Approved Judgment

Neutral Citation Number: **[2026] EWHC 110 (Comm)**

Case No: CL-2023-000456

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 January 2026

Before:

MR JUSTICE PICKEN

- -

BETWEEN:

(1) MCLAREN INDY LLC

(2) MCLAREN RACING LTD

Claimants

- and -

(1) ALPA RACING USA LLC

(2) MR ALEX PALOU MONTALBO

(3) PALOU MOTORSPORT SL

Defendants

- -
- -

Mr Paul Goulding KC, Ms Celia Rooney, and Mr Abe Chauhan (instructed by **Morgan, Lewis & Bockius UK LLP**) for the **Claimants**.
Mr Nick de Marco KC, Ms Hollie Higgins, and Ms Aislinn Kelly-Lyth (instructed by **Mishcon de Reya LLP**) for the **Defendants**.

Hearing dates: 29 September 2025, 2-10 October 2025, 20-24 October 2025, 5 November 2025
Judgment provided in draft: 16 January 2026.

Approved Judgment (in redacted form)

This judgment was handed down remotely at 10.30am on 23 January 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives. There are two versions of this Judgment: an unredacted version which has been provided to the parties; and a version which contains redactions because of the need to maintain commercial confidentiality, the Judge being satisfied that this is appropriate notwithstanding the open justice principle.

Mr Justice Picken:

Introduction

1. The dispute in this case is set in the high-stakes commercial world of elite motorsport, specifically the North American IndyCar Series. Liability for breach of contract is not in issue. By an order dated 4 June 2024, judgment on liability was entered against the Defendants for various admitted breaches of the agreements in question. The dispute, therefore, relates to causation, remoteness and the quantum of damages.

2. The First Claimant ('McLaren Indy') is a limited liability company under the laws of Indiana, which has its registered office in Indianapolis, USA. It operates and manages a racing team, including for the purpose of competing in the IndyCar Series, which is explained further below. The Second Claimant ('McLaren Racing') is a private limited company incorporated in England and Wales. It also operates and manages a racing team, including for the purpose of competing in the FIA Formula One World Championship ('F1'). McLaren Indy is an indirect subsidiary of McLaren Racing. I will refer to them collectively (where appropriate and where the distinction between the two companies is immaterial) as 'McLaren'.

3. The Second Defendant, Mr Alex Palou, is a Spanish racing driver, who has been described as a generational talent. He presently drives in the IndyCar Series for Chip Ganassi Racing ('CGR'). He won the IndyCar Series championship in 2021, 2023, 2024, and 2025, as well as the Indianapolis 500 (the 'Indy500', also explained further below) in 2025.

4. The First Defendant ('Alpa Racing USA') is an S-Corporation company, incorporated under the laws of Indiana, which operates as Mr Palou's personal service company, through which he provides his services as a racing driver. The Third Defendant ('Palou Motorsport'), formerly known as Alpa Racing SL, is a private limited company incorporated under the laws of Spain, in which Mr Palou at least at one stage held a 60% shareholding.

5. McLaren allege that Mr Palou, acting through his personal service companies, repudiated binding agreements under which he was contracted to drive for McLaren's IndyCar team ('Arrow McLaren') for the 2024, 2025, and 2026 racing seasons. McLaren seek damages in excess of US$20 million for six heads of loss – including lost sponsorship revenue and increased driver salary costs – which they claim to have incurred as a consequence of the breach. McLaren also seek restitution of a US$400,000

sign-on bonus paid to Mr Palou. In the alternative to their claim for loss of profits, McLaren claim for wasted expenditure for monies in the sum of US$1,103,452.

6. For their part, the Defendants say that McLaren have suffered no loss at all and, indeed, have financially benefitted from the breach, principally through the recruitment of a replacement 'pay driver' who brings substantial funding to the team. They submit that any benefits must be set off against any losses and that, on the proper application of relevant legal principles, no damages are payable.

7. What follows, by way of background, is drawn almost entirely from the Agreed Narrative Document prepared by the parties for the trial. It is, as such, almost entirely uncontroversial.

The IndyCar Series and other open-wheel competitions

8. The highest class of single seater motor car racing in the world is Formula 1 ('F1'): a racing competition which runs between March and December every year, and consists of 24 Grand Prix races, which take place at different racetracks (comprising tracks and street races, but not oval races) around the world.

9. There are various other motor racing competitions, including the IndyCar Series, which is the premier professional open-wheel car racing championship in North America. A form of IndyCar racing was first started over 100 years ago, albeit that the name and exact format of the competition has changed and evolved since then. The current competition has been running since 1996. The IndyCar Series is supported by developmental racing series, including Indy NXT by Firestone (previously known as Indy Lights).

10. McLaren are the only corporate group that currently has teams in both F1 and the IndyCar Series. McLaren have competed in F1 since 1966 and began competing full-time in IndyCar in 2020 (initially through an alliance with Schmidt Peterson Motorsports, a team which it subsequently acquired).

11. The IndyCar season ordinarily runs for six months from March until September each year. The number of races in each season is at the discretion of the owner of the IndyCar Series and can, therefore, vary. For example, the 2024 IndyCar season comprised seventeen championship races in total, sixteen of which took place in the United States and one of which took place in Canada.

12. The IndyCar Series is renowned for being a high-speed competition, with diverse tracks. Races in the IndyCar Series comprise oval circuits, road courses and street circuits. The most important event in the IndyCar Series calendar is the Indy500, in which 33 drivers take part in a 500-mile race around the Indianapolis Motor Speedway track. The history, audience size, and prize money make the Indy500 the most prestigious event of the IndyCar season.

13. There are currently 11 full-time racing teams in the IndyCar Series championship, including CGR – the team for which Mr Palou presently drives – and McLaren Indy's team, Arrow McLaren.

14. In the 2024 IndyCar season, an IndyCar team could have between two and five cars on the starting grid. From 2025, the existing teams in the IndyCar Series entered into a series-wide 'charter system' (the 'Charter') that guarantees a total of 25 cars for these teams in IndyCar, imposes a cap of three cars per team, and provides these teams with the right to compete in every IndyCar race except the Indy500.

15. In the 2020, 2021, and 2022 IndyCar Series, McLaren Indy ran two full-time cars: Car #5 and Car #7. McLaren Indy launched a third car, Car #6, full-time from 2023.

16. An ordinary race weekend consists of two practice sessions on Friday, one practice session on Saturday morning and a qualifying session on Saturday afternoon. The race itself takes place on Sunday. Drivers compete in the Drivers' Championship and are awarded points based on their finishing position in the race, as well as for achievements during the qualifying sessions and on race day (e.g. 1 point for pole position, 1 point for leading at least one lap, and 2 points for leading the most laps during the race). Until the 2023 season, a 'doubled points' system was adopted for the Indy500, by which double the value of points were awarded for finishing positions and other achievements in the Indy500 when compared with those which were awarded for other IndyCar championship races.

17. In any given season in the IndyCar Series, every team will use the same chassis, which is purchased from an Italian manufacturer, Dallara. There are two engine manufacturers – Honda and Chevrolet – each of which supply different teams in the IndyCar Series, with an equal split across the teams. McLaren Indy race cars are fitted with a Chevrolet engine. In contrast, CGR's cars have Honda engines.

Sponsorship

18. IndyCar teams are likely to have several sources of revenue, which include prize money and the monies they receive from any 'paying' driver (i.e. a racing driver who pays money to an IndyCar team in order to be one of its drivers). In truth, sponsorship revenue is the main revenue stream for the majority of teams in the IndyCar Series.

19. Commercial sponsorship can take many forms. For example, sponsors can buy naming rights (e.g. in respect of the team or a particular car) or may choose to buy livery sponsorship (e.g. on the car livery or the wider team livery, including on driver overalls). The more prominent the relevant branding space, the more valuable it is likely to be (the aeroscreen, sidepod, and rear wing of the car are considered to be particularly valuable). Sponsors may also buy access to a team's commercial assets and rights, or hospitality benefits, including at race days.

20. Different sponsors value different features of IndyCar sponsorship: whilst some will favour on-car branding, and the resulting exposure of their products and brands to fans and potential consumers, others are primarily interested in the 'business-to-business' (or 'B2B') opportunities that may arise from IndyCar sponsorship. Sponsors may choose to sponsor a team for a particular race or across one or more seasons, and IndyCar teams may have a rotating roster of sponsors.

21. The process of obtaining sponsors varies from team to team. However, in respect of livery, teams very often use 'rate-cards': internal documents that guide the price that the team will seek when selling branding rights to sponsors.

22. As for McLaren in particular, sponsorship revenue represents McLaren's main source of revenue. McLaren have over 50 sponsors (or partners) across different racing platforms, including F1. They sell a variety of different assets to sponsors, including: (a) naming rights for both the team and particular cars; (b) other branding rights, for its cars, drivers, and team uniforms; (c) hospitality packages at races; and (d) time with its drivers. Sponsors can also become 'official partners' for a particular aspect of the team's operation.

23. The main sponsorship asset that McLaren have are their branding rights. Like other teams, McLaren ascribe values to particular locations on the car, which are recorded in their rate cards. For the IndyCar Series, McLaren Indy has two rate-cards for each car: an internal rate-card, representing "*the bottom line before [it] will walk away from a deal*", and a pitch rate-card, which will be used as the "*starting position in negotiations*".

24. In addition, McLaren Indy sells naming rights, for both the team and each of its cars. In respect of the former, the Arrow McLaren team takes the first part of its name from Arrow Electronics Inc. ('Arrow'). Arrow also sponsors Car #5. The primary sponsors of Car #6 and Car #7 meanwhile are NTT Data Americas, Inc ('NTT') and RJ Reynolds Vapor Company ('RJV') respectively. Each of those cars will carry the name of the relevant sponsor or the name of a specific product.

25. McLaren Indy has three broad levels of sponsorship: gold, silver, and bronze, where sponsors are categorised by reference to their level of investment. As a general rule, it also prioritises long-term sponsorships and ideally seeks to secure sponsors for between 10 to 15 years, instead of shorter 3 to 5 year deals.

Formula 1

26. F1 comprises two title competitions: the Drivers' Championship, in which individual drivers compete for points, and the Constructors' Championship, which is a competition between the racing teams. Each team has two full-time drivers, who will ordinarily compete in any given race, as well as reserve drivers, who will drive in the place of a full-time driver in certain circumstances (e.g. injury). Unlike the IndyCar Series, each racing team is, by regulation, required to design and develop significant parts of their race cars themselves.

The AP Agreements

27. Mr Palou first raced in the IndyCar Series in 2020 (his 'rookie' year) when he drove for Dale Coyne Racing.

28. On or around 1 November 2020, Palou Motorsport (then known as ALPA Racing SL) entered into an agreement with CGR, pursuant to which the former agreed to procure the services of Mr Palou as a racing driver (the 'CGR Driver Agreement'). The CGR

Driver Agreement commenced on 1 November 2020 and was due to terminate on 31 December 2022. However, it provided for CGR to have the option, exercisable by written notice from CGR to Palou Motorsport on or before 1 September 2022, to extend its term until 31 December 2023.

29. The same parties entered into a related driver sponsorship agreement (the 'CGR Sponsorship Agreement'), pursuant to which CGR was licensed to exploit the name, signature, voice, likeness, photograph, caricature, image, biographical material, and endorsement of Mr Palou.

30. Pursuant to the CGR Driver Agreement, during the 2021 season, Mr Palou drove for CGR in the team's Car #10, alongside Mr Scott Dixon (who had been the IndyCar champion in 2020), Mr Marcus Ericsson and another new driver, Mr Jimmie Johnson. Mr Palou went on to win the 2021 IndyCar Championship.

31. The terms of both the CGR Driver Agreement and the CGR Sponsorship Agreement were amended at the end of Mr Palou's first season with CGR, by an agreement dated 20 December 2021 (the 'First CGR Amendment').

32. I will return to this later. However, on 4 March 2022, Alpa Racing USA entered into a driving agreement with McLaren Indy, pursuant to which Alpa Racing USA agreed to procure Mr Palou's services as a racing driver for McLaren Indy in the IndyCar Series in the 2023 to 2025 season (the 'March 2022 McLaren Agreement').

33. During the 2022 season, Mr Palou drove for McLaren's F1 team in its 'Testing Previous Car' ('TPC') Programme (as part of which McLaren Racing and other F1 teams are permitted to run F1 cars from previous seasons) and took part in certain Free Practice 1 ('FP1') sessions (the first one-hour practice session, which ordinarily takes place on Friday evening before a Grand Prix, as above). Mr Palou was required to notify CGR of any such testing and to seek and obtain its confirmation that he could participate in the same.

34. On 11 July 2022, CGR exercised the option in the CGR Driver Agreement by written notice, requiring Mr Palou to continue to drive for CGR in the 2023 season.

35. A mediation between Mr Palou, McLaren Indy, and CGR followed. Mr Palou drove for CGR in the 2023 season.

36. Also, in the wake of the mediation, on or around 29 September 2022, Palou Motorsport entered into a further agreement with CGR, amending the terms of the CGR Driver Agreement and the CGR Sponsorship Agreement (the 'Second CGR Amendment'). The recitals to the Second CGR Amendment record that Mr Palou/Palou Motorsport had *"indicated their desire to pursue opportunities for [Mr Palou] to drive in Formula One beginning no later than the 2024 season and to prepare therefore in 2022 and 2023 with simulator, track testing, reserve driver activities, and otherwise, with McLaren Racing or perhaps other Formula One teams, provided those activities do not conflict with Driver's Team commitments and responsibilities during the Term of the [CGR Agreement and CGR Sponsorship Agreement]..."*.

37. On or around 1 October 2022, McLaren Indy and Alpa Racing USA entered into a written agreement, pursuant to which Alpa Racing USA agreed to procure Mr Palou's services as a racing driver to McLaren Indy, including in the IndyCar Series, in exchange for compensation (the 'AP Driving Agreement').

38. On the same date, McLaren Indy and Alpa Racing USA also entered into an agreement pursuant to which the former was permitted to exploit Mr Palou's name, fame, reputation, and likeness in exchange for compensation (the 'AP Promotions Agreement'). The AP Driving and Promotions Agreements each state that they were entered into *"in parallel to and at the same date"* as each other.

39. That position was clarified in a further agreement of the same date, between McLaren Indy and Alpa Racing USA, which concerned the inter-relationship between the AP Driving and Promotions Agreements (the 'AP Link Agreement').

40. On 1 October 2022, Mr Palou and each of the Claimants also entered into a further written agreement, by which Mr Palou gave various personal warranties and guarantees to McLaren Indy in respect of the performance of the AP Driving Agreement, Promotions Agreement, and Link Agreement (the 'AP Undertaking Letter Agreement'). By clause 1 of the AP Undertaking Letter Agreement, Mr Palou was, on demand, obliged to pay and discharge all sums of money and liability due, owing, incurred or unpaid by Alpa Racing USA in respect of the AP Driving Agreement and AP Promotions Agreement. The AP Driving, Promotions, Link, and Undertaking Letter Agreements are together referred to as the 'AP Agreements'. I will come on to address these more fully later when dealing with the issues in dispute.

The extension of the CGR Driver and Promotions Agreement to 2027

41. On 1 August 2023, CGR and Alpa Racing USA entered into a third amendment to the CGR Driver Agreement and the CGR Sponsorship Agreement (the 'Third CGR Amendment'). By the Third CGR Amendment, it was recited that CGR and Alpa Racing USA/Mr Palou wished to extend the Terms of the CGR Driver Agreement and AP Promotions Agreement; it was agreed that the CGR Driver Agreement became effective on 1 November 2020 and terminated on 31 December 2027; and CGR and Alpa Racing USA/Mr Palou consented to the substitution of Alpa Racing USA for Palou Motorsport SL in the CGR Driver and Sponsorship Agreements and all amendments thereto.

The indemnity provided by CGR to the Defendants

42. Also on 1 August 2023, CGR and the Defendants entered into a *"Settlement Agreement"* (the 'Settlement Agreement'). By clause 4 of the Settlement Agreement, CGR agreed: (a) to bear *"all reasonable legal fees and expenses associated"* with any legal action commenced by McLaren Racing, insofar as it relates to the AP Driving Agreement or the negotiation or entry of the Settlement Agreement itself; and (b) to *"defend and indemnify [the Defendants]"* from any legal claims brought by McLaren Racing, including *"all legal fees and expenses, and damages of any kind..."*.

The Defendants' breaches of the AP Agreements

43. On 8 August 2023, representatives of Alpa Racing USA/Mr Palou – Mr Jonathan Hadaya and Mr Adam Ross, both of whom are US attorneys – informed Mr Zak Brown, Chief Executive of McLaren Racing, that the Defendants had entered into a new, multi-year contract with CGR, pursuant to which Mr Palou agreed to provide his services as a racing driver to CGR for the 2024, 2025, and 2026 IndyCar Series.

44. Thereafter, on 10 August 2023, Mr Tim Murnane, McLaren's Legal Director and Company Secretary, sent a letter to Alpa Racing USA/Mr Palou stating that, if it was their intention to perform the contract with CGR, this would constitute a clear breach of the AP Driving Agreement, including clauses 2.3, 2.5, and 15. Alpa Racing USA/Mr Palou were invited to confirm by return that Alpa Racing USA would comply with their obligations in the AP Driving Agreement including by procuring the attendance of Mr Palou at the F1 Grand Prix, which was due to take place in Singapore in September 2023.

45. In the absence of such confirmation, on 12 August 2023, Mr Murnane sent a formal notice of breach to Alpa Racing USA/Mr Palou pursuant to clause 12.2.1 of the AP Driving Agreement.

46. On 21 August 2023, Alpa Racing USA/Mr Palou's representatives responded to McLaren, communicating Alpa Racing USA/Mr Palou's intention not to perform their contractual obligations under each or any of the AP Agreements.

Driver line-up at McLaren Indy

47. McLaren Indy has run Car #5 and Car #7 in IndyCar since 2020 and launched Car #6 full-time from 2023. The driver line-up for McLaren Indy in what at trial was described as the actual scenario between 2022 and 2025 was:

	Car #5	Car #6	Car #7
2022	Pato O'Ward	N/A	Felix Rosenqvist
2023	Pato O'Ward	Felix Rosenqvist	Alexander Rossi
2024	Pato O'Ward	Callum Ilott (2 races) Théo Pourchaire (5 races) Nolan Siegel (10 races)	Alexander Rossi (16 races) Théo Pourchaire (1 race)
2025	Pato O'Ward	Nolan Siegel	Christian Lundgaard

48. After the Defendants communicated Mr Palou's decision not to drive for McLaren Indy in breach of the AP Agreements, McLaren Indy signed another racing driver, Mr David Malukas, to drive Car #6 for McLaren Indy. The relevant agreements of the same date are comprised of a driving agreement, promotions agreement, and associated undertaking letter.

49. On 8 September 2023, Mr Malukas was formally announced as a driver for McLaren Indy. At that time, he was due to drive alongside McLaren Indy's existing drivers, Mr Pato O'Ward and Mr Alexander Rossi, for the 2024 season.

50. Mr O'Ward originally provided his services to McLaren Indy pursuant to a driving agreement dated 22 October 2019 (the 'POW Driving Agreement'). That agreement was first amended on 26 May 2022 (the 'POW 2022 Amendment'). The POW Driving Agreement was further amended on 28 February 2024 (the 'POW 2024 Amendment').

51. Mr Rossi's contract as a driver for McLaren Indy was due to expire at the end of the 2024 season.

52. On 12 December 2023, McLaren Indy also entered into a letter agreement and associated undertaking letter with Mr Christian Lundgaard, which gave McLaren Indy the option to use his services in the 2025 season.

53. On 11 February 2024, Mr Malukas was injured in a mountain bike accident that left him with torn ligaments and a dislocated wrist.

54. On 4 March 2024, McLaren Indy entered into an agreement with another racing driver, Mr Callum Ilott, pursuant to which he agreed to drive for McLaren Indy in the first two races of the 2024 IndyCar Series (the 'First Ilott Letter Agreement'). On the same day, McLaren Indy also entered into a further agreement with Mr Ilott, which gave McLaren Indy the option to use his services as a driver in the 2025 and 2026 IndyCar Series seasons (the 'Ilott Option Agreement'). McLaren Indy subsequently entered into a further agreement with Mr Ilott, dated 5 April 2024, pursuant to which he agreed to drive for McLaren Indy in the 2024 Indy500 (the 'Second Ilott Letter Agreement'). That race took place on 26 May 2024.

55. On 28 April 2024, McLaren Indy formally terminated its agreements with Mr Malukas. Thereafter, on 9 May 2024, McLaren Indy entered into driving and promotions agreements with Mr Théo Pourchaire for the 2024 IndyCar Series, with options for three subsequent seasons (the 'Pourchaire Agreements'). Around the same time, on 1 June 2024, McLaren Indy also entered into a further agreement with Mr Lundgaard, extending the option in respect of his services so that it could be exercised any time up to and including 1 July 2024 (the 'Lundgaard Option Agreement').

56. On 18 June 2024, McLaren Indy signed Mr Nolan Siegel for the remainder of the 2024 IndyCar Series, as well as the 2025 and 2026 seasons, pursuant to a driving agreement, promotions agreement, and undertaking letter (together, the 'Siegel Agreements'). Mr Siegel is a young driver who pays monies to McLaren Indy as part of the Siegel Agreements.

57. The following day, on 19 June 2024, McLaren Indy also exercised its option in respect of Mr Lundgaard, so that he would drive for McLaren Indy from the beginning of the 2025 IndyCar Series. The resulting agreements are a driving agreement, promotions agreement, and link agreement, each dated 19 June 2024 (together, the 'Lundgaard Agreements').

58. As matters stand, therefore, McLaren Indy's present driver line-up is Mr O'Ward (Car #5), Mr Siegel (Car #6), and Mr Lundgaard (Car #7).

59. Mr Palou continues to drive for CGR.

McLaren's case (in outline)

60. It is against this background that McLaren bring claims for damages in respect of the Defendants' breach of contract, further or alternatively for wasted expenditure and/or unjust enrichment in respect of the US$400,000 sign-on bonus that was paid to Mr Palou (and which he has retained, notwithstanding the admitted breach).

61. First, McLaren seek lost profits in the sum of US$1,312,500, representing the additional sums that McLaren Indy has incurred or expects to incur in respect of driver salaries or other fees which would not have been incurred absent the Defendants' breach.

62. McLaren's position is that, had the Defendants complied with their obligations, the driver counterfactual would have seen: Mr O'Ward driving in Car #5 (2024 to 2027); Mr Palou driving in Car #6 (2024 to 2027); and Mr Siegel driving in Car #7 (2025 to 2027), replacing Mr Rossi (who would have driven Car #7 in 2024).

63. In the wake of the breach, McLaren Indy signed Mr Malukas to drive Car #6. However, on 11 February 2024, Mr Malukas sustained a wrist injury in a mountain bike accident and was unable to compete for McLaren Indy.

64. McLaren's position is that, by reason of the Defendants' breaches, it was necessary to pay additional salary costs and/or the payment of such sums represented a reasonable attempt by McLaren to mitigate their losses. In this respect, McLaren claim for losses representing the additional salary that McLaren Indy had to pay to Mr O'Ward, who, in Mr Palou's absence, became indispensable as McLaren Indy's franchise driver and was therefore able to secure considerably higher fees in negotiations than would have been the case in the counterfactual.

65. Secondly, McLaren seek lost profits in the sum of US$7,266,902, representing losses incurred in respect of the renegotiation of what was described at trial as the NTT Agreement entered into with NTT, which they maintain was entered into on the understanding that Mr Palou would drive for McLaren Indy. In the light of the Defendants' breach, McLaren say that they had to renegotiate the NTT Agreement with reduced base fees and provide a series of 'make goods' in that respect in two amended agreements. NTT has since terminated the NTT Agreement. In the counterfactual scenario, McLaren contend, the amendments to the NTT Agreement would not have been necessary and NTT would instead have paid the base fees payable in the original NTT Agreement. Accordingly, McLaren seek lost profits representing the reduction in base fees received from NTT under the NTT Agreement and losses associated with the termination of the NTT Agreement for the following periods: 2024-2026 (prior to termination): US$5,382,344; and 2027 (after termination): US$1,884,559.

66. Thirdly, McLaren seek lost profits in the sum of US$500,000, representing the uplift that McLaren Indy would have received pursuant to what was described at trial as the GM Agreement, under which General Motors LLC ('GM') agreed to lease engines to McLaren Indy in return for sponsorship benefits and to provide team support payments to McLaren Indy. McLaren explain in this context that, under clause X of the GM Agreement, the team support payments were reduced by US$500,000 for each season in which the drivers of Arrow McLaren's three cars were not *"A level drivers"*. As a result of the Defendants' breach, McLaren say that they did not meet the A-level driver

requirement for 2024 and did not receive the additional US$500,000 from GM – hence the claim for that amount against the Defendants.

67. Fourthly, McLaren seek lost profits in the sum of US$5,839,809 by way of other IndyCar sponsorship revenue, which represents the difference between the amount that McLaren have recovered, or now expect to recover, from other sponsorship revenue from its participation in the IndyCar Series, and the sums that McLaren reasonably expected to receive with Mr Palou as their driver.

68. Fifthly, McLaren claim lost profits in the sum of US$548,490, representing F1 sponsorship benefits, which McLaren say that they have been required to provide to NTT by way of compensation and/or the renegotiation of the NTT Agreement.

69. Sixthly, McLaren seek performance-based revenue in the sum of US$4,102,876, representing the difference between the performance-based revenues that McLaren obtained in the actual scenario compared to the counterfactual scenario. Those sums represent differences in the prize money and performance-related sponsorship revenue received by McLaren, taking account of related savings in driver compensation.

70. It is McLaren's case that the losses in respect of (i) NTT base fees in 2027, (ii) other sponsorship revenue, (iii) F1 benefits, and (iv) performance-based revenues represent the loss of a chance of obtaining the additional revenues. Applying a loss of chance approach, McLaren's case is that they satisfy the low threshold of a real and substantial chance of obtaining these additional revenues. Alternatively, they invite the Court to treat the loss of a chance as a separate head of loss and to approach the matter on the basis that the Defendants' breach has caused McLaren to sustain this head of loss.

71. Finally, and alternatively, McLaren seek monies in the sum of US$1,103,452, representing their wasted expenditure in light of the Defendants' breach. That sum consists of: (a) US$400,000, representing the sign-on bonus paid to Mr Palou on 9 January 2023; and (b) US$703,452, representing the costs arising from his participation in F1-related opportunities under his agreements with McLaren. In the further alternative, McLaren claim the sum of US$400,000 as unjust enrichment.

The Defendants' case (again in outline)

72. The Defendants' case is that, whilst it is accepted that, in telling McLaren on 8 August 2023 that Mr Palou intended to remain with CGR and would no longer perform his obligations under the AP Agreements, they are liable for breach of contract, nonetheless the claim now advanced is vastly inflated, with McLaren seeking to lay at the Defendants' door *"a series of remote, speculative and unevidenced losses"* which were not caused by the Defendants' breach. Furthermore, in circumstances where McLaren have not given appropriate credit for savings or benefits that they are now enjoying by reason of the breach.

73. Taking McLaren's claims in the order set out above, as to the driver salary losses, the Defendants say that they are not liable for the losses said to flow from McLaren Indy's dealings with its Car #5 driver, Mr O'Ward, in circumstances where he was a well-established driver, who would have had sufficient leverage to negotiate an increased salary in exchange for agreeing to drive for an extended term in any event. They say

also that they are not liable for the sums paid by McLaren Indy to its Car #7 driver as from 2025, Mr Lundgaard, given that McLaren Indy would have hired Mr Lundgaard (or another paid driver on an equivalent salary) to drive Car #7 in any event. The Defendants nonetheless accept that, in principle, McLaren could recover damages reflecting any losses that they have suffered by reason of incurring the additional costs of hiring alternative drivers for Car #6, but contend that there is in this respect no relevant loss because such costs are more than outweighed by the payments which were made by Mr Siegel's father, amounting to US$[REDACTED] million.

74. As to the NTT base fee loss that is claimed by McLaren, the Defendants deny that the breaches of the AP Agreements were the factual cause of McLaren's renegotiation of its sponsorship deal with NTT. This was not, as Mr de Marco KC (on the Defendants' behalf) put it, McLaren *"acting in subservience to an unhappy sponsor holding all the cards"* but, instead, McLaren *"seeking to re-cut a deal with a sponsor which it knew wanted to move over into F1 due to a change in its top leadership"*. In any event, the Defendants say, if any part of the base fee reduction was caused by the breaches, then, McLaren have not properly quantified the base fee loss, alternatively any losses flowing from the renegotiation of the NTT sponsorship deal are too remote as to be recoverable from the Defendants in circumstances where drivers are otherwise not typically named as conditions to sponsorship deals, Mr Palou was not made a contractual condition of the NTT deal and Mr Palou was not otherwise informed at the time of contracting that he was a de facto contractual condition of the NTT deal. Lastly, the Defendants maintain that McLaren acted unreasonably in giving away its valuable contractual rights to a higher base fee from NTT and so that the Defendants should not be liable for the same.

75. As to the GM Agreement alleged losses, the Defendants' position (at least by the time of closing) is that, whilst they accept that GM would have paid McLaren US$500,000 in team support payments in respect of 2024 in the counterfactual, nonetheless the Defendants should not be liable for what is claimed because, had McLaren Indy taken reasonable steps to mitigate this loss, then it could have recruited an alternative A level driver for the 2024 IndyCar Series.

76. Turning to the other sponsorship losses, the Defendants deny that Mr Palou's breaches caused McLaren to suffer additional losses of profit from sponsorship deals. They say, in particular, that McLaren cannot identify any other actual or prospective sponsor whose conduct is alleged to have changed as a result of the breach. On the contrary, the Defendants say, the evidence shows that: (i) McLaren successfully sold all primary sponsor inventory for Car #6 for the 2024 IndyCar Series; (ii) to the extent that any Car #6 inventory remained unsold, that was not because McLaren had lost Mr Palou but rather because its own past sales strategy had left it with a rump of undesirable non-primary slots which it was then unable to package up and sell with the more desirable slots; and (iii) sponsorship revenues continued to increase over the relevant period.

77. As for the NTT F1 opportunity losses claimed, the Defendants say that, in assessing whether McLaren (strictly speaking, McLaren Racing) have suffered any loss of profit, credit should be given both for the US$1,537,800 in fees actually payable by NTT under NTT Amendment 2 and the US$1,068,917 of fees received by McLaren Racing under an agreement concluded with Toyota by Mr Ryo Hirakawa (the 'Hirakawa Agreement') under which Mr Hirakawa was given the opportunity to take Mr Palou's seat in a

'Testing Previous Car' ('TPC') event which took place on 12 October 2023. They also say that the claim should be dismissed because it is clear, on the evidence, that McLaren Racing suffered no such loss, specifically that McLaren Racing has not been prevented from selling the relevant rights for more than the US$1,537,800 in fees that NTT has agreed to pay for them. Alternatively, the Defendants maintain, any such loss has been mitigated by the fees actually received by McLaren Racing under NTT Amendment 2 and/or the Hirakawa Agreement. In the alternative, the Defendants object to this claim on the same causation, remoteness, and failure to mitigate grounds advanced in respect of the NTT base fee loss claim.

78. As to the loss of performance-based revenues, the Defendants' case is that they are not liable for any such losses since there was no real, rather than speculative, chance that Mr Palou would have performed as well upon moving teams from CGR as he did when he chose to stay at CGR.

79. In relation to the wasted expenditure (signing-on bonus and TPC costs) claim, the Defendants' position is that this is not a valid claim because McLaren would not have recouped these costs in the counterfactual since McLaren Racing would never have promoted Mr Palou to its F1 team and so there would have been no revenue stream from which it could have recouped this expenditure. Secondly and in any event, this expenditure was not wasted, the Defendants contend, given that McLaren Racing got what it expected to get, namely an F1 reserve driver from October 2022 to August 2023 and an opportunity to assess his potential in an F1 car. Thirdly, the Defendants say that any such claim is reduced to zero by reason of the US$3.5 million which McLaren Racing has received (or will receive) under the Hirakawa Agreement.

80. Lastly, as to the (alternative) unjust enrichment claim concerning the signing-on bonus, the Defendants submit that this cannot succeed in circumstances where Mr Palou was paid the US$400,000 bonus pursuant to an express contractual obligation, which provided that the bonus was payable upon him signing the AP Driving Agreement and the bonus was not made conditional upon any degree of future performance.

The witnesses and other evidential matters

81. Before coming on to address the issues that arise, it is convenient at this juncture to say something about the witness evidence that was before the Court at trial – together with certain submissions which were advanced concerning the absence of other witness evidence and McLaren's approach to document retention.

82. I do not propose to take up too much time dealing with the parties' respective observations as to their own witnesses (both factual and expert) and, more particularly, their criticisms of the witnesses (both factual and expert) called by the opposition. Suffice it to say that, in general terms, I do not accept that one side's witnesses were better than the other side's, although, as will appear, it is the case that some of the witnesses gave evidence which caused me to be somewhat circumspect.

83. I start, however, with some initial observations. First, as Mr Goulding KC reminded me, when making findings of fact, the Court will have regard to the entirety of the evidence where witness evidence is involved: see ***Onassis & Calogeropoulos v Vergottis*** [1968] 2 Lloyd's Rep 403 per Lord Pearce at page 431. In doing so, the Court

will have regard to motives and overall probabilities: see ***Armagas Ltd v Mundogas SA (The Ocean Frost)*** [1985] 1 Lloyd's Rep 1 per Lord Goff at page 57.

84. Secondly, in assessing credibility, the Courts have regularly recognised the potential fallibility of human memory, including what Leggatt J (as he then was) had to say in the oft-cited ***Gestmin SGPS SA v Credit Suisse (UK) Ltd*** [2013] EWHC 3560 (Comm), which the Court of Appeal in ***Kogan v Martin*** [2020] EMLR 4, at [88], explained was not intended to lay down *"any general principle for the assessment of evidence"*. Rather, the decision is *"one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documents and evidence upon which undoubted or probable reliance can be placed"*. In a similar vein, in ***Natwest Markets Plc v Bilta (UK) Ltd*** [2021] EWCA Civ 680 the Court of Appeal recognised, at [50]-[51], that the approach in ***Gestmin*** may not be open to the Judge or will be of limited assistance, in circumstances, for example, where there *"may simply be no, or no relevant, contemporaneous documents, and even if there are, the documents themselves may be ambivalent or otherwise insufficiently helpful"*. What the Court needs to do is to have regard to other considerations including *"the overall plausibility of the evidence; the consistency or inconsistency of the behaviour of the witnesses and other individuals with the witness's versions of events; supporting or adverse inferences to be drawn from other documents; and the judge's assessment of the witness's credibility, including his or her impression of how they performed in the witness box, especially when their version of events was challenged in cross-examination"*. Furthermore, the Court must be *"alive to the dangers of honest but mistaken reconstruction of events, and factors in the passage of time …"*.

85. Thirdly, when assessing the credibility of a witness, as recognised by Lewison J (as he then was) in ***Painter v Hutchison*** [2007] EWHC 758 (Ch), at [3], evasive or argumentative evidence, straining the meaning of plain words, self-contradiction, the making of speeches instead of answering questions and a changing position upon cross-examination are all factors that go to credibility.

86. Fourthly, this last aspect applies to both factual witnesses and expert witness alike. As made clear in ***National Justice Compania Naviera SA v Prudential Assurance Co (the Ikarian Reefer)*** [1993] 2 Lloyd's Rep 68, expert evidence should be, and be seen to be, the independent product of the expert and uninfluenced in form or content by the demands of litigation. Expert witnesses should provide objective, unbiased evidence on matters within their expertise, and should disclose any potential conflict of interest. An expert should avoid taking the role of an advocate, should explain the facts or assumptions on which their opinion is based and should make clear where an issue falls outside the scope of any expertise or where there is insufficient data available.

87. Turning, against this background, to the factual witnesses, McLaren called six factual witnesses, the first of whom was Ms Laura Bowden, who is McLaren's Chief Financial Officer and is, as such, responsible for McLaren's finance, procurement and project management teams, as well as IT. Mr de Marco sought to criticise Ms Bowden's evidence, suggesting that it formed *"part of a broader picture"* in which McLaren have *"sought at all times to inflate [their] claimed losses as high as possible without regard to the truth"*. Mr de Marco, in particular, criticised what Ms Bowden had to say concerning rate cards (relevant to the other sponsorship losses claim addressed later),

suggesting that much of the evidence which she gave in her witness statements as to rate cards turned out to be incorrect and contradicted by the documents. Mr de Marco also suggested that insofar as Ms Bowden gave evidence on McLaren's NTT losses, GM agreement losses and/or driver salary losses, she had no personal knowledge of the relevant factual matters underpinning those claims since what she had to say was based upon what Mr Brown had told her.

88. I do not accept these criticisms. On the contrary, I regarded Ms Bowden as a straightforward witness. As to the rate cards in particular, she was clear that these are not documents prepared by her and that she was not involved in their creation. There was nothing misleading about this. Specifically, when it was put to Ms Bowden that her first witness statement was misleading as regards the existence of a contemporaneous rate card, Ms Bowden explained that she understood the position to be correct when she made the statement, albeit that she was not the owner of the relevant document. It was also suggested to Ms Bowden that she had applied misleading highlighting to her witness statement in an attempt to show that the primary sponsor slots on Car #6 had been sold for the 2024 series. Ms Bowden rejected this suggestion, and she was right to do so since it later became clear that the highlighting derived from the underlying documents so that Ms Bowden did not do what she was accused of doing.

89. The next witness was Mr David Croxville. He is the former Executive Vice President and CFO at NTT. He was the main point of contact at NTT in respect of the NTT Agreement and its amendment following Mr Palou's breach. As such, he gave evidence as to NTT's position in the negotiation and renegotiations of its sponsorship deals with McLaren Indy in 2022 and 2023 (prior to his departure from the business).

90. It was Mr de Marco's submission that the Court should treat Mr Croxville's evidence with care given that he had not sought NTT's consent to give evidence and in circumstances where he suggested that NTT was extremely sensitive to involvement in these proceedings. Mr de Marco went further: he submitted that Mr Croxville was willing to provide less than truthful evidence, even where the documents contradicted his account, citing Mr Croxville's insistence that NTT had never discussed moving its sponsorship across to McLaren prior to 15 July 2022 (being the date when NTT became contractually able to negotiate with other teams), in circumstances where he nonetheless accepted that there had been around two years of meetings between NTT and Mr Brown.

91. Again, I reject this criticism. I found Mr Croxville to be a witness who had no axe to grind; indeed, it was apparent from what he had to say that he had real respect and affection for Mr Palou, on occasion messaging him to congratulate him on his wins. He was an honest and straightforward witness, with no axe to grind in the proceedings.

92. As for Mr Brown, Mr de Marco went on to criticise him in no uncertain terms. As previously mentioned, Mr Brown is McLaren's Chief Executive Officer, having previously been a former professional racing driver and the founder of Just Marketing Inc, which he ran for 20 years before selling the company to Chime Communications Ltd, one of the world's largest sports marketing agencies, where Mr Brown continued to work for another three years. He is a person, in short, with very considerable experience, being described, indeed, by the Defendants' IndyCar expert, Mr Brian

Marks, as somebody who "*wrote the book on sponsorship"* and who *"wrote the book on commercial partnerships and there's many [sic]…. that look up to him to this day*".

93. Mr de Marco nonetheless submitted that the Court should not accept Mr Brown's evidence unless it is clearly supported by contemporaneous documentation. Mr de Marco described Mr Brown as a combative witness, who was willing to give evidence which was untrue or inconsistent in order to answer the point being put to him. This included, Mr de Marco suggested, Mr Brown's insistence that McLaren Indy did not know that Mr Palou was not free to negotiate with other teams at the time that he signed the March 2022 McLaren Agreement and the October 2022 AP Driving Agreement, did not know that CGR had a unilateral option to extend Mr Palou's contract for the 2023 Series and was not asked to indemnify Mr Palou in the event that he was sued by CGR. That evidence, Mr de Marco observed, is implausible, given that, as part of the negotiations leading up to the March 2022 Agreement, Mr Palou's management team planned to seek an indemnity from McLaren in the event that he was sued by CGR "*for breaking the contract"* and, in the event, McLaren ultimately did cover Mr Palou's legal expenses in relation to the August 2022 mediation which arose out of the March 2022 Agreement. The obvious inference, Mr de Marco suggested, is that they asked for an indemnity and McLaren Indy agreed to provide it, knowing that there was some kind of legal risk involved with Mr Palou signing to its team.

94. That Mr Brown was keen, and able, to stand his ground was clear. He is, after all, a competitor. However, in my view, Mr Brown was straightforward enough. He accepted, for example, as Mr Goulding pointed out, that McLaren Indy is not one of the two teams that has historically dominated in the IndyCar Series, that CGR has better cars and a better backroom team and, indeed, that this could be important to the outcome of a race. Mr Brown also had no difficulty in acknowledging that there are limits to his knowledge and expertise. It is fair to say, as I point out later, that Mr Brown did, on occasion, adopt a somewhat opportunistic stance in some of the evidence that he gave, however, overall, I am clear that he did not set out to give evidence that was untrue, on the contrary, I formed the impression that he was generally doing his best to assist the Court in what he had to say in evidence.

95. Mr Matt Dennington has been the Co-Chief Commercial Officer of McLaren Racing since March 2024. He started his career as a professional cricketer but has been employed by McLaren for approximately 8 years. He has particular responsibility for current business, including engagement with McLaren's top strategic partners. He was a straightforward witness; indeed, Mr de Marco did not suggest otherwise. That said, Mr de Marco was right to note in closing that Mr Dennington did not have direct knowledge of some of the aspects on which he gave evidence. This includes the discussions between NTT and McLaren Indy prior to July 2022, the initial discussions between NTT and McLaren Indy immediately after Mr Palou's breach, NTT's views on McLaren Indy's decision to hire various drivers (including Mr Siegel) for Car #6 and the reasons for McLaren Indy's decision to hire Mr Siegel.

96. Mr Benito dos Santos is the Head of Brand Marketing at the Arrow McLaren team, having been appointed to that position in January 2025. He oversees the livery approval process. He gave evidence addressing the circumstances in which Mr Siegel came to be approved by IndyCar to drive Car #6 in the 2025 Sonsio Grand Prix, where the car carried the so-called 'VELO' branding of RJV. Mr dos Santos was undoubtedly doing

his best to assist the Court in giving the evidence that he did. However, it is the case that he was unaware of the provision in the IndyCar rulebook which confers IndyCar LLC with the power to withhold its approval for such designs. Whilst not fatal to what he had to say, this was nonetheless somewhat surprising.

97. The last factual witness to give evidence on McLaren's behalf was Ms Valerie Mras, who is the Director and President of RJV, where she has worked for 17 years. She has been responsible since February 2024 for the marketing and commercialisation of RJV's vapor products, including the VUSE brand. She was described by Mr Goulding in closing as having *"appeared for and on behalf of RJV, and therefore in a corporate capacity"*. As such, he submitted, it was not right that she was asked by Mr de Marco in cross-examination about her personal views as to whether, for example, RJV would place branding on a tennis racquet. I do not agree with this, however, since the questions that she was being asked were quite properly directed at ascertaining what position she (and so RJV) would have taken had it been appreciated that somebody under the age of 21 was engaged in sporting activity which RJV sponsored. In response, Ms Mras revealed two things.

