



Neutral Citation Number: [2015] EWHC 2840 (Comm)

Case No: 2012 FOLIO 692

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

Rolls Building
7 Rolls Building
Fetter Lane
London EC4A 1NL

Date: 08/10/2015

Before:

THE HONOURABLE MR JUSTICE FLAUX

Between:

MR H TV LIMITED
(Formerly known as CAN ASSOCIATES TV
LIMITED)
- and -
ITV2 LIMITED

Claimant

Defendant

Mr Max Mallin (instructed by **Archerfield Partners LLP**) for the **Claimant**
Mr Deepak Nambisan and Mr Daniel Edmonds (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Defendant**

Hearing dates: 7-9, 13-16 and 20-23 July 2015

Approved Judgment

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

.....
The Hon. Mr Justice Flaux

The Honourable Mr Justice Flaux :

Introduction

1. The sole director and shareholder of the claimant company is Mr Neville Hendricks. His business and that of the claimant is the production of reality television programmes featuring the real lives of popular show business personalities. Specifically, for some seven years until the summer of 2011, when the dispute with which this case is concerned crystallised, the claimant had produced a series of reality television programmes featuring Mr Peter Andre the singer, initially concerned with his marriage to the model Katie Price (formerly known as Jordan), then after their divorce, featuring him and his life in programmes called “Peter Andre: The Next Chapter” and “Peter Andre: Here to Help”. The claimant also produced reality television programmes featuring the singer (and former member of the group Atomic Kitten) Kerry Katona called “Kerry Katona: The Next Chapter”.
2. These programmes featuring Peter Andre and Kerry Katona were broadcast by the defendant ITV2, part of the ITV group of television channels, with whom the claimant had a series of television production agreements. The most recent of these with which the dispute is concerned was an ITV2 Production Agreement contained in a letter from ITV2 to the claimant dated 9 December 2010. In respect of the programmes featuring Mr Andre, the agreement was for three years, with Peter Andre: The Next Chapter series 4 and 5 and Here to Help series 1 to be produced in the first year, Peter Andre: The Next Chapter series 6 and 7 and Here to Help series 2 in the second year and Peter Andre: The Next Chapter series 8 and 9 and Here to Help series 3 in the third year. In respect of the programmes featuring Kerry Katona, the agreement was for two or three years, with Kerry Katona: The Next Chapter series 2 to be produced in the first year and The Next Chapter series 3 in the second year, with series 4 to be made in the third year, subject to ITV2’s right to break after the end of year 2. As the numbering of these series suggests, three series of Peter Andre: The Next Chapter and one series of Kerry Katona: The Next Chapter had been successfully produced by the claimant and had been or were going to be broadcast by ITV2 pursuant to earlier agreements.
3. The manager of both Peter Andre and Kerry Katona at that time was Claire Powell, whose company CAN Associates worked in close association with the claimant. Indeed the “CAN” in the names of both companies was an abbreviation for “Claire and Neville”. Mr Hendricks and Ms Powell had been both business and personal partners for some years and had a son together who was six in 2011. Their physical relationship came to an end during the course of 2010, but initially the business relationship appears to have continued relatively unaffected. Both Mr Hendricks and Ms Powell were always involved in the editing process for each of the programmes produced before the programmes were sent to ITV2 as broadcaster. The final decision as to editing the programmes rested with ITV2.
4. It was the unchallenged evidence of Mr Hendricks and his former personal assistant and colleague, Nicola Partridge, who also gave evidence, that the editing process at the claimant, involving as it did the participation of both Mr Hendricks and Ms Powell, remained unchanged throughout the production of Peter Andre: The Next Chapter series 4, which was delivered to ITV2 on dates between 14 March and 6 June 2011, and would have remained unchanged in the production of series 5 had that ever

been produced by the claimant. For reasons which will require elaboration hereafter, the series was never produced by the claimant, since on 17 August 2011, ITV2's solicitors wrote to the claimant terminating the Production Agreement for repudiatory breach by the claimant.

5. It is clear that, by some time in May 2011, relations between Mr Hendricks and Ms Powell had deteriorated considerably. It will be necessary to make detailed findings about the events between May and August 2011, but in broad terms they can be summarised as follows. What appears to have particularly incensed Mr Hendricks was the discovery that Ms Powell had taken her latest boyfriend Mr Drew Rush (who worked for the security company employed by the claimant) with her to Dubai during filming of a calendar shoot with Mr Andre and other clients and that they had been conducting their affair whilst his six year old son was around. He assumed that other people, including Mr Andre, had known about the affair but kept it from him. Mr Andre described in evidence an occasion when he was filming *Here to Help* in Harrow, probably on 19 May 2011, when Mr Hendricks had come to his dressing room and remonstrated about the affair between Ms Powell and Mr Rush.
6. By the beginning of June 2011, it is clear that Ms Powell was looking for an opportunity to replace the claimant as the production company for the Peter Andre programmes. She told ITV2 on the telephone and at a meeting on 20 June 2011, that Mr Andre had issues with Mr Hendricks. What those issues were was never explained to Mr Hendricks. At the meeting she suggested that a company other than the claimant be used to produce the Peter Andre programmes, but ITV2, through Ms Sarah Clarke, Director of Business and Legal Affairs, did not take her up on this suggestion.
7. At around the same time, on 17 June 2011, the management agreement between Ms Powell and Kerry Katona came to an end in somewhat acrimonious circumstances. The popular press picked up a rumour, which was untrue, that Ms Katona was having an affair with Mr Hendricks. He considered, with some justification that this rumour was being generated and spread by Claire Powell or people who worked for her or with whom she was on good terms. Ms Katona then consulted Max Clifford who, before his recent disgrace, was the supremo of celebrity management and he ensured that the rumour ceased.
8. It was this rumour and his anger about the affair with Drew Rush which led Mr Hendricks on 23 June 2011 to open a Twitter account entitled @TheNevCan. Within a short period of time he was in communication with two other twitter users, @LLuke33 and @KMaddock, neither of whom has been identified but both of whom appear to have been sufficiently close to Ms Powell and her circle of friends, including Mr Andre, to have been able to tweet intimate details of their private lives, often in the most scurrilous and vitriolic terms. Mr Hendricks himself tweeted some pretty unpleasant tweets over the period from 26 June to 17 August 2011. Although it is fair to say that most of his bile was reserved for Ms Powell, there were a few tweets which were directed at Mr Andre.
9. Although attempts were made to resolve the differences between the claimant and CAN Associates/Mr Andre and there were two mediation sessions on 27 July and 9 August 2011 which seem to have made some progress towards resolution, ultimately on 16 August 2011, Mr Andre's solicitors wrote a letter to the claimant's then

solicitors Swan Turton saying the efforts to resolve the dispute had failed. The letter referred to grossly offensive messages on Twitter about Mr Andre and his team. It concluded that Mr Andre wanted no further dealings whatsoever with Mr Hendricks or the claimant.

10. ITV2's solicitors Quinn Emanuel were aware of that letter and it was that letter which almost certainly led to the letter the following day, 17 August 2011 from Quinn Emanuel terminating the Production Agreement with the claimant for alleged breaches of ITV's General Terms and Conditions which were said to have been incorporated into the Production Agreement. The letter accused the claimant of breaching the confidentiality provisions, undermining Peter Andre: The Next Chapter and undermining the relationship between the claimant and PJA Promotions. These were said not only to amount to Events of Default under the General Terms and Conditions entitling ITV2 to terminate the Agreement but a fundamental breach of the Agreement entitling ITV2 to terminate.
11. So far as Ms Katona is concerned, as I have said, after Ms Powell ceased being her manager, she was represented by Max Clifford. She had been approached by Channel 4 to take part in Celebrity Big Brother which she was anxious to do in order to make money to discharge her bankruptcy. With the assistance of Mr Clifford this was arranged. ITV2 was not keen on this proposal, contending that the claimant had undertaken that ITV2 would have the exclusive television services of Ms Katona and that the proposal would be a breach of that obligation. ITV2 was prepared, with some reluctance, to take four programmes rather than eight of Kerry Katona: The Next Chapter series 3 in the event that she appeared on Celebrity Big Brother. Mr Hendricks countered that he would agree to six. ITV2 sought to terminate the Production Agreement on 17 August 2011 also on the ground that the proposal that Ms Katona appear on Celebrity Big Brother was a fundamental breach by the claimant of its exclusivity obligation under the Production Agreement.

The proceedings

12. The Claim Form and Particulars of Claim were issued and served on 22 May 2012. The claimant's claim was and is that the purported termination by ITV2 by its letter of 17 August 2011 was wrongful and a repudiatory breach of the Production Agreement. The claimant claimed damages consisting of the lost profits which the claimant would have earned on the licence fees for the remainder of the Term, which were estimated at £6-7 million. The claimant also claimed £549,060 under an outstanding invoice delivered to ITV2.
13. The Defence and Counterclaim was served on 10 July 2012. It pleaded that the posting of the tweets by Mr Hendricks constituted breaches by the claimant of (i) an implied term of the Production Agreement that the claimant would not act in any way such as to damage the necessary relationship of trust and confidence in the relationship between Mr Andre as the subject of a reality television programme and the claimant as the producer of such a programme; (ii) an implied term that the claimant would use reasonable skill and care in providing services under the Production Agreement and (iii) various provisions in the ITV General Terms and Conditions. The effect of those breaches was said to be that (a) the claimant was unable to perform its obligations under the Production Agreement; (b) Mr Andre was unwilling and unable to render his services. Schedule 1 to the Defence and

Counterclaim set out what the body of the pleading described as: “*The full text of the tweets in question of which ITV2 is currently aware (and prior to disclosure)*”. The tweets set out in that Schedule were the sixteen tweets set out in the schedules to the termination letter. In relation to Ms Katona, the claimant was said to have been in breach of the exclusivity term in the Production Agreement. All these breaches were said to have been repudiatory and to have entitled ITV2 to terminate the Production Agreement. Various other breaches of the Agreement were alleged by ITV2 but those have not been pursued at trial.

14. It was pleaded in the alternative that the Agreement was frustrated because Mr Andre and Ms Katona became unavailable to perform their services, so that ITV2 was discharged from performance. ITV2 counterclaimed the repayment of all sums paid to the claimant under section 1 of the Law Reform (Frustrated Contracts) Act 1943.
15. ITV2 admitted that it had not paid the outstanding invoice. It claimed that some £264,886 fell to be deducted from the invoice because of a reduction in the number of programmes. It denied that the profits which the claimant could have earned could ever have been anywhere near £6-7 million and denied that this estimate was given in good faith. It counterclaimed on the basis that the claimant’s breaches of contract had caused it loss and damage consisting of diverted management time incurred, including in mitigating its loss. The sum claimed was £284,174 which was said to extinguish or diminish anything otherwise due to the claimant.
16. The Defence was amended in November 2012 to add to Schedule 1 two further tweets both sent on 12 July 2011 (dealt with in more detail below), one from Mr Hendricks which I will refer to as the “I chose Nicola tweet” and one from Ms Partridge which I will refer to as the “Nicola Partridge tweet”. At that stage therefore, only eighteen tweets were relied upon.
17. On 2 October 2013, ITV2 issued an application to re-amend its pleading to add to what now became Schedule 1A a substantial number of additional tweets from Mr Hendricks, including many which were alleged to have endorsed the tweets by @LLuke33 and @KMaddock. Tweets posted by those two tweeters were also relied upon. In all 302 tweets were relied upon. The reference in the body of the pleading to the tweets in the Schedule was now on the basis these were examples. Following directions concerning the re-amendment at a hearing before Cooke J on 4 November 2013, permission to re-amend the Defence and Counterclaim was eventually granted pursuant to a Consent Order of Leggatt J dated 16 July 2014.
18. Not long before the trial, on 16 June 2015, the claimant amended its Particulars of Claim to set out its case on the quantum of loss in more detail by reference to the expert evidence, including the Joint Statement of the experts dated 7 November 2014. The loss of profits claim was quantified as £5,251,320 alternatively £4,721,320. On 18 June 2015, ITV2 served a Re-Re-Amended Defence and Counterclaim. That reduced the deduction to be made from the claimant’s invoice to £205,346. It continued to take issue as to whether the claimant had pleaded its case on loss of profits properly. It denied that the claimant was entitled to reimbursement of various costs claimed.

The contractual framework

The ITV2 Production Agreement

19. The contractual relationship between the claimant and ITV2 in respect of Peter Andre: The Next Chapter for series 4 onwards, Here to Help and Kerry Katona: The Next Chapter was governed by the ITV2 Production Agreement contained in a letter from ITV2 to the claimant dated 9 December 2010. The preamble to that agreement included the following:

“We refer to the separate agreement entered into by [ITV2] with PJA Promotions Limited (“Lender”) of even date but effective as of 1st December 2010 (“**the PA Agreement**”) relating to the services to be provided by Peter Andre (“**PA**”) with respect to various series of programmes to be produced for ITV2 (and in any event not less than twenty two (22) hours each year in accordance with the terms of the PA Agreement) (“**the PA Programmes**”) during the period of three (3) years commencing 1st December 2010 and expiring on 30th November 2013 (“**the Term**”).

We also refer to the separate agreement ITV2 has reached with CATV (as detailed herein) regarding ITV2’s commitment to commission CATV to develop and produce a minimum of an additional sixteen (16) hours (each year) of additional observational documentary programmes featuring Kerry Katona (“**the KK Programmes**”) for the first two (2) years of the Term and CATV’s commitment to procure the exclusive television services of Kerry Katona (“**KK**”) during the Term so as to enable CATV to produce and deliver the KK Programmes.”

20. The express terms of the Production Agreement then included the following:

“2 Production Role

2.1 It is agreed that, unless ITV2 and CATV agree otherwise in writing, CATV shall act as the production company in respect of each of the following Programmes: [the Agreement then set out the various series to be produced to which I have already referred at [2] above].

In accordance with the Terms of this Agreement provided always that CATV’s production obligations shall be conditional upon and in respect of sub-clause 2.1.1 ITV’s commissioning obligations shall be conditional upon:

2.1.1 with respect to the PA Programmes, the PA Agreement remaining in full force and effect;

2.1.2 ITV2 having paid all remuneration to PA in accordance with the terms of the PA Agreement;

2.1.3 ITV2 having paid CATV in accordance with the terms of this Agreement;

2.1.4 the provisions of clause 2.2 below.

2.2 CATV shall use reasonable endeavours to procure that Kerry Katona shall not during the Term (i) commit any criminal act or (ii) commit any action which is in breach of Ofcom rules or (iii) make any statement or do anything which is derogatory of ITV or likely (in the reasonable opinion of ITV2) to bring ITV or KK into disrepute or damage the good name and standing of ITV (or any of its officers, directors, agents or employees) or Kerry Katona. In the event of the occurrence of any of the above, ITV2 shall be entitled to immediately terminate this Agreement but only with respect to the production of future KK Programmes...In the event of any such termination of this agreement by ITV2 with respect to the KK Programmes for the reasons set out above, CATV shall not be deemed to be in breach of this agreement and this agreement shall remain in full force and effect with respect to the PA Programmes and the Other Programmes.

2.3 ITV2 confirms to CATV that it will commission and fully finance CATV by means of payment of the licence fees referred to in clause 2.4 below:

(i) to develop and produce twenty two (22) hours of the PA Programmes for each year of the Term as detailed in the PA Agreement and as further detailed in clause 2.1 above; and

(ii) to develop and produce sixteen (16) hours of the KK Programmes for the first two years of the Term (or any extension thereof, as agreed between the parties in accordance with clause 4.1 below) as detailed in clause 2.1 above (subject always to clause 2.1.4 above).

It is intended that the Programmes to be produced under this Agreement during the first year of the Term will be produced and transmitted by ITV2 in accordance with the dates set out in the First Schedule.

2.4 It is agreed that, unless ITV2 and CATV agree otherwise in writing, CATV shall act as the production company for all of the Programmes. CATV shall enter into a separate production and commissioning agreement with ITV2 with respect to each series of the Programmes to be produced under the agreement and the PA Agreement in the form attached hereto as the Second Schedule (“**the ITV2 Licence Agreements**”) whereby ITV2 shall pay a licence fee to CATV for each of the Programmes in an amount of [£120,000 for each of the PA Documentary Programmes, £145,000 for each of the

PA Format Programmes and £130,000 for each of the KK Programmes].

2.6 ...Furthermore, CATV acknowledges and agrees that ITV2 shall require CATV to produce and deliver the Programmes in HD...and CATV shall submit a budget to ITV2 in respect of the HD costs for each of the Programmes to be approved in advance by ITV2 (such approval not to be unreasonably withheld or delayed)...ITV2 agrees that the extra HD costs for all series of KK Programmes and PA Programmes in 2011 are ...£11,500 per episode and that, accordingly, ITV2 shall pay CATV the difference between such amount and the ...3% figure referred to above.

8 Publicity and Sponsorship

8.3 ...It is intended that PA and KK shall for so long as ITV2 continues to commission and exhibit the ...Programmes be some of the faces of the services known as ITV2 and CATV acknowledges and agrees that such artists' image may be used by ITV2 to promote the ITV2 services or platforms...

9 Miscellaneous

9.7 Save for any ITV Licence Agreement and/or separate licence agreements which ITV and CATV may conclude relating to any of the Programmes, this agreement constitutes the entire agreement between ITV2 and CATV relating to the Programmes and the agreements at the date hereof and any variation to this agreement is valid only if it is in writing and is signed by or on behalf of each party."

21. Clause 4 of the Production Agreement headed "Review and Option to Extend Term" contained detailed provisions concerning ITV2's option to extend the Agreement in respect of KK Programmes for a third year, which it is not necessary to quote here. It is only necessary to note that there was no contractual obligation on ITV2 to extend the Term. It follows that for the purposes of computing any damages claimed by the claimant in respect of the loss of revenue from KK Programmes, only the first two years of the Term are relevant on the well-established principle that damages are assessed on the basis that the contract would have been performed in the manner least onerous to the defendant. Although Mr Mallin did not concede this point, he realistically did not pursue it in his closing submissions.
22. The First Schedule to the Production Agreement did not in fact set out the Production, Delivery and Transmission Dates for the various series, which were all "TBC" (to be confirmed). In the event, as set out in more detail hereafter, Peter Andre: The Next Chapter series 4 was filmed between the weeks of 3 January and 16 May 2011, edited between the weeks of 7 February and 23 May 2011, delivered to ITV2 between the weeks of 14 March and 16 June 2011 and broadcast on Thursdays between 21 April and 9 June 2011. So far as Here to Help series 1 is concerned, according to an Excel spreadsheet produced by the claimant after the trial, filming took place between the

weeks of 28 March and 26 June 2011, editing between the weeks of 4 April and 31 July 2011 and delivery to ITV2 between the weeks of 11 July and 15 August 2011. The first programme in Here to Help series 1 was broadcast on Thursday 14 July 2011 with the other programmes following on subsequent Thursdays. However, because of the disputes which gave rise to this litigation, Peter Andre: The Next Chapter series 5 and Kerry Katona: The Next Chapter series 3 and subsequent series of all the Programmes were never made with the claimant as production company.

23. The Second Schedule to the Production Agreement was the template ITV2 Licence Agreement. ITV2 and the claimant entered into production and commissioning agreements in the terms of this template for Peter Andre: The Next Chapter series 4 and Kerry Katona: The Next Chapter series 2 on 26 May 2011 (but with effect from 28 March 2011) and for Here to Help series 1 on 25 May 2011 (but with effect from 14 April 2011). However, there is no allegation made by ITV2 in this litigation that there was any problem with the filming or editing of either of the Peter Andre series, which were successfully broadcast on ITV2. The alleged problems in relation to Mr Andre arose in the context of The Next Chapter series 5, in relation to which Mr Andre refused to start filming if Mr Hendricks and Ms Partridge were involved in the production. Because no series were made with the claimant as production company after Peter Andre: the Next Chapter series 4, Here to Help series 1 and Kerry Katona: The Next Chapter series 2, it follows that no licence agreement ever came into force in respect of the subsequent series.
24. That template agreement contained terms relating to the production and content of the Programmes produced pursuant to it, including granting final editorial control and approval rights to ITV2. By clause 4.15, ITV's General Terms and Conditions were to apply to any licence agreement. The ITV General Terms and Conditions set out the specific mechanics of matters such as production, delivery and the transfer of IP rights. They contained the following provisions upon which ITV2 rely:

“18.1.16 the Producer will not at any time do or say anything which is or may be considered by ITV2 (acting reasonably) to be detrimental or prejudicial to or to affect adversely the name, image, reputation or business of ITV2 or any member of the ITV Group or otherwise to bring ITV2 or any member of the ITV Group into disrepute.

23 TERM AND TERMINATION

23.2 Any one or more of the following events shall be an “Event of Default”:

23.2.1. a party [here the claimant] commits a material breach of this Agreement or is in breach of any material term of this Agreement either of which is incapable of remedy or, if capable of remedy, is not remedied within 14 days of notice being given by the party not in breach to remedy such breach;

23.2.4 any of the Specified Persons [i.e. Mr Andre and Ms Katona] shall... be unable or unwilling fully and properly to render his or her services on the Programmes as contemplated herein and the Producer is unable to procure the engagement of a

substitute approved by ITV (such approval not to be unreasonably withheld or delayed) within 14 days of notification from ITV.

23.3 If the Producer suffers or commits an Event of Default which in the reasonable opinion of ITV has or may:

23.3.1 affect the Producer's ability to deliver any Delivery Materials by the applicable Delivery Date;

ITV may...terminate this Agreement with immediate effect by notice to that effect to the Producer."

25. ITV2 also relies on: (a) clause 3.1 (failure to produce and deliver the Programmes strictly in accordance with the agreement); (b) clause 3.2 (failure to produce the Programmes to the standards of a first class producer of audio-visual programmes); and (c) clause 6.1 (failure to perform its obligations under the agreement as diligently and expeditiously as possible to the said standards).
26. The problem with ITV2's attempt to rely upon the ITV General Terms and Conditions is the obvious one that the Production Agreement itself does not incorporate those Terms and Conditions and no Licence Agreement (which would have incorporated the General Terms and Conditions) was ever entered in respect of the Peter Andre series which are the subject of the dispute. Mr Nambisan on behalf of ITV2 seeks to overcome that problem by relying on clause 9.7 of the Production Agreement, contending that on the true construction of that Agreement, the "entire agreement" between the parties consisted of the terms of the Production Agreement, the Licence Agreements and the ITV General Terms and Conditions.
27. I consider this point is completely hopeless. Quite apart from the fact that the object of an entire agreement clause such as clause 9.7 is to narrow the scope of what can be relied upon by way of contractual terms of the particular contract and not widen it, the clause conspicuously does not incorporate the terms of the template Licence Agreement even if no actual Licence Agreement is ever concluded in respect of the particular Programmes under consideration. The clause refers to "separate licence agreements which ITV2 and CATV may conclude relating to any or all of the Programmes" so that it expressly provides that only licence agreements actually concluded are part of the "entire agreement". It is no answer that licence agreements were concluded for Peter Andre: The Next Chapter series 4 and Here to Help series 1, because there is no dispute about those programmes and clause 2.4 of the Production Agreement provided that there would be a separate Licence Agreement for each series of Programmes, which there never was for series 5 or any subsequent series of the various Programmes. It follows that the General Terms and Conditions were not incorporated into the Production Agreement so far as series 5 or the subsequent series are concerned.
28. To the extent that ITV2 seeks to argue that there was a term of the Production Agreement that the claimant would not act in any way such as to damage the necessary relationship of trust and confidence in the relationship between the subject of a reality TV programme and the producer of such a programme, it can only do so on the basis that such a term was to be implied into the Production Agreement. Before considering the issue of implication of terms, I should consider the remaining

agreements which formed part of the overall contractual framework and the issue of exclusivity in relation to Ms Katona.

The PA Agreement

29. The PA Agreement between ITV2 and PJA Promotions Limited (Mr Andre's company) dated 14 December 2010 (but with effect from 1 December 2010, matching the Production Agreement) incorporated Deal Terms, Special Conditions and ITV2's Terms and Conditions. Under clause 14 of the Deal Terms is a provision that ITV2 engages Peter Andre for the Contract Period (i.e. the same 3-year period as the Term of the ITV2 Production Agreement), and PJA Promotions agrees on behalf of Mr Andre to procure and provide his exclusive services in the field of television programming during the Contract Period. It concludes that PJA Promotions: "*shall procure that for each Programme [PA] shall enter into an agreement for his exclusive services with [CATV] and no such agreement shall be deemed to be in breach of the exclusivity provisions hereof*".
30. Term 11 of the Deal Terms provides that the "*Artist's Minimum Commitment*" ("*AMC*") will be 22 Programme hours in each of Years 1 – 3. Clause 9.1 of the Terms and Conditions to the PA Agreement provides that PJA Promotions shall procure that Mr Andre shall be available to ITV2 and/or the claimant (as appropriate) on a first call basis at times to be agreed between the claimant and Mr Andre to ensure that he is able to satisfy the AMC. Clause 9.2 of those Terms and Conditions provides that ITV2 will procure that it commissions production of sufficient Programmes to ensure that he is engaged by the claimant for the AMC.
31. Clause 4 of the ITV2 Terms and Conditions headed "*Exclusivity and Availability*" sets out a detailed provision that PJA Promotions procures that Mr Andre will not, without ITV2's prior consent (not to be unreasonably withheld or delayed), take part in other television programmes or advertisements or commercials if in ITV2's reasonable opinion it would compromise the editorial impartiality of the Programmes or breach any OFCOM code or if such advertisement or commercial promotes another television channel. There is a detailed carve out in clause 4.3 excluding from this prohibition Mr Andre's existing commitments and matters such as guest appearances on chat shows or drama acting roles.
32. In early December 2010, Mr Andre signed an undated "*Inducement Letter*" addressed to ITV2 under which he consented to the execution and delivery of the PA Agreement, warranted that PJA Promotions was entitled to enter that Agreement and make his services available pursuant to it, agreed to render all the services required of him by that Agreement and agreed that in the event of a breach of his obligations under the Inducement Letter, ITV2 would be entitled to legal or equitable relief against him without any obligation of first resorting to or exhausting its legal right or remedies against PJA Promotions.
33. Before the present dispute arose, the claimant and PJA Promotions had entered into a production agreement (which I will refer to as a "*filming agreement*" to avoid confusion with the Production Agreement) in respect of each of Peter Andre: The Next Chapter series 1 to 3 for the services to be provided by Mr Andre in collaborating with the filming of the Programmes. Those agreements had been signed by or on behalf of Mr Andre, after the benefit of legal advice from his solicitors,

without demur. They provided, inter alia, that PJA Promotions would provide the claimant with access to Mr Andre on an exclusive basis for the purpose of filming him with respect to the production of the Programmes. In May and June 2011, the claimant produced filming agreements in materially similar terms to those previous agreements for Peter Andre: The Next Chapter series 4, Here to Help series 1 and Peter Andre: The Next Chapter series 5 and submitted them to Mr Andre and his solicitors Clintons for signature. Notwithstanding the fact that the proposed filming agreements were in substantially the same terms as before and that Peter Andre: The Next Chapter series 4 had finished filming and Here to Help series 1 was close to filming being finished, Clintons refused to sign the agreements on behalf of Mr Andre, contending in correspondence with both ITV and the claimant's then solicitors, Swan Turton, that the terms of the agreements were not reasonable or transparent. As set out in more detail in the chronological findings of fact I have made, given that previous agreements in similar terms had been signed without demur after legal advice, this refusal has to be seen for what it was, part of an overall scheme by Ms Powell (to which Mr Andre was a party) to replace the claimant as the production company and a pretext for putting commercial pressure on the claimant and ITV2 to agree terms which they must have known would not be acceptable to Mr Hendricks.

34. The claimant did enter similar filming agreements with Ms Katona for the provision of her services for Kerry Katona: The Next Chapter series 1 and series 2. Clause 2.1 of each of those agreements provided:

“2.1 KK shall provide the Company with access to KK on an exclusive basis for the purposes of the filming of KK with respect to the production of the Programmes in accordance with the production schedule and details set out in Annex 2 and/or on such other dates as shall be jointly agreed in good faith by the Company and KK. KK shall make herself exclusively available for filming during the period [12th March 2010 until 4th September 2010 in the case of series 1 and 4th October 2010 and 22 April 2011 in the case of series 2]. It is acknowledged that KK's children and family and friends will also be filmed and that they will be featured in the Programmes.”

