in considerable detail, but it is not necessary, and would not be helpful, to recite the evidence in microscopic detail.

The credibility of the witnesses

22. In my judgment, each of the witnesses who gave evidence before me endeavoured to tell the truth. As Mr Mehrzad QC, for the Claimants, submitted in his closing submissions, Mr Lambert was, at times, heated and excitable during the course of his evidence. He would sometimes start to answer a question before Mr Mehrzad QC had finished asking it. However, it is understandable that Mr Lambert should be tense and emotional during the trial. He said during his evidence that he had not checked for

restrictive covenants in the Trading Agreement before embarking on efforts to find alternative work for his ISAs in November 2020, and it is clear that he was shocked and resentful that Credico should bring proceedings against him in these circumstances. It is also clear that he is a tough character who is proud of his achievements in the direct marketing business in the last decade or so and who firmly believes that this is the result of his own skills and efforts, rather than of any assistance that Credico may have provided to him. Mr Lambert was keen to downplay the amount of useful assistance he had received from Credico and Mr Cote. On the other hand, Mr Cote and Ms Linney were keen to persuade the Court that the support that they provided to MCs, including S5 and Mr Lambert, was substantial and invaluable.

23. I do not think that this means that either Mr Lambert or Mr Cote and Ms Linney were deliberately untruthful in the evidence that they gave to the court about the way in which the businesses operate. Indeed, a very substantial amount of the detailed evidence about how the face to face marketing business run by Credico and its MCs operates was not in dispute. To the extent that there was a disagreement between Mr Lambert and the Claimants' witnesses, and especially Mr Cote and Ms Linney, about the amount of support and assistance that Credico provided to MCs in general, and S5 in particular, this is explained, in my view, by differences in perspective. There was agreement, in general terms, about the services that Credico provide to the MCs, though there was some disagreement on this topic, and there was considerable disagreement about how useful or valuable those services were. For example, Mr Cote had a very different recollection of the amount of assistance that he had provided to Mr Lambert, as compared to Mr Lambert's recollection, but this was because they had very different views about how much help Mr Lambert needed and how much

benefit Mr Cote's advice and support was to him, rather than because one or the other was not telling the truth about what had taken place. Mr Cote, Mrs Linney and the other Claimant witnesses genuinely believed that the support that they provided to MCs, including S5, was very significant, whereas Mr Lambert genuinely believed that it did not amount to very much. Just as Mr Lambert was cross-examined on the basis that he was not telling the truth, it was put to Mr Cote in cross-examination that his evidence was not truthful. I accept that his evidence was truthful.

24. I will deal with the contested evidence about the extent of Mr Lambert's dealings with ESM and ESM's backer, Mr Gilles Baudet, in November and December 2020 in the findings of fact below.

Mr Lambert and S5

25. Mr Lambert began working as an ISA in PerDM's network in 2009. He worked for Co & Co MC, which was run by Olivia Coudert. Ms Coudert left the business in early 2010 and Mr Cote approached Mr Lambert to open his own MC in Birmingham, with Mr Cote as his sponsor. Mr Lambert agreed to do so and incorporated S5 in May 2010. He signed the Trading Agreement in August 2010. He did not take legal advice before doing so, and was not invited to do so by PerDM. By 2013, Mr Lambert was the sponsor of 5 other MCs, and of 3 "second generation" MCs. Over the years that followed Mr Lambert moved from Birmingham to Reading, then to Liverpool and Newcastle before settling in Manchester in September 2016.

26. From time to time, S5 adopted various trading names. For some time prior to 2017, the company traded as "Blue Moose". In 2017, Mr Lambert changed the trading name to "Jump Manchester" and in September 2020, he adopted the trading name of

"Immabee". By December 2020, there were 19 first and subsequent MCs in Mr Lambert's network. In 2020, S5 was one of five MCs that were based in Manchester.

27. Mr Lambert was one of the more successful and prominent MC owners in the PerDM/Credico network, and as such regularly attended and spoke at owner seminars and conferences. In 2014-15, Mr Lambert became a Regional Consultant, which entitled him to a higher level of override commission on his sponsored MCs.

28. I have been shown figures for the income received by S5 from Credico and PerDM since 2010. During this period the total sum received by S5 in commission and overrides was almost £3.5 million. In 2016 and 2017, S5 received £450,000 and £500,000, respectively. Not all of this represented profit for Mr Lambert, however, by any means. He had to pay the commission to ISAs and the overheads of S5 from these sums. I do not have profit and loss figures for S5 for recent years, but I have seen accounts for 2014 and 2015, which show that the profit made by Mr Lambert from the business in each year was about £38,000, as compared to commission and override income of about £311,000 and £347,000, respectively.

The change from PerDM to Credico on 1 January 2016

29. The acquisition of PerDM's business by Credico was carried out by way of a share sale. On January 1, 2016, in a three-line letter, Jesse Young, the owner and director of PerDM wrote to Antoine Nohra, Director of Credico, to confirm his agreement to sell 100% of the share capital of PerDM to Credico, with effect from that date. The consideration was stated to be 33.3% of the share capital of Credico. There is no other documentation relating to this transaction in the hearing bundle.

30. MC owners, including Mr Lambert, were notified of the forthcoming change by email from Kealy Ditchfield, PerDM's Director of Operations, dated 8 December 2015. The email said, "I write to you with great news! As of January 1, 2016, PerDM London and Credico Chester will merge to become one company….. You won't see any operational changes and the people you currently contact for various things will remain exactly the same."

31. The email enclosed a letter headed "Notice of Assignment of Contract" which stated:

> "Pursuant to Clause 22.3 of Marketing Company Trading Agreement signed by you please be advised that as of 1st January 2016 all interests and rights under the Marketing Company Trading Agreement entered into between PerDM Trading Limited…. and your company will be permanently assigned to Credico Marketing Limited…
>
> Please be advised that because of the proposed assignment all of the obligations and rights of the former party to this contract are now the responsibility of the new party to this contract."

32. Mr Lambert was not asked to sign anything to signify his agreement to this change. However, the relationship continued largely as before. Credico provided the campaigns and paid the commission that had previously been the responsibility of PerDM. Mr Lambert and S5 dealt with Credico in the same way that they had previously dealt with PerDM. The emails sent to Mr Lambert from management and support staff at Credico had Credico's logo on them. In his witness statement, Mr Lambert said of the change, "As far as I was concerned it didn't really change anything….I operate a marketing company, and, whether PerDM or Credico, they were simply a supplier, a middle man between the marketing company and the end clients."

33. Mr Lambert said, however, that the culture changed somewhat when PerDM became Credico. PerDM, under Mr Young, was, in Mr Lambert's view, a people-focused

business, whereas Mr Lambert described Credico as a spreadsheet-focused business. Credico was not as financially generous as PerDM had been, and, in particular, would claw back commission payments in the event of the cancellation of a sale.

34. The main difference between the way that PerDM and Credico operate is that PerDM worked as a "middleman" for unconnected businesses that were looking for someone to run direct marketing campaigns. Credico, in contrast, mainly runs campaigns for businesses that are part of the Credico group, such as Money Expert ("MEX"), an associated company in the Credico group which operates a price comparison service in the utility and broadband sectors. MEX retains Credico to provide campaigns in order to persuade householders to swich services.

The business model operated by Credico and the MCs

35. These proceedings are not concerned with old-fashioned door-to-door selling, in which products such as encyclopaedias, vacuum cleaners, or cleaning materials are offered for sale to householders. Credico, the MCs, and the ISAs, are mainly involved in direct marketing in the charity fundraising, energy, broadband/telecoms, and home security sectors. Only a few types of products or services are suitable for the type of face-to-face marketing that is provided by the parties to these proceedings. This is because such marketing is only commercially viable for high value, long-term, clients who are selling products and services which are suitable for selling door-to-door and which are likely to be attractive to householders or to those who pass by a pop-up display booth. Often, where the energy or broadband/telecoms sector is concerned, the ISA will promote a price comparison service, with a view to persuading the customer to switch providers in order to save money. In such cases, the purpose of the first approach by the ISA is normally to obtain an agreement in principle to switch

provider, which is then followed up by a telephone sales adviser who speaks to the customer with a view to entering or concluding into a contract with them.

36. The direct marketing business sector with which these proceedings are concerned is composed of a number of layers. At the top are the clients who commission campaigns in order to market the services that they provide or the charities that they are responsible for. Next, there is the company, such as Credico and PerDM, which contracts with the clients to arrange for the campaigns to be run. Credico is one of only two or three companies which perform this function on a large scale, nationwide. There are, however, a number of other businesses who operate a similar business model on a much smaller scale. Beneath the company at Credico's level are the MCs, and beneath them are the ISAs who each work for a particular MC as an independent contractor. At the bottom of the structure are the customers, the householders or passers-by, to whom the services or charities are marketed by the ISAs.

37. Credico is a UK subsidiary of Credico Holdings Limited. Credico's clients include charities and large energy and broad-band companies such as Shell and, indirectly, BT. From time to time, Credico enters into agreements with these companies or with other companies in the Credico group to arrange for campaigns to be carried out for them. The campaigns which Credico/PerDM contract to run are long-term, running for many months and often for years. For the last four years or so of the relationship between Credico and S5, S5 was exclusively concerned with marketing the price comparison service provided by MEX. Prior to that, much of its work was in the charity sector.

38. Credico does not carry out the face to face marketing itself. Beneath Credico are the MCs, which are dependent on Credico for providing them with campaigns that will generate their commissions. There is a network of MCs which enables Credico to offer its service to clients across much of the country. However, as I have said, Credico does not own or operate the MCs. They are each owned by an owner who started off as an ISA and who worked their way up. MCs are separately owned by their owner-proprietor, but they are connected with each other in various ways. Each MC owner will have been supported and sponsored by another MC owner. In this way, a network is built up as newer MC owners sponsor their own MCs, and second and third generation MCs come into being. The network is held together by the fact that sponsoring MCs receive override commission from the marketing that is carried out by the MCs in the network. This gives the more experienced MC owners a financial incentive to keep an eye on, and to provide advice and support to, less experienced MC owners.

39. MCs are located throughout the UK, though the coverage across the country is not comprehensive. MCs do not have exclusive rights to conduct face to face marketing for Credico in the town or city in which they are based. Indeed, there will usually be several MCs in each large city. Sometimes they operate out of the same office. MCs will regularly organise "road trips" to visit parts of the country that do not have a resident MC. Often this is done for one week a month, as it helps to ensure that the MC's home territory is not "overfished".

40. A somewhat surprising feature of the way in which MCs work in practice is that they often relocate from city to city. The Trading Agreement does not tie an MC to a particular location. If an MC owner finds that a location is not sufficiently profitable,

he or she will move somewhere else. Sometimes they will do so because they have sponsored a new MC in the same territory, and they want to go elsewhere to allow the two MCs to thrive. In S5's case, for example, Mr Lambert started it in Birmingham, and then moved the business to Reading, then Liverpool, then Newcastle, before relocating again, in September 2016, to Manchester.

41. There was some argument before me as regards to the extent to which the relationship between Credico and MCs is akin to a franchise relationship. No-one suggested that the business model was exactly that of a franchise operation, but the Claimants contended that the business model was sufficiently close to a franchise that the case law on restrictive covenants in the franchise context was relevant.

42. In my judgment, it is clear that the relationship between Credico and MCs is not a franchise relationship. However, there are some similarities.

43. I will come back to deal in more detail with the extent of the support and guidance that is provided by Credico to MCs, but it is clear that Credico does provide guidance and considerable back-office support (albeit often on the basis that a charge is levied for it). MC owners are almost always inexperienced in business, and so, particularly when they start off, they are very dependent on the support of Credico.

44. Most importantly, Credico provides MCs with the work for them to do. Without Credico, MCs would not have access to the campaigns that are their life-blood. It is of great benefit to MCs that Credico is able to negotiate a single agreement with the client to service a national campaign. It would be very difficult indeed, if not impossible, for each MC to negotiate directly with an energy or telecoms provider. It would be very unattractive for a client to have to negotiate piecemeal with a large number of MCs in order to arrange for a national direct marketing campaign, and

there would be little value in an agreement with a single MC to provide direct marketing services to be carried out by a relatively small number of ISAs in a relatively small area. It is, therefore, the scale of service that Credico can offer that makes it attractive to the clients. It follows that the involvement of a "middleman" such as Credico is essential to the business model which enables MCs to exist and to function.

45. Mr Cote described the business model as a "turnkey operation". This phrase is apt to refer to a business opportunity that exists in a condition that allows for immediate operation: the business owner needs only turn the key to begin operations. This is accurate as far as it goes. It is true that Credico provides MCs with a ready-made body of work, consisting of the campaign or campaigns that Credico has negotiated to provide to clients. Also, Credico provides guidance and support, including the wording of the agreement to be offered to ISAs. However, it is a key feature of the arrangement that Credico stands back from the MCs and does not purport to direct them in their day-to-day operations. In part this is because Credico is very keen to ensure that it does not inadvertently create an employment relationship between Credico and the MC owners, or between Credico and ISAs. Also, Credico is aware that sometimes direct marketing can lead to complaints against ISAs, and it suits Credico to have MC owners as a buffer between Credico and a rogue ISA, and to enable Credico to disavow responsibility for any dubious practices within an MC. Furthermore, as Mr Lambert was keen to emphasise, most of the day-to-day functions of MCs, and the day-to-day management of ISAs, are the responsibility of MC owners, not Credico. It is the MC that carries out the onerous task of recruiting the constant stream of new ISAs that is required, and it is the MC that trains them. Though advice is given on a general level by Credico, and though Credico will offer

training in relation to the particular campaign, it is the MC owner and team leaders who provide the main training for ISAs. ISAs are trained primarily by following more experienced ISAs, team leaders and owners around and by watching them work and discussing sales techniques with them. It is the MC management, rather than Credico, which runs the campaigns on a day-to-day basis. There was some debate before me, to which I will return, about how far it is the MC management and how far it is the ISAs themselves which decide which streets they will visit, but it was not suggested that Credico has any significant involvement in these decisions. At most, Credico will provide guidance to MCs about which other localities are worth visiting on road trips, and which other localities are worth avoiding because they have been visited recently by another MC.

46. One somewhat unusual feature of this business model, and one that distinguishes Credico from most franchise and turnkey operations, is that Credico's brand is of no value to the MCs. It will not assist an ISA who is conducting door to door sales to say to the customer that he or she is associated with Credico. Realistically, members of the public will not have heard of Credico, and mention of Credico will not make a sale more likely. It will not assist an MC in its attempts to recruit ISAs to drop a reference to Credico into the conversation. MCs do not source the clients that make use of direct marketing services and so, once again, Credico's brand name is not used by MCs to obtain clients (though Credico's brand identity no doubt makes it easier for Credico to attract clients, for the mutual benefit of Credico and the MCs). Credico does not encourage MCs to stress their connection with Credico, because this would run counter to the impression that it suits both Credico and MCs to give, which is that MCs are wholly independent businesses.

47. The Trading Agreement does not encourage the MC to make use of Credico's brand. In practice, Credico strongly encourages MCs to set up their own branding, and encourages them to retain a branding company, Brandelective Communications Ltd ("Brandelective"), that is run by a former MC owner, to set up their own bespoke website. The websites tend to be polished and impressive and give the somewhat misleading impression that the MC is in business on the open market and is hoping to attract new clients who will provide them with campaigns to run. In fact, this not the case, because each MC is tied to Credico. The real purpose of the websites is to draw in ISA recruits. Very sensibly, MCs assume that anyone who is considering work for a MC as an ISA will first carry out an internet search for the MC's website. The aim of the websites is to impress potential recruits and to give the impression of the MC as a successful, go-ahead, and vibrant company. The websites that all MCs operate invariably make no reference to Credico. Also, as Mr Lambert made clear in his evidence, MCs tend to downplay the door-to-door sales aspect of the ISA role when they are looking for new recruits. They realise that few people will have ambitions to do door-to-door sales work on a long-term basis, and so they try to draw in recruits by giving the impression that the role is more of a traditional sales or entry-level management role. The websites assist MCs in giving this impression.

48. This brings me to one other feature of the business model for MCs. This is that whilst, ostensibly, a MC's main function is to arrange for direct marketing to be carried out, the greatest challenge for a MC is to ensure that sufficient numbers of ISAs are recruited. A very great deal of time and attention is devoted by MC owners and managers to attracting and recruiting ISAs, because the turnover is so great, and because the job is not instantly attractive. Much more effort is devoted to recruiting ISAs than to training them up. Though the work of an ISA is demanding, it is not

complicated, and nor is the work of running a direct marketing operation (which is not to say that is it not challenging and stressful). If an ISA is struggling, they will soon drop out and it would not be a useful expenditure of an MC's resources to devote time to persuading an unhappy or unsuccessful ISA to stick with the job. In an Assistant Owners' Manual prepared by Mr Cote, he said, "We are first and foremost a recruiting business" and "We are not a fix-it business or welfare business."

The ISA Agreement

49. All MCs are required by the terms of their Trading Agreement with Credico to enter into a contract with ISAs in the terms set out in Schedule 3 to the Trading Agreement ("the ISA Agreement"). The ISA Agreement is drafted on the basis that ISAs will be independent contractors. The ISA Agreement states in terms, at paragraph 10, that "Nothing in this Agreement shall be interpreted as meaning that the Independent Sales Advisor or their substitutes are employees of the Company."

50. The ISA Agreement states that the ISA may arrange for the marketing/sales work to be carried out by appropriate substitutes. However, I think that this is wholly unrealistic and, though I heard no evidence directly on this issue, I would be astonished if this happens in practice. I think that this term will have been included to maximise the chances that the ISAs are not regarded for tax or employment law purposes as employees of the ISA.

51. The ISA Agreement can be terminated at any time, without notice, by the MC or the ISA. Clause 13 provides that the MC has no obligation to provide work to the ISA, and the ISA has no obligation to accept work. Unlike the Trading Agreement, there is no exclusivity clause. Indeed, clause 14 states that "This Agreement does not prohibit or restrict the Independent Sales Advisor's employment or performance of services

for any third party in any manner or respect." There are no restrictive covenants equivalent to clauses 21.1 and 21.2 of the Trading Agreement in the ISA Agreement. The only restriction is a restriction on the use of confidential information.

The work that is done by ISAs and the degree to which they are given direction by the MC that has engaged them

52. Face to face marketing is a gruelling and challenging business. However good an ISA may be, the reality is that only a tiny minority of the people that the ISA speaks to will buy a product from them. The expectation across the sector is that an ISA will obtain 3 new customers for every 100 persons spoken to. This means that an ISA must become accustomed to constant rejection. Inevitably, there will be some days when the strike rate is worse than 3 out of 100. It takes a considerable amount of courage and persistence to knock on doors or to approach passers-by hour after hour, in the knowledge that most will be indifferent, and some will be hostile. The hours are very long, and ISAs frequently work 12-hour days.

53. The pressures upon an ISA are increased by the fact that face to face marketing is a commission-based business. If the ISA does not achieve a sale, or obtain a lead, s/he will not be paid for the work s/he does. There is no minimum wage. Even if the customer signs up at the doorstep, there is no guarantee that the ISA will be paid, and there is a time lag between the interaction with the customer and the payment of commission to the ISA.

54. As a result of these demands, the turnover in ISAs is very high indeed. If an ISA is successful, then she or he is very swiftly promoted and before long becomes a MC owner. If, as is very much more likely, the ISA does not like the work, or is unable to make sufficient commission to make it worth their while, the ISA will choose to leave

the industry. Many ISAs are students or are at the start of their career. If someone is not enjoying, or is not good at, being an ISA, it is rarely if ever worth a MC's while trying to nurture the ISA or to allocate resources to training the ISA in the hope that s/he improves or become happier. It is much easier to allow the ISA to drop out and then to devote the MC's energies towards seeking fresh recruits.

55. The frankly unattractive nature of the work of an ISA has two consequences. First, there is a constant need for MCs to replenish the pool of ISAs as others drop out or (less often) move up the ladder. Second, the job is "sold" to ISAs on the basis that the door-to-door sales work is just a stepping-stone to a more interesting and rewarding career as an entrepreneur and a business owner.

56. MC owners spend much of their time interviewing prospects, and the vast majority of the MC's administrative support assistant's time will be spent on recruitment work. One stage of the interview process consists of the candidate spending a day shadowing (unpaid) a senior member of the MC team to see if the candidate thinks that the job is for them, and so that the MC can see if the candidate is suitable.

