Neutral Citation Number: [2022] EWHC 2959 (Comm)

Claim No: CC-2019-MAN-000011

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
CIRCUIT COMMERCIAL COURT (KB)

Manchester Civil Justice Centre
1 Bridge Street West,
Manchester M60 9DJ

Date: 25/11/2022

Before :

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

- -

Between :

CW & CG CLAIMS LIMITED	**Claimant**
- and -	
(1) CLARKEWOOD LIMITED	
(2) MASUM MOHAMMED	**Defendant**

- -
- -

Elisabeth Tythcott (instructed by **Ask Legal Solicitors**) for the Claimant
David Berkley KC (instructed by **Kingsnorth Solicitors**) for the First Defendant
Steven McGarry (instructed by **Kingsnorth Solicitors**) for the Second Defendant

Hearing dates: 20-21, 24-28, and 31 October 2022

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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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HHJ CAWSON KC

This judgment was handed down remotely at 10.30 am on 25 November 2022 by circulation to the parties or their representatives by email and by release to The National Archives.

HHJ CAWSON KC:

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Introduction

1. By these proceedings, commenced in March 2019, the Claimant seeks relief against the First Defendant for breach of contract, breach of fiduciary duty and fraud arising out of a relationship between the Claimant and the First Defendant under which the Claimant introduced claims in respect of payment protection insurance ("**PPI**") and packaged bank accounts ("**PBA**") to the First Defendant, a Claims Management Company ("**CMC**"). Further, the Claimant seeks relief against the Second Defendant alleging that the Second Defendant unlawfully procured the breaches of contract on the part of the First Defendant in question.

2. On the first day of the trial, the Defendants applied to strike out the proceedings, essentially on the basis that the Claimant, either itself or through the actions of its former Solicitors, had been guilty of a number of abuses of the process of the Court that were said to be such as to render further proceedings unsatisfactory, and to prevent the Court from doing justice. The allegations centred upon: (a) the way that Claimant's former Solicitors were said to have dealt with an expert witness formerly engaged by the Claimant to provide evidence as to industry norms and to have subsequently misled the Court in relation thereto; (b) the way in which the witness statements served on behalf of the Claimant were said to have been prepared by the Claimant's former Solicitors; and (c) an allegation that the Claimant's claim had been knowingly exaggerated. There was a second, alternative, limb to the application, namely that if I did not strike out the proceedings as a whole, then I should strike out the allegations of fraud in the Amended Particulars of Claim. In the event, I dismissed this application for the reasons set out in a judgment delivered on the morning of the second day of the trial.

3. The Claimant's former Solicitors, Ozon Solicitors Limited, came off the record as acting for the Claimant on 26 September 2022, and the Claimant's present Solicitors, Ask Legal Solicitors, only came on the record as acting for the Claimant on 16 October 2022, at which stage Ms Elizabeth Tythcott of Counsel ("**Ms Tythcott**") was instructed on behalf of the Claimant in place of leading Counsel previously instructed by the Claimant.

4. The Defendants have been represented throughout by Kingsnorth Solicitors. Prior to the adjourned hearing of the pre-trial review on 28 September 2022, the Defendants were both represented by Mr David Berkley KC ("**Mr Berkley KC**"). However, as from that hearing, whilst Kingsnorth Solicitors have continued to act for him, the Second Defendant has been represented by Mr Steven McGarry of Counsel ("**Mr McGarry**").

5. I am grateful to Ms Tythcott, Mr Berkly KC and Mr McGarry for their helpful written and oral arguments and submissions, and assistance during the course of the trial.

Key individuals and entities

6. The proceedings concern the following key individuals and entities:

Name	Description
CW & CG Claims Limited ("**CW Claims**")	The Claimant, a company incorporated on 14 June 2017.
Wayne Robert Catterall ("**Mr Catterall**")	A director of CW Claims and its sole shareholder. A witness for CW Claims.
Clarkewood Limited ("**Clarkewood**")	The First Defendant, a company incorporated on 5 November 2014.
Masum Mohammed ("**Mr Mohammed**")	The Second Defendant. A director of Harringtons until May 2019. Acted as agent for Clarkewood in concluding the agreement between Clarkewood and CW Claims the subject matter of the proceedings. Originally alleged by CW Claims to be a shadow director of Clarkewood, an allegation which was denied by the Defendants and which was not pursued by CW Claims at trial. A witness for the Defendants.
Carrie Bates ("**Ms Bates**")	A director of CW Claims, and the domestic partner of Mr Catterall. Witness for CW Claims.
Amir Rafiq ("**Mr Rafiq**")	A director of Clarkewood between 29 March 2017 and 15 January 2018. Sole shareholder therein at all relevant times prior to January 2018.
Asim Rashid Khan ("**Mr Khan**")	A director of Clarkewood as from 17 October 2017, and sole shareholder therein as from January 2018. A witness for the Defendants.
Daniel Naylor ("**Mr Naylor**")	A director of Clarkewood, appointed on 16 January 2018. Did not give evidence.
Ibrar Akbar (known as "Ibby" ("**Mr Akbar**")	A close friend and confidante of Mr Mohammed. Director of Harringtons until May 2019. Died in 2019.
Idrees Mohammed ("**Idress**")	Mr Mohammed's brother.
Darren Lee Robertshaw ("**Mr Robertshaw**")	An accountant, and financial controller of Clarkewood. Director of New Mount. A witness for the Defendants.

Andrew David Foster ("**Mr Foster**")	The managing director of Harrods.
Michael Ozon ("**Mr Ozon**")	CW Claims' former solicitor. Managing director of Ozon Solicitors Limited.
Dr Nigel John Bowes Young ("**Dr Young**")	A mathematician, and consultant forensic IT specialist to First Response (Europe) Limited. CW Claims' IT expert witness.
Dr Paul Hunton ("**Dr Hunton**")	A senior technical investigation specialist and digital forensic consultant at Hunton Woods Limited. Clarkewood's IT expert witness.
Simon Evans ("**Mr Evans**")	The chief executive of the Consumer Redress Association. Clarkewood's industry norms expert witness.
Andrew Leslie Thomas Smith ("**Mr Smith**")	A member of the Association of Professional Compliance Consultants. Acted as CW Clams' industry norms expert witness until August 2022. Ceased to act as CW Claims' industry norms expert witness in the circumstances referred to in paragraph 107 below.
Harringtons Advisory Limited (**Harringtons**")	A CMC of which Mr Mohammed and Mr Akbar were directors, along with a David Grimshaw. Entered into voluntary liquidation on 29 October 2019 following the loss of its licence from the Ministry of Justice ("**MOJ**") to operate as a CMC in November 2018.
BrightOffice Limited (now known as Clearcourse Business Services Limited)	A software company and host of Clarkewood's customer relationship management ("**CRM**") system known as BrightOffice ("**BrightOffice**")
Goldman Knightley Limited ("**GLM**")	A firm of Solicitors to whom certain PPI claims against RBS and RBS Group companies were passed on by Clarkewood to be dealt under the terms of an agreement dated 25 October 2017 and subsequent agreements providing for fees payable by customers to be split 65:35 as between Clarkewood and GLM.
New Mount Reclaim Limited ("**New Mount**")	A claims Management Company in which Mr Robertshaw was a director and which had dealings with Clarkewood and Mr Mohammed.

Harrods Solutions Limited ("**Harrods**")	A company that provided claims leads to Harringtons, of which Mr Foster was the managing director.

Background

The CMC Industry

7. The present claim involves the industry concerned with the pursuit of claims on behalf of customers against banks and other providers that historically arranged PPI and, in the case of banks, provided PBAs, i.e. bank accounts in respect of which additional benefits were provided in return for an ongoing monthly fee.

8. Three types of claim are involved, namely:

   i) Claims in respect of the mis-selling of PPI;

   ii) Claims in respect of *"unfair"* commission received by banks and other entities in connection with the sale of PPI, so-called *"Plevin"* claims ("**Plevin Claims**") after the decision of the Supreme Court in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61, [2014] 1 W.L.R. 4222, in which the availability of such claims was confirmed;

   iii) Claims in respect of the mis-selling of PBA's.

9. The time for bringing PPI mis-selling claims under the framework provided by the Financial Conduct Authority ("**the FCA**") expired in 2019. However, historically, PPI and PBA mis-selling claims, and unfair commission claims, have been managed largely by CMCs, and other claims handlers such as firms of Solicitors. CMCs were originally regulated by the MOJ, but latterly were regulated by the FCA. Although work was generated by advertising for customers to come forward and instruct CMCs and others on their behalf, a very significant amount of work was generated by cold calling customers, or individuals believed to be customers, over the telephone.

10. In many instances, the task of making these cold calls by telephone was given by CMCs and others managing these claims to so-called *"introducers"*. These introducers, often using data provided by the CMCs as to potential customers, would operate call centres that would make volume calls to members of the public in order to identify customers prepared to pursue claims. Having identified the customers, details in respect thereof would then be passed onto the CMCs and others in order for the claims to be pursued.

11. In the present case, CW Claims acted as introducer of the above types of claims to Clarkewood operating as a CMC. The principal issues in the present case are as to the terms of the relevant agreement between CW Claims and Clarkewood concluded in June 2017 ("**the June Agreement**"), as to whether Clarkewood has paid the amounts (if any) properly due to CW Claims under the terms of the June Agreement, and if Clarkewood has acted in breach of the terms of the June Agreement, as to whether Mr Mohammed unlawfully procured it to do so. CW Claims alleges that Clarkewood has not only failed to properly account to it in accordance with the terms of the June

Agreement, but has deliberately falsified the data recording transactions in its BrightOffice CRM system to conceal its breaches.

Background to the June Agreement

12. Mr Catterall and Mr Mohammed have known each other for many years, having at one time socialised in the same circles. However, in the last decade or so, their lives have each taken a rather different turn.

13. Mr Catterall has spent some 7 ½ years in prison, having been convicted of a number of firearms offences involving, as I understand it, the supply of firearms. Following his last release from prison in June 2016 after serving a four year term, Mr Catterall published a crime novel titled *"Empty Shells"*. Although suffering, he says, from a number of mental health problems, including PTSD, it was Mr Catterall's evidence that he has stayed out of further trouble and, is seeking to, and succeeding in turning a new leaf, which has involved him endeavouring to pursue various business activities, including his involvement in CW Claims.

14. Mr Mohammed, on the other hand, helped set up and participated himself in a very successful and very profitable claims management business, Harringtons, which was established in 2012. It was Mr Mohammed's evidence that he succeeded in making, personally, many millions of pounds out of his involvement in Harringtons.

15. However, in January 2017, the Claims Management Services Regulator of the MOJ decided to cancel Harringtons' authorisation to provide regulated case management services as from February 2017. This prevented Harringtons from taking on new business, albeit that it was permitted to continue to handle existing claims. The decision of the MOJ was appealed, but the appeal was ultimately abandoned in November 2017.

16. It was Mr Mohammed's evidence that after the MOJ had decided to cancel Harringtons' authorisation, he decided to step back from day-to-day involvement in a claims management business, and spend more time with his young family. Mr Rafiq and Mr Khan had each been employed by Harringtons, but, in early 2017, decided to join Clarkewood, which had been established in 2014 and run by others up to that point. Mr Rafiq became sole director of Clarkewood in April 2017, having first become a director thereof in March 2017. He also became Clarkewood's sole shareholder. Mr Khan was subsequently appointed as a director in October 2017. Mr Rafiq then resigned as a director in January 2018 when Mr Khan acquired his shareholding in Clarkewood. In January 2018, Mr Naylor was appointed as a second director of Clarkewood.

17. Although he says that he had stepped back from his involvement in Harringtons, Mr Mohammed caused Harringtons to loan monies to Clarkewood to fund its activities, but on terms providing for a 200% return. In this way, Mr Mohammed, although not having any shareholding in Clarkewood and not being a director thereof, had an interest in Clarkewood being successful and generating the agreed return. In addition, Mr Mohammed agreed to, and did subsequently act as agent on behalf of Clarkewood, dealing with various issues on its behalf, including, in due course, agreeing with Mr Catterall the terms of the June Agreement.

18. CW Claims pleads in its Amended Particulars of Claim that Mr Mohammed was a shadow director of Clarkewood, and that the directors of Clarkewood acted on his

instructions and directions, the inference being that Clarkewood was a construct to get around the difficulties that Harringtons has encountered with the MOJ. This was denied by the Defendants, and at trial CW Claims did not pursue this allegation as to shadow directorship, accepting the Defendants' case that Mr Mohammed acted solely as an agent on behalf of Clarkewood albeit with an interest in it being successful, but not as a shadow director.

19. In November 2016, Mr Catterall contacted Mr Mohammed by WhatsApp message suggesting that they meet in order to catch up. They did not in fact meet up until doing so briefly in February 2017, and did not then meet again until 11 June 2017, when the June Agreement was discussed as referred to below. However, it is a feature of the present case that from November 2016 until May 2018, when the relationship between Mr Catterall on the one hand, and Clarkewood and Mr Mohammed on the other hand, broke down in the circumstances referred to below, Mr Catterall and Mr Mohammed kept in frequent and regular contact by WhatsApp message. Indeed, Mr Catterall has produced some 155 pages of WhatsApp messages between himself and Mr Mohammed, showing them to have so communicated most days, with them very often sending each other a significant number of WhatsApp messages each day.

20. Mr Catterall began the messages in November 2016 by congratulating Mr Mohammed on his achievements, by referring to the publication of his own book, and by suggesting that he had *"proper turned the corner"*. In communication the same day, Mr Mohammed responded suggesting that it had been some five years since they last met, and stating that he was *"so glad you're moving in the right direction."*

21. There is a dispute between the parties as to what should be made of the correspondence and interaction between Mr Catterall and Mr Mohammed thereafter, leading up to the formation of the June Agreement. It was Mr Mohammed's evidence that he regarded the constant contact from Mr Catterall by WhatsApp message to be something of an inconvenience that he regarded as *"occasionally threatening"*, with Mr Catterall bombarding him with, amongst other things, various *"hairbrained"* business propositions that Mr Mohammed was not interested in participating in. Mr Mohammed says that he felt obliged to engage with Mr Catterall given the latter's antecedents and reputation as something of a hard man, and because he was by disposition inclined to be generous, but he considered that that Mr Catterall was desperately trying to find a way of achieving success off the back of Mr Mohammed's own success. On the other hand, it was Mr Catterall's evidence that he was quite genuinely seeking make a new start and improve his own position with the help of somebody (Mr Mohammed) who he regarded as an old friend, and that he was merely seeking to interest Mr Mohammed in legitimate business opportunities that would be of benefit to the two of them.

22. Despite Mr Catterall's antecedents and occasional angry outbursts, my overall impression from the evidence is that he was, following his release from prison in June 2016, making a genuine attempt to make a new start, and that Mr Mohammed was not intimidated by him, and was open to helping him if an appropriate opportunity arose. Further, having renewed contact with Mr Mohammed in November 2016, during the course of early to mid 2017, Mr Catterall established contact with a number of individuals connected to the call-centre and the claims management business, and sought to interest Mr Mohammed in various propositions that Mr Mohammed was not, at least initially, keen to take up. However, by April or May 2017, Mr Catterall had decided to set up a call centre with a view to generating leads for road traffic personal

injury compensation claims and/or travel sickness claims, with his nephew Cameron leading the sales team given his prior involvement in the claims industry generating leads for PPI claims. This led to WhatsApp exchanges and telephone calls between Mr Catterall and Mr Mohammed in the course of which, as I view the evidence, the idea freely emerged of Mr Mohammed introducing Mr Catterall to Clarkewood with a view to a company incorporated by Mr Catterall acting as an introducer of PPI and PBA claims to Clarkewood after Mr Catterall had indicated that he was looking for a loan. I note one particular exchange in May 2017 in the weeks leading up to the June Agreement:

> "*[11/05/2017, 13:02:59] … Are you going to give ya brother a 5k biz loan mas lol need an injection to make things move quicker [11/05/2017, 13:05:54] Masume: Haha. I wanna be involved. Its not bullets and bullying [11/05/2017, 13:06:09] Masume: You might need my a d v i c e 11/05/2017, 13:06:48] Wayne C: You want to be involved? I'll quite happily bring you in mate youl be surprised how we have operated so far mate [11/05/2017, 13:08:49] Wayne C: We have five other companies generating the claims for us Ines is starting next month though as they were doing ppi now they want to jump on with us. Just phone me and we will talk. Put a good bit of dog in and I'll give you 20% of the company. [11/05/2017, 13:15:11] Masume: Let's meet up. No gangster shit. Just wise business men"*

The June Agreement

23. Mr Catterall met with Mr Mohammed, who was accompanied by Mr Akbar, on 11 June 2017. Mr Catterall was picked up by Mr Mohammed and Mr Akbar in a Range Rover, and this meeting took place in the Range Rover whilst it was being driven around the Bolton area. The WhatsApp messages would suggest that Mr Catterall was picked up at about 3:37 PM, and there is a gap in communication by WhatsApp message until 5:55 PM when Mr Catterall messaged: *"So what you thinking then mas? We run a introducer company for ya cos Cameron has said he will have no problem cos he knows how it all works. What are your thoughts on everything?"* The timing of this message would suggest that the meeting in the Range Rover had concluded some time prior thereto.

24. It is Mr Catterall's evidence that discussion regarding the terms of the June Agreement was brief and straightforward, with Mr Mohammed saying something along the lines of: *"We will fund your call centre, you will introduce customers to us, we will process the claims and we go 50:50 back-end. The money we are loaning to you, we will take it out of your 50%"*; and Mr Catterall responding along the lines of *"right no problem"*. Mr Catterall explained that, in this context, *"back-end"* referred to the commission or fee payable at the end of the transaction after the customer had been invoiced by, and had paid Clarkewood 39% of the sum recovered from the relevant bank or other provider.