98. The first was that she had limited personal knowledge of the matters about which she was called to give evidence, notwithstanding the position that she holds and her own evidence that she works *"closely with colleagues who are directly involved in promoting that product*" and that she has "*visibility of the promotional activities*" for VELO, as a result of her role in the marketing leadership team, alongside the operational team that supports McLaren sponsorship.

99. This is a matter to which I return when dealing with the Siegel issue: as I there explain, although I do not consider Ms Mras to have been necessarily the most appropriate witness called by McLaren on that issue, it needs to be appreciated that McLaren had only limited time within which to prepare their case in response to something of a repackaging undertaken by the Defendants only at the start of the trial. In addition, although Ms Mras had only limited knowledge of the matters about which she was called to give evidence, nonetheless she did have relevant overall responsibility within RJV, and so was able to explain what RJV's position was at a high level and in a general (yet still relevant) sense.

100. The second thing revealed by Ms Mras's evidence was that she was not prepared to engage with the questions other than through what Mr de Marco described *"as an executive who had committed to memory a series of vetted and approved corporate soundbites"*. Examples of this approach include this exchange:

> *"Q. So you're very careful to take steps to avoid being seen to target young people.*
> *A. I can say our responsible marketing framework has an intended audience of 25-plus consumers.*
> *Q. Not people under the age of 21, obviously.*
> *A. Our marketing materials are intended for a 25-plus audience."*

Another example was her refusal to engage, at least in any meaningful way, when Mr de Marco put to her that there is sensitivity around tobacco and nicotine companies using athletes in their marketing, that there is an obvious association between driver

and car in IndyCar and that this sensitivity would be heightened if that individual were under the age of 21. This resulted in the following exchange:

"Q. In that paragraph 12, you sort of summarise what some of these steps are, and you say the first is never to leverage athletes in your advertising. So, as I understand it, you try and avoid using any athletes or other celebrities in your marketing regardless of their age; is that right?
A. That is correct, we do not feature any celebrities, athletes, influencers or famous people in any of our marketing materials.
Q. And that's because you understand the sensitivity about that?
A. That is because that is our internal practice associated with any brand that we have within our portfolio.
Q. Yes, but because you understand the sensitivity, using a sportsperson or a celebrity or an influencer might encourage young people to follow; that's why you do it, I suppose, isn't it?
A. Once you use many of these individuals, the content is out in the realm and you leverage their network. We want to refrain from having any association to the celebrities or famous people or athletes themselves, therefore do not feature any of them in any of our marketing materials.
...
Q. But would you agree with me it would be even worse to use a 19-year-old?
A. I believe that's a completely hypothetical situation, in which we would -- a question of age would never come in because it would never be something we would consider in our marketing materials."

101. As I shall come on to explain when addressing the Siegel issue, ultimately it probably does not matter that Ms Mras adopted this approach to Mr de Marco's questions given the other points that arise in the context of the Siegel issue. However, all in all, I was unimpressed by Ms Mras's approach when giving her evidence. I consider that Mr de Marco was right when he submitted that her primary motivation was to avoid saying anything which might be used as a basis for findings about what RJV, IndyCar or the FDA may or may not do vis-à-vis RJV's sponsorship activities.

102. The first of the Defendants' witnesses was Mr Palou. As previously mentioned, he is considered to be a generational talent – possibly even what is known as the 'G.O.A.T' or 'greatest of all time'. On any view, he is highly successful as a driver and is currently the top IndyCar driver, having won the IndyCar Championship four times (in 2021, 2023, 2024, and 2025) and having in May 2025 also won the prestigious Indy500 race. In the wake of the latter, Mr Palou was described, variously, as "*unbelievable*" (by Mr O'Ward), as "*the best driver ... unbelievable*" and "*one of the greats*" (by Mr Ganassi), as "*a legend in IndyCar*" (by Mr Fernando Alonso, two-time F1 Drivers' Championship winner) and as one of "*the all-time greats*" (by Mr Will Buxton, a British motorsport journalist, commentator and presenter who is currently the lead commentator for Fox Sports). Fellow driver, Mr Kyle Kirkwood, noted, indeed, that viewers were "*witnessing greatness in action*" and that "*second this year is like winning the championship*". Other commentators have described Mr Palou's driving ability as "*not just impressive*" but a "'*make-the-other-drivers-reconsider-their-careers' kind of dominance*" (in an article entitled "*Alex Palou is Unstoppable: Here's How He's Making History*"), and Mr Brown described Mr Palou in his witness statement as "*the most complete and best driver in IndyCar in this era*", something with which Mr

Ganassi apparently agrees since he was quoted in an article in USA Today Sports entitled "*How IndyCar's Alex Palou became the most dominant driver of 2025*" as saying that the sport is seeing "*history made right now*" and that Mr Palou's "*name has to be among and certainly in the conversation of the great drivers … in the conversation of the greatest*".

103. It was Mr Goulding's submission that nonetheless, as a witness, Mr Palou was at times evasive and apparently unwilling to answer straightforward questions – as well as heavily prepared. One example, Mr Goulding suggested, was Mr Palou repeatedly refusing to recognise the importance of a driver to the overall performance of a car in IndyCar, insisting that a "*good driver cannot outweigh a bad car*", which is a phrase that is repeated in almost the exact same formulation in the witness statement made by Mr Michael Hull. When asked to explain the position, Mr Palou's response was that he and Mr Hull "*want to say the same thing*". Mr Goulding also criticised Mr Palou for seeking to blame Mr Brown for his failure to break into F1. Mr Palou said, more than once, that he had been misled by Mr Brown who had broken promises he allegedly made to Mr Palou about his prospects of driving in F1. Mr Goulding submitted that this is unfounded and also inconsistent with Mr Palou's admission of liability for breach of contract together with the absence of any defence or counterclaim alleging misrepresentation.

104. I reject these criticisms. I found Mr Palou to be an honest and engaging witness in much the same way as I found Mr Brown also to be. The fact that, like Mr Brown, he has an interest in the outcome of the proceedings does not justify a conclusion that he was less than straightforward any more than it does in relation to Mr Brown. Both are used to winning, that much is clear, but it does not follow from this that either of them sought to mislead in the evidence that they gave. As to Mr Palou's F1 ambitions and what joining McLaren would mean in relation to those ambitions, Mr Palou accepted that neither of the agreements he signed with McLaren obliged McLaren to promote him to F1. His point was that Mr Brown sought to persuade him that he retained a realistic prospect of promotion to F1 even after Mr Oscar Piastri was signed for the 2023 season (including by reassuring him that the decision to recruit Mr Piastri was a decision taken by the F1 Team Principal and not him personally), and it seems to me that this is probably what Mr Brown did, indeed, do. The extent to which it happened is probably a matter of impression, however. In short, it is understandable that Mr Palou and Mr Brown might have different (yet entirely honest) views as to which of them thought what concerning Mr Palou's F1 dream.

105. The other factual witness called by the Defendants was Mr Hull, CGR's Managing Director, who gave evidence from CGR's perspective in relation to the team's decision to sign Mr Palou and its considerations when hiring racing drivers. Again, Mr Goulding suggested that Mr Hull had been heavily prepared to give the evidence that he did, although he acknowledged that Mr Hull *"was, in many respects, a somewhat refreshing witness"*, citing by way of example the fact that he accepted that his role is race-focused and that, as such, his involvement in the business side (and so with sponsors) is "*very small"*; indeed, he explained that he had "*never read a sponsorship contract in the… 33 years"* that he had worked at CGR. Indeed, in closing Mr de Marco himself acknowledged that Mr Hull's evidence was of little relevance to the issues at hand since Mr Hull does not have specialist knowledge about sponsorship.

106. Mr Goulding noted in this respect, however, that in his witness statement Mr Hull dealt with sponsorship-type issues, explaining that he had been "*involved in some negotiations for CGR regarding sponsorship arrangements*", that he is CGR's "*relationship person for sponsors*" and that he has "*had involvement with sponsors since [he] joined CGR in 1992*". Mr Goulding fairly recognised that Mr Hull made it clear in the same witness statement that he is "*not involved in the details which are handled by more junior staff members*", but pointed out that nonetheless Mr Hull went on to state that in his experience "*it is not typical for contracts between IndyCar teams and sponsors to specify the identity of drivers*" and "*it is not typical for contracts with sponsors to set out the minimum standards for CGR's drivers*". There is, therefore, some force in the submission made by Mr Goulding that Mr Hull's witness statement might have been somewhat inaccurate or overstated in places.

107. As for the expert witnesses, the first discipline involved evidence from forensic accountants: Mr Steve Harris instructed by McLaren; and Mr Luke Steadman instructed by the Defendants. Whilst Mr Goulding submitted that Mr Harris was *"a conspicuously fair and straightforward witness"*, Mr de Marco submitted that he *"would often slip into advocacy"*, and whilst Mr de Marco submitted that Mr Steadman *"gave careful and thorough forensic accounting evidence"*, Mr Goulding submitted that he *"clearly sought to act as an advocate for [the Defendants'] case"*.

108. Mr de Marco highlighted in this context the fact that, when confronted with Ms Bowden's evidence that McLaren Indy "*would have been thinking about Alex in the car*" when preparing rate cards which were used to price multi-year deals in 2022, Mr Harris attempted, as Mr de Marco put it, to give his own spin on the facts by implying that Ms Bowden must be wrong because Mr Palou would not be factored into the rate cards at the relevant time. He also criticised Mr Harris for failing to scrutinise relevant evidence. For example, in relation to the alleged F1 opportunity losses, Mr de Marco submitted that Mr Harris simply adopted the values asserted in McLaren's witness evidence, leaving it to Mr Steadman to raise the need to consider the underlying documents which resulted in Mr Harris, then, revising his position and accepting that in many cases there had, in fact, been no loss suffered by McLaren. In my view, however, the fact that Mr Harris reacted in the way that he did to Mr Steadman's work reflects well on him since he frankly accepted when asked in cross-examination about this that the "*problem with my first report is that I didn't think properly and clearly about the opportunity loss issue that Mr Steadman raises*" and that "*Mr Steadman thought through the Formula 1 loss issues more carefully and did more work in his report than I did, and I think in respect of Formula 1, Mr Steadman raises good points*". He explained that his failure to assess the F1 losses on the basis that he did for the purposes of his first report came about because McLaren had provided him with "*next to nothing, if not nothing*" in terms of documentary evidence.

109. Whilst it might be right that, as Mr de Marco suggested, he ought to have asked for adequate financial documentary evidence so as to enable him properly to assess McLaren's alleged losses, it does not follow that he should be regarded as unreliable in the manner suggested by Mr de Marco. On the contrary, I am clear that Mr Harris understood his duties to the Court and did his best to provide independent expert evidence on matters that were within his expertise. As seen by what he had to say concerning the F1-related claim, he was willing to make appropriate concessions, and the suggestion that he was overly reliant on the evidence given by Mr Brown and Mr

Dennington is unjustified since, as an expert, it was appropriate that he should do so provided that, as he did, it was made clear that what he had to say by way of opinion was based on the assumption that that factual evidence would be accepted by the Court.

110. In contrast, although Mr de Marco maintained that Mr Steadman did not act as an advocate, unfortunately I formed the impression that that is, indeed, what, at least on occasion, he did. A prominent example of this was highlighted by Mr Goulding in closing. This related to Mr Palou's evidence, given in examination-in-chief and not trailed in his witness statement, that he would, if necessary, have sat out the 2027 season and sought to obtain a seat in F1. Mr Steadman accepted that this was a matter for the factual evidence and not, therefore, for him as an expert. However, rather than leaving matters there and despite (like Mr Harris) having been asked in their respective instructions to prepare calculations that included an assessment of losses for 2027, Mr Steadman asserted that it was "*counterintuitive*" that Mr Palou would have driven for McLaren in 2027. Mr Steadman also in his reports gave his view on the likely driver line-up in the counterfactual, although he had accepted in the joint report (and, indeed, when giving his oral evidence) that this was not within his expertise. Challenged about this, Mr Steadman explained that he was merely pointing out documents that might undermine the assumptions in Mr Harris' evidence, but, as Mr Goulding pointed out, his evidence went well beyond this. Furthermore, it emerged during cross-examination that there was, as Mr Goulding described it in closing, *"a very concerning overlap"* between the evidence of Mr Steadman and Mr Marks, the Defendants' IndyCar expert. This involved Mr Steadman explaining, when pressed on the topic, that he independently alighted on precisely the same documents relevant to the driver line-up in the counterfactual issue and, having done so, independently presented them in almost exactly the same way as Mr Marks had done in his report – a draft of which Mr Steadman had seen when preparing his own report. This was evidence which was unimpressive, and the fact that it came from an expert witness who owes a duty to act independently was all the more surprising.

111. More generally and more than with any other witness (factual or expert), with the possible exception of Ms Mras, Mr Steadman's evidence was characterised by a repeated inability or unwillingness to answer questions, which necessitated my sometimes having to put the relevant question myself and even then not always with success. An example is Mr Steadman's evidence in his reports that the opportunity for Mr Siegel to drive in 2024 was "*decisive*" in relation to his decision to drive for Arrow McLaren, meaning that without that opportunity Mr Siegel would not have driven in the counterfactual. When pressed, he suggested that, in fact, his position was that Mr Siegel "*may not have joined for 2025*", yet refused to accept that this meant that the availability of 2024 driving could not, therefore, have been "*decisive*". Again, this was unimpressive; it was also disappointing.

112. The second area in which expert evidence was given concerned the IndyCar business. Here, I am again in no doubt that McLaren's expert, Mr Julian Jakobi, was a better expert than the expert called by the Defendants, Mr Marks.

113. Mr Jakobi was vastly more experienced an expert than Mr Marks. Mr Jakobi trained as a chartered accountant. However, after that he has enjoyed a long and distinguished career in sports and management. After working at IMG for 15 years, in 1995, he established his own company, Stellar Management Group, to manage the commercial

affairs of leading sportsmen and women, and clients in IndyCar and F1. In 2010, he formed GP Sports Management, his current company, representing a range of F1 and IndyCar Series drivers, including various winners of the Indy500 and IndyCar Series Drivers' Championship.

114. Mr Marks, on the other hand, had rather more limited relevant experience. Although he suggested in his first report that he had 35 years working in motorsports, in fact, his experience over that time period is of working in the combined fields of motorsports and the consumer package goods industry but most of the time in the latter rather than the former. His experience is also different in scale to that of Mr Jakobi, characterised by Mr Goulding in closing *"as small fry"* in comparison. Mr Marks is an enthusiastic motorsports devotee and knowledgeable, but his expertise is at a different (and lower) level when set against that of Mr Jakobi.

115. There is also the point that Mr Marks was at one stage employed by McLaren, albeit only briefly, since his employment came to an end, in May 2020, after only six months. Mr Marks explained, when asked about this in cross-examination, that Mr Sam Schmidt (then an owner of McLaren Indy) had decided to terminate his contract because of financial challenges caused by the COVID pandemic. That may very well have been the case, but it is also relevant for present purposes that it was Mr Brown's evidence that Mr Marks did not bring one deal to McLaren and even Mr Marks accepted that he brought only one. This, again, underlines Mr Marks's relative lack of experience in relation to IndyCar racing.

116. In addition, like Mr Steadman and although I am in no doubt that, as Mr de Marco submitted, Mr Marks was honest in the evidence that he gave, Mr Marks nonetheless sometimes assumed the role of an advocate. In contrast, I did not have that impression in relation to Mr Jakobi, who gave his evidence in a straightforward way. As Mr Goulding observed in closing and despite Mr de Marco's criticisms concerning a fourth report submitted by Mr Jakobi shortly before he came to give evidence at trial, Mr Jakobi explained in that fourth report that he did not have any relevant or up to date knowledge of tobacco or nicotine sponsorship in the IndyCar Series and was therefore unable to speak to that issue. He also fairly accepted that Mr Marks had more experience in sponsorship whereas he himself had more experience of drivers, although he made the point that he had considerable experience of sponsorship through his work with drivers. Mr de Marco suggested that the reason why the fourth report was prepared was different: that those instructing Mr Jakobi were unhappy with certain statements which he had made in the joint expert report concerning RJV sponsoring a car driven by a driver under the age of 21. Having listened carefully to Mr Jakobi give evidence, I am clear, however, that what he had to say in the fourth report was, at least as far as he was concerned, not put before the Court for that reason but because he wanted the Court to know what his experience actually is.

117. In contrast, Mr Marks seemed a little too keen not only that the Court should think that his experience is greater than it really is, but also to put forward certain views which were, in truth, in the nature of arguments rather than matters for an expert. Thus, as Mr Goulding pointed out, in addition to his reports, Mr Marks provided two witness statements in support of an application by the Defendants to amend their statement of case and, furthermore, like Mr Steadman, he strayed into territory concerning the driver line-up in the counterfactual issue in a manner which went beyond what was appropriate

for an expert, describing his view as being the "*only reasonable conclusion that can be drawn*" even though it was a view that was at odds with the factual evidence which had been given.

118. I had the impression also that in Mr Marks's case his reports were, as Mr Goulding put it, heavily lawyered. A clear example of this concerns the references to particular US law provisions in his third report concerned with the Siegel issue and RJV's sponsorship. Mr Marks only reluctantly conceded, when pressed, that he had "*taken some instruction*" from Mishcon de Reya on these aspects – itself a somewhat strange use of language for an independent expert to adopt.

119. Expert evidence was lastly given by F1 experts (Ms Claire Williams on behalf of McLaren, and Mr Otmar Szafnauer on behalf of the Defendants), both of whom I found to be impressive and appropriately independent.

120. Ms Williams has spent her whole life in F1, including working at Williams, then a family run team, from 2002. Ms Williams originally worked in the communications team, before moving to take up the role of Commercial and Marketing Director in 2010. In 2013, she took over the running of the team and its Advanced Engineering business. She left Williams in 2020, when her family sold the team and is now brand ambassador and Chair of Motorsport for Fortescue Zero: a green technology business working towards net zero. Ms Williams was made an OBE in 2016, in large part in recognition of her services to motorsports and charitable work. I agree with Mr Goulding when he submitted in closing that she was a genuinely independent expert: thoughtful, considered, and measured.

121. Although Mr Goulding questioned his impartiality (and so independence), pointing to what he characterised as repeated (and very public) 'bust ups' with Mr Brown, Mr Szafnauer was no less impressive than Ms Williams. It was clear, in particular, from what he had to say in cross-examination that he holds no grudges against Mr Brown personally. As he explained, any comments made between them in their capacities as F1 team principals were simply part of motorsport: each team principal will do what they need to do to advance their team's interests, including "*us[ing] the media to our respective advantage"*. As he put it: "*It is what happens in the sport ... It is part of what we do"*. Indeed, in answer to a question from me, before they enter press conferences, "*we have a nice chat before we sit down and actually perform in front of the cameras"*.

122. There are two further matters which I should mention at this stage, before coming on to address the issues.

123. The first concerns a submission made by Mr de Marco concerning the fact that McLaren did not call as a witness Mr Gavin Ward, who was the Team Principal at Arrow McLaren until November 2024. This, in circumstances where Mr Ward was apparently able and willing to give evidence and only refused to do so because he felt bound by certain confidentiality obligations to McLaren contained within his severance agreement. This, in circumstances also where it is clear that Mr Ward had met with Morgan Lewis, McLaren's solicitors, in the immediate lead-up to the trial.

124. As to this, where it is alleged that the Court has not heard evidence from relevant witnesses and/or that not all relevant documents are before the Court, a party may invite

the Court to draw adverse inferences: see ***Royal Mail Group Ltd v Efobi*** [2021] 1 WLR 3863, in which Lord Leggatt JSC said this at [41]:

"*So far as possible, tribunals should be free to draw, or decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules*".

125. The reasons for not calling a witness are significant. For example, in ***Credit Suisse Virtuoso Sicav-Sif v Softbank Group Corp*** [2025] EWHC 2631 (Ch), at [308], Miles J (as he then was) declined to draw an adverse inference from a party's failure to call a former employee who was alleged to have relevant knowledge of a trading decision, on the basis that he "*is no longer employed by Credit Suisse and there is no reason to expect Credit Suisse to call him*". In ***LLC EuroChem North-West-2 v Societe Generale SA*** [2025] EWHC 1938 (Comm), Bright J declined to draw an inference from a party's failure to call a witness with knowledge in relation to a specific relevant issue where there is, as he put it at [363], "*a limit to the number of overlapping witnesses any party can be expected to call*" and the Court could assume the missing witness' evidence would corroborate that presented by those who were called from the same organisation.

126. It was Mr de Marco's submission that Mr Ward had relevant evidence to give, as demonstrated by the fact that the Defendants (through Mishcon de Reya) were able to obtain certain documents held by him through an application made in the US, in particular documents which reveal, as I shall come on to explain, McLaren's auto-deletion policy as far as WhatsApp communication is concerned. It is clear also, Mr de Marco submitted, that Mr Ward was heavily involved in the decision-making regarding the recruitment of the driver for Car #6 in the summer of 2024 and had relevant evidence to give concerning the Siegel issue. Specifically, Mr Ward attended meetings with Mr Siegel's manager, Mr Charles Crews whereas Mr Brown did not do so, and it was Mr Ward who spoke to Mr Crews in March 2024, May 2024, and early June 2024 about the different options which were on the table for Mr Siegel. As such, Mr de Marco observed, he would have been best placed to speak to the importance of the mid-season 2024 opportunity to the negotiations which ensued.

127. I reject these submissions and decline the invitation made by Mr de Marco that I should draw adverse inferences from the fact that Mr Ward was not called by McLaren as a witness in these proceedings. It is clear that Mr Brown was able to give evidence on the matters that he addressed and that, had he been called as a witness by McLaren, Mr Ward would have largely been asked to cover similar terrain to that covered by Mr Brown, somebody to whom it is clear that Mr Ward answered in his role as McLaren's Chief Executive Officer and somebody whom it is perfectly clear made the decisions as to who was to drive for McLaren. This is an instance, in short, similar to that described by Bright J in ***EuroChem***: Mr Brown was clearly not only able, but also best

qualified, to give the evidence that he did in relation to the issues in this case; there was no need, in such circumstances, for Mr Ward to give evidence also.

128. This is my view notwithstanding the last issue which needs to be addressed as to evidential matters, namely the previously mentioned deletion policy which was employed by McLaren concerning WhatsApp messages – a policy described by Mr de Marco as *"a troubling internal policy which encourages the taking of steps to avoid adverse documents coming to light within the context of litigation"*.

129. Mr de Marco referred in this context to an internal policy document dated July 2023 and entitled *"McLaren Racing Data Subject Access Request & Legal Disclosure – Exec Briefing – July 2023"*, which was only belatedly disclosed, during the course of the trial, after it was mentioned by Mr Dennington, one of McLaren's witnesses, as he was giving evidence. Mr de Marco labelled this policy *"a rogue's charter"* on the basis that it instructs and advises McLaren employees to take steps to avoid the truth being revealed through documentary disclosure, including by engaging in regular deletion exercises and making broad and unjustified claims to legal privilege.

130. Specifically, Mr de Marco highlighted how, under the heading "*Minimise Your Risk*", the policy advises employees to: avoid making written records of key conversations ("*Have conversations over the phone or in person, if possible, to avoid creating a record of what was discussed*"); use codes or pseudonyms when discussing key individuals in written communications, no doubt with a view to decreasing the chance that documents are picked up by keyword searches ("*When discussing sensitive situations, try to avoid using the names of the individual concerned. Use code names or numbers where possible*"); delete written communications regularly and in any event where they would not be happy for the same to be disclosed to a Judge ("*Clear out files and electronic communication channels often. Get into the habit of doing this regularly… Always use the disappearing messages functionality within WhatsApp… Consider what is being written and if you would be happy for the individual or an Employment Tribunal to see it. If not, delete it*"); and copy in-house counsel to sensitive communications in order to try and cloak the same with legal privilege ("*When needing to communicate about a sensitive employee matter on email, copy in our lawyer and title the email "legally privileged". Using "legally privileged" without a lawyer on copy will not work*").

131. Mr de Marco went on also to highlight how in their Disclosure Review Document in these proceedings, McLaren stated that "*WhatsApp is not an official company communication method"* and that "*it is a best practice within the Claimants' organisation to use the disappearing message function to encourage people to not use this as a persistent store of business information and only for the purpose of informal 'in the moment' communications".* Mr de Marco submitted that what was there stated was misleading since it is now clear that McLaren had a policy which, rather than dissuading employees from using WhatsApp for business purposes, encouraged the use of the *"disappearing messages"* function on WhatsApp – at least in part because of a concern that there might need to be disclosure in the context of litigation. As Mr de Marco put it, the policy does not say that executives should not be using WhatsApp; on the contrary, the fact that it advises executives in general terms to "*[c]lear out … electronic communications channels often"* suggests that the authors anticipate wide-ranging use of such channels, including WhatsApp; and the policy goes beyond

instructing executives to use the disappearing messages function on WhatsApp since it also more generally encourages the general and regular deletion of other electronic communications including email.

132. That McLaren employees – including Mr Brown, Mr Dennington, and Mr Ward – communicated over WhatsApp is clear. What is also clear is that not only was the disappearing messages function used as a matter of course, but that it continued to be used after Morgan Lewis instructed custodians to preserve all relevant documents in late August 2023. Mr Brown, indeed, when asked in cross-examination, initially said that he had no recollection of ever being told to stop using the disappearing messages function, albeit that he, then, said, on being shown the preservation notice sent by Morgan Lewis, that he was told to turn off the disappearing messages function but that he did not do this because he stopped having relevant conversations on WhatsApp.

133. This, however, was somewhat unsatisfactory evidence since, as Mr de Marco submitted, not only does the fact that Mr Brown kept on the disappearing messages function mean that his assertion as to the relevance of the communications cannot be tested, but, given that WhatsApp was used within the McLaren business generally and by Mr Brown in particular, it is difficult to understand how Mr Brown could be so confident he would not be sent a relevant WhatsApp message which ought then to be disclosed.

134. The point goes further, however, since I agree with Mr de Marco also when he referred to Mr Brown's additional explanation that the disappearing messages function might have turned itself on or off. This is not supported by WhatsApp's own guidance. It is also inconsistent with documents obtained in the US in relation to Mr Ward which show Mr Brown instructing key members of his team to keep communications to WhatsApp and subsequently to delete messages (immediately after a document was shared with the password *"Palou"*), specifically this: "*Keep everything whatapp amd [sic.] then delete. Ill respond any changes here"*.

135. The position in relation to WhatsApp communications is, in short, unsatisfactory. I bear this in mind when I come on to consider the evidence in this case, in particular the reliability of that evidence.

The law

136. I turn next to the law, as to which I received extensive written submissions.

Purpose of an award of damages

137. Damages are primarily compensatory: they seek to restore the innocent party to the position it would have been in had the contract been performed. As Parke B put it in ***Robinson v Harman*** (1848) 1 Ex 850 at page 365:

> "*The rule of the common law is that, where a party sustains a loss by reason of the breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages as if the contract had been performed*".

138. Rather more recently, referring to ***Robinson***, in ***One Step (Support) Limited v Morris-Garner*** [2018] UKSC 20, [2019] 1 AC 649, Lord Reed JSC put matters as follows at [31]:

> *"It is necessary next to consider some basic principles of the law relating to damages for breach of contract: principles which it will be necessary to bear in mind at a later stage of this judgment, when considering [the case of **Attorney General v Blake**] and its aftermath. Damages in contract serve a different remedial purpose from damages in tort, reflecting the different nature of the obligation breached by the wrongdoer in each case. The law of tort is concerned with civil wrongs, that is to say with breaches of duties imposed by the law, sometimes generally and sometimes on those who are party to particular relationships or have assumed particular responsibilities, which protect the interests of others in respect of such matters as their bodily integrity, their liberty, their property, their privacy and their reputation. Damages in tort are generally intended to place the claimant as nearly as possible in the same position as he would have been in if the tort had not been committed. The law of contract, on the other hand, gives effect to consensual agreements entered into by particular individuals in their own interests. Remedies granted by the courts are designed to give effect to what was voluntarily undertaken by the parties. Damages in contract are therefore intended to place the claimant in the same position as he would have been in if the contract had been performed."*

139. Damages are, therefore, assessed by comparing the position that the claimant would have been in had the contract been performed (i.e. the counterfactual position) with the position that it is actually in (i.e. the actual position).

140. In this respect, as Mr de Marco pointed out, since it is trite that damages for a breach of contract must reflect the difference between a claimant's actual situation and the situation they would have been in had contractual obligations been performed, there is no basis for an award of damages for an alleged failure to perform hypothetical contractual terms which were never agreed. That was made clear, albeit in a somewhat different context but applicable by way of analogy, by Popplewell J (as he then was) in ***Qogt Inc v International Oil and Gas Technology Ltd*** [2014] EWHC 1628 (Comm) at [126], as follows:

> *"I have already concluded that the Fund would not have been entitled to put either manager on gardening leave as a matter of the true construction of the IMAA. It would also have been impractical to have put both on gardening leave, because clause 26 of the IMAA provided for exclusivity in terms which prevented the Fund from appointing anyone else to perform the services whilst the IMAA remained in force. Appointing a new manager without terminating the IMAA was therefore not an option. It is impermissible for QOGT to seek to calculate damages on the counterfactual hypothesis that the Fund would have acted in a way which was not permitted by the IMAA. Damages do not fall to be assessed on the footing that if the contract breaker had not been in breach, he would have acted in a way which was a different breach of contract. On the contrary, damages are intended to put the innocent party in the position he would have been in had the contract been performed. Damages are to be assessed by valuing the contractual rights which the innocent party has lost by reason of the breach, not by valuing the benefit of conduct to which the innocent party was not entitled under*

the contract: see ***The Golden Victory*** *[2007] 2 AC 353, especially at [30],[32] and [37]."*

Standard of proof

141. In civil cases the Court will generally assess allegations by reference to the balance of probabilities. Accordingly, if a claimant shows more than a 50% likelihood that a loss would not have been incurred but for a breach, then (subject to rules of causation and remoteness, discussed below) it will recover that loss in full. However, where the assessment of damages is dependent on whether particular events *would have* occurred or *will* occur – that is, where quantification involves a hypothetical exercise – the Court will adopt a more nuanced approach. In certain instances, the claimant need only show that there was or would have been a "*real or substantial, rather than speculative*" chance of relevant events occurring. The court will, then, award proportionate damages according to the likelihood of the hypothetical event: see ***Allied Maples Group Ltd v Simmons & Simmons*** [1995] 1 WLR 1602 at page 1614D-E per Stuart-Smith LJ; ***Wellesley Partners LLP v Withers LLP*** [2015] EWCA Civ 1146 at [94]-[110] per Floyd LJ; and ***AssetCo Plc v Grant Thornton UK LLP*** [2019] EWHC 150 (Comm) at [415] per Bryan J.

142. This is sometimes termed the 'loss of a chance' approach to damages, as explained by Andrew Burrows QC (as he then was) in ***Palliser Ltd v Fate Ltd*** [2019] EWHC 43 (QB) at [27]:

"The correct picture of the law on proof in relation to damages is therefore that where the uncertainty is as to past fact, the 'all or nothing balance of probabilities' test applies. Where the uncertainty is as to the future, proportionate damages are appropriate. Where the uncertainty is as to hypothetical events, the correct test to be applied depends on the nature of the uncertainty: if it is uncertainty as to what the claimant would have done, the all or nothing balance of probabilities test applies; if it is as to what a third party would have done, damages are assessed proportionately according to the chances."

143. As to the actions of a party, the '*all or nothing'* test applies, and the claimant recovers either 100% of the claimed loss or 0% thereof. Thus, in ***Perry v Raleys Solicitors*** [2019] UKSC 5, [2019] AC 352 at [23] Lord Briggs JSC said this:

"Two important consequences flow from the application of this balance of probabilities test to the question what the client would have done, in receipt of competent advice. The first is that it gives rise to an all or nothing outcome, in the usual way. If he proves upon the narrowest balance that he would have brought the relevant claim within time, the client suffers no discount in the value of the claim by reason of the substantial possibility that he might not have done so: see Stuart-Smith LJ in the ***Allied Maples*** *case [1995] 1 WLR 1602, 1610G-H. By the same token, if he fails, however narrowly, to prove that he would have taken the requisite initiating action, the client gets nothing on account of the less than 50% chance that he might have done so."*

144. However, where the question is one of proportionate loss of chance, the Court applies a two-staged approach. First, as Lord Briggs JSC went on to explain in ***Perry*** at [34], the Court determines where there has been a lost opportunity, through a *de minimis*

threshold of whether there was a "*real and substantial, rather than merely negligible*" chance of gain; secondly, once this threshold has been met, proportionate damages are awarded with a range of outcomes between 0% and 100% of the identified loss.

145. Accordingly, as Mr de Marco put it (and it seemed Mr Goulding agreed): in relation to the *actual* scenario (i) where an alleged loss depends on *past* events, the claimant must prove what actually happened, whether prior to the breach or after the breach but prior to trial, on the balance of probabilities, whereas (ii) where a loss depends on *future* events, the claimant need only show that these have a "*real or substantial*" chance of occurring, following which damages will be assessed by reference to the likelihood of those events; and in relation to the *counterfactual* scenario: (i) a claimant must prove *its own* and *the defendant's* counterfactual conduct on the balance of probabilities, whereas (ii) if the loss sought depends on the counterfactual conduct of *third parties*, the claimant need only prove that there would have been a "*real or substantial*" likelihood of those third parties acting in a way which would have benefitted them, following which damages will be assessed in proportion to the likelihood.

146. In addition, as pointed out by HHJ Hacon in ***Sprint Electric Ltd v Buyer's Dream Ltd*** [2020] EWHC 2004 (Ch) at [119]:

> *"Where the claimant relies on more than one hypothetical event in a no breach counterfactual to establish causation, the events in the chain must be separately assessed. Only an event which involves the actions of one or more third parties is [to] be assessed by reference [to] a chance – so that the assessment becomes whether on the balance of probability there would have been a significant chance of that event occurring."*

Proving and quantifying loss

147. It is for the claimant to prove its loss, which means that the claimant bears the burden of proof: ***Capita Alternative Fund Services Ltd v Drivers Jonas (a firm)*** [2012] EWCA Civ 1417 per Moore-Bick LJ at [80]. This, as I will come on shortly to explain, is subject to the defendant's burden of proof in relation to remoteness, intervening act and mitigation. As to this, as Lord Reed JSC explained in ***One Step*** at [95]:

> *"(7) Where damages are sought at common law for breach of contract, it is for the claimant to establish that a loss has been incurred, in the sense that he is in a less favourable situation, either economically or in some other respect, than he would have been in if the contract had been performed.*
>
> *(8) Where the breach of a contractual obligation has caused the claimant to suffer economic loss, that loss should be measured or estimated as accurately and reliably as the nature of the case permits. The law is tolerant of imprecision where the loss is incapable of precise measurement, and there are also a variety of legal principles which can assist the claimant in cases where there is a paucity of evidence.*
>
> *(9) Where the claimant's interest in the performance of a contract is purely economic, and he cannot establish that any economic loss has resulted from its breach, the normal inference is that he has not suffered any loss. In that event, he cannot be awarded more than nominal damages.*

…

(12) Common law damages for breach of contract are not a matter of discretion. They are claimed as of right, and they are awarded or refused on the basis of legal principle."

148. The Court will compare what, in fact, happened with counterfactual scenarios, namely what would have happened if the breach had not occurred. The leading case is the Supreme Court's decision in ***Recovery Partners GP Ltd v Rukhadze*** [2025] UKSC 10, [2025] 2 WLR 529, in which Lord Leggatt JSC said as follows, at [162]-[163]:

"*When a claimant's right to claim compensation depends on proving a causal connection between a breach of a duty owed by the defendant and harm suffered by the claimant, the law uses counterfactual reasoning to determine whether the necessary causal connection has been shown. A comparison is made between what actually happened and what would have happened if the breach had not occurred. The purpose of the comparison is to identify with precision those consequences, if any, of the defendant's conduct for which the defendant should (subject to any further limiting factors) be held responsible.*

It is worth spelling out in a little more detail what the exercise involves. The first step is to identify the specific duty of which the defendant was in breach and the particular conduct which constituted the breach. The next step is to construct a hypothetical scenario in which the defendant's conduct is changed to the minimum extent necessary to achieve compliance with the duty. The court then considers what harm, if any, the claimant would have suffered in that scenario."

149. As Mr de Marco observed, this reflects the Court's approach of following "*the general rule that the burden lies on the claimant to prove its case*", which "*applies to proof of loss just as it does to the other elements of the claimant's cause of action*", whilst also recognising that the "*attempt to estimate what benefit the claimant has lost as a result of the defendant's breach of contract or other wrong can sometimes involve considerable uncertainty*": see ***Yam Seng Pte Ltd v International Trade Corp Ltd*** [2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 1321 at [188] per Leggatt J).

150. Whilst quantification may, therefore, require, as Lord Reed JSC earlier put it in ***One Step*** at [37], "*the exercise of a sound imagination and the practice of the broad axe*" (in other words, the Court doing its best on the available evidence), there are nonetheless limits to the Court's willingness to deploy that broad axe. Since, as Lloyd LJ noted in ***Capita Alternative Fund Services (Guernsey) Ltd v Drivers Jonas (a firm)*** [2012] EWCA Civ 1417 at [122]-[123], claimants are to be expected to bring forward "*as good evidence as can reasonably be obtained"* and it is not for the courts to embark upon guesswork in order "*to make good the failure of the Claimant's attempt to adduce evidence on which the court could rely in order to prove the amount of their loss*".

151. Leggatt J described the position in this way in ***Marathon Asset Management LLP v Seddon*** [2017] EWHC 300 (Comm), [2017] 2 CLC 182 at [164]:

"There are legal principles which may assist a claimant who has difficulty in proving loss. One such principle is that difficulty of estimation should not be allowed to deprive the claimant of a remedy, particularly where that difficulty is itself a result of the defendant's wrongdoing. Accordingly, the court will attempt as best it can to quantify the claimant's loss even where precise calculation is impossible. The court may do so by making reasonable assumptions about what the claimant's financial position would have been if the defendant had complied with its obligation to the claimant. A second principle is that, where the defendant has destroyed or wrongfully prevented or impeded the claimant from adducing relevant evidence, the court will make presumptions in favour of the claimant. The classic illustration of this principle is the old case of ***Armory v Delamirie*** *(1722) 1 Strange 505; 93 ER 664, where a chimney sweeper's boy found a jewel and took it to the defendant's shop to find out what it was. The defendant did not return the jewel but only the empty socket, and was held liable to pay damages to the boy. Experts gave evidence about the value of the jewel which the socket could have accommodated. According to the case report:*

'The Chief Justice directed the jury, that unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did.'"

He added at [165]:

"These principles can help a claimant to overcome evidential difficulties in proving damages. There is a limit, however, to how far they can be taken. They may assist in resolving uncertainties where evidence is not reasonably available but they do not enable the court to conjure facts out of the air and they have little role to play where evidence could reasonably have been obtained, or has in fact been adduced. They may give the claimant a fair wind, but not a free ride."

152. In making reasonable assumptions to quantify uncertain losses, it is sometimes appropriate to rely upon evidential 'anchors' to guide the Court's assessment. Thus, ***Experience Hendrix LLC v Times Newspapers Ltd*** [2010] EWHC 1986 (Ch) was concerned with a breach by the defendant of the claimant's intellectual property rights in a performance by The Jimi Hendrix Experience (formerly led by Jimi Hendrix) at the Royal Albert Hall. The defendant had recorded the performance and provided a free CD thereof to its customers. However, the claimant had intended to commercialise the performance itself through a film of the concert and release of the musical recordings. Asked to quantify this loss, Sir William Blackburne explained at [197] that:

"I have come to the clear conclusion that it is quite impossible to forecast, so as to provide a reliable basis for computing losses, what the box-office takings are likely to be for a film, whether in the US or beyond, which has yet to be released, which, at the time of the trial, had not even been completed and which none of the independent experts giving evidence before me had seen in any shape or form and, if they had, would not have possessed the relevant expertise to comment on."

He went on to ask himself, in these circumstances, whether this meant that he should decline to award the claimants any damages on the footing that they have failed to discharge the burden which is upon them to prove their loss. His conclusion at [204]

was that, as the Court had found that a loss had been suffered, *"this would be a most unsatisfactory outcome"*, noting that, in carrying out this task, in *"the midst of the mass of speculation about how well the Project will fare, two figures emerged to which, in my view, it is possible to anchor an assessment of the claimants' losses from the delay"*. These were a distribution agreement for the film and CD with another company (at [206]) as well as a rival offer made for performance rights (at [214]).

153. Similarly, ***IRT Oil and Gas Ltd v Fiber Optic Systems Technology (Canada) Inc*** [2009] EWHC 3041 (QB) concerned an exclusive sales agency contract under which the claimant was entitled to a certain percentage of the purchase price of all sales of oil pipeline sensors and monitors in Africa that it negotiated. The defendant terminated in breach. Counsel for the defendant argued that *"the claim for damages is hopelessly overstated and vague"* (see [105]), Tugendhat J nonetheless considered that, despite there being *"no evidential basis on which I can adopt the figures given"*, he should nonetheless *"do the best I can"* (see [109]-[110]) by relying upon sales figures from the claimant company in other regions in the world to ground a reasonable estimation of loss.

154. As to the second of the principles identified by Leggatt J in ***Marathon***, sometimes known as the 'fair wind' principle (arising from ***Armory v Delamirie*** (1722) 93 ER 664), it is worth noting what Leggatt J had previously had to say in ***Yam Seng*** at [188], namely that the principle entails the proposition that:

"it is fair to resolve uncertainties about what would have happened but for the defendant's wrongdoing by making reasonable assumptions which err, if anything, on the side of generosity to the claimant where it is the defendant's wrongdoing that has created those uncertainties".

This, as explained by Jonathan Parker LJ in ***Browning v Brachers*** [2005] EWCA Civ 753 at [210], operates as *"an evidential (i.e. rebuttable) presumption in favour of the claimant which gives him the benefit of any relevant doubt"*.

155. A recent example of the principle in action, Mr Goulding suggested, is ***Wemyss v Simon C Dickson Ltd*** [2022] EWHC 3091 (Ch), [2023] PNLR 7, a case which concerned the auction of a painting sold on the basis that it was under a notable artist's hand, but where there was a distinct possibility that substantial parts were painted by others. The painting would have realised a much higher sale price had it been unequivocally attributed to the artist. The Court considered a claim that the defendant should have sought an endorsement of authenticity from a leading expert on the artist where there was precedent for the expert to provide this. Simon Gleeson (sitting as a High Court judge) found as follows at [152]:

"In the case before me, the question which I have to answer is as to whether, on the assumption that The Painting is not in fact visibly inferior to the other versions, M. Rosenberg [the expert], upon seeing it, would have been prepared to go beyond his usual 'see my book' response, and to deliver a positive verdict on the autograph status of The Painting. On the facts I consider this to be unlikely. However, it is by no means impossible, and I note that he appears to have done exactly that as regards 'La Gouvernante'. I think that this is therefore a case where Mr Onslow's fair wind sends the overall conclusion to the point that we assume that M. Rosenberg gives The Painting

his public endorsement – that is, that he delivers one of the first two responses identified above."