The Exclusivity Term

35. One of the matters in issue between the parties is whether, on the true construction of the Production Agreement, there was an express obligation upon the claimant to procure that Kerry Katona provided exclusive television services to ITV2 during the Term of the Agreement. ITV2 contends that the provision in the preamble or recital to the Agreement: “*We also refer to...CATV's commitment to procure the exclusive television services of Kerry Katona during the Term so as to enable CATV to produce and deliver the KK Programmes*” is such an express obligation. It also contends that the reference to Ms Katona being one of the “faces” of ITV2 in clause 8.3 is only consistent with there being such an obligation of exclusivity. If she were free to appear on Channel 4 or any other channel, she could hardly be one of the “faces” identified by the public with ITV2.

36. Mr Mallin on behalf of the claimant contends that these words in the preamble are “pre-operative” by which he means that they are not an obligation in this agreement but a reference to a pre-existing commitment. On that basis, he submits that the court is entitled to look at the pre-contractual negotiations leading up to the Production Agreement to see exactly what the nature of that commitment was. He relies upon the evidence of Mr Hendricks that at a meeting in November 2010 with, inter alia, Mr Zai Bennett of ITV, he made it clear that the claimant could not give any undertaking as regards providing the exclusive services of Ms Katona because of her bankruptcy. That evidence was strongly contradicted by Ms Sarah Clarke for ITV2. Her evidence was that whilst ITV recognised that the bankruptcy made it impractical for Ms Katona to enter into a separate agreement with ITV2 along the lines of the PA Agreement, it was always the understanding of both parties to the Production Agreement that Ms Katona’s television services would be provided exclusively to ITV2 and she said that Mr Hendricks gave a commitment to that effect at a meeting on 8 November 2010 which she attended.
37. I make detailed findings about the evidence later in the judgment and for the present simply record that I do not accept Mr Hendricks’ evidence on this issue, essentially for three reasons. First, I do not consider that the suggestion that an undertaking of exclusivity could not be given because of Ms Katona’s bankruptcy makes any sense. She may not have wanted to commit herself because a lucrative offer might come along which would help her discharge her bankruptcy, but in no sense was it not possible to give an undertaking of exclusivity because of her bankruptcy. This has all the air of an ex post facto attempt to exculpate the claimant for her seeking to appear on other television channels. Second, I am quite satisfied that ITV2 would never have agreed to her being free to go on other television channels and if Mr Hendricks had, as he suggested, told them he could not guarantee her exclusivity, I have little doubt that they would have insisted that he did make a commitment to procure her exclusivity. Third, the conversation which Mr Hendricks contends took place in which he said he could not guarantee her exclusivity because of her bankruptcy and ITV2 was apparently prepared to accept that, is wholly inconsistent with the preamble to the Agreement. Even if Mr Mallin were right that this was a reference to some prior agreement or commitment, what is referred to, a “*commitment to procure the exclusive television services of Kerry Katona during the Term*”, is in unqualified terms, pointing strongly to there having been some such commitment, as Ms Clarke said in her evidence.
38. In any event, it seems to me that the point about the commitment being “pre-operative” is a non-point on analysis. As Mr Nambisan submitted, it is well established that, where the wording of a recital manifests a clear intention that the parties should do certain acts, the Court may infer from that wording a covenant to do such acts as if the instrument had contained an express agreement to that effect, citing *Chitty on Contracts* 31st edition [13-025]. Furthermore, where there is ambiguity within the operative parts of a contract and a recital is clear, the recital will govern the construction of the contract: see per Lord Esher MR in *Re Moon* (1886) 17 QBD 275.
39. Mr Mallin had an alternative submission that, if there was a contractual obligation on the claimant to procure the exclusive television services of Ms Katona, it was only an obligation to use reasonable endeavours to do so. The obvious difficulty with that submission is that, unlike the obligations in clause 2.2 concerning Ms Katona’s behaviour, the commitment referred to in the preamble was unqualified by the words:

“shall use reasonable endeavours”. It is understandable why those obligations in clause 2.2 should be qualified in that way given what seems to have been her somewhat erratic behaviour in the past. Her behaviour was marginally less controllable by the claimant than procuring her exclusive television services, which was a question of ensuring a sufficiently tightly-drawn provision was inserted in the filming agreement between the claimant and Ms Katona. If clause 2.1 of the filming agreement with her did not ensure her exclusivity, which at least arguably, it should have done, the claimant should have imposed a stronger provision on her. In conclusion on the issue of exclusivity, I consider that it was a term of the Production Agreement between the claimant and ITV2 that the claimant would procure the exclusive television services of Kerry Katona.

Implied terms of the Production Agreement

40. The applicable test for the implication of terms is that set out in [21] of the speech of Lord Hoffmann in the Privy Council in *A-G of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 WLR 1988:

“It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. It will be noticed from Lord Pearson's speech that this question can be reformulated in various ways which a court may find helpful in providing an answer – the implied term must “go without saying”, it must be “necessary to give business efficacy to the contract” and so on – but these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?”

41. Following that reformulation of the relevant test, there was a certain amount of academic debate as to whether it was still the law that a term would not be implied into a contract unless it was necessary that the agreement should contain such a term to give effect to the agreement of the parties, although it might be thought that it was, from the fact that Lord Hoffmann expressly adopts necessity to give business efficacy as one way of expressing the test. That necessity is still required is made clear by the decisions of the Court of Appeal in *Mediterranean Salvage and Towage Ltd v Seamar Trading (“The Reborn”)* [2009] EWCA Civ 531 and *Marks & Spencer Plc v BNP Paribas Security Services Trust Company* [2014] EWCA Civ 603; [2014] L&TR 26. In the latter case helpful guidance is provided in the judgment of Arden LJ at [26]-[28]:

“26 Furthermore, as this court made clear in *Mediterranean Salvage and Towage Ltd v Seamar Trading and Commerce Inc ...The Reborn*) [2009] EWCA Civ 531, and Mr Dowding submits on this appeal, the court will not imply a term as a matter of interpretation following the *Belize* approach unless it is necessary that the agreement should contain such a term to achieve the parties' express agreement, purposively

construed against the admissible background. Lord Hoffmann also made this point in *Belize*:

‘An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves.’

27 Mr Fetherstonhaugh accepts this but points out that the word "necessary" is imprecise, and that courts have not always applied this test strictly (see per Lord Wilberforce in *Liverpool City Council v Irwin* [1977] AC 239). I agree that what is necessary must depend on the particular type of contract. So, for example, the House of Lords implied a term that directors should use their power under their company's articles to pay bonuses so as not to frustrate the expectations of holders of annuity policies which contained a guaranteed annuity rates (*Equitable Life Assurance Co Ltd v Hyman* [2002] 1 AC 408). In this case, however, there is little admissible evidence of communications between the parties beyond that contained in the lease, and so the exercise admits of less room for argument than might otherwise have been the case.

28 However, I would accept that a party does not show that a term is unnecessary simply by showing that the parties' agreement could work without the implied term. That approach overlooks the fact that as part of the process of interpretation the court seeks to find the parties' common aim in entering into the agreement. A term may be implied if it is necessary to achieve the parties' objective in entering into the agreement.”

42. What ITV2 contends for in the present case is an implied term of the Production Agreement that the claimant would not act in any way such as to damage the necessary relationship of trust and confidence in the relationship between the subject of a reality television programme and the producer of such a programme. What is immediately striking about this implied term is that it is not said to involve a relationship of trust and confidence between the parties to the Agreement, ITV2 and the claimant, but between the claimant and a third party, Peter Andre.
43. Even where the alleged implied term of trust and confidence is said to arise between the parties to the contract, the courts have been reluctant to permit implication of such a term into a commercial contract like the present. For example, in *Bedfordshire County Council v Fitzpatrick Contractors* [1998] 62 Con LR 64, Dyson J (as he then was) refused to imply such a term into a highway maintenance contract, stating:

“...the court should in any event be very slow to imply into a contract a term, especially one which is couched in rather general terms, where the contract contains numerous detailed express terms such as the contract in this case. In my judgment, in such a case, the court should only do so where there is a clear lacuna. The parties in this case took a great deal of trouble to spell out with precision and in detail the terms that were to govern their contractual relationships. The alleged implied term is expressed in broad and imprecise language. I can see no justification for grafting such a term onto a carefully drafted contract such as this.”

44. That reasoning and approach were adopted by HHJ Peter Coulson QC (as he then was) in relation to a franchise agreement in *Jani-King (GB) Ltd v Pula Enterprises Ltd & ors* [2007] EWHC 2433 (QB). The authorities and principles to be applied when considering an implied term of trust and confidence were recently helpfully reviewed by Richard Spearman QC (sitting as a Deputy High Court Judge in the Chancery Division) in *Chelsfield Advisers LLP v Qatari Diar Real Estate Investment Company & Ors* [2015] EWHC 1322 (Ch). That case concerned the implication of such a term of trust and confidence into the contract between the parties said to have the relevant relationship, there a contract between the promoter of a property development project and the intended development manager.
45. The learned deputy judge recognised that in certain categories of contract, specifically contracts of employment, there may be such an implied term implied by law as an incident of all such contracts, citing the decision of the House of Lords in *Malik v Bank of Credit and Commerce International* [1998] to that effect. However, he was not prepared to imply such a term into the contract before him. At [61]-[62] of the judgment, he said this:

“Accordingly, *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 is authority for the proposition that there may be implied by law as an incident of all contracts of a certain description (in that case, contracts of employment) mutual obligations that each party will not conduct itself in such a way as, assessed objectively, is likely to destroy or seriously damage the trust and confidence that is required if their relationship is to continue in the manner that the contract implicitly envisages.

In my judgment, that is a far cry from the implied term for which Mr Choo-Choy contends in the present case, which (a) does not relate to a class of contract in respect of which any such implication has previously been recognised in any decided case to which I have been referred, (b) does not depend upon one party conducting itself in breach of an implied promissory obligation, and (c) would give rise to a right to terminate the contract not on the basis of any objective criteria but instead on the subjective basis that the other party genuinely considers that trust and confidence has broken down. In this regard, in argument Mr Choo-Choy made clear that the test for which he

contended was that loss of trust and confidence had to be genuine or honest, but did not have to be reasonable.”

46. The learned deputy judge pointed out later in his judgment that many of the arguments advanced in support of the alleged implied term could be made in relation to the implication of a duty of the utmost good faith, but that outside those categories of contract where such a duty was implied as a matter of law [such as insurance contracts] the courts would not imply such a duty. At [80] he addressed this point:

“I am in any event very sceptical about the suggested implication. It seems to me that arguments to like effect as many of the submissions made by Mr Choo-Choy could be made with regard to the implication of a duty of good faith. However, although a duty of good faith is implied by law as an incident of certain categories of contract (including contracts of employment), the general rule in commercial contracts is that ‘If the parties wish to impose such a duty they must do so expressly’ (see *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200, Jackson LJ at [105]). I consider that the case is stronger still for saying that if the parties wish to produce the result that each of them has the right to terminate the contract in the event that it loses trust and confidence in the other, even when the other party is not in breach of contract and if that may be unreasonable, then they should do expressly.”

47. Mr Nambisan was not able to point to any authority where an implied term of trust and confidence had been implied into a television or film production agreement between the parties to the agreement, let alone between one of the parties and a third party. He sought to justify the implication of the term contended for by reference to the particular characteristics of reality television programmes. These were set out in Ms Clarke’s witness statement and were largely accepted by Mr Hendricks in evidence and can be summarised as follows:

- (1) Reality television programmes are underpinned by the concept of exclusivity, in that they provide exclusive access to both public and behind the scenes aspects of the subject’s daily life.
- (2) The subject necessarily agrees to provide access to his or her daily life, including to interaction with family members and friends.
- (3) The subject must be sufficiently comfortable with the people who film, edit and produce the programmes in question.
- (4) Image and “brand” are of central importance in return for allowing the intimate access and the subject expects and is entitled to expect the programmes to portray him or her in a sympathetic light.
- (5) Content must be up to date maintaining relevance.

48. Despite the emphasis placed by ITV2 and Mr Nambisan upon these allegedly unique characteristics of reality television, I am unconvinced that they even begin to justify the implication of the term alleged. Ultimately, this intimate access to his private and public life is provided by Mr Andre in return for a substantial fee and the contractual relationship is a commercial one like any other. Since Mr Hendricks did not appear in any Peter Andre: The Next Chapter programmes after episode 4 of series 4 which was filmed in February and March 2011 and it was not intended that he would appear in any of the series 5 or Here to Help programmes, concern about Mr Hendricks being on set was misplaced. There was no suggestion by Mr Andre that he was not comfortable with the film crew who filmed the various programmes.
49. It seems to me that Mr Andre does not have to like or have particular trust and confidence in Mr Hendricks as editor and producer, since ITV2 as broadcaster would have exercised its rights under the Licence Agreement to correct any deficiencies in his editing or producing or simply have refused to broadcast the programmes in question. In fact of course, at the very time when Mr Andre claims that he had lost or was losing trust and confidence in Mr Hendricks in the period May to July 2011, Mr Hendricks was editing both Peter Andre: The Next Chapter series 4 and Here to Help series 1 properly and professionally. There was no complaint by Mr Andre or ITV2 about the editing or production of those programmes or suggestion that Mr Andre's image or brand had been adversely affected by that editing or production.
50. The allegations made by Clare Powell and Peter Andre about loss of trust and confidence in the claimant and Mr Hendricks, which I will consider and analyse later in the judgment really demonstrate that the alleged implied term suffers from precisely the same defect as the judge identified in [62] of *Chelsfield*, that the question of whether it was breached would not be determined on the basis of any objective criteria, but on an entirely subjective basis. Indeed the position would be worse than in that case, because it is not even a question of whether the other party to the contract genuinely considers that trust and confidence has broken down, but of ITV2 having to assess whether the protestations of the third party are genuine or not, whether the conduct in question viewed objectively is such as should cause the breakdown of trust and confidence and whether it has in fact caused such a breakdown. This sort of subjective analysis is inappropriate in the performance of what is a commercial contract between ITV2 and the claimant.
51. Furthermore, the implication of the proposed implied term is not necessary in the sense that it is not necessary for the Production Agreement to contain such a term in order to achieve the parties' express agreement construed against the admissible background. This agreement was, as I have shown above, part of a contractual framework negotiated between experienced lawyers on both sides and, had they thought such a term was necessary, no doubt they would have included an express provision. In the circumstances, there is no scope for the implication of the proposed term.
52. Contrary to the thrust of some of Mr Nambisan's submissions, this does not leave ITV2 without a remedy in a difficult situation. If the behaviour of Mr Hendricks in relation to the tweets or otherwise was such as to evince an intention on the part of the claimant not to perform the Production Agreement, leading ITV2 reasonably to conclude that the claimant no longer intended to be bound by the contract, that would amount to a renunciation of the contract entitling ITV2 to terminate for that breach. I

consider in more detail later in the judgment the question whether there was a renunciation of the Production Agreement by the claimant.

53. So far as the implication of other terms into that contract is concerned, it is common ground that the Production Agreement contained a term implied by law, under section 13 of the Supply of Goods and Services Act 1982, that the claimant would perform its services with reasonable care and skill.

The witness evidence

54. Before setting out my detailed findings of fact, I propose to summarise the view I formed of the various witnesses who gave evidence. For the claimant, Mr Hendricks and Ms Partridge were called. Mr Hendricks was an engaging personality. He comes from a relatively humble background and has made a successful career in music management and, latterly, reality television, where (certainly until this dispute) he was one of the most respected producers of this particular genre of television, which in a very real sense, he had devised. He is, by his own admission, a volatile character and often foul-mouthed, but I was simply not prepared to accept that he was capable of the level of violence ascribed to him by Mr Andre and Ms Powell. Whilst it is true that, when angry he made some very unpleasant threats in his tweets, it is clear that he would not have carried them out, since although his temper was quick to rise, that temper would evaporate as quickly as it came. I do not consider that either Mr Andre or Ms Powell felt genuinely threatened by Mr Hendricks and I reject utterly any suggestion that he made death threats, a matter to which I return in detail below.
55. I found him to be an essentially honest witness. Although I could not accept his evidence about having told ITV2 that an undertaking of exclusivity could not be provided in relation to Ms Katona and I preferred the evidence of Ms Clarke on that issue, in all other respects where his evidence and that of Ms Clarke was in conflict (specifically in relation to the meeting on 20 June 2011), I preferred his evidence. The other area where I was somewhat sceptical concerned whether he had said something very unpleasant about Mr Powell to his builder Mr Clinton Gadd. I considered that in all probability he had said something unpleasant, although falling a long way short of the death threats against her which Mr Andre alleged Ms Powell had told him that Mr Gadd had told her Mr Hendricks had made.
56. Ms Nicola Partridge was a patently honest witness who was clearly still understandably upset at the way she had been treated by Ms Powell and Mr Andre. She gave her evidence in a measured and dignified manner. To a very large extent, her evidence in her witness statement was unchallenged by Mr Nambisan on behalf of ITV2. Furthermore, he did not put to her some of the matters which were being alleged against her by Ms Powell and Mr Andre, specifically that whilst on the film set of the Peter Andre programmes she was in effect acting as a “spy” for Mr Hendricks reporting back to him on the telephone about what was happening. I do not accept Mr Andre’s evidence about Ms Partridge constantly reporting back to Mr Hendricks. Her evidence about the editing process was also unchallenged. She said that Ms Powell and she were involved in viewing the first cut and integral to the editing. There was no change in that procedure after Mr Hendricks and Ms Powell fell out or in the editing of Here to Help or Peter Andre: The Next Chapter series 4.

57. The claimant also called Mr Clinton Gadd, to whom Mr Andre alleged Claire Powell had told him the death threats were made, in order to counter the suggestion that any death threats were made. In his short witness statement, he described something very unpleasant Mr Hendricks had said about Ms Powell, but which fell a long way short of being a death threat and which was said after termination of the Production Agreement, not some time in June 2011 as Mr Andre alleges. Mr Gadd gave his oral evidence in somewhat peculiar circumstances, in that he was interposed during the cross-examination of Mr Hendricks, with Mr Nambisan showing a disinclination to cross-examine Mr Hendricks about the death threats. After I had indicated that the court expected ITV2 to cross-examine Mr Hendricks about such a serious allegation, if it was proposed to call Mr Andre to repeat the allegation, Mr Nambisan only in fact put to Mr Hendricks what Mr Gadd contended he had said to him, which as I have said was not a death threat. Mr Hendricks denied saying this. Mr Gadd was then called, but Mr Nambisan did not put to him the death threats alleged by Mr Andre, only cross-examining him about the timing of the comment Mr Hendricks had made to him about Ms Powell. Mr Gadd said that he had looked at various emails and thought that it was on 16 September 2011 that he and Mr Hendricks had the relevant conversation in his office. At the actual time of termination he was on holiday and he said that the conversation could not have been before. I see no reason not to accept that evidence.
58. Ms Sarah Clarke is a solicitor who, having worked in private practice for nearly ten years, joined ITV in 2009 originally as Head of Commercial Affairs. After a period of maternity leave immediately after the events with which the current dispute is concerned, she took up her current role as Director of Legal and Business Affairs in May 2012. Ms Clarke was essentially an honest witness, but she was put in a difficult position because, for whatever reason, she was the only representative of ITV2 called to give evidence. Accordingly, she was in effect the “mouthpiece” for the defendant, occasionally driven to defend positions taken by ITV2 which were difficult to defend. Her evidence about the meeting with Mr Hendricks on 20 June 2011 was an example of this. She persisted in maintaining the position that Mr Hendricks had raised the question of editing and that there had been a discussion about a solution to the editing process, that Mr Hendricks should step back and someone else come in to edit the programmes. In my judgment, for reasons I develop in detail later, it is inherently unlikely either that Mr Hendricks raised the question of editing or that there was a discussion about the editing process. Ms Clarke did not really have a clear recollection of the meeting and fell back on her witness statement, which I had the distinct impression did not really set out her actual recollection. On this issue I much preferred the evidence of Mr Hendricks.
59. Mr Peter Andre is a successful performer both as a pop singer and as the star of reality television and it is clear that his success is due in part to an engaging manner. However, he was an extremely unsatisfactory witness. Much of his evidence was (i) exaggerated, for example his evidence about the effect on him of Mr Hendricks’ tweets and some frankly ridiculous evidence about everyone on the film set shaking in fear of Mr Hendricks even though he was not on the set at all or anywhere near it, or (ii) designed to show himself in a good light, for example his refusal to accept that he had wanted Ms Partridge removed from the programmes, in the face of correspondence from his own solicitors making that one of the conditions of continuing to work with the claimant. Regrettably I formed the view that on some

issues his evidence was not truthful. Two examples are (i) his attempt to avoid knowledge of the fact that Ms Powell was writing to his own solicitor on 2 June 2011 discussing the removal of the claimant as production company, by claiming that he never read emails “cc’d” to him; and (ii) his evidence about what he alleged Ms Powell told him about the death threats, which I have concluded was a complete fabrication designed to denigrate Mr Hendricks and bolster Mr Andre’s exaggerated evidence about the impact of the tweets. I suspect that Mr Andre was driven to some of the extremes he exhibited in his evidence out of loyalty to Ms Powell, but that did not make his evidence any more impressive or credible.

60. There were a number of other potential witnesses who one might have expected ITV2 to call to give evidence. Obviously, there is Ms Powell herself, although since she is not an employee of ITV2, one can see that it might not have been possible to procure her cooperation. Ms Zolkwer on the other hand is still employed by ITV and could have given useful evidence about her dealings with both Mr Hendricks and Ms Powell.
61. The parties called forensic accounting experts on the issues of quantum raised by the claim and the counterclaim. Ultimately, as is so often the case, there was not all that much between them, certainly as regards the claim. The claimant called Mr Frederick Brown a Client Service Director at Grant Thornton LLP. He gave his evidence in a straightforward and objective manner and was careful to limit himself to matters which were within his area of expertise. ITV2 called Mr Gregory Harman of FTI Consulting LLP. He was clearly an experienced expert witness. I have no doubt he was endeavouring to assist the court, but at times I felt that his evidence assumed positions which meant it was not as objective as it might have been. He also had a tendency to seek to give evidence about matters which were for the court rather than for him. Where their evidence differed, I preferred the evidence of Mr Brown.

Factual chronology

The history of the relationship with Peter Andre and Claire Powell before 2011

62. Much of the past history of the professional relationship of the claimant with Mr Andre and Ms Powell is not controversial and is set out in Mr Hendricks’ first witness statement.
63. Mr Hendricks has known Claire Powell for the best part of twenty years. In 1999, they started a personal relationship which continued on and off until about February 2011. They have a son together, Nysna, who is now eight. They set up CAN Associates Limited, a PR and Celebrity Management company of which they were both directors, in 2002. In 2004, Mr Hendricks set up CAN Associates TV Limited (the former name of the claimant) of which he was the director and Ms Powell was company secretary. The purpose was to have a television production company to produce television programmes starring the clients whom Ms Powell managed, particularly reality television programmes the production of which was a particular skill of Mr Hendricks. One of Claire Powell’s clients was Peter Andre and it was through her that Mr Hendricks met Mr Andre. In evidence Mr Andre said he had known Ms Powell over twenty years and she was one of his best friends.

64. At around that time in 2004, Peter Andre had appeared in “I’m a Celebrity, Get me out of here” enduring the privations of life in the jungle. Whilst there, he met and started a relationship with the model Katie Price (then known as “Jordan”). Mr Hendricks invested his own money in filming them together from the time they came out of the jungle and this developed into a highly successful reality television programme “Katie and Peter” produced by the claimant. This raised the public profile of Mr Andre to a considerable extent, his popularity having dipped prior to going into the jungle. Mr Hendricks also worked with Mr Andre on his albums and his tours. He also assisted Mr Andre financially.
65. Mr Andre and Ms Price split in 2009. The evidence of both Mr Hendricks and Ms Partridge was that the tactic adopted by Claire Powell as his manager was to portray him as the victim in the break-up and demonise Ms Price. In cross-examination, Mr Andre indignantly rejected any such suggestion and it is not necessary to resolve any issue about that aspect of the history. Suffice it to say that the split increased public interest in Peter Andre and it was that which led to the production by Mr Hendricks and the claimant of reality television programmes which allowed access to Mr Andre in the immediate aftermath of the split and thereafter rebuilding his life. Initially there was a one off special entitled Peter Andre: Going it Alone broadcast in August 2009, followed by the first series of Peter Andre: The Next Chapter, which was filmed four or five weeks after the split.
66. Mr Hendricks’ evidence was that in August/September 2009 he decided that he no longer wanted to be in a relationship with Ms Powell and moved out of the house they shared together. On the business front, he transferred his shares in CAN Associates to her and he owned the claimant. He remained a director of CAN Associates and she remained company secretary of the claimant. He said they intended to and did work together seamlessly, including continuing to work together on Mr Andre’s programmes and career.
67. After the filming of any given reality television programme, a process of editing the rough cuts of filming took place with a view to reducing what was sent to ITV2 pre-broadcast. Mr Andre described 200 hours of filming being reduced to 20 hours, which presumably was a reference to the filming of a whole series. The evidence of Mr Hendricks and Ms Partridge (who was not challenged on this point) was that Ms Powell was always involved in this editorial process with Mr Hendricks and continued to be involved to the same extent as before, even after their relationship turned sour in the spring and summer of 2011. That is a matter to which I return in detail later in the judgment.
68. Mr Hendricks said that in late 2010 they tried again to see if their personal relationship could work. Indeed, they can be seen together with their son on Mr Hendricks’ shoulders enjoying a bonfire night party in episode 8, the last episode of Peter Andre: The Next Chapter series 3, which was presumably filmed some time in early November 2010 and was delivered to ITV2 on 22 November 2010. However, Mr Hendricks’ evidence was that by January 2011, he knew the relationship was over, as all they ever talked about was work. Nonetheless the split was amicable and they continued to work together. Again they can be seen sitting next to each other, apparently perfectly amicably, at a family dinner of Mr Andre’s in episode 1 of Peter Andre: The Next Chapter series 4, filmed in January 2011 and delivered to ITV2 on 30 March 2011.

69. In his witness statement Mr Hendricks says that in all the time they knew each other, he and Mr Andre rarely had any issues. He does say Mr Andre was obsessed with not being seen to be the bad guy. That was certainly a characteristic which manifested itself in his evidence in cross-examination, specifically in his insistence, in the face of contemporaneous correspondence from his own solicitors to the contrary, that he had never wanted Ms Partridge removed from involvement in the filming and production of the programmes, a matter to which I return in more detail below. In cross-examination, specifically about the alleged death threats, to which I also return in detail below, Mr Andre's evidence in answer to questions from me was that Mr Hendricks had a tendency to lose his temper and to become aggressive and threatening throughout the period from 2004 onwards that Mr Hendricks was involved in his management. That evidence is of some significance, since it inevitably casts doubt upon the extent to which Mr Andre's assertion that he lost trust and confidence in Mr Hendricks subsequently was genuine, as opposed to siding with his manager of 20 years and close friend in seeking to engineer the replacement of the claimant as the producer of his reality television programmes. This is also a matter to which I return in more detail below.

Negotiation of the Kerry Katona agreements

70. Before turning to deal with events leading to the complete souring of relations between Mr Hendricks and Ms Powell, I should deal with the negotiation of the Kerry Katona agreements. Ms Katona was another artist managed by Ms Powell. Mr Hendricks first approached ITV2 in early 2010 about the production of reality television programmes showing Ms Katona's life after her move down south from Manchester. ITV2 was initially reluctant because of her well-publicised personal difficulties, including drink and drug issues. She was also an undischarged bankrupt. A first series of Kerry Katona: The Next Chapter was filmed successfully during the course of 2010 and Mr Hendricks then sought a deal with ITV2 for the broadcast of reality television programmes involving Ms Katona. In October and November 2010, there were negotiations between Ms Clarke on behalf of ITV2 and Mr Jeremy Gawade of Lee and Thompson, the claimant's then solicitors in relation to what became the Production Agreement entered into on 9 December 2010, covering both Mr Andre and Ms Katona.
71. In those negotiations, ITV2 were seeking an arrangement whereby Ms Katona would contract direct with them in the same way as PJA Promotions did for Mr Andre, but there were evidently difficulties with that because of her bankruptcy. In an email to Mr Gawade (copied, inter alia, to Mr Hendricks) of 4 November 2010, Ms Clarke sought clarification of whether Ms Katona would be able to contract direct with ITV2. A meeting was arranged for Monday 8 November 2010 at which this issue amongst others was to be discussed.
72. Mr Hendricks' evidence in his witness statement was that he had explained to ITV2 that she could not enter into the same type of exclusive contract with ITV2 as Mr Andre as all her monies would go to her trustee in bankruptcy. He said he negotiated a deal with her trustee whereby her fees for each show were included in the production fee ITV2 paid the claimant, as in that way he could control her monies whilst he tried to negotiate her way out of bankruptcy. In cross-examination, Mr Hendricks expanded on that evidence and said that this explanation that Ms Katona could not enter an

exclusive arrangement was given to Mr Zai Bennett, Director of Digital Channels at ITV at a meeting.