57. I asked Mr Lambert how much time recruits spend as ISAs doing the door to door work. He said that usually people will drop off within the first 5 days after starting, or they persevere, in which case they will reach a leadership position as a Team Leader within a 2-3 week period. The next stages after being an ISA are Team Leader, Senior Team Leader, Campaign Manager, and Assistant Manager. After some time as an Assistant Manager, if all goes well, a person is ready to be sponsored to become the owner of their own MC. He said that people still knock on doors all the way through these stages, and that much of a Team Leader or Manager's time is spent training people up, which he says can only be done on the job. He said that only

5% of the job is selling. The rest is leadership skills. Mr Pollard, the Claimants' witness, said that it was possible to go from being a brand-new ISA to a MC owner in 12 months.

58. There was considerable debate during the evidence before me about how far ISAs are given direction by the MCs. Both Credico and the MCs are very sensitive about this, because their business model depends upon ISAs being self-employed independent contractors rather than employees, and they are concerned that if there is too much control of ISAs, that will turn them into employees.

59. The ISA Agreement conspicuously does not say that ISAs are obliged to follow the instructions of the MC or that they must go where they are told to go by the MC. The only exception is in clause 2, which states that:

> "The Independent Sales Advisor understands that the Company's clients may restrict the Company from selling their products and services to consumers outside a geographical area. The Company shall notify the Independent Sales Advisor when a restriction on a geographical area applies, and the Independent Sales Advisor agrees that he/she, or their substitutes, will not sell outside the designated geographical area to preserve the integrity of the chain of supply."

60. This clause is slightly misleading. The restrictions in practice have nothing to do with the chain of supply. In practice, specific restrictions are imposed only in relation to charity campaigns where there are licensing or other reasons why the client charity organisation does not want ISAs to operate in particular areas.

61. So far as the amount of direction that is given to ISAs is concerned, in my judgment, and on the basis of the evidence that I have heard, theory and practice diverge. In theory, ISAs have complete autonomy in relation to how they work. They are not obliged to take instruction from the MCs and they can even, if they wish, put forward a substitute. The practice is different. New ISAs are new to the direct marketing

business. They are not experienced lateral hires. They are dependent on the experienced senior staff of the MC to show them how to do the job, and so, inevitably, in my view, they take direction from them, especially at first. The input of the senior staff may be couched as guidance, but, in reality, ISAs generally do what they are told. They are told how to do the job. If they choose to ignore the guidance that they were given and act truly independently, they will not last long.

62. So far as the territories or locations in which ISAs work are concerned, Mr Lambert said that, when an ISA started, he would pass on information to the ISA about the areas in which he had been successful in the past, and other Team Leaders would suggest places to go. He said that the senior staff treat the city like a pizza and would recommend to ISAs that they go to particular sections of the city, or slices of the pizza, and avoid others. This ensures that no area is visited too often, and that all suitable areas are covered. The ISAs or Team Leaders use Google Maps or photo-copied pages from the A-Z, and use their previous experience to decide where to go. However, he said that it is for ISAs to choose their territory on a particular day, and they have complete freedom about where to go.

63. I think that Mr Lambert's evidence somewhat underplayed the extent of the direction that is given to ISAs about where to go. In theory they have complete freedom. In practice, they generally go where they are advised to go.

64. As I have said, MCs are not required to work in a particular area. In big cities there are several MCs operating simultaneously, sometimes out of the same office. However, it is in the interests of all involved that there is some co-ordination. It would not be in anyone's interests if a particular area was saturated with too many MCs, too often. This would lead to over-working of prospects. There is an obvious

danger that a particular set of streets will produce slim pickings if the same or a different team of ISAs worked on them a few weeks or a couple of months previously. The best prospects will probably already have been identified and sold to, and would be unlikely to be in the market for another sale. Those who did not buy the first time might react adversely if another ISA, selling the same product, knocks on their door within a short time. It follows that it is in everyone's interests that the ISAs from the various MCs do not overlap and that MCs allow a few months or even a year to go by before targeting the same set of streets.

65. It follows in turn that ISAs will benefit from guidance about where to go within a particular town or city. The senior staff in the MC are likely to know which seams have been overworked, so to speak. There may also be demographic reasons to target particular areas over others. For example, certain products may be more successful in better-off areas than in poorer areas. Again, it might be better to avoid areas with lots of detached houses with long drives because too much time would be wasted going from door to door.

66. All of these considerations are no more than common sense. They are matters that may well occur to an ISA, but they have no experience of identifying promising areas and they do not know which areas have been visited recently. Sometimes, an ISA, or a couple of ISAs, may have a hunch and may go off somewhere that they have chosen themselves. This may happen if an ISA feels more comfortable, or has higher hopes, in selling to areas or in communities with which they have a connection. But it is much more likely, in my view, that the senior staff of the MC will bring their expertise to bear about which areas might be fruitful ones to target, and which areas have been covered recently. The ISAs will be given guidance by their team leader or

more senior manager as to which group of streets they should cover. In practice, teams of ISAs will usually go off to the same area with a Team Leader who will have selected the area to visit, either alone or with the assistance of the Assistant Manager or MC owner. They will often go in a car together. Part of the reason why ISAs assemble in the office before going off for the day (at least in the pre-Covid era) is so that there can be discussion and guidance about where to go for the day.

67. The position is all the clearer during the road trips, which generally happen about one week a month (again, before Covid made this more difficult). It would be the MC owner or managers who would select the town or area to visit. The ISA could choose not to come, but if they did join in, then they would be led by the MC owner or team leader, and it is unrealistic to think that there would not be some central co-ordination of which areas to visit.

68. In my view, therefore, in practice the senior staff at the MC have a very considerable input into which places an ISA will visit on a particular day. This is consistent with something that is said in the New Owners Manual, which is provided by Credico to new MC owners. This says that MCs can provide advice on areas to target and about the areas which it is aware have already been covered, but the ISA must ***believe*** that they are choosing where to go (my emphasis).

The extent to which Credico is involved in the selection of areas to be worked by MCs

69. As for how far Credico is involved in co-ordinating the territories that were covered by a particular MC, I think that the answer is that there is very little involvement. On a day to day basis, Credico leaves it to the MCs to decide where their ISAs should work. There are only three partial exceptions.

70. The first is that, as I have said, it is not uncommon for an MC owner to move his or her MC from one town or city to another. Mr Lambert did this four times in less than 10 years. I think that it was inevitable that this would have been done in consultation with Credico/PerDM, because some degree of co-ordination is in everyone's interests. On the one hand, it would not be in anyone's interests if a major population centre was left without a MC. Part of Credico's appeal to its clients is that it can offer a nationwide coverage. It would be no use, for example, if there were plenty of MCs in Manchester but none in Liverpool. On the other hand, it would not be in anyone's interests if a particular area was saturated by too many MCs, because over-fishing would inevitably result. There is a great deal of regular communication between Credico and its MCs and I think it is clear that there would be careful consultation and discussion before a city move took place, albeit that the final decision would rest with the MC owner.

71. The second exception is where there are two or more MCs in the same area, or even sharing the same office. This was the position for S5 in Manchester. In such circumstances, I have no doubt that the MC owners would discuss amongst themselves where they were working so as to avoid over-fishing in a particular locality, especially if they are working on the same campaign. However, to some extent at least, Credico would be involved in the discussions. I was shown some emails that Mr Lambert sent to Credico in July 2018 on behalf of one of his sponsored MC owners who was running a charity campaign. Another MC had opened up an office in Manchester and was running the same campaign. Mr Lambert said, "please can we allocate separate postcodes for each office to avoid overlaps." He said that representatives had visited an area that had been visited by the other MC's ISAs a few days earlier. In response, the campaign manager at Credico, Michael Lush, provided

Mr Lambert with a list of postcodes (or territories) in the Manchester area which had been allocated by Credico to each of the two MCs running the same campaign in the Manchester area. This was, therefore, an example of a case in which Credico decided which territories the different MCs should work on the same campaign.

72. The third partial exception relates to road trips. Credico provides MCs across the country with interactive maps, known as "heat maps", on a fortnightly basis. These heat maps indicate where a successful sale was achieved in the last six months. This assists MCs in selecting areas for a road trip which are not "hot" in the sense that there had been no significant sales there in the last six months. Credico also discusses with MC owners where to go on road trips and suggests particular locations, and warns MC owners to avoid a location that another MC owner was planning to visit.

73. In theory the heat maps could also be used by an MC owner as an information tool for their own home territory, as the heat maps would show where recent sales had taken place within the MC's home territory. However, I accept Mr Lambert's evidence that in practice little or no attention is paid by MCs such as S5 to these heat maps, except for the purposes of planning road trips. MC owners are well aware which areas within their own territories have been visited in recent months, and they are well aware which areas are likely to be fruitful and which are not.

74. Apart from these partial exceptions, in general Credico leaves it to MCs to decide which areas to work in and to visit.

75. As for the express obligations that MCs assume towards ISAs, they promise to pay commission on sales achieved. As with the MC's own commission, the ISA Agreement does not specify rates of commission, and ISAs are informed of the commission rates when they start or when a new campaign begins.

The Trading Agreement

76. All new MCs have to sign a Trading Agreement with Credico (and, before that, with PerDM). Mr Lambert entered into a Trading Agreement with PerDM on 4 August 2010, on behalf of S5.

77. Under Clause 2.1, PerDM appointed S5 as a MC. Clause 2.4 provides that, as a MC, S5 may be engaged by PerDM to provide Campaign Services on the terms of Campaign Agreements specifying the relevant Client, Campaign Services, Campaign Period, Territory and other details.

78. "Campaign Services" are defined in Schedule 2 to the Trading Agreement to mean:

> (a) "direct marketing services as agent or direct marketing sales as reseller respectively of Client Services or Group Products, by the Independent Sales Advisor, including (as applicable):
>
> (b) Procuring Customers;
>
> (c) Providing authorised information and Campaign Materials to prospective Customers;
>
> (d) Assisting Customers to complete Customer Forms accurately and fully understanding the relevant terms;
>
> (e) Completing sales."

79. "Client Services" are defined in the Trading Agreement to mean "services of products of a Client or PerDM in respect of which the Independent Sales Advisor is providing Campaign Services." "Group Products" are defined as "products the Field Representative is authorised to sell under any Campaign Agreement." The phrase "Field Representative" is not defined and appears to have come from an earlier version of the Trading Agreement. It is plainly a reference to the ISA. "Customers" are persons solicited to complete a Customer Form, or to purchase a Group Product.

80. There is reference in clause 2.1 to "Territory" and this is defined in Schedule 2 to mean "the restricted geographical area allocated to the Independent Sales Advisor in respect of any Campaign Services." In relation to most campaigns, there is no such restriction. However, restrictions are applied by the client to charity campaigns. This is primarily because charity fundraising had to be licenced and some local authorities refused to grant licences for door-to-door charity campaigns and because some charity clients are keen to ensure that ISAs operate in relatively wealthy areas and avoid pressuring residents in low-income areas to make charitable contributions. These are not the only reasons, though. I have referred above to an example in 2019 in which Credico allocated territories to two MCs in the Manchester area for a different reason, namely so as to avoid overlap and overfishing.

81. As Mr Casey, leading counsel for Mr Lambert and S5, pointed out, the Trading Agreement is essentially a framework agreement. As I have already said, under the terms of the Trading Agreement, Credico has no contractual obligation to offer any campaigns to a MC. However, by the time a new MC is set up the MC owner will already be part of the wider Credico "family" and the clear expectation on both sides is that Credico will provide the MC with a campaign or campaigns to run, in order to keep the MC's ISAs busy, so far as possible.

82. Also, as again I have already said, the Trading Agreement does not offer or guarantee the MC sole use of an exclusive territory. Nor does the Trading Agreement specify the commission rates that will be payable for particular campaigns. The Trading Agreement envisages that the parties will enter into a separate agreement, known as a Campaign Agreement, for the provision of services in relation to the particular campaign. Sometimes this may have happened but, more often, in practice, the MCs

were simply told by Credico at the start of each individual campaign what the rates of commission payment would be for the particular campaign.

83. Clause 3 imposes a number of general obligations upon MCs. These include an obligation for MCs to engage sufficient ISAs for each campaign, and to engage them on the terms of the standard ISA Agreement that is set out at Schedule 3 to the Trading Agreement (this was also required by clause 5.1). Clause 3 also requires the MC to use its best endeavours to ensure that the ISAs discharge their duties effectively and properly. The MCs are required to comply with all campaign instructions and are required promptly to provide on request such information and documents in relation to the MC's affairs as Credico/PerDM may require, including daily and weekly operational reports relating to a campaign. They are required to permit Credico/PerDM to inspect the MC's records. It is a condition of starting up as a MC that the new business has access to a trading account with a minimum credit balance of £5,000. This is to ensure that the new MC owner has enough funding to keep going for the first few weeks.

84. Clause 4.1.3 provides that the MC and its ISAs shall not represent themselves as being authorised representatives of Credico/PerDM or any client except expressly in accordance with the Trading Agreement.

85. Clause 4.1.6 provides that the MC shall use its best endeavours to ensure that none of the MC's employees or ISAs will "at any time (whether before or after the termination of this Agreement) use or divulge to any unauthorised person any Confidential Information." "Confidential Information" is defined as follows:

"all information provided by the Company to the Independent Sales Advisor relating to the Company, any Client, PerDM, any Customer,

any Client Service or Group Product, the Network, or any Campaign Materials except information which the Company can prove:

(a) is in the public domain otherwise than by breach of this Agreement;

(b) was in the lawful possession of the Independent Sales Advisor prior to the date of this Agreement, otherwise than through liaison between the parties prior to this Agreement;

(c) was obtained by the Independent Sales Advisor from an independent third party free to divulge it;

(d) is required to be disclosed by a court or other competent authority;

(e) is properly disclosed on a confidential basis to professional advisers of the Independent Sales Advisor for the purposes of this Agreement."

86. Clause 5.3 provides that the MC shall issue "Campaign Materials" to each ISA at the beginning of each Campaign Working Day. Once again, there is no definition of "Campaign Materials" and, in any event, by the time with which these proceedings are concerned, ISAs did not use written materials for their campaigns, but were issued with tablets by the MC (which the MC was required to purchase, at cost, from Credico).

87. Clause 6.1 provides that:

"PerDM shall provide Campaign Instructions, Campaign Materials and support to enable the Company to provide Campaign Services (provided that, where applicable, the client has provided required Campaign Instructions and Campaign Materials to PerDM)."

88. Yet again, "Campaign Instructions" is not defined, but the meaning of the phrase is obvious.

89. Clause 7.1 provides that PerDM may, in its discretion, provide product training for a particular campaign to MCs and ISAs, as the MC might reasonably request or which is required by PerDM or the client.

90. Clause 8 provides that the MC will be entitled to Fees (i.e. commission) for the services it provides through its ISAs. The mechanism set out in the Trading Agreement for the calculation and payment of fees is obsolete because it dates from the time when the arrangements were paper-based. In practice, the successful transactions between the ISA and the customer are now communicated to the MC and Credico via the tablet. Credico keeps a record of the transactions but the commission will not actually be paid to the ISA or the MC for several weeks, as payments are not made unless the transactions are actually completed. If the ISA has obtained a lead to be followed up by a telesales operator, there is a risk that the customer may change his or her mind and will not proceed. If the ISA signs up the customer there and then, there is usually a cooling-off period within which the customer may change his or her mind. Again, there is the risk that the customer may not pass credit checks or that there is some other reason why the transaction may not go through, such as that the customer has already switched energy providers less than a year previously and so is barred from doing so again. As a result, there is a time-lag between the sale being made, or the lead obtained, and commission being paid. In relation to the price comparison and provider-swich campaigns that S5 specialised in over the last few years, Credico pays "early" commission to MCs two weeks after a sale. There is then a reconciliation after 8 weeks. If the client has not cancelled the switch, the remainder of the commission, a "quality bonus", is paid. If the client has cancelled within the 8 week period, the early commission is clawed back from the MC (but often the MC will not claw back the early commission that has already been paid to an ISA, especially if the ISA has left the business).

91. Clause 15 deals with override payments, i.e. commission payments made to MCs which sponsored other members of the network to set up a new MC. These

commission payments are payable on the sales made by the sponsored MC, and they continue indefinitely. In the Trading Agreement, the override payments are called "Growth Incentive Payments". The Trading Agreement does not specify the amount of override payments that are due to sponsor MCs. In fact, the amount of override commission differs depending upon whether a MC owner is a promoting owner, a regional consultant, or a national consultant. An MC owner qualifies for these rankings if he or she has sponsored a specified number of new companies and has generated a specified level of product. The national consultant level is the highest and, for most of the last decade or so, Mr Cote has been the only national consultant in the UK. Mr Lambert became one of a handful of regional consultants in 2014-15.

92. Clause 16 imposes the requirement that the MC owner signs the Guarantee in the prescribed form. Clause 16.1 states that:

> "The Guarantor [Mr Lambert], in consideration of the benefits provided to the Company under this Agreement, hereby… personally guarantees to PerDM the obligations of the Company under this Agreement on the terms of the Guarantee."

93. Clause 19.1 provides as follows:

> "This agreement may be terminated at any time by either party giving 14 (fourteen) days written notice of such termination to the other."

94. Clause 20.1.3 and 20.1.4 provides that:

> "Upon ….. termination of this Agreement the Company shall
>
> ….
>
> 20.1.3 return all Campaign Materials [at] the date of suspension or termination.
>
> 20.1.4 deliver, or destroy, as PerDM shall require, any documents or other materials provided to it by PerDM under this Agreement."

95. Clause 20.2 provides that:

> "In default of the Company fulfilling its obligations under clause 20.1 any authorised representative of PerDM may take reasonable steps to procure such delivery or destruction, including entering any premises owned or occupied by the Company to secure any items or materials required to be delivered to PerDM or destroyed."

96. The restrictive covenants are in clause 21:

> "The Company shall not, without prior express agreement from PerDM:
>
> 21.1 at any time while this Agreement is in force directly or indirectly carry on, or be involved in, any similar type of business as outlined under this Agreement.
>
> 21.2 during the period of 6 (six) months after termination of this Agreement, for any reason directly or indirectly, carry on, or be involved in any similar business conducted in a similar manner to that contemplated in this Agreement, within a radius of 10 (ten) miles of the principal place of business of the Company at any time during the final 6 (six) months (or lesser duration) of this Agreement."

97. Clause 24 provides that the relationship between PerDM and the MC is solely that of principal and distributor and nothing in the Trading Agreement constitutes the Company as agent or partner, and no person as an employee of PerDM. The MC is prohibited from holding itself out as an agent, partner or employee of PerDM and has to use its best endeavours to ensure that no ISA incurred any obligations, commitments or liabilities on behalf of PerDM, or the MC, or the client.

The Guarantee

98. In certain respects, the Trading Agreement is somewhat sloppily drafted. An example is that Clause 16.1 indicates that, in the Guarantee, the MC owner personally guarantees the obligations of the MC under the Trading Agreement. In fact, the Guarantee goes further than this in relation to the restrictive covenants, in that it provides at Clause 10, as I have said, that "I agree that clause 21 of the Agreement

shall apply to me as though for reference to "the Company" in the first line there was substituted a reference to myself."

The guidance, support and assistance that was provided by Credico to S5

99. When each new marketing campaign began, Credico would provide S5 and the other MCs with the client's brief, together with any accompanying campaign materials, such as tabards, podiums and leaflets, and would provide S5 with tablets and SIM cards for the use of the ISAs. Training would be provided for ISAs in relation to the campaign, either from representatives of the client if the client was a third-party business, or from a Credico representative if the client was a Credico business such as MEX. This might take the form of a training session for an hour or two to educate the ISAs about the benefits for customers of the products they were being asked to market. Credico would also inform the MCs of the amount of commission that would be payable on each sale.

100. In broader terms, the Claimants contend that PerDM/Credico "invested" in MCs like S5 in four ways (which overlap to an extent). These are the provision of (a) bookkeeping and other back-office support; (b) know-how; (c) one-to-one advice, coaching, and training and (d) confidential information relating to sales/ISA performance. In most respects, there was little dispute between the witnesses about what was actually provided to Mr Lambert and S5 by PerDM/Credico, though there was some, but there was a much more substantial dispute between the parties about the utility or otherwise of the support and guidance that was provided by PerDM/Credico. I will focus on the evidence about what was being provided during the period after Credico had taken over from PerDM.

101. Even though the factual dispute was limited, I will deal with this is some detail as it was the subject of a large amount of evidence and cross-examination.

