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Case No: BL-2021-000012

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 July 2022

Before :

RICHARD FARNHILL
(sitting as a Deputy Judge of the Chancery Division)

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Between :

INSTRUMENT PRODUCT DEVELOPMENT LTD **Claimant**

- and –

W D ENGINEERING SOLUTIONS LTD **Defendant**

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- -

Mr Robin Howard (instructed by **DWF Law LLP**) for the **Claimant**
Mr Stephen Hackett (instructed by **RHF Solicitors**) for the **Defendant**

Hearing dates: 21-23 June 2022

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APPROVED JUDGMENT

Richard Farnhill (Sitting as a Deputy High Court Judge for the Chancery Division):

1. In a noted study published in 1981, "*Role of schemata in memory for places*", the psychologists William Brewer and James Treyens reported on a simple but revealing experiment they had conducted. Each of the 87 study subjects was asked to wait briefly in an office before being led into another room. In that second room they were asked to write down a list of everything they had seen in the office. The overwhelming majority recalled seeing typical office furniture – a desk, chairs, shelves and so forth. That was unsurprising, since they had seen such items only seconds earlier. Thirty per. cent recalled seeing books and ten per. cent recalled seeing a filing cabinet. That was more unusual, because the office contained neither books nor a filing cabinet.

2. The study demonstrates an aspect of the fallibility of memory. We do not store memories as images, like a photo album, to be revisited in detail at a later date. We recreate the image every time we recall it, combining the details of what we do recall with our expectations of what we should recall. The process is automatic, and done without conscious realisation that it is taking place.

3. That issue is at the heart of this case. In the Brewer and Treyens study, different witnesses had different recollections of the same room that they had seen only seconds before. In this case, two witnesses have critically different recollections of the same telephone conversation held in March 2017 to which they were the only parties.

The witnesses

4. Mr Paget is a director of the Claimant (**IPD**) and was its principal witness. He concluded the contract in dispute in this case (**the Agreement**) on IPD's behalf on 6 March 2017 by way of a telephone conversation with Mr Beale of the Defendant (**WDES**).

5. Mr Paget was a helpful witness. He gave comprehensive answers but ones that were always responsive to the question asked. He accepted where he felt his recollection was unclear, particularly as regards the precise timing of meetings for which there was no documentary record, and acknowledged where matters were outside the scope of his knowledge. He understood his obligations to assist the court and in my view he fully discharged those obligations.

6. Mr Batchelor was the other director of IPD. He played a somewhat secondary role to Mr Paget on this project, and was not involved in the 6 March telephone call that gave rise to the Agreement. He was, however, a co-principal of the Claimant and was involved throughout, on occasion taking the lead in exchanges. He attended some of the critical meetings.

7. Mr Batchelor had a discursive manner, and often gave long answers to the question that did not always address the point being put to him. In saying that I mean no criticism of him. I did not consider him evasive or argumentative and he was obviously trying to assist. The fact remains, however, that there was a degree of vagueness to his evidence.

8. Ms Vanns was one of the lead designers at IPD working on the Nespresso project. She is a highly experienced designer and represented IPD at a meeting at Lausanne that was important to the development of the Nespresso relationship. She was also present at several of the meetings with Mr Beale. She held no executive position at IPD, however, and was not involved in any of the contract negotiations.

9. As a witness she came across very impressively. Her answers were clear and concise. She was ready to concede where matters were outside her knowledge and at no stage did I feel she ventured into speculation.

10. Mr Barker, Mr Ellis and Mr Warman all gave short, quite discrete statements covering quite limited points. Their cross examination was similarly brief. Each of them was helpful and co-operative. Mr Ellis' recollection was unclear on some of the key events but he was open and candid in recognising when that was the case.

11. Mr Beale was the only witness for WDES. This was understandable, since he was its only representative with significant involvement in the formation of the Agreement and the ensuing Nespresso relationship.

12. On critical points Mr Beale claimed to have no or almost no recollection. It was striking to me that the areas he said he could not recall were the areas that might reflect poorly on his conduct in this matter or WDES's case. In respect of a number of events it was put to Mr Beale that his behaviour had been dishonest. To be clear, I do not accept that to have been the case as regards any of the instances put to him. As I will go on to address, the courts now recognise that one of the flaws of memory is to recall "*past events concerning themselves in a self-enhancing light*". Mr Beale's failure to recall may simply have been a variation of that.

13. By contrast, on some points Mr Beale's evidence was lengthy and detailed. Those answers frequently came across as pre-prepared and had only tangential, if any, relevance to the question he had been asked. He was prepared to make some concessions, particularly in respect of a spreadsheet provided to IPD in February 2018. That was exceptional, however.