73. It was accepted by ITV2 that Mr Hendricks had explained that Ms Katona could not contract direct with ITV2 in the way that Mr Andre had through PJA Promotions because of her bankruptcy, but it was strongly disputed that he had ever explained that she could not provide an undertaking of exclusivity or that ITV2 had ever agreed to this. Ms Clarke said in cross-examination that she was at a meeting with Mr Hendricks and Ms Powell and Mr Bennett and Adam Crozier for ITV. She did not recall any issue about Ms Katona's bankruptcy being raised at that meeting. The issue was raised by Mr Hendricks at the meeting with her and Mr Gawade on 8 November 2010. Mr Hendricks had explained that Ms Katona could not enter a direct contract with ITV because of her bankruptcy, but she said it was "absolutely not correct" that there was a discussion about Ms Katona not being able to enter any exclusivity deal. She said that she recalled very clearly that, at the meeting Mr Hendricks had said that although there could be no direct contract between Ms Katona and ITV, the claimant would procure her exclusive services.
74. On this issue, I prefer the evidence of Ms Clarke to that of Mr Hendricks and reject the suggestion made by him that he had explained to ITV that he could not procure the exclusive services of Kerry Katona because of her bankruptcy. I have reached this conclusion for the three reasons already set out at [37] above. In summary they are, first that the suggestion makes no sense. It is difficult to see how the fact of bankruptcy could adversely affect the ability to agree to provide exclusive television services and, indeed, that is essentially what Ms Katona agreed to in clause 2.1 of the filming agreement between her and the claimant. Second, the inherent probabilities of the situation are that ITV would always have insisted on an assurance that she would provide her television services exclusively to ITV2 during the Term of the Production Agreement. As Ms Clarke said, exclusivity was "fundamental". Third, the conversation which Mr Hendricks says took place is inconsistent with the preamble to the Production Agreement.
75. That it was understood on both sides that Ms Katona would be providing her television services to both sides is also apparent from a "Kerry Communications Plan" prepared internally within ITV on 11 November 2010 which seems to have been sent to the claimant. That identifies as a key message: "*ITV2 has made a long term investment in Kerry and the ambition is to build her profile as a key part of the ITV2 family over time*". Without a commitment that her services would be provided exclusively to ITV, it is difficult to see how she could have been a key part of the "ITV2 family" or, as expressed in the Production Agreement, a "face" of ITV2. A press announcement of her joining ITV2 was released on 12 November 2010. As recorded in that announcement, a one-off 90 minute special called Kerry Katona: Coming Clean was screened in early December followed later the same week by the first episode of Kerry Katona: The Next Chapter.
76. It follows that I have concluded that the claimant did make a commitment to ITV2 in unqualified terms to procure the exclusive television services of Ms Katona for ITV2. As I have already held in the analysis of the contractual framework, that commitment was confirmed in the preamble to the Production Agreement, which was concluded on 9 December 2010.

Events up to the end of May 2011

77. As already noted above, Mr Hendricks appeared with Ms Powell in the first episode of Peter Andre: The Next Chapter series 4, filmed in the weeks of 3, 10 and 17 January 2011. Filming of the next few programmes continued in February and March 2011. Mr Hendricks also appeared in episode 4, in a cold bath and sauna with Mr Andre and others. That was filmed in the weeks of 28 February and 7 and 14 March 2011 and delivered to ITV2 on 9 May 2011. In the event, that was the last programme in Peter Andre: The Next Chapter series 4 in which Mr Hendricks appeared. It was not intended that he appear in any of the programmes in series 5 or in Here to Help, the first programme of which was filmed in the week of 28 March 2011. Editing of the first few episodes of Peter Andre: The Next Chapter series 4 took place in February and March 2011 and the first episode was delivered to ITV2 in the week of 14 March 2011. Editing of episode 4 took place between the weeks of 28 March and 18 April 2011. Editing of the first episode of Here to Help also took place in early April 2011. Although the relationship between Mr Hendricks and Ms Powell had ended for a second time, they appear to have been able to continue with their professional relationship and there is no suggestion by ITV2 of any filming, editing or production problems in that period in relation to any of those programmes.
78. On 14 April 2011, Ms Powell received an email from Ros Phillips, a talent executive with a company called Endermol, who was responsible for casting the next series of Celebrity Big Brother. She was keen to talk about clients of Ms Powell's who might appear on the programmes, specifically Amy Childs, who had starred in The Only Way is Essex ("TOWIE"), and Kerry Katona. Ms Powell and Ms Partridge met Ms Phillips at the Mayfair Hotel on 20 April 2011. Following that meeting, on 26 April 2011, Ms Phillips sent them both an email saying she would like to meet Amy Childs provided that her TOWIE contract would allow her to take part in Celebrity Big Brother. She asked if Ms Katona's shooting schedule would allow a 3-4 week stay in the Big Brother house in August, although she referred to their having had doubts at the meeting. In response on 28 April 2011, Ms Partridge said that they would have to rule Ms Katona out as they would be shooting her reality show [i.e. Kerry Katona: The Next Chapter series 3] and could not afford to lose her for that time period.
79. On 20 April 2011, Mr Hendricks emailed Ms Powell about various business matters saying: "I thought it better to just email them as we will just argue". One of the matters he raised was a magazine article about Mr Andre which caused him concern:
- "...we need to be careful when doing articles in magazines. All that, I am an animal in the bedroom will damage his family/image/brand. I know you won't agree with [me] about this, but you should ask yourself the question, would David Beckham do an article along those lines? The answer would be no, so I am just flagging it."
80. In the same email he referred also to the need to stop Kerry Katona "running her mouth off about the new fame chaser". This was a reference to the fact that Ms Katona had taken up with a man called Dan Foden who Mr Hendricks thought was only interested in her because he thought it could make him famous and Mr Hendricks was worried that Mr Foden would hurt her and she was talking to the press about Mr Foden in a way which would make her look foolish when he dumped her, which he

eventually did. Mr Hendricks wanted Ms Powell to get Mr Foden to sign a confidentiality agreement in order to protect Ms Katona which is what they usually did for clients in such situations and he could not understand why Ms Powell did not do this, but just let Ms Katona dig herself in deeper.

81. It was during this period in the first few months of 2011, that, according to Ms Partridge (whose evidence on this issue, which was not challenged, I summarise in this and the following paragraph), Ms Powell started a physical relationship with Mr Drew Rush, who was employed through a security company as a security man by the claimant. During the filming of the first episode of Here to Help, Ms Partridge learnt that he was sneaking into Ms Powell's hotel room at night, which worried Ms Partridge. At the beginning of May 2011, Ms Powell and Mr Andre flew out to Dubai for a calendar shoot with a party of people which included Mr Rush. A few days later, Ms Partridge flew out with Kerry Katona and Amy Childs. Whilst in Dubai, Ms Partridge witnessed the relationship between Ms Powell and Mr Rush at first hand. That and his attitude towards Ms Partridge made her uncomfortable. She was also concerned about the effect of Ms Powell's behaviour on Mr Hendricks and on the business. She raised her concerns with Ms Powell who said they could speak about it when they got back to the United Kingdom and not to worry.
82. On her return to England, Ms Partridge arranged to meet Mr Hendricks and told him she wanted to leave CAN Associates. Although she did not mention Mr Rush, she had a feeling he knew about the relationship, possibly from the film crew who had been in Dubai, who were very loyal to Mr Hendricks. When Ms Powell returned from Dubai, she and Ms Partridge met and there were heated exchanges, although Ms Powell did not want her to leave CAN Associates. Ms Partridge was clearly uncomfortable about Ms Powell's relationship with Mr Rush and felt as if she was being forced to lie about something she knew was true. She worked with Mr Andre on 14 May 2011 and from their conversation in the evening was in no doubt he knew about Ms Powell and Mr Rush. Mr Andre's evidence was that he wasn't sure if he had known about the relationship when they were in Dubai, but he did find out soon after they came back. He certainly knew by the time of the encounter with Mr Hendricks in his dressing room on 19 May 2011 to which I refer below.
83. In his witness statement, Mr Hendricks confirmed that he found out about the relationship between Claire Powell and Drew Rush in late April/early May 2011. Mr Hendricks also found out that Mr Rush was engaged and that his fiancée was pregnant with his child. He confronted Ms Powell about the relationship but she denied it, so he checked his information was correct and confronted her again. However, she denied it again, swearing on their son's life that she was not having an affair, which Mr Hendricks said in his witness statement that he found utterly contemptible. In cross-examination he confirmed that he had three issues about the relationship with Drew Rush: (i) the fact that Ms Powell had hidden the relationship from him and sworn on their son's life; (ii) the fact that Mr Rush was engaged and his fiancée was pregnant could be a PR catastrophe for Ms Powell and for Mr Hendricks and their companies and (iii) he found out there was an issue relating to Mr Rush's accreditation as a security professional which could expose CAN Associates or its directors to prosecution.
84. Mr Hendricks said this put a strain on his relationship with Ms Powell and they argued, but by 12 May 2011 things were back on a more even keel and they agreed to

meet, which they did the following day at Bray Studios to discuss personal and professional matters. Mr Hendricks described the meeting as entirely amicable. He made a note of the meeting. That note discloses, inter alia, that it was agreed that he would work with her on all projects that related to her clients working with the claimant and that arrangement was to be reflected in a legally binding document. He was not to handle any business dealings with Mr Andre going forward or attend business meetings regarding Mr Andre unless it was to do with television. He would advise her on any legal issues regarding Ms Katona if requested. She would offer him any new clients she felt had television potential and he would decide if he wanted to take the client on. If he declined, she was free to work with another production company. They agreed to have fortnightly board meetings to update each other on all aspects of their business dealings. She and Ms Partridge would attend any production meetings that were required to give their input.

85. Despite that meeting, it soon transpired that Ms Powell had other ideas. On 16 May 2011, Mr Hendricks received an email from her which referred to his trying to control and bully her and how he had insulted her and stamped on her. She said she now intended to run CAN Associates on her own. He said he thought at the time that this email had been drafted for her by somebody else and that he subsequently discovered that it was drafted by her sister Victoria Allen. In cross-examination he described this as a script, a set up so that he did not reply to it. It seems to me that he may well be right about that and that this email may be the beginning of Ms Powell's scheme to replace the claimant as the production company for Peter Andre's reality television programmes.
86. On 18 May 2011, Mr Hendricks took Ms Clarke and her assistant Alexia Edwards for lunch which seems to have been a jolly occasion. The following day she sent him an email thanking him saying: "Thank you so much for a delicious lunch and a lovely time yesterday. It was great to catch up and have a good old chin wag...It was a great opportunity for a rare week day lunch out and a lot of fun." Mr Hendricks replied the same afternoon, 19 May 2011, saying: "I just wanted to thank you both for being such great company and restoring my faith in that there are still some lovely people in our industry."
87. It was on 19 May 2011 that Mr Hendricks spoke to Mr Andre in his dressing room on the Here to Help filming location in Harrow. Filming of the series had resumed that week. Mr Hendricks' account of this meeting in his witness statement was that he had asked Mr Andre to tell him if he knew about Ms Powell and Mr Rush. Mr Andre was clearly embarrassed and said he had known but did not want to get involved. Mr Hendricks thought this was hypocritical, given how upset Mr Andre had been when he thought people had hidden things from him about Katie Price, but Mr Hendricks did not say so. Mr Andre asked how this would affect them workwise to which he replied: "You know me Pete, I will be professional at all times." This was the last occasion on which he spoke to Mr Andre, since it was not necessary to do so on a day to day basis during filming, as that was for other staff including Ms Partridge. Mr Hendricks was not cross-examined about his account of this meeting.
88. Mr Andre agreed in cross-examination that this was the last occasion on which he had spoken to Mr Hendricks. However what he described in his evidence was a much more stormy and emotionally charged encounter. He agreed that Mr Hendricks had asked him if he had known about the relationship with Drew Rush which Mr Andre

said he had. He described Mr Hendricks as fuming, effing and blinding about Ms Powell sleeping with Mr Rush. Mr Andre had said to him: "Don't ask me to take sides." Mr Andre returned to his evidence about this encounter later in his evidence when he described Mr Hendricks as having been in a rage during this period of time in May and June 2011.

89. Although Mr Andre could not remember if he had seen Mr Hendricks during the filming of *Here to Help* which finished filming at the end of June 2011, other than on the occasion at Harrow on 19 May 2011, I am quite satisfied, on the basis of Mr Hendricks' evidence which I accept, that he was not present during the filming because he did not need to be and that the last time they saw or spoke to each other was on 19 May 2011. It follows, as Mr Mallin put to Mr Andre that he cannot have seen Mr Hendricks in a rage after the Harrow meeting.
90. Even in relation to the Harrow meeting, I suspect Mr Andre is exaggerating the extent to which Mr Hendricks was angry. It was clear to me, particularly from his distinctly unimpressive evidence about hearing from Claire Powell about death threats Mr Hendricks had made (which I deal with a little later in this judgment) that Mr Andre was prone to exaggeration in his evidence and was at pains to portray Mr Hendricks as someone who was aggressive and threatening. Mr Hendricks is undoubtedly someone who is volatile and loses his temper as he was essentially prepared to accept, but the temper evaporates as quickly as it has flared up. I very much doubt whether he was in as much of a rage on 19 May 2011 as Mr Andre sought to suggest. After all, he had known about the affair for some weeks and this meeting was on the same day as he sent the friendly email to Ms Clarke to which I referred above.

Claire Powell's scheme to replace the claimant as Mr Andre's production company

91. The claimant discovered more about the extent to which, from at least the beginning of June 2011 onwards, Claire Powell was trying to oust the claimant as the production company for Mr Andre's reality television programmes, after termination of the Production Agreement by ITV2, when a brown envelope containing copies of various emails sent by Ms Powell to others, including her solicitors and Mr Andre's solicitors, was delivered anonymously to Mr Hendricks' home address. A suggestion in cross-examination that Mr Hendricks himself had procured these emails illicitly was denied by him and abandoned by ITV2 when I pointed out the seriousness of the allegation. The emails in fact included the draft of the email of 16 May 2011 drafted by Ms Powell's sister. The copies are poor and although they have been transcribed, it has not always been possible to decipher the whole text of the email.
92. The first emails of relevance for present purposes are an exchange between Ms Powell and Mr Andre's solicitor, Mr Andrew Myers of Clintons. This is incomplete. There is a fragment of an email from her at 8.36 a.m. saying "*hi Andrew*" then a response from him saying: "*perfect. Do you want to meet up to discuss the way forward and what needs doing?*" Her reply to him the same day is copied to Mr Andre's email address and reads: "*Yes that would be good. One of the first things is moving Peter ITV deal away from CAN TV filming it. His contract is direct with ITV and we don't start filming until July again but if I send it over can you or a TV lawyer look over it to see if I am correct then I can go to ITV*".

93. Although Mr Nambisan sought to downplay the significance of this email in his closing submissions, in my judgment it is of considerable significance. It demonstrates that Ms Powell (and Mr Andre) were looking to oust the claimant as the production company of his reality television programmes from at least the beginning of June 2011 onwards. It is quite clear from the subsequent correspondence that, thereafter, they were looking for some pretext or loophole in the claimant's contract with ITV2 which would justify termination. The fact that they had this intention at this early stage inevitably casts some doubt over the genuineness of the issues and concerns raised later (including in relation to the tweets from Mr Hendricks and the alleged editing issues) and of the alleged loss of trust and confidence. It is difficult to give much credence to the contention that Mr Andre lost trust and confidence in Mr Hendricks in circumstances where this strategy to replace the claimant was being devised at the beginning of June 2011, before any alleged death threats and some weeks before the Twitter account was even set up. Furthermore, at least at this stage on 2 June 2011, Mr Andre does not seem to have had any issues with Mr Hendricks (at least none is mentioned) and it is difficult to see what those issues could have been, given that both Peter Andre: The Next Chapter series 4 (all but one episode of which had already been delivered to ITV2 and the last episode of which was delivered in the following week of 6 June 2011) and Here to Help series 1 (which was then being filmed and edited) were successfully made and broadcast.
94. In cross-examination, Mr Andre tried, in a most unconvincing manner, to claim that he was unaware of this email exchange. He claimed that he never read emails which were "cc'd" to him and that he did not see these emails until he was preparing to give evidence in these proceedings. I simply do not accept that evidence. It is inconceivable that Ms Powell would have been discussing such an important matter as changing the production company for his programmes without consulting him or that he would not have read emails to and from his lawyers on this subject. After all, he was the "talent" and, however close their relationship, she was only his manager and agent. In my judgment, this scheme or strategy to replace the claimant was devised and carried out with the full knowledge and consent of Mr Andre.
95. Of course Mr Hendricks was unaware of this scheme or strategy which was being devised behind his back. In his witness statement he describes how on 2 June 2011, he and Ms Powell were in touch about sums she wanted the claimant to pay in relation to trips to Dubai and a skiing trip. They were tetchy with each other and she threatened to stop any filming in respect of Mr Andre and Ms Katona until CAN Associates was paid. He was concerned about what had happened and wanted to check these expenses. Over the next few days, professional relations improved, with her assuring him she was not trying to damage the claimant and wanted the companies to do well. They agreed the terms on which they were to work together would need to be recorded in writing.
96. On Monday 13 June 2011, the claimant's solicitor Mr Gawade emailed Ms Powell saying the ITV2 contracts had been signed and he had prepared final drafts of the filming contracts for Mr Andre (through his loan out company) and Ms Katona for the three series currently in production/being delivered. ITV2 were asking for signed copies of these contracts, so he asked her to get them signed as soon as possible and returned to Mr Hendricks for signature. He made the point that the drafts were based on the ones used regularly in the past, so she should not have any issue with them.

97. Also on 13 June 2011, Ms Berendsen of the claimant sent Ms Powell an email about, inter alia, Mr Andre's itinerary, saying:

"I still have no news for Pete and his itinerary. I need July/August...anything. Can you let me know when I'll receive something. I have a meeting with the new controller at ITV on Mon for which I'll need some kind of heads up on series 5. They will expect me to know something".

98. Ms Powell responded to that email later the same day, saying: "tomorrow". However, she did not provide Mr Andre's itinerary the next day, nor did she provide Mr Hendricks with signed copies of the filming contracts. Instead, she arranged a meeting for the afternoon of 14 June 2011 with her solicitors, evidently to discuss how to replace the claimant as the production company. This is apparent from another of the "brown envelope" emails from her assistant Kerry Baldwin to Debbie Minter of her solicitors Simons, Muirhead & Burton ("SMB") at 12.21 pm that day forwarding, at Ms Powell's request, a copy of Mr Andre's agreement with ITV. The email states:

"Claire would like to continue with ITV but no longer wants to use CAN TV as the filming production company and this is one of the topics she wishes to discuss with you when she comes in to see you at 3.30 pm today."

99. On the same day, 14 June 2011, Ms Powell telephoned Ms Claire Zolkwer, Commissioning Editor: Comedy and Entertainment at ITV and told her that there were issues between Mr Andre and the claimant with Peter Andre: The Next Chapter going forward. She seems to have said the relationship was untenable. Since neither Ms Powell nor Ms Zolkwer gave evidence, it is not possible to discern what issues Ms Powell may have identified, although it seems likely, from the email referred to in [104] below, that they included the blurring out of Mr Rush in the editing of one of the programmes, for which Ms Powell blamed Mr Hendricks. It seems possible that Ms Powell also mentioned her concern about the fact that Mr Hendricks had control over the editing process, although the clear and unchallenged evidence of Mr Hendricks and of Ms Partridge was that nothing changed in the editing process after the breakdown in the relationship between Mr Hendricks and Ms Powell and she had the same input into that process as she had always had. If Ms Powell was suggesting that there were issues with the editing process, that was not true and was just a pretext.
100. Whatever it was that Ms Powell mentioned, Ms Zolkwer seems to have regarded it seriously since in her reply the following morning she says that if Ms Powell was saying the situation was untenable and Mr Andre could no longer work with the claimant, both parties would have to acknowledge this to ITV's business affairs department [i.e. Ms Clarke] in order to formalise the position. However, the email from Ms Zolkwer says that ITV's position is that they would prefer to retain the arrangement they had with Mr Andre and the claimant especially so near to the start of a new deal, which had proved a fruitful deal to date. She said they would hope that any production company and talent would be able to work out any difficulties, continuing: "*If it were a simple case of being able to feel secure that there were some safety nets in place for approval-that would be our best outcome-and in many cases, in my experience, that works well.*" She ended by saying that Ms Powell should let

her know if she wanted to discuss further although it would be better if the business affairs department was there too.

101. Also at 08.53 on the morning of 15 June 2011, before he was aware of this contact between Ms Powell and Ms Zolkwer, Mr Hendricks sent Ms Powell an email saying that he had said countless times that there was no reason why their split should impact on their professional relationship. The one area they could not agree on was Mr Rush. He said it would not be good for either of them or for clients. He pointed out that Mr Rush's fiancée was expecting his child, so how would it look if her relationship with Mr Rush got into the press. He said the fallout would be catastrophic for both of them. He also said that she had gone out of her way to make it as difficult as possible for his company to work with her. He said his reputation was everything and he would not allow her to try and damage his good working relationship with ITV.
102. Mr Hendricks then received a text from Ms Zolkwer at 13.24 on 15 June 2011 saying: *"Pretty much straight after we spoke I had a worrying call from Claire yesterday-it seems there are issues with Pete and the Next Chapter going forward. Should I be alarmed or are you resolving it?"* Mr Hendricks replied: *"Trying to resolve. The issue is not PA it's Claire. Call and I will update you."*
103. Later that afternoon Mr Hendricks sent Ms Zolkwer an email saying:
- "I am sorry that Claire decided to air to you what she thinks are problems between CAN Associates and CAN TV. Actually there are no problems between the companies and no problem with the talent. There is however a major problem with Claire. Below is the email [the one referred to at [101] above] that I sent this morning before I received your text.
- This is the issue. Nothing else. Everything that you have been told is just a smoke screen to cover what is outlined below. Peter has not complained about CAN TV, this is just Claire thinking that she can act like a lovesick teenager without thinking of the damage it will do."
104. Later the same evening, Ms Powell responded to the earlier email from Ms Zolkwer saying she had spoken to her lawyers and to Mr Andre and they thought the best thing would be to come in and see ITV's business affairs for a meeting as soon as possible. There is then an email which is one of the "brown envelope" emails which is dated by the transcriber as 1 June 2011 (but which it seems to me must in fact be dated 15 or 16 June 2011 after Ms Powell had asked Ms Zolkwer for a meeting with ITV's business affairs department) from Ms Powell to her own solicitor, Mr Simon Goldberg of SMB. Not all of this is legible but it concerns a complaint by Ms Powell about something that Mr Hendricks had done vis-à-vis Mr Rush. It seems likely that this is a reference to the blurring out of Mr Rush in one of the programmes in Peter Andre: The Next Chapter series 4, since she says:

"surely this should help with the ITV situation as he [i.e. Mr Hendricks] hasn't done this in the best interests of Peter show....whenever I was standing next to Drew. Peter and I had a conversation last night saying this is exactly the point we are

making saying that because he had editorial control he has the power to do this.

Claire Zolkwer hasn't come back to me on a meeting but I was thinking in the meantime if you knew any TV production companies that they would be happy to work with me that has shot reality TV shows before as we are due to start filming his next series."

105. In fact, Ms Powell was being unduly paranoid about Mr Rush being blurred out of a scene. This was done not by Mr Hendricks but by the creative director of the claimant, Daniella Berendsen, because she did not know whether they had clearance for Mr Rush. She explained this to ITV2 at the meeting she and Mr Hendricks attended on 20 June 2011 which I refer to below. No doubt Mr Hendricks and Ms Berendsen could have explained this to Ms Powell and Mr Andre as well, had they bothered to ask. Furthermore, the editorial control Mr Hendricks had as producer was no greater than it had always been and Ms Powell still had the input in the editorial process she had always had.
106. At 07.48 am on 16 June 2011, Mr Hendricks sent an email to Mr Mike Brooks of Lee & Thompson asking him to look into what redress there would be against CAN Associates, Ms Powell and Mr Andre for damage to his reputation. He said:
- "Seeing that CP has gone to ITV stating that PA working relationship is untenable, which is an outright lie. CP is just using PA as leverage to damage CATV and myself. If we don't bring her to heel immediately the damage at ITV will be terminal".
107. Later that morning at 10.25 Mr Hendricks sent an email to Ms Powell (which he copied to Ms Zolkwer) saying:
- "I have been informed by ITV that you have stated that Peter Andre has some issues with Can TV. I am not aware of any issues with Peter and Can TV and I am somewhat surprised that you have raised these issues with ITV and not informed us of them first.
- Please outline exactly what the issues are, so that we can look into them and try and resolve them."
108. It is striking that Mr Hendricks did not ever receive a reply to that email nor did Ms Powell or Mr Andre ever set out for the claimant's consideration what the alleged issues were. The reason for this failure is not hard to discern. In reality there were no issues, other than possibly the blurring of Mr Rush, which by no stretch of anyone's imagination was sufficiently serious to make the relationship untenable and for which there was an innocent explanation which Mr Hendricks and Ms Berendsen could easily have provided. What Ms Powell seems to have been doing is looking for some pretext to remove the claimant as the production company, so leaving it in the air what the "issues" were no doubt suited her.

109. Rather than send an email setting out what Mr Andre's issues were, Ms Powell sent a somewhat emotive email at 12.26 pm on 16 June 2011 which purported to be a response to the email Mr Hendricks had sent her at 08.53 the previous day. She made reference to the other relationships he had been conducting and asked if his reputation mattered why had he gone into Mr Andre's dressing room and told him very private matters about her private life, evidently a reference to the meeting at Harrow on 19 May 2011. She also complained about some incident the previous evening involving clients of hers. The email ended: "*You told me again on Monday night you didn't want to work with me. I'm running a business not a kindergarten and I won't be treated like this anymore.*" She copied the email to her own solicitors and to Lee & Thompson.
110. Mr Gawade of Lee & Thompson emailed Mr Hendricks advising him not to reply, because as they had discussed they needed to avoid her having ammunition to show the professional relationship had broken down. However, before receiving that email advice, Mr Hendricks had responded to her at 12.54 along much the same lines as previously.
111. Also on 16 June 2011 at 14.57 Ms Berendsen chased up on her email of Monday 13 June 2011 to Ms Powell about Mr Andre's itinerary, saying: "*How are we looking for a PA schedule of sorts? I expected to hear something on Tuesday? I have a team starting a week on Monday, so we are tight for time. Not knowing any of his itinerary (or what we need to do to compliment it) so close to the start of filming a series is a bit of a concern*" Ms Powell responded: "*Please discuss with Neville Daniella. Sorry*".
112. In the evening of 16 June 2011, Ms Powell's solicitor Mr Goldberg of SMB emailed Mr Gawade saying:
- "On the Peter Andre situation, to enable me to advise my client in relation to the contractual aspects that you raised, please urgently send over a copy of the CAN TV Agreement with ITV2.
- I have also been advising Claire's company in relation to its management contract with Kerry Katona, who has indicated to Claire that her management is now going to be taken over by your client. Do you have any instructions on this separate matter?"
113. It is difficult to see what interest Ms Powell's lawyers would have in seeing the Production Agreement between the claimant and ITV2, other than to see if they could pick holes in it with a view to persuading ITV2 to terminate the agreement on some ground or other. In fact at around this time Lee & Thompson said they could no longer act for the claimant because of a conflict of interest in relation to Claire Powell. Given that they had acted for Mr Hendricks in his family dispute with her (to do with their child) he was understandably aggrieved by this. He instructed Swan Turton in their stead.
114. So far as Ms Katona is concerned, the reason why she wished to terminate her relationship with Ms Powell as her manager was mainly to do with Ms Powell's

relationship with Drew Rush, in other words similar grounds to those which led Ms Partridge to want to part company with Ms Powell, as Ms Partridge confirmed in evidence. However, what happened is that a press release was issued on 17 June 2011, which Ms Powell seems to have been behind, saying that Ms Katona had been dumped by her agent the day after going on a six hour bender. Other rumours were circulating that Ms Katona was back on drugs. In his witness statement Mr Hendricks said that, to Ms Powell's knowledge, these claims were false.