Bookkeeping and back office support

102. This support was provided by a team of Credico employees, known as the Hub team, which was managed by Ms Shaw.

103. Some of the services that were provided were specified in the Trading Agreement.

(1) Banking

104. Clauses 12.1, 12.4.3, and 12.4.8 of the Trading Agreement provide that:

> "12.1 To ensure the financial integrity of the Network, it shall be a condition of this Agreement that the [MC] shall use special banking arrangements arranged for Network companies by PerDM with the Bank."
>
> "12.4.3 The Company shall operate each of its bank accounts only in accordance with applicable instructions issued by PerDM"
>
> "12.4.8 To enable the sound management of the Company bank accounts PerDM shall hold any and all cheque books relating to Company's bank accounts and shall have unilateral control of any Internet Banking facility."

105. The word "Network" is defined in Schedule 3 to mean "the network of corporate dealers such as the Company and Independent Sales Advisors and sub-distributors of Merchandise."

106. In accordance with clause 12.1, Credico requires that all MCs bank with HSBC. The Hub team maintains oversight over MCs' bank accounts so as to ensure that funds are handled in accordance with the Trading Agreement. Also, the use of the same bank for all MCs minimises bank charges when funds are transferred on a same-day basis.

107. The MCs, rather than Credico, pay any bank charges that arise.

(2) Accountancy services

108. Clause 13 provides that it is a condition of the Trading Agreement that the MC shall appoint accountants and bookkeepers nominated by PerDM. This is stated to be in order "to maintain consistent accounting procedures and to ensure legal compliance within the Network."

109. This is of benefit to the MCs and to Credico, because it ensures that the accounts of MCs are dealt with by accountants who are familiar with, and understand, the work that MCs do, and their relationship with Credico. It avoids delays and misunderstandings that might arise if a MC retained an accountancy firm that was not familiar with the business model that is used by MCs and Credico. It also keeps accountancy costs down.

110. The Hub team also uses the preferred accountants to incorporate new MCs for their owners.

111. The MC is required to pay the accountants' charges.

(3) Insurance

112. Clause 14 provides that it is a condition of the Trading Agreement that the MC will become an insured body under an insurance policy maintained by PerDM in respect of its Network, and that the MC will pay the cost of this insurance.

113. The Credico group policy is cheaper than individual policies for each MC would be, and the Hub team spreads the costs for the MCs by recovering the costs of the policy by a weekly charge, even though Credico pays the insurance company's costs as a

one-off upfront charge. It is to Credico's benefit that each MC has adequate insurance, but it is also of benefit to the MC to have ready access to a suitable insurance policy at a reasonable rate.

(4) Processing payments and other financial

114. As this is a commission-based business, a considerable effort is involved in recording sales, and in processing and reconciling commission payments. This is done primarily by the Hub team. ISAs record sales on their tablets (which, as I have said, are sold to MCs by Credico, at cost price). Credico then uses several IT systems to record the sales and work out and allocate commissions. The Hub team makes payment of commission directly to ISAs on behalf of MCs.

115. The Hub team also arranges payment of MCs' rent and other office charges (such as photocopier leases), handles their VAT payments, and manages payroll and bonus payments to employees (i.e. the administrative assistants). This is facilitated by the fact that Credico is given access to the MCs' bank accounts.

116. The Hub team keeps an eye on the financial operations of the MCs, and will prompt them to send bills through so that Credico can arrange payment, and, if the MC needs help to manage its cash flow, it will arrange calls with the MC owners to provide assistance.

117. Credico charges MCs a Hub Service fee of £108 plus VAT per week for the Hub team's support. This covers the salary costs of the Hub team managers, but it does not cover the costs of Ms Shaw or her assistant. In addition, Credico charges back the cost of one of the IT systems it uses for recording sales and processing commissions,

Meridian, to MCs. Ms Shaw's evidence was that the Hub is run at a loss of about £200,000 per annum to Credico.

(5) Other support and ad hoc advice and assistance

118. Ms Shaw and the members of the Hub team are available to deal with any queries that MCs might have, and to provide ad hoc advice and assistance when required. They provide advice, for example, on handling insurance claims, and on dealing with legal and compliance issues. So, for example, the Hub team provided support and assistance to S5 when there was a National Minimum Wage investigation into S5 in 2011. Again, Mr Lambert requested advice from the Hub team when his Manchester office lease came up for renewal in 2018.

119. The Hub team provides advice to MCs, including S5, on any employment issues that arise with directly employed staff and with ISAs. As I have said, Credico provides the MCs with model ISA Agreements which they are required to use. These are updated from time to time. This is in the joint interests of the MCs and Credico, because both sets of businesses' business model, and perhaps viability, depends on ISAs not being regarded as employees for income tax or employment law purposes.

120. Ms Shaw prepared a guide on how to write job advertisements which complied with the specific policies of the main online recruitment websites.

121. Ms Shaw also gave MCs considerable assistance on how to deal with the Covid 19 Pandemic, including, for example, providing advice and template letters for furloughed staff, and helping to source Personal Protection Equipment for their ISAs.

How useful was this for the MCs?

122. In my judgment, the back-office services that were provided are of very considerable value to MCs, including S5. They free up MCs from much of their administrative burden, so that they can focus on the two main tasks facing them: recruiting ISAs and maximising sales. It would no doubt have been possible for MCs to arrange to do most of these functions themselves, and to farm them out to professional advisers where necessary, but there is a great advantage in having these responsibilities taken out of their hands by Credico. This applies in particular to the task of keeping track of sales and commission and the banking arrangements. There is a ready-made structure that MCs can slot into.

123. It is true that the MCs have to pay for many of the services provided to them by Credico, but it is very much more convenient for them to be made available in one place, and for the services to be provided by a team that is experienced in the type of work done by MCs, than for the services to be obtained from elsewhere. I have no doubt that these services are made available by Credico at a cheaper price than it would have cost the MC to do the work itself or to pay for them on the open market.

124. These facilities are particularly useful for an MC owner when the MC is starting off, at which point, almost certainly, the MC owner will be inexperienced in business and would have struggled to keep up with back-office functions if left to their own devices. Mr Lambert was not inexperienced in business by the time Credico came on the scene (though he was inexperienced when he first became a MC owner with PerDM in 2010), but the services provided to him were still very useful because they freed him up to focus on the key tasks.

125. There is no doubt, in my view, that these arrangements are also greatly to Credico's benefit. They enable Credico to keep control of the sales and commission payments,

and to keep a significant degree of control and direction over the MCs. They promote the efficiency of the business model, to the benefit of all. Without the support provided by Credico, it would not have been feasible for Credico to rely upon MCs, which are almost always started up by persons with no previous business experience.

Know-how

126. The know-how that was dealt with in the evidence consists of two types: campaign-specific know-how, and general know-how.

Campaign-specific know-how

127. As I have said, when each new campaign was launched, the ISAs would have to be trained on the product. Where the client was a third-party, the client's employees would normally be responsible for providing the training. In the period from 2016 onwards, the campaigns that were provided to S5 were MEX campaigns, which were price comparison campaigns in the telecoms and energy sectors that were launched on behalf of MEX, a price comparison business that was associated with Credico. The objective was to persuade the customer to switch provider, and the MC, and the ISA would be paid commission if this took place. In the last year or so before S5 terminated its relationship with Credico, these campaigns had been operated under the names "Simply Switch" and "Quick Compare".

128. The know-how for MEX campaigns was created in-house by Credico staff. Mr Pollard gave evidence that he was responsible for creating the know-how for the MEX Energy Switch campaign which began in August 2017. This consisted of a powerpoint-style presentation which explained the service provided by MEX, gave

detailed information regarding energy products, and provided a step by step guide about how to complete a switch/sale. In his witness statement, Mr Pollard said that,

> "It contains what I consider to be invaluable know-how and experience gained over many years in the industry; including directly from Credico's client, MEX. This know-how would be transferable to another energy campaign and useful for a long period."

129. I think that Mr Pollard has overstated the value of the know-how in this presentation. It is really just a general overview of the energy sector. Much of the contents are very basic: for example, it takes three slides to tell the viewer that payment can be made by way of monthly direct debit, quarterly direct debit, or on receipt of a bill. It contains advice about the steps an ISA should go through, via introducing themselves, confirming the customer address, and asking who the customer's existing supplier is. It is something of an exaggeration to suggest that this is invaluable know-how and experience gained over many years. The information in the slides could readily be obtained in a 10-minute internet search. I have no doubt that the slides would provide useful assistance for a brand-new ISA, but it is really very basic stuff.

130. Mr Pollard also provided a "MEX Sales Pitch" document. This provided some suggested answers to common questions from customers, and suggested some lines of conversation to adopt. It is true that these approaches could be used in other marketing campaigns, but there is nothing particularly specialised or unusual about them. They are the types of techniques that one would expect to see in door to door or any type of high pressure selling, e.g. appealing to greed, and keeping up with the Jones's (or what is more currently nowadays called FOMO, the fear of missing out).

131. I have been provided with a number of other documents along similar lines. In all cases, in my view, they either provide specific information which is of no value to any other campaign, or they give very general advice about selling techniques. I do not

think that the material conferred any long-term competitive advantage either on the MCs or on the ISAs. It was useful for them to be given what was good advice about selling, but this was run-of-the-mill advice which was very easily available from other sources. In addition, I think that Mr Lambert was right to say in his evidence that the best training that ISAs received was on-the-job training, from watching more experienced Team Leaders and the like working on the doorstep.

General know-how

132. As for general know-how, Credico asserts that it provided MCs with know-how in three broad categories, namely sales techniques, the recruitment, retention and training of ISAs, and business administration. I have been shown a large number of documents that were provided to MCs, including S5. Generally, they were prepared by Mr Cote for his own sponsored MC owners (of which Mr Lambert was one) but they were circulated to all of Credico's MCs. In his (until recently) uniquely lofty status of National Consultant, Mr Cote took it upon himself, with the consent of Credico, to act effectively as leader for the MCs in the UK, and to provide support and guidance, including written materials accordingly. Mr Cote was paid for this by the high levels of his override commission payments. There was some debate before me as to whether this meant that the know-how did not belong to Credico at all, but in my view it is clear that the materials were being supplied by or on behalf of Credico, regardless of the fact that Mr Cote was generally their author. The know-how came from Credico. MCs do not pay for this know-how.

133. However, in my judgment the importance of the know-how in these documents was somewhat exaggerated by Credico's witnesses. The documents, which included documents entitled "The Cycle of Development", "The Art of Being a Distributor –

Learning the Basics", "Assistant Owner Handbook", "Leaders Manual", and "Three Years to Vice Presidency", contained much good advice, but it was fairly basic in nature. Mr Cote and Credico had not created a new or bespoke methodology for starting up small businesses, recruiting staff, or for conducting direct sales campaign. Rather, the documents set out general and, again, fairly run-of-the-mill, advice on these topics. As Mr Casey pointed out on behalf of Mr Lambert, the sales techniques that are set out in these documents, "5 steps to a conversion", "8 steps to success" and the "law of averages" were not techniques that had been created by Mr Cote or by Credico. Rather, they are pithy, and standard, descriptions of sales techniques which have passed the test of time and are tried-and-trusted. They are well-known to most people who work in sales. Similarly, the advice on how to recruit staff and run a business is, with respect, quotidian. For example, they exhort leaders to come to work on time and to have a great attitude. In their closing submissions, Mr Mehrzad QC and Mr Sheridan on behalf of the Claimants referred to guidance in the Leaders Manual about the "Day of O". This was the rather grand title for the stage in the recruitment process at which a potential recruit spent a day, unpaid, shadowing a MC Owner, Assistant Manager, or Team Leader as they carried out face to face marketing ("the Day of Observation"). The Leaders Manual made suggestions about matters such as topics of conversation for the journey out to the territory to be covered, and what explanations to make about the business.

134. To say that the information contained in these documents is standard for the sales business and somewhat quotidian is not to criticise the documents. They are a useful collection of helpful materials, containing good advice. It is true that it was helpful for MCs to have this advice set out in a few documents. It is also the case that most MC owners who received this advice were beginners in the sales business, and so the

know-how would have been more helpful for them than for seasoned sales staff. Furthermore, it is also true that these documents would have been useful resources for MCs when they were training their ISAs and those who were moving into management roles. However, as with Mr Pollard's materials, the same information could have been obtained in a few minutes' research on the internet, and the key part of the training that ISAs received was that which was given to them by colleagues on the job. MC owners learned mostly through experience, and through sharing their experiences with their fellow MC owners through the networks that Credico encouraged to come into being. I am not persuaded, therefore, that the know-how that was provided was of great value to MC owners such as Mr Lambert, though it was of some value.

135. In his closing submissions, Mr Mehrzad QC reminded me of the well-known passage of the judgment of Megarry J in **Coco v Clark** [1968] FSR 415, at 419-420, as follows

> "Something that has been constructed solely from materials in the public domain may possess the necessary quality of confidentiality: for something new and confidential may have been brought into being by the application of the skill and ingenuity of the human brain. Novelty depends on the thing itself, and not upon the quality of its constituent parts. Indeed, often the more striking the novelty, the more commonplace its components…"

136. However, in my judgment, there is nothing particularly novel in the way in which the general advice about setting up businesses, recruitment and sales techniques was collected by Mr Cote and Credico in the various documents. The straightforward advice that is provided in these documents does not trigger an equitable duty of confidence (the matter at issue in **Coco v Clark**) simply because it has been pulled together by Mr Cote in this way. The materials contained in these documents merely

contain the general know-how that a person engaged in sales and in running a small business will learn from doing the job.

137. The Claimants point out that Mr Lambert had disclosed a notebook in which he had made some manuscript plans for Immabee Limited, the company which he incorporated in November 2021, as a vehicle for supplying S5's ISAs to ESM. This notebook refers to the "5 steps of the conversation", "8 great working habits" and the "law of averages". It may well be that Mr Lambert had copied these from one or more of the documents provided to him by Credico, but the fact remains that these were not lists or "laws" that had been thought up by Credico or Mr Cote: Mr Lambert was just copying lists and laws which had been taken by Credico and Mr Cote themselves from the general well of knowledge about sales and running small businesses.

138. The Claimants rely upon some other sources of know-how. MCs, including S5, were provided with a spreadsheet entitled "Marketing Company Health Check" which sets out guidance about the GDPR and about how to avoid ISAs gaining employee, rather than self-employed, status. This is really just an example of the advisory function that was provided by the Hub to MCs. Other documents, such as a Business Planner, and slides, which MCs were invited to rebrand and then to use to show ISAs could progress in five stages in a short period to become a MC owner, do not contain any specialist know-how.

139. The Claimants also rely upon an online resource known as "The Development Tank" ("TDT") which was launched in 2018 and which contained a number of materials including the general documents referred to above, some documents that were prepared for specific campaigns, and videos of motivational speeches given by MC

owners at seminars of such owners. In practice, Mr Lambert made no use of the materials in TDT. The evidence showed that it was not used very often by MCs. The highest that the Claimants could put it was that there was an average of one user per day. The statistical analysis of the usage of TDT, obtained by the Claimants, showed that 70% of users logged in once and never returned again, and that 48% of those who logged in looked at only one page before logging out. In any event, the materials contained in TDT were essentially the same as the materials that I have already dealt with. For the same reasons as I have already given, I think that this know-how-was of limited value to MCs. Mr Casey was right to say that TDT was not primarily designed to be a library of know-how: it was set up as an information and communication hub for the MC network, and contains sections on campaign news , bulletins, magazines, suggestions for meetings, biographies, photo galleries, and events.

140. In summary, then, the know-how that was provided to MCs such as S5 by Credico was certainly of some assistance but it was not of great value, and it was not as valuable as the Claimants' witnesses claimed that it was. In my opinion, the much more important and valuable assistance that was provided by Credico to MCs consisted of the ready-made clients, the processing of sales and commission, and the back-office support.

One-to-one advice, coaching and training

141. Mr Lambert received and benefited from one to one coaching from Mr Cote and from Ms Mo Fox of Credico in relation to the development of his business. In particular, he received coaching about how to improve the performance of his ISAs, for example, in reducing the cancellation rate of sales achieved. He attended seminars laid on by

Credico, which contained a mixture of speeches by consultants such as Mr Cote and encouraging success stories and exhortatory speeches provided by MC owners (including, sometimes, Mr Lambert himself). In the early days, in 2009, Mr Cote had moved to Birmingham for some months in order to work closely with Mr Lambert and to provide him with guidance.

142. The coaching that Mr Lambert received was directed especially towards recruitment and retention of ISAs (the hardest part of the job of a MC owner) and towards campaign-specific training. Ms Fox gave intensive training to Mr Lambert about the training of his ISAs, and in reducing cancellations and complaints, during the period from 2014-2016.

143. In my judgment, this advice, coaching, and training was useful to Mr Lambert and S5. It was expected to take place and to be useful when the Trading Agreement was entered into. However, from about January 2017 onwards, Mr Lambert had fallen out with Mr Cote and he relied upon him much less than he had previously done for advice and guidance. In January 2019, the calls that had continued to take place between them on a regular basis had ceased entirely.

144. Credico also provided coaching and training that was campaign-specific. So, for example, Credico would host weekly calls for all of the MC owners working on a particular campaign, and Mr Pollard arranged for targeted training in 2018-2019 for ISAs, including S5 ISAs, who were performing badly on the MEX energy Switch campaign in any particular weeks.

Confidential information

145. The Claimants contend that, during the currency of the Trading Agreement, Mr Lambert and S5 were provided with two broad categories of confidential information, which they say was compiled by the Claimants at their expense and which was presented to MCs in an easily digestible and memorable format. These categories were: (1) 'territory management' data showing how many sales had been made in the past and where those sales were made; and (2) sales/ISA performance data.

146. Mr Lambert and S5 do not dispute that this information was provided to them, but they deny that it had the quality of confidentiality.

(1) Territory management data

147. The Claimants submit that the value of the territory management data, consisting primarily of the 'heat maps' relating to the MEX campaign, was that it enabled MCs to see the postcode sectors in which sales had been made (and, by looking at the data in the spreadsheet provided with the heat map, the number of sales in that postcode sector) over the previous 6 months. This enabled them to avoid areas which had recently been successfully targeted within the MC's own territory and elsewhere (for the purposes of 'road trips').

148. I accept the Claimants' submission that the heat map data was valid for more than two weeks, even though it was updated every two weeks, as it contained data stretching back for six months. However, in my judgment, this information was useful for the purposes of planning road trips, but was otherwise of little value to MCs. It is true that it could have been used to work out which areas within an MC's home territory had not been visited in the last six months, but an MC would not need this documentation in order to work this out. The MC would know which areas in its locality had been visited in recent months and, in locations like Manchester where

there were other MCs, the information would be exchanged with other MCs, as it would be in both MC's interests to do so.

149. In their closing submissions, Mr Mehrzad QC and Mr Sheridan said that,

> "if a Marketing Company owner left Cs' network and retained in their head the picture presented by a recent heat map, that Marketing Company would still be far more likely to identify previously untargeted areas than a marketing company which was not part of Cs' network and had not seen the heat map"

150. I do not accept this submission. The reality is that if a MC left the Credico network, the information in the heat maps would be of very limited value to it. The bread-and-butter work of a MC was carried out in its own locality, and, as I have said, an MC would not need a heat map to work out which areas had recently been visited and so which should be avoided for a while. So far as road trips were concerned, the heat maps did not have much long-term value. An MC which had left the Credico network could pick an area away from a major population centre and, unless it was very unlucky, would be unlikely to select an area which had recently been visited by another Credico MC.

151. Mr Mehrzad QC submitted that heat maps retain a shelf-life of 12 months or so, because energy companies on the MEX panel generally operate a fixed period of 12 months before someone is permitted to switch again, but it is important to bear in mind that heat maps do not enable MCs to identify which individual houses were the site of a recent sale. Even if they did, this would be of little use, because the fact that a householder was prepared to sign up to a campaign a few months ago is not a sign that s/he will be prepared to look favourably upon an ISA who visits them a little while later to sell another campaign. Indeed, it may well be that a householder who has signed up to a campaign recently will not be inclined to sign up to another one. In

her evidence, Ms Linney accepted that a MC would not use data to target specific areas. Taking these points together, this means that the information in the heat maps was not very useful, even when it was current.

152. It is also worth noting, as Mr Casey pointed out, that for a substantial period of 2020, no work was being done and so there were no hot spots.

153. In addition to heat maps, MCs were provided, in March 2020, with a spreadsheet which ranked each post code area by "decile", an indication of affordability by reference to average household income, and with sales made in each post-code area within the last six months. I accept Mr Lambert and S5's submission that this information was of very little value to them. As for how wealthy a particular area was, this is something that a MC would know from local experience. Most people who have lived in a city for any length of time will have a pretty good idea of how prosperous particular areas are. In any event, this information is available for free from a Government website. The information relating to sales in each post code does not provide much greater assistance, because this really just indicates which locations have been visited recently, and this is information that is already known to the MCs.