25. It is Mr Mohammed's evidence that the relevant meeting lasted around 1-2 hours, during the course of which he and Mr Catterall discussed many things, reminiscing about old times and *"general stuff"*, with the discussion including discussion as to Mr Mohammed acting as a guarantor for Mr Catterall's flat, as well as a company established by Mr Catterall acting as an introducer of PPI claims to Clarkewood for commission. However, in contrast to Mr Catterall's evidence, it was Mr Mohammed's evidence that there was fairly detailed discussion as to the terms upon which commission would be payable by Clarkewood to Mr Catterall's company in respect of successful claims introduced.

26. In particular, it was Mr Mohammed's evidence that:

    i) He informed Mr Catterall that Clarkewood had recently received notice from Royal Bank of Scotland ("**RBS**") that it was not prepared to deal with Clarkewood in respect of PPI claims, and so no commission would be recoverable or payable in relation to claims against RBS (and thus other banks within the RBS group, namely NatWest and Ulster Bank), and therefore that no such claims should be sent to Clarkewood, Clarkewood having no interest therein. A letter dated 8 June 2017 from RBS to *"Financial Justice"*, Clarkewood's trading name, provides evidence that RBS had, in fact, refused to deal with Clarkewood, at least in relation to PPI claims.

    ii) He informed Mr Catterall that his company would only receive commission on any specific claims that his company referred to Clarkewood, and that as other introducers were also in possession of customer data supplied by Clarkewood, Mr Catterall's company would not be entitled to commission on additional claims not identified and referred by his company. In paragraph 33 of his witness statement, Mr Mohammed explained that he was: *"keen to separate out "claims" on the one hand and "customers" on the other; I pointed out to [Mr Catterall] that sometimes customers had more than one claim, but his company would only ever receive commission in relation to the specific claims he referred and nothing more. I pointed out to him that any additional claims arising from the customer would not result in additional commission to his company, unless his company specifically referred those claims"* - (I will refer to these additional claims identified by Mr Mohammed as *"***Additional Claims***"*). Although Mr Mohammed said that the question of Additional Claims was discussed with Mr Catterall, at one stage during cross examination Mr Mohammed referred to the exclusion of commission in respect of Additional Claims as being something that *"goes without saying"*.

    iii) He also discussed the question of overheads with Mr Catterall, making it clear that any commission payable to his company would be net of Clarkewood's own overheads, and that those overheads would have to be estimated by Clarkewood's accountants. He said in paragraph 34 of his witness statement that the discussion of this issue was *"brief"*, but that it was relayed and understood by Mr Catterall that the commission would always be net of overheads.

27. It was Mr Mohammed's evidence that, on reflection, he was not entirely sure that Mr Catterall understood everything that had been discussed, but that at the end of the meeting he told Mr Catterall that he would discuss matters with Clarkewood and revert to him.

28. Mr Mohammed says that he subsequently informed Mr Rafiq about the terms that he had discussed with Mr Catterall, and that Mr Rafiq expressed agreement with them. Under cross examination, Mr Mohammed essentially stuck to his story as to what he had said to Mr Catterall. Nevertheless, he, himself accepted that the general intention behind the June Agreement was that in respect of successful claims referred to Clarkewood, the profit in the form of the commission received from the customer should be split 50:50. However, he and the other Defendant witnesses said that, given the risks incurred by Clarkewood in funding Mr Catterall's company by way of loan, this necessitated that not only should Mr Catterall's company be required to repay the loan made by Clarkewood out of its 50% share of the 39% paid by the customer, but also Clarkewood's own overheads in connection with the generation of this profit.

29. The meeting in the Range Rover was followed by Mr Catterall's WhatsApp message timed at 5:55 PM on 11 June 2017 referred to above. A significant number of further WhatsApp exchanges took place later that evening and over the course of the next few days, including the following:

> *"[11/06/2017, 18:21:37] Masume: Yeah you'll generate sales and introduce to us*
> *[11/06/2017, 18:21:49] Masume: We'll deal with back end*
> *[11/06/2017, 18:22:05] Masume: You just need to worry about getting the packs in.*
>
> *…*
>
> *[11/06/2017, 18:42:52] Masume: I'll help fund it and IBBY and idrees. But not gonna find it unless the staff on point*
>
> *…*
>
> *[11/06/2017, 18:59:02] Wayne C: And I know that I won't be getting no money for at least six month and I'm cool with that bro.. as long as I've got this flat sorted next week I'm cool cos I've got that rent etc covered. I'll wait for the money off the ppi.*
> *Cameron's already making calls now but not telling them who they're working for. Thanks for this mas. I know that the minute you don't think they're doing what's required youl walk and they will know that too. It has to work for you Ibby and Idrees before it works for me and I know that bruv. I'll be on theses lot like a lion.*
> *"[11/06/2017, 19:01:01] Masume: Let's do it bruv.*
> *You'll take a small wage and that will cover u. It will go against the debt*
> *[11/06/2017, 19:03:13] Wayne C: Right my bruva I'll sort staff.*
> *What do you mean go against the debt just do I know [11/06/2017, 19:08:23] Masume: So you'll see money come in after 3 months. But with the overheads were paying we'll be taking that untill your in profit.*
> *The loan cones bl9 of your 50 percent*
> *[11/06/2017, 19:10:29] Wayne C: Yeah sweet mate I'm in it x"*

…

"[13/06/2017, 14:46:45] Wayne C: Are me and you going 50 50 straight off the bat now bruv
[13/06/2017, 14:46:57] Wayne C: I'm online doing it now
[13/06/2017, 14:47:12] Masume: We're 50 50"

30. On 14 June 2017, Mr Catterall sent a WhatsApp message to Mr Mohammed saying: *"Cheers mate. Company is registered now and ico licence is getting sorted today to. I'll message soon."*

31. It was against this background that CW Claims was incorporated, and began to refer claims to Clarkewood.

32. As to the June Agreement, it is common ground between the parties that:

    i) A contract was concluded between CW Claims and Clarkewood orally and/or by a series of WhatsApp messages, with Mr Catterall acting on behalf of CW Claims and Mr Mohammed acting as agent on behalf of Clarkewood. Whilst the June Agreement is pleaded by CW Claims as having been concluded on 11 June 2017, it is common ground between the parties that the June Agreement could not have been concluded until the incorporation of CW Claims itself.

    ii) CW Claims was to act as a referrer or introducer to Clarkewood of potential claims for compensation relating to the mis-selling of PPI and PBA;

    iii) Of the commission charged by Clarkewood of 39% the recovery made by a customer with a successful PPI or PPA claim against the relevant bank or other provider that had been pursued on their behalf, Clarkewood would pay 50% thereof to CW Claims *"back-end"*, i.e. on receipt from the customer.

    iv) Clarkewood would lend to CW Claims sufficient sums to enable it to set up in business and pay for its expenses as it went along until such time as it was able to bear the same itself out of the commission that it was entitled to, the monies so advanced being repayable out of the share of commission due to be paid to CW Claims before any payment of the same to the CW Claims.

33. However, the following terms of the June Agreement are in dispute:

    i) The Defendants maintain that there should be deducted from the 50% payable to CW Claims not only the sums loaned by Clarkewood to CW Claims, but also Clarkewood's own overheads. CW Claims disputes that such overheads fall to be so deducted on the basis that this was never agreed.

    ii) The Defendants maintain that claims against RBS (and banks within the RBS Group) were excluded from the June Agreement, and that no sums can be due from Clarkewood in respect thereof. CW Claims maintains that there was no agreement to exclude any such claims from the June Agreement, and no reason why they should be excluded.

iii) The Defendants maintain that Additional Claims were excluded from the June Agreement, and that no sums can be due from Clarkewood in respect thereof. CW Claims challenges the very concept of Additional Claims, and claims that it is entitled to its 50% in respect of all commission received from customers that it introduced to Clarkewood through its Connex system, at least unless there is clear evidence that, in respect of a customer introduced by CW Claims to Clarkewood, that customer's particular claim in fact emanated from another source.

iv) The Defendants maintain that Plevin Claims fall outside the scope of the June Agreement, on the basis that it was not agreed that they should be included, and that they were never within the contemplation of the parties. CW Claims maintains that there is no good reason why such claims should be excluded simply being one incident of a PPI claim.

How the introduction of customers and claims worked in practice

34. Following the conclusion of the June Agreement, CW Claims began to refer claims to Clarkewood. This essentially worked as follows:

i) CW Claims employed and trained a number of staff known as *"diallers"*, who had access to a computer that operated a telephone system.

ii) Clarkewood supplied data for the diallers to work. This data comprised the names and telephone numbers of potential claimants for compensation for mis-sold PPI and PBA policies, and was provided through Connex, a cloud based predictive dialler system, which was accessed by CW Claims' telephone system.

iii) When a telephone call connected with a potential claimant, the dialler would rehearse a pre-recorded script in order to determine whether or not a potential claim existed;

iv) In the event that a potential claim was identified, the dialler completed a form identifying basic details of the potential claimant which was recorded on the Connex system operated by CW Claims. This would record the potential claimant's name and address, the date and time of creation of the claim, the identity of each bank or other provider in respect of which a claim was identified and the product or products (i.e. credit card, mortgage, loan etc., there also being recorded in some cases a blank in the product column) provided, and the claim type e.g. PPI. CW Claims' Connex system also recorded a *"lead_id"* and *"a case_id"*, the former being a common number assigned to the potential claimant in respect of each matter identified, each matter identified then being given a distinct *"case_ref"*. CW Claims' Connex system also recorded a *"BORef"*, beginning C7, and containing six further numbers, with each claim identified having a common "BORef" linked to the particular potential claimant.

v) CW Claims' Connex system was linked to Clarkewood's CRM, BrightOffice, such that information recorded on CW Claims' Connex system was transferred by XML from the Connex system to Clarkewood's BrightOffice CRM. At this stage, BrightOffice would automatically allocate to each potential claimant the reference number beginning C7. It is apparent from what is recorded on CW

Claims' Connex system that this latter number was transmitted back by BrightOffice back to the Connex system and there recorded as the *"BORef"*. There is no evidence that BrightOffice utilised the *"case_ref"* recorded on the Connex system, or the *"lead_id"*.

vi) Clarkewood then sent out a pack of information ("**the Pack**") to the potential claimant by Royal Mail. CW Claims had no involvement in sending out the packs, or dealing with those that were returned. However, it was CW Claims role to chase the customers to whom packs had been sent to return the same to Clarkewood. This was an important function because it was CW Claims that had established contact with the potential claimant and no claim could be pursued unless the pack was returned. Subject thereto, CW Claims ceased to have any control over the potential claim, and was reliant upon Clarkewood to correctly process any data subsequently received on the return of the Packs, or subsequently in the process described below.

vii) The Pack contained a form which the potential claimant, in order to pursue any claim or claims, had to complete identifying the providers of financial products that might entitle the potential claimant to claim compensation. The form contained separate sections dealing with PBA claims and PPI claims:

a) So far as the section in respect of PBA claims is concerned, the form was rather more prescriptive, requiring that it be completed by reference to the relevant bank so as to identify the PBA, by ticking the appropriate box to show whether the account was joint or single, and by completing the relevant boxes to state the account number and sort code. Significantly, RBS and NatWest were included on the form as banks against whom PBA claims might be brought.

b) So far as the section in respect of PPI claims is concerned: in respect of NatWest, RBS, Santander and Co-Operative Bank, the provider required to be identified, and there were boxes to be ticked with respect to separate product types, e.g. credit card, loan, mortgage, overdraft etc. However, in respect of other banks and other providers, all that was required was that a box to be ticked to identify the provider in question without any necessity to identify the product. Significantly RBS and other RBS Group banks were included on the form.

viii) The Pack also included:

a) A Letter of Authority ("**LoA**") which the potential claimant was required to sign providing authority to Clarkewood to deal with the PBA and PPI providers that the customer had identified in completing the form;

b) Terms and Conditions sitting out the terms upon which the customer appointed Clarkewood to act on his or her behalf. It is to be noted that these Terms and Conditions defined *"Claim"* as meaning the customer's claim against: *"the Creditor(s) relating to the mis-selling of a PPI policy or policies or a Package Bank Account (PBA) on any account with that Creditor, including unfair commission charges."* This latter reference to *"unfair commission charges"* was clearly a reference to Plevin Claims.

ix) The Pack required to be returned to Clarkewood, but, as already mentioned, it was the function of CW Claims to chase the customers that it had recorded on its Connex as potential claimants to return the completed Packs. It was, of course, in CW Claims' and Clarkewood's common interest that as many Packs be returned as possible.

x) When the Pack was returned to Clarkewood, its employees would change the status of the claim on the BrightOffice CRM from *'potential'* to *'actual'*. It was the evidence of Dr Hunton, consistent with that of Mr Khan, that it was at this stage that each *"actual"* claim would be given a distinct case reference on BrightOffice, beginning CA, and followed by seven numbers. In addition, BrightOffice would record a case creation date, having already noted a customer creation date consistent with the creation date in CW Claims' Connex system.

xi) Clarkewood's employees would then, in respect of the providers identified in the forms returned by the customers, submit a subject access request ("**SAR**") on behalf of the potential claimant to the relevant provider in order to see if a qualifying financial product had been sold to the potential claimant. Mr Khan accepted in giving evidence that the customer information transmitted by XML from CW Claims' Connex system to BrightOffice identifying particular providers, and perhaps more pertinently the forms returned by the customer identifying particular providers, such as for example Barclaycard, would result in only one LoA and SAR being sent to each identified provider, to which the provider would respond by sending back all relevant information about the customer, including details of all the products provided by that particular provider.

xii) If the results of the SAR confirmed that there had been a PPI policy, then a Financial Ombudsman Consumer Questionnaire ("**FOCQ**") required to be completed with the customer in respect of each PPI policy identified. If no PPI policy was confirmed, or if the PPI policy had already been investigated, then any claim in respect thereof was closed.

xiii) Where appropriate, an FOCQ was then sent by Clarkewood to the customer for signature and return. The returned FOCQ was then submitted to the relevant provider together with a complaint letter.

xiv) A complaint acknowledgement letter was then received from the provider, identifying an eight week investigation period within which the complaint ought to have been processed.

xv) Having considered the FOCQ and the complaint letter, the complaint would be either upheld or rejected by the bank or other provider. If accepted, an offer would be put forward. In anticipation of the payment of the appropriate sum to the customer, Clarkewood would then invoice the customer for 39% of the sum to be received. The client would then receive the appropriate sum from the relevant provider, and pay the invoice. BrightOffice, in addition to recording the dates referred to above, also recorded the invoice date, and the last payment date.

xvi) In the event that a claim was rejected, then there was a facility to refer the matter to the Financial Ombudsman Service which, if it agreed with the complaint, might advise the provider to uphold the complaint in respect of the particular customer.

Circumstances leading up to the breakdown in the relationship

35. The creation dates within CW Claims Connex system include dates in June 2017, showing that CW Claims was up and running and referring claims to Clarkewood shortly after it incorporation on 14 June 2017.

36. It can also be seen from Connex that CW Claims did, in fact, refer on to Clarkewood, by XML transmission to BrightOffice, customer details in respect of PPI provided by RBS and other RBS Group companies. Reliance is placed by CW Claims on an email dated 11 August 2017 sent by Mr Naylor to CW Claims attaching details of: *"the Bank Providers we deal with and there (sic) requirements for us to process a claim."* The list provided included RBS, NatWest and Ulster Bank. However, it should be noted that this email was directed at PBA claims rather than PPI claims, which had been the particular subject matter of RBS's letter dated 8 June 2017.

37. Consistent with Mr Naylor's email dated 11 August 2017 is a WhatsApp exchange between Mr Mohammed and Mr Catterall on 16 September 2017 in which Mr Mohammed said: *"Banks like rbs accept just branch they got it from. Others want account numbers"*. Mr Catterall replied by saying: *"we are having a better response anyway but I was just trying to find an easier less intrusive way of getting the info."* The context would suggest that this exchange related to PBA claims rather than PPI claims.

38. Important exchanges by way of WhatsApp communication took place on 8 August 2017 and 16 August 2017 in that:

i) There was an exchange on a WhatsApp group set up to include Mr Mohammed, Mr Catterall and other representatives of Clarkewood and CW Claims on 8 August 2017, as follows:

> *"[08/08/2017, 18:41:15] Wayne C: We've had loads o issues today with connex mate so don't worry about it, the stats are nothing to shout about today ! [08/08/2017, 18:51:27] Wayne C: What's Caitlin Hickman a number [08/08/2017, 20:23:38] Wayne C: Mas, how do we see what lenders are on the pack backs [08/08/2017, 20:27:31] Masume: On your crm. Have you got 1 [08/08/2017, 20:28:05] Camron : Yeh we have a crm I just don't know how to find it properly [08/08/2017, 20:28:30] Camron : I can go into individual cases and check tat way [08/08/2017, 21:12:03] Masume: Aleem can train you on it [08/08/2017, 21:32:23] Kam: image omitted [09/08/2017, 06:31:37] Aleem: Call me ill show you"*

One can see from this that Mr Catterall was concerned as to how CW Claims could find out what lenders had been identified in the packs sent back by

customers, and that it was agreed that arrangements would be made to show Mr Catterall how this could be seen on Clarkewood's CRM, i.e. BrightOffice.

ii) There was a WhatsApp exchange just between Mr Catterall and Mr Mohammed on 16 August 2017, as follows:

> "[16/08/2017, 19:57:40] Wayne C: Easy pal. Say for instance a customer adds lenders to their paper work before sending them back to you, how do we find that info out?
> [16/08/2017, 20:03:45] Masume: They wont be on your crm as we woukd have created cistomer for that particulare extra lender.
> [16/08/2017, 20:04:39] Wayne C: So what happens in that scenario then
> [16/08/2017, 22:46:13] Masume: You keep whatever u get. We keep the extras"

It was Mr Mohammed's evidence that matters were left at that, but Mr Catterall said that he objected to what was being suggested by Mr Mohammed, and contacted him and objected.

