Neutral Citation Number: [2020] EWHC 1072 (Comm)

Case No: E50CF007

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
CIRCUIT COMMERCIAL COURT (QBD)

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 5 May 2020

Before:

HIS HONOUR JUDGE KEYSER Q.C.
sitting as a Judge of the High Court

- -

Between:

QUANTUM ADVISORY LIMITED	**Claimant**
- and -	
QUANTUM ACTUARIAL LLP	**Defendant**

- -
- -

Guy Adams (instructed by **Stuart Brothers Solicitors**) for the **Claimant**
Andrew Butler QC (instructed by **Acuity Legal**) for the **Defendant**

Hearing dates: 4, 5, 6 & 7 February 2020

- -

Approved Judgment

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

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HIS HONOUR JUDGE KEYSER Q.C.

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be on Tuesday 5th May 2020 at 2 p.m.

JUDGE KEYSER QC:

The Background

1. The story begins with a company called Quantum Advisory Limited; it was not, however, the same entity as the company that now bears that name, the claimant, and I shall refer to it as Old Quad. Old Quad carried on business as a provider of administrative, actuarial and related services, primarily for defined benefit pension schemes. It had been formed in 2000 by a group of people who had worked together at PricewaterhouseCoopers: Martin Coombes, Peter Baldwin, Andrew Reid-Jones and David Deidun. Mr Coombes was the single largest shareholder and the managing director.

2. In 2004 Old Quad was instrumental in setting up a second company, Renaissance Pension Services Limited ("RPS") to carry on a similar business. RPS was a joint venture between Old Quad and a team, led by Robert Davies and including Mark Vincent and Stuart Price, who had been colleagues at Bacon & Woodrow. The principal shareholders in RPS were Old Quad and Robert Davies. The company was incorporated on the basis that, after an initial three-year period of business development in which RPS would attract its team's former clients, there would be a merger of the businesses of Old Quad and RPS into a single entity. Meanwhile, all engagements with RPS's clients were formally entered into by Old Quad, which then accounted to RPS for an agreed proportion of the fee income.

3. A third company, Quantum Financial Consulting Limited ("QFC"), was set up in 2000 for the purpose of undertaking regulated financial services work associated with the pensions consultancy and administration work carried out by Old Quad. For regulatory reasons, Mr Coombes was the majority shareholder in QFC, but there was an understanding that his shareholding was held on trust for Old Quad.

4. These three companies—Old Quad, RPS and QFC—are conveniently referred to as the legacy companies, and their clients as the legacy clients.

5. By 2007 two particular matters fell to be addressed. First, there was the intended merger of the businesses of Old Quad and RPS. Second, however, the interests and ambitions of those involved in the legacy companies had begun to diverge. In particular, while Mr Coombes, wanted to diversify, the other directors and shareholders wanted to focus on developing the existing business. For this and other reasons, it was agreed that there would be a reorganisation of the businesses. The particular difficulty that this presented was that the value of Mr Coombes' shareholding in Old Quad was such as to make it unaffordable for the others to buy him out. It was also thought that, regardless of affordability, great difficulties would attend attempts to fix a price for any buy-out. A method of reorganisation was devised to get around that problem.

6. The gist of the reorganisation was as follows (it is explained in considerable detail in a letter dated 14 November 2007 sent by Mr Coombes to HMRC requesting clearance under tax legislation). The business of the legacy companies would be continued by a new entity, which would seek to develop and expand it. However, the goodwill of the existing legacy business would be ringfenced: the legacy clients would remain the clients of the legacy companies or their assigns, but they would be serviced on behalf

of the legacy companies by the new entity, which would then receive a fee representing the cost to it of providing the services to the legacy clients. Thus the new entity would not receive any profit element for servicing the legacy clients. Instead, the benefit to the new entity was that it would receive a turnkey business: it would take over all of the staff of the legacy companies and have the full use of their premises and equipment and the Quantum brand name, as well as having an established client base on which to build new business. Thus it would be enabled to develop its own business without the usual costs and risks associated with starting a business from scratch.

7. It was originally intended that this basic model would be put into effect at the same time in respect of all legacy companies. In the event, however, it was implemented in two stages, dealing first with the unregulated business of Old Quad and RPS and later with the regulated business of QFC. This is not of fundamental importance to the case, although it does mean that different agreements govern the regulated and unregulated businesses.

8. The new entity for the purposes of this arrangement was a limited liability partnership, Quantum Actuarial LLP. This is the defendant; I shall refer to it as "the LLP". The substance of the arrangement was put into effect as regards the unregulated business in April 2007, but it was formalised by a written agreement ("the Services Agreement") entered into between Old Quad and the LLP on 1 November 2007. The Services Agreement provided that the work relating to the pensions consulting, actuarial, administrative and investment services that Old Quad provided to its legacy clients would be carried out by the LLP and that Old Quad would pay to the LLP 57% of the fee income received from those clients, a percentage calculated to represent the LLP's costs of servicing the legacy clients. The LLP was given the right to use the Quantum brand and the premises, personnel and equipment of the existing business. The Services Agreement contained provisions restraining the LLP from acting for Old Quad's legacy clients on its own behalf. The terms of the Services Agreement will be considered in some detail below.

9. The other side of the reorganisation was carried out between 31 December 2007 and 2 January 2008. The claimant, which was then called Pascal Company Solutions Limited and was wholly owned by Mr Coombes, bought the entire issued share capital of Old Quad and of RPS. Then the entire business and assets of Old Quad and RPS were transferred to the claimant, subject to outstanding liabilities. And the claimant and Old Quad swapped names: the claimant changed its name to Quantum Advisory Limited, and Old Quad changed its name to Pascal Company Solutions Limited. At this point, Old Quad and RPS effectively drop out of the story. Old Quad was dissolved on 25 May 2011. I shall refer to the claimant as "New Quad".

10. The regulated business of QFC was dealt with in substantially the same way. However, because the conduct of the business was subject to regulation by the Financial Services Authority and because clients' engagements had to be with an entity that was authorised by the FSA, there was a delay while the LLP obtained authorisation; and it was necessary to arrange matters between QFC and the LLP in such a way that the LLP would be acting for clients on its own account. Accordingly, in February 2009 the LLP and QFC entered into the Introducer's Appointed Representative Agreement ("the Introducer's Agreement"), under which the LLP was obliged to pay to QFC 43% of the net commission or other fee income it received in

respect of the provision of investment advice and insurance mediation services to the legacy clients who had been introduced to the LLP with the intention that it should provide such services to them. The Introducer's Agreement was novated between New Quad and the LLP by a deed of novation dated 31 March 2011, and QFC dropped out of the picture. The result, accordingly, is that the LLP provides regulated services to the legacy clients but accounts to New Quad for the profit element of the fee income; so the LLP provides the services to the legacy clients on what is intended to be, for it, a break-even basis.

The Dispute

11. New Quad and the LLP conducted their affairs according to the Services Agreement and the Introducer's Agreement without any real difficulty for a number of years. In view of some of the arguments advanced in these proceedings, this simple fact is worth noting at the outset.

12. However, the arrangement to which the two agreements gave effect bred dissatisfaction, if not resentment, on the part of those concerned in the LLP. The principal reason for this had been foreseen in 2007 by Mr Coombes, who had remarked on it at the time in an email to Mr Baldwin: with the passage of time, the advantages conferred on the LLP by the structure of the reorganisation (that is, the provision to it of a turnkey business) featured less prominently in the thoughts of the members of the LLP than did the fact that the LLP was carrying on a significant part of its business activities on a basis that provided profit to New Quad but none to itself. A further reason for the dissatisfaction may possibly have been the perception that retention of 57% of the fee income from the legacy business was not, after all, or was no longer, sufficient fully to cover the costs of servicing that business.

13. Therefore in 2018 the LLP took advice from solicitors and counsel as to the terms of the Services Agreement and, more specifically, as to whether it remained enforceable. On 11 June 2018 the LLP wrote to the directors of New Quad, explicitly setting out the tenor of the advice received. Three main issues were identified. First, New Quad was asked to state whether, and if so how, the Services Agreement had been novated to it from Old Quad. The letter said that the LLP had never received notice of any novation or assignment. Second, the letter said that, insofar as the LLP was now providing services to some legacy clients under direct retainers rather than pursuant to retainers with Old Quad or New Quad, those services could not as a matter of contractual interpretation be governed by the Services Agreement. Third, it was contended that the provisions of the Services Agreement amounted to an unreasonable restraint of trade. The letter said that, in view of the advice received, the LLP would no longer account for any money in respect of legacy clients for whom it acted under a direct retainer, and that the LLP would henceforth consider itself free to contract with whomever it wished, without restraint.

14. That letter led New Quad to commence these proceedings, seeking a declaration that the Services Agreement remains in full force and effect as between the parties, and an injunction to restrain the LLP from acting in breach of the Services Agreement or its duties of loyalty and good faith that are said to arise as a consequence of it. During the proceedings, the status quo has been preserved by an interim injunction.

15. In response to the claim made by New Quad, the LLP denies that New Quad is a party to the Services Agreement or has any standing to enforce it. By its counterclaim it claims from New Quad payment of all the moneys New Quad has ever received from legacy clients whom the LLP has serviced under the Services Agreement; these moneys, amounting to more than £12 million, are said to be recoverable on the ground of unjust enrichment. The LLP further contends that, if it is indeed bound by the Services Agreement, its provisions amount to an unreasonable restraint of trade. It also contends that those of the legacy clients for whom it acts under a direct retainer are now to be treated as the LLP's own clients, for whom it may act for profit outside the terms of the Services Agreement.

16. Issues also arise under the Introducer's Agreement. New Quad seeks an account of the moneys due to it. The LLP denies that any account ought to be ordered. More importantly, the LLP contends that the Introducer's Agreement is and always has been void for uncertainty because it lacks an identifiable list of clients, and by its counterclaim it seeks repayment of all the moneys it has paid to New Quad under the Introducer's Agreement, a sum in excess of £2 million, as having been paid by mistake.

17. The parties agreed a list of issues, which I have found too long and detailed to be useful. In my view, the main issues, which will be subject of some refinement in the discussion below, are the following:

- Was the Services Agreement novated from Old Quad to New Quad?
- Has the entry by the LLP into direct engagements with certain legacy clients had the effect that those clients are now to be treated as clients of the LLP and not as New Quad's legacy clients, with the result that New Quad is not entitled to a share of the fee income from those clients under the Services Agreement?
- Are covenants by the LLP in the Services Agreement unenforceable as being in unreasonable restraint of trade?
- Is the Introducer's Agreement void for uncertainty?
- If the Introducer's Agreement is not void, is New Quad entitled to an account of moneys due to it under the Introducer's Agreement?

18. This list omits one substantial issue that Mr Adams for New Quad insisted was, and Mr Butler Q.C. for the LLP insisted was not, important, namely the question whether the Services Agreement created a relationship of principal and agent between Quad (whether Old Quad or New Quad) and the LLP. I have come to the view that it is unprofitable and unnecessary to consider that issue, for reasons that I shall explain in due course.

19. In the following discussion of the issues, I have regard to all of the witness evidence and to all of the documentation to which I have been referred. However, I shall only make mention of such evidence as I consider particularly useful for the purpose of deciding the issues.

20. I shall make only a brief general comment on the evidence. Each side called three witnesses: for New Quad, they were Mr Coombes, Mr Baldwin and Mr Russell Powis, who was a non-executive director of Old Quad; for the LLP, they were Mr Reid-Jones, Mr Vincent and Rhidian Williams. I have found no reason to doubt the honesty of any of them. More than that: it seems to me that each side, while properly acting in its own interests, has sought to act towards the other in good faith. I think it important to make this point, because the LLP's stance necessarily involves seeking to establish that it is, to a lesser or greater extent, not obliged towards New Quad under the Services Agreement and the Introducer's Agreement. The evidence persuades me that, in adopting that stance (whether rightly or wrongly), the LLP has sought to act openly and on the basis of advice and has not engaged in any underhand, sneaky or surreptitious practice. Similarly, it seems to me that New Quad, while maintaining what it sees (whether rightly or wrongly) as its rights, has also sought to adopt an approach that it regards as fair and reasonable to all concerned. In short, if and insofar as the present dispute has engendered mutual suspicions and resentments among honest and reputable businessmen, that is a consequence much to be regretted.

21. Before I turn to the issues, I shall refer in more detail to the provisions of the Services Agreement, which are central to this case. I shall deal with the Introducer's Agreement later.

The Services Agreement

22. The Services Agreement referred to Old Quad as "Quad" (though "Quad" was defined to mean what I am calling Old Quad and to "include any other party to which this Agreement is novated in its place") and referred to the defendant as "the LLP". The Recital, which according to clause 1.8 formed an operative part of the Agreement, stated:

> "Quad has resolved to appoint the LLP to carry out certain responsibilities for and on behalf of Quad in relation to its business, and the LLP agrees to carry out such responsibilities (the Services, as defined below) in consideration for the payment by Quad of the Administration Fees and any other payments due to Quad pursuant to this Agreement."

23. Clause 2 contained the following provisions:

> "2.1 With effect from the Effective Date [defined to mean 6 April 2007], Quad confirms the appointment of the LLP to be (subject to the provisions of clause 2.8 below) solely responsible for the provision to Quad of the services set out in Schedule 7 to this Agreement to the extent that they:- (a) relate to any engagements of Quad by the Clients, or (b) are referred to Quad or the LLP by any of the Introducers during the Extended Period [defined to mean the period from 6 April 2007 until 31 March 2008] (save where any Introducer receives a bona fide substantive financial reward from the LLP), or (c) relate

to the Pipeline Business, together with such other services as the parties may agree from time to time in writing that the LLP is to perform for Quad (the 'Services'). Quad confers upon and grants to the LLP such power and authority as is necessary or desirable for providing the Services. The LLP hereby accepts the appointment to provide the Services to Quad, subject to the terms and conditions set out in this Agreement.

2.2 The LLP shall not, during the course of this Agreement and for a period of 12 months after its expiration or termination for whatever reason, directly or indirectly:-

2.2.1 solicit or entice away (or attempt to solicit or entice away) any Client in connection with any Services; or

2.2.2 obtain instructions for any Services from any of the Clients or undertake any Services for any of the Clients; or

2.2.3 undertake any Services in relation to either the Pipeline Business or any work introduced by any of the Introducers during the Extended Period without first having referred such matters to Quad other than pursuant to the provisions of this Agreement;

It is acknowledged that the LLP shall not be in breach of these provisions to the extent that Quad has been given the opportunity to undertake any such Services and has declined the opportunity to do so in writing.

2.3 If the LLP commits any breach of clause 2.2 above then it agrees to pay to Quad on demand an introduction fee equal to 2.15 x the Actual Revenue [defined to mean the highest revenue, net of VAT, received by any "Relevant Company", namely Old Quad, New Quad, the LLP and QFC].

2.4 It is acknowledged that the damages payable pursuant to clause 2.3 above does not preclude Quad from applying to Court for an injunction to restrain a breach of clause 2.1 [sic; presumably clause 2.2]. …

2.5 Each party acknowledges that the provisions of clauses 2.2 & 2.9 are no more extensive than is reasonable to protect the interests of Quad and that the level of liquidated damages set out in clause 2.3 represents a genuine pre-estimate of the anticipated loss which would be incurred by Quad in the event of such breach.

2.6 The restrictions contained in clause 2.2 & 2.9 (each of which is a separate obligation) are considered reasonable by the parties (each of the parties having taken, if required, separate legal advice) in all the circumstances as necessary to protect the legitimate interests of the other party; but if any such restriction shall be judged by a competent court to be void but would be valid and enforceable if certain words were deleted or the period reduced or any other amendment made, such restriction shall apply with such modification to make it valid and effective.

…

2.9 In addition to the restraints on the part of the LLP contained in this clause 2.2 above, the LLP shall not during the period from the date of this Agreement to and including the expiration of the Extended Period directly or indirectly solicit or endeavour to solicit or obtain instructions for Services from any of the Prospects [i.e. those identified by Old Quad as potential new clients in the twelve-month period before the making of the Services Agreement] other than for the benefit of Quad pursuant to the provisions of this Agreement save that this provision shall not apply to P&O.