(2) Sales/ISA performance data

154. Credico provides MCs like S5 with various types of sales/ISA performance data. The Claimants refer to five categories of sales/ISA performance data.

155. First, Credico provides data which tracks the number of sales that are currently being achieved in a particular campaign. So, for example, on 30 October 2020, Credico emailed all MCs in relation to the MEX Simply Switch campaign. The email set out the gross income and the number of switches achieved that week by each participating

MC in the campaign. It also named the top performing ISAs (and their MC) and said how much commission they had earned and the number of switches they had achieved.

156. This would be of some value to MCs, whilst the campaign was going on, in that it would enable them to compare themselves to other MCs to see how they were faring. It would be of no value once the MC stopped participating in the particular campaign. It would also be of some small value to MCs in identifying high performing ISAs, though in my view the MCs would already be aware of this information. The information about high-performing ISAs in other MCs would be of no value to MCs, because there was no culture of poaching high-performers.

157. The second category of information is concerned with conversion rates by ISAs. An example I was shown was sent to Mr Lambert on 19 October 2020 by Credico, also in relation to MEX Simply Switch. This data was limited to S5 ISAs. This showed the number of quotes that were given to customers, and their conversion rates, i.e. the percentage of customers who actually switched their provider. This helped Mr Lambert and S5 identify those ISAs who had poor conversion rates, so that they could be given support and guidance to improve their rates.

158. The third category concerns call success rates. I have seen an email on this topic that was sent by Credico to MCs on 3 January 2020 in relation to the MEX Energy campaign. These were rates similar to conversion rates, in that the email set out the number of sales that had been obtained by each MC's ISAs that week and then the number of those sales that had led to a switch. This email also provided a breakdown of reasons why the switch had not taken place (e.g. changed their mind and did not want to switch, or the customer felt that they had been prompted to agree by the ISA).

In addition, the email listed the 30 top ISAs, in terms of success rates, and the 30 worst performing ISAs, across the MCs participating in the campaign. This information would be useful to MCs, which might not otherwise know for a few weeks how many of the doorstop sales obtained had translated into switches, as it would enable the MC to give praise and encouragement to high-performers, and to take remedial steps with poor performers. The information about how ISAs in other MCs were doing was of virtually no value.

159. The fourth category is concerned with early cancellations. These take place when the customer completes all of the stages of the switching process but then cancels the switch within 14 days of the sale. If this happens, the MC and the ISA forfeit their commission. I have seen an example dated 18 November 2020, relating to the MEX Quick Compare campaign. The spreadsheet specifies whether the cancellation was the act of the supplier or the customer. To some extent this assists MCs in identifying ISAs who obtain sales which turn out to be insecure.

160. The final category consists of quality bonus reports. This is the final reconciliation data which sets out whether or not the customer has cancelled the switch after 8 weeks, and so whether the MC is entitled to a quality bonus or will have to pay back the commission already paid in relation to the customer. I have been shown an example of a spreadsheet containing this data from April 2019 in relation to the MEX Energy Switch campaign. This data was broken down by MC and then by individual ISA. It follows that the MC could see how well it and its ISAs were doing in comparison to others across the country. The provision of this data was also an integral part of the role of Credico in managing commission payments.

161. Generally, in my judgment, this was management information which was useful for MCs whilst the campaigns were ongoing. The data enabled the MCs to keep track on how their individual ISAs were doing and also to keep track on how they were doing in comparison to other MCs. The information was of virtually no value when a MC ceased to participate in a particular campaign, and when the MC left the Credico network. It was campaign-specific. The benchmarking information relating to other MCs was of no use once the particular campaign was over. The information about successful and unsuccessful ISAs was of some limited value, but it was really very limited because the MC management would be bound to know who their good and poor performers were, and because there is a constant turnover of ISAs. It would have been impossible for a MC to draw conclusions about what worked and what did not work for direct marketing from this data.

The events of 2020 and the alleged breaches of the restrictive covenants by Mr Lambert and S5

162. As would be expected, the Covid 19 Pandemic had a very damaging effect on the direct marketing business. When the first lockdown was imposed in March 2020, all face to face campaigns stopped immediately. They started up again three or four months later. In April 2020, Credico set up a limited home telesales operation. Mr Lambert decided that S5 would not participate because it required a start-up financial outlay in specialist equipment. S5 essentially shut down for a while. Mr Lambert set up a small business selling hot tub surrounds on Facebook Marketplace which was unrelated to S5. S5 placed its one direct employee on furlough and took a bounce-back loan of £50,000 from the Government. ISAs did not qualify for furlough, as they were not classed as employees, and few, if any, could apply under the

Government's self-employed support scheme as they had not worked on a self-employed basis for long enough.

163. By the Autumn of 2020, campaigns had started up again, but Mr Lambert was unhappy with Credico. As I have said, he had fallen out with Mr Cote. He has a strong confidence in his own abilities and he felt that the success of S5 was mainly due to his own hard work and entrepreneurship rather than the help he received from Credico. He was unimpressed by the efforts that Credico had made to provide work for MCs and ISAs during the lockdown. As late 2020 approached, he felt that Credico had failed to take adequate steps to make lucrative campaigns available. He was unimpressed by the option of taking part in the new Credico telesales campaign.

164. Matters came to a head when the two campaigns that S5 was working on, the MEX Simply Switch and Quick Compare campaigns, were suspended altogether by the clients between 2 and 16 November 2020. This was not the fault of Credico. This happened because three MCs in Mr Lambert's network had been the subject of a critical article in the Daily Mail which alleged that they had breached Covid protocols.

165. There is a dispute between the parties as to whether, by November 2020, Credico was still providing Mr Lambert and S5 with campaigns that they could sensibly participate in. On behalf of Credico it was said that, once the suspension was over, Credico was offered work on the Simply Switch campaign and that the option to take part in the telesales campaign was still available. Mr Lambert said that he was not interested in telesales and that the SSW campaign was not sufficiently lucrative to make it worth his while. It is not necessary for me to decide whether or not Credico was continuing to offer appropriate work to S5 at this stage. Mr Lambert and S5 do not contend that

Credico's failure to provide them with any or any sufficient work in late 2020 amounted to a repudiatory breach of the Trading Agreement which would mean that they were no longer bound by the restrictive covenants. It would not have been possible for Mr Lambert and S5 realistically to have advanced such an argument, as the Trading Agreement did not impose an obligation on Credico to offer any work at all to the MC.

166. It is clear, however, that by November 2020, Mr Lambert had decided to look at other potential sources for campaigns that could be run by S5 and by his ISAs. Mr Lambert was frank in his evidence that he had not looked at the Trading Agreement since he signed it in 2010 and was wholly unaware that there were restrictive covenants in it. He did not give any thought to whether there were any restrictions that would prohibit him and S5 from working on campaigns for someone else.

167. Mr Lambert stressed in his evidence that when he started to look around for other sources of work, he was mainly motivated by the desire to find work for his ISAs to do so that they would have an income in the run-up to Christmas. In my judgment, this was largely true, and Mr Lambert genuinely believed that this was his prime motivation. However, consciously or unconsciously, by late 2020 Mr Lambert had become so disaffected with Credico that he had decided that a parting of the ways was, at least potentially, on the cards. It is not necessary, for the purposes of this judgment, for me to decide whether Mr Lambert's relationship with ESM and with its backer, Mr Baudet, whom he met at a restaurant in the Lake District on 2 December 2020 was intended to be temporary and short-term or whether there were hopes that it would turn into a long-term relationship. Mr Casey has invited me to refrain from making any findings on this matter, because that would be to trespass on the potential

claims of unlawful means conspiracy and unlawful interference against Mr Lambert and S5 which are the subject of an application to amend that has not yet been dealt with.

168. Mr Lambert does not dispute that he obtained other work for "his" ISAs in November and December 2020. In his first affidavit in these proceedings, sworn on 8 February 2021, Mr Lambert said:

> "I accept that I did offer some services to clients other than Credico when Credico had no work for me during the pandemic…."

169. However, Mr Lambert denies that he acted in breach of the obligations, if any, owed by him and S5 to Credico (or PerDM). In addition to denying that the restrictive covenants are enforceable either by Credico or PerDM, Mr Lambert contends that the work that he and S5's ISAs did for others in November/December 2020 did not come within the scope of the restrictive covenants, either because it was done with the express prior agreement of Credico, or because it was not "similar business" to that done on behalf of Credico.

170. In the course of his evidence, Mr Lambert accepted that for about a day and a half in mid-November 2020 he had arranged for Credico's ISAs to work on a direct marketing campaign relating to cosmetic products, and specifically eyelashes. This is not one of the pleaded allegations that is relied upon by the Claimants and in closing Mr Mehrzad QC told me that the Claimants had taken a positive decision not to apply to amend to rely upon this as a further alleged breach of the restrictive covenant. I need say no more about it. The two breaches relied upon by the Claimants are concerned with a campaign called Novibet and a campaign called the "60 Second Challenge".

Novibet

171. Mr Lambert and S5 admit that, for a two-week period, in the weeks commencing 9 and 16 November 2020, S5 and its ISAs marketed a gambling app, called Novibet. The work fizzled out in the second week, because the client changed the criteria for sign-ups, requiring that the app be marketed only to those aged 26 and over and this meant that the sales dropped away and it became clear that the work was not financially viable. In the event, S5 made sales commissions of only £400 from the Novibet campaign

172. S5 carried out the Novibet campaign as a subcontractor for another MC in the Credico network, OGC Holdings Limited ("OGC"), which was owned by Matthew Stewart, and invoiced OGC, rather than Novibet, for the commissions that were due. However, Mr Lambert and S5 say that Mr Lambert believed that the work for Novibet was done with the knowledge, and implicit consent, of Credico. Mr Lambert said that he had been told by Mr Stewart that OGC was putting the proceeds of Novibet through the accounts that were controlled by Credico, and he assumed that Credico knew about it. As stated above, all MCs' bank accounts were controlled by Credico. Mr Lambert said that he had discussed the work that S5 was doing for Novibet during a call on 12 November 2020 with Mr Cote, and Mr Cote raised no objection to it. Mr Lambert further said that he assumed that as Credico had no work for MCs, it had no objection to MCs finding work from other sources.

173. The central question on this issue is whether S5's work for Credico was done with the express prior agreement of Credico. If so, then it would not have been done in breach of the restrictive covenant, even if the covenant was binding, as clause 21.1 contains an exception for things done with Credico's "express prior agreement". I am satisfied

on the evidence that the work that was done by S5 and its ISAs for Novibet was not the subject of express prior agreement by Credico, or by anyone acting on Credico's behalf. At the time when Mr Lambert took on the Novibet work for S5, he knew that Mr Stewart's MC was already engaged in it. He may have assumed that Credico had no objection, because it was an open secret amongst MC owners, but nonetheless, there is no evidence that Credico had given express prior agreement to OGC, let alone to S5. It is certainly possible that reference was made to the Novibet campaign in the call between Mr Lambert and Mr Cote on 12 November 2020, but it is not clear whether it was made clear to Mr Cote that S5 was engaged on the campaign. In any event, I am satisfied that Mr Lambert did not ask for express permission from Mr Cote for S5 to work on the campaign. The call was a somewhat hostile call in which Mr Cote had called to complain about a post that Mr Lambert had made on a WhatsApp group for MC owners, in which he had asked what was going on in light of the suspended MEX campaigns. Mr Cote did not think that this comment was appropriate. Mr Lambert expressed the firm and blunt view that Credico was not doing enough to find work for MCs, and Mr Cote had responded by offering work on the telesales campaign on the Simply Switch campaign. There is evidence that somewhat later, on 30 November 2020, Mr Cote and other representatives of Credico had engaged in discussions with Mr Stewart about "onboarding" Novibet, i.e. bringing Novibet in as a client of Credico. I accept Mr Cote's evidence that if he had been aware at this stage that S5 was also working with Novibet, he would have included Mr Lambert in this discussion.

174. There was no indication from the banking arrangements which would have alerted Credico to the fact that S5 was working for Novibet, as S5 was not directly invoiced by Novibet, but was paid indirectly via another MC, OGC. There was nothing in this

payment arrangement which would have indicated to Credico that S5 was working for Novibet.

ESM and the 60 Second Challenge

175. I am satisfied that Mr Lambert generally told the truth as he recalled it about his involvement with ESM and the 60 Second Challenge, at least until 7 December 2020. His evidence about the dealings with Novibet and ESM was consistent with the contemporaneous documentary evidence, and, so far as ESM was concerned, with the evidence of Mr Allen and Mr Scroggins, who were each honest and straightforward witnesses. Mr Lambert does not contend that he sought or obtained Credico's consent before entering into the arrangements relating to this campaign. However, he says that ESM was engaged on a different type of business from Credico, for the purpose of the definition of "similar business" in the restrictive covenants.

176. The 60 Second Challenge came to Mr Lambert's notice on the informal MC grapevine, because other MCs which he sponsored in Credico's network started working on the campaign.

177. The 60 Second Challenge is a campaign that is run by ESM (i.e. ESM is in the same position in the structure that Credico occupies in its campaigns). The clients were a panel of energy companies, including Scottish Power. It was a leads generation campaign, in that the objective was not that the ISA would achieve a sale on the doorstep. Rather, the hope was that the ISA would obtain a lead from the customer, and the lead would then be passed on to telesales workers at a call centre who would telephone the customer with a view to selling the product to them. It was called the "60 Second Challenge" because the aim was to obtain the customer's details within 60 seconds.

178. Mr Lambert obtained a contact number for ESM from one of his MC owner colleagues, Jamie Talbot, who was already dealing with ESM. He called Mr Leepaul Scroggins, who is the sales manager for ESM. ESM is a much smaller business than Credico, and the idea of obtaining a ready-made network of MCs and ISAs to work for it, through the contacts with MCs in Credico's network, was very attractive to it. The first call between Mr Scroggins and Mr Lambert took place on 21 November 2021. Mr Lambert immediately expressed a desire to take part. He saw this as a way of generating income for S5's ISA in the run-up to Christmas, at a time when nothing much was happening with Credico. Mr Scroggins followed up with an email to Mr Lambert on 22 November 2020 setting out the essential terms on which ESM was willing to do business with Mr Lambert and S5, including the payments that would be paid for each lead. The email said that there would have to be a signed agreement between ESM and Mr Lambert's company.

179. Mr Lambert replied on 23 November 2020, saying, "Thank you for the follow up email. I will send over the photos and names to get the ball rolling and so we can get reps active in the field selling." Mr Lambert then made arrangements for S5 ISAs to be given photo ID badges and product training.

180. As I have said, Mr Lambert was unaware specifically of the existence or terms of the restrictive covenants. However, by this stage he must have been at least vaguely aware that there might be restrictions on his ability to provide direct marketing services through anyone other than Credico. He took no steps to inform Credico what he was doing, and a suggestion was made by Mr Baudet, which was never put into effect, that commission payments should be made to boyfriends and girlfriends of ISAs, rather than to the ISAs themselves. Moreover, on 24 November 2020 he

incorporated a new company, Immabee Ltd, and provided its details to Mr Scroggins. In my judgment, this was done so that he could do business with ESM "off the books" from Credico. Mr Lambert points out that he had changed the trading name of S5 from time to time to refresh the brand and that he had started the process of changing the trading name to Immabee a couple of months previously, but the Defence of Mr Lambert and S5 admits that Immabee Ltd was incorporated so that it could potentially be the contracting party with ESM.

181. Mr Lambert was, however, cautious about working with ESM. He did not know much about the business and he was particularly worried that there was a risk that ESM would not be able to pay the commission that would be due to the ISAs. On or about 27 November 2020, Mr Lambert contacted Mr Scroggins and mentioned his concerns. Mr Scroggins put Mr Lambert in touch with Mr Baudet, the Third Defendant, who backed ESM through his company, The Interactive Team Limited, the Fifth Defendant. Mr Lambert met with Mr Baudet at a restaurant in the Lake District on 2 December 2020, and Mr Lambert reassured him that ESM had the necessary financial backing. It is clear that Mr Lambert and Mr Baudet also discussed plans for the future. As I have said, I have been invited to refrain from making findings about how far these discussions reached, and so I will not do so, save to say that it is clear that no firm written agreement was reached between Mr Lambert and Mr Baudet. It is also clear that Mr Baudet, who is perhaps more experienced in business than Mr Lambert, drew Mr Lambert's attention to the possibility that there would be restrictive covenants in his agreement with Credico, and they had a discussion about strategy if Credico took steps to restrain Mr Lambert from working with ESM and/or Mr Baudet.

182. Some of the S5 ISAs started training and then to work in the field on the 60 Second Challenge campaign with effect from 26 November 2020, and they carried on doing so for a week or two. To begin with, Mr Lambert helped co-ordinate the campaign for his ISAs, in the same way that he would have done for a Credico campaign. He organised training, and arranged for ID badges, and he communicated with Mr Allen and Mr Scroggins from time to time, mainly by WhatsApp message.

183. The arrangements with ESM were entered into with the expectation on both sides that S5 (or Immabee Ltd) would receive commission for the work that was done by its ISAs, but in the event this fell away because Mr Lambert and S5 were warned off from any further dealings with ESM before a written agreement was entered into between S5 and ESM that would have entitled S5 to commission. The draft agreement was sent to Mr Lambert on 7 December 2020, which was the same day on which Mr Lambert signed undertakings to Credico. It was backdated to 26 November 2020. Mr Lambert was cross-examined at length on the basis that he was lying about whether he had entered into an agreement with ESM that entitled S5 to commission, but I am satisfied that this was not the case and that he and counsel for the Claimants were at cross-purposes about the meaning of "agreement" in this context. Mr Lambert's evidence was consistent with the evidence of Mr Allen, the proprietor of ESM: when the S5 ISAs started working for ESM, both Mr Allen and Mr Lambert expected that S5 would be paid commission for the work that was done. However, this did not happen because Mr Lambert and S5 (or Immabee Ltd) pulled back from working for ESM before a written agreement was entered into and both Mr Allen and Mr Lambert took the view that without a written agreement there was no obligation for ESM to pay S5 commission for the work that had been done. In the event, though ISAs were paid commission, Mr Lambert and S5 were not paid any

commission of their own. There is no evidence of any such payment. The draft agreement with ESM was never signed.

184. Mr Lambert was not the only MC owner who went into business with ESM in November/December 2020. A number of other MCs in the Credico network did the same, including some which did so before Mr Lambert became involved with ESM.

The Undertakings

185. On or about 3 December 2020, Credico got wind that Mr Lambert and S5's ISAs were working on a campaign for someone else. Mr Ian Attwood, CEO of Credico, wrote to Mr Lambert, saying that Credico had become aware that Mr Lambert had set up Immabee Ltd and that this new company was active in direct marketing in the Manchester area. Mr Attwood said that this was clearly in breach of Clause 21.1 of the Trading Agreement, but said that Credico would not take any action against him if he agreed to provide undertakings, in specified terms, to the effect that this activity would cease by 7 December 2020, and that he would not provide direct marketing services to any other business from this time onwards.

186. On the same day, Mr Baudet messaged Mr Lambert, asking for a copy of the ISA agreement. Mr Baudet said that his solicitor was working out a game plan to deal with Credico's threat of legal action. Mr Lambert first took legal advice, from Druces, who were Mr Baudet's solicitors, on 4 December 2020.

187. Mr Lambert provided the undertakings on 7 December 2020, signed on his own behalf and on behalf of S5. The undertakings were in the following terms:

"For the purposes of this undertaking, save where otherwise indicated, the defined terms shall be interpreted by reference to their respective

> meaning in the [letter of 3 December 2020] and the Trading Agreement.
>
> Whilst the Trading Agreement is in force:
>
> Neither I or S5 will, whether directly or indirectly, carry on, or be involved in any direct marketing business.
>
> Following the termination of the Trading Agreement:
>
> Neither I or S5 will during the period of 6 (six) months after termination of the Trading Agreement, whether directly or indirectly, carry on or be involved in any direct marketing business within a radius of 10 (ten) miles of the postcode M1 2PW [the postcode of S5's office in Manchester]"

188. These undertakings were in exactly the same terms as those that had been set out in Mr Attwood's letter of 3 December 2020. However, they omitted the following wording that had been set out in the draft undertakings immediately before the undertakings themselves:

> "In consideration of Credico refraining from applying for interim injunctive relief against me and/S5 Marketing Limited (S5) at this time as referred to in the letter, but without prejudice to Credico's rights against me and/or S5 in respect of any other act by me and/or S5, I and S5 each hereby undertake to Credico, whether acting by ourselves, our directors, officers, employees, agents and/or otherwise howsoever, as follows:"

189. Mr Lambert did not draw Credico's attention to his changes. In cross-examination, he said that he was willing to conform with the undertakings.

