Neutral Citation Number: [2019] EWCA Civ 335

Case No: A3/2017/3397

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
(Mr Edwin Johnson QC sitting as a deputy judge of the High Court)

Royal Courts of Justice
The Rolls Building
London, EC4A 1NL

Date: 05/03/2019

Before:

SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE HENDERSON
and
LADY JUSTICE ASPLIN

Between:

(1) Harcus Sinclair LLP

First Claimant/Appellant

(2) Harcus Sinclair UK Limited

Second Claimant

and

Your Lawyers Limited

Defendant/Respondent

and

Damon Parker

Part 20 Defendant

- -

Mr David Foxton QC, **Mr Jawdat Khurshid QC**, and **Ms Josephine Higgs** (instructed by **Harcus Sinclair UK Limited)** for the **Appellant**

Mr Richard Coleman QC and **Mr Philip Ahlquist** (instructed by **Your Lawyers Limited**) for the **Respondent**

Hearing dates: 12th to 14th February 2019

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Approved Judgment

Sir Geoffrey Vos, Chancellor of the High Court (delivering the judgment of the court):

Introduction

1. The backdrop to this appeal is the so-called "Volkswagen diesel emissions scandal" that became public on 18th September 2015, when the United States Environmental Protection Agency issued a notice of violation alleging that certain Volkswagen vehicles manufactured between 2009 and 2015 had been fitted with a device which (a) detected when the vehicle was being tested for compliance with emissions standards, and (b) manipulated the results.

2. Your Lawyers Limited ("YLL"), a relatively small company offering the services of solicitors (the defendant and respondent) and Mr Amandip Johal ("Mr Johal"), a solicitor and director of YLL, quickly saw the opportunity to bring a group action in respect of diesel Volkswagen vehicles sold in the UK. YLL gathered some thousands of clients together, before approaching a third-party funding broker, Mr Gregory Fairley, a director of Capital Interchange Limited ("Mr Fairley"), to obtain third-party funding for the claim. Mr Fairley suggested collaboration with a larger firm of solicitors that had more experience of financing and undertaking major group actions.

3. Mr Fairley, therefore, put YLL in touch with Harcus Sinclair LLP (the first claimant and appellant ("HSLLP")), and HSLLP's partner, Mr Damon Parker, the Part 20 Defendant ("Mr Parker"). YLL's first step was to require HSLLP to sign a non-disclosure agreement dated 11th April 2016 (the "NDA").

4. The NDA included a "non-compete" clause, which has given rise to this litigation. That clause (universally referred to by the parties as "Sentence 2", but which we will call the "Restriction") provided that HSLLP undertook "not to accept instructions for or to act on behalf of any other group of Claimants in the contemplated Group Action" without the express permission of YLL.

5. The parties have argued many issues in this appeal, all of which we will need to mention in due course. As it seems to us, however, the case really turns on only 4 important questions: two central issues and two subsidiary ones.

6. The first central issue relates to the proper interpretation of the Restriction. Mr Edwin Johnson QC, sitting as a deputy judge of the High Court, decided that the phrase "the contemplated Group Action" as used in the Restriction was to be given a broad meaning comprising "any actual or intended group action in the English courts involving [YLL's] client group against anyone who could be held responsible in civil proceedings in respect of the diesel emissions scandal" (the "Emissions Litigation"). Conversely, HSLLP contended that "the contemplated Group Action" should be interpreted narrowly to mean only the group action that was in fact contemplated at the time when the NDA was concluded, in respect of which YLL intended to disclose confidential information to HSLLP. YLL had, on 25th October 2015, sent a letter before action to Volkswagen Group United Kingdom Limited ("VWUK"), the importer of Volkswagen vehicles into the UK. On 25th January 2016, more than 2 months before the NDA, YLL had issued a Claim Form on behalf of five representative claimants against VWUK, saying that it intended to apply for a Group Litigation Order under CPR Part 19 (the "January action"). HSLLP, therefore, argued that "the contemplated Group Action" meant only the January action against VWUK.

7. The second central issue is whether the judge was right to hold that the Restriction was enforceable, on its proper interpretation, on the basis that it was not an unreasonable restraint of trade.

8. The two subsidiary issues arise only if the Restriction is to be given the wide interpretation adopted by the judge, and is not rendered unenforceable as an unreasonable restraint of trade. In that event, it will be necessary for us to decide whether the judge was right to determine that:-

   i) a term should be implied into the NDA to the effect that HSLLP would ensure that its associated company, Harcus Sinclair UK Limited, the second Claimant ("HSUK") did nothing which, if done by HSLLP, would be a breach of the Restriction; and anyway, even without the implied term, HSLLP was itself in breach of the Restriction by acting, through the staff it seconded to HSUK, for its own clients in the Emissions Litigation (the "HS Group"); and

   ii) YLL had not agreed that it would not enforce the Restriction, and YLL was not estopped by convention or by acquiescence from denying that HSLLP and/or HSUK were entitled, despite the Restriction, themselves to act for claimants in the Emissions Litigation. HSLLP requires permission to appeal from this court to pursue these issues.

9. In addition to the above issues, HSLLP has permission to appeal the judge's determination that (a) HSLLP continued to act after 25th January 2017, when it transferred the conduct of the October action (see paragraph 12 below) to HSUK, (b) HSLLP had passed confidential information to HSUK in June 2016, and (c) he should exercise his discretion so as to grant injunctive relief against HSLLP.

10. YLL also seeks permission to advance by way of cross-appeal that the judge had been wrong (a) to decide to follow *Kanat Assaubayev v. Michael Wilson & Partners* [2014] EWCA Civ 149 ("*Kanat Assaubayev*") in concluding that the court did not have a supervisory jurisdiction over HSLLP, and (b) to decide that the court had no supervisory jurisdiction over Mr Parker, and (c) only to award YLL 70% of its costs against HSLLP, and to require YLL to pay Mr Parker's costs. YLL also sought to raise by way of Respondent's Notice arguments that (a) a restraint of trade defence is not available where the court exercises its supervisory jurisdiction, (b) the judge ought to have construed the Restriction as the recipient of a solicitors' undertaking would have understood it, and (c) the judge ought to have held that the implied term was obvious and necessary to give the NDA business efficacy, where HSLLP created HSUK specifically to conduct group litigation.

The NDA

11. YLL drafted the NDA, and Mr Parker signed an amended version of it, without himself reading it, having asked Ms Jennifer Morrissey, a senior solicitor in his office, to review and amend it. The NDA included the following clauses, only the first two of which were mentioned by the judge:-

> "1. The Discloser [YLL] intends to disclose information (the Confidential Information) to the Recipient [HSLLP] for the purpose of obtaining legal advice on behalf of Claimants in a large Group Action (the Purpose).

> 2. [HSLLP] undertakes not to use the Confidential Information for any purpose except the Purpose, without first obtaining the written agreement of [YLL]. [HSLLP] further undertakes not to accept instructions for or to act on behalf of any other group of Claimants in the contemplated Group Action without the express permission of [YLL].
>
> 3. [HSLLP] undertakes to keep the Confidential Information secure and not to disclose it to any third party except those who know they owe a duty of confidence to [YLL] and who are bound by obligations equivalent to those in clause 2 above and this clause 3.
>
> 4. The undertakings in clauses 2 and 3 above apply to all of the information disclosed by [YLL] to [HSLLP], regardless of the way or form in which it is disclosed or recorded but they do not apply to:
>
> a) any information which is or in future comes into the public domain (unless as a result of the breach of this Agreement); or
>
> b) any information which is already known to [HSLLP] and which was not subject to any obligation of confidence before it was disclosed to [HSLLP] by [YLL] …
>
> 7. The undertakings in clauses 2 and 3 will continue in force for six years from the date of this Agreement. …".

