Neutral Citation Number: [2021] EWHC 626 (Ch)

Case No: E30NE059

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (ChD)

Manchester Civil Justice Centre
1 Bridge Street West,
Manchester M60 9DJ
Date: 19 March 2021

Before :

HIS HONOUR JUDGE CAWSON QC
SITTING AS A JUDGE OF THE HIGH COURT

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Between :

(1) DRSP HOLDINGS LIMITED	**Claimants**
(2) DRSP LIMITED	
- and -	
(1) THOMAS O'CONNOR	
~~**(2) ABIGAIL O'CONNOR**~~	
(3) OCTAX LIMITED	**Defendants**

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MR TOM MOODY-STUART QC (instructed by **Kuit Steinart Levy LLP**) for the **Claimants**
MR MARTIN BUDWORTH (instructed by **JMW Solicitors LLP**) for the **Defendants**

Hearing dates: 26-27 (reading), 28-30 January 2021, 2-4, 5 (reading), 8-9 February 2021

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Approved Judgment

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

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Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, and by release to BAILII.

The date and time for hand-down is deemed to be 10.30 a.m. on Friday 19 March 2021

His Honour Judge Cawson QC:

Introduction

1. The present proceedings were commenced on 18 September 2018. The essence of the claim is that the Defendants have misused data contained in a database called "Slate" ("**Slate**") used in the Second Claimants' claims management business. As commenced, the claim included allegations of lack of good faith and dishonesty on the part of Defendants. However, the claim has been reshaped by comparatively recent amendments and re-amendments to the Particulars of Claim so as to introduce a claim of infringement of database right, to drop the allegations of lack of good faith and dishonesty and other allegations, and to discontinue the claim entirely as against the Second Defendant. The Claimants now say that they do not believe that the Defendants acted maliciously. As now formulated, the claim is, as it was put by Leading Counsel for the Claimants, a more technical case based upon alleged infringements of the Claimants' database right in Slate, misuse of confidential information, and breach of fiduciary duty. The Claimants seek an inquiry as to damages, and restitution of the sum of £151,433 said to have been paid to the Third Defendant by mistake.

2. The First and Third Defendants defend the claim. They challenge the existence of the database right claimed, deny that there has been any extraction or re-utilisation of data from Slate, and assert that any extraction was, in any event, with the Second Claimants' consent. Further, the Defendants deny that there has been any misuse of confidential information or breach of fiduciary duty. It is their case that they were entitled to access to and use of the data in question within Slate pursuant to contractual arrangements between the parties, and Third Defendant counterclaims for fees or commission alleged to be due under those contractual arrangements, and specifically pursuant to the terms of an Introducer Agreement dated 11 May 2018 ("**the Introducer Agreement**").

3. The Claimants were represented before me by Tom Moody-Stuart QC (who was not instructed until shortly prior to the more recent amendments and re-amendments to the Claimants' case), and the First and Third Defendants were represented before me by Martin Budworth of Counsel. I am grateful to them both for their helpful written and oral submissions, and their assistance throughout the trial, which, by reason of the exigencies of the current Covid 19 pandemic, was conducted entirely remotely by Microsoft Teams.

Bundles of Documents

4. Before addressing the issues that arise for determination in this case, it is necessary for me to say something about the unsatisfactory manner in which the bundles of documents were prepared for the trial.

5. Paragraph 24.1 of the directions given by District Judge Obodai by her order dated 18 November 2019 expressly provided for a bundle index to be prepared by reference to the Chancery Guide, and thus in accordance with Chapter 21 thereof. Paragraph 21-41 of the Chancery Guide provides that, in general, documents included in any trial bundle should be arranged in date order starting with the earliest document. The necessity to hold hearings remotely through the pandemic has resulted in bundles generally being prepared electronically rather than in paper form in traditional ring-binders, but this does not detract from the need to comply with the relevant provisions of the Chancery Guide and, in particular, the requirement to produce a chronological bundle.

6. In the present case, there has regrettably been no attempt to produce a chronological bundle. Rather, a number of bundles comprising separate PDF files were prepared comprising the exhibits to various witness statements (in their original form without the documents therein being chronologically sorted), copies of transcripts of various meetings, correspondence, and certain additional witness statements requested to be included by the Defendants. In addition, I was provided with a memory stick containing the parties disclosure, and including thereon Excel spreadsheets of the respective parties' disclosure, embedded within which such spreadsheets were hypertext links to certain but not all of the disclosed documents.

7. It was explained that this latter course of action, and in particular the use of the excel spreadsheets, had been taken given the vast number of documents disclosed in the present case. What was done may well have been done with the best will in the world, and this did at least provide a method of gaining access to the relevant documents. However, the necessity to access documents through the hypertext links in the Excel spreadsheets led to not inconsiderable difficulty during the course of the trial, in particular during the course of cross-examination, exacerbated by the fact that a download provided to the Defendants did not contain the hypertext links to the Claimants' documents. Further, the lack of a chronological bundle has made my task of understanding how the documentation fits in with the factual narrative and the evidence very much more difficult and time consuming, and must also have caused considerable difficulty to Counsel in preparing cross-examination, and marshalling their arguments.

8. At my direction, a chronological PDF bundle containing the documents referred to from the Excel spreadsheets during the course of cross-examination was prepared for the purposes of closing submissions. Further, prior to closing submissions I asked Counsel to identify by reference to a chronological list those other documents upon which they placed reliance, and during the course of closing submissions I directed the preparation of a composite chronological bundle in PDF format bringing together in chronological order the documents in the bundle prepared for closing submissions and these further lists. This composite bundle has been available to me in order to assist in writing this judgment, and has been of great assistance.

9. I mention these deficiencies in order to stress the importance, in cases such as the present, of there being a chronological bundle in a readily accessible format available for use by judge, advocates and witnesses in preparation for and at trial. The Chancery Guide, at paragraph 21.34 notes, that: *"The efficient preparation of bundles of documents is very important. Where bundles have been properly prepared, the case will be easier to understand and present, and time and costs are likely to be saved. Where documents are copied unnecessarily bundled incompetently the cost may be disallowed."* The present case demonstrates how apt these words are. It may be necessary to revisit the suggested sanction in respect of costs in due course.

10. The importance of discipline in the preparation of a readily navigable chronological trial bundle is all the more acute where a trial is being conducted remotely using electronic documents. I suspect that in most cases, one or more PDF files, properly bookmarked and with pagination corresponding to the PDF pagination, is likely to suffice without the use of a more sophisticated documentation presentation platform.

11. In the event, despite the protestations as to the amount of documentation disclosed in the present case, the composite chronological bundle produced as above for use in

writing this judgment was a readily manageable and navigable PDF file of 740 pages. It has been of immeasurable assistance to me in writing this judgment, and represents the sort of bundle that ought, by cooperation between the parties, to have been produced prior to the commencement of the trial for the assistance of all involved.

12. However, a consideration of this chronological bundle has revealed to me a number of documents that may well have been put to the witnesses had the documents been more readily accessible. This is unsatisfactory given that although I do not consider that the case turns on them, I have felt compelled to refer to a number of these documents in this judgment, and serves further to emphasise the importance of complying with the relevant part of Chancery Guide.

Key Participants

The Claimants

13. The First Claimant ("**Holdings**") is the holding company of the Second Claimant ("**DRSP**"), which carries on business as a claims management company ("**CMC**") in respect of consumer claims relating to, amongst other things, mis-sold personal protection insurance ("**PPI**") policies and self-invested personal pensions ("**SIPP**").

14. The one issued share in the share capital of Holdings is held by one Elizabeth ("Liz") Robinson ("**Mrs Robinson**"). Mrs Robinson is the sole *de jure* director of Holdings, and a director of DRSP, currently along with David Michael Shalom ("**Mr Shalom**") and Angela Walker. Melanie Taylor ("**Ms Taylor**") was a director of DRSP between 22 June 2018 and her death on 5 October 2018. The First Defendant, Thomas O'Connor ("**Mr O'Connor**"), was a director of Holdings between 18 November 2016 and 16 May 2018, and a director of DRSP between 1 October 2013 and 11 May 2018.

15. In addition to acting as a director of DRSP, Ms Taylor acted as Interim Operations Manager of DRSP and subsequently, after her appointment as a director, as Managing Director of DRSP.

16. It is the Defendants' case that the true beneficial owner, or at least a significant ultimate beneficial owner of Holdings, and thus of DRSP, is one David Emanuel Merton Mond ("**Mr Mond**"), and that it is he who effectively controls DRSP and acts as its ultimate directing mind. The statement of truth on the Re-Amended Particulars of Claim was signed by Mr Mond, and Mr Mond was the principal witness on behalf of the Claimants at trial.

17. Mr Mond is a Chartered Accountant and Licensed Insolvency Practitioner, being the owner of Hodgsons, Chartered Accountants. On the latter's website he is described as having over 41 years' experience. In addition, Mr Mond is a substantial shareholder in ClearDebt Group Plc, the parent company of ClearDebt Limited ("**ClearDebt**"), a debt resolution company providing a source of leads for and/or data relating to PPI mis-selling claims, including those falling within individual voluntary arrangements ("**IVAs**").

18. Mr Mond disputes that he has had any interest in DRSP, his evidence being that he has merely provided consultancy services to DRSP over the last 9 years. He says that, in 2011 and on behalf of ClearDebt, he looked for a CMC with which ClearDebt could

form a relationship to handle financial product mis-selling claims falling within IVA estates. He says that, given the poor quality of alternatives, he decided that ClearDebt should collaborate with an independent company that had been set up by Mrs Robinson, which changed its name to DRSP. He says that Mrs Robinson asked him to act as a consultant to DRSP. He says that, in this way, ClearDebt was able to establish a commercial relationship with a company in which Mr Mond could have some confidence, so that ClearDebt could recover money generated by DRSP from mis-selling PPI claims referred to it by ClearDebt. It was his evidence that DRSP was awarded a contract by ClearDebt in 2012 to do the work, and that because of the symbiotic relationship between the two companies, he was happy to undertake the consulting role on a gratuitous basis.

19. Mrs Robinson did not give evidence at trial, and it is not in dispute that she did, at all relevant times, act as Mr Mond's personal assistant. Further, it is not in dispute that Mr Mond received all emails addressed to an email account in the name of Mrs Robinson, and that emails were responded to, if not also sent as original emails, by Mr Mond, and to a lesser extent Mr Shalom, on this account. Thus emails that had the appearance of having been sent to, or sent by Mrs Robinson were received or sent by Mr Mond or, in a limited number of cases, Mr Shalom.

20. In addition to Mr Mond, the Claimants called two further witnesses:

    20.1. Mr Shalom, a Chartered Accountant who acted as a financial consultant to DRSP, and who has since 14 May 2020, been a director of DRSP; and

    20.2. Matthew Waddell ("**Mr Waddell**"), an IT engineer employed by Pro-Networks, providing outsourced IT support to DRSP.

The Defendants

21. Mr O'Connor joined DRSP as Operations Director in October 2013, and served in that capacity until 28 February 2018 when he ceased to be employed by DRSP, and became a consultant to DRSP acting on behalf of the Third Defendant ("**Octax**") upon the terms of a consultancy agreement made between DRSP and Octax, and ultimately signed on 11 May 2018 ("**the Consultancy Agreement**"). Mr O'Connor acted in this latter capacity until shortly prior to the commencement of the present proceedings. Albeit not a solicitor himself, Mr O'Connor is now a director of, and majority shareholder in First Dispute Management Limited ("**FDML**"), a firm of solicitors. Mr O'Connor gave evidence at trial.

22. The Second Defendant ("**Mrs O'Connor**"), is the wife of Mr O'Connor. She was, prior to 28 February 2018, a managerial employee of DRSP, latterly holding the position of Customer Services and Payments Manager. She has, at all relevant times from its incorporation, been the sole director of and shareholder in Octax. The present proceedings were discontinued against Mrs O'Connor in November 2020, but she gave evidence at trial on behalf of Mr O'Connor and Octax.

23. Octax was incorporated on 13 May 2017. Although Mrs O'Connor has been its sole director and shareholder, it is properly to be regarded as a joint venture between Mr and Mrs O'Connor. Octax was party to the Consultancy Agreement and the Introducer

Agreement, both of which were signed on 11 May 2018 albeit that the terms thereof had been agreed sometime prior thereto.

24. The Introducer Agreement provided the basis for Octax to refer leads/cases to DRSP to pursue the relevant claim, and also, as a second element, for DRSP to provide data to Octax in respect of leads/cases where DRSP had not been able to engage with the customer, which such data Octax would use to try and get the customer to engage so that if they did, Octax could then refer the lead/case back to DRSP to pursue the claim. In each such scenario DRSP would earn a fee if the claim was successful, and it is Octax's case that terms of the Introducer Agreement provided for the fee so earned by DRSP to be split 50-50 between DRSP and Octax when and if received by DRSP.

25. In addition to Mr and Mrs O'Connor, Mr O'Connor and Octax called the following witnesses:

    25.1. Hayley O'Connor – An employee of DRSP between 2013 and July 2018, latterly employed as Customer Services and Lender Relations Manager. She candidly accepted that she is a close friend of Mr and Mrs O'Connor, and she is now employed by FDML as Operations Manager. However, she is not related to Mr or Mrs O'Connor;

    25.2. Rebecca Jordan ("**Ms Jordan**") – Employed by DRSP between June and October 2018 as a Relationship Manger. She also accepts that she is a good friend of Mr O'Connor, and that she has known him for some time. She now also works at FDML, as a Relationship Manger.

    25.3. Matthew Connell ("**Mr Connell**") – An employee of DRSP between 2013 and July 2018, latterly employed as Business Development Manager, and engaged on a consultancy basis by DRSP for a short time after the termination of his employment.

26. In addition, Mr O'Connor and Octax relied upon the witness statement of Simon Christopher Lee ("**Mr Lee**"), who was, in 2018, the Managing Director of Aperture Debt Solutions Ltd, and who is a former Chief Operating Officer of ClearDebt Group Plc. Mr Lee was not required to attend for cross-examination.

Other relevant individuals

27. Other relevant individuals include:

    27.1. Phil Carney ("**Mr Carney**") – An employee of DRSP with responsibility for IT;

    27.2. Mark Hindle ("**Mr Hindle**") – A "Product Specialist" employed by DRSP in 2018;

    27.3. Adam Horan ("**Mr Horan**") – An employee of DRSP, described by Mr Mond in his witness statement as Sales Manager, but who had some responsibility for the operation of Slate. He left his employment with DRSP in April 2018.

DRSP'S business and Slate

28. Before considering the background to the matter, it is necessary to describe in rather more detail the nature of DRSP's business, and the history, development and operation of Slate.

29. As I have identified, DRSP at all relevant times carried on business as a CMC.

30. CMCs (including those such as DRSP dealing with financial mis-selling claims for consumers and on behalf of supervisors of IVAs) carry out regulated financial activities requiring them to comply with the relevant regulatory requirements. The identification of parties who might have a claim in respect of mis-sold products is not, itself, subject to such regulatory requirements, although there must necessarily be compliance with data protection legislation and regulations. In consequence the identification of potential claimants and the actual processing of claims will often be dealt with by separate and distinct entities, with one introducing potential claimants to the other, and with contractual arrangements invariably governing the relationship between the introducer and the CMC. Octax acted as an introducer of claims to DRSP, as did other entities including Flexx Digital ("**Flexx**").

31. The steps involved in processing a potential PPI claim are described in paragraph 15 of Mr Mond's witness statement. In essence, potential customers are identified and contacted to obtain instructions to investigate whether a claim is possible, the claim is then investigated, instructions are sought and obtained to pursue the claim for payment (obtaining a signed letter of authority) and claims are then submitted to the relevant lender and pursued to their conclusion. Once any payment has been recovered, the CMC then seeks to recover its agreed fee from the customer (in the case of IVAs, this fee is recovered from the supervisor of the IVA, but for individuals it requires to be claimed from the individual customer after their payment has been recovered).

32. It follows that a not insignificant amount of work and expense is liable to be involved in identifying potential claimants, checking whether they do in fact have a claim, identifying and checking the relevant details of the customer and formulating and submitting the claim. These steps involve not only email or telephone correspondence but also the sending out and retrieval by pre-paid post of physical materials, both promotional and related to the claim itself. Further, even when a claim has been successfully processed and the customer paid, there might potentially be further costs involved in obtaining the fees due to the CMC from the customer.

33. Obtaining data as to potential leads may be carried out by the CMC itself through websites and other advertising, or the CMC may purchase potential leads from third party introducers, in which case the purchased data may be paid for up front or a commission may be paid in respect of those leads which are successfully converted to claims and lead to the payment of fees to the CMC.

34. The processing of claims includes obtaining, verifying and keeping safe significant and commercially sensitive personal data. This is liable to include financial records, bank account and credit card details, and personal data such as the name, date of birth, address and other contact details of the customer.

35. It is thus the Claimants' case that CMCs such as DRSP depend on robust, reliable and secure data processing, and also upon sourcing customer leads to identify potential claimants. It is thus said that those leads and data relating thereto, apart from being

(personally at least) sensitive to the customer, are likely to be highly commercially valuable to the CMC, such that they are treated as highly confidential within the industry.

36. As Mr Mond identifies in paragraph 34 of his witness statement, at all relevant times DRSP has obtained its data for new business from four sources, namely:

    36.1. Its own websites, where consumers sign up for a free PPI checks;

    36.2. Third party introducers of leads, such as Flexx;

    36.3. Supervisors of IVAs who wish to check whether any potential claims exists in respect of the individual who is the subject of an IVA; and

    36.4. A joint venture partner, Adimus Limited ("**Adimus**").

37. The management of mis-selling claims and the data relating thereto by DRSP is carried out through Slate, a bespoke database system. Slate is said by the Claimants to be fundamental to the operation of its business, and to have been created at considerable expense and such that DRSP has been required to make significant investment in obtaining and verifying the accuracy of the data within Slate.

38. The detailed structure and the nature of access permissions to DRSP's slate database is dealt with at paragraphs 16 to 33, and 88 to 92 of Mr Mond's witness statement, and in Mr Waddell's witness statement. I do not understand this account to be seriously challenged by Mr O'Connor and Octax, although it is pointed out on their behalf that certain concepts such as Level 1, 2 and 3 access to Slate have only recently been identified in the Re-Amended Particulars of Claim and Mr Mond's evidence, and formed no part of the Claimants' case prior thereto, it previously having been alleged from the commencement of the present proceedings until then that Mr O'Connor had made use on a wholly unauthorised basis of a "super-user" status to access Slate.

39. According to Mr Mond:

    39.1. Slate is a computer system with the software to allow users to access and manage individual cases and potential cases from the initial contact giving rise to a lead, through the process of obtaining authorisation to act, the progression of the claim and, if all goes well, recovery of payment to the customer and fees for DRSP.

    39.2. Slate thus comprises a bespoke electronic database which records customer information and information about their claim (if any), and other information such as the status of any marketing to that customer.

    39.3. The database is generally accessed via a user interface in a web browser, accessible by authorised users of DRSP's Network logged in with relevant permissions. Data accessed *via* the user interface is accessed on a record by record basis, that allows the user to do all that is needed to process claims.

    39.4. The data records in Slate can also be searched in bulk, by running what are known as SQL searches which interrogate the underlying database itself thus circumventing the Slate user interface. These SQL searches are only capable of

being carried out by a person with suitable network permissions for access to the DRSP Network and to run the SQL Server Management Studio software, and with the necessary IT training. When such a search is run, the data identified can be exported from Slate in various formats.

39.5. Within the DRSP network, a user who has "Network Admin" (or "Domain Admin") permissions can create other user accounts and can alter the network permissions of other users, including to grant the same network permission to other users. A user account with the lowest, standard, access to the DRSP network will also generally be able to access Slate, but the nature of that access, and what they can do within Slate, will depend on the roles assigned to that user within slate.

39.6. There are three general categories of network permissions afforded to users of DRSP's network, referred to as Levels 1 to 3 as follows:

39.6.1. Level 1 – Providing access to the user interface, and the viewing of claims and the updating of individual cases.

39.6.2. Level 2 – In addition to the access provided at level 1, provides access to the reporting server, thus allowing ready-made searches and reports to be run (but not the creation of custom search reports).

39.6.3. Level 3 – In addition to the access provided at levels 1 and 2, provides direct access to the server containing Slate and, though an additional login process, the ability to run the SQL Server Management Studio and so create bespoke searches and reports. The ability to run the SQL Server Management Studio also requires network admin permissions.

39.7. Distinct from network permissions, within the Slate application, access to different levels of functionality is afforded by the assignment of "Roles". A user with the Admin Role within Slate (to be distinguished from "Admin" permissions within the network) can assign "Roles" to other users which allow them to access specific features and functions within Slate. The Admin Role within Slate is itself a role that can be assigned by others who have the Admin Role.

39.8. The Claimants thus stress that in considering the evidence, it is important to bear in mind the distinction between two similarly named "admin" statuses:

39.8.1. Network admin status, which allows privileged access to the DRSP network, thus allowing the user to create user accounts (and confer network admin permissions thereon) and to run the SQL Server Management User Software, i.e. something that might be described having a "superuser" status; and

39.8.2. The Slate Admin role, which allows the user to assign roles within Slate to themselves and otherusers at will, but does not of itself allow privileges outside of Slate.

Background

40. DRSP was incorporated on 22 June 2011.

41. Mr O'Connor initially worked for ClearDebt, but moved to DRSP as its Operations Director in 2013.

42. At that time CMCs were regulated by the Ministry of Justice ("**MOJ**").

43. A Claims Management Regulation - Audit Report dated 13 September 2013 raised a query regarding whether Mr Mond should be named as having a significant influence over the policy or management of the business of DRSP. In response thereto, by an email dated 11 November 2013, Mr O'Connor responded to the MOJ in the following terms:

> *"Within DRSP I have been given complete autonomy to run the business as I see fit free from any outside interference or influence. Whilst Mr Mond is a significant client of DRSP, he has never had, nor will he ever have, any influence over either policy or management of the business.*
>
> *Where Mr Mond has been consulted, this is only in regards to how he would like his own claims which vest in him to proceed.*
>
> *…*
>
> *Given the above clarification, I would like to request that your instruction to add Mr Mond to DRSP's "Application for Authorisation" be withdrawn and again reiterate that Mr Mond holds no influence over any aspect of DRSP's policy, management or any other aspect of the day-to-day running of the business."*

44. Mr Mond explained during the course of his evidence that it was important that he be regarded as independent of DRSP so that expenses incurred in acting as supervisor of IVAs could be treated as "category 1" disbursements rather than as "category 2" disbursements. Category 1 disbursements are restricted by Statement of Insolvency Practice 9 (SIP 9) to payments to independent third parties. They are more favourably treated than category 2 disbursements because category 1 disbursements, unlike category 2 disbursements, can be drawn without prior approval of creditors.

45. It was Mr O'Connor's evidence that what he had written in his email dated 11 November 2013 was untrue, and written because Mr Mond instructed him to write in these terms to the MOJ. It was his evidence that Mr Mond was sort of person for whom you did as you were told. As he put it in relation to this particular matter: *"When given an instruction by Mr Mond, I will do what is necessary or would at the time, particularly when I am very young at that stage, in my first real directorship acting under Mr Mond. That is just how it is with him."*

46. As I have said, it was Mr Mond's evidence that he remained a mere consultant throughout.

47. Shortly after the incorporation of Octax in May 2017, Mr O'Connor informed Mr Mond that he was thinking of resigning from his employment with DRSP, and of working for himself, albeit indicating to Mr Mond that he would not leave DRSP in the lurch, and would continue in his position as Operations Director for a handover period.

In order to seek to persuade him to remain at DRSP, Mr O'Connor was offered, and took up a 24.99% shareholding in DRSP. Consequently, he did not, at this stage, resign his employment with DRSP, or resign as a director of DRSP.

48. Thereafter the decision was taken to introduce Ms Taylor into the business of DRSP as a consultant, and with a view to her taking a shareholding in Holdings. Mr Mond's evidence is that this was a decision taken by himself and Mrs Robinson. Mr Mond has explained that the thinking about engaging Ms Taylor was that it was considered that she would bring her many years of experience in the industry to the business, that there was a need for management reporting, that Ms Taylor had indicated that she would be able to procure a significant number of IVA leads from the charity sector, and that this tied in with Ms Taylor having asked Mr Mond personally to invest in a debt management business with her.

49. Mr O'Connor was informed about the intention to introduce Ms Taylor into the business on or about 18 September 2017. This did not go down well with him, and Mr O'Connor says that he was suspicious of Mr Mond's motives for bringing someone else on board, and regarded Ms Taylor as unqualified for the role that it was intended that she should play within DRSP. Further, once Ms Taylor had become involved in the business, although he got on well enough with her on a personal level, Mr O'Connor had concerns about a number of matters including the fact that Ms Taylor had a habit of missing meetings, and appeared inebriated on a number of occasions and to suffer from a drink problem. Mr O'Connor's dissatisfaction was clearly expressed in an email chain of 21 and 22 December 2017.

