Neutral Citation Number: [2016] EWHC 486 (Comm)

Case No: 2014 Folio 595

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

Rolls Building
7 Rolls Building
Fetter Lane
London EC4A 1NL

Date: 08/03/2016

Before :

THE HONOURABLE MR JUSTICE FLAUX

- -

Between :

ALAN RAMSAY SALES & MARKETING LIMITED	**Claimant**
- and -	
TYPHOO TEA LIMITED	**Defendant**

- -
- -

Mr Oliver Segal QC (instructed by **Bankside Commercial Ltd**) for the **Claimants**
Mr Robert Thomas QC (instructed by **Fox Williams LLP**) for the **Defendants**

Hearing dates: 9th, 10th, 11th & 12th February 2016

- -

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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THE HONOURABLE MR JUSTICE FLAUX

Introduction

1. The claimant is a commercial agent run and largely owned by Mr Alan Ramsay, who worked between 1978 and 2001 for what was then Cadbury Typhoo/Premier Brands, before setting up his own company. For the last fifteen years, the claimant has operated in the food and drink sector, predominantly in the cash and carry and wholesale areas of that sector. The claimant acts for a number of principals, with non-competing products. From about 2006 until May 2013, these included the defendant, the well-known producer of Typhoo and other teas.

2. The present dispute concerns the circumstances in which the agency agreement between the parties came to be terminated on 11 May 2013. The claimant brings claims for damages for breach of contract and under the Commercial Agents (Council Directive) Regulations 1993, as amended ("the Regulations"), for the termination of the agency on insufficient notice and for compensation under Article 17 of the Regulations.

3. The claimant's case is that the relevant agency agreement provided for 12 months' notice of termination but the defendant gave notice of termination with effect from 11 February 2013, to terminate on 11 May 2013, by two emails dated 18 and 26 March 2013 and was thereby in repudiatory breach of contract, which repudiation the claimant accepted as bringing the agency agreement to an end by its email of 28 March 2013. However, without prejudice to that termination, the claimant offered to continue to work under the agreement for the remainder of the stipulated notice period until 11 May 2013 if the defendant preferred. The claimant contends that the defendant accepted that offer by its conduct and/or affirmed the agency agreement and that the agency agreement continued until 11 May 2013, when it terminated.

4. The defendant's case is that the two emails of 18 and 26 March 2013, both marked "Without Prejudice", were part of a series of without prejudice negotiations to settle a dispute as to termination of the agency and that, as such, they cannot be relied upon by the claimant as repudiatory and are inadmissible in evidence, from which it follows that the claimant's email of 28 March 2013 purporting to rely upon those emails as repudiatory was itself a repudiation of the agency agreement. The defendant contends that it accepted that repudiation as terminating the agency agreement by its conduct, although it is fair to say at the outset that, despite the ingenuity of Mr Robert Thomas QC for the defendant, it remained unclear at the end of the trial exactly how and when the defendant had accepted the claimant's repudiatory breach as bringing the agreement to an end. In those circumstances, the defendant contends that it is the claimant which brought the agreement to an end, so that the claimant was entitled neither to damages nor to compensation under the Regulations. The defendant also contends that to the extent that the claimant performed work between 28 March 2013 and 11 May 2013, this was not pursuant to the original agency agreement, but pursuant to a fresh ad hoc agreement.

5. In response to that case, the claimant contends that, although marked "Without Prejudice", the two emails were not on a proper analysis protected by without prejudice privilege because there was no extant dispute and they were not part of any attempt to settle a dispute but a statement of intention in mandatory terms. If the claimant is wrong about that, it submits that its offer to continue working until 11 May 2013 was an offer made under the existing agency agreement, not some new ad

hoc agreement, which was accepted by the defendant, thereby affirming the original contract so that the claimant's entitlement to claim damages and/or compensation in contract and under the Regulations was not lost.

6. The defendant originally had a counterclaim for damages for alleged poor performance of the agency agreement by the claimant. That counterclaim was discontinued by the defendant on 14 January 2016. Mr Thomas QC informed me that the counterclaim was discontinued because the claimant was balance sheet insolvent and not worth pursuing as a consequence.

7. It can be seen immediately that the principal issue in dispute which the court has to determine is whether the emails of 18 and 26 March 2013 were protected by "without prejudice" privilege and thus inadmissible. If they were not, then the question remains whether those emails constituted a repudiatory breach of the agency agreement, which the claimant was entitled to accept and did accept by its email of 28 March 2013.

8. If the emails were without prejudice and inadmissible, so that the claimant's email of 28 March 2013 was repudiatory, the next issue is whether the defendant accepted that repudiatory breach as bringing the agency agreement to an end. It is not suggested that there was any express acceptance, so this issue turns on whether there was an acceptance by conduct. The related issues are (i) whether the work which the claimant carried out after 28 March 2013 was pursuant to the original agency agreement or to a new ad hoc agreement and (ii) whether the defendant affirmed the original agency agreement, notwithstanding the claimant's repudiatory breach.

9. In addition to these liability issues, there are hard fought issues of quantum of any loss, in relation to which both parties called expert forensic accounting evidence. The defendant's primary case is that the claimant's agency for the defendant was loss-making so that the claimant is not entitled to recover anything by way of damages or compensation. Alternatively, the defendant contends that the profitability was marginal, so that any damages or compensation should be far less than the claimant's revised claim based on the evidence of its expert.

10. I propose, after setting out the relevant Articles of the Regulations with which the case is concerned, to address first the law on without prejudice communications and negotiations, since that inevitably informs the analysis of the factual evidence.

The Regulations

11. The relevant provisions of the Regulations are as follows:

> ***Minimum periods of notice for termination of agency contract***
>
> *15(1) Where an agency contract is concluded for an indefinite period either party may terminate it by notice.*
>
> *(2) The period of notice shall be—*
>
> *(a) 1 month for the first year of the contract;*
>
> *(b) 2 months for the second year commenced;*

(c) 3 months for the third year commenced and for the subsequent years;

and the parties may not agree on any shorter periods of notice.

(3) If the parties agree on longer periods than those laid down in paragraph (2) above, the period of notice to be observed by the principal must not be shorter than that to be observed by the commercial agent.

(4) Unless otherwise agreed by the parties, the end of the period of notice must coincide with the end of a calendar month.

(5) The provisions of this regulation shall also apply to an agency contract for a fixed period where it is converted under regulation 14 above into an agency contract for an indefinite period subject to the proviso that the earlier fixed period must be taken into account in the calculation of the period of notice.

Entitlement of commercial agent to indemnity or compensation on termination of agency contract

17. (1) This regulation has effect for the purpose of ensuring that the commercial agent is, after termination of the agency contract, indemnified in accordance with paragraphs (3) to (5) below or compensated for damage in accordance with paragraphs (6) and (7) below.

(2) Except where the agency contact otherwise provides, the commercial agent shall be entitled to be compensated rather than indemnified.

(3) Subject to paragraph (9) and to regulation 18 below, the commercial agent shall be entitled to an indemnity if and to the extent that—

(a) he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers; and

(b) the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers.

(4) The amount of the indemnity shall not exceed a figure equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration over the preceding five years and if the contract goes back less than five

years the indemnity shall be calculated on the average for the period in question.

(5) The grant of an indemnity as mentioned above shall not prevent the commercial agent from seeking damages.

(6) Subject to paragraph (9) and to regulation 18 below, the commercial agent shall be entitled to compensation for the damage he suffers as a result of the termination of his relations with his principal.

(7) For the purpose of these Regulations such damage shall be deemed to occur particularly when the termination takes place in either or both of the following circumstances, namely circumstances which—

(a) deprive the commercial agent of the commission which proper performance of the agency contract would have procured for him whilst providing his principal with substantial benefits linked to the activities of the commercial agent; or

(b) have not enabled the commercial agent to amortize the costs and expenses that he had incurred in the performance of the agency contract on the advice of his principal.

(8) Entitlement to the indemnity or compensation for damage as provided for under paragraphs (2) to (7) above shall also arise where the agency contract is terminated as a result of the death of the commercial agent.

(9) The commercial agent shall lose his entitlement to the indemnity or compensation for damage in the instances provided for in paragraphs (2) to (8) above if within one year following termination of his agency contract he has not notified his principal that he intends pursuing his entitlement.

Grounds for excluding payment of indemnity or compensation under regulation 17

18. The compensation referred to in regulation 17 above shall not be payable to the commercial agent where—

(a) the principal has terminated the agency contract because of default attributable to the commercial agent which would justify immediate termination of the agency contract pursuant to regulation 16 above; or

(b) the commercial agent has himself terminated the agency contract, unless such termination is justified—

(i) by circumstances attributable to the principal, or

> *(ii) on grounds of the age, infirmity or illness of the commercial agent in consequence of which he cannot reasonably be required to continue his activities; or*
>
> *(c) the commercial agent, with the agreement of his principal, assigns his rights and duties under the agency contract to another person.*
>
> ***Prohibition on derogation from regulations 17 and 18***
>
> *19. The parties may not derogate from regulations 17 and 18 to the detriment of the commercial agent before the agency contract expires.*

Without prejudice privilege

12. Both counsel cited a number of authorities during the course of their written and oral submissions, although by the end of the trial, the legal principles applicable in determining the scope of without prejudice privilege were essentially common ground. The effect of the authorities is distilled in [24.09] of *Phipson on Evidence* 18th edition:

> "Written or oral communications which are made for the purpose of a genuine attempt to compromise a dispute between the parties may generally not be admitted in evidence. The policy behind the rule has been described as follows:
>
> > "It is that parties should be encouraged as far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much a failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should … be encouraged fully and frankly to put their cards on the table … the public policy justification, in truth, essentially rests with the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the Court of trial as admissions on the question of liability."
>
> The juridical basis of the rule is part contract and part public policy. In part it depends upon an implied agreement by the parties to the effect that what is said in settlement negotiations will not subsequently be relied upon in court. But it cannot be wholly explained on this basis. The first letter passing between the parties marked "without prejudice" will be protected by without prejudice privilege even though it was unsolicited and thus there cannot be said to be any implied agreement between the parties. And the three party situation, where without prejudice letters written between A and B may be inadmissible

> in proceedings between A and C, has nothing to do with contract. It has been said that it cannot be explained purely on public policy either, as there is no public policy basis in refusing to let the judge see without prejudice material on issues of costs.
>
> Recent authorities have emphasised that the rule is concerned with excluding evidence of admissions against interest in relation to issues that will be before the trial judge. It follows that a number of exceptions to the rule have developed in circumstances where admission of the without prejudice correspondence in evidence does not infringe this principle."

13. The citation is from the *locus classicus* in this area, the judgment of Oliver LJ (as he then was) in *Cutts v Head* [1984] Ch 290 at 306. The editors of *Phipson* go on, at [24-11], to emphasise that there must be a bona fide attempt to resolve a dispute, or, as other authorities put it, there must be a dispute in existence between the parties for correspondence marked "without prejudice" to be protected by the privilege. For example, as Lord Mance put the principle in *Bradford & Bingley v Rashid* [2006] UKHL 37; [2006] 1 WLR 2066 at [81]: "The existence of a dispute and of an attempt to compromise it are at the heart of the rule whereby evidence may be excluded (or disclosure of material precluded) as "without prejudice"."

14. Lord Mance goes on at [84]-[87] of his speech to emphasise that the express use of the words "without prejudice" will not without more make a communication privileged, because the words may be used in other senses than pursuant to an intention to settle an existing dispute:

> "84…I wish to say a few words on the situation where (unlike in this case) words such as "without prejudice" are expressly used. If they are used in the context of an attempt to compromise a dispute, then the "without prejudice" rule, which I have already described, applies. Indeed, in an article of great learning and continuing value, 'Without Prejudice' Communications — their admissibility and effect (1974) U.B.C. Law Review 85 (on which Robert Walker LJ also drew in *Unilever v Proctor & Gamble* [2000] 1 WLR 2436, Mr David Vaver (now Reuters Professor of Intellectual Property Law at Oxford) concludes at page 90 that the express use of the term "without prejudice" was developed by the legal profession by about 1830 as a result of the distinction drawn by previous court decisions (to two of which I have referred) between admissions of liability and offers of compromise. Even where there is a dispute, not every offer of compromise is necessarily intended to be without prejudice, and the express use of the phrase not only puts the matter beyond doubt in a situation where there is an offer to compromise an existing dispute, but is also capable of throwing some light on the answer to the objective question whether such a situation existed. But its use is by no means conclusive. Neither a dispute nor a concession or offer to compromise can be conjured out of mere words.