12. After signature of the NDA, the parties collaborated informally. HSLLP recruited its own claimants, which we have described as the HS Group, and issued a Claim Form on their behalf on 19th October 2016 (the "October action"). The judge found that the October action derived from HSLLP's work and not from YLL's confidential information.

13. The judge found that HSLLP was in breach of the Restriction in the NDA from 29th September 2016, when it first accepted instructions to act for the HS Group, until it transferred the conduct of the October action to HSUK on 25th January 2017. The judge also held that HSLLP was, from 25th January 2017, in breach of the alleged implied term of the NDA to the effect that it would ensure that HSUK would not do anything which, if done by HSLLP, would be a breach of the Restriction.

The privacy of the hearing and new evidence

14. Before dealing with the substantive issues, it is necessary to mention two preliminary matters that exercised the parties. First, the parties had agreed at the outset that the court should sit in private for the entirety of the appeal. Secondly, HSLLP sought to admit new evidence of the events that had occurred in the Emissions Litigation since the trial before the judge, and YLL sought to rely on evidence in reply.

15. When the appeal began, the court indicated its preliminary views on these points. As to a hearing in private, the court said that it thought it unnecessary to hear the entire appeal in private, and that many, if not most, of the arguments would not require detailed reference to privileged or confidential materials. The court suggested that such of those documents that did need to be referred to could be read by the court without reciting them aloud. The court made an agreed order to regulate access to the court file and the position in case of any accidental reference to privileged material. As to the new evidence on both sides, the court suggested that it could be admitted *de*

bene esse, so that both sides could make whatever arguments they wanted without disrupting the course of the appeal.

16. In the result, it was not necessary to go into private to hear any part of the appeal, and little oral argument was addressed to the admissibility of the new evidence. It seems to us that the new evidence usefully brought the court up to date as to events that occurred since the trial and should be admitted. Since, however, the two main issues relate to questions that arose for determination as at the date of the NDA, the new evidence amounted to no more than informative background.

The parties

17. We have already mentioned both HSLLP and HSUK. The judge explained that HSLLP was incorporated in March 2016 as the successor to a general partnership called "Harcus Sinclair". HSUK was incorporated in May 2014, and created for the purposes of taking over the conduct of a different substantial group action from Harcus Sinclair. Save for inconsequential variations, all HSLLP's members and partners are directors of HSUK, and the shares in HSUK are held by them according to their equity shares in HSLLP.

18. Employees of Harcus Sinclair, and later HSLLP, were sometimes seconded to HSUK. HSUK had no employees of its own, and HSLLP paid all the remuneration of seconded employees, whilst HSUK paid a fee for their secondment. The judge concluded that the decision to transfer the conduct of the Emissions Litigation from HSLLP to HSUK on 25th January 2017 was not motivated by a desire to sidestep the effect of the Restriction in the NDA.

The factual background

19. We do not propose to summarise the detail of the judgment below, which ran to some 108 pages and 483 paragraphs. Both parties have given justifiable credit to the judge, who produced his lengthy decision within 6 weeks of the hearing, and who dealt carefully and meticulously with both the facts and the arguments. We will content ourselves with picking out some of the more important factual findings that the judge made. Some have been relied on by the parties as relevant factual matrix; others are said to found the agreement permitting HSLLP to act for its own claimants or the alleged estoppel.

20. When the news of the diesel emissions scandal broke, the judge found that Mr Johal took the view that the potential for a group claim should be pursued, and he began preparations to get a group claim off the ground. Conversely, whilst it "crossed Mr. Parker's mind that there might be a viable group claim against Volkswagen", and Mr Parker asked his team at HSLLP to "have a look at the background facts to the Emissions Events", he was not convinced of the economics of the group claim. Mr Parker's view was that "because each individual claim would be of relatively low value", there would have to be "thousands of claims for the litigation to become a viable proposition for a third party funder".

21. As we have said, YLL wrote a letter before action to VWUK on 26th October 2015. It listed causes of action including fraudulent misrepresentation, unjust enrichment, breaches of various consumer regulations and of the Sale of Goods Act 1979.

Thereafter, YLL engaged in correspondence with Freshfields Bruckhaus Deringer LLP ("Freshfields"), VWUK's solicitors, before commencing the January action on 25th January 2016 against VWUK as the sole defendant.

22. On 19th February 2016, Mr Fairley signed a non-disclosure agreement between Capital Interchange Limited and YLL in similar but not identical terms to the NDA. On 25th February 2016, Mr Fairley emailed Therium Capital Management ("Therium"), a company which provides third-party funding for group litigation, raising the possibility of YLL working alongside HSLLP. By April 2016, YLL had obtained instructions from approximately 4,000 potential claimants. On 4th April 2016, Therium met Mr Johal and Mr Fairley together with Mr Tom Goodhead, junior counsel instructed by YLL ("Mr Goodhead"). On 5th April 2016, Mr Fairley emailed to Therium what has been referred to as the "Litigation Pack" including:-

    i) An overview note prepared by YLL on the proposed group claim entitled the "VW Group Litigation" (the "Overview Note").

    ii) An Advice on Liability provided by Mr Goodhead dated 24th March 2016.

    iii) Mr Goodhead's Note on Quantum dated 2nd April 2016.

    iv) The letter before action dated 26th October 2015.

    v) The Claim Form in the January action.

    vi) Correspondence with Freshfields following the letter before action.

    vii) Transcripts from proceedings in the United States.

    viii) Wikipedia information relating to the Emissions Events.

23. After Therium and Capital Interchange Limited had been in touch with Mr Parker, Therium sent the Litigation Pack on to Mr Parker on 8th April 2016, telling him that they would be interested in his opinion on the legal merits of the case. Mr Parker said at an early stage that he was willing to sign a non-disclosure agreement. YLL sent Mr Parker the draft NDA on 10th April 2016. Mr Parker asked Ms Morrissey to take a look at it, and she responded with some suggested minor amendments. The judge found that Mr Parker signed the NDA on 11th April 2016 but did not read it at any stage up to January 2017. He had, however, by the time he signed the NDA, considered the contents of the Litigation Pack.

24. The judge found that the Litigation Pack had been provided to Mr Parker "because Mr. Moore [of Therium] bumped into Mr. Parker at a lunch, and asked him for his thoughts on the proposed group claim". He also found that Therium "had no right to send the Litigation Pack to Mr. Parker without the authority of [YLL]" and "that Mr. Parker should have appreciated that he was being sent a pack of documents which included documents which were confidential and, in some cases, subject to legal privilege". We should note, however, that the judge did not accept the suggestion that Mr Parker was devious, even if he had "paid less attention than he should have done to the legalities of the position, in terms of whether he had a right to see the Litigation Pack when it was sent to him".

25. The judge held that, when the NDA was signed, "the only legal obligations owed by [HSLLP to YLL] were those contained in the NDA. The NDA said nothing about how precisely [YLL and HSLLP] would work together, moving forward. Everything was up in the air".

26. On 12th April 2016, Mr Parker sent Messrs Fairley, Johal and Goodhead, an anonymised draft collaboration agreement, providing for two firms of solicitors to work together, each having their own clients. Thereafter, HSLLP and YLL discussed their proposed collaboration. The judge found specifically that no formal agreement to collaborate, beyond the draft, was reached at a meeting on 28th April 2016, and that HSLLP was not then released from its obligations under the Restriction. He found that an informal process of collaboration began on that date, whereby the parties proceeded on the basis that they would be working towards agreeing the terms of a written collaboration agreement; pending its signing neither side was legally committed to the process. The judge found that HSLLP committed substantial legal resources without a formal collaboration agreement in place, because that was the nature of group claims, and because, as Mr Parker said, if Therium funded the claims, that funding would cover the initial expenditure.

27. On 17th August 2016, Mr Johal sent Messrs Fairley and Parker a further draft collaboration agreement between YLL and HSLLP. The judge said that it remained apparent from various clauses that each would have its own clients. Later drafts were also exchanged. The judge found that neither side addressed its mind at any stage to what would happen if no written collaboration agreement were agreed. Mr Johal relied on the NDA, and Mr Parker assumed that HSLLP "would be free to strike out on [its] own or in collaboration with another firm or firms, in terms of acting for [its] own group of claimants in the proposed group claim", because he had not read the NDA.