50. In the event, and against this background, Mr O'Connor decided that he would now resign from his employment with DRSP, and as a director of DRSP and Holdings. This led to a series of negotiations which resulted in terms being agreed for the purchase of Mr O'Connor's shares, and for the payment of compensation in respect of the termination of Mr O'Connor's employment as ultimately provided for by a Settlement Agreement dated 11 May 2018. Importantly for present purposes, these negotiations also led to the entry into of the Consultancy Agreement and the Introducer Agreement.

51. As part of this process, a number of meetings took place in January and February 2018 between Mr Mond and Mr O'Connor, with Ms Taylor and Mr Shalom also each being present for at least one of these meetings. Mrs Robinson was also present for part at least of these meetings, although she is not recorded on the transcripts of recordings of these meetings that have been produced as having played any part in the meetings – apart from being asked to make the tea. The recordings of these meetings were taken surreptitiously by Mr O'Connor who says that he did not, at least by this stage, trust Mr Mond, and wanted a record of what had been said in case any issue should subsequently arise.

52. In support of their case that Mr Mond is the true owner of Holdings/DRSP, Mr O'Connor and Octax place reliance upon fact that at a meeting on 29 January 2018 Mr Mond is recorded as saying:

> *"I own the business. That's my right isn't it? So I delegate that too and you understand that but you are given complete autonomy, right, and you sometimes think it's your business, Tom. The way that you speak, the way that you do things and everything else. Fine. You're not happy that I brought in Melanie. You're not*

happy with whatever deal I'm going to do with her or not do with her. Fine. To be quite honest that has nothing to do with you."

53. In late 2017, DRSP had been given access to ClearDebt's closed IVA case data. During the course of the discussions between Mr Mond and Mr O'Connor in January and February 2018, they discussed the basis upon which there might be a continuing relationship between DRSP and Mr O'Connor/Octax after Mr O'Connor had resigned his employment with DRSP, under which Octax, through Mr O'Connor and as provided for by the terms of a consultancy agreement, would provide consultancy services to DRSP, and under which Octax, as provided for by the terms of an introducer agreement, would introduce claims to DSRP. In additions, there was discussion with regard to old cases that might be referred by DRSP to Octax/Mr O'Connor to turn into live leads for DRSP to pursue.

54. Thus at one meeting Mr O'Connor, when discussing his future intentions, as recorded by the transcript, said to Mr Mond:

"Well I think that my intention was initially is there's all sorts of different bits and pieces that could be done, even just with DRSP, with the fee cap coming in soon, there's all of the cases that have been closed historically as no contact, where we know they've got PPI but they're not answering the phones, they haven't engaged. You've got all of your old IVA cases that don't return the packs before the cut-off date that could potentially be we do something on those."

55. Later in the same meeting, Mr O'Connor is recorded as saying:

" – my intention then will be trying to get a call centre up and running for 1 March, I'm not going to mess about. And then I will need to sort out introducer agreements between the two and exclusivity, which I can draft over the next couple of days … "

56. As one point in this meeting, Mr Shalom interjected: *"So the only thing is making sure that it's legit how we can share the data between each other for you to work off I suppose."*

57. The meeting also included the following exchange:

"Tom O'Connor	*We're looking to generate pension leads, when we get those, we'll call them and anyone who's got a claim, we'll hock over to your guys to sell. Vice versa, if you're buying all these leads off Dan, there's a lot that get closed each day as not contacted, where you've tried [unintelligible 01:11:05] –*
David Mond	*So we get them back to you.*
Tom O'Connor	*Those come to us, we can churn it –*

David Mond	*You churn them and try and get them in so it comes back to us.*
Tom O'Connor	*– and sell them back. All Clear Debt cases where we're –*
David Mond	*Right, just work out a remuneration thing for you on that, a share.*
Tom O'Connor	*I think we just 50/50 everything.*
David Mond	*Whatever.*
Tom O'Connor	*And then the – again with the old ClearDebt IVA cases, any that don't come back, we'll have them back –"*

58. The reference in the above passage to "Dan" was to a reference to Dan of Flexx.

59. In an email dated 14 February 2018, Mr O'Connor wrote:

> *"From thereon out, Abi [Mrs O'Connor] and I would leave on 28 February with me carrying out the consultancy for six months remotely (as Octax Limited). A marketing agreement can then be drawn up between DRSP and Octax to market exclusively to DRSP for old PPI cases, closed pension leads plus other leads sourced by Octax on a 50/50 backend split."*

60. An email sent from Mrs Robinson's account sent on 15 February 2018 to Mr O'Connor and Ms Taylor and clearly written by Mr Mond summarised the overall terms agreed between Mr O'Connor and DRSP, including that there should be a referral agreement between DRSP and *"newco of TOC"*. In response, Mr O'Connor sent a draft Introducer Agreement for consideration. This used as its basis an existing introducer agreement as between DRSP and Flexx, and contained track changed amendments made by Mr O'Connor to cater for the fact that it was intended that leads/cases would also be referred by DRSP to Octax, for Octax to work on for referral back to DRSP to pursue the claim.

61. The background/recital to the draft Introducer Agreement thus read as follows (with tracked changes), where "You/Your" is a reference to Octax, and ("We/Us/Our") is a reference to DRSP:

> *"We are a Claims Management Company dealing with individuals looking at making a claim for ~~pension mis-selling~~ financial mis-selling including mis-sold pensions and Mis-sold Payment Protection Insurance ("PPI").*

You have agreed to act as a marketing agent to Us of prospective Customers utilising Landing Pages, websites and advertorials with content approved by Us. You will also market by telephone to opted in customers referred to You by Us as an agent of Us to generate packs back for mis-selling products both for prospective Customers and IVA Customers in relation to both PPI and Pension Mis-selling. ~~The marketing spend for Our specific Pension mis-selling campaign is to be paid by Us but managed by You within the limits approved by Us.~~"

Other tracked changed amendments were made including the addition of a new clause 3.6.1 in the terms referred to below.

62. Certain minor revisions were suggested to the draft by Mr Mond on behalf of DRSP, which were acceptable to Mr O'Connor with the result that the terms of the Introducer Agreement, ultimately signed on 11 May 2018, were agreed.

63. An email dated 19 February 2018 sent on Mrs Robinson's email account to Mr O'Connor, Mr Shalom and Ms Taylor summarised the final heads of terms agreed in consequence of the departure of Mr and Mrs O'Connor, and referred to a compromise agreement relating to the basis for Mr O'Connor and Mrs O'Connor to "leave" as employees with effect from 1 March 2018, an agreement in respect of the sale of Mr O'Connor shares, a consultancy agreement for a period of six months, and *"Referral agreement between DRSP and newco of TOC as per previously attached introducer agreement which I believe covers all we discussed and includes the covenants requested"*.

64. Mr O'Connor responded to this email the same day stating that he was *"happy with the agreement as below"*.

65. The other terms of the Introducer Agreement relevant for present purposes, in addition to the background referred to above, are the following:

    65.1. Clause 1.1: This contains a number of important definitions including:

        65.1.1. *"CMC Fees":* means *"the fee paid by an Introduced Customer to Us in respect of Regulated Claims Management Activity."*

        65.1.2. *"Commencement Date"* : 1 March 2018

        65.1.3. "Fee": means "*the payment that* [DRSP] *will arrange to be paid to* [Octax] *in return for the provision of an Introduced Customer who pays* [DRSP] *a CMC Fee*"

        65.1.4. "Introduced Customers" which refers to individuals referred to DRSP by Octax "*without charge whom have signed DRSP Terms of Engagement and Pension and/or PPI Claim specific DRSP Letters of Authority*"

    65.2. DRSP's Obligations: Clause 3 set out DRSP's obligations. Of particular relevance is the following:

        65.2.1. Clause 3.3: Provides for payment; "*Where* [DRSP] *have submitted a claim and a CMC fee has been paid to [DRSP] by the Introduced*

Customer or IVA estate, [DRSP] *will pay to* [Octax] *a fee as defined in Schedule 1 to this Agreement.*

65.2.2. The definition of "fee" in Schedule 1 is the following terms:

"*Where* [Octax] *have conducted the marketing and or telesales activity on our behalf for an Introduced Customer,* [DRSP] *will pay* [Octax] *a Fee in relation to those Introduced Customers in relation to both the CMC Fee received by* [DRSP] *or any Referral Fee* [DRSP] *may receive from third parties for referring that Introduced Customer elsewhere for other services.*
The level of Fee is set at 50% of the combined CMC Fee and Referral Fee received by [DRSP] *and is payable against any income generated from the Introduced Customer*."

65.2.3. Clause 3.4: *"*[DRSP] *will provide* [Octax] *with updates on the progress of any cases* [Octax] *have referred to* [DRSP], *with the frequency of such updates to be agreed."*

65.2.4. Clause 3.5: *"Where* [DRSP] *report that no service has been provided by* [DRSP], [Octax] *are free to market to these customers as* [Octax] *see fit."*

65.2.5. Clause 3.6.1: *"In consideration of* [Octax] *agreeing to provide all leads for pension and PPI mis-selling* [Octax] *generate to* [DRSP] *on an exclusive basis,* [DRSP] *will …* p*rovide details of all Leads* [DRSP] *have received from other sources which* [DRSP] *have not been able to engage for* [Octax] *to contact as an agent of* [DRSP] *with any potential claims for mis-sold PPI or mis-sold pensions to be refereed back to* [DRSP]".

65.3. Introduced Customers: Clause 5.1 provides that: *"An Introduced Customer shall be deemed as such provided that he/she is not already present in* [DRSP's] *database. In the event that the same customer is introduced by more than one Introducer, the customer shall be deemed to have been introduced by the Introducer who first introduced the customer."*

65.4. Duration and Termination: Clause 6.1 provides that the Introducer Agreement came into effect on the Commencement Date and continued for an initial period of 6 months and that it should "*thereafter continue in force on a rolling basis subject to clause 6.2 there shall be a one month notice of termination*". Clause 6.2 provides for termination with immediate effect in case of "*serious breach*".

65.5. Entire Agreement: Clause 9 consists of an "entire agreement" clause which states: "*This agreement constitutes the entire agreement between the parties with respect to the subject matter of this agreement and supersedes all prior agreement, negotiations, and discussions between the parties relating to it."*

65.6. Amendments: Clause 10 provides "*Save as expressly provided in this agreement, no amendment or variation of this agreement shall be effective*

unless in writing and signed by a duly authorised representative of each of the parties to it."

66. It is not entirely clear when the terms of the Consultancy Agreement, ultimately signed on 11 May 2018, were agreed, although nothing really turns on this. However, the terms of the Consultancy Agreement are relevant. The key provisions thereof are the following:

    66.1. Clause 1.1 provided for DRSP to engage Octax and for Octax to make available to DRSP, Mr O'Connor ("*the Individual*") to provide the services set out in schedule 1 (*"the Services"*) . However, schedule 1 merely states that Octax is *"engaged on a non-exclusive basis to provide specialist consultancy services"*, without saying more.

    66.2. Clause 1.2 leaves the commencement date blank, but then provides that the agreement should continue for a fixed term terminating automatically on the expiration of four months unless extended by prior written agreement.

    66.3. Clause 2.1 provides that during the engagement Octax should and should procure that Mr O'Connor (and any substitute) provide *"the Services"* with all due care, skill and ability and use its or their best endeavours to promote the interests of DRSP.

    66.4. Clause 3.1 provided for DRSP to pay Octax in accordance with the provisions set out in schedule 2. Schedule 2 provided that Octax was entitled to charge a fee of £7500 per month plus VAT.

    66.5. Clause 4.1 provided that Octax and Mr O'Connor (and any substitute) might be engaged, employed or concerned in any other business, trade, profession or other activity during the engagement provided that they should not (without DRSP's consent), amongst other things, *"create any actual or potential conflict of interest with DRSP".*

    66.6. Clause 5.1 provided that: *"*[Octax] *shall not, and shall procure that* [Mr O'Connor] *(and any substitute) shall not (except in the proper course of its or their duties), either during the engagement or at any time after the engagement use or disclose to any third party any confidential information about the business or affairs of DRSP or any of its business contacts, or about any other confidential matters which may arise in the course of providing the Services. For the purposes of this clause, confidential information means any information* or *matter which is not in the public domain or which relates to the affairs of DRSP or any of its business contacts."*

    66.7. Clause 5.2 then provided that: *"This restriction does not apply to any use or disclosure authorised by us in writing or required by law or any information which is already in, or comes into, the public domain otherwise than through* [Octax's] *or* [Mr O'Connor's] *unauthorised disclosure."*

    66.8. Clause 9.1 provided that DRSP might terminate the engagement with immediate effect and without notice and without any liability to make any further payment if at any time Octax materially breached any obligations

under the Consultancy Agreement or if it wilfully neglected to provide or failed to remedy any default in providing the Services.

67. Against this background, Mr O'Connor's and Mrs O'Connor's employment with DRSP was terminated with effect from 1 March 2018, although Mr O'Connor continued thereafter to provide consultancy services in anticipation of the Consultancy Agreement being formally signed.

68. On 28 February 2018 Mr O'Connor sent an email to a number of key members of staff which might fairly be said to have sought to reassure the latter as to the position following his departure. Thus he commented that: *"I will still have an ongoing interest in the company and so fully expect you will be seeing plenty of me over the coming months. I'll still be working very closely with the company and will be referring cases over to you which I would not do if I didn't believe that the company and the staff were the best in the industry and so will continue to look forward to popping in to see you all."*

69. Further, notwithstanding his reservations in respect of Ms Taylor, he continued in this email as follows: *"I'm sure all of you will continue to give your all for the company and offer the remaining managers the same level of faith, support and kindness you invariably showed me over the years and am also thankful that in Melanie, my replacement has massive experience within the industry and will be able to offer opportunities for you all individually and the company generally to continue to expand. I've no doubt that the company is in safe hands and that you will find Melanie to be amiable and approachable at all times …"*

70. Ms Taylor's dependency on alcohol had, despite what Mr O'Connor might have said, become an issue by this stage. Indeed, at paragraph 65 of his witness statement, Mr Mond refers to it having transpired that Ms Taylor had been suffering from a dependency on alcohol, a matter that he says that he only began to notice in January 2018. Mr Mond further commented that it was clear that this had an impact on her performance *"from time to time"* over the coming months.

71. Mr Mond, himself, had his own health issues, which meant that he was not able to play his usual part in the business over the next few months, and that accounted for his own absences.

72. I note that in an email dated 9 March 2018, Mr O'Connor raised with Mr Waddell issues in relation to Octax's access to Slate. He commented that he thought that Octax would *"need to connect through their pro-networks remote desktop through a VPN using their windows auth if possible"*, and he continued: *"Essentially so they can connect to Slate, which will recognise them from their windows credentials and allow them to see only what they should."* This does flag up a recognition on Mr O'Connor's part that Octax's access to Slate should be limited.

73. By an email dated 19 March 2018, Mr O'Connor chased regarding the finalisation of the Introducer Agreement, pointing out that nine new leads had been passed from Octax to DRSP *"on good faith"* so far.

74. Following on from early discussions, on 21 March 2018, Mr O'Connor sent a very important email to Ms Taylor setting out his summary of what had been discussed

with regard to the referral of leads by DRSP to Octax (i.e as envisaged by clause 2.6.1 of the Introducer Agreement). It is necessary to set out the terms of this email in full:

"Hi Melanie,

Further to earlier, here's a quick summary of what was discussed:

- ***Old Clear Debt cases***
    - *To be worked by Octax 2 weeks from pack being sent and not returned (referred over by setting a database flag and view on our system – AH has come across to check this works and we have access only to those cases)*
    - *Octax to note cases on Slate with each contact attempt and outcome*
    - *Octax to call as DRSP and use only scripts, text messages and emails approved by DRSP*
    - *Each case to be called over a period of 2/3 weeks where each case will be attempted 6 times where possible*
    - *Octax to utilise dedicated number to ensure any returned calls can be answered as DRSP*
    - *Where a customer wants a pack resending, the references for these will be provided on spreadsheet to DRSP daily*
    - *Initially in the region of 2,000 cases being referred for calling plus approximately another 200 in a week and the remainder 2 weeks after they have been sent*

- ***Pension Cases***
    - *Any leads which have been closed as uncontactable can be referred over to Octax*
    - *Any cases packed out which have subsequently been closed as the customer has not returned the pack can be referred to Octax*
    - *These again will be called from a dedicated line and noted within Slate*

- ***Has PPI***
    - *Any cases where there has been a positive PPI response can be referred over to Octax to work where the case has been uncontactable*
    - *Details regarding noting, scripting etc. as above*

These are the primary products we would look to work owing to (1) the value of pension claims and (2) the PPI fee cap which is due to be implemented in the near future.

In addition, we also discussed working:

- *Old PPI/IVA data for pension leads (potentially targeted at people aged 45-65)*
- *Free PPI Check Packs which had not been returned*

The other products probably trump these in terms of importance as it is doubtful that the Free PPI Check packs will materialise in time to beat the cap into effect – although we could trial some if desired; the old PPI/IVA data is likely to take some significant mining meaning it could be several weeks/months before a project could be looked at for that – although I am not averse to trying.

In relation to DRSP's own R&D claim, you mentioned bringing in Adam's friend to draft but there is likely to be some prep work required before that which I am happy to help Hayley with.

Finally, with regard to Flexx, I am aware there is exclusivity with Flexx but I am certain I would be able to utilise their services to generate more Pension leads to me via a variety of websites I am running/will be running. I can manage the spend etc. on these myself but would no doubt see better results with their involvement. As these leads will be exclusively being passed to DRSP for pension mis-selling, is there any issue with Flexx running some of my marketing spend for pensions?

I think this was everything. If you can confirm you're happy with this I'll arrange for Hayley and Adam to sort out the data to pass over.

Best,

Tom"

75. Ms Taylor responded later that day, copying Mr Horan and Hayley O'Connor in on the reply, as follows:

"Hi Tom,

Many thanks for the comprehensive overview. Please proceed as outlined.

Taking your point in relation to the free PPI checks – let's review the position once the other cases have been attempted and the contact strategy exhausted.

In terms of Flexx, I'll come back to you shortly.

Adam/Hayley – can you please arrange for the agreed data to be sent (with appropriate password protection) over to Tom and confirm once this has been done.

Many thanks all,

Melanie"

76. Adam Horan responded:

"That'll be around lunch Thursday Melanie once all current packs through the system

I went to Tom's office earlier and have no concerns re his access to slate - all is as described

Perhaps another look after the 1st drag and drop for absolute clarity but I can't see any issues"

77. Ms Taylor responded *"Great, many thanks"*.

78. The following day, Mr O'Connor wrote using his Octax email account setting out the fields of data that were required.

79. On 23 March 2018, Mr Horan arranged for the first drag-and-drop within Slate of the relevant data in order that Octax could access the same in order to chase up the leads pursuant to the Introducer Agreement. This involved the dragging and dropping of some 1896 cases. Whilst the Claimants complain that other drags-and-drops of data were not authorised by Ms Taylor, and therefore involved an infringement of the Claimants' database right, no complaint is made in respect of this drag-and-drop, or in respect of a subsequent drag-and-drop of 364 cases on 9 May 2018 by Hayley O'Connor.

80. However, the Claimants do complain about the following drags-and-drops of data, which are alleged to have been effected on Mr O'Connor's instructions by the individuals referred to below, without Ms Taylor's specific consent which the Claimants maintain was required:

- 10 April 2018, data relating to 49 cases dragged and dropped by Mr Horan
- 17 April 2018, data relating to 97 cases dragged and dropped by Mr Carney
- 27 April 2018, two tranches of data relating to 301 and 516 cases dragged and dropped by Hayley O'Connor
- 4 May 2018, data relating to one case dragged and dropped by Mr Connell
- 22 May 2018, data relating to 117 cases dragged and dropped by Mr Connell
- 23 May 2018, data relating to 21 cases dragged and dropped by Mr Connell
- 4 June 2018, data relating to 20 cases dragged and dropped by Mr Connell
- 14 June 2018, data relating to 4 cases dragged and dropped by Mr Connell
- 2 July 2018, data relating to 47 cases dragged and dropped by Mr Connell
- 19 August 2018, 118 cases dragged and dropped by Mr O'Connor himself

81. Through his DRSP account, Mr O'Connor enjoyed "Level 3" access to Slate during the course of his employment with DRSP. The position did not change after Mr O'Connor (through Octax) became a consultant with effect from 1 March 2018. Mr Mond described such access as follows at paragraph 94 of his witness statement:

> *"One of the purposes of Octax's consultancy with DRSP was to provide a smooth transition following Tom's departure. It was therefore both natural and sensible that, in order to enable Tom to perform that consultancy function, he kept the DRSP account he had held as an employee and further, that his account retained:*
>
> *94.1 firstly, all of the network permissions (and the access privileges that those permissions afforded) which had previously been associated with it; and*
>
> *94.2 secondly the Admin Role connected with the use of Slate PPI together with many of the other Roles."*

82. So far as Octax's access to Slate is concerned, a limited external role was conferred upon a number of account holders. One of Claimants' complaints, to which I shall return in due course, is that Mr O'Connor wrongly used his DRSP Consultancy account to grant Octax account holders, including himself, additional roles in addition to the default setting under the external role.

83. It is further a complaint of the Claimants, amongst other complaints, that Mr O'Connor used his DRSP Consultancy account to write and run SQL queries, not only to assist Octax in chasing up leads, but also in order to identify cases to be passed by DRSP to Octax when, on the Claimants' case, it was a matter for DRSP to identify the relevant candidates even if the cases in question fell within the scope of Mr O'Connor's email dated 21 March 2018. It is said that the requisite steps required the express authority of Ms Taylor, which was never provided, and the Claimants rely upon a number of emails attaching spreadsheets containing Slate records sent from Mr O'Connor's DRSP email account to his Octax email account.

84. More fundamentally, it is the Claimants' case that any licence or consent on the part of DRSP given to Mr O'Connor to access Slate using his DRSP Consultancy account was limited to accessing Slate for purposes solely to do with his consultancy role, and not when acting on behalf of Octax.

85. It is a further complaint of the Claimants that cases dragged and dropped to Octax included cases going beyond the scope of the cases provided for by email exchange on 21 and 22 March 2018, and that that was unauthorised in any event. It is Mr O'Connor's and Octax's case in response that whilst cases might have been referred going beyond the scope of this correspondence, that correspondence envisaged other types of case being referred to Octax, and that everything that was in fact referred to Octax was done so with appropriate authority.

86. At much the same time and/or shortly after the initial transfer of data to Octax on 23 March 2018, Mr O'Connor did in fact, by using his DRSP Consultancy account, grant Octax external account holders additional roles in Slate. When cross-examined in relation to this, Mr O'Connor explained, having not previously mentioned this, that Mr Horan had visited Octax's premises prior to the first drag-and-drop as referred to in Mr Horan's email dated 21 March 2018, but that there was a second visit by Mr Horan about seven days thereafter when Mr Horan assisted Mr O'Connor in relation to granting the additional roles to Octax external account holders. Further, it was Mr O'Connor's evidence that the extension of the roles in this way was done to assist Octax in reheating leads referred to Octax by DRSP, and thereby generate more business for DRSP.

87. Mr O'Connor accepts that he did run SQL queries in order to identify cases falling within a particular criteria, ascertained by the use of particular codes applied to the searches, appropriate for transfer of data to Octax. It is Mr O'Connor's and Octax's case that this was an essential part of the operation of the agreement, and specifically approved by DRSP's managers, Mr Connell or Hayley O'Connor, and endorsed by Ms Taylor herself.

88. As to the dragging and dropping of data, it is Mr O'Connor's and Octax's case, they say supported by the evidence of Mr Connell, Hayley O'Connor and Ms Jordan, that Mr O'Connor did not "instruct" the relevant individuals to drag-and-drop the cases in

question. Rather, he requested them to do so in accordance with agreed criteria, and they, with the necessary authority, and indeed with Ms Taylor's knowledge and approval, effected the drags-and-drops.

89. I will deal in more detail with the allegations concerning the dragging and dropping of data when dealing with the merits of the claim. However, it is necessary to refer to some of the correspondence and other documentation relating to the transfer of leads to Octax.

90. By an email dated 20 March 2018 Ms Taylor wrote to Mr Connell to ask for daily updates from Mr O'Connor. Hayley O'Connor, in her evidence, stated that she considered that this showed that Ms Taylor knew that Mr O'Connor had access to the relevant data on the basis that this information could only be provided by carrying out SQL searches/queries.