The ISA Agreement was sent to ESM

190. In response to Mr Baudet's request, Mr Lambert sent over a copy of the ISA Agreement and Code of Conduct that were used for S5 ISAs, and which had been drafted by Credico, to Mr Allen. Mr Allen then provided an Agreement and Code of Conduct in ESM's name for ISAs working on the 60 Second Challenge in essentially the same terms. These were signed by the S5 ISAs during the period from 9

December 2020 onwards. Mr Allen denied that the wording was taken from the documents drafted by Credico, and said that he used the wording from precedents that he already owned. I have found this a difficult factual issue to resolve. At first blush, the coincidence is very great. However, on the balance of probabilities I conclude that the ESM Agreements were taken from precedents already in Mr Allen's possession. In my view, Mr Allen was an honest and convincing witness. I think it likely that documents in similar terms, all designed to ensure that ISAs are not employees, were commonplace in the direct marketing industry.

Events from 7 December 2020 onwards

191. In Mr Casey and Mr Webb's opening skeleton argument on behalf of Mr Lambert and S5, it was said that Mr Lambert stepped away completely from the 60 Second Challenge after giving the Undertakings. The contemporaneous documentary evidence does not entirely bear this out. Mr Lambert's involvement with ESM was wound down but did not end entirely.

192. Mr Scroggins said that after 7 December he had much less need to communicate with Mr Lambert on the campaign. On 9 December 2020, Mr Lambert emailed Mr Scroggins to say "just need the templates as we have the badging machine". This was plainly a reference to printing off badges for the ESM campaign. On 10 December 2020, Mr Lambert messaged Mr Scroggins to say, "We have stopped all recruitment for 2020. So all ID have been sent will bring us up to capacity." Mr Scroggins replied, on 11 December, "Ash is going to do them over the weekend" and Mr Lambert responded "Brilliant. Thanks mate." Mr Scroggins then messaged to say, "Ben give Ash [Mr Allen] a call to see where he is at badges." In his witness statement, Mr Scroggins said that he had messaged Mr Lambert in relation to a couple

of additional badges on 12 December, and Mr Lambert agreed in cross examination that this took place, even though there is no such message in the bundle before me.

193. There are no more messages until 18 December, when Mr Scroggins messaged, "Ben the Bank account has gone down again…. I think Ash has paid all but 20 agents… Until we get it sorted we cannot pay… Its only effected the brand new agents because we got to add them to the accounts but gone down." Mr Lambert did not respond.

194. On the evening of 21 December, Mr Lambert messaged the names and addresses of three of his ISAs, and said, "Hi Leepaul. Please can we check these 3 reps. They have said that they didn't receive any payments this week." A little later, he said, "Make sure these guys get paid Paul." Mr Scroggins replied, "Excellent… These agents will be paid this morning." In cross-examination, Mr Lambert said that he was following up payments for people who had worked for him for many months, and had put time and energy and effort and trust into the relationship and who had then moved into a venture alone. He was trying to help them out.

195. The only subsequent message was one on 28 December from Mr Scroggins to Mr Lambert, asking if he had a good Christmas. Mr Lambert did not reply.

196. Credico instructed enquiry agents to keep a watch on S5's premises in Manchester, and on 14 December an agent observed ISAs leaving S5's premises to go to a housing estate in Skelmersdale to work on the 60 Second Challenge. Mr Lambert accepted in his evidence that this had happened, but denied that he played any part in managing the ISAs. He said that he was not in the office that day.

197. Mr Scroggins accepted in cross-examination that the 60 Second Challenge campaign ended on around 23 or 24 December 2020. Then Mr Mehrzad QC asked:

"Q. As far as you're concerned Mr Lambert was still sort of involved because he was your point of contact.

Yes, so he had obvious responsibility because he'd brung his ISAs over to ESM, so he felt it was his responsibility."

198. The Claimants have found an advertisement for Immabee Ltd which appeared on an internet recruitment site on 29 December 2020. I accept Mr Lambert's evidence, however, that this was an aggregating site which had picked up and reposted, without permission, an advertisement that had been posted in early December, in the hope that it might generate some commission for the site. This is not evidence that Immabee Ltd was active in late December 2020.

199. Mr Lambert set up a WhatsApp group to communicate with the ISAs who were working on the 60 Second Challenge. Mr Lambert deleted the WhatsApp group sometime in mid-December, at about the same time that he was reminded by the Claimants' solicitors to retain documentation for the purposes of the litigation. He said he did so because he had to distance himself from the 60 Second Challenge. The Claimants suggest that this may have been in order to delete messages that would show the extent and duration of his involvement with the ESM Campaign. In addition, Mr Lambert performed a reset on his home computer on 20 December 2020 which had the effect of wiping his hard drive, including deleting any emails that may have been stored on it. He said that this was an accident and that the computer was old, and that it had no relevant material on it. Still further, Mr Lambert failed to pay the fees to Brandelective for the business email account that he was operating at the material time (jump-manchester) and was blocked from the account on 21 December 2020, and as a result was unable to disclose the emails in these proceedings until several months later. It is unfortunate that Mr Lambert did not co-operate with the evidence safeguarding process more effectively, and it leaves a poor impression.

The injunction

200. On 10 December 2020, three days after the Undertakings were provided by Mr Lambert, the Claimants' solicitors, Addleshaw Goddard, wrote to Mr Lambert, reminding him of the terms of the restrictive covenants in the Trading Agreement and of the terms of the Undertakings. The letter noted that a paragraph had been omitted from the Undertakings but asserted that this did not mean that there was no consideration for them. The letter alleged that there had been further breaches since 7 December 2020 of the Trading Agreement and the Undertakings in that Mr Lambert and/or S5 "have been directly or indirectly involved in direct marketing on behalf of agencies known as the Interactive Team and/or Power 21 and/or Ian Dorian." The reference to the Interactive Team was to one of Mr Baudet's businesses. In addition, the letter alleged that on 9 December Mr Lambert met with Mr Stewart to seek to persuade him to breach his restrictive covenants. The letter invited Mr Lambert and S5 to submit to a court order by consent by 14 December 2021.

201. On 11 December 2020, Mr Lambert served a notice of termination of the Trading Agreement with effect from 25 December 2020.

202. On 14 December 2020, the then solicitors to Mr Lambert and S5, Druces, wrote to say that a substantive response would be forthcoming by 17 December.

203. On 22 December 2020, Mr Justice Jacobs granted an injunction by consent in favour of the Claimants. The injunction was endorsed with a penal notice.

204. The restrictions on carrying on business that were imposed by the injunction were as follows:

"Until further order, or, if earlier, the termination of the Trading Agreement on 25 December 2020, the Defendants must not directly or indirectly, carry on, or be involved in any similar type of business to that outlined in the Trading Agreement and in particular (but without limitation) the Defendants must not carry on or be involved in the business of face to face selling and/or marketing through Immabee Limited.

During the period from 25 December 2020 until judgment after trial or further order, or, if earlier, 25 June 2021, the Defendants must not directly or indirectly carry on, or be involved in any similar busines conducted in a similar manner to that outlined under the Trading Agreement within a 10 mile radius of the postcode M1 2PW and in particular (but without limitation) the Defendants must not carry on or be involved in the business of face to face selling and/or marketing within that area through Immabee Limited."

Conclusions on the extent and duration of Mr Lambert's involvement with ESM

205. It is for the Claimant to establish, on a balance of probabilities, that Mr Lambert has breached the restrictive covenants and/or the Undertakings. I will deal with the meaning and effect of the covenants and the Undertakings in a later section of this judgment. These conclusions deal with matters of fact.

206. In my judgment, it is clear (and is not disputed) that Mr Lambert dealt with ESM from 21 November to 7 December 2020. He was active in making arrangements for his (i.e. S5's) ISAs to be trained in the 60 Second Challenge, and to be provided with the necessary IDs and other materials. He managed the ISAs in the same way that he would have managed them in a Credico campaign, with a relatively light touch. Until 3 December 2020, when he met with Mr Baudet, Mr Lambert was blissfully unaware that there were restrictions that might limit his ability to arrange for his ISAs to work for someone else, though it appears that he was not keen for Credico to know what he was doing. He sent an ISA agreement across to Mr Allen on or about 3 December 2020.

207. Despite giving the Undertakings on 7 December 2020, Mr Lambert continued to provide assistance for ESM, to a limited extent, for a few more days, mainly by making arrangements for badges to be issued to the ISA. He did not expect that he, or S5, would be paid for this assistance. This activity ceased on or about 12 December 2020. The ISAs carried on working for the challenge until sometime before Christmas, but, subject to the point mentioned in the next paragraph, Mr Lambert played no part, though he let them work out of his office in Manchester.

208. Thereafter, the only activity that Mr Lambert undertook in relation to the 60 Second Challenge and ESM was to chase up payments on behalf of some ISAs on 21 December. This was not done out of a desire to assist ESM, or with any expectation that he would be paid, but was done out of a sense of loyalty to his ISAs. He had led them into the arms of ESM and he felt a particular responsibility to do what he could to ensure that they were paid.

209. On the balance of probabilities I find that (apart from chasing up payment) Mr Lambert did not manage his ISAs in their activities in the 60 Second Challenge from 12 December onwards. In my judgment, it is unlikely that he would have done so in any significant way after receiving and digesting the letter from Addleshaw Goddard on 10 December 2020. Mr Lambert is an astute businessman, albeit inexperienced in matters such as those with which these proceedings are concerned. The stakes are too high, and the rewards too limited, for it to be likely that he would continue to deal with ESM for any significant period after he had been warned of legal action by Addleshaw Goddard. However, blasé he might have been about restrictive covenants in the past, and however strongly he might feel that he has a good case that the restrictions are unenforceable, I do not think that Mr Lambert would have been

prepared to take the risk of carrying on working with ESM in light of the threat of legal proceedings. He had been prepared to sign the undertakings on 7 December. He had refrained from signing the draft agreement with ESM, given to him on 7 December and so had forfeited any commission payments for himself or his business from the 60 Second Challenge.

210. I have considered whether Mr Lambert might have been enticed by the prospect of a long-term lucrative relationship with Mr Baudet to take the risk of continuing to work with ESM, but I do not think that this is likely. Whatever plans there might have been, they were not firm or definite plans, and so there was no strong commercial reasons for taking the risks involved in continuing with ESM. I have also considered whether the fact that Mr Lambert did continue, to a limited extent, to work with Mr Scroggins for a few days after he had given the undertaking on 7 December 2020 shows that he was prepared to disregard any promises he might have made and to carry on with ESM come what may. However, I think that it is more likely, on the basis of the evidence, that, having given his undertaking, Mr Lambert wound down his involvement with ESM, and continued to communicate about the badges simply because he wanted to help out his ISAs and thought it a minor issue. I think it likely that the penny did not drop with him that he should stop altogether having any dealings with ESM until about 12 December 2020, and even then his sense of loyalty to his ISAs meant that he was still prepared to contact ESM to ensure that they were paid.

211. It is clear that Mr Lambert permitted his ISAs to continue using his premises in central Manchester after 10-12 December 2020. They carried on working on the 60 Second Challenge. This is what they were observed to do by the enquiry agent on 14

December. They signed ISA Agreements with ESM. However, I accept that Mr Lambert's personal involvement stopped. The Team Leaders amongst the ISAs would have been able to work out where to go each day: his input was not required for that.

212. The evidence of Mr Allen and Mr Scroggins, which I accept, supports the conclusion that Mr Lambert played no significant part in the ESM campaign after 7 December 2020. Contrary to what was said on behalf of the Claimants in closing submissions, Mr Scroggins's answers in cross-examination, set out at paragraph 197, above, did not support the conclusion that Mr Lambert remained involved in the 60 Second Challenge until 23 or 24 December. It may well be that the S5 ISAs remained involved until the campaign ended, but Mr Scroggins did not say in clear terms that Mr Lambert remained involved until the last gasp. There is no evidence that Mr Lambert or S5 acted in breach of the injunction that was granted on 22 December 2020, and there is no reason to infer that they did so.

213. I do not draw any adverse inference from the somewhat unsatisfactory way in which Mr Lambert dealt with his home computer, his work email account, and the WhatsApp group. I accept that Mr Lambert's home computer was old and simply failed, and this was why the hard disk was wiped. I think that it is highly unlikely that Mr Lambert would have kept any incriminating materials on it. Again, I think that there is a legitimate explanation for why Mr Lambert's access to his work email account was blocked. He was somewhat resentful of Credico by late 2020 and he did not feel that Brandelective, which managed the emails, was justified in charging S5 for them. The refusal to pay, which started on 11 November 2020, predated the point at which Mr Lambert might have expected to become involved in litigation and to

have been required to provide disclosure of emails. It is particularly unfortunate that Mr Lambert's WhatsApp account, shared with ISAs, was deleted, but I think that this was the result of naivety, rather than anything more sinister.

The issues

The parties to the Trading Agreement and the Guarantee in 2020

(1) Was there a novation of the Trading Agreement in 2016, so that Credico is entitled to take proceedings with a view to enforcing the restrictive covenants?

214. Novation of a contract takes place when both parties to a contract, and a third party, agree that the third party will step into the shoes one of the contracting parties, assuming the rights and obligations of that original contracting party. Both of the original parties, and the new party, must agree: see **Seakom Limited v Knowledgepool Group Limited** [2013] EWHC 4007 (Ch) per Carr J, at paragraphs 145-146. A novation is different from an assignment, in which the rights enjoyed by a party to a contract, but not the obligations, are transferred to a third party. The test for whether there has been a novation in law is an objective one: the parties do not need to appreciate or understand that there has been a novation in law: **Evans v SMG Television Ltd** [2003] EWHC 1423 (Ch) per Lightman J at paragraph 186.

215. The parties' consent to a novation need not be set out in writing. Indeed, the parties do not need to give their consent expressly, whether orally or in writing. A novation may be inferred from the circumstances. In **Evans,** at paragraph 181, Lightman J said:

> "The proper approach to deciding whether a novation should be inferred is to decide whether that inference is necessary to give business efficacy to what actually happened (compare **Miles v Clarke** [1953] 1 WLR 537 at 540). The inference is necessary for this purpose if the implication is required to provide a lawful explanation or basis for the parties' conduct."

216. In particular, a novation may be inferred from the way that the parties behave towards each other, in that, with the consent of all concerned, the third party assumes the obligations of the original contracting party towards the other contracting party. See, for example, **P14 Medical Ltd v Edward Mahon** [2020] EWHC 1823 (QB), [2021] IRLR 39, at paragraph 48. In the **Seakom** case, Carr J said, at paragraph 147,

> "The necessary agreement may be express or may be inferred from conduct. Sufficient evidence of novation by conduct has been found where the third party makes payment in respect of a liability of one of the original contracting parties – see **Re Head** [1894] 2 Ch 236."

217. In the present case, in my judgment, it is clear that there was a novation to Credico of PerDM's contractual rights and obligations under the Trading Agreement with effect from 1 January 2016. Mr Lambert and S5 were notified of the change by letter dated 8 December 2015. It is true that the letter referred to "assignment", not "novation" but there is no doubt that what actually happened, as Mr Lambert and S5 were well aware, was that Credico took the place of PerDM in all respects in relation to the Trading Agreement. MC owners were told that it would be business as usual. There is no doubt that PerDM and Credico consented to the novation. The purpose of the sale of the share capital of PerDM to Credico was so that Credico could take over PerDM's business and would stand in PerDM's shoes in respect of the relationship with MCs. Mr Lambert was well aware from the beginning of 2016 onwards that he and S5 were dealing with Credico, not PerDM. All the emails that were sent to him were marked with Credico's logo, not PerDM's. He attended Credico branded

seminars and other events. Most significantly, with Mr Lambert and S5's knowledge and consent, Credico assumed the obligation to pay commission and to provide the back-office services that had previously been provided to S5 by PerDM. It was Credico, not PerDM, which supplied S5 with direct marketing campaigns. It was Credico that Mr Lambert contacted when he wanted to discuss those campaigns or to make arrangements in relation to them.

218. In those circumstances, the inference of a novation is necessary to give business efficacy to what actually happened. It would fly in the face of common sense and practical reality to conclude other than that, by mutual consent of the three parties involved, Credico took over the contractual rights and obligations of PerDM under the Trading Agreement.

219. The novation to Credico of the rights conferred on PerDM under the Trading Agreement means that the benefit of the restrictive covenants (if they were enforceable) passed from PerDM to Credico. These were part of the bundle of rights enjoyed under the Trading Agreement that were enjoyed by Credico and which therefore passed to the new contracting party by means of the novation. There is no issue about whether this significantly changed the scope of the obligations contained in the restrictive covenants: it did not. This is not a case in which a party entered into a restrictive covenant with a small business which was then taken over by a much larger business, thereby rendering the restrictions very much more onerous than they had previously been. The business of running direct marketing campaigns via MCs which was operated by PerDM was simply taken over by Credico.

(2) Alternatively, is there an estoppel by convention which prevents Mr Lambert and S5 from disputing that Credico should be treated as if it was a party to the Trading Agreement?

220. In light of the conclusion that I have reached on Issue (1), this does not arise.

(3) Was the Guarantee part of the Trading Agreement and/or was it novated so that Credico can rely upon it? This raises the question whether the Guarantee cannot have been novated because the requirements of the Statute of Frauds 1677 were not complied with in 2016. Alternatively, does estoppel by convention apply so that Mr Lambert and S5 are prevented from denying that Credico should be treated as a party to the Guarantee?

221. The Guarantee was indeed an integral part of the Trading Agreement, albeit that it was entered into by Mr Lambert, rather than by S5, the main party to the Trading Agreement. It was set out in Schedule 3 to the Trading Agreement and the agreement of the MC owner to sign the Guarantee was a condition of PerDM/Credico entering into the Trading Agreement. The commercial purpose behind the Guarantee is obvious. Although MCs are incorporated companies, the reality is that they are invariably set up by an individual who has started as an ISA and risen from the ranks. They are the power behind the throne. The owner of the MC is in charge of the MC's day to day operations and provides the seed-funding, the £5,000, to enable the MC to start up and enjoys the profits that are generated by the MC. An MC is an empty shell without the support of its owner. A restriction which limited the freedom of action of the MC, but which did not limit the freedom of action of the MC owner, would be of no practical utility. It is for that reason that PerDM and now Credico requires the MC

owner to provide an indemnity in relation to any liabilities that the MC may owe to PerDM/Credico.

222. Clause 10 of the Guarantee is of a different nature to the clauses that precede it. It is not an indemnity by the owner of the MC's obligations to PerDM/Credico. It is not a promise to take over responsibility for an obligation owed primarily by the MC if the MC defaults on it. Rather, it requires the MC owner to promise personally to abide by the same restrictive covenants that the MC is signing up to.

223. It is clear from all of the circumstances that the agreement between PerDM and Mr Lambert as the MC owner that is set out in Clause 10 of the Guarantee was novated at the same time as the novation of the Trading Agreement itself. It is clear that PerDM and Credico agreed between themselves that all aspects of the legal relationship between PerDM and the MCs and their owners would be taken over by Credico. By his conduct, and by his personal dealings with Credico, Mr Lambert indicated his agreement to Credico taking the place of PerDM in relation to the Trading Agreement and in relation to the terms of the Guarantee document that underpinned the Trading Agreement. The consideration for the novation of the Guarantee is that Credico continued to provide the benefits to S5 that resulted from the Trading Agreement, including, in particular, paying commission. It does not matter that the 8 December 2015 letter did not specifically mention the Guarantee. The novation of the Guarantee was effected by conduct, rather than by any express written documentation.

224. Mr Lambert and S5 contended that there could not have been an effective novation of the Guarantee in 2016, because, if the Guarantee were to constitute a new contract as between Mr Lambert and Credico, it would be in breach of the requirement in the Statute of Frauds 1677, section 4, that a guarantee is only legally binding if its terms

are reduced to writing in a note or memorandum and signed by the guarantor. Accordingly, Mr Casey submitted that, in so far as it was purportedly novated so as to apply for the benefit of Credico, the Guarantee was unenforceable.

225. Section 4 of the Statute of Frauds provides as follows:

> "Noe Action shall be brought . . . whereby to charge the Defendant upon any speciall promise to answere for the debt default or miscarriages of another person . . . unlesse the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in Writeing and signed by the partie to be charged therewith or some other person thereunto by him lawfully authorized."