85 Mr Vaver submits at page 134, and I agree with him, that the "without prejudice" rule of admissibility should be "strictly confined" to "the area of its legitimate utility … in the facilitation of disputes". In that area, concerning admissibility in court or disclosure, the court is, as Lord Griffiths stated in *Rush & Tompkins*, giving effect to a rule of public policy. But there are, as Mr Vaver recognises, other contexts in which the phrase "without prejudice" may be deployed by one or more parties, in a way which can have some effect on their legal relations (rather than on admissibility or disclosure). When Mr Guppy in Dickens' Bleak House (chapter IX) insisted after the event that his unsuccessful move "to file a declaration — to make an offer" of marriage to Miss Esther Summerson had been "without prejudice", he was not suggesting that the offer had been made to compromise some dispute between them, merely that he did not want to be embarrassed by later reference to it, and Miss Summerson was fully entitled therefore to qualify her response: "I will never mention it," said she, "unless you should give me future occasion to do so."

86 The use and potential significance of the phrase "without prejudice" in contexts where there is no dispute or attempt to compromise is considered in Mr Vaver's article at pages 132 and 164–169. At page 132, he identifies two relevant questions, the one what effect (if any) may have been intended, the other whether the court ought to give effect to that intention. At pages 164–169, he points out that the intention is likely to have been to deprive a communication or act of all or a particular legal consequence which it would otherwise have or to reserve or preserve a course of action which might otherwise be prejudiced. He cites as examples *Oliver v. Nautilus Steam Shipping Co. Ltd*. [1903] 2 KB 639 and *Unsworth v. Elder Dempster Lines Ltd.* [1940 1 KB 658, and, in the context of limitation, *Cory v. Bretton* (1830) 4 Car. & P. 462; 172 ER 783, where the provision in a letter that it was "not to be used in prejudice of my rights …" was read as meaning that an apparent acknowledgement of indebtedness in the same letter was "clearly a conditional statement," as well as *In re River Steamer Company* (1871) LR 6 Ch.App. 822, 831–2, where the phrase "without prejudice" meant that the debtor could not be regarded as having entered into the new contract — an acknowledgement being at the date of these last two cases only capable of restarting the limitation period if read as implying a fresh promise to meet the old debt. In any such case, it is a matter of construction and substantive law (rather than admissibility or privilege) whether effect will be given to the intention. But, as Mr Vaver points out, the phrase may also be used unthinkingly or superfluously, in which case it falls simply to be ignored: cf also *Nicholson v. Southern Star Fire Insurance Co. Ltd.* (1927) 28 SR (NSW) 124, *Re Brisbane City*

> *Council and White* (1981) 50 LGRA 225, where the phrase was "futile" in the context of an originating process, and the *Unilever* case, where Robert Walker LJ at page 2448A referred to "the uncontroversial point that 'without prejudice' is not a label which can be used indiscriminately so as to immunise an act from its normal legal consequences, where there is no genuine dispute or negotiation". In his Treatise on the Anglo-American System of Evidence (2nd Ed. 1923) paragraph 1061, Wigmore echoed Dickens in noting the confusion resulting from the unthinking use of the phrase as a "shibboleth", and the Law Reform Committee made the same point with judicious understatement in its sixteenth report on Privilege in Civil Proceedings (Cmnd. 3472: December 1967) paragraph 23.
>
> 87 In the light of this analysis, it is wrong to assimilate the express use or effect of the phrase "without prejudice" in a context where there is no dispute or attempt to compromise a dispute with the significance of the "without prejudice" rule which applies, or of the "privilege" which exists, where there is an attempt to compromise a dispute."

15. *Oliver* and *Unsworth* were examples of cases from the field of workers' compensation where the employee had suffered injury and accepted a payment from the employer "without prejudice", meaning without prejudice to his right to claim damages at common law. In each case the employee was held entitled to pursue an action against the employer for damages. It seems to me that to the examples Lord Mance gives can be added the use of the words "without prejudice" where negotiations between the parties are subject to contract, in other words where the parties wish to negotiate a contract but in doing so, do not wish to become contractually bound during the negotiations unless and until they have reached a satisfactory agreement. Unless the agreement they are trying to reach is in settlement of an existing dispute, the use of the words "without prejudice" in that sense would not attract the privilege, although of course, the pre-contractual negotiations may be inadmissible in evidence for other reasons, principally the rule that evidence of subjective intentions is inadmissible in construction of a contract. Mr Oliver Segal QC on behalf of the claimant submits that the words "without prejudice" were used in that sense of "subject to contract" in the present case and that, at least until the emails of 18 and 26 March 2013 created one, there was no existing dispute between the parties.

16. Mr Segal QC placed particular reliance in this context upon the decision of the Court of Appeal in *Avonwick Holdings Limited v Webinvest Limited* [2014] EWCA Civ 1436. In that case, money was lent by the claimant to the defendant with the intention that it be lent to a third party. The loan was guaranteed by Mr Shlosberg, the individual behind the defendant. After the defendant failed to pay principal and accrued interest in May 2012, there were discussions into 2013 and 2014 about rescheduling the loan, but no agreement was reached. On 3 April 2014, the claimant served demands under the loan agreement and guarantee, followed by statutory demands.

17. At the same time as those demands, the claimant's accountants sent the defendant an email enclosing draft heads of terms providing for security, repayment of an amount

by a certain date and an extension of the maturity date. Both the email and the draft heads of terms were marked "without prejudice & subject to contract". Those terms were drafted by the claimant's solicitors. The relevant correspondence between the parties thereafter continued to be marked "without prejudice & subject to contract". On 7 April 2014, the defendant's solicitors wrote back saying that their clients were: *"most grateful for your understanding and readiness to consider an amicable restructuring of the position"*. The claimant's solicitors replied on 10 April 2014, saying if the defendant and Mr Shlosberg wished to avoid being wound up and made bankrupt respectively, they should engage with the claimant in determining whether a restructuring as outlined in the draft heads of terms could be achieved. The defendant responded saying it desired to achieve a settlement agreement as soon as possible and since the overall structure of any settlement was unlikely to differ from the claimant's proposals, invited the claimant's solicitors to draft documentation. There was other correspondence between the principals not marked without prejudice, but it was common ground it formed part of the same chain of correspondence. Then, on 30 May 2014, Mr Shlosberg contended for the first time that the original transaction was subject to a collateral oral agreement that Avonwick would only be entitled to be repaid in the event that Webinvest was repaid by the third party.

18. David Richards J at first instance and the Court of Appeal concluded on the facts that at the time of the correspondence there was no dispute about the defendant's or Mr Shlosberg's liability. The dispute only arose when the collateral agreement was raised for the first time on 30 May 2014. The question then arose whether, as the claimant contended, it was a necessary condition for without prejudice privilege to attach to correspondence expressly marked "without prejudice" that there must be a dispute or issue in existence which the parties are trying to resolve or whether, as the defendant contended, the parties may by agreement extend without prejudice privilege even if there is no extant dispute. The judge upheld the claimants' contention.

19. In the Court of Appeal, Lewison LJ (with whom Sharp and Burnett LJJ agreed) reviewed all the various authorities and concluded at [17]-[18] of his judgment:

> "17. My conclusions are these. There are two bases for the operation of the without prejudice rule. The first rests on public policy and that policy is to encourage people to settle their differences. However, in order for that head of public policy to be engaged there must be a dispute. The concept of dispute is given a wide scope so that an opening shot of negotiations may fall within the policy even though the other party has not rejected the offer. That is the explanation for *Standrin*. In order to decide whether this head of public policy is engaged, the court must determine on an objective basis whether there was in fact a dispute or issue to be resolved. If there was not then this head of public policy is not engaged. On facts of this case, in my judgment the judge was right to say there was no dispute at the time the communications took place. The other basis for the rule is contractual, that is by contract the parties may extend the usual ambit of the without prejudice rule. In *Cutts v Head* the dispute was over so the justification was purely in terms of contract. In *Unilever* the possibility of extending the scope of

> the rules [was] expressly envisaged and the decision in *Unilever* is treated as an authoritative exposition.
>
> 18. Mr Berry submitted that although the parties could by agreement extend the ambit of a without prejudice rule, they could only do so in circumstances in which there was a dispute either existing or imminent. If that is the case, then it seems to me to be hard to see what it adds to the public policy justification. Freedom of contract is a basic principle of English law. If A and B agree for valuable consideration that their communications will not be used in civil proceedings in court, I find it difficult to see why, as a matter of principle, the court should not uphold their agreement. Confidentiality clauses are the stuff of commercial life. Moreover, it is often open to two parties by agreement to immunise their acts from what would otherwise be their legal consequences. A non-reliance clause in a contract would immunise what would otherwise be a misrepresentation and an entire agreement clause would immunise what would otherwise be a collateral warranty. This must however be done by agreement. One person cannot unilaterally impose a rule on another. That, in my view, is the better explanation for cases such as *Daintrey*.

20. Lewison LJ then considered whether the second basis for rule was engaged, namely whether there was a contract to the effect that the communications would not be used in proceedings. In concluding that there was no such contract, he said this, at [19]:

> "The question boils down to this; was there a contract in this case? It is not a good start that the communications are headed, "Subject to contract" which is generally taken to mean that no legal consequences are to flow from the communications…Mr Berry has pointed to many usages of the phrase, "Without prejudice" apart from the settlement of extant or contemplated disputes. One such usage is that the user of a statement does not mean to give up any right that he may have. In my judgment, that is the way in which the phrase is used in this case."

21. Mr Thomas QC has not suggested that in the present case there was a contract between the parties extending the "without prejudice" rule, but has nailed his colours firmly to the mast of saying that there was an extant dispute, in relation to which the parties were negotiating, and that the emails of 18 and 26 March 2013 were part of those negotiations. It follows that *Avonwick* is of limited assistance, since the legal principles it applies are not in issue. It is, of course, as Mr Segal QC submits, an example of a case where the court concluded that there was no extant dispute and "without prejudice" was being used in the sense of without legal commitment (i.e. subject to contract) or without giving up any legal rights. However, the question whether there is an extant dispute in any given case and whether "without prejudice" has the same meaning as in *Avonwick* is a question of fact.

22. In determining the scope of what amounts to a "dispute" for the purpose of the application of the privilege, a crucial consideration is whether, in the course of

negotiations, the parties contemplated or might reasonably have contemplated litigation if they did not agree: see per Auld LJ in *Barnetson v Framlington Group Limited* [2007] EWCA Civ 502; [2007] 1 WLR 2443. That judgment contains a helpful analysis of what would constitute a "dispute" for the without prejudice privilege to apply:

> "29. A good instance of the working of the rule can be seen in the "opening shot" cases, in which an initial proposal in negotiations before commencement of proceedings may be protected by the privilege. Were it not so, a party to a dispute could never safely make, by way of negotiation, an initial offer in response to a claim: see *South Shropshire District Council v Amos* [1986] 1 WLR 1271 , a Lands Tribunal case, which concerned "without prejudice" negotiations in a dispute that arose long before reference to the tribunal as to the amount of compensation payable in respect of a discontinuance of business use order made under section 51(1) of the Town and Country Planning Act 1971 . Parker LJ, giving the judgment of the court upheld, at pp 1276d – 1278a, the ruling of Gatehouse J that "without prejudice" negotiations could begin with an "opening shot", that is, an initial offer from one party in dispute with another setting out his proposal for settlement of his or the other's claim giving rise to the dispute, and could continue with the ensuing exchanges, all before the commencement of proceedings.
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> …
>
> 32 The question remains how proximate, if at all, must unsuccessful negotiations in a dispute leading to litigation be to the start of that litigation, to attract the "without prejudice" rule. Must there be, as Mr Oldham contended, an express or implied threat of litigation underlying the negotiations, or, failing any such threat, some proximity in time to the litigation eventually begun? In answering that question, the courts are logically driven back, as Mr Nicholls submitted, to the public policy interest behind the rule, of encouraging parties to settle their disputes without "resort" to litigation or without continuing it until the needless and bitter end. If the privilege were confined to settlement communications once litigation had been threatened or shortly before it is begun, there would be an incentive on both sides to escalate their dispute with threats of litigation and/or to move quickly to it, before they could safely start talking sensibly to each other. That would be a slippery slope to mutual hardening of positions and commencement of litigation-hardly the encouragement to settle their disputes without resort to litigation that Oliver LJ had in mind in *Cutts v Head* [1984] Ch 290 , 306.
>
> …

> 34 However, the claim to privilege cannot, in my view, turn on purely temporal considerations. The critical feature of proximity for this purpose, it seems to me, is one of the subject matter of the dispute rather than how long before the threat, or start, of litigation it was aired in negotiations between the parties. Would they have respectively lowered their guards at that time and in the circumstances if they had not thought or hoped or contemplated that, by doing so, they could avoid the need to go to court over the very same dispute? On that approach, which I would commend, the crucial consideration would be whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree. Confining the operation of the rule, as the judge did, to negotiations of a dispute in the course of, or after threat of litigation on it, or by reference to some time limit set close before litigation, does not, with respect, fully serve the public policy interest underlying it of discouraging recourse to litigation and encouraging genuine attempts to settle whenever made.
>
> 35 Most of the judicial observations on the rule and the public policy underlying it have been made in cases where the communications in question were made after litigation had been commenced. However, as I have mentioned, in *Bradford & Bingley plc v Rashid* [2006] 1 WLR 2066 they antedated the start of proceedings by about two years; and in *South Shropshire District Council v Amos* [1986] 1 WLR 1271 the Court of Appeal was not deterred from upholding Gatehouse J's acceptance of negotiations as privileged long before referral of the matter to the Lands Tribunal."