2.10 For the purposes of this Agreement, the provisions of clause 2.1 shall not apply to work undertaken for any Clients where Quad acknowledges in writing to the LLP that both of the following conditions are satisfied:

2.10.1 the LLP employs or directly engages one or more individuals who previously acted as a scheme consultant or scheme actuary to a Client to the extent that any such employment or engagement does not relate to any person employed or directly engaged by Quad prior to the Effective Date; and

2.10.2 the sole reason for any additional work emanating from any such Client is the engagement by the LLP of the individual referred to in 2.10.1.

In such circumstances such discrete items of work shall be carried out by the LLP and invoiced by the LLP without any payment being due to Quad. For the avoidance of doubt, it is agreed that clause 2.10.1 shall not include circumstances where the LLP engages one or more individuals pursuant to an agreement or

> arrangement between the LLP and a third party for the provision of services to or on behalf of the LLP."

24. Schedule 7 defined the "Services" as "Provision of pensions consulting, actuarial, administrative and investment services". It contained a long list of examples of what fell within the definition. Clause 1 defined "Clients" to mean:

> "the clients and schemes to which Quad has provided any Services prior to 1st April 2007 together with such clients as are attributable to the Pipeline Business and any parties introduced either to Quad or the LLP by any of the Introducers during the Extended Period including (without limitation) those clients and schemes as are set out in Part 1 of Schedule 2 to this Agreement which expression shall include (where appropriate) any companies within the same group of companies as the relevant Client from time to time and any pension schemes sponsored by any Clients and any new entrants into such schemes".

The "Pipeline Business" was defined to mean "any engagements by Quad entered into with any of the Clients or Prospects or which are referred to Quad by any of the Introducers in connection with the provision of Services during the Extended Period". "Introducers" was defined to include all Clients, all those identified in Schedule 4 to the Services Agreement, and everyone else with whom Old Quad had had face to face contact for the purposes of engendering a commercial relationship in the twelve months immediately prior to 1 April 2007.

25. Clause 5 and Schedule 8 provided for the TUPE transfer of Quad's employees to the LLP. Schedule 8, which recorded that the agreement "envisage[d] that subsequent to the commencement of this agreement, the identity of the provider of the Services (or any part of the Services) may change (whether as a result of termination of this agreement, or part, or otherwise) resulting in a transfer of the Services in whole or in part" (paragraph 3.1) also contained detailed provisions dealing with employment upon such a Service Transfer.

26. Provisions relating to the supply of the Services were contained in clause 7, including the following:

> "7.1 The LLP shall provide the Services to Quad subject to the terms and conditions set out in this Agreement.
>
> 7.2 Quad shall at its own expense from time to time supply the LLP with all necessary information, data, documentation and other records and materials relating to the Services (the 'Input Documentation') within sufficient time to enable Quad [presumably this should read 'the LLP'] to provide the Services in accordance with this Agreement. The parties hereby acknowledge and confirm that as at the date hereof Quad has provided to the LLP all such Input Documentation as may be necessary for the LLP to commence provision of the Services to Quad. In

addition, Quad shall make available the Assets to the LLP in order to enable it to perform the Services PROVIDED HOWEVER THAT such consent to use the Assets shall be terminated immediately upon the termination or expiration of this Agreement.

7.3 The LLP shall provide the Services in a professional, competent, diligent and efficient fashion in accordance with Best Industry Practice and shall devote such time and efforts as it deems reasonably necessary for the efficient operation of Quad's business.

7.4 The LLP shall in providing the Services comply with any statutory, regulatory or professional requirements as well as any other reasonable requirements made known to it from time to time by Quad which shall include (but not be limited to) the implementation of any actions arising from any reviews of service standards by Quad with any Clients or Introducers. The LLP shall consider in good faith any recommendations made by Quad in the LLP's performance of the Services and the LLP shall be deemed to accept any such recommendation unless the LLP promptly notifies Quad in writing of the LLP's rejection of any such recommendation and provides reasonably detailed reasons for such rejection.

7.5 Without prejudice to the generality of the LLP's obligations contained in this Agreement, the Services shall be performed to a standard no less favourable than that provided by the LLP from time to time for other clients in respect of services the same as or similar to the Services."

Clause 1 and Schedule 1 defined "Assets" as "All assets owned or leased by Quad to the extent that they are used on or prior to the date of this Agreement for the provision of the Services to the Clients or for any reason relating to the business of Quad".

27. Some of the provisions of clause 8 are also relevant in respect of the provision of the Services:

"8.1 With effect from the Effective Date, but subject to the proviso to this clause and to clause 8.3 below, the LLP is authorised to and agrees to exercise the powers and authorities conferred upon Quad to the extent that such powers and authorities relate or are ancillary to, arise from or are requisite for the provision of the Services PROVIDED THAT, in performing the duties and exercising the powers and authorities referred to in this clause the LLP shall:

> 8.1.1 have no power or authority whatsoever to bind or commit Quad, other than pursuant to a power of attorney or other written authority granted by Quad; and
>
> 8.1.2 be subject to the restrictions set out or referred to in this Agreement.
>
> 8.2 The LLP reserves the right to request specific approval by Quad before taking any action whether or not such action constitutes part of the Services and shall not be in breach of this Agreement if it requests such approval but such approval is not or has not been granted and it does not therefore take the action for which approval was requested.
>
> 8.3 Quad shall have the right at any time while this Agreement subsists to serve notice on the LLP prescribing limitations on the duties, powers, authorities and discretions exercisable by the LLP hereunder and the time at which such limitations shall take effect.
>
> 8.4 The LLP shall use all reasonable endeavours to avoid doing anything which might prejudice or bring into disrepute in any manner the business or reputation of Quad or any of its directors.
>
> 8.5 The LLP shall allow Quad, upon demand from any director of Quad, immediate access to any Information requested."

"Information" was defined to mean "such data, records, files or information in the possession of the LLP in relation to the Clients and the Services".

28. Clause 9 contained provisions relating to finance. Clause 9.1 provided for the LLP's remuneration:

> "In consideration of the provision of the Services by the LLP to Quad, the LLP shall on the last working day of each month invoice Quad in the sum of 57% of the aggregate of the amounts Quad has invoiced to the Clients and received payment for during each respective month for the Services … together with any Commissions received by Quad for that month to the extent that the Services were carried out on or after 1st April 2007 ('the Administration Fees'). For the avoidance of doubt the amounts referred to above shall include payments and Commissions received in respect of QFC matters. …"

(This arrangement reflected the fact that it was envisaged that the Clients would contract directly with Quad, not with the LLP; therefore, as a matter of form, the LLP

would seek payment from Quad. The formal position was reversed under the Introducer's Agreement in respect of regulated business: the Clients there contracted with the LLP, which accounted to QFC, and subsequently to New Quad, for the relevant percentage of fees.) Clause 9.8 made provision for the advance of set-up costs by Old Quad to the LLP:

> "The LLP shall invoice Quad in respect of set up fees in the sum of £250,000 within 28 days of the date of this Agreement. Quad shall be entitled to a reduction of the amounts invoiced in accordance with clause 9.1 above to such amount as equates to the set up fees invoiced to it by the LLP. This reduction shall be effected by the LLP declining to invoice and waiving any future entitlement to invoice in respect of any period after 1st April 2009 which reduction and waiver shall have effect until such time as the full reduction has taken effect. In the event of this Agreement being terminated prior to the full reduction being achieved, then the difference between any reduction achieved and the amount invoiced in respect of set up fees shall become immediately due and payable from the LLP to Quad."

29. Clause 15 contained extensive provisions regarding the term and termination of the Services Agreement. Clause 15.1 provided that either party might terminate the agreement by written notice in certain specified events, which concerned the insolvency of the other party. Clause 15.2 provided that Old Quad might terminate the agreement if the LLP committed a material breach of the agreement (and, if the breach were remediable, failed to remedy it within 30 days). Clause 15.3 gave to each party the right to terminate the agreement on three months' written notice; however, clause 15.4 provided that no such notice could be effective to terminate the agreement before the expiry of 99 years from the Effective Date: that is, before 6 April 2106. Clause 15.5 gave to Old Quad the right to terminate the agreement by three months' notice in two specified circumstances, which concerned respectively the cessation of involvement of certain key personnel in the LLP and the fall of Old Quad's income under the agreement below specified levels. The effect of clause 15 as a whole was that the LLP could only bring the agreement to an end on the occurrence of one of the events indicating Old Quad's insolvency; though the Services Agreement did not purport to derogate from the LLP's rights under the general law to terminate for a repudiatory breach of contract by Quad.

30. Schedule 9, headed "Exit Plan and Service transfer arrangements", contained detailed provisions, unnecessary to set out here, but the purpose of which was described in paragraph 2.1:

> "The LLP is required to ensure the orderly transition of the Services from the LLP to Quad or any Replacement Provider in the event of any termination (including partial termination) or expiry of this agreement. This Schedule sets out the principles of the exit and service transition arrangements which are intended to achieve this and upon which the Exit Plan shall be based."

The "Exit Plan" was required to facilitate the transition of the Services from the LLP to the Replacement Provider (if Old Quad outsourced them to such a third party) or to Old Quad itself (if it decided to insource them).

31. The following further clauses of the Services Agreement are worth noting:

> "18. The LLP and Quad are not partners with each other and neither the terms of this Agreement nor the fact that Quad and the LLP or anybody affiliated to the LLP may have joint interests in any one or more investments shall be construed so as to make them partners of each other or impose any liability as such on either of them."
>
> "20.1 The LLP may not assign, sub-contract, novate or otherwise dispose of any or all of its rights and obligations under this Agreement without the prior written consent of Quad other than in accordance with this Agreement.
>
> 20.2 Quad may assign, novate or otherwise dispose of any or all of its rights and obligations under this Agreement to any third party of its choice without consent."

32. Clause 17 contains an "entire agreement" provision:

> "17.1 This Agreement and the documents referred to in it constitute the entire agreement between the parties and supersedes all prior arrangements, written or oral with respect thereto. All other terms and conditions, expressed or implied by statute or otherwise, are excluded to the fullest extent permitted by law.
>
> …
>
> 17.3 If any of the provisions of this Agreement are held by any competent authority to be invalid or unenforceable in whole or in part, the validity of the other provisions of this Agreement and the reminder [scil. remainder] of the provisions in question shall not be affected."

33. I turn to the issues arising in connection with the Services Agreement and the Introducer's Agreement.

Is New Quad a party to the Services Agreement by Novation?

34. It is common ground, accepted at trial by both parties, that Old Quad's business and assets were assigned to New Quad.

35. However, the LLP denies that New Quad ever became a party to the Services Agreement by novation. It says that, whatever might be the true construction of clause 20.2, novation is necessarily a matter of agreement between the parties to a contract. In the present case, there was no formal agreement for novation. And the LLP contends that no novation occurred by conduct or by implication because it did not know that it was dealing with any party other than the "Quad" that was the original party to the Services Agreement, namely Old Quad. It knew that "Quad's" company number had changed, but it understood only that the number previously used had been wrong, not that it was dealing with a different company. This case is most clearly set out in paragraph 13 of the Defence:

> "At no stage prior to the emergence of this dispute was the Defendant informed that the Claimant had taken the place of Old Quad in the manner described in the Particulars of Claim; at all material times prior to that, the Defendant believed that it was dealing with Old Quad. The use of the Claimant's company number was simply a result of an instruction from Mr Baldwin that the number previously being used was erroneous. This falls far short of amounting to a novation."

36. The evidence leaves no doubt at all but that the LLP's case as so advanced is false. In fairness, the LLP's witnesses made no real attempt to maintain it in the course of their oral evidence. How the statement of truth on the Defence came to be signed remains something of a mystery, though I suspect that it is due to a too casual acceptance that a document believed to reflect the results of legal advice could be approved as true.

37. The contractual principles are straightforward and may be taken for present purposes from *Chitty on Contracts*, 33rd edition, 2018, (citations omitted):

> "19-087 Novation takes place where the two contracting parties agree that a third, who also agrees, shall stand in the relation of either of them to the other. There is a new contract and it is therefore essential that the consent of all parties shall be obtained; in this necessity for consent lies the most important difference between novation and assignment.
>
> 19-088 Many of the reported cases in English law have arisen either out of the amalgamation of companies, or of changes in partnership firms, the question being whether as a matter of fact the party contracting with the company or the firm accepted the new company or the new firm as his debtor in the place of the old company or the old firm. That acceptance may be inferred from acts and conduct, but ordinarily it is not to be inferred from conduct without some distinct request."

38. In the present case, it is important to keep a number of things firmly in mind. First, the novation in issue concerns the contract between Old Quad and the LLP, not the various contracts between Old Quad and its third-party clients. Second, the question of novation is to be considered in its proper context: that the formation of the LLP and the making of the Services Agreement were steps in the restructuring of the legacy businesses, which involved the replacement of Old Quad and RPS by a new company,

New Quad, and the servicing of those businesses by the LLP. Third, all of the affairs of Old Quad (formally from 1 November 2007, though informally from 1 April 2007) and New Quad (from 1 January 2008) were conducted by the LLP: Old Quad and New Quad had no staff, and every aspect of their operations, including the billing and financial records, was dealt with by the LLP's personnel, including its finance department.

39. When these things are borne in mind, the true position is obvious. The substitution of New Quad for Old Quad was not some covert whim of Mr Coombes and Mr Baldwin but was integral to the arrangements that I have previously described. The LLP's dealings with New Quad were not some kind of enduring mistake by people who spent years thinking that Old Quad remained the party with which they were dealing; they were a matter of course, which has only been turned into an issue because the absence of a formal novation has been torn from its context in the search for a way to find that the LLP is free of obligation under the Services Agreement. When the facts are viewed as a whole, clause 20.2, though undoubtedly drafted in terms that wrongly suggest that novation may be non-consensual, does not create a practical problem, whether the clause be best construed to mean that the LLP could not refuse consent or that it would be estopped from denying consent. The simple fact is that, in accordance with the very basis of the restructuring, the LLP accepted the substitution of New Quad for Old Quad and dealt with New Quad for more than ten years before lawyers got involved.

40. The realities of the position can be seen by considering the roles and positions of the various individuals in respect of the various entities.

- *The LLP*: At the date of the Services Agreement the members of the LLP were Mr Reid-Jones, Mr Davies, Mr Vincent and Mr Deidun (all of whom had been members since incorporation on 12 March 2007) and Rhidian Williams and Karen Kendall (who became members on 1 June 2007, having formerly worked for Buck Consultants). Those six remain members of the LLP. Mr Baldwin became a member of the LLP on 1 January 2008 and remained a member until 30 April 2013.

- *Old Quad*: At the date of the Services Agreement and until after January 2008 the directors of Old Quad were Mr Coombes, Mr Baldwin, Mr Deidun, Mr Powis and Mr Reid-Jones. At the date of the Services Agreement the shareholders in Old Quad were Mr Coombes, Mr Baldwin, Mr Deidun, Mr Reid-Jones, Mrs Emma Reid-Jones, Ms Betty Binysh (Mr Coombes' wife) and Mrs Jane Baldwin. (Ms Binysh and Mrs Baldwin held only non-voting shares.) The entire issued share capital of Old Quad was purchased by New Quad on 1 January 2008.

- *RPS*: The directors of RPS were Mr Davies and Mr Powis (from incorporation on 25 November 2004) and Mr Reid-Jones (from 16 February 2005). Mr Powis resigned in July 2008. The shareholders in RPS were Mr Davies, Old Quad, Mr Powis, Mr Vincent and Mr Price. (Mr Vincent and Mr Price held only non-voting shares.) The entire issued share capital of RPS was purchased by New Quad on 1 January 2008.

- *New Quad*: At the date of the Services Agreement the directors of New Quad (then, of course, called Pascal Company Solutions Limited) were Mr Coombes, Mr Baldwin, Mr Reid-Jones, Mr Deidun, Mr Davies and Mr Powis. Mr Baldwin, Mr Reid-Jones, Mr Deidun and Mr Powis had been appointed as directors on 31 October 2007, the day before the Services Agreement was executed. Mr Powis, who was a non-executive director, resigned as director on 1 April 2008. Mr Reid-Jones and Mr Davies resigned as directors on 25 May 2018, at the commencement of the dispute between the parties. The shareholders in New Quad as from 1 January 2008, when their shares were issued, were Mr Coombes, Mr Baldwin, Mr Deidun, Mr Reid-Jones, Mrs Reid-Jones, Mr Davies, Mr Vincent, Ms Binysh and Mrs Baldwin. (Mr Davies, Mr Vincent, Ms Binysh and Mrs Baldwin held only non-voting shares.)