115. This was compounded by the fact that Dan Wootton, a journalist who is a close contact of Ms Powell's to whom she apparently feeds stories, posted a tweet insinuating that Ms Katona was having an affair with Mr Hendricks. Although the tweet was taken down because it was untrue, the story was picked up by OK Magazine which ran an article a few weeks later where Ms Katona denied the allegations. Quite apart from the adverse effect on Ms Katona's reputation, this rumour was deeply hurtful to Mr Hendricks. As he told me, Ms Katona regarded him as a father figure and she is the same age as his own daughter, so one can see why the rumour would be hurtful. In fact, it appears that the various rumours about Ms Katona were shut down after Ms Katona consulted Max Clifford, who started acting for her again, having done so before she went to Ms Powell.
116. Mr Hendricks' evidence was that around this time in June 2011, Ms Powell made a number of untrue allegations, including that he had smashed into the gates of the house they shared to intimidate her, that he had stolen jewellery from the house (in relation to which he was interviewed by the police but they accepted he had nothing to do with it) and that he had been violent to his ex-wife and smashed up her house. He had to get statements from his ex-wife and daughter to refute these untrue allegations.
117. It was the untrue allegations and rumours about Ms Katona and about Mr Hendricks referred to in the last few paragraphs which led him to open the Twitter account which he did on 23 June 2011. This is probably an appropriate place in the chronology to deal with the alleged death threats.

The alleged death threats

118. In his witness statement, Mr Andre says that he was told by Claire Powell that she had learnt from Mr Clinton Gadd that Mr Hendricks had told Mr Gadd that he was going to kill her and to ruin Mr Andre's career. He couldn't remember the exact words but she definitely understood that her life was being threatened and Mr Andre said he recalled that she was shaking when she told him. She also told him that she understood from Mr Gadd that Mr Hendricks had made similar threats to the life of both Drew Rush and Carl Machin, Mr Andre's friend and road manager. Mr Andre relies upon these allegations to justify his alleged loss of trust and confidence in Mr Hendricks. He does not put a date on when he learnt about the threats in his statement but from the context of his allegations, he must be pinning it to some time in June 2011 when the filming of Here to Help was still taking place.
119. In view of those extremely serious allegations, the claimant obtained a statement from Mr Gadd, in which he said that the allegations were incorrect. He said that he did recall a conversation with Mr Hendricks at the latter's office where Mr Hendricks was very upset with Ms Powell and Mr Andre for their involvement in ITV2's decision to

terminate the contract (from which it is obvious the conversation was post-termination, in fact in cross-examination he said he thought it was on 16 September 2011). Mr Hendricks was extremely angry saying that: “the fucking bitch has taken Pete up to ITV behind my back” and that he wanted to be “standing over Claire Powell with my foot on her back and a flag of triumph stuck up her cunt and pull it out of her mouth”. Mr Gadd said he thought Mr Hendricks was being somewhat imaginative in his description as to what he would like to do to her and although he thought she should be careful, he did not take this as a death threat. At no stage in the conversation did Mr Hendricks threaten to kill Ms Powell or Mr Rush or Mr Machin or threaten to ruin Mr Andre’s career.

120. The way in which the issue of the alleged death threats was dealt with in cross-examination of the claimant’s witnesses was unsatisfactory. At the beginning of day 3 of the trial, when Mr Hendricks was still in the middle of being cross-examined, a request was made to interpose Mr Gadd at some point that day during the cross-examination. I indicated that this was acceptable, provided that Mr Hendricks had been cross-examined about the death threats before Mr Gadd was called. No objection was raised. Shortly before lunch, at a point where Mr Nambisan had not yet cross-examined Mr Hendricks about the death threats, Mr Nambisan suggested it would be a convenient moment to interpose Mr Gadd. I pointed out that he had not cross-examined Mr Hendricks about the death threats to which Mr Nambisan replied that he did not intend to cross-examine Mr Hendricks about them, apparently because ITV2 did not rely on the death threats and had not known about them at termination, only learning about them during the course of the proceedings. As I pointed out, if ITV2 was going to call Mr Andre who made these allegations, given their seriousness, the allegations had to be put to Mr Hendricks in cross-examination.
121. When the case resumed after lunch, Mr Nambisan did put to Mr Hendricks the statement of Mr Gadd and what Mr Gadd said Mr Hendricks had said about what he would like to do to Claire Powell. Mr Hendricks denied saying any such thing. On balance I consider he probably did say something along those lines but, although it was extremely unpleasant and offensive, it fell a very long way short of a death threat and it was not seen as such by Mr Gadd, who could therefore hardly have told Ms Powell that Mr Hendricks had made a death threat. In any event, whatever was said, it was said a month after termination and not at around the time that Here to Help was being filmed in June 2011, as Mr Andre sought to suggest. What were never put to Mr Hendricks in cross-examination were the very serious allegations which Mr Andre was making in his witness statement.
122. Ms Clarke had not known about the alleged death threats at any stage prior to termination and only learnt of them during the course of the proceedings, although in her witness statement she said that, given Mr Hendricks later abusive conduct, she was not overly surprised to learn of the threats. In cross-examination, Mr Mallin invited her to withdraw this evidence which she declined to do, but she then had considerable difficulty justifying her stance. She sought to do so by reference to a tweet where Mr Hendricks referred to “burying” someone which she took to be a very unpleasant threat. Mr Mallin asked her if she was saying to the court that she thought he was a violent man and she said no, she was not saying that. She accepted that after termination she had met Mr Hendricks on more than one occasion, once in a café,

apparently without any concern. Furthermore, for reasons I elaborate later, no-one reading the “burying” tweet could have thought it was meant literally.

123. This evidence of Ms Clarke’s was unworthy of her. As Mr Mallin put to her and I agree, it was all part and parcel of an attempt by ITV2 to paint Mr Hendricks in a bad light. The fact that she said it at all and then was not prepared to withdraw it having heard Mr Gadd’s evidence did lead me to doubt how objective some of her evidence really was. It seemed to me that this was an example of Ms Clarke seeking to maintain in the witness box a particular position which ITV2 wished to adopt in the litigation.
124. Mr Andre maintained in cross-examination his evidence that Ms Powell had told him about the death threats, but he was unable to explain why, if he had been told about these threats, he had not told his solicitors, despite apparently being shocked and appalled by what he was told. He said he had told Ms Powell to report the matter to the police, but he was unable to tell the court whether she had or whether he had chased her to do so. He also alleged that Ms Powell told him she was going to increase the security at her house in view of what had happened.
125. In the light of the evidence of Mr Hendricks and Mr Gadd I am quite satisfied that no death threats were ever made by Mr Hendricks against Ms Powell or against anyone else. That leaves two possible explanations of Mr Andre’s evidence: either Ms Powell lied to him and told him there had been death threats when there had not or his evidence is a complete fabrication. Obviously I have thought long and hard before reaching this conclusion about a well-known entertainer who is in the public eye, but I have concluded that this evidence has been made up by Mr Andre. If Ms Powell had ever told him about the death threats, it is inconceivable that he would not have told his solicitors and that they would not have told ITV2 immediately. In view of the fact that he and Ms Powell were clearly looking for grounds upon which the claimant could be removed as the production company, which was well-known to their respective solicitors, these death threats, if they had ever been made or mentioned by Ms Powell would have been manna from heaven, a complete vindication of the alleged loss of trust and confidence. No need in those circumstances to rely upon “editing issues”. This would have been the clearest possible renunciation of the Production Agreement by the claimant and Ms Powell and Mr Andre and their respective solicitors would have undoubtedly gone straight to ITV with the information about the threats.
126. Equally, if there had been death threats, when Mr Andre discussed the tweets with Ms Clarke at the time of the second mediation on 9 August 2011, he would surely have said words to the effect that these offensive tweets were not the half of it, Mr Hendricks had also made death threats. Yet clearly he never told Ms Clarke about these death threats. The only sensible explanation for that is that they were never made and he was never told about them. Also, if Ms Powell had told him about the death threats and he told her to go to the police, it is inconceivable that, as her close friend of twenty years he would not have followed that up and insisted she went to see them, if necessary going with her. There would have been a police investigation and yet there was none. I consider the evidence about Ms Powell saying she would put extra security in place at her home was also a fabrication.

127. In all the circumstances, I completely disbelieve Mr Andre's evidence about the alleged death threats. Inevitably that conclusion means that I have treated with considerable scepticism much of his other evidence, save where it is consistent with that of Mr Hendricks or with contemporaneous documentary evidence. I am particularly sceptical about his evidence about the effect on him of Mr Hendricks' tweets, a matter to which I will turn in detail later.

The meetings on 20 June 2011

128. On the morning of 20 June 2011, Mr Hendricks and Ms Berendsen went to ITV's offices for a development meeting with Ms Zwolker and her colleague Ms Jain. They were not expecting to discuss anything legal but Ms Clarke and Ms Edwards turned up to the meeting without warning. Mr Hendricks' evidence was that, during the meeting, the ITV representatives asked him if he knew what the "issues" between Mr Andre and the claimant were and he said he did not. He asked if they knew what the issues were and Ms Clarke said they did not. He thought that the blurring out of Mr Rush in one of the programmes in Peter Andre: The Next Chapter series 4 came up and Ms Berendsen explained that she had done this because she wasn't sure if they had clearance for Mr Rush to be in the programme, a perfectly innocent explanation. Mr Hendricks said in cross-examination he thought it must have been at this meeting that that issue was discussed because that was the only meeting with ITV at the relevant time which Ms Berendsen had also attended and it was she who had given the explanation.
129. Ms Clarke's version of the meeting in her witness statement was that it was Mr Hendricks who had raised the concerns Ms Powell had about the editing of the programmes and ITV had asked if there were any practical solutions that Mr Hendricks could think of to give whatever comfort Mr Andre was seeking. For example, whether he could personally step away from production and someone else, an employee or freelance producer be brought in. She said she couldn't recall his reaction except that he did not think that was a practical solution given his central role.
130. When this version of what happened at the meeting was put to Mr Hendricks in cross-examination, he was adamant that this is not what occurred. The only editing concern raised by ITV was the blurring of Mr Rush which Ms Berendsen had explained. There was no discussion with him of practical solutions or of the comfort Mr Andre was seeking. In her evidence in cross-examination, although Ms Clarke stuck to the line that it was Mr Hendricks who had raised the issue of the editing process, I was left with the distinct impression that she was much less sure of her ground and did not really have a clear recollection of the meeting. When pressed, she could not say what the issues about the editing process were. She accepted that no-one was saying there were any issues with Peter Andre: The Next Chapter series 4 or Here to Help series 1. She accepted also that she had no personal knowledge of any changes in the editing process and could not gainsay the unchallenged evidence of Mr Hendricks and Ms Partridge that there was no change in the process after the split between Mr Hendricks and Ms Powell.
131. Her cross-examination about the meeting took place either side of lunch on day 4 of the trial. After lunch she repeated pretty much verbatim what she said about the meeting in [24] of her first witness statement. It emerged that, somewhat surprisingly,

she had re-read her statement over the lunch break. Mr Mallin then pressed her about what she could actually recall about the meeting. She said she did recall Mr Hendricks walking away from production being discussed, but couldn't recall who raised it. She also accepted that she could not recall anyone raising the issue of a freelance producer and that, although she had given that as an example of a practical solution in her statement, it was not her evidence that that example had in fact been raised at the meeting. In the light of that, I had a real concern about the extent to which her evidence about the meeting was really recollection as opposed to an ex post facto reconstruction on the basis of ITV's case.

132. Part of the problem was that, if Ms Clarke had made a contemporaneous note of the meeting (and it remained unclear whether she had or not), it was not disclosed by ITV because litigation or legal advice privilege was claimed. The issue of privilege had been challenged by the claimant and resolved in favour of ITV2 at an interlocutory hearing before the trial by Cooke J. That ruling would of course have been subject to what emerged in cross-examination at trial. Mr Mallin cross-examined Ms Clarke about the claim to litigation privilege at the time of this meeting, after which I was in considerable doubt whether litigation privilege could in fact be claimed as at 20 June 2011. Furthermore, I also doubt whether legal advice privilege could really be claimed for those parts of any note of the meeting which simply recorded what had been said rather than the advice Ms Clarke had given as a consequence. However, Mr Mallin did not renew any application for disclosure and I proceed on the basis that privilege was legitimately claimed, so that no adverse inference can be drawn from the failure to disclose any note of the meeting.
133. I much preferred Mr Hendricks' evidence about what was discussed at the meeting. Quite apart from the fact that I had a real concern as to whether Ms Clarke's evidence was really recollection as opposed to an ex post facto reconstruction on the basis of the case ITV was running, the inherent probabilities support his account of the meeting. He had gone for a development meeting not a legal meeting and he did not know what the alleged issues were, let alone that they concerned the editing process, if they did. He had asked Ms Powell in an email on 16 May 2011 to tell him precisely what the issues were so that he could address them and she had not responded, so that his evidence that ITV asked him what the issues were and he said he didn't know is consistent with his state of knowledge at the time. In those circumstances, it is difficult to see how it could have been Mr Hendricks who raised the issue of the editing process as Ms Clarke contended.
134. It also seems to me improbable that ITV asked him what practical solutions there were since Ms Zwolker already knew that bringing in someone else was a solution, since she had raised that in her email to Ms Powell on 15 June 2011. Equally if there had been any suggestion that Mr Hendricks should step back from the editing role, it is likely he would have had an angry reaction but Ms Clarke did not suggest that she recalled such a reaction. In my judgment, all that happened was that ITV2 asked him what the issues with Mr Andre were and he said he did not know, which is true. There was in all probability some discussion about the blurring out of Drew Rush and Ms Berendsen explained what had occurred. Mr Hendricks' evidence, which I accept, was that he was not told at the meeting that ITV had a meeting with Ms Powell arranged for that afternoon and that he did not know about that proposed meeting.

135. In cross-examination, Ms Clarke accepted that prior to the meeting on 20 June 2011, the claimant was not in breach of contract and had done everything it was supposed to. She also accepted that there was never a time, subsequent to the meeting, when the claimant was other than ready, willing and able to perform its side of the bargain with ITV2 in relation to the production of Peter Andre: The Next Chapter series 5. It is also worth emphasising that, at this stage, whatever the basis was upon which Ms Powell and Mr Andre were seeking to replace the claimant as the production company, ITV2 does not and cannot allege that the basis was any breach of contract by the claimant. There were no genuine editing issues and the Twitter account was not even set up until some days later.
136. The only account of what transpired at the meeting with Ms Powell in the afternoon of 20 June 2011 is that of Ms Clarke in her evidence and again no note of that meeting was disclosed on the grounds of privilege. Ms Powell attended with her solicitor, Mr Goldberg. Ms Zwolker and Ms Edwards were there with Ms Clarke for ITV. Ms Clarke agreed in cross-examination that, although Ms Powell had said Mr Andre had serious concerns personally, she had not said what the nature of the concerns was. Ms Powell was concerned about Mr Hendricks being the only arbiter of what went into the programmes and was keen to be involved in the editing process to redress the imbalance. In fact, of course, on the basis of the evidence of Mr Hendricks and Ms Partridge, nothing had changed in the editing process from what had been the practice before the split between Mr Hendricks and Ms Powell, so Ms Powell was effectively asking for something to which she had not previously been entitled.
137. Ms Clarke said that Ms Powell raised the possibility of a new production company being brought in to replace the claimant, thereby removing the issues created by the relations between Mr Hendricks and Ms Powell. This suggestion surprised Ms Clarke. She closed down the suggestion very quickly. Whilst ITV2 was open to something being done to alleviate the editing process, it was not prepared to agree to a new production company. She reiterated that the parties should sit down and discuss how to work together and that the impasse needed to be resolved, so that filming could start as soon as possible.
138. Ms Clarke accepted in cross-examination that at the meeting she had a concern that ITV2 was potentially being set up by Ms Powell. She accepted that, despite this, ITV2 had not protested that Ms Powell was in effect suggesting that it should breach its contract with the claimant. Nor had ITV2 told Mr Hendricks after the meeting that Ms Powell was suggesting the replacement of the claimant as the production company. After the meeting, Ms Clarke's concern was that the fall-out between Ms Powell and Mr Hendricks could potentially jeopardise the future production of the programmes and, in particular Peter Andre: The Next Chapter series 5. However, although she repeated that she had a concern that this was some sort of set up on Ms Powell's part, she took what was said about editing issues at face value, rather than Ms Powell creating a pretext. However, ITV2 had not enquired as to the precise nature of the alleged problems.
139. In my judgment, as at that date in June 2011 (and indeed thereafter), there was in fact no objective basis for any concern about the future filming, editing or production of the programmes. All the programmes in Peter Andre: The Next Chapter series 4 had already been successfully broadcast, the last episode going out on 9 June 2011. The filming of Here to Help was drawing to a close, in fact finishing on 26 June 2011, and

editing was in process throughout June and July 2011. In due course, the programmes were delivered to ITV2 in July and August 2011. ITV2 has never identified any issues with the programmes or their editing and, in due course, they were successfully broadcast.

From the setting up of the Twitter account to the Quinn Emanuel letter of 14 July 2011

140. Mr Hendricks set up the Twitter account @TheNevCan on 23 June 2011. His reason for doing so was to deal with what he saw as the lies and distortions being published about him by Claire Powell and others, including in relation to Kerry Katona. I should deal first with the question whether this was a personal or a company account. Mr Hendricks was insistent that it was a personal account, “TheNevCan” being a play on words: “The Nev [Neville Hendricks] can and will” and that any Twitter account of the claimant would only have been used for matters such as publicity. In my judgment this was a somewhat arid dispute. I have little doubt that he is right to say it was a personal account, but since he was the principal director and shareholder of the claimant and was identified with the claimant by those with whom he dealt, including ITV2, it seems to me that the claimant cannot escape liability for breach of contract (if the sending of the various tweets was a breach of the Production Agreement) by saying the account was a personal one which had nothing to do with it.
141. Immediately after opening the account, Mr Hendricks encountered tweets on Twitter from someone called Luke G@@LLuke33. This person has never been identified, but was evidently someone close to Claire Powell since he or she (for convenience I will assume he) was already disseminating what appears to have been accurate information on Twitter about Ms Powell and her private life from about 19 June 2011. On that day, @LLuke33 told the journalist Dan Wootton that his story about Ms Katona’s split from CAN Associates was incorrect. In later tweets also on 19 June 2011, @LLuke33 said that both Ms Partridge and Ms Katona had left CAN Associates because Ms Powell was sleeping with a security guard, Drew Rush, who was engaged and whose fiancée was pregnant. In tweets on 23 June 2011, @LLuke33 tweeted that the stories about Ms Katona and drink and drugs were being spread by Ms Powell and that Ms Katona had had a negative result on a drug test so that Ms Powell had been lying. All this information was disseminated by LLuke 33 on Twitter before Mr Hendricks started tweeting.
142. On 24 June 2011, @LLuke33 first realised that @TheNevCan was actually Mr Hendricks. He continued tweeting to the effect that Ms Powell hated Mr Hendricks because he had found out about Mr Rush, hated Ms Partridge because she resigned about Mr Rush and hated Ms Katona because she would not lie to Mr Hendricks about Mr Rush. On 26 June 2011 @LLuke33 tweeted that his sources were saying that Ms Powell would do everything in her power to destroy Mr Hendricks and that she was saying that Ms Katona was playing the victim. Mr Hendricks replied to that tweet: “*You can tell Claire to bring it on. Also Kerry is not playing the victim, she just moving on and CP lying about me will backfire*”. That is in fact the first tweet relied upon by ITV2 in Schedule 1A to the Re-Re-Amended Defence and Counterclaim as being “aggressive, abusive and/or threatening” although it is difficult to see how it could be viewed in that way.
143. During the course of that day there were a stream of tweets from @LLuke33, to the extent that Mr Hendricks tweeted that he was bored with him. To that his response

was: “*did you know that C has already had a meeting with ITV behind your back. Who’s bored now?*” evidently a reference to the meeting Ms Powell had on the afternoon of 20 June 2011. Mr Hendricks’ response was: “*I owe you an apology. I had my suspicions but I did not know about the ITV meeting. So I can add deceit and treachery to her list.*” That tweet is also relied upon by ITV2 in Schedule 1A as aggressive, abusive and/or threatening and is the first tweet which is said to endorse a series of aggressive, abusive and/or threatening tweets from @LLuke33 and @KMaddock. I will deal later in the judgment with ITV’s case about Mr Hendricks endorsing tweets from @LLuke33 and @KMaddock. For the present, it is only necessary to note that, at the time, in June to August 2011 prior to termination, neither ITV2 nor Mr Andre nor Ms Powell complained to Mr Hendricks or his lawyers about his having endorsed tweets from others, nor was that relied upon as a ground of termination.

144. It appears that on 27 June 2011 Ms Powell may have been trying to shut down @LLuke33’s tweets since he tweeted Mr Hendricks: “*will you [keep] your word and answer anything I put up with a yes or no, because C is trying to shut me down and I need back up*”. Mr Hendricks responded: “*If you want me to confirm from now on I will just say this is true, yes or no and I will answer.*” There was no direct evidence from Twitter as to the position in relation to shutting down an account in 2011 and there was a conflict of evidence between the witnesses, specifically in relation to whether Mr Andre could have shut down the account of @KMaddock if what was being tweeted about him was untrue. Mr Hendricks’ evidence was that it was always possible to shut down any Twitter account that was making statements that were untrue. Mr Andre said that this was a rule that had only come in more recently with the focus on Twitter trolls and that he had asked his lawyers to take steps to shut down @KMaddock but had been told it was not possible. I was not convinced by that evidence and it seems to me far more likely that it was always possible to get Twitter to shut down an account which was being used to spread lies.
145. In the meantime, on 24 June 2011 Ms Powell emailed her solicitor Mr Goldberg (this was another “brown envelope” email) setting out the reasons why she could no longer work with Mr Hendricks. She referred to the fact that a new Twitter account had been created in the last twenty four hours and that if it was a fake, Mr Hendricks should follow the procedures to have it removed. She said:

“I can no longer work with Neville due to the breakdown of our personal relationship last year and also the breakdown of our business over the last few weeks. Peter and myself feel that he will make things difficult [illegible] filming and [illegible] the final edit.

Neville has a lot of issues with people surrounding Peter’s show and Pete is now worried about how this will be edited. He blurred a face of someone on the show...and Peter worries if he doesn’t like someone he will edit them out or show them in a bad light.

My relationship with Nicola Partridge has broken down beyond repair and she is the client liaison at Can TV. We refuse to work with her...

Pete has been finding out many things about Neville in the last few days and has no longer got any trust in him. I don't think you need to add this in Simon but I just wanted to put that.

The only way it could work is if I deal with Danielle at Can TV and another person in the middle and Nev isn't anything to do with it otherwise we go back to ITV and suggest a JV [joint venture].”

146. Mr Nambisan submitted that, because this email was sent to her own solicitor, I should work on the assumption that what she was telling him was true. I very much doubt whether that would be a safe assumption. The issues which Mr Andre allegedly had with Mr Hendricks are not identified nor did she ever tell Mr Hendricks what those were, despite his request. It also remains a mystery what were the many things Mr Andre had learnt about Mr Hendricks in the last few days, let alone why it meant he had lost trust in him. Mr Andre's own evidence did not elucidate this mystery. It cannot have been tweets since, whilst Mr Hendricks had set up the account the previous day, he had yet to send any of the tweets of which complaint is made. Mr Andre had not seen Mr Hendricks for over a month since he came to Harrow. Filming of Here to Help was about to finish (on 26 June 2011) and editing had been going on since early April. No complaint has ever been made about those programmes. In the circumstances, it seems highly unlikely that what Ms Powell said about Mr Andre having lost his trust in Mr Hendricks was true.
147. In my judgment, what this email demonstrates is that, having failed to get ITV2 to buy into having a new production company at the meeting on 20 June 2011 (which of course Mr Goldberg had attended), Ms Powell was suggesting a change of tack to having other people than Mr Hendricks and Ms Partridge dealing with the production and editing. If that failed, they should go back and suggest the joint venture to ITV2 which was probably a reference to another production company in which she had an interest (there is some reference to this in emails from ITV2 after termination). In the meantime, the many things Mr Andre had learnt about Mr Hendricks were for Mr Goldberg's information, as ammunition no doubt, although she evidently did not want him to deploy it yet, hence saying he did not need to add it in, presumably to any communication he had with ITV2 or the claimant's solicitors. However, Ms Powell must have known that Mr Hendricks would never agree to being removed from his central editing and production role.
148. In line with this change of tack, Mr Goldberg then wrote a letter to the claimant's solicitor, Ms Catherine Fehler at Swan Turton, in relation to various points. He reiterated the request he had made to Mr Gawade for a copy of the Production Agreement saying: “*Without knowing what the contract says, it is impossible for me to advise my client properly as to the detail of ITV2's contractual commitment to your client*”. As Ms Clarke accepted in cross-examination, the most likely motive for Ms Powell's lawyers wanting to see the Production Agreement was to see if there was a way ITV2 could get out of it, so this was hardly a legitimate request.
149. The letter also mentioned the Twitter account which it said: “*contains content that is extremely damaging for my client's business*” although it did not identify what content and how it was damaging. It is difficult to see how the tweets sent by Mr Hendricks up to that point could be categorised in that way. The letter said that, if this

was a fake account, the usual procedural steps should be taken to have the account removed. It continued that Ms Powell had explained to ITV2 that the personal issues were jeopardising the future of the series. The most sensible solution would be for CAN TV to continue with production but with Mr Hendricks having no personal role or involvement, including in editing. He said his client would accept an independent third party dealing with editorial issues. He also said his client would not accept the ongoing involvement of Ms Partridge but would be happy to liaise with Ms Berendsen. The letter concluded: “*Subject to us reaching an agreed resolution along [these] lines, my client would be prepared to provide the itinerary for Peter Andre that your client has requested.*”

150. On 28 June 2011 Ms Clarke emailed both Ms Powell and Mr Hendricks asking them to let her know where they were in terms of exploring ways to fulfil the production commitment for Peter Andre: The Next Chapter. She referred to the letter which she had understood was being sent by Mr Goldberg but which she had not seen. She also referred to the fact that the series was due to start filming in about a week and asked for an update. Mr Goldberg then sent Ms Clarke a copy of the letter he had sent Ms Fehler. Ms Clarke said in cross-examination that, until she had read that letter, she had not been aware of the Twitter account. She agreed that through this letter Ms Powell was clearly exerting aggressive commercial pressure. Mr Mallin put that, given that there was a strong likelihood that Ms Powell was trying to set ITV up, as Ms Clarke had accepted, it was likely that these concerns in the letter were bogus. Ms Clarke said that there was some sort of concern in relation to editing, but that she was concerned about this being a bit of a set-up. She accepted in answer to me that there was absolutely nothing wrong with the programmes in Peter Andre: The Next Chapter series 4 and that Mr Hendricks and Ms Powell seem to have been working together fine up until about 15 June 2011. Later in cross-examination, she accepted in answer to me that bringing someone else in to do the editing would effectively be writing Mr Hendricks out of the script.
151. In my judgment the reality is that there were no genuine editing issues. If ITV2 had pressed Ms Powell and Mr Andre to give specific examples from the programmes actually made or being filmed at that time which gave any cause for concern, as it seems to me ITV2 should have done given the suspicion that it was being set up, they could not have pointed to anything, other than the blurring out for which there was an innocent explanation and which in any event had nothing to do with Mr Hendricks. The obvious question for ITV to ask then would have been, if there was nothing wrong with Peter Andre: The Next Chapter series 4, what was it that had suddenly changed that was going to make series 5 so difficult to make. If ITV had taken that robust commercial approach with Mr Andre and his manager, as one might have expected it to do, given that the effect of the refusal to provide an itinerary unless demands to which they were not contractually entitled were met, was a threatened refusal by Mr Andre to perform his contractual obligations to ITV (filming had in fact originally been due to start on 27 June, the day before the letter was written, but it had been put back to 13 July 2011), ITV2 would have flushed out that what was really going on here was a strategy to replace the claimant as the production company.
152. The fact that there were no genuine issues also emerged from an email from Mr Hendricks to Ms Clarke on 1 July 2011. He said that they had finished filming Here to Help and were in the edit. There were no issues with Mr Andre during the shooting

and he had told the team how much he liked working with them. Also Ms Partridge was part of the team during shooting and there had been no issues there either. Mr Hendricks said they had not had the itinerary for the next series and that the “PA issues” were a smoke screen, saying this was all about Ms Powell, who he had been told by a very reliable source was out looking for another production company. He also said the filming release forms (i.e. the filming agreements) had not been signed by Mr Andre either, despite their being exactly the same as usual. He gave her his word that the claimant had done nothing to cause this dispute. He was trying his best to sort this, but Ms Powell had a different agenda and it was not about reconciliation.