23. The questions of fact, whether there was an extant dispute and whether a particular communication was indeed an attempt to resolve that dispute, are to be determined objectively (the subjective intention of the party in question being irrelevant) having regard to all the circumstances: "In my view, in so far as such question turns on the meaning of any particular passage in the September letter, it is to be answered by reference to what a reasonable person, in the position of the recipient of the letter, with its knowledge of all the relevant circumstances as at the date the letter was written, would have understood the writer of the passage to have intended, when read in the context of the letter as a whole" (per Lord Neuberger MR in *Best Buy Co Worldwide Sales Corporation* [2011] EWCA Civ 618; [2011] BusLR 1166 at [18]. It follows that, although the court heard evidence from both Mr Ramsay himself and Mr Keith Packer, the Chief Executive Officer of the defendant, who were the people principally engaged in the relevant discussions, that evidence was of limited assistance in determining whether the negotiations were protected by without prejudice privilege.

24. In opening his case Mr Segal QC maintained that, even if the other correspondence was protected by "without prejudice" privilege, the two emails of 18 and 26 March 2013 were not, because they could not be construed as part of a chain of

correspondence which was seeking to resolve the dispute, rather they were statements of intention in mandatory terms. That point was not pressed in closing, which is just as well, since it seems to me that it runs counter to the principle recognised by Robert Walker LJ in *Unilever v Proctor & Gamble* [2000] 1 WLR 2436, in two passages at 2443H-2444C and 2448H-2449B respectively, that it is not appropriate to fillet out, from a continuum of without prejudice negotiations, particular pieces of correspondence as constituting identifiable admissions which would be admissible in evidence:

> "Without in any way underestimating the need for proper analysis of the rule, I have no doubt that busy practitioners are acting prudently in making the general working assumption that the rule, if not "sacred" (Hoghton v. Hoghton (1852) 15 Beav. 278, 321), has a wide and compelling effect. That is particularly true where the "without prejudice" communications in question consist not of letters or other written documents but of wide-ranging unscripted discussions during a meeting which may have lasted several hours.
>
> At a meeting of that sort the discussions between the parties' representatives may contain a mixture of admissions and half-admissions against a party's interest, more or less confident assertions of a party's case, offers, counter-offers, and statements (which might be characterised as threats or as thinking aloud) about future plans and possibilities. As Simon Brown L.J. put it in the course of argument, a threat of infringement proceedings may be deeply embedded in negotiations for a compromise solution. Partial disclosure of the minutes of such a meeting may be, as Leggatt L.J. put it in *Muller v. Linsley & Mortimer* [1996] P.N.L.R. 74 , 81, a concept as implausible as the curate's egg (which was good in parts)…
>
> …to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties, in the words of Lord Griffiths in the *Rush & Tompkins* case [1989] A.C. 1280, 1300: "to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts." Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders."

25. Those passages have been followed and approved including by the House of Lords in *Ofulue v Bossert* [2009] UKHL 16; [2009] 1 AC 990, per Lord Hope of Craighead at [7]; Lord Rodger of Earlsferry at [43] and Lord Neuberger at [89].

26. Because the without prejudice rule as it would apply in the present case is based on public policy, not on contract, there is some suggestion in at least one of the cases, that this public policy might yield to other more important considerations of public policy which might require the admissibility of particular correspondence in evidence. The decision of the Court of Appeal in *Best Buy Co Worldwide Sales Corporation* concerned a claim pursuant to section 21 of the Trade Marks Act 1994, which affords a right of action to a person aggrieved by groundless threats of proceedings for infringement of a registered trade mark. The issue was whether a letter from the defendant's solicitors constituted such a threat, but was protected by the without prejudice rule because it contained settlement proposals, as the judge at first instance had held.

27. The Court of Appeal held that the letter was not a settlement proposal and hence not protected by the without prejudice rule (see [41] of the judgment of Lord Neuberger MR). However, Lord Neuberger went on to say at [42] that, even if he had thought that the without prejudice rule was brought into play, he was of the provisional view that the letter could still have been relied upon to support the claimant's threat claim. He gave his reasons for that conclusion at [43]-[45]:

> "43 It is plain that, even a letter which is bona fide marked without prejudice can be relied on in court in some circumstances. Thus in *In re Daintrey; Ex p Holt* [1893] 2 QB 116 it was held that an undoubtedly without prejudice letter could be relied on in court to establish an act of bankruptcy on the part of the writer. Albeit that Vaughan Williams J's reasoning appears to me to amount to little more than assertion, the decision itself has been cited with express or implied approval in the *Unilever* [2000] 1 WLR 2436 and *Ofulue* [2009] AC 990 cases.
>
> 44 It may be that the decision in *In re Daintrey* [1893] 2 QB 116 rests on the notion that the without prejudice rule can only be asserted to prevent a communication being relied on as an admission or a concession, as I think Hoffmann LJ in the *Muller* case [1996] PNLR 74, 79 would support. However, as mentioned, that is a difficult and controversial area, in which it is unnecessary to tread further in this judgment. In my view, at least one reason *In re Daintrey* was rightly decided is that, given that the without prejudice rule is based on public policy, it has to yield on occasions to another rule or principle which may apply.
>
> 45 In *In re Daintrey* [1893] 2 QB 116 the without prejudice rule could not prevail over the statutory bankruptcy principles. In this case, by the same token, I incline to the view that the rule would not have prevailed over the clear statutory policy of the threats jurisdiction contained in section 21. If, by writing a genuinely without prejudice letter, one could with impunity make threats which otherwise would clearly fall within the ambit of section 21, it would render that section close to being a dead letter, except for the poorly advised."

28. Of course, the view expressed by the Master of the Rolls is *obiter* and provisional and in *Avonwick,* Lewison LJ considered that the better explanation for cases such as *Re Daintrey* [1893] 2 QB 116, was that they were instances of one party impermissibly seeking to impose the without prejudice rule on the other. It is certainly right that one of the grounds of the decision of the Divisional Court was to that effect, at 120:

> "Moreover, we think that the rule has no application to a document which, in its nature, may prejudice the person to whom it is addressed. It may be that the words "without prejudice" are intended to mean without prejudice to the writer if the offer is rejected; but, in our opinion, the writer is not entitled to make this reservation in respect of a document which, from its character, may prejudice the person to whom it is addressed if he should reject the offer, and for this reason also we think the judge is entitled to look at the document to determine its character."

29. However, it is clear that the other ground upon which the Divisional Court went on to decide the case was that, even though there may have been a dispute and the letter in question may have been an offer of compromise, it was a clear notice of an act of bankruptcy and hence not capable of attracting the without prejudice rule:

> "There was a dispute, for there was an action pending between the parties. There was an offer, i.e., the offer of a composition, which was intended to apply, amongst other things, to the petitioner's claim in the action; but the document, the letter of the debtor to the petitioner, was, in our opinion, more than this: it was a clear act of bankruptcy, and it was notice to the petitioner of such act of bankruptcy, and it seems to us that a notice of an act of bankruptcy cannot be given "without prejudice" because the document in question was one which, from its character, might prejudicially affect the recipient whether or not he accepted the terms offered thereby. For the reasons already given we think that such a document does not fall within the rule which excludes offers for peace written without prejudice, and ought to have been admitted in evidence. If admitted, it conclusively proves the act of bankruptcy."

30. Thus, it seems to me that both *Re Daintrey* and *Best Buy* recognise that there may be circumstances in which other public policy considerations may override the public policy protecting without prejudice communications from being deployed in evidence in proceedings. However, the question remains whether it can be said that there is a public policy against parties engaging in repudiatory or renunciatory conduct being able to avoid the normal consequences of such conduct (that the innocent party is entitled to treat the relevant contract as at an end), because the repudiation or renunciation occurs in without prejudice communications.

31. There is no authority which the industry of either counsel or the court has been able to find which is directly in point. During the course of the trial, I raised with the parties whether there was any assistance to be obtained from the judgment of Christopher

Clarke J (as he then was) in *MJ & SC Collins v H Padfield & Sons* [2005] EWHC 351 (QB). The parties helpfully provided a copy of the transcript of the judgment, but having read it carefully, I consider that for present purposes it provides no more than a straw in the wind. It was a case where there was a dispute between the parties as to whether (as the claimant alleged) a binding seven year contract was in place and, during the course of negotiations for a compromise agreement, the claimant threatened that unless the defendant agreed the compromise agreement within a tight deadline, and then accepted that the seven year contract was in place, the claimant would not regard itself as bound by the obligations that undoubtedly had been assumed as to provision of machinery and storage. The learned judge held at [52] that that threat was a *"classic renunciation by [the claimant] of [its] obligations"*. However, although it is a case which demonstrates that, even during negotiations for a compromise a party may commit renunciatory conduct, it was not a case where the relevant negotiations were on a "without prejudice" basis, or at least not such as to attract the without prejudice privilege and there is no suggestion in the judgment that the learned judge felt in any sense constrained by the existence of the privilege from reaching the conclusion he did. Therefore, on reflection, that case is of no assistance.

32. In the absence of authority, the court has to consider the point as a matter of principle. I have concluded that, on the assumption that the two emails of 18 and 26 March 2013 formed part of a chain of without prejudice privileged correspondence seeking to resolve an extant dispute, I would not be prepared to conclude that the claimant could rely upon the emails in evidence, essentially for two reasons. First, I rather doubt whether there is any public policy requiring repudiatory conduct to be opened up when it occurs as part of a without prejudice sequence of communications, which overrides the public policy that such communications should be privileged. It seems to me that this is exactly the sort of statement which might be characterised as a threat which is part of the continuum of without prejudice negotiations which Robert Walker LJ considered in *Unilever* should not be filleted out and made admissible, but should remain protected by the privilege.

33. The second reason is that it seems to me that if the emails were part of a continuum of without prejudice discussions, it would simply not be possible to construe them as sufficiently unequivocal to constitute renunciation or repudiation of the agency agreement. I return to this point below in my consideration of the facts, to which I now turn.

Chronology

34. The claimant first acted as a commercial agent, within the meaning of the Regulations, on behalf of the defendant in 2006, at which time the claimant had a monthly retainer plus commission of 2.25% on sales over £12 million. After the claimant failed to exceed the commission threshold, a higher monthly retainer was agreed, with the entitlement to commission removed, in 2008. The retainer reduced in 2009 to reflect reduction in staffing levels at the claimant and the fact that responsibility for various accounts was assumed by the defendant. In late 2010, the defendant reviewed the structure of the business and considered an increased role for the claimant covering the whole of the "Out of Home" or "OOH" sector, covering cash & carry, wholesale and foodservice convenience. The claimant took over this new role in early 2011.

35. There were then negotiations for a new agency agreement. Although the agreement was never finally signed, by the conclusion of the trial, it was common ground that the relevant agreement which applied was one dated 27 May 2011 which contained a 12 month notice period.

36. In April 2012, Mr Andrew Knight was appointed by the defendant as Director of Sales for the OOH sector. Shortly thereafter, because of concerns about the claimant's performance and various complaints received, in order to ensure proper management of the sector, which included a number of important clients, the claimant's role was reduced and the defendant took back responsibility for two of the biggest clients, Booker and Bestway, accounting for about 25% of the OOH business. In July 2012, it was agreed that to reflect this reduced responsibility for the claimant, the monthly retainer was reduced from £26,666 per month to £21,666 per month or £260,000 per annum.