Burden of proof: mitigation, intervening cause and remoteness

156. The burden of proof in relation to mitigation, intervening cause, and remoteness rests on the defendant.

157. This has recently been confirmed by the Supreme Court in ***Armstead v Royal & Sun Alliance Insurance Co Ltd*** [2024] UKSC 6, [2025] AC 406. Although the case involved a claim in negligence the same approach to burden of proof applies to a claim in contract. The majority judgment was given by Lord Leggatt and Lord Burrows JJSC (with whom Lord Richards and Lady Simler JJSC agreed). The principles capable of limiting the damages recoverable were identified at [23], as follows:

"*Where it is shown that loss has (factually) been caused by the defendant's breach of a duty of care, five principles are capable of limiting the damages recoverable by the claimant. They are: (i) the scope of the duty; (ii) remoteness; (iii) intervening cause; (iv) failure to mitigate; and (v) contributory negligence.*"

The majority addressed the burden of proof starting at [58], describing at [59] the proper approach as being:

"*In our view, the correct analysis is that once the claimant has proved that a tort has been committed and that the loss claimed was in fact caused by the defendant's breach of duty, it is for the defendant to assert and prove that one, or more, of the principles mentioned at para 23 above applies to limit the damages recoverable by the claimant.*"

158. The law is, as Mr Goulding observed, clear: the defendant bears the legal burden of pleading and proving a failure to mitigate loss caused by a tort: see ***Armstead*** at [60] and see also ***Vainker v Marbank Construction Limited*** [2024] EWHC 667 (TCC) at [330].

159. The position is the same as regards the question of whether an intervening event subsequent to the tort has broken the chain of causation between the tort and a particular loss: the weight of authority supports the view that here too the burden is on the defendant: see ***Armstead*** at [61].

160. As to remoteness, the majority noted in ***Armstead*** at [62] that there is a surprising lack of authority on the question of who has the legal burden of proof in relation to this. However, as a principle which cuts back the right to recover damages for loss that has been factually caused by a tort, remoteness plays an analogous role to the duty to mitigate and the concept of an intervening cause. The majority continued:

"*Logically, therefore, the legal burden of proof must likewise lie on the defendant to plead and prove that loss which was in fact caused by the defendant's tort is nevertheless irrecoverable because it is too remote.*"

161. As the majority explained at [63]:

"*The underlying justification for this approach rests, as we see it, on considerations of both fairness and efficiency. Once it has been proved that the defendant has committed a wrong which has caused loss to the claimant, it is fair to place the onus on the wrongdoer to show a good reason why the wrongdoer should not be liable to compensate the victim for the full extent of the loss caused. In addition, it would be unduly burdensome to require a claimant who has proved that the defendant committed a tort which has caused the claimant loss to have to anticipate ways in which it might nevertheless be said that the defendant should not be held legally responsible for the loss and rebut them. It is far more efficient, as well as just, to place the burden on the defendant to make such a case.*"

Causation

162. This brings me to causation. There is no issue about the fact that a loss will only be recoverable if the claimant can establish a sufficiently close causal connection between it and the loss.

163. Mance J (as he then was) explained the test in ***Famosa Shipping Co Ltd v Armada Bulk carriers Ltd (The 'Fanis')*** [1994] 1 Lloyd's Rep 633 at pages 636-7 as follows:

"The general issue is in my view appropriately stated as being whether any profit or loss arose out of or was sufficiently closely connected with the breach to require to be brought into account in assessing damages. Resolution of that issue involves taking into account all the circumstances, including the nature and effects of the breach and the nature of the profit or loss, the manner in which it occurred and any intervening or collateral factors which played a part in its occurrence, in order to form a commonsense overall judgment on the sufficiency of the causal nexus between breach and profit or loss."

164. The claimant may recover damages for a loss only where the breach of contract was an "*effective*" cause of that loss; it need not, however, be the sole cause or even the dominant cause. Rather, a claimant may recover damages if a breach of contract is one of two or more causes, so long as those causes are co-operating and of equal efficacy: ***Heskell v Continental Express Ltd.*** [1950] 1 All ER 1033 per Devlin J (as he then was) at page 1048; and ***FCA v Arch Insurance*** [2021] UKSC 1, [2021] AC 649 per Lords Hamblen and Leggatt JJSC at [172]-[173].

165. This was made clear in ***Galoo v Bright Grahame Murray*** [1994] 1 WLR 1360 at pages 1374-1375, the issue in that case being whether an auditor's negligence was the cause of a company trading at a loss or merely the opportunity for it to sustain that loss. Glidewell LJ concluded at page 1374G-H that "*if a breach of contract by a defendant is to be held to entitle the plaintiff to claim damages, it must first be held to have been an 'effective' or 'dominant' cause of his loss*".

166. Accordingly, in ***County Ltd v Girozentrale Securities*** [1996] 3 All ER 834, where the claimant bank (County) sued brokers (Gilbert Eliott) for losses sustained by the bank in underwriting the issue of shares and there was more than one cause of the bank's loss, including the brokers' breach of contract as well as the bank's own negligence, the Court of Appeal held the brokers liable for the bank's loss. Beldam LJ made clear

that it was sufficient that the brokers' breach of contract was an effective cause of the bank's loss, even if the bank's negligence was of greater efficacy as a cause than the brokers' breach of contract. Beldam LJ explained as follows at page 849D:

"*For my part I would not agree that the conduct of County could be regarded as of greater efficacy but, even if it could, it certainly did not displace the efficacy of Gilbert Eliott's breach. Accordingly, I would hold that Gilbert Eliott was in breach of the terms of its engagement as brokers and that its breach caused County the loss claimed"*.

167. The chain of causation may be broken by an intervening act. However, broadly summarised, under the relevant legal principles, conduct on the part of a claimant will only represent an intervening act for this purpose where it is unreasonable: see, for example, ***Quinn v Burch Bros Builders Ltd*** [1966] 2 QB 370. For a claimant's post-breach conduct to amount to an intervening cause, it "*must constitute an event of such impact that it 'obliterates' the wrongdoing … of the defendant*", in the sense that it divests the defendant's breach of all causal efficacy and/or relegates it to being no more than part of the background: ***Borealis*** at [44], endorsed by the Court of Appeal in ***Stacey v Autosleeper Group Limited*** [2014] EWCA Civ 1551 at [14]-[15]. This involves a higher threshold than merely unreasonable conduct. A claimant must not only have behaved unreasonably but must also have *"obliterate[d]"* the causal potency of the defendant's breaches so that they cannot even be concurrently operative causes: ***Delos Shipholding S.A. v Allianz Global Corporate and Specialty S.E*** [2024] EWHC 719 (Comm) at [137], discussing ***Borealis*** at [45].

168. The question of whether the breach of duty is the cause of the claimant's loss involves an exercise in the application of the court's common sense: see ***Galoo*** per Beldam LJ at pages 1374H-1375A. As Mr Stephen Houseman KC (sitting as a High Court judge) put it in ***YJB Port Ltd v M&A Pharmachem Ltd*** [2021] EWHC 42 (Ch) at [67], the Court is ultimately required to apply *"common sense in ascertaining whether a breach of contract operates as an effective cause of the loss claimed"* and should *"minimise relative injustice, bearing in mind the moral asymmetry where one party is at fault and the other an innocent victim of wrongdoing"*. Accordingly, the task does not "*involve the appliance of science*" and may "*embrace imprecision or imperfection*".

Remoteness

169. The leading cases on remoteness remain ***Hadley v Baxendale*** (1854) 9 Ex 341, ***Victoria Laundry (Windsor) Ltd v Newman Industries*** [1949] 2 KB 528 and ***Koufos v C Czarnikow Ltd ('The Heron II')*** [1969] 1 AC 350. In order to be recoverable, the type or kind of loss sought must, at the time of contracting, have been within the parties' reasonable contemplation as a "*not unlikely*" result of that breach (a term intended to denote "*a degree of probability considerably less than an even chance but nevertheless not very unusual and easily foreseeable*"): ***Siemens Building Technologies FE Ltd v Supershield Ltd*** [2010] EWCA Civ 7, [2010] 2 All ER (Comm) 1185 at [38] per Toulson LJ (as he then was).

170. A more recent decision is ***AG for the Virgin Islands v Global Water Associates Ltd*** [2020] UKPC 18, [2021] AC 23, in which Lord Hodge JSC (sitting in the Privy Council) noted at [27] the variety of phrases used in ***The Heron II*** to describe the prospect of the type of loss materialising that must be in the parties' reasonable

contemplation. These include "*not unlikely*", which denoted "*a degree of probability considerably less than an even chance but nevertheless not very unusual and easily foreseeable*"; "*liable to result*"; a "*real danger*"; and a "*serious possibility*".

171. Lord Hodge JSC went on to explain at [28], as follows:

"*In the common law tradition the phrases and expressions used by judges do not have and should not be accorded the status of the words of a statute. In the Board's view it is more important to identify what it is that judges have been trying to encapsulate in their choice of language. And that is whether as a question of fact the parties to a contract, or at least the defendant, reasonably contemplated, if they applied their minds to the possibility of breach when formulating the terms of the contract, that breach might cause a particular type of loss.*"

172. As Lord Hodge JSC observed, in the context of contractual liability the Court is not concerned with the percentage chance of such an event occurring, although that is not irrelevant. He referred to Lord Pearce who, in ***The Heron II***, gave the example of defective repairs to a courtroom ceiling giving rise to the chance of the roof falling in when the court was occupied as being almost 10:1 but nevertheless was a natural and obvious result of the breach of contract.

173. Lord Hodge JSC summarised a number of relevant principles at [31]-[35]:

"*First, in principle the purpose of damages for breach of contract is to put the party whose rights have been breached in the same position, so far as money can do so, as if his or her rights had been observed.*

But secondly, the party in a breach of contract is entitled to recover only such part of the loss actually resulting as was, at the time the contract was made, reasonably contemplated as liable to result from the breach. To be recoverable, the type of loss must have been reasonably contemplated as a serious possibility, in the sense discussed in paras 27 and 28 above.

Thirdly, what was reasonably contemplated depends upon the knowledge which the parties possessed at that time or, in any event, which the party, who later commits the breach, then possessed.

Fourthly, the test to be applied is an objective one. One asks what the defendant must be taken to have had in his or her contemplation rather than only what he or she actually contemplated. In other words, one assumes that the defendant at the time the contract was made had thought about the consequences of its breach.

Fifthly, the criterion for deciding what the defendant must be taken to have had in his or her contemplation as the result of a breach of their contract is a factual one."

174. As Mr Goulding pointed out, Lord Hodge JSC's second principle in ***AG of the Virgin Islands*** refers to whether the "*type of loss*" was reasonably contemplated as a serious possibility. If that test is satisfied, the defendant is liable even if the manner in which the loss occurred, or its extent, was not reasonably contemplated, as happened in ***Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd*** [1978] 1 QB 791. In that case, the

defendant provided a defective pig hopper to the claimant which rendered the nuts stored in it mouldy, and which led to 254 pigs dying from disease. The Court of Appeal held that this loss was not too remote. The majority (Scarman and Orr LJJ) stressed that it is the type and not the extent or precise manner of loss that must be reasonably contemplated. Scarman LJ considered (in agreement with what was stated in the then current edition of *McGregor on Damages*) that recovery is not to be limited because the degree of physical injury or damage could not have been anticipated. This was so because "*it would be absurd to regulate damages in such cases upon the necessity of supposing the parties had a prophetic foresight as to the exact nature of the injury that does in fact arise*": see page 813B-C. Scarman LJ added at page 813D-E:

"*It does not matter, in my judgment, if they thought that the chance of physical injury, loss of profit, loss of market, or other loss as the case may be, was slight, or that the odds were against it, provided they contemplated as a serious possibility the type of consequence, not necessarily the specific consequence, that ensued upon breach.*"

175. Subsequently, in ***Brown v KMR Services Ltd*** [1995] 4 All ER 598, the Court of Appeal adopted the same approach. In that case, a Lloyd's name claimed against a members' agent in respect of large losses suffered on the Lloyd's insurance market. Stuart-Smith LJ at pages 620F-621F, having referred to ***Parsons***, concluded that the authorities were accurately summarised in *Chitty on Contracts* (35th Ed., 2023) as follows:

"*A type or kind of loss is not too remote a consequence of a breach of contract if, at the time of contracting (and on the assumption that the parties actually foresaw the breach in question), it was within their reasonable contemplation as a not unlikely result of that breach",*

"*The reference to 'the loss' in the formulation of the test for remoteness of damage is to be interpreted as the type or kind of loss in question. The 'party who has suffered damage does not have to show that the contract-breaker ought to have contemplated, as being not unlikely, the precise detail of the damage or the precise manner of its happening. It is enough if he should have contemplated that damage of that kind is not unlikely.'"*

Hobhouse LJ agreed that "*If the kind of damage was reasonably foreseeable it is immaterial that the extent of the damage was not*": see page 643C.

Mitigation

176. Mitigation is an aspect of legal causation. A claimant must take all reasonable steps to mitigate their loss consequent upon the defendant's wrong and cannot recover damages for any such loss which they failed, through unreasonable action or inaction, to avoid. Put differently and as Lord Toulson JSC put it in ***Bunge SA v Nidera*** [2015] UKSC 43, [2015] 3 All ER 1082 at [81], a contract breaker will not be held to have caused loss which the claimant could reasonably have avoided.

"*It is well recognised that the so-called duty to mitigate is not a duty in the sense that the innocent party owes an obligation to the guilty party to do so… Rather, it is an aspect of the principle of causation that the contract breaker will not be held to have caused loss which the claimant could reasonably have avoided*".

177. The standard of 'reasonableness' is "*not a high one, since the defendant is a wrongdoer"*: see ***NTN Corporation v Stellantis NV*** [2022] EWCA Civ 16 at [27] per Green LJ citing from the then applicable edition of *Chitty on Contracts*, and also ***Banco de Portugal v Waterlow*** [1932] AC 452 at 506 per Lord Macmillan, as follows:

"*Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken*."

178. In "*judging whether [a Claimant] ha[s] acted reasonably*", the Court "*should be very indulgent and always bear in mind who was [originally] to blame*": ***Lodge Holes Colliery Company v Wednesbury Corporation*** [1908] AC 323 (HL) at 325, applied in ***Borealis AB v Geogas Trading SA*** [2010] EWHC 2789 (Comm) at [137]. The Court will, in particular, recognise that the innocent party is likely to be in a "*better position than [the judge] to assess what was appropriate commercially*": ***British Racing Drivers Club Ltd v Hextall Erskine & Co*** [1996] BCC 727 (HC) at page 743 per Carnwath J (as he then was).

179. Moreover, there will often be a range of reasonable responses open to the claimant. It is not enough for the defendant to show that there was a reasonable course of action open to the claimant that it did not follow. In order to establish a failure to mitigate, the defendant must show that it was unreasonable for the claimant not to follow it. As stated by Potter LJ in ***Wilding v British Telecommunications plc*** [2002] EWCA Civ 349, [2002] ICR 1079 at [55]:

"*[I]f there is more than one reasonable response open to the wronged party, the wrongdoer has no right to determine his choice. It is where, and only where, the wrongdoer can show affirmatively that the other party has acted unreasonably in relation to his duty to mitigate that the defence will succeed.*"

180. As Leggatt J put it in ***Thai Airways International Public Co Ltd v KI Holdings Co Ltd*** [2015] EWHC 1250 (Comm), [2016] 1 All ER 675 (Comm) at [38] the standard of reasonableness is "*applied with some tenderness towards the claimant having regard to the fact that the claimant's predicament has been caused by the defendant's wrongdoing*". What the defendant must show is *"that there was a course of action which it was reasonable to expect the claimant to adopt that would have avoided all or an identifiable part of the claimant's loss*".

181. It is clear also that a claimant need not take action that will prejudice its commercial reputations or put its good public relations at risk: see *McGregor on Damages* at [10-098]. Thus, in ***James Finlay & Co Ltd v Kwik Hoo Tong*** [1929] 1 KB 400 (a case

recently cited with approval by the Supreme Court in ***BDW Trading Ltd v URS Corporation Ltd*** [2025] UKSC 21, [2025] 2 WLR 1095 at [57]-[60] and [185]-[188]) the defendant seller breached his contract with the plaintiff buyer by tendering a bill of lading that incorrectly stated that the shipment had taken place in the contract month. The buyer had entered into sub-contracts which stated that the bill of lading shall be conclusive evidence of the date of shipment. The sub-purchasers refused to take delivery, alleging that the shipment had not been made during the contract month. The buyer was entitled to damages for breach by the seller of his obligation to deliver a bill of lading stating the date of shipment correctly. The Court of Appeal held that the buyer was not bound to enforce, for the purpose of minimising the damages, the contracts with the sub-purchasers, as to do so might seriously injure its commercial reputation. The defendant argued that the plaintiff was under a duty to mitigate its loss by enforcing its contracts with the sub-purchasers. The plaintiff accepted that it had a right to enforce those contracts, to which the sub-purchasers had no defence in law. However, it argued that it need not do so because to do so "*would not be in the ordinary course of business … and would in fact ruin their credit in India*" (see page 410). Scrutton LJ agreed, stating that a defendant who has committed a breach of contract cannot compel a plaintiff to minimise the damage by taking action that would "*ruin his credit in the business world*" (see page 410). Greer LJ stated at page 415:

"*The respondents would have been perfectly entitled, as a matter of business morals, to hold the sub-purchasers to their bargain and make them pay damages if they did not take the goods. But it is wholly unreasonable to say that that would be the ordinary course of business which they ought to pursue to diminish the damages. People have not to consider what is right in a strict court of conscience; they have to consider the effect of their conduct upon their business relations with other people, and I have little doubt that it would not have suited the respondents' business, nor would it be reasonable as a matter of business to require them, to do what is suggested in order to diminish the damages, if prima facie they are entitled to recover damages from the defendants.*"

Sankey LJ agreed, observing at page 418 that:

"*In this case I do not think that it would be reasonable to ask the respondents to sue their sub-purchasers and to insist upon the conclusive evidence clause when by the hypothesis they had learned that the bill of lading was in fact untruly dated. The damage might have been minimised to this extent, that the Indian sub-purchasers would have had no defence; but a person is not obliged to minimise damages on behalf of another who has broken his contract, if by doing so he would, as I think might have happened here, have injured his commercial reputation by getting a bad name in the trade.*"

182. Furthermore, a claimant need not embark on litigation against a third party in order to mitigate its loss: see *McGregor on Damages* at [10-091]-[10-093] and ***Pilkington v Wood*** [1953] Ch 770 in which the claimant was not required to sue the vendor of land who provided defective title in order to mitigate his recoverable loss from his negligent solicitor, even where the defendant offered an indemnity in respect of the proposed action, Harman J observing at page 777 that:

"*I am of opinion that the so-called duty to mitigate does not go so far as to oblige the injured party, even under an indemnity, to embark on a complicated and difficult piece of litigation against a third party.*"

183. Turning to the second limb of the mitigation principle, where the claimant does act reasonably in trying to avoid loss, then, the costs resulting from those actions are treated as caused by the breach: see *Chitty on Contracts* at [30-123] and authorities cited therein.

184. There is, then, a third aspect to have in mind. This is that a claimant must give credit for benefits enjoyed, where there is a sufficiently close link between the benefit enjoyed and the loss caused by the breach: see ***Fulton Shipping Inc of Panama v Globalia Business Travel SAU of Spain ('The New Flamenco')*** [2017] UKSC 43, [2017] 1 WLR 2581. In that case, shipowners sold the vessel after the premature termination of the charterparty and thereby avoided a substantial capital loss occasioned by the collapse in the market for such vessels following the financial crisis in 2008. Whilst the premature termination of the charterparty in ***Fulton Shipping*** was the occasion for the owners' decision to sell the vessel, the Supreme Court held that that decision was not necessitated by the termination but was a commercial decision of the owners at their own risk: see the summary of this decision in ***Sainsbury's Supermarkets Ltd v Mastercard Inc*** [2020] UKSC 24, [2020] Bus LR 1196 at [213]. Lord Clarke JSC set out Popplewell J's summary of relevant principles at first instance (without dissent) at [16]. These included:

"*(1) In order for a benefit to be taken into account in reducing the loss recoverable by the innocent party for a breach of contract, it is generally speaking a necessary condition that the benefit is caused by the breach*

…

(3) The test is whether the breach has caused the benefit; it is not sufficient if the breach has merely provided the occasion or context for the innocent party to obtain the benefit, or merely triggered his doing so

…

(5) The fact that a mitigating step, by way of action or inaction, may be a reasonable and sensible business decision with a view to reducing the impact of the breach, does not of itself render it one which is sufficiently caused by the breach.

…

(6) Whilst a mitigation analysis requires a sufficient causal connection between the breach and the mitigating step, it is not sufficient merely to show in two stages that there is (a) a causative nexus between breach and mitigating step and (b) a causative nexus between mitigating step and benefit. The inquiry is also for a direct causative connection between breach and benefit … Accordingly, benefits flowing from a step taken in reasonable mitigation of loss are to be taken into account only if and to the extent they are caused by the breach."

Lord Clarke JSC's view was that the essential question is whether there is a sufficiently close link between the loss caused by the wrongdoer and the benefit acquired by the innocent party from the mitigation step. The relevant link is causation. The benefit to be brought into account must have been caused either by the breach of the charterparty or by a successful act of mitigation: see [30].

185. Consistent with what has previously been explained concerning burden of proof, where a defendant alleges that a claimant has benefitted from steps taken in mitigation, and that those benefits must be brought into account, the burden lies on the defendant to prove the fact and extent of the alleged benefits, as well as the necessary causal nexus between the breach and those benefits. Thus, in ***Sainsbury's***, the Supreme Court observed at [212]:

"*In some cases of mitigation, the court is concerned with additional benefits which a claimant has gained from the mitigation action which it has taken. In such a case, it is for the defendant to show that the benefits should be set off against the prima facie claim of loss.*"

Wasted expenditure

186. As Coulson LJ explained in ***Soteria Insurance Ltd v IBM United Kingdom Ltd*** [2022] EWCA Civ 440, [2022] 2 All ER (Comm) 1082 at [40], when a claimant claims damages in consequence of the defendant's repudiation, it may claim either consequential losses, such as loss of profits or - in the alternative - its wasted expenditure; the claimant has a choice.

187. The reason why wasted expenditure can be recovered is the (rebuttable) presumption that such expenditure would have been recouped from profits, revenues or savings (in other words, the contract would have been worth at least as much as the claimants spent in anticipation of its performance): see **S*oteria*** at [85]. It follows that, where the defendant can show that the claimant's expenditure in anticipation of performance of a contract would never have been recouped in any event (i.e. the bargain was a bad one), or that the breach has placed the claimant in a better position than if the contract had been performed, the claim will fail: see ***Soteria*** at [44]-[45]). This means that recovery is limited by profits that would have been earned assuming "*full performance*": see *Chitty on Contracts* at [30-027].

188. Expenditure includes the price paid under a contract: see *Chitty on Contracts* at [30-029]. In ***Havila Kystruten AS v Abarca Companhia De Seguros SA*** [2022] EWHC 3196 (Comm) the claimant successfully claimed for wasted expenditure in the form of instalments paid under a contract with the defendant before the defendant terminated in breach of contract. Henshaw J considered, at [327], that there was no bar to recovery of payments where no claim in unjust enrichment would lie, explaining that:

"*It is no answer to say that, because no claim would lie in restitution (as there was no total failure of consideration), there should equally be no claim for reliance loss. The one does not follow from the other.*"

189. If there has been some benefit received as a result of the expenditure, those can operate to reduce the amount which can be recovered: see ***Grange v Quinn*** [2013] EWCA Civ

24, [2013] 1 P & CR 18 at [128] per Gloster LJ. It follows that recovery is limited to the maximum profits that would have been earned had performance been carried out in full. However, the relevant assessment of benefits is somewhat holistic. For example, in ***CCC Films (London) Ltd v Impact Quadrant Films Ltd*** [1985] QB 16, the relevant contract concerned the provision of tapes, and the rights over those tapes, by an English subsidiary of a German company in circumstances where the German company sought to exploit those tapes for profit. Hutchinson J considered, at page 38G, that the relevant test for unprofitability was "*whether or not the exploitation of the subject matter of the contract would or would not have recouped the expenditure*" and that entailed considering not only whether the English subsidiary (which paid the sum for which recovery was sought) would have recovered that sum in value under the contract, but whether the wider activity for which the contract was created would be a profitable one to the claimant.

190. Lastly, where a defendant seeks to limit recoveries in this way, it bears the burden of proof on a balance of probabilities basis, and the Court will otherwise presume that the contract would have been a profitable one: see ***Yam Seng*** at [187] per Leggatt J.

Unjust enrichment

191. The elements of a claim in unjust enrichment were recently considered by the Supreme Court in ***Barton v Morris*** [2023] UKSC 3, [2023] AC 684, at [77] and [228].

192. The Court will first consider three questions: (a) has the defendant been enriched; (b) was the enrichment at the claimant's expense; and (c) was it unjust? Thereafter, the burden of proof shifts to the defendant to prove any defence.

193. Amongst the recognised categories where there can be a restitutionary claim is the case where there is a total failure of consideration, including where the promised counter-performance does not materialise: see ***Barnes v Eastenders Cash & Carry plc*** [2014] UKSC 26, [2015] AC 1 per Lord Toulson JSC at [106]-[107]. As explained by Professor Birks in his revised edition of *An Introduction of the Law of Restitution* (1989) at page 23, cited with approval by Lord Toulson JSC in ***Sharma v Simposh Ltd*** [2011] EWCA Civ 1383, [2013] Ch 23 at [24]:

"*Failure of the consideration for a payment … means that the state of affairs contemplated as the basis or reason for the payment has failed to materialise or, if it did exist, has failed to sustain itself*".

194. For this purpose, the relevant basis must be shared between the parties and is to be assessed objectively. Thus, parties cannot rely upon uncommunicated thoughts: see ***Gray v Smith*** at [428]-[430] per Mr Richard Smith (as he then was, sitting as a High Court judge). In cases where the transfer is made pursuant to a contract, that common basis is reflected in the contractual terms: see *Goff & Jones on Unjust Enrichment (10th Ed., 2022)* pages 13-18. This is uncovered through ordinary principles of contractual interpretation. Accordingly, the ability of the law of unjust enrichment to operate is - or can be - tempered where the parties' relationship is otherwise governed by contract.

195. Where the enrichment is transferred pursuant to a valid contractual obligation to confer it, the resulting enrichment is not unjust; and the law of contract determines and governs

the consequences of obligations in respect of the subject matter of the contract: see ***Barton*** at [190]-[193] per Lord Leggatt JSC; and see also ***Dargamo Holdings Ltd & anr v Avonwick Holdings Ltd & anr*** [2021] EWCA Civ 1149, [2021] 2 CLC 583 at [70]-[71] per Carr LJ (as she then was).

196. That said, as to the requirement that the failure of consideration is 'total', Carr LJ explained in ***Dargamo*** at [103] that "*the courts have not adopted a literal approach to the total failure of basis requirement*". For example, ***Rover International Ltd v Cannon Film Sales Ltd*** [1989] 1 WLR 912 concerned a claim for the recovery of advance royalties paid under a contract for film dubbing services. The defendant alleged that the claimant had received several films, however the Court of Appeal found that "*the possession of the films was merely incidental to the performance of the contract in the sense that it enabled Rover/Monitor to render services in relation to the films by dubbing them*": at page 924H per Kerr LJ. Recovery under restitution was consequently permitted in that case.

197. Where the basis of the consideration is expressly and unconditionally spelt out on the face of a valid and subsisting contract, there is no scope for inquiring into an alternative basis which is plainly contrary to the express basis freely agreed between the parties: see ***Barton*** at [102] citing ***Dargamo*** at [133].

198. Where parties stipulate in their contract the circumstances which must occur in order to impose an obligation on one party to pay, they necessarily exclude any obligation to pay in the absence of those circumstances - both any obligation to pay under the contract, and any obligation to pay to avoid an enrichment which they have received from the counterparty from being unjust. The silence of a contract on a particular aspect means that no obligations of payment or repayment arise, and to grant restitutionary remedies would be to cut across the risk allocation in the contract: see ***Barton*** at [96] and also Lady Rose JSC's concluding remark at [107] that "*Unjust enrichment mends no one's bargain"*.

The driver salary loss claim

199. Turning, then, to the various claims that have been made by McLaren and starting with the driver salary loss claim, McLaren seek lost profits in the sum of approximately US$1,312,500 representing what they say are the additional sums that have had to be incurred, or that are expected to be incurred, in respect of driver salaries and other similar fees, which would not have been incurred absent the Defendants' breaches.

200. The background to this claim has already largely been set out. Its premise is that, had Mr Palou complied with his contractual obligations, Mr O'Ward would have driven Car #5 (2024 to 2027), Mr Palou would have driven Car #6 (2024 to 2027) and Mr Siegel would have driven Car #7 (2025 to 2027), replacing Mr Rossi, who would have driven that car in 2024. In the actual scenario, by way of contrast, whilst Mr O'Ward has driven Car #5 throughout, Car #6 has been variously driven by Mr Ilott, Mr Pourchaire and Mr Siegel, whilst Car #7 has been driven by Mr Rossi in 2024, and then by Mr Lundgaard.

201. McLaren, accordingly, say that they have incurred additional salary costs. That is, indeed, not really disputed by the Defendants as far as Mr Ilott, Mr Pourchaire and Mr Malukas are concerned since it is accepted by the Defendants that none of them would

have driven for McLaren Indy in 2024 but for the breach of contract. The dispute, rather, is as to McLaren's case that the breach caused them to renegotiate the contract which it had with Mr O'Ward much earlier than it would otherwise have done and to agree to pay him significantly greater sums of money compared with what McLaren would otherwise have agreed to pay him.

202. Mr O'Ward originally provided his services to McLaren Indy pursuant to a driving agreement dated 22 October 2019. That agreement was first amended on 26 May 2022. Following the Defendants' breach, however, McLaren say that the Arrow McLaren team was left in a position of considerable vulnerability: having already lost the driver it expected to be its franchise driver (Mr Palou), the team could not risk losing Mr O'Ward since, as Mr Brown put it in his witness statement, that would have been a "*disaster*". As a result, McLaren say, the effect of the Defendants' breach was to deprive Mr Brown of the "*leverage and flexibility*" which he maintains he would otherwise have had when entering into negotiations with Mr O'Ward and his representatives. In consequence, Mr Brown explained in his witness statement that he was put in a weaker negotiating position, meaning that McLaren had to "*pay Pato more and sign him for a longer term*". Mr Brown explained further when he gave his oral evidence that:

"*once I lost Alex I needed to make sure I had my franchise driver, because I was planning on Alex being my franchise driver along with Pato, but when Alex breached, that gave Pato a tonne of leverage and I needed to make sure, if I'm going to pay more, that I get some extension to the contract*".

He added:

"The situation is you have Alex as your franchise driver, two franchise drivers, if you have Alex secured then you're at less risk in the market on Pato. When Alex breached, I had to make sure I didn't run a risk of losing Pato, so I had to respond quickly to secure him longer term, and part of the renegotiation was paying him more immediately; same as that conversation I had with Alex the Monday after the Indy 500".

203. Whereas before the Defendants' breach, Mr Brown explained in his witness statement, his intention (and that of McLaren) was to extend the terms of the POW Driving Agreement beyond 2025 on "*the same or similar terms to his existing contract*", potentially agreeing to increase Mr O'Ward's base pay by US$100,000 year-on-year to account for inflation, what, in fact, happened was that Mr O'Ward's contract was extended with very considerable increases in salary. Specifically, on 28 February 2024, the POW Driving Agreement was further amended, with an increase in Mr O'Ward's base salary of US$5.1 million, comprising increases as follows: for [REDACTED], from US$2.3 million to US$3.3 million; for [REDACTED], from US$2.4 million to US$3.4 million; for [REDACTED], from US$2.5 million to US$4 million; and for [REDACTED], from US$2.6 million to US$4.2 million.

204. The issue here, as previously mentioned, is not whether McLaren Indy entered into these revised arrangements with Mr O'Ward, but whether McLaren can recover what is claimed having regard to the causation and remoteness issues that have been raised by the Defendants, who invite the Court to conclude that the Defendants' breach was not the factual or legally relevant cause of McLaren Indy deciding to enter into a further

extension of Mr O'Ward's contract in February 2024 and thereby agreeing to pay the increased fees to Mr O'Ward set out above.

205. In this respect Mr de Marco highlighted, first, how, irrespective of whether Mr Palou was also part of the driver line-up, Mr O'Ward was (and, indeed, still is) a very valuable asset to McLaren given that, as Mr Brown explained in his witness statement, in addition to being a strong on-track performer (he came second in the 2025 IndyCar Series Championship), he is universally recognised as a unique "*fan favourite*" within IndyCar with significantly more "*off-track*" appeal than Mr Palou. This was noted, for example, in certain McLaren Board Meeting Minutes which were before the Court where he was described as being "*named second favourite driver in the series, first among females*". It was also consistent with what Mr Jakobi had to say when giving evidence. Mr Jakobi observed, in particular, that the strong interest in motorsport racing amongst the Latin American community makes Mr O'Ward, who is Mexican, a "*special case*", with a "*huge difference*" in fan following between him and other IndyCar drivers. Mr O'Ward's popularity is additionally borne out by certain figures relating to social media followers for current IndyCar drivers to which the Court was also taken.

206. Moreover, as Mr de Marco pointed out, the sponsorship agreement for Arrow McLaren's name sponsor, Arrow, specifically requires McLaren Indy to retain Mr O'Ward unless Arrow agrees otherwise, and Mr Brown's evidence was that Arrow "*came back to us time and time again because we have Pato O'Ward*". Given this, Mr de Marco submitted, the salary negotiated for Mr O'Ward was entirely in line with market rates. It was, indeed, Mr de Marco noted, common ground between McLaren Indy and Mr O'Ward's agents, prior to the renegotiation, that McLaren Indy had Mr O'Ward "*under market rates in 24/25*", with Mr Brown apparently at the time being "*prepared to uplift that*" in return for an extension to Mr O'Ward's contract. This, in circumstances where not only was Mr Rossi at the time on a significantly higher base fee, but also in circumstances where, as Mr Jakobi and Mr Marks agreed, there has been a significant increase in pay across the market in recent years, largely driven by significant investments by Team Andretti. For example, Mr Jakobi noted that Mr Ericsson's salary is understood to be US$3.1 million, and it was Mr Marks' evidence that Mr Dixon is understood to be earning between US$3.5 million and US$4.5 million a year. There are, in addition, reports in the press suggesting that the salary of Mr Herta (another IndyCar driver, who started with Harding Steinbrenner Racing and went on to join Andretti) may be up to US$7 million per year and that Mr Kirkwood earns over US$3 million per year. These are all drivers, Mr de Marco noted, whose on-track performance is no better than Mr O'Ward's and who enjoy nothing like the off-track appeal that Mr O'Ward does.

207. On that basis and as Mr Jakobi acknowledged in saying that the numbers "*look pretty reasonable*", Mr de Marco's submission was that what McLaren Indy agreed to pay Mr O'Ward was merely in line with market rates. There is, however, a need for some caution here. This is because, as Mr Goulding observed and as Mr Jakobi explained in his second report, there was no marked improvement in Mr O'Ward's on-track performance between the POW 2022 Amendment and the POW 2024 Amendment. The same is shown from an analysis carried out by Mr Harris relating to Mr O'Ward's on-track performance between 2020 to 2024, from which it is apparent that there was, as Mr Harris put it, "*no discernible improvement in Mr O'Ward's on-track performance*

between the POW 2022 Amendment and the POW 2024 Amendment". Most notably, whereas in the 2021 season, which ended approximately eight months before the POW 2022 Amendment was signed, Mr O'Ward won two IndyCar Series races and finished third in the Drivers' Championship and fourth in the Indy500, in the 2023 season, which ended approximately five months before the POW 2024 Amendment was agreed, Mr O'Ward did not win an IndyCar Series race and finished fourth in the Drivers' Championship and 24th in the Indy500. It seems unlikely, given this, that, had there been no breach on the part of the Defendants and had Mr Palou joined the Arrow McLaren team, McLaren Indy would have agreed to pay Mr O'Ward the increased amounts that they did after it became apparent that Mr Palou was not joining after all.

208. Secondly and consistent with this, whilst there are documents showing a willingness on the part of McLaren Indy to increase the amounts paid to Mr O'Ward which pre-date the POW 2024 Amendment, it should be borne in mind that a number of those documents not only pre-date that amendment but also the POW 2022 Amendment. As Mr Goulding observed, in such circumstances, any associated salary increase would have been reflected in the POW 2022 Amendment rather than the subsequent POW 2024 Amendment.

209. Thirdly, it is significant as regards Arrow that, whereas Arrow made a significant financial contribution to McLaren when they agreed to extend Mr O'Ward's contract in 2022, that increase being reflected in the POW 2022 Amendment, Arrow did not increase its contributions when McLaren Indy increased Mr O'Ward's salary in 2024. This, I agree with Mr Goulding, suggests that the decision to enter into the POW 2024 Amendment was, as McLaren maintain, a reaction to the Defendants' breach, and not something that had been planned or which would have happened even if there had been no such breach.

210. Fourthly, I also agree with Mr Goulding when he submitted that the increases agreed with Mr O'Ward in 2024 are unlikely to have been attributable to Mr O'Ward's off-track popularity since it is unclear why, as Mr Goulding put it, an increase in, for example, the number of Mr O'Ward's Instagram followers would mean that McLaren Indy would feel the need to pay him more. That is all the more unlikely to have been the position given that it appears that Mr O'Ward's popularity was, at least in part, attributable to his association with McLaren Indy, a cross-over team, which meant that he was able to attract F1 fans as well as IndyCar fans. Mr O'Ward would not have been able to attract this additional (F1) fanbase had he joined another IndyCar team since there was (and is) no other crossover team. It is noteworthy in this context that an analysis undertaken by Mr Harris reveals that nearly half of the increase in the number of Mr O'Ward's Instagram followers in 2023 occurred during the week after he participated in the F1 pre-race practice session for the 2023 Abu Dhabi Grand Prix in November 2023.

211. Turning to Mr de Marco's second main submission on this issue, this was that at the time of the Defendants' breach, McLaren Indy had Mr O'Ward under contract through to the end of 2025, and so there was no urgent need to secure his services notwithstanding the breach. On the contrary, Mr de Marco observed, if McLaren had been concerned that they might not have any good drivers left for 2026 and thereafter, then, they had plenty of time to address that issue by finding a replacement driver. The reality, Mr de Marco suggested, is that McLaren valued Mr O'Ward so highly that they

wanted to secure an extension with him regardless of the Defendants' breaches. This, Mr de Marco submitted, is consistent with Mr Jakobi's evidence that, if a driver is performing well and is still under contract for the coming year or years, then, it is commonplace for him to "*go to the team that [he's] currently with and say, 'Fine, I'd like to increase my salary, bonuses, but in exchange for that, I'm willing to extend my contract for another two years'*". Indeed, as Mr Brown himself acknowledged, McLaren "*redid Pato's contract a couple of times to get extensions, just as I've done with Lando Norris, just as I've done with Oscar ... it is not unusual for us, it is actually normal course of business for us to take care of our drivers if we feel they're worth it and to try and get extensions on the back of it*".

212. Mr de Marco pointed in this respect to the fact that McLaren had done this before in entering into the POW 2022 Amendment at a time when the POW Driving Agreement entered into in 2019 was still current and, under that agreement, Mr O'Ward was required to drive for McLaren Indy until the end of 2024 in return for payment of US$750,000 for each of the 2023 and 2024 seasons. Three years before that agreement was due to expire, in September 2021, McLaren offered Mr O'Ward terms which included substantially higher base fees of US$1.5 million for 2024, US$1.75 million for 2025 and US$2 million for 2026 - in exchange for a contractual extension. A month later, in October 2021, that offer was increased to US$1.75 million for 2024, US$2 million for 2025 and US$2 million for 2026, and shortly after that an additional US$100,000 travel allowance was added to the package on offer. In the event, under the POW 2022 Amendment higher amounts were, then, agreed: US$2.3 million for 2024 and US$2.4 million for 2025. This shows, Mr de Marco submitted, that increases in pay are commonplace where a team is negotiating an extension for an in-demand driver.

213. Again, however, I am unpersuaded by this submission. On the contrary, I accept that Mr Brown was telling the truth when he told the Court that he was put in a weaker negotiating position as a result of the Defendants' breach and that this is why McLaren had to "*pay Pato more and sign him for a longer term*", not that they would have paid Mr O'Ward more in any event.

214. Nor do I consider that it matters, despite a somewhat faint suggestion by Mr Jakobi that he had been told by Mr O'Ward at the time that he thought that he would be able to use Mr Palou's breach of contract to secure an uplift in his contract with McLaren (which Mr Jakobi clarified in his oral evidence was not what he was told in terms), that it was McLaren, rather than Mr O'Ward, who, as Mr Steadman put it, *"made the first move"*. It is clear that it was, indeed, McLaren Indy (specifically, Mr Tony Kanaan) who approached Mr Hadaya, Mr O'Ward's representative, on 24 September 2023. What matters, however, is the timing of that email, which was sent only a matter of weeks after Mr Palou informed McLaren Indy that he would not drive for Arrow McLaren.

215. What matters also is that there, then, followed negotiations, in which it is clear that Mr Hadaya was doing his best to achieve enhanced terms for Mr O'Ward. Thus, in an email from Mr Kanaan to Mr Hadaya sent on 7 October 2023, Mr Kanaan emphasised that the team had been "*working through budgets*" and having a "*lot of conversations with Zak to stretch as much as possible*", explaining that McLaren Indy valued Mr O'Ward "*A LOT*". Furthermore, on 9 November 2023, Mr Brown sent an email to Mr Hadaya with an updated proposal in respect of Mr O'Ward's salary, bonus payments and

personal sponsorship. In the email, Mr Brown explained that he "*must draw the line somewhere and this is where it is*", before going on to observe that "*when you look at his overall package with the performance incentives today he would be the highest paid driver in the sport*". Mr Brown was here, quite obviously, referencing efforts being made on Mr O'Ward's behalf to secure a better deal for him. The fact that he was still under contract at the time does not seem to have been regarded as a relevant factor in this context. On the contrary, Mr Brown was not seemingly objecting to efforts being made on Mr O'Ward's behalf to secure higher remuneration notwithstanding the fact that Mr O'Ward was still under contract but, as he went on to explain, to Mr O'Ward's father *"overplaying his hand"*; in other words, Mr Brown considered that Mr O'Ward and his father were being too greedy. As he put it at the end of the email:

"Go win the 500 and Championship and future income will take care of itself".

216. A later email sent on 30 January 2024 shows much the same thing since in that email Mr Brown said this:

"*I feel we have been very generous. Pato is a star but he has won 4 races … but I think we are offering to pay for results in advance effectively and with the bonus structure would make him one of the highest (if not highest) including branding he can monetise which is also money out of our pocket. Including the f1 testing we are spending a LOT*".

Mr Brown went on to explain that he was feeling "*penny pinched*", adding that he wanted *"closure as unfortunately my Pato negotiations are more complicated and drawn out th[a]n all my other drivers combined …".* Asked about this in cross-examination, Mr Brown explained that this was "*in return for getting a longer-term contract*", underlining the fact that McLaren felt that they had to secure Mr O'Ward for longer and for more money because they no longer had Mr Palou as a driver.