91. On 10 April 2018, Mr O'Connor emailed Hayley O'Connor setting out a search code, and stating that that this was the code that had been run in order to get *"the data to chase with"*. Mr O'Connor stated that, by reference thereto, he had got *"501 complaints ready to go by my logic"*. Hayley O'Connor responded to the effect that she had *"sorted it"*, attaching a file stating that: *"This is my updated data to show where things are up to, just so you can review if needed."* There was further email exchange between Mr O'Connor and Hayley O'Connor relating to data and reports that Mr O'Connor had run, which Hayley O'Connor forward onto Mr Horan. Mr Horan then effected the drag-and-drop of cases that took place on 10 April 2018, emailing Mr O'Connor with an attached list of leads and cases *"that have been closed by DRSP and are available for you to chase"*, and stating that he had *"done the drag-and-drop and it looks like these cases should be available for you to view"*.

92. Although Ms Taylor was not involved in this email exchange, it was Hayley O'Connor's evidence that she considered that she was acting within the scope of her authority, Ms Taylor having conferred a degree of autonomy on managers such as Hayley O'Connor and Hayley O'Connor having in any event discussed matters on an ongoing basis with Ms Taylor.

93. Support for the fact that Hayley O'Connor was, as she said, in regular contact with Ms Taylor, and reporting to her, is provided by an email sent the following day, 11 April 2018, by Hayley O'Connor to Ms Taylor in which she said that: *"We have 2016 complaints that can be sent to lenders … of which 501 are for claims passed to Octax. I will get more up-to-date figures for you in the morning, but the chasing they are doing is definitely working!"*

94. In an email dated 27 April 2018 to Mr Connell, Mr O'Connor said: *"It's irritating looking at that folder knowing I can just do it myself but don't want to interfere without an invite and could look dodgy if people see me adding LOAs to my own cases without knowing first … I'm also capable to getting the data for the IVA cases myself but that probably should come from you guys".*

95. Mr Connell emailed Hayley O'Connor the same day saying, referring to Mr O'Connor, that *"He's after – 500 Has PPI cases (close no response) / 500 SAR Pack Out no response / Any other ClearDebt Packs out not returned (that where happy to hand over (over 14 days for example)."*

96. On the same day, 27 April 2018, Ms Taylor sent a report to Mr Mond which included the following under the heading "TOC":

> *"Tom is keen for the introducer agreement to be concluded and for the exit agreement to be implemented …*
>
> *The re-work we have given is producing some good results, which I need to better quantify, but costs are not being borne by DRSP.*
>
> *The PPI new pipeline, from the re-work is looking promising, so I briefly discussed some more PPI/IVA, mortgage and pension re-work too from the existing database. Tom is keen to undertake this and I prefer not to utilise DRSP resource given the current issues. The consent problem obviously isn't a concern on these occasions. It is however difficult to project what additional revenue may be available until we have implemented a strategy and trialled some cases. There will be some email campaigns by DRSP as a starting point, but this will require limited resource and the cost of this will be minimal."*

97. In an email dated 2 May 2018 to Hayley O'Connor, Mr O'Connor observed that there were a couple of reports that *"I think will be helpful for both of us but they're beyond my level."* This would suggest that Mr O'Connor did not regard himself as having unfettered access to Slate for all purposes, and would, as appropriate, have deferred to Hayley O'Connor in relation to matters as between DRSP and Octax.

98. As I have said, in addition to the data dragged and dropped on 23 March 2018, the Claimants do not object to the dragging and dropping of data that occurred on 9 May 2018, and nor could the Claimants realistically have done so given the disclosure of text messages by which Ms Taylor plainly authorised the transfer of the relevant data to Octax. However, it is not without significance that a chain of email correspondence began on 9 May 2018 with Mr O'Connor referring to a particular query code, and stating that: *"This query returns 369 leads that haven't been called and aren't from today - can have a look at ones with notes later on once we start motoring through these".* Hayley O'Connor responded to say that: *"Those have been dragged and dropped now and should show as Octax".*

99. On 10 May 2018, Mr O'Connor emailed Ms Taylor with regard to "Flexx Figures". The position was that Flexx had advertised for pension claims in very broad terms with the result that a significant number of unproductive leads were being provided. Mr O'Connor commented: *"I can 100% see why so many non-qualifying customers are coming through as the advert is so broad".* This email was forwarded to Mr Mond, who commented *"Interesting"* in an email in reply to Ms Taylor.

100. The Introducer Agreement, the Consultancy Agreement, and the Settlement Agreement were all signed on 11 May 2018, on which date Mr O'Connor formally resigned as a director of DRSP.

101. The forthcoming implementation of the GDPR raised a number of issues at this time as touched upon in Mr O'Connor's email dated 21 March 2018, in particular as to the ability to make use of data that was liable to become worthless if not quickly used. Further, a cap of 20% was to be introduced later in the year on the fees that CMCs

could charge in respect of PPI claims. The former issue was raised by Mr O'Connor in an email to Ms Taylor dated 11May 2018.

102. An email exchange between Mr O'Connor and Ms Taylor on 14 May 2018 shows that they were in communication at this time. Not many emails have been produced to which Ms Taylor was party. During the course of her evidence, Hayley O'Connor explained that it was Ms Taylor's practice to deal with matters verbally over the telephone, or face-to-face, rather than through emails, and this is borne out by the evidence.

103. However, Ms Taylor did write to Mr Connell on 14 May 2018 referring to the excessive leads from Flexx in consequence of the matters referred to in paragraph 99 above. In this email, Ms Taylor referred to her understanding that *"Hayley was going to send the excess to Tom"*, and stated that: *"I'll be speaking to Dan* [of Flexx] *once I've got your figures – there's clearly too many of the wrong type. Tom has made some good suggestions to fix - which I'll share with Dan later*."

104. For some further insight as to how drag and drops were being progressed, I note that on 24 June 2018, Mr O'Connor emailed Mr Connell in the following terms:

> *"Please can you allocate the latest closures over to us on the drag-and-drop and send me a list of them so I'll get my guys bashing through them - think last time we ended up with about 18 packs back from those leads so could help give you a decent week as they'll be on that and that alone.*
>
> *I brought my laptops home but like a pillock forgot my charger for my old DRSP laptop and it's a different fitting for my Octax one so can't get into SQL to sort out a list, but I think the code for the leads we want will be something like this: …"*

Mr O'Connor then set out the relevant code.

105. Mr Connell responded the following day to say that he would *"run the lead reassignment stuff this morning and get a list over to you asap."*

106. On 27 June 2018, Mr Shalom sent an email to Mrs Robinson's email address enquiring as to whether Ms Taylor had given notice to Mr O'Connor under the Consultancy Agreement. He observed that the latter was *"fixed to 31/8/18, and then rolling 1 month thereafter."*

107. On 27 June 2018, Mr Connell wrote to "Liz" raising a number of concerns, and commenting that Ms Taylor did not have her work PC or phone. Mr Connell's concerns largely centred upon the loss by DRSP of a number of key staff, and in particular the possible future loss of Hayley O'Connor who had, herself, indicated her dissatisfaction with matters. This email was responded to by Mr Mond who simply commented that Ms Taylor would have a PC the following day, and her business mobile telephone.

108. On 6 July 2018, Mr O'Connor wrote by email to Mrs Robinson's email account and to Ms Taylor stating that he had heard on the *"grapevine"* that Hayley O'Connor had left the DRSP, and made a number of offers to help out in the light thereof. On 13 July

2018, Mr O'Connor wrote again to Mrs Robinson's email account and Melanie Taylor suggesting an urgent catch up. This latter email raised issues concerning the capacity and ability of DRSP to deal with new leads and also the old cases chased up by Octax and referred back to DRSP, a particular concern being that Octax was bound to provide leads exclusively to DRSP, and therefore was not in a position to send leads that it might have generated elsewhere.

109. Ms Taylor responded the same day, stating that she was aware of the issues that Mr O'Connor had outlined, and that *"we are well under way towards resolving many of them"*. She agreed that a meeting was appropriate, and a meeting was subsequently arranged for 18 July 2018.

110. A further important exchange of emails took place between 14 July 2018 and 16 July 2018:

    110.1. On 14 July 2018 Mr O'Connor emailed Mr Connell asking him if he would drag-and-drop a number of pension leads. The email referred to the fact that Mr O'Connor had used the code set out in the email, and Mr O'Connor continued: *"if you're happy with this code I can run it myself if you prefer?"*

    110.2. On 16 July 2018, Mr Connell replied *"Done"*.

    110.3. In response to this email, Mr O'Connor enquired by an email sent at 9.31 on 16 July 2018 as to whether Mr Connell would be *"happy for me to do the D&D myself in the future if it is done using the code below? Saves you a job then?"*

    110.4. One minute later, Mr Connell replied: *"Yes that's fine by me!"*.

    110.5. Mr Connell was adamant in giving evidence that he would only have agreed to Mr O'Connor doing drag-and-drops himself if satisfied that he had Ms Taylor's agreement to this. He said that it was his recollection that he had discussed his latter email with Ms Taylor in the office, notwithstanding that the response was sent only a minute after the receipt of the earlier email from Mr O'Connor.

111. Mr O'Connor and Octax rely upon this exchange of emails as having given authority to Mr O'Connor to drag-and-drop the 118 files that were dragged and dropped to Octax on 19 August 2018.

112. A meeting took place between Mr and Mrs O'Connor and Mr Mond at DRSP's offices on 18 July 2018. Ms Taylor was not present, and Mr O'Connor made a recording which has been transcribed.

113. The transcript of this meeting records a number of relevant matters, including:

    113.1. Mr Mond commenting that there had been a management change for a number of reasons and that: *"There's no reflection of you not having a go. You have more staff, she has her staff and whatever. Whether Melanie stays on long-term or not is another question but until, you know, things are OK with getting more staff in etc. …"*

113.2. Mr Mond continued: *"But whatever we can do to try and improve the position will be great. So for example, what we've been spending with Flexx recently hasn't been working. He's changed his own modus operandi and I don't know why that's the case or what, we were trying to get him to go back to his original adverts, you know …"*

113.3. The meeting also included the following important exchange:

"Tom O'Connor	*I know the figures myself because I had a quick look. Basically it's looking very good. So we got about 5500 complaints that we've done from er that. To date there is about £1m of offers.*
David Mond	*That's fine. We gave that to you to do.*
Tom O'Connor	*So we're halves on that. So, end of this month you're probably looking at about £100,000 to us, £100,000 to DRSP, about £90,000 odd to ClearDebt in supervisor fees. So, it looks pretty good but …*
David Mond	*Put that in the minutes so I know exactly.*
Tom O'Connor	*So, there's still - what we should end up with at the end of 5500 complaints is we both should be looking at about a mill to us a mill to DRSP and maybe £900,000 to ClearDebt but at the moment off (sic) the £1m of offers there has only been £300,000 of cheques, so we know there is no chasing taking place at the moment.*
David Mond	*So, we've got to chase. I've asked them. Right, one of the things I said to Melanie is we've got to chase, and I think Becky is looking at, the new Becky is looking after that arranging to chase up and things.*
Tom O'Connor	*Ok, I'll minute up the bits and pieces*
David Mond	*Put all the figures and your projections in for me because I like the way so I can follow it, so I can understand it in detail.*
Tom O'Connor	*So, there's this £300,000 of cash in so far this month and I'm told there is another couple of hundred grand still to go through. So, it's going to be two hundred*

	and odd grand of fees this month which is great, and it should get bigger.
David Mond	*so, on the 5000 cases, the 5000 claims, on the ClearDebt ones, there is a £1m offers?*
Tom O'Connor	*Yeah, just short of £900,000 something odd, £300,000 of cash so there will be a lot going into the IVA estates at the end of the month but what I'd suggest, and can speak to David Shalom on is this if you wanted, is do you remember how they do sort of the pre-drawing of money, so I'd maybe speak to him and say don't do any disbs on the closed cases for a few months to make sure the money is there to cover fees as they come in otherwise there will be a loss on recovery.* *So I'll put something in there on that as well. Have you got any ideas.*
David Mond	*You're saying £300,000 of the opening offers has already been received, that's not fees, that's £300,000.*
Tom O'Connor	*cash, yeah. So, fees on that I think are about £140,000, something like that, so far.*
David Mond	*Right. That's fine."*

114. Mr O'Connor produced minutes of this meeting which referred to Mrs Robinson as an attendee, but not Mr Mond.

115. On 26 July 2018, "Liz" emailed Mr O'Connor to say that they been in discussion with Ms Taylor, and that a full response would be sent to him shortly dealing with matters arising from the meeting the previous week, from Mr O'Connor's minutes and from his recent emails. The letter went on to say that *"I"* had decided that the consultancy would not continue after the August payment, and that the email should be taken as notice to that effect, but that referrals *"from you to us will continue on agreed terms which we still need to document between us."*

116. Mr O'Connor responded to this latter email by an email dated 28 July 2018 that further chased for a response. The email refers to Mr O'Connor having seen some DRSP staff whilst out the previous evening, who had expressed concern that Ms Taylor had left the business and in relation to other matters concerning DRSP. Mr O'Connor said that he had told them that these concerns were *"nonsense and that I*

wouldn't pass leads to a company if I had doubts over its longevity and have tried to reassure them that Melanie hasn't left."

117. "Liz" forwarded this email to Ms Taylor commenting: *"need to sort Tom out various responses of his emails and Minutes - sooner rather than later."*

118. On 31 July 2018, Mr O'Connor emailed "Liz" referring to the fact that he was just doing the end of month invoicing, and stating that the figures that he had on his report *"for the Old ClearDebt IVA cases that we've worked are that £304,202.24 (inclusive of VAT) has been drawn in fees which by my maths means will be invoicing you for £126,750.93 plus VAT."* The email went on to state that Mr O'Connor would also be invoicing *"for the leads later today for £8250 plus VAT - as discussed"*.

119. "Liz" forwarded this latter email to Mr Shalom asking: *"where are these funds £304,202.24"*. A further email to Mr Shalom commented: *"We have CD overheads to cover before split to TOC"*. Mr Shalom responded: *"No idea on any of this - any funds are in the general pot of money and I have never reserved for any splits with TOC as no idea what it is based upon or relates to.* "Liz" forwarded this email chain to Ms Taylor.

120. Earlier in the day, Ms Taylor had emailed Mr Connell and Mr Mond, copying in Mrs Robinson's email account, attaching an agenda for a meeting later that morning. The agenda consisted of highlighted sections of the minutes produced by Mr O'Connor in respect of the meeting on 18 July 2018, and raised a number of questions in respect thereof. This included asking whether the figures were correct, and what payment chasing had taken place to date in respect of the sections of the minutes that referred to the fact that Octax work had generated around £1 million gross to date, and that there had been receipts of only £300,000 thus far, adding *"so lots of payment chasing required"*.

121. On 2 August 2018, and following on from earlier email correspondence with Mr Shalom with regard to figures, Mr O'Connor emailed Mr Shalom at 10.20am attaching a PPI client account reconciliation. In this email, Mr O'Connor stated that he had attached a query that would show Mr Shalom: *"all of the references of cases associated with Octax so I make it that from this batch, there is £302,866 in gross fees so will invoice for £151,433 inc VAT"*. This email then contained a table setting out how the total sum of £165,383 claimed was calculated, being £7,500 plus VAT (total £9,000) in respect of the consultancy, £4,125 plus VAT (total £4,950) in respect of *"50% of Leads"*, and £126,194.17 plus VAT (total £151,433) in respect of *"50% Outsource ClearDebt work"*. The relevant invoice dated 2 August 2018 addressed to Mrs Robinson at DRSP claimed the above sums of £4,125 and £126,194.1 plus VAT , totalling £160,433.

122. The copy of this latter email dated 2 August 2018 that has been produced is shown to have been forwarded to Mr Mond and to Mrs Robinson's email account on 24 October 2018, but not prior thereto. However, Mr Shalom accepted under cross-examination that he was told to pay the invoice: *"whether it was by Melanie, Liz or Mr Mond, I do not know"* (Day 4/page 467).

123. Further, it can be seen that at 10.27 on 2 August 2018, after Mr O'Connor had sent his email to Mr Shalom, "Liz" sent an email to Mr O'Connor saying: *"Presumably DRSP overheads comes out first before we split the fees?"*

124. Mr O'Connor responded to this stating: *"No it's a straight 50/50 split on these with neither side's costs been taken into account."* This email went on to explain that: *"For these cases though, most of the costs incurred will be on our side as 90% of the packs were sent by us, 90% of the complaints, all of the phone work and customer engagement, the data searches to validate addresses, most of the cheques were put through and from DRSP's side none of the Missing Info, Payment Chasing, Overdue responses have been actioned so we're going through that ourselves as well now. The only bits done by DRSP so far is the logging of post/workflow and we've done a decent amount of that on our side as well."*

125. "Liz" then responded to say: *"Ok - let me discuss with Melanie as who (sic) sent out initial packs and when were they sent?"*. In an email in response to this latter email, Mr O'Connor questioned the relevance of this. "Liz" then responded with an email that said: *"I just want to know how we got into this position and why did the DRSP staff not do the work in chasing."*

126. Mr O'Connor responded the following day pointing out that this is what had been discussed at the meeting a few weeks ago, i.e. on 18 July 2018. He further stated that he believed that Ms Taylor was aware of the relevant matters, and that she was *"on the way to fixing them long term"*. Mr O'Connor observed that with Hayley O'Connor having left, there was no longer anybody in DRSP's offices *"who has a decent understanding of SQL"* other than Mr Carney, and he stated that he had therefore offered to do SQL training sessions for DRSP employees.

127. Notwithstanding the above exchanges, the invoice dated 2 August 2018 was paid by DRSP, although it is the Claimants' case that it was paid by mistake believing that the relevant amount was due and payable when, in fact, it was not.

128. It would appear from an email dated 6 August 2018, that Mr O'Connor and Mrs O'Connor attended to give basic SQL training to DRSP's employees at about that time.

129. In an email dated 21 August 2018 to Ms Jordan, Ms Taylor asked: *"What was Tom in for today?"*. Ms Jordan responded setting out a number of matters that Mr O'Connor had assisted with. She concluded by saying: *"if it's okay with you it might be beneficial to utilise him until his consultancy is up at the end of August?"*

130. There was then an important exchange of email correspondence on 23 and 24 August 2018:

    130.1. At 16.39 on 23 August 2018, Mr Hindle emailed Ms Taylor querying whether it was right that *"Ash Sewell is calling leads that were previously allocated to our guys here?"* He expressed concern that leads that *"our guys could be calling are being taken by Octax"*.

    130.2. Ms Taylor responded to inform Mr Hindle that his concerns were *"absolutely valid"*. She asked Mr Hindle to provide the customer reference, and to let her

know if he came across any other cases. Ms Taylor copied Ms Jordan in on the response, and asked if she had anything to add.

130.3. Ms Jordan responded seeking confirmation as to: *"the agreement Octax has in place currently"*, and saying that: *"If they are allowed to work leads over two weeks old (or whatever the agreement is) then this may explain why these leads are being called?"*

130.4. The following day, at 13.25, Ms Taylor responded: *"Working DRSP referrals, whether live or closed, has not been agreed by me, nor by Matt. Could you please confirm what discussions you've had with Tom in relation to the data he and his team are accessing/using? Clearly Octax working the same data as DRSP is not acceptable nor conducive to good customer outcomes."* Ms Taylor copied Mrs Robinson's email account in on this reply and added *"Liz - I assume this hasn't been agreed by you either?"*

130.5. Ms Jordan responded to say: *"I haven't agreed to Octax working closed cases. This was already in place when I started and was an agreement between Octax and DRSP"*.

130.6. Ms Taylor then responded as follows:

> *"The case [Mr Hindle] has raised is not a closed case. Has working live data been discussed with Tom?*
>
> *I am unaware of any agreement regarding closed cases, with the exception of a batch of old ClearDebt cases, that Octax was given permission to work.*
>
> *Matt - are you able to offer any further clarity?*
>
> *Please refrain from contacting Tom/Octax staff at this time."*

130.7. Mr Connell then replied at 13.54 on 24 August 2018 stating:

> *"Octax were also assigned all old Pension leads that we closed as non-contactable, and old PPI cases that were closed for the same reason (as I understand this was agreed to by someone!).*
>
> *If they have worked a closed lead and this has subsequently been re-opened, this could be the reason for them working a live case.*
>
> *Can you send me the case reference and I'll see what has happened?"*

130.8. Ms Taylor also forwarded this latter email to Ms Jordan commenting:

> *"Given the low volume of referrals, is there any good reason to have Octax working closed cases, instead of DRSP following up? Also, have you asked the sales team to chase closed cases? I'm concerned that both businesses are potentially trying to contact the same customers."*

130.9. Ms Taylor also responded to Mr Connell at 14.12 on 24 August 2018 stating: *"I assume you don't know who that "someone" is?"*. She went on to provide Mr Connell with details in respect of the case in question, and asked him to let her know his findings.

130.10. Mr Connell responded at 14.18 on 24 August 2018 to the effect that he believed that the *"someone"* was either *"you or Liz - it was also discussed with [Mr Horan] as he was re-assigning these at the outset."* He then confirmed that the case in respect of which the query had been raised was, in fact, *"fine"*, going on to observe that the case was closed by *"Sarah"* on 11 July 2018. He explained that: *" as she could not get hold of him, it was passed to Octax on 19 August 2018 and then Ash re-agreed it. ... No wrongdoing here as far as I can see."* This email was copied in to Mrs Robinson's email account.

130.11. By an earlier email sent by Ms Taylor to Mr Connell on 23 August 2018 at 18.56, Ms Taylor had sought confirmation from Mr Connell with regard to any agreements that may have been made with Mr O'Connor *"which I am unaware of?"*

130.12. In response to this latter, Mr Connell replied at 10.38 on 24 August 2018 stating that as far as he could recall: *"any leads that were closed as non-contactable were being passed to Octax, but I don't think they will be given any active cases."* This email subsequently went on to state that: *"In terms of access, I believe Tom's DRSP account is still active, so he would have unlimited access to the system I believe. Regarding terms, that something that was discussed at the outset and mentioned above - nothing I can comment on. Commission also would be part of the original agreement between DRSP and Octax, which I understand to be a fee share on anything they work - but as discussed with Becs* [Ms Jordan]*, I assume there is a definition of "work" within the original agreement to define when and what they get paid on?"*

130.13. Ms Jordan responded to Ms Taylor's email referred to in paragraph 130.8 above stating that it was difficult to say without knowing *"the exact agreement"*, and that she would not want to make an informed decision *"if David has put something in place with Octax"*. She suggested that: *"It may be best to gather the information from David/Liz as to the agreement so we can sit down and discuss on Tuesday how best to move forward."*

130.14. Ms Taylor responded to this latter email saying: *"Parking any agreement, which I discussed with Liz/David, and given the fees we stand to lose, is there any good reason for not chasing these cases ourselves - at least until referral volumes increase? ... After what time does the auto-allocation take place? And is this to reassign to Octax or an individual".*

131. An exchange of emails took place between Ms Taylor and Ms Jordan on 28 August 2018 in that:

131.1. Ms Taylor emailed Ms Jordan asking: *"Following our earlier discussion, are you going to be advising Tom that DRSP will currently be chasing the closed cases?"*

131.2. Ms Jordan replied: *"I can do if you like … He may want to speak to you directly, I doubt he'll be happy about it. You never know he may surprise us!"*

132. Ms Taylor then forwarded the latter email to Mr Mond stating: *"Can I have your thoughts please? Potentially the only impact I can see from him being unhappy is him withdrawing referrals, but he stands to lose to (sic). Might be worth us continuing until I meet with him. He's back from holiday tomorrow, so probably next week would be better once I have got the IT restrictions in place."*

133. Mr Mond replied, on his own email account, stating: *"Leave it to you to decide."*

134. It was Mr Mond's evidence that he had discovered from Ms Taylor in August 2018 that Mr O'Connor had been involved in the illicit downloading of data that amounted to data infringement. Mr Mond was unable to be specific as to when Ms Taylor had brought this to his attention, suggesting that it was probably by way of a telephone call.

135. On 1 September 2018, Mr O'Connor's and Octax's access to Slate was stopped.

136. In an email dated 3 September 2018, Mr O'Connor complained to Ms Jordan that Octax was struggling to get into Slate.

137. There was a lengthy exchange of email correspondence between Mr O'Connor and Ms Taylor between 30 August 2018 and 5 September 2018 the gist of which was that:

137.1. By email dated 30 August 2018, Mr O'Connor sought to arrange a catch up meeting.

137.2. Friday, 7 September 2018 was identified as a mutually convenient time, and Ms Taylor informed Mr O'Connor that Mr Mond would be joining the meeting. Mr O'Connor suggested meeting over lunch at a restaurant, but Ms Taylor responded that she and Mr Mond preferred to meet at DRSP's offices.

137.3. In an email dated 31 August 2018, copied into Mrs Robinson's email account, Mr O'Connor complained about Mr Hindle refusing to send out a pack for no good reason. In an email sent the following day, he stated that he did not think that the catch up could wait until the Friday.