41. The reorganisation on 1 January 2008 effected the intended merger of Old Quad and RPS into a new entity, namely New Quad. Mr Vincent and Mr Reid-Jones knew full well that their shareholdings in the old companies were being replaced by holdings in the new entity, and in their oral evidence they made no attempt to advance the incredible claim that they were unaware that the ongoing relationship after 2007 was with New Quad rather than the old companies. The two members of the LLP who did not have shareholdings in the limited companies were Mr Williams and Ms Kendall. Mr Williams said in cross-examination that until 2018—that is, until the LLP received legal advice—he believed that there was a legal relationship between the claimant and the LLP. Ms Kendall did not give evidence. Mr Williams and Mr Vincent both gave evidence to the effect that they were not entirely au fait with all of the details of the restructuring, but that does not advance the LLP's case on this issue.

42. Paragraph 13 of the Defence suggests, by reference to a communication from Mr Baldwin, that the LLP did not know that it was dealing with a new entity (New Quad) but simply thought that there had been a correction, or alteration, of the registration number of the old company (Old Quad). That suggestion is false, as the documents show. In mid-November 2007 a draft letter was prepared for Old Quad's clients. The letter had the heading "Transfer of the Trustee bank account following a company restructure", and it began:

> "Due to the restructuring of Quantum Advisory Limited's business activities it has become necessary to open new client bank accounts under a new Quantum Advisory Limited company profile.
>
> The new Quantum Advisory Limited Company has been formed under the temporary name Pascal Company Solutions Limited but will change its name to Quantum Advisory Limited following the change over from the old Quantum Advisory Limited Company on 1st January 2008."

Mr David Timms, the LLP's Financial Controller, showed the draft to Mr Vincent for comment and approval. On 15 November 2007 Mr Vincent sent the draft by email to all the other members of the LLP and to Mr Baldwin. The email, which had the Subject line "QAL to Pascal and back again!", said:

> "I'm not sure how clients will react to this so should we be adding more meat to the bones of the covering letter? Comments please."

Ms Kendall replied:

> "I don't understand at all … what's Pascal, and why are we temporarily having to call bank accounts Pascal instead of Quantum Advisory?
>
> If I don't understand then I am sure clients won't either—if anything it looks like some dodgy money laundering scam."

That reply shows that Ms Kendall took the view—I should have thought, entirely reasonably—that the draft letter failed to give clients a sufficient explanation of what was happening. It also shows that she did not herself have a clear understanding of the restructuring; she, of course, was not a member of the legacy companies. Mr Baldwin responded in turn with an email that, though rather jocular in tone, was straightforward and accurate:

> "In the beginning there was Quad and then the lord (Rob etc) cometh and we formed Renaissance Pension Services Ltd as a mechanism for bringing Rob into the business, paying him etc tax efficiently and giving him shares in the combined business.
>
> It was always intended that Renaissance would be merged into Quantum.
>
> Apparently the best way of doing this is to tip both Quad and Ren into a new co and then to rename the newco Quad.
>
> I gather this is fairly common."

That response explained the restructuring but did not address the issue of communication with clients. Mr Reid-Jones therefore asked, pertinently:

> "Does this deal with the point raised by Karen in terms of how it looks to her and therefore our clients?"

Mr Williams, who was the other person not involved in the restructuring, replied:

> "No, still looks dodgy to me. A couple of points:
>
> I think that more explanation is needed in the covering letter. Could/should this letter be countersigned by the consultant/actuary for the client?
>
> If this is purely a device for tax purposes, why use the name Pascal? How about Quad II or some such similar.

> Why do we need to change client bank accounts at all? Surely it is just a change in the responsibility for operating those accounts that is needed."

Mr Vincent responded:

> "I suspected this to raise a few comments. We will raise Rhidian's points with Dave T[imms] and see what he says. The obvious route would be to keep the accounts intact, but I suspect this has already been discounted as not feasible.
>
> Pete, can you and I have a chat with Dave T tomorrow and let everyone know the outcome.
>
> The letter will of course have to be expanded on."

The relevant chain of emails concluded the following morning, 16 November 2007, with Mr Baldwin's reply to all:

> "I know that we have discussed possible alternatives with the bank on several occasions—but there is no alternative as the new Quantum Advisory Limited is a different company to the old one.
>
> There may be some merit in deferring until we are in a position to write to clients re the QFC changes. The changes can then be explained in more detail and clients only get troubled once.
>
> However, we have no scope for delay. We need the accounts transferred before Quad becomes new Quad otherwise we can't pay pensions etc.
>
> Do we have a feel for LLP authorisation timescale?"

43. The position, accordingly, is that not only were five of the seven members of the LLP directly involved in the replacement of Old Quad by New Quad but all seven, including Ms Kendall and Ms Williams, had the position explained to them in mid-November. The suggestion that the LLP believed that it was always thereafter dealing with Old Quad is plainly false. Communications in January 2008 concerning the company number of Quantum Advisory Limited have to be seen in the context of the knowledge that the business had been transferred into a new company; they simply reflected the fact that the company name did not change on letters or invoices (because of the name-swap mentioned in paragraph 9 above) but that a different number had to be shown. It may possibly be, as Mr Butler contended, that some of the LLP's employees laboured under the misapprehension that there was merely a change of registration number of the existing company and were ignorant of the substitution of the new company. If that is so, however, it cannot assist the LLP. And, as I have already observed, such residual functions as Old Quad and New Quad continued to perform—being merely matters of documentary and accounting records—were carried out by the LLP itself.

44. In cross-examination, Mr Reid-Jones confirmed that he understood the way that the reorganisation had been structured and knew that the business had been transferred from Old Quad to New Quad. He said that he could give no explanation for the inclusion of paragraph 13 in the Defence.

45. Two further details may be noted. First, when the Introducer's Agreement was made between the LLP and QFC in February 2009, a side agreement was signed by Mr Coombes on behalf of New Quad (identified by name and registration number) and QFC and by Mr Reid-Jones on behalf of the LLP for the purpose of dealing with a number of operational matters concerning the Services Agreement and the Introducer's Agreement. The side agreement presupposes that New Quad was then privy to the Services Agreement. Neither Mr Reid-Jones nor anyone else gave evidence that the side agreement was the result of a mistake as to identity. Second, although there was no formal novation of the Services Agreement, there was a formal novation of the Introducer's Agreement by deed dated 31 March 2011: having originally been made between the LLP and QFC, the Introducer's Agreement was novated between the LLP and New Quad. No one has sought to argue, or given evidence to the effect, that the LLP thought it was novating the Introducer's Agreement with Old Quad. These matters simply serve to confirm that the claim that the LLP spent the period 2007 to 2018 mistakenly thinking that it was doing unregulated business under the Services Agreement for Old Quad, unaware of the involvement of a different company, is incredible.

46. In conclusion, it is clear that the Services Agreement was novated between the LLP and New Quad, although no documentation for the novation was produced.

47. Mr Butler's alternative submission was that, if there was a novation, the Services Agreement necessarily became incoherent and unworkable. The argument, which was set out in paragraphs 48 to 50 of Mr Butler's written opening and was repeated by him in oral closing submissions, may be summarised as follows. "If you novate, you novate for all purposes" (oral submissions). Therefore the effect of novation must be that the Services Agreement must be construed throughout as referring to New Quad; all references to "Quad" must be taken to be references to "New Quad", because otherwise there would be the impossibility of "a multiplicity of co-contracting parties" (written opening, paragraph 48). The effect of this, in turn, is that there can never be "Clients" within the definition in clause 1 (see paragraph 24 above): New Quad had no clients before April 2007 or before the making of the Services Agreement; it also had no "Prospects" (potential clients) in the twelve-month period before the making of the Services Agreement; and, because the definition of "Introducers" refers only to persons with whom "Quad" has had dealings in the twelve-month period immediately preceding 1 April 2007, New Quad could have no clients within the final part of the definition of "Clients".

48. This alternative submission is entirely without merit, for at least two simple reasons. First, it rests on a misunderstanding of the nature of novation. The paradigm case of novation is where Contract 1 between A and B is replaced by Contract 2 between A and C on otherwise identical terms (in effect, though not as a matter of strict analysis, C is substituted for B in the original contract). The substitution of one party for another does not effect any alteration of the contractual subject matter. Therefore, if the subject matter is identified by reference to the original party (by reference, for example, to "B's clients"), novation does not involve substitution of reference to the

new party ("C's clients"). If it did, the effect of novation of a contract of any complexity would tend to the destruction of the contractual subject matter, rendering novation useless. In short, novation involves consensual substitution of a new party on the existing terms; it does not involve altering those terms so as to eradicate all reference to the original party where such reference defines the subject matter of the contract. If used in the latter sense (which is how Mr Butler's argument requires him to have been using it), the slogan "If you novate, you novate for all purposes" is false.

49. The second reason why the submission is wrong is that it ignores the clear wording of the Services Agreement. The identification of the parties on the first page of the contract makes clear that "Quad" refers to what I am calling Old Quad. The definitions in clause 1 then provide:

> "'Quad' shall mean Quad as defined above and shall also include any other party to which this Agreement is novated in its place".

That by itself is sufficient to dispose of the submission.

50. Having stated my conclusions on the question of novation, I merely note that the parties' shared acceptance that Old Quad's assets were assigned to New Quad means that the benefit of the Services Agreement would anyway be held by New Quad. Novation is required to pass the burden of a contract to a new party, but assignment suffices to pass the benefit.

Direct Client Engagements

51. The Services Agreement envisaged that clients would continue to contract with Quad (originally Old Quad, then New Quad by novation), and the LLP would provide services to Quad by providing the services to Quad's clients. Quad would then bill its clients and, on receiving payment, would pay to the LLP its agreed share of 57%. However, in the course of time some clients ("the Direct LLP Clients") have entered into direct retainers with the LLP. For some of the Direct LLP Clients, the billing and payment arrangements in clause 9 of the Services Agreement have been followed; for others, the billing has been done directly by the LLP, which has then accounted for the same proportion of fees, namely 43%, to New Quad. In both cases, all of the billing has been done by the LLP's Finance Department, because it alone has staff. In its letter of 11 June 2018 the LLP informed New Quad that it had been advised that any services provided to clients who had engaged directly with the LLP rather than with Quad would not be "Services" within the meaning of clause 2.1 of the Services Agreement and would not attract any liability to share the fee income with Quad: "The clear reading of clause 2.1 confirms that in order to be 'Services', as defined, it is necessary for the service to be provided to Quad." This case is repeated in the counterclaim, where it is said that, whichever billing and payment arrangement has been operated in respect of a Direct LLP Client, it has been operated by mistake, because the Direct LLP Clients fell outside the scope of the Services Agreement and New Quad had no right to any share of the fee income from them. The LLP seeks restitution of all moneys received by New Quad in respect of the Direct LLP Clients.

52. I regard the LLP's case on this point as wholly without merit. It is entirely a construct of the lawyers and is a matter of a legal tail wagging a commercial dog. Because it has lost touch with the reality of the way the parties' conducted their legal affairs, it does not even have technical legal merit.

53. The evidence from both parties shows plainly that the reason why the LLP entered into direct engagements with some clients was purely for administrative convenience. The parties knew full well that, by reason of clause 2.2 of the Services Agreement, the LLP was not entitled to contract with Quad's legacy clients. However, for purely practical reasons, it was agreed that the renewed retainers with those clients would be made by the LLP. But those clients were still regarded as legacy clients, and the division of the fees was unaffected. In his re-examination by Mr Butler, Mr Vincent made clear that, whatever the particular reason for a direct engagement in any given case, the LLP ensured that the 43% was duly paid to Quad. As Mr Williams said in the course of his evidence, the LLP never sought to divert business away from Quad. Mr Coombes' evidence, which I accept, was that the practical reasons for the direct engagement were explained to New Quad's directors by Mr Baldwin and that they were happy with the position. Of course, as New Quad had no staff or premises and everything, including billing, was carried out by the LLP (all letterheads showing both entities), the important question was only ever how the LLP and New Quad treated the clients as between themselves.

54. One interesting example of a Direct LLP Client is Welsh Water. The direct retainer with the LLP came about after Welsh Water imposed a re-tendering exercise. That exercise led to dialogue between New Quad and the LLP, because the LLP was unhappy that the calculation of the 57% for the cost of providing services for the legacy clients had not taken into account the possible costs of engaging in a re-tendering exercise. New Quad accepted the point and contributed either all or a substantial part of the LLP's costs of re-tendering. The LLP was successful in the re-tender on behalf of New Quad. Welsh Water produced contractual documents, which were in the name of New Quad. Then, before the contract was executed, the documents were altered to show the name of the LLP instead of New Quad. The reasons for this change are unclear—the evidence on the point is at best secondhand—but Mr Reid-Jones thought that Welsh Water had decided that it wanted the billing to be done by the people who were actually doing the work. If that is right, the evidence still does not show anything about how Welsh Water's decision came about. However, both the LLP and New Quad understood that, as between themselves, Welsh Water remained a legacy client to which the 57/43 division of fees continued to apply, and they continued to treat Welsh Water in precisely the same way after the re-tender as before. This is, of course, unsurprising, not least because New Quad had paid for the costs of the re-tendering at the LLP's request. The other Direct LLP Clients were dealt with by way of engagement letters that, though identifying the contracting party as the LLP, were on Quantum paper showing both New Quad and the LLP.

55. It is clear that the parties regarded the direct engagement of legacy clients by the LLP as an administrative detail for reasons of practical convenience, with no consequence of substance as between themselves and that they both intended and continued to treat the Direct LLP Clients in precisely the same way as other legacy clients for the purposes of the Services Agreement. Mr Butler's response to this is that, whatever

the parties may have intended and done, they were wrong as a matter of law: the effect of the direct engagements was to take the work done in respect of the Direct LLP Clients outside the definition of "Services" under the Services Agreement and to relieve the LLP of any obligation to share fees received from those clients. He said that, although the parties may not have intended any such result, that was the necessary legal effect of what they had done: "the law is the law."

56. In my judgment, with respect, that submission makes no sense at all. In the first place, it has lost touch with the intentions and activities of the parties. In support of his submission, Mr Butler cited the example of *Street v Mountford* [1985] UKHL 4, [1985] AC 809, where the House of Lords held that an agreement with certain characteristics amounted to a tenancy, regardless of the different label that the parties gave to it. That does not assist him; quite the contrary. The House of Lords began from the parties' actual agreement and, when that had been identified, it applied the legal consequences of the substance of that agreement, not those of the parties' incorrect characterisation of that agreement. Mr Butler proposed that his approach was analogous as being a strict application of the provisions of clause 2.1 of the Services Agreement. But this is to ignore the fact that the parties consensually treated the Direct LLP Clients as remaining on the same footing after as before the direct engagement. It is unclear why this fact should be ignored. It cannot be that such an agreement is impossible. If instead the supposition is that there was no such agreement in fact, I reject it: the agreement is clear from the parties' conduct, which bears no relation to Mr Butler's legal analysis, and from the evidence of the parties' witnesses.

57. If Mr Butler's submission were correct, the LLP would, by reason of the direct engagements, have been in breach of clauses 2.2.1 and 2.2.2 of the Services Agreement and liable to pay damages or to be restrained by injunction. It would thus be in no better position than if it had not breached its contract.

Is clause 2.2 of the Services Agreement an unreasonable restraint of trade?

58. This is, in my view, the central issue in the case. First, I shall summarise briefly the LLP's argument in the context of a short statement of the doctrine of restraint of trade. Second, by reference to some of the modern cases, I shall go into a little more detail on a few particularly relevant aspects of the doctrine. I do not intend, however, to burden this judgment either with an attempt at a comprehensive analysis of the law or with detailed discussion of the ways in which the courts have applied the principles to the particular facts of those earlier cases. Third, I shall consider the Services Agreement in the light of the relevant principles.