28. The judge found that these informal arrangements continued through to the end of November 2016, notwithstanding that by that time the informal process of collaboration was faltering, but not abandoned by either party, even when Mr Parker was having collaboration discussions with Slater and Gordon (another firm of solicitors specialising in group actions) without Mr Johal's knowledge.

29. Meanwhile, on 2nd June 2016, HSUK was retained to act in an emissions claim by a Ms Elizabeth Gabrel. On 25th July 2016, HSLLP sent a formal letter of claim to Volkswagen Financial Services (UK) Limited (not VWUK) on behalf of Ms Gabrel. Later, on 1st September 2016, HSUK sent Freshfields another detailed letter of claim on behalf of its clients, Mr Edward Parkes and Mrs Laura Parkes. Mr Parker used HSUK rather than HSLLP because Mr Parker and HSLLP used the two entities interchangeably. Mr Johal became aware that Harcus Sinclair (using that name generally) were acting for Ms Gabrel and Mr and Mrs Parkes and did not object, because he thought they had been recruited in the context of the continuing cooperation with YLL.

30. HSLLP placed some reliance on an email from Mr Fairley to Therium of 28th August 2016 referring to each of YLL and HSLLP having its own clients after the completion of a collaboration agreement, and saying that Mr Johal was "very relaxed" on this point, as he was "of the firm view that there will be plenty of clients to go around".

31. On 30th August 2016, Therium emailed Mr Johal making it clear that it would not be funding the proposed group claim without HSLLP in control. On 29th September 2016, Mr Parker and Harcus Sinclair were retained by another 12 clients. The judge found that these retainers were unknown to YLL, and that by the end of September 2016, HSLLP had begun to form, without the knowledge of YLL its own separate group of claimants (which he too called the "HS Group"). By the trial, the HS Group for whom HSUK and Slater and Gordon acted jointly, amounted to some 43,000 claimants.

32. A confusing correspondence ensued in October 2016 between HSLLP and Freshfields. The judge concluded on the basis of a letter dated 12th October 2016 from HSLLP to Freshfields that HSLLP, rather than HSUK, was acting for the clients.

33. The October action was commenced by HSLLP with 67 claimants, as we have said, on 19th October 2016. Mr Parker reported this to Mr Johal after the event on 20th October 2016 in an email, upon which both parties placed some reliance in relation to the estoppel arguments. The judge drew 3 particular points from it. First, it was the first notification to YLL that the HS Group had been formed. Secondly, that it was presented as a *fait accompli*, not as a request for permission. Thirdly, the email did not terminate the informal process of collaboration, and kept open the possibility of working together pursuant to a collaboration agreement if terms could be agreed. Undoubtedly, the 20th October 2016 email referred to HSLLP having its own clients and considering collaboration with other firms.

34. Mr Johal's response of 20th October 2016, according to the judge, expressed surprise at the content of Mr Parker's email. He interpreted Mr Parker's email as asking YLL to support the application for HSLLP to be the sole lead solicitor in the absence of a cooperation agreement. He asked HSLLP to "hold off on issuing" the GLO application until "we can conclude the manner in which we are to cooperate". He said: "I am unfortunately unable to support the application nor the contents of the witness statement, were it to be issued, without first agreeing the cooperation agreement between our two firms. The application for the GLO to be supported would need to have [YLL] as joint lead Solicitors with [HSLLP]". As the judge found, the possibility of a collaboration agreement remained open. HSLLP filed its GLO application to be lead solicitor on 28th October 2016, although it was fortuitously not issued until 18th November 2016.

35. During this period, there were a number of emails and telephone conversations on which the parties relied. YLL suggested that Mr Parker had concealed what HSLLP was doing from YLL. We are not sure that the details of these exchanges are important to what we have to decide. Suffice it to say that in one or two respects, the judge found that the information that Mr Parker relayed to YLL was less than complete. As the judge found, by the time of a telephone call on 11th November 2016, "the cracks … were starting to appear in the informal collaboration process", because there was disagreement between the parties as to how the claim against Volkswagen should be pleaded, and YLL was "less than happy that Mr. Parker" had proceeded with the GLO Application without prior reference to it. The judge did not think any of these events to have been of particular significance because the informal process of collaboration was still continuing, whatever cracks were appearing, and neither party was addressing what would happen if HSLLP struck out by itself without a binding collaboration agreement being concluded.

36. On 25th November 2016, Therium declined to fund YLL. On 6th January 2017, Mr Johal emailed Mr Parker asserting for the first time that HSLLP's involvement had been "on the basis that you could not accept instructions from any Claimants without my authority". The judge decided that the correspondence which followed marked (a) the effective end of the informal process of collaboration which had commenced following the meeting on 28th April 2016, and (b) the first time that the parties had addressed the question of what the legal position was between themselves, in the absence of agreement on a formal collaboration agreement, and in circumstances where HSUK was acting with Slater and Gordon for its own group of claimants.

The judge's judgment

37. We can now briefly summarise the judge's determinations on the main issues that he decided. This summary should not be taken as a substitute for a consideration of the judge's own careful reasoning.

38. The judge decided first that the Restriction took effect as a solicitor's undertaking. He held, however, that that conclusion did not assist YLL because the Court of Appeal in *Kanat Assaubayev* (per Christopher Clarke LJ at paragraphs 46-47) had decided that the court's supervisory jurisdiction over solicitors was confined to solicitors as officers of the court, and did not extend to limited liability partnerships and companies, through which solicitors conducted their practice. Moreover, the undertaking in the Restriction did not take effect as a solicitor's undertaking given by either HSUK or Mr Parker, the latter because he gave the undertaking expressly on behalf of HSLLP.

39. As to interpretation of the Restriction, the judge concluded that it precluded HSLLP from accepting instructions from or acting for the HS Group, or for any other group of claimants in the Emissions Litigation save for YLL's group of clients, without the express permission of YLL. In reaching this conclusion, it is important to note that he put to one side questions of restraint of trade. He took the principles to be applied from the Supreme Court's decisions in *Rainy Sky SA v. Kookmin Bank* [2011] UKSC 50, *Arnold v. Britton* [2015] UKSC 36, and *Wood v. Capita Insurance Services Limited* [2017] UKSC 24. The judge held that the words "the contemplated Group Action" in the Restriction were to be taken as a reference back to "a large Group Action" in clause 1 of the NDA. He thought that construing those words narrowly as referring only to the January action was unrealistic and uncommercial. He thought that both YLL and HSLLP understood at the time of the NDA what was involved in a group action such as the Emissions Litigation, which had been referred to as the "VW Group Litigation" on the front page of the Overview Note, which had itself envisaged different firms of solicitors acting for different groups of claimants. The judge thought that no reasonable reader could think that the Restriction allowed HSLLP to start its own set of proceedings on behalf of its own group of claimants at any time.

40. Accordingly, the judge concluded that the "contemplated Group Action" in the Restriction referred generally to the group litigation contemplated by the Overview Note, which was the claims against Volkswagen (using the term generally), arising out of the Emissions Events, which, it was contemplated, would be made in a group action by various groups of claimants, to be governed by a Group Litigation Order. The argument that the Restriction only covered claims against VWUK was another way of putting the argument that it only covered the January action. Finally, the

judge said that it was important to keep in mind that clause 1 of the NDA identified that confidential information was to be disclosed to HSLLP for the purpose of obtaining legal advice. Both parties would have appreciated that it was likely that the claims made by YLL's claimants would evolve, both in terms of causes of action and defendants. Equally it was likely that other firms of solicitors, acting for other groups of claimants in the contemplated Group Action, would have their own views on what causes of action should be advanced, and against which defendants involved in the Emissions Events.