137.4. In an email dated 2 September 2018 to Ms Taylor, copying in Mrs Robinson's email account, Mr O'Connor referred to not having heard back Ms Taylor, and stated that he had just come into the office to discover that his VPN access to Slate was not working, that it looked as if his password been changed, and that he had noticed that the permissions had been *"messed around with as well"*. He continued: *"Any ideas? It looks intentional but I have no idea why it would be or why it wouldn't have been communicated?"*

137.5. An email sent from Mrs Robinson's email account on 3 September 2018 suggested changing the meeting to 11.30 on Friday 7 September. In an email response sent the same day, Mr O'Connor agreed to this *"as discussed"*. The contents of this email supports Mr O'Connor's evidence that he had a telephone call with Mr Mond at this point during the course of which Mr

Mond made a number of allegations which Mr O'Connor refuted. Mr O'Connor's email continued that refutation and concluded by saying: *"Given that Octax's money is reliant on the performance of DRSP, it is not in my interests either professionally or personally (I have tried to make sure you and the staff were okay following my departure) to see the company in such a pitiful state and am sure you can recall numerous emails from me and Abi begging to help when we saw the standards slide."*

137.6. In a further email sent the same day, Mr O'Connor further complained about his treatment, and the issues that had arisen concluding: *"As per the previous email, this whole situation is farcical and unprofessional beyond words. As you can no doubt tell, the way this has been handled has left me furious. I thought better of you than this and would have hoped you thought better of me also."*

137.7. In response, in an email sent at 3.26am on 4 September 2018, Ms Taylor replied: *"I'm not in keeping with your concerns. You have broken the rules regarding data access … Let's meet Friday as agreed."*

137.8. Mr O'Connor responded to this latter email, writing: *"Melanie - I really haven't … David has assured me that I'll be provided will (sic) all of the information well in advance of the Friday meeting … It appears as though you've decided there has been some kind of breach and as such it follows that the information upon which your conclusions are based can be forwarded immediately.*"

137.9. Mr Mond responded to the latter email, using Mrs Robinson's email account, stating that: *"factual evidence will be supplied before the meeting"*.

137.10. The email correspondence continued with Mr O'Connor trying to seek an assurance that the relevant evidence would be provided 24 hours before the proposed meeting in order that he could consider it, and not be ambushed at the meeting. In the event, nothing further was provided, although it is Mr O'Connor's evidence that Mr Mond left a voicemail message for him at 10.10 on the Friday asking where he was. It was Mr O'Connor's evidence that he did not attend the meeting because he had not been provided with the information or evidence that he had sought.

138. On 14 September 2018, Ms Jordan emailed Mr O'Connor saying that Ms Taylor had asked her to check again with him as to whether: *"we are fine to call your leads and cases?"*

139. The present proceedings were commenced on 18 September 2018, and immediate application was made for interim injunctive relief, returnable on 21 September 2018. The latter application was supported by a witness statement made by Ms Taylor, in her capacity as Managing Director of DRSP, dated 18 September 2018.

140. As already mentioned, the proceedings as commenced contained allegations that Mr O'Connor and Mrs O'Connor had both acted dishonestly, and otherwise than in good faith. It is Mr Lee's unchallenged evidence that Mr Mond had advised him at the time that Mr O'Connor and Octax had been stealing data from DRSP, and told him that Mr

O'Connor was a thief and untrustworthy, hence he had *"issued an urgent interim injunction against Tom and Octax in the High Court"*.

141. A number of points should be noted so far as the contents of Ms Taylor's witness statement is concerned:

    141.1. At paragraph 16.4 it referred to Mr O'Connor's *"consultancy work"* following the termination of his employment with DRSP being *"strictly linked"* to 2 categories of work, namely sourcing potential leads in relation to pension mis-selling claims and introducing the latter to DRSP in return for a commission, and working on a number of historic IVA PPI claims that DRSP *"had been commissioned to work on"* where Mr O'Connor and/or Octax *"would receive a commission for work done on such files where such work had not been done by employees of* [DRSP]*."*

    141.2. In paragraph 24, it was asserted as follows: *"However, on or about the beginning of September* [DRSP's] *suspicions were aroused by* [Mr O'Connor's] *behaviour. He was coming into the office more, accessing information and data was updated on his IT account when he was not in the office. In isolation, the individual items were not particularly significant but taken together they were sufficient for me to start an investigation into precisely what* [Mr O'Connor] *had been doing."*

    141.3. Paragraph 25 then went on to allege that as part of the investigation, evidence had been uncovered of *"the systematic access, misuse and transfer of customer data by* [Mr O'Connor] *extracting large quantities of such data from* [DRSP] *and disclosing it to* [Octax] *as well as manipulating* [DRSP's] *Slate system for the direct benefit of* [Octax]*."* Particulars were then provided.

    141.4. In paragraph 26.1 it was alleged that: *"Notwithstanding the termination of* [Mr O'Connor's] *employment,* [Mr O'Connor] *had without my knowledge remained registered as a "super user" of the Slate IT system. This enabled him to access Slate freely at any time and also gave him the ability to amend and download customer data without my knowledge or authorisation. For the avoidance of doubt,* [Mr O'Connor] *was not authorised to remain registered as a "super user" and there was no legitimate reason for him to hold this level of access. Had I been aware of this level of access, I would have given instructions to revoke it immediately as I did when I discovered in (sic) on 31 August 2018."*

142. On 21 September 2018, and without any admission of liability, the Defendants agreed to a consent order granting interim injunctive relief pending trial.

143. Ms Taylor sadly died on 5 October 2018. It is common ground between the parties that she had suffered from an alcohol dependency, which had affected her behaviour, and her ability to carry out duties, albeit that this has been emphasised to greater extent by the Defendants than the Claimants.

144. It is necessary to refer to a meeting that took place on 19 October 2018 between Mr Mond and Ms Jordan, a recording of which was made by Ms Jordan, and which has been transcribed. By this stage issues had arisen concerning Mr Jordan's employment

by DRSP, and the amount that was to be paid to Ms Jordan on the termination of her employment. Whilst the transcript does require to be read as a whole, the following matters stand out:

144.1. At one stage Mr Mond said to Ms Jordan: *"Let me caution you. There's a big civil action against Tom, right? The police have been advised, right, LB criminal actions, and anybody who's helped the … So it's best to be truthful ".*

144.2. Towards the end of the meeting, the following exchange took place:

"David Mond	*Yeah? But when you find out, if I'm wrong, I'll apologise to Tom, and he gets a million pounds, he gets £2 million, he can get £10 million, whatever massive claim you think he's going to bring against me. It doesn't matter, I've got the money to give him. And Liz will tell you because she's worked with me now for how many years?*
Liz Robinson	*27*
David Mond	*27 years*
Rebecca Jordan	*Well done!*
David Mond	*Right? I'm a man of principle, and I don't let anybody take the piss out of me.*
Rebecca Jordan	*Yeah. Oh, no, I know. I already know that."*

145. Following this meeting, by an email dated 26 October 2018, Ms Jordan wrote to Mr Mond in the following terms:

> *"On Friday you came across in a very unprofessional manner and at the end of the meeting I had no doubt that any further payment was going to be incumbent upon my bearing false witness in your frivolous claim against Tom O'Connor.*
>
> *I expected so much better from someone of your years and experience and the repeated willingness demonstrated to lie about insignificant details to fabricate a ludicrous chain of events only served to highlight your desperation.*
>
> *I came into your office to help you on Friday despite the way you treated me … "*

146. As I have already touched upon, the Claimants' claim in respect of database right was introduced by way of amendment to the Particulars of Claim made in March 2020, after Mr Moody-Stuart QC had been instructed to act on the Claimants' behalf. A claim for restitution in respect of the sum of £151,433 paid under the invoice dated 2 August 2018 was also added at this stage, The Particulars of Claim were then re-amended in November 2020 so as to discontinue all claims apart from the database right claim, a claim in respect of the misuse of confidential information, and a claim of breach of fiduciary duty as pursued against Mr O'Connor and Octax, and so as to discontinue all claims against Mrs O'Connor.

147. The Claimants have made an open offer to compromise the present proceedings on the basis of both the claim and the counterclaim being discontinued, and the parties bearing their own costs. It is the Claimants' position that whilst there is merit in the claim, the costs of pursuing it to trial would be disproportionate to the amount of any damages that might be awarded. This open offer had not been accepted by the Defendants, hence the matter proceeding to trial.

Credibility and reliability of the witnesses

148. Before dealing with the merits of the Claimants' claim, and the Defendants' counterclaim, it is necessary for me to consider the credibility and reliability of the witness evidence.

The correct approach

149. In embarking upon this exercise, I bear firmly in mind the much repeated observations made by Leggatt J (as he then was) in *Gestmin SGPS S.A. v Credit Suisse Limited* [2013] EWHC 3560 (Comm) at [15] – [22] with regard to the unreliability of memory, and his caution to place limited weight on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. I consider this caution to be particularly apt in the circumstances of the present case where:

    149.1. Events took place around three years ago;

    149.2. There were frequent ongoing conversations between a number of the key witnesses giving rise to considerable scope for confusion and false recollection;

    149.3. Hayley O'Connor and Ms Jordan, are friends of Mr and Mrs O'Connor, and employed by FDML, and no doubt keen to assist Mr O'Connor and Octax.

150. I do, however, take into account the importance stressed by the Court of Appeal in *Kogan v Martin* [2019] EWCA Civ 1645 at [88] of making findings by reference to all the evidence, that is both documentary evidence and witness evidence, placing such weight as the circumstances require on each. Further, in testing what has been said by a witness, it is plainly appropriate to do so as against the inherent probabilities of the relevant situation, and considerations such as the consistency (or otherwise) of a particular witness' evidence with other evidence, the internal consistency of that evidence, and the consistency of that evidence with what the witness might have said on other occasions – see *Kimathi v The FCO* [2018] EWHC 2066 (QB), at [98].

Mr Mond

151. Although, given the fairly technical case now pursued by the Claimants against Mr O'Connor and Octax, aspects of Mr Mond's evidence that might be open to challenge might not be key to the case, his evidence is important as to credibility, and in particular the credibility of the evidence of Mr O'Connor given, not least, that the Claimants maintain that Mr O'Connor's evidence as to Mr Mond being the true ultimate owner of DRSP is part of a false ad hominem attack on Mr Mond made by Mr O'Connor that undermines his own credibility as a witness. Further, his evidence does touch on a number of other issues such as the circumstances in which the alleged misuse of data on the part of Mr O'Connor came to be discovered, and some aspects of the commercial issues that I consider at paragraph 178 et seq below.

152. I regret to say that I did not find Mr Mond to be a satisfactory witness.

153. Firstly, I do not accept his evidence that he was simply a consultant to DRSP, and that Mrs Robinson is the true owner of the business without him having any other stake or interest therein. I reach this conclusion principally for the following reasons:

    153.1. I do not consider that Mr Mond would have informed Mr O'Connor at the meeting on 29 January 2018 that he owned *"the business"* if he was not the true beneficial owner of DRSP, or at least a party with a very significant personal stake therein otherwise than as a consultant. I found his explanation given under cross examination in respect of these remarks (Day 2, page 217) to be wholly unpersuasive and lacking in credibility. He sought to distinguish *"the business"* from ownership of *"the company"* which he described as a *"separate distinct legal entity"*, and said that he always regarded the business as his, *"even after transferring it from ClearDebt, because there is a mutuality of income that can be earned by both Mrs Robinson with DRSP and the fees that ClearDebt would earn in relation to higher supervisory fees"*. In closing submissions, Mr Moody-Stuart sought to explain matters in terms of there being an emotional connection with DRSP, as a result of its genesis, and its close relationship with ClearDebt. But Mr Mond used the expression *"my business"* in the context of explaining his entitlement to monitor matters in relation to the operation of DRSP's business, and in this context the explanation that has been provided does not, to my mind, make a great deal of sense.

    153.2. Whilst I recognise that Mr Mond was not cross-examined on this, and whilst my findings do not turn on this, the exchange with Ms Jordan on 19 October 2018 referred to in paragraph 144.2 above would have been an extremely odd one for Mr Mond (and Mrs Robinson) to have had if Mr Mond was not, in fact, the true owner and/or effective directing mind of DRSP, and Mrs Robinson was.

    153.3. If Mrs Robinson was the true owner and directing mind of DRSP, then one might have expected her to have had at least some substantive input into relevant discussions and the making of decisions in relation to DRSP. There is no evidence of her ever having done so, and whilst she might have been present at meetings, the evidence suggests that this was solely in her capacity as Mr Mond's personal assistant, performing functions such as making the tea.

153.4. Ignoring for a moment the evidence of Mr O'Connor, the evidence of the other of the Defendants' witnesses was that they regarded Mr Mond as the owner of DRSP. Thus, for example:

153.4.1. Hayley O'Connor described herself as being *"very confident"* in the knowledge that Mr Mond owned DRSP. It was put to her this was a matter of *"office gossip"*, to which she responded: *"I have worked with David Mond in my capacity as a manager at DRSP where he has directly shown that he is the owner, directing both Tom O'Connor and me and every other manager at DRSP"*. In contrast, her evidence was that her only involvement with Mrs Robinson was to borrow a laminator, to ask her for three ring binders because Mrs Robinson managed the stationary, to enquire whether Mr Mond was available for a meeting, and to co-organise a Christmas party with her. I accept Hayley O'Connor's evidence as to these matters, and given the length and extent of her involvement in the affairs of DRSP, I consider that she was in a position to say with real authority who really controlled DRSP.

153.4.2. Mr Connell was equally firm on the point. When challenged that his evidence as to Mr Mond's ownership of DRSP was *"inaccurate"*, he responded: *"If you want to say it is inaccurate you can do so of course, we worked there. I specifically worked there for a long time, and he was always answering to, when Tom O'Connor came on board he was working for Tom and for - answering to Tom in answer to David. There was never any answering to Liz on anything. Liz was David's PA. That is all I can say on that. It was always David who was, David was in charge and David was the one we spoke to when we could not speak to Tom and we could not speak to Melanie. There was no involvement from Liz at all within the business."*

153.5. I am satisfied that emails sent from Mrs Robinson's email account, whether or not electronically signed "Liz" were sent by Mr Mond or, on the odd occasion, by Mr Shalom, or at least that Mr Mond or Mr Shalom were the authors of the contents of the emails, even if sent by Mrs Robinson. I have referred above to many emails sent using Mrs Robinson's email account, but which were plainly written by Mr Mond. In my judgment, matters can only have been arranged in this way in order to create a false impression to regulators and others who might be concerned in relation thereto, that Mrs Robinson was the owner and directing mind of DRSP when, in fact, that was not the case. I do not accept the explanation concerning emails given by Mr Mond in paragraph 8 of his witness statement. Likewise matters such as the preparation of minutes show Mrs Robinson (and not Mr Mond) to have attended meetings when, in fact, it was Mr Mond who attended the meeting as the active participant. An example is provided by the minutes of the meeting held on 18 July 2018, albeit that I recognise that Mr O'Connor produced those minutes.

154. In reaching the conclusion that I have with regard to Mr Mond's ownership of DRSP, I have taken into account the email dated 11 November 2013 sent by Mr O'Connor to

the Ministry of Justice in which he said, amongst other things, that Mr Mond *"never had, nor will he ever have, any influence over either policy or management of the business."* As to this, I accept Mr O'Connor's evidence under cross examination that this was a lie on his part. Of course, I must necessarily treat with some caution the evidence of a party who has admitted having lied in the past, but in my judgment Mr O'Connor very credibly explained that he was young and new to the position at that particular time (some seven years ago), and felt under pressure to say what he did to support the business by Mr Mond. Further, I accept Mr O'Connor's evidence that this letter was written on Mr Mond's instructions, Mr Mond himself having referred to having had legal advice with regard to the claiming of category 1 disbursements (as provided for by SIP 9 as referred to above). I note that the email dated 11 November 2013 went so far as to maintain that, to the extent Mr Mond was consulted as a consultant by DRSP, *"this is only in regards to how he would like his own claims which vested in him to proceed."* It is difficult to see how, even if Mr Mond's actions are properly to be regarded as those of a consultant rather than the true owner of DRSP, this was ever a true description of Mr Mond's role and involvement.

155. Further, I have taken into account that Mr Shalom was not cross-examined in relation to Mr Mond's involvement in DRSP as he might have been. However, having said that, if Mr Mond is not the true owner of DRSP, then one might reasonably have expected Mr Shalom to have been able to comment on this in his witness statement, but he does not do so. Further, it would have been open to the Claimants to call Mrs Robinson herself to explain the position, but they did not do so and no reason has been advanced as to why her evidence might have been available, cf. *Wisniewski v. Central Manchester Health Authority* [1998] PIQR 324 at 340, per Brooke LJ. Indeed, the Claimants resisted the attempts of the Defendants to call Mrs Robinson themselves. The absence of her evidence is, in my judgment, telling.

156. My above findings are a matter of some concern if the supposed independence of DRSP from Mr Mond has been used in order to justify disbursements incurred in relation to IVA estates as category 1 disbursements. However, this issue was not explored in the evidence at trial and I say no more about it.

157. The second principal issue that has caused me to have serious concerns as to the credibility and reliability of Mr Mond's evidence is his response to cross examination as to whether a 50% split had been agreed in respect of commission to be paid to Octax in respect of the cases that clause 2.6.1 of the Introducer Agreement and the emails dated 21-22 March 2018 had provided might be referred by DRSP to Octax, for Octax to refer back to DRSP to enable DRSP to pursue the claim and recover a fee. Irrespective of how the Introducer Agreement is properly to be construed, there is pretty solid documentary evidence that there was an understanding that the relevant fees earned would be split between DRSP and Octax – see e.g. The transcript of the meeting referred to in paragraphs 54-57 above, the email dated 14 February 2018 referred to in paragraph 59 above, the transcript of the meeting on 18 July 2018 referred to in paragraphs 112 and 113 above, the exchange of emails on or about 2 August 2018 referred to in paragraphs 122-124 above, and the reference to Octax receiving commission in paragraph 16.4 of Ms Taylor's witness statement. I found Mr Mond's evidence under cross-examination when questioned about a number of these matters to be evasive and unhelpful – see e.g. Day 3/310-311, 328-330, 368-370.

158. The third matter that has given me cause for concern relates to Mr Mond's evidence as to the circumstances in which he says that Ms Taylor disclosed to him that Mr O'Connor had been making inappropriate use of data, something that Mr Mond appeared to regard as a bombshell revelation that had come to light by the end of August 2018. However, this does not to my mind tie in with the chronology, particularly bearing in mind that the exchange of email correspondence on 23 and 24 August 2018 did not reveal that Octax had been dealing with cases that had not been closed, with Mr Connell, who appeared to know more about matters than anybody else, contemporaneously expressing the view within such exchange that there was no wrongdoing so far as he could see. Further, this does not tie in with paragraph 24 of Ms Taylor's witness statement, which is referred to her suspicions being aroused at the beginning of September by Mr O'Connor's behaviour in coming into the office more often, and accessing information and data when he was not in the office.

159. It is fairly clear that Ms Taylor, with her unfortunate dependency on alcohol and the effects thereof, was not in a good place in late August/early September 2018, and her email correspondence on 23 and 24 August 2018 is surprising as to her apparent lack of knowledge that DRSP had reached any agreement at all with Mr O'Connor/Octax with regard to the passing of closed or uncontactable cases to Octax. Further, it is apparent that with Ms Taylor's illness and absences, perhaps contributed to by Mr Mond's own absences and medical issues at the time, the operation of DRSP had, despite offers by Mr O'Connor to help out, become somewhat dysfunctional with the loss of a number of key staff. To my mind, it does Mr Mond little credit that against this background he was prepared, through the present proceedings, and in remarks made to others such as Mr Lee and Ms Jordan, to accuse Mr and Mrs O'Connor of dishonesty and lack of good faith, when there was simply not the evidence to support these allegations, which have been abandoned shortly before trial.

160. Further, I am satisfied, not least from what he said during the course of the exchange with Ms Jordan on 19 October 2018, that a significant factor behind the decision to seek to challenge Mr O'Connor's actions, and to do so making unfounded allegations of dishonesty and lack of good faith, was at least in part motivated by the fact that Mr Mond was aware that DRSP was potentially liable to pay very significant sums to Octax in the form of commission as discussed at the meeting between Mr Mond and Mr O'Connor on 18 July 2018, and a perception that attack was the best form of defence.

161. In short therefore, I treat Mr Mond's evidence with a significant degree of caution.

Mr Shalom and Mr Waddell

162. I have no reason to doubt the truth of Mr Shalom's and Mr Waddell's evidence, and I am satisfied that they were doing their best to assist the Court. Ultimately, so far as the merits of the claim and the counterclaim are concerned, nothing of real significance rests upon their evidence.

Mr O'Connor

163. The Claimants maintain that I should treat Mr O'Connor as an untruthful and unreliable witness.

164. Firstly, reliance was placed on the fact that Mr O'Connor had made a number of allegations against Mr Mond in his witness statement that were not put to Mr Mond, or which, on analysis, turned out to be grossly exaggerated.

165. So far as exaggeration is concerned, reference was made by the Claimants to paragraph 111 of Mr O'Connor's witness statement in which he had referred to Mr Mond having stated in earlier proceedings that he was: *"an old man, easily confused and frequently suffers memory lapses"*. The decision of the relevant tribunal dating back to 8 June 2011 referred to the fact that, in order to explain delay in bringing a tax appeal, Mr Mond had, amongst other things, relied upon the fact that he *"suffers health-wise and has lapses of memory."* It was put to Mr O'Connor in cross examination that he had deliberately exaggerated and distorted what the tribunal had relied upon, and done so to *"further your own litigation aims and criticise Mr Mond"*.

166. Mr O'Connor's response to this line of enquiry was not entirely satisfactory, but I am satisfied that he was not, in any sense, seeking to mislead this court. To the contrary, the impression that I get is that he does feel genuinely frustrated and exasperated by the claims that have been brought against him, including the allegations of dishonesty and lack of good faith that have not been pursued, which he sees as an attempt by Mr Mond to bully him, and a sense of grievance has caused him, on occasion, to exaggerate matters. I bear this in mind when considering the overall reliability of his evidence.

167. As to the fact that allegations against Mr Mond referred to in Mr O'Connor's witness statement were not put to Mr Mond, I am not prepared to draw any significantly adverse inferences therefrom. There are a variety of reasons why peripheral matters in relation to the case may not have been put to Mr Mond, including a proper attempt to limit the issues before the court to those matters that are strictly relevant. The allegations in relation to the true ownership of DRSP were fairly and squarely put to Mr Mond.

168. Mr Moody-Stuart, on behalf of the Claimants, expressed concern at the way that Mr O'Connor, in answer to a question put by Mr Budworth in re-examination, seemed to anticipate and identify a document that Mr Budworth was seeking to re-examine him in respect of, but was unable immediately to locate. Mr Moody-Stuart made great play that there might have been something sinister in this. I recall the exchange in question, and have considered the transcript relating thereto with some care, but I do not consider that there was anything sinister about the relevant exchange. Rather, the impression that I have been left with is that Mr O'Connor, in preparing for the trial, had got very much on top of the documents, and that this is how he was able to identify and work out where Mr Budworth's line of re-examination was going.

169. Reliance is also placed by the Claimants upon the fact that Mr O'Connor wrote the email dated 11 November 2013 to the Ministry of Justice in the terms that he did. It is said that what he said in this email does not rest easily with Mr O'Connor's evidence during the course of the trial to the effect that Mr Mond is not the true owner of DRSP. However, as I have already said, Mr O'Connor frankly admitted that he lied in the email dated 11 November 2013, and I accept his evidence that, at the time that he wrote that email, he was comparatively young and inexperienced, and rather more accustomed to doing what Mr Mond said than he might subsequently have been.

170. Plainly, I do have to take into account the fact that Mr O'Connor was prepared to lie for the purposes of the email dated 11 November 2013, albeit in the circumstances that he described. It might further be said that Mr O'Connor is to be criticised for going along with the pretence to the outside world, including, potentially, the relevant regulators, that Mr Mond was not the true owner DRSP, and that Mrs Robinson was, by, for example, referring to Mrs Robinson, rather than Mr Mond, as having been present at the meeting on 8 July 2018 in the minutes that he prepared, and communicating with Mr Mond via Mrs Robinson's email account.

171. However, notwithstanding the above matters, I am satisfied that when giving evidence before me, Mr O'Connor, albeit prone to exaggeration on occasion, did seek to do his best to assist the court, and sought to give an honest and truthful account of events. I rely, amongst other things, upon the fact that, I detected no significant inconsistency between his evidence and the documentation before the court relating to the key events as they unfolded in 2018.

172. Consequently, to the extent that there is any inconsistency between the evidence of Mr Mond and Mr O'Connor, I prefer that of Mr O'Connor.

Mrs O'Connor, Hayley O'Connor, Ms Jordan and Mr Connell

173. I am satisfied that each of these witnesses did their best to assist the court, and sought to give an honest and truthful account of events.