Summary of the LLP's case

59. *Chitty on Contracts* summarises the doctrine thus at para 16-106 (citations omitted):

> "All covenants in restraint of trade are prima facie unenforceable at common law and are enforceable only if they are reasonable with reference to the interest of the parties concerned and of the public. Unless the unreasonable part can

> be severed by the removal of either part or the whole of the covenant in question, its inclusion renders the covenant or the entire contract unenforceable."

60. The LLP's case may be summarised as follows. Clause 2.2 is a restraint of trade, because apart from its provisions the LLP would be free to do business with anyone it wanted. Therefore the restraints in the clause are enforceable only in so far as they are reasonable with reference to the interests of the parties to the agreement and those of the public, and they should go no further than what is reasonable to protect the legitimate interests of New Quad. Among the matters showing that the covenants in clause 2.2 are unreasonable are the following in particular:

- The lack of a genuine process of negotiation leading to the Services Agreement, the imbalance of the bargaining positions of the parties to the agreement, and the absence of independent legal advice for the LLP.

- The fact that, because of the very limited powers of the LLP to terminate the Services Agreement, the likely duration of the restraints is 100 years.

- The fact that this duration, far from being due to any assessment of what was necessary to protect Quad's legitimate interests, resulted from a late decision, made for other reasons, to extend the term of the contract.

- The fact that the LLP is not only prevented from acting for the Clients on its own behalf but positively obliged to act for them on New Quad's behalf.

- The level of fees to which New Quad is entitled in respect of work done by the LLP.

- The consequences of the restraints on a competitive market for the Clients.

61. The two broad sub-issues are, first, whether the restraints in clause 2.2 are in restraint of trade within the meaning of the doctrine and, second, if they are, whether they are reasonable. In considering these questions, I have regard in particular to the following authorities that were cited to me: *Petrofina (Great Britain) Ltd v Martin* [1966] Ch 146 (Court of Appeal) ("*Petrofina"*); *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 (House of Lords) (*"Esso"*); *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] EMLR 229 (Jonathan Parker J) (*"Panayiotou"*); *Proactive Sports Management Ltd v Rooney* [2011] EWCA Civ 1444, [2012] FSR 16 (Court of Appeal) (*"Proactive Sports Management"*); *One Money Mail Ltd v RIA Financial Services* [2015] EWCA Civ 1084 (Court of Appeal) (*"One Money Mail"*); *CJ Motorsport v Bird* [2019] EWHC 2330 (QB), [2019] IRLR 1080 (Murray J) ("*CJ Motorsport"*). The judgments in these cases contain substantial consideration of other leading decisions. In particular, the judgment in *Panayiotou*, though only a decision at first instance, contains lengthy analyses of the leading authorities in the House of Lords with respect to a number of the issues with which I am concerned; so too, though more briefly, does the judgment in *CJ Motorsport.*

Some relevant points of law

Scope of the doctrine

62. There is a line between contracts in restraint of trade, within the meaning of the doctrine, and ordinary contracts that merely regulate the commercial dealings of the parties, although the latter will usually involve some necessary restraint on the freedom of trade of one or both of the parties. However, the courts have resisted the temptation to define the line precisely; the limits of the doctrine are to be ascertained by the use of "a broad and flexible rule of reason" (*per* Lord Wilberforce in *Esso*).

63. In *Petrofina,* a case concerning a solus agreement for petrol supply, the Court of Appeal rejected the submission that the doctrine applied only to certain categories of contract. Lord Denning MR said at 169:

> "Every member of the community is entitled to carry on any trade or business he chooses and in such manner as he thinks most desirable in his own interests, so long as he does nothing unlawful: with the consequence that any contract which interferes with the free exercise of his trade or business, by restricting him in the work he may do for others, or the arrangements which he may make with others, is a contract in restraint of trade. It is invalid unless it is reasonable as between the parties and not injurious to the public interest."

He resisted the submission that the principle as formulated was too broad, stating: "The categories of restraint of trade are not closed." To similar effect, Diplock LJ offered the following definition at 180:

> "A contract in restraint of trade is one in which a party (the covenantor) agrees with any other party (the covenantee) to restrict his liberty in the future to carry on trade with other persons not parties to the contract in such manner as he chooses."

Having observed at 183 that most of the reported cases concerned contracts between master and servant and between purchasers and vendors of the goodwill of businesses, Diplock LJ noted the existence of "plenty of others in which neither of these relationships subsists between covenantee and covenantor" and, like Lord Denning MR, he rejected the submissions that the doctrine of restraint of trade was limited to certain confined categories of contract.

64. The House of Lords considered the limits of the doctrine in *Esso,* which was an appeal from the same constitution of the Court of Appeal that decided *Petrofina* (Lord Denning MR, and Harman and Diplock LJJ). The House held that the doctrine applied to both of the solus petrol agreements between the parties; the restraints for five years in the one agreement were reasonable, but those for twenty-one years in the other agreement were unreasonable. Lord Reid observed at 293 that he had "not found it an easy task" to determine how far principles developed for the original categories of contracts between master and servant or between vendor and purchaser of a business had been or should be extended, and at 298 he said: "I would not attempt to define the dividing line between contracts which are and contracts which are not in restraint of trade". His approach to resolving the problem lay, at least in part, in identifying a freedom that the covenantor would otherwise have had but was giving up: see 298-299. Although that approach can hardly suffice as a universal touchstone

for the operation of the doctrine (cf. *Chitty on Contracts* at para 16-116 for criticism) it seems to me, with respect, to have its proper place within the "broad and flexible rule of reason".

65. In *Esso* Lord Morris of Borth-y-Gest doubted whether it was "possible or desirable to record any very rigid classification of groups of cases" to which the doctrine did and did not apply: 306. While finding attempts at definitions, such as those in the *Petrofina* case, "helpful expositions", he observed that they were to be used "rationally and not too literally": 307. His approach was to begin by considering "whether the agreements made by Harper's should, in a reasonable sense, be regarded as in restraint of trade": 308. Lord Hodson at 317 approved the definition given by Diplock LJ in *Petrofina*. Lord Pearce tried at 328-329 to capture the distinction between contracts to which the doctrine applied and those to which it did not:

> "The doctrine does not apply to ordinary commercial contracts for the regulation and promotion of trade during the existence of the contract, provided that any prevention of work outside the contract, viewed as a whole, is directed towards the absorption of the parties' services and not their sterilisation. …
>
> When a contract only ties the parties during the continuance of the contract, and the negative ties are only those which are incidental and normal to the positive commercial arrangements at which the contract aims, even though those ties exclude all dealings with others, there is no restraint of trade within the meaning of the doctrine and no question of reasonableness arises. If, however, the contract ties the trading activities of either party after its determination, it is a restraint of trade, and the question of reasonableness arises. So, too, if during the contract one of the parties is too unilaterally fettered so that the contract loses its character of a contract for the regulation and promotion of trade and acquires the predominant character of a contract in restraint of trade. In that case the rationale of *Young v. Timmins* (1831) 1 Cr & J 331 [where the covenantor was obliged to work for no one but the covenantee, but the covenantee had no obligation to provide work to the covenantor] comes into play and the question whether it is reasonable arises."

66. Lord Wilberforce's speech in *Esso* seems to me to be (with respect) particularly helpful on the question of the scope of the doctrine. He rejected any attempt rigidly to restrict the doctrine of restraint of trade to certain categories of contract and said at 331:

> "Often, in reported cases, we find that instead of segregating two questions, (i) whether the contract is in restraint of trade, (ii) whether, if so, it is 'reasonable', the courts have fused the two by asking whether the contract is in 'undue restraint of trade' or by a compound finding that it is not satisfied that this contract is really in restraint of trade at all but, if it is, it is reasonable. A well-known text-book describes contracts in

> restraint of trade as those which 'unreasonably restrict' the rights of a person to carry on his trade or profession. There is no need to regret these tendencies: indeed, to do so, when consideration of this subject has passed through such notable minds from Lord Macclesfield onwards, would indicate a failure to understand its nature. The common law has often (if sometimes unconsciously) thrived on ambiguity and it would be mistaken, even if it were possible, to try to crystallise the rules of this, or any, aspect of public policy into neat propositions. The doctrine of restraint of trade is one to be applied to factual situations with a broad and flexible rule of reason."

Nevertheless, Lord Wilberforce did consider that some guidance could be given as to the kinds of case to which the doctrine would not apply:

> "This does not mean that the question whether a given agreement is in restraint of trade, in either sense of these words, is nothing more than a question of fact to be individually decided in each case. It is not to be supposed, or encouraged, that a bare allegation that a contract limits a trader's freedom of action exposes a party suing on it to the burden of justification. There will always be certain general categories of contracts as to which it can be said, with some degree of certainty, that the 'doctrine' does or does not apply to them. Positively, there are likely to be certain sensitive areas as to which the law will require in every case the test of reasonableness to be passed: such an area has long been and still is that of contracts between employer and employee as regards the period after the employment has ceased. Negatively, and it is this that concerns us here, there will be types of contract as to which the law should be prepared to say with some confidence that they do not enter into the field of restraint of trade at all.
>
> How, then, can such contracts be defined or at least identified? No exhaustive test can be stated - probably no precise non-exhaustive test. But the development of the law does seem to show that judges have been able to dispense from the necessity of justification under a public policy test of reasonableness such contracts or provisions of contracts as, under contemporary conditions, may be found to have passed into the accepted and normal currency of commercial or contractual or conveyancing relations. That such contracts have done so may be taken to show with at least strong prima force that, moulded under the pressures of negotiation, competition and public opinion, they have assumed a form which satisfies the test of public policy as understood by the courts at the time, or, regarding the matter from the point of view of the trade, that the trade in question has assumed such a form that for its health or expansion it requires a degree of regulation. Absolute

> exemption for restriction or regulation is never obtained: circumstances, social or economic, may have altered, since they obtained acceptance, in such a way as to call for a fresh examination: there may be some exorbitance or special feature in the individual contract which takes it out of the accepted category: but the court must be persuaded of this before it calls upon the relevant party to justify a contract of this kind."

67. Although the facts of *Esso* were dissimilar to those of the present case, it is instructive to consider why Lord Wilberforce considered that the solus agreements were within the scope of the doctrine. At 337 he said:

> "I turn now to the agreements. In my opinion, on balance, they enter into the category of agreements in restraint of trade which require justification. They directly bear upon, and in some measure restrain, the exercise of the respondent's trade, so the question is whether they are to be treated as falling within some category excluded from the 'doctrine' of restraint of trade. The broad test, or rather approach, which I have suggested, is capable of answering this. This is not a mere transaction in property, nor a mere transaction between owners of property: it is essentially a trade agreement between traders. It is not a mere agreement for exclusive purchase of a commodity, though it contains this element: if it were nothing more, there would be a strong case for treating it as a normal commercial agreement of an accepted type. But there are other restrictive elements. There is the tie for a fixed period with no provision for determination by notice, a combination which *McEllistrim's* case [1919] AC 548 shows should be considered together, and there is the fetter on the terms on which the station may be sold. … Finally the agreement is not of a character which, by the pressure of negotiation and competition, has passed into acceptance or into a balance of interest between the parties or between the parties and their customers; the solus system is both too recent and too variable for this to be said."

68. In *Panayiotou* Jonathan Parker J analysed the speeches in *Esso* in some detail. At 320 he summarised what he took to be "an overriding principle" appearing from those speeches:

> "'The doctrine of restraint of trade is one to be applied to factual situations with a broad and flexible rule of reason' (Lord Wilberforce p. 331G), taking into account 'the wider aspects of commerce … as well as the narrower aspect of the contract as between the parties' (Lord Pearce p. 330B): 'its application ought to depend less on legal niceties or theoretical possibilities than on the practical effect of a restraint in hampering that freedom which it is the policy of the law to protect' (Lord Reid p. 298A–B)."

His conclusion as to the correct approach was set out at 327:

> "[I]t follows, in my judgment, that the right approach for the court, once it is satisfied that the contract before it is a contract which is (in ordinary parlance) in restraint of trade, is to consider whether in all the circumstances sufficient grounds exist for excluding that contract from the application of the doctrine: as Lord Wilberforce put it, 'to dispense [the contract] from the necessity of justification' (p. 332G). If no sufficient grounds exist, the contract attracts the doctrine.
>
> As to what constitutes sufficient grounds for this purpose, this raises once again the question where the line is to be drawn between those contracts in restraint of trade (giving that expression its ordinary meaning) which attract the doctrine and those which do not. Lord Reid said (p. 298G):
>
> > 'I would not attempt to define the dividing line between contracts which are and contracts which are not in restraint of trade.'
>
> And, as noted above, Lord Morris of Borth y Gest said (p. 306F):
>
> > 'For my part, I doubt whether it is possible or desirable to record any very rigid classification of groups of cases.'
>
> Accordingly, on the authority of *Esso* it would be a wrong approach in this case to attempt answer the question whether the 1988 Agreement is a contract which attracts the doctrine, so that its terms require to be justified under the *Nordenfelt* test, by reference to any kind of formula applicable in all cases. Yet this appears to me to be no more than a reflection of the fact the doctrine itself is not of its nature susceptible of that degree of analysis. *Esso* establishes that the doctrine is not to be applied in a mechanistic or formalistic way. Such an approach would, as it seems to me, be the antithesis of the approach required by the 'rule of reason'."

Reasonableness: general

69. If the doctrine of restraint of trade applies to the contract, the test of justification is that stated by Lord Macnaghten in *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd* [1894] AC 535, 565:

> "[R]estraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable – reasonable. that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate

> protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."

70. However, as Lord Wilberforce noted in *Esso*, the two stages of application and justification are not as distinct in practice as they are in theory. In *Proactive Sports Management*, Arden LJ said at [59]:

> "However, in practice, I find that the line between the two stages identified by Jonathan Parker J [in *Panayiotou*] is not clear cut, and that the analysis has to be an iterative one between them. In particular, the matters that might be raised under the second stage might also be relevant to the question whether the doctrine of restraint of trade is engaged at all."

Gross LJ noted at [147] that the two questions were analytically distinct, though he acknowledged that they could not "be viewed as existing in wholly watertight compartments", and at [148] he said that the question of which contracts attract the doctrine of restraint of trade could not be answered "in a mechanistic or formalistic way."

71. The *Nordenfelt* test requires that the restraint be reasonable in reference to the interests of the parties and reasonable in reference to the interests of the public. In *Esso*, Lord Hodson said at 319:

> "It has been authoritatively said that the onus of establishing that an agreement is reasonable as between the parties is upon the person who puts forward the agreement, while the onus of establishing that it is contrary to the public interest, being reasonable between the parties, is on the person so alleging: see *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688, 700, 707-708, *per* Lord Atkinson and Lord Parker. The reason for the distinction may be obscure, but it will seldom arise since once the agreement is before the court it is open to the scrutiny of the court in all its surrounding circumstances as a question of law."

The relationship between the two parts of the *Nordenfelt* test has been a matter of different emphases in the cases. In *Petrofina,* Diplock LJ remarked at 181-182:

> "Although reference to the distinction drawn by Lord Macnaghten between the interest of the parties and the interest of the public continues to be made in subsequent cases, it appears to be true in 1965, as it was in 1913 (see the *Adelaide Steamship Co.* case [1913] AC 781), that, with one possible exception, the courts have never yet held a restriction which is reasonable in reference to the interests of the parties to be unreasonable in reference to the public. This, I think, is because the interests of the parties are simply a particular facet of the interests of the public – and generally the most important facet. The public interests, which the common law doctrine against restraint of trade is designed to promote, are social and economic – liberty and prosperity; the liberty of the individual

> to trade with whom he pleases in such manner as he thinks desirable, the prosperity of the nation by expansion of the total volume of trade. … A liberty to trade with whom one pleases in such manner as one thinks desirable, if it is shared with any other trader, cannot be absolute. The liberty of one cannot be exercised to the full without some curtailment of the liberty of the other. … The test of unreasonableness has been expressed in a number of different ways, but most helpfully, I think, by Lord Atkinson in *McEllistrim v Ballymacelligott Co-operative etc. Society* [1919] AC 548, 574, as being whether
>
> > 'it affords no more than adequate protection to those interests of the private parties concerned which they have a right to have protected.'
>
> It is for the party seeking to enforce the restriction to show that it complies with that test.
>
> Put in this way, the test really does combine regard for the interests of the parties with regard for the interests of the public. It is consideration of the public interest which determines what is an interest of the private party concerned which he has a right to have protected."