41. The judge's formulation of the meaning of "contemplated Group Action" was "any actual or intended group action in the English courts involving YLL's client group against anyone who could be held responsible in civil proceedings in respect of the diesel emissions scandal". That was, the judge held, a precise statement of what was referred to in the Overview Note as the VW Group Litigation, and what was understood by the parties to the NDA to be in contemplation at the time.

42. The judge then held that the NDA was subject to an implied undertaking by HSLLP that HSUK would not do anything which, if done by HSLLP, would be a breach of the Restriction. The judge applied the principles stated by Lord Neuberger in *Marks & Spencer plc v. BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72 at paragraphs 16-21. He relied on (a) the fact that HSUK was created and used by HSLLP as a vehicle through which to conduct group litigation, (b) the fact that at the time of the NDA, HSLLP was aware of HSUK's existence, but YLL was not, (c) his view that, if the matter had been raised with the parties, before the NDA, the parties would have responded with the testy suppression envisaged by MacKinnon LJ in *Shirlaw v. Southern Foundries (1926) Ltd* [1939] 2 K.B. 206 at page 227, (d) the implied term suggested would have been seen as obvious, and necessary to give business efficacy to the NDA, and (e) the fact that it would make a mockery of the obligations in the NDA if they could be sidestepped by the simple expedient of HSLLP using its corporate vehicle, HSUK, to carry out the relevant restricted activity. This was a case where HSLLP was required to ensure that the vehicle through which it conducted the relevant part of its business did not breach the Restriction in the NDA. It did not follow from the fact that YLL could have imposed a wider Restriction that the tests of obviousness and business efficacy were not met.

43. The judge concluded that, with or without the implied term for which he had found, HSLLP was in continuing breach of the Restriction after 25th January 2017. HSLLP had provided staff to HSUK pursuant to secondment arrangements between them, so that HSLLP was acting, through its relevant members and employees (including Mr Parker), for the HS Group, in breach of the Restriction.

44. The judge then concluded that the Restriction was not unenforceable as being an unreasonable covenant in restraint of trade. He referred to the predecessor edition of Chitty on Contracts, 33rd edition at paragraphs 16-106 to 134. He made the important point that the time for testing the validity of a particular restriction was when it was imposed. He explained that a contract in restraint of trade is enforceable only if it is reasonable, with reference to the legitimate interests of the parties concerned and with reference to the interests of the public; the former has to be proved by the party relying on the restriction, and the latter by the party attacking it.

45. The judge decided first that the Restriction was indeed in restraint of trade, applying Diplock LJ's test in *Petrofina (Great Britain) Ltd v. Martin* [1966] Ch. 146 at 180 ("one in which … the covenantor … agrees with … the covenantee … to restrict his liberty in the future to carry on trade with other parties not parties to the contract in such manner as he chooses").

46. The judge held that YLL had established that the Restriction was no more than was reasonably necessary to protect the legitimate interests of YLL and commensurate with the benefits secured to HSLLP. The judge rejected HSLLP's focus on the Restriction as protecting YLL's confidential information, and looked at the matter instead from YLL's perspective in seeking to prevent HSLLP from setting up a rival group of claimants in the proposed group claim. He relied in this latter respect on what Mr Parker had accepted in cross-examination, and upon emails demonstrating how competitive group litigation solicitors can be.

47. The judge dealt with HSLLP's argument that the 6-year Restriction was too broad, because it went beyond governing the position whilst the parties formed a collaboration agreement. He thought that the Restriction was intended to protect YLL from HSLLP, as in fact happened, being well placed, as a result of its work during the period of informal collaboration, to form its own group of claimants in competition with YLL; it was, he said, "hard to see how a restriction which was intended to provide this protection went beyond what was reasonably necessary, as at the date of the NDA, to protect the legitimate interests" of YLL. The benefit that HSLLP received from the Restriction was "access into a process of collaboration with YLL". The burden of the Restriction on HSLLP was commensurate with that benefit. The judge supported this reasoning with a finding that, if Mr Parker had never been approached to help YLL, and had never informally collaborated with YLL, his views on the merits of a group claim would have remained negative.

48. Finally, in relation to restraint of trade, the judge could not see how the Restriction could be said to be contrary to the public interest. He relied on Lord Fraser's *dictum* in *Bridge v. Deacons* [1984] 1 A.C. 705 at 719G-H in relation to a covenant preventing a departing partner from continuing to act for a client, where he had said that "a solicitor is always … entitled to refuse to act for a particular person, and it is difficult to see any reason why he should not be entitled to bind himself by contract not to act in future for a particular group of persons". Moreover, the judge thought that there was a public interest in group action solicitors knowing that the court would enforce reasonable restrictions of this kind.

49. We can deal with the judge's other determinations more shortly. He decided that:-

    i) The Restriction did not cease to have effect as a result of the discussion between the parties at the meeting on 28th April 2016.

    ii) YLL never gave HSLLP or HSUK express or deemed permission to act for the HS Group.

    iii) HSLLP (but not HSUK) has been and remains in breach of the Restriction and in breach of its implied undertaking that HSUK would not do anything which, if done by HSLLP, would be a breach of the Restriction.

iv) YLL has not lost the right to enforce the Restriction or the implied undertaking as a result of acquiescence, waiver or estoppel.

v) Neither HSLLP nor HSUK acted in breach of confidence in violation of the first sentence of clause 2 of the NDA.

vi) HSLLP (but not HSUK) breached its non-contractual duty of confidence by providing the third draft Particulars of Claim to Slater and Gordon on 9th November 2016, and by providing, from June 2016, the confidential information to HSUK.

vii) YLL was entitled to an injunction for 6 years from the NDA requiring HSLLP to cease acting, by its members and employees, and to procure that HSUK cease acting, for the HS Group in the Emissions Litigation.

Issues to be determined

50. Against that background, this court has to decide whether the judge was right to decide that:

i) the Restriction should be interpreted broadly;

ii) the Restriction was not unenforceable as amounting to an unreasonable restraint of trade;

iii) the NDA was subject to an implied undertaking by HSLLP that it would ensure that HSUK would not do anything which would be a breach of the Restriction, and HSLLP was itself in breach of the Restriction by acting, through the staff it seconded to HSUK, for the HS Group; and

iv) YLL had not agreed that it would not enforce the Restriction, and YLL was not estopped by convention or by acquiescence from denying that HSLLP and/or HSUK were entitled, despite the Restriction, to act for claimants in the Emissions Litigation.

v) The other issues should be resolved as he did.

Was the judge right to interpret the Restriction broadly?

51. HSLLP has advanced a number of arguments as to the correct interpretation of the Restriction. In the result, there were two main submissions. First, that the judge ought to have interpreted the phrase "contemplated Group Action" as meaning only the group action in contemplation at the time of the NDA, namely that against VWUK. Secondly, Mr David Foxton QC, leading counsel for HSLLP, placed reliance on clauses 3 and 4 of the NDA as demonstrating that the scope and purpose of the Restriction concerned group actions founded on the use of confidential information disclosed under clause 2 and nothing else. Mr Foxton also submitted that, on a close textual analysis, "the contemplated Group Action" could not mean "Group Actions", and the plural word "undertakings" used in clause 4 had to refer to both undertakings in clause 2, including the Restriction. This latter point focused the interpretation of the Restriction on the disclosure of the confidential information and

made HSLLP's second interpretation, Mr Foxton submitted, the only possible meaning, or at least a possible meaning, of the words used in the whole of the NDA.

52. Before dealing with these arguments and Mr Foxton's attack on the judge's reasoning, it can be noted that neither party suggested that the judge had not accurately summarised the relevant principles of construction to be derived from three recent decisions of the Supreme Court in *Rainy Sky SA v. Kookmin Bank*, *Arnold v. Britton*, and *Wood v. Capita Insurance Services Limited* (references above).