174. I do not understand the Claimants to seriously suggest otherwise, although the point was taken by Mr Moody-Stuart that Mr Connell had, at paragraph 17 of his witness statement, referred to having talked to his wife about what a *"great deal"* Mr O'Connor managed to get with DRSP, and that he had assumed that Mr Mond was doing Mr O'Connor a favour, and that when cross-examined about this, Mr Connell had sought to backtrack on this realising that this evidence might not be entirely helpful to Mr O'Connor.

175. I did gain the impression from Mr Connell that he was more sympathetic to the position of Mr O'Connor and Octax than that of the Claimants, and that this may well have affected the way that he has recalled and interpreted events. I bear this in mind in considering the overall reliability of his evidence.

176. Likewise, in respect of Mrs O'Connor, who might naturally be expected to be sympathetic to Mr O'Connor and Octax having been brought into the present proceedings herself and accused of dishonesty, and being married to Mr O'Connor.

177. Further, Hayley O'Connor and Ms Jordan were candid in accepting that they were friendly with Mr and Mrs O'Connor, and of course both of them now work for FDML, Mr O'Connor's company. Again, I consider that I need to treat their evidence with some care, not because I considered that they might have been deliberately seeking to mislead the court, but, again, these considerations might well have affected the way in which they have recalled and interpreted events.

Commercial considerations

Introduction

178. Before addressing merits of the claim and the counterclaim, there are a couple of related factual issues relevant to both the claim and the counterclaim that it is convenient to deal with at this stage concerning the commercial considerations behind the dealings between DRSP and Mr O'Connor/Octax. I will consider the relevance and admissibility, or otherwise of these considerations when dealing with the merits themselves.

179. The issues in question are the following:

    179.1. Whether, as suggested by the Claimants, a fee or commission of 50% of the fee received by DRSP from the customer in respect of cases/leads referred by DRSP to Octax and then referred back by Octax to DRSP as envisaged by clause 3.61 of the Introducer Agreement made no commercial sense, such that this something that the parties might not have been expected to have provided for;

    179.2. Whether, as suggested by the Claimants, cases/leads were referred by DRSP to Octax and then back by Octax to DRSP at such a rate that this prejudiced DRSP's ability itself to process leads from introducers such as Flexx, to whom a commission significantly less than 50% was payable, so as to create something that, it was suggested to Mr O'Connor under cross examination, amounted to a vicious circle (Day 5/719-720) whereby more and more leads would be referred back to DRSP, thus preventing DRSP from working on its own leads and resulting in yet more leads being passed to Octax, thereby furthering the interests of Octax only and not those of DRSP.

Commerciality of 50% fee

180. As to the commerciality of the 50% fee:

    180.1. It was Mr Mond's evidence that the normal level of fee paid to an introducer was between 15% and 30%, and that the fee payable to Flexx was 15% albeit that a significant further sum was paid to Flexx each year. It is therefore said by the Claimants that the fee of 50% agreed for leads introduced by Octax to DRSP, which DRSP does not dispute was payable, was extremely generous in itself, and that an obligation on the part of DRSP to also have to pay in addition a 50% fee in respect of leads referred back by Octax to DRSP, where DRSP had received a CMC fee, should be regarded as being wholly uncommercial, and therefore not something that might be expected to have been agreed.

    180.2. It was further suggested by the Claimants that, in respect of Old ClearDebt cases, uncontactable pension and PPI cases, and other cases identified in the 21-22 March 2018 correspondence, that might have been referred by DRSP to Octax, there was comparatively little for Octax to do to justify a fee of 50%. On this basis, it was argued that a fee of 50% was therefore something that one would not have expected to have been agreed, particularly if DRSP was obliged to pay to Octax 50% of gross receipts from customers of CMC fees, without deduction of its own costs and expenses.

180.3. The Claimants rely upon one particular suggested unfairness in respect of a 50% fee being payable in respect of cases referred back to DRSP, namely where DRSP was already obliged to pay an introduction fee, such as the 15% payable to Flexx, to an introducer of leads/cases. In the case of the Flexx example, DRSP would, so it was said, be paying away 65% of the fee recovered from the customer. It was put to Mr O'Connor this was not in DRSP's interests, to which he responded: *"Yes, under those, I can see an argument. Where there is a double hit, where there are two people being paid commission under those situations, the sensible course of action probably would be for Mr Mond to have spoken to me and I would probably have taken his point on that, that 65% was not right and we would make sure it was capped to 50. Something like that could have been worked out quite easily"* (Day 5/717).

181. Despite these contentions, I am not persuaded that a 50% fee payable by DRSP in respect of leads/cases referred back to DRSP as anticipated by clause 2.6.1 of the Introducer Agreement is properly to be regarded as uncommercial, or at least as being so uncommercial as to make it an improbable or unlikely subject matter of agreement.

182. I reach this conclusion essentially for the following reasons:

182.1. In a report sent by Ms Taylor to Mr Mond on 27 April 2018, in the context of a discussion relating to Mr O'Connor being keen to undertake the work in relation to the reheating of leads, Ms Taylor commented that she would prefer not to utilise DRSP's resources, suggesting that it would be more beneficial to DRSP for Octax to do the necessary work, than DRSP itself.

182.2. This ties in with the observations made by Mr O'Connor in his email of 2 August 2018 (13.14) in which he sought to justify why DRSP's overheads ought not to come out before the fees received from the customer were split between DRSP and Octax. This email identified the significant amount of work that Octax was required do, in contrast to the fact that: *"The only bits done by DRSP so far is the logging of posts/workflow and we've done a decent amount of that on our side as well."*

182.3. It was put to Mr O'Connor in cross examination that working on reheated leads involved very much less work in identifying leads for Octax to refer to DRSP. Mr O'Connor cogently and persuasively rejected this suggestion, saying: *"... as I mentioned earlier, there are two specific issues, there is the quality of the lead and there is the cost of staffing to be able to deal with it. The two things in combination are what give the value. DRSP's cases being referred into us to be referred back are the ones they have given up on. They have zero value at that point but we could turn them into value. In terms of how much work is actually done on claims, in terms of PPI, you send the letter, you receive an acknowledgement seven days later, normally five days, and you receive an offer eight weeks late" (Day 5/711).* The point that Mr O'Connor fairly made is that if the leads/cases were ones that DRSP were not going to pursue themselves because of the failure of the potential customer to bite at that point and they therefore appeared to be going nowhere, then there was commercial advantage in DRSP passing the case on to Octax who then

had to put in the work required in order to turn something that was not going to earn a fee, into something that was.

182.4. Slightly later on, it was put to Mr O'Connor that it was not in the interests of DRSP to divert capacity away from the Flexx leads for which it was only paying an introduction fee of 15%, as opposed to the 50% fee payable in respect of leads referred back to DRSP by Octax. Mr O'Connor disagreed with this, pointing out that what Octax were doing was to replace DRSP's sales function … *"which meant that DRSP sales staff members were able to concentrate on those Flexx leads rather than having to deal with the reheating … so what Octax's service is actually doing is freeing DRSP staff to work on those Flexx leads and to be able to continue to take that volume through. What we were doing was in everyone's interests"* (Day 5/714). That made entire sense to me.

182.5. Mr Mond is no fool, and plainly has a very intimate knowledge of the commercial realities of the CMC industry. He does not appear to have balked at any point with regard to splitting the relevant fee 50:50 as between DRSP and Octax as one might have expected him to have done had it been uncommercial as suggested. As we have seen, when Mr O'Connor suggested a 50-50 split at one of the January 2018 meetings, Mr Mond's response was simply to say: *"whatever"*. Further, when Mr O'Connor mentioned a *"50/50 backend split"* in his email dated 14 February 2018, Mr Mond went along with that. Significantly, these discussions took place against the background of discussions regarding Octax not only referring new leads to DRSP, but to DRSP referring old leads back to Octax. Had a 50-50 split been uncommercial, then one might reasonably be expected Mr Mond to have objected, and to have declined to go along with what was proposed, even if he might not have been in the best of health when the discussions took place.

182.6. Significantly, there was no dissent from Mr Mond at the meeting on 18 July 2018, when Mr O'Connor mentioned that there were about £1m of offers relating to leads referred to Octax, and said to Mr Mond that they were *"halves on that"*.

182.7. Further, it can be seen from the email exchanges on 2 August 2018 that *"Liz"*, in an email sent from Mrs Robinson's account and plainly sent by Mr Mond, did not query the split of the fees, but merely whether DRSP overheads would come out first. Mr O'Connor then explained why they should not for the reasons set out in his email in response, and the invoice submitted on that day was paid in full. Again, if a 50% fee was uncommercial, then one might have expected Mr Mond to have engaged with Mr O'Connor on the point when Mr O'Connor had set out the case for DRSP not deducting its fees first, but Mr Mond did not do so.

182.8. Mr Moody-Stuart did make the point that one of the reasons for referring cases on to Octax was to get through the cases before a cap on fees for PPI cases came in later in the year, which would have capped fees at 20%. It was suggested that it would have been better for DRSP to have done the work itself, and be limited to 20%, rather than getting Octax to do it and therefore being limited to receiving only 10%, i.e 50% of the 20%. However, if these

were cases that were not going to go anywhere in any event unless reheated by Octax, then it could fairly be said that DRSP had little to lose in passing the cases to Octax on the basis that 10% was better than nothing.

182.9. It is right that Mr O'Connor did accept that there might be a degree of unfairness in DRSP having to pay two sets of fees out of the fee received from the customer, paying 50% to Octax and something to the introducer who had introduced the lead in the first place (if indeed introduced to DRSP). However, I do not consider this is sufficient to outweigh the other commercial considerations discussed above, and again it might fairly be said that some fee for the relevant cases was better than nothing, if the cases had not been progressed.

Excessive referrals

183. As to the second question, namely as to whether the leads were referred by DRSP to Octax, and then back by Octax to DRSP at such a rate as to prejudice DRSP's ability itself to process leads from introducers such as Flexx, I do not consider there to be any real or credible evidence that that was the case.

184. As to this:

184.1. The evidence suggests that the Flexx leads were, themselves causing difficulties. Hence Mr O'Connor's email dated 10 May 2018 in which he had referred to Flexx's changed advertising that had led to significantly more non-productive leads being produced. Further, Ms Taylor produced some minutes on 4 June 2018 that referred to the fact that: *"morale in the team is low, due to the quality of referrals from Flexx"*. This was consistent with Mr Mond's comments at the meeting with Mr O'Connor on 18 July 2018 when he commented that: *"... what we've been spending with Flexx recently has not been working."*

184.2. There is no real evidence of any contemporaneous complaint or issue with regard to any vicious circle of the kind described to Mr O'Connor under cross examination. Certainly no document has been produced providing any contemporaneous evidence thereof.

184.3. The prejudice alleged is inconsistent with Mr O'Connor's evidence under cross-examination, which I accept, including that referred to in paragraph 182.3 above. The issue was dealt with further by Mr O'Connor under cross examination as recorded in the transcript at Day 5/717-720 when Mr O'Connor cogently, in my judgment, refuted the suggestion that DRSP had been prejudiced by an inability to deal with leads, because of the volume of leads being referred back by Octax on which 50% commission was payable. To my mind, Mr O'Connor cogently explained that the advantage to DRSP of referring the relevant leads to Octax was that those leads appeared to be going nowhere until passed to Octax, Octax had to bear the cost and expense of reheating the leads, if they could be reheated, and when the leads were referred back to DRSP, it was a relatively simple and not particularly labour-intensive task (that did not significantly interfere with the handling of leads to

DRSP from Flexx and others) for DRSP to advance the claims and recover the CMC fee from the customer, to be split with Octax.

184.4. To the extent that DRSP might have been in difficulties by late August 2018, the evidence does not, as I see it, point to this having been occasioned by an inability of DRSP to deal with cases referred to it by introducers such as Flexx because it was having to deal with the referral back of cases by Octax. Rather the evidence suggests that any difficulties were caused by losses of key staff, and a failure of management, in circumstances where Mr O'Connor was actively seeking to assist DRSP to overcome its difficulties, not least because it was in Octax's interests to continue to deal with DRSP.

The Merits of the Claim

Database Right

185. It is, in short, the Claimants' case that DRSP has a database right in Slate, and that Mr O'Connor and Octax infringed that database right by making unauthorised extractions therefrom.

The Database Regulations

186. Database right is an intellectual property right conferred by the Copyright and Rights in Databases Regulations 1997 ("**the Database Regulations**") implementing Council Directive 96/9/EC. Although founded in EU law, it is not in dispute that the Database Regulations remain in force unchanged in all material respects notwithstanding the exit of the UK from the European Union. It is accepted that the relevant Court of Justice of the European Union ("**CJEU**") and domestic authorities remain good law.

187. A database is defined by reg. 12 of the Database Regulations as having the meaning given by s. 3A of the Copyright Designs and Patents Act 1988 ("**CDPA**") (as amended by reg. 6 of the Database Regulations), namely:

> *"a collection of independent works, data or other materials which—*
> *a) are arranged in a systematic or methodical way, and*
> *(b) are individually accessible by electronic or other means*"

188. Reg. 13 provides that database right subsists in a database: *" if there has been a substantial investment in obtaining, verifying or presenting the contents of the database."* The meaning of these three requirements has been the subject matter of decisions of the CJEU in *BHB v William Hill C-203/02* [2005] RPC 13 and *Fixtures Marketing v Oy Veikkaus AB* C-46/02 [2004] and other cases, and has subsequently been considered by the Court of Appeal in *Football Dataco v Sporttrader GmbH* [2013] FSR 30, to which latter case in particular I will return.

189. Pursuant to Regs 14 and 15 of the Database Regulations, database right is first owned by the *"maker"*, being the person who assumes the risk of investing in the obtaining, verification or presentation of the contents of the database.

190. Reg. 16 defines the criteria for infringement of a database in which database right subsists, as follows:

> *"(1) Subject to the provisions of this Part, a person infringes database right in a database if, without the consent of the owner of the right, he extracts or re-utilises all or a substantial part of the contents of the database.*
>
> *(2) For the purposes of this Part, the repeated and systematic extraction or re-utilisation of insubstantial parts of the contents of a database may amount to the extraction or re-utilisation of a substantial part of those contents."*

191. Reg 12(1) defines *"Extraction"* as "*the permanent or temporary transfer of those contents to another medium by any means or in any form*." and *"Re-utilisation"* as "*making those contents available to the public by any means*". "Substantial" for the purposes of subsistence or infringement means "*substantial in terms of quantity or quality or a combination of both*".

192. Reg 17 provides that the initial term of database right protection is 15 years from the end of the calendar year in which the database was completed. There can be no issue that if a database right ever existed in the present case, it had not expired at the time of the alleged infringement. The acts complained of fall well within this term of 15 years and no issue of expiry of protection arises.

193. Reg 97 (1) applies the statutory defence in respect of innocent infringement under s. 97 CDPA. S. 97(1) provides:

> *"Where in an action for infringement of copyright it is shown that at the time of the infringement the defendant did not know, and had no reason to believe, that copyright subsisted in the work to which the action relates, the plaintiff is not entitled to damages against him, but without prejudice to any other remedy.*"

Issues in respect of database right

194. The issues between the parties in respect of database right are as to:

    194.1. Whether a database right of DRSP in respect of Slate ever subsisted;

    194.2. If it did, whether, whether that database right was infringed by Mr O'Connor and Octax; and

    194.3. If there was infringement, whether the statutory defence is available.

195. On the issue of infringement, there are two principal sub-issues, namely whether the acts alleged to amount to infringement were *"extractions"*, and if they were, whether they were lawful extractions carried out with the express or implied consent of DRSP.

Subsistence of database right?

196. The issue is whether there has been substantial investment in *"obtaining"*, *"verifying"* or *"presenting"* the contents of the database so as to satisfy reg. 13 of the Database Regulations.

197. Dealing first with *"obtaining"*, it is not in dispute that investment in the creation of data (such as the creation of fixture lists or race cards) is not relevant investment for

the subsistence of database right. As Jacobs LJ put it in *Football Dataco* (supra) at para 32: *"investment in creating data was not the right kind of investment. So that if only that kind of investment is involved in the creation of a database, there is no sui generis right in it."*

198. *BHB v William Hill* (supra) at [30] and [31] provides cogent authority for the proposition that investment in *"obtaining"* the contents of the database extends to the resources used to seek out existing independent materials and collect them in a database, as opposed to using resources for the creation of such independent materials.

199. In this respect, the Claimants rely upon the investment in procuring customer data from third parties and investment in obtaining data from enquiries to its website, and also upon investment in identifying whether customers were sold PPI and so have a potential PPI claim and in obtaining via subject access data requests the details of their bank accounts or policies if they have forgotten them. The Claimants maintain that this did not involve investment in creating data, and this did involve using resources to seek out existing independent materials and collect them in a database.

200. Whilst the Defendants may at some stage have placed reliance on the sports fixture cases, and by reference thereto suggested that one was essentially concerned in the present case with investment in the creation of data, their case at trial was rather more nuanced. In opening, the Defendants posed the question as to how cases ought to be dealt with where a database has been composed from bought-in data, it being submitted that where bought-in data comes in "database form", then there will not be the relevant investment merely by inserting that data into the database, unless substantial investment has been put into processing data so that it meets the organisational requirements of the database to which it is being added. In closing, Mr Budworth, on behalf of the Defendants, put this argument in terms of it not been possible to say that there had been relevant substantial investment put into the processing of data simply by spending money on leads, and he suggested that the evidence of Mr Mond amounted to little more than the fact that money had been paid to buy leads, and that those leads had been automatically uploaded and/or migrated into the database. Mr Budworth submitted that any other conclusion would necessarily lead to the further conclusion that the purchaser of a database would become the owner of a fresh database right in the database, merely because the purchaser had *"invested"* by committing the funds necessary to make the purchase.

201. Further, and although this may be more pertinent to the issue of *"presentation"*, Mr Budworth was dismissive of the money that DRSP might have paid software developers, suggesting that that related to the development of software applications, which might give rise to copyright protection in respect of the software as a literary work, but did not assist in establishing database right.

202. I shall first deal with the point that the present case involved the creation of data, in case that does remain a live issue, and then consider the Defendants' more nuanced arguments.

203. In *Football Dataco* (supra), data was entered by sports information processors (*"SIPs"*) working from information supplied to them by mobile phone by football analysts (*"FBAs"*) attending football grounds at which matches were being played. The FBAs would relay to the SIPs detailed information as to what was happening as

the match progressed, including but not limited to information about goals scored (such as time of goal, scoring team, scoring player, goal type, pitch position from which the goals was scored etc.). The FBAs also kept the SIPs up to date with information such as which team had most possession, and would make their own subjective assessments such as *"the man of the match"*. In order to seek to establish database right, the claimants estimated that the investment in obtaining verifying this data was about £600,000 per season. The defendants contended, amongst other things, that the data relied upon by the claimants was not existing data, but was created while the football match to which it related was going on and, as such, the investment upon which the claimants relied was investment in the creation of the relevant materials and that as what was required for subsistence was investment in creation, verification or presentation of the contents of the database which was independent of investment in the creation of such materials, no database right had been established.

204. This defence was rejected by the Court of Appeal, and Jacobs LJ considered the relevant principles at para [31] et seq of his judgment. One can extract therefrom the clear principle that the inability to rely upon investment in the creation of data (or other materials contained in a database) for the purposes of establishing subsistence in database right does not extend to investment in ascertaining, measuring or recording pre-existing facts. *Football Dataco* therefore provides good authority for the proposition that investment in ascertaining, measuring or recording pre-existing facts can constitute investment in obtaining or verifying the contents of a database.

205. The evidence of Mr Mond does, as I read it, go beyond simply showing that DRSP purchased leads which were uploaded to a database by some automatic process. Mr Mond's substantially unchallenged evidence does support the fact that the Claimants have invested significant sums in obtaining data, paying fees for purchased-in data and also incurring expenditure on generating home-grown leads through its website, as well as establishing whether PPI and other claims exist by more closely examining the existing facts behind the day. At paragraph 30 of his witness statement, Mr Mond refers to a report from Mr Shalom that summarises the expenditure in question, and puts a figure of £925,000 on the cost of developing Slate.

206. This investment has not, as I see it, been concerned with the creation of data, but with the ascertaining of existing facts as to, amongst other things, the identity of individuals (and IVA estates in the case of PPI) who had PPI or pensions and who might have claims, and the facts behind those claims, so as to obtain the contents of the Slate database, which has been developed to collect and record these material and allow the data to be processed in an organised way to enable leads to be chased up and claims pursued. The position so far as the collection of data comprising existing facts is materially analogous, as I see it, with the facts of *Football Dataco*. There are particular existing factual matters (e.g. a scored goal or the fact that a particular person has had PPI and therefore might have a claim), and those facts are entered into the database to give it contents so that the data can be utilised.

207. So, to deal with the Defendants' more nuanced point, significantly more is involved than leads being acquired and simply added to a database by some automatic process. There has been a process involving DRSP seeking out independent materials, i.e. the existing facts behind potential claims, by agreeing to buy leads and through the operation of DRSP's website, and then collecting those materials on the specifically

developed Slate database in a systematic and organised way with the aid of specially developed software, so that it can be utilised for the pursuit of claims.

208. In these circumstances, there has, in my judgment, been substantial investment on the part of DRSP in obtaining the contents of the Slate database, sufficient to found a database right.

209. So far as *"verification"* is concerned, the Claimants accept that acts of verification which take place as part of the normal business of DRSP are not separate investment in verification.

210. *BHB v William Hill* (supra) at [34] provides authority for the proposition that investment in verification of the contents of a database essentially involves investment of resources with a view to ensuring the reliability of the materials and monitoring their accuracy.

211. Whilst the Defendants might quibble as to the extent of the verification might have occurred, Mr Mond does give substantially unchallenged evidence as to substantial investment in the verification of the accuracy of names, addresses and contact details in the database and in checking whether a PPI claim may be available.

212. There was evidence that DRSP paid a third party to check on the validity of telephone numbers, and I would have thought that that sort of expenditure would count for this purpose.

213. So far as *"presentation"* is concerned, *Fixtures Marketing* (supra) at [43] provides authority of the proposition that investment in *"presentation"* of the contents of a database concerns the resources used for the purposes of giving the database its function of processing information, namely the resources used for the *"systematic or methodical"* arrangement of the materials and their accessibility. This would, as I see it, include investment in the creation of a bespoke database system such as Slate given that the system, and the software that that allows it to operate, allow the data added to the database to be processed, and the data within the database to be arranged in a systematic way, if not also a methodical way.

214. It was the unchallenged evidence of Mr Mond that the development costs incurred in respect of Slate included some £346,683 in respect of software development. This was investment incurred in the creation of the bespoke Slate database and therefore represents, in my judgment, substantial investment in presenting the Slate database sufficient in itself to give rise to database right in Slate. The fact that other intellectual property rights might exist in the software is, as I see it, beside the point.

215. In short therefore, I am satisfied that the Claimants have established the database right that is relied upon to pursue the claim.

Infringement

Claimants' allegations

216. It is the Claimants' case that from 1 March 2018 onwards, Mr O'Connor (and Octax) was to carry out two distinct activities in respect of DRSP:

216.1. Firstly, Mr O'Connor's consultancy (formally via Octax) where he was in effect working to assist DRSP and act in DRSP's interests to facilitate and enable the smooth operation of DRSP's business, for which purpose Mr O'Connor retained and used his DRSP-Consulting account which had network admin status and (for the purpose of access to Slate) his DRSP Slate Admin role. In this respect, it is argued that by reason of his fiduciary duties owed to DRSP and Octax's contractual obligations under the Consultancy Agreement, this access to Slate and these network privileges provided by Mr O'Connor's DRSP-Consulting account should have been use only for the benefit of DRSP.

216.2. Secondly, an external role on behalf of Octax (the counterparty to the Introducer Agreement), whereby Mr O'Connor and other Octax employees provided leads to DRSP under the Introducer Agreement, and also carried out Octax's activities in dealing with leads/cases referred by DRSP to Octax with a view to Octax re-heating the same as envisaged by clause 6.2.1 of the Introducer Agreement and the 21-22 March 2018 email correspondence. So far as this latter role, or aspect of the relationship is concerned, access to DRSP's network was by way of an external DRSP-Octax account for Mr O'Connor and other Octax employees involved under which the accounts had only level 1 access to the network, and their access to Slate was under the External role. Consequently, these external accounts did not have network admin status and so could not operate the software needed to run SQL queries.

217. It is argued that given the limited purpose for which Mr O'Connor and other Octax employees were provided with access to Slate via their designated DRSP-Octax accounts, the nature of such access was intended to be limited.