At 182-183 Diplock LJ illustrated this approach by reference to the two main categories of contract to which the doctrine applies: master and servant, and vendor and purchaser of a business. In the former category, the employer's interest in protecting confidential information is to be weighed against the employee's right to compete with his former employer; in the latter category, the interest in protecting goodwill that has been built up is to be weighed against the purchaser's interest in carrying on any trade or business that he chooses. In each case, however, the private interest on either side reflects a public interest; therefore: "A compromise between these two conflicting interests, if reasonable in reference to the interests of the parties concerned, is reasonable in reference to the interests of the public."

72. Lord Reid's remarks in *Esso* at 300-301, while not I think in contradiction to Diplock LJ's, seem readier to distinguish between the parties' and the public's interests:

> "[I]n every case it is necessary to consider first whether the restraint went farther than to afford adequate protection to the party in whose favour it was granted, secondly whether it can be justified as being in the interests of the party restrained, and, thirdly, whether it must be held contrary to the public interest. …
>
> I think that in some cases where the court has held that a restraint was not in the interests of the parties it would have been more correct to hold that the restraint was against the public interest. For example, in *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd* [1959] Ch 108 the parties had agreed that neither would employ any man who had left the

> service of the other. From their own points of view there was probably very good reason for that. But it could well be held to be against the public interest to interfere in this way with the freedom of their employees. If the parties chose to abide by their agreement an employee would have no more right to complain than the Mogul Company had in the *Mogul* case [1892] AC 25. But the law would not countenance their agreement by enforcing it. And in cases where a party, who is in no way at a disadvantage in bargaining, chooses to take a calculated risk, I see no reason why the court should say that he has acted against his own interests: but it can say that the restraint might well produce a situation which would be contrary to the public interest.
>
> Again, whether or not a restraint is in the personal interests of the parties, it is I think well established that the court will not enforce a restraint which goes further than affording adequate protection to the legitimate interests of the party in whose favour it is granted. This must I think be because too wide a restraint is against the public interest. It has often been said that a person is not entitled to be protected against mere competition. I do not find that very helpful in a case like the present. I think it better to ascertain what were the legitimate interests of the appellants which they were entitled to protect and then to see whether these restraints were more than adequate for that purpose."

73. For the purposes of this judgment, it is unnecessary to explore the differing theories concerning the relationship of the two limbs of the *Nordenfelt* test or the nuances of the approaches in various cases. For my part, I respectfully find helpful the remarks of Lord Pearce in *Esso* at 324:

> "The onus is on the party asserting the contract to show the reasonableness of the restraint. That rule was laid down in the *Nordenfelt* case and in *Herbert Morris Ltd v Saxelby*. When the court sees its way clearly, no question of onus arises. In a doubtful case where the court does not see its way clearly and the question of onus does arise, there may be a danger in preferring the guidance of a general rule, founded on grounds of public policy many generations ago, to the guidance given by free and competent parties contracting at arm's length in the management of their own affairs. Therefore, when free and competent parties agree and the background provides some commercial justification on both sides for their bargain, and there is no injury to the community, I think that the onus should be easily discharged. Public policy, like other unruly horses, is apt to change its stance, and public policy is the ultimate basis of the courts' reluctance to enforce restraints. Although the decided cases are almost invariably based on unreasonableness between the parties, it is ultimately on the ground of public

> policy that the court will decline to enforce a restraint as being unreasonable between the parties. And a doctrine based on the general commercial good must always bear in mind the changing face of commerce. There is not, as some cases seem to suggest, a separation between what is reasonable on grounds of public policy and what is reasonable as between the parties. There is one broad question: is it in the interests of the community that this restraint should, as between the parties, be held to be reasonable and enforceable?"

Inequality of bargaining power

74. Inequality of bargaining power as between the parties to a contract neither brings the doctrine into play nor, in itself, constitutes a ground for finding a restraint to be unreasonable. However, it does have some relevance to the *Nordenfelt* test.

75. In *Esso,* Lord Reid said at 300, at the point marked by the ellipsis in the foregoing citation:

> "Where two experienced traders are bargaining on equal terms and one has agreed to a restraint for reasons which seem good to him the court is in grave danger of stultifying itself if it says that it knows that trader's interest better than he does himself. But there may well be cases where, although the party to be restrained has deliberately accepted the main terms of the contract, he has been at a disadvantage as regards other terms: for example where a set of conditions has been incorporated which has not been the subject of negotiation – there the court may have greater freedom to hold them unreasonable."

Accordingly, the usual inclination of the courts to proceed on the basis that contracting parties are the best judges of their own interests—and, to the extent that those private interests correlate to public interests, of those latter interests also—will be modified where one of the parties was to some extent disabled from protecting his own interests. The same point appears from the speech of Lord Morris of Borth y Gest at 305:

> "The law recognises that if business contracts are fairly made by parties who are on equal terms such parties should know their business best. If there has been no irregularity, the law does not mend or amend contracts merely for the relief of those for whom things have not turned out well. But when all this is fully recognised yet the law, in some circumstances, reserves the right to say that a contract is in restraint of trade and that to be enforceable it must pass a test of reasonableness."

Lord Pearce, too, at 323, made the point by way of emphasis on the relevance of *equality* of bargaining power:

> "It is important that the court, in weighing the question of reasonableness, should give full weight to commercial practices

> and to the generality of contracts made freely by parties bargaining on equal terms. Undue interference, though imposed on the ground of promoting freedom of trade, may in the result hamper and restrict the honest trader and, on a wider view, injure trade more than it helps it. … Where there are no circumstances of oppression, the court should tread warily in substituting its own views for those of current commerce generally and the contracting parties in particular. For that reason, I consider that the courts require on such a matter full guidance from evidence of all the surrounding circumstances and of relevant commercial practice. They must also have regard to the consideration. It is clear that the question of the consideration weighed with Lord Macnaghten in the *Nordenfelt* case. And although the court may not be able to weigh the details of the advantages and disadvantages with great nicety it must appreciate the consideration at least in its more general aspects. Without such guidance they cannot hope to arrive at a sensible and up-to-date conclusion on what is reasonable. That is not to say that, when it is clear that current contracts (containing restraints), however widespread, are in fact a danger and disservice to the public and to traders, the court should hesitate to interfere."

76. Having referred to these passages and to others in the speech of Lord Wilberforce, Jonathan Parker J said in *Panayiotou* at 332:

> "As I understand these references, they establish that while the Court is in general slow to substitute its (objective) view as to the interests of the contracting parties for the (subjective) views of the contracting parties themselves in electing to enter into the contract, that consideration will carry less weight, and may (depending on the particular facts) carry no weight at all, where the evidence establishes that the contracting parties were negotiating on other than equal terms."

77. In the context of inequality of bargaining power, the absence of independent legal advice for the weaker party may be relevant. This is illustrated by *Proactive Sports Management*, which concerned an image rights agreement with the then-teenage footballer Wayne Rooney. Giving the leading judgment, with which Sullivan and Gross LJJ agreed (Gross LJ delivered a concurring judgment), Arden LJ said at [100]:

> "It will be recalled that the Rooneys had no legal advice at the time of execution. This is all the more important in the light of the judge's finding that, on Proactive's side, a longer term than usual was demanded for the IRRA [image rights representation agreement] because it was known that WR was 'hot property'. The absence of independent legal advice in my judgment deprives the fact that the Rooneys were content with the terms of the IRRA of probative weight on the restraint of trade issue. It underscores the inequality of bargaining power between the

> parties. Moreover, it predisposes the agreement to a finding that it was one-sided, unfair or oppressive."

Consideration

78. The consideration for a covenant in restraint of trade is capable of being relevant to the justification of the covenant. In *Esso,* Lord Reid said at 300:

> "Surely it can never be in the interest of a person to agree to suffer a restraint unless he gets some compensating advantage, direct or indirect. And Lord Macnaghten said [in *Nordenfelt*]: '… of course the quantum of consideration may enter into the question of the reasonableness of the contract.'"

Lord Hodson, too, referred at 318 to the speech of Lord Macnaghten in *Nordenfelt* and said that "a restriction as to time may be reasonable or unreasonable according to whether sufficient compensation has been given to the person restrained". Lord Pearce's comments to similar effect are set out in the citation, above, from his speech at 323.

79. In *Panayiotou* Jonathan Parker J considered the relevance of consideration at 329-330. Having referred to the speeches in *Esso* and to the judgment of the Privy Council in *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* [1975] AC 561, he rejected the submission that the only relevance of consideration was that an inadequate consideration could tend to negative justification and continued at 330:

> "As I read the passages in *Esso* referred to above, in applying the first limb of the *Nordenfelt* test the size of the consideration may be a positive factor tending to justify the restraint. If the consideration for the restraint is so substantial that by any objective standard it is in the interests of the party receiving the consideration to subject himself to the restraint, then that must in my judgment be a factor pointing in the direction of justification. Without bringing that factor into account the courts could not, in my judgment (and paraphrasing Lord Pearce), hope to arrive at a sensible and up-to-date conclusion on what is reasonable as between the parties, for the purposes of the first limb of the *Nordenfelt* test. The dictum in *Amoco* supports this conclusion."

80. As Jonathan Parker J went on to observe, there might however be cases, such as a bare covenant against competition, where public policy would preclude enforcement under the second limb of the *Nordenfelt* test, no matter how large the consideration for the covenant.

81. It may be noted that the consideration received by the covenantee is not the same as the benefits that accrue to any party by reason of the performance of the contract. In *Proactive Sports Management*, Gross LJ said at [149]

> ""[W]hen addressing the question of whether a contract attracts the doctrine of restraint of trade, the contract must be considered when it is made: *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 1308, at 1309 *per* Lord Reid. As it seems to me, how the contract has subsequently turned out is only relevant for these purposes insofar as it furnishes evidence of the nature of the contract in question when made."

Thus Arden LJ said at [104]:

> "It is no answer to say that there have been substantial financial rewards on all sides from the exploitation of WR's image rights. The question of restraint of trade has to be considered by reference to the terms of the IRRA."

Pre- and post-termination restraints

82. In *Petrofina* Lord Denning MR at 170 confirmed that the doctrine could apply to trading or service contracts during the subsistence of the trading or service. Harman LJ reached a similar conclusion at 177-178. Similarly, at 184 Diplock LJ rejected the submission that the doctrine of restraint of trade could have no application to restraints that lasted only for the duration of a trading contract between the parties, however unreasonable in the interests of either or both of the parties the restraints might be.

83. The same approach was applied in *Esso*, where the restraints lasted only during the subsistence of the trade established by the solus agreements: the different outcomes in respect of the two agreements turned on the long duration of the twenty-one-year agreement (for example, Lord Wilberforce at 339C).

84. Nonetheless, the distinction between pre- and post-termination restraints is not without relevance. In *Esso* Lord Pearce at 328 made the point that the objection to restraint of trade concerned "the sterilising of a man's capacity for work and not its absorption", and he continued:

> "The doctrine does not apply to ordinary commercial contracts for the regulation and promotion of trade during the existence of the contract, provided that any prevention of work outside the contract, viewed as a whole, is directed towards the absorption of the parties' services and not their sterilisation. Sole agencies are a normal and necessary incident of commerce and those who desire the benefits of a sole agency must deny themselves the opportunities of other agencies. …
>
> When a contract only ties the parties during the continuance of the contract, and the negative ties are only those which are incidental and normal to the positive commercial arrangements at which the contract aims, even though those ties exclude all dealings with others, there is no restraint of trade within the meaning of the doctrine and no question of reasonableness arises. If, however, the contract ties the trading activities of

> either party after its determination, it is a restraint of trade, and the question of reasonableness arises. So, too, if during the contract one of the parties is too unilaterally fettered so that the contract loses its character of a contract for the regulation and promotion of trade and acquires the predominant character of a contract in restraint of trade. In that case the rationale of *Young v Timmins* comes into play and the question whether it is reasonable arises.
>
> The difficult question in this case … is whether a contract regulating commercial dealings between the parties has by its restraints exceeded the normal negative ties incidental to a positive commercial transaction and has thus brought itself within the sphere to which the doctrine of restraint applies."

85. In *Panayiotou* Jonathan Parker J referred to the speeches in *Esso* and concluded at 335:

> "So while the mere fact that the operation of a restraint is limited to the period of the contract may not suffice to justify the restraint, it is, as I understand the position, a factor to be brought into account on the side of justification (the weight to be attached to that factor depending, of course, on the facts and circumstances of the particular case)."

86. In *One Money Mail,* a case concerning a sole agency, Longmore LJ, with whom Lloyd Jones and Briggs LJJ agreed, drew in particular on the speeches of Lord Pearce and Lord Wilberforce and said at [5]:

> "Contractual terms which are in unreasonable restraint of trade are unlawful as a matter of English law. This legal principle applies to restrictions applicable during the contract not just to restrictions applicable on or after the termination of the contract, see *A. Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 W.L.R. 1308. In the case of restrictions intended to be effective during the currency of the contract, however, the court must be careful not to fetter what one may call ordinary commerce. Sole agencies are common in ordinary commerce and there would, therefore, have to be something specially restrictive before the restraint of trade principle will be effective."

Application to this case

87. In my judgment: (1) the doctrine of restraint of trade does not apply to the restraints in the Services Agreement; (2) if the doctrine did apply to the restraints, the restraints would satisfy the requirement of reasonableness. I distinguish the two parts of the conclusion analytically, but in forming a view on each part I have had regard to the full range of considerations relevant to either. In the following paragraphs I set out the reasons for my conclusion.

The doctrine does not apply

88. I have said a great deal already about the terms, nature and purposes of the Services Agreement. It was a bespoke agreement, fashioned to address the competing needs and interests of a group of professional people and, in particular, the practical issues involved in permitting one part of the group enjoy the benefits of the established Quantum brand and business when they were unable to afford a buy-out of the interest of the other part of the group. The question of the application of the doctrine to the Services Agreement cannot usefully be answered by seeking to pigeon-hole the agreement. The Services Agreement has to be considered very much on its own terms and in its own circumstances.

89. It is for much the same reason that I have not found it helpful to address the question whether the effect of the Services Agreement was to make the LLP an agent of Quad (whether New Quad or Old Quad). The part that the issue played in Mr Adams' submissions on restraint of trade was his contention that the LLP was carrying on the legacy business of New Quad as agent rather than as principal under a sub-contract. However, the existence of an agency relationship is neither necessary nor sufficient for the application of the doctrine of restraint of trade. As no relief for breach of fiduciary duty is being sought under the Services Agreement, it seems to me to be better to focus on the substance and detail of the contractual relationship, and to apply the doctrine directly, than to approach the matter via the interposition of another piece of categorical analysis.

90. A group of related considerations seems to me to weigh especially strongly against the application of the doctrine of restraint of trade to the Services Agreement.

91. To begin with, the LLP, which is the person subject to the restraints, was brought into existence for the purpose of the restructuring that was effected via the Services Agreement. It had no prior being or business and no other rationale. (Strictly, of course, it had been in existence for several months before the Services Agreement was made. But, as I have explained, from April 2007 it was informally operating the arrangement that was formalised in the Services Agreement; this is reflected in the identification of 6 April 2007 as the Effective Date in the Services Agreement.) In the circumstances, therefore, the complaint that the LLP's trade is restrained by the Services Agreement, though in one sense obviously true, lacks the kind of traction that is normally found where the doctrine applies.

92. Again, there is a sense in which the Services Agreement was itself the *sine qua non* of the LLP's ability to carry on business at all. This is not to say that the individuals who became members of the LLP could not themselves, whether severally or by some or all acting jointly, have set up a new business in a different way. But it is to observe that to speak in terms of this particular covenantor's freedom to trade other than under the arrangements in the Services Agreement is to invoke a conceptual abstraction rather than a practical reality. More than that, the point shows that the Services Agreement was not, in any relevant sense, a restraint of trade but rather a means of providing the opportunity to trade.

93. The same underlying point shows up, I think, a degree of incoherence in attempting to place the covenants in the Services Agreement within the scope of the restraint of trade doctrine. It is convenient to look at this in stages.