53. It is, however, useful first to consider three preliminary considerations debated in argument:-

i) Whether the proper meaning of the Restriction is a question of law or fact;

ii) Whether the fact that one meaning might be unenforceable as an unreasonable restraint of trade, and another might not, is relevant to the proper meaning itself; and

iii) The extent of the admissible factual matrix that should be used as an aid to interpretation in this case.

Law or fact?

54. Mr Richard Coleman QC, leading counsel for YLL, submitted that the meaning of the words used by the parties was a question of fact, and that the effect of the words was a question of law. He relied on Lindley LJ's *dictum* in *Chatenay v. Brazilian Submarine Telegraph Co* [1892] 1 Q.B. 79, cited in Lewison on *The Interpretation of Contracts*, 6th edition, 2015, at pages 194-5.

55. This submission was all part of Mr Coleman's argument that HSLLP's appeal more generally was an impermissible attack on the judge's detailed findings of fact. He drew attention to Lewison LJ's well-known dictum in *FAGE UK Limited v. Chobani UK Limited* [2014] EWCA Civ 5 at paragraph 114, where he said that "[a]ppellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them". Lewison LJ gave the following reasons for this approach:-

i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.

ii) The trial is not a dress rehearsal. It is the first and last night of the show.

iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.

iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.

56. We take the view that the meaning of words used by the parties in contractual documentation will undoubtedly, in some cases, be explained by the factual background. In this case, the proper meaning of the words "contemplated Group Action" was inevitably going to be informed by the facts, and the judge referred primarily to the Litigation Pack to derive the meaning of that phrase. The proper construction and effect of the NDA is, however, in our judgment a question of law. The point may not ultimately be critical as we, like the judge, have to apply the principles he stated in order to determine whether he was wrong as to his interpretation of the Restriction.

Does the likely conclusion on restraint of trade affect the correct construction?

57. Mr Foxton pointed to a *dictum* of Waller LJ in *Turner v. Commonwealth & British Minerals* [2000] IRLR 114 as supporting his proposition that a narrow interpretation that avoided invalidity should, if it were legitimately available, be preferred. Waller LJ said at paragraph 14 that there was "some interconnection between the question of construction and the doctrine of restraint of trade" because if a particular construction were to "lead to the view that the clause was unenforceable, then an alternative view, which did not lead to the same result if legitimate, ought to be preferred".

58. In our judgment, however, the first issue that needs to be determined is whether the Restriction does, in fact, admit of two possible interpretations at all. It is only if it does, that it would be permissible to consider its possible unenforceability on one of those possible interpretations as an aid to the choice of the correct interpretation.

Admissible factual matrix

59. Both parties accepted that the contents of the Litigation Pack that both Mr Parker and Mr Johal had seen before the conclusion of the NDA could be considered as relevant factual matrix. Before dealing with those contents, we should deal with a number of other points advanced by the parties.

60. First, Mr Coleman suggested that it was relevant that the judge had found that Mr Parker had not thought, before seeing the Litigation Pack, that a group action was an economic proposition. Mr Foxton said that there was no evidence that Mr Parker's views had "crossed the line" so that they could not be admissible factual matrix. We agree with that latter proposition.

61. Mr Coleman connected his first point about Mr Parker's view of the group action before he saw the Litigation Pack with a second point about the judge's emphasis on the "insight" that YLL had provided to HSLLP. At paragraph 272, the judge said that the Restriction "was intended to ensure that [HSLLP], having provided its advice on the claim made by [YLL's] group of claimants and having had the benefit of insight into that claim, could not then strike out on its own, or in collaboration with another firm, with its own rival group of claimants". Mr Foxton submitted that the judge had

not sought to legitimise the Restriction as the protection of knowledge of a business opportunity, and that he had not said that the Restriction supported either the provision of confidential information or the insight gained from it. All the judge had said was that the Restriction was there to protect YLL against competition. In the context of restraint of trade, to which we will come in due course, Mr Foxton highlighted that the judge had found that the confidential information provided had not in fact been used by HSLLP as a springboard. In our view, the "insight" point is relevant factual matrix, in that it was the substratum of the NDA that both parties understood that YLL would be providing confidential information and their case theory to HSLLP pursuant to it. We cannot, however, see how that fact points specifically towards one or other of the suggested interpretations of the Restriction.

62. Thirdly, Mr Foxton argued that the NDA was just a non-disclosure agreement, and not in any sense a collaboration agreement. He criticised the judge for thinking that the NDA should be viewed as the basis for an extended period of informal collaboration, so that the Restriction should be construed in that light. We agree with Mr Foxton's premise, but not with his conclusion. The NDA was undoubtedly just a non-disclosure agreement and, in no sense, a collaboration agreement. As it seems to us, however, the judge did not fall into the trap of interpreting the Restriction as if it were a term in a collaboration agreement. Whilst he referred repeatedly to the period of informal collaboration that did not terminate until January 2017, he did not do so in the context of his determination of the meaning of the Restriction. That much is made explicit in paragraph 276 of the judgment where the judge deals with HSLLP's fourth construction argument before him that the Restriction "governed the position only until the parties agreed to collaborate". The judge said that was wrong, saying explicitly that "[a]ll would depend upon the terms of any subsequent agreement to collaborate. It seems to me to be quite impossible to say, as at the date of the NDA, that [the Restriction] would govern the position until the parties agreed to collaborate". The judge undoubtedly understood that he was construing the NDA objectively as at the time it was entered into without the benefit of hindsight.

Interpretation of the Restriction

63. With that introduction, we will turn to deal with the substantive challenge to the judge's interpretation of the Restriction. We start with the relevant evidence of the meaning of the "contemplated Group Action", and would say at once that we agree with the judge that those words refer back to the words "a large Group Action" in clause 1 of the NDA.

64. In order to ascertain objectively what "large Group Action" was contemplated, it is, as we have said, permissible to look at the Litigation Pack. In doing so, however, the documents cannot sensibly be construed as deeds. Indeed, the judge made clear at paragraph 265 that the parties well understood at the time what was involved "in a group action such as the litigation which I am now referring to as the Emissions Litigation". As he said, the Overview Note "correctly anticipated what this VW Group Litigation would look like, in the sense that it anticipated different firms of solicitors acting for different groups of claimants". It is quite clear also that such litigation inevitably involves numerous separate Claim Forms being brought together by a Group Litigation Order under CPR Part 19.10.

65. In our judgment also, nothing in the Overview Note limits the contemplated litigation to a claim in the form of the January action, or to a claim only against VWUK. The letter before action is addressed to VWUK, but is headed "Volkswagen Group Vehicle Emissions Group Action". The Overview Note refers to the Volkswagen Group, at least one other Volkswagen company and to VWUK. The key point, however, is that group litigation of this kind is and was known to evolve. It is, in our judgment, unrealistic to suppose that the parties to the NDA in referring at clause 1 to the disclosure of information for the purposes of obtaining legal advice in a "large Group Action" were then to be taken as having confined the nature of that action when they mention "the contemplated Group Action" in the Restriction in the very next clause. Moreover, we do not see why the words "a large Group Action" and "the contemplated Group Action" should be construed as referring to a single set of proceedings started by a single Claim Form. That is not what any solicitors undertaking this kind of litigation would expect.

66. Starting with that premise, it is then necessary to examine whether the words used in the NDA as a whole necessitate or even allow another interpretation as HSLLP submitted. Ultimately, Mr Foxton's argument turned on his suggestion that clauses 1-4, and 7 read as a whole made it clear that the Restriction was limited to actions brought, based on the disclosed confidential information. He reached that conclusion by arguing that, otherwise, neither clauses 3 nor 4 made sense, because they referred respectively to the "obligations" and "undertakings" in clause 2. Since the plurals were used, the references back in clauses 3 and 4 must be taken to refer to **both** the first sentence of clause 2 concerning confidential information and the Restriction inhibiting competition.