217. It is impossible, in such circumstances, to conclude, as the Defendants invite the Court to conclude, that the Defendants' breach was not an effective cause of the renegotiations that took place between McLaren Indy and Mr O'Ward resulting in the POW 2024 Amendment. That, consistent with authorities such as ***Galoo***, is what matters in the present context, not whether Mr O'Ward or Mr Hadaya sought to leverage the Defendants' breach in their negotiations with McLaren Indy – although Mr Palou's decision not to join McLaren was obviously, as Mr Goulding put it in closing, the elephant in the room, regardless of whether it was used by Mr O'Ward as leverage. All that matters is whether the Defendants' breach caused McLaren Indy to pay Mr O'Ward what they agreed in the POW 2024 Amendment, and I see no reason to reject what Mr Brown had to say about this. On the contrary, I accept without reservation what he had to say since it makes perfect sense that, faced with having lost Mr Palou, McLaren should feel that they had to do everything they could to ensure that they did not also lose Mr O'Ward – and to do so with some urgency.

218. It follows, too, that, in strict causation terms and as a matter of commonsense, the Defendants' breach is properly to be regarded as an effective cause of the loss now claimed by McLaren. The Court is not obliged to decide whether, if there were other causes, the Defendants' breach was the most effective. However, had it been necessary to do so, I would have concluded that the Defendants' breach was, indeed, just that. In short, for reasons previously explained, I reject the suggestion that the POW 2024

Amendment was entered into because of Mr O'Ward's on-track performance and/or off-track popularity. However, if these were factors in McLaren's decision to enter into the agreement, I am clear that the more effective reason was McLaren Indy's desire to retain Mr O'Ward as a driver having lost Mr Palou.

219. This brings me to Mr de Marco's third submission, which is that, to the extent that any of the increase in Mr O'Ward's salary was caused by the Defendants' breach, the loss claimed by McLaren is too remote to be recoverable because a reasonable person in the Defendants' shoes at the time of entering into the AP Agreements in October 2022 would not have contemplated the possibility that a breach of the contract would prompt McLaren to renegotiate Mr O'Ward's salary in circumstances where he was under contract for the foreseeable future, at a salary well below market rates.

220. I do not agree with Mr de Marco about this. I regard it as being obvious that the losses arising from Mr O'Ward's salary renegotiations are not too remote given that increased driver salaries entail a type of loss which must have been in the Defendants' reasonable contemplation at the time that they entered into the AP Agreements as liable to result from a breach of contract on their part. I do not accept, in particular, that losses arising from salary renegotiations with another driver are too remote as to be outside that reasonable contemplation even if (as here) those renegotiations involved (as inevitably they would) renegotiating binding contracts. In any event, as made clear in ***Parsons***, the manner in which a loss is incurred is not relevant for remoteness purposes, and so the fact that the renegotiation involved the re-opening of a binding agreement is nothing to the point. The question for the Court is whether driver salary losses were a type of loss that Mr Palou reasonably contemplated.

221. As to that and approaching the matter with the guidance given by Lord Hodge JSC in ***AG for the Virgin Islands*** in mind, it is significant that Mr Palou was obviously very familiar with how salary renegotiations work in the IndyCar context; he also had specific knowledge of his importance, and also Mr O'Ward's importance, to the Arrow McLaren driver line-up. As to the former, Mr Palou knew about how to exercise leverage in the salary negotiation context. Indeed, as Mr Goulding noted in closing, when he was deciding whether to drive for Arrow McLaren or CGR, he himself used offers from each as leverage in negotiations with the other: as he put it, when asked in cross-examination, he and his representatives used CGR's offer as "*a way to push McLaren for better conditions*" and used McLaren's offer "*to get the market pay*" from CGR. As to the latter, Mr Palou knew (and knows) full well how talented a driver he is and how, therefore, significant a signing McLaren would have viewed (and did view) him as being. The same applies to Mr O'Ward and his importance to McLaren, as Mr Palou himself acknowledged in his witness statement where he described Mr O'Ward as "*the number one driver in McLaren's IndyCar team before 2021, and that was understood by everybody*".

222. I am, therefore, in no doubt that the Defendants understood when they entered into the AP Agreements that drivers' salaries can be renegotiated (including, necessarily, when there are binding contracts still on foot), that drivers can and do leverage favourable conditions when negotiating (or renegotiating) salaries, that Mr Palou was to be Arrow McLaren's franchise driver and that, as such, if he breached his contract, the loss of his services would mean that Arrow McLaren would be under pressure regarding its driver line-up as a result and, lastly, that, in that event, Mr O'Ward would have a larger role

to play in the driver line-up and greater leverage in relation to his own terms and conditions. Accordingly, I agree with Mr Goulding that McLaren's claimed loss was not too remote but was of a type of loss that was within the Defendants' reasonable contemplation as liable to result from, or a serious possibility following, their breach.

223. In strict ***Hadley v Baxendale*** terms, should it be necessary to approach the matter on that basis, an increase in drivers' salaries in respect of the future driver line-up which Arrow McLaren would be forced to arrange and negotiate was an ordinary and natural consequence of the Defendants' breach – the first limb; alternatively, Mr Palou had special knowledge which meant that an increase in Mr O'Ward's salary was reasonably in contemplation as liable to result or as a serious possibility of the Defendants' breach – the second limb.

224. Lastly, although I recognise that it would be open to the Court to decide that the relevant loss should be reduced on the basis that, consistent with an exercise carried out by Mr Harris in the alternative to McLaren's primary case, based on a scenario in which 50% of the uplift in Mr O'Ward's salary for [REDACTED] and [REDACTED] is treated as if it would have been agreed irrespective of the Defendants' breach, I decline to reduce the amount claimed. Even though Mr Brown said what he did in evidence about not ruling out paying Mr O'Ward less in the counterfactual, nonetheless, given that what happened in the renegotiations with Mr O'Ward was the result of the Defendants' breaches, for reasons that have been explained, it would not be appropriate (indeed, it would be counter-intuitive) to make a reduction.

225. It follows that the driver salary claim succeeds in the sum of US$1,312,500 – subject to the Siegel issue which I will come on to address.

The NTT base fee loss claim

226. McLaren's case is that, in the wake of the Defendants' breach, McLaren had to spend time attempting to manage the impact on its sponsorship arrangements. In some cases, this involved renegotiation. McLaren say that NTT was one of those cases given that, again McLaren say, NTT had entered into the NTT Agreement on the understanding that Mr Palou would be driving Car #6, which NTT had agreed to sponsor.

227. NTT is a company incorporated in Delaware, USA, which provides IT and business services. It is a US subsidiary of NTT Inc, a Japanese telecommunications company which is one of the largest publicly traded companies in Japan and partially owned by the Japanese government. NTT has been involved in sponsorship in the IndyCar Series since 2013, initially sponsoring a CGR car at the Indy500 and then becoming the title sponsor of IndyCar Series in 2019 – a position that NTT still holds. From 2014 to 2022, NTT became the primary title sponsor of CGR's Car #10, driven most recently by Mr Rosenqvist (2019, 2020) and Mr Palou (2021, 2022), who continues to drive in the Car #10 today. With effect from the 2023 season, NTT moved its sponsorship from CGR to McLaren Indy.

228. It was put to Mr Croxville that NTT was interested in moving to McLaren Indy because of the enhanced hospitality and B2B opportunities available at McLaren Indy compared with CGR. Mr Croxville acknowledged that NTT was frustrated with the "*commercial side*" of its sponsorship agreement with CGR, however, he went on to make it clear that

this was not why NTT was considering moving to McLaren Indy since what NTT was, in fact, doing was (as he put it) "*following the driver*". By this, he meant following Mr Palou, with whom he and NTT had formed a relationship through NTT's sponsorship of CGR's Car #10. That NTT knew that Mr Palou was going to be joining McLaren Indy was the consistent theme of both Mr Brown and Mr Croxville's evidence, which I accept. I reject, in particular, as I will come on to explain, the suggestion made by Mr de Marco, both in closing submissions and in his cross-examination of Mr Jakobi, that the only reason why NTT was interested in moving to McLaren Indy from CGR was the B2B reason.

229. I accept, in short, although I will return to this topic later, Mr Brown's evidence that NTT came to McLaren because Mr Palou was expected to be driving for them, and that NTT would have known this "*at the time of the negotiations ... in the middle of the racing season, July/August*". Mr Brown explained - and again I accept - that he had approached NTT when he "*knew their contract was coming to an end to say 'I've got Alex coming to join our team*"'. This is consistent also with what Mr Croxville had to say, which was that, whilst he did not know for certain that Mr Palou was joining McLaren Indy before, as explained in a moment, Mr Palou announced it in July 2022, nonetheless he knew that Mr Brown was pursuing him.

230. Whilst it was not until somewhat later, in October 2022, that NTT and McLaren Indy agreed sponsorship terms, this was because, as previously mentioned, in the summer of 2022 a dispute came about between CGR and McLaren Indy as to Mr Palou's driving services, with both parties laying claim to his services for the 2023 season. Specifically, again as previously mentioned, on 4 March 2022 Alpa Racing USA entered into the March 2022 McLaren Agreement, pursuant to which Alpa Racing USA agreed to procure his services as a racing driver to McLaren Indy in the IndyCar Series in the 2023 to 2025 seasons. That agreement, it was not in dispute, was reached following 6 months of negotiations between McLaren Indy and Mr Palou's representatives, Monaco Increase Management ('MIM'), although there is a dispute (irrelevant for present purposes) as to whether (as Mr Palou maintains) Mr Brown approached his representatives or whether (as Mr Brown maintains) MIM reached out to him with a view to discussing a potential move to McLaren Indy. Be that as it may, in July 2022, CGR issued a press statement, stating that Mr Palou would be driving for its team in the 2023 season, in circumstances where the CGR Driver Agreement gave CGR an option to extend the term of the agreement so that Mr Palou could be required (upon written notice) to provide his services to CGR during the 2023 season. Following a mediation in August 2022, CGR and McLaren Indy agreed that Mr Palou would drive for CGR for the 2023 season – effectively deferring his start date with McLaren Indy by a year. However, as previously mentioned, pursuant to the Second CGR Amendment entered into on or around 29 September 2022, it was nonetheless agreed that Mr Palou would be permitted to pursue certain F1 driving opportunities with McLaren, provided that they did not conflict with his commitments to CGR in the IndyCar Series in 2023.

231. Mr Croxville explained during his oral evidence that NTT had, in the meantime, taken a step back from negotiations during what he described as a "*kerfuffle*" in order to see how the dispute panned out, bearing in mind also that NTT sponsored the IndyCar Series as a whole, and not only a specific team. NTT was, however, told about the outcome of the mediation, with Mr Brown writing to him (and others at NTT) on 14 September 2022 to say that:

"*Although not in the press release, we can confirm to you that Alex Palou will be racing for AMSP in the NTT INDYCAR SERIES in 2024 and beyond"*.

There, then, followed negotiations between McLaren Indy and NTT, which included Mr Croxville writing to Mr Brown on 26 September 2022 setting out various heads of terms. These included NTT proposing a base fee of US$6.75 million for the 2024-2025 seasons with "*Alex named as intended driver*", with Mr Croxville noting as follows:

"*I also thought you said Alex was signing up for 2024 through 2026. If that term is longer, I would be willing to make the contract coterminous with his*".

Mr Goulding submitted that this reflected the understanding between McLaren Indy and NTT that Mr Palou would be driving Car #6 sponsored by NTT.

232. I agree with Mr Goulding about this. Mr Croxville explained in his witness statement that, before they entered the NTT Agreement, "*everybody believed that [Mr Palou] was coming to McLaren in IndyCar (including us)*". He added that:

"*Our decision was therefore that, although we would have 1 year at McLaren without Alex driving for us (i.e., during 2023), we were nonetheless happy to enter into the agreement with McLaren on the basis that Alex was contracted to come to McLaren for the 2024 season, as part of the resolution of the dispute mentioned at paragraph 47 above*".

Mr Croxville continued:

"*To be absolutely clear, we made our decision to move to McLaren on the basis that Alex was contracted to drive for McLaren in IndyCar for the 2024, 2025 and 2026 seasons. If it had been otherwise, we would not have been willing to enter into an agreement with McLaren*".

Mr Croxville was equally clear when he gave his oral evidence. He explained that Mr Palou joining McLaren Indy from 2024 "*was an essential part of our decision to sponsor McLaren*", and that "*all of our conversations around payment, setting this contract up were based on Alex Palou coming to McLaren as our driver*". He added:

"*there was always a commitment to put him in the car. That was all our conversations around who was going to be our driver, was really around Alex Palou from the start of that until we completed it. Our intent was that Alex – intent was that Alex would be in the car. That's what we believed that he was coming over to McLaren and he would be our driver*".

233. Mr Brown's evidence was to the same effect. He explained in no uncertain terms that "*NTT committed to the sponsorship deal with McLaren based on the understanding … that Alex Palou would be driving for the 2024 season and beyond*", and this is consistent with an internal McLaren email which he himself sent on 27 September 2022 when sharing the heads of terms agreed since he stated in that email that McLaren "*Intend to put Alex P in their car in 2024*".

234. On 1 October 2022, McLaren Indy and Mr Palou entered into the AP Agreements.

235. A few weeks later on 28 October 2022, McLaren Indy and NTT entered into a four-year sponsorship agreement with McLaren Indy, pursuant to which NTT agreed to be the title sponsor of McLaren Indy's Car #6 for four IndyCar Series between 2023 and 2026 (the 'NTT Agreement'). Mr Palou was not named as the driver of NTT's Car #6 in the NTT Agreement. However, the NTT Agreement provided NTT with a right to be consulted as to any changes to the driver of Car #6: see clause 2.3.3. Otherwise, pursuant to this agreement, NTT was entitled to the following sponsorship benefits for the IndyCar Series from 2023 to 2026: NTT was to be McLaren Indy's exclusive 'Official IT Services Partner' and non-exclusive 'Official Partner'; McLaren Indy's Car #6 was to be entered as the '#6 NTT Data McLaren Indy's car in ten 'Primary Races' in the IndyCar Series, in which Car #6 and its driver, pit crew and team would display specified NTT branding; in respect of 'non-Primary Races', Car #6 and its pit crew and team would display certain specified (lesser) NTT branding; for McLaren Indy's Car #5 and Car #7, these would also display the specified (lesser) NTT branding in all IndyCar Series races; in the event that McLaren Indy entered a fourth car in the Indy500 in the 2023 season, NTT was to receive specified branding on the car; and NTT was to benefit from specified image association rights, driver and management appearances, hospitality & experiences, and social/digital engagement campaigns and announcements. In return for those benefits, NTT agreed to pay McLaren Indy sponsorship fees consisting of certain fixed fees plus variable performance incentives. In respect of the fixed fees, NTT agreed to pay an annual base fee as follows: 2023 - US$6 million; 2024 - US$6.75 million; 2025 - US$6,918,800; and 2026 - US$7,091,700. In addition, NTT agreed to pay performance incentives based on race wins, Drivers' Championship wins and Indy500 race wins, across the term of the NTT Agreement.

236. Thereafter and before the Defendants' breaches, on 10 February 2023, McLaren Indy and NTT entered into an amendment to the NTT Agreement ('NTT Amendment 1'), under which NTT purchased additional branding for McLaren Indy's Car #7 for three races in the 2023 IndyCar Series. In return, NTT agreed to pay McLaren Indy an additional one-off sponsorship fee of US$800,000.

237. Subsequently and again before the Defendants' breaches, on 18 May 2023, NTT entered into a letter agreement with McLaren Racing (the 'NTT 2023 F1 Agreement'), pursuant to which NTT agreed to purchase sponsorship of the outer halo on McLaren's two F1 cars at Grand Prix races held in Austin on 22 October 2023 and Las Vegas on 19 November 2023, the 'halo' on a F1 car being the curved bar that is placed above the driver's head to protect the driver from harm and the outer halo being the side of the halo that faces out of the car.

238. Moving forward several months, shortly after the Defendants breached the AP Agreements on 8 August 2023, Mr Brown contacted Mr Bob Pryor, NTT's CEO, to inform NTT that Mr Palou would not be driving Car #6. According to Mr Brown, he did so because he wanted to tell NTT *"that we had a problem and I would do the right thing and fix it*". Mr Brown went on to explain that:

"*I know what verbal agreement and representation I've made to NTT and have been in this business long enough to know that integrity and what you said you're going to do*

is critically important, whether it's fully captured in a contract or not, and so I knew had I not resolved what I've promised NTT that I would end up with either them potentially saying I've breached or looking for an exit, damaging my reputation, McLaren's reputation."

239. A few days later, on 12 August 2023, Mr Brown also forwarded to Mr Croxville and Mr Pryor an internal McLaren email sent by him on 11 August 2023 explaining that Mr Palou had no intention of honouring his contract with McLaren for the 2024 season and beyond. The email explained that McLaren had made it clear to Mr Palou that they expected him to honour and perform his contract. However, the leadership team was focused on addressing the 2024 driver line-up in order to be prepared if Mr Palou did not do so.

240. Mr Croxville's evidence on this was that his initial reaction to the news was: "*You've got to be kidding*", but that NTT ultimately decided to "*wait and see how the situation would play out and find out what Alex's decision meant … before renegotiating anything*" since, in view of the prior dispute between CGR and McLaren Indy, Mr Croxville wanted to wait until "*it became clear that Alex was not joining*".

241. Thereafter, there appears to have been only limited correspondence between NTT and McLaren. In fact, it seems that there were only two further exchanges between August/September 2023 and December 2023. Thus, in an email from Mr Ward to Mr Mo Murray at NTT on 22 August 2023, it was explained that Mr Brown and Mr Kanaan had been in contact with Mr Croxville and Mr Pryor about Car #6; and two weeks or so after that, on 8 September 2023, Mr Brown sent an email to NTT attaching a draft letter agreement and stating "*ive [sic] taken an additional million from the base and moved it to performance bonus"*. There was, then, nothing in writing, in what Mr de Marco suggested in closing was *"an unusual window of time"*, until an email sent by Mr Brown on 14 December 2023 attaching McLaren's "*proposal to compensate you for the unfortunate and unforeseen loss of Alex Palou"*.

242. That proposal said nothing about reducing the base fee, instead referring to "*Fees as per existing agreement"*, and contained an offer of additional branding rights in the shape of F1 car sponsorship inventory and sponsorship of a new IndyCar engineering truck. Mr Brown explained, however, in his oral evidence - and I accept - that *"there was active conversations from the moment of notification to sitting down with"* NTT *"in Las Vegas"*, which is a reference to the F1 Grand Prix in Las Vegas that took place on 18 November 2023. It was, therefore, following this meeting that Mr Brown sent NTT the proposed renegotiated terms on 14 December 2023.

243. On 21 December 2023, Mr Croxville replied to Mr Brown's email, stating:

"*As we have discussed previously, we would have been unlikely to have signed the current contract with a relatively untested driver. No need to belabor the point, but that contract was designed around a championship caliber driver*".

NTT proposed, instead, a reduction in the base fee of US$1.75 million, from US$6.75 million to US$5 million, in 2024, with an incremental increase of 2.5% on a compound basis for future seasons, as well as other changes to the races sponsored and additional benefits as proposed by McLaren Indy.

244. Ultimately, these negotiations led to an agreement concluded on 27 February 2024, the Second Amendment Agreement ('NTT Amendment 2'). This agreement contained changes to the NTT Agreement as follows: the number of Primary Races was reduced from ten to nine, in light of changes to the schedule for the IndyCar Series in 2024 (clause 1); the base sponsorship fees to be paid by NTT to McLaren Indy were as follows (clause 4): 2024: US$5 million; 2025: US$5.125 million; 2026: US$5,253,100; 2027: US$5,384,500; 2028: US$5,519,100; the performance incentive payments due from NTT to McLaren Indy were amended (clause 5); McLaren Indy agreed to provide NTT with F1 branding and hospitality benefits, in return for fees in 2024 (US$500,000), 2025 (US$512,500), 2026 (US$525,300), 2027 (US$538,400) and 2028 (US$551,900) (clause 7); the term of the NTT Agreement was extended, to include the IndyCar Series in 2027 and 2028 at the option of NTT (clause 8); and the IndyCar branding provided to NTT was changed to include: (a) the addition of NTT branding to McLaren's engineering truck; (b) the addition of specified NTT branding to any fourth car entered into an IndyCar 500 race; (c) the provision by NTT of an on-board camera for use on Car #6; and (d) adjustments to the specified NTT branding of Car #6's interior aeroscreen, and the specified branding for Car #5 and Car #7.

245. In addition and relevant to a separate claim dealt with later, pursuant to NTT Amendment 2, NTT was also granted F1 branding and hospitality rights between 2024 and 2028, comprising: branding on the outer halo of the Second Claimant's two F1 cars for up to three F1 races in the USA; designation of NTT as the regional 'Official Technology Partner' for the McLaren Racing in the USA, on a non-exclusive basis; an annual credit of US$200,000 for NTT to purchase F1 paddock club or general admission ticket packages at F1 races in the USA, the F1 paddock club being the F1 hospitality service, which caters for 'VIP' guests and team sponsors, very often offering luxury dining and superior views at events. In return, NTT agreed to pay a sponsorship fee of US$500,000 in 2024, which increases by 2.5% per year. NTT, therefore, agreed to pay a total of US$2,628,200, comprising: US$500,000 (2024); US$512,500 (2025); US$525,300 (2026); US$538,400 (2027); and US$551,900 (2028).

246. It will be appreciated that McLaren Indy's NTT-related claim primarily concerns NTT Amendment 2, however, it also relates to another agreement entered into later the same year, on 18 November 2024, in which McLaren Indy and NTT amended the terms of the NTT Agreement ('NTT Amendment 3'). Pursuant to NTT Amendment 3, the parties agreed that NTT would be provided with various branding and other benefits in respect of McLaren's 'F1 Academy' between August 2024 and December 2025. The F1 Academy is an all-female series that was launched in 2023 by F1 to help prepare and develop female drivers to progress to higher levels of motorsport. The parties also agreed that NTT would be permitted to participate in the McLaren Racing's '60 Scholars' initiative: a programme of masterclasses, which aims to empower 60 women in careers in science, technology, engineering, and mathematics.

247. Lastly in this context, under clause 8.2 of NTT Amendment 2, NTT had the right to terminate the NTT Agreement with effect from 31 December 2026 by providing notice in writing to McLaren Indy by no later than the last day of the last IndyCar Race in the year 2025. The last day of the 2025 season being 31 August 2025, on 29 July 2025, Mr Dennington wrote to representatives of NTT in relation to the approaching deadline for termination, apparently following up on a previous meeting, stating as follows:

"*you are all deep in discussion and analysis around the future of our partnerships and other potential partnerships for the future given the global focus of your organisation. We acknowledge the gap in driver equity but have also worked hard to close that with access to all drivers and of course your biggest advocate in TK. We are open to working with you for the future in this area …*".

Just under a month later, on 25 August 2025, in a letter to Mr Kevin Thimjon, the President of McLaren Indy, NTT exercised its termination right under clause 8.2, thereby terminating the NTT Agreement with effect from 31 December 2026.

248. McLaren say that the lost profits under NTT Amendments 2 and 3 were caused by the Defendants' breach, alternatively that they are recoverable as costs incurred by way of reasonable mitigation of further losses that flowed from the Defendants' breach. The loss is put at US$5,382,344 representing reductions in the base fees payable for the period 2024-2026 (prior to termination) under the NTT Agreement and those payable in 2027 by NTT (after termination) pursuant to an extension of the NTT Agreement or by another sponsor in the sum of approximately US$1.9 million.

249. As previously mentioned, the Defendants' position is that this claim should fail since, contrary to McLaren's case, the Defendants' breach did not cause the reduction in NTT's base fee; on the contrary, they say that it was clear that a renegotiation with NTT was going to be necessary in respect of unrelated matters. They refer, in this regard, specifically, to a reduction in the number of races at which NTT was granted branding rights; a personal services contract between NTT and Mr Kanaan; and a reduction in the value of the inventory rights granted to NTT. Alternatively, the Defendants contend that, insofar as any of the base fee is attributable to the Defendants' breach, it must be limited to the US$750,000 annual *"uplift"* from 2024. Furthermore, the Defendants argue that any such loss, if it did arise, is, in any event, too remote to be recoverable since a reasonable person in the Defendants' shoes in October 2022 would not have contemplated the possibility that McLaren Indy would seek to renegotiate its contract with NTT, still less that in doing so they, as Mr de Marco put it in closing, *"would hand NTT millions of dollars"*. Alternatively, insofar as any sufficiently foreseeable loss was suffered, then, the Defendants say that McLaren unreasonably failed to mitigate it by renegotiating a binding contract in circumstances where there was no upside to doing so and no relevant reputational risks, and/or that McLaren failed to take reasonable steps to recruit a better driver from 2025 – instead, hiring a lesser calibre pay driver for Car #6, without consulting NTT.

Causation

250. As to causation, Mr de Marco's submission in closing was that the idea that NTT demanded a reduction in the base fees which it had contractually undertaken to pay as a result of learning that Mr Palou would no longer be driving for McLaren Indy is a fiction. Specifically, Mr de Marco invited the Court to conclude that McLaren decided to plead a case in these proceedings, on 29 September 2023 (as part of a concerted effort to generate as high a claim as possible so as to try and leverage the maximum settlement it could from the Defendants) at a time when, despite it being stated in the Particulars of Claim that NTT had demanded a reduction in base fees, NTT had, in fact, not done this because, Mr de Marco submitted, NTT appreciated that it was not a condition of

the NTT Agreement that Mr Palou (or some driver of a similar calibre) should drive Car #6. More than this, Mr de Marco suggested, once the case had been pleaded, McLaren and NTT *"went through the motions"* of negotiating an agreement with a revised base fee in order to substantiate McLaren's pleaded claim in the hope that the financial consequences of the same could be laid at the Defendants' door in circumstances where the NTT Agreement was going to be subject to a renegotiation, in any event.

251. Mr de Marco made a number of associated submissions in this regard.

252. First, he submitted that NTT did not decide to move from CGR to McLaren Indy because it thought that Mr Palou was moving to McLaren Indy but because it felt that McLaren Indy had better hospitality and B2B provision. I have touched on this already, but I do not accept this submission. Mr Croxville did, indeed, identify these as important reasons why NTT sponsored IndyCar. However, in cross-examination he was very clear that this was not the primary reason. He was consistent in his evidence that NTT wished to follow Mr Palou and that this was the reason why NTT entered into the NTT Agreement. He did not say that NTT would have entered into that agreement even if Mr Palou was not driving for McLaren Indy for the 2023 season. Mr Croxville explained that "*[s]uccessful drivers bring larger and more sponsors*", and that this was because a winning driver creates a better "*experience at the track*". He explained:

"*Well, we're bringing clients in to have that experience that IndyCar gives them, and a lot of that is access to the drivers, access to the pit crew, access to -- during a race even in the pit crew, but the excitement that builds from a driver that's winning races, that's chasing the championship. It's quite different than if, you know, you're coming in 15th in the race. So it just makes that experience on the track that much different, and that much better*."

What, in any event, is abundantly clear is that, even if the B2B attractions that McLaren Indy had to offer were part of NTT's thinking in moving from CGR to McLaren Indy, Mr Palou moving to McLaren Indy was at the very least a factor in NTT's decision to enter into the NTT Agreement. That is sufficient for McLaren's purposes since the authorities are clear that the Defendants' breach needs only to be a cause of the renegotiation for McLaren to succeed; it does not have to have been the only cause.

253. Secondly, it is nothing to the point that NTT and McLaren Indy were in discussions well before July 2022 (and so well before it was announced that Mr Palou would be joining McLaren Indy), as highlighted by Mr de Marco and as I accept they were, given that internal McLaren documents demonstrate that by 13 July 2022 McLaren had a sufficiently crystallised expectation that NTT would purchase a particular primary sponsor package that it reflected this in its July 2022 rate card and, furthermore, Mr Palou's recollection was that by the time that he began negotiating the March 2022 McLaren Agreement, Mr Brown was already in discussions with Mr Croxville about NTT moving across to McLaren Indy. What matters is that both Mr Brown and Mr Croxville were clear that it was always understood in the discussions that took place, and whenever they took place, that Mr Palou would be moving to McLaren Indy.

254. Thirdly, Mr de Marco submitted that, whilst NTT had previously sponsored Mr Palou's car at CGR, it had no special relationship with Mr Palou. He pointed in this respect to

the fact that NTT did not enter into a personal services contract with Mr Palou at any time. However, it is not in dispute that Mr Croxville *did* propose such a sponsorship agreement to Mr Palou in early September 2022, seeking to foster a relationship with Mr Palou similar to what NTT has with Mr Kanaan, who continues to represent the company in retirement alongside his role at Arrow McLaren. This rather undermines the submission made. The fact that, as he explained, Mr Palou declined the proposal, on the basis that he was due to continue driving for CGR in 2023 and that, in circumstances where NTT would be moving across to McLaren Indy, a personal sponsorship agreement would be inappropriate does not alter the fact that a proposal *was* made, so demonstrating that - contrary to the Defendants' position - NTT was, indeed, wanting to have a special relationship with Mr Palou.

255. Fourthly, as to a related point made by Mr de Marco, namely that NTT was willing to move to McLaren Indy in 2023 when Mr Palou was still driving for CGR, so suggesting that NTT cannot have been interested in sponsoring Mr Palou's car, Mr Croxville explained (and I accept) that this was a decision that was reached because NTT did not want to lose the opportunity to sponsor Mr Palou's car in the future. As he put it in his statement:

"*So, we speculated that we would likely lose our ride for the next year (i.e. 2024) if we did not move in 2022 for the 2023 season.*"

He amplified this in cross-examination:

"*If we stayed with him at CGR for a year, we'd lose the opportunity to sponsor him with McLaren going forward because McLaren would have moved on with another sponsor to cover that hole*".

He added later:

"*I wouldn't say we were happy for him not to be driving the car, but that was the situation that we found ourselves in … we positioned to have him be our driver for the future*".

In other words, far from not wanting to sponsor Mr Palou's car, NTT was prepared to wait for Mr Palou to join Arrow McLaren in order to achieve just that.

256. Fifthly and somewhat fundamentally, Mr de Marco highlighted how, during the course of the negotiation of the NTT Agreement, the parties variously raised the possibility of naming Mr Palou and Mr Kanaan as drivers or making some proportion of the base fee conditional upon McLaren Indy hiring a *"Multi Race Winner"* or *"Champion"* driver, yet ultimately did neither of these things. Mr de Marco highlighted in this connection the fact that Mr Croxville said, when asked in cross-examination, that it was not unusual for NTT to enter into contracts which named the particular driver of NTT's car, yet ultimately neither of these things was done. Instead, the NTT Agreement used the term "*Indy Car Drivers"*, which was defined as meaning "*the drivers from time to time engaged by McLaren"*. It was Mr de Marco's submission, in the circumstances, particularly given that no defined portion of the base fee was expressed to be conditional upon either Mr Palou or a driver of a particular calibre in Car #6, that the parties should be taken as not intending that the identity of the driver was important.

257. In this respect, Mr de Marco noted not only that Mr Brown agreed, when asked, that, if a driver's identity is particularly important to a sponsor, then, the sponsor may push for the driver's name to appear in the contract, but also that Mr Jakobi explained in his oral evidence that:

"*... the reason why you wouldn't name a particular driver in a contract because, you know, if the driver were to leave, what happens to the contract between the sponsor and the team? In other words, if you are the team, you would want to retain most of the rights going forward so that if a sponsor left -- sorry, if a driver left, the sponsor would remain and you find another driver. What you don't want is driver leaves, sponsor leaves... So you would -- the normal thing would be to make sure, if you're the team, that you try to keep the driver out of it*."

258. In closing, Mr de Marco also noted that Mr Croxville and Mr Brown each gave different reasons for the NTT Agreement not naming Mr Palou or a driver of similar calibre. Mr de Marco was right about this. Thus, Mr Brown said that the reason was that McLaren wanted flexibility in case it needed to swap Mr Palou due to injury or F1 promotion. This was also what he had previously stated in his witness statement (as had Ms Bowden and Mr Dennington in their evidence), where he noted that it is "*uncommon for sponsorship contracts in IndyCar to name a specific driver*" and that it is general practice of McLaren not to do so for a variety of reasons, including the risk of injury to the driver voiding the contract, as well as giving individual drivers too much leverage. That said, later in his evidence he floated the possibility that the absence of a reference to Mr Palou within the agreement was not an intentional decision but was instead "*a mistake*" by the parties' lawyers and "*not accurately reflective of what was agreed*". As for Mr Croxville, he thought that the reasons were, first, that the sponsorship deal was based upon an F1 template, and, secondly, that "*McLaren was not used to naming a driver"*. As Mr de Marco was able to demonstrate in closing, however, there are McLaren contracts where drivers are named. These include McLaren's contracts with Arrow, Mission Foods, and RJV.

259. Notwithstanding this, however, as I see it, the absence of a reference to Mr Palou (or an equivalent driver) in the NTT Agreement is not important in circumstances where, as previously explained, it was the clear evidence of both Mr Croxville and Mr Brown that it was always understood that Mr Palou would be driving for McLaren Indy and that this was the reason why (or at least one of the reasons why) NTT decided to transfer its sponsorship from CGR to McLaren Indy.

260. This is borne out by the fact that, when it was unclear whether Mr Palou would be moving to McLaren Indy, after CGR exercised its option requiring him to stay at CGR, pending resolution of the dispute between Mr Palou and CGR, NTT delayed entering into the NTT Agreement. If Mr Palou did not matter to NTT, then, NTT would not have delayed.

261. Furthermore, I found Mr Brown's attitude on being told that Mr Palou was not, after all, moving to McLaren Indy in immediately contacting NTT and informing Mr Pryor that he "*would do the right thing*" entirely believable. As far as Mr Brown was concerned, regardless of whether the NTT Agreement referred to Mr Palou, NTT and McLaren Indy had only entered into that agreement on the basis that Mr Palou would

be driving at McLaren Indy, and so that was the basis on which McLaren (and Mr Brown) were approaching NTT in the aftermath of the Defendants' breach.

262. Sixthly, as previously touched upon, Mr de Marco drew attention to what he characterised as *"an unusual window of time"* in which there were no substantive email communications between McLaren Indy and NTT between September 2022 and mid-December 2022. He did so for two reasons: first, in support of his submission that McLaren and NTT were engaged in some sort of connivance in order to enable McLaren to make the present claim against the Defendants; and, secondly, in support of a submission that the length of time between the Defendants' breach and the entry into NTT Amendment 2 indicates that these two events were causally unrelated. The difficulty with the latter submission, however, is that, as Mr de Marco himself acknowledged, there were discussions taking place in this period, including specifically at the Las Vegas Grand Prix. These discussions followed Mr Brown telling NTT immediately what had happened after the breach, and there is also the point that, as previously explained, it was apparently NTT's position that it was willing to wait and see how the situation developed before renegotiating the terms.

263. As to the former of Mr de Marco's submissions, Mr de Marco drew attention to the fact that, when, on 29 September 2023, McLaren filed their Particulars of Claim, the allegation was made that NTT had "*required the NTT Agreement to be renegotiated*" as a result of the Defendants' breach. This, despite the fact that it has since emerged, and is not in dispute, that NTT had made no such demand at that time. On the contrary, a McLaren board update from 29 August 2023 recorded that Mr Malukas had been signed to replace Mr Palou and that NTT were "*very happy with the choice*". Mr de Marco speculated that the explanation for the case being put in the way that it was in the Particulars of Claim is that McLaren saw an opportunity to bolster their case as against the Defendants by describing NTT as having "*required*" a renegotiation as a result of the Defendants' breach, and that McLaren, in effect, offered NTT a base fee reduction (orally or in a deleted WhatsApp message) on the basis that this would be passed on to the Defendants. As a result, Mr de Marco suggested, the purported negotiations between McLaren Indy and NTT that culminated in NTT Amendment 2 were not genuine negotiations at all; rather, he suggested, what McLaren, in effect, did was to *"open my drawer and say [to NTT], 'Come and take half the cutlery'"*.

264. Although Mr de Marco was clear that the Defendants were not meaning in this context to allege a conspiracy of any sort, this is nonetheless a serious allegation, which I reject. It is not altogether easy to see why the Particulars of Claim should have been framed in the way that they were. However, to reach the conclusion urged upon the Court by Mr de Marco on what was pleaded seems to me to be asking too much.

265. Furthermore, although in closing, when challenged by Mr Goulding, Mr de Marco was at pains to disavow any case of wrongdoing as against Mr Croxville, the fact is that, if NTT was engaged in the sort of negotiation suggested by Mr de Marco, then, that would necessarily have involved Mr Croxville, and I have no hesitation in saying that Mr Croxville was part of no such thing. I am clear that he was telling the truth when he stated that the negotiation between McLaren and NTT was *"very genuine"*. As Mr Goulding observed during closing, the suggestion that Mr Croxville would have left NTT (as he did) and, then, when semi-retired, travel to London *"to add perjury to his list of other alleged wrongs"* is fanciful.

266. Mr de Marco's submission, I might add, is not aided by the submission that he went on to make concerning what he described as *"a very revealing exchange"* in February 2024 in the lead-up to NTT Amendment 2. He referred, in particular, to McLaren Indy having sent a draft of that agreement to NTT and to Mr Croxville's response saying that "*two big things are concerns from our legal team"*, one of these being "*the opening paragraph"*. As Mr de Marco pointed out, the redline of the draft agreement attached to Mr Croxville's email shows that NTT had struck through McLaren Indy's suggested wording in the recitals which stated:

"*Sponsor entered into the Agreement and the amendment on the basis that one of McLaren's three drivers required by clause 2.2 of the Agreement would be Alex Palou. As a result of Alex Palou no longer being a driver … Sponsor has required that McLaren compensate it in kind … along with a package to be procured by McLaren from McLaren Racing Limited ('Racing') to compensate Sponsor for the unanticipated change in circumstances relating to Alex Palou"*.

This is language which, as Mr de Marco noted, is almost identical to the wording McLaren had adopted in the Particulars of Claim filed in September 2023, which stated that the NTT Agreement "*was agreed on the basis that [Mr Palou] was one of the three drivers required by clause 2.2*".

In its redline, NTT replaced McLaren's words with:

"*By this Second Amendment Letter, the parties confirm the following amendments to the Existing Agreement as negotiated and agreed between McLaren and Sponsor"*.

McLaren, then, sent through a further draft which added words to the preamble, so that it read "*as negotiated and agreed between McLaren and Sponsor as a result of McLaren not providing Alex Palou or a Driver of similar calibre to him"*. NTT was content with that wording.

267. It was Mr de Marco's submission, in those circumstances, that these exchanges indicate that McLaren were working with NTT in order to support McLaren's case as against the Defendants. The difficulty with this, however, is that NTT reverted with wording which, on any view, did not assist McLaren since it was avowedly neutral. This makes it impossible to conclude that NTT and Mr Croxville were somehow acting in cahoots with McLaren. On the contrary, Mr Croxville was obviously telling the truth when, asked about this matter, he explained that the changes made by NTT were motivated by a general desire on NTT's part not to be involved in the present proceedings.

268. It follows, for all these reasons, that the Defendants' breach was a cause of the NTT renegotiation. More than that, as I shall now explain, I am quite clear that the breach was not only, in fact, *a* cause of the base fee reduction but was an *effective* cause of the entire base fee reduction. Put differently, I am clear that none of the other elements of NTT Amendment 2 had any causal impact on the base fee reduction and, in any event, even if they did, that the Defendants' breach caused the entire base fee reduction rather than just a part of it.

269. There are a number of aspects to this, the first of which is that, contrary to Mr de Marco's submission, I do not agree that the base fee was affected by the reduction in the number of primary races in the 2025 race season.

270. As Mr de Marco pointed out, it is common ground that, under the NTT Agreement, NTT agreed to sponsor ten Championship races, and that IndyCar, then, adjusted its series schedule, eliminating two of the races which NTT wanted to sponsor. This change resulted in a reduction in the number of races sponsored by NTT: under NTT Amendment 2, NTT sponsored eight Championship races plus the Thermal race - an exhibition or 'purse' race which does not count towards the Championship.

271. Mr de Marco pointed, in this connection, to the fact that Mr Harris accepted in cross-examination that, all else being equal, one would expect a reduction in the number of races provided in a sponsorship agreement to result in a reduction to that sponsor's base fee. He referred also to Mr Croxville having accepted that NTT generally approached deal pricing on the basis that each race would represent a proportion of the overall price payable. Mr Croxville accepted also that NTT had, in part, negotiated a reduction in the base fee to account for this reduction in its sponsorship assets. Indeed, Mr Croxville's email to Mr Brown on 21 December 2023 expressly stated that:

"*Last year we had ten races with the 6 car in the base contract. Two of those have now been eliminated (TMS and IGP2) and replaced with two Milwaukee races. We have little interest in that market and no desire to pick up two races there. We propose dropping down to eight races, plus Thermal, for our base contract fee*."

It follows, Mr de Marco submitted, that NTT would have sought to negotiate the same reduction in the counterfactual: it was receiving less than it had bargained for in terms of sponsorship assets, through no fault of its own.

272. Despite acknowledging the obvious logic of that point, Mr de Marco pointed out that Mr Harris did not include any allowance for the reduction in his calculations. Rather, he based himself on what Mr Dennington had to say, which was that additional branding provided to NTT had fully offset the reduction in races. The difficulty with this, Mr de Marco observed, is that that additional branding entailed merely some minor branding on McLaren Indy's fourth car for the Indy500 for one year and branding on an engineering truck for 2024 to 2026.

273. Although there is a superficial attractiveness to these submissions, in truth, they go nowhere in circumstances where, as Ms Williams explained, when dealing with sponsors:

"*… the last thing that you would ever do, is say, 'I'll give you some money off your base fee'. That money is what you go racing with. You reduce it -- you would never volunteer to reduce it. You reduce it and then, you know, the cost of doing so is one less front wing that you're able to bring to a Grand Prix or whatever it might be. That's the last point of call that you would use.*"

I am clear, given this, that Mr Goulding was right when he submitted that McLaren should be taken as only having offered the ultimate concession of base fee reductions as a last resort to compensate NTT for the Defendants' breach and that any other

outcomes of the consequent renegotiation with NTT were balanced separately through the provision of non-monetary sponsorship benefits and the making of concessions apart from the base fee. As Mr Harris explained, when cross-examined, giving the example of the Sonsio Grand Prix where McLaren swapped sponsorship inventory between sponsors to respond to restrictions and other interests relating to advertising in particular locations:

"*What you observe is that generally, you know, McLaren finds a way of making its sponsors happy without changing the financial amounts paid under the contract, and that's essentially what I'm assuming in the counterfactual scenario*".

274. Mr de Marco's approach was, by his own admission, "*more simplistic*", involving as it does the base fee being divided by the number of races to calculate changes in value across seasons – hence the argument that, there being fewer sponsored races in 2025, so there must have been lost consideration which had to be accounted for in the base fee reduction. The difficulty with this, however, is that not all races will have the same value to different sponsors – as demonstrated indeed, by the email from Mr Croxville with his counter-proposal sent on 21 December 2023, where he explained that two primary races (the Texas Motor Speedway and Indy Grand Prix) had been replaced in the season calendar with two Milwaukee races, and that:

"*We have little interest in that market and no desire to pick up two races there. We propose dropping down to eight races, plus Thermal, for our base contract fee*."

Thermal was a new non-championship race introduced for the 2024 season where drivers competed for a cash prize of US$1 million. The Defendants argue that the reference to "*for our base contract fee*" indicates that part of the lost consideration for additional races is reflected in the reduced base fee. However, the reference to the base fee is, in actual fact, to clarify what follows Mr Croxville's list of races, namely:

"*Last year we also purchased three additional races on the 7 car. My understanding is that only two of those races (Detroit and Toronto) are available for 2024. We would like to purchase those two races as well*".