1) The context of the agreement, mentioned several times already, is critical. The springboard for the LLP was provided in the form of financial assistance, the use of the means to carry on business (staff, equipment, premises), and the ability to carry out the legacy business and use the Quantum brand. But the legacy business itself—its goodwill and its profits—was not given to the LLP but remained Quad's. The LLP never bargained for its acquisition, and the Services Agreement expressly provides for it to revert to Quad upon termination of the agreement.

2) The LLP does not in terms complain of the duration of the Services Agreement; this itself cannot be within the purview of the doctrine. Nor does it complain of the nature of the covenants; these are rightly accepted to be unexceptional in principle. What it complains of is the duration of the restraints in the covenants, which last for the full term of the Services Agreement and for twelve months thereafter (a total of 100 years, unless the agreement is terminated early), in circumstances where the LLP has very limited ability to extricate itself from the Services Agreement before its term expires. Mr Butler said in his submissions that a shorter period for the restraints might have been justifiable; he said that he would have found it much harder to argue that a 10-year duration was unreasonable.

3) That way of approaching the matter seems to me to divorce the restraints from the wider agreement and thus to mistake their nature. In his witness statement (paragraph 23) Mr Coombes explained why he did not agree that the provisions of clause 2.2 were an unreasonable restraint of trade: "The purpose of those provisions was to recognise the legacy/LLP client ownership boundaries and it would have been unacceptable for legacy to entrust LLP with the servicing of legacy clients and legacy assets without such protection." The point about "ownership boundaries" is relevant to understanding why the doctrine does not apply in this case. Consideration of the practical realities of the situation shows this clearly enough.

4) A basic point of the Services Agreement was to enable the members of the LLP to use the legacy business, its infrastructure, and the Quantum brand to build up a business of its own; while at the same time the legacy business remained that of Quad, as mentioned above. The evidence shows that it was always intended that the restraints now found in clause 2.2 should last for the full term of the agreement and one year thereafter. The original discussions and agreement in principle were, I find, for a 10-year term for the Services Agreement (I accept the evidence of Mr Coombes and Mr Baldwin on this point). However, the members of the LLP were concerned that, if the agreement ended after 10 years, the LLP's sustainability would be threatened by the loss of a major part of its business and income so soon after trading had commenced (cf., for example, Mr Coombes' statement at paragraph 30, and Mr Reid-Jones' statement at paragraph 32). Mr Coombes had the idea of addressing that concern by extending the term of the agreement to 99 years. This found favour with the LLP, which never thereafter asked for a shorter term. The consequence of this for the LLP was that, as it was concerned to do, it retained the benefit of carrying on Quad's legacy business under the Quantum brand, as well as the other benefits under the Services Agreement.

> The consequence for Quad was that the opportunity of either re-tendering the outsourcing of its legacy business or choosing to insource it was lost, though the LLP had not acquired or sought to acquire the legacy business itself. These consequences endured so long as the agreement subsisted. The covenants give effect to the "ownership boundaries", in that they reflect the fact that, while the LLP is given the benefit of servicing the legacy Quantum business for the lengthy period it agreed to and therefore wanted, it has not acquired that business for itself and is not entitled to use its favourable position under the Services Agreement to help it to take a business for which it has not bargained.

94. In addition to the matters mentioned above, I also have regard to the further matters mentioned below in respect of reasonableness.

<u>If the doctrine applies, the restraints are reasonable</u>

95. First, the matters referred to above tend to show that, if the restraints require justification, they are reasonable within the terms of the doctrine of restraint of trade.

96. Second, the Services Agreement and the restraints in clause 2.2 were a matter of free agreement between experienced, intelligent, articulate and highly competent business people, who were properly able to look after their own interests and who expressly agreed that they were reasonable as being necessary to protect the parties' interests.

97. The LLP has raised a number of matters that are said to militate against the force of this second point.

98. The LLP complains that there was an inequality of bargaining power between the parties, and indeed that the circumstances that gave rise to the Services Agreement meant that there was no formalised negotiation process at all and no one clearly and unequivocally representing the interests of the LLP. In my judgment, there is no true substance in this point. For one thing, as I have mentioned, all of the relevant individuals were well able to look after their own affairs and interests. This is most certainly not a case of one naïve and inexperienced party up against a commercially sophisticated counterparty. (Contrast the position in *Proactive Sports Management*, which was much relied on by Mr Butler. Specious similarities on the facts must not be viewed apart from the very different circumstances in the two cases.) Again, to view the discussions and negotiations in 2007 simply as adversarial is to mischaracterise them and to view them too much from the perspective of the present adversarial dispute. I accept the evidence of Mr Coombes and Mr Baldwin that for certain purposes various individuals wore different "hats". Thus Mr Coombes, as someone who would not be joining the LLP, spoke solely for Quad. Mr Reid-Jones, though a director of Old Quad, took the lead for the LLP; his shareholding in the legacy business was small. (It is more than a little strange that the LLP, through its lawyers, should complain of a blurring of the lines in the negotiations, when Mr Reid-Jones, who took the lead for the LLP, was its principal witness. It is quite clear to me from his oral evidence that Mr Reid-Jones did not feel the least bit compromised.) Mr Baldwin and Mr Vincent did the work that resulted in the agreement for a 57/43 split of the income from the legacy business, each producing his own analysis as a basis for discussion. But the negotiations were carried out in a spirit of seeking not special advantage for one side or the other but rather an outcome that was fair and reasonable

as among all those involved. This was largely a matter of the inherent decency of the individuals involved. It was also, as Mr Reid-Jones acknowledged in cross-examination, because it was understood that Quad and the LLP were to some extent interdependent and that it would be in no one's interests to inflict damage on one's counterparty. As Mr Baldwin remarked in cross-examination, it was in the interests of everyone that the LLP, which had no money or assets of its own, should succeed, because it was to be the vehicle by which Quad would receive income from the legacy business.

99. In his oral submissions, Mr Butler went so far as to say that the LLP had "next to no bargaining power". Insofar as this is more than a hyperbolic way of referring to the relations among the individuals, it tends to highlight one of the underlying difficulties with the application of the doctrine to the Services Agreement, as already mentioned. Although the details took several subsequent months to finalise, the LLP only came into being in order to give effect to the reorganisation described many times above. To that extent, the basic shape of the Services Agreement is a given, not an avoidable contingency. The alternative scenarios were a continuation of the status quo ante (which no one appears to have wanted), a buy-out of Mr Coombes' interest in Old Quad (which was not a realistic option), and, presumably, the voluntary winding up of the legacy businesses. Any of these options could have been pursued, but for obvious reasons they were not. (So far as it is suggested that the overall bargain was unfairly slanted to one side, I address this below.)

100. The LLP complains that it did not receive independent legal advice in connection with the Services Agreement: SRBlegal LLP, the solicitors who drafted the agreement, were retained by Quad; the LLP did not retain its own solicitors. I do not regard this as any indication that the parties' free agreement ought to be viewed with particular caution when considering its reasonableness. The LLP was perfectly capable of taking its own legal advice, if it wished to do so, though it was not obliged to do so. Clause 2.6 recorded that each party had taken, "if required", separate legal advice. In cross-examination, Mr Baldwin rejected the suggestion that the members of the LLP had never made a conscious decision not to obtain legal advice; that they had, in truth, never turned their minds to the question. He said that the members of the LLP were comfortable with the agreement and remarked of them, "None of us are stupid." I accept his evidence, which gains support from the words of clause 2.6.

101. The LLP complains that the principal commercial consideration under the Services Agreement, namely the fee division in clause 9, was inadequate and unfair, although it had been agreed after a process of discussion between Mr Baldwin and Mr Vincent and drew on their respective analyses. I do not find that this head of complaint indicates any unreasonableness in the restraints in clause 2. First, the figures were a matter of mutual discussion and agreement; they were not imposed by a stronger party on a weaker. Second, and consistently with the first point, I am satisfied that when the agreement was made both parties considered the split to be fair and reasonable. Third, despite the complaints that are now made, the totality of the evidence falls far short of indicating that the parties were mistaken in their view when the agreement was made. No serious attempt was made by either side to address this point with any rigour in the evidence; this may itself reflect the facts that the court is concerned with the time of the agreement, not with the vagaries of how things actually turned out, and that, as I have said, the split of fees was not imposed by the stronger on the weaker.

Mr Butler pointed to evidence that the LLP suffered a loss of approximately £700,000 in its first year of trading as evidence that the split did not enable the LLP to cover its costs. In the absence of any attempt at proper analysis of trading, that conclusion cannot be established even for the first year of operation of the Services Agreement, not least because the LLP's 57% was specifically not calculated so as to include the LLP's expenditure on anything, such as marketing and promotion, by way of investing with a view to build up its own business—a cost that the LLP, not the legacy businesses, would have to bear. More generally, figures from the first year certainly do not establish that the split was other than reasonable for the term of the agreement. Fourth, I see little force in Mr Butler's complaint that the fee-split lasts for the full term of the agreement but has no provision for tapering. It was clear from the terms of the Services Agreement that the split would apply during the term of the agreement. Insofar as Mr Vincent suggested in evidence that the split would be subject to periodic renegotiation, his evidence is to be treated with caution. I find that the parties knew that there was no contractual provision for renegotiation. It may very well be that the individuals involved assumed that, as a matter of common sense, the operation of the Services Agreement would be kept under informal review, as is suggested by the evidence given by Mr Reid-Jones in cross-examination; but this simply reflects the facts that it is a mistake to think of commercial contracts as necessarily and simply adversarial, and that (as I have already mentioned) the successful trading of the LLP was in the interests of the members of New Quad, not merely of the members of the LLP. As for tapering over a lengthy term, it is hardly axiomatic that the absence of a provision for tapering is disadvantageous to one party or the other; much would depend on the success of the LLP's business. It must be remembered that, as Mr Coombes rightly pointed out in cross-examination, the 57/43 split relates not to the overall profitability of a business but to the marginal cost of managing a portfolio; it seems entirely reasonable to suppose that, as the LLP's operations expanded, increased efficiencies of scale would be likely to cause the cost to it of servicing legacy clients to decrease, rather than increase, as a proportion of the fee income received from those clients. Insofar, therefore, as the "tapering" argument is intended to address the question of the accuracy of the costs-based split over time, it is at least as likely to show that any tapering would have been in Quad's favour. If, on the other hand, the argument relies on some notion that, as years passed, the LLP should be permitted to retain some of the profit from the legacy work, the answer to it is that this is not the bargain that the parties made, for the very good reason that such a bargain would have been contrary to the "ownership boundaries" to which the Services Agreement gave proper effect. In any event, neither the term of the agreement nor the financial provisions were imposed by a stronger party on a weaker; the facts of *Proactive Sports Management* are materially different in that regard. (Generally, in this connection, I note that New Quad has offered a review of the fee-split, to be conducted by an independent arbitrator, on condition that the variation might be in favour of either party. That offer has not found favour with the LLP.) Fifth, I see no force in Mr Butler's observation that New Quad has received under the Services Agreement many times more by way of fees from the legacy clients than the value placed on the legacy business in 2007. That is simply the result of three things: first, the LLP did not buy the legacy business in 2007 or at all and could not have afforded to do so—the principal reason for the arrangement that was made; second, and relatedly, Quad retained the legacy business and so continued to receive income from it (obviously, the multiple of annual income that might be used to value a business for sale purposes will not be the same as the length of time the business

might endure); third, the legacy business has continued to do well, and rather better than Mr Coombes had anticipated. Of course, as the authorities show, the actual benefits received over time by reason of performance of a contract are not themselves relevant to the assessment of reasonableness: see para 81 above. Sixth, and importantly, the question is not whether the split of fees was favourable to one side or to the other but whether the restraints in clause 2 were reasonable. The adequacy of consideration is capable of being relevant to the latter question, but it is distinct from it. To pick up again a point already made in a different context: the LLP is bound to conduct business with New Quad in accordance with the trading terms in the Services Agreement, including the terms as to the split of fees; its contention is that it ought nevertheless to be permitted to seek to draw away the legacy clients and act for them on its own behalf with no split of fees, although the other terms of the Services Agreement, with the ongoing benefits it provides to the LLP, would remain intact and the exit provisions in Schedules 8 and 9 would not come into effect.

102. The contention that the totality of the consideration provided to the LLP under the Services Agreement is sufficiently inadequate to constitute evidence of the unreasonableness of the restraints might pertinently be considered in the light of the remarks made by Mr Reid-Jones in an email to his fellow-members of the LLP, Mr Vincent and Ms Kendall, on 11 October 2007 (about 8 weeks after Mr Coombes and Mr Reid-Jones had provisionally agreed an extension of the term of the agreement to 99 years):

> "In putting the outsource deal together, part of the thinking behind was that it should, in broad terms, be fair. … Now if we want to go back to legacy and renegotiate, we are always free to do so. However, we should be aware that legacy should decide that there has been enough give on its part and decide that it might like to renegotiate on certain areas that it feels hard done by on. … Taken in the entirety, I think the deal is reasonable. There will always be elements of it we can point to as unfair, but that is available to both parties."

103. Third, if the duration of the restraints required justification, I should consider it reasonable.

104. The LLP attacks the term of the restraints (100 years, unless the agreement is terminated before its term expires) as "wholly remarkable" and unjustified by any legitimate interest of New Quad. The point is made in conjunction with several others: the obligation of the LLP to carry out work under the Services Agreement during its term; the limited circumstances in which the LLP can bring the agreement to an end; the consideration under the agreement (mentioned above); and the fact, as is said, that the term, originally envisaged as being for 10 years, was extended to 99 years for reasons that had nothing to do with the necessary duration of the restraints.

105. This complaint does not seem to me to indicate that the restraints, if they require justification, are anything other than reasonable, as the parties considered them to be. First, the restraints only apply during the subsistence of the Services Agreement and for 12 months thereafter. Restraints during the subsistence of an agreement are not necessarily justified, but as the cases mentioned above demonstrate the concurrence of the restraints and the contractual relationship is capable of being relevant to

justification; the particular contract has always to be considered. In the circumstances of this case, it seems to me to be entirely justified that New Quad, which upon termination of the agreement has the right to seek to retender the outsourcing of the legacy business or to seek to insource it, should protect that business from the LLP that bargained to use that business for its own advantage but never to acquire it. To contend that the Services Agreement, with its benefits for the LLP, should subsist but that the LLP should be free (either entirely free, or free after 5 or 10 years or however long) to poach the legacy clients and thus cut New Quad out of the remuneration for which it contracted is bold: as Mr Adams said, a case of seeking to eat one's cake and have it. Second, neither the term of the Services Agreement nor the termination provisions are within the purview of the restraint of trade doctrine, though both can be taken into account when considering the reasonableness of restraints. But, at all events, the term of 99 years was not imposed by New Quad but was suggested and accepted as a method of addressing a concern of the LLP (again, contrast *Proactive Sports Management,* especially at [100]). Further, there is nothing inherently unreasonable in the absence of a contractual ability to bring a fixed-term contract to a premature end; and I accept Mr Coombes' evidence that the LLP did not ask for the inclusion of contractual termination rights. Again, the 99-year term is not arbitrarily long when viewed in its context rather than in comparison with wholly dissimilar contracts. The clients for whose benefit the services are to be provided are pension funds, which may themselves subsist for more than 100 years and might therefore remain within the scope of the Services Agreement for that time. However, the LLP would continue to service any particular legacy client only for so long as that client retained Quad as its service-provider (the evidence from Mr Coombes, which I accept, was that a business such as that of the legacy companies and the LLP would expect to lose half of its clients every 15 years), so that a reduction of the contribution of the legacy business to the LLP's Quantum portfolio would be attended by a reduction in the work subject to the fee-split. Third, I see no force in Mr Butler's complaint that the restraints are objectionable because the Services Agreement positively requires the LLP to service the legacy clients for the duration of the agreement: "So not only is [the LLP] not free to deal direct with those clients; it is not free to apply its energies elsewhere" (written opening, para 56). For one thing, the positive obligations in the Services Agreement require the LLP to service the legacy clients; the LLP's case seeks to circumvent the positive obligations by attacking the restraints. More importantly, perhaps, the argument seems calculated to convey the misleading impression that the positive obligations stifle the opportunity for trade. The impression is misleading because: (a) one of the main purposes of the Services Agreement was to *facilitate* the trading of the LLP on its own account—a purpose that, as the success of the LLP shows, has been amply achieved; (b) the LLP's attack on the restraints in clause 2.2 is directed not at the creative release of energies but at cutting New Quad out of the equation and thus increasing the LLP's profits from the very same work that is being done.