67. In our judgment, this ingenious approach proves too much. It requires the addition to the Restriction of the words "based on the confidential information disclosed" which are simply not present. The Restriction does not say that HSLLP undertakes not to accept instructions for or to act on behalf of any other group of Claimants in a contemplated Group Action based on the confidential information disclosed. The last 6 words are not present, even though they could easily have been added. Moreover, the more obvious interpretation is to read clauses 3 and 4 of the NDA as if they are only referring back to the main provisions of the NDA concerning disclosure of confidential information. That does no violence to clause 3, where the words "obligations equivalent to those in clause 2 above and this clause 3" can properly refer to the first sentence of clause 2 and the whole of clause 3 itself. It is true that the words "[t]he undertakings in clauses 2 and 3 above" in clause 4 do, on the judge's interpretation, need to be read as if they refer only to the undertakings in the first sentence of clause 2 and in clause 3. As it seems to us, however, that is a perfectly natural reading of an agreement that includes two types of obligation: those related to the disclosure and use of confidential information on the one hand, and a non-compete clause on the other hand.

68. We accept Mr Foxton's point that the Restriction seems rather broad on the judge's construction. We accept that the Restriction is a single provision in an agreement that is otherwise wholly concerned with the protection of confidential information disclosed for the purposes of obtaining what is seemingly intended to be preliminary legal advice. But we find it impossible to escape the conclusion that the clear words of the Restriction mean what they say. We agree with the judge when he said at

paragraph 274 that the Restriction is not ambiguous. Accordingly, we do not need to consider the applicability of Waller LJ's suggestion in *Turner v. Commonwealth & British Minerals* (above) that a narrow interpretation that avoided invalidity might be preferred to an unenforceable broad construction. In these circumstances, we take the view that, as a matter of interpretation, the Restriction did, as the judge said, purport to prevent HSLLP accepting instructions for or acting for any group of claimants apart from YLL's group of clients in the Emissions Litigation without YLL's permission.

Was the judge right to decide that the Restriction was not unenforceable as amounting to an unreasonable restraint of trade?

69. It is not suggested that the judge stated the wrong legal principles as to the question of whether or not the Restriction was unenforceable as amounting to an unreasonable restraint of trade. It is also not suggested that the Restriction is not in restraint of trade as the judge held it was. It is, however, submitted by Mr Coleman that the question of the applicability of the doctrine of restraint of trade is a question of fact with which this court should not interfere.

70. The main question here is whether the restriction was fair as between the parties. As Lord Diplock put the question to be answered in *Macaulay v. Schroeder Publishing* [1974] 1 W.L.R. 1308 at page 1315-6: ""Was the bargain fair?" The test of fairness is, no doubt, whether the restrictions are both reasonably necessary for the protection of the legitimate interests of the promisee and commensurate with the benefits secured to the promisor under the contract".

71. In essence, the competing positions are as follows.

72. Mr Foxton submitted that the judge used a large dose of hindsight to conclude both (a) that the Restriction was reasonably necessary for the protection of the legitimate interests of YLL, and (b) that the Restriction was commensurate with the benefits secured to HSLLP under the NDA. He submits that the judge, whilst stating that he was considering the NDA as at 11th April 2016, was in fact looking at it as an agreement entered into to allow a significant period of informal collaboration during which HSLLP would gain an insight into, and confidential information about, the Emissions Litigation that it could use to its advantage in gathering the HS Group together. That, submitted Mr Foxton, was not what the NDA provided for expressly or impliedly. The fairness of the restriction, HSLLP contended, had to be viewed in the context of the terms of the NDA as at the date it was formed, without any assumption being made about what might follow. The NDA could, quite as easily, have continued only for a few days before being replaced by a detailed collaboration agreement, or a single piece of legal advice from HSLLP could have been an end of the matter. A 6-year blanket ban on acting could not be justified. Moreover, such a ban could not be commensurate with the benefit that HSLLP received by seeing the confidential information in question.

73. Mr Coleman, in response, pointed again to the importance of the "insight" that the judge found that HSLLP gained from its involvement with YLL. The NDA was entered into in order to facilitate HSLLP's advice and collaboration. The judge proceeded on the basis that what in fact happened was contemplated at the time of the NDA. Lawyers in general and YLL in particular had a legitimate interest in

preventing rival firms from acting in group claims. Mr Parker accepted as much in evidence. Moreover, YLL had a fiduciary and regulatory obligation to protect their clients' interests as well: see Principle 4 of the Solicitors Regulation Authority's Principles 2011 and Outcome O(4.1) of its Code of Conduct 2011. YLL could have been criticised for not including the Restriction, but certainly could not be criticised for having done so.

74. We agree that the task of applying the relevant restraint of trade tests to the facts is primarily an exercise for the trial judge and that much latitude should be given to his approach. But we have nonetheless ultimately concluded that the judge did fall into a serious error in this part of his analysis. In essence, we take the view that the judge had become so embroiled in his detailed treatment of the events following the NDA and what he described as the informal collaboration between HSLLP and YLL between April 2016 and January 2017, that he considered the Restriction's validity in that context rather than in the context of the bare NDA as it was concluded on 11th April 2016 in its admissible factual matrix.

75. This oversight can be seen from paragraphs 302-313 in the judgment. The judge acknowledged first that the possibility of consumer claims arising out of the Emissions Events was well known at the time of the NDA, but said that the Restriction was not concerned with the preservation of confidentiality in respect of the proposed group claim, but was specifically intended to protect YLL from HSLLP forming its own competitive group of claimants. That may have been the intention, but YLL's intention does not assist in answering the reasonableness questions. In paragraphs 303-305, the judge explains why in his view, the Restriction was intended to protect YLL from "just such a scenario", namely from allowing HSLLP to form its own competitive group of claimants after a period of informal collaboration and a failure to agree a formal collaboration agreement.

76. In our judgment, that was not on any analysis what YLL was entitled to expect as being reasonably necessary for the protection of its legitimate interests as a party to the NDA. Its legitimate interests under the NDA were to protect the confidential information whilst it was being used by HSLLP for the purpose of giving legal advice (and perhaps afterwards); but the NDA said nothing about negotiating or concluding a collaboration agreement.

77. At paragraph 310, the judge expressed the view that the restriction could not be narrower if it were to protect YLL's legitimate interests. But the interests he had considered were (a) "preventing [HSLLP] from using its position as advisor/collaborator in respect of [YLL's] group of claimants to strike out alone, or in concert with another firm, and set up a rival group in competition with [YLL]", and (b) protecting YLL against HSLLP gaining a competitive advantage in the Emissions Litigation. The problem as we see it is that the NDA was just about the disclosure of some preliminary privileged information for the purposes of obtaining legal advice from HSLLP. It was not an agreement to facilitate collaboration between YLL and HSLLP, nor was it an agreement providing for the terms upon which an informal collaboration in relation to the conduct of that litigation might occur.

78. The question that, in these circumstances, the judge ought to have been asking was as to whether the restriction was reasonably necessary for the protection of YLL's

legitimate interests as the party to the NDA disclosing the confidential information to HSLLP for the purpose of obtaining legal advice.

79. We consider next the judge's approach to the second part of the reasonableness test, namely whether the Restriction was commensurate with the benefits secured by HSLLP under the NDA. The judge thought that the benefit that HSLLP received as the *quid pro quo* for entering into the Restriction was "access into a process of collaboration with YLL" (paragraph 311). He added the rider that "[i]f that process of collaboration resulted in a collaboration agreement with [YLL], [HSLLP] and [YLL] would be acting together in the proposed group claim, and [HSLLP] would enjoy the benefits of that collaboration. If not, [HSLLP] would have to accept that it would not be free to set up its own group of claimants, in competition with the [YLL]". The judge described that bargain as perfectly reasonable – and as opening "the way to a potentially lucrative business opportunity" for HSLLP. In our view, the problem with this approach is simply that the judge has misdescribed the bargain. The Restriction was given in exchange for the disclosure of confidential information and, perhaps, the opportunity to provide some legal advice on the basis of it. It was not provided in exchange for any collaborative opportunity. As we have said, collaboration is not mentioned in the NDA.