14. In assessing Mr Beale's evidence I make allowance for the fact that his cross-examination was direct and at times confrontational. However, for the reasons I give above I had limited confidence in key aspects of his evidence.

The rules regarding interpretation of oral contracts

15. There were two lines of authority relating the interpretation of oral contracts that the parties agreed were relevant in this case.

16. The first related to the relevance of post-contractual conduct. The approach to be applied was laid down by Lord Hoffmann in *Carmichael v National Power plc* [1999] 1 WLR 2042 at 2051:

> "The evidence of a party as to what terms he understood to have been agreed is some evidence tending to show that those terms, in an objective sense, were agreed. Of course the tribunal may reject such evidence and conclude that the party misunderstood the effect of what was being said and done. But when both parties are agreed about what they understood their mutual obligations (or lack of them) to be, it is a strong thing to exclude their evidence from consideration. Evidence of subsequent conduct, which would be inadmissible to construe a purely written contract (see *Whitworth Street Estates (Manchester) Ltd. v. James Miller and Partners Ltd.* [1970] A.C. 583) may be relevant on similar grounds, namely that it shows what the parties thought they had agreed. It may of course also be admissible for the same purposes as it would be if the contract had been in writing, namely to support an argument that the terms have been varied or enlarged or to found an estoppel."

17. It is worth noting that where subsequent conduct or statements are relied upon to support a variation, the analysis is principally, but not wholly, an objective one. The position is summarised in Chitty on Contracts 34th Ed at paragraphs 4-002 and 4-003. Typically the test is objective: if the parties have to all outward appearances agreed on terms, neither can rely on an unexpressed qualification or reservation to undermine that agreement. However, where the offeree is aware that, whatever the objective appearance, the offeror lacks the necessary intent then the offeror is not bound, regardless of what the conduct or language used might suggest.

18. Lord Hoffmann's analysis was applied and expanded upon by Lord Neuberger in *Thorner v Majors* [2009] UKHL 18 at [82]:

19. "82. This [the decision in *Carmichael*] shows that (a) the interpretation of a purely written contract is a matter of law, and depends on a relatively objective contextual assessment, which almost always excludes evidence of the parties' subjective understanding of what they were agreeing, but (b) the interpretation of an oral contract is a matter of fact (I suggest inference from primary fact), rather than one of law, on which the parties' subjective understanding of what they were agreeing is admissible.

> 83. The reason for this dichotomy is partly historical. Juries were often illiterate, and could therefore not interpret written contracts, whereas they could interpret oral ones. But it also has a good practical basis. If the contract is solely in writing, the parties rarely give evidence as to the terms of the contract, so it is cost-effective and practical to exclude evidence of their understanding as to its effect. On the other hand, if the contract was made orally, the parties will inevitably be giving evidence as to what was said and done at the relevant discussions or meetings, and it could be rather artificial to exclude evidence as to their contemporary understanding. Secondly, and perhaps more importantly, memory is often unreliable and self-serving, so it is better to exclude evidence of actual understanding when there is no doubt as to the terms of the contract, as when it is in writing. However, it is very often positively helpful to have such evidence to assist in the interpretation of an oral contract, as the parties will rarely, if ever, be able to recollect all the details and circumstances of the relevant conversations."

20. Lord Neuberger's comments regarding the issues with witnesses' memories chimes with the approach suggested by Leggatt J, as he then was, when considering how to assess their evidence. He summarised the position in *Ashley v Blue* [2017] EWHC 1928 (Comm) at [66]:

"66. I have no reason to think that (with the possible exception of Mr Leach when he retreated from what he had said to Mr Blue's solicitors) any of the witnesses were doing anything other than stating their honest belief based on their recollection of what was said in relevant conversations. But evidence based on recollection of what was said in undocumented conversations which occurred several years ago is problematic. In *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm), at paras 16-20, I made some observations about the unreliability of human memory which I take the liberty of repeating in view of their particular relevance in this case:

"16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.

17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).

18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have

> a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.
>
> 20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been 'refreshed' by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events."

67. In the light of these considerations, I expressed the opinion in the *Gestmin* case (at para 22) that the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.