106. One particular matter, which I raised in the course of argument, gave me pause. It concerns legacy clients who cease to be clients during the term of the Services Agreement. To take a hypothetical case: after 15 years of the 99-year term of the agreement, Client X decides to run a tendering exercise for the future provision of services; the business is lost to Quantum (that is, Quad/LLP) and given to a third party. Clause 2.2.2 would appear to prevent the LLP from providing Services to Client X at any future time within the 100-year term of the restraints, and the question

arises whether this result would be reasonable. However, I have concluded that this point does not indicate that the provisions of clause 2.2 are unreasonable. First, it seems to me that in assessing the reasonableness of a restraint, the Court is entitled to have regard to its likely operation in practice rather than to its possible operation in theory. It is relevant in this connection that the LLP's case was not advanced on the basis of the matter raised in this paragraph; it was I, not the LLP, that raised it. This suggests that, if indeed the issue arises in theory, it is not in fact identified as a substantial point of concern. Second, during the operation of the Services Agreement the ability of the LLP to bid for work will be enhanced by its enjoyment of the benefit of the portfolio of legacy business and the Quantum brand, which has been mentioned many times above. At the date of making the Services Agreement, it is unrealistic to suppose that the extent of the relevant benefit in bidding for work can be assessed in advance for different future times; this will depend on the amount of legacy business that has been retained and the amount of new business that the LLP has acquired for itself. Third, the ability of the LLP to win back, though on its own account, the business of former legacy clients is liable to be assisted by the fact that it has carried out work for those very clients on behalf of New Quad; this is the more so because, as has been mentioned, the clients in question are in effect long-term trust funds. The question when a former client has in effect ceased to be that and become no more than a potential, brand new client is liable to be difficult to answer in the abstract; the provisions of clause 2 provide certainty without introducing arbitrary distinctions. Fourth, during the subsistence of the Services Agreement New Quad had no ability to seek new business, whether from former legacy clients or from wholly new clients, because its entire business base was in the hands of the LLP. Fifth, clause 2.5 contains an acknowledgment by the LLP that the restraints are no more extensive than is reasonable to protect the interests of Quad. That acknowledgment is by no means determinative, but I see no reason why it should be ignored. Sixth, although I ground my view principally on the foregoing reasons, I note the concluding words of clause 2.2. It seems to me that, in the circumstances under consideration, it would be open to the LLP to ask New Quad whether it wanted to bid for the new business of the former client, which would necessarily involve the funding of such a bid, and that if New Quad declined the opportunity the LLP would be free to pursue the business on its own account. (In the circumstances, I do not think it necessary to discuss here the question whether my query that set this hare running, as mentioned at the start of this paragraph, is illusory on account of the precise terms of the definition of "Services" in clause 2.1. The answer would, I think, depend on the relation between that definition and the use of the word in clause 2.2; a point that might not be free of difficulty.)

107. Fourth, the LLP has not persuaded me that the restraints are unreasonable on account of any consideration of public policy. Two related points were advanced on behalf of the LLP. In the first place, Mr Butler relied on evidence showing that the LLP is the only business of its kind in Wales to indicate that restraints upon the freedom of a business to trade with whomsoever and on whatever terms it wished was deleterious to the operation of the market. That is unconvincing. First, I can see no reason at all to suppose that Wales constitutes a discrete market; in the absence of compelling evidence to the contrary, the relevant market would be no narrower than England and Wales. As Mr Baldwin remarked in cross-examination, although the LLP is the only business of its kind *based* in Wales, it is by no means the only business of its kind that provides services of this nature in Wales. Second, the evidence showed that the LLP provides services to legacy clients on the same terms as those on which it provides

services to its own clients; this is indeed consistent with its obligations under clauses 7.3 to 7.5. The evidence also shows that the LLP has become highly successful, in what is accepted as being a competitive market. Therefore there is no good reason to suppose that its obligations under the Services Agreement are resulting in detriment to the market or to recipients of the kind of services provided by the LLP. Third, the LLP adduced no independent or expert evidence relating to the effect of the Services Agreement on the market.

108. The second point advanced by Mr Butler on behalf of the LLP was the contention that, if freed from the obligation to account (in effect) for 43% of the fee income from legacy clients, the LLP would be able to offer services at more competitive rates; therefore the Services Agreement was contrary to the public interest. In my judgment, there is nothing in that point. First, I regret that I view the argument with considerable scepticism. It is entirely clear that the LLP's interest, and what drives this dispute, is its desire to retain the profit element from the legacy business instead of having to pay it over to New Quad. Second, the LLP's evident ability to trade very profitably and successfully under the current arrangements do not suggest that its commercial advantage would lie in cutting its prices. Third, the argument takes altogether too narrow a view of the matter; for that reason, it either proves nothing or proves too much. If any form of restraint or obligation or cost is viewed in isolation, it will tend towards making trade more difficult and expensive and thereby towards imposing costs on end users. But that is the nature of trade; what has to be considered is (at the very least: I do not mean to limit the relevant considerations) the overall facilitation of the provision of goods and services. It is the very arrangement given effect by the Services Agreement, with its *quid pro quo* and its give and take, that enabled the LLP to enter the market at all and thereby to provide services on what are clearly competitive terms.

The Introducer's Agreement

109. The purpose of the Introducer's Agreement is set out in the recitals:

> "(A) The LLP [that is, the defendant] is a specialist firm of actuaries and employee benefit consultants and has recently obtained authorisation from the FSA to provide investment advice and insurance mediation services.
>
> (B) QFC is currently authorised by the FSA to provide investment advice and insurance mediation services but is willing to voluntarily de-authorise itself for the purposes of this Agreement.
>
> (C) QFC has agreed to act as an introducer appointed representative to the LLP in accordance with the provisions of this Agreement".

Accordingly, clause 2.1 provided:

> "With effect from the Effective Date [defined to mean 30 November 2008], the LLP confirms the appointment of QFC as an Introducer Appointed Representative to the LLP in accordance with the terms of this Agreement."

Clause 1 defined "Introducer Appointed Representative" as having the meaning set out in section SUP12.2.8 of the FSA (now the FCA) Handbook[1]. Nothing of substance turns on the detail of that definition or on the corresponding definitions of "Introduction", "Introduce" and "Introduced". Clause 2.2 provided:

> "In its capacity as an Introducer Appointed Representative, QFC shall Introduce to the LLP:
>
> 2.2.1 all those clients whose names are set out on the Q List;
>
> 2.2.2 any Prospective Clients."

"Relevant Services" was defined to mean "the provision of investment advice and insurance mediation services to Clients in accordance with the provisions of Part II of the Financial Services & Markets Act 2000 (Regulated Activities) Order 2001".

110. "Clients" was defined to "incorporate all clients listed on the Q List and any Prospective Clients". "Q List" was defined to mean "the existing clients of QFC as listed in Schedule 1 of this Agreement". In fact, no clients were listed in Schedule 1; it was blank. "Prospective Clients" was defined to mean "any clients not listed on the Q List who approach QFC for the provision of Relevant Services".

111. Clause 7.1 provided:

> "In consideration of each Introduction …, the LLP shall pay QFC a fee equal to 43% of the Relevant Income actually received by the LLP in respect of the Client Introduced ('QFC Income')."

"Relevant Income" was defined to mean "the net commission or other fee income (exclusive of VAT and any disbursements) received by the LLP in respect of the provision of Relevant Services to a Client Introduced by QFC to the LLP pursuant to this Agreement". The substance of this apportionment of fees was therefore the same as that under the Services Agreement. The mechanism was different, because the retainer for regulated services was required to be with an authorised person; as QFC was becoming de-authorised, it could not contract directly with the clients, and they had to contract with the newly authorised LLP.

112. Clause 9 as a whole is headed "Confidentiality / Data Protection"; clause 1.7, however, provides that the headings in the agreement are inserted for convenience only and shall not affect the construction or interpretation of the agreement. Clause 9.1 provides:

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[1] "(1) An introducer appointed representative is an appointed representative appointed by a firm whose scope of appointment must, under SUP 12.5.7 R, be limited to: (a) effecting introductions to the firm or other members of the firm's group; and (b) distributing non-real time financial promotions which relate to products or services available from or through the firm or other members of the firm's group."

> "With respect to the parties' rights and obligations under this Agreement, the parties agree that QFC is the Data Controller and that the LLP is the Data Processor."

Clause 9.2 begins, "The LLP shall", and it then set out obligations of the defendant under ten numbered sub-paragraphs. The focus of each of those sub-paragraphs is data protection, and clause 9.2.9 is the only one that does not include the words "Personal Data":

> "9.2.9 [The LLP shall] permit QFC or its external advisers (subject to reasonable and appropriate confidentiality undertakings) to inspect and audit the LLP's data processing activities and those of its agents, subsidiaries and sub-contractors and comply with all reasonable requests or directions by QFC to enable QFC to verify and procure that the LLP is in full compliance with its obligations under this Agreement".

113. Clause 13 contains an "entire agreement" provision:

> "13.1 This Agreement and the documents referred to in it constitute the entire agreement between the parties and supersedes all prior arrangements, written or oral with respect thereto. All other terms and conditions, expressed or implied by statute or otherwise, are excluded to the fullest extent permitted by law.
>
> …
>
> 13.3 If any of the provisions of this Agreement are held by any competent authority to be invalid or unenforceable in whole or in part, the validity of the other provisions of this Agreement and the reminder [scil. remainder] of the provisions in question shall not be affected."

(The clause is identical, right down to the typographical error, to clause 17 of the Services Agreement.)

114. As has already been mentioned, the Introducer's Agreement was novated as between the claimant and the defendant by a deed of novation dated 31 March 2011. QFC was dissolved on 26 March 2013.

Is the Introducer's Agreement void for uncertainty?

115. The first issue in respect of the Introducer's Agreement arises under paragraph 28 of the Defence:

> "[T]he Q-List under the [Introducer's Agreement] was blank and accordingly, on its face, there are no clients in respect of whom the Defendant is obliged to pay. Further or alternatively,

> the [Introducer's Agreement] is, for that reason, void for uncertainty."

Paragraph 39 of the Counterclaim reads:

> "Pursuant to the [Introducer's Agreement], the Defendant had at [30 November 2018] paid the Claimant the sum of £2,184,439. The [Introducer's Agreement] being devoid of an identifiable list of clients, and/or void for uncertainty, this money has been paid under a mistake, and the Claimant has been unjustly enriched by its receipt. The Claimant is obliged to repay the same."

116. The LLP's pleaded case therefore puts the matter on two slightly different bases: first, that the Introducer's Agreement is void for uncertainty or incompleteness; second, that there are no clients in respect of whom the Introducer's Agreement imposes on the LLP an obligation to make payment to New Quad. Mr Butler's submissions focused on the first way of putting the case, but I bear in mind the second way also.

117. Neither way of putting the case is attractive, given that the evidence shows—and I find—that both parties carried on business with each other for several years under the Introducer's Agreement without any difficulty or uncertainty and that the LLP did not believe that there was any problem with operating the agreement until in 2018 it was advised that the fact that Schedule 1 was blank meant that the Introducer's Agreement was unenforceable against it. The LLP's case on this point is rendered even less attractive by the consideration that the Introducer's Agreement was part and parcel of the original reorganisation and involved QFC presenting to the LLP a turnkey regulated business on terms that it now seeks (pursuant to advice, I emphasise) to avoid. However, Mr Butler submits that the law is the law; so it is necessary to address the issue. He also submits, ambitiously, that the LLP's argument serves to advance the policy of English commercial law in favour of certainty; though why that policy should be advanced by telling businessmen who for years have carried on business without any difficulty under what they believed to be a contract that in fact, because of uncertainties of which they were never aware, there was no contract, is not immediately obvious.

118. "Q List" was the name that the individuals involved in the legacy businesses gave to the class of those who would be legacy clients for the purposes of the reorganisation. The first documented reference to it in the evidence is an email sent on 5 February 2007 by Mr Reid-Jones to Mr Deidun, Mr Coombes, Mr Davies, Mr Vincent and Philippa Aaronson (whose involvement need not be explained here). The Subject line of the email read, "Q List" and the attachment to the email was "Q List.xls". The text of the email read, "Please find attached the first stab at the Q List – please take a look and add where necessary." The draft was then subject to a process of revision. Eventually, in an email on 6 June 2007 to Mr Vincent, Mr Davies, Mr Baldwin, Mr Deidun and Mr Coombes, Mr Reid-Jones wrote, "Q List sorted, well done all."

119. I accept the evidence of Mr Baldwin that, when the Q List was compiled in 2007, it was a unitary list comprising the clients of all the legacy businesses. At that stage, it was intended and envisaged that QFC's regulated work would be outsourced in the same way as the unregulated work of Old Quad and RPS; only as matters developed

did that intention change. The Q List therefore contained clients to whom only regulated services were provided as well as clients to whom only unregulated services, or services of both sorts, were provided. Some emails in September 2008 show that New Quad's compliance manager at the time, Derek Lavington, was querying the suitability for the Introducer's Agreement of the existing Q List, because it included those who had been Quantum clients generally but never specifically clients of QFC. But those emails, culminating in a rather strange one from Mr Lavington with the subject "Tales from the Quantumverse (oh yes)", indicate that his desire for a revised Q List was resisted. I accept Mr Baldwin's evidence, which is consistent with the emails, that the Q List remained unaltered and was meant to have been incorporated in its existing form into Schedule 1 of the Introducer's Agreement.

120. On 18 February 2009 Liz Hitchings, a solicitor with SRBlegal LLP, sent by email to Mr Reid-Jones and Mr Lavington a clean copy of the Introducer's Agreement for printing and signature, together with draft board minutes for QFC and draft minutes for a meeting of the designated members of the LLP. Her email noted three specific matters for the attention of the parties, including "Schedule 1 – the 'Q List' needs to be inserted." In the event, the Q List was not inserted into Schedule 1. Mr Reid-Jones said in cross-examination that he did not know why it had been omitted. He confirmed that, when he signed the Introducer's Agreement on behalf of the LLP, he understood that he was signing a binding contract. The obvious explanation for the non-insertion of the Q List into Schedule 1 is oversight. I reject any suggestion that the Q List had not been agreed; if that had been the case, there would be evidence of ongoing disagreement and of attempts to reach agreement; and there is clear evidence that the list had in fact been agreed. Mr Butler invited the conclusion that an email sent by Mr Coombes on 30 March 2009, in which he asked for "the billing names and addresses of all QFC clients", showed that there was ongoing uncertainty as to the identities of the Q List clients. I do not draw that conclusion. Mr Coombes' evidence, which I accept on the point, was that he made the enquiry not because of uncertainty over the Q List but because he wanted accurate contact details for the purposes of new letters of engagement.

121. The parties acted for many years on the basis that the LLP was receiving fees from Q List clients and had to account for 43% of those fees. It is unattractive to say that they could not have been doing what they thought they were doing, because the Q List was devoid of content. Nor is there any need to reach any such conclusion.

122. In considering this issue, a convenient starting point is the approach to the construction of commercial contracts. The general principles of construction are not in doubt. They were summarised pithily by Lord Bingham of Cornhill in *Dairy Containers Ltd v Tasman Orient CV* [2005] 1 WLR 215 at [12]:

> "The contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed."

The ramifications of that approach have been discussed in detail in many cases. I refer in particular to *Rainy Sky S.A. v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900; *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619, esp. *per* Lord Neuberger PSC at [15]-[22]; and *Wood v Capita Insurance Services Limited* [2017] UKSC 24,

[2017] AC 1173, esp. *per* Lord Hodge at [10]-[13]. Lord Hodge's judgment in *Wood v Capita Insurance* discussed in particular the relationship between text and context; he said:

> "10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning."