This is a reference to NTT Amendment 1 under which NTT agreed to purchase additional sponsorship inventory for Car #7 for Long Beach, Detroit, and Toronto for US$750,000. As Mr Goulding explained, Mr Croxville was, accordingly, drawing a distinction between those races referred to in his email which fall under the base fee and those for which NTT intended to offer additional consideration. The reference to "*for our base fee*", therefore, does not assist the Defendants' contention that the base fee reduction was influenced by the change in the racing schedule. Furthermore, Mr Steadman accepted that, if value is attributed to the branding on McLaren's engineering truck and on its fourth Indy500 entry, as provided for in clause 2 of NTT Amendment 2, then, NTT is compensated for the loss of one race, with a value (on Mr Steadman's figures) of US$675,000, by branding on the engineering truck with a value of US$500,000 and branding on the Indy500 fourth car.

275. Mr de Marco had a further submission, however. This was that the Court should have regard to the fact that clause 9 of the NTT Amendment 2 is in these terms:

"*The Parties hereto, agree, that as additional consideration and inducement for entering this Second Amendment to the Existing Agreement, Sponsor agrees to enter a third party personal services agreement with a representative, known as Tony Kanaan ('Representative') … The Parties, hereto, have adjusted the Base Fee, in Article 4 above, pursuant to this McLaren request … This ancillary Sponsor/Representative agreement shall be co-terminus with the Existing Agreement …".*

Mr de Marco's submission was that, in the circumstances, particularly given that McLaren has not disclosed the NTT/Kanaan agreement to which clause 9 refers, the Court should proceed on the basis that the fees payable to Mr Kanaan were substantial and likely reflected the difference between what McLaren internally considered to be the proportion of the fees contingent upon Mr Palou (the Defendants say US$750,000 per annum) and the higher amount by which the annual base fee was reduced pursuant to NTT Amendment 2; and on the basis also that McLaren agreed to reduce the base fee payable under NTT Amendment 2 in a proportion equivalent to the fees payable to Mr Kanaan because McLaren knew that this was money that they would retain or receive in one way or another (either because they could then reduce the salary or fees which they were paying to Mr Kanaan by the same amount, or because there was some other arrangement by which those sums would flow through to McLaren Indy's balance sheet). Accordingly, Mr de Marco submitted, the Court should find that Mr Palou's breach did not cause the reduction in base fees properly attributable to this new arrangement regarding NTT and Mr Kanaan.

276. I am not persuaded by this argument either. That is because, whilst clause 9 might not be overly clear, it is nonetheless clear enough from an exchange between Mr Croxville and Mr Brown on 2 February 2024, shortly before NTT Amendment 2 was entered into, that the arrangement between NTT and Mr Kanaan was distinct and, furthermore, that it *pre-dated* Mr Kanaan's joining of McLaren Indy. In that email, Mr Croxville pointed out that *"We have a few changes"* and that *"we need to have something in regard to TK [Mr Kannan] in the amendment"*. Mr Brown responded with this:

"*Do you want to do something independent with TK as I adjusted the dollars are [sic] do you want us to put TK inside our agreement adjust the dollars back up*".

Mr Croxville replied on 4 February 2024:

"*We don't need to put an amount in our contract but we need to reference the agreement as they are related. I'll put some language in and then we will have a separate agreement with TK*".

These exchanges show, as Mr Goulding submitted, that the contract between NTT and Mr Kanaan operated outside the NTT Agreement, and Mr Croxville, indeed, agreed in re-examination that "*payments were made or due to be made under [the personal services] agreement to Mr Kanaan*" with none of the remuneration flowing through NTT Amendment 2. As Mr Brown put it:

"*What I'm saying is there is no point in them paying me 5.375 million and I'm going to go pay Tony 375. We're better off calling the number 5 million and let them go do whatever deal they want with Tony*."

It follows that the arrangement with Mr Kanaan referred to in clause 9 has no bearing on the level of the base fee.

277. Accordingly, for these reasons, I reject the Defendants' case that the base fee reduction in NTT Amendment 2 reflected various changes which were unrelated to Mr Palou and each of which would have been agreed irrespective of the Defendants' breach of contract. That this was the case is, furthermore, consistent with the email preceding the 2/4 February 2024 emails sent by Mr Brown to Mr Croxville on 30 January 2024 since in that email he referred only to base fee reductions and what Mr Goulding, in submissions, described as 'make goods' and did not include other items that ultimately appeared in NTT Amendment 2 such as the reduction of a single race and additional IndyCar branding such as on the engineering truck. Mr Brown quantified that reduction for the period 2024-2026 at US$5.382 million, which is consistent with the forensic accounting experts' agreed computation of base fee losses for that period.

278. Nonetheless, Mr de Marco went on to submit that, if and insofar as any of the base fee reduction is attributable to the Defendants' breach, that portion cannot have been any higher than US$750,000 per annum, given that, after the breach, McLaren's finance team expected that McLaren Indy could lose what they described as the NTT "*uplift*" of US$750,000 in respect of 2024. By this, they meant the uplift between the base fee figures for 2023 (when Mr Palou was not driving for McLaren Indy) and 2024 (when Mr Palou would join McLaren Indy).

279. Once again, however, I do not agree with Mr de Marco about this since, although he was right to criticise what Mr Brown had to say about this when taken to the relevant exchanges, particularly his suggestion that the "*uplift*" related to an entirely separate one-off payment which NTT made in 2023 towards McLaren Indy's fourth car in the Indy500, Ms Bowden's evidence was nonetheless clear (and I accept that evidence) that what she and others at McLaren were doing in these exchanges was "*spit-balling ideas around what the impact could be in the immediate aftermath*". As Mr Brown explained (and again I accept) "*our finance department … would not have been privy to any conversations with NTT, so this would have been an uninformed view."*

280. There is a final point concerning causation which ought to be mentioned. This is that I am satisfied that, even if there were multiple causes of the reduction in the base fee, these all resulted from the Defendants' breach since it was that breach that caused the renegotiations to take place. As Mr Croxville put it:

"*I would say again the reason we were renegotiating this was because of the driver not coming. Because Alex didn't come, it opened this whole renegotiation up, and when contracts get opened up, frequently a broad variety of things get thrown back on the table and so I would say you can't say it didn't have anything to do -- we wouldn't have been there had not the contract been subject to revisiting based on Alex Palou not coming over to McLaren*."

Mr Brown said much the same thing when he described the process of renegotiation in this way:

"*You kind of re-open it up and put everything on the table; effectively have to re-cut the deal knowing that we're not going to be able to deliver Alex*" and "*You work through a lot of scenarios. What they see as value within the McLaren organisation, potentially what drivers."*

281. Causation has, therefore, been established in this case – although I will return to one further aspect later when considering whether McLaren Indy should be permitted to recover in respect of the 2027 season now that NTT has terminated its sponsorship.

Remoteness

282. The Defendants' next objection is that McLaren's losses flowing from the renegotiation of the NTT Agreement are, in any event, too remote. Mr de Marco submitted, in particular, as previously mentioned, that a reasonable person in the Defendants' shoes at the time of signing the AP Agreements in October 2022 would not have contemplated the possibility that McLaren Indy would seek to renegotiate an otherwise binding sponsorship agreement which was not contingent upon his performance, still less would such a person have considered this to be a not unlikely thing for McLaren Indy to do.

283. Mr de Marco made a number of submissions in this respect. First, he observed that, at the time of signing the AP Agreements, Mr Palou's hope and expectation was that McLaren would promote him to the F1 Series. Accordingly, he suggested, a reasonable person in his shoes would not have foreseen that McLaren would be entering into contracts which were, effectively (if not in form), conditional on him driving in the IndyCar Series in those circumstances. Secondly, Mr de Marco submitted that, given that the AP Driving Agreement contained a confidentiality clause, which required both parties to "*keep confidential all provisions and terms of this Agreement at all times both during and after the term hereof save for disclosure thereof to revenue authorities and to professional and business advisers of each of the parties*", a reasonable person in Mr Palou's shoes would not have expected McLaren Indy to be giving assurances to its sponsors as to the identity of its drivers for particular years, where, in particular, the length of the contract was a confidential term. Thirdly, in circumstances where, to the best of Mr Croxville's knowledge, neither Mr Palou nor his agents were involved in the negotiation of the NTT Agreement or aware of its contents, and given that Mr Brown also confirmed that he did not tell Mr Palou or his agents whether the NTT Agreement was conditional on Mr Palou driving for McLaren Indy, Mr de Marco submitted that there was no reason for Mr Palou to believe that he was particularly important to NTT or that NTT was moving to McLaren Indy because he was going to be their driver. Lastly and in any event, Mr de Marco submitted that no reasonable person in the Defendants' shoes could have anticipated a serious possibility that McLaren Indy would react to their breach by, as he put it, *"giving away"* millions of dollars of valuable rights to NTT in circumstances where it did not have to do so.

284. I reject these submissions for several reasons.

285. First, it is important to consider what Mr Palou should be taken as knowing about the importance of drivers to sponsorship arrangements, as well as his specific knowledge about NTT. It is clear, as Mr Goulding put it in closing, that Mr Palou has been surrounded by sponsorship for his entire motorsports career. He, therefore, knows, as, indeed, he accepted, that drivers play an important role in the relationship between a

racing team and its sponsors. Thus, having raced for Team Goh's Super GT team in Japan, Mr Palou subsequently, in 2019, agreed to race in IndyCar for the 2020 season with Team Goh supporting his move to Dale Coyne Racing.

286. As for his time at CGR, where he moved for the 2021 season, on 1 November 2020 he entered into parallel driver and driver sponsorship agreements with CGR, on the basis that he would be providing driving services but also promotional assets and services for the benefit of sponsors. He also agreed to a non-interference provision in the CGR driving agreement (clause 8A) pursuant to which he would not "*solicit or attempt to solicit any alternative employment for any Team employee or accept sponsorship of any kind with any of said companies*" including NTT. Mr Palou agreed in cross-examination that this meant that CGR was concerned about a risk that its sponsors might sponsor him if he were to leave CGR.

287. Then, as has been seen, on 4 March 2022, Mr Palou entered into parallel driving and promotion agreements with McLaren with the intention of racing with them from the 2023 season. Furthermore, in the context of his dispute with CGR that resulted in a mediated settlement, the claim brought against Mr Palou by CGR included an allegation that Mr Palou would go and drive for a rival and thereby cause CGR to lose sponsorship money because it could not exploit his sponsorship rights. Subsequently, on 29 September 2022, following resolution of the CGR-Palou proceedings, Mr Palou entered into an amendment to his CGR driver and driver sponsorship agreements. Clause 2 of that amendment agreement made provision for CGR to negotiate for compensation in the event that Mr Palou received an offer from an F1 team. As with the CGR Agreements and the 2022 McLaren Agreements, the AP Agreements were parallel driving and promotions contracts. As Mr Goulding noted, the driving agreement mentions *"sponsor"* 59 times, whilst the promotions agreement mentions *"sponsor"* 25 times.

288. Lastly, and significantly, Mr Palou was aware that an agreement was being negotiated between McLaren Indy and NTT when he entered into the AP Agreements since Mr Palou has disclosed a WhatsApp conversation with his agent at the time (Mr Roger Yasukawa), discussing NTT's potential move to McLaren Indy whilst the dispute with CGR was ongoing. This reveals Mr Yasukawa commenting "*so who in the earth think that NTT will suddenly up that budget for team/driver package that is currently in dispute*". Mr Palou was clearly, therefore, aware of NTT's desire to negotiate a team sponsorship agreement with McLaren Indy and a driver sponsorship agreement with him at the relevant time. Furthermore, it was Mr Brown's evidence (which I accept) that he told Mr Palou's representatives on numerous occasions that NTT was going to sponsor his car with McLaren Indy. I agree with Mr Goulding that it is unlikely that Mr Brown would negotiate the AP Agreements and the NTT Agreement in parallel and inform NTT that Mr Palou would be joining McLaren Indy but not tell the Defendants about NTT (Mr Palou's car sponsor at CGR) also transferring to McLaren Indy.

289. In the circumstances, although the Defendants dispute having actual knowledge of the NTT Agreement and maintain that they could not reasonably have foreseen that McLaren Indy would enter into sponsorship contracts where Mr Palou would be an essential element, I cannot accept this. I am clear that they should be regarded as having either actual or imputed knowledge and, in any event, sufficient knowledge for remoteness purposes – specifically, that NTT was negotiating a move to McLaren Indy

so as to follow Mr Palou, and that McLaren Indy would (or might) lose sponsorship revenue in the event that Mr Palou was not at McLaren Indy. I am clear, in the circumstances, that a reasonable person in the Defendants' position would contemplate that loss of sponsorship income was liable to result from their breach of contract, and even if the extent of the loss or the precise manner in which it was sustained were not reasonably contemplated, that does not make the loss too remote: see ***Parsons*** and ***Brown***. It is not necessary that Mr Palou had particular knowledge of the NTT Agreement, although I am clear that he had sufficient knowledge of the agreement for present purposes.

290. This leaves Mr de Marco's argument concerning the confidentiality provision in his driving agreement. However, where, as here, NTT had decided to transfer to McLaren Indy because Mr Palou had himself decided to join McLaren Indy, it is unreal to suppose that the Defendants would have any difficulty with McLaren Indy sharing such information with NTT.

Mitigation

291. The Defendants next say that, even if the NTT Amendment 2 did result in loss to McLaren which was causally connected to Mr Palou's breach and this loss was not too remote, nonetheless McLaren unreasonably failed to mitigate that loss.

292. In support of this argument, Mr de Marco submitted, first, that holding NTT to commercially negotiated terms would not have irreparably damaged McLaren Indy's relationship with NTT. Furthermore, Mr de Marco observed, even if NTT might have been frustrated at McLaren Indy for failing to renegotiate the base fee, there was, in any event, no real prospect of McLaren Indy persuading NTT to renew its deal in 2026, and so there was no real prospect of future financial loss as a result of refusing to reopen the commercial agreement with NTT. In those circumstances, Mr de Marco submitted that it was unreasonable for McLaren Indy to seek to renegotiate the terms of a contract in ways which are alleged to have caused it millions of dollars of loss, rather than simply holding NTT to the agreed terms.

293. I do not agree with Mr de Marco about this. On the contrary, I agree with Mr Goulding when he submitted that not renegotiating would have created considerable tensions in the relationship between McLaren Indy and NTT that would likely have rendered the NTT Agreement unworkable given that the NTT Agreement is an agreement which requires the maintenance of trust and confidence. Furthermore, as Mr Goulding put it, even if the parties could somehow stagger through to the finishing line at the end of 2026, McLaren Indy's insistence on NTT's full performance of the NTT Agreement would have destroyed any possibility of renewal of the NTT Agreement upon its expiry.

294. As to the point made by Mr de Marco concerning NTT being expected to terminate the NTT Agreement in 2026, this is a submission that was based on an email sent by Mr Brown on 11 February 2024, following his call with Mr Eric Clark of NTT, who had replaced Mr Pryor as CEO of NTT but was shortly handing over that role to Mr Abhijit Dubey. At points 4 and 6, Mr Brown queried whether, if the NTT Group did not renew its sponsorship of the IndyCar Series after 2026, it was likely that NTT would not renew its sponsorship of McLaren Indy. This was, however, merely speculation; it could not

be known at that stage whether NTT would actually renew its sponsorship of the IndyCar Series.

295. Coming on to the second of the submissions made by Mr de Marco in support of the Defendants' failure to mitigate case, I also cannot accept that he was right to dismiss as irrelevant a concern on McLaren Indy's part that insisting on performance of the NTT Agreement by NTT would put its commercial reputation at risk. Mr de Marco suggested, in this context, that, if this had been a genuine concern, then, it would have been pleaded sooner than it was (in July 2025) and, furthermore, that there is no indication that NTT would have made its unhappiness known to the market. In any event, Mr de Marco suggested, even if NTT had made any public statements on the matter, McLaren could have explained that they were well within their rights to insist upon holding NTT to the contract, given that the contract was not made contingent on any particular calibre of driver.

296. In these respects, Mr de Marco submitted that the authorities relied upon by McLaren in this context, ***Banco de Portugal*** and ***James Finlay*** in particular, could not be more different from the facts of the present case. These are cases to which reference has already been made, but Mr de Marco pointed out that in ***Banco de Portugal*** a British printing company which was responsible for printing genuine Portuguese banknotes allowed itself (in breach of contract) to be duped into printing and releasing vast numbers of unauthorised ones. The Portuguese central bank, concerned for the integrity of the currency, decided that it needed to withdraw all the spurious notes (i.e. the relevant batches of notes printed by this printing company - both legitimate and illegitimate) from circulation. To do so, it decided to buy back all the notes from the members of the public who were holding them. The question was whether this was reasonable mitigation. The defendants argued that the bank should have waited to see whether they might be able to distinguish between the legitimate and illegitimate notes in due course, and then only buy back the latter. The House of Lords held, however, that what the bank had done was reasonable: the public was aware of the situation, and if the bank had not acted immediately, economic panic would have erupted (which would also have had very significant reputational impacts for the bank).

297. As for ***James Finlay***, Mr de Marco noted that in that case a seller tendered to the buyer a bill of lading in which the date of shipment was incorrect. The buyer entered into sub-contracts on the understanding that the bill of lading was accurate. The buyer sued the seller for breach of contract; and the seller argued that the buyer should reduce its loss by suing the sub-purchasers, because the contracts with the sub-purchasers contained clauses stating that the bills of lading would be "*conclusive evidence of the date of shipment*". The buyer argued that this was not reasonable mitigation, given the harmful reputational impacts of taking such an approach. The Court accepted that submission, holding that suing the sub-purchasers was not reasonable mitigation in the circumstances.

298. It was Mr de Marco's submission, in the circumstances, that these cases are of no relevance to the present facts since the Defendants do not suggest that McLaren were reasonably required to embark on uncertain litigation against NTT.

299. This, however, is no answer to McLaren's point. On the contrary, I agree with Mr Goulding when he submitted that the principle identified in ***Banco de Portugal*** and

James Finlay is applicable in the present case since, if McLaren had insisted on the express terms of the NTT Agreement and refused to renegotiate, this would obviously have damaged McLaren's commercial reputation, in particular its prospects of securing future sponsorship. As Ms Williams explained:

"*It's not, you know, just a case of throwing a contract at a sponsor and going, "You will live up to the requirement within it". That's not how I've worked. I don't think it's how Mr Brown works. It's about managing that relationship. It's about nurturing that relationship and having conversations*".

She went on:

"*just throwing contracts in people's faces doesn't nurture relationships and it certainly -- when you do find yourself in a position where you lose a driver or a similar such scenario, you want to have built those relationships so it provides you with a really strong foundation where you can move past them through some goodwill gestures*".

Ms Williams also explained that:

"*the paddock is a very small world and if you aren't treating your sponsors in the way that they feel they should be, that gets out and it can be damaging to your reputation*".

I agree with Mr Goulding when he observed in closing that this would have been an especially risky course of conduct where the NTT Group is the title sponsor of the IndyCar Series and has been involved in the sport for over ten years.

300. It should also not be overlooked that, as Mr Brown explained, McLaren has a particularly strong commercial reputation to maintain, across IndyCar and F1. As he put it:

"*McLaren, we are the commercially most successful racing team in the world and this is something that -- branded integrity is extremely important, and I wasn't interested in finding out a legal position because we work on ethic* --".

301. Mr de Marco's last point concerning an alleged failure to mitigate was a submission that, even if it was reasonable for McLaren Indy to seek to renegotiate the NTT Agreement, McLaren Indy's approach to the renegotiation was, as he put it, *"eminently unreasonable"*.

302. Mr de Marco's submission, specifically, was that McLaren Indy ought to have made reasonable efforts to limit the extent of the base fee and other benefits which it would need to give up by offering a reduction to NTT's base fee of US$750,000 for 2024 only and assuring NTT that they would continue to take steps to find a driver with whom NTT would be happy from 2025 onwards, thereby preserving the remainder of the fees and the relationship in the longer term. Instead of doing this, Mr de Marco submitted, McLaren Indy failed to make reasonable efforts to look for a high calibre driver for 2025 onwards. The failure to take steps to recruit such a driver from 2025 onwards was especially striking, Mr de Marco submitted, given the weight that McLaren place on the 'time crunch' for retaining a replacement driver for 2024, which was not a factor at all for the 2025 IndyCar Series or beyond. In particular, after an offer to Mr Ericsson

was declined, Mr de Marco submitted that McLaren Indy effectively gave up on finding a high calibre driver for 2025 or beyond.

303. The difficulty with this submission, however, as Mr Goulding pointed out in closing, is that the Defendants have not themselves, even now, identified a suitable driver whose appointment would have mitigated McLaren's losses. None of the individuals identified at trial has been shown to have been available at the relevant time or to have been willing to have agreed terms with McLaren Indy or to have been capable of satisfying NTT's legitimate expectations of being a suitable replacement for Mr Palou.

304. This, in circumstances also where it should not be forgotten that Mr Brown has a strong reputation for recruitment ability, meaning that, at least on the face of things, if he could have done, he would have found a suitable replacement for Mr Palou.

305. To take the individuals identified at trial, McLaren made an offer to Mr Ericsson to join McLaren Indy in the immediate aftermath of Mr Palou's breach. Mr Ericsson explained, however, that he had agreed to sign with Andretti Global and would be honouring that agreement. He was, therefore, not available at the relevant time.

306. The Defendants have also suggested that reasonable mitigation action would have been to retain Mr Malukas after his wrist injury in 2024, place someone else in Car #6 in the interim and then, reintroduce Mr Malukas who in the end has turned out to be an able driver. However, I agree with Mr Goulding when he made the submission that reasonableness is to be assessed at the time when the relevant mitigation action could have been taken, and Mr Brown could not have known how Mr Siegel would perform for McLaren Indy in 2024 and 2025, how Mr Malukas would perform in 2025 or when he would recover from his injury. Accordingly, the suggestion that what should have happened is that Mr Brown should have favoured Mr Malukas over Mr Siegel is not sustainable.

307. Mr de Marco also suggested that McLaren Indy could have sought to obtain the services of Mr Josef Newgarden from the 2025 season onwards in mitigation of their losses from that point. There is no evidence, however, that Mr Newgarden would have been available and willing to drive for McLaren Indy. On the contrary, it appears that he would not have been because Mr Newgarden was driving with Team Penske at the relevant time and was not available to drive for Arrow McLaren; Mr Newgarden remains with that team today. Furthermore, Team Penske has historically been viewed as a better team than Arrow McLaren, and so there is no reason to suppose that he would have been willing to move.

308. Mention of Mr Ryan Hunter-Reay was also made in closing by Mr de Marco, who pointed out that McLaren Indy did not contact him even though he had 16 IndyCar wins between 2008 and 2018. Mr Hunter-Reay was, however, retired by that point and, as it happens like Mr Kanaan (Arrow McLaren's sporting director and aged 48), he had only occasionally, since his retirement, competed in the Indy500. As Mr Brown explained, Mr Hunter-Reay, whilst "*Very good at the Indy 500*", was "*not competitive any more on a season-long basis*". Mr Brown added in somewhat ironic terms: "*Yeah, I could have also approached Nigel Mansell, but he hasn't driven for a while …*".

309. Lastly, as for Mr Felipe Drugovich, who was also mentioned by Mr de Marco, at least in closing, he was the then 2022 Formula 2 champion and, as Mr Brown explained, he had "*Zero experience in IndyCar*". He, therefore, was not a viable option either.

310. For all these various reasons, the Defendants' failure to mitigate case must be rejected.

The 2027 season: post-termination

311. There is one further issue that needs also to be addressed. This is the fact that, as previously noted, the NTT base fee claim is advanced in relation to two periods: 2024-2026 and 2027. As to the latter, where the loss is put at US$1,884,559, the Defendants' position is that nothing is due in relation to 2027.

312. McLaren's case proceeds on the basis that the relevant elements of the counterfactual scenario are: that Mr Palou drives for McLaren Indy for the three IndyCar seasons 2024-2026; that, during these three seasons driving for McLaren Indy, Mr Palou is likely to bring more success to McLaren Indy (the IndyCar experts, Mr Jakobi and Mr Marks, agreeing that he is likely to win a number of races), with his presence and success likely to enhance McLaren Indy's standing further in IndyCar and to attract other employees, such as engineers, who will help improve on-track performance; and that Mr Palou's contract is extended to 2027.

313. This, McLaren say, is in contrast to what actually happened, namely that: Mr Palou did not drive for McLaren Indy at all in the period 2024-2027; that, as a result of the Defendants' breach, Car #6 did not enjoy much on-track success; and NTT terminated the NTT Agreement with effect from 31 December 2026.

314. Mr Goulding submitted that, self-evidently, in the circumstances, McLaren Indy's prospects of selling Car #6 inventory in 2027 in the counterfactual would have been significantly better than in the actual, such that McLaren Indy would have been likely to be able to sell primary sponsorship of Car #6 in 2027 in the counterfactual at a higher price than in the actual scenario. It is likely, in particular, Mr Goulding submitted, that McLaren Indy would have sold the primary sponsorship of Car #6 in 2027 either to NTT (by way of extension of the NTT Agreement) or to another sponsor in the counterfactual, and, on any view, McLaren have lost the chance of doing so.

315. As to this, Mr Goulding submitted that NTT would likely have continued to wish to have an association with Mr Palou, given that in the counterfactual Mr Palou would have enjoyed further success during 2024 to 2026. Alternatively, it was Mr Goulding's submission that, if NTT did not extend the NTT Agreement to 2027, there is a real chance that McLaren Indy would have sold the primary sponsorship of Car #6 in 2027 to another sponsor. In either of these scenarios, Mr Goulding submitted, the amount that NTT or another sponsor would pay by way of base fee in 2027 should be taken as being in line with an exercise carried out by Mr Harris, which assesses the figure at US$7,269,012 by applying a 2.5% escalator to the fee payable under the NTT Agreement in 2026 – as to which there is no disagreement between the experts as to the mathematical calculation.

316. As to the likely fee payable from the sale of the primary sponsorship of Car #6 in 2027 in the actual scenario, Mr Harris's view was that the best available evidence of the base

fee at which McLaren Indy will now be able to sell the NTT inventory on the open market in 2027, following NTT's termination, is the base fee that NTT had agreed to pay under NTT Amendment 2, namely US$5,384,453. On that basis, McLaren Indy's loss is the difference between US$7,269,012 (in the counterfactual) and US$5,384,453, namely US$1,884,559.

317. It was Mr de Marco's submission that McLaren's case is flawed for several reasons.

318. First, Mr de Marco submitted that it is unlikely that McLaren Indy would have secured Mr Palou for the 2027 series in the counterfactual. Indeed, he suggested, Mr Palou would have parted ways with McLaren Indy as soon as contractually possible. Mr Palou was clear, Mr de Marco pointed out, that, if he had decided to drive for McLaren Indy in the counterfactual, then, he would nonetheless have vetoed any attempt by McLaren Indy to extend the AP Driving Agreement through to 2027. He understood that doing so would preclude him from driving for any other IndyCar team in that season, but explained that he would have sought to obtain a seat as an F1 reserve driver in order to pursue his ultimate goal of reaching F1. This, Mr de Marco submitted, is credible given that, in the counterfactual, Mr Palou would have been driving for a team which he believed had made false promises about his potential opportunities in F1 in order to secure his services for their second-tier IndyCar team.

319. Whilst I do not question what Mr Palou had to say when giving evidence on this issue, although it is worth noting that the first time that he mentioned that he would have chosen "*not to race in IndyCar but still to try and get an F1 reserve seat or reserve role with another team"* and so to sit out the 2027 season, was when he was asked by Mr de Marco in examination-in-chief, nonetheless I harbour considerable doubt that, in reality, had the time come when he had to decide what to do, he would have opted to sit out a season rather than drive for McLaren Indy in the IndyCar Series.

320. I say this because Mr Palou would by that stage (in the counterfactual) have driven for McLaren Indy for three seasons, during which he is likely to have enjoyed on-track success on top of the two championship wins he would have had before joining McLaren Indy. His competitive spirit, as such an accomplished talent, would surely have meant that whatever disgruntlement he might have had with McLaren Indy on joining them would have reduced – just as apparently he has no difficulty in continuing to drive for CGR despite having been sued by CGR twice in the space of 12 months.

321. He would, in addition, have earned well whilst at McLaren Indy given that Mr Brown made an improved offer to him on 27 June 2023 which would have seen him earn US$3.75 million base salary and up to US$1.75 million in bonuses. This, moreover, in circumstances where Mr Palou would have been 30 years old in 2027, making it less likely (and, perhaps, highly unlikely) that he would receive an offer of a full-time F1 seat if he had not received one already. Both Ms Williams and Mr Szafnauer were agreed about this. Ms Williams explained:

"*You look at the drivers currently in the sport and the average age that they started their careers, it's around the 20 mark. I think the oldest was Lewis Hamilton, my Lord, who started his career at 22. Max Verstappen started at 17. Alex Palou coming into the sport at 27/28, not having had any prior Formula 1 experience, would have been, you know, just crazy*".

Mr Szafnauer was of the same view, explaining in his reports that the prospects of Mr Palou obtaining a full-time racing seat were negligible, explaining that the fact that a driver is successful in IndyCar does not mean that the driver will also perform well in F1, that IndyCar is not a natural feeder to F1 and that there is in F1 a vast market for reserve drivers with lots of competition. Mr Szafnauer noted in this regard that in 58 years only six drivers have been promoted from IndyCar to F1, and that four were unsuccessful, including the four-time IndyCar Champion Sebastien Bourdais, the last person to obtain a full-time F1 seat, nearly 20 years ago. The exception is Mr Jacques Villeneuve, but Mr Szafnauer was clear that he was an anomaly.

322. I agree with Mr Goulding, therefore, when he observed that it is implausible that Mr Palou would forego his place in the Arrow McLaren team in order to take up a F1 reserve role with another team in 2027.

323. In any event, even if Mr Palou would not have driven for McLaren Indy in 2027 in the counterfactual (either because McLaren Indy did not exercise their 2027 option or, if they did, Mr Palou vetoed the exercise of the option), this does not mean that McLaren have no claim. This is because I agree with Mr Goulding when he drew attention to the fact that, in the counterfactual scenario, Mr Palou would have driven for McLaren Indy for three seasons from 2024-2026 (albeit not for 2027) and this would have brought improved on-track performance and success to McLaren Indy, which would have enhanced McLaren Indy's standing in IndyCar generally, meaning that McLaren Indy would have had better prospects of selling the primary sponsorship of Car #6 in 2027, even without Mr Palou driving in 2027, than they do in the actual scenario. That said, as I will come on to explain, that loss will nonetheless be less than that claimed.

324. Secondly, Mr de Marco submitted that there is now, since NTT's termination of the NTT Agreement, no logical reason for selecting 2027 as the end point for the assessment of loss, Mr Harris having originally selected 2027 as the end date simply because that was what he believed would be the termination date of the NTT Agreement on the assumption that NTT would exercise its option to extend into 2027; on the contrary, in the light of the termination by NTT, Mr de Marco suggested, it makes no sense to permit a claim that extends beyond 2026. I do not agree: it seems to me that to do as Mr de Marco proposes ignores the contractual right of NTT to extend the NTT Agreement and so the possibility that NTT would, in fact, extend in the counterfactual on which McLaren's case (both as it was pre-termination and as it now is post-termination) is founded.

325. Thirdly, Mr de Marco submitted that McLaren Indy's projection as to what it would have been able to sell the NTT branding rights for in 2027 in the counterfactual fails to take into account a recent economic downturn in the market. As a result, Mr de Marco suggested, Mr Harris's loss assessment should be regarded as unduly optimistic from McLaren Indy's perspective given that market conditions would be precisely the same in the counterfactual as they are in the actual. On this, I do agree with Mr de Marco.

326. Taking this last point into account alongside the point about Mr Palou not driving for McLaren Indy in the 2027 season in the counterfactual, and doing the best I can, I assess McLaren's loss at approximately half of what is claimed – and so at US$950,000.

327. It follows that the NTT base fee claim succeeds - subject to the Siegel issue - in the following amounts: 2024-2026: US$5,382,344; and 2027: US$950,000.

The GM annual uplift loss claim

328. GM is one of the suppliers of the Arrow McLaren team. It is a car manufacturing company that includes brands such as Chevrolet and Cadillac. GM is also a major sponsor of the Arrow McLaren team.

329. On 15 March 2022, GM entered into the GM Agreement with McLaren Indy, pursuant to which GM agreed to lease engines to McLaren Indy for the [REDACTED] to [REDACTED] IndyCar Series (in return for sponsorship benefits) and to pay McLaren team support payments and performance incentive payments amounting to US$1.5 million per season for each IndyCar season between [REDACTED] and [REDACTED].

330. Clause X of the GM Agreement provided as follows:

> "*[McLaren Indy] acknowledges that GM $500,000 USD of annual team support defined in Exhibit B is dependent on (3) full time 'A' level drivers during entirety of this Agreement. This includes Pato O'Ward, Alex Palou, and Alexander Rossi … 'A' level drivers defined by both [the First Claimant] and GM by previous years race wins, championship contention, Indy 500 performance, and/or previous open wheel accomplishments. Both parties agree to be reasonable on driver rankings and comparisons*".
>
> Accordingly, US$500,000 of the annual team support payments was dependent on Arrow McLaren's three cars having "*'A' level drivers*" (including "*Pato O'Ward, Alex Palou, and Alexander Rossi, along with other replacement professional driver(s) [sic] as approved by IndyCar and GM*"), defined "*by both TEAM and GM by previous years race wins, championship contention, Indy 500 performance, and/or previous open wheel accomplishments*".

331. Following the Defendants' breach, McLaren Indy sought to obtain another 'A' level driver to replace him for the 2024 season, but these efforts were unsuccessful (it is not in dispute that Mr Rosenqvist, Mr Ilott, Mr Pourchaire, and Mr Siegel, the drivers of Car #6 in 2023 and 2024, did not constitute 'A' level drivers for the purpose of the GM Agreement), with the result that GM did not pay the uplift for 2024. Thus, on 11 April 2024, McLaren Indy and GM entered into an amendment to the GM Agreement ('GM Amendment 1'), which confirmed that the team support payments that were due for the 2023 and 2024 IndyCar Series were US$1 million per year (as opposed to US$1.5 million).

332. GM Amendment 1 also amended clause X of the GM Agreement with regard to the criteria for drivers considered 'A' level drivers, in the event that a "*driver is not considered 'A' level upon entering [McLaren IndyCar's] services*", the amendment stating:

"*[i]n principal [sic], 'A' level talent is defined as previous 3 seasons Race wins in Series, championship contention, Indy 500 performance, and/or previous open wheel accomplishments*".

Clause X of the GM Agreement, as amended by GM Amendment 1, also states that "*[f]or the avoidance of doubt, Pato O'Ward and Alexander Rossi are considered 'A' level drivers through the Term of this agreement*".

333. In the circumstances, McLaren's case is straightforward: they say that, as a consequence of the Defendants' breach, McLaren Indy did not have three 'A' level drivers in 2024, and this meant that, pursuant to clause X of the GM Agreement, GM's team support payments were reduced by US$500,000 to US$1 million.

334. Although prior to closing, the Defendants had put McLaren to proof that Mr Malukas, who agreed to drive in Mr Palou's place for the 2024 season following his breach, was not an 'A' level driver, in closing Mr de Marco explained that this point was no longer pursued. Mr de Marco also confirmed at the same time that the Defendants no longer maintain their case that the GM uplift loss claimed by McLaren was not caused by the Defendants' breach.

335. That case had entailed an argument that, as a matter of construction, under clause X of the GM Agreement, the requirement for three 'A' level drivers applies across the entire term of the Agreement, such that failure to provide such drivers at any point during that term contractually disentitles McLaren Indy to the GM uplift over all of that term. This was an argument, which, had it been maintained, I would have rejected since, as Mr Goulding pointed out, if the Defendants were right, then, it would mean that, if McLaren Indy had in place three 'A' level drivers for the 2023, 2024 and 2025 seasons, but failed to have three 'A' level drivers for the [REDACTED] season, none of the GM Uplift would be payable. This would make no sense at all and cannot have been what McLaren Indy and GM intended when agreeing clause X. It makes much more sense, as ultimately the Defendants appear to have accepted, to treat clause X as entitling McLaren Indy to payment of the GM uplift for each year of the term of the Agreement for which it has three 'A' level drivers. This also gives proper effect to clause X's reference to "*annual team support*" payments and fits in with the reference to "*during entirety of this Agreement*" which plainly contemplates cumulative seasons rather than a single (or combined) term.

336. The Defendants' alternative case – and by the time of closing their only case – is that they should not be liable for this loss because it flows from McLaren's breach of their duty to mitigate their loss. The Defendants say, in short, that McLaren Indy did not take reasonable steps to find an 'A' level driver for the 2024 series. Mr de Marco noted that by late July 2023 McLaren were expecting the breach and considering alternatives to Mr Palou, including Mr Ericsson, to whom Mr Brown confirmed that he had spoken in advance of the Defendants' breach. Despite this, Mr de Marco observed, McLaren Indy did not take any immediate steps to secure Mr Ericsson following the breach.

337. There is no merit in the Defendants' case. It is worth bearing in mind in this respect, in addition to the points made previously in relation to the NTT base fee claim, that it was not until late that, having signed CGR Amendment 3 on 1 August 2023 under which CGR agreed to indemnify Mr Palou for any claims brought by McLaren, Mr Palou

informed McLaren Indy that he would not be joining McLaren Indy after all. This, as Mr Goulding put it, in the context of a fast-moving driver market during the summer in IndyCar, leaving McLaren Indy in an extremely challenging position where most of the top drivers were already under contract and time was of the essence.

338. Mr Brown, whom Ms Williams described as "*one of the strongest commercial negotiators that you will come across*", explained that, in response to rumours in the paddock as to what Mr Palou was going to do, McLaren Indy started to formulate a plan as to potential drivers. However, once Mr Palou gave notice of the breach, the situation had already moved on. As Mr Brown put it: "*having what I was handed, which was a breach on no notice near the end of the season, which gave me no time to react and I reacted as quickly as I could, two days later making a multi-million dollar offer to Marcus Ericsson, which unfortunately was too late*". After this point, McLaren Indy was unable to find any 'A' level driver who might have replaced Mr Palou, eventually replacing Mr Palou with Mr Malukas.

339. I am clear, in such circumstances, that approaching Mr Ericsson and, then, signing Mr Malukas to drive Car #6 was a reasonable course to take; indeed, Mr Marks himself accepted that the appointment of Mr Malukas was a reasonable course of conduct once Mr Ericsson had rejected the offer.

340. As to the various drivers identified by the Defendants at trial, I have previously addressed the positions of Mr Ericsson, Mr Newgarden, Mr Hunter-Reay (and, indeed, Mr Kanaan to the extent that the Defendants also maintain that he should have been hired) and Mr Drugovich. As for Mr Malukas, he was not an 'A' level driver or, at least, as Mr Brown explained, was not regarded as such by GM. Other drivers who have been mentioned (although it is unclear whether the Defendants base their mitigation case on them also) are Mr Rossi, who was an 'A' level driver at the time but was already driving for Arrow McLaren, and Mr Linus Lundqvist, who was *"definitely"* not, Mr Brown explained, an 'A' level driver.

341. This leaves a further point raised by the Defendants which has something of an echo of a case that I refused to be allowed to be introduced by way of amendment at the start of the trial. This is the argument that there was what Mr de Marco described as a lack of effort on the part of McLaren Indy because Mr Brown managed to negotiate an alternative arrangement with GM which involved an equivalent payment by GM to McLaren Indy in relation to McLaren Indy's fourth car in the Indy500 in 2024, and so had no real motivation or incentive to mitigate its losses by finding a replacement driver. The answer to this, however, is that, as Mr Goulding put it in closing, *"money is money"*: the idea that McLaren Indy would have received sponsorship income under one contract and, on that basis, be content to relinquish potential sponsorship income under another makes no commercial sense.

342. It follows that McLaren Indy's GM uplift loss succeeds in the sum claimed: US$500,000 - subject to the Siegel issue which I will come on to address.

The other IndyCar sponsorship losses claim

343. The next claim to be considered is McLaren's claim for lost profits in the sum of US$5,839,809 (undiscounted) said to represent the difference between the amount that

McLaren Indy has recovered, or now expects to recover, from other (not NTT or GM) sponsorship revenue from its participation in the IndyCar Series and the sums that McLaren Indy reasonably expected to receive with Mr Palou as its driver.

344. Noting that in 2023 McLaren Indy earned approximately US$[REDACTED] million from sales to on-car sponsors in respect of Cars #5, #6 and #7, Mr Goulding made the point that, projected across a 4-year period, this would amount to sponsorship income in the region of US$[REDACTED] million. He suggested, in the circumstances, that it cannot sensibly be in dispute that McLaren Indy would have achieved greater sponsorship income with Mr Palou in Car #6, given his unique abilities and the value that many sponsors attribute to a winning driver. Accordingly, he submitted, the claim for other sponsorship losses is modest - equating to less than [REDACTED] of McLaren Indy's total sponsorship revenue over the relevant 4-year period based on 2023 values.

345. Although Mr Goulding went on to address, in some detail, the expert evidence that is relevant to this aspect of the claim, in particular the evidence of Mr Harris, whose evidence is critical to the claim, Mr Goulding, first, made a number of initial observations. Thus, he suggested, it ought not to be in dispute that drivers in the IndyCar Series are ordinarily considered to be of importance to sponsors. For example, Mr Dennington explained when giving evidence that there is "*less difference between the cars*", and so drivers become particularly important and in turn "*more attractive to sponsors*", adding that "*talent*" is "*vitally important to ensuring you attract ... the top brands*". That is all the more the case, Mr Goulding submitted, where in the present case Mr Palou is considered to be a generational talent. Mr Marks accepted, indeed, that a championship winning driver is more attractive to sponsors, "*depending on who the sponsor is*", and that, accordingly, Mr Palou was likely to be more attractive to sponsors than any of Mr Malukas, Mr Ilott, Mr Pourchaire, Mr Siegel, or Mr Lundgaard. Mr Brown, furthermore, was clear (and I accept) that he anticipated being able to sell greater sponsorship with Mr Palou as a driver – something which he stated in both his statement and in cross-examination. All in all and against this background, it was Mr Goulding's submission that the Court must consider the following relevant counterfactual position, namely: that, in 2023, Mr Palou would have been officially announced as McLaren Indy's driver from 2024 onwards; at that time, Mr Palou would have been a two-time IndyCar Champion and the current 2023 champion; Mr Palou would have driven for McLaren Indy for at least three seasons; and, on McLaren Indy's case, and in accordance with what I have already decided, Mr Palou would also have driven in 2027. In such circumstances, Mr Goulding submitted, the issue that the Court must ask itself is whether McLaren Indy would have received more sponsorship revenue with or without Mr Palou. The answer, Mr Goulding suggested, is obvious: McLaren Indy would have attracted more sponsorship with Mr Palou as one of its drivers than if he was not driving for McLaren Indy.

346. For their part, the Defendants dispute that any such additional sponsorship revenue was lost. They note, in this connection, that McLaren have not been able to point to any other existing sponsors who required their contracts to be renegotiated or who terminated their agreements; as Mr de Marco put it in closing, there is *"not a scintilla of evidence that there has been any sponsorship losses"*. Instead, Mr de Marco observed, McLaren rely merely upon the accounting evidence of Mr Harris. Mr de Marco noted also how, at least as he characterised things, McLaren's case has evolved

from a contention that McLaren Indy would have adopted an US$[REDACTED] million rate card for Car #6 in 2024 (because, based on what Ms Bowden had to say, that is what it had always planned to do) and, in turn, McLaren Indy would have achieved a certain proportion of that US$[REDACTED] million rate card, into a contention that McLaren Indy could have achieved a certain proportion of the US$[REDACTED] million rate card because it was already outselling its existing rate cards and because McLaren Indy could have adopted an US$[REDACTED] million rate card, and so it is reasonable to conclude that this is what it would have done.