153. Swan Turton replied to the SMB letter on 1 July 2011. On the demand for a copy of the Production Agreement, Ms Fehler said: *“I am unclear as to why you consider it necessary to advise your client on the detail of ITV2’s contractual commitment to my client and await clarification.”* Ms Fehler asked for details of the content of the Twitter account that Mr Goldberg’s client considered damaging to its business and said she would then be in a position to take instructions. The letter continued: *“My client has received no indication that Peter Andre has any concerns and is unaware of any such issues involving him in its production of the programmes, which it continues to complete in a first class manner. When we spoke you stated that the interests of Peter Andre and your client were ‘seamless’.”*
154. In relation to the demands about editing being carried out by someone else, the letter made Mr Hendricks’ position entirely clear in terms of his contractual arrangements with ITV2:

“Your letter indicates that ITV have made express suggestions concerning the filming and programming going forward. Please provide full details of such, as I am unaware of the same. You refer to one particular suggestion of ITV of an independent third party dealing with editorial and other programming issues. If ITV has made that suggestion, I do not know the basis upon which your client, Peter Andre’s agent, believes it is in a position to ‘accept’ or reject it; this point is reiterated in respect of your client not accepting the ongoing involvement of Nicola Partridge and regarding the continued involvement of Daniella Berendsen.

While my client is keen to maintain a suitable framework for the smooth operation of these matters, it is wholly inappropriate to request that Neville Hendricks should have no personal role or involvement with any of the series, particularly when he is the owner and director of the company contracted to deliver the programmes. This is plainly an unsustainable position, however my client is willing to put in place practical arrangements such that Neville Hendricks and Claire Powell’s interaction can be appropriately limited.”

155. Ms Clarke had asked to be sent a copy of the reply to Mr Goldberg’s letter and this was duly sent to her. The first paragraph quoted in the previous paragraph is a further indication that Ms Clarke’s evidence about the 20 June 2011 meeting with Mr Hendricks is mistaken, since if it was he who had suggested someone else doing the

editing, she would surely have told Mr Hendricks and Ms Fehler that this part of the letter was wrong. Ms Clarke also accepted in cross-examination that the offer to put practical arrangements in place to ensure Mr Hendricks and Ms Powell's interaction was limited was a reasonable approach, whereas demanding that Mr Hendricks had no further involvement in the production did not seem particularly reasonable.

156. Mr Andrew Myers of Clintons then emailed Ms Fehler on 6 July 2011 asking for a copy of the Production Agreement in order to advise Mr Andre properly about his TV arrangements. The email said he was playing catch up to some extent as he had only recently been asked to advise Mr Andre. This was not really correct, as he had been in email communication with Ms Powell and Mr Andre more than a month previously about replacing the claimant as the production company. Mr Goldberg did then email Ms Fehler providing Mr Andre's itinerary on 7 July 2011 but maintained his demand for a copy of the Production Agreement and also raised with Ms Fehler another issue concerning £472,000 allegedly due from the claimant to CAN Associates and demanding immediate payment. It is noticeable that that email did not address Ms Fehler's request for details of how the tweets posted were said to be damaging to Ms Powell's business.
157. On 8 July 2011, Mr Myers sent an email to Ms Fehler about the filming agreement which the claimant was requesting that Mr Andre sign. He said that this was not acceptable and that it was also not acceptable: *"for you to seek to use the production schedule as leverage to get our client to sign an agreement which is neither equitable nor transparent."* The email set out various provisions of which complaint was made and demanded a copy of the claimant's agreement with ITV. This is an extraordinary email, since the filming agreement Mr Andre was being asked to sign was in the same form as he had signed without raising any objection demur previously. Since, as I address in more detail below, it appears that Clintons had advised Mr Andre in the past about his agreements with ITV, it would be surprising if they had not also advised him about his parallel filming agreements with the claimant. Ms Clarke accepted in cross-examination that it was an unfair characterisation to describe the claimant as using the production schedule as leverage but would not accept that the email was commercially unacceptable. In my judgment it was commercially unacceptable, given that Mr Andre had previously signed the contracts in this form.
158. On 11 July 2011 Mr Myers emailed Ms Clarke saying that Mr Andre had concerns relating to the claimant and did not feel able to begin filming until certain matters had been addressed and safeguards put in place to protect him and the quality of the show. He asserted that Mr Goldberg had sought over the previous three and a half weeks to engage the claimant in a constructive manner and the only response was to present the filming agreement the terms of which were not reasonable or transparent. They had not seen the Production Agreement with ITV which they had asked for. He now had no alternative but to involve her, something they had hoped to avoid.
159. The email continued:

"The first of Peter's requests was that Nicola Partridge should not be involved in the show in any way at all and/or referred to as his manager. This request has simply been ignored.

The second and principal request was that past editing practices be replicated. This could be achieved if CATL were to agree contractually to provide first and second ‘cuts’ to Claire for her comments and to agree to incorporate the suggested amendments into the final cut sent to ITV2.

The third request was to have sight of the CATL Agreement...

Peter’s primary concern is the continued quality of the programme and that the filming and editing process goes smoothly. He feels that the requests referred to above are an essential part of making sure that happens. You will understand his reluctance to begin filming unless these are put in place.”

160. In the light of this email from his own solicitor demanding that Nicola Partridge not be involved in the programmes in any way at all, Mr Andre’s evidence about his attitude to Ms Partridge was quite extraordinary. He claimed that they were great friends, “besties” as he put it and that his only issue with her was her constantly phoning Mr Hendricks from the set. He said he and Ms Powell had just wanted her to take more of a back office role. Mr Mallin then put to him her evidence that there was no back office role for her and that this was tantamount to saying that she should lose her job. In fact, of course, both the letter of 28 June 2011 from SMB and Mr Myers’ email of 11 July 2011 were not talking about Ms Partridge only having a back office role, but about her having no job at all.
161. Even when confronted with the first request to which Mr Myers had referred (that Ms Partridge have no involvement in the programmes) in cross-examination, Mr Andre claimed he had never made the request and he had never wanted Ms Partridge not to work with him. He just wanted her to have a back office role. In my judgment, this evidence about never having wanted Ms Partridge removed altogether is simply not true. It is inconceivable that an experienced media lawyer like Mr Myers would have referred to this being a request of Mr Andre’s that had been ignored, if those were not his instructions from Mr Andre. This evidence of Mr Andre’s was simply an example of his not wanting to appear to be “the bad guy”. I am quite sure that, as the email said and as had been said in Mr Goldberg’s letter of 28 June 2011, both Ms Powell and Mr Andre wanted Ms Partridge removed from any involvement at all in the programmes, which would effectively mean she had no job. This seems to have been driven by a desire for revenge on Ms Powell’s part because she thought, wrongly, that it was Ms Partridge who had told Mr Hendricks about her affair with Drew Rush, but Mr Andre was clearly happy to go along with it.
162. So far as the other matters raised by Mr Myers are concerned, Mr Andre’s evidence about the editing process was very confused. At an early stage of cross-examination, he accepted that he did not know how much of what was filmed Ms Powell ever saw for the purposes of editing. It subsequently emerged later in cross-examination that there was no editing issue on Here to Help, which was not a reality television programme. He was not able to identify any editing issue with Peter Andre: The Next Chapter series 4. That is scarcely surprising, since the editing process had been completed in May 2011 before relations between Mr Hendricks and Ms Powell really deteriorated and the programmes had been successfully broadcast between 21 April and 9 June 2011. The stark reality is that, despite a great deal of hyperbolic and vague

evidence about concerns and fears, Mr Andre was not able to identify a single editing issue where Mr Hendricks had done something which showed him in a bad light. Equally, he could not gainsay the evidence of Mr Hendricks and Ms Partridge that nothing changed in the editing process throughout the relevant time.

163. Another striking aspect of his solicitor's email of 11 July 2011 is that, although in his evidence Mr Andre said he had had serious concerns about the tweets Mr Hendricks was posting from the very outset, on 26 June 2011, and that he had told his solicitors about those concerns, there is no mention of the tweets anywhere in the email. It seems to me inconceivable that, if that was one of the concerns Mr Andre raised with him, Mr Myers would not have mentioned the concern about the tweets in the email, especially given that he was in close liaison with Mr Goldberg, who had raised the Twitter account in his letter of 28 June 2011. The most likely explanation for Mr Myers not mentioning the tweets was that at that stage, contrary to his evidence, Mr Andre had not raised any such concern with his solicitors.
164. It also striking that, although in cross-examination Mr Andre sought to contend that, from the moment that Mr Hendricks starting tweeting on 26 June 2011, he was saying that he could not work with Mr Hendricks and that he was so upset by the tweets because they were public, the one thing he never did was to contact Mr Hendricks and say to him that the tweets were really offensive to Mr Andre and Mr Hendricks should stop posting them. He only ever contacted Ms Powell.
165. In cross-examination about the email from Mr Myers of 11 July 2011, Ms Clarke accepted that saying that Mr Andre did not feel able to start filming until certain matters had been addressed was in effect a direct refusal to perform his contract with ITV. She agreed that the reference to the draft agreement not being reasonable and transparent was not accurate. Although Ms Clarke did not necessarily accept this, I agree with Mr Mallin that this email was a continuation of the agenda or strategy to oust the claimant as the production company.
166. By this period in the first half of July 2011, there were a lot of tweets posted by @LLuke33 and also by @KMaddock, who is also an unknown person, but again someone who seemed to know a great deal not only about Ms Powell but also about Mr Andre. There was some suggestion it was a woman in Australia who had known Mr Andre or his family in the past, but there is no evidence about that. The tweets posted were often extremely offensive and included further allegations. Mr Hendricks did not respond to all the tweets and indeed on 6 July 2011, he tweeted asking @LLuke33 to back off Ms Powell saying: *"it's my problem and I will deal with it. That said I would like to thank you for putting the truth out there."*
167. The demand that Ms Partridge have no involvement at all in the programmes provoked a reaction on Twitter from both Ms Partridge and Mr Hendricks. Ms Partridge (who seems to have been an infrequent user of Twitter, at least on the "Nicola@Can" account, her previous tweet being in February), tweeted on 12 July 2011: *"@MrPeterAndre just because I wouldn't lie for @ClaireatCan it should not be a reason for you to want me to lose my job"*. In cross-examination, Ms Partridge was clearly still upset about the way in which she had been treated by Ms Powell and Mr Andre. She said in her witness statement that the tweet was sent out of anger and frustration at the way she was being treated by Ms Powell and Mr Andre as she felt they were vindictively trying to punish her for not wanting to lie about Ms Powell's

affair with Mr Rush. In cross-examination she said she would challenge anybody not to be extremely hurt by that. She thought Mr Andre probably did want her to lose her job. She made the perfectly valid point that she wasn't exactly inundated with phone calls saying: "Nicola, this isn't the case."

168. Also on 12 July 2011, Mr Hendricks, who was clearly angered by the treatment of Ms Partridge by Ms Powell and Mr Andre posted two tweets in particular. One was addressed to someone tweeting as "@THE EIIiH1":

"...personally I am very happy, but I have staff jobs to protect and I will not let CP or PA put people's jobs on the line over CP mission of revenge. Not on my watch. I will do whatever it takes and take down whoever stands in my way because we have done nothing wrong other than not want to be part of CP bullshit circus. Ask you yourself you started all this with a pack of lies".

Allowing for the somewhat emotive language which is explicable as indicative of Mr Hendricks' anger, this tweet was an understandable reaction to what Mr Hendricks rightly saw as a spiteful act of revenge on Ms Powell's part, with which Mr Andre was prepared to go along.

169. The second tweet seems to have been directed to Ms Powell: "*CP, if you or PA think that I am going to get rid of Nicola Partridge to continue working with you both. You're wrong. I choose Nicola.*" As Mr Hendricks said in his witness statement, this tweet was not aggressive or threatening, but factually accurate in circumstances where Ms Powell and Mr Andre were trying to get rid of Ms Partridge who had worked for Mr Hendricks for seventeen years. As he said, she had been a good friend to both of them and had done absolutely nothing wrong.
170. The posting of those tweets by Mr Hendricks and Ms Partridge led Mr Myers to send a further email to Ms Clarke later that afternoon 12 July 2011. These tweets were alleged by him to have rendered the relationship between Mr Andre and the claimant "untenable". Mr Myers attached a screen grab of the tweets. He reiterated his theme from the previous email that the proposal (that Mr Hendricks relinquish his editing role) was constructive and said: "*At no point has our client sought to exclude Can TV or taken any steps that were capable of undermining his relationship with them. It cannot be the case that requesting that a production company's member of staff not be involved on a shoot and that contractual arrangements be regularised, can be considered in any way inappropriate or unreasonable. It certainly cannot in any way justify NH's and NP's actions.*" The email goes on to talk about trust and confidence being at the heart of the relationship between production company and the subject of a reality television programme and how the claimant had put itself in an untenable position. Mr Myers said that he understood that filming had already been delayed and urged that a solution be found quickly.
171. Of course, filming of Peter Andre: The Next Chapter series 5 (which had already been put back from 27 June) was due to start the following day 13 June 2011. Mr Myers' email to Ms Clarke was only copied to Mr Goldberg, not to Mr Hendricks or Ms Partridge. Instead, without prior warning, at 6.25 pm on 12 June 2011, Jeanette Whiston of CAN Associates emailed Gus Hurdle of the claimant saying: "*Peter will*

be unable to start filming and we will confirm with you in due course when the necessary arrangements have been made which will allow for the process to commence.” Mr Hurdle replied: “Are you saying that contrary to the itinerary that you sent at the end of last week (which documented filming starting this Weds 13 July) PA no longer wishes to begin then and prefers to curtail filming to a date of his convenience. Obtaining a firm date at this point is imperative as you know the effects of curtailment have been made quite clear. The delivery of the show to meet its transmission date is beginning to be jeopardised and I’ll need to inform ITV if this is going to be the case.”

172. Given that Ms Powell and Mr Andre had been engaged in a strategy to remove the claimant as the production company since at least the beginning of June 2011 and Mr Myers had been party to that strategy (being the recipient of Ms Powell’s email of 2 June 2011), the first sentence of the passage from his 12 June 2011 email which I quoted above asserting that his client had not sought to exclude the claimant was simply not true, as Ms Clarke accepted in cross-examination. She could not recall being lied to in solicitors’ correspondence before, but was seriously concerned.
173. When asked about Mr Myers’ second email, Mr Andre maintained that he had not known about this email either and that Mr Myers had got it wrong, since he had not wanted Ms Partridge to lose her job. For the reasons I have already given, that evidence is not truthful. It is inconceivable that Mr Myers would have sent an email of this seriousness (which in effect was a refusal by Mr Andre to perform his contractual obligations) without consulting his client and taking detailed instructions. Furthermore, Mr Andre had said himself in his third witness statement that he had read print-outs of tweets provided to him by his lawyers before they were attached to letters or emails to ITV, which was normal because his lawyers usually run letters and emails by him before they send them. As Mr Mallin pointed out, only the email of 12 July 2011 and Clintons’ letter of 19 July 2011 attached tweets. Despite Mr Andre’s unimpressive attempt in cross-examination to suggest that he did not read emails and letters his lawyers were proposing to send, on the basis of his own witness statement (which reflects entirely what one would expect), it is clear that he did read the correspondence the lawyers were proposing to send, including this email.
174. Mr Andre claimed that when he saw the Nicola Partridge tweet he was shocked and upset as he had not wanted Ms Partridge to lose her job. He also claimed to have rung Ms Powell to ask what was going on, but he could not recall her response. However, if he really had not wanted Ms Partridge removed from the programme and Mr Myers had somehow misunderstood the situation, one might have expected him, as someone who professed to be such a good friend of Ms Partridge, to have phoned her, not Ms Powell, and to have said that there must be some misunderstanding. However he did not, which was precisely the point Ms Partridge made about not being inundated with phone calls. The truth is he did want her removed from the programmes or, at least, Ms Powell did and he was prepared to go along with that demand and instruct his solicitor to make it.
175. Mr Andre also gave evidence in his witness statement about a conversation with Ms Partridge which he alleged had taken place when Here to Help was being filmed and Drew Rush was on set. Mr Andre said that he told her that there was no need to tell Mr Hendricks that Mr Rush was on set that day as it might cause trouble. She said something like: “so you expect me to lie” to which he said he certainly did not. Ms

Partridge said in cross-examination that she thought this conversation had not happened. Mr Mallin put to Mr Andre that his evidence about the conversation was a piece of fabricated evidence designed to deal with the Nicola Partridge tweet on the basis that he had misread it as referring to him having asked to lie rather than Ms Powell. That may be right, but whether it is or not, I find that the alleged conversation did not take place.

176. Mr Andre claimed in evidence that he had also found Mr Hendricks' tweets, which were an attack on Ms Powell and through her on him, given that he was associated with her in the entertainment industry, distressing. However, as Mr Mallin pointed out they are directed primarily at Ms Powell. Furthermore, if what was being said about him, that he wanted Ms Partridge to lose her job, had not been true and there had been a misunderstanding, then if he had really wanted a solution as his solicitor professed in the email, the simplest thing in the world would have been to contact Mr Hendricks and Ms Partridge to tell them that there had been a misunderstanding and to ask them to post corrective tweets, which there is no reason to suppose they would not have done.
177. However, as I have already found, there was no misunderstanding and, as his solicitor was saying on his behalf, Mr Andre did want Ms Partridge removed altogether from the programmes. In relation to all the tweets of which Mr Myers complained, if they upset Mr Andre at all, that can only have been because Mr Hendricks and Ms Partridge were saying things in a public forum which were true, but which he was concerned would not match his "good guy" image. In my judgment that was no good reason for saying they had rendered the relationship untenable or that there had been a breakdown of trust and confidence. That was all feigned and Mr Myers' email was a continuation of the strategy to engineer the removal of the claimant as that production company. That was the real "solution" that was being sought.
178. On 13 July 2011, Ms Fehler emailed Mr Goldberg and Mr Myers about the email from Ms Whiston saying that Mr Andre would not start filming. She pointed out there had been no prior warning of cancellation and that if Mr Andre failed to conform with the agreed schedules, the claimant would be unable to deliver the programmes as it was contracted to do. In the event that the claimant was put in a position of breach, it would have no alternative but to take all appropriate steps against relevant parties. The stark position was, as Ms Clarke accepted in cross-examination, that there was a unilateral refusal by Mr Andre to perform his contract.
179. In those circumstances, Mr Goldberg's response to Ms Fehler which suggested that because the first programme in series 5 was not due to broadcast until October, he was surprised that the claimant considered that the postponement put it at risk of being in breach, was an extraordinary position to take. Ms Fehler replied on 14 July 2011 saying that, as they had provided the itinerary, Mr Andre should be complying with it. She said that aside from the cancellation of filming, Swan Turton were not aware of any issues and if it was necessary, she was happy to discuss a suitable protocol.
180. As Ms Clarke said in evidence, ITV2 was concerned that the postponement of the filming would mean the programme would not be made. On 14 July 2011, ITV2's solicitors, Quinn Emanuel, sent a letter to Clintons, Swan Turton and SMB referring both to the Production Agreement and the PA Agreement and inducement letter. The letter stated that ITV2 needed to see a resolution by no later than 1 August 2011 of the

current impasse which was already delaying filming of series 5. It pointed out that all parties had agreed that the first programme would be transmitted on 20 October 2011. If the series was not produced and delivered on time, ITV2 would suffer loss and damage and the reputation of the series as a product would be damaged. The letter continued that PJA Promotions and the claimant appeared unwilling to continue to work together towards the production of the series pursuant to the terms of the Agreements. It stated that the recipients of the letter must resolve their differences without delay by no later than 1 August 2011 and that ITV2 required them to explore all possible avenues of resolution, including if necessary, mediation.

181. In cross-examination Ms Clarke agreed that the claimant was not unwilling to perform its contract with ITV2 but it was clear that the parties could not find terms which would make it happen. It was not that the claimant of itself was unwilling, it was the circumstances around it that made it not possible.

From the Quinn Emanuel letter until the first mediation on 27 July 2011

182. On 18 July 2011, Swan Turton responded to the Quinn Emanuel letter. They referred to the claimant's desire to comply with its contractual obligations and continue the ongoing business relationships. It referred to the emails from CAN Associates stating that Mr Andre was "*unable to start filming*", pointing out that the claimant was unaware of the reasons for this inability and, although an explanation had been sought, none had been forthcoming. The claimant had never indicated that it was unwilling to continue working with Mr Andre, whom it urged to comply with the itinerary provided. Given that Mr Myers had said his client was committed to the filming schedule, they were at a loss to understand the reasons for the impasse, which had not arisen through any act or omission on the part of the claimant. They asked Quinn Emanuel to provide any pertinent information arising from the meeting between ITV and Ms Powell and Mr Goldberg [i.e. the meeting on 20 June 2011] which might assist in clarifying or indicating the reasons behind the communication that Mr Andre was "*unable to start filming*". It is telling that ITV2 did not provide any information about that meeting and, in particular, did not inform the claimant or its solicitors that Ms Powell had suggested the replacement of the claimant by another production company, which of course would have been very pertinent information, pointing to commercial pressure to replace the claimant being the motive or at least part of the motive for the refusal to begin filming. Once Mr Andre had begun filming with the claimant as the production company, moving to another production company at least for series 5 would have been impractical.
183. Clintons on behalf of Mr Andre replied to the Quinn Emanuel letter on 19 July 2011. Their letter stated:

"Our client takes issues with some of the contentions in relation to the letter of 14 July and particularly with the suggestion that our client is unwilling to continue working with Can TV. Our client welcomes not only the sentiment in your letter but also your willingness to take an active role in achieving a workable solution.

It would be disingenuous not to say that our client hoped that ITV would take a firmer line with Can TV and expressly

acknowledge the shocking and deplorable conduct of Neville Hendricks and Nicola Partridge on Twitter over the last week...

[Their] postings on Twitter since 12 July 2011 have not only been personally offensive to and defamatory of both our client and his manager Claire Powell, they are also extremely damaging to the programme. We attach screen grabs of their most recent 'contributions'. We cannot conceive of a clearer example of conduct designed to destroy this necessary relationship of trust and confidence."

[The letter then goes on to say that if there is an agreement between the claimant and Mr Andre, the claimant has repudiated it. Mr Andre's rights are reserved.]

184. Four pages of Tweets posted by Mr Hendricks are attached to the letter. Despite the assertion in the body of the letter, there are no further tweets from Ms Partridge beyond the "Nicola Partridge tweet". So far as Mr Hendricks' tweets are concerned, many of them are expressed in extremely offensive language about Ms Powell, but essentially repeat what he had already been saying, namely that she had lied to him, that she was sleeping with Mr Rush and that @KMaddock seemed to be spot on in her information. The screen shots are difficult to read, but, of the tweets relied upon by ITV2 in the schedules to the termination letter, there are only five on the screen shots.
185. Furthermore, only one of these tweets was attached to the email which Ms Clarke sent to Mr Hendricks the following day, 20 July 2011, expressing concern about his Twitter traffic. That was the one sent on 14 July 2011 which referred to the episode of Here to Help scheduled to be broadcast that evening and read: "*tonight you will see acting at its best. CP, PA, MA & Carl all being nice to Nicola on camera, but behind closed doors?????*" As Mr Hendricks explained it in cross-examination, at the time the programme had been filmed, they had all appeared to get on and now weeks later they were saying they could not work with Ms Partridge, which was hypocritical and inconsistent. Mr Nambisan sought to suggest to Mr Hendricks that this tweet was damaging to Mr Andre's image or brand, in the same way as Mr Hendricks himself had recognised that the magazine article saying that Mr Andre was an animal in the bedroom would be damaging to his image or brand. In my judgment, the two are simply not comparable. The magazine article containing the interview in which Mr Andre was talking about being an animal in the bedroom was clearly capable of damaging his family image. As Mr Hendricks put it in cross-examination: "*he's gone off on his ego going "oh, I'm an animal in bed" and we are trying to create a family brand and at the same time I'm talking to people like Mothercare*". In contrast, whilst this "acting" tweet was one which, as Mr Hendricks accepted in the email he sent Ms Clarke on 21 July 2011 he should not have sent, it is difficult to see how it could really have been damaging to Mr Andre's image or brand and it was certainly not abusive, aggressive or threatening. Mr Andre sought to suggest in cross-examination that that tweet frightened him. I simply do not accept that evidence.
186. There was then a tweet on 16 July 2011 addressed to @KMaddock which read: "*If I find out this is true, certain people and their careers will find themselves dead and buried...It's proper Cangate. Just off to get my shovel because I am now out to bury some people. Be afraid, be f..king very afraid. Trust me, if ever someone needed a*

super injunction it's them. Even I am shocked about the info you have. I am shaking with anger. But they all know me and what's coming to them. If this true. This going to be proper Elm Street and I won't stop until it's done."

187. It is quite clear that Mr Hendricks was very angry when he sent this tweet. In his witness statement he said this was to do with Claire Powell trying to stop him seeing his son. Mr Nambisan suggested in cross-examination that this was in fact a response to a tweet @KMaddock had posted on 12 July 2011 about Ms Powell and Mr Andre having a "*carefully woven plan together to try and take them down,*" the "them" apparently being either a reference to Mr Hendricks and Ms Partridge or to the contracts @KMaddock thought Mr Andre had signed with the claimant [which in fact he had not]. Mr Hendricks was not disposed to accept this and one of the obvious difficulties in analysing the tweets is determining after this length of time to what tweet or tweets they are a response. However, on the basis that Mr Nambisan is right and @KMaddock had somehow found out about the strategy to replace the claimant as the production company, about which Mr Hendricks had not previously known, an angry reaction on his part was understandable, even if his language was excessive.
188. To the extent that this tweet was relied upon (particularly by Ms Clarke when defending her statement that when she heard about the death threats she was not surprised) as somehow demonstrating a propensity on Mr Hendricks' part for violence, the tweet has to be put in context. To begin with, the threat to "bury people" is clearly metaphorical not literal, hence the reference to super injunctions. Furthermore, it is clear that a number of people tweeted complaining about this tweet because two tweets on, on the same day, Mr Hendricks apologised for his reaction: "*I hear you all. I will not do anything until I get the truth and is one thing that's not been easy to get for them these days. But I will get to the bottom of this as if my life depended on it. So excuse me for being a little angry, but it will pass, it always does and I only do revenge with a very very cool head. As for lawyers, only the best for The Nev. See back to chilling already.*" That seems to me to defuse the unpleasantness of the earlier tweet. Reading the two together, it does seem to me likely that what he had learnt about that had made him angry and would require lawyers was indeed learning that Ms Powell and Mr Andre had an agenda to replace the claimant as the production company. Given that this was indeed what they were seeking to achieve, reliance on this tweet by Clintons as justifying a loss of trust and confidence has a distinctly hollow ring to it.
189. There were then three tweets on 17 July 2011 addressed to @Claire33Claire, a tweeter who seems to have been supportive of Ms Powell. Two of these were about Ms Powell reaping what she sowed and @KMaddock being: "*as an enemy...your worst nightmare and that's why their shitting themselves because no one knows what she is going out with next. She has told me stuff I didn't know and I was CP partner.*" The third tweet included this passage: "*Go to Aus and find KM and ask her, you might find CP, PA and MA [Michael Andre, Mr Andre's brother] are on the same plane with a massive suitcase filled with money to pay her off.*"
190. These tweets are all essentially about how @KMaddock seemed to know a great deal about Ms Powell and about the Andre family. Mr Hendricks explained in his witness statement that the context of these tweets was his anger that Ms Powell was preventing him from seeing his son and his ongoing issues with her. Mr Andre said in his evidence that he found the "suitcase" tweet highly offensive. He said the problem

with the Twitter traffic was that this was becoming public and that was what upset him. Mr Mallin put to Mr Andre (albeit he would not accept it) that he had effectively been caught in a side swipe by Mr Hendricks primarily directed at Ms Powell. Although this is clearly another tweet which Mr Hendricks should not have sent, it has nothing whatever to do with the filming, editing or production of the programmes and, in any event, it is difficult to see how anyone could really take it seriously. It is striking in that context that, although Mr Andre's solicitors wrote this letter to ITV2 and enclosed the screen shots, they never once wrote direct to Mr Hendricks to ask him to stop tweeting.