37. The defendant continued to have concerns about the performance of the claimant throughout the remainder of 2012 and by December, it is clear that serious consideration was being given to serving notice to terminate the agency agreement. Because no formal contract had been signed in 2011, there was an internal debate within the defendant as to which contract was applicable with which notice period. On 11 December 2012, Mr Packer emailed Mr Knight, Mr Saha, the Finance Director and Mr Ahmed, one of the principal shareholders, saying he could not find a signed copy of the agreement but enclosing the copy he had which had a 12 month notice period. Mr Saha responded that there was no need to give notice yet but after completing their set up (a reference to running OOH internally), they would give 12 weeks' notice, saying: *"I think it is a typing error in the agreement, it should be 12 weeks"*. Mr Packer responded: *"if only it was a typo!!"*

38. On 14 December 2012, Mr Knight circulated internally a sheet showing what he described as *"a number of possible ARSM exit plans for our debate"*. Although Mr Knight and Mr Packer sought to deny in cross-examination that any decision had been taken to terminate the agency agreement, all three options on that sheet involved termination of the agency, albeit with the possibility of retaining Mr Ramsay and some of his staff. The third option was to retain Mr Ramsay as a consultant on £70,000 per annum, and this was the one Mr Packer preferred.

39. Mr Ramsay had a desk within the defendant's offices close to both Mr knight and Mr Packer, from which he conducted the claimant's business, not just on behalf of the defendant but his other principals. He attended the offices on average about three days a week. In cross-examination he admitted that he was aware of the defendant's concerns about the performance of the agency and that he was not surprised when Mr Packer raised with him the issue of termination.

40. On 6 February 2013, a meeting took place between them at which Mr Packer told Mr Ramsay that he wanted to explore the future of the agency. Mr Packer said in terms that the meeting was to be on a without prejudice basis. Mr Packer made a proposal which involved bringing the agency to an end and Mr Ramsay, and possibly one of his staff, coming to work for the defendant in-house. Mr Ramsay asked Mr Packer to put the proposal in writing, so that he could decide what to do with his company. Mr Ramsay's evidence, which I accept, is that at that meeting, Mr Packer made it clear that the defendant had decided to terminate the agency. Mr Packer said in cross-

examination that the offer of employment to Mr Ramsay was made because they were trying to open a negotiation with Mr Ramsay, which would result in a compromise of the claimant's contractual rights, and Mr Ramsay had led them to believe previously that he would be open to a job offer from the defendant. I see no reason not to accept that evidence and his further statement that, at the time of the meeting, he was unaware of the Regulations.

41. After some internal discussion within the defendant as to the precise form of any written proposal, Mr Packer sent Mr Ramsay an email on 8 February 2013 headed *"Without any prejudice"*, which then stated: *"as per our discussion and your requirement I have narrated below our discussion for your review"*. The email then set out the proposal, which was for one month's termination of the agency with effect from 11 February 2013 and an offer to employ Mr Ramsay at the defendant to manage the discount channel on a salary of £60,000, plus car allowance and participation in the pension and health care schemes, and a three month notice period. The email also stated that the defendant would consider employing Mr Platt, one of Mr Ramsay's staff. It concluded: *"This is a proposal only"*.

42. Mr Ramsay responded on 11 February 2013, in an email headed *"without prejudice"*, saying: *"however, as discussed at our meeting… I will not consider my personal future until you have notified me on an open basis what you propose to do with my current agency."* In cross-examination, Mr Ramsay said that, before he sent this email, he had consulted his solicitors and he accepted that he understood the difference between without prejudice and open correspondence. From this email, it is clear that he wanted the defendant to commit itself in open correspondence to saying what its proposal was for the termination of the agency, which he could then use, if necessary, to make a claim against the defendant. In his evidence, Mr Packer said that is how he understood the request to make an open statement and, in my judgment, that is how a reasonable person in his position would have interpreted the request.

43. Mr Packer did not respond on an open basis, but telephoned Mr Ramsay and left a voicemail message, asking Mr Ramsay to ring back. Mr Ramsay did not do so, but instead, on 15 February 2013, sent an email which said in terms that he had had an opportunity to seek legal advice. The email (which was clearly drafted by his solicitors) continued:

> *"I am unable to accept your offer because as discussed with you I need to resolve the position of Alan Ramsay Sales & Marketing Limited's contractual obligations to Typhoo Tea Limited before I can consider any offer to me personally.*
>
> *ARSM's engagement with Typhoo is governed by the [Regulations] and therefore if you wish to terminate ARSM's agency, it is my understanding you will need to give 12 months' notice in writing of the effective date of termination and pay compensation for the loss of agency. If it is your intention to terminate the agency, then compromise any claims that ARSM may have for contractual notice and compensation under the Regulations, by payment of a reasonable sum, I invite you to make proposals. I can then consider your proposals…*

> *In the meantime, [ARSM] continues to discharge its duties as Typhoo's sales agent and will refuse any further attempt to vary the existing terms of engagement"*

44. Mr Segal QC sought to suggest that Mr Ramsay was saying that there needed to be a sequence of events: first the resolution of the claimant's contractual obligations and second, negotiation over the job offer, which were separate matters and, indeed, Mr Segal QC got Mr Packer to accept that interpretation of the email in cross-examination. In my judgment however, the email is not open to that interpretation. The contractual notice period was in effect being used by Mr Ramsay as a bargaining counter to procure a settlement which was acceptable to him. He accepted in cross-examination that, as is clear from the tone and content of the email, he had consulted a lawyer because he saw trouble ahead and the possibility of a claim being made. It seems to me that this email was effectively a warning shot across the defendant's bows that the claimant was entitled to 12 months' notice of termination, which was a riposte to the without prejudice proposal, at the meeting on 6 February and in the email of 8 February 2013, that the defendant would give one month's notice, and was telling the defendant that the claimant's entitlement to that notice period would have to be factored into any compromise.

45. That email was sent at just after 5 pm on a Friday and elicited the response from Mr Packer on the Monday, 18 February 2013: *"Please be available on Wednesday this week to meet with me at some point."* A meeting did then take place on Wednesday 20 February 2013, between Mr Packer and Mr Ramsay. Mr Packer again made clear that this was on a without prejudice basis. In his evidence, Mr Packer described how he explained the defendant's reasons for wishing to reduce the claimant's involvement and possibly serving notice of termination, which were primarily a result of the performance issues over the previous 12 to 18 months. He said that Mr Ramsay was defensive and refused to accept that there were any performance issues. Since Mr Ramsay candidly said in evidence that he could not remember the meeting, and so was not in a position to challenge Mr Packer's recollection, I see no reason not to accept Mr Packer's evidence about the meeting. The discussion did not, however, include anything about how much compensation the claimant would be entitled to under the Regulations, and Mr Packer had no recollection of discussing that subject at any time between 15 February and 28 March 2013.

46. The monthly retainer of £21,666 was due to be paid on the 24th of each month. In February 2013, the defendant did not pay on time and Mr Ramsay chased. The defendant contended that there were cash flow issues, but did pay after a telephone conversation between Mr Ramsay and Mr Ahmed on 28 February 2013, in which Mr Ahmed encouraged Mr Ramsay to make a reasonable proposal for settlement. Mr Ramsay refers to that conversation in an email (marked *"without prejudice"*) to Mr Packer of 4 March 2013: *"Nadeem said we both knew that [the defendant] wanted to recruit its own team in the relevant channels [the claimant] represents [the defendant] and suggested I was being unreasonable in not talking to you about a proposal and Nadeem invited me to make a reasonable proposal for settlement".*

47. Having set out in his email of 4 March 2013 what Mr Ahmed had said, Mr Ramsay continued:

> *"I cannot begin to make any proposals until I have a clear understanding of when Typhoo Tea intends to terminate the agency contract with [ARSM] and on what terms ie specific dates and plans for account and administrative handovers.*
>
> *In the meantime ARSM remain Typhoo's agent and will continue to fully discharge its obligations as Typhoo's agent. I say again that I am amenable to reaching an amicable settlement of ARSM's rights pursuant to the agency. I would again invite Typhoo Tea to make reasonable proposals for settlement of the agency including the contractual notice period and compensation for the loss of the agency…*
>
> *I look forward to hearing from you"*

48. In my judgment, viewed objectively, that email is part of a process of negotiation and compromise, whereby the parties were trying to see if there were terms upon which the agency could be terminated on an amicable basis without the claimant bringing a claim against the defendant. Mr Ramsay admitted as much in cross-examination. Although he sought to contend in effect that the two paragraphs were disjunctive, as with the email of 15 February 2013, I do not accept that the first paragraph quoted above is separate from the second. The reference to the defendant making reasonable proposals for settlement: *"including the contractual notice period and compensation for the loss of the agency"*, makes it clear that he was inviting an overall proposal for settlement of what he described as: *"ARSM's rights pursuant to the agency",* including the period of notice.

49. Despite the ingenious arguments advanced by Mr Segal QC to the effect that these were all just "subject to contract" negotiations without any extant dispute, I consider that, objectively, it is not possible to construe the email of 4 March 2013 as other than the claimant saying: *"make a proposal for termination of the agency which is acceptable, including as regards the notice period, or else"* the *"or else"* not being an express threat of proceedings, but in my judgment a very clear implicit one.

50. In fact, the defendant did not respond to the email of 4 March 2013 for two weeks, and then, on 18 March 2013, sent the first of the emails alleged by the claimant to be repudiatory. That was again headed *"without prejudice"* and read:

> *"Thank you for your email*
>
> *With effect from February 11th 2013, Typhoo will give ARSM 3 months' notice to terminate services provided by ARSM to Typhoo.*
>
> *This means that the final date of provision of services will be 11th May 2013"*

51. I will return in my analysis below to whether this correspondence is all protected by without prejudice privilege, but it is to be noted straight away that, although the email of 18 March 2013 did not set out *"reasonable proposals for settlement",* as requested in the second paragraph of the email of 4 March 2013 quoted at [47] above, it was a

response to the second paragraph of that email, which was asking for a clear indication of when the defendant intended to terminate the agency. In other words, Mr Ramsay got exactly what he requested, that he be given a clear understanding of when the defendant intended to terminate the agency. From the defendant's perspective, as Mr Packer said in evidence, Mr Ramsay had indicated that he was not prepared to negotiate further until he had a clear statement from the defendant as to termination, so Mr Packer thought that if they were to advance the negotiations, he needed to make a clear statement about termination, which is what he did.

52. Not having received any response or reaction from Mr Ramsay, Mr Packer sent a follow up email on 26 March 2013, again headed *"without prejudice"*, which read:

> *"I have had no response to this email [of 18 March].*
>
> *Payments due to ARSM will finish on 11th May 2013"*

53. On the morning of 28 March 2013, Mr Packer spoke to Mr Ramsay on the telephone again on an expressly "without prejudice" basis. The gist of their conversation is recorded in an internal email which Mr Packer then sent:

> *"Spoke with Alan today, without prejudice.*
>
> *He is awaiting response from his lawyer so he can respond to us legally, he has said he will have a response by latest Tuesday next week.*
>
> *In conversation;*
>
> *First time in 11 years that ARSM contract has ended without the principal paying to terms*
>
> *ARSM likely to survive after change/withdrawal of the Typhoo contract of the Typhoo contract*
>
> *Wants to end the relationship amicably with both parties walking away happy"*

54. Mr Packer then sent Mr Ramsay an email saying: *"Thanks for the time today for our discussion, without prejudice. I look forward to your response to our termination proposal by close of play Tuesday next week"*. It is clear from that email, that Mr Packer was expecting Mr Ramsay to come back with a proposal for an amicable settlement of some description, in response to what he described as the defendant's "termination proposal". In his evidence, Mr Ramsay sought to suggest that the "termination proposal" to which Mr Packer was referring was only the offer of employment, not the notice period, because Mr Packer had said quite categorically, in the phone conversation of 28 March 2013, that 11 May 2013 was *"utterly fixed"* as the termination date. However, in my judgment, what Mr Packer was referring to was the whole "termination proposal", which included the job offer and the notice period. He confirmed in cross-examination that he expected Mr Ramsay to state in any response whether he had any claim under the Regulations.

55. Mr Packer disputed in cross-examination that he had categorically stated that 11 May 2013 was fixed as the termination date. He insisted that they were negotiating with Mr Ramsay, including in relation to the contract terms and had not reached an agreement, so that nothing was fixed. I accept that evidence. Whilst no doubt Mr Packer took a firm line in negotiations that the defendant would give a three month notice period, nothing was fixed, as is evidenced by the fact that in later negotiations at the beginning of May 2013, Mr Saha was offering a nine month notice period.