68. A long list of cases was cited by counsel for Mr Blue showing that my observations in the *Gestmin* case about the unreliability of memory evidence have commended themselves to a number of other judges. In some of these cases they were also supported by the evidence of psychologists or psychiatrists who were expert witnesses: see e.g. *AB v Catholic Child Welfare Society* [2016] EWHC 3334 (QB), paras 23-24, and related cases. My observations have also been specifically endorsed by two academic psychologists in a published paper: see Howe and Knott, "The fallibility of memory in judicial processes: Lessons from the past and their modern consequences" (2015) Memory, 23, 633 at 651-3. In the introduction to that paper the authors also summarised succinctly the scientific reasons why memory does not provide a veridical representation of events as experienced. They explained:

> "… what gets encoded into memory is determined by what a person attends to, what they already have stored in memory, their expectations, needs and emotional state. This information is subsequently integrated (consolidated)

> with other information that has already been stored in a person's long-term, autobiographical memory. What gets retrieved later from that memory is determined by that same multitude of factors that contributed to encoding as well as what drives the recollection of the event. Specifically, what gets retold about an experience depends on whom one is talking to and what the purpose is of remembering that particular event (e.g., telling a friend, relaying an experience to a therapist, telling the police about an event). Moreover, what gets remembered is reconstructed from the remnants of what was originally stored; that is, what we remember is constructed from whatever remains in memory following any forgetting or interference from new experiences that may have occurred across the interval between storing and retrieving a particular experience. Because the contents of our memories for experiences involve the active manipulation (during encoding), integration with pre-existing information (during consolidation), and reconstruction (during retrieval) of that information, memory is, by definition, fallible at best and unreliable at worst."
>
> 69. In addition to the points that I noted in the *Gestmin* case, two other findings of psychological research seem to me of assistance in the present case. First, numerous experiments have shown that, when new information is encoded which is related to the self, subsequent memory for that information is improved compared with the encoding of other information. Second, there is a powerful tendency for people to remember past events concerning themselves in a self-enhancing light."

21. From these cases I draw a number of principles that I consider to be relevant to this case:

    i) In interpreting an oral contract, the parties' subjective understanding about what they were agreeing is relevant and admissible evidence.

    ii) What is critical is their understanding at or immediately after the point at which contract is entered into. That is the only sensible reading of Lord Neuberger's reference to their "*contemporary understanding*".

    iii) Later statements and actions are much less reliable indicators of what the parties understood to have been agreed. Just as memory is affected by the process of preparing for trial, it is affected by seeing how a transaction works out in practice, the "*interference from new experiences*" referred to by Leggatt J.

    iv) Subsequent conduct and statements may be relevant to questions of variation and estoppel, just as they may be in the case of written agreements. In those cases, the analysis is principally, but not exclusively, an objective one. The focus is on what the parties said and did, more than on what the parties thought.

    v) To the extent that it exists, documentary evidence of what was said in meetings and conversations will almost inevitably be a more reliable guide than the witnesses' unaided recollections.

Chronology and findings of fact

The prior relationship and the inception of the Nespresso project

22. IPD provides industrial and engineering design services. In October 2016 IPD was approached by IDEO, an international design consultancy, in relation to a proposed large project by Nespresso, which makes and sells coffee making machines in which the coffee is contained in a pre-packed capsule. Nespresso wanted customers to be able to see, smell and compare the different types of coffees in the various capsules. IDEO had been engaged to design "props" for use in Nespresso's shops that could be used to that end.

23. IPD had a quite long running relationship with WDES, which provides manufacturing services. In November 2016 IPD sent certain design files to WDES to produce prototype props. This was WDES's first involvement in the Nespresso project, although WDES was not at the time aware of either the project or the use to which the sample parts would be put.

24. Between December 2016 and February 2017 IPD continued to design and make prototype props for Nespresso, with WDES making some elements of them.

25. By 28 February 2017 Mr Paget was having discussions with Mr Barker, of IDEO, about a pilot project for using the props in one of Nespresso's stores in Cannes. Mr Paget understood that the aim was to have the props ready for the opening of the Cannes Film Festival in late April. In an email exchange on 1 March 2017 Mr Barker asked Mr Paget for quotes by the end of that day. Mr Paget said he would see what he could do and asked Mr Barker about the potential ultimate scale of the Nespresso project. Mr Barker said it would be 20 stores in the United Kingdom and 300 worldwide.

26. In a subsequent email exchange, also on 1 March 2017, Mr Paget asked Mr Beale for an estimate for making certain items as drawn. He explained that the items were for Nespresso but did not say anything about the potential scale of the project. That evening, without having received a response, Mr Paget sent an estimate to IDEO for onward transmission to Nespresso. Mr Barker wrote to ask if the estimate was based on an order of 50 units and Mr Paget confirmed that it was.