191. Having referred to the tweets, the letter of 19 July 2011 from Clintons to ITV2 then continues:

“The fact of the matter is that despite the difficulties with Can TV, our client remains willing and able to render his services to ITV. The contractual provision in the ITV agreement which specified that Can TV had are to be the producer do not come close to having the status of a warranty or condition and therefore the inability to use Can TV should not be an impediment to the production of the programme. It will certainly not be from our client's perspective an impediment to him providing his services to ITV.

Historically of course Mr Andre's agreement with ITV made no specific reference to which production company would be entrusted with the filming of the programme. We suspect that in the normal course of events, the vast majority of such agreements do not. The fact is that our client did not realise that such an insertion had been made. We are currently investigating the circumstances that allowed the insertion of such a provision into the ITV agreement, to the detriment of our client. We trust that it will not prove necessary, but it is right that we put you on notice that our client may in due course require information from your client as to the facts and circumstances surrounding the negotiation of the ITV agreement. For the record, this firm neither advised Mr Andre in relation to his agreement with ITV or his previous agreements with Can TV.”

192. Ms Clarke accepted, albeit with some reluctance, that the first paragraph was a repeat of the suggestion that the claimant be replaced as the production company. There is little doubt that this whole passage in the letter was seeking to ratchet up the commercial pressure on ITV2, in a rather menacing way as Mr Mallin submitted, to agree to a replacement production company, in effect as a condition of Mr Andre agreeing to start filming which he had refused to do a week earlier. Again, this letter from Clintons must have been approved by Mr Andre before it was sent, so that he was aware of and agreed to the approach which was being adopted. Furthermore, the suggestion that Clintons had not previously advised Mr Andre in relation to any of the agreements may not have been entirely accurate, as appears from the next two paragraphs of this judgment, but whether they had advised him or not, it would be

surprising if he had signed previous agreements with the claimant without the benefit of some legal advice.

193. On 20 July 2011, Mr Myers emailed Ms Fehler on a number of matters raised in recent correspondence. First he said that Clintons had only advised Mr Andre in relation to his first contract with ITV, advice that was sought on the day before the deadline and was not concerned with the terms of the agreement, but its effect on an entirely separate matter. He said that Clintons had not advised Mr Andre in relation to the agreement with ITV dated 14 December 2010 or any of his agreements with ITV. The email went on to assert that the fact that Mr Andre had previously signed the filming agreement in the same form was irrelevant, because he should not have done so without seeing the claimant's agreement with ITV. However, it seems that the suggestion that Clintons had not advised Mr Andre about any of the agreements may not be entirely correct. Ms Fehler returned to this issue in her letter of 1 August 2011, to which she exhibited some emails. First there was an email from Mr Nick Pedgrift, evidently an agent or adviser, to Mr Myers of 8 October 2004 headed "Peter Andre TV Agreement". This reads: "*As discussed today, subject to Peter's instructions please could you let me have your marked comments on the attached.*" It is not clear whether the attachment was an agreement with ITV or with the claimant, but this email suggests that Mr Myers did look at the terms of the relevant agreement and provide his comments.
194. Ms Fehler also exhibited an email from Mr Hendricks to Mr Myers of 24 November 2008 headed "Peter Andre ITV2 Talent Agreement" which stated: "*Peter has asked that I forward to you his new ITV2 Talent Agreement to look over before signing. I have also attached the previous 2006 agreements for terms of reference.*" These various emails suggest that Mr Myers had given advice about Mr Andre's ITV agreements on at least two different occasions. To be fair to him, it is unclear whether the agreements he saw and advised on included Mr Andre's filming agreements with the claimant, but as I said above, it would be surprising if Mr Andre had signed these without the benefit of legal advice. It would be equally surprising if Clintons advised him about his agreements with ITV, but neglected to advise him about his parallel filming agreements with the claimant, which they must surely have known he was signing.
195. Mr Myers' email of 20 July 2011 went on to say that, without prejudice to the contention that there was no extant agreement between Mr Andre and the claimant, the conduct of Neville Hendricks and Nicola Partridge "*in particular their defamatory and grossly offensive postings on Twitter puts your client in clear breach of the term of trust and confidence to be implied into any production agreement which provides for the subject of the filming giving the production company access to his home and children*". This somewhat hyperbolic statement does not identify which tweets are being complained about, how tweets posted by Mr Hendricks were defamatory of Mr Andre or how the single tweet posted by Ms Partridge was defamatory or grossly offensive. It clearly was neither, for reasons I have already given. Nor does the email state that Mr Hendricks must stop tweeting. Despite the aggressive tone of the email, it ends by expressing a willingness to participate in the mediation, although only on the basis of seeing a copy of the Production Agreement before the mediation. In the event, Swan Turton did not provide such a copy before the mediation.

196. Ms Clarke's reaction to Clintons' letter of 19 July 2011 was not as one might have expected to write back in strong terms protesting that illegitimate pressure was being put upon ITV2. Instead she sent an email to Mr Hendricks at 9.21 pm the following day, 20 July 2011, raising the issue of his extensive Twitter traffic as an issue of real concern to ITV2 which was in danger of undermining the proposed mediation. She attached screenshots of three pages of tweets which she described as "just some of them" and said; *"we are very concerned that they are both undermining the programming and are also contrary to the terms of the agreement with Can TV and the express confidentiality provisions. We do need to consider the potential repercussions of the traffic under our agreement but in the meantime can you please confirm that you and Can TV generally (and all of those employed by or working for Can TV and representing the business) will cease the traffic and not comment on any issues that relate to any of the programmes or our agreement?"*
197. The screenshots attached consisted of (i) a page of Mr Hendricks' tweets from late June 2011, the best part of a month previously, the only ones of which could conceivably be of any relevance were three tweets to @LLuke33 two of which were those I have referred to at [143] and [144] above and the third merely confirming the second; (ii) a page of tweets including one from @KMaddock and two from Dan Wootton, but including the Nicola Partridge tweet and the "acting" tweet from Mr Hendricks of 14 July 2011; and (iii) a page of tweets from @LLuke33 sent on 26 and 27 June 2011.
198. Mr Hendricks replied to Ms Clarke's email at 6.32 am the following morning, 21 July 2011. He started by saying that he wanted to make it perfectly clear that the tweets from @LLuke33 and @KMaddock were nothing whatsoever to do with him or anyone working for him. He said he had joined Twitter after he had been told he needed to see tweets being posted about Kerry Katona and how she had been dumped by Ms Powell for drinking and failing a drugs test, which was untrue and a deliberate attempt to damage Ms Katona's reputation. Prior to his joining Twitter, @LLuke33 was already posting information that was pro Ms Katona and anti Ms Powell. He also noticed that @LLuke33 was very accurate and posted things he did not know, so it was obviously someone very close to Ms Powell who disliked her immensely. More importantly @LLuke33 was tweeting that Ms Powell was lying about Ms Katona and knew the real reason why she had left CAN Associates. Mr Hendricks tweeted to confirm the information was true to protect Ms Katona. He then referred to the fact that he had been told that Dan Wootton had posted that he and Ms Katona were having an affair but then removed the tweet. He said though that the story had gained enough momentum that OK! had run it on its front page a fortnight previously. He said that out of nowhere @KMaddock started tweeting on 4 July 2011 about Ms Powell and the Andre brothers. He said he didn't know who @KMaddock was but was certain they did as the tweets were about things going back to Mr Andre's time in Australia. The information relating to Claire Powell was very accurate but he repeated nothing to do with him or anyone working for him.
199. His email concluded:
- "I take on board that I should not have tweeted about them acting being nice to Nicola Partridge, but I was really angry when I found out that they did not want Nicola working on any of Peter's shows after Nicola had worked so loyally and

professional for the last 7 years with Claire plus Nicola has been in my employment for the last 16 years and does not deserve to be treated so badly. Please excuse my long-winded reply, but I still don't know what the issues [are] that Peter Andre has with Can TV and I am not going to allow them to use Twitter traffic that has nothing to do with me or my company as an excuse, seeing that they seem to have brought these Twitters upon themselves.

I confirm that I will not tweet anything relating to the shows, but I will not give any undertakings not to tweet to protect my reputation if called upon to do so.”

200. In cross-examination, Ms Clarke said that she was happy with this response, which she found acceptable. She did not write back taking issue with anything that Mr Hendricks had said. Mr Hendricks did continue tweeting after his email of 21 July 2011, but not about the Peter Andre programmes. The only one of those tweets sent before the first mediation on 27 July 2011 relied upon in the schedules to the termination letter is one on 24 July 2011 which reads: “*Don't worry, I watching what's being said and I will deal with it in my own time and in my own way*” and which, frankly, is completely innocuous. However, in Schedule 1A to the Re-Re-Amended Defence and Counterclaim, ITV2 rely upon six further tweets sent before the first mediation all of which are said to be endorsement of @LLuke33 and @KMaddock. I deal with ITV2's case about endorsement in a separate section of the judgment later.
201. There was further solicitors' correspondence between SMB, Clintons and Swan Turton prior to the mediation which it is not necessary to set out. The mediation took place on 27 July 2011. Obviously what was discussed has not been disclosed, although in a subsequent email Ms Fehler says she thought it was generally productive. It did not lead to any overall settlement, but a second mediation session was arranged for 9 August 2011. Ms Clarke was not at the first mediation and she was away from the office until about the time of the second mediation, as she was heavily pregnant and had various hospital appointments. Indeed, it appears that no representative of ITV was present. Mr Andre was not at that first mediation either, only his lawyers.

From the first mediation to termination

202. On 29 July 2011 Mr Martin Davies of Quinn Emanuel emailed Ms Fehler asking for an update on the discussions (i.e. the mediation). On 4 August 2011 she replied saying that the claimant had agreed to provide the Production Agreement on terms, which Clintons had just agreed. She asked whether ITV2 was happy for filming to resume after Mr Andre returned from holiday on 6 August 2011.
203. It appears that at the mediation, there was a further discussion between Clintons and Swan Turton about Clintons being provided with a copy of the Production Agreement, since on 1 August 2011, Swan Turton wrote to Clintons agreeing to provide a copy with commercial terms redacted, on the basis of an undertaking by Clintons not to release the copy to either their client or SMB. That letter also referred to email exchanges indicating that Clintons had previously advised Mr Andre in

relation to the agreements he had signed and enclosed an email exchange of 24 November 2008 and an email dated 8 October 2004, to which I have referred earlier. There does not seem to have been any response from Clintons explaining what those emails concerned, if it was not advising Mr Andre about the terms of the various agreements.

204. Between the two mediations, Mr Hendricks continued to tweet. ITV2 relied upon nine [in fact eight because two are the same tweet] of these tweets in the schedule to its termination letter. These are also relied upon in Schedule 1A together with a few more said to be endorsement of @LLuke33 and @KMaddock. The first was on 27 July 2011, the day of the first mediation and seems to have been prompted by a story which Ms Powell had leaked that day about her giving up her half of the claimant. This incensed Mr Hendricks because it was not true. He pointed out in the tweet that he had set up both companies and given her shares in both. 18 months previously he gave her Can [Associates] and kept [the claimant]. He continued: *“It’s all on record so stop lying about it CP or can’t you tell the truth anymore. Take this as your final warning, you lie about me once more and I will stand you up in a court to repeat the lie. That’s a promise.”* Whilst expressed in fairly trenchant language, that tweet was prompted by what he saw as her lying about the companies. It had nothing whatsoever to do with Mr Andre and it is difficult to see how it can be said to have led to a loss of trust and confidence.
205. There is then a tweet of 4 or 5 August 2011 to someone called Tom Spicer. The tweet to which this is a response is not available but so far as it concerns Ms Powell it says: *“The person you need to thank is CP without her lies we would all be in bed now”*, presumably a reference to tweeting late at night. Again this has nothing to do with Mr Andre. Likewise a tweet to @pepperpurple referring to the possibility of suing Ms Powell. He says: *“My lawyers are considering that option. I would like nothing more than to see the lying bitch in a courtroom”*. Although expressed in offensive language, given the situation with Ms Powell trying to replace him and the claimant, the sentiment was understandable and again had nothing to do with Mr Andre.
206. There is a tweet on 7 August 2011 to Galwaykelly expressing the same sentiment: *“Some people have tried to stitch me up and think because of their so called status and who they know that they will get away with it. But I swear on my life I won’t let it go until they get theirs. I always stated that I never started all this, but I promise I will finish it, fuck with me for no reason and you will pay the price”*. Again this is expressed in emotive language but the point is the same: he considered that he was being set up by Ms Powell, which of course in one sense he was.
207. In a tweet also on 7 August 2011 to @kimcalum Mr Hendricks said: *“I only came on twitter because certain people you all know stated that I was having an affair with KK which was a total lie. They never thought that I would bring them on twitter. So that why I am here, without twitter everyone would just believe their lies. I want my day in court and until then, I fucking love twitter. It only hurts you if you tell lies and it’s free.”* ITV2 relies on this as aggressive abusive and threatening but, aside from the swear word it is difficult to see how it can be characterised in that way. Again there is nothing about Mr Andre. That is made clear by the very next tweet also to kimcalum which states: *“So seem to care about things that are negative against PA and that’s your choice, but get your facts straight before you sound off because there’s a big difference a rumour and a fact. I only deal in facts, I let the liars handle the rumours.”*

I don't mention PA that's @KMaddock and they have to deal with her, not me. I like her and at least she is up front and says it as it is." The tweet from kimcalum to which that is a response is not available, but as I said in cross-examination of Mr Andre, it seems likely that kimcalum had asked something along the lines: "why are people tweeting nasty things about Peter Andre?"

208. ITV2 rely upon this tweet as an endorsement of what @KMaddock was tweeting, but it seems to me that it is not, at least as regards what she was tweeting about Peter Andre. Mr Hendricks makes it clear that he is not mentioning Mr Andre, consistent with his position throughout that it was Ms Powell and what he saw as her lies that he was seeking to counter by tweeting. In cross-examination, Mr Andre was asked by Mr Mallin to identify the tweets sent between the two mediations which contributed towards the relationship between him and the claimant becoming untenable. This was one of the tweets he identified apparently because if you were reading the tweet, you could click on @KMaddock within it and see what she was saying. It seems to me that that tweet cannot in any sense be construed as offensive to or about Mr Andre. It is explaining the difference between what Mr Hendricks is dealing with which is Claire Powell and what others are tweeting at the same time about Mr Andre. This is borne out by another tweet at around the same time on 4 August 2011 to bexter2, not relied upon by ITV2, which states in terms: "*I have no issues with the Andres. My issue is with CP.*" In my judgment, apart from the "acting" and "suitcase" tweets, his tweets simply cannot be construed as an attack on Mr Andre.
209. There is then a tweet addressed to Ms Powell herself which reads: "*make sure your lawyer copies all my tweets so he can stack them up against all your lies. I am coming for you and that's not a threat, that's a promise. So you had better get that wanker Dan Wootton tweeting on your behalf real soon, whilst he is looking for a job.*" ITV2 rely upon this as aggressive abusive and threatening, but again, whilst it uses foul language, in its context, the threat is clearly about legal proceedings not a physical threat. One does not know what Ms Powell had tweeted to which this is a response. So far as Dan Wootton is concerned, the offensive comment was no doubt prompted by the fact that it was he who had tweeted the rumour about Mr Hendricks having an affair with Ms Katona. It is also worth noting that, amongst the tweets on the screenshots attached to Ms Clarke's email of 20 July 2011, were two from Mr Wootton which can only be described as stirring things up. In any event, whatever the rights and wrongs of the relationship between Mr Hendricks and Ms Powell, this tweet had nothing to do with Peter Andre.
210. The next tweet on 7 August 2011 relied upon by ITV2 is another one to @pepperpurple saying: "*you seem to be attacking @KMaddock for the wrong reasons. If CP had never lied in the first place, PA would not be dealing with her [i.e @KMaddock]. @KMaddock saw what CP was doing to me and decided that she would come to my defence and for that I am grateful to her.*" Mr Andre also identified this particular tweet as one which contributed towards the relationship between him and the claimant becoming untenable. When Mr Mallin put to him that all Mr Hendricks was saying was that @KMaddock had only come on the scene because of Ms Powell's lies (which was Mr Hendricks' evidence about this tweet) and that it was not an attack on him, he said that it was because it offended him that his best friend and manager was being called a liar.

211. As I pointed out to Mr Andre, if Mr Hendricks genuinely thought, as he did, that Ms Powell had lied to him, the fact that he was saying on Twitter that she had lied to him about the affair could not of itself have been sufficiently offensive for Mr Andre not to want to have anything to do with him. Mr Andre could see the force of the point, but was not inclined to accept it. When Mr Mallin pressed him, he countered by talking about Mr Hendricks' relationship with another woman and said now that Claire Powell was happy with Drew Rush, he was not going to stand there and watch her be demoralised publicly. That was no doubt a laudable attitude, but in my judgment the tweeting saying that Ms Powell was a liar cannot have made Mr Andre's relationship with Mr Hendricks untenable.
212. What emerged from this part and indeed from other parts of the cross-examination was that Mr Andre seemed to have an all-embracing concept of what offended him. In effect anything which he regarded as unpleasant said about anyone who had anything to do with him, whether his family or friends was offensive. Even if that degree of sensitivity was genuine (as to which I have considerable doubts), it cannot justify the assertion that tweets which were unpleasant about a friend, here Ms Powell, rendered the professional relationship between Mr Andre and Mr Hendricks untenable, particularly in circumstances where Mr Andre never once asked Mr Hendricks to stop tweeting. Furthermore, this extensive subjective sensitivity on Mr Andre's part, even if genuine, demonstrates precisely the danger of the implied term for which ITV2 contends. How can an objective assessment be made of whether the relationship has become untenable?
213. The second mediation took place on 9 August 2011. Mr Hendricks was not present, because he was on holiday. However his solicitors were there, together with representatives from Clintons, SMB and Quinn Emanuel. Ms Clarke was there, as was Mr Andre. There was some discussion between the two of them about the tweets and she said in cross-examination that he made his feelings about the tweets very clear, but given that the mediation process was all without prejudice, no further evidence could be given about those discussions, nor was it possible for Mr Mallin to explore in cross-examination exactly what was discussed.
214. It appears that some progress was made at the mediation, although no final resolution was reached. However, on 10 August 2011, Mr Goldberg sent an email to Clintons and to Martin Davies of Quinn Emanuel. He said: *"...notwithstanding the progress that was apparently made at yesterday's mediation, Neville Hendricks tweeted late last night several hours after the mediation had ended saying that this would be his last tweet but with the comment: '...going to court is the best way of dealing with this'. I'm not sure how this statement is compatible with the aim of the other participants, which was/is to come to a resolution which avoids litigation. I hope that we all hear from Swan Turton in positive vein and sooner rather than later."*
215. The full text of that tweet which was a response to two tweeters called @samglover82 and @leanne sao, read: *"I have decided that going to court is the best way of dealing with this. So this is my last tweet. But before I go I just wanted to say thank you to those have you that have supported me and I promise to keep it real going forward. The NevCan and will."* In his witness statement, Mr Hendricks explains that the context of this tweet was his attempts to see his son and to deal with the false claims that Ms Powell had made against him (i.e. the claims that had prevented him seeing

- his son). In other words it had nothing to do with Mr Andre or the making of the programmes. That explanation was not challenged in cross-examination.
216. That the tweet might well be nothing to do with the subject of the mediation was appreciated by Mr Davies in his reply to Mr Goldberg's email, in which he said: "*We had seen the tweet although the context of the comment in the overall scheme of things is not entirely clear.*" In those circumstances, it is a little surprising that this was one of the tweets relied upon by Quinn Emanuel a week later in the schedule to the termination letter. Ms Clarke accepted in cross-examination that it was not clear what this tweet was referring to.
217. Later on 10 August 2011, Mr Goldberg emailed Clintons and Mr Davies again referring to budgeted items from the Peter Andre series for which the claimant had to account to CAN Associates and said his client and Mr Andre would insist that these were paid as a condition precedent of any agreed deal with the claimant if it was to be the production company for ongoing series. That demand does seem to me to cast some doubt on the extent to which either Ms Powell or Mr Andre was genuinely prepared to reach a settlement with Mr Hendricks through the mediation process. The outstanding invoices, about which there was in any event, a dispute, had nothing to do with Mr Andre or the making of the programmes and the condition precedent demanded was an attempt to impose a unilateral condition not in the relevant contractual documentation.
218. Mr Hendricks continued tweeting after the second mediation. The termination letter does not rely upon any of those tweets as justifying termination, other than the one about going to court to which I have already referred. However, Schedule 1A to the Re-Re-Amended Defence and Counterclaim relies upon a number of these tweets. Most of these are said to be endorsing @KMaddock and I will deal with that allegation compendiously later. However, since Mr Mallin pressed Ms Clarke in cross-examination to say which of the tweets between 9 and 16 August 2011 she considered offending so far as the Production Agreement was concerned and she identified two of the "endorsement" tweets as Mr Hendricks endorsing what @KMaddock was saying, I should refer specifically to those.
219. First, there is a tweet to two other tweeters saying: "*prove there are lies, you all had long enough, but you can't so you revert to trying to smear @KMaddock. I can back everything I said in a court of law, so why don't your lot meet me in one. Not one piece of evidence to prove KM is lying.*" Of course we do not have the tweets to which these are a response so it is not possible to say that they were about what @KMaddock was saying about Mr Andre as opposed to Ms Powell. However, from the reference to backing up what he is saying in court, it is clear that Mr Hendricks is talking about Claire Powell, not Peter Andre.
220. The second tweet Ms Clarke referred to was one again to two other tweeters saying: "*I have stated that everything that relates to CP, that she has put up is true and that's all I'm interested in*". However, it is quite clear that this is only about what @KMaddock is saying about Ms Powell, not about what she is saying about Mr Andre, the truth of which Mr Hendricks would not know about. As I pointed out to Ms Clarke during cross-examination, Mr Hendricks is actually quite careful in these tweets prior to termination to say that he is really dealing with the Claire Powell issue and that what @KMaddock was saying about Mr Andre was between @KMaddock

and Mr Andre, given that Mr Hendricks was not in Australia in the 1990s or 2000s, to which period some of what @KMaddock was saying about Mr Andre related. This is made crystal clear by the last tweet he sent before termination, on 16 August 2011 which read: “...I have always stated that KM is not my problem. Her comments regarding CP are true and that’s all I have responded to. All the other stuff is for other people to deal with.”

221. Of the tweets sent after the second mediation said in Schedule 1A to be aggressive abusive and threatening, whilst they continue to use offensive language, they are not directed at either Ms Powell or Mr Andre, except for one which refers to Ms Powell, from Mr Hendricks to a journalist called Clemmie Moodie. The context was an article she had written in the Daily Mirror on 8 August 2011. Mr Hendricks’ tweet said: “Hi Clemmie, I had no problem with the article and can see why she went ballistic because the truth is finally coming out and she is shitting it.” In cross-examination, Mr Andre said he had read the tweets to and from Ms Moodie and they made him more nervous now that Mr Hendricks had involved a journalist.
222. That was an exaggerated misreading of what these tweets were about. In an earlier tweet (not relied upon by ITV2) Mr Hendricks had said to Ms Moodie: “Hi, I saw your article in The Mirror and just wanted to correct a major error. I have made some massive mistakes regarding CP but actually marrying her was not one of them. If you need any information just DM [direct message] me. Anyway, hope you are well, speak soon, Nev x.” Evidently there is then some telephone or email discussion between them and she says “Done” after which he sends the tweet complained about. That article was in the public domain anyway and, despite Mr Andre’s alleged reaction, there is no suggestion that Mr Hendricks somehow put Ms Moodie up to write the article. The fact that he said Ms Powell was going ballistic and “shitting it” because the truth was coming out was evidently his opinion, but it does not seem to me to be remotely aggressive or threatening and is only abusive in the sense that, as he so often did, he used foul language in his tweet.
223. It seems that following the mediation, there was no further communication between Clintons and Swan Turton until Clintons wrote on 16 August 2011 saying that Mr Andre wished to have no further dealings with Mr Hendricks and would take all necessary legal steps to protect himself from Mr Hendricks’ abusive and unlawful behaviour. The letter referred to the efforts to resolve issues at the mediations and that those efforts had failed. That was not entirely accurate since progress had been made.
224. The letter referred to the central issue between Mr Andre and the claimant and Mr Hendricks as the grossly offensive tweets about not only Mr Andre and his team but also about the series. This was said to have caused Mr Andre grave concern and distress, particularly where the making of the series involved him, his family and his home. The letter said the tweets had continued unabated despite ongoing attempts to resolve the matters. The letter then referred to the fact that Mr Andre had no extant agreement with the claimant and he had no wish to enter any such agreement. It is striking that, although the letter clearly alludes to some of the earlier tweets for example the “acting” tweet and asserts that the posting of offensive messages had continued unabated, it does not identify any particular tweet posted since the first mediation, which was being relied upon.

225. Clintons and Quinn Emanuel were clearly communicating with each other after the mediation as Ms Clarke accepted and ITV2 and Quinn Emanuel must have been aware this letter was going to be sent. In my judgment it is no coincidence that the termination letter was sent the very next day. Before considering that letter, I should deal with the distinct issue surrounding Kerry Katona's decision to appear in Celebrity Big Brother.

Kerry Katona and Celebrity Big Brother

226. After Max Clifford became Ms Katona's agent again, Celebrity Big Brother approached him on her behalf and offered £300,000 for her to appear in the programme. On 4 July 2011, one of his staff emailed Mr Hendricks to say they were accepting the offer that day but Ms Katona must not discuss it with anyone. Mr Hendricks replied the same day saying that ITV2 would not be happy about her going into Big Brother as it would impact on the delivery schedule for the reality television programmes. He thought they could get round this by saying that she was doing this to clear her bankruptcy, which he thought ITV would agree to, but they would not agree to her being tied into Big Brother after she came out of the house, so they had to make sure no contract was signed which was at odds with ITV.
227. On 12 July 2011 Ms Clarke told Mr Hendricks that ITV2 was not happy with Ms Katona doing Big Brother. He emailed her explaining that clearing her bankruptcy was Ms Katona's "holy grail" but if they could come to some arrangement to pay off her bankruptcy without her having to do Big Brother, he knew that she would be happy. He said Mr Clifford had told him that he had arranged a meeting with ITV to discuss matters and suggested Mr Hendricks attend. After a further email exchange Mr Clarke stated that ITV's position was that they would not pay more than agreed under the contract and expected Ms Katona's exclusive services to be provided in accordance with its terms in order to go ahead with Kerry Katona: The Next Chapter series 3. Mr Hendricks responded asking if Ms Clarke was saying that if Ms Katona went into Big Brother ITV would not want series 3 so he would be free to place it elsewhere, because Ms Katona wanted to clear her bankruptcy more than anything else.
228. By this time in mid-July 2011, the claimant was in the process of filming series 3 of Kerry Katona: The Next Chapter and had completed four programmes. There was a meeting between ITV2 and Max Clifford on 14 July 2011 at which ITV made it clear that their arrangement with the claimant for Ms Katona's reality television programmes was based on the claimant being able to provide her exclusivity.
229. On 27 July 2011 Ms Katona informed Mr Hendricks that she had entered an agreement with Endermol UK to participate in Celebrity Big Brother and that filming was due to start on 19 August 2011. Mr Hendricks instructed Swan Turton to write a letter to her, which they did the same day, 27 July 2011. This pointed out that if she participated in Celebrity Big Brother during the Term she would be in breach of her obligation to the claimant to make herself exclusively available for filming series 3. This would cause disruption to the arrangements for filming and production of the series and would put the claimant in breach of its obligations to ITV. The letter said that the claimant was not prepared to tolerate any breach and asked her to confirm by return whether she had entered an agreement with Endermol, that she would not take part in Celebrity Big Brother during the Term and that she would continue to comply

with her obligations under the Agreement with respect to series 3. The letter threatened an application for an injunction if she did not provide the confirmation sought.