39. It certainly seems to be the case that RBS would not deal with Clarkewood, at least in respect of PPI Claims. However, Clarkewood came up with a workaround solution to this, it being Mr Khan's evidence that he came up with the solution. The solution involved passing on customer claims in respect of RBS, NatWest and Ulster Bank to one of three firms of Solicitors, including the firm of Goldman Knightly, upon terms providing for the commission received from the customer to be split between Clarkewood and Goldman Knightly. In the case of Goleman Knightly the agreement was recorded in a formal signed agreement dated 25 October 2017, which was subsequently replaced later agreements in materially identical terms, providing for the commission to be split 65:35 as between Clarkewood and Goldman Knightly.

40. Consistent with the Defendants' case that CW Claims was not to be concerned with claims concerning RBS and other RBS Group banks, CW Claims was not informed by Clarkewood about the arrangements that it had come to with the three firms of Solicitors, and Mr Catterall did not become aware thereof until February 2018. At this time, the following WhatsApp exchange took place as between Mr Catterall and Mr Mohammed:

> *"[21/02/2018, 14:16:19] Wayne C: Who is it that gets passed to Solicaters RBS?*
> *[21/02/2018, 19:32:31] Masume: 3 different sols. Moj demanded it. To show were lookimg out dor client.*
> *[21/02/2018, 19:33:11] Wayne C: So is it just RBS mate*
> *[21/02/2018, 19:35:21] Masume: Yeah just rbs [21/02/2018, 19:37:43] Wayne C: Ok*
> *[22/02/2018, 08:59:30] Wayne C: I'm a bit confused as to why you would even consider paying for your introducers to generate work for 3 different solicitors and be expected to hand over these leads without a return. It's madness buddy ....madness, I'm guessing you had no choice though*

> *[22/02/2018, 14:59:32] Masume: We get back 10 per cent which covers yhe admin on our side. We had to do ir or we'd be in breach"*

41. Reliance is placed by CW Claims upon the fact that in this exchange Mr Mohammed appeared to be blaming the inability to process claims involving RBS on the MOJ rather than RBS itself. Reliance is also placed on the fact that in the exchange Mr Catterall contemporaneously talks about the introduction of RBS claims in a way entirely inconsistent with any agreement that such claims fell outside the scope of the June Agreement and ought not to have been referred by CW Claims to Clarkewood. Additionally, it might be noted that Mr Mohammed did not seek to correct him, and that the 10% referred to by Mr Mohammed is rather different from the 65:35 split provided for by the agreement as between Clarkewood and Goldman Knightly.

42. CW Claims activities were, as had been agreed between Mr Mohammed and Mr Catterall in June 2017, funded by Clarkewood, and I do not understand it to be in dispute but that the latter had advanced some £573,393.61 to CW Claims by the time that the relationship between the two parties broke down in May 2018. It is, as I have already identified, common ground that this would be repayable out of the 50% share of commission otherwise due to CW Claims.

43. It was Mr Catterall's evidence that by December 2017 he had become concerned that Clarkewood was not dealing with matters correctly, and was not properly accounting to CW Claims in respect of commission due on successful claims. He says that he noticed that sales staff chasing customer packs back were being told by customers that the papers had been returned some time ago, but that this was not reflected in the status of claims in BrightOffice. Mr Catterall raised his concerns in a WhatsApp message sent at 17:06 on 1 December 2017, which Mr Mohammed dealt with somewhat dismissively in a WhatsApp message sent in response.

44. On 8 December 2017, Mr Catterall sent a WhatsApp message to Mr Mohammed at 20:01 explaining that he had identified customers of CW Claims that seemed to be *"disappearing"* from the records held on BrightOffice. Mr Catterall raised further concerns in respect of *"cancelled"* claims in WhatsApp messages sent on 8 January 2018, 22 January 2018 and 15 February 2018.

45. It is Mr Catterall's evidence that, in February 2018, Mrs Ruth Taylor informed CW Claims that her against Lloyds Bank had been successful, but that when he looked at what was recorded on BrightOffice in respect of this customer, it was stated that the claim had been *"cancelled"*. Mr Catterall raised this issue with Mr Mohammed in a WhatsApp message dated 1 February 2018, in response to which Mr Mohammed essentially put this down to mistakes in recording information, or *"cock ups"*, as he put it.

46. Mr Catterall says that this was not an isolated incident, and that other similar examples emerged.

47. In her evidence, Ms Bates referred to the fact that whilst browsing the part of the BrightOffice to which CW Claims was able to gain access, she came across a function described as *"casenote"*, being an activity log in respect of customer claims. She says that this contained information about the progress of claims including, for example, whether or not the customer had received compensation and whether Clarkewood had

been paid fees. She says that she checked some of the claims where Clarkewood was shown to have been paid fees and ascertained that some of the claims had been reported as *"cancelled"* despite having been successful. She says that Mr Catterall then took this up with Mr Mohammed, at which point CW Claims' entire access to BrightOffice was withdrawn for approximately four days. Thereafter, although access was restored, no access was permitted to *"casenotes"*.

48. It was further Ms Bates' evidence that having been denied access to *"casenotes"*, she decided to investigate the task logging section of the BrightOffice, and cross checked the information against cases that had been notified as *"cancelled"*. She says that this showed that Clarkewood had been working the relevant cases even though they were said to have been *"cancelled"*, which, as she put it *"made no logical sense"*. She says that she downloaded a report containing details of customers where cases were said to have been *"cancelled"* with a view to them calling the customers in question in order to verify whether, in fact, their claims had been cancelled.

49. Ms Bates then says that a verification exercise was undertaken by three members of CW Claims' staff whereby customers whose claims had been recorded as *"cancelled"* were telephoned. She says that whilst a number of customers declined to cooperate, a number of customers were identified who said that they had been paid notwithstanding that their claims were recorded as having been *"cancelled"* on BrightOffice. However, it is necessary for me to treat the results of this exercise with some caution. One of the customers whose claim is said to have been shown as *"cancelled"* despite having been paid was a John W Daley ("**Mr Daley**"). During the course of the trial it was shown that the invoice amount received from Mr Daley has been brought into account in the spreadsheet produced by Clarkewood showing completed cases in respect of which Clarkewood recognises that there is an obligation to account to CW Claims.

50. CW Claims' concerns were subsequently escalated with Clarkewood/Mr Mohammed. As Mr Mohammed put it in paragraph 53 of his witness statement: *"By April 2018 [Mr Catterall] was claiming the claims had been improperly cancelled and then hidden in the system. He claimed that he had generated up to £2 million worth of revenue … Which I immediately challenged as I was well aware that the numbers he was quoting was (sic) simply unrealistic."*

51. There was a WhatsApp exchange on 23 May 2018 after which the relationship between CW Claims and the Defendants soon came to an end:

> *"[23/05/2018, 01:17:45] Wayne C: You have disrespected my LOYALTY to you*
> *You have no one than can protect you from me Masume and u know it so pu it right and I go quiet*
> *Thts the deal bruv cos when everyyknkws why I know I'm you're back up ... and I will be that back up and do the jail required but my money has to be in place NOW [23/05/2018, 01:18:23] Masume: You what. You threatening me??*
> *[23/05/2018, 01:18:42] Masume: You for real? [23/05/2018, 01:19:31] Masume: Shut shop mate. Not interested in anything after that*
> *[23/05/2018, 01:19:33] Masume: No way*

[23/05/2018, 01:19:37] Wayne C: Oh Masume I just told you I hit ya back
I want looking after I don't threaten you know that [23/05/2018, 01:19:39] Masume: I'm staying quiet mate [23/05/2018, 01:19:59] Masume: You came to me saying yoir going homeless
[23/05/2018, 01:20:05] Masume: And this is what i get [23/05/2018, 01:20:09] Masume: Ful.that
[23/05/2018, 01:20:31] Masume: Do what u got to do. I fear no one but God.
[23/05/2018, 01:20:32] Wayne C: Yep and I gave you major doh
[23/05/2018, 01:20:47] Masume: You gave me doe [23/05/2018, 01:20:53] Masume: Your on a wage [23/05/2018, 01:20:59] Masume: You not put a penny in [23/05/2018, 01:21:03] Masume: Crazzxu
[23/05/2018, 01:21:14] Wayne C: Yep I did let me show them
[23/05/2018, 01:21:15] Masume: U just lost the best person I. Ya life.
[23/05/2018, 01:21:43] Wayne C: Let me show you who's robbing ya
[23/05/2018, 01:22:46] Wayne C: You will lose the loyalty from me mas I want to show you what I know and this is the only way to get a reaction
[23/05/2018, 01:24:44] Wayne C: Come and see me and if you wanna part way the prt way but come and see me
Threatening you I've done nothing but protect you you never even New it bruv"

52. The present proceedings were commenced on 19 March 2019 after Clarkewood had made it clear that it considered that no monies were due to CW Claims on the basis that the entitlement of CW Claims to 50% of the commission received in respect of successful claims was very much less than contended for by CW Claims. On the Defendants' case, this is because the success rate of claims had been significantly less than CW Claims contended was the case, and there required to be deducted from what might otherwise be due to CW Claims by way of a 50% share of the commission received from customers, not only monies loaned to CW Claims totalling £573,393.61, but also Clarkewood's own overheads, which are now said to be £610,938.92, or £543,143 if one excludes the cost of processing of PBA claims.

53. The IT experts are agreed that over the period of the working relationship between CW Claims and Clarkewood between June 2017 and May 2018, reports through CW Claims' Connex system to Clarkewood's BrightOffice CRM led to the referral of 25,000 odd customers to whom Packs were sent, with some 188,000 odd lines of claims within the data provided. However, it is recognised that there may be a significant element of duplication of claims, and errors in recording data within that figure of 188,000, so that the number of potential claims referred is likely to be significantly less than this figure of 188,000 odd.

CW Claims' Claim

54. CW Claims' claim is based upon the June Agreement and essentially seeks to recover the proper amount said to be due thereunder, applying the terms of the June Agreement

as contended for by CW Claims as referred to in paragraphs 32 and 33 above, i.e. on the basis that:

i) RBS and RBS Group claims did fall within the scope of the June Agreement;

ii) Plevin Claims fell within the scope of the June Agreement;

iii) Claims as against additional lenders first identified on the return by customers of the forms included within the Packs and not identified on the referral through Connex, and to the extent that there were Additional Claims, Additional Claims, fell within the scope of the June Agreement;

iv) Clarkewood's own overheads do not fall to be deducted from CW Claims' 50% share of the commission received by Clarkewood from customers, although CW Claims accepts that the monies loaned by Clarkewood to fund the operation of CW Claims' business do fall to be deducted from CW Claims' 50% share.

55. On this basis, and given that Clarkewood has calculated the state of account that it maintains exists as between itself and CW Claims on the basis of the application of the terms of the June Agreement that it contends for, it is CW Claims' case that if the Court is in its favour to *any extent* in respect of the contested terms referred to above, then there requires to be a recalculation of the state of the account.

56. In addition to a claim that a significant sum is due to CW Claims as a matter of contract by reason of the proper application of the terms of the June Agreement, CW Claims alleges that the June Agreement was subject to an implied term to the effect that Clarkewood would: *"act in good faith and deal fairly with [CW Claims], in respect of cooperation with [CW Claims] and/or in respect of [Clarkewood's] performance of the contract and/or [Clarkewood's] influence over customers introduced by [CW Claims] and the pursuit of the Underlying Claims"* – see paragraph 11D(ii) of the Amended Particulars of Claim. Paragraph 11(iv) of the Amended Particulars of Claim defined *"Underlying Claims"* as meaning *"PPI or PBA claims of the customer as introduced by [CW Claims] to [Clarkewood]."*

57. Such an implied term is said to arise as a result of the proper application of the test for implying terms into a contract as identified in *Marks and Spencer plc -v- BNP Paribas Securities Services Trust Company (Jersey) Limited* [2015] UKSC 72, [2016] AC 742, including that a term will only be implied where it is strictly necessary. However, in closing submissions Ms Tythcott realistically recognised that a case based on such the alleged implied term in all probability adds nothing to CW Claims' case based upon the express terms of the June Agreement. To the extent that the alleged term is to be implied, it is CW Claims case that Clarkewood has acted in breach thereof in the way that it has accounted for the claims of customers that had been introduced to Clarkewood by CW Claims, and in particular by failing to properly record successful claims of customers introduced by CW Claims as attributable to CW Claims so as to trigger payment of the 50% of the commission received to which CW Claims is entitled.

58. A further way that the CW Claims seeks to put its case is on the basis of Clarkewood having owed a fiduciary duty to CW Claims, reliance being placed by CW Claims upon the decision of the Court of Appeal in *Bristol & West Building Society -v- Mothew* [1998] Ch 1, per Millett LJ at 18A – C. In short, it is alleged that there was a relationship

of trust and confidence as between CW Claims and Clarkewood whereunder the latter came under a fiduciary duty to account fully and properly towards CW Claims for all sums to which CW Claims was properly entitled, and to act in good faith at all times. It is alleged that CW Claims acted in breach of this fiduciary duty in much the same way as it is alleged that CW Claims acted in breach of the implied term that it contends for.

59. CW Claims alleges that not only did Clarkewood act in breach of the express terms June Agreement, in breach of the implied term above referred to, and in breach of fiduciary duty, but also that Clarkewood acted fraudulently. However, no separate or distinct cause of action is identified as such. Whilst various allegations in the Amended Particulars of Claim might have been read as being separate claims in fraudulent misrepresentation, see, for example, paragraphs 42 and 43 thereof, it was made clear in Ms Tythcott's opening of the case that this was not the way in which CW Claims put its case. Rather, it is said that Clarkewood acted in a fraudulent manner in the way in which it acted in breach of the terms of the June Agreement, (express and implied), and in breach of the above fiduciary duty.

60. As to CW Claims' case that Clarkewood acted fraudulently, it is alleged by CW Claims that Clarkewood has deliberately manipulated the record of claims introduced by CW Claims on BrightOffice so as to, amongst other things, show claims introduced by CW Claims as *"cancelled"*, and therefore as not pursued to a successful conclusion with CW Claims being entitled to a 50% share of the 39% commission payable by the Customer, when the relevant claim was in fact dealt with to a successful conclusion as a claim under a different *"CA"* number that was not recorded as having been sourced from CW Claims, and in respect of which CW Claims has therefore been treated as entitled to nothing.

61. In support of these serious allegations, CW Claims relies, in particular, upon:

    i) The various matters discovered during the course of the relationship between CW Claims and Clarkewood referred to in paragraphs 43 to 49 above, beginning with customers being chased to return their Packs stating that they had already returned them to Clarkewood;

    ii) Further examination of a number of examples where claims introduced by CW Claims had been recorded as *"cancelled"*, but where what appears to be the same claim has been given a different *"CA"* number and recorded as having been successful but without being attributed to CW Claims;

    iii) The expert evidence of Dr Young, and a contention that there is nothing within Dr Hunton's expert evidence that undermines CW Claims' case as to Clarkewood's dishonest manipulation of its BrightOffice system.

    iv) Evidence in the form of documentation published by the FCA as to conversion rates of PPI claims, which it is said identifies an industry norm in respect of conversion rates that plainly shows that the actual conversion rate on the basis of the Defendants' own figures of only about 1.9% in itself serves to demonstrate falsity in Clarkewood's records, and that Mr Evans' evidence as to an industry norm of a conversion rate of 5.6% is unsound and unreliable.

62. The Amended Particulars of Claim quantify the true sum said to be due to CW Claims at some £22 million, calculated as follows:

    i) It is alleged that at least 58,723 claims of customers introduced by CW Claims were entered by Clarkewood in the section of BrightOffice entitled *"customers with cases"*.

    ii) It is alleged that information published by the FCA in October 2018 shows that complaints made by the public were upheld and compensation awarded in 71% of PPI mis-selling claims and 68% of Plevin Claims, i.e. an average of 69.5%, with an equivalent figure of 33% in respect of PBA claims.

    iii) It is then said that data published by the FCA shows that the average award of compensation in a PPI claim was approximately £2,064.

    iv) Thus, applying the above success rates to the 58,723 claims, there ought to have been some 40,812 successful claims. If each claim was worth an average £2,064, then compensation of £84,236,969 ought to have been paid to customers introduced by CW Claims. Of this, CW Claims would have been entitled to 50% of the 39% charged to customers in respect of their successful claims, i.e., £84,236,969 × 0.39 × 0.5 = £16,426,208.

    v) In addition to this, it is alleged that at least 44,142 claims of customers introduced by CW Claims were entered by Clarkewood as *"telesales prospects"*. It is then alleged that there ought to have been a success rate of approximately 50% in respect of these potential claims. On this basis, an additional £6,129,363.90 ought to have been payable to CW Claims, i.e. 44,142 × 2,000 × 0.5 × 0.5 = £6,129,363.90.

63. In closing, Ms Tythcott adopted a rather more conservative approach. While primarily submitting that I should direct an account and/or inquiry as to the amount properly due, to the extent that I considered it appropriate to seek to determine the sum actually due, then she submitted that CW Claims' claim against Clarkewood is properly to be quantified as follows:

    i) Apply a more modest success rate of 44% as identified by other FCA materials referred to below, and multiply it by the number of PPI checking claims as identified by Dr Hunton (58,781) as referred to in paragraph 7.23 of his report, being 33,057 shown as referred cases from CW Claims, and 25,724 Additional Claims shown as added by Clarkewood. 44% of 58,781 results in a figure of 25,863 claims. One would then apply to that an uphold rate of 70% as further identified by the FCA, giving a figure of 18,104 successful claims. One would then multiply that by an average redress of £2,000, and multiply that by 39%, and then 50% so as to arrive at a figure of £7 million as the value of CW Claims' claim.

    ii) In addition, in relation to RBS claims, in paragraph 8.2 of his report, Dr Hunton found that there were 8756 checking claims. Applying the same formula as above, one gets to a figure of £1,051,596 in respect of RBS claims, although it is necessary to bear in mind that Clarkewood only received 65% of the 39%

commission that would have been received by the firm of Solicitors acting in respect of the relevant claim.

iii) So far as telesales prospects are concerned, and applying more modest success rates, the figure of £2,409,810 is said to represent the likely amount to which CW Claims would be entitled.

iv) Thus, as quantified in closing, CW Claims' claim was said to amount to £10,552.005.