56. Within a matter of hours of that email, at 15.25 on 28 March 2013, Mr Ramsay sent a response to the defendant's 26 March 2013 email which had clearly been drafted by his lawyers and which was expressly stated to be sent on an open basis:

> *"I refer to your email dated 26 March 2013, and your purported termination of the Agreement on notice, with effect on 11 May 2013.*
>
> *Your email is expressed to be without prejudice. It is not and will be relied upon.*
>
> *The Agreement requires that you give 12 months notice in writing. I treat your purported notice to terminate the agreement with effect on 15 May 2013, as a repudiatory breach of the Agreement, which I accept as terminating the Agreement forthwith.*
>
> *ARSM is discharged from any further obligations to Typhoo under the Agreement or otherwise.*
>
> *Please take this letter as notice of ARSM's claim for damages for breach of contract and take this letter as notice pursuant to Regulation 17(9) of [the Regulations] to claim compensation for termination of the ARSM's agency and other entitlements flowing from the agency.*
>
> *Offer of re-engagement*
>
> *ARSM recognises that, notwithstanding its release from any further obligation to Typhoo, Typhoo may require ARSM to assist with the orderly handover of the accounts that ARSM sold to on behalf of Typhoo. Further ARSM was authorised in respect of the Agreement to man Typhoo's stand and to negotiate the sale of Typhoo products on behalf of Typhoo, at the Nisa Today Trade Show on 8, 9 and 10 April 2013.*
>
> *Without prejudice to the termination of the Agreement today, or to any rights flowing from that termination, AR-SM offers to provide the services that is has provided under the terms of the Agreement, up to and including 11 May 2013, to include manning the Typhoo stand on 8, 9 and 10 April 2013 and assisting with the orderly handover of the accounts for which ARSM has had responsibility during the term of the Agreement*

> *in consideration for which Typhoo will pay to AR-SM, the sum of £36,063 (representing payment for AR-SM's services in respect of the period 25 March 2013 – 10 May 2013 inclusive) by no later than 24 April 2013.*
>
> *The offer of re-engagement will remain open for acceptance until 5 p.m. today."*

57. A few minutes later, Mr Ramsay sent another email expressed to be "*without prejudice save as to costs"* stating:

> *"the intention of trying to reach a resolution of the dispute that has arisen as a result of your termination of the Agreement.*
>
> *Notwithstanding my proposed re-engagement until 11 May 2013, I remain prepared to compromise ARSM's claims pursuant to [the Regulations] for compensation and other entitlements and or damages for breach of the Agreement. If Typhoo wishes to make reasonable proposals for settlement of these claims, then please do so now, so that I may consider with my lawyers.*
>
> *In the absence of your reasonable proposals, within the next 7 days, my solicitors have instructions to prepare a letter of claim…*
>
> *This letter will be referred to on the issue of costs at the appropriate time, should you deny liability. I look forward to hearing from you."*

58. Mr Packer sent a holding email, acknowledging the emails and saying he would respond in due course. It appears that not all the defendant's staff were aware that the claimant had purported to terminate the agency and were continuing to hold the claimant out as the defendant's agent. On 4 April 2013, Mr Ramsay emailed Mr Packer about this, saying:

> *"Typhoo (or its management) appears unaware of the termination of ARSM's agreement with Typhoo, by email dated 28 March 2013 timed at 15.25, because it continues to hold out ARSM as its agent.*
>
> *You have not responded to my offer of re-engagement dated 28 March 2013.*
>
> *The Nisa Trade Show begins on Monday 8 April 2013. I understand that Typhoo expects ARSM to be in attendance on its behalf at the…show on the 8, 9 and 10 April, notwithstanding the termination of the Typhoo agreement with ARSM on 28 March 2013 and your failure to respond to my offer of re-engagement stated therein.*

> *Without prejudice to the termination of the agency on 28 March 2013, I will unless I hear from you to the contrary assume that Typhoo wishes to re-engage ARSM from 29 March 2013 until 11 May on the terms stated in my email dated 28 March 2013 and on this basis, ARSM will expend money attending the …Show on Typhoo's behalf."*

59. In response, also on 4 April 2013, Mr Packer emailed Mr Ramsay, rejecting the contention that there had been a repudiatory breach or that the defendant's emails were anything other than without prejudice. The defendant's position and rights were reserved. No specific mention was made in correspondence of the claimant continuing to act as the defendant's agent until 11 May 2013, but the claimant did represent the defendant at the Nisa Trade Show and oversaw the orderly handover of accounts, so that the defendant must be taken to have accepted by conduct the claimant's offer to continue the agency agreement until 11 May 2013. On 29 April 2013, the defendant paid the claimant the monthly retainer due under the agreement for the period from 25 March to 24 April 2013.

60. Further without prejudice discussions took place between the parties with a view to reaching a settlement, including a meeting between Mr Ramsay and Mr Saha on 23 April 2013. On 29 April 2013, the claimant's solicitors wrote a letter before action to the defendant. This set out the claimant's case pretty much as it has been pursued at trial, that the emails of 18 and 26 March 2013 were repudiatory and that, by its email of 28 March 2013, the claimant had accepted that repudiation as terminating the Agreement forthwith. In the alternative and without prejudice to that primary case, the letter said that the Agreement would terminate on 11 May 2013. It continued that the claimant had continued to represent the defendant since 29 March 2013 and would continue to discharge its duties until 11 May 2013. Referring to this letter in evidence, Mr Ramsay said he remained hopeful that matters could be resolved.

61. On 8 May 2013, Mr Saha sent Mr Ramsay a without prejudice offer to settle. The first paragraph of that email stated: *"Based on your current effective contract dated 27 May 2011, Typhoo served the notice".* This is difficult to follow, since on the basis that the notice being referred to is the three month notice given in the email of 18 March 2013, that did not comply with the notice period in any version of the 2011 Agreement. At all events, this email went on to offer a nine month notice period effective from 11 February 2013. Mr Ramsay rejected that offer in his reply on 9 May 2013. There were then further discussions and, on 10 May 2013, Mr Saha sent another email (not marked "without prejudice", but, although Mr Segal QC submitted it was not without prejudice, I consider the better view is that it was the last in a line of without prejudice negotiations) stating: *"we wish to terminate the contract between ARSM and Typhoo in accordance with clause 10.2 agreement dated 27 May 2011."* That email went on to repeat that 9 months' notice was being given and asked the claimant to work normally as per the contract. In evidence, Mr Ramsay described the position as surreal. He said that the offer was too late, as he had already made staff redundant. On 13 May 2013, the claimant's solicitors wrote in response saying that the contract was at an end.

62. On 17 May 2013, the defendant's then solicitors wrote to the claimant's solicitors in response to the letter of 29 April 2013. That letter accepted that the claimant was a commercial agent within the meaning of the Regulations, and stated, inter alia: *"Our*

client also accepts and agrees your client's position that the agreement between our respective clients has been terminated with effect from 11 May 2013. The termination is subject to payment in lieu of notice and your letter claims that your client is entitled to 3 months' notice of termination under Regulation 15." The letter then goes on to say that any entitlement to compensation under Regulation 17 would be calculated on the basis of the value of the agency which would be valued as subject to a three month notice period. However, in the Defence served by the defendant, the defendant has resiled from that position, now contending that it is the claimant which terminated the Agreement.

Was the correspondence subject to without prejudice privilege?

63. Having set out the chronology of events, I turn to the principal issue between the parties on liability, which is whether the two emails of 18 and 26 March 2013 formed part of a chain of correspondence containing negotiations between the parties, which were subject to without prejudice privilege. This issue turns on whether there was an extant dispute between the parties at the time they were sent, as Mr Thomas QC contends, or whether, up until that time, there was no dispute and the parties were simply negotiating on a without prejudice, subject to contract, basis as in *Avonwick*, the dispute in effect being created by the emails, as Mr Segal QC contends.

64. As I said above when dealing with the law, this issue ultimately turns on an assessment of the facts. In my judgment, despite the ingenuity of Mr Segal QC's submissions, there clearly was an extant dispute about the termination of the agency before the emails of 18 and 26 March 2013 were sent. Applying the test derived from Auld LJ's judgment in *Barnetson*, I have no doubt that, by the time those two emails were sent, the parties might reasonably have contemplated that litigation would ensue if they could not agree. Viewed objectively, it seems to me that litigation, in the event that an amicable settlement could not be reached, was a possibility as early as Mr Ramsay's email of 15 February 2013, which, as I said at [44] above, was effectively a warning shot across the defendant's bows that the claimant was entitled to 12 months' notice of termination and that this was the effect of the Regulations. The possibility of litigation, in the event that no satisfactory compromise could be reached, is even clearer from the email of 4 March 2013, to which the email of 18 March 2013 was a response and which, as I said at [49] above, contained a clear implicit threat of litigation, in the event that a compromise satisfactory to Mr Ramsay was not reached. In the circumstances, I consider that there clearly was an extant dispute at the time the emails of 18 and 26 March 2013 were sent.

65. I have already noted that Mr Segal QC did not press, in his closing submissions, the suggestion that, even if the other correspondence was protected by "without prejudice" privilege, the two emails of 18 and 26 March 2013 were not, because they could not be construed as part of a chain of correspondence which was seeking to resolve the dispute, rather they were statements of intention in mandatory terms. Quite apart from the fact that such an approach runs counter to the judgment of Robert Walker LJ in *Unilever*, it is unduly blinkered. Whilst if the two emails are viewed in isolation, they can be seen as somewhat mandatory or peremptory, when they are seen as part of the whole chain of correspondence and meetings constituting the relevant negotiations, they are still part of those negotiations. There are many occasions in

without prejudice negotiations where one party may state a position in firm, categorical terms for negotiating purposes and, in my judgment, that was what was happening here. That these emails were part of the negotiating process is clear from Mr Packer's evidence, which I referred to at [51] above, that Mr Ramsay had indicated that he was not prepared to negotiate further, until he had a clear statement from the defendant as to termination, so Mr Packer thought that if they were to advance the negotiations, he needed to make a clear statement about termination, which is what he did. Having sent the email of 18 March 2013, he had no response of any kind from Mr Ramsay, so he sent the follow up email of 26 March 2013, designed to provoke a response and advance the negotiations. As Mr Packer said in his witness statement: *"I had not envisaged a situation whereby Mr Ramsay would not seek to present a counter-offer on the terms of termination."*

66. Accordingly, in my judgment, the two emails are protected by without prejudice privilege and could not be and should not have been relied upon by the claimant as constituting a repudiatory breach of the Agreement. I should add that, even if I had been prepared to accept Mr Segal QC's submission that the correspondence was not protected by without prejudice privilege, because the two emails formed part of a continuum of negotiations between the parties to reach an agreement on the basis for termination, I would not regard them as repudiatory. Taken in the context of the negotiations as a whole, they simply cannot be regarded as unequivocal statements amounting to a renunciation or repudiation of the defendant's contractual obligations.

67. It must follow that the open email from the claimant of 28 March 2013 purporting to accept the defendant's two emails as a repudiation of the agency agreement and to terminate the agreement forthwith, was itself a repudiatory breach of the agency agreement. The critical issues which then arise are (i) whether that repudiatory breach was ever accepted by the defendant as bringing the agreement to an end and (ii) whether the defendant affirmed the agreement. It is to those issues that I now turn.

Acceptance of repudiatory breach and affirmation

68. The relevant legal principles are well-established and can be summarised as follows:

(1) In order for a repudiatory breach to bring the contract to an end, the innocent party must accept the repudiation, as "an unaccepted repudiation is a thing writ in water" (per Asquith LJ in *Howard v Pickford Tool* [1951] 1 KB 417 at 421). Acceptance of a repudiation must be clear and unequivocal and there must be a "conscious intention to bring the contract to an end, or the doing of something which is inconsistent with its continuation" (per Lord Hope DPSC in *Societe Generale v Geys* [2012] UKSC 63; [2012] 1 AC 513 at [17]); see *Chitty on Contracts* 31st edition at [24-003] and [24-013].

(2) In those circumstances, mere inactivity or acquiescence will generally not be regarded as acceptance for this purpose. However, there may be circumstances where a continuing failure to perform will be sufficiently unequivocal to constitute acceptance of a repudiation: see *Chitty* at [24-013] again; *Vitol S.A. v Norelf* [1996] AC 800 at 811 per Lord Steyn.

(3) If the innocent party who is entitled to treat himself as discharged from the contract by the other party's breach, elects, with full knowledge, to treat the

contract as continuing, he will be taken to have affirmed the contract. Affirmation can be express or implied. It will be implied if, with knowledge of the breach and of his right to choose whether to accept a repudiation or to affirm the contract, the innocent party does some unequivocal act from which it may be inferred that he intends to go on with the contract or that he will not exercise his right to treat the contract as repudiated: see *Chitty* at [24-003].