80. In these circumstances, we do not think that the judge's decision on the restraint of trade issue can stand, and we must consider the matter afresh. Even regarding the matter as one of fact, the judge took into account matters that he should not have taken into account in applying the relevant law to the validity of the Restriction as it was found in the NDA.

Was the Restriction an unreasonable restraint of trade?

81. The question, in our judgment, is therefore whether the Restriction was (a) reasonably necessary for the protection of YLL's legitimate interests as the party to the NDA disclosing the confidential information to HSLLP, and (b) commensurate with the benefits secured by HSLLP under the NDA.

82. It is important to note at the outset the nature of the Restriction. It is, as properly construed, a blanket restriction on HSLLP acting for claimants in the Emissions Litigation without YLL's consent. It lasted 6 years from the NDA, which was well beyond the expiry of any applicable limitation period. In context, as the judge found, group litigation is a highly competitive business as between the solicitors engaged in it. The names of the firms commonly involved in such cases are well known and were mentioned by the judge. Thus, whilst there are many firms of solicitors in England and Wales, we think we can take into account that there are not so many with expertise in this kind of major group litigation. That was why YLL were put in touch with HSLLP in the first place. Moreover, we think that it is relevant also that it is commonplace, as the judge also explained, in litigation of this kind for different groups of claimants to be represented by different solicitors. In other words, the market is small and highly competitive and group litigation solicitors fight hard for clients, no doubt because the potential rewards are great. It has not been suggested that YLL's objective was to exclude competitors, but, as Mr Foxton pointed out, had YLL approached a number of firms and persuaded them to sign an agreement in the form of the NDA, and if the Restriction were valid, the clients' choice of solicitors would quickly be significantly curtailed.

83. In our judgment, YLL's legitimate interests can only be ascertained at the date of the NDA and on the basis of its actual provisions. The NDA was aimed at protecting the confidential information which was being disclosed for the purpose of obtaining legal advice, not at collaboration between YLL and HSLLP. Had the NDA included a collaboration agreement, it might well have been reasonable to prevent HSLLP from acting for other claimants outside that collaboration. But that was not what the NDA was about. In our view, YLL's only legitimate interest under the NDA was to protect the confidential information that it was disclosing for the purpose of obtaining HSLLP's legal advice. It is hard to see why a restriction that went beyond using that confidential information for its own purposes or for the purposes of other clients could be reasonable in that context. It is worth noting in this connection that the confidence in question was that of YLL's clients. That is a factor that might be thought to be relevant to the reasonableness of preventing HSLLP from seeking to act for claimants. We say no more on the point, having heard no argument on that question.

84. For the quite simple reasons we have given, we take the view that a broad Restriction preventing HSLLP ever acting for other claimants in the Emissions Litigation, inserted into an otherwise unobjectionable NDA, cannot possibly be reasonably necessary to protect YLL's legitimate interests. That much is obvious, we think, once those legitimate interests are identified. The judge's error was to think that the NDA allowed for a period of informal collaboration, which YLL had the legitimate right to protect. YLL might have had such a right if it had entered into any kind of collaboration agreement, but it did not.

85. We understand that it might, in these circumstances, be difficult to formulate a clause that would be reasonable, within the NDA, inhibiting HSLLP from acting for clients in the Emissions Litigation. That does not, in our judgment, lead to the conclusion that the Restriction was reasonable; rather the reverse. As we have explained in the section of this judgment on interpretation of the Restriction, it was obviously intended to be broad and, as the judge found, to prevent HSLLP from acting at all for 6 years. We do not think that such a Restriction was reasonably necessary for the protection of YLL's legitimate interests as the party to the NDA disclosing the confidential information to HSLLP for the purposes of obtaining what might well have been a one-off piece of legal advice. Even if the legal advice envisaged was more extensive, as to which there was no real evidence, the NDA would not have been transformed by that fact from a non-disclosure agreement into a collaboration agreement.

86. It follows from what we have said already that the Restriction was also not commensurate with the benefits secured by HSLLP under the NDA. HSLLP was not securing any form of collaboration under the NDA. It was securing disclosure of confidential information to enable it to give some legal advice. The Restriction was wide-ranging and out of proportion to the benefit HSLLP received under the NDA.

87. In considering this issue we have taken into account that HSLLP could be considered as the stronger party, and also YLL's argument that it had a fiduciary and regulatory obligation to protect its clients. Neither of these points affects our reasoning. The bargaining position of the parties might be relevant, but not when the interest that the covenantee is seeking to protect is one that does not arise under the agreement itself. The best interests of the clients cut both ways. On one analysis, it may be thought that the interests of YLL and its clients were not aligned. YLL may well have wanted

to narrow the intense competition; but its clients might at some point have benefited from being able to ask HSLLP to act for them. Either way, the point does not turn a clearly unreasonable restriction in restraint of trade into a reasonable one.

88. We have not thus far said anything about whether the Restriction was to be regarded as reasonable in the public interest. The judge thought that, if the Restriction were held to be contrary to the public interest, it could create substantial problems for solicitors practising in this area. He found that there were a number of firms willing and able to run group claims arising out of the Emissions Events, so that removing HSLLP from the pool was not contrary to the public interest. In our judgment, the question of the public interest brings into question the broader position concerning solicitors acting in major group litigation. We heard little argument on this point and were not taken to any of the relevant factual background. In view of our findings on the parties' own interests, it is not necessary for us to say anything about the public interest and we will not say more than that we are not convinced that the judge was asking the right question. Once again, he seems to have been asking whether it was in the public interest for YLL to prevent HSLLP acting in the context of their collaboration. If the correct question were asked, namely whether it was reasonable in the context of an NDA under which YLL was disclosing confidential information to obtain legal advice, for YLL to prevent HSLLP ever to act for another group of claimants in the Emissions Litigation, we are not sure that the same conclusion would be reached.

89. Finally, under this heading, we should mention Mr Coleman's argument that the public policy in favour of holding solicitors accountable for their undertakings should outweigh the policy in refusing to enforce agreements in restraint of trade (see Sir Thomas Bingham MR's judgment in *Bolton v. The Law Society* [1994] 1 W.L.R. 512 at page 518). It should first be recalled that *Bolton* was not about restraint of trade. As Balcombe LJ suggested in *Udall v. Capri Lighting Ltd* [1998] Q.B. 908, at page 917G-H, external considerations, which can we think include public policy considerations, should be taken into account when the court exercises its discretion as to the enforcement of a solicitor's undertaking. The judge held that the Restriction could not be enforced as a solicitor's undertaking on the current law (with which we agree), so this point does not, in our judgment, affect the consequences of our having held that the Restriction was unenforceable as an unreasonable restraint of trade.

Was the judge right to decide that the NDA was subject to an implied undertaking by HSLLP that it would ensure that HSUK would not breach the Restriction, and that HSLLP was in breach of the Restriction by acting, through the staff it seconded to HSUK, for the HS Group?

90. In the light of our conclusion on the restraint of trade issue, these questions are not determinative. We can, therefore, deal with them shortly. The judge achieved the same result by two routes. First, he held in favour of YLL's alleged implied undertaking by HSLLP that HSUK would not do anything which, if done by HSLLP, would breach the Restriction. Secondly, he held that, in any event, HSLLP's staff secondment arrangements were themselves a breach of the Restriction.

91. Mr Coleman contended, and we accept, that the usual rules of construction apply to covenants in restraint of trade (see *Arbuthnot Fund Managers v. Rawlings* [2003] EWCA Civ 518, per Chadwick LJ at paragraph 21). He also, however, relied on *Beckett Investment Management Group v. Hall* [2007] EWCA Civ 613 where the

Court of Appeal had interpreted the word "Company" in a definition of "prohibited services" in a restrictive covenant as including its subsidiary company. Maurice Kay LJ said at paragraph 18 that he did not feel inhibited by a purist approach to corporate personality. This case seems to have turned on principles of construction that preceded the cases in the Supreme Court that we have mentioned.