226. In my judgment, this submission is misconceived. There is an interesting question as to whether, if a guarantee is originally compliant with the Statute of Frauds, it ceases to be enforceable if it is not signed again when a novation takes place. None of the cases cited by Mr Casey dealt with this situation. However, it is not necessary to answer this question for the purposes of the present case. In my view, Mr Merhzad QC is right that, in any event, the Statute of Frauds has no application to Clause 10 of the Guarantee. The requirements of section 4 of the Statute of Frauds apply to a promise to answer for the "debt, default or miscarriages of another person." In **Abbhi v Slade (t/a Richard Slade and Co**) [2019] EWCA Civ 2175, the Court of Appeal made clear that the requirements of the Statute of Frauds only apply to promises that are conditional on another party failing to comply with an obligation: see paragraph 58. They applied, therefore, to the clauses in the Guarantee which required Mr Lambert to indemnify Credico in the event that S5 failed to pay any debts owed by S5 to Credico. However, Clause 10 of the Guarantee did not contain such a promise. This clause contained a free-standing and independent obligation, assumed by Mr Lambert, which was not a promise to be liable for the obligation of another party in the event that the other party failed to comply with an obligation owed to the person

seeking to enforce the guarantee. It was a promise to do something independently of any default on the part of S5. Accordingly, there was no need for the requirements of section 4 of the Statute of Frauds to be complied with in order for Clause 10 to be enforceable in favour of Credico. As Mr Mehrzad QC said, the fact that Clause 10 appears in a document somewhat misleadingly headed "Guarantee", or that it is contained in a document which also contains indemnities, is nothing to the point.

227. It follows that the Guarantee remained in place after 1 January 2016. It follows in turn that Credico does not need to rely upon an estoppel by convention.

(4) If there was no novation or estoppel by convention, so that, in 2020, the contracting parties to the Trading Agreement and the Guarantee were still PerDM, S5, and Mr Lambert, are the restrictions unenforceable because PerDM ceased trading in 2016?

228. Given my conclusions on Issues (1) and (3), this does not arise. The correct Claimant is Credico, not PerDM. If this issue had arisen, I would have taken a view that the Court should exercise its discretion to decline to enforce any restrictive covenants in favour of PerDM, because PerDM ceased trading over five years ago and so has no extant legitimate business interest in the enforcement of the restrictions.

The enforceability of the restrictive covenants

(5) What is the applicable test and what is the level of scrutiny that should be applied to the enforceability of the covenants in clause 21.1 (if the doctrine of restraint of trade applies to it at all) and clause 21.2 of the Trading Agreement?;

229. The central question that a court must ask itself, when considering the enforceability of a restrictive covenant to which the doctrine of restraint of trade applies is whether the party seeking to rely upon them can show that the restrictions go no further than is reasonably necessary to protect that party's legitimate business interests.

230. The level of scrutiny that is applied depends upon whether the restriction was imposed in the context of an employment relationship, or something that is akin to an employment relationship, on the one hand, or in the context of a commercial relationship, on the other. The task of showing that the restrictions go no further than is reasonably necessary to protect the claimant's legitimate business interest is much more onerous in an employment relationship case than in other types of case. The standards of scrutiny are not binary, however, and, in a non-employment case, the extent of the scrutiny depends on all of the circumstances of the case: there is no one-size-fits-all standard.

231. However, notwithstanding the different standards of scrutiny, the issues that the Court must consider, when dealing with non-competition covenants, are fundamentally the same in both types of cases. They were helpfully set out by Haddon-Cave J in **QBE Management Services (UK) Ltd v Dymoke** [2012] EWHC 80 (QB) [2012] IRLR 458, at paragraph 210, as follows:

> "(1) The court must determine what the covenant means, properly construed.
>
> (2) The court must then consider whether the former employer has shown on the evidence that it has legitimate interests requiring protection in relation to the employer's employment.
>
> (3) Once legitimate protectable interests are shown, the covenant must be shown by the former employer to be no wider than reasonably necessary.

(4) Even if the covenant is held to be reasonable, the court will decide whether, as a matter of discretion, the injunctive relief sought should in all the circumstances be granted having regard, amongst other things, to its reasonableness at the time of trial.

(5) The burden is on the covenantee to establish that the restraint is no greater than reasonably necessary for the proper protection of protectable interests.

(6) Reasonable necessity is to be assessed from the perspective of reasonable persons in the position of the parties at the time that the contract was entered into or varied and having regard to the contractual provisions as a whole and to the factual matrix to which the contract would then realistically have been expected to apply."

232. In relation to reasonable necessity, Haddon-Cave said, at paragraph 215:

"…it is only if the Court finds that a "**much** less far-reaching" covenant would have afforded adequate protection is it likely to regard the existing restriction as unreasonable. The exercise is not a marginal one, otherwise Courts would be faced with a paralysing debate in every case about whether a covenant with x days shaved off would still provide adequate protection." (Haddon-Cave J's emphasis).

233. In a recent, and again very helpful, judgment of the Court of Appeal, **Quantum Advisory Ltd v Quantum Actuarial LLP** [2021] EWCA Civ 227, Carr LJ said, at paragraphs 62-65:

"**Reasonableness**

62. On the question of reasonableness, it is common ground that the test identified by Lord Macnaghten in **Nordenfelt** (at 565) is to be applied:

"reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is no way injurious to the public."

63. Whilst in some of the authorities the courts have conflated the two (private and public interest) aspects of the test (see for example **Attorney-General of the Commonwealth of Australia v Adelaide SS Co** [1913] AC 781 (at 795 per Lord Parker) and **Esso** (at 324D per Lord Pearce)), the broad view appears to be that Lord Macnaghten's dichotomy is to be preferred. Where businesses have dealt at arm's length with each other, they can usually be regarded as adequate

guardians of their own interests. However, the possible impact of the bargain upon third parties, or the public more generally, may call for careful judicial scrutiny. Clarity of analysis is more likely to be facilitated by preservation of both limbs of the exposition.

64. A court will be slow to substitute its (objective) view as to the interests of the contracting parties for the (subjective) views of the contracting parties themselves. The law recognises that if business contracts are fairly made by parties who are on equal terms such parties should know their business best (see in particular **Esso** (at 300C-D per Lord Reid; at 305B-D per Lord Morris and at 323B-E per Lord Pearce)). That consideration will carry less or no weight if the parties were negotiating on other than equal terms (see Panayiotou (at 332 per Jonathan Parker J)). The absence of independent legal advice for the weaker party may also be relevant (see **PSM** (at [100] per Arden LJ)).

65. Beyond this, and again drawing the relevant threads together by way of summary:

i) The onus of establishing that a covenant is no more than is reasonable in the interests of the parties is on the person who seeks to rely on it (see in particular **Attwood v Lamont** [1920] 3 KB 571 (at 587-588 per Younger LJ). If he/she establishes that it is no more than reasonable in the interests of the parties, the onus of proving that it is contrary to the public interest lies on the party attacking it (see in particular **Saxelby** (at 716 per Lord Shaw));

ii) The time for considering reasonableness is again the time of the making of the contract (see in particular **Gledhow Autoparts Ltd v Delaney** [1965] 1 WLR 1366 (at 1377 per Diplock LJ); **Shell v Lostock Garage Ltd** [1976] 1 WLR 1187 (at 1197-1198 per Lord Denning MR) and **Schroeder** (at 1309H per Lord Reid));

iii) It is no answer on the question of reasonableness to say that there have been substantial financial rewards on all sides. The question of reasonableness has to be considered by reference to the terms of the contract (see in particular **PSM** (at [104] per Arden LJ));

iv) For a restraint to be reasonable between the parties it must be no more than what was reasonably required by the party in whose favour it was imposed to protect his legitimate interests (see in particular **Saxelby** (at 701 per Lord Atkinson) and **Schroeder** (at 1310B per Lord Reid and 1315H per Lord Diplock));

v) The court is entitled to consider whether or not a covenant of a narrower nature would have sufficed for the covenantee's protection (see in particular **Office Angels Ltd v Rainer Thomas and O'Connor** [1991] IRLR 214 (at 220 per Sir Christopher Slade));

vi) What is reasonable may alter with the changing nature of commerce and society (see in particular **Nordenfelt** (at 547 per Lord Herschell));

vii) Factors to be considered when assessing reasonableness between the parties include the character of the business (see in particular **Nordenfelt** (at 550 per Lord Herschell)) and also:

a) The relevance of the consideration for the restraint;

b) Inequality of bargaining power;

c) Standard forms of contract;

d) Whether the restraints operate during or post-contract;

e) The surrounding circumstances, including the factual and contractual background;

(see in particular **Panayiotou** (at 329-336 per Jonathan Parker J));

viii) The duration of an agreement in restraint of trade is a factor of great importance in determining whether the restrictions in an agreement can be justified (see in particular **Schroeder** (at 1312F-G per Lord Reid));

ix) The level of compensation may be relevant to the question of reasonableness (see **Esso** (at 300B-C per Lord Reid) and (at 329-330 per Jonathan Parker J));

x) The motives of the party challenging the contract are immaterial to the question of whether the terms of the contract are reasonable as between the parties (see in particular **Schroeder** (at 1309H per Lord Reid) and **Panayiotou** (at 336 per Jonathan Parker J))."

234. The application of this test in the employment context is very much more stringent than in the general commercial context. See **Dawnay, Day & Co Ltd v de Braconier d'Alphen** [1997] IRLR 285 (Ch) at paras.29, 67 & 69 per Robert Walker J (upheld on appeal by the Court of Appeal, see [1997] IRLR 442, at paragraph 41); **Dyno Rod Plc v Reeve** [1999] FSR 148 (Ch) at 154, per Neuberger J, and **Guest Services Worldwide Ltd v Shelmerdine** [2020] EWCA Civ 85 (CA) per Asplin LJ at paragraph 41. Even in the wider commercial context, however, the test is not applied in a uniform way in all circumstances. In the passage from the **Quantum**

case, set out above, at paragraph 64, Carr LJ made clear that the extent of judicial scrutiny may be different depending upon whether or not there was inequality of bargaining power, and whether the party which assumed the obligations had the benefit of legal advice. At paragraph 65(vii) (c), she said that the Court should take into account whether the parties were contracting on one party's standard terms of business.

235. The present case is not an employment case. The MCs, being companies, were not employees of Credico. Nor is it akin to an employment case, in my view. It is true that MCs were companies that were set up by individuals so that they could trade with Credico/PerDM. Credico/PerDM imposed this as a requirement before Credico/PerDM would supply them with direct marketing campaigns. However, it was never envisaged that the MC owner would simply provide his or her personal services to Credico/PerDM, through the vehicle of the MC. Rather, the intention was always that the MC owner would grow his or her own business, and would engage Assistant Managers, Team Leaders, ISAs, and administrative staff, to service the campaigns that Credico/PerDM supplied them with. The MCs were real businesses, not vehicles through which an independent contractor provided his or her services.

236. Accordingly, the level of scrutiny that should be applied in this case is not the same as would be appropriate in a standard employment case. However, there are features of this case which mean that a stricter standard of scrutiny should be applied than in a commercial case in which the restrictions have been imposed and accepted after arm's length negotiations between parties of broadly equal bargaining power. The underlying reality is that the MCs and their owners had no alternative but to accept the restrictions as a condition of being allowed to join the Credico/PerDM network.

The restrictions were set out in Credico/PerDM's standard form contracts. In practice, there was no possibility that a new MC owner would be able to renegotiate the terms of the Trading Agreement so as to vary the restrictions. Moreover, Credico is a large, sophisticated, and experienced business operation, whilst, at the time of entering into the Trading Agreement, the MC owners were inexperienced and had only recently joined the industry. The reality is that there was inequality of bargaining power, and this must be reflected in the standard of scrutiny that I apply to the question whether the restrictions are no more than reasonably necessary to protect Credico's legitimate business interests (if, in the case of clause 21.1, the doctrine of restraint of trade is applicable at all).

237. This does not mean that the test approaches the severity of the test that applies in employment cases. As the Claimants point out, the Courts have applied a less strict test to franchise cases, even though, almost always, the franchisor which seeks to enforce the restrictions will be a larger and more powerful business than the franchisee, and will have contracted on its own terms of business (see, for example, **Dyno Rod** at 153-154). However, I think that it is appropriate to recognise that in the present case, a new MC owner is likely to be particularly inexperienced in business and will not have substantial resources behind him or her. It is also relevant, though perhaps of lesser importance, that Mr Lambert was not invited to, and did not, take legal advice before entering into the Trading Agreement on behalf of S5.

(6) What is the meaning of phrase "any similar type of business", and "any similar business", in clauses 21.1 and 21.2 of the Trading Agreement, respectively?

238. The pre-termination restriction in Clause 21.1 applies to "any similar type of business as outlined under this Agreement". The post-termination restriction in Clause 21.2 applies to "any similar business conducted in a similar manner to that contemplated in this Agreement". Notwithstanding the slight difference, the wording must have the same meaning in both clauses.

239. On behalf of Mr Lambert and S5, Mr Casey submits that this form of words does not cover the 60 Second Challenge. If he is right, then there would be no question of Mr Lambert and S5's work with ESM contravening either of the two restrictive covenants, even if they were binding.

240. Mr Casey submits that the language of the clauses shows that similar business is defined by reference to the way that business is done as outlined under the Trading Agreement, or in a similar manner to that contemplated in the Trading Agreement. Clause 2.4 of the Trading Agreement makes clear that the MC is engaged to provide Campaign Services to Credico. "Campaign Services" are defined in Schedule 2 to the Trading Agreement. Mr Casey submits that these are limited to selling through ISAs. He says that this does not cover the 60 Second Challenge, because the 60 Second Challenge was concerned with lead generation, not sales.

241. I do not accept this submission. I agree that the definition of "Campaign Services" in Schedule 2 to the Trading Agreement (set out at paragraph 78, above) is the best guide to the meaning of "similar types of business" or "similar business". However, the definition of "Campaign Services" is not limited to direct marketing services which are aimed at making a sale on the doorstep. The definition of "Campaign Services" in Schedule 2 includes "completing sales", but it also includes "procuring customers". Direct marketing with the aim of generating leads which can then be

followed up by a telesales operative amounts to "procuring customers". This conclusion is reinforced by the close similarities between the MEX campaign and the 60 Second Challenge. In both cases, the aim was for the ISA to make contact with a customer but for the sale to be completed at a later stage by a telesales operative. The only difference was that, in the MEX campaign, the objective was to obtain the customer's agreement in principle to the sale agreement on the doorstep, whereas in the 60 Second Challenge the ISA was not expected to go so far as to obtain agreement in principle, all that was required was that the ISA procured a lead to be followed up.

242. I accept the submission on behalf of the Claimants that the words "any similar business conducted in a similar manner to that contemplated by this Agreement" mean the activity of face-to-face marketing conducted through the use of individuals (such as ISAs) selling or marketing clients' products or services (or procuring customers) 'in the field', in other words, through direct interactions with customers through residential door-to-door sales and/or through the use of pop-up booths and events at venues such as shopping centres. "Similar business" or "similar type of business" does not cover direct marketing which is not face-to-face, such as telesales, and it does not cover "business to business" direct marketing.

243. It follows that participation in the 60 Second Challenge was "similar business" for the purposes both of Clause 21.1 and Clause 21.2.

(7) What is the meaning and effect of the 10 mile geographical restriction in clause 21.2 of the Trading Agreement?;

244. This aspect of clause 21.2 is somewhat awkwardly and unhelpfully drafted. It refers to "similar business conducted in a similar manner to that contemplated in this

Agreement, within a radius of 10 (ten) miles of the principal place of business of the Company."

245. The problem is concerned with the word "conducted". Does it mean solely that the face-to-face marketing must not be conducted in streets within 10 miles of the principal place of business of the MC – as Mr Lambert and S5 contend – or that not only must the face to face marketing not be conducted within 10 miles of the principal place of business of the MC, but the MC must not continue to be based within 10 miles of the principal place of business at the time when the Trading Agreement terminated – as the Claimants contend?

246. As Mr Casey and Mr Webb submitted in their opening skeleton argument, this clause has to be given the meaning which it would convey to a reasonable person having all the background knowledge reasonably available to the parties in the situation in which they were at the time that the Trading Agreement was made: see **Investors Compensation Scheme v West Bromwich Building Society** [1997] UKHL 28; [1998] 1 WLR 896 and **Arnold v Britton & ors**. [2015] UKSC 36; [2015] AC 1619.

247. In my judgment, applying that approach, the second of the two alternatives is the correct interpretation. This is the sensible meaning to be ascribed to the wording, in light of the factual matrix at the time that the Trading Agreement was entered into. The protection that Credico was seeking was protection against competition by the MC, within a defined geographical area. It plainly makes sense, in the factual context, that the MC should be prevented from sending out, or permitting, ISAs to work within 10 miles of the MC's base when it was part of the Credico network. But it also makes sense that the prohibition should additionally apply to the location of the

MC's base. The location of the base matters. It is where ISAs congregate and go to work from each day. It places a practical limitation on where ISAs can travel to and achieve sales. If the base is within the 10-mile radius, it means that the MC which has left the Credico network will be fishing from the same pond, so to speak, as ISAs employed by Credico MCs in the same area. Also, the competitive activity of the MC is not limited to the marketing activity. A rival MC will also be seeking to recruit new ISAs, and the geographical limitation on the MC's location limits the ability of a MC to fish from the same pond for ISAs. The other reason why a limitation on the base of the MC makes good business sense is that it is easier to police than a limitation which applied solely to the streets in which ISAs did their marketing. The geographical restriction on the base of the MC did not have the effect in practice of preventing the MC from carrying out direct marketing all over the UK. As the contracting parties were well aware, in practice a MC carried out direct marking in the locality in which it was based (apart from the road trips).

248. For these reasons, I accept the Claimants' submission that the restriction in clause 21.2 applies not just to marketing by ISAs within the 10-mile exclusion zone, but also to the siting of the MC premises within the exclusion zone.

(8) Does the doctrine of restraint of trade apply to the restriction in clause 21.1 of the Trading Agreement?

249. It is clear that there are certain types of restrictions to which the doctrine of restraint of trade does not apply at all. The leading authority in this issue is the recent Supreme Court judgment in **Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd** [2020] UKSC 36 (SC), in which the Supreme Court departed from the House of Lords decision in **Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd** [1968] AC

269. The **Peninsula** case was concerned with restrictions on the use of land for trading. The guidance given by the Supreme Court in **Peninsula** was considered by the Court of Appeal in the **Quantum** case, which, like the present case was a case about restrictive covenants limiting the ability to compete. In **Quantum,** Carr LJ summarised the law as follows at paragraphs 54 and 60-61:

"54. The definition of a covenant in restraint of trade presents "peculiar conceptual difficulty": Chitty comments that all contracts are to some extent in restraint of trade by at least preventing the parties to the contract from trading with others. However, there has been no suggestion that all contracts are or should be subject to the doctrine, which is rather "to be applied to factual situations with a broad and flexible rule of reason" (see Esso (at 331G per Lord Wilberforce)). The courts have made no apologies for refraining from any attempt to identify the dividing line between contracts which are and are not in restraint of trade. It has been described as "uncertain and porous" (see **Proactive Sports Management Ltd v Rooney** [2012] FSR 16 ("PSM") (at [55] per Arden LJ). The courts have emphasised repeatedly that the categories of restraint of trade are not closed (see for example **Petrofina (Great Britain) Ltd v Martin** [1966] Ch 146 (at 169 per Lord Denning MR)) ("**Petrofina**").

….