347. The difficulty with this from McLaren's perspective, Mr de Marco submitted, is that: first, it is inconsistent with contemporaneous documentary evidence which shows that McLaren Indy did not think that it could achieve an US$[REDACTED] million rate card either before or after the Defendants' breach; secondly, it is inconsistent with contemporaneous documentary evidence, which shows, more generally, that McLaren Indy did not think that Mr Palou would serve to drive up sponsorship revenues; thirdly, it is contradicted by evidence that McLaren Indy's existing sponsors have, on average, renewed and/or increased their investment into the company after the breach and that, far from decreasing its targets for sponsorship revenue after the breach, McLaren Indy has, in fact, increased those targets and gone on to meet or exceed targets which it set itself; fourthly, Mr Harris's proposition that McLaren Indy was already exceeding its existing rate cards is based upon what Mr de Marco described as *"a meaningless set of calculations"*; and, fifthly, the true picture is that McLaren Indy has been attracting and extending sponsors year-on-year despite a broader economic slowdown and despite also the fact that it had a very weak driver, Mr Siegel.

348. I will deal with these points in turn.

349. In relation to the first, Mr de Marco rightly highlighted that Mr Harris recognised at the outset of his oral evidence that "*The reference rate cards used in my calculations do affect the result of my loss assessment*". As Mr de Marco observed, that is obvious in circumstances where, in his methodology, Mr Harris assumed that McLaren Indy would have achieved 80% of an US$[REDACTED] million target on Car #6 in the counterfactual as opposed to 80% of a lower rate card target such as US$[REDACTED] million as applied in relation to the other Arrow McLaren cars. There is, as such, a fundamental problem with the primary basis on which McLaren Indy's case is put. That is because I agree with Mr de Marco when he submitted that there is nothing in the pre-breach documentation before the Court that points to McLaren Indy having planned an US$[REDACTED] million rate card for Car #6. That appears, in fact, to have been acknowledged by McLaren in their written closing submissions where the only documents suggesting an US$[REDACTED] million rate card date from 2024 and so after the Defendants' breach.

350. I will come back to those documents in a moment, after first looking at what came before them.

351. As Mr de Marco pointed out, the first disclosed rate card was prepared on or around 13/14 July 2022. This came after Mr Palou had signed the March 2022 Agreement and very shortly after Mr Palou had made it clear on Twitter that he intended to drive for McLaren in response to an announcement by CGR saying, in effect, that he would be driving for CGR. In short, as Ms Bowden agreed, McLaren Indy was internally

budgeting on the basis that Mr Palou would be driving for Arrow McLaren in the 2023 Series. I agree with Mr de Marco when he submitted that, in the circumstances, the obvious inference is that this July 2022 Rate Card was prepared on the basis that Mr Palou would be driving Car #6 for the 2023 Season and on the basis also that McLaren Indy had multi-year driving agreements with both Mr O'Ward in Car #5 and Mr Rossi in Car #7. McLaren were thinking about the impact Mr Palou might have on their ability to generate sponsorship revenues. Moreover, as Ms Bowden accepted when taken to certain contemporaneous email exchanges, McLaren used the July 2022 rate card, which envisaged McLaren Indy targeting US$[REDACTED] million in respect of Car #6 to price the sponsorship deal negotiated with NTT later that same year.

352. The July 2022 rate card was subsequently revised in the shape of a rate card produced in March 2023 which uplifted certain figures from the July 2022 rate card in order to reflect a "*target profit"*. This rate card gave an overall target figure for Cars #5 and #7 of US$[REDACTED] million and an overall target figure for Car #6 of US$[REDACTED] million. Ms Bowden accepted that the likely explanation for this is that the overall target figure in respect of Car #6 took into account that Mr Palou would be driving Car #6 for the 2024 Series onwards.

353. There was, in short, no rate card pre-dating the Defendants' breach which reflected an expectation that Car #6 would generate US$[REDACTED] million of sponsorship revenue in 2024. This is not in dispute since McLaren's case and Mr Harris's methodology proceeds on the basis not of a rate card prior to the breach but on the basis of a rate card produced *after* the breach in 2024 – specifically, a rate card attached to an email sent by Mr Brian Woerner, McLaren's Vice President, Business Development - Americas, to Ms Bowden on 16 April 2024. In this email, Mr Woerner stated as follows:

"As discussed with Nick, sharing a summary of the sponsorship revenue impact from the change of drivers from Alex Palou as originally planned in the #6 car for the 2024 season to David Malukas.

- *Previously for both the #5 and #7 cars we had built a total on-car branding revenue rate card for $*[REDACTED]*m per car. Those have been sold out by available positions/revenue to* [REDACTED] *and* [REDACTED] *respectively.*
- *With incoming two-time champion in Palou, the plan was to elevate his rate card to $*[REDACTED]*m given on-track success and partner interest. We would have expected to at minimum meet the* [REDACTED] *sell-out figure we historically achieve ($*[REDACTED]*M), plus raised remaining available #5 and #7 car positions to an equal per position value given the scarcity and packaging intent for new Palou-focused partners, driving an additional $*[REDACTED]*M total (~$*[REDACTED]*M) on #5, ~$*[REDACTED]*M on #6) if forecasted at a similar* [REDACTED] *sell out.*
- *With the change to Malukas, we were instead forced to stay at the lower $*[REDACTED]*M rate card where we're alternatively at a* [REDACTED] *sell out for his car given significantly less sponsor demand, and have not been able to sell additional #5 and #6 car inventory as planned."*

354. As support for the proposition that McLaren intended, pre-breach, to generate an overall profit of US$[REDACTED] million in respect of Car #6, I agree with Mr de Marco

when he submitted that this email has serious limitations for a number of reasons. I say this for a variety of reasons.

355. First, it is not a question of the email being an *"underhand attempt to generate fictional evidence of loss"*, as in closing Mr Goulding sought to characterise Mr de Marco's submission concerning the email; rather and more straightforwardly, it is that the email shows that there was no previous US$[REDACTED] million rate card in respect of Car #6. It follows that, when Mr Woerner referred to there having been a plan to elevate the rate card for Mr Palou's car, it was, on McLaren's best case, no more than that: a plan. It had not actually happened. More than that, as previously pointed out, the July 2022 and March 2023 rate cards were prepared on the basis that Mr Palou would be driving Car #6, and so for Mr Woerner to imply that it was because Mr Palou would be driving Car #6 that it was planned to elevate the rate card makes little sense.

356. Secondly, Ms Bowden accepted that Mr Woerner's email was prompted by her request that Mr Woerner put some kind of analysis together in order to generate evidence to support McLaren Indy's pleaded claim in these proceedings. As such, since the email was sent as part of an effort by Ms Bowden and Mr Andrew Greenfield, one of the three Finance Directors reporting to Ms Bowden, to try and generate analysis which would portray McLaren's sponsorship losses as being as high as possible, I agree with Mr de Marco when he suggested that this is an email that needs to be approached with some caution.

357. The more so, thirdly, given that Ms Bowden accepted in cross-examination that McLaren Indy had never, in fact, planned to adopt an US$[REDACTED] million rate card for Car #6 in 2024, contrary to what is represented in Mr Woerner's email and contrary also, I agree with Mr de Marco, to the impression which she gave in her first witness statement.

358. Fourthly, if there were any doubt over Mr Woerner's email, this is removed when it is appreciated that what Ms Bowden did with the email, shortly after receiving it, was to forward it to Mr Greenfield under cover of a message in which she said this:

"Sharing as useful for business plan you are looking at. The $[REDACTED]*m was only ever a v high level estimate so I think its [sic] … good if we can demonstrate higher but wanted your view on whether you think this stacks up".*

This confirms that there was no pre-breach plan (as, indeed, accepted by Ms Bowden when she was cross-examined) or rate card (as is self-evident and anyway common ground) which entailed McLaren aiming for US$[REDACTED] million in respect of Car #6, and that what was being done by Mr Woerner (in conjunction with Ms Bowden and Mr Greenfield) was in an effort to bolster McLaren's case against the Defendants.

359. Fifthly, and no less tellingly, the US$[REDACTED] million rate card attached to Mr Woerner's email (and, so it has turned out, edited by Mr Greenfield and Ms Bowden prior to its being sent to Mr Harris for the purpose of the preparation of his first report) was, in fact, lifted from an entirely different analysis produced by McLaren for a different purpose, namely a proposal made in January 2024 as to how McLaren Indy could ultimately achieve an US$[REDACTED] million rate card not merely for Car #6 but for all three cars – moreover, in 2026 rather than in 2024.

360. A presentation in respect of this, given in January 2024, explained that the existing rate cards were "*sporadic and difficult to package*", and that future rate cards should be "*built off of what we need to get to in 2026 – target of $*[REDACTED]*m per car*", and proposed, among other things, increasing the sellable inventory spaces (in particular, by introducing around 10 spaces which had not appeared on previous rate card iterations, and ascribing them significant value) and targeting a "*hurdle rate card value per car*" of US$[REDACTED] million in 2024 and US$[REDACTED] million by 2026. Ms Bowden, furthermore, accepted that this January 2024 planning exercise was being driven by a need to cover inflation costs and building costs, and even that target was understood to be a challenge because McLaren Indy's prior sales strategy had led to the valuable inventory being locked-up in multi-year sponsorship deals leaving a rump of unattractive inventory which it was struggling to sell. As Mr de Marco observed, it had nothing to do with the Defendants' breach, despite the fact that in his email Mr Woerner lifted the proposed US$[REDACTED] million rate card and presented it as the rate card which McLaren Indy would have sought to apply to Car #6 in the counterfactual from 2024 onwards.

361. Sixthly, what has also emerged is that, after it was sent to him, Mr Greenfield revised the figures down to the "*hurdle*" target of US$[REDACTED] million for 2024, only raising it to US$[REDACTED] million for 2026, and Ms Bowden, then, reversed that change before providing the document to Mr Harris. Accordingly, what Mr Harris did, in proceeding on the understanding that what he was looking at was a rate card that was based on Mr Palou driving, was based on a misconception for which he was not responsible.

362. Mr Goulding sought in closing somewhat to gloss over these matters, maintaining that it was appropriate for Mr Harris (and McLaren) to rely upon what he described as the 'Palou 2024 Rate Card' on the basis that the January 2024 presentation anticipated an increase in the rate card to US$[REDACTED] million and Mr Woerner's email, *"properly construed"*, shows that the January 2024 recommendation to deploy an US$[REDACTED] million rate card would have been implemented for Mr Palou. I am not persuaded by this, however. On the contrary, for the reasons outlined above, I agree with Mr de Marco that it is, quite simply, wrong for McLaren to proceed on the basis that they do in relation to this aspect of their claims, and so to invite the Court to adopt an approach based on Mr Harris's calculations that is itself premised on the so-called Palou 2024 Rate Card.

363. Where this takes things is a matter to which I will return later, after first dealing with the second main submission advanced by Mr de Marco in relation to this other sponsorship claim. This is Mr de Marco's point that the contemporaneous documents do not show that McLaren Indy anticipated that there would be some significant increase in Car #6 sponsorship revenues as a result of Mr Palou being its driver.

364. I agree with Mr de Marco about this as well. As he pointed out, the July 2022 rate card set out the individual inventory on Car #6 with a total value of US$[REDACTED] million, which is only US$[REDACTED] higher than the total for Cars #5 and #7, and which is explained by the fact that the value of the Chassis Side on all three cars is accounted for in the Car #6 rate card as a bundle. Car #6 was, then, given an overall target of US$[REDACTED] million whereas no such overall target was given in respect

of Cars #5 and #7. This, however, Ms Bowden agreed, was because of McLaren Indy's plan to adopt a different sales strategy to the other two cars, consisting of packaging Car #6 inventory into three primary sponsorship packages which McLaren Indy anticipated would be sold to OnSemi, NTT, and another (at that point unknown) sponsor, in circumstances where, in contrast to Car #6, the vast majority of Car #5 and Car #7 inventory was already locked-up in multi-year sponsorship deals by this point, so limiting McLaren Indy's ability to try and extract additional value from those same assets.

365. Again as Mr de Marco pointed out, in December 2022, McLaren Indy presented a 5-year financial forecast to the board of McLaren Racing which included representatives of a number of different private investors who would have been anxious to see if they were likely to make a profit from their investment in the company (not least because McLaren Indy was not, as at that date, profitable). That plan had nothing to say about McLaren Indy expecting to see a sudden increase in sponsorship revenues in 2024 relative to 2023. Furthermore, it appears that by January 2023 McLaren Indy had successfully entered into its three planned *"primary sponsor"* package deals with OnSemi, NTT, and SmartStop – with deals entered into on 1 July 2022, 28 October 2022, and 24 January 2023 respectively. McLaren Indy had also been able to sell a substantial amount of non-primary sponsor inventory on Car #6: to Arrow in an agreement dated 16 September 2021, to Mission Foods on 28 November 2022 and to Lucas Oil on 2 December 2022. I agree with Mr de Marco, in the circumstances, that, had McLaren Indy expected to be able to leverage Mr Palou to achieve higher sponsorship revenues, this is likely to have been reflected in the rate cards prepared as at the date of negotiating those three agreements, yet there is no such indication in the evidence before the Court.

366. Whilst it is the case that the March 2023 rate card showed increases in certain figures from the July 2022 rate card in order to reflect a "*target profit"*, the overall target figure for Cars #5 and #7 being US$[REDACTED] million and the overall target figure for Car #6 being US$[REDACTED] million, it is self-evident that that gap is not as great as it would have been had the overall target been set at US$[REDACTED] million in respect of Car #6.

367. Lastly in this context, as Mr de Marco observed, there is no evidence that Mr Palou's status as a top driver was leveraged in sponsorship proposals during the periods when McLaren Indy expected him to be driving from 2024. Nowhere in any of the sponsorship pitches made by McLaren Indy during the relevant period was this done. Indeed, Mr Palou was mentioned by name in just three presentations - in each case only in passing and as an alternative to Mr Rosenqvist. Accordingly, I agree with Mr de Marco that, at the time, having Mr Palou as Car #6's driver does not appear to have been regarded by McLaren Indy as likely to drive up sponsorship revenues to any significant degree.

368. I come on, then, to consider Mr de Marco's next submission, which was that there was no material drop in sponsorship revenues or change in sponsor activity after the Defendants' breach. Mr de Marco noted, in this connection, that, in the financial plan prepared in January 2024, the value of McLaren Indy's rate cards increased steadily between 2024 and 2026 to cover cost inflation and building costs, with the interim hurdle target set for 2024 around US$[REDACTED] million per car, whereas, in fact,

McLaren Indy was able to achieve a total of just over US$[REDACTED] million in 2024 at an average of US$[REDACTED] million per car notwithstanding the Defendants' breach. Mr de Marco highlighted also how Ms Bowden accepted that in 2023, 2024, and 2025 McLaren Indy had outperformed its sponsorship revenue projections set in an earlier five-year plan presented to the McLaren Racing in December 2022.

369. On this, I am less persuaded by what Mr de Marco had to say. I tend to think, indeed, that his point is somewhat over-simplistic. I think the same in relation to his criticism, in addition, of a table contained in Mr Harris's third report (table 7.5), which showed the value of sponsorship sales and renewals before and after the breach and revealed that McLaren Indy was achieving an average of [REDACTED] of an US$[REDACTED] million rate card before the breach and [REDACTED] afterwards, since Mr Harris had the following to say about that at paragraph 7.40 of his third report:

"In the majority of cases, McLaren Indy's revenue equates to inventory values that exceed those in the Palou 2024 Rate Card. This supports my assumption in my loss calculations that additional sales of Car #6 sponsorship in the Counterfactual Scenario are likely to have been at rates equal to those in the Palou 2024 Rate Card. In light of my analysis in this report, I therefore remain of the view that my approach in this regard is reasonable and appropriate."

370. I come, then, to the dispute between the experts, Mr Harris and Mr Steadman. In addressing this, I do not propose to rehearse the detailed evolution of the various expert reports but instead prefer to focus on the position which was arrived at by Mr Harris and Mr Steadman by the time of trial – or, more accurately, by the end of the trial. It is right, nonetheless, that I should, relatively briefly, outline the three-stage process that Mr Harris's methodology entails, not least because otherwise Mr Steadman's criticisms of the methodology (and the differences between the experts) will be hard to describe.

371. I can take this summary from McLaren's written closing submissions, although I make it clear that I have studied Mr Harris' reports with care to satisfy myself that I understand both what he has had to say and that McLaren's summary is accurate.

372. The first step in the process entailed Mr Harris assessing the percentage of sold and unsold inventory in respect of Car #5, Car #6, and Car #7, specifically an assessment of the sold inventory for Car #6 as at the summer of 2024 which Mr Harris was able to undertake in his third report after disclosure of certain sponsorship agreements in August last year. Mr Harris's analysis shows that [REDACTED] of the inventory for Car #6 Car was unsold for the 2024 season, which is slightly more than the [REDACTED] level that he had used in his first and second reports. In the circumstances, however, Mr Harris has not revised his calculations to reflect the up-to-date percentage even though it would be more favourable to McLaren had he done so. Thereafter, still as part of step 1, Mr Harris sought to identify the proportion of sold inventory for each of Car #5, Car #6, and Car #7 in the actual scenario, noting that, between 2023 and 2025, the average percentage of sold inventory for Car #5 and Car #7 was between [REDACTED] and [REDACTED] which is between [REDACTED] and [REDACTED] higher than the percentage of sold inventory for Car #6 over the same period. Specifically: the actual proportion of sold inventory for Car #5 is [REDACTED] in the 2023 season, [REDACTED] in the 2024 season and

[REDACTED] in the 2025 season, which includes inventory sold and/or provided to Mr O'Ward pursuant to a 2023 agreement and the amendment to his driving agreement in 2024; the actual proportion of sold inventory in Car #7 is [REDACTED] in the 2023 season, [REDACTED] in the 2024 season and [REDACTED] in the 2025 season, RJV being the primary sponsor of Car #7 for most races; in the ten-month period between 1 October 2022 (when Mr Palou was contracted to drive for Arrow McLaren) and 8 August 2023 (the date of the Defendants' breach), Car #6 sold inventory for 2023 to 2025 increased from between [REDACTED] to between [REDACTED]. In consequence, Mr Harris has determined, the actual proportion of sold inventory for Car #6 was [REDACTED] in the 2023 season, [REDACTED] in the 2024 season and [REDACTED] in the 2025 season, and, as of 31 July 2025, the existing agreements for Car #6 account for just [REDACTED] of inventory for the 2026 season and [REDACTED] for the 2027 season.

373. As for step 2, this requires an assessment of the percentage of inventory that would have been sold on Car #6 in the counterfactual scenario. In this regard, Mr Harris considered it appropriate to assume that, if Mr Palou had joined Arrow McLaren, McLaren Indy's Car #6 sponsorship sales would at least have been in line with the volume of sales for Cars #5 and #7. Based, therefore, on the actual sales of inventory for Cars #5 and #7 between 2023 and 2025 amounting to between [REDACTED] and [REDACTED], Mr Harris has assumed that McLaren Indy would have sold 80% of inventory for Car #6 in the counterfactual.

374. Turning to step 3, here Mr Harris assessed the value of the inventory of Car #6 which would be sold in the counterfactual, basing this on the actual sponsorship agreements that have been disclosed in the proceedings – hence his conclusion at paragraph 7.40 to which reference has previously been made, namely that, in the majority of cases, this exceeds the rate identified in the 2024 Palou Rate Card.

375. McLaren rely upon this methodology, and Mr Harris's conclusions, in support of their case, whilst also inviting the Court to step back from the detailed analysis and to conclude that it is inherently likely that McLaren Indy's sponsorship sales would have been boosted from having a multi-championship winning driver, Mr Palou, being hired to drive Car #6. This, Mr Goulding submitted, must be the position as a matter of basic common sense.

376. Mr Steadman and the Defendants have made a number of criticisms of the approach adopted by Mr Harris and McLaren. Mr de Marco, in closing, submitted, indeed, that no reliance can or should be placed on Mr Harris's calculations. He submitted, in particular and most fundamentally, that Mr Harris was wrong to proceed on the basis of an assumption that an US$[REDACTED] million rate card would have been adopted for Car #6 in the counterfactual whilst taking it that an US$[REDACTED] million rate card would have been adopted for Cars #5 and #7 in circumstances where, as previously noted, the US$[REDACTED] million rate card only came into existence after the Defendants' breach and, furthermore, when all of the primary sponsor spaces on Car #6 had already been sold on multi-year contracts before the breach and by reference to lower value rate cards.

377. I will come back to that matter in a moment since it relates to step 3 of Mr Harris's methodology. It is, however, to be noted that in relation to steps 1 and 2 there was

somewhat less in issue between Mr Harris and Mr Steadman. As to step 1, it is right to observe that Mr Steadman took issue with the percentage approach adopted by Mr Steadman to assess sold and unsold inventory in respect of Cars #5, #6, and #7 given that some parts of the relevant inventory will be worth more than others. Mr Harris recognised this, but explained that that is why he adopted the methodology which he did since it allows a comparison of the total value of assets/total percentage of the selling price of assets. I agree with Mr Harris about this, noting that Mr Steadman has not put forward an alternative approach and, furthermore, that Mr Steadman accepted in cross-examination the broad conclusion that McLaren Indy has sold fewer spots on Car #6 than it has done for Cars #5 and #7.

378. As to step 2, Mr Steadman accepted that the approach adopted by Mr Harris is a "*good way to measure*" a sponsorship loss, provided that it can be assumed that there is a sponsorship loss, as to which I agree with Mr Goulding when he submitted that it is, indeed, a matter of basic common sense that McLaren Indy will have suffered at least some sponsorship losses as a result of losing Mr Palou. I reject the suggestion made on the Defendants' behalf, explored both in the cross-examination of Ms Bowden and also that of Mr Harris, that McLaren Indy was unable to sell inventory on Car #6 because effectively it had been left with a rump of scattered inventory that it was unable to package up for sponsors and was therefore not valuable. Although Ms Bowden agreed that there were generalised issues selling scattered inventory from time to time, she was clear that she considered McLaren Indy's sponsorship issues to be attributable to the loss of Mr Palou and, furthermore, it is at odds with the fact that there were significantly more high value positions available on #6 Car than the other cars.

379. It follows that I do not regard the criticisms in relation to steps 1 and 2 to be significant. The dispute in relation to step 3 (and Mr Harris's reliance on the Palou 2024 Rate Card) is, however, more substantial.

380. In this respect, Mr de Marco's submission was not only that Mr Harris should not have assumed that an US$[REDACTED] million rate card would have been adopted for Car #6 in the counterfactual in circumstances where for Cars #5 and #7 an US$[REDACTED] million rate card was used, but also that Mr Harris should not have assumed that 80% of the allegedly applicable target rate card value would have been achieved in the counterfactual since, as Mr de Marco put it, that translates differently depending on which rate card is adopted: in short, 80% of US$[REDACTED] million is easier to achieve than 80% of US$[REDACTED] million. Furthermore, Mr de Marco noted in closing, the value ascribed to different pieces of inventory varies depending on which rate card is used. For example, whereas Mr Harris attributed a value of US$[REDACTED] million to the sidepod side on the US$[REDACTED] million rate card, the value on the US$[REDACTED] million rate card was given as US$[REDACTED] million. Thus, if Car #5 is valued at US$[REDACTED] million and Car #6 at US$[REDACTED] million, and it is assumed that both cars will eventually sell out at 80% of the target, then, the sale of the sidepod side alone means that Car #6 has [REDACTED] left to sell, whereas Car #5 has only [REDACTED] left to sell. This means, Mr de Marco explained, that a car which only has the sidepod side sold will, on Mr Harris's approach, already be said to be [REDACTED] sold out if it is Car #5, but only [REDACTED] sold out if it is Car #6. It follows that, even though the same piece of inventory has been sold on both cars, there is an 8% gap in sell-out rates, which, in turn, means that many more sales (of proportionately lower-value inventory) would

need to occur in order for 80% to be achieved on the US$[REDACTED] million rate card than on the US$[REDACTED] million rate card.

381. It further follows, Mr de Marco submitted, since Mr Harris adopted this flawed analysis, that he was wrong to conclude that Car #6 achieved 15% less of its inventory target sales than he would have expected in the counterfactual (8% of which is attributable entirely to the sidepod side valuation, as explained immediately above). In Mr de Marco's submission, this should not be taken to mean that 15% less of the car livery is occupied on Car #6 than on Cars #5 or #7, and nor does it mean that Car #6 made 15% less than either of the other cars in dollar revenue terms. All it signifies, Mr de Marco submitted, is that there was unsold low-tier inventory on all three cars, but that that inventory is deemed to be much more valuable on an US$[REDACTED] million rate card and the sale of high-tier inventory does not get as far towards an US$[REDACTED] million target as it does towards an US$[REDACTED] million target.

382. Accordingly, it was Mr de Marco's submission that adopting inconsistent rate cards to assess sell-out proportions is inappropriate, and since, Mr de Marco submitted, Mr Harris had not conducted an exercise that considered a US$[REDACTED] million rate card, so the Court should reject the claim. It is not good enough, Mr de Marco suggested, for Mr Harris to say, when asked whether he had compared the actual number of sold spaces across the cars or compared the sell-out rates of the cars against any kind of consistent benchmark, that he had not done that exercise but that:

"I think if I were to do an [REDACTED] *million assumption for all three cars, my losses would come down. Like, I'm kind of intuitively guessing this, but like a million, a million and a half from where it is; I think five and a half at the moment. If I did a* [REDACTED] *million assumption for all cars, I think it would go down to about 2/2.5, you know. So it makes a difference, right, and what that tells you basically that about half of the losses and about 5 million I assess is the value proposition and about half's [sic] the volume proposition...".*

383. Whilst I have some sympathy with the proposition that Mr Harris should ideally have produced, in advance of giving evidence, an alternative set of calculations premised not on a US$[REDACTED] million rate card, but a US$[REDACTED] million rate card, nonetheless I consider Mr de Marco's objection to be somewhat overblown, particularly in circumstances where Mr Steadman has not himself carried out such calculations. Nor has Mr Steadman put forward an alternative methodology; he has instead merely criticised what Mr Harris has had to say and, even then, as previously explained, it appears that he does not actually disagree with certain core aspects to Mr Harris's approach. This is not to say, however, and still focusing on step 3 for these purposes, that I agree with Mr Goulding when he suggested that it was unclear why the Defendants should have spent so much time seeking to cross-examine both Ms Bowden and Mr Harris on the Palou 2024 Rate Card, given that in the joint expert report, at item 12, it was noted that:

"*Mr Steadman agrees that there are many instances where amounts paid by sponsors – if measured principally in relation to inventory branding and ignoring other aspects of the package – is consistent with rates higher than the 2023 rate cards and in other cases consistent or above the Palou 2024 Rate Card*".

The point being made here is a different point: not as to the appropriateness of using the Palou 2024 Rate Card for Car #6 and different rate cards for Cars #5 and #7, but what, in the event, turned out to have been achieved by way of sponsorship. What is important is that, as Mr de Marco put it in closing, Mr Harris's approach - that Cars #5 and #7 sold inventory equivalent to 80% of an US$[REDACTED] million rate card but Car #6 only sold inventory equivalent to 65% of an US$[REDACTED] million rate card - compares apples with oranges in circumstances where there is no basis for doing so.

384. The reality is that McLaren Indy has adduced no evidence showing any discrepancy in sales across the three cars other than Mr Harris' analysis on the basis of different rate cards. The fact that, when this was put to him in cross-examination, Mr Harris asserted that McLaren Indy had, in fact, achieved sales reflective of an US$[REDACTED] million rate card in the actual world as a means of justifying the use of that figure does not assist McLaren Indy. As Mr de Marco explained, for example, Mr Harris noted that NTT had originally agreed to pay US$6.75 million per year, whereas the inventory granted to them under the NTT Agreement was only worth US$[REDACTED] million per the US$[REDACTED] million rate card, so as to mean, he suggested, that NTT was paying [REDACTED] of the value of the assets. On that basis, Mr Harris considered that it was "*reasonable to assume that incremental sales in the counterfactual scenario would have been at rates which on average approximate to an* [REDACTED] *million rate card*". However, that would imply that an US$[REDACTED] million rate card is achievable for all three cars, since sponsors on all of the cars are (on this approach) over- and under-paying for inventory. It also assumes that the entirety of the fee paid by a sponsor is attributable to on-car branding. However, if that were the case, then, it would mean that inventory valuations are reflective not only of the inventory values themselves but also the value of broader hospitality benefits which the sponsor may receive, which was not ventilated in the expert reports. That would mean, in turn, that adopting different rate cards for different cars is even more nonsensical: as Mr de Marco put it, if buying, say, the 'lower rear sidepod 1' also buys a sponsor a certain package of hospitality rights, then, it would make no sense for the cost to be US$[REDACTED] when that inventory is purchased on Car #5 but US$[REDACTED] when purchased on Car #6.

385. My conclusion, nonetheless, is that the methodology used by Mr Harris is appropriate, except in respect of step 3 and his reliance upon the Palou 2024 Rate Card. In short, therefore, Mr Harris will need to carry out the exercise which he explained he had not yet done but which he thought would likely result in a loss of between US$2 million to US$2.5 million. Mr Steadman and the Defendants will obviously need to say whether they agree with whatever figure is arrived at by Mr Harris. It is to be hoped that agreement can be reached but, if not, then, the Court will need to determine the precise level of loss suffered by McLaren Indy in relation to this head of claim.

The F1 loss claim

386. The next claim to be considered is McLaren's claim for lost profits in the sum of US$548,490 said to represent certain F1 sponsorship benefits, which McLaren were required to provide to NTT by way of compensation and/or renegotiation of the NTT Agreement by entering into NTT Amendment 2.

387. It will be recalled that, pursuant to NTT Amendment 2, NTT was granted F1 branding and hospitality rights between 2024 and 2028. Specifically, in return for NTT paying a sponsorship fee of US$500,000 in 2024 (thereafter increasing by 2.5% per year), with effect from 27 February 2024 and by reason of clauses 7.1 to 7.3, NTT acquired a right to have its branding on the outer halo of McLaren's two F1 cars for up to three F1 races in the USA - the halo on an F1 car being a ring that is prominent at the front of the car; became designated as the regional 'Official Technology Partner' for McLaren's F1 team in the USA on a non-exclusive basis (the 'OTP Designation'); and received an annual credit of US$200,000 to purchase F1 paddock club or general admission ticket packages at F1 races in the USA. Mr Brown described these benefits as "*part of the compensation package for NTT*" as a result of Mr Palou's decision not to drive for the Arrow McLaren team. Mr Dennington referred to them as "*make good*" measures. As such, McLaren's case is that they have suffered a loss of profit because, but for the NTT renegotiation leading to NTT Amendment 2, they would have been able to sell the F1 assets received by NTT for more money.

388. As for NTT Amendment 3, it will (again) be recalled that, pursuant to that agreement, the parties agreed that NTT would be provided with various branding and other benefits in respect of McLaren's 'F1 Academy' between August 2024 and December 2025, specifically that NTT would be permitted to participate in the McLaren Racing's '60 Scholars' initiative.

389. As previously mentioned, the Defendants' position is that this claim should be dismissed on the basis that McLaren have not suffered the loss alleged – specifically because, the Defendants say, McLaren have not been prevented from selling the relevant rights for more than the US$1,537,800 in fees that NTT agreed to pay for them. The Defendants additionally say that the claim fails on the same remoteness and failure to mitigate grounds as they have advanced in respect of the NTT base fee loss.

390. It should be noted, in this context, that it is common ground that, in assessing whether McLaren have suffered any loss of profit, credit should be given both for the US$1,537,800 in fees actually payable by NTT under NTT Amendment 2 and US$1,068,917 of the US$3.5 million fees received under the Hirakawa Agreement. As to the latter, this is the proportion of the total fees which was attributable to Mr Hirakawa's participation in the first of the TPC days covered by the Hirakawa Agreement, namely the TPC that took place on 12 October 2023. This was an event that Mr Palou was originally scheduled to attend, meaning that Mr Hirakawa, in effect, took Mr Palou's place. As such, it is right that credit is given. This, however, I agree with Mr Goulding is only in respect of McLaren Racing's claim, not also the claims brought by McLaren Indy. Also, since Mr Palou was never scheduled to take part in the second TPC day that took place on 3 February 2024, no credit is called for in respect of the fees attributable to that TPC day; and nor is credit appropriate in relation to the fees that are attributable to Mr Hirakawa's participation in an FP1 session which took place in Abu Dhabi that is also covered by the Hirakawa Agreement.

391. McLaren accept also that, in circumstances where NTT has terminated the NTT Agreement, there can be no loss in respect of the 2027 season.

392. The question, as Mr de Marco framed it in closing, is whether, in assessing whether there has been any relevant loss, McLaren Indy has been prevented from selling the same assets for more money as a result of the Defendants' breach or, putting the point another way, whether McLaren Indy would have sold these assets for more in the counterfactual. It is McLaren's position that the F1 benefits provided to NTT could have been sold to NTT in the counterfactual, Mr Harris explaining when cross-examined that:

"*I think the only logical scenario in which a sale was prevented by giving these assets to NTT … is that it's prevented a sale to NTT in the counterfactual scenario*".

On that basis, Mr Harris pointed to an existing sale to NTT in 2023 for US$500,000, which he described as a "*reference point*" (adopting a bottom-up approach) for estimating a price for the sale of the package of benefits provided to NTT under NTT Amendment 2. Based on this, Mr Harris considered that the loss in the counterfactual entails McLaren Indy either selling the assets to a third party at a price higher than US$500,000 or selling them to NTT at a price higher than US$500,000, although in closing McLaren conceded that, in reality, selling to NTT was the only likely scenario. Put another way, ultimately McLaren's case is that there was clearly a real and/or substantial chance that it would have been able to sell the rights given to NTT under NTT Amendment 2 and, for that matter, also under NTT Amendment 3.

393. I come on, then, to address this claim.

394. Under clause 7.1 of NTT Amendment 2, NTT acquired the right to place its branding on the Outer Halo (Side) of McLaren's F1 cars "*at no more than 3 (three) Formula 1 races in the United States of America during the Contract Period … unless McLaren sells the space to a third party in which case McLaren shall provide an alternative position on the Formula 1 cars of equivalent or greater prominence*". As Mr de Marco noted, therefore, the right granted to NTT was qualified in the sense that McLaren Indy retained the right to sell the relevant inventory to a third party and move NTT's logo to an equally prominent spot on the car.

395. In fact, as Mr de Marco pointed out, McLaren Racing did just that since Bapco Energies ('Bapco') purchased the Outer Halo (Side) spot for one race in 2024 and Okta purchased the Outer Halo (Side) spot for all F1 races from the date of the 2025 car launch through to the end of the [REDACTED] F1 series. The fact that these deals were entered into, Mr de Marco observed, supports Mr Szafnauer's evidence in his report that he has never known an F1 car to be fully sold out because "*There is always room for one more sticker. You can always find a place*". As Mr de Marco put it, the requirement to move NTT to an equally prominent position has seemingly not been a problem in terms of McLaren Indy's ability to sell this asset to a third party. Although Mr Dennington suggested that providing the halo branding to NTT "*would have made it … difficult*" to sell the same asset to a sponsor within the same category as NTT, pointing out that there might be some sponsors who would not wish to have any association with the McLaren F1 team if a competitor were also sponsoring the car, this is not borne out by the fact that McLaren Racing secured the Bapco and Okta deals.

396. I agree also with Mr de Marco when he submitted that it is clear that McLaren Racing has a number of sponsors operating in the technology sector, judging from the list of

F1 Official Partners which was before the Court. This rather suggests that sponsors take a more relaxed view than Mr Dennington sought to suggest. It is clear, in short, that the qualification contained in clause 7.1 was not merely theoretical; it was exercised in that, when a sponsor was willing to pay for the outer halo, McLaren Racing agreed to that in return for payment.

397. As to the suggestion that NTT, in particular, would have purchased the relevant F1 assets – not confined to the outer halo branding - for more money in the counterfactual, it is notable that, when it was put to Mr Harris that there was, in fact, no opportunity loss, his answer was as follows:

"*I think that's right and I think I've tried to clarify earlier that logically, there can only be a loss in respect of these items if, in the counterfactual scenario, NTT would have purchased it for more than US$500,000. You know, as I also, I think, acknowledge, there's limited evidence in respect of whether or not that was likely to happen.*"

The truth is that there is no basis for a conclusion that NTT would have paid more for halo branding rights or, indeed, for the overall package of rights in the counterfactual. On the contrary, Mr Croxville's evidence was that because of NTT's focus on the US market, "*even after agreeing the Second Amendment, it is unlikely we would have transferred to Formula 1*". It is also notable that, when McLaren sold a relatively modest amount of F1 branding to NTT for the 2023 season, on 18 May 2023, McLaren did so (along with Paddock Club tickets for the Austin Grand Prix and Las Vegas Grand Prix) for US$500,000 in total. Not only must Mr de Marco be right that McLaren would not have struck that deal if they reasonably thought that it would prevent them from concluding a more lucrative deal with another competitor, but that price was the same as under NTT Amendment 2 (subject to the annual escalator), so indicating that there was something of a limit to the amounts that NTT was willing to invest in F1 concurrently alongside its IndyCar sponsorship.

398. Coming on to deal with the Paddock Club aspect to the claim, the Defendants accept that in relation to the 2025 and 2026 seasons and subject to the need to give credit, as outlined previously and touched on later also, McLaren are entitled to recover US$94,900 in respect of each of those seasons. That is on the basis that this is what McLaren paid for the eleven Paddock Club packages provided to NTT in 2025 (eight in respect of the Miami Grand Prix and three in respect of the Austin Grand Prix) after NTT told McLaren Indy that this is what NTT wanted from McLaren Indy. These packages were, in short, specifically ordered by McLaren Indy for NTT. As for 2025, Mr Harris assumed in his calculations (and the Defendants take no issue with him about this) that McLaren Indy's loss in 2026 would replicate its loss in 2025.

399. The dispute is as to the 2024 season in circumstances where the twelve packages provided by McLaren Indy to NTT in respect of that season were allocated from tickets that McLaren Indy had already purchased and McLaren's case is, therefore, that what is recoverable is the price that McLaren would have been able to sell those tickets to (as McLaren put it in the Further Information that they have served) *"other sponsors and/or NTT"*. That price was put at US$197,400 by Mr Harris, hence McLaren's total claim across all three seasons (2024, 2025 and 2026) is US$387,200. I agree with Mr de Marco, however, that McLaren's approach in respect of the 2024 season is flawed in that, even assuming that it is appropriate to have regard to the resale value of the

tickets, it cannot be right that McLaren should receive by way of damages the entirety of the price that they (or Mr Harris) say would have been achieved on resale. On the contrary, as Mr de Marco rightly submitted, it is the loss of the profit which McLaren would have made from selling the tickets in the counterfactual that is recoverable. This is the net profit, namely the sales revenue achieved (put at US$197,400 by Mr Harris) less the cost of purchasing the tickets (apparently US$91,800), which produces a total loss of net profit of US$105,600 for 2024.

400. As to the OTP Designation, this claim cannot succeed in circumstances, where: first, Mr Harris and Mr Steadman were agreed that it has a nil value on a standalone basis as opposed to when considered as part of a bundled package of benefits; secondly, Ms Williams and Mr Szafnauer were agreed that non-exclusive, regional designations are typically 'value-adds' or 'gifts' used to sweeten larger deals, rather than standalone revenue generators since they are not, in and of themselves, commercial assets; and, thirdly, as Mr de Marco pointed out in closing, NTT has not advertised itself as holding the OTP Designation, which underlines the fact that it is not an asset and that NTT would not have paid money for a package of benefits by reason of its inclusion in the counterfactual.

401. As to the F1 Academy Branding assets, these were provided to NTT for no additional financial consideration under NTT Amendment 3 and, again, Mr Harris and Mr Steadman attributed a nil loss value to this asset. Mr Dennington, indeed, agreed that they were right to do so. The claim concerning this aspect, therefore, must similarly fail.

402. This means that this aspect of the claim fails – irrespective of the Siegel issue which I will come on to address. It is unnecessary, in such circumstances, to address the Defendants' alternative failure to mitigate case.

The loss of performance-based revenue claim

403. McLaren seek damages for what they describe as performance-based losses amounting to US$4,102,876, representing the difference between the performance-based revenues that McLaren obtained in the actual scenario compared with what McLaren say would have been the position in the counterfactual scenario with Mr Palou driving for McLaren.

404. These losses comprise prize money (prize money paid to teams based on results for individual races and across the season as a whole); sponsorship revenue (where a number of sponsors pay performance-based fees to the team based on car and driver performance for individual races and across the seasons, including, for example, NTT, GM, Lucas Oil and Mission Foods); and driver compensation (where McLaren's driver contracts specify performance-based compensation for drivers based on their performance in the Drivers' Championship, Indy500 and other races in the IndyCar Series, including uplifts to salaries and bonuses).

405. McLaren Indy's position is that it clearly had, and will have, a poorer performance in the years 2024 to 2027, when compared with what the position would likely have been had Mr Palou provided his services to McLaren Indy as a driver, given that Mr Palou

is so talented a driver that, as previously mentioned, he is regarded by many as a generational talent.

406. The Defendants dispute the claim. They say that it cannot be assumed that Mr Palou's performance at McLaren Indy would have been anything like his performance has been at CGR – whether before or after the Defendants' breach. In this regard, Mr de Marco submitted that the evidence is clear that driver performance is heavily influenced by the team (including its leadership, mechanics, engineers and race strategies), noting that in cross-examination Mr Brown himself attributed McLaren's recent F1 success not just to its drivers, but also to its leadership, car design and the wider team. Mr Brown went on to agree, Mr de Marco observed, that great teams, great engineers and a good mechanic team with good pit stop strategies are crucial to a team's success in any motorsport series, Mr Brown agreeing also with Mr Marks' view that the quality of the car build will be affected by financial resources and personnel and that engineers are "*very important"* to a team.

407. Mr de Marco additionally highlighted in this respect that Mr Jakobi similarly explained that "*it's a combination of the driver and the team ... where the line falls between how much the driver and how much the team is a difference of opinion between different people, but it's a combination*", before observing that, as he put it, McLaren Indy was well aware of its weaknesses as an IndyCar team, given an email sent on 8 October 2021, in which the Director of IndyCar Engineering provided Mr Brown with updates on "*key projects"* to "*address our key weakness"* regarding the team and its planning (including "*road course aero mapping"*). These weaknesses, Mr de Marco suggested, persisted since on 24 April 2024 Mr Kanaan emailed Mr Brown expressing dissatisfaction with members of the McLaren Indy team and noting, in particular, that:

"*We are dropping the ball on leadership at the bottom. (we can't do everything). Gavin, Brian, Lauren and I can't micromanage everything, there not a move that they make that one of us don't have to over look, but we can't trust the people that are running as they have no experience... We are lacking direction or organization. I'm mot sure witch [sic] one ... We need to get better organized"*.