230. Ms Katona's lawyers Grosvenor Law replied on 28 July 2011, denying that Ms Katona was bound by the draft filming agreement (which of course she had not signed) and asserting that she was free to appear on Celebrity Big Brother. Up until then, the claimant had continued filming Kerry Katona: The Next Chapter series 3 without any issue. However, on 29 July 2011 Ms Partridge received a voicemail from an assistant of Max Clifford saying that the claimant had to stop filming with Ms Katona immediately and that Adam Crozier at ITV2 was looking at "*sorting something*", but until then filming must cease.
231. On 1 August 2011, Denise Palmer-Davies in Max Clifford's office emailed Peter Fincham, Director of Television at ITV, saying that all filming was on hold until they heard from ITV otherwise, but that Ms Katona and Mr Clifford were fully committed to completing the third series. Mr Fincham replied the same day referring to the meeting of 14 July 2011, where ITV had said their arrangement with the claimant was based on the claimant providing her exclusivity and stated that her decision to sign for Celebrity Big Brother was an issue for ITV as it: "*undermines the value of our exclusive reality series and certainly from an editorial perspective renders the third series filming prior to her going into the CBB house redundant, as well as making post CBB material less valuable to us.*" He concluded that this placed ITV in a very difficult position not of its own choosing and said they would prefer to continue with the producing the third series maintaining their exclusive reality access to Ms Katona.
232. On 5 August 2011 Mr Fincham emailed Mr Clifford direct. He expressed sympathy for the position Ms Katona was in but said that needed to be balanced against the rights ITV had acquired for exclusivity. They had the option of taking this up legally with Mr Hendricks but if it was the case that Ms Katona was going to take part in Celebrity Big Brother come what may, they were prepared to explore her appearing on ITV2 on a different basis. They had told Mr Hendricks in a letter that they were willing to consider taking a four episode series (on the basis that in the circumstances there would not be enough material for an eight episode series) with a reduced licence fee and clear and appropriate editorial guidelines that allowed for the two to work together. It was not their preferred option but worth talking through to avoid the alternative legal route. If they were not able to reach a suitable arrangement that worked for ITV editorially, they would have no alternative but to refer to their legal rights and remedies under their contract with the claimant.
233. The letter to Mr Hendricks to which Mr Fincham referred was evidently a letter of 5 August 2011 from Quinn Emanuel to Swan Turton which set out ITV2's case on exclusivity and their entitlement to terminate for breach but said that ITV2 might be prepared to consider the alternative of a 4 episode series (on the basis there would not be enough material for 8 episodes) with a pro-rata reduced licence fee and clear and appropriate editorial guidelines to ensure that the two productions could both operate successfully. The letter went on that ITV2 was willing to explore this alternative and proposed that Swan Turton reverted with the claimant's suggestions as to a clear logistical and editorial framework for how this might be feasible. At that point it might be appropriate for the next stage of discussions to be carried out by the relevant individuals at the respective clients in order for the detail of the proposal to be

finalised. In the event that a satisfactory resolution could not be reached, ITV2's rights and remedies were reserved.

234. That letter was sent on a Friday. In fact, Mr Hendricks was on holiday from the Monday 8 August until 22 August 2011. However, Swan Turton responded to Quinn Emanuel's letter on the Monday 8 August 2011, setting out the claimant's case that the commitment in the preamble to the Production Agreement was only to procure Ms Katona's exclusive television services in order to enable the claimant to produce and deliver the programmes. The letter went on to say that the proposal for four episodes was not acceptable, because of the contractual commitments the claimant had, inter alia to the production team. However, the letter did also continue: "*Our client...is prepared to explore suitable alternative arrangements in order to progress this matter...We understand that your clients have been in direct communication with Ms Katona's solicitors and we suggest it may be sensible for the parties' solicitors to meet as a matter of urgency to progress matters on a sensible basis*", a clear indication of a willingness to negotiate about the programmes and reach some compromise acceptable to all parties.
235. Also on 8 August 2011, there was what seems to have been a cordial email exchange between Mr Hendricks and Ms Angela Jain, Director of Digital Channels and Acquisitions at ITV. She mentioned viewings she had in her diary for Ms Katona but said it seemed inappropriate for her to be doing them whilst the matter of editorial spec., delivery and broadcast of the series remained unresolved. He replied saying he was away on holiday until 22 August but he gathered the lawyers had been speaking so he would respond once he knew the state of play.
236. She replied: "*Great thanks. I am sure you agree that we should aim to resolve this fairly quickly as any potential delivery would be right up against it now.*" He replied on 9 August 2011 saying: "*My understanding of the current situation from my lawyers is that ITV have suggested that they would consider taking 4 shows, whilst allowing Kerry to take part in CBB. That offer is unacceptable to me. However, I would agree to us delivering 6 shows, that meeting you half way. I gather that the lawyers are meeting today [a reference to the mediation], so an answer to 6 shows alternative is required urgently.*"
237. Quinn Emanuel sent a letter on 9 August 2011 in response to Swan Turton's letter of 8 August 2011. That letter took issue with the claimant's construction of the exclusivity term in the Production Agreement. It asked Swan Turton to confirm when Celebrity Big Brother was due to start, which Quinn Emanuel understood was on 18 August 2011. It noted that from the definition of term in Swan Turton's letter of 27 July 2011, they agreed that the exclusivity provisions in the Agreement would be breached in any event. It is unclear whether that letter was sent before or after the mediation took place and, of course, the court heard no evidence about what was discussed at the mediation.
238. On 12 August 2011 Swan Turton wrote a further letter to Quinn Emanuel in response to that letter of 9 August 2011. The first paragraph referred to the fact that they were aware that ITV had corresponded direct with Max Clifford and indicated a more co-operative approach. They asked for copies of the exchanges which were clearly pertinent to the issue. They then referred to the dispute as to the extent of the exclusivity obligation. They also made the point that Celebrity Big Brother, which

was due to start filming on 18 August 2011, was not to be broadcast at the same time as Kerry Katona: The Next Chapter. They made the point that the claimant had not sanctioned Ms Katona's decision to take part in Celebrity Big Brother and was not responsible for the schedule.

239. In my judgment, the letters from Swan Turton on 8 and 12 August 2011 cannot possibly be construed as a refusal by the claimant and its solicitors to discuss further with ITV2 a possible compromise in relation to Kerry Katona: The Next Chapter series 3. ITV2 had put forward a proposal to take four programmes, to which Mr Hendricks had countered with the suggestion that they take six in his email to Ms Jain of 9 August 2011 and Swan Turton had indicated that the claimant was prepared to negotiate. Indeed, Swan Turton were asking for copies of the correspondence with Max Clifford, a further indication of a willingness to reach an accommodation. Quinn Emanuel did not send that correspondence and there was no response from them or ITV on this issue or in response to Mr Hendricks' proposal to deliver six programmes prior to the termination letter. Nor did Quinn Emanuel or ITV follow up on requesting the "clear logistical and editorial framework" they had asked for.

The termination letter and events post termination

240. The termination letter was sent on 17 August 2011, the day after Clintons' letter stating that Mr Andre would not sign the filming agreement and wanted nothing further to do with the claimant as production company. I do not propose to quote the letter extensively, but to highlight the main points it makes. On the analysis of the contract, much was made of obligations imposed on the claimant under the ITV General Terms and Conditions. However, as I found above when dealing with the contractual framework, those Terms and Conditions were not incorporated into the Production Agreement. They would only have been incorporated into any Licence Agreement for series 5 but none was ever entered so reliance on the General Terms and Conditions was misplaced.
241. In relation to Mr Andre, the letter referred to Quinn Emanuel's letter of 14 July 2011 and Swan Turton's response on 18 July 2011 saying the claimant was unaware of the reasons for the impasse in filming but it was not as a result of any act or omission by the claimant and the claimant would conform with its contractual obligations and produce the series in a consistently first class manner. The termination letter then alleged that it was clear that the claimant had not abided by that position, undermining the series and the necessary relationship between the claimant and PJA, without which the claimant could not produce the series at all.
242. The letter then summarised the background and recent developments. It referred to the "acting" tweet of 14 July 2011 saying that Mr Hendricks had said the programme was not real but staged which was an extraordinary statement to publish that undermined the programmes and those appearing in them. This was a complete misreading of what Mr Hendricks had meant by the tweet, which he had explained to Ms Clarke, apparently to her satisfaction, in his email of 21 July 2011.
243. The letter said that ITV2 had then asked Mr Hendricks to cease such conduct and refrain from commenting on any of the programmes or the Agreement. They had understood from his response on 21 July 2011 that he would not repeat the conduct and would abide by the terms of the Agreement. However, he had not done so. The

letter attached two Schedules of tweets, one of those before 20 July 2011 and the other of tweets thereafter, giving a number of examples of his recent tweets attacking and threatening individuals close to Mr Andre and who appear in the series. It says those attacks are taken personally by him and goes on that the aggressive nature of the tweets had created an atmosphere of animosity and fear between the claimant as producer and those it was filming. It refers to the need for the subject of reality television needing to be allowed to behave and be filmed naturally. The claimant was alleged to have failed to be a first class producer and that it had become impossible for it to produce and deliver the series. This was said to be a fundamental breach of the Production Agreement entitling ITV2 to terminate the Agreement which it did with immediate effect. It is to be inferred that the tweets which were set out in the two schedules were the ones which particularly concerned Mr Andre and that the schedules were prepared after consultation with his solicitors.

244. In relation to Ms Katona the letter set out the recent developments. It referred to ITV2's attempt to reach a resolution by saying it might consider a reduced 4 episode series if the claimant was able to revert with a clear logistical and editorial framework for how that might be feasible. The letter continued that the claimant had not provided an indication of how this might work, nor provided a clear logistical and editorial framework and had rejected the proposal. Accordingly the claimant remained in fundamental breach.
245. The letter concludes that to the extent that the claimant contended that the impasse was not of its making, the fact remained that it could not continue as producer as it could not secure the necessary access, so that in the alternative, the Agreement had been frustrated.
246. After termination there was immediately discussion on 18 August 2011 between Ms Jain and Mr Tim Miller, Creative Director of ITV Studios (a separate company which had produced the Katie Price series for ITV2) about ITV Studios filming series 5, which is what in fact occurred. However, in November 2011, Ms Powell was looking to take the next series elsewhere. As Ms Kate Maddigan Commissioner Entertainment at ITV said in an email of 16 November 2011 to Mr Miller: "*We all know her agenda as she has a JV interest with the other company [i.e. another production company]. We are continuing to try and resist but she makes it very difficult by making it a talent issue...*" Ms Maddigan asked if ITV Studios would be prepared to make the next series. Mr Miller responded: "*yes absolutely up for this series but understand talent rules!*" In the event, Ms Powell appears to have backed down and ITV Studios continued to produce the programmes.

Were ITV2 entitled to terminate the Production Agreement?

Alleged loss of trust and confidence

247. I have already held that no term is to be implied into the Production Agreement that the claimant would not act in any way such as to damage the necessary relationship of trust and confidence in the relationship between Mr Andre and the claimant. Nonetheless, it is necessary to consider the allegations of breach of trust and confidence for the purposes of the overall analysis, including in considering whether there was a renunciation of the contract by the claimant.

248. In the Re-Re-Amended Defence and Counterclaim, the case in relation to breach of the implied term is put on the basis of the offensive tweets which Mr Hendricks posted and those of @LLuke33 and @KMaddock which he is alleged to have endorsed. These are set out in Schedule 1A to that pleading which runs in all to 302 tweets. As I said in the section of the judgment dealing with the proceedings, all but 18 of these were first relied upon by ITV2 in a re-amendment eventually served in July 2014. The 18 originally relied upon in the Defence and Counterclaim consisted of the 16 tweets identified in the schedules to the termination letter plus the “I choose Nicola” tweet and the Nicola Partridge tweet, both dated 12 July 2011, which were added to the Schedule by amendment in November 2012.
249. I deal with the issues of massive expansion of the Schedule and endorsement in more detail below, and for the present assume that ITV2 is entitled to rely upon all these tweets in support of its case. That case depends in large measure on the evidence of Mr Andre, since it is pleaded that: *“The direct and foreseeable effect of CATV’s [tweeting] was that Mr Andre was unable and unwilling to render his services on the Programmes due to the breakdown of the necessary trust and confidence in the relationship between him and CATV.”*
250. I have already said that I regarded Mr Andre as an unsatisfactory witness. His evidence about the tweets was particularly unreliable. Having seen and heard him giving that evidence in cross-examination, I formed the clear view that he had no recollection of which tweets he saw at the time and what his contemporaneous reaction was. A particularly striking example of that was his reliance in cross-examination on tweets where he said the police had got involved. Those tweets were in fact sent a long time after termination and had nothing to do with the termination, but Mr Andre was clearly confused and thought that he had seen them before termination.
251. I was also not convinced by his evidence that, in effect, he was checking his mobile phone or computer all the time to look at the various tweets. He was unable to distinguish between his reaction at the time and his reaction subsequent to termination, in particular when his statement was being prepared and when giving evidence. That inability is obviously of considerable significance in a case in which it is said that the tweeting by Mr Hendricks caused a loss of trust and confidence at the time. On the basis that Mr Andre would have informed his lawyers about the tweets which particularly concerned him, it seems to me that the only reliable evidence of those tweets which he actually saw and which caused him any concern is in the contemporaneous correspondence: the email of 12 July 2011 and the letter of 19 July 2011 from his solicitors, Clintons, the email from Ms Clarke of 20 July 2011 and the termination letter of 17 August 2011 (on the basis that that was sent after Ms Clarke had discussed the tweets with Mr Andre at the mediation on 9 August 2011 and the schedules were prepared after consultation with his solicitors). In my judgment, it is likely that in the contemporaneous correspondence both Clintons and Quinn Emanuel/ITV2 put forward what they regarded as the best tweets from their respective perspectives.
252. I considered that the evidence Mr Andre gave as to his reaction at the time to the tweets he saw was extremely exaggerated. Whilst many of the tweets sent by Mr Hendricks were offensive and expressed in foul language, I reject Mr Andre’s suggestion that they caused him to fear for himself and his family. As Mr Mallin

correctly submitted, the suggestion that a grown man in the position of Mr Andre was genuinely scared by what was said in the tweets has to be viewed with considerable scepticism. Mr Andre's evidence about that fear was, of course, to a large extent dependent upon his assertion that this was a man who had made death threats, which, as I have found, was a complete fabrication. It seems to me that it is not remotely true that the tweets caused him to fear for himself, his family and children, either that they would come to harm or witness something awful. I have little doubt that if he had genuinely had that concern at the time, he would have contacted the police.

253. I also considered that the suggestion that the tweets were damaging to his reputation or image or brand was another complete exaggeration. There is no evidence that they had that effect: indeed Mr Andre seems to have remained as popular as ever with the public. Very few of Mr Hendricks' tweets were in any sense directed at Mr Andre personally. The two principal exceptions were the "acting" tweet on 14 July 2011 and the "suitcase" tweet on 17 July 2011. Given that, as I have found, Mr Andre went along with Ms Powell's act of revenge in seeking to remove Ms Partridge from the programmes and, on his own evidence, he had no issue with Ms Partridge other than the phone contact with Mr Hendricks (which I do not accept), the first tweet was understandable and in large measure reflected the true position. Mr Hendricks accepted a month before termination that it should not have been sent, but I reject the suggestion that it could have caused a loss of trust and confidence.
254. The second tweet should not have been sent either but I regarded Mr Andre's evidence about his reaction to it as exaggerated. It is difficult to see how anyone could take it that seriously. Again I reject the suggestion that that tweet could have caused a complete breakdown of trust and confidence.
255. The tweets which were offensive about Mr Andre were those posted by @KMaddock and, to a lesser extent, @LLuke33. For the reasons set out in more detail below, I do not accept that Mr Hendricks can be "tarred" with these tweets or that there is a sustainable case that in some way he endorsed them in a manner that could conceivably have caused a loss of trust and confidence. Indeed it is striking that neither Mr Andre's solicitors nor ITV2 suggested at the time that Mr Hendricks was endorsing the tweets from @LLuke33 and @KMaddock. Mr Hendricks was very clear in his email to Ms Clarke of 21 July 2011 that those tweets were nothing to do with him, his staff or his company and that statement was never challenged or contradicted contemporaneously by ITV2. Ms Clarke said she was happy about this response.
256. The vast majority of the offensive tweets from Mr Hendricks were directed at Claire Powell. Whilst many of them used foul language and were extremely unpleasant, they are to be viewed against the background of Mr Hendricks: (i) discovering that she was having an affair with Drew Rush and had lied to him about it; (ii) seeking to counter scurrilous allegations about Ms Katona which he believed Ms Powell was behind and (iii) then discovering that she had gone to ITV behind his back and was trying to get the claimant replaced as the production company. All of those matters made him extremely angry and whilst they may not be an excuse for the tweets, they certainly provide an explanation. It is also the case that, even whilst sending those tweets, he continued to edit Here to Help in exactly the same way as before, that Ms Powell was not excluded from the editorial process and that neither Mr Andre nor ITV had any issues with the programmes produced.

257. As I said earlier, it appeared from his evidence that Mr Andre had an all-embracing concept of what was an attack on him, viewing an attack on Twitter against anyone close to him, including his manager or indeed anyone else in his “team” as in some way an attack on him. I do not consider such an egocentric approach appropriate. The tweets from Mr Hendricks about Claire Powell were often offensive, but they cannot be construed as an attack on Mr Andre himself.
258. Given that Mr Hendricks was not responsible for filming the programmes, which was done by a separate film crew, that it was not intended that he would appear in any of the programmes in Peter Andre: The Next Chapter series 5 and that he had continued editing and producing Here to Help in the same professional manner as all the other programmes he had produced, despite the tweets, I do not consider that the alleged loss of trust and confidence on the part of Mr Andre was genuine. In relation to the filming of the programmes, if there were a relationship of trust and confidence, it would be with the film crew. I can see that a reality television star has to be comfortable with the crew filming him and his family and friends. However, there is no suggestion that Mr Andre or Ms Powell, for that matter, had an issue with the film crew, nor is there any evidence that the film crew treated Mr Andre or Ms Powell differently at any stage.
259. The suggestion that the tweeting caused Mr Andre to lose trust and confidence in Mr Hendricks and the claimant is difficult to accept when the circumstances were that Ms Powell and Mr Andre (through his solicitor) were discussing a strategy to replace the claimant as the production company from the beginning of June 2011, three weeks before the Twitter account was even opened. The pursuit of that strategy was hardly the action of people who considered they had a relationship of trust and confidence with the claimant. In those circumstances, if there was ever such a relationship, it seems to me it had broken down before the Twitter account was even set up, for reasons for which Ms Powell and Mr Andre were responsible, not the claimant or Mr Hendricks.
260. I consider that Mr Andre and Ms Powell used the tweets as a pretext, first to justify refusing to start filming Peter Andre: The Next Chapter series 5 and second to put illegitimate commercial pressure on ITV2 to terminate its contract with the claimant and use another production company. If the tweets had caused Mr Andre so much concern and upset, one would have expected him to contact Mr Hendricks and ask him to stop tweeting altogether. It is striking that that is the one thing which Mr Andre never did, a further indication that the tweets were being used as a pretext to further the commercial strategy of removing the claimant as the production company. In my judgment, had it not been for Ms Powell and Mr Andre wanting to get rid of the claimant as the production company and to use the tweets as a pretext for doing so, their reaction to the tweets would have been completely different: they would have contacted him and said something along the lines of: *“Look Neville, you can’t do this. If we are to go on with our relationship in a professional manner and produce the programmes despite the personal differences between you and Claire, you are going to have to stop this tweeting altogether.”*
261. It follows that, even if I had concluded, in favour of ITV2, that there was an implied term in the Production Agreement that the claimant would not act in any way such as to damage the necessary relationship of trust and confidence in the relationship between Mr Andre as the subject of the reality television programmes and the

claimant as the producer of such programmes, I would have concluded that the claimant was not in breach of such implied term.

262. I can deal briefly with one of the other ways in which ITV2 pleads its case, that the posting of the tweets was a breach of the implied obligation on the part of the claimant to use reasonable skill and care in providing its services under the Production Agreement. I agree with Mr Mallin that the suggestion that in posting the tweets, the claimant was performing its services under the Production Agreement or was failing to use reasonable skill and care in doing so, is unsustainable.

Expansion of ITV2's case and alleged endorsement of @LLuke33 and @KMaddock tweets

263. As set out earlier, ITV2 originally relied in its Defence and Counterclaim only on the sixteen tweets referred to in the two schedules to the termination letter. By an amendment served in 2012, they added two further tweets the “acting” tweet and the Nicola Partridge tweet. By an amendment finalised in July 2014, ITV2 amended Schedule 1A to rely upon in total 302 tweets, including substantial numbers of tweets posted by @LLuke33 and @KMaddock and a large number of tweets posted by Mr Hendricks, which were said by ITV2 to “endorse” what was being alleged by those two tweeters.
264. Of course, in a case where a party terminates the contract for alleged repudiatory breach, there is no bar in principle to the party relying subsequently upon some different or further ground to justify termination beyond the ground relied upon at the time of termination. This is what is sometimes known as the principle in *Boston Deep Sea Fishing v Ansell* (1888) 39 Ch D 339; see *Chitty on Contracts* 31st edition [24-014]. However a major difficulty which ITV2 faces here, in relation to this multitude of other tweets not relied upon at the time of termination, is that it simply cannot establish which of these tweets were the ones which Mr Andre or ITV2 itself read at the time and considered so offensive that they rendered the relationship with the claimant untenable (even if, contrary to the conclusion I have reached Mr Andre did genuinely read them and consider them offensive). As I have already held, the only reliable evidence as to the tweets which caused either Mr Andre or ITV2 concern at the time is to be found in the contemporaneous correspondence attaching tweets and was effectively limited to the eighteen tweets relied upon in ITV2's pleading before the re-amendment. In those circumstances, it does not seem to me that ITV can demonstrate that any of the other tweets posted by Mr Hendricks at the time which they now seek to rely upon caused a loss of trust and confidence.
265. So far as the tweets which are said to have endorsed the postings by @LLuke33 and @KMaddock are concerned, ITV2's case faces additional difficulties. First, this concept of endorsement was not raised at the time either by ITV2 or Mr Andre. It is clearly a lawyer's construct thought up some two years later in an attempt to justify termination. Although Mr Andre sought in cross-examination to make much of Mr Hendricks having made comments about the accuracy of what @KMaddock in particular was tweeting as having caused him distress, I simply do not accept that evidence. If what Mr Hendricks was tweeting about @KMaddock and @LLuke33 really had caused Mr Andre distress at the time, because it showed Mr Hendricks endorsing the truth of what they were tweeting, I have little doubt Mr Andre would have raised that with Mr Myers who would have immediately raised that complaint with ITV2, particularly in circumstances where, as I have found, Ms Powell and Mr

Andre were using Mr Hendricks' tweets as a pretext to stop filming and put commercial pressure on ITV2 to terminate the Production Agreement and Mr Myers was writing aggressive correspondence to ITV2. The fact that no such complaint was made about the "endorsement" tweets now relied upon gives the lie to any suggestion that they caused a loss of trust and confidence at the time.

266. Second, although Mr Nambisan maintained that in some of the endorsement tweets Mr Hendricks was endorsing the truth of what @KMaddock was tweeting about Mr Andre, I do not consider that individual tweets can be considered in isolation. Looking at the endorsement tweets overall, I consider that a fair reading of them would lead to the conclusion that Mr Hendricks was only saying that what @LLuke33 and @KMaddock were saying about Claire Powell was true, he was not endorsing anything they were saying about Mr Andre. A number of the tweets make that very clear, including those referred to above at [207], [208], [210], [219] and [220], which include the last one posted before termination.
267. Third, this concept of endorsement is a nebulous one. It is not being alleged that he encouraged @LLuke33 and @KMaddock to send tweets which they would not otherwise have done and any such allegation would be unsustainable: clearly they were going to tweet whether he was also tweeting or not. Indeed @LLuke33 was already tweeting about Claire Powell before Mr Hendricks even opened the Twitter account. Equally, it can hardly be suggested that he should have tried to shut them down and that he somehow endorsed their tweets by not doing so, in circumstances where Mr Andre did not do so. I simply did not accept Mr Andre's evidence that he had asked his solicitors to get @KMaddock shut down and they could not do so. If that had been the case, it seems to me that that is something else which Mr Myers would have raised with ITV2.
268. Fourth, in his response to Ms Clarke on 21 July 2011, Mr Hendricks made it clear that the tweets from @LLuke33 and @KMaddock were absolutely nothing to do with him or his company or staff. ITV2 did not challenge that explanation and respond: "*we do not accept what you say, we consider you are endorsing what they are tweeting. All this tweeting must stop*". On the contrary, Ms Clarke did not respond at all, no doubt because, as she accepted in cross-examination, she was happy with his response. In those circumstances, not having raised the issue of endorsement in response to Mr Hendricks' explanation that the @LLuke33 and @KMaddock tweets were nothing to do with him, I consider that it is not open to ITV2 to seek to raise these alleged "endorsement" tweets two years after termination as a justification for termination. For all these reasons, in my judgment the endorsement case is unsustainable.

Renunciation

269. I accept Mr Mallin's submission that the correct contractual analysis in the present case in considering whether there was a repudiatory breach by the claimant entitling ITV2 to terminate the Production Agreement is not through the implication of the term for which ITV2 contends, but through the application of the doctrine of renunciation. A clear statement of the scope of that doctrine is to be found at [24-018] of *Chitty on Contracts* 31st edition:

"Renunciation

24-018

A renunciation of a contract occurs when one party by words or conduct evinces an intention not to perform, or expressly declares that he is or will be unable to perform, his obligations under the contract in some essential respect. The renunciation may occur before or at the time fixed for performance. An absolute refusal by one party to perform his side of the contract will entitle the other party to treat himself as discharged, as will also a clear and unambiguous assertion by one party that he will be unable to perform when the time for performance should arrive. Short of such an express refusal or declaration, however, the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions. The renunciation is then evidenced by conduct. Also the party in default:

‘... may intend in fact to fulfil (the contract) but may be determined to do so only in a manner substantially inconsistent with his obligations.’”

270. The issue for determination is thus whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of ITV2, the claimant had clearly shown an intention to abandon and altogether refuse to perform the Production Agreement: see *Eminence Property Developments v Heaney* [2010] EWCA Civ 1168; [2011] 2 All ER (Comm) 223 at [61] to [63] per Etherton LJ, cited at *Chitty on Contracts* [24-020]. One can postulate circumstances where the words or conduct of Mr Hendricks on behalf of the claimant would satisfy that test. For example, if he had said: “*I am going to ruin Mr Andre’s image through the way in which I edit and produce the programmes in Peter Andre: The Next Chapter series 5*” or if his conduct was such as did ruin Mr Andre’s image.
271. However, applying that test to the present circumstances, I do not consider Mr Hendricks’ words or conduct come anywhere near what a reasonable person in the position of ITV2 would consider evinced an intention not to perform the Production Agreement. So far as the tweets are concerned, I have already held that, even if the implied term for which ITV2 contends were implied into that Agreement, the tweets posted were not such as to destroy any relationship of trust and confidence between the claimant and Mr Andre. Furthermore, although the tweets were unpleasant and offensive to Ms Powell, they fell a long way short of being a threat to ruin Mr Andre’s image. In that context, it is of particular significance that Mr Hendricks was editing *Here to Help* right through to the end of July 2011 when the tweeting was going on and yet there is no suggestion that his editing was anything other than professional and up to his usual high standard, showing Mr Andre in a favourable light.
272. In his oral closing submissions, Mr Nambisan confirmed that it was no part of ITV2’s case that the editing process or how Mr Hendricks conducted it was a breach of contract by the claimant. That confirmation was a realistic recognition that any suggestion that the claimant was in breach of contract in relation to editing would be completely hopeless in the light of: (i) the unchallenged evidence of Mr Hendricks

and Ms Partridge that the editing process and Claire Powell's entitlement to be involved in it did not change after their personal relationship broke down and (ii) the evidence that Mr Hendricks produced and edited both Peter Andre: The Next Chapter series 5 and Here to Help in an entirely satisfactory manner and that both series were successfully broadcast by ITV2.

273. There is absolutely nothing to suggest that the claimant did not intend to perform its obligations under the Production Agreement to edit and produce all the future programmes to the same high standard and with reasonable skill and care as previously. Furthermore, any contention by ITV2 that a reasonable person in its position would have considered that the claimant had evinced an intention not to perform its obligations under the contract faces the obvious major obstacle that Ms Clarke, the only employee of ITV who gave evidence, accepted that the claimant was always ready, willing and able to perform the contract. As she put it in the passage in her evidence I referred to at [181] above, it was the circumstances which made it not possible for the claimant to perform. However, since, as I have found, Mr Andre and Ms Powell were using the tweets as a pretext to refuse to start filming unless conditions which they had no contractual right to demand were satisfied, the true position is that what rendered performance of the contract not possible was the clear breach by PJA Promotions and Mr Andre of their obligations to film the programmes under the PA Agreement and the inducement letter.
274. Furthermore, whilst ITV2 relies upon the cumulative effect of the tweets in support of its case of renunciation, given that, in relation to the tweets preceding 20 July 2011 about which Ms Clarke wrote her email to Mr Hendricks that day, Mr Hendricks provided an explanation which Ms Clarke regarded as satisfactory, it seems to me that there must be a real question mark whether it is open to ITV2 in effect to "blow hot and cold" and rely upon pre-20 July tweets in support of its case that there was a renunciation. I do not consider that the tweets sent by Mr Hendricks after 20 July 2011, none of which mention the Peter Andre programmes or the editing or production of them, whether taken individually or cumulatively, amount to a renunciation. In any event, even if it is open to ITV2 to still rely upon pre-20 July tweets, I do not consider that the whole body of tweets, whether looked at individually or cumulatively, amount to a renunciation.
275. In my judgment, there is no question of the claimant having renounced the Production Agreement.