64. So far as the claim against Mr Mohammed for unlawfully procuring a breach of contract on the part of Clarkewood is concerned, as pleaded in paragraphs 38 to 41 of the Amended Particulars of Claim, the case is that Mr Mohammed negotiated and concluded the June Agreement and therefore knew of the existence in terms thereof, procured Clarkewood to act acted in breach of the June Agreement by not paying what it ought to CW Claims and manipulating its BrightOffice records to conceal some at least of the breaches, and that Mr Mohammed intended to cause this breach of contract on the part of Clarkewood. It is then alleged that the officers, servants and agents of Clarkewood acted on the instructions of Mr Mohammed in failing to properly enter on BrightOffice details of customers who had completed and returned Packs to Clarkewood, in failing to account to CW Claims for the sums properly due to it in accordance with the June Agreement, and in wrongfully diverting claims of customers introduced by CW Claims to third parties.

65. However, at the close of CW Claims' case Ms Tythcott indicated that CW Claims actually sought to put its case as to unlawful procurement of breach of contract rather differently, the case based upon Mr Mohammed acting as a shadow director of Clarkewood who directed its officers to cause Clarkewood to act in breach of contract no longer being pursued. After Ms Tythcott had explained the basis upon which the case was now to be put, I required that this be reduced to writing for consideration by the Court and the Defendants.

66. On Friday 28 October 2022, and after Mr Mohammed had given evidence, Ms Tythcott produced a written outline as to CW Claims' case as to procurement of breach of contract by Mr Mohammed. The case as set out therein, and as further developed in closing submission, which I describe in more detail below, is, in essence, that Mr Mohammed procured Clarkewood to act in breach of contract by informing Mr Rafiq, as a director of Clarkewood, that he had agreed the terms of the June Agreement in the terms as contended for by Clarkewood in the present proceedings (i.e. as not extending RBS claims, Plevin Claims and Additional Claims, and as requiring CW Claims' share of the commission to bear Clarkewood's overheads) when he knew that this was false and that by giving effect to June Agreement as if it had been concluded in such terms, Clarkewood would act in breach of contract. It is thus said that Mr Mohammed caused the breach of contract and intended to do so. On this basis, it is alleged that Mr Mohammed is liable for damages sufficient to put CW Claims in the position that it would have been in had not the breach of contract been procured by Mr Mohammed, i.e. if Clarkewood had performed the terms of the June Agreement.

Defendants' Defence

67. The Defendants' case is that the June Agreement excluded RBS claims, Plevin Claims, and Additional Claims, or at least claims against lenders that were not initially identified in the information provided by CW Claims through Connex, but which were referred to on the forms in the Packs returned by customers, and required that Clarkewood's overheads, or at least those incurred in dealing with claims introduced by CW Claims, should be deducted from CW Claims' 50% share of the 39% of recoveries charged by way of commission to the successful customer. On this basis, it is submitted that Clarkewood has properly accounted to CW Claims, and that there has been no breach of contract.

68. It is the Defendants' case that there is no proper basis for implying the implied term contended for by CW Claims, or for the relationship between CW Claims and Clarkewood being categorised as a fiduciary relationship giving rise to fiduciary duties. As to the implied term, it is submitted that it is quite simply not necessary to imply the term alleged on the basis that the contractual arrangements between the parties are capable of working perfectly well without implying the alleged term. So far as the question of fiduciary relationship is concerned, it is submitted that this was not a relationship under which, properly analysed and understood, CW Claims placed its trust and confidence in Clarkewood, and that the relationship was simply a contractual relationship providing for the payment of a share of the monies earned from cases introduced by CW Claims upon the terms of the June Agreement.

69. The allegation that records within BrightOffice have been dishonestly manipulated is emphatically denied. It is submitted that proper scrutiny of the records that Clarkewood has produced does not provide any basis for the claim that fraudulent manipulation has occurred as alleged, and reliance is placed on Dr Hunton's expert evidence to the effect that he found no evidence of manipulation. So far as the evidence of Dr Young is concerned, the point is made by Clarkewood that my Order dated 25 February 2022 contained provisions that would have enabled Dr Young to gain access to the whole BrightOffice system, including data therein that might potentially have provided a more sound basis for alleging manipulation, but that for reasons that have not been satisfactorily explained, Dr Young never gained access thereto.

70. So far as conversion rates from potential to successful claims are concerned, the Defendants rely upon the expert evidence of Mr Evans that the relevant applicable conversion rate of claims is approximately 5.6%, and his evidence that the conversion rates in fact achieved in the present circumstances are not inconsistent with the industry norm.

71. The Defendants rely upon the speech of Lord Hoffmann in *In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2008] UKHL 35; [2009] AC 11, as authority for the proposition that whilst there is only one civil standard of proof, namely that the fact in issue more probably occurred than not, the court should have in mind that the more serious the allegation, the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Given the serious nature of the present allegations, it is submitted that the evidence of fraudulent manipulation is simply not strong enough to prove CW Claims' case.

72. So far as the case against Mr Mohammed for unlawfully procuring breach of contract on the part of Clarkewood is concerned, Mr Mohammed's primary submission is that

there has been no breach of contract, and therefore that there can be no liability on his part.

73. The point is taken by Mr McGarry on behalf of Mr Mohammed that, given the way in which CW Claims' case as to procuring breach of contract has changed during the course of the trial, Mr Mohammed has, as Mr McGarry puts it in his closing submissions, been *"left to face a claim which had never been particularised in the past or even signposted"*. However, no formal objections was taken to the case as to procuring breach of contract being advanced in the way that it ultimately was.

74. Should it be established that Clarkewood has acted in breach of the terms of the June Agreement, then Mr Mohammed's case is, in essence, as follows:

    i) It is submitted that the claim is a highly artificial and weak one, with no more merit than the claim as to procuring breach of contract that was abandoned during the course of the trial;

    ii) It is submitted that the claim is demurrable at law on the basis that an agent acting within the scope of his agency cannot generally be liable for procuring a breach of contract by his principal; and

    iii) It is submitted that the claim is demurrable on the facts, not least because, on CW Claims' case, there was no discussion between Mr Mohammed and Mr Catterall with regard to the terms of the June Agreement and therefore no misrepresentation of the terms thereof to Mr Rafiq as alleged.

75. In the above circumstances, both Clarkewood and Mr Mohammed invite me to dismiss the claims brought against them respectively.

Witnesses

Correct approach

76. In assessing the reliability of the oral evidence in this case, it is necessary to bear firmly in mind the much-repeated observations of 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 provable facts.

77. These observations have a real resonance in the present case where we are concerned with events that took place some five years ago, and with significant aspects of the parties' respective cases being based upon matters alleged to have been discussed and orally agreed between them. In these circumstances, there is particular scope for witnesses to have subconsciously recalled events, and for their understanding as to the terms of the June Agreement in particular to be shaped by matters have been recalled in a self-serving, but inaccurate, way.

78. Nevertheless, however, I recognise that any findings that I make must be made by reference to all the evidence, that is both documentary evidence and witness evidence,

placing such weight as the circumstances require on each and drawing such inferences from the circumstances as might be appropriate.

CW Claims' witnesses

79. Mr Catterall and Ms Bates gave evidence on behalf of CW Claims.

80. CW Claims had intended to also call as a witness Mr Foster in order to give evidence that he had, through his own company, Harrods, experienced similar difficulties with Harringtons to those experienced by CW Claims with Clarkewood, with claims being recorded as *"cancelled"* when the customer had received compensation in respect of the relevant PPI claim. However, after hearing submissions at the conclusion of the fourth day of the trial, I determined that this evidence, although otherwise admissible, should be excluded in the exercise of my discretion under CPR 32.1(2), applying the decision of the House of Lords in *O'Brien v Chief Constable of South Wales Police* [2005] 2 AC 534, as applied by the Court of Appeal in *JP Morgan v Springwell* [2005] EWCA Civ 1602 at [67] – [69]. My reasons were set out in a judgment delivered at the beginning of the fifth day of the trial. Essentially, I was concerned that this evidence raised issues that I could not conveniently determine on the limited evidence before the Court, and therefore that the admission of this evidence was liable to unnecessarily lengthen the trial whilst making it harder to see the wood from the trees, and thus determine the issues that do fall to be determined.

81. So far as Mr Catterall is concerned, despite his convictions for firearms offences and antecedents, I generally found him to be a good witness who did his best to assist the Court in a frank and honest way. I consider there to be force in Ms Tythcott's point that Defendants have relied on Mr Catterall's antecedents as a reason for thinking that the Court would reject his evidence and prefer that of the Defendants. It has not been suggested that any of Mr Catterall's convictions relate to offences involving dishonesty.

82. Mr Catterall was open about his previous convictions and provided answers to the questions put to him in an open, and what I consider to be convincing way. I gained the impression that Mr Catterall, after a difficult upbringing and making a number of bad decisions that led to the significant terms of imprisonment that he has served, following his release from prison in June 2016, has genuinely determined to turn his life around and make something of himself, as evidenced by the publication of his novel, and his manifest desire, as expressed in his WhatsApp communications with Mr Mohammed from November 2016 onwards, to make a go of some legitimate business activity, with the assistance of others such as Mr Mohammed.

83. In order to seek to discredit Mr Catterall reliance was placed by Mr Berkley KC when cross examining Mr Catterall upon his apparent willingness to assist Mr Mohammed to get over his difficulties, and those of Harringtons, with the MOJ in January 2017, by suggesting that Mr Mohammed covertly put a business in Mr Catterall's name. Reliance is placed upon the fact that Mr Catterall had, in a WhatsApp message, stated that *"my lips are sealed bruv"* as indicating that Mr Catterall was prepared to indulge in nefarious activity that required to be kept quiet in order to assist Mr Mohammed. However, Mr Catterall was able to point to the proposed involvement of a solicitor in what he had suggested, and overall I was left with the impression that Mr Catterall had acted naïvely rather than with any improper intent.

84. Nevertheless, there was one aspect of Mr Catterall's evidence that I did not find persuasive, namely his evidence that following the WhatsApp exchange on 16 August 2017 in which Mr Mohammed had suggested that Clarkewood would keep additional lenders, he took this up with Mr Mohammed in a telephone call or other conversation. However, rather than Mr Catterall deliberately seeking to mislead the Court, I consider it more likely that Mr Catterall now has a faulty recollection as to how he reacted to the WhatsApp exchange, and in seeking to recall how he reacted thereto, he has persuaded himself that that is how he would have reacted when I am not convinced that he fully comprehended the significance of what was being said at the time.

85. As I have mentioned, it was a feature of the strike out application that I determined on the first two days of the trial that the present claim has been deliberately and knowingly exaggerated. As I mentioned in my judgment dealing with the strike out application, Mr McGarry, acting on behalf of Mr Mohammed, conceded during the course of submissions on the strike out application that, as initially conceived, the case based upon a conversion rate of claims into successful claims of 70% probably could not properly be described as knowingly or intentionally exaggerated bearing in mind that this was a figure referred to by Dr Young in his third statement, and also by Mr Smith in a draft report provided in February 2022, and in his report dated 3 August 2022, albeit that a closer reading of Mr Smith's reports does suggest that he was referring to this conversion rate as applying at a later stage in the process than that to which it was applied by CW Claims in formulating its Amended Particulars of Claim. However, Mr McGarry did submit that once Mr Evans's first summary report had been provided to CW Claims' Solicitors on or about 23 June 2022, providing evidence as to a conversion rate of 5.6%, then it ought to have been clear that the claim was exaggerated. But no point was taken in respect of Mr Evans' summary report at the hearing on 30 June 2022 when I considered the application to amend the Particulars of Claim and granted permission to do so, and Ms Tythcott has since reshaped CW Claims' case as to quantum in the light of the further evidence as to conversion rates that has emerged and still asserts a claim of in excess of £10 million. In these circumstances, I do not consider that the credibility of Mr Catterall as a witness is undermined by any exaggeration of the quantum of CW Claims' claim.

86. Likewise, I found Ms Bates to be an honest witness doing her best to assist the Court.

87. Mr Berkley KC sought to undermine Ms Bates' evidence under cross examination by challenging a statement in paragraph 15 of her witness statement that CW Claims had *"60 staff alone"* by November 2017. It was put to her that this was inconsistent with WhatsApp exchanges between Mr Mohammed and Mr Catterall in November 2017, and CW Claims' bank statements. However, as Mr Tythcott pointed out, a number of bank statements are missing from the bundle, and I note that Mr Catterall was not cross-examined on this issue. I am not persuaded that Ms Bates was deliberately misleading the Court with this evidence, and nor am I persuaded that her evidence as a whole relating to the key issues in the case is undermined thereby.

88. I consider that Ms Bates' evidence concerning the results of the verification exercise referred to in paragraph 49 above does require to be treated with some caution for the reasons referred to therein. However, I do not consider that this provides an example of Ms Bates deliberately putting forward false evidence.

Defendants' witnesses

89. I found the Defendants' witnesses to somewhat less satisfactory as witnesses than the CW Claims' witnesses.

90. Mr Mohammed was the first of the Defendants' witnesses to give evidence. Unfortunately he adopted a belligerent and combative approach in responding to Ms Tythcott's questioning under cross examination. Whilst he sought to explain away this approach on the basis of his *"passion"* in wishing to defend the serious allegations made against the Defendants, this provides no answer to the point that, on a number of occasions under cross examination, this mode of response was plainly, as I saw it, used as a technique of evasion as Mr Mohammed sought to deflect questions that were put to him.

91. I consider that the veracity of Mr Mohammed's evidence is undermined by three matters in particular:

    i) Firstly, he was adamant in giving evidence that the June Agreement expressly excluded *"Additional Claims"*, i.e., as he put it in paragraph 33 of his witness statement, claims that were not specific claims referred by CW Claims to Clarkewood. To quote from paragraph 33 of his witness statement: *"I pointed out to him that any additional claims arising from the customer would not result in additional commission to his company, unless his company specifically referred those claims."* However, the difficulty with this, as recognised by Mr Khan under cross examination, is that the process did not recognise the referral of specific claims as such, at least in the case of PPI claims. As referred to above, the form sent out as part of the Pack merely required that customers wishing to make a claim identify providers of PPI and not specific claims, and as a result only one LoA and SAR were sent to each of the providers so identified. There is no record or evidence of any process by which potential claims that had been identified on CW Claims' Connex system were matched as against the information as to providers referred to on the forms returned by customers, or the confirmation of the existence of particular PPI Policies provided in answer to the SAR's.

    ii) Secondly, during the course of his cross-examination, Mr Mohammed sought to suggest that the data provided to CW Claims was also provided to other introducers, so that, effectively, CW Claims was competing with other introducers for particular customers and claims, and a case to this effect was put to Mr Catterall under cross examination, only for him to firmly reject the suggestion. Whilst this is consistent with what Mr Mohammed had said in final sentence of paragraph 32 of his witness statement, this evidence is, in my judgment, wholly unconvincing, and I reject it for a number of reasons, including that:

        a) The idea of introducers competing over the same data is inconsistent with the WhatsApp exchange on 26 September 2017 referred to above during the course of which Mr Mohammed had identified that it would be counter-productive for more than one introducer to be working the same data. This makes absolute sense.

        b) The idea is also inconsistent with other evidence given on behalf of the Defendants to the effect that data would only be provided to another

introducer when recycled after another introducer had exhausted the same. However, even this evidence as to later recycling is difficult to reconcile with Mr Mohammed's evidence that there was only one other introducer to Clarkewood, namely a South African entity that operated under a rather different business model, with other claims being generated by *"diallers"* employed by Clarkewood itself;

iii) For reasons that I consider in more detail in paragraph 117 et seq below, I regard Mr Mohammed's evidence that there was, during the course of the meeting in the Range Rover on 11 June 2017, express discussion, and agreement reached with regard to the exclusion of RBS claims and Additional Claims, and with regard to Clarkewood's overheads being payable out of Mr Catterall's company's 50% share of commission, to be unconvincing and to be evidence that I should also reject.

92. Mr Khan was, unfortunately, another somewhat combative and belligerent witness in the manner in which he gave evidence, and again, on a number of occasions, gave the impression of seeking to avoid the questions that were put to him. However, it is also fair to say that Mr Khan, was, albeit with some reluctance, prepared to make concessions, for example his acceptance that all claims against the providers recorded in CW Claims' Connex system transmitted therefrom BrightOffice would, if successful, entitle CW Claims to commission. However, in the light of the evidence as to the process, and the logic of this conclusion, this is probably a concession that Mr Khan had no option but to make.

93. On a number of occasions whilst giving evidence under cross examination, Mr Khan, when saying that he was unable to answer a question, made reference to Mr Naylor, who was not called to give evidence on behalf of the Defendants. A particular issue that did arise during the course of Mr Khan's cross examination was the effect of a ransomware attack on Clarkewood's computer system that was said to have prevented Clarkewood from disclosing documentation that it might otherwise have been expected to have disclosed, and whether the ransomware attack had in fact occurred with the consequences for disclosure that had previously been portrayed by Clarkewood. Mr Khan's response to questioning in respect thereof was that this was outside his sphere of experience or responsibility. By my Order dated 7 March 2022, I directed that a responsible officer of Clarkewood should produce a witness statement, verified by a statement of truth, explaining fully, in respect of Section 2 of the Disclosure Review Document at paragraph 8, the circumstances of the alleged ransomware attack. The requisite witness statement was provided by Mr Naylor, in which such witness statement he sought to explain why Clarkewood could not give full and complete disclosure. In the circumstances, it is, I consider, somewhat surprising that Mr Naylor was not called to give evidence. Ms Tythcott relies on the decision of the Court of Appeal in *Wiszniewski -v- Central Manchester Health Authority* [1998] PIQR P324 as authority for the proposition that I ought to draw adverse inferences from the failure to call Mr Naylor. I am mindful that I should now have regard to what was said by Lord Leggatt in *Royal Mail Group v Efobi* [2021] UKSC 33 at [41] about drawing adverse inferences in this sort of situation, and in particular Lord Leggatt's identification of the need to identify the particular issue or issues in respect of which an adverse inference is asked to be drawn, and to the requirement for the Court to then adopt a common sense approach in respect thereof.