60. I draw together the relevant legal principles from the authorities (including most recently **Peninsula**) as follows:

(i)The doctrine is not confined to immutable boundaries or rigid categorisation, but there are certain categories of covenants to which the doctrine traditionally applies, in particular those by which an employee undertakes not to compete with his employer after leaving the employer's service and those by which a trader who has sold his business agrees not thereafter to compete with the purchaser of the business. The doctrine has been held to apply to franchise agreements, share-purchase agreements and the assignment of a patent;

(ii)There are no clear limits on the scope of the doctrine and no precise or exhaustive test can be stated. The doctrine is to be applied to factual situations with a broad and flexible rule of reason (see **Esso** (at 331G per Lord Wilberforce)). The question is whether or not in all the circumstances the contract should be excluded from the application of the doctrine or, as Lord Wilberforce put it in **Esso** (at 332G), whether it is appropriate to dispense the contract "from the necessity of justification under a public policy test of reasonableness";

(iii)Contractual restraining provisions which are of a sort which have become part of the accepted machinery of a type of transaction which have generally been found acceptable and necessary – reflecting the accepted and normal currency of commercial or contractual conveyancing relations - will generally fall outside the scope of the doctrine (following the "trading society" test discussed above and approved in **Peninsula Securities**);

(v)Determining whether contractual restraints fall outside the range of a normal commercial contract imposing restrictions on a contracting party's ability to carry on a business activity is a question of evaluating all the relevant factors to be assessed cumulatively...**;**

(vi)The assessment of application of the doctrine is to be carried out by reference to the position as at the time that the contract is made (not by reference to subsequent performance and events). How the contract turns out may be relevant only in so far as it furnishes evidence of the nature of the contract in question when made…;

(vii)The application depends less on legal niceties or theoretical possibilities than on the practical effect of the restraint in hampering the freedom to trade…. It is a question of substance not form…;

(viii)The doctrine can apply to restraints operating during the currency of the contract, as well as post-contractually. However, the distinction between pre-and post-termination restraints is not without relevance. The fact that a restraint is limited to the period of the contract may be a factor in favour of excluding the doctrine (or a factor to be brought into account on the side of justification)…

(ix)As already set out above, where the doctrine applies, the contractual restraints are prima facie unenforceable but all, whether partial or total, are enforceable if reasonable.

61. The approach of the courts to analogous factual situations may be of assistance in determining the correct approach to be taken but is unlikely to be determinative because of the fact-sensitive nature of the exercise to be carried out."

250. Carr LJ summarised the relevant question at paragraph 68(ii) of her judgment:

"The question is whether or not (as a matter of public policy) it is appropriate to dispense the contract from the necessity of justification under a public policy test of reasonableness"

251. As Carr LJ pointed out at paragraph 54 of her judgment in **Quantum,** it can sometimes be difficult to work out whether a case falls within the category of

restrictions in which the doctrine of restraint of trade does not apply at all. Carr LJ returned to this point in **Quantum,** at paragraph 66. She said:

> "66. There is a degree of overlap between the two stages to be considered (namely whether the doctrine applies at all and, if it does, whether the restraints are reasonable): see **PSM** at [59] where Arden LJ observed:
>
> "….the line between the two stages…is not clear cut, and the analysis has to be an iterative one between them…."
>
> and where Gross LJ went on (at [147]) to state:
>
> "…these questions, though analytically separate, cannot be viewed as existing in wholly watertight compartments."

252. In practice, in my view, it will often be the case that where a restriction is on the cusp of falling into a category in which the doctrine of the restraint of trade does not apply at all, it will be clear that, even if the doctrine does apply, the restriction is enforceable on the basis that it is no greater than reasonably necessary for the proper protection of protectable interests. In such cases, the outcome will be the same whether the restriction is regarded as one which is outside the doctrine of restraint of trade altogether, or as one which is within the scope of the doctrine but which is enforceable in accordance with the doctrine.

253. At paragraphs 79 and 80 of her judgment, Carr LJ said the following:

> "79…..Public policy, which sets a high threshold, remains the foundation of the doctrine. As the authorities make clear, there is no bright line to be drawn (and it would be wrong to attempt to define one). But what does have to be decided is on which side of the line the facts of any given case fall. This involves an assessment of public policy to be carried out by reference to the facts as they stood at the time that the contract was entered into, balancing the competing considerations of holding parties to freely negotiated contracts whilst not permitting them to be restricted unduly in their ability to trade. The freedom to contract is itself in the public interest (see Esso (at 304F-306C per Lord Morris)). The doctrine is not there to rescue business

> men and women from having entered into agreements which they may later regret.
>
> 80. The search is for one or more features of the Services Agreement which, in all the circumstances, can be said to be such a cause for concern (or apparently oppressive) as to justify (as a matter of public policy) requiring the covenantee to prove reasonableness. As indicated, LLP contends that there are, including the duration of the Covenants and the one-sided nature of the termination provisions."

254. Applying these principles to the present case, I have come to the conclusion that the restriction in clause 21.1 is not one that is outside the scope of the doctrine of restraint of trade altogether (the Claimants do not contend that the post-termination restriction in clause 21.2 was outside the scope of the doctrine).

255. The best argument in favour of the contention that clause 21.1 is outside the scope of the doctrine of the restraint of trade, in my view, is that it may be said that a restriction which prevents a MC from working on campaigns for a competitor of Credico whilst contracted to Credico is part of the accepted machinery of a type of transaction which have generally been found acceptable and necessary – reflecting the accepted and normal currency of commercial or contractual conveyancing relations. It is, in essence, a contract for exclusive agency. If a MC signs up with Credico, and Credico invests time energy and money in providing the MC with campaigns, and with providing support and assistance, it might be thought that it is consistent with public policy that in return the MC should not simultaneously work for a competitor of Credico. That would mean that others would reap the benefits of the nurturing that Credico provides for the MC. It might also mean that clients were less willing to contract with Credico to supply campaigns, if they thought that MCs which carried out the campaigns in the field might also be carrying out campaigns for competitors of the clients. It may be said that an exclusivity agreement is a standard and necessary part, or part and parcel, of the overall arrangement in return for which Credico

provides a steady stream of work to the MC. Mr Cote said that restrictive covenants of this type are common in the industry. It is also significant that the restriction in 21.1 applies only whilst the agreement is in force.

256. The Claimants rely upon **One Money Mail Limited v RIA Financial Services** [2015] EWCA Civ 1084. In this case, the claimant agreed that the defendant could act as its agent in a money transfer business in the city of Hereford. The contract contained a provision that the defendant would not act for any other money transfer organisation during the term of the agreement (and for a period after termination). The Court of Appeal held that the doctrine of restraint of trade did not apply to the restraint which applied during the currency of the contract, even though the Claimant was entitled to appoint another agent to operate in Hereford during the currency of the agreement with the defendant (see judgment, paragraph 11). At paragraph 5 of the judgment, Longmore LJ said that sole agencies are:

> "common in ordinary commerce and there would, therefore, have to be something specially restrictive before the restraint of trade principle will be effective"

257. In his dissenting judgment in the **Esso** case, which was followed by the Supreme Court in **Peninsula,** Lord Wilberforce said, at page 336, that

> "The line of thought that restrictions may in some context be imposed, and upheld, where they have become part of the accepted pattern or structure of a trade, as encouraging or strengthening trade, rather than as limiting trade, is I think behind the courts' acceptance of exclusivity contracts and contracts of sole agency. So, in **Servais Bouchard v Prince's Hall Restaurant Ltd**, the contract was for exclusive purchase of burgundy for the defendant's restaurant for an indefinite period. The judgments of the Lord Justices are based on different grounds and it was held, in any event, that the covenant was reasonable: but the judgment of Henn Collins M.R. is instructive. He thought that the case did not come within the principle by which restraints of trade were held to be invalid as being contrary to public policy. Contracts of the same class as that now in question, viz, contracts by which persons bound themselves for good consideration

> to supply their customers with goods obtained from a particular merchant exclusively, were for the benefit of the community. There was need for contracts of this kind and the court must have regard to the fact that contracts for sole agency were matters of every-day occurrence."

258. These are strong arguments in favour of the conclusion that the doctrine of restraint of trade does not apply at all. I have not found this an easy question to decide. However, in my judgment, the countervailing considerations as to why the doctrine of restraint of trade should apply to the restriction in clause 21.1 are to be preferred. Carr LJ has emphasised that each case depends on its own facts. In the present case, under the Trading Agreement, Credico had no contractual obligation to provide the MC with any work to do. Even when no work was being provided, the obligation to refrain from competing enured. It is true that, at the time that the Trading Agreement was entered into, it was envisaged on both sides that Credico would keep the MC busy with campaigns. It is also true that a MC which was left bereft of work could terminate the Trading Agreement on only two weeks' notice. The MC would not be left high and dry for a long period. However, in my view these are considerations which should be weighed in the balance when the doctrine of restraint of trade is being considered. So is the fact that there was nothing to prevent Credico to appoint other MCs to work in the same town or city as S5 is based. These features do not sit comfortably with the idea that the doctrine of restraint of trade should not, as a matter of public policy, apply at all. Again, it is relevant, in my view, that there was a stark inequality of bargaining power between Credico/PerDM and Mr Lambert and S5 when the Trading Agreement was entered into, that the restriction was not freely negotiated but was in Credico/PerDM's standard terms of business, and that Mr Lambert was not encouraged to, and did not, take legal advice when the restriction was entered into. Also, like all MC owners, Mr Lambert was inexperienced in

business when he entered into the Trading Agreement on behalf of S5. The position was very different in the **Quantum** case, in which the doctrine of restraint of trade was held not to apply at all. In that case, the parties were commercially sophisticated and of equal bargaining power (see judgment, paragraph 86). Again, though Credico supplied clients, back-office support, and guidance, it did not provide the MCs with goodwill, and did not have goodwill of its own to protect, unlike in the franchise cases. At the time of contracting, it was not envisaged that S5, or any MC, would make use of Credico's name in order to entice customers or to attract candidates to become ISAs. Still further, ISAs are free to work for anyone they like, and there is nothing to stop them from working as an ISA for a competitor of Credico as the same time as they are working for an MC on a Credico campaign.

259. All of this, in my view, supports the conclusion that the restriction comes within the scope of the doctrine of restraint of trade.

(9) If the doctrine of restraint of trade applies to it, does the restriction in clause 21.1 of the Trading Agreement/the Guarantee go no further than reasonably necessary to protect the Claimants' legitimate business interests? (This issue, and the next one, encompasses the question as to which, if any, of the Claimants' legitimate business interests are engaged.)

260. This issue can conveniently be considered in two stages. First, do the Claimants have legitimate business interests which require protection by a restriction during the currency of the Trading Agreement? Second, if, so does the restriction in clause 21.1 go no further than reasonably necessary to protect the Claimants' legitimate business interests?

261. I have already said that the standard of scrutiny is not the severe standard that applies in employment cases. It is, to a substantial extent, a less strict standard than that, though it must be borne in mind that the parties were not of equal bargaining power when the Trading Agreement was entered into, that the restriction is contained in Credico/PerDM's standard terms of business, and that Mr Lambert was inexperienced in business and was not encouraged to take legal advice about the effect of the restriction. As a result, the standard of scrutiny is somewhat stricter than the standard that would apply to a bespoke restriction that was negotiated at arm's length by parties who had equal bargaining power.

(a) Did Credico have legitimate business interests which required protection?

262. It is common ground between the parties that, if, as I have held, there was a novation, this question must be assessed by reference to the time of the novation, 1 January 2016. I do not think that this is right. I think that the time that matters is when the Trading Agreement was originally entered into, which was in August 2010. A novation does not mean that a contract starts anew as if there had never been a previous contractual relationship. Indeed, a feature of a novation is that the new contracting party takes over any outstanding legal obligations owed by the previous contracting party. So, if any outstanding commission had been owed to S5 under the trading agreement by PerDM as at 1 January 2016, Credico would have been obliged to pay the commission. Consistently with that, I think that the right approach is to identify the legitimate business interests and to evaluate the reasonableness of the restrictive covenants as at the date when the original contract was entered into. However, nothing turns on this point. My conclusions on enforceability would be the

same whether the evaluation should take place by reference to the position as at August 2010 or at January 2016.

263. The categories of legitimate business interests are not closed. In **Dawnay Day,** at paragraph 30, Evans LJ said:

> "In my judgment, far from confining the circumstances in which covenants in restraint of trade may be enforced to certain categories of case, and defining those categories strictly, the courts have moved in the opposite direction. The established categories are not rigid, and they are not exclusive. Rather, the covenant may be enforced when the covenantee has a legitimate interest, of whatever kind, to protect, and when the covenant is no wider than is necessary to protect that interest."

264. In my judgment, it is clear that Credico did indeed have legitimate business interests which required protection. This is an agency case. Though I have found that this was not a restriction in respect of which which the doctrine of restraint of trade was excluded altogether, it is in my view a case that was on the cusp of the categories of restrictions which are beyond the scope of the doctrine.

265. It was envisaged that Credico would invest a great deal of effort and money in supporting Mr Lambert and S5. Credico provided them with the ready-made clients for their campaigns. This of itself created a legitimate business interest. It is true, as I have said, that there was no contractual obligation to provide a particular amount of work, but the reality is that both parties expected when the contract was entered into, and when the novation took place, that Credico would provide a steady stream of work that would keep S5 and its ISAs busy. This broke down somewhat in the exceptional circumstances of the Pandemic, but that is nothing to the point, as the position must be assessed at the time that the Trading Agreement was entered into.

266. In addition to providing Mr Lambert and S5 with clients, it was expected that Credico would provide Mr Lambert and S5 with very substantial back-office support for their operations. I have described this support in detail earlier in this judgment, and will not repeat it here. It was of great value to S5. It freed the MC up to concentrate on the two main tasks of direct marketing and recruiting ISAs. It ensured that commissions were monitored and paid in a hassle-free way. They were also given a great deal of advice and coaching. Not all of it was as useful as Credico might have liked to think, but it was still a significant benefit for the business.

267. The Claimants rely on other legitimate business interests. They say that they expected to provide MCs with a substantial volume of confidential information which was specific to the Marketing Company's territory. I have again made findings about the information which Credico regarded as confidential earlier in this judgment. I do not think that much of this information was really confidential at all. Information about the performance of S5 ISAs in a particular week was ephemeral and did not provide Mr Lambert with information that he was not already well aware of. Benchmarking data about how other MCs were doing in a particular week in relation to a particular campaign was not of great benefit to S5. The value of the heat maps to MCs such as Mr Lambert's has been exaggerated by Credico. Save to the limited extent that they helped a MC to select a suitable location for a road trip, the heat maps were of no real use. They were not used to work out where to go within the MC's own territory and could not have been expected to be used in this way. The decile documents provided information about the prosperity of particular areas which was readily available elsewhere and which was no doubt already common knowledge to Mr Lambert and his colleagues. The information about the particular campaigns was not confidential either. It was either general information about how to approach a client, or it

contained information about the particular client's product which was not confidential because the whole idea of providing it to MCs and their ISAs would be that the information would be passed on to the customers.

268. The Claimants also rely upon the know-how that they provided to the MCs. Once again, I have dealt with this in my findings of fact. Again, I think that the significance of this was exaggerated by Credico. Much of the know-how was general advice about how to sell to customers which was not unique to Mr Cote or to Credico and was readily available elsewhere. It was somewhat helpful for Credico to provide this information in the documents that had been prepared by Mr Cote, but it did not create much benefit for MCs. At the time of contracting, both Credico and the MCs would have expected that the main know-how for ISA would be obtained from the MCs, not from Credico, by working in the field and watching more experienced ISAs and Team Leaders operate.

269. Finally, the Claimants say that they expected to provide MCs with one-to-one advice, coaching and/or training. I have already made findings of fact about this. This did take place, and it was of benefit to the MCs.

270. Overall, in my judgment, by far the most important matters that gave rise to a legitimate business interest in a restriction on the part of Credico were the fact that it was expected that Credico would supply Mr Lambert and S5 with a ready-made stream of campaigns, and that they would provide him with back-office services that would be of great value to the functioning of S5, especially since all MCs enter into Trading Agreements when their owners are starting off and are inexperienced. By January 2016, Mr Lambert was no longer inexperienced but the stream of work and

the back-office services were still very beneficial for him. Without the clients and the back-office support, Mr Lambert and S5 could not have functioned.

271. In the **One Money Mail** case, the trial judge had found that:

> "OMM provided its agents with training, transactional systems, software, marketing materials, regular visits from sales staff and a helpdesk dedicated to agents giving them operational and technical assistance. It is clear from this that OMM dedicate both time and money to training and supporting their agents." (Court of Appeal judgment, paragraph 16)."

272. In the Court of Appeal, Longmore LJ said, at paragraph 18, that:

> "The primary facts as found by the judge and set out above all point to the right inference being that OMM did have a legitimate interest to protect and the only question should therefore be whether the duration the restriction or the area were unreasonable restraints."

273. Though the facts in the **One Money Mail** case were not exactly the same as the facts in the present case, the conclusion reached by the Court of Appeal in that case supports the conclusion that I have come to in the present case about the existence of legitimate business interests.

(b) Does the restriction in clause 21.1 of the Trading Agreement go no further than reasonably necessary to protect Credico legitimate business interests?

274. In my judgment, having found that Credico has legitimate business interests, it is clear that clause 21.1 of the Trading Agreement did not go any further than was reasonably necessary to protect those legitimate business interests. It was an exclusivity clause, which applied for the duration of the agreement. Such a restriction is commonplace in agency agreements such as this. It is hard to see how there could have been a less onerous restriction which would have applied during the currency of the agreement.

S5 was entitled to terminate the agreement, and so to terminate this restriction, on 14 days' notice.

275. The factors that I have referred to at paragraph 258 above, which led me to the conclusion that this was a restriction to which the doctrine of restraint of trade applies, are not factors which mean that the restriction in clause 21.1 goes further than is reasonably necessary to protect Credico's legitimate business interests. These were that there was no obligation to give work to S5, that S5 did not have an exclusive right to operate as the only MC in Manchester, the inequality of bargaining power, that Credico did not have goodwill that S5 could exploit with customers or ISAs, and that ISAs can work for others.

276. Mr Casey accepts that some type of pre-termination restriction would have been reasonable, but he says that the restriction in clause 21.1 goes too far, because Credico could have had adequate protection from a restriction which prohibited Mr Lambert and S5 from providing direct marketing services to businesses which competed with Credico's business, or with Credico's clients. I do not accept this submission. Credico's clients change from time to time and in my judgment it was reasonable to impose a restriction on all face to face marketing activities. Otherwise the restriction would have been very difficult if not impossible to police.

277. Finally, the restriction in the Guarantee is reasonable and enforceable for the same reasons that apply to the equivalent restriction in the Trading Agreement.

(10) Does the post-termination restriction in clause 21.2 of the Trading Agreement/the Guarantee go no further than reasonably necessary to protect Credico's legitimate business interests?

278. This raises different questions from the one that arose in relation to clause 21.1. The first question is whether Credico has a legitimate business interest in restraining competition from Mr Lambert and S5 ***after*** the Trading Agreement has terminated.

279. In my view, the answer is "yes". It was expected, when the Trading Agreement was entered into, that Credico would invest considerable energy and money in training Mr Lambert and S5, and in giving them work which would enable them to trade and to prosper. It was also expected that, as a result, S5 would gain transferable skills that they could use if they joined up with competitors of Credico in the future, and which would mean that they would be more formidable competitors than would otherwise have been the case. As I have said, if Credico had not provided work to S5, the business could not have operated.

280. On the other hand, there were other legitimate business interests which often exist in agency relationships, and which are relevant to post-termination restraints, but which did not exist here. Credico did not provide Mr Lambert and S5 with any goodwill that was transferable, and did not have goodwill of its own to protect. Mr Lambert and S5 could not exploit their prior connection with Credico to make themselves more attractive to customers or to ISAs. Customers never knew who was behind the ISA. As for the recruitment of ISAs, MCs' websites worked hard to give the impression that they were independent direct marketing businesses and did not even mention Credico. Though Credico did provide S5 with some know-how, it was generally material that was readily available elsewhere, and was well-known in the sales sector. I do not think that Credico supplied S5 with any confidential information that was of any significant value as soon as the Trading Agreement was terminated and so Credico did not have a legitimate business interest in protecting its confidential

information. As I have said, the heat maps and deciles were of no real value, even shortly after they had been prepared. The sales and performance information was not confidential information which Mr Lambert and S5 could exploit if they entered into a new arrangement with someone else to supply them with campaigns. Knowledge about how other MCs were doing in a Credico campaign was not knowledge that Mr Lambert could use in campaigns for another provider. The information about S5's own sales in the current Credico campaign was of no value to Mr Lambert and S5 when they left the Credico network. Information that had been provided by Credico about the performance of particular ISAs was of no significant value after the Trading Agreement was terminated. Mr Lambert already knew who were the strong performers and the weak performers. In any event, there was such a constant turnover in ISAs that performance information about weak performers was of negligible value, as such weak performers were virtually certain to drop out and it was not worth S5's while trying to train them up. Still further, Credico did not have a legitimate interest arising from needing a breathing space to find a new MC to take S5's place. There were multiple MCs in each big city and so the other MCs in Credico's network could take over the campaign work that S5 had been doing (although it may have taken a little time for the other MCs to recruit and train additional ISAs).