Breach of the Kerry Katona exclusivity term

276. I have already held that there was a term of the Production Agreement that the claimant would procure the exclusive television services of Ms Katona for ITV2 during the Term and that that obligation was absolute, not limited to the use of best endeavours. In those circumstances, the decision of Ms Katona to participate in Celebrity Big Brother would have been a breach by the claimant of that obligation, at least once she started filming on 18 August 2011, the day after termination. The critical issue for present purposes is whether there was an anticipatory breach by the claimant as at the date of termination which was repudiatory.

277. The test as to whether a breach is repudiatory can be taken as that formulated by Diplock LJ in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 66:

“Does the occurrence of the event deprive the party who has further undertakings to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?”

278. In my judgment, the breach of the exclusivity term here cannot be said to have deprived ITV2 of substantially the whole benefit of that part of the Production Agreement concerned with the Kerry Katona programmes on the basis that the Production Agreement in fact comprised two separate or severable agreements as regards Peter Andre programmes and Kerry Katona programmes, as is made clear by the preamble quoted at [13] above. In circumstances where, albeit reluctantly, ITV2 was prepared to accept four programmes from series 3 and there was at least one more series to be produced in 2012 (on the basis the agreement was for sixteen hours of programmes in the first two years of the Term) and an option for a third year and further series, it cannot be said that the breach of the exclusivity clause in relation to Kerry Katona: The Next Chapter series 3 was repudiatory. Ms Katona through Mr Clifford had made it clear that, although she was keen to appear in *Celebrity Big Brother*, she was also keen to continue making programmes for Kerry Katona: The Next Chapter. Once the furore over *Celebrity Big Brother* died down, there is no reason to suppose that subsequent series of Kerry Katona: The Next Chapter would not have been produced by Mr Hendricks to his usual high standard and broadcast successfully by ITV2.
279. However, even if the breach of the exclusivity term had been repudiatory, I consider that it was not open to ITV2 to terminate the Production Agreement for that breach on 17 August 2011. The termination letter alleged that the claimant had not provided an indication of how the ITV2 proposal for a reduced 4 episode series might work, nor provided a clear logistical and editorial framework for it and that the claimant had rejected the proposal. In my judgment, that is not a fair summary of the position.
280. The position as I see it was that in their letters of 8 and 12 August 2011, Swan Turton had indicated a willingness on the part of the claimant to negotiate a compromise and asked for copies of the correspondence with Max Clifford. Quinn Emanuel had not responded prior to the termination letter. Mr Hendricks had said the proposal to take only four programmes was not acceptable to him and suggested a compromise of six. ITV2 had not responded at all to that counter-proposal. He was in fact on holiday until 22 August 2011 as Ms Jain knew, so the alleged failure to provide the clear logistical and editorial framework is not surprising, if as ITV2 knew, he was away, nor had ITV2 chased for it to be provided. It seems to me that the parties were still in negotiation about achieving a compromise and that it was not open to ITV2 to terminate the contract for alleged repudiatory breach where those negotiations had not concluded.
281. It follows that, for all the reasons set out above, I have concluded that ITV2 was not entitled to terminate the Production Agreement and in purporting to do so by its

solicitor's letter of 17 August 2011, ITV2 was itself in repudiatory breach of the Production Agreement.

Frustration

282. The alternative case pursued by ITV2 that the contract was frustrated was not elaborated by Mr Nambisan in his closing submissions, perhaps in recognition that it was not a sustainable case. The test as to whether a contract has been frustrated was restated by Lord Simon of Glaisdale in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC:675 at 700:

“Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.”

283. In relation to the Peter Andre programmes, there was no supervening event which so significantly changed the nature of the outstanding contractual rights and obligations from what the parties reasonably contemplated at the time the Production Agreement was entered. Under that Agreement, ITV2 was obliged to commission five further series of Peter Andre: The Next Chapter after series 4 and two further series of Peter Andre: Here to Help after series 1 during the remainder of the Term. Whilst it is true that the obligation to commission the programmes was conditional under clause 2.1 upon the PA Agreement remaining in full force and effect, that Agreement did remain in full force and effect. All that happened was that Mr Andre refused to comply with his obligations under that Agreement and the Inducement Letter to provide access to his life for filming. He was under an obligation to provide such access, which was not conditional upon his relationship with the producer. His refusal to proceed with filming unless ITV2 replaced the claimant as the production company was not something he was contractually entitled to do and that refusal placed him and PJA Promotions in breach of the PA Agreement and Inducement Letter. ITV2 cannot rely upon the fact that Mr Andre and PJA Promotions were in breach of the PA Agreement and letter to contend that the Production Agreement was frustrated.
284. The position is equally clear in relation to the Kerry Katona programmes. Ms Katona was willing to film the remaining programmes and series, but ITV2 decided not to pursue that course but to purport to terminate the Production Agreement for repudiatory breach by the claimant. If, as I have held, ITV2 was not entitled to terminate for such breach, it cannot save its position or avoid the consequences of its own breach by relying on the doctrine of frustration.
285. There was a faint argument floated by ITV2 to the effect that there was impossibility of performance of the Production Agreement. Any such argument suffers from the same fundamental defects as the argument based on the doctrine of frustration.

The claimant's claim for damages

Causation

286. Before dealing with the claim for lost profits, I need to deal with a point on causation raised by Mr Nambisan for the first time in his written closing submissions. This was a contention that, even if ITV2 was in repudiatory breach of the Production Agreement, that breach did not cause the loss of licence fees claimed by the claimant. Although the contention was elaborated at some length in the written submissions, the essence of the contention was that, since Mr Andre had said he was not prepared to make the programmes with the claimant as the production company, there was: *“only one possible counter-factual (assessed in accordance with the principle of ‘least onerous obligation’) namely that ITV2 would have terminated the PJA Agreement such that it would no longer be in full force and effect.”* Accordingly, it was submitted that since the obligation on ITV2 to commission the programmes under clause 2.1 of the Production Agreement was conditional on the PA Agreement remaining in full force and effect, that obligation would have fallen away.
287. Ingenious though the contention is, it faces a number of serious difficulties. The point was neither pleaded nor foreshadowed in opening submissions. This is not a technical objection but one of substance. Had the point been pleaded, ITV2 would surely have had to call a more senior executive than Ms Clarke, for example Mr Fincham, to give evidence as to what ITV2 would have done had it not wrongfully terminated the Production Agreement and to be cross-examined about that evidence. Furthermore, if Mr Mallin had known that this point was being taken, he would no doubt have cross-examined Ms Clarke as to what steps ITV2 would have taken had it not terminated the Production Agreement but rather supported the claimant as it should have done, in effect to bring Mr Andre and Ms Powell to heel and require them to comply with his filming obligations. He would also have wanted to cross-examine Mr Andre as to whether, if ITV2 had taken a tough line with him and insisted that he and PJA Promotions perform their obligations under the PA Agreement and Inducement Letter, he would really have held out for the replacement of the claimant, particularly if faced with the prospect of a substantial claim for damages from ITV2 if he continued to refuse to perform. No evidence was led by ITV2 from Mr Andre on this point, which is of course why Mr Mallin did not cross-examine about it. In view of the fact that this causation point was not raised until closing submissions, I do not consider that, in fairness to the claimant, ITV2 should be allowed to run the point at all.
288. In any event even if ITV2 were allowed to run the point, the assertion that the only possible counterfactual was that ITV2 would have terminated the PA Agreement because of Mr Andre's refusal to continue filming suffers from a fundamental fallacy, namely that it proceeds on the assumption that Mr Andre's loss of trust and confidence in Mr Hendricks because of the tweets was genuine. However, as I have found, it was not genuine. The tweets were being used by him and Ms Powell as a pretext to pressurise ITV2 into replacing the claimant as the production company. In those circumstances, I consider that if ITV2 had taken a tough line with Mr Andre and indicated that it would maintain the Production Agreement with the claimant, whilst insisting that Mr Andre perform his obligations under the Inducement Letter or face a claim for substantial damages for non-performance, it is likely that he and Ms Powell

would have backed off and abandoned their attempt to replace the claimant and Mr Andre would have continued filming.

289. In my judgment, the one thing that ITV2 would have been least likely to do if the Production Agreement had not been terminated was to terminate the PA Agreement, because to do so would have exposed ITV2 to paying Mr Andre the balance of the minimum guaranteed payments under the PA Agreement, some £1.4 million. It would also have exposed ITV2 to the collateral damage of terminating its relationship with Mr Andre, one of its best “faces”. It follows that the assumptions upon which Mr Nambisan’s contention are founded are misconceived.
290. There is another fundamental objection to the causation point raised by Mr Nambisan as a matter of legal analysis. Whilst it is correct that damages for breach of contract are assessed on the basis that the party in breach would have performed the contract in the manner least onerous to it, the court will make its counterfactual assessment on the basis that the parties would have acted in good faith albeit with their own commercial interests in mind. The applicable principle is set out clearly in the judgment of Patten LJ in *Durham Tees Valley Airport v Bmibaby Ltd* [2010] EWCA Civ 485; [2011] 1 Lloyd’s Rep 68, applying the principle enunciated by the majority of the Court of Appeal in *Abrahams v Herbert Reisch Ltd* [1922] 1 KB 477:

“None of the cases I have referred to has or could have questioned the principle laid down by the majority of the Court of Appeal in *Abrahams* which is set out most clearly in the judgment of Atkin LJ. The court, in my view, has to conduct a factual inquiry as to how the contract would have been performed had it not been repudiated. Its performance is the only counter-factual assumption in the exercise. On the basis of that premise, the court has to look at the relevant economic and other surrounding circumstances to decide on the level of performance which the defendant would have adopted. The judge conducting the assessment must assume that the defendant would not have acted outside the terms of the contract and would have performed it in his own interests having regard to the relevant factors prevailing at the time. But the court is not required to make assumptions that the defaulting party would have acted uncommercially merely in order to spite the claimant. To that extent, the parties are to be assumed to have acted in good faith although with their own commercial interests very much in mind.”

291. The relevance and applicability of that principle in the present case is not affected in any way by the recent decision of the Supreme Court in *Bunge SA v Nidera BV* [2015] UKSC 43; [2015] 3 All ER 1082, upon which ITV2 relies. The passage from [23] of the judgment of Lord Sumption JSC to which Mr Nambisan refers is concerned with an analysis of the decision of the House of Lords in *The Golden Victory* [2007] UKHL 12; [2007] 2 AC 353, where, in a case of anticipatory breach, the party in breach had a right to cancel the contract, which the House considered it would have exercised.

292. The present case is not concerned with a right to terminate or cancel the PA Agreement given by the Production Agreement, but with the question whether, had the Production Agreement with the claimant as producer not been terminated, ITV2 would have terminated the separate PA Agreement. On the material before the court, I do not accept that it would have done so. That would have been to act in a manner which was uncommercial in order to prevent the claimant from recovering substantial damages. In my judgment, what ITV2 would in all probability have done is take a tough line with Mr Andre and his manager and insist that the PA Agreement was performed in conformity with its existing terms. In those circumstances, as I have said, it seems to me that Mr Andre and Ms Powell would have realised that the attempt to replace the claimant as the production company was not going to work and would have found some sensible way of working with Mr Hendricks, especially since, as I also find, Mr Hendricks himself was always willing to find a way of carrying on with the business relationship.
293. Mr Nambisan also sought to maintain an argument that because as at the date of ITV's purported termination of the Production Agreement and hence, ITV's repudiatory breach, Mr Andre was refusing to perform his obligations under the PA Agreement and inducement letter, that Agreement was not in full force and effect meaning that ITV2 was under no obligation to commission the programmes under clause 2.1 of the Production Agreement. That argument was misconceived. ITV2 never sought to rely upon that refusal to perform as a repudiatory breach by PJA Promotions and Mr Andre of the PA Agreement and the Inducement Letter entitling ITV2 to terminate those agreements. Unless and until ITV2 had done so, on well-established contractual principles, that breach was "writ in water" and certainly, a refusal to perform did not mean that the PA Agreement was not in full force and effect.
294. Furthermore, the PA Agreement continued in full force and effect. It was not terminated. Indeed, ITV2 went on to make the other series as contemplated, albeit with ITV Studios as the producer. At the time when the Production Agreement was wrongfully terminated, the PA Agreement was in full force and effect and, accordingly, ITV2 was obliged to commission the various programmes. Mr Nambisan's submission that there was no obligation under the Production Agreement to "deliver" Mr Andre is simply wrong: ITV2 had agreed to commission the programmes and remained under the obligation to do so. If Mr Andre did not make himself available, that no doubt posed a problem for ITV2 vis-à-vis the claimant to whom it had undertaken to commission the programmes, but it did not relieve ITV2 of the obligation to do so. That is another reason why I consider that if ITV2 had not terminated the Production Agreement, it would have been anxious to hold Mr Andre and his company to their contractual obligations.
295. Once the causation argument is seen to be misconceived, the claimant is entitled to recover as damages for breach of contract the losses it has suffered as a consequence of that breach by ITV2 in wrongfully terminating the Production Agreement. As I have just held, if ITV2 had not terminated, what would have happened is that in effect, the bluff of Ms Powell and Mr Andre would have been called and, in all probability, Mr Andre would have performed his contractual obligations and continued filming Peter Andre: The Next Chapter and Peter Andre: Here to Help, for the remainder of the Term. Equally, it seems to me that in relation to the Kerry

Katona programmes, some compromise would have been worked out whereby ITV2 took four programmes of series 3 and the other series would have been filmed thereafter.

QuickBooks

296. In terms of the quantification of damages, there was a great deal of common ground between the forensic accounting experts. One area of disagreement concerned QuickBooks the computerised accounting package used by the claimant and its reliability. Both Mr Harman in his evidence and Mr Nambisan in his cross-examination of Mr Brown sought to contend that it was unreliable and that, as a consequence, the claimant's books and records were in a mess, so that evidence coming from the claimant as to costs and expenses incurred was not to be trusted. Mr Brown was not prepared to accept that criticism. He considered that Quickbooks was a package which recorded the core data well. There were some errors and adjustments which would have been picked up by the company's external accountants at year end when preparing the accounts for the financial year (as a small company the claimant was statutorily exempt from the requirement for an audit). The year end was 31 October 2011 and in the normal course, the external accountants would have been making the adjustments the following spring. However, because the Production Agreement was terminated in August 2011, removing the claimant's sources of income, the claimant had entered a Creditors Voluntary Arrangement in February 2012. Accordingly, no accounts had ever been produced for the year to 31 October 2011.
297. In those circumstances, Mr Brown had sought to take account of the adjustments to the QuickBooks data required, with the assistance of Mr Hendricks, whose third and fourth witness statements dealing with financial matters were produced pursuant to the Order of Cooke J dated 7 February 2014. Mr Brown had also spoken to the external accountants. I found Mr Brown's constructive evidence, which recognised the limitations of the data but sought to make such adjustments as were necessary in consequence, of far more assistance than the approach of Mr Harman which was essentially to cast doubt on the reliability of any of the internal accounting evidence or any evidence about financial matters emanating from Mr Hendricks, even though much of what Mr Hendricks said was not challenged in cross-examination.
298. Helpfully, the experts attached a Summary Table at section 11 of their Joint Statement dated 7 November 2014 which set out the figures that were agreed and those which were not agreed and I propose to follow that table in dealing with the various quantum issues.

Income under the Production Agreement

299. The main source of income under the Production Agreement was of course the licence fees which would have been generated from the programmes produced for the remainder of the Term. Because ITV2 had no contractual obligation to continue the Agreement into a third year in respect of the Kerry Katona programmes, damages are to be assessed on the basis that licence fees on those programmes would only have been earned in the first two years of the Term. The figure of £9,660,000 this produces requires reduction, presumably by £520,000 (i.e. £130,000 x4 under clause 2.4(iii) of

the Agreement) to reflect the fact that, as I have found, a compromise at four programmes for series 3 would have been reached.

300. Mr Brown's evidence is that another source of income which has to be taken into account is the costs of delivery of episodes in High Definition (HD) pursuant to clause 2.6 of the Agreement. Because no costs were actually paid by ITV2 due to termination, Mr Brown has taken the agreed "deemed" figure of £11,500 per episode for 2011 under the clause and used the same rate for the subsequent years as the best evidence of what would have been earned had the Agreement been performed. The resultant figure of £705,000 will require some reduction to take account of the fact that there would only have been four programmes of Kerry Katona: The Next Chapter series 3 and no third year for the Kerry Katona programmes.
301. Mr Harman's position on HD costs was difficult to understand. He relied upon instructions from ITV2 that any HD costs would only have been payable if certain conditions were met under the Agreement which were not satisfied and said he had seen no evidence of the level of HD costs actually incurred. Accordingly, he allowed nothing for HD costs. That approach ignored that conditions had not been met and HD costs not in fact incurred because ITV2 had wrongfully terminated the Agreement. The exercise in assessing damages is one of assessing the net profits which would have been earned if the Agreement had been performed and the various episodes delivered, in which case ITV2 would in all probability have required delivery in HD. Furthermore, given that the production costs and expenditure for which allowance is made against the income in order to arrive at the net figure does include the cost of producing episodes in HD, it seems to me that the HD costs recoverable from ITV2 do need to be brought into the balance on the income side of the equation.
302. Ultimately it was agreed that no allowance should be made for development funding in assessing income so that although Mr Brown originally included a figure for this, it is now left out of account.

Production costs

303. The base production costs taken by both experts in the table were £5,462,599 and although Mr Harman continued to cavil at the accuracy of the books and records in his evidence, I propose to take and accept that figure. On the basis that there would not have been a third year of the Term in respect of the Kerry Katona programmes, those production costs fall to be reduced by £994,392. The other item within the production costs was the Kerry Katona appearance fees which (because ITV2 did not have a separate contract with her unlike the position with Mr Andre) were included in the licence fees to be paid to the claimant and which therefore require to be deducted from income.
304. Mr Hendricks' evidence was that of the £10,000 performance fee per episode agreed with her, £5,000 was held back and not paid to her, but would have been paid to her when she came out of bankruptcy. The allowance that is to be made for the performance fee obviously falls to be reduced to the extent that only four episodes of series 3 would have been accepted by ITV2 and there would have been no third year of the Term.

Overheads

305. The starting point 27 month overhead costs were agreed between the experts as £1,380,281. One area that was particularly in issue was whether that figure had to be reduced to remove any editing suite and training costs payable in years 2 and 3 of the Term. Mr Brown explained, following discussions with Mr Hendricks, that in year 1 £25,462 was payable to Cutting Edge, for whom an employee called Mr Kruger set up an editing suite for the claimant and trained a Mr Lever, an employee of the claimant, in supporting the equipment. Mr Kruger returned to Australia and, based on Mr Hendricks' explanation, Mr Brown assumed that this was a one-off cost which would not be repeated, so he considered that the overheads fell to be reduced by £25,462 per year for the second and third years, £50,924. Mr Harman's position was that allowance should still be made within the overheads for other costs at the same level in the subsequent years, but I found that evidence unimpressive. Mr Harman had no basis for challenging that the Cutting Edge costs were one-off and his suggestion that there might have been other costs not accounted for was pure speculation. In my judgment the overheads fall to be reduced by £50,924.
306. Mr Brown also considered that an allocation for the costs of development work of £282,844 should be excluded from the overhead costs. Although Mr Harman did not agree this, given that the cost of development funding is not being pursued as part of the claim, the costs of development should clearly be excluded from the overheads for which an allowance has to be given against income.
307. Mr Harman sought to include within his assessment of overheads various other figures. One of these was in respect of the remuneration of Mr Hendricks by way of executive producers' fees, in the sum of £178,750. Of this £100,000 was shown in the books as executive producers' fees paid on 31 December 2010. However, that appears to have been in error. In his fourth witness statement Mr Hendricks explained that he would not have received any executive producers' fees under the Production Agreement because Ms Berendsen was employed by the claimant as executive producer and Mr Hurdle as head of production. Mr Brown said that Mr Hendricks had explained that the £100,000 paid to him was repayment of a director's loan. I see no reason not to accept that explanation, which seems much more likely than that Mr Hendricks would have paid himself such a substantial amount by way of executive producer's fees at the outset of the Production Agreement, completely out of line with the much more modest fees he had received in earlier years. I also see no reason not to accept his evidence (on which he was not challenged in cross-examination) that he was not going to receive any executive producer's fees as Ms Berendsen and Mr Hurdle were performing that role. The fees payable to their respective companies are already included in the overheads, so no further allowance needs to be made.
308. As I have said above, there were errors in the QuickBooks data which required adjustment, but having made the necessary adjustments, in particular in relation to petty cash, Mr Brown was satisfied that no further adjustment was required. Although items had been misposted in the data giving an apparent discrepancy on the petty cash balance, the bottom line was correct and the relevant items of expense were accounted for elsewhere. In contrast, Mr Harman persisted in his position that a further sum by way of petty cash balances of £262,503 should be deducted as part of the overheads. According to the Joint Statement he had concerns about the explanations provided by Mr Brown. It did not seem to me that any of those concerns had any validity. To the

extent that Mr Brown's explanations, which I accept, left an explained balance of some £4,700, that was clearly *de minimis* and can be safely ignored.

309. Mr Harman also sought to make a deduction of £84,400 in respect of depreciation. However, as Mr Brown pointed out on the basis of Mr Hendricks' evidence in his fourth witness statement, the equipment which the claimant used and would have continued to use to perform the contract was all newly purchased and no further equipment would have required to be purchased. In the circumstances, I accept his evidence that no deduction fell to be made in respect of depreciation or capital expenditure. Mr Harman's suggestion that some of the capital expenditure on equipment of £400,000 should be taken into account in reducing the damages because the claimant could have put the equipment to use elsewhere not only trespassed on a matter which is for the court, but was wrong in law, as I pointed out when he gave that evidence.

Inflation

310. Mr Harman applied an increase to costs of 2% per year in years 2 and 3 to reflect inflation. In his oral closing submissions Mr Mallin did not press the contrary argument very hard, it seems to me correctly. It may be however that the figure of £187,491 requires adjustment to reflect matters such as the four programmes for Kerry Katona: The Next Chapter series 3 and the fact that a third year of the Term should not be taken into account for Ms Katona's programmes.

Actual costs and unused advance

311. Figures for wasted costs and overheads which should form part of the damages were agreed between the experts at £386,056 and £126,766. A deduction of £205,346 was also agreed in respect of unused advance.
312. That left the issue of the rent incurred for the balance of 2011 after termination of the Production Agreement. Mr Brown relied upon the information in QuickBooks that some £200,000 plus VAT liability to pay rent was incurred by the claimant to Bray Management Limited, a related company and from the supervisor of the CVA that £225,000 inclusive of VAT remained outstanding for the period September to December 2011. Accordingly, this was not a cost which had in fact been paid, apart from a small amount, but a liability which would have to be discharged at some stage. Mr Harman did not make any allowance for rent, on the basis that there was no evidence it had been paid, although he accepted that it might be paid hereafter, subject to the claimant mitigating its loss.
313. There was another point of difference between the experts in relation to the amount of rent that would have been payable going forward. Mr Brown took this as £810,000 at £30,000 per month for 27 months on the basis of Mr Hendricks' evidence that the rent being charged by Bray Management Limited had been increased to £50,000 from £30,000 per month in April 2011 to cover a capital repayment of £100,000 which it had to make to HSBC in respect of its mortgage in August 2011. Mr Hendricks said that once that capital repayment had been made by Bray Management Limited, the rent would have dropped back to £30,000 a month. Mr Harman on the other hand took

the figure of £50,000 per month for the whole 27 month period. I see no reason not to accept Mr Hendricks' evidence, about which he was not cross-examined, in which case the correct figure is Mr Brown's £810,000. However, a logical consequence as I see it is that the outstanding rent for the period September to December 2011 should be reduced from £200,000 to £120,000, but since no submissions were addressed on that point, I will allow the parties the opportunity to make submissions.

314. As I have indicated, a number of aspects of the quantification of damages may require adjustment in the light of my findings. To the extent that the parties are unable to agree these, I will give liberty to apply. The outstanding invoice must clearly be paid by ITV2.

The counterclaim

315. Since I have concluded that it was ITV2 not the claimant which was in repudiatory breach of the Production Agreement, the counterclaim for alleged diverted time lost by ITV2 executives and employees falls away. However, even if I had concluded that the claimant was in repudiatory breach, I would have held that the counterclaim was not recoverable for two reasons with which I can deal shortly.
316. ITV2 itself did not employ any of the relevant employees whose time was said to have been diverted. According to its accounts for the year to 31 December 2011, they were all employed by other companies and the costs of their employment on ITV2 business was recharged to ITV2 by ITV Plc. The total of staff costs recharged to ITV2 in 2011 was set out in the annual accounts as £1,909,000. However, ITV2 did not produce any breakdown of the charge paid for any of the individual employees and, as Mr Harman accepted, it was a reasonable assumption that it could have done. However, the information about the salaries and the recharge for individual employees was said to be confidential and was not disclosed by ITV2 or ITV Plc. Indeed, the counterclaim was not based upon the wasted actual salary costs of the employees recharged to ITV2 but on a notional benchmark by reference to what comparable executives were earning at other broadcasters, in fact as I understand it, the BBC.
317. This benchmarking approach to assessing the cost to ITV2 of diverted time was one of the three approaches adopted by Mr Harman in his expert reports to assess that cost, the other two being a cost-based approach and a profit-based approach. It is not necessary to dwell on any of these. All three were wholly artificial constructs adopted to avoid the fundamental difficulty that, for reasons best known to itself, the ITV Group chose not to disclose or provide evidence as to the actual salaries of the executives or the actual recharge for each such executive which ITV2 had to pay.
318. That gives rise to the first reason for rejecting the counterclaim. The evidence about the actual salaries and a breakdown of the recharge was evidence that it would have been reasonable for ITV2 to produce and, having failed to do so, but relying instead on an artificial construct, the court is entitled to conclude that ITV2 has chosen not to make out its case. The relevant principles were stated by Wilson LJ in *Aerospace Publishing Limited v Thames Water Utilities Limited* [2007] EWCA Civ 3; [2007] BusLR 726 at [86]:

“I consider that the authorities establish the following propositions: (a) The fact and, if so, the extent of the diversion of staff time have to be properly established and, if in that regard evidence which it would have been reasonable for the claimant to adduce is not adduced, he is at risk of a finding that they have not been established. (b) The claimant also has to establish that the diversion caused significant disruption to its business. (c) Even though it may well be that strictly the claim should be cast in terms of a loss of revenue attributable to the diversion of staff time, nevertheless in the ordinary case, and unless the defendant can establish the contrary, it is reasonable for the court to infer from the disruption that, had their time not been thus diverted, staff would have applied to activities which would, directly or indirectly, have generated revenue for the claimant in an amount at least equal to the costs of employing them during that time.”

319. The second reason why I would have rejected the counterclaim also appears from that passage. ITV2 would have to demonstrate that the diversion of time caused a significant disruption to its business. It cannot do so. About 50% of the alleged diverted time consists of the time of the in house lawyers (40% Ms Clarke alone) but they were not generating revenue but rather providing support services. There was no evidence at all that, because Ms Clarke and her colleagues were diverted into dealing with the dispute with Mr Hendricks, the actual revenue generators in ITV2 had to engage in more non-revenue generating activities. The alleged diverted time for the other executives is often very short amounts of time which also does not begin to demonstrate a significant disruption to the business.

Conclusion

320. For all the reasons set out above, I have concluded that the claimant was not in repudiatory breach of the Production Agreement and that the contract was not frustrated. Rather, the purported termination was a repudiatory breach by ITV2 in respect of which it is liable for substantial damages to the claimant. The claimant is also entitled to recover the amount of its outstanding invoice in full. The counterclaim is dismissed.