94. In one sense, the relevant issue is the absence of documentation that might have been expected to be disclosed on disclosure that might go to important issues in the case, and whether the ransomware attack is the cause of it not being available for disclosure. However, I was not addressed on the significance of the absence of particular documentation going to any particular issue in the case. In these circumstances, I am reluctant to draw the adverse inferences that I am invited to draw.

95. What I consider to be of more significance is the fact that Mr Robertshaw, who gave evidence before Mr Khan, gave evidence that he had, at all relevant times, had access to Clarkewood's Xero accounting software system, through which he was able to gain access to bank statements and accounts of Clarkewood that had not been disclosed. However Mr Khan was unable, under cross examination, to give any cogent explanation as to why these bank statements had not been disclosed, and why Clarkewood's profit and loss account had not been disclosed, notwithstanding that these could have been highly relevant to the question of whether Clarkewood has properly accounted to CW Claims.

96. Regrettably, Mr Robertshaw also proved to be a somewhat defensive witness, who displayed a reluctance to engage with the questions put to him under cross examination. This was particularly so during the afternoon of 25 October 2022. However, Mr Robertshaw did, the following morning, apologise for the manner in which he had answered questions the previous afternoon, and I am inclined to put his approach on the first day of his evidence down more to a nervousness about giving evidence, rather than a deliberate attempt to avoid giving honest answers to the questions put to him. I did not gain the impression that Mr Robertson was seeking, in his evidence, to deliberately mislead the Court in any respect. Nevertheless, there was a something of an ingrained partiality, and lack of objectivity about his evidence which I did not find helpful.

97. Mr Robertshaw said that he had been informed by Mr Akbar about the terms of the June Agreement, but had had to press Mr Akbar for information regarding how overheads were to be dealt with, and, in respect of overheads, he said that it was he himself who came up with a formula that he considered *"fair to both sides"*. However, when questioned regarding this, Mr Robertshaw was, as I see it, unable cogently to explain why it was fair that CW Claims would, out of its 50%, have to bear not only its own overheads (which were loaned to it but which were repayable out of the 50%), but also Clarkewood's overheads as well. Further, by reference to an Excel spreadsheet (*"18(12) Excel sheet Overheads May 2017"*), Mr Robertshaw came up with a figure of £543,143 payable by CW Claims out of its 50% share of commission in respect of Clarkewood's overheads. This apportioned <u>all</u> of Clarkewood's overheads by reference to the number of Packs sent out following introductions by CW Claims as a proportion of all the Packs sent out by Clarkewood over the relevant period, i.e. 35,880 out of 140,527. However, Mr Robertshaw accepted when questioned on the point, that the overheads so intended to be charged to CW Claims included overheads referable to <u>all</u> of the claims that have come out of the Packs sent as a result of CW Claims introductions, and therefore included overheads in connection with Additional Claims, and also presumably RBS claims and Plevin Claims, which on the Defendants' case fall outside the scope of the June Agreement.

<u>Expert witnesses</u>

IT Experts

98. I found each of Dr Young and Dr Hunton to be helpful and impressive expert witnesses doing their best to assist the Court when cross examined on their respective statements and reports.

99. Dr Young provided statements dated 13 November 2019, 27 May 2020, and 4 February 2021. It was a consistent theme of his statements that Dr Young had not been provided with full unrestricted access to Clarkewood's BrightOffice CRM system, which he considered necessary in order to properly examine the integrity thereof with a view to ascertaining whether the data therein had been subject to inappropriate manipulation as alleged by CW Claims.

100. In consequence, by paragraph 6 of my Order dated 25 February 2022, I directed that Clarkewood allow Dr Young to inspect its entire cloud-based BrightOffice CRM software system on receipt of two days' notice in writing. This Order then provided, at paragraph 7 thereof, for the service of any further report by Dr Young by 8 April 2022, with the Defendants then being entitled to serve any expert evidence in response to the expert evidence of Dr Young by 9 May 2022. However, inspection of the entire BrightOffice system by Dr Young did not take place as envisaged by the Order dated 25 February 2022, and no further report of Dr Young was filed and served by 8 April 2022. Nevertheless, the Defendants did serve Dr Hunton's report dated 11 May 2022. CW Claims then served a further statement from Dr Young dated 24 June 2022, but this complained that whilst the Court had *"previously ordered on multiple occasions that I am afforded unrestricted access to data held on the BrightOffice system"*, this had not occurred, and Dr Young expressed concern that the two experts had been provided with *"substantially different methods of access to the BrightOffice data"*.

101. At a hearing on 30 June 2022, I was invited by Mr Ozon, appearing as Solicitor for CW Claims, to, effectively, remake paragraph 6 of my Order dated 25 February 2022 so as to permit Dr Young unrestricted access to the BrightOffice system at that stage. However, no cogent explanation was provided as to why the facilities for access provided for by the Order dated 25 February 2022 had not been taken up. Given that any remaking of paragraph 6 of my Order dated 25 February 2022 was liable to cause considerable difficulty and inconvenience in preparing for, if not threaten the trial commencement date of 20 October 2022, and that a trial of this matter had already been vacated when listed in April 2022, I refused to make the order sought, and simply directed that the experts hold discussions and produce a joint report.

102. A joint report was produced by Dr Young and Dr Hunton on 15 July 2022. The joint report expressed a measure of agreement, in that:

    i) Both experts agreed that the contents of a report from CW Claims' Connex system was *"substantially consistent with corresponding records in the BrightOffice system"*; and

    ii) The experts were agreed that a report taken from CW Claims' Connex system and a report taken from Clarkewood's BrightOffice system showed that approximately 25,000 customers with approximately 188,000 claims had been introduced by CW Claims to Clarkewood, although it requires to be recognised that the evidence suggests that were probably not insignificant amounts of

duplication and/or other errors within the 188,000 claims introduced, and so the number of actual claims introduced is likely to have been considerably less than that.

103. A consequence of the events described in paragraph 100 above is that Dr Young has not had the access that he would like to have had to the BrightOffice system in order to examine the same for inappropriate manipulation. However, it is the case that Dr Young has now had access to the same data as Dr Hunton has had access to, namely an image of the data on the BrightOffice system. Nevertheless, this has not allowed for as full an inspection of the source data as Dr Young would have wished to have carried out in in order for him to analyse, for example, when particular entries were made on the system. This does raise the question as to whether this might have been down to a deliberate decision on the part of CW Claims not to investigate. I am satisfied that it was not, and that it was down to other reasons, particularly given the belated, but I consider genuine, attempt made on 30 June 2022 to secure full access the BrightOffice system.

Industry Norms Experts

104. The Order dated 25 February 2022 gave the parties permission to each call experts as to industry norms in respect of the issues raised in the case, with reports to be exchanged by 30 July 2022, the experts to hold discussions by Wednesday, 3 August 2022, and for a joint report to be produced by 17 August 2022.

105. There was an agreed extension of time for experts reports, and CW Claims exchanged the report of Mr Smith dated 3 August 2022, and the Defendants exchanged the report of Mr Evans dated 2 August 2022.

106. Mr Smith had produced for the benefit of CW Claims a report in February 2022. This had identified a document produced by the FCA referring to an average conversion rate of claims into successful PPI claims of 70%, and this was relied upon by CW Claims as forming the basis of its case as to quantum contained in its Amended Particulars of Claim.

107. Mr Evans had also produced a report in February 2022 for the benefit of the Defendants. A summary of this report was provided to CW Claims on or about 23 June 2022. This summary (or precis) report set out Mr Evans' opinion that the industry uphold rate from *"leads provided"* was acknowledged to be extremely low, and on the basis of figures said to have been obtained across a representative sample of firms, he opined that the appropriate conversion figure was 5.6%. He then expressed the opinion that the figure presented by Clarkewood of an uphold rate of 1.4% was: *"entirely consistent when compared to the industry as a whole and considering their method of customer acquisition (outbound dialling, often known, somewhat incorrectly as "cold calling") which always produced the lowest rates of uphold across the industry."* Mr Evans' report dated 3 August 2022 included an *"Executive Summary"* which substantially replicated the main part of the summary provided on or about 23 June 2022, but in relation to uphold rate:

i) At paragraph 8 of the Executive Summary he said: *"In my opinion, the figures presented by Clarkewood, and Dr Hunton's report, on the uphold rate of 1.9% are also entirely consistent when compared to the industry as a whole and considering their method of customer acquisition (outbound dialling, often*

known, somewhat incorrectly as 'cold calling') which always produced the lowest rates of uphold across the industry."

ii) At paragraph 63 of the main body of his report he said: *"As part of the evidence gathering in preparation for this report, I asked several of the members of the then ACC for their uphold rates as compared to the 'uphold rate diagram' provided by Clarkewood Ltd, which shows an uphold rate of 1.9% from 'Potential PPI cases received from CWCG'. As shown in Appendix 3, the average uphold rate cross these firms was 5.6%."* Further detail was provided in subsequent paragraphs with regard to this exercise.

108. At the PTR on 8 September 2022, I was told by Mr Ozon, who again appeared as Solicitor for CW Claims, that Mr Smith had declined to cooperate in the process of holding discussions with Mr Evans with a view to producing a joint report. This was further explained in Mr Ozon's witness statement dated 2 September 2022 I was told that, in the circumstances, CW Claims had lost confidence in Mr Smith, and CW Claims applied to call a replacement expert as to industry norms. Given my concerns as to the adequacy of the explanation given regarding Mr Smith's lack of cooperation, and the difficulty with a new industry norms expert being introduced only weeks prior to trial, I adjourned the application to a further hearing in the week commencing 26 September 2022, and I directed that if discussions between the experts did not take place, and a joint report was not produced by 23 September 2022, then Mr Smith was to explain to the Court in writing by 16 September 2022 why he was unable or unwilling to comply with my direction regarding discussions and a joint report.

109. The matter came back before me for a further hearing on 28 September 2022, by which stage Ozon & Co had, on 26 September 2022, come off the record as acting for CW Claims, and Mr Catterall and Ms Bates appeared in person on behalf of CW Claims. By then, Mr Smith had provided statements addressed to the Court dated 15 September 2022 and 28 September 2022. As explained therein, and as further expanded upon by Mr Smith in an email to the Defendants' Solicitors dated 7 October 2022, it was Mr Smith's stated position that he had ceased to act as expert after Mr Ozon had put pressure upon him to deal with matters outside his expertise, and after he had signed a report that he subsequently maintained largely contained material that he had not written.

110. The circumstances behind Mr Smith ceasing to act as expert formed a significant part of the basis for the strike out application made on the first day of the trial, that I refused for the reasons set out in the judgment that I delivered at the beginning of the second day of the trial. However, the net effect of the above is that CW Claims has come to trial without the benefit of any expert evidence as to industry norms, and I only have the benefit of Mr Evans' reports, and the product of Ms Tythcott's cross examination of Mr Evans thereupon.

111. I gave permission on 28 September 2022 for a short supplemental report from Mr Evans dealing with a discrete issue regarding the way in which claims were processed as between CW Claims and Clarkewood, and as to the stage in that process to which the 70% conversion rate identified by the FCA applied. As to this, it was Mr Evans' evidence that the 70% applied to the numbers of returned questionnaires submitted to providers together with a complaint letter, i.e., the stage referred to in the second sentence of paragraph 34(xiii) above.

112. Ms Tythcott submits that Mr Evans failed to apply proper professional focus to the task, as said to have been revealed by a rather inappropriate political jibe made at Ms Tythcott during the course of cross-examination. Notwithstanding this I am satisfied that Mr Evans was seeking to assist the Court, did display the requisite independence, and has experience of the CMC industry at a practical level through his involvement in CMCs, and for the last six years as Chief Executive of the trade body, The Consumer Redress Association (UK) Limited ("**the CRA**"), that does qualify him as an expert as to industry norms. However, for reasons that I explain in paragraph 156 et seq below, I am not satisfied that Mr Evans' evidence, properly analysed, really assists the Court in seeking to resolve the issues that arise

The terms of the June Agreement

Correct approach

113. It is common ground between the parties that a binding agreement was concluded between the parties under which CW Claims would introduce PPI and PBA claims to Clarkewood by XML transmission of customer and claim details from the Connex system to the BrightOffice system, and chase up with the relevant customers the return of the Packs sent out to them by Clarkewood, in return for a 50% share of the commission received by Clarkewood from the claimant in the event of a successful claim.

114. As I have identified, the issues between the parties are as to whether it was expressly agreed that RBS claims and Additional Claims would be excluded from the agreement regarding the 50% share of commission in respect of successful claims, and whether payment of this share to CW Claims was subject to deduction out of the same of Clarkewood's own overheads, it being the Defendants' case that these were matters expressly agreed in the Range Rover on 11 June 2017. In addition there is an issue as to whether Plevin Claims were included in the June Agreement, it being Clarkewood's case that they were never discussed or in contemplation and fell outside the scope thereof.

115. I understood the parties to accept the suggestion that I made during the course of closing submissions that my task in determining what the terms of June Agreement involves:

    i) Making factual findings as to what was in fact expressly agreed between the parties, a matter that involves a consideration of what the witnesses said in evidence and contemporaneously by their WhatsApp exchanges, and the context in which the June Agreement was concluded and CW Claims began to introduce claims to Clarkewood; and

    ii) Having regard thereto, the background circumstances and commercial reality, determining, by considering the matter objectively, what the bargain between the parties comprised – see e.g. Chitty on Contracts, 34th Ed, at 15-004.

Findings of as to the terms of the June Agreement

116. There were clearly discussions leading up to 11 June 2017, and then further discussions in the Range Rover on 11 June 2017 itself, at which agreement was reached that a company to be incorporated by Mr Catterall would operate a telesales business that

would introduce customers and claims in respect of PPI and PBA mis-selling to Clarkewood, and subsequently chase up the customers so introduced to provide requisite information to Clarkewood, on the basis that the profit made from successful claims so introduced payable in the form of *"back-end"* commission would be split 50:50 between Clarkewood and Mr Catterall's company. As Mr Mohammed put it at one stage during the course of his evidence, when it came to the profit, this was to be split 50:50. Further, I accept that there was discussion, contemporaneously therewith, with regard to Clarkewood (in reality using funds provided by Mr Mohammed and/or Harringtons) covering the overheads of Mr Catterall's company until such time as it was able to support itself, on the basis that the monies so advanced would be treated as a loan repayable as a first call upon Mr Catterall's company's 50% share of the commission before it was paid to the latter.

117. However, as touched upon in paragraph 91(iii) above, I consider Mr Mohammed's evidence that there was discussion and agreement reached during the course of the meeting in the Range Rover on 11 June 2017 with regard to the exclusion of RBS claims and Additional Claims, and with regard to Mr Catterall's company being obliged to bear out of its 50% share of commissions Clarkewood's own overheads, to be unconvincing, and evidence that I should reject.

118. So far as the timing of the conclusion of a binding agreement between the parties to the present claim is concerned, I consider that the agreement must have been formally concluded after CW Claims had been incorporated on 14 June 2017, and at the latest when CW Claims acted on what had been agreed by introducing customers and claims to Clarkewood in the manner agreed. Although not the Defendants' case as such, I consider it unlikely that there was any discussion with regard to the terms in dispute between 11 June 2017 and when a binding contract came into existence, albeit that there would necessarily have been discussion between 11 June 2017 and when CW Claims began to introduce claims to Clarkewood with regard to the setting up of the interconnection between the Connex system and the BrightOffice system, and the practical arrangements in relation thereto. However, the WhatsApp exchanges that followed the meeting on 11 June 2017 do, as referred to below, provide some assistance in deciding what was agreed at that meeting, and the Defendants place reliance on the WhatApp exchanges that took place in August 2017 with regard to the issue as to whether Additional Claims were included within the scope of what was agreed between the parties.