281. Nevertheless, even without any significant confidential information or even know-how to be protected, post-termination, there are still substantial legitimate business interests to be protected. The investment that Credico was expected to make in S5 in the direct marketing business and in providing it with the back-office support and other support and guidance that it was expected to provide is sufficient to justify a reasonable post-termination restraint, as well as a pre-termination restraint. If a business in Credico's position could train up a MC by giving it work to do and by

providing it with the support it needed to function, only for the MC to start working for a competitor as soon as the Trading Agreement terminated, there would be little incentive for the business to invest in the MC at all. Credico is entitled to a reasonable post-termination restriction in order to protect itself against competition by persons who built up their knowledge and interest in the Credico network, and who had benefited from Credico's investment in them: see **Prontaprint Plc v Landon Litho Ltd** [1987] FSR 315 at 324, per Whitford J, cited with approval in **ChipsAway International Ltd v Kerr** [2009] EWCA Civ. 320, at paragraph 22. In my judgment, this applies even if there is no goodwill to protect.

282. I bear in mind also that the standard of scrutiny is considerably less than would apply in an employment case. This is not a case of an employee being prevented from using the general experience he amassed whilst in the employer's employment. I also take account of the inequality of bargaining power, but this does not mean, of itself, that a post-termination restraint would not be reasonable.

283. The second question is whether the post-termination restriction in clause 21.2 of the Trading Agreement goes no further than reasonably necessary to protect Credico legitimate business interests.

284. In a normal case, where the usual range of legitimate business interests were to be found, a restriction of this type would not be regarded as going further than reasonably necessary to protect the claimant's legitimate business interests. The issue in the present case is whether the fact that Credico's legitimate business interests, post-termination, are narrower than is the norm, means that the six months, 10 mile, restriction goes further than is reasonably necessary to protect Credico's legitimate business interests.

285. I have found this to be another difficult question. However, I have come to the conclusion that this restriction is enforceable.

286. Once it is determined that a post-termination restraint of some kind is reasonable, I consider that it is clear that the post-termination restriction in clause 21.2 does not go further than was reasonably necessary. It is not unduly onerous. The six-month restriction is a standard period. In the **One Money Mail** case, Longmore LJ described six months as a "commonly agreed duration." This is not a case in which the post-termination restraint follows a lengthy notice period: notice was only 14 days. A 10-mile geographical radius is, again, relatively modest, even though it applies not only to the area in which S5 is barred from working, but also to where S5 can have its base. In fact, it will have been known when the contract was entered into that MCs fairly often move cities (as S5 did, four times) and so are not tied to one location.

287. Mr Casey submitted, as with Clause 21.1, that Credico could have been protected, without going further than necessary, by restricting sales and marketing of products which compete with Credico and Credico's clients. For the reasons that I gave in relation to Clause 21.1, I do not accept this submission, Furthermore, post-termination, Mr Lambert and S5 are not prevented from carrying out direct marketing for a competitor of Credico anywhere outside the 10 mile radius from the Manchester office.

288. Finally, the restriction in the Guarantee is reasonable and enforceable for the same reasons that apply to the restriction in clause 21.2 of the Trading Agreement.

289. For these reasons, I find that both the restriction in clause 21.1 and the restriction in clause 21.2 went no further than was reasonably necessary to protect Credico's legitimate business interests and so was enforceable.

The Undertakings

(11) Did the Undertakings given by Mr Lambert on 7 December 2020 constitute a binding contract between the Claimants, on the one hand, and himself and S5, on the other?

290. Since I have found that the restrictions in Clauses 21.1 and 21.2 were reasonable and enforceable, Credico does not need to rely on the Undertakings. However, in case I am wrong about Clauses 21.1 and 21.2, and as I have heard full argument on the matter, I will express my conclusions on whether the Undertakings amount to a binding contract.

291. In my view, the answer is plainly "yes". The letter dated 3 December 2020 from Addleshaw Goddard was an offer. Mr Lambert accepted that offer, on his own behalf and on behalf of S5, by signing the undertakings and returning them to Addleshaw Goddard on 7 December 2020. There was consideration for the offer in that Credico agreed to refrain from taking legal action if Mr Lambert and S5 agreed to the undertakings. The fact that Mr Lambert omitted the paragraph referring to the consideration in the version of the Undertakings that he returned is of no significance. It did not mean that the consideration ceased to exist. It is not necessary for a party to refer expressly to the consideration for a contractual agreement in the contract document itself.

292. The signed version of the undertaking was not a counter-offer by Mr Lambert, as was suggested by Mr Lambert. It was an acceptance of the offer that had been made to him by Credico. The contract was complete when his acceptance was communicated to Credico's solicitors.

293. Mr Casey also submitted that, even if the return by Mr Lambert of the Undertakings on 7 December 2020 amounted to a concluded contract, that contract was superseded or somehow fell away because the parties consented to the injunction that was granted by Jacobs J on 22 December 2020. I do not accept this submission. It is very common for an interim injunction to be made by consent in restrictive covenant proceedings. The parties may agree to an injunction in terms that are slightly different from the contract term that contains the restrictions. This does not mean that the original term in the contract of employment or commercial contract falls away. If the matter goes to trial, the issue will be the enforceability of the original contract term. The same applies in the present case. Whether the Undertakings have contractual force must be evaluated in light of the position on 7 December 2020. The significance of the injunction granted by consent on 22 December 2020, of course, is that any breach of the terms of the injunction from that date onwards may be contempt of court. Any breach between 7 and 22 December will not be a contempt of court, but may have been a breach of the Undertakings, as well as of Clauses 21.1 and 21.2.

294. I should add that there is no suggestion on the part of Mr Lambert and S5 that Credico cannot rely upon the Undertakings because, by threatening legal proceedings on 10 December 2020, the Claimants acted in breach of their promise in the Undertakings not to commence proceedings. The Defendants were right not to make this

submission. The promise to refrain from taking legal action applied only if Mr Lambert and S5 did not breach the Undertakings, by competing with Credico. I have found that they did do so by continuing to assist ERM, at least until 11 December 2020.

(12) If so, are the restrictions in the Undertakings enforceable under the doctrine of restraint of trade?

295. The language of the restrictions in the Undertakings is not quite the same as in Clause 21.1 and 21.2. In the Undertakings, Mr Lambert and S5 promise that they will not take part in any direct marketing business, rather than any similar business to Credico. In my judgment, this is a distinction without a difference. In the circumstances in which the Undertakings were given, there could be no doubt that "direct marketing business", though not defined, meant the business that S5 carried out for Credico, namely direct marketing, face to face, to customers, either door to door, or via pop-up booths. In this context "direct marketing business" did not cover telesales or business to business direct marketing. These are essentially the same restrictions as are set out in clause 21.

296. Where a restriction is voluntarily assumed by a party in negotiations in order to avoid legal proceedings, the considerations which normally apply to determine the enforceability of a restrictive covenant do not apply. There is a public interest in holding parties to agreements that they make in an attempt to compromise threatened legal proceedings (see **Davies and others v Hart** [2015] EWHC 3121 (QB), per Wilkie J at paragraphs 28-30). There is a presumption, in these circumstances, that the restraint is enforceable: see **Thurstan Hoskin & Partners v Jewill Hill & Bennett** [2002] EWCA Civ 249, **Gerrard v Reed** [2001] All England Reports 355,

World Wide Fund for Nature v World Wrestling Federation Entertainment Inc [2002] FSR 33, and **Capgemini India Private Ltd v Krishnan** [2014] EWHC 1092 (QB). It is not necessary to decide whether this means that the doctrine of restraint of trade does not apply at all to the Undertakings, or that they plainly go no further than is reasonably necessary to protect Credico's legitimate interests in averting legal action. Either way, it is clear, in my view, that the Undertakings are enforceable. Mr Lambert had the benefit of legal advice before he signed the Undertakings. Very sensibly, Mr Casey did not seek to persuade me otherwise.

Breach of the covenants

(13) If the covenants in the Trading Agreement, the Guarantee and/or the Undertakings are enforceable, did Mr Lambert and/or S5 act in breach of them?

297. I have found that the restrictions in Clause 21.1 and 21.2 of the Trading Agreement, and the restrictions in the Undertaking dated 7 December 2020, were binding upon Mr Lambert and S5 and were enforceable. None of the alleged breaches relate to the post-termination period, which began on Christmas Day, 25 December. For the avoidance of doubt however, I find that neither Mr Lambert nor S5 have breached either the post-termination restriction in Clause 21.2, or the post-termination restriction in the Undertakings. The injunction took effect on 22 December 2020, and I find that there was no breach of the restrictions after that date.

298. I have made detailed findings of fact in earlier parts of this judgment about the breaches that have taken place. I will not repeat those findings in detail here. In short:

(1) Mr Lambert was not aware of the restrictions in the Trading Agreement, not having looked at it since 2010. It is perhaps a sign of his relative inexperience in business that he does not appear to have engaged properly with the possibility that he and S5 might be subject to restrictions until the matter was raised with him by Mr Baudet on 2 December 2020, although the fact that he was planning to trade with ESM through Immabee Ltd indicates that he had a least a vague idea that he might be in breach of his obligations to Credico;

(2) Mr Lambert entered into an arrangement between 9 and 20 November 2020 for S5's ISAs to provide direct marketing services for Novibet. This ceased on or about 20 November 2020. It was a breach of clause 21.1 of the Trading Agreement and of the Guarantee. In fact, this campaign was a damp squib, and S5 only earned £400 overall from this campaign;

(3) Mr Lambert then entered into an arrangement with ESM to work on the 60 Second Challenge. He agreed to supply S5's ISAs to work on the campaign and to provide the normal level of management and support for the campaign that he would provide for any S5 campaign;

(4) Mr Lambert first made contact with ESM on 21 November 2020 and worked with them throughout the period up to 7 December 2020. This was a breach of Clause 21.1 of the Trading Agreement and the Guarantee. The fact that Mr Lambert intended to provide the services through Immabee Ltd is immaterial. Nor is the fact that the amount of work that Mr Lambert actually put into the ESM campaign was limited;

(5) Mr Lambert continued to work with ESM even after 7 December, up until about 12 December 2020. This was in breach of Clause 21.1, the Guarantee and the

Undertakings that he gave on 7 December. The amount of work that Mr Lambert did was very limited, essentially consisting of arranging for his ISAs to be provided with ESM ID badges;

(6) Though the original intention was that Mr Lambert/S5 would be paid for the work with ESM, this did not happen, because Mr Lambert decided not to sign the agreement that was provided to him by Mr Allen of ESM, as it arrived on the day when he signed the Undertakings, 7 December 2020. Both Mr Lambert and Mr Allen took the view that, even though Mr Lambert and S5 had assisted ESM, they would not be entitled to payment unless they signed the agreement. It follows that Mr Lambert did not expect that he or S5 would be paid for the work that he did from 7 December 2020 onwards. The fact that Mr Lambert and S5 were not paid does not mean that their actions did not breach the restrictive covenants, the Guarantee and the Undertakings;

(7) Thereafter, Mr Lambert's ISAs continued to work for the 60 Second Challenge, up until its closure just before Christmas. However, Mr Lambert and S5 played no part in it, save that he allowed the ISAs to use S5's offices. I do not regard this as a breach of clause 21.1, the Guarantee or the Undertakings. There were no restrictions which prohibited the ISAs from working for a competitor for Credico whilst they were also contracted to S5. Gradually during this period, the ISAs signed ISA Agreements with ESM so that they worked directly with ESM;

(8) The 60 Second Challenge campaign came to an end just before Christmas 2020. It was abandoned because the second lockdown made it impossible for it to carry on; and

(9) Mr Lambert contacted Mr Scroggins of ESM on 21 December to chase up commission that had not been paid to several of his ISAs. I do not regard this as a breach of Clause 21.1, the Guarantee or the Undertakings. He was not carrying on, or being involved in, the business of ESM. He was just chasing up payments as a favour to the ISAs for whom he felt responsible.

299. It is clear that Mr Lambert felt justified in doing what he did because he felt let down by what he saw as Credico's failure to take sufficient steps to provide him and his ISAs with work during the Autumn and Winter months of 2020. He was genuinely interested in the well-being of his ISAs and he felt a responsibility to do something that would provide them with some earnings before Christmas. He also wanted to generate business for himself and S5. Unfortunately for him, this is not a defence to Credico's claims for breach of the restrictive covenants in the Trading Agreement. The Trading Agreement was binding upon him and S5, regardless of whether or not Credico provided him with work.

Misuse of confidential information/know-how

(14) Did Mr Lambert and/or S5 misuse and/or disclose confidential information and/or know-how belonging to the Claimants in breach of the implied contractual duty and/or equitable duty of confidence?

300. It is common ground between the parties that it was an implied term of the Trading Agreement that S5 would not misuse or disclose to third parties any confidential information provided (or made available) to them by Credico to assist in the performance of the Trading Agreement. It is also common ground that Mr Lambert and S5 owed an equitable duty of confidence to like effect. In addition, it is not in dispute that the Trading Agreement contained (at clause 20.1.4) an express term by

which, on termination of the Trading Agreement, S5 was obliged to deliver up or destroy any documents provided by Credico pursuant to the Trading Agreement.

301. Credico pleads that it is to be inferred from the breaches that have taken place, and from Mr Lambert's interactions with ESM and Mr Baudet, that, in breach of their duties to Credico, Mr Lambert and S5 have misused or disclosed confidential information and/or know-how provided to them (or to which they were given access).

302. In my judgment, Credico has failed to establish that Mr Lambert or S5 have misused or disclosed any confidential information or know-how provided to them. It is true, as I have found, that Mr Lambert provided ESM with a copy of the ISA Agreement, but I do not accept that this Agreement has the necessary quality of confidentiality to be protected under the implied contractual obligation of confidentiality, or the equitable duty of confidentiality. There is nothing in the Trading Agreement or the ISA Agreement to say that they are confidential as between Credico and S5. Indeed, they were designed and intended to be provided to third parties, the ISAs. It will have been anticipated that the ISA Agreement would be provided to very many people, including some who would be ISAs for a very short time. The ISA Agreement does not contain any private information about the operations of Credico, such as sales figures. It is simply a template contract for an independent contractor. I have already found that ESM already had a form of draft contract in very similar terms.

303. There is no evidence that Mr Lambert and S5 have provided ESM or Mr Baudet, or anyone else, with any other confidential information and know-how belonging to Credico. Mr Lambert made manuscript notes in a notebook which contained some of the formulae for sales success (the 8 Steps etc) which were no doubt taken from

Credico's documents, but there is no evidence that he shared these notes with anyone else. In any event, in my judgment, these standard pieces of advice to sales operatives do not have the necessary quality of confidence to make them protectable. There would have been no reason why Mr Lambert would pass on the heat maps or the sales/performance data, or any other materials provided to him by Credico to ESM, or to Mr Baudet. It would not have assisted with the 60 Second Challenge campaign. There is no evidence that he did so. All that Mr Lambert did with ESM was to agree that his ISAs would help on the 60 Second Challenge, and to provide some limited and practical personal assistance. Nor is there any evidence that Mr Lambert passed on any confidential information belonging to Credico to Novibet.

Delivery up of documents

(15) Did Mr Lambert and/or S5 fail to deliver up all documents provided to them under the Trading Agreement on termination of the Trading Agreement, in breach of Clause 20.1.4 thereof and/or the injunction granted on 22 December 2020?

304. This issue is concerned with compliance by Mr Lambert (on his own behalf and on behalf of S5) with the requirements in the injunction granted by consent on 22 December 2020 that he would deliver up by 4 January 2021 all confidential information as defined in the injunction, and would serve an affidavit by 8 January confirming that he had complied with this order. The deadline of 8 January was extended by consent to 20 January 2021.

305. In the event, Mr Lambert served an affidavit on 19 January 2021 which was unsworn.

306. Credico contends that Mr Lambert failed to comply with the order in several respects.

307. First, he did not deliver up documents from the email address that he used for work (jump-manchester) until 14 April 2021. The explanation given by or on behalf of Mr Lambert for this delay, in affidavits dated 8 February and 21 April 2021, and in correspondence from his former solicitors, Collyer Bristow, dated 7 January 2021, was that (a) he had reset his home computer on 27 December 2020 and this had accidentally wiped any emails that were contained on the hard drive; (b) he had been unable to access the jump-manchester account online because Brandelective had cut off his access to the emails in this account on 21 December 2020 as a result of his failure to pay certain invoices, totalling about £500 (which Mr Lambert disputed was owed by S5 and which he said that he could not, in any event, pay as Credico was in control of S5's bank account).

308. Second, Mr Lambert failed to deliver up documents from his personal email address. There is a dispute between the parties as to whether any confidential documents were sent to that address. Mr Lambert and S5 deny that any were. Credico contend that amongst other matters, tables with the number of leaders (i.e. established ISAs) per office, briefing notes for a campaign and bonus spreadsheets were sent to that email address.

309. Credico submits that these matters strongly support the inference that Mr Lambert and S5 have misused and/or disclosed confidential information and/or know-how.

310. It is clear that the description of events given on behalf of Credico and set out in paragraphs 304-307 are accurate. Mr Lambert was not as assiduous in obtaining his jump-manchester emails as he might have been, though I accept that there was a genuine dispute about whether he should pay Brandelective's invoices had nothing to do with any unwillingness to disclose emails in actual or potential proceedings. It is

not possible for me to determine whether any confidential matters were sent to Mr Lambert's personal email address. In any event, however, I do not think that the delays on the part of Mr Lambert in delivering up emails generated by Credico and sent to his "jump-manchester" work email address or personal email addresses justifies the inference that he or S5 were misusing confidential information. There would simply have been no point in providing ESM or anyone else with Credico's confidential information.

Declaratory relief

(16) Is Credico and/or PerDM entitled to declarations that (a) the restrictions in clause 21 of the Trading Agreement and/or the Undertakings are enforceable; and (b) they were entitled to interim relief against Mr Lambert and S5 in the terms of the injunction?

311. For the reasons given above, Credico is entitled to declarations that the restrictions in Clause 21 of the Trading Agreement, in the Guarantee, and in the Undertakings, are enforceable.

312. I will require further submissions on the question whether Credico is entitled to a declaration that it was entitled to interim relief against Mr Lambert and S5 in the terms of the injunction. I have found that the restrictions were enforceable. I have also found that Mr Lambert and S5 acted in breach of the restrictions (and that the breach extended beyond the date of the Undertakings). It follows that if there had been a contested hearing on 22 December 2020 (and if the judge took the same view as me on the matters of law), Credico would, prima facie, have been entitled to interim relief in the terms of the injunction.

313. However, I have also found that Mr Lambert and S5 did not breach the restrictions in the Trading Agreement, the Guarantee and the Undertakings beyond about 12 December 2020. If the injunction hearing on 22 December 2020 had been contested, and if the judge had been provided with detailed evidence by the parties, there might potentially have been some possibility that he might have exercised his discretion to decline to grant an injunction on the basis that there was no continuing threat or possibility that Mr Lambert or S5 would act in breach of restrictions. On the other hand, the very fact that the interim injunction application was contested might well mean that the judge would have granted interim relief to Credico.

314. I have heard no argument on this issue and I think that it is appropriate to give the parties an opportunity to make further submissions on it before I decide whether to make a declaration in the terms sought in (b), especially as the declaration may have an impact on costs.

Injunctive relief

(17) If the post-termination restraint in clause 21.2 of the Trading Agreement and/or the post-termination covenant in the Undertakings are enforceable, should the court exercise its discretion to grant an injunction to enforce them until they expire on 25 June 2021?

315. In light of my rulings in this case, I will grant an injunction to restrain Mr Lambert and S5 from acting in breach of the post-termination covenant in clause 21.2 of the Trading Agreement, the Guarantee and the Undertakings, until they expire on 25 June 2021. The fact that Mr Lambert and S5 have contested the enforceability of the post-termination restrictions at trial means that it is appropriate, in the court's discretion, to

grant a final injunction restraining them from acting in breach of the post termination restrictions, until 25 June 2021.

(18) Should the court grant injunctive relief to restrain misuse and/or disclosure of confidential information and/or know-how belonging to the Claimants, and to address Mr Lambert and/or S5's alleged failure to deliver up documents.

316. I am not prepared to grant such injunctive relief. As I have said, I am not persuaded, on the evidence before me, that Mr Lambert and S5 have misused confidential information and/or know-how belonging to Credico, which is protectable. To the extent, if at all, that any of the information and/or know-how that has been provided to Mr Lambert and S5 has the sufficient quality of confidentiality to be protected post-termination, its usefulness will by now have expired. Credico is sufficiently protected by the express post-termination restraints and I decline to grant broader or longer-lasting injunctive relief relating to confidential information.

Conclusion

317. I will hear from counsel in due course, whether in writing or at a short oral hearing, about the terms of the order that I should make, and any consequential matters.