(4) The innocent party is not required to make his election immediately after he learns of the repudiatory breach, but will have a reasonable time in which to decide what to do. How long will depend on the facts of the case, but if he does nothing for too long, he runs the risk that he will be taken to have affirmed: see *Chitty* at [24-002]; per Rix LJ in *Stocznia Gdanska SA v Latvian Shipping Co (No. 2)* [2002] EWCA Civ 889; [2002] 2 Lloyd's Rep 436 at [87].

69. The claimant's case on this area of the dispute is straightforward. If, contrary to its primary case, the email of 28 March 2013 was capable of being a renunciation of the contract and repudiatory, that repudiation was never accepted by the defendant by words or conduct. Mere inaction in these circumstances cannot amount to acceptance of the repudiatory breach and *Vitol* is not an authority for the contrary proposition, but depends on its own special facts.

70. In any event, the claimant submits, there was the clearest possible affirmation of the agency agreement by the defendant, in accepting the continued performance by the claimant of its duties as the defendant's agent pursuant to the agency agreement until 11 May 2013, in representing the defendant at the Nisa Trade Show on 8-10 April 2013 and otherwise and in ensuring an orderly handover. Furthermore, the defendant paid the claimant for those services under the agency agreement, at least up until 24 April 2013, which is itself clear affirmatory conduct.

71. The defendant's case is that the services provided in relation to the Trade Show and up until 11 May 2013 were not provided pursuant to the agency agreement, but pursuant to a new ad hoc agreement, so that acceptance of and payment for those services did not amount to affirmation of the original agency agreement. Alternatively, Mr Thomas QC submitted that the payment was no more than an administrative act on the part of the defendant not capable of being affirmatory. In that context, he relied upon the judgment of Moore-Bick J (as he then was) in *Yukong Line v Rendsburg Investments* [1996] 2 Lloyd's Rep 604 at 608-9 where the learned judge held in a charterparty case that telexes sent by the owners giving notice of delivery after the charterers had sent a renunciatory fax were not an unequivocal election to affirm, but essentially concerned with administrative matters.

72. Mr Thomas QC placed considerable reliance in his closing submissions on the speech of Lord Steyn in *Vitol*, in support of his case that the defendant had accepted the claimant's repudiatory breach. He referred to the statement of principle at 810H-811A, which is not in dispute:

> "An act of acceptance of a repudiation requires no particular form: a communication does not have to be couched in the language of acceptance. It is sufficient that the communication or conduct clearly and unequivocally conveys to the

> repudiating party that that aggrieved party is treating the contract as at an end."

73. He then referred to the passage at 811E-H where Lord Steyn gave examples of instances where failure to perform an obligation may signify to the repudiating party that the innocent party is treating the contract as at an end:

> "It is now possible to turn directly to the first issue posed, namely whether non-performance of an obligation is ever as a matter of law capable of constituting an act of acceptance. On this aspect I found the judgment of Phillips J. entirely convincing. One cannot generalise on the point. It all depends on the particular contractual relationship and the particular circumstances of the case. But, like Phillips J., I am satisfied that a failure to perform may sometimes signify to a repudiating party an election by the aggrieved party to treat the contract as at an end. Postulate the case where an employer at the end of a day tells a contractor that he, the employer, is repudiating the contract and that the contractor need not return the next day. The contractor does not return the next day or at all. It seems to me that the contractor's failure to return may, in the absence of any other explanation, convey a decision to treat the contract as at an end. Another example may be an overseas sale providing for shipment on a named ship in a given month. The seller is obliged to obtain an export licence. The buyer repudiates the contract before loading starts. To the knowledge of the buyer the seller does not apply for an export licence with the result that the transaction cannot proceed. In such circumstances it may well be that an ordinary businessman, circumstanced as the parties were, would conclude that the seller was treating the contract as at an end."

74. I agree with Mr Segal QC that there is nothing in the *Vitol* case which assists the defendant in the present case. In that case, the buyers of a cargo of propane sent the sellers a telex rejecting the cargo and repudiating the contract of sale on the ground that the vessel was not likely to complete loading within the contractual time. The vessel did in fact complete loading and sailed. The sellers did nothing to affirm or perform the contract but sold the cargo elsewhere at a loss. The sellers' claim for damages was referred to arbitration. The buyers contended that the sellers had failed to accept the buyers' repudiation. The arbitrator rejected that submission and awarded the sellers damages, holding that the failure of the sellers to take any further step to perform the contract, which was apparent to the buyers, constituted sufficient communication of acceptance.

75. The buyers obtained leave to appeal to the Commercial Court under section 1(2) of the Arbitration Act 1979 on the question of law whether, as a matter of law, mere failure to perform contractual obligations can ever constitute acceptance of an anticipatory repudiation by the other party. At first instance, Phillips J held that the answer to that question was yes although it depended on the circumstances. He said that he did not have to decide whether the failure of the sellers to tender the bill of lading to the buyers, which was apparent to the buyers, was a clear indication that the

contract was at an end (which seemed to be what the arbitrator had thought) as that was a question of fact for the arbitrator. All he had to decide was the question of law. His decision on the question of law was reversed in the Court of Appeal but restored in the House of Lords.

76. Accordingly, all the House of Lords was deciding was the narrow question of law whether, as a matter of law, mere failure to perform contractual obligations can ever constitute acceptance of an anticipatory repudiation by the other party, which like the judge they decided in the affirmative. As Lord Steyn said in the passage I have quoted, whether or not mere failure to perform constitutes acceptance of a repudiatory breach depends on all the circumstances, including the particular contractual relationship. Dealing with the facts of that particular case, in the passage in his speech immediately after the passage quoted, he said:

> "Taking the present case as illustrative, it is important to bear in mind that the tender of a bill of lading is the pre-condition to payment of the price. Why should an arbitrator not be able to infer that when, in the days and weeks following loading and the sailing of the vessel, the seller failed to tender a bill of lading to the buyer he clearly conveyed to a trader that he was treating the contract as at an end? In my view therefore the passage from the judgment of Kerr L.J. in the *Golodetz* case [1989] 2 Lloyd's Rep. 277 , 286, if it was intended to enunciate a general and absolute rule, goes too far. It will be recalled, however, that Kerr L.J. spoke of a *continuing* failure to perform. One can readily accept that a continuing failure to perform, i.e. a breach commencing before the repudiation and continuing thereafter, would necessarily be equivocal. In my view too much has been made of the observation of Kerr L.J. Turning to the observation of Nourse L.J. [1996] Q.B. 108, 116-117, that a failure to perform a contractual obligation is necessarily and always equivocal I respectfully disagree. Sometimes in the practical world of businessmen an omission to act may be as pregnant with meaning as a positive declaration.
>
> …. My Lords, I would answer the question posed by this case in the same way as Phillips J. did. In truth the arbitrator inferred an election, and communication of it, from the tenor of the rejection telex and the failure, inter alia, to tender the bill of lading. That was an issue of fact within the exclusive jurisdiction of the arbitrator."

77. The difficulty which Mr Thomas QC faces in the present case in placing any reliance on *Vitol* is that, whilst the principle of law it stands for, that mere failure to perform contractual obligations can in an appropriate case constitute acceptance of an anticipatory repudiation by the other party, cannot be doubted, he is unable to point to any particular obligation under the agency agreement which the defendant failed to perform in the period after 28 March 2013. In fact, as set out below, the defendant (like the claimant) continued to perform, for example, by cooperating over the Trade Show and the orderly handover and by paying the claimant, thereby affirming the

contract. However, even if that analysis were wrong, because there was a new ad hoc agreement after 28 March 2013, Mr Thomas QC failed to identify what it was that was alleged to have constituted acceptance by the defendant of any repudiatory breach by the claimant.

78. He submitted that the claimant was in continuing repudiatory breach because Mr Ramsay maintained the position that the agency agreement was at an end, as a consequence of the defendant's repudiation in their emails of 18 and 26 March 2013, for example in his email of 4 April 2013 and the claimant's solicitors' letter of 29 April 2013 . I rather doubt if that is strictly correct, since the claimant was by then continuing to perform the agency agreement until 11 May 2013 on the same terms as before, albeit without prejudice to its contention that the defendant's repudiation had brought the agreement to an end. However, even assuming in the defendant's favour that there was a continuing breach and no affirmation, Mr Thomas QC was still unable to identify when I asked him what precisely was alleged to constitute the acceptance by the defendant of that continuing breach as a repudiation.

79. Ultimately, what it came to was that the defendant was to be taken to have accepted the claimant's repudiatory breach by doing nothing. The difficulty with that submission is that, where the innocent party does nothing, in circumstances where he is not failing to perform a particular contractual obligation, his inactivity is at best equivocal. It cannot be said that doing nothing is in Lord Steyn's words: "as pregnant with meaning as a positive declaration" and nothing in *Vitol*, which is concerned with failure by the innocent party to perform a contractual obligation, not mere inactivity and silence, supports the contrary proposition. In the circumstances, even if (for the reasons set out below) I had not concluded that the defendant affirmed the original agency agreement, I would have concluded that the defendant never accepted the claimant's repudiation in its email of 28 March 2013 and that, accordingly, the agency agreement continued until it was terminated by agreement on 11 May 2013.

80. In support of his case that the services rendered after 28 March 2013 were pursuant to a new ad hoc agreement, not the original agency agreement, Mr Thomas QC relied upon the wording of the email of 28 March 2013 which contained an unequivocal statement that the original agreement was at an end. Accordingly, he submitted that the "offer of re-engagement" could not be pursuant to the original agreement, but must be a new agreement. In my judgment, the submission that an offer to continue with the original agreement until 11 May 2013 is not consistent with having terminated, misunderstands the commercial position. Both in that email and his subsequent email, saying that he assumes the defendant wants the claimant to attend the Trade Show on its behalf, Mr Ramsay is only doing what people do commercially in such situations on a regular basis, saying that although the claimant's primary position was that the agreement had come to an end, without prejudice to that position, the claimant was prepared to continue with the existing agreement on the same terms until 11 May 2013, which was when the defendant had said it would come to an end.

81. In my judgment, Mr Thomas QC's submissions are also inconsistent with the actual terms of the 28 March 2013 email. The use of the word "re-engagement" most naturally means re-engagement under the existing agreement, not engagement under a fresh agreement. That the offer was to continue with the existing agreement is clear from the words: *"ARSM offers to provide the services that it has provided under the*

terms of the Agreement". With respect to Mr Thomas QC, the contention that there was an ad hoc new agreement is a lawyer's construct created after the event, not borne out by the contemporaneous communications and conduct.

82. I agree with Mr Segal QC that there is nothing in the decision of Moore-Bick J in *Yukong Line* which assists the defendant. The telex giving 20 days' notice of delivery of the vessel in that case was categorised by the learned judge as concerned with administrative matters and, in any event, it was followed on the same day by a telex responding to the charterers' repudiatory fax which the learned judge described at 609 col. 1 as a: "cry of protest at what the owners regarded as a dishonourable attempt by the charterers to abandon their obligations". He held that it was impossible to read that telex as *"an unequivocal statement on the part of the owners that they will proceed with the contract and await performance in due course regardless of the position adopted by the charterers."*

83. The applicable principle of law, that affirmation will only be inferred where there is some unequivocal act by the innocent party which is only consistent with a decision to keep the contract alive, stated by Moore-Bick J in his principle (8) on 607 col. 2, is not in dispute in the present case. Whilst it is quite right, as Mr Thomas QC points out, that at 608 col. 1, the learned judge counselled against adopting: "an unduly technical approach to deciding whether the injured party has affirmed the contract" and continued that the court: "should not be willing to hold that the contract has been affirmed without very clear evidence that the injured party has indeed chosen to go on with the contract notwithstanding the other party's repudiation", each case turns on its own facts and circumstances. I have concluded that, once the contention that there was an ad hoc agreement is rejected, there is clear evidence of affirmation in the present case.

84. In particular, the defendant accepted the claimant's offer by permitting the claimant to attend the Nisa Trade Show on 8-10 April 2013 and to act thereafter as its agent until termination on 11 May 2013, by working alongside the claimant and cooperating in the orderly handover of accounts and by paying the claimant pursuant to the agency agreement at least up until 24 April 2013.

85. When Mr Ramsay sent his email of 4 April 2013 stating: *"I will unless I hear from you to the contrary assume that Typhoo wishes to re-engage ARSM from 29 March 2013 until 11 May on the terms stated in my email dated 28 March 2013 and on this basis, ARSM will expend money attending the …Show on Typhoo's behalf"*, it seems to me that the defendant had a choice. Either it could have emailed back, saying the offer was rejected and the agreement had been repudiated by the claimant, or it could do what it did, either expressly or by implication, permit the claimant to represent it at the Trade Show and thereafter, and to incur expense in doing so. The defendant no doubt took the latter course because it suited the defendant commercially to have the claimant continue to represent it at the Trade Show and thereafter until 11 May 2013, rather than have to take over responsibility for the accounts at short notice without an orderly handover, but having done so, it does not seem to me that the defendant can maintain that it was open to it to accept the repudiation as bringing the contract to an end on 28 March 2013, because by its conduct the defendant had affirmed the agency agreement.