119. As to my finding that there was no discussion with regard to the terms in dispute, I have reached the conclusion that I have for the following reasons:

    i) I prefer the evidence of Mr Catterall so far as what was discussed and agreed, or rather as to what was not discussed and agreed, on 11 June 2017 is concerned. I accept that in light of the considerations identified in *Gestmin* (supra) I must place limited weight on recollections as to what may or may not have been discussed in the course of business meeting such as the present. However, I consider that Mr Catterall's version of events is supported by a significant number of other evidential considerations.

    ii) Firstly, I consider that the WhatsApp exchanges that took place following the meeting in the Range Rover, including those on 11 June and 13 June 2017 referred to in paragraph 29 above, are inconsistent with there having been the

detailed discussion as to the relevant terms that the Defendants contended took place in the Range Rover on 11 June 2017. I do not consider that Mr Mohammed would have been providing the explanations that he was during the course of these exchanges if there had been the detailed discussion contended for.

iii) Secondly, although the meeting in the Range Rover on 11 June 2017 may have lasted 1-2 hours or so, Mr Mohammed accepts in paragraph 32 of his witness statement that there was, on this occasion, discussion with regard to *"a great many things, reminiscing about old times and general stuff"*, i.e. the sole focus of the meeting was not upon the terms of the June Agreement.

iv) So far as RBS Claims are concerned:

a) It may well be that RBS had, on 7 June 2017, made it clear to Clarkewood that it was not prepared to deal with Clarkewood, but that does not mean Clarkewood had no interest in both PPI and PBA claims to be made by RBS, and RBS Group customers. As Mr Khan accepted during the course of his evidence, there were commercial disadvantages if Clarkewood could not deal with claims on behalf of RBS customers because customers with claims against RBS and other providers were liable to be less inclined to use the services of Clarkewood than a CMC that could handle claims against all providers. This no doubt explains why CW Claims did in fact refer RBS customers and claims to Clarkewood, and why the forms sent out to customers as part of the Pack specifically identified RBS and RBS Group banks, without saying anything about Clarkewood not dealing with claims against RBS and RBS Group banks. Further, as we have seen, Clarkewood, comparatively shortly after the June Agreement was entered into, found a way around the difficulty by passing on RBS claims to Solicitors such as Goldman Knightly and thereby make a profit from the same.

b) The attachment to Mr Naylor's email dated 11 June 2017 did identify RBS and RBS Group banks as being banks that Clarkewood dealt with, but I accept that this was in relation to PBA claims, and not specifically PPI claims, and that the letter dated 7 June 2017 simply referred to the latter. A similar point might be made with regard to a WhatsApp exchange between Mr Catterall and Mr Mohammed on 16 September 2017. However, there was the further WhatsApp exchange between Mr Catterall and Mr Mohammed on 21 and 22 February 2018 with regard to RBS claims. In the course of this exchange, Mr Mohammed explained, in response to a query from Mr Catterall, that the MOJ had *"demanded"* that RBS claims be passed to Solicitors, which is hardly consistent with Mr Mohammed having, on 11 June 2017, informed Mr Catterall as to RBS's stance with regard to Clarkewood. Further, Mr Catterall's response on 22 February 2018 is, as I see it, consistent only with Mr Catterall contemporaneously understanding and believing that RBS claims fell within the scope of the June Agreement.

c) In the circumstances, I simply cannot accept that it was agreed on 11 June 2017 or at any other time that RBS claims would be excluded from the scope of the June Agreement. It was not expressly agreed that these

claims should be excluded, and I can see no other good reason for excluding them, and none has been suggested.

v) So far as Additional Claims are concerned:

a) As I have already identified in paragraph 91(i) above, the way that the process worked was such that it did not recognise the referral of specific claims, at least in the case of PPI claims, with the form sent out as part of the Pack to customers merely requiring that specific providers be identified, and with only one LoA and SAR being sent to each of the providers so identified, such that there is no record or evidence of any process by which potential claims that had been identified on CW Claims' Connex system were matched as against the information provided on the forms (in the Packs) returned by customers, or in answer to SAR's .

b) In these circumstances, it is difficult to see in what context Mr Mohammed can have been *"keen to separate out "claims" on the one hand and "customers" on the other hand"*, or in which Mr Mohammed can have told Mr Catterall that *"his company would only ever receive commission in relation to the specific claims he referred and nothing more"*, as contended in paragraph 33 of his witness statement.

c) One can see that there might have been some logic in an agreement for the exclusion of claims against lenders or other providers who had not initially been identified to Clarkewood through Connex, but which such lenders or other providers were identified for the first time on the form returned by the customer. But this is not the agreement alleged by the Defendants, and is significantly different from that asserted by Mr Mohammed in paragraph 33 of his witness statement.

d) There was what I consider to be a significant WhatsApp exchange between Mr Mohammed and Mr Catterall on 11 June 2017, during the course of which Mr Mohammed said: *"You just need to worry about getting the packs in."* This does, as I see it, emphasise the point that it was a very important function for CW Claims to have to seek to get the Packs in, thereby getting the customers on board to that extent, and identifying more fully the lenders and other providers to whom SAR's were to be sent. In this context, when it is the lender or other provider as identified on the form returned by the customer that defines who the SAR's are to be sent to, then, looking at the matter objectively, it is difficult to see why, vis-à-vis Clarkewood and CW Claims, claims against lenders or other providers first identified on the forms should be treated any differently than those initially identified through Connex.

e) As referred to in paragraph 97 above, Mr Robertshaw accepted when questioned on the point, that the overheads that Clarkewood has sought to charge to CW Claims' 50% share of commission includes overheads referable to all of the claims that have come out of the Parks sent as a result of CW Claims introductions, and therefore includes overheads in connection with Additional Claims (as well presumably as RBS claims

and Plevin Claims). Of course, this entitlement to overheads is challenged by CW Claims, but the fact that Clarkewood has sought to deal with overheads in this way does, as I see it, serve to further demonstrate the artificiality of trying to separate out *"Additional Claims"* in the way that Clarkewood has sought to do so far as the entitlement of CW Claims to its 50% share of commission is concerned.

f) In the circumstances, I am simply not persuaded that it formed any part of the terms discussed and agreed between Mr Catterall and Mr Mohammed that Additional Claims should be excluded from the agreement. Further, I can see no sound basis for it having been part of the June Agreement that claims against lenders or other providers only identified on return by customers of the forms in the Packs should be excluded from the scope of the June Agreement, there being no commercial imperative for excluding them. Further, for what it is worth, this is not, strictly speaking at least, the Defendants' case in so far as it is based upon what Mr Mohammed said in paragraph 33 of his witness statement.

g) Mr Mohammed, in giving evidence under cross examination, said at one point that the exclusion of Additional Claims *"went without saying"*. This is inconsistent with the case that there was discussion with regard thereto, but I do not consider there to be any basis for saying that such exclusion should be implied for any reason on the basis that it *"went without saying"*.

h) Reliance is, of course, placed by the Defendants upon the exchange on 16 August 2017 referred to in paragraph 38(ii) above. In a sense, this passage supports CW Claims case in that Mr Catterall is unlikely to have asked the question if the matter had been agreed as part of the June Agreement. However, the Defendants rely upon the fact that when Mr Catterall asked how he could find out which lenders had been added when the packs were sent back, Mr Mohammed replied to say that Clarkewood would have *"created a cistomer (sic) for that the particular extra lender"*, adding subsequently in the exchange: *"You keep whatever u get. We keep the extras"*. However, this was a post-contractual discussion, there was no consideration for any variation in the terms of the June Agreement provided by Clarkewood, and although I have found that it is unlikely that Mr Catterall specifically challenged the point despite the fact that he now maintains that he did so, there is no evidence that Mr Catterall specifically agreed to the interpretation placed on events by Mr Mohammed. The discussion, in any event, related to additional lenders or providers rather than Additional Claims as described by Mr Mohammed in paragraph 33 of his witness statement.

i) In conclusion, therefore, I do not consider that any agreement was reached between the parties for the exclusion of Additional Claims, or that they ought to be excluded for any other reason, and I do not consider that it is open to the Defendants, on the evidence, to maintain an alternative case that claims against additional lenders (or other

providers) first identified by customers on the forms that they returned are excluded from the June Agreement.

vi) So far as any entitlement of Clarkewood to deduct its own overheads is concerned:

a) Again, consistent with my more general findings with regard to what was discussed on 11 June 2017, or otherwise prior to the conclusion of the June Agreement, I do not accept that it was agreed that Clarkewood's overheads would fall to be deducted from CW Claims' 50% share of the commission received from the successful customer.

b) Further to my more general findings, I regard it as significant that whilst the exchanges on 11 June 2017 between 19:01:01 and 19:10:29 referred to the loan and the deduction of the loan from CW Claims' 50% share of commission received before any payment thereof was made to CW Claims, there is no mention of Clarkewood's overheads being deducted in the same way as one might have expected if that is something further that had been agreed in the discussions earlier in the day.

c) There is, as I see it, a lack of clarity as to what overheads were to be deducted, and I regard it as not in significant that when Clarkewood has sought to articulate what it says that it is entitled to, it has done so by reference to all its expenses, including expenses incurred in respect of claims that it maintains fall outside the scope of the June Agreement.

d) I can see that there are various commercial considerations as to why Clarkewood might have wanted to seek to recover its overheads referable to claims referred to it in the way that it contends given that it was, as the Defendants maintain, bearing a significant risk in lending substantial sums to a new entity which might have failed, and done so on terms, in respect of which it is common ground, that did not provide for the payment of interest or any other return apart from the benefit for Clarkewood of the claims that CW Claims were able to introduce. These are considerations that led Mr Robertshaw to devise what he referred to as a *"fair"* arrangement in respect of overheads. However, this is, as I see it, insufficient to enable me to conclude that agreement was reached as alleged in respect of overheads, or that agreement for the payment of overheads as alleged is to be implied in some way.

e) I consider this particularly so bearing in mind that if Clarkewood is right, then it would be entitled to 50% of the commission received from successful customers without having to ultimately bear any of the cost of generating the profit apart from the cost of lending to CW Claims to fund the latter's own overheads interest free. So far as the latter is concerned the evidence is that Mr Mohammed and/or Harringtons lent to Clarkewood at very high rates of interest. However, as Mr Mohammed explained, this was to ensure a return on monies that he/Harringtons invested in Clarkewood, and as consideration for the assistance that he provided to the latter such that the latter cannot be equated with an ordinary commercial loan. Further, Mr Mohammed's evidence was that

Harringtons was hugely profitable, and profitable for him, and it is reasonable to assume that he also expected Clarkewood to be hugely profitable, and that the claims to be introduced by CW Claims would significantly contribute to the generation of those profits.

f) Thus, in short, I do not consider that Clarkewood is entitled to insist on the discharge of the overheads that it contends for, or indeed any overheads from CW Claims' 50% share of the commissions received from successful customers.

120. This leaves the question of Plevin Claims, and as to whether commission generated by successful claims in respect of unfair commission claims fell within the scope of the June Agreement. As to this:

i) It is CW Claims' case that although there was no discussion with regard to Plevin Claims, and although they might not have been specifically in the parties' minds at the relevant time, they are simply one form of PPI claim related to the mis-selling of PPI, and thus necessarily fall within the scope of the June Agreement. CW Claims points to the fact that the Pack sent to customers by Clarkewood included the latter's Terms & Conditions which set out at the top of the relevant page: *"THIS DOCUMENT SETS OUT THE TERMS UPON WHICH YOU APPOINT CLARKEWOOD LIMITED TRADING AS FINANCIAL JUSTICE TO ACT FOR YOU"*. The definitions section within these Terms and Conditions then defined *"Claim"* as meaning: *"Your Claim(s) against the Creditor(s) relating to the mis-selling of a PPI policy or policies or a Packaged Bank Account (PBA) on any account with that Creditor, <u>including unfair commission charges</u>."* [My emphasis added]. CW Claims submits that this is entirely consistent with its case, and demonstrates that one cannot logically separate out Plevin Claims.

ii) The Defendants, on the other hand, maintain that Plevin Claims are a separate and distinct form of claim, distinct from PPI mis-selling claims as such, that necessarily fall outside the scope of the June Agreement, not least because they were never discussed, and were not within the specific contemplation of the parties.

iii) I am persuaded that CW Claims' case with regard to the inclusion of Plevin Claims is to be preferred. They may not have been within the specific contemplation of the parties, or discussed as such, but I consider that the scope of the claims to be included is properly to be informed by the types of claim that Clarkewood was likely to pursue if a customer or claim was referred by CW Claims to it. The fact that Clarkewood's own Terms and Conditions defines the sort of claim liable to be pursued as including claims in respect of unfair commission charges (i.e. Plevin Claims) does to my mind demonstrate that Clarkewood must have had in mind pursuing such claims if customers with the benefit of such claims were referred to it by CW Claims. In the circumstances, I find it difficult to see why Plevin Claims should not fall within the scope of the June Agreement. The position might have been different if there had been no evidence of Plevin Claims actually having been pursued, but the fact of the matter is that the evidence clearly demonstrates that Plevin Claims were pursued

on behalf of customers introduced by CW Claims against lenders specifically identified by the latter in introducing the claims.

121. In short, therefore, I consider that June Agreement as concluded between the parties was such as to include within its scope RBS claims, Additional Claims, and Plevin Claims, that there was no agreement to exclude these claims and that there is no other good reason why they should be excluded from the scope thereof. On the other hand, I do not consider that it formed any part of the June Agreement that Clarkewood's overheads of any kind should be deducted from what was otherwise CW Claims' entitlement to 50% of the commission received from the customers in respect of successful claims, or that there is any other basis for saying that overheads should be so deducted.

Breach of Contract

122. It follows from the above, that I consider that Clarkewood has acted in breach of the terms of the June Agreement in failing to properly account to CW Claims in respect of the latter's entitlement to 50% of the commission received from successful claimants, given that the Defendants have failed to account to CW Claims on the correct basis, namely that the June Agreement included within its scope RBS claims, Additional Claims, and Plevin Claims, and did not provide for Clarkewood's overheads to be deducted in the way contended for by the Defendants or at all.

123. The position in respect of RBS claims is complicated by the fact that Clarkewood did not invoice, or receive anything directly from the customers, but rather has received 65% of the commission received by the Solicitors acting in respect of these claims. However, I do not consider that it is open to Clarkewood to say that the commission that it did receive in respect of RBS claims introduced by CW Claims, but which it passed onto the Solicitors without at least initially informing CW Claims, fell outside the scope of the June Agreement simply because Clarkewood might not itself have invoiced customers, or received commission directly from the latter. Considering what was agreed between the parties, and viewing the matter objectively, I consider that the express terms of the June Agreement are properly to be regarded as extending to the 65:35 agreed share of the commission received by Clarkewood from the Solicitors, such that CW Claims is entitled to 50% thereof. To the extent that the express terms of the June Agreement did not so provide, then I consider that such an obligation arose as a matter of necessary implication applying the principles referred to in paragraph 127 below.

124. I will return, in due course, to the appropriate remedy in respect of Clarkewood's breach of contract.

Implied term and breach of fiduciary duty

125. As I believe that Ms Tythcott recognised in her closing submissions, once CW Claims' claim for breach of contract is made out based upon the express terms of the June Agreement, it must be doubtful whether a claim based upon the implied term contended for by CW Claims, or a claim of breach of fiduciary duty significantly adds to CW Claims' case.

126. However, I am not in any event persuaded that a term is to be implied as contended by CW Claims, and nor am I persuaded that the relationship between CW Claims and Clarkewood was a fiduciary relationship.

127. As to the application of the term contended for, it is necessary to have regard to the test for the implication of terms as recently restated by the Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited* [2015] UKSC 72, [2016] AC 742, per Lord Neuberger, including that:

    i) A term will only be implied where it is strictly necessary for business efficacy;

    ii) The test is not one of absolute necessity but whether, without the term, the contract would lack commercial or practical coherence.

    iii) It is not enough that the parties would have agreed to it had it been suggested to them;

128. I do not consider that is necessary to imply the term contended for, not least because I do not consider that it can properly be said that without the term the June Agreement would lack commercial or practical coherence. I consider that commercial or practical coherence is provided by the express terms of the June Agreement without having to impose an obligation on Clarkewood to act in good faith or fairly towards CW Claims in relation to its dealings with customers. It was in the commercial interests of both CW Claims and Clarkewood to maximise the number of successful claims. That being the case, I consider that the parties' bargain can be given effect to simply by requiring Clarkewood to account in accordance with the express terms of the June Agreement in respect of commission that it has recovered from customers.

129. Further, I do not consider that the relationship between CW Claims and Clarkewood gave rise to a fiduciary relationship in that I do not consider that CW Claims can properly be said to have been in a relationship of trust and confidence in which it placed its trust and confidence in Clarkewood over and above being entitled to expect the latter to comply with the express terms of the June Agreement.

130. I do not therefore consider that CW Claims is entitled to any further relief based upon any breach of the implied term contended for, or breach of fiduciary duty.

Alleged fraudulent manipulation of the BrightOffice system

Introduction

131. The Defendants are clearly correct to contend that, in considering these serious allegations, it is necessary to me to direct myself by reference to what was said by Lord Hoffmann in *In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)* (supra), i.e., that whilst there is only one civil standard of proof, proof on the balance of probabilities, the Court should have in mind that the more serious an allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the Court can properly conclude that the allegation is established on the balance of probability.

132. I should observe that, dependent upon the extent of any manipulation, it might not actually matter so far as quantum is concerned even if the BrightOffice system has been deliberately manipulated if CW Claims is now able to ensure that the terms of the June Agreement are given effect to, and transactions now properly accounted for in accordance therewith. Nevertheless, ensuring that transactions are properly accounted for may require that the extent of the manipulation, if any, is understood.

Summary of CW Claims' case as to manipulation

133. In support of its case as to manipulation of claims by Clarkewood, and as touched upon in paragraph 61 above, CW Claims relies, in particular, upon the following:

i) The various matters discovered during the course of the relationship between CW Claims and Clarkewood referred to in paragraphs 43 to 49. This includes the following:

a) Being informed by customers that their claims had been successful albeit that their claim appeared to be shown as *"cancelled"* on BrightOffice;

b) What was ascertained by Ms Bates from *"casenote"* on BrightOffice, prior to access to CW Claims' access to BrightOffice being withdrawn and subsequently reinstated with more limited access that excluded *"casenote"*, with regard to claims reported as *"cancelled"* still being worked upon;

c) The results of Ms Bates's investigation of the task logging section of BrightOffice, and her crosscheck of information against cases that had been notified as *"cancelled"*; and

d) The results of the verification exercise referred to in paragraph 49 above.

ii) Further examination of a number of examples where claims introduced by CW Claims had been recorded as *"cancelled"*, but where what appears to be the same claim has been given a different *"CA"* number and recorded as *"completed"*, i.e. recorded as having been successful, but without being attributed, or properly attributed, to CW Claims. There was a particular focus at trial, by way of example, upon a claim by John Francis Maher ("**Mr Maher**") in respect of an MBNA credit card PPI claim, and a claim by Carol Byers ("**Ms Byers**") in respect of a Barclaycard credit card PPI claim, in respect of which CW Claims maintains that the Defendants have been unable convincingly to provide a cogent explanation as to why these were not treated as successful claims attributable to CW Claims, and that the Defendants have put forward a false explanation in respect thereof to the effect that the successful claim was attributable to another introducer.

iii) The expert evidence of Dr Young, and a contention that there is nothing within Dr Hunton's expert evidence that, on proper analysis, undermines CW Claims' case as to Clarkewood's dishonest manipulation of its CRM system.

iv) Evidence in the form of documentation provided by the FCA as to conversion rates of PPI claims, and a submission that the Defendants' own figures showing

a conversion rate of 1.9% in itself, and notwithstanding Mr Evans evidence, serves to demonstrate falsity in Clarkewood's records, and that Mr Evans suggested conversion rate of 5.6% is plainly wrong.