408. It was Mr de Marco's submission also that there are other reasons why it is not possible to say that Mr Palou would have performed well if he had been driving for McLaren Indy in the counterfactual: first, Mr Palou would have been adapting to a new team around him and, as Mr Jakobi put it, "*it takes time to bed in*" since developing a strong working relationship with a team takes several years and winning championships together "*takes some doing*", hence Mr Jakobi's view that the "*Ganassi/Palou combination*" is "*pretty hard to beat*"; and, secondly, Mr Palou would have been driving with a poorer engine at McLaren Indy than at CGR since Mr Jakobi agreed that Honda engines such as those used by CGR have been performing better in recent years than Chevrolet engines used by McLaren Indy.

409. Whilst Mr de Marco was, no doubt, right to make these points and, indeed, they were not, it appears, in dispute, his third submission was, however, more controversial. This was that, in the counterfactual, Mr Palou would have been feeling disillusioned with McLaren, in circumstances where he had signed a contract on the basis of an understanding which, Mr de Marco submitted, turned out to be false, and given that Mr Jakobi agreed that driver psychology impacts upon performance. Mr de Marco added,

furthermore, that Mr O'Ward having been performing very strongly with McLaren Indy, coming second in the 2025 IndyCar Series, then, if Mr Palou were put on a level playing field with Mr O'Ward (in the sense of having similar calibre teams and the same engines), then, it is not clear which of them would come out "*on top*", not least because they could "*take points off each other*", so resulting in a worse performance for McLaren Indy's drivers overall.

410. I will return to this last point in a moment. However, it was Mr de Marco's submission, based on what both Mr Marks and Mr Jakobi had to say, that, taking account of the various matters raised by him, there are so many variables and intangibles at play with IndyCar that anticipating driver performance with any certainty is not possible. That said, however, both Mr Marks and Mr Harris considered that Mr Palou may have won one or two races with McLaren Indy in 2025 and/or 2026, and I agree with them about that. Indeed, I am clear that, even having regard to the submissions made by Mr de Marco, if Mr Palou had joined the Arrow McLaren team, then, he would have won races and, indeed, that he is likely to have won championships and the Indy500. To repeat, Mr Palou is an exceptional talent. He is now a four-time champion, who has also won the Indy500. However, just as significant as that is the fact that Mr Palou won his first season racing for CGR. This, despite driving with a new team, for which he had three race wins and 8 podiums in his first season.

411. Notably also, before he joined CGR, CGR had struggled to find a successful driver to drive alongside Mr Dixon. Mr Palou is such an exceptional talent that he was able, as a driver, to make a difference to the performance of CGR as a team. As Mr Jakobi put it in his first report:

"*I would say the likelihood of Palou winning a further, fourth championship with McLaren (in either 2025, 2026, or 2027) would not have been as high as where he is with CGR. To summarise, I think there is no guarantee that Palou would have been the triple IndyCar Series champion if he had driven for McLaren in 2024. And no guarantee that he would have been champion in the 2025, 2026 and 2027 seasons, but he would almost certainly have won some races. McLaren is not as good a team as CGR, as can be seen from race results*".

I agree with Mr Jakobi about this and, accordingly, approach this aspect of McLaren's claim on that basis. I consider, in contrast, that Mr Marks was rather too circumspect when he said this in his first report:

"*I do accept that Alex Palou is a talented driver in his own right and should take some credit himself for his racing performance so I agree with Mr Jakobi that Alex Palou may have won some races with Arrow McLaren in 2024 and beyond, but I do not agree that this could extend to winning the entire IndyCar Championship with Arrow McLaren in 2024 and beyond*".

I agree with Mr Goulding that, even allowing for differences in historical team performance, in 2025 at least, if Mr Palou had driven for Arrow McLaren in the counterfactual, then, there must be a real or substantial chance that he would have finished as champion.

412. I am not persuaded by Mr de Marco's submission that, had he been required to drive for Arrow McLaren, this would have affected Mr Palou's mindset and, as such, he would not have performed as well as he has, in the event, done after deciding to stay at CGR. As Mr Goulding put it, it is unrealistic to suppose that a competitive-minded and highly successful driver in his prime would have *"sat and sulked"* had he joined Arrow McLaren and so would not therefore have performed well. I am in no doubt, bearing in mind all that I know about Mr Palou and also having heard him give evidence, that he would have done no such thing. In fact, I am clear that he would have done what he has apparently always done which is to try and win every race in which he takes part. That is what champions and winners in every sport do; it is why they become champions and why they win. As Mr Marks acknowledged, competition is in "*the nature of an IndyCar driver*" and "*the only reason a driver gets behind the wheel is to win*".

413. It should also not be overlooked both that Mr Palou stood to gain financially from winning, given the lucrative performance incentives which would have applied had he joined Arrow McLaren, and also that what Mr Palou has achieved whilst at CGR has been achieved despite the fact that he has twice previously been embroiled in legal disputes with CGR. This has not stopped him from doing his best to win (and from actually winning) the Championship. In fact, and somewhat quaintly, Mr Palou has been reported in the press, when asked about CGR, that:

> "*I think this drama has made us a lot closer … When you break one time with your girlfriend, then you are even better because you understand each other and all of the previous issues. Suddenly it is a better relationship*".

There is no reason to suppose that Mr Palou would not have taken the same approach to McLaren Indy had he joined McLaren Indy in the counterfactual.

414. For these various reasons, therefore, I do not accept that the Defendants are right to say that, had Mr Palou joined McLaren Indy, there would have been no lost performance-based revenue. I am clear that, on the contrary, there would have been, which brings me to the quantification of the loss.

415. As to this, it should be noted that, whilst Mr Harris explained in detail how he had arrived at his assessment of the likely loss, Mr Steadman did not himself put forward any alternative methodology. He merely observed in his first report that Mr Harris's figures could be "*at best – illustrative*" and that they were of "*limited utility to the Court*", before going on to suggest that an Arrow McLaren season report to which he made reference might assist in making "*more robust*" assumptions about performance and to raise a number of potentially relevant factors as regards performance, such as "*performance over a longer or shorter period; driver age; driver medical history*". He did not, however, make any attempt at putting forward an alternative methodology or explain what, in his view, the relevant loss (if there were one) would be. On the contrary, it appears that he might well agree with Mr Harris's methodology since ultimately in his first report he stated that "*an expert accountant can only calculate a loss once the Court has, on the basis of other expert evidence, documents or agreements, provided guidance and findings in this area*". Even if that is not the case, the fact remains, however, that, save in limited respects outlined in what follows when dealing with Mr Harris's various reports, Mr Steadman did not engage with Mr Harris's methodology or put forward his own (different) methodology.

416. The position is, therefore, straightforward: the Court has only Mr Harris's methodology to assist in arriving at an appropriate figure for the loss claimed. Although not bound to accept what Mr Harris has had to say in this respect if unpersuaded by it, the Court has had no alternative put forward by Mr Steadman. In fact, having considered Mr Harris's approach and his reports with some care, I am clear that the approach and methodology adopted by him are appropriate.

417. Thus, and adopting the useful summary contained in Mr Goulding's written closing submissions, although I repeat that I have read the reports in detail, in his first report Mr Harris explained that, in order to project performance-based incremental cash flows in the counterfactual and actual scenarios, it is necessary to conduct an analysis to project driver performance between 2024 and 2027. In undertaking that exercise, Mr Harris was clear about the difficulties and uncertainties of the exercise, noting as follows:

"*I recognise that it is difficult to project the performance of Arrow McLaren's drivers in future and/or hypothetical scenarios. I also acknowledge that I do not have the necessary expertise to inform reasonable, subjectively-determined, projections of driver performance*".

Mr Harris went on to explain that he had adopted an assumption that, in the counterfactual and actual scenarios, drivers' performance would match their actual past results. This was premised, at that stage, on the actual results in 2024 only, Mr Harris assuming that, in the counterfactual and actual scenario, from 2025 onwards, McLaren Indy's drivers would perform in line with their average overall performance between 2021 and 2024. This approach was adopted by Mr Harris for all drivers except for Mr Lundgaard, who only competed in one race in the IndyCar Series in 2021 (and whose performance was, therefore, projected on the basis of 2022-2024 results) and Mr Siegel, who competed in only ten races in the IndyCar Series in 2024 and in respect of whom Mr Harris adopted an assumption that Mr Siegel would finish 20th in each championship between 2025 and 2027.

418. Using that analysis, Mr Harris, then, projected McLaren Indy's performance-based revenue and costs based on prize money for the 2024 IndyCar Series, the terms of McLaren Indy's sponsorship agreements (as they were in disclosure at that time), and the terms of McLaren Indy's driver contracts. The lost profits, as they stood at the time of Mr Harris's first report were, then, summarised by Mr Harris, his essential conclusion being that McLaren Indy would receive higher performance-based revenue in the counterfactual scenario and would incur higher performance-based costs in large part, attributable to additional salary and bonuses that would have been payable to Mr Palou.

419. In his second report, Mr Harris summarised the areas of agreement and disagreement between the experts: for example, that McLaren Indy receives performance-based prize money and performance-based sponsorship revenue, and that McLaren Indy incurs performance-based costs in respect of driver compensation. Mr Harris, then, went on also to explain the key assumptions that informed his assessment of performance-based losses, noting, in particular, that: "*the main factors … are Indy 500 wins, non-Indy 500*

championship race wins and Drivers' Championship wins"; in essence, whilst second and third place finishes are significant, they are not as significant as wins.

420. As regards Mr Palou specifically, Mr Harris explained that the differences arise primarily from increased net revenue, which Mr Harris assumed to be received by virtue of his projection that Mr Palou's performance in the #6 Car would be better in the counterfactual scenario than performance of the #6 Car in the actual scenario. However, as Mr Harris explained both in his second report and in his fourth report, his assumption that Mr Palou would win the 2024 Championship in the counterfactual scenario driving for Arrow McLaren *reduced* rather than increased his assessment of McLaren Indy's lost profits. That is because, under Mr Palou's contractual arrangements with McLaren Indy, each driver championship win results in a payment of US$500,000 base salary uplift for all future seasons of the contract, in addition to US$500,000 increase to the annual cap on Mr Palou's performance-related bonuses. In contrast, Mr Palou did not receive a base salary uplift in the event of an Indy 500 or non-Indy 500 race wins. As a result, an improvement in Mr Palou's projected performance in individual races produces, all else being equal, an increase in McLaren Indy's lost profits.

421. Mr Harris also provided a "*sensitivity analysis*", which shows the effects of adjusting the various driver performance assumptions that he had adopted, so as to account, for example, for the possibility that Mr Palou did not win the championship in 2024 in the counterfactual scenario, but won the 2025 Indy500 in the counterfactual; Mr O'Ward performed better in the counterfactual than his average past performance; Mr O'Ward performed worse in the counterfactual; and Mr Lundgaard performed better than his past performance. In short, Mr Harris' estimates increased if he assumed that Mr Palou did not win the championship in 2024, or that he won the Indy500 in 2025; in contrast, the changed assumptions regarding Mr O'Ward's performance in the counterfactual had minimal impact on the assessment of losses, and assuming that Mr Lundgaard's performance improved on past performance reduced the assessment of McLaren Indy's profits, albeit by a modest amount.

422. Subsequently, in his fourth report, Mr Harris updated his loss figures to reflect the (then) known actual results for the 2025 season. In doing so, he provided a summary of the assumptions that he had adopted in respect of the counterfactual and actual scenarios for the IndyCar Series for 2024 to 2027, arriving at an overall assessment of McLaren Indy's losses in the sum of US$4,102,900 (as rounded up and before interest and discounting). This took account of Mr Palou's performance in 2025 and involved Mr Harris, accordingly, assuming that Mr Palou would have won the Indy500 in the 2025 IndyCar Series in the counterfactual scenario, however, even if this is adjusted to assume that Mr Palou would finish in fifth place, Mr Harris concluded that McLaren Indy's losses would still be substantial: US$2.2 million (before interest and discounting).

423. It is against this background that Mr Goulding submitted that the Court should award McLaren Indy the amount claimed, namely US$4,102,876.

424. I see no reason not to accept the assessment made by Mr Harris. I consider it to be reliable and it has not been matched by an alternative put forward by Mr Steadman; it is reasonable and balanced. That said, since this is an area where there is necessarily uncertainty and, even allowing for the fact Mr Steadman has not offered an alternative

calculation, it is appropriate to adopt a cautious approach. This is all the more appropriate given Mr Jakobi's evidence that Mr Palou may have required half a season to find his feet at Arrow McLaren. It might very well be that, as Mr Goulding submitted, Mr Palou would, in fact, have won the championship in 2024 and thereafter – as well as potentially the Indy500. I prefer, however, not to approach matters on this basis, but instead on a basis (more favourable to the Defendants) that sees the c. US$4.1 million identified by Mr Harris reduced by 50% to account for uncertainty, so resulting in a recovery (subject to the Siegel issue) of US$2.05 million by McLaren Indy.

The Siegel issue

425. It is the Defendants' case that McLaren Indy has mitigated its loss by recruiting Mr Siegel as a replacement driver who, over the course of his contracts, will pay the team at least US$[REDACTED] million - a sum exceeding the loss alleged to flow from their breach.

426. Their submission, in short, is that, in the counterfactual that would have seen Mr Palou as a McLaren Indy driver, McLaren Indy would not have recruited Mr Siegel for Car #7 but would instead have signed Mr Lundgaard to drive Car #7 from 2025 onwards, just as they did in the actual world. As such, the Defendants maintain, the revenue derived from having Mr Siegel should be set off against McLaren's claims in its entirety, and not limited to the US$[REDACTED] million received in respect of Mr Siegel in respect of the 2024 Series for which McLaren accept that credit must be given – just as it is not in dispute that credit should be given for US$9 million in fees which would otherwise have been payable by McLaren Indy to Alpa Racing under the AP Driving Agreement, and also for the US$1,068,917 paid under the Hirakawa Agreement in respect of Mr Hirakawa's participation in the TPC event which took place on 12 October 2023.

427. McLaren's position in relation to the Siegel issue is straightforward. It is that the Defendants have not discharged the onus which lies upon them of establishing that Mr Siegel would not have driven for McLaren Indy in the counterfactual. In fact, McLaren say that the position is clear: Mr Siegel was not only a promising young driver, but also he brought significant financial compensation to the Arrow McLaren team; and, given that, in the counterfactual, McLaren Indy would have had both Mr Palou and Mr O'Ward (currently the first and second ranked drivers in the IndyCar Series), McLaren would have done what, in fact, they did do (albeit not with Mr Palou and Mr O'Ward as their other drivers but with Mr O'Ward and Mr Lundgaard), which was to take a risk on Mr Siegel as a potential (but, at that stage, unproven) talent.

428. McLaren say, in short, that there is no reason to believe that the position would have been different in the counterfactual to what it was in the actual. Indeed, they say, the logic of the decision to hire Mr Siegel would have applied with even greater force in the counterfactual since a team otherwise consisting of Mr Palou and Mr O'Ward (and Mr Siegel) would have been stronger than a team comprising Mr O'Ward and Mr Lundgaard (and Mr Siegel).

429. The Defendants acknowledge that they bear the relevant burden in this respect. To that end, they raise four main points, which I will shortly come on to address. First, however, I should mention that the Siegel issue, which was, in any event, only raised somewhat

late in the day, underwent a certain amount of expansion as a result of an application made at the start of the trial. That application sought to introduce a case based on the fact there is a ban in the US on the selling of tobacco products to persons under the age of 21. I allowed this case to be put forward since I considered (as turned out to be the position) that McLaren would be able to deal with it during the course of the trial, making it clear, in doing so, that the Defendants would not be permitted to go beyond what they were seeking to allege in the draft Re-Re-Amended Defence that was at that stage before the Court.

430. Turning, then, to the Defendants' various points, first, they say that the evidence prior to the recruitment of Mr Siegel indicates that McLaren Indy's driver strategy up until that point was to recruit three race-winning drivers, and Mr Siegel was nowhere near that category. They say that, on the contrary, what drove Mr Siegel's recruitment was McLaren Indy's perception that it needed his (or his father's) money in order to fill the gap left by Mr Palou, and that, importantly, would not have been the position in the counterfactual. In this regard, Mr de Marco highlighted how Mr Brown confirmed in cross-examination that, save for Mr Siegel, he has never before hired a pay driver. This, Mr de Marco noted, is consistent with Ms Williams explaining that Williams Racing was in the *"unfortunate position*" of needing to bring on pay drivers towards the end of her tenure and that teams only bring in pay drivers where they have "*a hole in [their] budget"*.

431. Mr de Marco noted also that Mr Brown accepted during the course of his evidence that McLaren's policy in both F1 and IndyCar is that they race to win. This, Mr de Marco observed, is consistent with certain internal McLaren documents in which they established targets in 2021 and 2022 to "*finish in top 3, both within the top 5"* (in the case of a slide deck dated September 2021) and board minutes dating from December 2021 which record that Mr Brown "*noted that the priorities for 2022 were: compete for championship with both cars winning races …"*. It is also consistent, Mr de Marco pointed out, with the facts that: in March 2022 McLaren Indy recruited Mr Palou for Car #6 through to 2026; in May 2022 McLaren Indy extended Mr O'Ward's contract for Car #5 through to 2025; and in June 2022 McLaren Indy announced that it had signed Mr Rossi for Car #7 pursuant to a multi-year sponsorship deal. These were all top ten drivers when McLaren Indy did these things, as underlined by the fact that the minutes of a McLaren Group Board meeting from 2022 record, with reference to the GM Agreement, that the "*additional fees for Rossi are met by contributions from BAT and in the new Chevrolet agreement to fund a star 3 driver package"*.

432. The same approach of aiming to win (and so, Mr de Marco submitted, having three top ten drivers) is shown, Mr de Marco suggested, by a document that was only disclosed at a late stage in the trial, namely a slide-deck dated 24 October 2022 prepared for a McLaren/RJV meeting and dealing with "*planning"* for the 2023 season in terms of RJV sponsorship. Specifically, slide 19 referred to a plan to create a "*season-long video series"* featuring team spokespersons who would identify goals for the coming weekend which were intended to be "*more than 'win the race' or 'finish 1-2-3'"*. This shows, Mr de Marco submitted, that the aim was for all three cars to be competing to win, and not that only two would do so.

433. Furthermore, Mr de Marco submitted, this remained McLaren Indy's approach in the immediate wake of the Defendants' breach since, in September 2023, Mr Brown let it

be known internally within McLaren that "*top drivers"* are *"critical"*, the following month circulating draft term sheets on three potential drivers for Car #7 in the shape of Mr Rossi, Mr Lundgaard and Mr Ilott. Mr Brown and Mr Kanaan, then, exchanged thoughts on these drivers, with Mr Kanaan stating that he would "*keep a eye on Lundgard to see how his first few races go next year*", his view apparently being that McLaren should renew Mr Rossi's contract because he was a good driver.

434. As far as Mr Brown, however, was concerned, as he explained in cross-examination, Mr Rossi was not performing to the standard required and did not have sufficient long-term potential to be retained by McLaren. It was, indeed, because of this, Mr Brown explained in his witness statement, that, starting in November 2023 (although, in fact, the documents show that it was the previous month), McLaren began considering potential drivers for Car #7 who could be hired from 2025, when Mr Rossi's contract would expire, and McLaren planned to assess the performance of Mr Ilott and Mr Lundgaard during the 2024 Series, entering into option agreements with both of them. Mr Lundgaard had been a top ten driver in the 2023 Series, ranking ahead of Mr Rossi, whereas (as it was put to Mr Brown in cross-examination without apparent demur) Mr Ilott was something of a back-up option, depending on the drivers' respective 2024 performances.

435. Mr de Marco submitted that McLaren's approach only changed, resulting ultimately in McLaren Indy's signing of Mr Siegel, after the Defendants' breach when, as he put it, with a *"hole in their budget in the middle of the 2024 season",* with a driver (Mr Pouchaire) *"considered expendable",* and faced with a willingness on the part of Mr Siegel (or his father) to pay a high sum on the basis that Mr Siegel would be able to start driving immediately, McLaren decided to replace Mr Pourchaire with Mr Siegel despite having had almost no opportunity to assess him. This is not something, Mr de Marco submitted, which would have happened but for the Defendants' breach and the budget hole.

436. Mr de Marco drew attention, in this regard, to the fact that, after the decision had been made to hire Mr Siegel, on 26 June 2024, Ms Gaudion sent Mr Ward "*a few watch out questions*" for press engagement, which included a suggested answer to a question concerned with Mr Siegel's recruitment that said this:

> "*Nolan's still getting comfortable with the car, learning names of his crew and the team, and in general had a lot of noise to cut through to focus on racing last weekend. He's only going to get stronger and we're going to surround him with resources from engineering to strength training and more"*.

Mr de Marco suggested that the reference to "*noise*" was to concerns about McLaren's unprecedented decision to hire a pay driver, as supported by the fact that under a further heading ("*Reactive regarding 'pay driver' questioning*") the proposed answer was to say that "*our decision was based on his talent and potential*". It is clear, in the circumstances, that McLaren were sensitive to possible criticism of their decision to recruit Mr Siegel. Whether, however, it follows that the recruitment represented a departure from a strategy on the part of McLaren is a more nuanced question in circumstances where, whatever McLaren's experience in F1 might be, McLaren were newcomers to IndyCar, having only entered the IndyCar Series in 2020 and having only taken over the team inherited from Schmidt Peterson in 2021/22.

437. Furthermore, although Mr de Marco was critical of what Mr Brown had to say on the matter in his evidence, particularly his evidence that at "*the time we put him in the car, we were hoping he was the next Lando Norris*", I am not persuaded that that criticism is entirely justified. Mr de Marco drew attention, for example, to the fact that Mr Norris was a member of McLaren's Young Driver Programme for two years before he first drove for McLaren in F1 in 2019, meaning that McLaren were able to assess his driving abilities throughout that period. Prior to that, Mr de Marco highlighted, Mr Norris had worked his way through F4, F3, and F2 over the course of four years, during which period he had already developed a strong track record: he was the Eurocup Formula Renault 2.0 champion in 2016; he was the FIA F3 European champion in 2017; and he was second place in the FIA F2 championship in 2018. It is, indeed, correct, as Mr de Marco pointed out in closing, that, when those points were put to Mr Brown, he conceded that "*We had a lot more time with Lando, correct*." However, as Mr Brown noted, when explaining in his witness statement that Mr Siegel had come on to his radar in the spring of 2024 after Mr Siegel had been signed by United Autosports to drive in Le Mans, his partner there, Mr Richard Dean, had drawn attention to Mr Siegel's "*talent as a young driver … telling me things like, 'Nolan's a great driver – if not quite Lando Norris'*". As Mr Brown put it in cross-examination:

"*He had a very similar track record to Pato O'Ward coming out of what's called the Indy NXT, being rookie of the year. He finished, I believe, seventh, in his IndyCar debut or one of his early races at Thermal, and he was also pointed out to me by a gentleman named Richard Dean, who is also the individual who pointed out Lando Norris to me, who was racing in a series called Ginetta at the time, saying 'This guy's going to be a future Formula 1 world champion', and it looks like he's turned out to be accurate. He drove for him and he said to me, I recall, 'I'm not sure he's quite as good as Lando', referring to he's damn good whether he's as good as Lando*".

I have some sympathy, in the circumstances, when Mr Brown went on to make the point that:

"I think we're operating in hindsight as to Nolan Siegel's current performance. At the time we made the decision in our interest in Nolan, he had shown a lot of speed. He was rookie of the year in Indy NXT. He was young. He won Le Mans and so therefore – and again – if you look at Pato O'Ward's record coming into IndyCar, it was really no greater than Nolan Siegel's. So I think sitting here today, I don't have the benefit of hindsight to what I know today to what I knew a few years ago".

It should also be borne in mind in this connection that, as previously noted, Mr Brown has a considerable reputation in spotting driving talent. Mr Dennington referred to that, as did Mr Szafnauer, who accepted that neither Mr Norris nor Mr Piastri was hired by Mr Brown at a time when they were proven champions. I accept, in the circumstances, that Mr Brown was giving truthful evidence when he said this:

"*if you have drivers of Pato and Alex's calibre, two very experienced drivers, if you look at our track record, we would then look to bring in a young talent like a Pato O'Ward in hopes of ultimately ending up with three awesome cars, but one being a young up and coming driver, just as we did in Formula 1 when we brought Lando Norris in as a rookie alongside an experienced Carlos Sainz, just like we did with Oscar*

Piastri, when we brought him in as an inexperienced driver alongside Lando, who had become an experienced driver".

438. That said, I agree with Mr de Marco when he submitted that certain other evidence given by Mr Brown was somewhat opportunistic. This concerns what was described at trial as the 'two plus one' strategy or, as Mr Brown put it when cross-examined, a strategy whereby the team comprises "*two superstars and an up and coming driver that you hope will become a superstar*". The fact is, however, that Mr Brown made no reference to such a strategy in his first witness statement. He mentioned it for the first time only in his second witness statement, which came after Mr Jakobi had raised it in his second expert report. I agree with Mr de Marco, in the circumstances, that it is curious that Mr Brown had not mentioned the strategy before. I agree that that is because it was not a strategy that McLaren had fixed upon, and so that it is what lay behind the decision to hire Mr Siegel. The fact that, as Mr Brown pointed out, CGR apparently adopted such a strategy when hiring Mr Kyffin Simpson is, in the circumstances, beside the point: if McLaren (and Mr Brown) had actively decided to adopt the CGR approach in this respect, then, Mr Brown would have been bound to have explained sooner and it would also have been reflected in internal McLaren documents (which it is not).

439. The question, however, is whether the fact that Mr Siegel (or his father) was paying McLaren Indy to be permitted to drive is something which, as has actually happened, would have meant that he was hired by McLaren Indy in the counterfactual. This, in circumstances where McLaren do not dispute that Mr Siegel was hired, at least in part, because of the money that came with him when he joined the Arrow McLaren team, albeit that Mr Brown was clear that Mr Siegel would not have been taken on as a driver if he had not been considered to have the requisite talent and potential. As he put it:

"*If we didn't think he had potential performance, we would never get to the second reason*".

I accept this evidence. I am satisfied that, given McLaren and Mr Brown's track record of *"investing in young upstarts"* (as Mr Goulding put it), McLaren would have had no reason not to accept the monies that Mr Siegel (or his father) was willing to offer in the counterfactual, given that Mr Brown (on Mr Dean's recommendation) would have considered Mr Siegel to have real potential in that counterfactual just as he actually did in the events which happened.

440. As I shall now explain, this conclusion is not affected by a submission made by Mr de Marco which highlighted the fact that the decision to hire Mr Siegel that was made, in the event, after the Defendants' breach, did not apparently entail the type of driver assessment which was carried out in relation to Mr Lundgaard and Mr Ilott – something which Mr de Marco described as unprecedented as far as McLaren are concerned.

441. First, as Mr Goulding pointed out in closing, when the point was put to Mr Brown that he would ordinarily test a driver's abilities before making any hiring decision, his answer was:

"*Sometimes, yes. Sometimes you don't have that luxury*".

That must be right. Just as was the case when Mr Siegel was, in fact, hired by McLaren Indy, so there is no reason to suppose that it would not also have been the case in the counterfactual: an opportunity arose (or would have arisen), and McLaren Indy took it, basing the decision on what Mr Dean had had to say about Mr Siegel and also, it appears, on the favourable view that had been formed by Mr Kanaan.

442. Secondly, as to the latter and in view of the next submission which Mr de Marco came on to make in this context, it is worth setting out the chronology in a little detail.

443. I have already described how it was Mr Brown's evidence that Mr Siegel had not come on to his radar before the spring of 2024 when Mr Dean told him about Mr Siegel. Mr Brown's evidence also was that, at around this time, Mr Siegel communicated to him that he wished to move to IndyCar. Mr Brown cannot recall precisely how this was communicated to him but believes that it was through a colleague or colleagues in McLaren.

444. After that, on 27 May 2024, Mr Kanaan sent an email to Mr Brown, entitled "*Rossi New Term Proposal*". The email set out a potential offer to Mr Rossi. However, as Mr Brown's reply the following day makes clear, there needed at that point to be a discussion within McLaren *"so we can land final plan"* and decide *"how we best handle communications (Lundgaard etc)*" apparently on the basis that Mr Lundgaard would not be involved in the event that the deal with Mr Rossi was agreed.

445. A further email from Mr Kanaan of that date (28 May 2024) in the same chain records that Mr Kanaan was meeting with Mr Siegel's manager, Mr Charles Crews, that day – as well as, separately, with Mr Lundgaard.

446. Subsequently, on 3 June 2024, Mr Ward sent an email to Mr Brad O'Brien, entitled "*Detroit Saturday Notes*". The email indicates that there was a meeting between Mr Ward and Mr Crews, stating that the latter "*didn't scoff at ballpark paying ~$*[REDACTED]*m + ~$*[REDACTED]*m for Juncos in 2025 then McLaren in* [REDACTED]" or *"at ballpark ~$*[REDACTED]*m for 6 car in 2025"*. It is plain, therefore, that Mr Siegel starting to drive for McLaren in 2025 was an option which was under consideration at that point, albeit that it is also clear that both Mr Lundgaard and Mr Rossi remained in contention for a seat in the car since the email went on to state that "*Lundgaard camp are super keen… Rossi is getting… proposal today… I doubt they have a better option than us*".

447. That same day, Mr Brown also emailed Mr Ward regarding a "*driver update tomorrow*". Mr Ward responded, saying that there was not but that he would like to speak for a "*quick touch base on Siegel talks*".

448. The following day (4 June 2024), Mr O'Brien sent an email to various Arrow McLaren recipients (including Mr Kanaan and Mr Ward, but not Mr Brown), attaching an "*NS Proposal*" document based *"as per our conversation today"*. The proposal was a plan to announce Mr Siegel in Car #6 and set out proposed base fees: US$[REDACTED] million in [REDACTED] and US$[REDACTED] million in [REDACTED], with a proposed start date in 2025.

449. Two days later, on 6 June 2024, Mr Kanaan sent Mr Brown, Mr Ward, Mr Barnhart and Mr O'Brien an email. This referred to Mr Kanaan having spent time with Mr Siegel the previous day and to a conversation with Mr Crews. Mr Kanaan's view was that *"our ask was a bit to [sic] high*" and that he would hate for Mr Siegel to walk away from it. The proposal in the email was for revised base fees of US$[REDACTED] million and US$[REDACTED] million in [REDACTED] and [REDACTED] respectively -with a proposed start date of 2025.

450. Mr Brown replied the next day, 7 June 2024, saying *"Got it"* and that he did not want to lose the deal by being "*too greedy*".

451. Mr Ward, then, replied a couple of hours later, noting that the figures were "*in the ballpark*" and setting out some thoughts, including that he *"could be talked into lowering the yr 1 [2025] fee a sniff to help … chances of closing a deal*", and querying whether there needed to be a row in the performance incentives for a "*championship win*".

452. Mr Brown replied, indicating his agreement with Mr Ward's thinking, and Mr O'Brien, then, emailed, later the same day, explaining that he had *"tweaked the proposal"* by amending the performance incentives but making no change in the proposed fees for [REDACTED] and [REDACTED].

453. Mr Brown agreed with Mr O'Brien about this, and the following day, 8 June 2024, which was the day before the Road America Race, Ms Sophie Markakis-Smith emailed updated proposals to the group, which included an 'Executive Summary' of the proposal to Mr Siegel based on the same base fees proposed for both [REDACTED] and [REDACTED] and an addendum to the proposal which introduced a new option for 2024 with base fees payable to Arrow McLaren of US$[REDACTED] million for 2024 from the Laguna Seca Race to the end of the season.

454. Mr Brown approved that proposal, noting that he would be "*expanding [his] wine cellar*", which was obviously a reference to the fact that McLaren would be receiving a substantial amount of money in the event that the proposals were accepted.

455. The next day, 9 June 2024, Mr Kanaan and Mr Ward received a letter from Mr Crews. I will come back to this letter, but for present purposes note merely that it states that the parties are "*close to ascertaining a positive outcome that we believe will lead to a long-term future for Nolan at McLaren"*. The letter, then, stated as follows:

> *"In general, we are accepting of the terms outlined in the* [REDACTED] *apart from a couple small changes. We would like to see the automatic execution of the* [REDACTED] *triggered if one of the following three criteria are met in either* [REDACTED] *or* [REDACTED]*:*
>
> - *Top 10 finish in the IndyCar Championship*
> - *Finishes within 5 positions of the highest finishing McLaren driver in the IndyCar Championship.*
> - *Finishes ahead of at least one full time McLaren driver in the IndyCar Championship.*

We would also like Nolan to receive a base salary of [REDACTED] *per year in* [REDACTED] *and* [REDACTED] *so we can in good faith say that Nolan is a paid McLaren IndyCar driver.*
Outside of this we are accepting of the financial investments required to make these first two seasons possible.
Regarding Addendum 1 this is where some of the more extensive modifications are required. We feel having Nolan take over the 6 car for the remaining part of 2024 is not only a benefit for Nolan but also for the team. It allows everyone a head start into the first full season having gained a vast amount of experience during the remainder of this season that would be otherwise wasted on a driver that wouldn't be returning. The financial outlays required to make the [REDACTED] *and* [REDACTED] *viable are needless to say considerable and a portion of the justification and value surrounding those numbers are based on receiving the remaining portion of this season without increasing the total required outlay. We are however more than willing to accept an additional risk associated with having Nolan take over the entry including guaranteeing the leader circle funds as well as accepting some crash damage liability for the 2024 season. Additionally, we would be fine with beginning the 2025 required investments immediately.*
If these terms are amenable to both of you, we are in a position to commit to McLaren tomorrow morning. I am happy to meet to discuss these points in further detail as well."

456. The addendum accompanying the email from Ms Markakis-Smith was, then, the same day, agreed between Arrow McLaren and Mr Siegel, except with a base fee of [REDACTED] for 2024. The other document – i.e. the underlying proposal for [REDACTED] and [REDACTED] – was agreed without further amendment.

457. It can be seen, therefore, that the decision to hire Mr Siegel was not, as it were, made blind; there was a recommendation from Mr Dean, and Mr Kanaan had also formed a favourable assessment as to his potential. I, therefore, reject the first of the submissions which was made by Mr de Marco in this connection and turn to the second reason why I do not accept Mr de Marco's submission concerning a suggested lack of assessment, specifically the contrast that he sought to draw in the timeline of the decision to hire Mr Siegel's case with that applicable to the decision to hire Mr Lundgaard, in relation to whom McLaren Indy had bought an option in December 2023.

458. Here, some further chronology - concerned with the process of replacing Mr Rossi and only touched upon previously - is required.

459. On 5 October 2023, Mr Brown sent an email to Mr Kanaan, Mr Ward and Mr Barnhart. He told them that he was "*Thinking ahead … no action for the moment … for the 7 car for future*" and that they *"should be thinking about a Month of May decision"*. At this stage, Mr Malukas having already been signed to drive in Car #6 after Mr Palou chose not to join McLaren, three drivers were under consideration for Car #7, namely Mr Lundgaard, Mr Rossi and Mr Ilott. That, indeed, is why the email attached three proposed term sheets, with Mr Brown apparently contemplating changes to Mr Rossi's remuneration (in the event that he were to remain), which would make his salary more performance-orientated. As to Mr Lundgaard, the email recorded that he "*looks pretty good*" but that Rahal Letterman Lanigan Racing ('RLL') wanted him and that, if he continued to perform, *"he becomes pretty hot property"* with CGR and Penske potentially being interested in him. It was for this reason that Mr Brown wanted to "*get*

an option on him". As regards Mr Ilott, he was thought to be the "*highest risk*" since there were concerns about "*his attitude and oval*" abilities. Mr Brown was clear, nonetheless, that he was waiting to "*see how everyone does*".

460. There, then, followed a meeting on or around 16 October 2023 between Mr Brown, Mr Ward and Mr Barnhart, in which the "*current driver market*" was discussed and it was noted, in particular, that Mr Lundgaard would not be on the market for long and raises the possibility of buying an option for him *"for approx.. $200k/$250k"*, with a *"preferable decision"* date of "*June 1st not May 1st, 2024*".

461. This was a few days after, on 10 October 2023, HMD Motorsports had announced that the "*2023 Indy NXT Rookie of the Year Nolan Siegel*" would return to HMD for 2024. At that point, Mr Siegel had finished third in the 2023 Championship, claiming two race victories, five podiums, six top-five finishes, and led 67 laps, earning his 'Rookie of the Year' status. The announcement noted that Mr Siegel would "*now be looking to follow in the footsteps of HMD Motorsports alumni who are now full-time NTT INDYCAR SERIES competitors*".

462. On 8 November 2023, Ms Bowden sent Mr Brown an email headed "*Christian Lungaard*", which attached certain draft agreements. Ms Bowden asked Mr Brown what his thinking was on drivers - specifically whether he was considering Mr Lundgaard as either a "*DM or AR replacement*". Mr Brown responded the same day: "*Ar [sic] replacement. But im [sic] still thinking*".

463. On 25 November 2023, Mr Brown sent an email to Mr Rick Gorne, Mr Lundgaard's manager, stating "*Intention is car 7*" in response to a query raised in an email the day before by Mr Gorne as to why the draft driving agreement referred to Car #6 and pointing out that that was *"Malukas car"*.

464. Thereafter, on 7 December 2023, McLaren Racing's board met, the minutes recording that the "*2025 driver decision is to be made by the time of the 2024 Indy500 for the No.7 car of Alex Rossi*" and that "*options were in the process of being put in place for the services of Christian Lundgaard and Callum Ilot for the car in 2025*".

465. Shortly after that, on 12 December 2023, McLaren entered into an agreement pursuant to which they had an option in respect of Mr Lundgaard's services, exercisable by 1 June 2024.

466. Pausing there, at this stage it is clear that McLaren had only been looking to fill one seat, namely Car #7. This changed, however, when, on 11 February 2024, Mr Malukas suffered his wrist injury and was unable to drive – his contract subsequently being terminated on 28 April 2024. That is why, shortly after Mr Malukas' accident, on 4 March 2024, McLaren Indy entered into an option agreement with Mr Ilott, and it was shortly after that, on 15 March 2024, that Mr Siegel raced and won in the St Petersburg race in the Indy NXT series, breaking the track record in the course of doing so.

467. This was followed, on 28 March 2024, by Mr Siegel, then, making his debut in the Thermal Club US$1 Million Challenge – a so-called 'purse' race, where drivers can win money, but where the points do not go to their championship standings – racing for Dale Coyne Racing. Whilst Mr Siegel qualified in twelfth position out of fourteen, he

was what was described in an article concerning the race as a "*rapid charger*", finishing the race in seventh place.

468. This was followed, in turn, on 19 April 2024, by Mr Siegel being signed by United Autosports, two days later competing in the Long Beach race, where he started at 27th and finished at 20th, beating a number of drivers including Mr Lundgaard (who had started in 7th place and finished 23rd) and coming just four places below Mr O'Ward.

469. By 2 May 2024, it was announced that Mr Siegel had landed the United Autosports ride for Le Mans and it was also reported that Mr Siegel was being given the opportunity to qualify with Dale Coyne Racing for the Indy500, which was due to take place on 26 May 2024. The article quotes Mr Dean as saying:

"*I've been watching Nolan since he came into LMP2 … His progression has been seriously impressive through to INDY NXT and now his INDYCAR testing*".

470. In the meantime, ahead of both Le Mans and the Indy500, Arrow McLaren signed Mr Pourchaire to drive for them in all races in 2024 except the Indy500.

471. On 8 May 2024, Mr Kanaan sent a proposal for a potential contract with Mr Rossi, prompting Mr Brown to raise budgetary concerns in respect of the proposal.

472. On 19 May 2024, Mr Siegel took part in qualifying for the Indy500 with Dale Coyne Racing. Whilst he crashed out of the qualifying race, he nonetheless impressed Mr Kanaan – so much so that, as Mr Marks put it and as was reported in the press at the time, Mr Kanaan *"went down to the pit wall with his arm around Nolan"* and had a *"private chat"* with Mr Siegel. One article, indeed, records that Mr Kanaan was "*struck by the 19-year-old driver's composure throughout Indy's pressure*" and considered "*the way he handled himself following the crash*" to speak volumes, Mr Kanaan noting that "*I've been in that position, and I was seven years older than him … that kid showed me how strong he is in the head*". The article goes on to state that, after the race, Mr Kanaan went to Mr Ward and said "*you've got to trust me on this. I'll put my job on the line, but I know what I'm doing*", in respect of his proposal to put Mr Siegel in Car #6.

473. The reason for setting out this brief chronology is that it can be seen from it (as well as from the chronology set out a little earlier) that Mr Brown intended to make his decision on driver selection for Car #7 in May 2024, having, in the meantime, entered into option agreements in respect of Mr Lundgaard and Mr Ilott. It is also clear that, as Mr Goulding submitted, Mr Siegel only came on to Mr Brown's radar relatively shortly before he had planned on making a decision. That is why Mr Siegel was not previously, in late 2023, under consideration alongside Mr Lundgaard and Mr Ilott; it was not because he was regarded by McLaren (and Mr Brown) as not being good enough to drive for the Arrow McLaren team.

474. The chronology also shows why Mr Brown considered that he did not have the luxury of time to assess Mr Siegel more fully. As he explained (and I accept), he had "*to react to the cards"* that he and McLaren had been dealt when Mr Siegel came on the scene. The fact that, in relation to Mr Siegel, Mr Brown/McLaren did not carry out the type of detailed assessment that was undertaken in relation to other drivers should not, therefore, be taken as meaning that Mr Brown/McLaren were not interested in Mr

Siegel's driving abilities and only interested in the fact that he (or his father) would pay for him to drive. That was a factor - hence Mr Brown's reference at one stage to expanding his wine cellar - but I am satisfied that it was not the only factor at play, and I reject the suggestion that Mr Siegel's driving ability and potential were essentially disregarded in the face of the money that was to accompany him when he joined the Arrow McLaren team.

475. There is a further point here that should also be mentioned. This is, thirdly, that Mr de Marco's submission as regards assessment (or lack of it) in relation to Mr Siegel assumes that Mr Siegel would not have performed well if there had been more time available to allow him to be tested more fully. As Mr Goulding observed, however, there is no reason – other than through hindsight, now knowing how Mr Siegel has since fared – to suppose that Mr Siegel would have done poorly. Indeed, even taking into account how Mr Siegel has performed to date, it cannot yet be known how well he will do in the future. Mr Palou himself finished only 16th in his rookie season with Dale Coyne Racing. Furthermore, Mr Jakobi explained that:

"*you have to give him another year to see, because a lot of rookies end up doing better in their second year than their first year. That can happen once they become more familiar with everything*".

I am, accordingly, less than convinced that Mr Siegel would have done badly had he been assessed more fully by McLaren prior to his being signed.

476. I turn to the second reason put forward by the Defendants why they say that Mr Siegel would not have been hired by McLaren in the counterfactual. This is that McLaren would not have risked jeopardising either the renewal of the entirety of RJV's primary sponsorship of Car #7, or at least a renewal with the level of base fees ultimately agreed, by placing a low calibre driver like Mr Siegel into Car #7.

477. Mr de Marco made the point that RJV is the primary sponsor of Car #7 and McLaren Indy's most valuable sponsor in monetary terms. He highlighted, in this connection, that driver competence was of particular importance to RJV, as demonstrated by the fact that its sponsorship agreement with McLaren provided expressly that:

"In recognition of Sponsor's importance and interest in strong Driver performance, McLaren will discuss with Sponsor at the Parties' quarterly steerco meetings, with a standing agenda item to be added to this effect."