218. It is thus the Claimants' case that Mr O'Connor's activities for DRSP (as a consultant) and for Octax (on behalf of Octax) could and should therefore have been carried out using his two different user accounts (indeed two different laptops) and the different access privileges and Slate roles related thereto. Furthermore, it is the Claimants' case that Mr O'Connor was not himself authorised to carry out drag and drop operations to transfer records for working by Octax and such operations should at all times have been authorised by Ms Taylor.

219. The Claimants deny that the acts said to amount to infringement were carried out with the permission of the Claimants. It is their case that in the absence of any express licence between DRSP and Octax the only permission to extract data was that which is to be implied into the agreements between the parties. They argue that under the principles set out in *Robin Ray v Classic FM* [1998] FSR 622 this is the minimum necessary for the purposes of those agreements

220. *Robin Ray v Classic FM* was a copyright case in which the plaintiff, who was well known for his encyclopedic knowledge of classical music, entered into a consultancy agreement with the radio station, Classic FM, to advise on the composition of its classical music repertoire, to catalogue its recorded music library, and to assist in assessing the estimated popularity of specific works or performances and the recommended maximum exposure to specific works. The consultancy agreement made no express provision in respect of the intellectual property rights in the work created by the plaintiff when acting as a consultant. It was common ground that Classic FM had an implied licence to use the works for the purposes of its radio

station, but there was an issue as to whether it had the copyright or a more extensive licence than simply for these purposes. It was held that where it was necessary, as in that case to imply the grant of some right to fill a lacuna in the parties' contractual arrangements, the principle to be applied was that in deciding which of various alternatives should constitute the contents of the term to be implied, the choice had to be that which did not exceed what was *necessary* in the circumstances. Accordingly, if it was necessary to imply some grant of rights in respect of a copyright work, and the need could be satisfied by the grant of a licence or an assignment of the copyright, the implication would be of the grant of a licence only. Further, if necessity required only the grant of a licence, the scope or ambit of the licence was the minimum required to secure to the commissioner the entitlement which the parties to the contract must have intended to confer on him. As Lightman J put it at page 643:

> *"… if necessity requires only the grant of a licence, the ambit of the licence must be the minimum which is required to secure to the client the entitlement which the parties to the contract must have intended to confer on him …*
>
> *… the licence accordingly is to be limited to what is in the joint contemplation of the parties at the date of the contract, and does not extend to enable the client to take advantage of a new unexpected profitable opportunity …".*

221. It is thus argued by the Claimants that to the extent that Mr O'Connor and Octax rely upon some licence in relation to the activities said to constitute infringement, then such licence would only have extended to that which was necessary, and that did not extend to accessing Slate for the purposes Octax otherwise that by the use of the external DRSP-Octax accounts setup for Mr O'Connor and other Octax employees involved under which the accounts had only level 1 access to the network, and their access to Slate was under the External role.

222. The Claimants allege that the database right was infringed in the following ways by Mr O'Connor using his DRSP-Consulting account in order to:

    222.1. Grant external account holders (himself and employees of Octax) additional roles in Slate to the default setting under the External role.

    222.2. Write and run SQL queries in order to identify candidate leads or cases to be passed to Octax, it being the Claimants' case that it was for DRSP to identify the same even if the cases fell within the scope of the 21-22 March 2018 emails;

    222.3. Write and run SQL queries which lay outside the scope of the 21-22 March 2018 emails

    222.4. Write and run reports used by Octax to manage the operation of cases passed to Octax; and

    222.5. Undertake drag-and-drop transfers himself on behalf of Octax.

    222.6. Instruct DRSP employees to undertake drag-and-drop operations.

    222.7. Instruct DRSP employees to mark leads as uncontactable or unable to contact.

223. As I have said, it is Mr O'Connor's and Octax's case that all that was done was done with the express or implied licence or consent of DRSP, and I deal with the detail of the allegations, and Mr O.Connell's and Octax's defence thereto below. However, it is first necessary to consider whether, if the allegations are otherwise made out, the acts done amounted to *"extraction"* of a substantial part of the contents of the Slate database within the meaning of reg. 16 of the Database Regulations.

"Extraction"

224. As we have seen, reg 12(1) of the database Regulations defines *"Extraction"* as "*the permanent or temporary transfer of those contents to another medium by any means or in any form*."

225. As Mr Moody-Stuart QC points out, the term *"extraction"* was considered and given a broad meaning by the CJEU in *Directmedia Publishing GmbH v Albert–Ludwigs-Universität Frieburg* (C-304/07), in which case the CJEU held that the transfer of material from a protected database to another database following lawful on screen consultation with the first database and an individual assessment of the material contained in that first database, was capable of constituting an extraction. I consider it to be sufficiently clear therefrom that the transfer between two mediums of the same type will still amount to extraction, and that the word transfer does not require that the content must disappear from the original medium.

226. The Claimants rely upon the transfer of part of the contents of the Slate database to another medium as amounting to extraction. They allege that extraction was carried out by, amongst other things, the transfer of data from Slate to an extracted Excel spreadsheet and the subsequent emailing of the files created thereby, and also the transfer from Slate to the memory of off-site computers for temporary display.

227. The Defendants deny that the acts complained of amount to *"extraction"*, and assert that what occurred amounted to a mere *"consultation"* of the database, and that this does not amount to infringement.

228. Further, the Defendants point out that there is a definition of *"extract"* and *"re-utilise"* in Article 7.2 of the Regulation, which has been elucidated in a number of CJEU judgements such that this should only cover the undue use of a quantitatively or qualitatively significant part of the investment which has given rise to protection (i.e. the investment in gathering, verifying and presenting), such that use of creative material, without more, will not give rise to infringement. This is reflected in the judgment of Jacobs LJ in *Football Dataco* at para [76] where he observed that: "… *the rules as to what amounts to infringement focus on whether the infringer is making undue use of the relevant resources which went into the database."*

229. Referring to the decision of the CJEU in *BHB v William Hill* (supra), Mr Budworth put the matter thus in closing: "… *before you conclude that there has been extraction of a substantial part, whether in qualitative or quantitative terms, you have to focus very much on extraction of the investment which is led to the qualification for the sui generis right in the first place."* He argued that the acts said to constitute infringement in the present case did not, on this basis, involve making use of resources which went into obtaining the contents of Slate. Further, by reference to Laddie, Prescott and Vitoria, Modern Law of Copyright, 5th ed, at para 23.72, Mr Budworth made the point

that the CJEU had, in *BHB v William Hill* (supra), sought to limit the scope of the database right, by making sure it did not give rise to a property right in data *per se*. I note that this passage refers to the CJEU as having further found in this later case that resources used for the creation as such of the materials included within a database cannot be taken into account in assessing whether the investment in the creation of the database was substantial.

230. Mr Budworth submitted, that, viewing the matter both qualitatively and quantitatively, and having regard to the nature and extent of the investment in the obtaining of the contents of database, there had been no undue use of a significant part of the investment that had given rise to any protection. In particular, the acts complained of related to leads that had been purchased rather than any investment in obtaining the database.

231. As to consultation, whilst it is correct that mere consultation of a database may not, in itself, be an infringing act, I consider that the Claimants are correct in their assertion that if the consultation involves the permanent or temporary transfer to another medium, as is the case when looking at a database on screen, as opposed to a paper copy database, it does amount to infringement – see the discussion of *BHB v William Hill* in Laddie, Prescott and Vitoria (supra) at paras 23.66-23.67 supporting the view, which I consider to be correct, that all that was intended to be said by the CJEU in respect of *"consultation"* in that case was that when an electric database is lawfully consulted (i.e. with the express or implied consent of the database make), there is an implied consent or authorisation to any temporary transfer of the database to allow that lawful consultation, but no more than that.

232. In my judgment, if Mr O'Connor and Octax were not authorised to do what they did, then what they did went beyond mere consultation of the Slate database, and did amount to extraction subject the Defendant' further arguments.

233. As to the Defendants' further arguments, I consider that one is getting into much the same territory with regard investment in obtaining the contents of the database as one did on the issue of *"obtaining"*. If, as I consider to be the case, the investment in obtaining of the contents of the database concerned the cost of collecting together existing facts concerning individuals who had taken out PPI and pensions, and the facts that gave rise to potential claims, so as to give rise to a database right in the first place, then I consider that any significant transfer of the contents of Slate concerning such facts does fall fairly and squarely within the scope of the resources which went into the Slate database.

234. The transfers complained of in the present case, and said to amount to infringement, do, in my judgment, amount to significant transfers concerning such facts collected within the Slate database. Even if, which I do not consider to be the case, individual transfers did not amount to significant transfers, it is to be noted that reg. 16(2) of the Directive provides that: *"… repeated and systematic extraction … of an insubstantial parts of the contents of the database may amount to the extraction … of a substantial part of those contents."* I considered it be open to the Claimants to pray in aid this provision.

235. Consequently, I consider that acts complained of do, subject to being authorised, amount to acts capable of amounting to infringement.

Express or implied licence of DRSP?

Discussion

236. The starting point is that reg. 16 of the Database Regulations provides for infringement where there has been extraction *"without the consent of the owner"*.

237. The Claimants' case is based on the proposition that from 1 March 2018, Mr O'Connor was to carry out two *distinct* activities in respect of DRSP, namely as a consultant (albeit via Octax) and an external role through Octax as counterparty to the Introducer Agreement. It is thus said that Mr O'Connor's activities for DRSP (as consultant) and for Octax should have been carried out using the two different user accounts, and using the two different access privileges and Slate roles relating thereto.

238. The basis of the Claimants' case when issued in September 2018, as reflected in paragraph 26.1 of Ms Taylor's witness statement dated 18 September 2018, was that without Ms Taylor's knowledge, Mr O'Connor had remained registered as user of his existing access to Slate. On this basis the Claimants' case was that Mr O'Connor's use after 1 March 2018 of his DRSP Consultancy-Account was wholly unauthorised. However, Mr Mond now puts matters very differently in paragraph 94 of his witness statement saying that it was *"natural and sensible that, in order to enable Tom to perform that consultancy function, he kept the DRSP account he had held as an employee"*.

239. This begs the question as to what Mr O'Connor's *"consultancy function"* actually involved. The way matters were expressed by Ms Taylor in paragraph 16.4 of her witness statement was that the consultancy was intimately bound up with the performance of the Introducer Agreement in that, in describing the consultancy work that Mr O'Connor had performed, she commented that it was *"strictly limited"* to *"two categories of work"*, and she then went on to describe what were, in essence, the two categories of work provided for by the Introducer Agreement, namely the introduction of new leads by Octax to DRSP, and the referral of old leads by DRSP to Octax with a view to Octax reheating the same and referring cases back to DRSP as envisaged by clause 2.6.1 of the Introducer Agreement.

240. This is, as I see it, reflected in the fact that, apart from other occasional ad hoc assistance that Mr O'Connor might have provided to DRSP, e.g. in dealing with the difficulties created by Flexx's new advertising and the number of unproductive leads provided thereby, the consultancy essentially involved seeking to further the joint interests of DRSP and Octax in Octax introducing leads to DRSP and DRSP referring leads to Octax with a view to reheating the same and referring them back to DRSP, in the latter case so that DRSP could benefit from income that would, or might not otherwise have been recovered if the case in question had been taken no further by DRSP.

241. In the circumstances, I consider it unrealistic and inconsistent with the facts of the case to draw the sharp distinction that the Claimant seek to do between Mr O'Connor's role as a consultant, and Mr O'Connor's role acting on behalf of Octax bearing in mind that the role as a consultant necessarily includes furthering the interests of both DRSP and Octax. Consequently, I do not consider it can be right for

the Claimants to base their case as to Mr O'Connor's entitlement to use the DRSP Consultancy account upon this distinction.

242. Further, in this context, I am not persuaded that the *Robin Ray v Classic FM* principle really assists. In that case, the Court was concerned with an implied licence and one can see why, in that context, the focus should have been upon what it was *necessary* to imply, and no more although Lightman J did, as we have seen, talk in terms of the ambit of the licence being *"the minimum required to secure to the commissioner the entitlement which the parties to the contract must have intended to confer on him."*

243. In the present case Mr O'Connor must, as I see it, be taken to have had express authority and consent to access Slate both through the DRSP Consultancy account, which it was *"both natural and sensible"* that he should be entitled to continue to use *"to perform the consultancy function"* (as per Mr Mond at paragraph 94 of his witness statement), and through the external Oxtax account. The issue is as to the extent of that authority and consent, and given that the test suggested by the Claimants is based upon a hard distinction between Mr O'Connor's functions which I do not consider existed, I prefer a test closer to that suggested by the Defendants, namely that Mr O'Connor's user of the DRSP Consultancy account, as consultant (acting on behalf of Octax), would fall within the requisite authority and consent so long as it reasonably served to further the interests of DRSP in giving effect to the terms of the Introducer Agreement.

244. Plainly, if I am wrong as to the above approach, and the Claimants are right that Mr O'Connor's use of the DRSP Consultancy account was limited as they suggest, then the acts complained of would have occurred without the consent of DRSP, unless some further authority and consent was provided by Ms Taylor, or somebody else with the requisite authority on behalf of DRSP. Consequently, I consider the allegations made and the facts of the case on this basis as well in the event that I should be wrong as to the scope of Mr O'Connor's general authority as consultant.

245. There are a number of other matters that require to be considered before I turn to consider the specific allegations of infringement that have been made:

    245.1. Although the 21-22 March 2018 emails do identify Old ClearDebt cases, Pension Cases and Has PPI as the *"primary products we would look to work"* as mentioned in Mr O'Connor's email dated 21 March 2018, that email also records that he and Ms Taylor had *"discussed working"* other products including Old PPI/IVA data for pension leads and Free PPI Check Packs. Further, in her report to Mr Mond dated 27 April 2018, Ms Taylor referred to briefly discussing other work, indicating that Mr O'Connor was keen to undertake this and that she would prefer not to utilise DRSP resources. This does show that the arrangements as envisaged by clause 2.6.1 of the Introducer Agreement were not necessarily limited to the specific three categories referred to in Mr O'Connor's email dated 21 March 2018, and that other work was at least the subject matter of discussion.

    245.2. That those discussions progressed is supported by an exchange of emails on 22 May 2018 in which Mr O'Connor stated that: *"There are a few things we are keen to do in terms of generating more PPI leads"*, after which he set out various actions including, amongst other things, in relation to *"Free PPI*

Checks", which had been mentioned in his email dated 21 March 2018. This email was sent to Mr Connell, who forwarded the same to Ms Taylor stating: *"Sending the Free PPI Checks over to him now to sort…"*.

245.3. The allegations of dishonesty and lack of good faith having been withdrawn, in paragraph 136 of his witness statement Mr Mond says that he does not believe that Mr O'Connor has been malicious, but does say that he considers that Mr O'Connor was aware *"deep down"* that his activities were overstepping the mark. That is not my assessment of Mr O'Connor's evidence, rather the impression I gained from his oral evidence taken together with a consideration of the contemporaneous correspondence was that he was anxious not to overstep the mark. Hence, for example:

245.3.1. The way he expressed matters in his emails dated 27 April 2018 and 2 May 2018 referred to in paragraphs 94 and 97 above.

245.3.2. The fact that on a number of occasions Mr O'Connor checked that the codes that he was using in order to run searches were correct, and it is not the Claimants' case that Mr O'Connor simply ran searches, and effected the dragging and dropping of cases without reference to anybody else at DRSP. Thus, one has, for example the exchange of emails between Mr O'Connor and Hayley O'Connor on 9 May 2018 when Mr O'Connor referred a query return relating to 369 leads to Hayley O'Connor with a view to them being dragged and dropped, referring to the fact that he had used a particular code for the query. It was Hayley O'Connor's evidence that she had probably written the code for Mr O'Connor in the first place, and one can see from the exchange of emails in question this was not a question of Mr O'Connor instructing Hayley O'Connor to effect the drag-and-drop, but of him requesting her to do so.

245.3.3. In relation to the one drag and drop that Mr O'Connor did effect himself, this was only done after matters had been run past Mr Connell in the email exchanges that took place between 14 and 16 July 2018, it being Mr Connell's evidence that the relevant matters were contemporaneously discussed with and agreed by Ms Taylor.

245.4. It is the Claimants' case that any relevant specific authority to use the DRSP Consultancy account required to come from Ms Taylor, who had taken up the position of acting Operations Director upon Mr O'Connor standing down from the role with effect from 1 March 2018. However, Hayley O'Connor was clear in her evidence that Ms Taylor conferred a significant degree of autonomy on managers such as herself, and that she considered that she had authority to send leads and cases that fell within the criteria that Ms Taylor had approved to Octax. Further, Hayley O'Connor gave evidence that she was in fairly regular and frequent contact with Ms Taylor, and that Ms Taylor was well aware that Mr O'Connor was running searches, and more generally that the dragging and dropping of cases was taking place. This accords with the evidence of Mr Connell who effected a number of the drags and drops himself, it being his evidence that he did so with the knowledge and approval of Ms Taylor, something supported not least by the email dated 22 May 2018

referred to in paragraph 245.2 above. As to the reliability of the evidence of Hayley O'Connor and Mr Connell in relation to these matters, I have taken into account that Hayley O'Connor is friendly with Mr and Mrs O'Connor, and that Mr Connell clearly favours the position of Mr O'Connor to that of the Claimants, and I recognise that their recollections are likely to have been affected by the passage of time and a sympathy for Mr and Mrs O'Connor, nevertheless I accept their evidence that they considered, at the time, that they were acting with the knowledge and approval of Ms Taylor, and that it is more likely than not that they actually were.

245.5. The Defendants make the point that it is accepted by the Claimants that Ms Taylor approved the drag-and-drop that took place on 23 March 2018 and 9 May 2018, and they submit that it is therefore implausible that she did not approve others. That may be putting matters rather high, but the approval of these drags-and-drops is consistent with a state of affairs whereby Ms Taylor was being kept informed of events, and approved what was going on. The absence of documentation evidencing Ms Taylor's approval was explained by Hayley O'Connor on the basis that Ms Taylor was someone who generally dealt with matters verbally, on the telephone, rather than sending emails. Given the limited number of emails that have been produced from Ms Taylor more generally, this is entirely credible.

245.6. Hayley O'Connor gave very clear evidence not only that Ms Taylor was aware that Mr O'Connor was running reports, but that Ms Taylor actually asked him to run his own reports because he had an understanding of how things operated as between Octax and DRSP. It was put to her in cross examination that this only related to certain specific reports, but she firmly denied that that was the case.

245.7. It is apparent from the transcript of a meeting between Hayley O'Connor and Ms Taylor on 9 April 2018 that Ms Taylor, although being aware that Mr O'Connor was producing reports, expressed concern that Mr O'Connor had been provided with a great deal of data, and that *"there needs to be accountability for all that data."* Further, I do note some minutes dated 3 May 2018 seemingly prepared by Ms Taylor, which referred to her intending to meet with Mr Connell the following day, and her intention … *"to discuss* [Mr O'Connor's] *ongoing involvement in the business and the restrictions I intend to bring in, in terms of access to workflows etc.. He will still need some access to Slate, however this will only be to record and review any data we have referred to him and any cases he has referred back"*. Mr Connell was cross-examined in relation to this, and could not recall a meeting the following day, which is perhaps understandable. However, if some restriction that did not previously exist had been imposed upon Mr O'Connor, then I would have expected Mr Connell to have recalled this, and this to have affected his dealings with Mr O'Connor thereafter. Further, it was not put to Mr O'Connor that restrictions of the kind mentioned in these minutes dated 3 May 2018 had been raised with Mr O'Connor or imposed by Ms Taylor or Mr Connell at any point, and I accept Mr O'Connor's evidence that, throughout, he believed that he was entitled to do that which he was doing.

245.8. As referred to above, in the exchange of emails on 24 August 2018, Ms Taylor in her email timed at 13.25 observed that: *"Working DRSP referrals, whether alive or closed, has not been agreed by me, nor by Matt [Connell]."* She subsequently observed in the email timed at 13.49 that she was *"... unaware of any agreement regarding closed cases, with the exception of the batch of old ClearDebt cases, that Octax was given permission to work"*, to which Mr Connell responded: *"Octax were also assigned all old pension leads we are closed as non-contactable, and all PPI cases that were closed for the same reason (as I understand this was agreed to by someone!)."* I have considered whether this provides credible evidence to undermine that of Hayley O'Connor and Mr Connell in particular with regard to Ms Taylor's knowledge of events throughout 2018, and the circumstances in which cases were being dragged and dropped to Octax. However, I have concluded that it does not. There were obviously serious issues in relation to DRSP and a loss of staff by late August 2018, and, as I have already concluded, Ms Taylor was plainly not in a good place so far as her issues with alcohol dependency were concerned. The observation in the first of her emails of 24 August 2018 to the effect that working DRSP referrals, whether live or closed, has not been agreed by her was particularly odd, in that it flies in the face of the email correspondence on 21-22 March 2018 and other subsequent documentation to which Ms Taylor was party relating to the transfer of closed cases to Octax such as the text exchanges on 9 and 10 May 2018. Of far more significance in my judgment are Mr Connell's emails in the relevant email exchange including the passage referred to above in which Mr Connell contemporaneously confirmed that agreement had been reached with regard to the assignment of closed leads, and clearly implied that Ms Taylor herself had reached the relevant agreement. In the circumstances, I consider that little weight is to be placed upon Ms Taylor's comments in the email exchanges on 24 August 2018. This conclusion is, I consider, supported by the fact that shortly thereafter, Ms Taylor made her witness statement dated 18 September 2018 in which a number of plainly incorrect assertions were made, which are no longer pursued by the Claimants.

245.9. The fact that Ms Taylor might, in the first of her emails dated 24 August 2018, have referred to DRSP referrals not having been agreed by her *"nor by Matt"* does lend support to the position having been that managers such as Mr Connell and Hayley O'Connor had a significant degree of autonomy in relation to such matters.

The particular allegations of infringement

(a) Using the DRSP Consultancy account to grant external account holders additional roles in Slate to the default settings under the External role

246. Mr O'Connor accepted under cross-examination that he had used his DRSP Consultancy account to grant Octax employees additional roles in Slate on 23 and 26 March 2018, but he denied that he had done this without the permission of DRSP. Mr O'Connor explained, for the first time under cross examination, that at the time of the email correspondence on 21-22 March 2018, or shortly prior thereto, Mr Horan had visited Octax's offices in order to ensure that External roles were set up, and that Mr Horan subsequently came back to check that the access to Slate was working, and that

the granting of the additional roles was carried out whilst Mr Horan was sitting with him. Mr O'Connor explained that: *"What we did, my Lord, is when we realised it was not working, we went on to my account on the Slate UAT and basically, because it is the first time that this is ever been used, we were looking at what combination of roles worked to get the permission that we did and what was required to be able to undertake the job. Once we figured out what those roles were, I went into the database on Slate UAT, copied the roles that I had on that and pushed them all into the live environment via a SQL insert, which is why you can see all of the exact transactions on all of the same users."* He subsequently observed that: *"So, what the idea was when Mr Horan came across was to make sure that the system could actually operate as it needed to be."*

247. Mr Moody-Stuart makes the point on behalf of the Claimants that no mention had previously been made of any further visit by Mr Horan, and he submits that I should reject this evidence. It is, perhaps, unfortunate that it was not mentioned before, or pleaded in the Defence. However, it is evidence that I do accept. As I already indicated, I found Mr O'Connor to be a generally reliable witness who did his best to assist the Court. I have considered whether Mr O'Connor might have persuaded himself that this further visit by Mr Horan took place when, in fact, it did not, but I have concluded that this is not the more likely explanation. Mr O'Connor was able to give a detailed and reasoned account of Mr Horan's further visit, and I note that Mr Horan's email dated 21 March 2018 to Ms Taylor did admit of the possibility of a further visit to Octax's premises after the first drag-and-drop, which is consistent with what Mr O'Connor says.

248. Mr Horan was clearly charged with responsibility on behalf of DRSP for overseeing the setting up of the Octax External access to Slate, and as the additional roles were added under his supervision, and with his approval, I do not consider that it can be maintained that the additional roles were added without the consent of DRSP, even if Mr O'Connor's own authority as a consultant with the use of the DRSP Consultancy account did not permit this to be done in any event, which I consider that it probably did bearing in mind the clear evidence that the additional roles were added so that Octax could properly do its job.

249. I do not therefore consider this allegation of infringement to be made out.

(b) <u>Using the DRSP Consultancy account to write and run SQL queries to identify leads or cases to be passed to Octax.</u>

250. It is the Claimants' case that it was for DRSP to refer cases to Octax, and not for Octax to identify the relevant cases, and that this is made clear by Mr O'Connor's email of 21 March 2018, with a specific mechanism for reference being provided for in the case of OldClear Debt cases by the setting of a database flag. Consequently, so the Claimants say, there was no need, and it was not appropriate for Mr O'Connor to search for candidates for reference to Octax.

251. It was put to Mr O'Connor in cross-examination that the use of SQL queries in order to identify matters that he wanted transferring to Octax was not approved by Ms Taylor. He responded as follows:

"A It was always under a standing instruction and agreement that my SQL account could be used for whatever purpose. It was in pursuit of helping all parties progress the agreement.