Matters discovered during the course of the relationship

134. So far as the matters referred to in paragraphs 43 to 49 are concerned, these matters do provide some cogent evidence of manipulation, if, as I consider that it largely should be, Ms Bates' evidence in relation to contemporaneous matters is accepted. I note that the problems encountered by CW Claims with regard to claims reported to be *"cancelled"*, when other evidence indicated that they were still ongoing or had been successful, were contemporaneously taken up by Mr Catterall in WhatsApp exchanges with Mr Mohammed and never fully addressed by the latter. However, I am not persuaded that this is enough in itself, by way of evidence, to base a finding of fraudulent and deliberate manipulation upon, not least given the holes described above that the Defendants were able to make in the verification exercise referred to in paragraph 133(i)(d) above. However, I do consider this evidence, subject to the caution that I have expressed with regard to the verification exercise, does provide corroborative evidence in support of these allegations when taken together with other evidence referred to below.

Evidence in respect of particular claims marked as cancelled

135. There was considerable examination at trial, during the course of cross-examination of witnesses and in submissions, of a number of Excel spreadsheets showing matters recorded on BrightOffice, and in one instance on the Connex system. The key spreadsheets in question were the following:

    i) A Connex report detailing all PPI claims referred by CW Claims to Clarkewood ("**Spreadsheet 96**");

    ii) Clarkewood's cases report ("**Spreadsheet 8C**");

    iii) Clarkewood's cases report with annotations added by Ms Bates ("**Spreadsheet 8E**");

    iv) Clarkewood's sales report of completed cases ("**Spreadsheet 104**");

    v) Clarkewood's cancelled cases with reasons report ("**Spreadsheet 105**"), as subsequently updated ("**Spreadsheet 110**").

136. CW Claims' case is advanced by reference to a number of particular claims as traced through the various spreadsheets. In opening, Ms Tythcott focused on the claims of Mr Maher. In his second witness statement dated 27 May 2020, Dr Young dealt with the claims of Ms Byers. I shall focus on these claims in this judgment.

137. CW Claims' Connext report (Spreadsheet 96) identifies for Mr Maher three potential HSBC claims (credit card, loan and one other) and a potential MBNA claim (credit card). He is shown as having a customer reference number of C7130931, being a number that would have been provided by BrightOffice when details regarding Mr Maher's claims were transmitted by Connex to the latter. The date of creation within

Connex is shown as 31 October 2017 at 10:51AM. A lead identification number for each claim is referred to, and a customer reference number common to each of Mr Maher's claims is shown on the Connex system against each claim, but these numbers are not replicated on any spreadsheet produced from BrightOffice, and I have seen no evidence that they were carried over to the latter to allow them to allow the claims to be traced through BrightOffice.

138. I propose to then trace the MBNA credit card claim of Mr Maher through the spreadsheets produced from data within BrightOffice.

139. Spreadsheet 8C (Clarkewood's case report) is split into two sections (or tabs on the Excel spreadsheet), one being described as *"Exact & Logical Match,"* i.e. claims that Clarkewood has matched to introductions made by CW Claims, and the other being described as *"No Logical Match,"* i.e. claims in respect of which there is said to be no match with any claim introduced by CW Claims in respect of which it is entitled to receive payment. So far as relevant, Spreadsheet 8C shows the following:

    i) There are no entries relating to Mr Maher and any MBNA claim under the Exact & Logical Match tab.

    ii) On line 14371 of the No Logical Match tab, one finds an MBNA credit card claim made by Mr Maher shown as *"cancelled"*. The relevant line includes his customer reference number (C7139031) (i.e. the same as that shown in Connex), and a CA number, CA713 5773 with a creation date of 10 November 2017. The evidence of Mr Khan and Dr Hunton was to the effect that this CA number would have been created on the return of the form in the Pack by the customer. The *"customer source"* is shown as being CW Claims, but the *"source company"* is shown as being *"FJS"* (i.e. an abbreviation of Clarkewood's trading style, Financial Justice). Line 19563 of Spreadsheet 110 (cases cancelled with reasons) shows the reason for cancellation as being *"duplication"*.

    iii) Line 13969 of the No Logical Match tab shows a further MBNA credit card claim by Mr Maher (with customer number C7130931), but with a different CA number, CA 7350526, created on 18 July 2018 (00.00.00). This is shown as *"completed"*, i.e. as having been successful. A *"provider reference"* is shown, being a credit card number with the last four digits 0416, the *"customer source"* is identified as CW Claims, but the *"source company"* is again shown as *"FJS"*.

    iv) Line 13823 of the No Logical Match tab shows a further MBNA credit card claim by Mr Maher (with customer number C7130931), but with the CA number, 7289133, created on 24 April 2018 (00.00.00). This is shown as *"completed"*, i.e. as having been successful. A *"provider reference"* is again shown as being the credit card number with the last four digits 0416, the *"customer source"* is identified as CW Claims, but the *"source company"* is again shown as *"FJS"*.

140. There is one entry for an MBNA credit card claim by Mr Maher in Spreadsheet 104 (Clarkewood's sales report). This spreadsheet is split into *"Exact Logical Match – Completed"* and *"No Logical Match"* tabs. The former includes those completed successful claims that Clarkewood accepts that CW Claims is entitled to payment for. The latter includes those claims that Clarkewood maintains that CW Claims has no

entitlement to payment in respect of. Mr Maher's claim appears within the latter, No Logical Match tab, at line 798. The CA number is shown as CA7350526, i.e. the same as the entry in Spreadsheet 8C referred to in paragraph 139(iii) above, and the claim is linked with the credit card number ending 0416. The amount invoiced to the customer is shown as £16,335.79. The following dates are shown, namely:

i) A *"customer creation"* date - 31 October 2017, which accords with the creation date shown in the Connex report in respect of Mr Maher;

ii) A *"case created"* date - 18 July 2018;

iii) An *"invoice date"* of 18 July 2018, oddly the same date as the case creation date; and

iv) A *"payment date"* of 20 July 2018.

141. So far as Ms Byers is concerned:

i) The Connex report identifies potential claims against a number of providers, including RBS and RBS Group companies and, so far as is relevant for present purposes, a provider described as *"Barclaycard PPI Complaints"* in respect of a credit card (See line 184707 in Spreadsheet 96 – the Connex report), as well as further entries for *"Barclays PPI Complaints"* and *"Barclaycard PPI Complaints"*, albeit without identifying the product. The creation date for all the various entries is shown as 18 May 2018 at 10:25 AM. The Connex report records Ms Byers' customer reference number as being C7180462, which, as above, would have been provided by BrightOffice, i.e. Clarkewood.

ii) There are then two relevant entries in the No Logical Match tab of Spreadsheet 8C (Clarkewood's cases report) for Ms Byers (with customer reference number C7180462):

a) At line 1267, a claim where the provider is described as *"Barclays PPI Complaints"*, with the CA number CA7311270 created on 25 May 2018 (00:00:00). This refers to the *"customer source"* as being CW Claims, and the *"company source"* as being FJS. This claim is shown as *"cancelled"*. It should be noted that Spreadsheet 110 (Clarkewood's cancelled cases report) records the reason for cancellation as being: *"Duplicate case-already been processed by us"*. The same report identifies "FJS" as the *"actual source"*.

b) At line 1268, a claim where the provider is described as *"Barclaycard PPI Complaints"*, with reference being made to a credit card and to a customer reference including a credit card number ending 6559. The CA number is shown as CA 7336454 created on 3 July 2018 (00:00:00). The *"customer source"* is again identified as CW Claims, but the *"company source"* is identified as being FJS. This claim is shown as being *"complete"*, i.e. as successful.

142. There is then one relevant entry in the *"No Logical Match – Completed"* tab of Spreadsheet 104 (Clarkewood's completed cases report), namely at line 1033, which

identifies Ms Byers with her customer number C7180462 (as per Connex), and a claim with the CA number CA7336454. This entry records a completed, i.e. successful PPI claim in respect of Ms Byers' credit card ending 6559. The following dates are recorded:

i) A *"customer creation"* date - 18 May 2018, which accords with the creation date shown in the Connex report in respect of Ms Byers.

ii) A *"case created"* date - 3 July 2018;

iii) An *"invoice date"* - 4 September 2018; and

iv) A *"payment date"* - 5 September 2018.

143. In addition to the spreadsheets that I have referred to, further documentation was referred to by Dr Young in his second report, including a document recording the completion of the claim with the CA number CA 73336454. This identified the *"source"* as *"FJS"*.

144. I do not understand it to be contended otherwise than that the position in respect of Mr Maher and Ms Byers is likely to be replicated in respect of other claims. Indeed that would be consistent with what I consider to be the false explanation provided that the above is down to other introducers and/or Clarkewood working the same data as that provided to CW Claims – see paragraph 91(ii) above and paragraphs 148 and 149 below. The question that obviously thus arises is as to why Mr Maher's MBNA credit card claim introduced by CW Claims through the Connex system on 31 October 2017 and Ms Byers' Barclaycard credit card claim introduced by CW Claims through the Connex system on 18 May 2018 were not treated as successful claims to which CW Claims was entitled to payment of a 50% share of the commission received by Clarkewood, notwithstanding that BrightOffice records show that an MBNA credit card PPI claim made by Mr Maher and a Barclaycard credit card PPI claim made by Ms Byers did succeed in respect of which commission were received by Clarkewood, and so succeeded with them both being identified in the relevant records by reference to the customer number originally provided by BrightOffice and recorded in Connex?

145. This question is particularly critical bearing in mind that in respect of each of these two claims, if the process described above had been followed, then after the introduction of Mr Maher and Ms Byers to Clarkewood through Connex to BrightOffice, they would have been sent a Pack including the form to complete, which they would then have returned to Clarkewood. Clarkewood would then have sent a SAR to MBNA and Barclaycard respectively, each of whom would have confirmed the existence of the relevant PPI policy, which ought then to have allowed the claim to proceed to a successful result.

146. It is difficult to see therefore how, even if the June Agreement was given effect to in accordance with Clarkewood's case as to the terms thereof, these were not claims in respect of which CW Claims was entitled to a 50% share of the commission received by Clarkewood given that it is difficult to see how an Additional Claim could have come into existence given the inherent difficulty in Additional Claims fitting within the process, and given that neither MBNA nor Barclaycard would have been additional lenders given that they were identified through Connex. It is therefore difficult, absent

some cogent explanation, to see how, within the BrightOffice CRM system, and the spreadsheets referred to above, FJS, i.e. Clarkewood itself, could have come to be identified as the source of the claim by any proper and legitimate entry in the BrightOffice system.

147. I note that Dr Hunton accepted in evidence that upon the return of the forms from the customers, entries would then be made manually into BrightOffice whereby what had been potential claims were recorded as actual claims, and a claim with a CA number was at that point created. Further, Dr Hunton accepted that the system would have permitted a manual entry to be made to show *"FJS"* as the source of the claim at that point.

148. The explanation provided on behalf of the Defendants was that the successful claims in question, although having the same lender or other provider and type description (e.g. MBNA, credit card) as claims introduced by CW Claims through Connex, were in fact introduced by other introducers, or Clarkewood's own diallers, and not CW Claims, or alternatively were recorded as they were as the result of innocent processing errors.

149. I reject the contention that the successful claims would have been introduced by other introducers, or indeed Clarkewood's own diallers, for the following reasons:

    i) For the reasons referred to in paragraph 91(ii) above, I consider that the suggestion that other introducers were working the same data and introducing claims in respect thereof to Clarkewood to be wholly unconvincing;

    ii) If the claims had been introduced by other introducers or indeed Clarkewood's own diallers, then it is difficult to see how or why the successful claims as recorded in Spreadsheets 8C and Spreadsheet 104 identified the claims by reference to the customer reference number associated with CW Claims and recorded in the Connex system, identified CW Claims as the *"customer source"*, and, in the case of Spreadsheet 104, referred to a customer creation date with the same date as the relevant customer was introduced through the Connex system.

150. Further, it is difficult to see that what occurred was simply an innocent processing error, particularly as no explanation has been provided as to how and in what circumstances the error might have occurred.

151. In the circumstances, I am driven to conclude that the examples of Mr Maher and Ms Byers provide strong evidence that records within BrightOffice have been deliberately manipulated to identify Clarkewood (FJS) as the source of claims that were introduced by CW Claims to Clarkewood in order justify these claims as having no logical match with CW Claims with a view to avoiding payment to CW Claims in respect thereof.

152. In a letter dated 14 September 2022, the Defendants' Solicitors set out the Defendants' case as to numbers of successful claims where CW Claims was entitled to a share of the commission by Clarkewood from successful customers. However, in the light of the evidence in respect of Mr Maher's and Ms Byers claims, and what I consider to be the false explanation that has been provided with regard to these claims being introduced by others, I consider that I can have no confidence in the figures put forward.

Evidence of Dr Young and Dr Hunton

153. Although perhaps not as helpful as it might potentially have been to CW Claims' case had Dr Young gained unrestricted access to the BrightOffice CRM system, his evidence is helpful to CW Claims, at least to the extent that in his second statement, he does identify by reference to Connex and BrightOffice entries, the anomalies that I have referred to above in respect of claims such as those of Ms Byers. I have considered whether it might be said that the fact that the best evidence that might potentially have been provided if full access to the BrightOffice system had been gained is not available is something that should count against CW Claims and lead me to conclude that there is insufficient evidence to support a case of deliberate manipulation. However, given the regrettable circumstances in which the opportunity for Dr Young to gain full access was not taken up as referred to above, and that I do not consider that this was down to a deliberate decision not to investigate, I do not consider that this should lead me to that conclusion.

154. Although Dr Hunton does provide cogent evidence as to the general integrity of the BrightOffice system helpful to the Defendants, and cogent evidence as to what the BrightOffice system shows in respect of claims, this does not really answer the point that there is strong evidence that manual entries have been made so as to show claims that ought to have been shown as attributed in BrightOffice to CW Claims as not so attributed.

155. I thus accept CW Claims' submission that there is nothing in Dr Hunton's expert evidence that, on proper analysis, undermines CW Claims' case as to Clarkewood's dishonest manipulation of its CRM system.

Evidence as to conversion rates of potential claims

156. In paragraph 21 of his report dated 3 August 2022, which is not in evidence before the Court, Mr Smith, in reliance on FCA published outcomes, had said that:

> *"Once PPI has been identified as being sold, the uphold rate for complaints made about PPI policies is 70% generally (and 85.5% for RBS claims) with the average pay out being about £2,000 (with a claim company receiving an average of between 30-40% of that amount)."*

157. The figure of 70% referred to by Mr Smith is consistent with the success rate referred to by Dr Young in paragraph 3 of his third statement, and, as referred to above, was the figure relied upon by CW Claims in formulating its Amended Particulars of Claim. However, it is to be noted that Mr Smith had referred to the 70% figure as applying once PPI had been *"identified as being sold"*. This is, properly considered, consistent with the evidence of Mr Evans that the 70% figure referred to by the FCA would apply no earlier than the stage in the process at which the results of the SAR had confirmed that PPI had been sold, and the questionnaire subsequently completed by the client had been submitted, alongside a complaint letter, to the relevant provider. Once this is understood, it is evident that the claim as advanced in the Amended Particulars of Claim had applied the relevant 70% figure (or figures close to 70%) to the wrong stage of the process.

158. In closing, Ms Tythcott relied upon figures contained within the FCA's *"Payment protection insurance complaints deadline Progress Report, October 2018"*. In paragraph 2.8 of this report, which did include the relevant period, there was reference to 8.4 million checking enquiries being made, and 3.7 million complaints being made in the 10 months identified. In paragraph 2.10 thereof it was stated that: *"we have seen that those complaints assessed for mis-selling are upheld and redressed in nearly 75% of cases, and those assessed in light of Plevin are upheld and redressed in nearly 66% of cases."* Ms Tythcott identifies that this shows a conversion rate from checking enquiries to complaints made of 44%, to which one would then apply the 70% conversion rate in respect of PPI claims, and 66% in respect of Plevin Claims.

159. Ms Tythcott submits that given these conversion rates identified by the FCA, Mr Evans explanation for why CW Claims fared so poorly compared with the industry norm with an uphold rate of just 1.9% is *"barely credible"*.

160. As I have identified above, it was Mr Evans' evidence that the industry norm conversion rate in a situation such as the present is approximately 5.6%. Mr Evans based his figure upon a comparatively small number of replies to emails sent by Mr Evans to members of the CRA (or ACC) enquiring with regard to their own success rates. Further, under cross-examination, Mr Evans explained that this was consistent with his own experience operating within a CMC *"on the coalface"*.

161. However, I consider there to be a number of difficulties with Mr Evans' figure of 5.6%, in seeking to apply the same to the circumstances of the present case, in that:

    i) Firstly, although further detail is provided in the body of his report in relation to the responses received by Mr Evans to his enquiries of the members of the CRA (or ACC), the responses themselves have not been produced, and it is difficult to assess the reliability of the same;

    ii) Secondly, Mr Evans accepted under cross-examination that there were a whole host of factors that might impact upon the success rates achieved by any particular CMC;

    iii) Further, it remains somewhat unclear to me at what stage in the claims process, exactly, the 5.6% figure is said to apply.

162. In the circumstances, I lack confidence that a conversion rate of 5.6% is a helpful figure to seek to apply in considering whether the success rate of claims referred by CW Claims to Clarkewood is consistent with the industry norm, and that there is certainly evidence in the form of the figures produced by the FCA to suggest that the success rate achieved is considerably less than that which might have been expected, which would be consistent with the manipulation alleged by CW Claimants. However, given that the evidence does demonstrate that there might be a whole host of factors that impact upon the success of an individual CMC, I am unable to reach the conclusion on the evidence before me that the figures produced by the FCA necessarily support CW Claims' case.

163. In the circumstances, I have reached the conclusion that the evidence as to industry norms neither supports the case of deliberate manipulation of the BrightOffice system by Clarkewood, nor serves to undermine it and that I should treated it as essentially neutral.

Conclusion with regard to fraudulent manipulation of the BrightOffice data

164. However, notwithstanding my observations in respect of industry norms, I am persuaded on the balance of probabilities by the evidence, namely the matters observed by Mr Catterall and Ms Bates in the period leading up to the relationship between CW Claims and Clarkewood coming to an end, taken together with the conclusions that I have reached in respect of the way in which certain particular claims were dealt with as referred to in paragraphs 135-152 above, that data within the BrightOffice system has been deliberately manipulated by Clarkewood so as to show claims that ought to have been shown as successful claims in favour of CW Claims as cancelled and/or as attributable solely to Clarkewood itself. In reaching this conclusion I take on board the point that an allegation of dishonesty requires sufficiently strong evidence to prove it, but I am satisfied that the evidence in the present case, taken as a whole, is sufficiently strong for this purpose.