478. Mr de Marco went on to observe that, when it was put to Mr Brown that driver competence is of particular importance to this sponsor, his response was "*Of course*". He, then, stated that RJV nonetheless "*wouldn't care*" if McLaren hired a pay driver, only subsequently to say this when I asked whether a sponsor would be concerned to know that McLaren had a driver who was paying to drive:

"A. No. As long as they felt comfortable, which would be the case, that it was a performance-driven decision and opportunity, the fact that there was incremental revenue, they'd be happy for us. There's more money to invest in the team.
...

MR JUSTICE PICKEN: But what you're saying is the sponsor would be aware of that, fine, but would weigh against that the assessment that McLaren has made as a team that, yes, this is an appropriate driver to put in the car.
A. Correct."

479. Mr de Marco also noted that RJV was interested in understanding who Mr Lundgaard was when it became clear that McLaren had decided to place him in Car #7 in early July 2024, with a Microsoft Teams call taking place between McLaren and RJV on 3 July 2024 which was followed by an email from Ms Gaudion at McLaren to RJV that set out information about Mr Lundgaard's credentials as a driver. That interest continued, judging from certain slide-decks which were disclosed towards the end of the trial. These show RJV being kept informed about drivers' performance and also demonstrate that RJV and McLaren were engaging in relation to drivers being involved in RJV's sponsorship activities.

480. Mr de Marco submitted that, in view of this evidence, the Court should not accept the evidence given by Ms Mras, in her witness statement, that:

"*The selection of the driver for IndyCar races is a matter for McLaren. We defer to the judgment of the team as to who should drive our branded car … I do not recall us expressing any views on or being involved in any driver selection decisions".*

He suggested that what Ms Mras was there saying, maintained in cross-examination, is at odds with the terms of the RJV Agreement and the exchanges referred to above. It is also inconsistent, he submitted, with the evidence given by Mr Dennington that regular bilateral steerco meetings occurred. Mr de Marco also suggested that Ms Mras likely had no personal involvement in discussions about driver selection because that does not form part of her role at RJV, and so what she had to say should be viewed with some caution. Ms Mras herself accepted, in particular, that she was not the main point of contact with McLaren and that instead there was "*an operational team that supports the sponsorship"*, and she was not copied into any of the disclosed email exchanges between McLaren and RJV.

481. Although, as previously explained, I did not find Ms Mras to be an entirely satisfactory witness and although I consider that Mr de Marco was probably right to submit that she herself had only limited direct and personal involvement in relation to McLaren, hence her not being at meetings and not being copied into correspondence, nonetheless it does not follow that what she had to say about RJV deferring to McLaren in relation to driver selection was wrong. On the contrary, it is clear to me that that is precisely the position since this is what both Mr Brown and Mr Dennington stated in their evidence, and I accept that evidence. Mr Brown was very clear that he was the relevant decision-maker and that, whilst RJV had the contractual right to be consulted, "*ultimately, yes, it's my decision*". He explained that, unlike other sponsors, "*RJ Reynolds lets [sic] us make the driver decisions*". Mr Dennington said the same:

"they've always taken the lead from Zak in terms of … Zak identifying those drivers … certainly through, you know, the six years I have been involved with them".

482. The fact that Ms Mras did not sit on the bilateral steerco and plainly, as Mr de Marco submitted, had only limited direct personal involvement with McLaren is, in the

circumstances, not critical. In any event, Ms Mras explained that she had "*spoken to the team that manage this and there have been no indication and no communication regarding driver selection or interventions on the Reynolds side*". The steerco slide decks do not contradict that evidence; they show that drivers and meetings with drivers are matters of interest, but they do not document any threat to withdraw sponsorship or refusal to accept a particular driver. The contractual provisions on which the Defendants rely are entirely consistent with a title sponsor wishing to be kept informed about performance and to have structured engagement with the team; they are not, in or of themselves, evidence that RJV would exercise a veto over a driver who, in McLaren's judgment, was an appropriate appointment.

483. Whilst it would, perhaps, have been preferable if one of that team had given evidence on this issue rather than Ms Mras, it should be borne in mind that Ms Mras was only called by McLaren in response to a late application to re-amend, and so it would not be right to criticise McLaren on this aspect.

484. Accordingly, I reject Mr de Marco's ultimate submission that McLaren would not have hired Mr Siegel in the counterfactual because of a concern that they would have had push-back from RJV, risking the non-renewal of RJV's sponsorship deal or bringing about a reduced level of sponsorship. I am clear, on the contrary, that there would not have been any such push-back.

485. Turning to the Defendants' third reason, this is their contention that McLaren would not have recruited Mr Siegel to Car #7 in the counterfactual because the opportunity for Mr Siegel to start with Arrow McLaren mid-season in 2024 was key to securing him at a time when other teams were courting him. In this context, Mr de Marco referred to a number of documents, several of which I have previously mentioned. The most significant, however, is the letter from Mr Siegel's management dated 9 June 2024, and the passage previously quoted which begins with the words *"Regarding Addendum 1 this is where some of the more extensive modifications are required …"* - "*Addendum 1*" being a reference to a proposal put forward by McLaren which related specifically to 2024.

486. It was the Defendants' position that, had McLaren not offered Mr Siegel a seat partway through the 2024 season, then, it is likely that he would have signed a multi-year contract with Juncos Hollinger Racing, for whom Mr Siegel had driven at the Road America on 9 June 2024; alternatively, Mr Siegel would have driven for McLaren but in exchange for lower fees. Alternatively, Mr de Marco submitted that, even if the Defendants are wrong about this and Mr Siegel was willing to start in 2025, then, the evidence is nonetheless clear that McLaren only ever considered him for Car #6. That is despite McLaren having the more obvious and immediate need to fill Car #7 for the 2025 Season, given Mr Rossi's contract was expiring at the end of the 2024 Season. If the possibility of creating a mid-season opportunity for Car #6 was not part of McLaren's reasoning, Mr de Marco submitted, then, it is difficult to understand why Mr Siegel was only ever considered for Car #6. The reason, Mr de Marco suggested, is that McLaren saw some other impediment to putting him in Car #7 and that impediment was that they knew RJV would not be happy with Mr Siegel either on performance grounds or his age given the products that they manufacture (the issue to which I will shortly come).

487. I do not accept these submissions for various reasons.

488. First, I agree with Mr Goulding when he submitted that it is clear from the documents that Mr Siegel's decision to join Arrow McLaren was not dependent on his starting to drive for McLaren in the 2024 Series. On the contrary, it is clear that McLaren made proposals to Mr Siegel's representatives that were based on a 2025 start, and that Mr Siegel was prepared to accept those proposals, with only minor amendments required, for example, for performance incentives.

489. Secondly, as to the letter from Mr Crews on 9 June 2024, there was nothing *"decisive"*, the description coined by Mr Steadman, about what was stated in it concerning the availability of what was left of the 2024 Series when it came to Mr Siegel's decision to join McLaren. The letter opens by noting that the parties were *"close to ascertaining a positive outcome"* for Mr Siegel's *"long-term future at McLaren"*. The letter is, then, divided into two main sections: the first addresses the core [REDACTED] proposal; the second deals with Addendum 1 for 2024. In the first section, the letter states that Mr Siegel is *"accepting of"* the [REDACTED] terms *"apart from a couple of small changes"*: one adjusting the performance trigger for the [REDACTED], and another proposing a modest base salary of [REDACTED] per year. The letter, then, records that, *"outside of this"*, Mr Siegel was *"accepting of the financial investments required to make these first two seasons possible"*. This language is unambiguous: it evidences a clear in-principle agreement to the [REDACTED] figures (substantial funding commitments from Mr Siegel), subject only to certain points and without any qualification linking Mr Siegel's acceptance to 2024.

490. Although in oral closing Mr de Marco explained that he no longer maintained this *"was a particularly strong argument"*, the Defendants (at least until then) suggested that the first section of the letter must be read in light of the second section, Mr de Marco noting that the letter describes the 2024 programme as *"not only a benefit for Nolan but also for the team"* and explains that it would provide a *"head start into the first full season"* and would avoid experience being *"wasted"* on a non-returning driver. They relied upon the fact that the letter goes on to state:

> *"The financial outlays required to make the* [REDACTED] *and* [REDACTED] *viable are needless to say considerable and a portion of the justification and value surrounding those numbers are based on receiving the remaining portion of this season without increasing the total required outlay."*

The Defendants also highlighted how the letter, then, proposes amendments to the addendum to avoid *"significant additional sums"* for 2024 and offers that the Siegel camp would be *"fine with beginning the 2025 required investments immediately"*. Mr de Marco's (at least one-time) submission, in the circumstances, was that the letter ties a portion of the [REDACTED] *"justification and value"* to the 2024 opportunity. He submitted that, absent participation in the 2024 Series, Mr Siegel would not have been able to justify the full scale of the [REDACTED] commitments.

491. I do not agree about this. I am clear that the availability of 2024 driving was not decisive as regards Mr Siegel's decision to join McLaren. I say this for a number of reasons.

492. First, the letter plainly shows that the parties agreed terms of a proposal premised only on [REDACTED] to [REDACTED] driving, subject to a "*couple small changes*". This conclusion is strengthened by the fact that the executed agreement reinforces this reading. The original 2025-only draft totalled approximately US$[REDACTED] million. The final deal incorporated 2024 at a US$[REDACTED] million base fee, left the [REDACTED] figures substantially unchanged (save for the agreed tweaks) and resulted in an overall commitment of US$[REDACTED] million (net of the modest salary). If the 2024 Series justified or preserved the [REDACTED] Series outlays, then, its inclusion should have maintained or increased the total, not diminished it.

493. Secondly, as Mr Goulding submitted, nor does the idea that Mr Siegel was insistent on 2024 driving find support in the witness evidence. For example, Mr Brown was clear that – before discussions regarding Mr Siegel driving in the 2024 season arose – Arrow McLaren had in fact "*made the decision to just start in 25 and put [Siegel] on a testing programme*". When pressed on that position in cross-examination, Mr Brown's evidence was that he was "*positive*" that this was the plan where he was the "*decision-maker*". Mr Brown was similarly clear that there were no real hardlines in the discussions: "*all these things are negotiable, and I'm sure if he was presented with a ride for McLaren in 2025 we would have been able to come to that arrangement*".

494. Thirdly, I agree with Mr Goulding also that it is appropriate, if not essential, to consider the inherent probabilities of the position. For example, it was put to Mr Brown in cross-examination that Mr Siegel may have received another offer (e.g. Dale Coyne or Juncos Hollinger) from a team to go racing in 2024 and would then have been unavailable to Arrow McLaren. However, the Defendants' own evidence is that those teams are not competitive in the IndyCar Series as compared to other teams such as CGR, Penske, Arrow McLaren and Andretti. It is, therefore, somewhat unlikely that Mr Siegel would have foregone the opportunity to race for Arrow McLaren in favour of a much less competitive team simply on the basis that he would thereby receive what Mr Goulding described as a *"modest head start"* in driving in some additional races in the 2024 Series. Moreover, it is particularly unlikely that he would have entered into long-term contractual arrangements with another (lower-ranked) team that would prevent Arrow McLaren from signing him, which he knew it was willing to do for 2025. It is, in short, highly implausible, especially given the level of financial backing which Mr Siegel brought, that he would have agreed a short-term deal for the 2024 Series only with another team, before driving for Arrow McLaren in the 2025 Series.

495. I come on, next, to address the Defendants' case that McLaren Indy would not have placed Mr Siegel into Car #7 in the counterfactual because McLaren Indy and/or RJV would have appreciated the obvious risks to which this would have given rise, in circumstances where this would have involved the association of a driver under the age of 21 with a nicotine product which could not legally be purchased by those under the age of 21.

496. Mr de Marco speculated in closing that McLaren had ignored this problem when they first asserted that Mr Siegel could (and would) have been hired for Car #7, going on to submit that, if the idea that Mr Siegel would be recruited as the driver of Car #7 had ever been seriously suggested *"in the real world"*, then, the risks of this approach would have been raised and the idea would have been *"put immediately to bed"*. Those risks, Mr de Marco suggested, would have included a risk that RJV and/or McLaren would

have suffered adverse reputational consequences; that IndyCar LLC (as the sanctioning body of the IndyCar Series) would have refused to approve VUSE or VELO branding across Car #7 if it was being driven by Mr Siegel; and that the US Food and Drug Administration (the 'FDA') would have viewed the association of Mr Siegel with a car bearing VUSE or VELO branding as marketing to persons under the age of 21, and on that basis would either have declined to grant RJV's Premarket Tobacco Product Application ('PMTA') in respect of VELO which is currently pending or would have taken steps pursuant to the authorisation order made in respect of certain VUSE products to further restrict RJV's capacity to market that product.

497. As to this, Mr de Marco explained that, since December 2019, US federal law has prohibited retailers from selling "*tobacco products"* to persons under the age of 21 by virtue of section 906(d)(5) of the Federal Food, Drug and Cosmetic Act (the 'FD&C Act') (21 U.S.C. §387f(d)(5)), which is in these terms:

"*It shall be unlawful for any retailer to sell a tobacco product to any person younger than 21 years of age."*

For this purpose, section 201(rr) of the FD&C Act defines "*tobacco product"* to mean "*any product made or derived from tobacco, or containing nicotine from any source, that is intended for human consumption, including any component, part, or accessory of a tobacco product (except for raw materials other than tobacco used in manufacturing a component, part, or accessory of a tobacco product)"*.

498. The words "*or containing nicotine from any source"* were inserted into the definition of tobacco product with effect from April 2022 pursuant to section 111 of the Consolidated Appropriations Act 2022. The aim of this amendment was to extend the legal regime to products containing synthetic nicotine, in light of concerns about increasing use by youth of these products.

499. The FDA has a parallel regulatory jurisdiction by which it can control and regulate the marketing of "*tobacco products"* (which bear the same meaning as under the FD&C Act). The core statutory provisions which confer that regulatory jurisdiction on the FDA are sections 901(b) and 910 to 911 of the FD&C Act (21 U.S.C. §§387a(b), 387j – 387k). For present purposes, the key aspects of that regulatory regime are as follows.

500. Manufacturers of new tobacco products or modified risk tobacco products must submit a PMTA to the FDA, new tobacco products meaning products not commercially marketed in the US as at 15 February 2007 or which are modified after that date (section 910(a)(1)). Modified risk tobacco products mean any tobacco product that is sold or distributed for use to reduce harm or the risk of tobacco-related disease associated with commercially marketed tobacco products (section 911(a) and (b)(1)). Section 910 governs new tobacco products, and the requirement for a PMTA is found in section 910(2). Section 911 governs modified risk tobacco products, and the requirement for a PMTA is found in section 911(a) read with 911(g).

501. Tobacco products that were brought within the scope of the FDA's regulatory power by reason of the April 2022 widening of the definition of "*tobacco product"* can continue to be marketed whilst a PMTA is pending, provided that this PMTA was filed

within 60 days of the relevant statutory amendment. See section 111(d) of the Consolidated Appropriations Act 2022.

502. The FDA must deny a PMTA in respect of a new tobacco product if it finds that one of four express conditions are satisfied set out in section 910(c)(2). The FDA may only grant a PMTA in respect of a modified risk tobacco product if it is satisfied that the conditions in section 911(g)(1)(A) and (B) are met - i.e. that the product will significantly reduce harm and the risk of tobacco-related disease to individual tobacco users, and benefit the health of the population as a whole taking into account both users of tobacco products and persons who do not currently use tobacco products. Additional mandatory conditions are listed in section 911(g)(2)(B).

503. In granting a PMTA, the FDA may restrict the advertising and promotion of the tobacco product concerned (sections 910(c)(1)(B) and 911(h)(5)). In respect of modified risk tobacco products, the FDA can require manufacturers to engage in post-market surveillance and studies to look at consumer perception, behaviour and health (section 911(h)(i)).

504. The FDA also has the power to keep the authorisation of any tobacco product under review, and to withdraw any marketing authorisation order (section 910(d) and section 911(j)). Marketing authorisation orders for modified risk tobacco products are in any event limited to 5 years in length and then need renewal (section 911(g)(C)(i)).

505. Mr de Marco submitted (and I agree) that it is to be inferred that, given their nature, both the VUSE and VELO products constitute *"modified risk tobacco products"* within the meaning of section 911 of the FD&C Act. That is presumably why RJV has obtained a marketing authorisation order in respect of certain of its VUSE products and conducts a post-market surveillance with respect to those.

506. In 2023, the FDA refused to authorise certain other VUSE products and issued Marketing Denial Orders ('MDOs') in respect of the same. The FDA's press release announcing that decision explaining that the FDA determined that "*evidence submitted by the applicant did not demonstrate that the menthol- and mixed berry-flavored products provided an added benefit for adults who smoke cigarettes - in terms of complete switching or significant smoking reduction - relative to that of tobacco-flavoured products that is sufficient to outweigh the known risks to youth"*.

507. The effect of the decision was that the relevant products "*cannot be legally introduced into interstate commerce in the U.S. If the product is already on the market, it must be removed from the market or risk FDA enforcement*".

508. The refusal is the subject of a pending appeal by RJV. In addition, RJV has a pending PMTA in respect of its VELO product, which is an oral nicotine pouch product.

509. On 16 January 2025, the FDA authorised the marketing of an oral nicotine pouch product named 'ZYN'. The FDA's press release referred to this being the first time that it had authorised nicotine pouches. It is clear that the regulatory concern is avoiding uptake by young people. The FDA imposed wide-ranging obligations on ZYN which are designed to facilitate the FDA's monitoring of all advertising, marketing, or

promotional activities relating to the product – specifically, to ensure that the product is only targeted and promoted to those over the age of 21.

510. Mr de Marco also drew attention to the fact that McLaren Indy must comply with the provisions in the IndyCar Series Official Rulebook (the 'Rulebook'), Rule 13.2.2 of which provides that:

"*Advertising may not be displayed until it has been approved by INDYCAR. INDYCAR may disapprove advertising for any reason, including, without limitation, advertising which it determines is offensive, inappropriate, illegal, undignified ... or may detract from the interest in any Event and/or the integrity of INDYCAR and/or the NTT INDYCAR SERIES".*

Accordingly, IndyCar LLC must pre-approve all advertising displayed on car or driver livery by McLaren Indy.

511. Furthermore, paragraph 1.1.1.2 of the Rulebook stipulates that, if a member has any doubt about whether something is compliant with the Rulebook, the onus is on them to raise that doubt and obtain express written approval:

"*If a Member is uncertain if an act and/or part violates a Rule, the burden is on the Member to receive pre-approval in writing from INDYCAR. For this purpose, emails are not written approval unless otherwise expressly permitted and specified by INDYCAR by bulletin. The Member assumes the risk of non-compliance".*

512. Mr de Marco went on to submit that IndyCar drivers are closely associated with the car that they drive in the sense that each driver is assigned to a particular car and they do not normally change car. To that end, IndyCar produces *"spotter guides"* showing drivers alongside their car, with the primary sponsor logo visible on each sidepod, to enable racegoers to find their preferred driver. Also, the FOX Sports coverage of each race superimposes graphics over the race footage to ensure that the audience understands which driver is driving each car, in a way that enables an association between driver and the sponsors visible on their car, firesuit, and helmet. Indeed, the FOX broadcasts open with a *"Starting Grid"* featurette in which each driver appears and introduces themselves alongside an image of their car with the primary sponsor logo visible for the audience to see.

513. This association between car and driver, Mr de Marco submitted, would give rise to an obvious risk if McLaren were to have put Mr Siegel in Car #7 for the 2025 Series in circumstances where the primary sponsor of Car #7 was RJV and the sidepod of the car (the most prominent spot on the car livery) displayed VUSE or VELO branding. That, in Mr de Marco's submission, is because the livery would likely not have been approved by IndyCar LLC on the grounds that this would be "*inappropriate"* and/or would detract from the integrity of the Series, because it would be tantamount to using an under-21 year old to promote products which they are too young to purchase; and/or the FDA would likely consider this to be inappropriate advertising/marketing/promotion of the VUSE or VELO product, because of the inevitable association with a young driver and the greater propensity for young drivers to appeal to under-21s (with the result that the FDA might either take steps to withdraw marketing authorisation orders already granted in respect of such products, or refuse

PMTAs still pending); and/or McLaren and/or RJV would likely face reputational backlash from other sponsors (and the public) not wanting to be associated with a team that uses younger drivers to promote nicotine products given the legal and regulatory sensitivities around the same. As a result of all of the above risks, Mr de Marco submitted, McLaren likely could not, and would not, have placed Mr Siegel in Car #7 in the counterfactual.

514. I disagree with Mr de Marco about this for reasons which I set out below, and which largely tally with the submissions that were made by Mr Goulding on this aspect.

515. First, I am not persuaded that RJV would have prevented Mr Siegel from driving in Car #7 because it was carrying 'VUSE' or 'VELO' branding and Mr Siegel was under the age of 21. Although the position might seem somewhat counter-intuitive, it is nonetheless clear that RJV distinguishes between the driver and the car: the driver does not wear anything with RJV branding, whereas it appears that in RJV's eyes the car operates, as Mr Dennington put it in his witness statement, as "*similar to a billboard*". RJV will not use any athlete or celebrity to promote their products, however old (or, indeed, young) they are, and so in RJV's eyes the fact that, in the counterfactual, Mr Siegel would have been driving Car #7 (the car sponsored by RJV) is irrelevant. This is not only clear from what Ms Mras and Mr Dennington had to say, but also from RJV's marketing guidelines since they stipulate that "*the use of celebrities/other persons judged to have special appeal*" is not permitted. This is what Ms Mras was referring to when she described, in cross-examination, RJV as having a strict policy where they "*do not feature any celebrities, athletes, influencers or famous people in any of [its] marketing materials*". As she later put it:

"I can tell you right now that there would be zero chance that as an organisation we would ever use a celebrity, an athlete or a famous person in any of our marketing materials. That is a categorical statement and not influenced by age".

Ms Mras went on to explain that:

"we apply no product branding to the driver themselves. We have taken that specific line of demarcation in our marketing principles. That is our approach".

She added:

"that line has been drawn to also include the materials that they wear, specific to this partnership. So we have opted to use corporate branding and therefore not product specific branding. The product specific branding is limited to the vehicle itself".

516. Mr de Marco dismissed the distinction drawn by Ms Mras in view of what he suggested is an obviously close association between the car and the driver assigned to that car. He highlighted, in particular, as he had done also when he cross-examined Ms Mras, the fact that spotter guides are prepared by IndyCar for each race and these (at least the website versions do) identify the cars racing with an image of the car along with images of the respective drivers. He highlighted also the fact that for the 2025 Series all IndyCar races were broadcast through FOX and, at the beginning of each race, the drivers introduce themselves with an image of their car superimposed behind them. The fact remains, however, that in none of those images was any IndyCar driver wearing or

carrying any RJV product-specific branding, underlining the fact that there is (at least in RJV's eyes) the distinction that Ms Mras described. Furthermore, what Ms Mras had to say was consistent with Mr Dennington's evidence, when cross-examined, that, in his experience, RJV "*haven't marketed the athletes*" and instead "*market the car*", and so that RJV distinguishes "*between the car and the athlete"*. Mr Dennington added that he and McLaren rely on BAT / RJV to know where lines and limits should be drawn in terms of policy as they are the "*specialists*" in the field. As he put it:

"*No one wears it on their overalls and it's just a policy that they've always had with us… they don't allow drivers or celebrities to market their brands*".

He added:

"*I don't make that distinction. This is something BAT and RJV do. They understand the regulation and what is appropriate… we take the lead from BAT and RJV's legal counsel, legal teams"*.

Like Mr Dennington, Mr Brown and Mr Dos Santos were also clear that RJV itself was responsible for ensuring that the approach complied with relevant laws regarding the marketing and advertising of nicotine.

517. There is, however, a further point to be made here. This is the fact that RJV has previously approved Mr Siegel to drive a car sponsored by VELO. This was explained by Mr Dennington in his witness statement, where he described that for the 2025 Series McLaren Indy had entered into parallel rights swap agreements with RJV and SmartStop in respect of several races. That was because RJV cannot put branding on the car for races in Canada, which happens to be a key market for another sponsor, SmartStop.

518. As a result of the switch, RJV's VELO branding was applied to Mr Siegel's Car #6 for the Sonsio Grand Prix, as can be seen in the spotter guide from that race. As to this, Mr Dennington was clear that RJV would have flagged any issue, had RJV been uncomfortable with Mr Siegel driving in a VELO branded car whilst he was under 21. He said:

"*BAT or RJV know the regulation and they would have flagged something if they're uncomfortable with it"*.

He added that, as far as he understood matters, "*[RJV] knew [Siegel] was in their car at the Sonsio Grand Prix and they were fine with it*" and that the Sonsio Swap was *"approved and signed off and you know we followed BAT's lead on that*".

519. Mr Dos Santos also gave evidence, in which he stated that RJV had specifically approved the arrangements for the Sonsio Grand Prix, adding, although admittedly only in re-examination, that he had checked the position with Mr Rhinesmith:

"*I checked with him and he consulted with Mr Austin DeLucia and I posed the question "It's okay to submit this livery for the #6 car?" He confirmed "yes I already spoke to Austin. As long as the driver is – well, as long as there's no logo going on the fire suit*

or the helmet" it's fine for us to continue with the car the way it is, even if the driver is under 21".

Mr de Marco was critical of Mr Dos Santos. He pointed out that, although he was the individual within McLaren who was responsible for obtaining IndyCar LLC's approval for the livery designs, nonetheless he was unaware of the relevant provision in the Rulebook. He also highlighted how Mr Dos Santos' evidence was that he became involved in these proceedings in January 2025, and it was at that point that he became aware of what he called "*RJV's approach to driver branding or on-car advertising".* Mr de Marco submitted that the Court should, in the circumstances, infer that McLaren understood as early as January 2025 that the RJV sponsorship of Car #7 might pose a problem for its proposed counterfactual, and so decided not to draw the matter to IndyCar LLC's attention in April 2025 when it was seeking livery approvals because they were concerned about the answer they might get. This, Mr de Marco suggested, is supported by the following exchange with Mr Dos Santos:

"Q. Third proposition, if McLaren had raised properly the question of Nolan Siegel's age in respect of the Sonsio Grand Prix livery, there's at least a possibility that IndyCar might have objected to it.

A. There was a possibility, probably, yes."

520. I reject this submission and the associated submission that the change involving Mr Siegel might have been made at the last minute and without RJV's careful consideration. As to the latter, Mr Dennington was clear (and I accept) that:

"*I don't know the exact timing, but I believe it was, you know, a number of weeks in discussion. I don't believe it was a last minute thing*".

As to the former, there is, in truth, nothing to support the suggestion that IndyCar would not have permitted Mr Siegel to drive Car #7 when he was under 21 insofar as the car was carrying VUSE or VELO branding, and so McLaren chose not to bring Mr Siegel's age to IndyCar's attention as part of the livery approval process. The simple fact is that Mr Siegel is widely known to be a young driver (as Mr Marks accepted): his age was provided to IndyCar when he was licensed as a driver, and his date of birth appears on IndyCar's website. IndyCar also knew full well that McLaren's proposal was to put VELO branding on both Car #6 and Car #7. IndyCar, therefore, knew all that needed to be known for relevant purposes. There is no reason to suppose that the position in the counterfactual would have been any different than it was in the actual scenario: the approval process would have occurred in the same way. The fact that this process was completed without incident for the Sonsio Grand Prix demonstrates that the same would, in all likelihood, have been true in the counterfactual for other races in the 2025 Series. Put shortly, the Sonsio Grand Prix shows that there is no reason to suppose that in the counterfactual there would have been any impediment to Mr Siegel driving Car #7 – whether from RJV or from IndyCar.

521. It should be noted also that the rights swap agreement applies not only for the 2025 Series but also for future Series, meaning I agree with what Mr Goulding submitted, that RJV should be regarded as being not only content in respect of the Sonsio Grand Prix but also going forwards that Mr Siegel should drive a VELO-branded car notwithstanding his age.

522. It is, in the circumstances, unnecessary for me to consider McLaren's alternative case that, even if Mr Siegel would not have driven in the counterfactual, nonetheless still the payments made by Mr Siegel (or on his behalf) in 2025 and 2026 do not fall to be set off against McLaren's losses because there is an insufficient causal nexus between the Defendants' breach and those payments.

523. This is a case which entails reliance, principally at least, on what the Supreme Court had to say in ***Fulton Shipping***, in particular that it is not sufficient for present purposes if the breach has merely provided the occasion or context for the innocent party to obtain the benefit or merely triggered him doing so, and nor is it sufficient merely that the benefit would not have been obtained but for the breach, since benefits flowing from a step taken in reasonable mitigation of loss are to be taken into account only if and to the extent that they are caused by the breach.

524. It was Mr Goulding's submission that in the present case the payments received by McLaren Indy in respect of Mr Siegel were not caused by the Defendants' breach but were, rather, obtained as a result of an independent decision by McLaren to recruit a driver who (or on whose behalf) a financial contribution was made, and that decision was not directly caused by the Defendants' breach.

525. This is not a submission that I can accept. The reason is simple. If Mr Siegel would not have been hired in the counterfactual, then, the fact that he was, in fact, hired (in the actual) must have been because there was a void left by Mr Palou's decision not to join McLaren Indy after all. It does not matter that, instead of being paid by McLaren Indy to drive, he (or his father) paid McLaren Indy to be permitted to drive; all that matters is that he became a member of the Arrow McLaren team in the circumstances that he did. Indeed, as Mr de Marco observed, McLaren accept that the recruitment of Mr Siegel as a replacement driver for Mr Palou amounted to an act of mitigation. As such, McLaren accept that it is appropriate that credit must be given for payments received in respect of him for the 2024 season (as well as money derived from Mr Siegel's on-track performance such as, for example, Leader's Circle payments made to McLaren Indy). Given this, there is no reason why McLaren should not also give credit for the payments received in respect of Mr Siegel for subsequent seasons.

526. Nonetheless, for reasons previously explained, specifically my conclusion that the Defendants have not shown that Mr Siegel would not have driven Car #7 in the counterfactual, I reject the Defendants' case that it is incumbent upon McLaren to give such additional credit. It follows that McLaren need not give the additional credit that the Defendants have submitted they should.

The wasted expenditure claim

527. I turn now to the first of two alternative cases which are put forward by McLaren. This is a claim for allegedly wasted expenditure amounting to US$1,103,452, consisting of US$400,000 paid to Mr Palou by McLaren as a 'signing-on bonus' pursuant to clause 3.1.1 of the AP Driving Agreement and US$703,452 in relation to the costs incurred by McLaren Racing in running TPC days attended by Mr Palou in Barcelona (on 15 and 16 September 2022), Austria (6 October 2022), and Budapest (8 June 2023).

528. This is a claim which is advanced in the alternative to McLaren Racing's loss of profits claim. There is no issue about this since, as Mr de Marco explained, the revenue from which the costs alleged in the context of the claim to have been wasted would have been recouped from the monies which McLaren Racing allege it would otherwise have achieved in the counterfactual. As it is put in *Chitty on Contracts* at paragraphs 30-32:

"*... the claimant should not recover both his gross return or profits expected under the contract ... and also the (now wasted) expenditure incurred in reliance on the contract which he had intended to meet from that gross return*".

529. Given the conclusions arrived at so far, the wasted expenditure claim does not fall to be determined. However, had it been necessary to determine it, then, I would have concluded that this is a claim which cannot succeed for a number of reasons.

530. First, I am not satisfied that McLaren Racing would have recovered this expenditure from Palou-related revenues in the counterfactual that is put forward since I am unpersuaded that McLaren Racing would have earned any additional revenues from Mr Palou, whether as a full-time or reserve F1 driver, and a claim for wasted expenditure can succeed only to the extent that the expenditure would have been recouped from the gross returns that would have been generated from the contract in the counterfactual. This is the point that was made by Coulson LJ in ***Soteria*** at [44]-[45].

531. When considering whether the AP Driving Agreement was a bad bargain from McLaren Racing's standpoint, I agree with Mr de Marco when he submitted that it is open to the Court to take account of post-breach events known as at the date of assessing damage. Thus, by analogy, in ***Pluczenik Diamond Co NV v W Nagel*** [2018] EWCA Civ 2640, [2019] 2 All E.R. 194 at [41], Leggatt LJ (as he then was) expressed the view that the principle that damages should be assessed as at the date of the breach is best seen as nothing more than a rule of thumb which reflects the usual result in practice of applying the mitigation principle where there is an available market: where there is an available market, it is presumed that the claimant acting reasonably will enter the market at once and obtain a replacement such that the loss is crystallised at or shortly after the time of breach, but where the mitigation principle does not apply or does not yield this result, then, subsequent events should be taken into account.

532. As to this, I agree with Mr de Marco when he submitted that there was no real prospect that McLaren Racing would have promoted Mr Palou to a full time F1 driver in the counterfactual. As such, McLaren Racing would not have generated any additional revenues by virtue of having Mr Palou as a full time F1 driver. McLaren's two full time F1 drivers have been Mr Norris and Mr Piastri since 2023. These are both very strong performers (Mr Norris has just won the 2025 Drivers' Championship and Mr Piastri has come third), whom McLaren Racing have publicly announced will stay at McLaren Racing for the foreseeable future: Mr Norris to the end of the 2027 series, and Mr Piastri to at least 2028. There is, accordingly, apparently no prospect that McLaren Racing would replace either Mr Norris or Mr Piastri for either the 2026 or 2027 seasons, with the result that in the counterfactual Mr Palou's only involvement with the McLaren F1 team would have been as a reserve F1 driver rather than as a full time F1 driver.

533. In that capacity, however, as a reserve F1 driver, Ms Bowden agreed, Mr Palou would not have generated for McLaren Racing any additional revenues in the counterfactual.

This is demonstrated by the fact that, although Ms Williams considered that McLaren Racing could have obtained greater sponsorship revenues in the counterfactual by leveraging Mr Palou as an F1 reserve driver (a view not shared by Mr Szafnauer, who considered that sponsors do not care about reserve drivers), McLaren Racing do not appear ever to have sought to leverage Mr Palou's presence as one of their reserve drivers for the 2023 F1 series in any negotiations with F1 sponsors. As Mr de Marco noted, the fact that different F1 teams are willing to share reserve drivers under cost-sharing arrangements, and the fact that Aston Martin was willing to extend its 2023 sharing agreement with McLaren Racing for a token £1 consideration (as set out in the recitals to an agreement between the two dated 4 September 2023) serves to confirm that F1 teams do not see reserve drivers as assets which can bring real revenues to the team. Indeed, notably, when pressed on the point, Ms Williams was unable to say whether additional revenue would have been earned had McLaren Racing sought to leverage Mr Palou's presence as a reserve driver, simply saying this:

"*I would have leveraged to the hilt the fact that Mr Palou was in my line-up. Whether I would have achieved additional revenue I couldn't possibly tell you...*".

534. There is also the point that, even assuming that McLaren Racing had been able to negotiate an extension to Mr Palou's appointment as an F1 reserve driver for subsequent years, Mr Palou would only have been able to attend F1 Grands Prix insofar as they did not conflict with his primary duties to McLaren Indy as an Indy Car driver, meaning that he would only appear at races intermittently and so limiting McLaren Racing's ability to leverage him in sponsorship negotiations.

535. There is a further point here to bear in mind, however. This is that, as Mr de Marco went on to observe, the situation in which McLaren Racing would have found themselves in the counterfactual would have entailed McLaren Racing offering a F1 reserve role to Mr Palou in future years (and Mr Palou accepting that offer) in circumstances where McLaren Racing would have had two of the best drivers on the F1 grid as primary drivers, both of whom have a far more significant appeal to sponsors than Mr Palou, somebody who would have been just one member of a pool of reserve drivers and who was only able to turn up at limited F1 Grands Prix given his full-time IndyCar duties. It is unrealistic to suppose, in these circumstances, that Mr Palou would have generated any significant additional revenue for McLaren Racing.

536. Accordingly, I agree with Mr de Marco that the AP Driving Agreement was a bad bargain from the standpoint of McLaren Racing. In doing so, I reject Mr Goulding's submission, in this context, that, adopting the more holistic approach described in ***CCC Films***, even if McLaren Racing did not stand to profit directly from the exercise of the F1 option under the AP Driving Agreement, McLaren Racing nonetheless stood to benefit from the subject matter of the activity, namely procuring Mr Palou as a driver for McLaren IndyCar's team, in circumstances where McLaren Racing wholly owns McLaren Indy. The claim is brought by McLaren Racing, not McLaren Indy, in circumstances where these two companies have been structured as separate corporate entities, no doubt for perfectly sound commercial reasons. Given this, the scope for application of the ***CCC Films*** approach is necessarily limited.

537. Secondly and in any event, I agree also with Mr de Marco that this is a case in which McLaren Racing are to be regarded as having derived some benefit as a result of the

expenditure which is alleged to have been wasted and that, as such, this operates to reduce the amount which can be recovered: see ***Grange*** at [128]. Mr Goulding submitted that, on the contrary, there was no benefit to McLaren Racing of Mr Palou being a reserve driver in circumstances where Mr Palou never drove during an F1 Grand Prix. He submitted also that McLaren Racing received no benefit for Mr Palou's service as an FP1 driver since there is an abundance of drivers available to fulfil the associated regulatory requirement. The primary purpose, he submitted, of FP1 is to train drivers seeking F1 promotion. Similarly, he suggested, Mr Palou's TPC activity provided no benefit to McLaren Racing since the TPC programme uses out of date F1 cars for non-competitive testing and its primary purpose is to train drivers who hope to be promoted to F1; there is no overlap of equipment or personnel with the Grand Prix racing team. However, I do not agree with Mr Goulding about this. In particular, I agree with Mr de Marco when he made the point that by combination of reviewing Mr Palou's participation in the TPC programme and FP1 session, McLaren Racing's F1 team obtained the best possible indication of how Mr Palou would perform as a full-time F1 driver. Although he was not ultimately promoted to a full time F1 driver seat, and would unlikely have been in the counterfactual, the ability to assess drivers is part and parcel of the benefit the TPC programme is designed to provide. Mr Palou's participation in the TPC programme also assisted in training up McLaren Racing's next generation of engineers and mechanics by giving them key experience, as recognised within internal McLaren documents which described it as being one of the key objectives of the TPC programme. The fact that, as Mr Brown explained, the team operating the TPC programme is different to McLaren's usual F1 team is neither here nor there since what matters is that the team operating the TPC programme is recognised as including individuals who may in due course go on to be the next generation of F1 team members. This was an obvious benefit to McLaren Racing; if the position were otherwise, then, it is not easy to see why the TPC programme would exist at all.

538. This brings me, lastly, to Mr Palou's signing on bonus of US$400,000. As to this, I agree with Mr de Marco when he submitted that, however Mr Brown may have sought to characterise the nature of this payment, which he described contemporaneously as a "*deposit*" and an "*advance*" on Mr Palou's salary and when being cross-examined as an *"upfront"* payment or *"first payment against [Mr Palou's] salary in 2024"*, the fact is that this is not how it was described. On the contrary, it was described in clause 3.1.1 as a *"signing-on bonus'*, which seems to me to confirm that it was, indeed, consideration for Mr Palou deciding to sign the AP Driving Agreement, so securing for McLaren his agreement to provide his services as an F1 reserve driver as opposed to doing so for another F1 team. The fact that clause 3.1 described the payments listed as compensation for the Defendants' "*performance of all of its obligations under this Agreement*" does not assist McLaren.

539. Nor does the fact that clause 3.1.1 then lists out the remuneration as including a "*signing-on bonus of up to $ 400,000 … to be determined by the parties*" since I do not agree with Mr Goulding when he submitted that the reference to "*up to*" should be taken as indicating that the signing on bonus was, in reality, a draw down rather than a bonus. That is not what the provision says: it uses the word *"bonus"*, not *"drawdown"* bonus or *"advance payment"*. I do not accept, in particular, that the "*up to*" wording is explained as permitting the Defendants to draw down part of Mr Palou's base fee payments in the years of performance, with the Defendants deciding how much of an advanced payment they wished to receive, subject to a US$400,000 upper limit. That is

simply not what the provision says and, to repeat, it is not consistent with the reference being to payment of a *"signing-on bonus"*, namely something received in return for the Defendants signing.

540. It is, furthermore, worth noting in this context that the AP Driving Agreement differs from the contract entered into concerning Mr Lundgaard, where the following is stated:

> *"If McLaren exercises the Option then:*
> *1. The US$200,000 ... shall be treated as an advance payment of US$100,000 ... against the 2025 fees in each of the Driving Agreement (clause 3.1.1) and Promotions Agreement (clause 3.1.1) ...*
>
> *If McLaren does not exercise the Option, Driveco shall be entitled to retain the US$200,000 ...".*

Here, then, a defined portion of the monies payable upon signature were described not as a *"bonus"* but as an "*advance payment"* and a mechanism was specifically built into the formula used so as to credit those advance payments against the fees otherwise due for future driving performance. The fact that this was not done in the case of the AP Driving Agreement underlines the correctness of the conclusion that I have reached, namely that McLaren intended Mr Palou's signing-on bonus to be consideration for his signature and that, therefore, McLaren took the risk that he may breach the agreement, leaving them with (and only with) contractual remedies if that proved to be the case.

541. For these various reasons, the wasted expenditure claim fails. It is unnecessary, in the circumstances, to address a further argument advanced on behalf of the Defendants concerning the Hirakawa Agreement.

The restitution (signing-on bonus) claim

542. In the alternative to the wasted expenditure claim concerned with the US$400,000 signing-on bonus, McLaren Racing advances a claim in restitution, alleging that there has been a total failure of basis.

543. Mr de Marco identified a number of reasons why, in his submission, this claim ought not to succeed. It suffices, however, to deal with just one of those reasons.

544. This is that, in the light of the conclusion that I have reached concerning the nature of the signing-on bonus and, in particular, my rejection of Mr Goulding's submission that it amounted to a *"drawdown"* or *"advance payment"* rather than a bonus (the word used in clause 3.1.1), this is not a case in which it can sensibly be suggested that the contractual basis for the payment has failed. Put shortly, the AP Driving Agreement was signed and, in return for that, the signing-on bonus was paid. Consistent with the approach adopted in ***Dargamo***, there is no basis for going beyond the terms of the parties' express agreement to find some alternative or wider basis for some or all of the signing-on bonus.

545. It follows that the restitutionary claim fails.

Conclusion

546. By way of conclusion and taking into account credit in respect of the particular aspects to which I have referred but not otherwise:

(1) The driver salary claim succeeds in the sum of US$1,312,500.

(2) The NTT base fee claim succeeds in the following amounts: 2024-2026: US$5,382,344; and 2027: US$950,000.

(3) The GM uplift loss succeeds in the sum claimed: US$500,000.

(4) The F1 loss claim fails.

(5) The other sponsorship losses claim succeeds in that the methodology used by Mr Harris is appropriate, except in respect of step 3 and his reliance upon the Palou 2024 Rate Card. Mr Harris will need to carry out the exercise which he explained he had not yet done but which he thought would likely result in a loss of between US$2 million to US$2.5 million. Mr Steadman and the Defendants will obviously need to say whether they agree with whatever figure is arrived at by Mr Harris.

(6) The loss of performance-based revenue claim succeeds in the amount of US$2.05 million.

(7) The wasted expenditure claim fails.

(8) The restitutionary claim fails.

547. Consequential matters will need to be addressed separately in the event that they cannot be agreed.

548. I end by thanking all counsel and solicitors for the admirable way in which this hard fought case was conducted.