86. Furthermore, the defendant not only allowed the claimant to continue performing the agency agreement, but paid it for the services rendered at least for the month to 24 April 2013. It is impossible to characterise payment for services under the contract as a mere administrative act. Rather it is an unequivocal act only consistent with an intention that the agency agreement would continue until 11 May 2013. In the circumstances, in my judgment, there was a clear affirmation of the agreement by the defendant, so that, even if the defendant had sought to accept the repudiation after the date of payment, 29 April 2013, it would not have been entitled to do so, affirmation being irrevocable. In fact, the defendant did not accept the repudiation, but proceeded on the basis that the agreement had continued and then been terminated on 11 May 2013. Its solicitors' letter of 17 May 2013 quoted at [62] above, clearly demonstrates that point.

87. In the circumstances, I have concluded that, both because the defendant did not accept the claimant's repudiatory breach in its email of 28 March 2013 as bringing the agency agreement to an end on that date and because the defendant thereafter accepted the claimant's offer to continue with the agreement until 11 May 2013 and affirmed the agreement, the agency agreement continued until it was terminated with effect from 11 May 2013.

Compensation pursuant to Regulation 17

88. Accordingly, contrary to the defendant's submissions, the exclusion of any entitlement to compensation under Regulation 17 by virtue of Regulation 18 (b) is not applicable. The claimant is entitled in principle to such compensation.

89. It is common ground that the proper approach to valuation of an award of compensation under Regulation 17 was authoritatively determined by the speech of Lord Hoffmann in *Lonsdale v Howard & Hallam Limited* [2007] UKHL 32; [2007] ICR 1338. At [9]-[13] he stated the relevant principles:

> "9. As this part of the Directive is based on French law, I think that one is entitled to look at French law for guidance, or confirmation, as to what it means. Article 12 of the French law says that the agent is entitled to "une indemnite compensatrice en reparation du prejudice subi". The French jurisprudence from which the terms of the article is derived appears to regard the agent as having had a share in the goodwill of the principal's business which he has helped to create. The relationship between principal and agent is treated as having existed for their common benefit. They have co-operated in building up the principal's business: the principal by providing a good product and the agent by his skill and effort in selling. The agent has thereby acquired a share in the goodwill, an asset which the principal retains after the termination of the agency and for which the agent is therefore entitled to compensation: see *Saintier & Scholes, Commercial Agents and the Law* (2005), pp 175–177.
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> 10. This elegant theory explains why the French courts regard the agent as, in principle, entitled to compensation. It does not,

however, identify exactly what he is entitled to compensation for. One possibility might have been to value the total goodwill of the principal's business and then to try to attribute some share to the agent. But this would in practice be a hopeless endeavour and the French courts have never tried to do it. Instead, they have settled upon compensating him for what he has lost by being deprived of his business. That is the "prejudice subi". The French case law makes it clear that this ordinarily involves placing a value upon the right to be an agent. That means, primarily, the right to future commissions "which proper performance of the agency contract would have procured him": see *Saintier & Scholes*, pp 187–188. In my opinion this is the right for which the Directive requires the agent to be compensated.

11. Having thus determined that the agent is entitled to be compensated for being deprived of the benefit of the agency relationship, the next question is how that loss should be calculated. The value of the agency relationship lies in the prospect of earning commission, the agent's expectation that "proper performance of the agency contract" will provide him with a future income stream. It is this which must be valued.

12. Like any other exercise in valuation, this requires one to say what could reasonably have been obtained, at the date of termination, for the rights which the agent had been enjoying. For this purpose it is obviously necessary to assume that the agency would have continued and the hypothetical purchaser would have been able properly to perform the agency contract. He must be assumed to have been able to take over the agency and (if I may be allowed the metaphor) stand in the shoes of the agent, even if, as a matter of contract, the agency was not assignable or there were in practice no dealings in such agencies: compare *Inland Revenue Comrs v* Crossman [1937] AC 26. What has to be valued is the income stream which the agency would have generated.

13. On the other hand, as at present advised, I see no reason to make any other assumptions contrary to what was the position in the real world at the date of termination. As one is placing a present value upon future income, one must discount future earnings by an appropriate rate of interest. If the agency was by its terms or in fact unassignable, it must be assumed, as I have said, that the hypothetical purchaser would have been entitled to take it over. But there is no basis for assuming that he would then have obtained an assignable asset: compare the Crossman case. Likewise, if the market for the products in which the agent dealt was rising or declining, this would have affected what a hypothetical purchaser would have been willing to give. He would have paid fewer years' purchase for a declining

> agency than for one in an expanding market. If the agent would have had to incur expense or do work in earning his commission, it cannot be assumed that the hypothetical purchaser would have earned it gross or without having to do anything."

90. Both parties called expert forensic accountants who were specialists in the valuation of companies, for the claimant, Mr Ross MacLaverty of RSM Restructuring Advisory LLP and for the defendant, Mr Doug Hall of Smith & Williamson. It was essentially common ground that valuation of compensation should be assessed on a future net earnings basis (the multiplicand) to be multiplied by a multiplier, although their assessment of both the multiplicand and the appropriate multiplier was wildly different.

91. As Mr MacLaverty explained, the multiplier is a measure of the risk of investing in an agency business, which is determined by commercial considerations such as the stability of the principal's business, its place in the market, financial position and trading relationships. The starting point was to take price/earnings (P/E) ratios from the FTSE on the day of termination, which since there was no direct comparator, he took as an average of the P/E ratio for Consumer Goods and Consumer Services, which was 16.93, to which he applied an adjustment of 40% for lack of marketability and 30% for the size of the business, to arrive at a P/E ratio of 5.09, which he rounded down to 5. His evidence was that, from experience of previous valuations, the multipliers adopted were in the range 1 to 7, with the higher multiples reserved for the most profitable and secure agencies. He considered that there were a number of factors justifying a multiplier of 5, at the higher end of the range, in this case: his assessment that the agency was profitable (which was hotly disputed by Mr Hall), the fact that there was a fixed retainer, which by 2013 was £260,000 per annum, and not a percentage commission dependent on sales and that the defendant was financially secure, producing successful brands of tea.

92. Mr Hall adopted the same approach of starting with FTSE P/E ratios, although he took the average of Food Producers and Food & Drug to arrive at a lower average starting point of 11.44, to which he applied the same discounts of 40% and 30% respectively, for lack of marketability and size of business, as Mr MacLaverty did, to arrive at a multiplier of 3.5. Since Mr Hall's starting point excluded Beverages and the relevant agency was for Typhoo Tea, I cannot see any justification for that approach and prefer Mr MacLaverty's starting point and, accordingly, his multiplier of 5.

93. Where there was even more disparity between the experts was as to whether there should be some further discount related to the specific nature of the claimants' business. Mr Hall discounted the 3.5 he had arrived at heavily downwards, to no more than 2, possibly only 1, to reflect the fact that the claimant was a small agency in a completely different league to the businesses reflected in the FTSE P/E ratios. In my judgment, that approach involved what was effectively double discounting, since a discount had already been applied to reflect the size of the business and, despite Mr Hall's attempt to justify this in his evidence, it did not seem to me to be capable of justification, involving as it did an overall discount, even from Mr Hall's lower starting point, of more than 90% from the FTSE ratios. It seemed to me that Mr MacLaverty's approach was more realistic, although the issue remains as to whether

his multiplier of 5 should be reduced to reflect some of the other factors identified by Mr Hall.

94. Clearly, the stability and profitability of the principal's business is a matter which can and should be taken into account in assessing the value of the agency. *Lonsdale* itself demonstrates this. The principal's business there was the manufacture of shoes. As Lord Hoffmann said at [3]:

> "Elmdale, on the other hand, was in terminal decline. Like many United Kingdom shoe manufacturers, H & H were unable to compete on style and price. Sales, and with them Mr Lonsdale's commission income, fell year by year. In 1997–1998 his gross commission was almost £17,000 but by 2002–2003 it had fallen to £9,621. In 2003 H & H ceased trading and sold the goodwill of the Elmdale brand to a competitor. "

95. He went on, at [32] and [33], to commend as a model of clarity and common sense, the judgment of the judge at first instance, Judge Charles Harris QC, whose finding he quoted: "Common sense would indicate that few people wanting the opportunity to earn what the claimant was earning would be prepared to pay well over £20,000 for the privilege of doing so, still less would they do so in an industry in remorseless decline, and in which the likely buyers would be men of modest means …"

96. In the present case, the defendant relied upon a document produced by Mr Ramsay, which showed that the defendant's total share of the UK tea sales had fallen year on year from 6.8% in 2007 to 3.6% in 2013 and that the share of the market of mainstream Typhoo tea had also fallen year on year from 6.4% in 2007 to 2.8% in 2013. That the defendant wanted to reduce its costs and increase the efficiency of the business, is evident from what Mr Packer said in his first draft of the email he sent to Mr Ramsay, following their meeting on 6 February 2013: *"The Typhoo board have recently reviewed the current performance of the company and have decided to go ahead with a number of cost reduction measures to improve the state of the business".*

97. However, there is no evidence that the defendant was in financial difficulties or that its business was or is in terminal decline. Whilst it is true that, as Mr Thomas QC said, the burden of proving the claim is on the claimant, if it were the case that the defendant was in financial difficulties, I would have expected the defendant itself to put forward some evidence about that, which it has not. I find that the defendant's business was financially stable and profitable and that the reduction in share of the market would not have affected the income stream for the agency, since it was on a fixed retainer of £260,000 a year, not variable commission.

98. One of the other points made by Mr Hall, which Mr Thomas QC put to Mr MacLaverty in cross-examination, was that any purchaser was likely to be an individual or small business which was likely to be conservative and cautious in his or its approach to buying the agency. Although Mr MacLaverty was disinclined to accept that proposition, it does seem to me, on reflection, that this is essentially the same point as Judge Harris QC made in *Lonsdale*. about the likely purchaser of the business being someone of modest means and his approach was endorsed by the House of Lords. In all the circumstances, it does seem to me that the multiplier should be reduced marginally to reflect such uncertainty as there is about the defendant's

business and share of the market, and the likelihood that any purchaser would be someone cautious of modest means. Those factors cause me to reduce the multiplier from 5 to 4.

99. One of the other points taken by Mr Hall is far more controversial. He says that any valuation should take account of the twelve month notice period in the agency agreement, which was another reason why he took a multiplier as low as 1 or 2. As he said in cross-examination:

> *"Again, I am taking a commercial view, putting myself in the position of advising a client, and in that situation if there is a possibility of termination in the foreseeable future there is a possibility that the purchaser might not be able to operate the agency sustainably, and those are contingencies that I would advise the client to build into the valuation."*

100. In his submissions, Mr Thomas QC placed great emphasis on this point, saying that, in the real world, any valuation would take account of the fact that the agency was terminable after twelve months. However, I agree with Mr Segal QC that this is a heterodox approach. As is clear from [12] of Lord Hoffmann's judgment in *Lonsdale* quoted above: "it is obviously necessary to assume that the agency would have continued and the hypothetical purchaser would have been able properly to perform the agency contract", in other words the valuation for the purpose of the Regulation is on the basis that the agency continues, with the purchaser performing the agency agreement in accordance with its terms, and the principal not invoking any termination or notice provision. Even if this point were not absolutely clear from *Lonsdale*, what is essentially the same argument was rejected by the Court of Appeal in an earlier case on the Regulations, *Page v Combined Shipping & Trading* [1997] 3 All ER 656: see per Staughton LJ at 660d-h. Accordingly, in my judgment, the notice period is to be disregarded in valuing the agency and the assumption should be made that, in the absence of external evidence of matters, such as financial difficulty or a trade in terminal decline, the agency would have continued.

101. Apart from the issue of the appropriate multiplier, the principal issue which divided the experts was the costs which would have been incurred in earning the fixed retainer of £260,000. Mr MacLaverty's opinion was that, after the costs that he considers would be incurred, there would be a post-tax profit of £42,100. Mr Hall, on the other hand, considers that the costs incurred, on the basis of his interpretation of Mr Knight's evidence as to the cost of wages, were such that only a small profit of £1,307 would have been made, whereas on his interpretation of Mr Ramsay's evidence as to the costs of wages, there would have been a loss of £22,981. There were other items of expenditure which gave rise to a difference of opinion, specifically fixed costs and inflation, for both of which Mr Hall makes allowance, but Mr MacLaverty does not.