Appropriate remedy in the claim against Clarkewood

165. I have found, as above, that Clarkewood acted in breach of the terms of the June Agreement in by failing to account to CW Claims in accordance with the terms thereof, the breach of contract being compounded by the deliberate manipulation by Clarkewood of BrightOffice data as referred to above.

166. It is trite that the aim of any remedy, e.g. by way of an award by way of damages, for breach of contract is to put the injured party, here CW Claims, in the position that it would have been in had the contract been performed in accordance with its terms. In the present case, had Clarkewood performed the June Agreement, it would have accounted to CW Claims for the sums properly due to it under the terms of the June Agreement as I have found them to be, i.e., with CW Claims being entitled to 50% of the commission received by Clarkewood in respect of all successful claims introduced by CW Claims, including RBS claims, Additional Claims and Plevin Claim, subject only to the deduction of the outstanding balance due from CW Claims to Clarkewood in respect of the monies loaned by the latter to the former. The alternative way of viewing the matter is that Clarkewood is liable to account to CW Claims for the sum properly due under the June Agreement calculated on this basis.

167. Although, as I have said, Ms Tythcott did, in closing submissions, advance a case as to the proper amount said to be due under the terms of the June Agreement properly applied, both Ms Tythcott on behalf of CW Claims, and Mr Berkley KC on behalf of Clarkewood, invited me, in the event of deciding that CW Claims had succeeded in its claim, to direct an account and/or inquiry, on the basis that that is the appropriate relief to grant in the circumstances.

168. I simply do not have the evidential materials upon which to finally decide the amount properly due from Clarkewood to CW Claims, and on this basis, I agree that the proper approach is to direct an account or inquiry as to damages. Particularly given the manipulation that I have found has occurred, the answer cannot be found within the various spreadsheets that have been produced taken from the BrightOffice system. On the other hand, the evidence as to industry norms in respect of conversion rates is, I consider, consistent with my observations above, insufficiently certain to provide a proper basis for assessing the amount due.

169. I shall therefore direct an account and/or inquiry as to damages, and invite submissions from the parties as to the appropriate terms thereof if this cannot be agreed. Given my findings as to manipulation of the BrightOffice data, I anticipate that any directions will need to make provision for the further interrogation and investigation of the data contained in the BrightOffice system.

Claim of procuring breach of contract brought by CW Claims against Mr Mohammed

CW Claims' case

170. As explained above, CW Claims' case as to procurement of breach of contract by Clarkewood has fairly fundamentally changed during the course of the trial. As set out in the written outline of the claim as to procurement of breach of contract provided by Ms Tythcott on 28 October 2022 referred to in paragraph 66 above, and as developed in closing submissions, CW Claims' case is essentially as follows:

i) Mr Mohammed, as agent for Clarkewood, agreed terms with CW Claims which included the right to payment for RBS claims, the right to payment for Plevin Claims, and the right to payment for Additional Claims.

ii) Mr Mohammed, on his own case and in evidence, communicated the terms of the contract between Clarkewood and CW Claims that he had agreed to Clarkewood, the latter acting by its then director, Mr Rafiq, who was reliant upon Mr Mohammed to inform him, and thus Clarkewood, as to the correct terms of the June Agreement. In doing so, Mr Mohammed wrongly and knowingly omitted to inform Clarkewood/Mr Rafiq that CW Claims was entitled to payment for RBS claims, Plevin Claims and Additional Claims, and thereby misrepresented the terms of the June Agreement to Clarkewood.

iii) In doing so, Mr Mohammed intentionally and inevitably induced and procured breaches of the June Agreement by Clarkewood by it failing to pay to CW Claims the sums that CW Claims was entitled to by way of 50% of the commission received from the successful customer (subject only to deduction by way of repayment of monies loaned) in respect of RBS claims, Plevin Claims and Additional Claims under the terms of the June Agreement.

iv) Ms Tythcott relies upon *OBG Ltd v Allan* [2008] 1 AC 1 as authority for the proposition that the tort of inducing breach of contract essentially consists of two elements, namely causation and intention. By reference to what was said by Lord Browne-Wilkinson at [192], Ms Tythcott pointed out in closing that: *"A desire to injure the claimant is not an essential ingredient of this tort"*.

v) As to the question of intention, Ms Tythcott relies upon what was said in *OBG Ltd v Allan* (supra) by Lord Hoffmann at [39], namely:

> *"To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realize that it will have this effect. Nor does it matter that you ought reasonably to have done so."*

vi) Further, as to what counts as an intention to procure a breach of contract, Ms Tythcott relies upon what was said by Lord Hoffmann at [42]:

> *" It is necessary for this purpose to distinguish between ends, means and consequences. If someone knowingly causes a breach of contract, it does not normally matter that it is the means by which he intends to achieve some further end or even that he would rather have been able to achieve that end without causing a breach. Mr Gye would very likely have preferred to be able to obtain Miss Wagner's services without her having to break her contract*[1]*. But that did not matter. Again, people seldom knowingly cause loss by unlawful means out of simple disinterested malice. It is usually to achieve the further end of securing an economic advantage to themselves."*

vii) In reliance upon the latter of these passages, Ms Tythcott submits that if someone knowingly causes a breach of contract, as she submits that Mr Mohammed has done by failing to correctly relay the contractual terms to Clarkewood, it does not normally matter that this is the means by which he intends to achieve some further end or even that he would rather have been able to achieve that end without causing a breach.

viii) Thus, it is submitted that the two elements of the tort of procuring breach of contract, namely causation and intention, are both demonstrated on the facts of the present case by what are said to be two simple propositions, namely:

a) Firstly, it is submitted that Mr Mohammed undoubtedly caused the breaches of contract by knowingly misstating the terms of the June Agreement, as concluded with Mr Catterall, to Mr Rafiq. This, in turn, so it is submitted, led Clarkewood to fail to pay what was due to CW Claims and misreporting the true position to the latter.

b) Secondly, it is submitted that the requirement of intention (in respect of this tort of procuring breach of contract) to cause the contracting party to act in breach of contract is to be contrasted with the alternative type of case where a third party pursuing his own independent activity does something in his own interests which has the foreseeable consequence that it will cause A to break his contract with B, where that is merely an unavoidable but not desired consequence. It is submitted that that this is not the case here where, as Ms Tythcott put it in closing, Mr Mohammed was *"acting solely in the affairs of [Clarkewood] and for no other purpose"*, i.e., that this is not a case of unavoidable collateral damage caused by an independent third party pursuing his own transaction. Rather, so Ms Tythcott submits, Mr Mohammed wrongly informed Clarkewood about the terms of the June Agreement knowing the outcome would result in gross underpayments to CW Claims and economic benefit to Clarkewood which, Ms Tythcott submits, was self evidently his desire or intention given his close association with Clarkewood in acting as its agent, and the success of Clarkewood, enhanced by paying as little as possible to CW Claims, being in his own

[1] This is a reference to the facts of *Lumley v Gye* (1853) 2 El. & Bl. 216 QB.

interests given the advantageous terms upon which he says that he and/or Harringtons had caused monies to be loaned to Clarkewood.

Mr Mohammed's defence

171. Mr Mohammed primary defence was that there has been no breach of contract by Clarkewood, and therefore that he could not have procured any breach of contract. However, I have now found Clarkewood to be in breach of contract in respect of RBS claims, Plevin Claims and Additional Claims, and so this defence cannot be available to Mr Mohammed.

172. Mr Mohammed does, as referred to above, make the point that the change in case as to how he is alleged to have wrongly procured Clarkewood to act in breach of contract has occurred very late in the day, during the course of the trial. Whilst no formal objection was taken to this new case being introduced so late in the day, it is Mr Mohammed's submission that it is a weak and artificial case, and that there is no more merit in the new case as to procuring breach contract that there was in the case that CW Claims has abandoned.

173. Mr Mohammed's defence to the new procurement of breach of contract claim is, in essence, as follows:

i) Mr McGarry submits that the claim is bad as a matter of law for the following reasons:

a) The tort of procuring a breach of contract cannot be committed by an agent acting within the scope of his agency. As Mr Mohammed was acting within the scope of his agency in reporting the terms that he had agreed to his principal, that must be the end of the claim.

b) As to the proposition that the tort of procuring a breach of contract cannot be committed by an agent acting within the scope of the agency, reliance is placed by Mr McGarry upon *Said v Butt* [1920] 3KB 497, where, at 505-506, McCardle J said this:

> *"But the servant who causes a breach of his master's contract with a third person seems to stand in a wholly different position. He is not a stranger. He is the alter ego of his master. His acts are in law the acts of the employer. In such a case it is the master himself, by his agent, breaking the contract he has made, and in my view an action against the agent under the Lumley v Gye (1) principle must therefore fail, just as it would fail if brought against the master himself for wrongfully procuring a breach of his own contract"*

c) Mr McGarry submits that CW Claims' own case is premised upon Mr Mohammed acting within the scope of agency as demonstrated by the reference in Ms Tythcott's closing submissions to Mr Mohammed *"acting solely in the affairs of [Clarkewood] and for no other purpose."*

ii) Further, Mr McGarry submitted that the claim is bad on the facts in any event for the following reasons:

a) The new way in which the case as to procurement of breach of contract was put arose out of the cross examination of Mr Mohammed on the hypothetical basis that if the Court were to find that he and Mr Catterall had discussed and agreed to the inclusion of RBS claims, Plevin Claims and Additional Claims when they met in the Range Rover on 11 June 2017, then the positive assertion by Mr Mohammed to Mr Rafiq that such claims were not included within the scope of the June Agreement caused the relevant breach of contract because Clarkewood acted on the basis that Mr Mohammed had accurately represented the terms of the contract.

b) Mr McGarry submitted that the difficulty with this is that it was not Mr Catterall's evidence that these matters had been discussed and agreed in the Range Rover on 11 June 2017 or at any other time. Rather, it is CW Claims' case that, given the more limited nature of the discussion and the fact that these particular claims were not expressly excluded from the scope of the June Agreement, then they were to be regarded as included within its scope, there being the further points that Additional Claims, as opposed to additional lenders or providers, are not readily identifiable as such. At best, it is submitted, there is a lack of clarity as to what was and was not discussed in the Range Rover.

c) On this basis, Mr McGarry submits that it is difficult to see how, on the present facts, Mr Mohammed can have deliberately misrepresented the terms of the agreement that he had concluded with Mr Catterall to Mr Rafiq, or deliberately omitted to mention terms agreed relating to RBS claims, Plevin Claims and Additional Claims at the time of reporting the fact of his agreement with Mr Catterall to Mr Rafiq, so as to enable the Court to conclude that he had intended to procure Clarkewood to act in breach of contract.

d) On this basis, apart from any additional causation difficulties, Mr McGarry submits that it is impossible to make out the necessary intent on the part of Mr Mohammed to procure Clarkewood to act in breach of contract given Mr Mohammed's likely state of mind at the relevant time, and his likely thinking in respect of what had been agreed with Mr Catterall.

e) Mr McGarry relies upon was said by Lord Nicholls in *OBG v Allan* (supra) at [192], where he said:

> *"The additional, necessary factor is the defendant's intent. He is liable if he intended to persuade the contracting party to breach the contract. Intentional interference presupposes knowledge of the contract. With that knowledge the defendant proceeded to induce the other contracting party to act in a way the defendant knew was a breach of that party's obligations under the contract. If the defendant deliberately turned a blind eye and proceeded regardless he may be treated as having intended the consequence he brought about. A desire to injure the claimant is not an essential ingredient of this tort."*

iii) Mr McGarry submits that knowledge of the contract must mean knowledge not only of the fact that there is a contract, but the terms of the contract.

The agency point

174. The essential ratio of *Said v Butt* (supra), cited by Mr McGarry, is that an agent acting within the scope of his authority who causes his principal to act in breach of contract will not, generally speaking, be regarded as having unlawfully procured a breach of contract between his principal and third party because he will be treated as the alter ego of his principal – see also *DC Thompson v Deakin* [1952] Ch 646 at 680-681, per Evershed MR. However, the position is likely to be different if the agent acts outside the scope of his authority – see *DC Thompson v Deakin* (supra). Likewise, where the agent acts other than bone fides towards his principal – see *Antuzis v DJ Houghton Catching Services Ltd* [2019] EWHC 843 (QB), [2019] Bus LR 1532, at [113] et seq, where Lane J considers the analysis of the decision in *Said v Butt* by the Court of Appeal of Singapore in *Athaputra v St Microelectronics Asia Pacific Pte Ltd* [2018] SGCA 17. See also Bowstead and Reynolds on the Agency, 22nd Ed., at para 9-121.

175. It is certainly correct that Ms Tythcott did, in her closing submissions talk in terms of Mr Mohammed acting solely in the affairs of Clarkewood. However, in reporting to Mr Rafiq with regard to the terms of the June Agreement, Mr Mohammed was not, as I see it, in relation to that function as distinct from agreeing the terms of the June Agreement with Mr Catterall, acting as the alter ego of Clarkewood but rather on his own account pursuant to the bilateral relationship as between Clarkewood and Mr Mohammed as principal and agent.

176. Further, if it is correct that Mr Mohammed deliberately misrepresented the true terms of the June Agreement to Mr Rafiq intending that Clarkewood should act in breach of contract, then I consider it difficult to see that Mr Mohammed could properly be regarded as acting bone fide towards Clarkewood as his principal.

177. In these circumstances, I do not consider that it can properly be said that the claim against Mr Mohammed for unlawfully procuring breach of contract on the part of Clarkewood falls to be dismissed simply on the basis that Mr Mohammed was acting as agent on behalf of Clarkewood so as to fall within the principal in *Said v Butt*.

The factual defence

178. I can see that if it were clearly established that an agent acting on behalf of his principal had negotiated particular terms on behalf of the principal with a third party, and that the agent then deliberately misrepresented the terms that had been agreed to the principal intending that the principal should act upon the terms as represented, rather than those as agreed, thereby causing the principal to act in breach of contract, a claim against the agent for unlawfully procuring a breach of contract by the principal might well lie if I am correct in rejecting Mr McGarry's agency point.

179. However, I am not satisfied that this is what has occurred on the facts of the present case, in circumstances in which I consider that the onus must fall firmly upon CW Claims to persuade me that this is what has occurred.

180. I consider it more likely than not that Mr Mohammed gave no specific thought at the time that the June Agreement was concluded as to whether RBS claims, Plevin Claims, or Additional Claims fell within the scope thereof, and that that is why they were not, as I have found, discussed at that time.

181. I also consider it more likely than not that when Mr Mohammed informed Mr Rafiq as to the terms of the June Agreement, he expressed his genuine understanding as to the effect thereof, or at least what he wishfully considered was the effect thereof, and that he has either subsequently persuaded himself that these matters would have been discussed with Mr Catterall at the time of the June Agreement was concluded, or he has given knowingly false evidence as to his recollection.

182. In these circumstances, I am not persuaded that when Mr Mohammed informed Mr Rafiq as to the terms of the June Agreement, he knowingly misrepresented the terms thereof to Mr Rafiq intending that Clarkewood should act in breach thereof. In these circumstances, I do not consider that the necessary ingredients of the cause of action, and in particular the requisite intention to procure Clarkewood to act in breach of contract, is made out.

183. I should add that I would have had a very considerable concerns about reaching a contrary conclusion given the very late stage at which the new case as to procuring breach of contract was advanced. I appreciate that I have not been invited to decline to deal with the issue on this basis, but my particular concern is that the new case was not reduced to writing until after Mr Mohammed had given evidence. Had the issue be properly pleaded out prior to Mr Mohammed giving evidence, then there is likely to have been rather greater investigation of the factual basis for the new case during the course of Mr Mohammed's evidence, if not by Counsel when cross examining Mr Mohammed, then by the Court. As Mr McGarry identified in closing, the case was put to Mr Mohammed on the basis of a hypothetical question. Given that Miss Tythcott had at that stage only briefly explained the new case orally at the close of CW Claims' case, I would have had very considerable concerns about deciding the case on the basis of his answers to that question given before the case had been reduced to writing.

184. I should add that I intend no criticism at all of the way that Ms Tythcott has dealt with the issue. She has come into the case very late in the day as a result of CW Claims' previous solicitors coming off the record as referred to above, and previously instructed Leading Counsel ceasing to be instructed. She has made an exemplary job of getting on top of the case in the limited time that she has had to do so, and was faced with the difficult task of more realistically shaping the case as to procurement of breach of contract in these circumstances.

185. In short, therefore, for the reasons that I have given, I do not consider that CW Claims has satisfied the evidential burden of persuading me on the balance of probabilities that Mr Mohammed did deliberately mislead Mr Rafiq in informing him as to the terms of the June Agreement. In these circumstances, I do not consider that the necessary ingredients of the tort of procuring a breach of contract, namely causation and intention, are made out.

Conclusion

186. In the circumstances, and the reasons set out above, I consider that the claim of unlawfully procuring breach of contract brought against Mr Mohammed should be dismissed.

Overall conclusion

187. For the reasons set out above:

i) CW Claims succeeds in its claim brought for breach of contract against Clarkewood on the basis that it has failed to give effect to the June Agreement in accordance with its terms, and its conduct has included deliberately manipulating the data within its BrightOffice CRM system so as to record a false state of account.

ii) I shall therefore direct that there be an account and inquiry as to the amount properly payable by Clarkewood to CW Claims in consequence of its breach of contract, giving appropriate credit for the monies loaned by Clarkewood to CW Claims. If the terms of the account and inquiry cannot be agreed, then I will hear from Counsel as to the terms thereof, and in respect of the appropriate directions for the conduct of the same.

iii) The claim for unlawfully procuring breach of contract brought by CW Claims against Mr Mohammed should be dismissed.