> "12. … To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

In the recent case of *First National Trust Co (UK) Ltd v McQuitty* [2020] EWCA Civ 107, Peter Jackson LJ, with whom Asplin LJ and Henderson LJ agreed, cited with evident approval the remarks of Briggs J in *LB Re Financing No 3 Ltd v Excalibur Funding No 1 Plc* [2011] EWHC 2111 (Ch):

> "46. Commercial absurdity may require the court to depart even from the apparently unambiguous natural meaning of a provision in an instrument, because 'the law does not require judges to attribute to the parties an intention they plainly could not have had': see per Lord Hoffmann in the *ICS* case at page 913. …"

> "59. … Where something has gone wrong with the language, it is not in my judgment necessarily an objection to dealing with it in a way that avoids commercial absurdity that provisions have, apparently, to be rewritten, blue pencilled, or amplified so as to work rationally in particular circumstances."

Peter Jackson LJ himself concluded:

> "33. When construing a document the court must determine objectively what the parties to the document meant at the time they made it. What they meant will generally appear from what they said, particularly if they said it after a careful process. The court will not look for reasons to depart from the apparently clear meaning of the words they used, but elements of the wider documentary, factual and commercial context will be taken into account to the extent that they assist in the search for meaning. That wider survey may lead to a construction that departs from

> even the clearest wording if the wording does not reflect the objectively ascertained intention of the parties."

123. In respect of incomplete and uncertain agreements, Mr Butler referred me to passages in Lewison, *The Interpretation of Contracts* (6th edition) and to the decision of Sir James Hannen P in *In the Goods of de Rosaz* (1877) 2 PD 66 (a wills case), and to the decision of the Court of Appeal in *Openwork Ltd v Forte* [2018] EWCA Civ 783. In the *Openwork* case, the judgment of Simon LJ, with which Arden LJ and Newey LJ agreed, contains a full discussion of the principles and authorities at [24] to [29], including consideration of the speeches of Lord Wright in *WN Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503 and *G Scammell & Nephew Ltd v HC and JG Ouston* [1941] AC 251 and the judgment of Leggatt J in *Astor Management AG v Antalaya Mining Plc* [2017] EWHC 425 (Comm). I shall not attempt any reformulation of the applicable principles; the following pieces of useful guidance, among others, can be picked out from the cases:

- "The Court should strive to give some meaning to contractual clauses agreed by the parties if it is at all possible to do so": *Openwork Ltd* at [25].

- To the same effect: "A conclusion that a contractual provision is too uncertain to be enforceable is, as was said by Leggatt J in *Astor Management AG v Antalaya Mining Plc* [2017] EWHC 425 (Comm) at [64], (approved in *Openwork Ltd v Forte* [2018] EWCA Civ 783) 'a last resort or, as Lord Denning MR once put it, a "counsel of despair"'": *Macquarie Capital (Europe) Ltd v Nordsee Offshore MEG I GmbH* [2019] EWHC 1655 (Comm), *per* Butcher J at [94].

- "The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity so long as any definite meaning can be extracted. But the test of intention is to be found in the words used. If these words, considered however broadly and untechnically and with due regard to all the just implications, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract": *per* Lord Wright in the *G Scammell & Nephew* case, at p. 268.

- "'A provision in a contract will only be void for uncertainty if the court cannot reach a conclusion as to what was in the parties' minds or where it is not safe for the court to prefer one possible meaning to other equally possible meanings,' while bearing in mind that what is in the parties' mind is a legal construct and not an enquiry into subjective intent": *Openwork Ltd v Forte* at [29], quoting from Lewison, op. cit. at p. 473.

124. In *In the Goods of de Rosaz,* the Court was concerned with the question of what if any parol evidence could be admitted to assist in ascertaining the meaning of the testator as expressed in his will. Mr Butler relied on a passage in the judgment of Sir James Hannen P at pp. 68-69 (citations omitted):

> "In considering, therefore, whether a particular person or thing has been sufficiently indicated by a testator, there must be some words to which the required meaning may be attached. A complete blank cannot be filled up by parol testimony, however strong. Thus a legacy to Mr _____ cannot have any effect given to it, nor a legacy to Lady _____. But if there are any words to which a reasonable meaning may be attached, parol evidence may be resorted to to shew what that meaning is. Thus a legacy to a person described by an initial, as to Mrs C, admits of explanation as by shewing that the testator was accustomed to speak of a particular person by the initial of her name. And where a blank was left for the Christian name, parol evidence has been admitted to shew who was intended."

125. I reject the LLP's case on this issue. In summary, my reasons for doing so are as follows. First, I see no reason to think that the Introducer's Agreement could be void for uncertainty, because it is possible to reach a conclusion as to which (if any) clients are encompassed by it. Second, I consider that it is possible to give ascertainable content to the Q List: (a) by simple construction; alternatively, (b) by means of estoppel by convention. Third, if I were wrong on the second point, I should be of the view that the LLP had not shown that the payments it has made did not fall to be made in respect of Prospective Clients. I address each of these three reasons in turn.

126. First, in my judgment the points raised by the LLP do not, even on their own terms, support the contention that the Introducer's Agreement is void for incompleteness or uncertainty. The scheme of the agreement is simply that the LLP will make payment to QFC in respect of fees received from two classes of client introduced to the LLP by QFC: clients on the Q List, and Prospective Clients. The Introducer's Agreement would be void for uncertainty or incompleteness only if no meaning could be given to "clients whose names are set out on [or "clients listed on"] the Q List". The case advanced by the LLP, namely that one cannot look beyond the blank Schedule 1, would do no more than lead to the conclusion that there are no persons within the first class of client; it would not lead to uncertainty as to which persons were within the first class. Whether any persons came within the second class would be a question of fact. If they did, fees would be payable in respect of those Prospective Clients; if they did not, no such fees would be payable. Even if the class of Prospective Clients remained empty, the Introducer's Agreement would not be void; it would be valid as regulating the parties' obligations in the event of a contingency that never materialised.

127. Second, if one reads the Introducer's Agreement contextually and strives to give to it some meaning that is not only grammatical but commercially practical, bearing in mind that the parties had no difficulty operating it for several years, there is no difficulty in identifying the clients in the first class, namely the Q List clients. The difficulty exists only if one is determined to derail the agreement. QFC was obliged to introduce the two classes of client identified in clauses 2.2.1 and 2.2.2 and was entitled to payment in respect of fees resulting from any such introduction. The primary way of making the introduction was by way of a client list: "the Q List", as mentioned in clause 2.2.1. I find that the identity of that list and the identities of those on it were certain and known to both parties; it was an actual list, not a notional list.

Although the contents of the list were inadvertently not transposed into Schedule 1, the Q List and its contents remained identifiable. (At the end of his oral evidence, in response to a question from me, Mr Reid-Jones confirmed that there had never been any problem in identifying the clients to which the Introducer's Agreement referred and that it was only in 2019 that he had learned that the list annexed to the signed Agreement was blank.) The Court can therefore identify them. To put the matter in the terms of the judgment in *In the Goods of de Rosaz*: this is not analogous to a gift to Mr _____, leaving us none the wiser; it is analogous to a gift to Mrs C, where we know how the testator used the designation "Mrs C". It is not a case of obligations relating to the following clients, namely _____; it is a case of obligations relating to the clients listed on the Q List, namely _____, where we know what the parties meant by the Q List.

128. I reach that conclusion as a matter simply of contractual interpretation. If it were necessary, however, I would reach the same conclusion by means of the doctrine of estoppel by convention.

129. In *K Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd, The 'August Leonhardt'* [1985] 2 Ll R 28, Kerr LJ, delivering the judgment of the Court of Appeal, said this of estoppel by convention at 34:

> "A convenient statement of this principle is to be found in the following passage in Spencer Bower and Turner on 'Estoppel by Representation', 3rd edition at p.157, which was cited with approval by Lords Justices Eveleigh and Brandon (as they then were) in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] 1 QB 84 at pp.126 and 130 as follows:
>
> > 'This form of estoppel is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped against the other from questioning the truth of the statement of facts so assumed.'"

Kerr LJ further said at 34-35:

> "All estoppels must involve some statement or conduct by the party alleged to be estopped on which the alleged representee was entitled to rely and did rely. In this sense all estoppels may be regarded as requiring some manifest representation which crosses the line between representor and representee, either by statement or conduct. It may be an express statement or it may be implied from conduct, e.g. a failure by the alleged representor to react to something said or done by the alleged

> representee so as to imply a manifestation of assent which leads to an estoppel by silence or acquiescence. Similarly, in cases of so-called estoppels by convention, there must be some mutually manifest conduct by the parties which is based on a common but mistaken assumption. The alleged representor's participation in this conduct can then be relied upon by the representee as a basis for this form of estoppel. … A similar situation existed in the *Amalgamated Investment* case (supra) which is now the leading authority on this doctrine in this country. The parties negotiated and dealt at length on the basis of their common assumption of a binding contractual nexus between them which did not in fact exist. Having acted on this assumption throughout these negotiations and dealings, neither party was thereafter entitled to rely on the absence of the contractual nexus on which these had been based. …
>
> The applicability of the doctrine of estoppel in any given case can also be tested in another way. There cannot be any estoppel unless the alleged representor has said or done something, or failed to do something, with the result that – across the line between the parties – his action or inaction has produced some belief or expectation in the mind of the alleged representee, so that, depending on the circumstances, it would thereafter no longer be right to allow the alleged representor to resile by challenging the belief or expectation which he has engendered. To that extent at least, therefore, the alleged representor must be open to criticism."

130. More recently, but to similar effect, in *Preedy v Dunne* [2016] EWCA Civ 805, [2016] C.P. Rep. 44, Vos LJ, with whom Longmore and King LJJ agreed, said at [47], in a passage relied on by Mr Butler:

> "The elements of an estoppel by convention are not much disputed between the parties. They are reflected in para 10.01 of *Wilken and Ghaly on The Law of Waiver, Variation and Estoppel*, 3rd edn. (Oxford: Oxford University Press, 2012), as follows:
>
> > '(i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.
> >
> > (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.

> (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.
>
> (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.
>
> (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.'"

131. A couple of remarks about this passage are in order. First, proposition (i), like the others, is taken from the judgment of Briggs J in *HMRC v Benchdollar Ltd* [2010] 1 All ER 174. However, in *Stena Line Ltd v Merchant Navy Ratings Pension Trustees Ltd* [2010] EWHC 1805 (Ch), [2010] Pens LR 411, at [137], Briggs J accepted on the authority of *The 'August Leonhardt'* that "the crossing of the line between the parties may consist either of words, or conduct from which the necessary sharing can properly be inferred". (This passage was unaffected on appeal.) The important point is that: "It is not enough that each of the two parties acts on an assumption not communicated to the other": *per* Lord Steyn in *The 'Indian Endurance'* [1998] AC 878 at 913. Second, to speak, as Mr Butler did in his oral submissions, of the need for the party against whom estoppel is raised (B) to be "at fault" or "to blame" for the common assumption and the reliance of the party raising the estoppel (A) is potentially misleading. What is necessary is that A's acting on the common assumption should not be purely down to its own judgment; B must have been in some way responsible for A's belief that this was a common assumption on which it could act; that is the extent to which B must be "open to criticism", in the words of Kerr LJ. The matter is put as follows in *Spencer Bower: Reliance-Based Estoppel*, 5th edition 2017, at 8.26 (citations omitted):

> "Viewed as an application of the general requirement for a reliance-based estoppel—that B (actually or as reasonably understood by A) intended to induce A to act in reliance on the relevant proposition other than at A's own risk—the question raised by this second of Briggs J's requirements is whether B actually (or as reasonably understood by A) intended that A could rely on the subscription of A to their common view (as opposed to each, keeping his own counsel, being responsible for his own view). It is by reference to their subsequent dealings on that basis that B will be answerable to A: for B will be taken to assume responsibility for A's reliance on the understanding to which B has assented if B knew or ought to have known that A was relying or would rely on it, unless A knew, or in the circumstances should have known, that B was not making himself responsible for A's understanding or action, which remained A's own risk and responsibility."

132. In the present case, I consider that the requirements for the application of the doctrine of estoppel by convention would be satisfied. Both parties executed the Introducer's Agreement, having first (as I find) agreed the Q List. The entire basis of the agreement was the introduction of business from identified clients and unidentified prospective clients by QFC to the LLP. The introduction of the identified clients was by way of the Q List. The conduct of each party admits objectively of no other understanding than that it was holding itself out as bound by the contract, with the inclusion of the Q List, and as regarding the other party as similarly bound. The failure to insert the contents of the Q List into Schedule 1 was a matter of oversight. That was not the "fault" of the LLP any more than it was the "fault" of QFC; that, however, is beside the point. In circumstances where the Q List was agreed and was the basis of the agreement, the LLP's conduct in signing the Introducer's Agreement and conducting business in accordance with it thereafter was clearly premised on the mutual rights and obligations of the parties under the Introducer's Agreement and on the basis of the Q List. Each party acted on that common assumption. In particular, QFC acted as introducer in respect of its client list, in effect handing over its business to the LLP. In my judgment, it would manifestly be unconscionable for the LLP to say (as indeed it now says, though only on advice) that it is entitled to take all the benefit of the Introducer's Agreement without paying anything for the introductions it has received.

133. Third, if all of the foregoing analyses were wrong, I should still find that the LLP's counterclaim for restitution of moneys paid failed. If the class of clients in clause 2.2.1 is empty, the class of Prospective Clients in clause 2.2.2 is correspondingly enlarged; it will now include <u>any</u> clients who approach QFC for the provision of investment advice and insurance mediation services, whether or not they were named on the actual Q List. The LLP has neither pleaded nor proved that it mistakenly made payments in respect of any persons who did not fall within the definition of Prospective Clients on this basis.

Ought the LLP be ordered to give an account under the Introducer's Agreement?

134. The second question arising in respect of the Introducer's Agreement is whether the claimant is entitled to, or ought to be granted, an order for an account of the moneys due to it under the agreement. The defendant denies that the claimant is entitled to an account of the moneys due to it under the Introducer's Agreement. It says (Defence, paragraph 28) that it "has consistently provided a monthly spreadsheet relating to the clients to whom it believes that the Introducer's Agreement applies, setting out the sums to which the claimant is entitled, and has made payments of such sums as it has believed itself obliged to pay under its terms".

135. The claimant relies on clause 9.2.9 of the Introducer's Agreement. However, in my judgment, if clause 9.2.9 is read contextually, it is clear that its reference to "full compliance with its obligations under this Agreement" is to the data protection obligations with which clause 9 is concerned. Nothing else in clause 9 relates to anything outside the scope of the heading, which, while not itself relevant to construction, appears accurately to have identified the subject matter of the clause. Further, the first part of clause 9.2.9 is concerned expressly with the policing of the defendant's "data processing activities". Only an acontextual literalism could take the

second part of the clause as referring to the range of other obligations outside clause 9. If there were a general obligation to comply with requests to enable QFC or the claimant to verify compliance with other obligations, it would naturally form the subject matter of a discrete provision.

136. Even if clause 9.2.9 were given the broader construction relied on by Mr Adams, I should not think the claimant entitled to the relief it seeks, which is an order for an account of dealings. Clause 9.2.9 requires the LLP to comply with all reasonable requests or directions by the claimant to enable the claimant to verify and procure that the LLP is in full compliance with its obligations under the Introducer's Agreement. The claimant has neither pleaded nor proved that the LLP has failed to comply with reasonable requests or directions, and there is nothing in the evidence to indicate that the LLP has not, or that there is a reasonable suspicion that it has not, properly accounted for the moneys due under the Introducer's Agreement in the manner it claims to have done so. Therefore I find no proper basis on which to order the defendant to give an account.

Conclusion

137. For the reasons set out above, I have reached the following summary conclusions:

1) The Services Agreement was novated from Old Quad to New Quad.

2) The Direct LLP Clients are correctly treated as New Quad's Clients for the purposes of the Services Agreement—which is, indeed, how both parties have treated them.

3) The covenants in clause 2 of the Services Agreement are not unenforceable restraints of trade because (a) the doctrine of restraint of trade does not apply to them and (b), if the doctrine did apply, the restraints would be reasonable.

4) The Introducer's Agreement is not void for uncertainty and the LLP is not entitled to the return of the moneys that it has paid under it.

5) No order ought to be granted to New Quad for an account of the moneys due to it from the LLP under the Introducer's Agreement.

138. Accordingly, the claim succeeds in all respects other than the claim for an account, and the counterclaim fails.