92. Against this background, whilst we would want to reserve for another occasion the question of whether it is permissible to imply terms into a restriction of this kind in order to extend its ambit, we can entirely understand how the judge reached the conclusion he did at paragraphs 344-345. We are not sure whether one can properly say that the staff acted on behalf of HSLLP when on secondment to HSUK, but we can see that HSLLP itself acted in breach of the Restriction (if valid) by providing the services of HSLLP's partners and employees to HSUK for the purpose of doing what HSLLP could not do under the Restriction.

Was the judge right to decide that YLL had not agreed that it would not enforce the Restriction, and YLL was not estopped from denying that HSLLP and/or HSUK were entitled to act for the HS Group?

93. Once again, we do not need to decide the issues of whether YLL gave HSLLP express permission to act for the HS Group or of estoppel. The judge rejected both arguments after a detailed and comprehensive review of the evidence. Having heard the argument in full, we have not been persuaded that the appeal on these grounds had a real prospect of success. It is true that Mr Johal was aware at various points that HSLLP was gathering clients for an HS Group, but, as the judge repeatedly indicated, that was all part of the process of informal collaboration that the judge found was in progress. The judge was, in our view, entitled to reach the conclusions he did to the effect that (a) YLL had not agreed that it would not enforce the Restriction, and (b) YLL was not estopped from denying that HSLLP and/or HSUK were entitled to act for the HS Group. We refuse permission to HSLLP to appeal these points.

Other issues raised

94. In the circumstances of the decisions we have reached thus far, we do not think that we need to say any more about HSLLP's argument that the judge was wrong to decide that HSLLP continued to act after 25th January 2017, when it transferred the conduct of the October action to HSUK.

95. As regards, HSLLP's appeal against the judge's finding that HSLLP had passed confidential information to HSUK in June 2016, we do not think that HSLLP has succeeded in showing that the judge reached a factual conclusion that was not open to him on the evidence.

96. We conclude that the judge ought not to have granted an injunction to enforce a Restriction that was unenforceable as being an unreasonable restraint of trade.

97. There are four issues raised by YLL that we do, however, think it appropriate to give YLL permission to raise in this court in case this case goes further. The first two are matters of cross-appeal, namely whether the judge was right (i) to follow *Kanat Assaubayev* and to conclude that the court did not have a supervisory jurisdiction over HSLLP, and (ii) to decide that the court had no supervisory jurisdiction over Mr

Parker on the ground that he gave the undertaking expressly on behalf of HSLLP. The second two are connected matters raised by way of Respondent's Notice namely (i) whether a restraint of trade defence is available where the court exercises its supervisory jurisdiction, and (ii) whether the judge ought to have construed the undertaking as the recipient of a solicitor's undertaking would have understood it. Each of these points would have some bearing on the question of how the restriction should be construed if the supervisory jurisdiction of the court were available, which the judge held it was not.

98. We are bound to follow this court's own decision in *Kanat Assaubayev* as the judge was. If, however, the Supreme Court were to think that a challenge to *Kanat Assaubayev* was appropriate, we can see that it would be unfortunate if we had closed off that avenue in this case by refusing permission to appeal from the judge. In these circumstances, we think it appropriate to grant permission to appeal on the first two additional grounds raised by YLL, and to permit the Respondent's Notice on the second two grounds. We will, however, dismiss each of the grounds for the reasons given by the judge, with which we agree. We do not, however, associate ourselves with any of the judge's remarks about the desirability of the supervisory jurisdiction being available in a case of this kind. For our part, we would regard this as part of the commercial relationships between solicitors and would expect the law to treat the construction, validity and enforcement of the Restriction according to commonly applicable principles. We can quite see, however, that there are arguments both ways. Since we have dealt with the matter on the basis of what we see as the clear meaning of the Restriction and the clear applicability of the restraint of trade doctrine, we heard little oral argument on the issues pertaining to the supervisory jurisdiction of the court. In those circumstances, we would not want to shut YLL out from asking the Supreme Court for permission to advance these matters. We include all the grounds we have mentioned because, as we have said, they all relate to the approach that would be adopted to a Restriction of this kind if the court were exercising its supervisory jurisdiction. As regards the exercise of the supervisory jurisdiction against Mr Parker personally, YLL sought to argue that, as a matter of professional conduct, Mr Parker was responsible for seeing that the Restriction was performed. We do not agree for the reasons the judge gave, but again we do not want to prevent YLL attempting to raise the point at a higher level.

99. We think that YLL's attempt to raise costs issues as points of cross-appeal was unnecessary. Had the appeal succeeded, YLL would no doubt have been able to challenge the costs orders below. We reject also the point in YLL's Respondent's Notice that the judge ought to have held that the implied undertaking was obvious and necessary to give the NDA business efficacy, where HSLLP created HSUK specifically to conduct group litigation. We repeat the reservations we have expressed about the judge's implication of a term.

Conclusions

100. For the reasons we have tried to express as shortly as possible, we have reached the following conclusions:-

i) We admit the new evidence, but we decline to hold the hearing in private. This judgment will be a public judgment.

ii) The judge was right as to the proper interpretation of the Restriction, and in particular as to the meaning of the expression "contemplated Group Action". Accordingly, HSLLP's appeal is dismissed on this point.

iii) The judge was wrong as to the applicability of the doctrine of restraint of trade to the Restriction. It was, in our judgment, a broader restriction than was reasonably required for the protection of YLL's legitimate interests as the party to the NDA disclosing confidential information to HSLLP. The judge placed too much reliance on HSLLP's interests as a party to an informal collaboration with YLL, when the NDA was not about collaboration, but about securing disclosure of confidential information to enable HSLLP to give legal advice. HSLLP's appeal is allowed on the restraint of trade issue.

iv) The judge was, therefore, wrong to grant an injunction against HSLLP preventing them acting for the HS Group for 6 years, and HSLLP's appeal on this point will be allowed and the injunction will be discharged.

v) We dismiss HSLLP's appeal against the judge's finding of fact that HSLLP had passed confidential information to HSUK in June 2016.

vi) The remaining points do not affect the outcome of the appeal, but we have dealt with them where appropriate in deference to the arguments that were addressed.

vii) We dismiss HSLLP's appeal on the judge's finding that HSLLP's staff secondment arrangements would themselves have amounted to a breach of the Restriction (had it been enforceable), but on the slightly different basis that HSLLP would not have been at liberty, under the Restriction, to provide the services of HSLLP's partners and employees to HSUK for the purpose of doing what HSLLP could not do under the Restriction. We do not find it necessary to express a view on the correctness of the judge's decision extending the ambit of the Restriction by the implication of a term that HSLLP would not allow HSUK to do anything which, if done by HSLLP, would breach the Restriction.

viii) We refuse HSLLP permission to appeal the judge's entirely factual conclusions that (a) YLL had not agreed that it would not enforce the Restriction, and (b) no estoppel by convention or otherwise, or acquiescence prevented YLL relying on the Restriction.

ix) In order to preserve the arguments if this case should go further, we give YLL permission to appeal on two points namely whether the judge was right (i) to follow *Kanat Assaubaye* and to conclude that the court did not have a supervisory jurisdiction over HSLLP, and (ii) to decide that the court had no supervisory jurisdiction over Mr Parker, but we dismiss the appeal on these points. We have allowed HSLLP to raise connected matters by way of Respondents' Notice, but we reject them for the reasons the judge gave. They too can be raised in the matter goes further. We do not, however, as we have said, accept the judge's remarks about the desirability of the supervisory jurisdiction being available in a case of this kind.

101. The appeal is, therefore, allowed on the limited basis explained above.