102. Before considering the detail of these differences, I should mention some of the general points on profitability of the business made by the defendant. The defendant placed particular reliance on a statement in the claimant's Financial Accounts. These were prepared by the claimant's accountants, although not audited, because the company was not required to obtain an audit in accordance with section 476 of the Companies Act 2006. However, the accounts were signed by Mr Ramsay as director, acknowledging his statutory responsibility to prepare financial statements which give

a true and fair view of the state of affairs of the company. The statement on which the defendant placed reliance is headed *"Post Balance Sheet Events"* and provides:

> "Following the year end a material contract has been cancelled which will have the effect of reducing turnover by approximately £400,000 in the following year. Whilst the contract represented a significant proportion of turnover, it was at relatively low margin so that the effect on profitability is expected to be fairly minimal."

103. Mr Ramsay's evidence about that statement was not entirely satisfactory. In his witness statement, he said the statement was prepared by the accountants and he neither reviewed it for accuracy or reasonableness although: *"I am told that [the] words 'relatively low margin' were intended to present a positive slant on what was a significant loss to the ARSM business as a whole."* In cross-examination, when faced with the fact that he had signed the accounts as director saying they presented a true and fair view, he accepted that the statement was a fair reflection of his view at the time. He went on to qualify that acceptance in this way:

> *"Q. Therefore, that must reflect what you told [the accountants] and what you expressed to them is your view of the profitability of the agency.*
>
> *A. It reflects the advice they gave me at the time, yes, based on the discussions that we had; yes.*
>
> *Q. What do you say was the advice they gave you?*
>
> *A. That prospective future clients would potentially look at my accounts and it would be dangerous to say that it would affect the profitability of the business.*
>
> *Q. This was made with the deliberate intention of giving the impression to anybody who looked at your accounts in the future that the loss of the Typhoo agency was not significant.*
>
> *A. Yes."*

104. Mr Thomas QC then put that what he had said in his witness statement about the Typhoo account being the most profitable agency was a very misleading statement, to which he said:

> *"A. Potentially, yes.*
>
> *Q. So why did you make it if you did not believe it?*
>
> *A. I did believe that Typhoo was profitable. I would suggest I made a mistake in the account."*

105. Mr Thomas QC went on to put to Mr Ramsay what Mr Packer said in his evidence about Mr Ramsay having informed him regularly at meetings that the agency with Typhoo was a loss maker. Mr Ramsay said that, if he had said that it would be as a

negotiation in discussions where Mr Packer wanted to reduce fees and agreed he was happy to say that because it suited his purposes at the time.

106. None of that reflects well on the integrity of Mr Ramsay as a businessman, but, as Mr Segal QC said, the statement in the accounts was far from accurate anyway, since the loss of turnover could not have been anything like £400,000 and, ultimately, the question for the court is whether the business was profitable on the basis of all the evidence. What Mr Ramsay may have believed and told others is only one part of the overall picture.

107. The defendant also placed reliance on a document headed "Structure-Proposed" which seems to have been prepared by Mr Ramsay in late 2010, when the defendant was contemplating increasing the claimant's involvement. On the basis of the amount of time being ascribed to the Typhoo agency, that document shows that the agency would have been loss-making. In fact, as Mr MacLaverty said, this was a bid to increase the monthly retainer. He did not regard it as a reliable basis for assessing the costs of the whole agency or the level of involvement of the claimant's staff in the Typhoo agency. As he pointed out, the total wage costs in the document far exceeded the actual wage costs for 2011 and 2012 shown in the accounts, four employees shown in the proposal had left in 2012 and two others were not on the 2013 payroll. Although Mr Knight had not worked for the defendant when this document was produced, he said in evidence that his guess was that the figures in it were exaggerated. In my judgment, the proposal is not a reliable basis for assessing either wage costs or profitability of the agency going forward from May 2013.

Wage costs other than equivalent of Mr Ramsay

108. Because the claimant's staff did not keep time sheets attributing their time to the particular principals for whom they were working at the time, there is obviously an element of estimation, in assessing what the wage costs derived from the Typhoo agency were in the last year of its operation and what they would have been in the future. Mr MacLaverty calculated the wage costs essentially by comparing the wage costs for the last year of the Typhoo agency to 31 March 2013 and the wage costs for the following year to 31 March 2014 after the agency had ended, taking account of staff who had left. The difference between the two he ascribed to the saving to the claimant from not running the Typhoo agency and thus representing in broad terms the wage costs of running it. After some adjustment, his figure was some £125,500.

109. Mr Hall's preferred approach was to take Mr Ramsay's evidence, in his witness statement, that he estimated that in the period leading up to termination of the agency, the workforce spent 50% of their time on the defendant's business. He then took the payroll for the last twelve months of the agency and averaged out the headcount of staff, arriving at 10 excluding Mr Ramsay which using the 50% figure gave 5 Full Time Equivalents ("FTE"s). Taking 50% of their payroll he arrived at a wages cost for the agency going forward of about £154,000. In my judgment, this was not an accurate or appropriate method for assessing the wages cost after 11 May 2013, given that for considerable periods of the time from April 2012 to March 2013, more staff were being employed than was the case in May 2013 (between April and September 2012 there were 13 or 12 overall whereas by March 2013 there were only 8). Inevitably, therefore, Mr Hall's average figure overestimates the number of staff necessary to run the Typhoo agency going forward. In cross-examination, Mr Hall

sought to justify his position by reference to a graph in his report, which he used to suggest that the staff had been cut after October 2012 to a greater extent than was necessary to operate the Typhoo agency efficiently. I did not regard any of that analysis or his evidence about it as reliable.

110. His alternative approach was based on passages in Mr Knight's witness statement in which he assessed that, as at April 2012, there were 5 FTEs (including Mr Ramsay) at the claimant working on the defendant's business. After deducting the cost of Mr Ramsay, this equated to a total cost of some £124,500, very close to Mr MacLaverty's figure. In fact, as Mr Segal QC pointed out to Mr Hall in cross-examination, on a proper interpretation of Mr Knight's evidence, he was suggesting a slightly lower number going forward after May 2013, given that the Booker and Bestway accounts had been taken back in-house by the defendant. At [33] of his statement he says that after this happened, the number of FTEs was approximately 3.5 plus Mr Ramsay. Furthermore, in an email dated 4 March 2013, Mr Knight put forward some figures for the *"optimum time required by ARSM team for future coverage"* which seem, on analysis, to suggest even fewer FTEs, albeit that was on the basis that the Costco account would also be taken back in-house. As Mr Segal QC said, on the basis of Mr Knight's evidence, the claimant could very well have argued for a lower wage cost figure than Mr MacLaverty's figure of some £125,500, but it was content to stick at that figure, which I propose to adopt.

Equivalent of Mr Ramsay

111. In relation to the cost of the salary for the equivalent of Mr Ramsay which the notional purchaser would have had to employ, Mr Hall's approach was simply to take a proportion of Mr Ramsay's overall remuneration of £70,000 per annum. In fact, Mr Ramsay paid himself the bulk of that by way of dividends from the company. Two points arise. The first is whether the fact that dividends are taken is of any relevance to the assessment of the profitability of the company, as Mr Hall suggested they were in cross-examination. In my judgment that cannot be right. If the net profit of the company was £70,000 but Mr Ramsay took all that out as dividend, the net profit is still £70,000. Equally, the point works the other way. If Mr Ramsay draws £10,000 in salary and £60,000 in dividends, the cost of him to the company is still £70,000.

112. The second question is whether taking Mr Ramsay's remuneration is the right comparison at all. In my judgment it is not. The notional purchaser would have wanted to employ a senior sales manager and the correct exercise is to establish the cost of such a person, which Mr MacLaverty quite rightly does. Based on the Annual Survey of Hours and Earnings ("ASHE") for 2011 uplifted to 2013, he gets a total salary of £50,951, so that, on the basis that 50% of the sales manager's time was spent on the defendant's business, the correct cost is £25,475. Once again, the dividends Mr Ramsay was taking out of the business are irrelevant to this exercise.

Motor, travel and accommodation

113. The experts agree that the figure for the cost of motor, travel and accommodation should be about 32% of the total wages bill so that the correct figure, based on Mr MacLaverty's figures, is £47,352.

Fixed costs/overheads

114. In *Lonsdale*, Lord Hoffmann talks at [29] about the position where the agent represents more than one principal and how the costs of running the agency as a whole are to be apportioned:

> "Furthermore, in the case of an agent who has more than one agency, the costs must be fairly attributed to each. He cannot simply say, as Mr Lonsdale did in this case, that the marginal cost of the Elmdale agency was little or nothing because he had to see the same customers and go to the same exhibitions for Wendel."

115. Mr Segal QC submits that this tells one nothing about whether a proportion of all costs is to be brought into account, or only the variable costs, as the claimant submits. The basis for this submission, which is supported by Mr MacLaverty's expert evidence, is that the court should not assume that the notional purchaser was a start-up operation as opposed to an established business and that, if it was the latter, then the overheads of the business would be incurred by it anyway, irrespective of whether this additional agency was taken on. This same argument, also supported by expert evidence from Mr MacLaverty, found favour with HH Judge Ralls QC (sitting as a High Court Judge) in another case on Regulation 17: *Invicta UK v International Brands Limited* [2013] EWHC 1564 (QB), although the learned judge did make a reduction of £500 to the multiplicand to reflect fixed costs.

116. However, that conclusion was essentially based on preferring Mr MacLaverty's evidence on the point, rather than any particular analysis. It seems to me that the better view is that Lord Hoffmann was talking about all the costs of the agency (both fixed and variable) being fairly attributed to all the principals. Furthermore, it does not seem to me possible to say of all the costs identified by Mr MacLaverty as fixed: insurance, computer expenses, subscriptions, donations, accountancy and legal expenses, that they would definitely all be incurred at the same level if this particular agency were not undertaken. Accordingly, I have deducted a total of £10,000 for these items, a slight rounding down.

Inflation

117. Mr Hall was very firmly of the view that there should be some increase made to the costs, particularly in relation to wages to reflect inflation. Mr MacLaverty disagreed. He could not say for sure that the FTSE P/E ratios included any allowance for inflation although he suspected they did. Certainly his alternative method of valuation, which was an annuity based calculation, which he used as a cross-check to ensure that his valuation using the P/E ratios and multiplier was in the right range, which it was, did include a factor for inflation. He considered that the fact that his two methods of valuation reached broadly similar figures suggested that there was some factor included in the P/E ratios for inflation. Mr Segal QC submitted that if one is using third party indices such as the P/E ratio or the ASHE index, one should assume that they take account of inflation and I see considerable force in that point.

118. For that reason and for the additional reasons that inflation remains very low and that, if that position changed and the country returned to an inflationary wage cycle, no doubt the fixed retainer would be negotiated upwards, I do not consider it appropriate to make an allowance for inflation in assessing the costs of running the agency.

Conclusion on compensation under Regulation 17

119. For all the reasons set out above, I accept Mr MacLaverty's figures for the wage costs including for a sales manager equivalent of Mr Ramsay. I allow £10,000 for fixed costs and for other variable costs take Mr MacLaverty's figures rather than Mr Hall's. On that basis the total costs are £217,375 which means that the pre-tax multiplicand is £42,625. The parties will be able to calculate the post-tax figure. To that must be applied a multiplier of 4. The resultant figure, which will be in the region of £130,000, seems to me a fair reflection of the value of the agency and what a notional purchaser would have been prepared to pay for it.

Damages for termination with insufficient notice

120. Under the agency agreement, the claimant was entitled to 12 months' notice of termination whereas only three months' notice was given. It follows that the unexpired notice period was 9 months and the claimant is entitled to damages for that period for breach of contract. The assessment of the correct monthly figure involves assessment of the same expert evidence as in relation to the Regulation 17 claim. I have found that I accept Mr MacLaverty's figures save in relation to fixed costs. Taking the figures at [4.96] of the Joint Statement of Experts, but factoring in another £10,000 per annum for fixed costs, the pre-tax figure for 12 months would be £60,612 and for 9 months would be £45,459, and the claimant is entitled to damages accordingly.

Non-payment of retainer for 25 April to 11 May 2013

121. The defendant failed to pay the retainer for the short period from 25 April to 11 May 2013 during which, as I have found, the claimant was continuing to perform its obligations under the agency agreement. This non-payment was a clear breach of contract. The amount at issue is £7,583.33. In his written submissions Mr Thomas QC suggested that this sum was being claimed elsewhere so that the court should be careful to avoid double-counting. However, I do not consider the claimant is claiming that sum elsewhere. The claimant is clearly entitled to damages in that sum.