Q Right. Perhaps I can put it this way, Mr O'Connor. I am not saying you did not believe that this is all something within some agreement you'd come to. I am saying that the use of SQL was not specifically approved by Melanie Taylor and it had not been generally approved by Melanie Taylor. That is correct is it not?

A No. I disagree. Melanie was always aware that I had an access to SQL, and that I would use it for the benefit of both companies. There was never a suggestion that anything I have done was detrimental to DRSP whatsoever.

Q ..... I suggest that if Melanie Taylor had authorised these matters, as you allege, there would be evidence that that had taken place in those documents. That is correct, is it not?"

A no. Again, not correct. In respect of the recordings, you will note it is only Mr Mond that I record. It is only Mr Mond I did not trust. Melanie I got on with and we had regular meetings ... She would rather pick up the phone than draft an email. That is always how it has been."

252. In my judgment, the running of the SQL queries fell within the scope of the authority that went with Mr O'Connor's continuing ability to access the DRSP Consultancy Account with a view to furthering, as both consultant (via Octax) of DRSP and on behalf of Octax, the joint interests of DRSP and Octax in pursuing leads that might not otherwise have been pursued by DRSP because forms had not been returned, or potential customers were considered to be uncontactable. As I have already mentioned, the evidence shows that the relevant search criteria was discussed on an ongoing basis with DRSP's managers, and the mere fact that the SQL queries might have come up with potential candidates for referral to Octax by dragging and dropping, this did not mean that the relevant leads/cases would be, or that DRSP was under any obligation to so refer them, at least unless the cases fell within agreed criteria.

253. In any event, even if it is not correct that the requisite authority came with Mr O'Connor's continuing ability to access the DRSP Consultancy Account, I accept the evidence of Mr O'Connor and Hayley O'Connor that Ms Taylor was aware that Mr O'Connor was carrying out searches, including SQL queries of the relevant kind, and that she went along therewith. I consider that this is supported by the fact that in relation to at least a significant number of the drag-and-drop's, apart from the final one, there is a pattern of:

253.1. Correspondence between Mr O'Connor and Hayley O'Connor or Mr Connell discussing the codes relating to the relevant searches;

253.2. SQL queries being carried out by Mr O'Connor by reference thereto;

253.3. The relevant information being passed on to Hayley O'Connor or Mr Connell with a request to carry out the relevant drag-and-drop.

254. Given the contact that Hayley O'Connor and Mr Connell had with Ms Taylor, and indeed the contact that Mr O'Connor himself had with Ms Taylor, I consider it highly unlikely that she did not know and approve of the fact that Mr O'Connor was carrying out the relevant searches, and that it was by reference thereto that the relevant drag-and-drop's were carried out following a request from Mr O'Connor to make the same.

255. Even if, which I consider to be most unlikely, Ms Taylor was unaware of the fact that Mr O'Connor was running the relevant SQL queries, or had not given her approval to him so doing, DRSP's managers, namely Hayley O'Connor and Mr Connell were intimately involved in the process, assisting with the relevant search codes etc.. The evidence demonstrates that Ms Taylor had conferred a considerable degree of autonomy on both of them, and indeed also on Mr Horan, and, in those circumstances, I consider it difficult if not impossible for the Claimants properly to maintain that what Mr O'Connor did was done without the consent of the DRSP within the meaning of reg. 16 of the Database Regulations.

256. I do not therefore consider that this allegation of infringement has been made out.

(c) <u>Using the DRSP Consultancy account to write and run SQL queries which lay outside the scope of the 21-22 March 2018 emails</u>

257. In closing submissions, reliance was placed by Mr Moody-Stuart, on behalf of the Claimants, upon some general admissions by Mr O'Connor under cross-examination that SQL queries had been run outside the scope of the 21-22 March 2018 emails. In particular, reliance was placed upon:

257.1. Record PCR62349 having been passed to Octax by Mr O'Connor following a drag-and-drop that he conducted where the reason for closure was that the customer had gone elsewhere due to a lower quote. The Claimants submit that whilst the Defendants contend that the 21-22 March 2018 emails allowed any case which had been closed for any reason and where a pack had not subsequently been returned to be referred, this was a not the true meaning of these emails, which allowed for cases to be referred if they were closed because ("as") the pack was not returned. The Claimants maintain that Mr O'Connor's belief that any closure where the pack was not returned would suffice reveals that his searches were not within scope of these emails.

257.2. The fact that the drag-and-drop effected by Hayley O'Connor on 9 May 2018 and the subject matter of the email exchange on 9 May 2018 were accepted by Mr O'Connor as not being within the scope of the 21-22 March 2018 emails, and were identified following a search created by Mr O'Connor.

257.3. That Mr O'Connor accepted (Day 5/664) that he had run SQL queries that did not fall within the ambit of the March emails and contended that the same fell within some later further agreement, which it was submitted by the Claimants had not been established on the evidence.

258. As I have already explained, whilst the 21-22 March 2018 emails did provide for the referral of particular types of lead/case in a particular way, both those emails and further later emails and other documents evidence the fact that it was anticipated that the scope of the leads/cases to be referred might well be extended. The drag-and-drop effected by Hayley O'Connor on 9 May 2018, and the email exchange on that date is particularly instructive. It was Hayley O'Connor's evidence that she might well have written the code set out in Mr O'Connor's first email of that date, and it was certainly a code that she approved. This particular drag-and-drop is one of the drags and drops that the Claimants accept was approved by Ms Taylor, as her approval is clearly established by the text exchanges between herself and Hayley O'Connor at that time.

259. When questioned under cross examination about the code set out in his email dated 9 May 2018, Mr O'Connor replied: *"Yes. That was following a conversation with Melanie Taylor. I think we agreed at that point that there was a –"*, at which point he was interrupted by Mr Moody-Stuart. The cross examination subsequently continued as follows:

> *"Q ... so it is not limited, this search was in no way limited to leads that were closed because you are unable to contact; correct?*
>
> *A No, this one was not, no.*
>
> *Q so, pausing there, that search itself was not within the scope of the March emails, was it?*
>
> *A The referrals for these, yes, there were a separate agreement with Melanie, yes."*

260. In the light of the fact that the transaction that followed from the relevant search was approved by Ms Taylor, I consider it likely that Ms Taylor did specifically approve the running of that particular search, or the very least was content to leave it to Hayley O'Connor to agree the scope of the search with Mr O'Connor following a discussion between Mr O'Connor and Ms Taylor regarding extending the scope of the types of lead/case that were to be searched for, for potential reference to Octax. Further, I consider it likely that when searches were conducted on other occasions that went beyond the strict scope of the 21-22 March 2018 emails, Ms Taylor specifically approved the same, or at least was content for Hayley O'Connor to do so, and subsequently for Mr Connell to do so. What is certainly clear is that Mr O'Connor did not randomly run SQL queries, but rather closely liaised with Hayley O'Connor or Mr Connell with regard to the code to be applied, and thus the scope of the search.

261. I consider it likely that the particular transaction identified in paragraph 257.1 above fell within the scope of the arrangements considered in the last paragraph, but in any event I prefer the Defendants' construction of the 21-22 March 2018 emails. I consider the construction suggested by the Claimants to be unduly restrictive. The reason for the pack not being returned may have been because the customer had gone elsewhere, but surely it was also the case that the case had been closed because the pack had not been returned – because the customer had gone elsewhere.

262. It is further my view that, in any event, it fell within the scope of Mr O'Connor's authority as consultant to run the relevant SQL searches in order to identify potential

cases to be referred to Octax even if strictly outside the scope of the 21-23 March 2018 emails, it then being a matter for DRSP whether the particular cases so identified by the search were in fact dragged and dropped to Octax.

263. Again, I do not consider this allegation of infringement to have been made out.

264. Using the DRSP Consultancy account to write and run SQL reports for use in Octax's operations and to manage the operation of cases passed to Octax

The Claimants rely on the fact that the Defendants accept that Mr O'Connor routinely ran reports for the purpose of allowing him to manage Octax's work on data from Slate. The Claimants point to the fact that whilst such reports were provided to other introducers such as Flexx and Adimus on request thereby allowing DRSP the opportunity to maintain control over what was transferred or not, Mr O'Connor simply ran the reports himself depriving DRSP of that opportunity. The Claimants rely upon the fact that at one point in his evidence, Mr Connell said that if he *"had asked for a wider remit from Melanie, she would have given it to me."* The Claimants submit that this suggests that Mr O'Connor was operating under the assumption that he was entitled to behave in the way that he was, but that he had not actually asked for the requisite permission.

265. At one point during the course of his evidence, Mr O'Connor stated: *"It was always under a standing instruction and agreement that my SQL account could be used for whatever purpose. It was in pursuit of helping all parties progress the agreement."* This may be putting it too widely, but at one point during the course of his cross-examination, Mr O'Connor did cogently explain the practical difficulties if he was not able to run these sorts of report.

266. It was put to him by Mr Moody-Stuart that it was not that Octax staff could not operate without access to these reports, but that it was that Mr O'Connor as their manager wanted more data so that he could keep abreast of their progress and could organise their activities. In response, Mr Connell said this:

> *"A. It is more a case that organisation is one fair way of putting it. In reality, without being able to allocate a specific case to a specific person, everyone is going to be clicking in the same cases, there is an issue of potentially two people calling the same individual at once. There seems to be some sort of filtering issue, in terms of what is coming back and then also a fairly obvious level where the search is designed to locate a single one person. If on every time of running this screen, which is in effect itself a query, you are hitting the entire Slate database so you would have to run this each and every time, go back out, run it again, you are taking a minute or so in between every operation. So, to all intents and purposes, if you are saying we could have just used screen, no, you could not really."*

267. In these circumstances, if reports of this kind were practically required so that Octax could do that it was provided for by the Introducer Agreement, then I am satisfied that Mr O'Connor's general authority as a consultant would have extended to permit the running of these reports.

268. In any event, it is clear from the evidence that Ms Taylor was well aware that Mr O'Connor was running a number of reports, and indeed, at one stage at least, was anxious to obtain a report from him, and in particular reports relating to how Octax was dealing with the cases that had been referred to it. Apart from reference to reports run by Mr O'Connor in the transcript of the meeting on 9 April 2018, during the course of her evidence, Hayley O'Connor said this:

> *"Q Well, he also ran his own reports for use at Octax, did he not?*
>
> *A Yes. So, Melanie Taylor, as you can see in the transcript from the meeting on 9 April, Melanie Taylor was chasing Tom O'Connor for reports on how Octax was doing. In a normal capacity, at DRSP, an introducer would not maybe possibly have access to that stuff, and we would report back to the introducer how things were transparent. But because Tom O'Connor had a consultancy and we were swamped working at DRSP, Melanie asked that Tom run his own reports because he had an understanding of how things were going, he had the understanding of both Octax and DRSP, and quite frankly, I just did not have time."*

269. I am satisfied that even apart from the general authority, Ms Taylor had knowledge of and approved the running by Mr O'Connor of the relevant reports.

270. In the circumstances, again, I do not consider the allegation of infringement to be made out.

(d) <u>Using the DRSP Consultancy account to undertake drag-and-drop transfers himself on behalf of Octax</u>

271. The evidence shows that there was only one such transaction, on 19 August 2018, when 118 cases were dragged and dropped by Mr O'Connor himself.

272. I have referred in detail above to the email exchange on 14 and 16 July 2018 between Mr O'Connor and Mr Connell relied upon by the Defendants as showing that this transfer was effected with the consent of DRSP. What this correspondence does show is that Mr Connell certainly expressly agreed that Mr O'Connor might carry out transfers of leads/cases identified by an SQL search carried out by reference to an agreed code identified in that correspondence.

273. It was Mr Connell's evidence that he agreed to Mr O'Connor's request to effect transfers himself after having obtained Ms Taylor's specific approved, but there is the forensic difficult that Mr Connell responded to Mr O'Connor's request made by email on 16 July 2018 in respect of future transfers by an email sent in reply only a minute after the request had been made, suggesting that there was little if any time for Mr Connell to take up the point with Ms Taylor. This tends to suggest that Mr Connell did not take up the specific query with regard to transfer with Ms Taylor, unless perhaps he was in the office with Ms Taylor at the time whatever he may recall.

274. However, Mr O'Connor's earlier email of 14 July 2018 had raised the prospect of Mr O'Connor running the code himself, and I accept that there is likely to have been some conversation at this point between Mr Connell and Ms Taylor with regard at least to the principal of Mr O'Connor running the code himself, as a result of which Mr Connell

correctly considered that he did have sufficient authority to agree to Mr O'Connor effecting future drags and drops in accordance with that code, even if Mr O'Connor did not, as a manager, have authority himself to agree to this.

275. However, if this is not right, and given the agreement in respect of the code by reference to which any search that might lead to a drag-and-drop affected by Mr O'Connor himself, I consider that Mr Connell, as a manager, would have had sufficient authority to permit Mr O'Connor to drag-and-drop cases within this parameter.

276. In the circumstances, I find that the drag-and-drop was carried out with the consent of DRSP, and that this allegation of infringement is not made out.

(e) Using DRSP Consultancy access to instruct DRSP employees to undertake drag-and-drop operations

277. The Claimants point to examples put to Mr O'Connor in cross examination of email exchanges with Mr Connell, Hayley O'Connor and Mr Horan in which it is said that he instructed them to carry out drag-and-drop operations on behalf of Octax. Whilst Mr O'Connor denied under cross examination that he had *"instructed"* them, maintaining that he had merely *"suggested"* the relevant operations, the Claimants submit that the emails in question show Mr O'Connor to have given instructions using his DRSP Operations Director email address and footer, rather than mere suggestions, in particular given Mr O'Connor's previous role as Operations Director and manager in charge of the recipients of the emails. It is also said that the emails do not reveal any permission or approval for the relevant operations by Ms Taylor.

278. I do not read the email correspondence relied upon by the Claimants as showing that Mr O'Connor did *instruct* Hayley O'Connor and Mr Connell in the way suggested. As I see it, the email correspondence formed part of the arrangements discussed above whereby, with the consent of DRSP, Mr O'Connor run searches in accordance with search criteria agreed with DRSP that produced leads/cases suitable for referral to Octax, but in circumstances where whether they were actually referred to Octax was down to DRSP acting through its managers Hayley O'Connor, Mr Connell and/or Mr Horan, with the appropriate authority of Ms Taylor, effecting the drags-and-drops necessary to refer the cases. Further, it was, as I see it, entirely consistent with Mr O'Connor's role as a consultant to request these transfers in order that the terms of the Introducer Agreement could be given effect to.

279. Again, I do not consider the alleged infringement to be made out.

(f) Use of DRSP Consultancy account to instruct DRSP employees to mark leads as uncontactable or unable to contact

280. This is said by the Claimants to be demonstrated by the email string dated 9 May 2018 in the course of which Mr O'Connor asked of Hayley O'Connor whether she was: *"able to close them as Unable to Contact or something like that please so that they don't show in the Sale guys lists as well and we end up calling the same customers?"* The Claimants submit that this amounted to an instruction to Hayley O'Connor to mark leads as uncontactable, or unable to contact.

281. Mr O'Connor was asked about this email string in cross examination, and in particular about the above question in his email dated 9 May 2018. He responded as follows:

> *"A I was suggesting that it may be prudent to get them out of the DRSP staff lists, so that there is no cross contamination.*
>
> *Q right. But just to be clear, you are asking her there to close them, as unable to contact, are you not?*
>
> *A No. I am suggesting that might be an idea. I have - there is no instruction or anything there, attached to it, although I would stand by it is a good idea.*
>
> *Q I am not going to do this every time we go back-and-forth, but I am suggesting it was a request that she close them. It is not a suggestion, it is a request on your part?*
>
> *A It is a suggestion."*

282. I do not read this or any other correspondence as amounting to an instruction to Hayley O'Connor or anybody else at DRSP to mark leads as uncontactable or unable to contact. I accept Mr O'Connor's evidence that it merely amounted to a suggestion which it was open to Hayley O'Connor to either act on or not.

283. In any event, I consider that this email correspondence formed part of the consensual arrangements referred to above whereby leads/cases were selected for referring to Octax.

284. Consequently, I do not consider there to have been any infringement of DRSP's database right involved.

Statutory defence

285. Should I be wrong as to my conclusion that the Claimants have not established their alleged acts of infringement, I consider Mr O'Connor's and Octax's case that they are entitled to rely on the defence provided for by s. 97 of the CDPA 1988 as applied to database right and databases in which that right subsists by reg. 23 of the Database Regulations.

286. S. 97 of the CDPA 1988 provides:

> "*Where in an action for infringement of copyright it is shown that at the time of the infringement the defendant did not know, and had no reason to believe, that copyright subsisted in the work to which the action relates, the plaintiff is not entitled to damages against him, but without prejudice to any other remedy.*"

287. It is apparent therefrom that the onus is on the party seeking to rely upon the defence to show that they did not know or have reason to believe that database right subsisted in the relevant database. Where the defence is made out, then the owner of the database right is not entitled to damages for database right infringement, but the defence does not prevent the owner of the database right from seeking an account of profits.

288. The defence does not apply in the case where a defendant wrongly but reasonably believes they were licensed, or that their acts did not infringe the database right. As Mr Moody-Stuart points out, the formulation *"reason to believe"* has been held in respect of other parts of the 1988 Act to involve the "*the concept of knowledge of facts from which a reasonable man would arrive at the relevant belief*" – see *ZYX v King* [1997] EMLR 319, and see also Laddie, Prescott, and Vitoria (supra), at para 26.33.

289. Mr O'Connor had a fairly detailed knowledge of Slate and how it was made up and operated, and had been involved in the development of its architecture as Operations Director of DRSP. In these circumstances, I do not consider that it can reasonably be said that Mr O'Connor and Octax did not have knowledge of the facts from which a reasonable man would arrive at a belief that the database right subsisted. In these circumstances, had the case of infringement been made out, then I do not consider that it would have been open to Mr O'Connor or Octax to rely upon the statutory defence.

Overall conclusion on infringement

290. It follows from the above that I do not find that any of the alleged acts of infringement of the Claimants' database right has been established.

Further or alternatives bases of claim in respect of use of Slate data

291. Further or in the alternative to the Claimants' claims based upon infringement of database right, the Claimants allege that Mr O'Connor's actions amounted to a misuse of confidential information belonging to DRSP, breach of fiduciary duty, and a breach of the terms of the Consultancy Agreement, and in particular clause 4.1.2 of the latter, on the part of Mr O'Connor and Octax.

292. So far as misuse of confidential information is concerned, the essence of the case is that data within Slate was plainly confidential, and that Mr O'Connor used the same, without the consent or authority of DRSP, for the benefit of Octax.

293. So far as breach of fiduciary duty is concerned, and breach of the Consultancy Agreement, the essence of the allegation is that Mr O'Connor, without the consent or authority of DRSP placed himself and Octax in a position where their interests conflicted with those of DRSP so that, although he might not have acted maliciously, he did act in breach of duty, and he caused Octax to act in breach of the Consultancy Agreement.

294. Mr Moody-Stuart realistically recognised that these issues stood and fell with whether DRSP knew of and consented to the acts complained of, and thus that these further allegations could not succeed if the Claimants were unsuccessful in relation to their claim of infringement of database right. In the circumstances, it is neither necessary nor appropriate for me to deal with the further issues that arose in relation to the Claimants' claims in respect of misuse of confidential information, breach of fiduciary duty, and breach of the terms of the Consultancy Agreement.

Unjust enrichment

295. The final head of claim relates to the payment by DRSP of Octax's invoice dated 2 August 2018 in the sum of £160,333 (inclusive of VAT), or at least the element of that

invoice that related to leads/claims that were referred by DRSP to Octax to be reheated, and then referred back to DRSP, and in respect of which they have been paid by the customer.

296. It is the Claimants' case that this invoice was paid by mistake because DRSP, although believing the invoice to be due and payable at the time of payment, was in fact under no obligation to pay any fee to Octax in respect of this referred back to work, because that was not the true effect of the Introducer Agreement, and Octax has not established any other contractual or other obligation obliging DRSP to make payment in respect thereof.

297. Although Octax maintain that other arguments arise even if the Court should determine that DRSP was under no obligation to pay any fee to Octax in respect of such referred back work, Mr Moody-Stuart, on behalf of the Claimants, accepts that this claim stands and falls with the issue of whether the fee invoice was due under some contractual agreement established by Octax.

298. Given that it is my finding, in dealing with the Counterclaim below, that Octax has established such a contractual agreement, it necessarily follows that the Claimants' unjust enrichment claim cannot succeed.

Conclusion in respect of the Claimants' claim

299. It follows, given my findings in respect of the respective elements of the Claimants' claim, that the Claimants' claim fails and should be dismissed.

Merits of the Defendants' Counterclaim

Introduction

300. The principal issues that arise in respect of the Defendants' Counterclaim are as to whether Octax is entitled to a 50% fee or commission on any CMC fee recovered by DRSP from the customer in respect of leads/cases referred back to DRSP as envisaged by clause 2.6.1 of the Introducer Agreement and, if so, whether that 50% fee is payable gross, or net of DRSP's own costs and expenses.

301. In addition to claiming an account in respect of fees/commission due, Octax claims damages alleging that DRSP acted in breach of the terms of the Introducer Agreement by failing and refusing to perform it after 1 September 2018, until it could have been lawfully terminated pursuant to clause 6.1 of the Introducer Agreement on 1 October 2018.

302. The case as ultimately pursued by Mr O'Connor and Octax at trial was that such fee was payable as a matter of true construction of the Introducer Agreement, in particular clause 3.3 thereof.

303. However, Mr Moody-Stuart, on behalf of the Claimants, has sought to take a pleading point, arguing that it is not open to Mr O'Connor and Octax to maintain this construction. It is therefore first necessary to consider this pleading point before dealing with the substantive merits, insofar as it is appropriate to do so in the light of my determination in respect of this pleading point.

Pleading point

304. As initially pleaded, paragraph 49 of the Particulars of Claim alleged that, in accordance with the Consultancy Agreement and/or the Introducer Agreement, it was agreed that DRSP would pay Octax the fixed fee of £7500 plus VAT per month for consultancy services and: *"(b) commission in respect of claims introduced known as and referred to as "old ClearDebt Case outsourcing, on condition that* [Octax] *discharged its obligations under the Consultancy Agreement and/or the Introducer Agreement…".* However, the admission made by these quoted words, which reflected what Ms Taylor had said in paragraph 16.4.2 of her witness statement, were deleted in the Re-Amended Particulars of Claim served as late as November 2020.

305. Further, it is to be noted that the Re-Amended Particulars of Claim, at paragraphs 62A-C thereof, introduced the new unjust enrichment case that the invoice dated 2 August 2018, save as to that part thereof that related to the consultancy fee of £7500 plus VAT, had been paid by mistake because the balance of the sum claimed thereby: *"… was not due under any valid or enforceable agreement between* [DRSP] *and* [Octax]. *In particular the said sum was not due under the Consultancy Agreement or the Introducer Agreement or any other agreement between* [DRSP] *and* [Octax]."

306. In response to the deletions made to paragraph 49 of the Particulars of Claim by the Re-Amended Particulars of Claim, paragraph 38 of the Re-Amended Defence pleaded as follows:

> *"38. …. The Introducer Agreement as amended and sent to DRSP included tracked changes to identify that the ClearDebt IVA cases would be worked as well as PPI/Pension cases referred by DRSP to Octax. The sentence in respect of "Already existing on the system" [which I understand to be a reference to similar wording in clause 5.1 of the Introducer Agreement] was in relation to where 2 lead sources referred cases to DRSP. It was not designed to say that DRSP could refer cases to Octax to be work free of charge. At no point during the proceedings has it ever before been alleged that there was a carve out for these cases. This was agreed all along. The payment of the Octax invoice is itself proof of this along with various other conversations with DRSP, announcements to their staff and the report sent by* [Mr O'Connor] *to David Mond's Liz Robinson account in July which clearly identified the fee split etc."*

307. In response to paragraphs 62A-C of the Re-Amended Particulars of Claim, paragraph 49.1 of the Re-Amended Defence repeated paragraph 38 thereof and continued: *"The effect of the new claim is that Octax had agreed to work for free and that is nonsensical.* [DRSP] *previously merely sought to argue that its costs should be debited to the 50% calculation. There was no accidental payment of the invoice. The invoice was paid because* [DRSP] *knew without doubt that it was due. There was no unjust enrichment."*

308. However, the Re-Amended Defence and Counterclaim made no amendments to paragraphs 75-78 of the original Counterclaim which had pleaded, and continues to plead as follows:

> *"75. Octax's remuneration was provided for by Schedule 1* [of the Introducer Agreement] *namely a fee of 50% of the combined CMC and Referral Fee received by DRSP in respect of a customer introduced by Octax.*

76. Octax is entitled to an account which identifies all Introduced Customers as defined, details the associated fees received by DRSP and an order for payment of half of those sums, and damages for the loss of the chance to convert further business from which fees and commissions would have been generated in the period between de facto cessation on 1 September 2018 and potential termination on 1 October 2018.

77. The emails of 21 and 22 March 2018 founded the Commission Sharing Agreement which was separate to the Introducer Agreement because the latter was expressly confined to marketing on PPI and pension mis-selling. By the Commission Sharing Agreement Octax was appointed by DRSP to work on old ClearDebt cases and to rework/resurrect pension case and PPI case leads (which was different to the marketing activity under the Introducer Agreement). DRSP agreed to pay 50% of the fees or commissions received in respect of this work. The work was lucrative as shown by example in the invoice dated 2 August 2018 issued by Octax to DRSP billing £126,194.17 for that month's 'Old ClearDebt Case Outsourcing'. These figures form the basis of the Defendants' belief that this action represents the Claimants' regret at making the Commission Sharing Agreement.

78. In the alternative the March 2018 emails found an extension or variation to the Introducer Agreement. Any such distinction may be without substance because the August invoice issued in respect of July's work (on the reworking of old ClearDebt cases) also demonstrates a 50/50 split (just as provided for in the Introducer Agreement)."

309. Mr Budworth assured me in closing that it had always been his and Mr O'Connor's intention to run a primary case that the terms of the Introducer Agreement, as a matter of true construction thereof, provided for the payment of the 50% fee/commission in respect of leads/cases referred by DRSP to Octax and referred back to DRSP, and a secondary alternative case that a liability to pay such 50% fee/commission arose under a separate *"Commission Sharing Agreement"*. He explained that paragraph 75 of the Counterclaim, in referring to *"Referral Fee received by DRSP in respect of a customer introduced by Octax"* was intending to refer not only to customers initially introduced by Octax to DRSP, but also customers referred back by Octax to DRSP.

310. However, I am bound to say that this does not rest easily with paragraph 77 of the Counterclaim which pleads that the 21 and 22 March 2018 emails founded the Commission Sharing Agreement, which is said to have been *"separate"* to the Introducer Agreement because the latter was expressly confined to marketing on PPI and pension mis-selling. However, I recognise that prior to the very late re-amendments to the Particulars of Claim, paragraph 49 of the Particulars of Claim appeared to accept that commission was due in respect of certain referrals back at least, and the re-amendments made to the Defence at paragraphs 38 and 49.1 thereof do appear to place primary reliance upon Introducer Agreement rather than some separate agreement.

311. At the Pre-Trial Review of this case in December 2020, the Claimants sought a formal direction that Mr O'Connor and Octax should be confined to their pleaded case in respect of the alleged Commission Sharing Agreement, the point being taken that proper particulars have not been provided in relation to such agreement as required by

paragraph 7.3 to 7.5 of the Practice Direction under CPR Part 16. I declined to make any formal order at that stage, but Mr Moody-Stuart, on behalf of the Claimants, sought to renew the matter during the course of his opening of the case, and I ruled on the matter on the second day of the trial. I held, in essence, that there were no proper particulars of any separate Commission Sharing Agreement, and that it was not open to Mr O'Connor and Octax to run a case based upon any such separate agreement.

312. Mr Moody-Stuart maintains that, during the course of the exchanges relating to my determination of this issue in relation to a separate Commission Sharing Agreement, he reserved his position so far as Mr O'Connor's and Octax's pleaded position in respect of the Introducer Agreement was concerned. In closing, he sought to maintain that the construction that Mr O'Connor and Octax seek to argue for in respect of the Introducer Agreement is not open to them on their pleaded case, and that it would be unfair for me to deal with this case because, so it is said, further evidence would have been advanced to address it had it been properly pleaded.

313. I have considered the submissions made, and how matters were dealt with during the course of opening submissions, in particular where recorded in the transcript at Day 2, pages 150, 156-157 and 182-184. The key points that I take therefrom are the following:

    313.1. Mr Moody-Stuart's primary concern was that Mr O'Connor and Octax should be tied down as to their case on the so-called Commission Sharing Agreement so that the Claimants knew the case that they had to meet before Mr Mond was cross-examined. His submissions drew a clear distinction between Mr O'Connor's and Octax's case in respect of the true meaning of the Introducer Agreement, and their case in respect of a separate Commission Sharing Agreement.

    313.2. Mr Moody-Stuart, whilst anxious to understand Mr O'Connor's and Octax case in respect of the Introducer Agreement, did not at that stage indicate any difficulty in the Claimants being able to deal with such construction issues as might have arisen, if anything positively suggesting that the Claimants were in a position to deal with the same.

    313.3. Unlike the position in respect of the Commission Sharing Agreement, Mr Moody-Stuart did not press for any ruling in relation to the case that Mr O'Connor and Octax were entitled to put forward in respect of the construction of the Introducer Agreement before evidence was called.

    313.4. Despite the ambiguities in Mr O'Connor's and Octax's pleaded case that I have identified above, I certainly understood their case to have been opened on the basis that they did rely upon the Introducer Agreement, as a matter of true construction thereof, providing for the payment of the 50% commission not only in respect of new leads/cases introduced by Octax to DRSP, but also to leads/cases referred back by Octax to DRSP.

    313.5. Hence, at Day 2, page 184, I said : *"Right. We have clarified what the construction case is now, I think."* I then flagged up that issues may arise as to what evidence might be admissible for the purposes of construing the relevant provisions of the Introducer Agreement. There was no dissent from the

Claimants at this point, and the dialogue following my ruling on the issue raised in respect of the Commission Sharing Agreement did not touch upon this issue.

313.6. Despite what Mr Moody-Stuart might now say, I do not consider that the Claimants will be prejudiced by my now dealing with the construction issues that arise in relation to the Introducer Agreement on their merits. Had there been any real concerns in this respect, then I am sure that they would have been identified during the course of the opening of the case, and that Mr Moody-Stuart would have pressed his objections at that stage in the way that he did in relation to the Commission Sharing Agreement. Further, no specific prejudice, by reference to any particular evidence that it has not been possible for the Claimants to adduce or deal with has been identified.

314. In the circumstances, and notwithstanding the somewhat unsatisfactory state of Mr O'Connor's and Octax's pleaded case, in part at least explained by the very late re-amendments to the Claimants' pleaded case, I consider it appropriate to deal with the construction issues that arise in relation to the Introducer Agreement on their merits.

True effect of Clause 3.3 of the Introducer Agreement

Correct approach to interpretation

315. In construing the Introducer Agreement, one must necessarily apply the well settled principles of construction, namely that deeds and other documents require to be construed objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the relevant deed or other document, would have understood the language thereof to mean, evidence, whether from prior negotiations or otherwise, about what the parties subjectively intended or understood the deed or other documents of mean being inadmissible and irrelevant to the task of the Court – see eg *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173, at [10]-[15] per Lord Hodge.

316. I get from Lord Hodge's analysis of the principles in the latter case the following further principles derived from the earlier cases:

316.1. Interpretation is a unitary exercise, and where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense;

316.2. In striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of the drafting of the clause, and it must also be alive to the possibility that one party may have agreed to something which with hindsight did not serve their interests;

316.3. The unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated, Lord Hodge expressing the view

that it did not matter whether the more detailed analysis commenced with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balanced the indications given by each;

316.4. Textualism and contextualism are not conflicting paradigms. The extent to which each tool might assist the court in its task will vary according to the circumstances of the particular agreement or agreements, and some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals.

317. It remains good law that if the court concludes from the background that something must have gone wrong with the language, the law does not require the court to attribute to the parties an intention which they plainly could not have had, and in deciding whether there has been a clear mistake, the court is not confined to reading the document without regard to its background or context - see *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC at [24] per Lord Hoffmann, cf. *Arnold v Brittan* [2017] AC 1173 at [70] and [111]. However, the mistake must be clear, and it must be apparent what correction is called for.

The rival contentions

Initial considerations

318. Before considering the parties' rival contentions, it is necessary to remind myself that evidence as to prior negotiations, and the parties' subjective intentions are irrelevant to, and inadmissible for the purposes of the interpretation exercise. Consequently, I do not take into account as part of this exercise the discussions between Mr O'Connor and Mr Mond, and correspondence passing between them with regard to the terms of the Introducer Agreement, and in particular the commission payable to Octax.

319. However, I consider that I am entitled to take into account that, as I consider the evidence clearly demonstrated, the Introducer Agreement comprised the terms of an earlier introducer agreement with Flexx which had been amended by Mr O'Connor himself without reference to legal advice so as to cover the further work stream relating to leads/cases referred by DRSP to Octax for reheating and potential reference back. To that extent we are not concerned with a document prepared with the benefit of professional advice and input, and I consider that this is a factor that requires to be taken into account when seeking to draw a balance between textualism and contextualism on the facts of the present case.

320. Further, I consider that I am entitled to take into account by way of background the fact that the Introducer Agreement as signed in May 2018:

320.1. Is in a form the terms of which had been agreed in early February 2018;

320.2. Was expressed to commence and thus take effect from 1 March 2018; and

320.3. Was signed after the exchange of correspondence on 21-22 March 2018, and after the parties had begun to perform as evidenced by the provision of leads

in the manner envisaged by clause 3.6.1 of Introducer Agreement prior to the latter being signed.

321. Both Mr Mond and Mr O'Connor were cross-examined with regard to their understanding of the meaning of the Introducer Agreement. I treat this evidence with great caution for the purposes of the present interpretation exercise given the inadmissibility for the purpose of evidence as to the subjective intentions of the parties. However, I recognise that the cross-examination of Mr O'Connor might potentially be relevant to one issue, namely whether, despite the position relating to the pleadings and the Defendants' difficulties in relation thereto, there was or was anticipated to be some separate agreement to deal with the work to be referred back to DRSP, in which case it might be said that the background circumstances pointed against the Introducer Agreement intending to deal therewith. However, Mr O'Connor's evidence was that he had always understood all matters to be encompassed within the Introducer Agreement, and he stuck to that under cross examination. I accept his evidence in relation to that, notwithstanding the pleading issues that I have referred to, and so I do not need to consider the admissibility of evidence that Mr O'Connor's believed there to be a separate agreement because that was not his evidence.

The Claimants' case

322. The Claimants maintain, in essence, that the natural meaning of the wording of the relevant provisions of the Introducer Agreement is to the effect that a fee or commission is not payable by DRSP in respect of the referred back work, that there is no ambiguity as to this, and that in any event the commercial context supports such an interpretation, and only such an interpretation given that, in the circumstances, the parties cannot reasonably have been expected to have agreed a 50% split of the kind contended for by Mr O'Connor and Octax because that would have been a wholly uncommercial thing for them to have done on the basis that, so it is said, a 50% split would have been an extraordinarily good deal for Octax, and that the a 50% fee split in respect of fresh leads introduced by Octax *"amply compensated"* Octax for all work contemplated under the Introducer Agreement, including that relating to referrals back.

323. The Claimants argue that the natural meaning of the wording of the Introducer Agreement set in context is that the fee provided for under schedule 1 and clause 3.3 is only payable in respect of "Introduced Customers" as defined in clauses 1 and 5.1. It is said that the combined effect of these clauses is that cases referred by DRSP to Octax are excluded from the term Introduced Customers and so from DRSP's payment obligations under clause.

324. The Claimants maintain that this construction is in accordance with the natural textual meaning of the relevant clauses when read as a whole, for the following reasons:

    324.1. The definition of "Introduced Customers" in Cl. 1.1 is of customers referred "*to* [DRSP] *by* [Octax]". It does not, it is said, extend to customers referred to Octax by DRSP, and the directional limitation is thus said to be robbed of all meaning if it is extended to such customers.

    324.2. A further definition of Introduced Customers in clause 5.1 in any event limits

Introduced Customers to those who are not already present in the DRSP database. Interpreting "Introduced Customers" as including cases provided by DRSP to Octax and then provided back is thus said to be wholly inconsistent with this definition. By contrast, it is maintained that DRSP's construction allows clauses 1.1 and 5.1 to be read consistently with each other.

324.3. A further textual problem with any interpretation that brings IVA estates provided by DRSP to Octax within the scope of "Introduced Customers" is said to be that the phrase "*Where ... Fee has been paid to* [DRSP] *by the Introduced Customer* ***or*** *IVA estate"* in clause 3.3 expressly differentiates between Introduced Customers and IVA Estates. IVA Estates provided by DRSP to Octax are thus said to be treated separately from Introduced Customers, which it is argued would make no sense if the latter included the former.

325. It is thus argued that a unitary interpretation of the text of the Introducer Agreement leads to the DRSP's proposed construction.

326. As to the relevant "contextual" factors, the Claimants rely principally upon their argument that the 50% fee was an extraordinarily good deal for Octax such that the fee in respect of fresh leads introduced by Octax provided ample compensation for all work contemplated under the Introducer Agreement, including that on reheated cases. I have already made findings in relation to the commerciality of the 50% fee split. However, a further relevant consideration said to stem from the wording of the Introducer Agreement is the absence of any positive obligation on Octax as to the rate of which it was to work reheated cases when provided to them by DRSP, in contrast to DRSP's own obligations under clause 3.1 and clause 3.6.1, and further emphasis is placed on the point that DRSP would potentially be liable to pay a 15% introduction fee to Flexx, as well as paying a further 50% to Octax.

<u>The Defendants' case</u>

327. The argument against that advanced by the Claimants is that one should start with the context, and the fact that the Introducer Agreement specifically referred in its "Background" section at the beginning thereof to two specific work streams in respect of (a) new customers introduced by Octax to DRSP and (b) customers to be referred by DRSP to Octax for potential reference back, and the proposition that it would be odd and incongruous if one of those work streams was to be remunerated, but not the other, at least unless there were some very compelling commercial considerations pointing to some other conclusion.

328. Turning to the text, the Defendants' position is that:

328.1. So far as the definition of "Introduced Customer" in clause 1.1 is concerned, whilst this does refer to individuals *"referred to* [DRSP] by [Octax]", clause 3.6.1 talks in terms of the claims referred by DRSP to Octax being *"referred back"* to DRSP, so the reference to *"referred to"* within the definition of "Introduced customer" in clause 1.1 was, in the context, plainly referring not only to referrals by Octax to DRSP, but also referrals back by Octax to DRSP, a significant consideration within the definition being the further requirement that the customer should have *"signed DRSP Terms of Engagement and*

Pension and/or PPI Claim specific DRSP Letters of Authority", which will be the case in respect of both referrals and referrals back.

328.2. So far as clause 3.3 of the Introducer Agreement is concerned, whilst, on one view, the reference therein to IVA estate might be taken as seeking to distinguish ClearDebt IVA work from the definition of "Introduced Customer", the fact is that clause 3.3 refers to a CMC Fee received from an IVA estate as falling within the circumstances in which DRSP clearly agreed to pay a fee to Octax pursuant to clause 3.3. A CMC fee would never be received from an IVA estate in the case of leads introduced by Octax to DRSP, and would only be so received in the case of a referrals back. Thus clause 3.3 is plainly not intended to be limited to apply simply to leads referred by Octax to DRSP, otherwise the reference to "IVA estates" in clause 3.3 would be otiose.

328.3. Clause 5.1 was plainly intended to cover the situation where a customer had been introduced to DRSP by two "Introducers", and included so as to prevent DRSP from having to pay two lots of introduction fees, by providing that a fee should only be payable to the Introducer who first introduced the customer. Consequently, the relevant sentence in clause 5.1 is only intended to apply where this conflict exists. This would not be the case in the case of a lead/case referred by DRSP to Octax for reheating, and potential reference back.

329. Returning to commercial considerations, in the context, a 50% split in respect of reheated leads/cases referred back does not, the Defendants say, create the commercial absurdity that the Claimants maintain that it does. To the contrary, it is the Defendants' case that it would be absurd if Octax were not to be remunerated for reheating the leads in question to the advantage of DRSP, particularly in circumstances where Octax had agreed by clause 3.6.1 to provide leads exclusively to DRSP in consideration for DRSP agreeing to refer leads/cases to Octax pursuant to clause 3.6.1 of the Introducer Agreement.

330. In all the circumstances, it is the Defendants' case that a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the Introducer Agreement would have understood the language of clause 3.3 of, and schedule 1 to the Introducer Agreement to mean that the fee as defined in schedule 1 was payable not only in respect of leads/cases introduced by Octax to DRSP, but also leads/cases referred by DRSP to Octax pursuant to clause 3.6.1 of the Introducer Agreement, and referred back to Octax as envisaged thereby, such fee becoming payable where a CMC fee is actually received by DRSP.

<u>The proper construction of the Introducer Agreement</u>

331. I consider it to be an important consideration in the circumstances of the present case that the Introducer Agreement is not a professionally drafted document, but rather is the product of an earlier agreement with a different party, which earlier agreement may or may not have been professionally drafted, and important amendments made thereto by Mr O'Connor himself, which were then revised by Mr Mond, without there being any evidence of a solicitor or other lawyer being involved in the drafting process. This, to my mind, emphasises the importance of context in the present case, and I consider that any textual analysis requires to take this into account in two

particular respects. Firstly, in considering the language of the amendments made by Mr O'Connor and, secondly, in considering the interrelationship between the language added by Mr O'Connor, and the existing drafting of the document, and any inconsistencies as between the same.

332. In my judgment the Defendants' interpretation is to be preferred. The purpose of the Introducer Agreement is to provide for two distinct work streams to be referred by Octax to DRSP which might then result in the payment of a CMC fee to DRSP in consequence thereof, comprising: firstly, new leads/cases initially introduced by Octax to DRSP; and secondly, leads/cases details of which are provided by DRSP to Octax, to be referred back to DRSP if the relevant leads/case can be reheated. I consider that the starting point must be that one would expect Octax to be remunerated in respect of both work streams unless the wording of the Introducer Agreement clearly provided to the contrary, or unless commercial considerations pointed very firmly against such a result.

333. So far as the wording is concerned, the reference to individuals *"referred"* to DRSP by Octax in the definition of "Introduced Customers" in clause 1.1 is, to my mind, quite capable, on the wording of the Introducer Agreement, of extending to matters *"referred back"* pursuant to clause 3.6.1. Significantly, clause 3.6.1 does talk in terms of *referring* back, wording entirely consistent with the wording within the definition of *"Introduced Customers"*. Thus, in the circumstances, subject to consideration of clause 5.1, I do not consider that the definition of *"Introduced Customer"* is to be limited only to those customers initially introduced by Octax to DRSP.

334. Further, I consider that clause 3.3 assists the Defendants rather than the Claimants given the reference therein to IVA estate. I agree that the inclusion of this reference would be otiose if clause 3.3, which governs the payment of the fee as defined in Schedule 1, were limited to cases initially referred by Octax to DRSP, because claims involving IVA estates (i.e. ClearDebt cases) would never have fallen within that category because they would not have been referred initially by Octax to DRSP. The Claimants certainly have a point that, prima facie, one would not strictly have needed to refer to IVA estates within clause 3.3 if the definition of Introduced Customer extended to cases pursued on behalf of IVA estates. However, this is an instance of drafting that I consider can be explained on the basis of having resulted from Mr O'Connor's own revisions to the existing draft and the considerations referred to in paragraph 331 above. Of greater significance, as I see it, is that the key clause (clause 3.3) providing for payment of the 50% refers to work that can only have derived from cases the data in respect of which was provided to Octax and which Octax would have referred back to DRSP.

335. So far as clause 5.1 is concerned, it is, in my judgment, necessary to read the two sentences of clause 5.1 together on the basis that the second sentence explains the context of the first. The second sentence explains that in the situation where a customers is introduced by more than one "Introducer", then the customer is to be deemed to have been introduced by the Introducer who first introduced the customer. This makes sense, in order to avoid payment of two introduction fees, and proceeds on an implied assumption that the first Introducer was the effective cause of the relevant business. It is thus concerned with the position in respect of competing Introducers. On this basis, it can be seen that the wording of the first sentence is designed to cater for the situation where an Introducer introduces a case, but it is already on DRSP's

database as a customer who has been introduced, or whose business DRSP may have obtained from another source, for example its own website advertisements. Again, the implied presumption being that the latter is the effective cause of obtaining the business, and not an Introducer who subsequently "introduces" the same customer. However, in the case of leads/cases whose details/data are provided by DRSP to Octax for reference back to DRSP if the lead/case can be reheated, then inevitably the relevant customer will already have been on DRSP's data base, but the problem that the first sentence of clause 5.1 was plainly designed to address will not arise in this situation.

336. In the circumstances, and accepting the argument advanced by the Defendants in paragraph 48(e) of their opening submissions, I consider it to be clear that the first sentence of clause 5.1 requires to be construed as if it read as if it contained the words "other than one referred back as provided for by clause 3.6.1" after "Introduced Customer" on the basis that it is only concerned with the position of competing introducers of new leads. Otherwise one would, as I see it, have something of a commercial nonsense. Whilst one might be less inclined to read clause 5.1 in this way had the Introducer Agreement been professionally drafted, and not revised by Mr O'Connor himself in the way that it was, then such an approach might not be appropriate. But given the circumstances in which the Introducer Agreement was put together without the benefit of legal advice, a different approach is required in order to give clause 5.1, and the Introducer Agreement as a whole, its proper meaning even if this requires an element of corrective interpretation in accordance with the principles considered in paragraph 317 above.

337. I have already dealt in some detail with the commercial considerations behind the 50% split of the fee payable by the customer to DRSP, and I do not consider the payment of this fee would give rise to the wholly uncommercial result that the Claimants seek to maintain that it would, even taking into account the further point made as to the absence of any positive obligation on Octax as to the rate of which it was to work reheated cases when provided to them by DRSP. This is, in my judgment, significantly outweighed by the uncommercial, and in my judgment obviously unintended consequence that Octax would work the second stream of work provided for by the Introducer Agreement for nothing.

338. I consider that the overall effect of the Introducer Agreement was to operate as a form of umbrella agreement in respect of work falling within the scope of clause 3.6.1 thereof, with the precise scope of the type of cases falling within the description of *"which we have not been able to engage"* being a matter for ongoing discussion and agreement as reflected in, for example, the 21-22 March 2018 correspondence.

339. In the circumstances, I consider that Octax is entitled to the account that it seeks, subject to the further point regarding the entitlement of DRSP to deduct costs and expenses before being required to split 50-50 the fee received from the customer.

Entitlement of DRSP to deduct costs and expenses

340. DRSP submits that if it is liable pursuant to clause 3.3 of the Introducer Agreement for fees received in respect of reheated cases, then it ought to be entitled to deduct its own costs and expenses. However, Mr Moody-Stuart was unable to identify in submissions any particular wording of the Introducer Agreement that might have led to any such

entitlement, and based his submissions upon the overall commercial effect of such costs and expenses not being. However, for reasons that I have provided, I do not consider there to be any compelling commercial reason why DRSP's cost and expenses should be deducted, but not those of Octax, not least given the considerations identified by Mr O'Connor in one of the emails dated 2 August 2018 referred to above sent by Mr O'Connor to Mr Mond after Mr Mond had suggested that costs and expenses should be deducted before the fees received from customers were split.

341. I have observed that the wording of Schedule 1 to the Introducer Agreement does say: *"The level of Fee is set at 50% of the combined CMC Fee and Referral Fee received by [DRSP] and is payable against any income generated from the Introduced Customer."* [emphasis added]. I can see an argument that this additional wording was intended to have some purpose, and that such a purpose might be to provide that the 50% should be applied to the income actually generated, i.e. out of the monies received in hand by DRSP after DRSP has paid not general expenses, but sums such as referral/introducer fees that DRSP is obliged to pay out of the CMC Fee that it receives. However, I consider that rather clearer wording would be required before the Court could properly conclude that these words had that meaning, and I consider that such words are correctly to be construed as simply providing that DRSP should only be liable to pay the relevant fee to Octax when it had been paid by the customer.

Conclusion in respect of the merits of the Counterclaim

342. It follows, therefore, in my judgment that Mr O'Connor and Octax succeed in their Counterclaim and are entitled to the account that they seek in respect of fees received by DRSP in respect of leads/cases referred back pursuant to clause 3.6.1 of the Introducer Agreement, without deduction of any costs or expenses. This would, of course, only require Octax to account for 50% of the fees actually recovered.

343. A further element of Octax's counterclaim is a claim for damages for breach of contract. I consider that DRSP did act in breach of contract in failing and refusing to perform the Introducer Agreement from and after 1 September 2018, and until 1 October 2018, when the same could be brought to an end lawfully.

344. Octax is therefore also entitled to an inquiry as to damages.

Overall Conclusion

345. The Claimants claim fails for the reasons that I have set out above, and ought to be dismissed.

346. The Defendants' counterclaim succeeds, and Octax is entitled to an account of the sums due to it pursuant to the terms of the Introducer Agreement on the basis referred to above, and to an inquiry as to damages for breach of contract.