The formation of the Agreement

27. Up to this point WDES had simply been a supplier of components to IPD and Mr Paget's evidence, which was not challenged, was that he intended to pay WDES in the same way as other suppliers. However, on 3 March he suggested to Mr Batchelor that they should offer to WDES a profit sharing arrangement. Following a discussion they settled on a 50/50 split. Mr Batchelor does not refer to this discussion in his witness statement, but again Mr Paget was not challenged and it seems highly likely that some such discussion happened. IPD is a small business and it was obvious from the emails that Mr Paget and Mr Batchelor work closely together.

28. It appears, again from Mr Paget's unchallenged evidence, that at least part of the reason for proposing a joint venture with WDES was a concern Mr Paget had regarding Nespresso's procurement process. While Mr Paget was confident that IPD could service the Cannes order, he was concerned that IPD lacked the size, trading history and logistical infrastructure needed for the wider rollout. WDES offered these things, and so Mr Paget considered that the pitch was more likely to succeed if Mr Beale was the main contact with Nespresso. However, Mr Paget made clear on cross-examination that he considered the wider Nespresso rollout to be a unique opportunity for IPD, and not one that he would simply give away.

29. There is no dispute that the Agreement was formed by way of a telephone call between Mr Paget and Mr Beale on 6 March 2017. The parties further agree that it gave rise to a 50/50 profit share. The disagreement concerns whether that profit share arrangement related to the pilot Nespresso store in Cannes then specifically in contemplation or whether it was to cover all future supplies to Nespresso of the props designed by IPD.

30. On 7 March 2017 Mr Barker wrote to Mr Paget to tell him that Nespresso's procurement team needed to contact him "*about the Cannes models and further rollout orders*". Mr Paget responded to say that IPD intended using WDES as their manufacturing partner. He explained, "*I discussed this with him yesterday and he is happy to supply*."

31. Later that day, at 10:14pm, Mr Paget sent an email to Mr Beale (the **7 March email**). The Claimant's case is that the Agreement was either oral or part oral part written, with this email being the written element of it. Mr Paget's evidence was clear, however: the purpose of the email was to record the Agreement, not to supplement or amend it in any way. To the extent it is relevant, I consider that the Agreement, at least at the point of formation, was wholly oral and the purpose of the 7 March email was simply to document what had already been agreed.

32. The 7 March email is of such central importance to this case, it merits being quoted in large part:

> "Hi Darren,
>
> I have attached the costs I already gave them, your costs highlighted in yellow. Take a look and let me know if you think it is a good start. We already added 30% to everything.
>
> We should reduce it a bit now that the quantity has gone up.
>
> Realistically I think we can get a 30-50% saving, but let's start high, they will try to bully us down so we can pad it and give in 30%. They want the product for end of April and nobody else will be able to supply it in time. Only us!
>
> We are happy to share the profit with you **50/50** on all the parts including yours if you cover/front all the costs and handle distribution etc.

> Matt and I can design out some costs if we get the job and help source cheaper components.
>
> We are on a train from 8:30 am. Please have quote or estimate by 10:00 to me on company letter head. Put my number and yours on the quote, they might need to call me. …
>
> These costs will need to include packaging.
>
> Please structure the quote as follows:
>
> [Details were then provided for 64 serving tray sets, 74 aroma tray sets and 20 capsule openers.]
>
> Please include a 30% "Discount" on the quote if you think it's a good idea."

33. On 8 March Mr Beale provided the quotation in the form requested. Mr Paget replied requesting a small change, which Mr Beale made. IPD sent the quote to IDEO who sent it on to Nespresso, introducing WDES as "*the engineers that can produce the small batch of models for the Cannes BTQ*." IDEO's email was not copied to IPD or WDES.

34. On 13 March Mr Beale wrote to Mr Paget asking, "*Shall I chase up ? Would be a shame to lose this ?*" Mr Paget replied that he would do so.

35. There followed various emails from both WDES and IPD chasing Nespresso to confirm the order and specify the quantities for the Cannes store. In the course of those exchanges, on 22 March, Mr Beale wrote to Estelle Jobin-Lewentree of Nespresso offering a 6.5% discount. He went on to note, "*We can in the future or with a longer initial lead time take considerable costs out of this project, assuming you have time or later you want to roll this out to some or all of your stores?*"

36. In ascertaining what was agreed on 6 March it seems to me that this was the critical period and these were the critical exchanges. After this point the nature of the Nespresso opportunity changed, as what had previously been an inchoate opportunity became concrete and translated into orders.

37. For the reasons given by Leggat J, in ascertaining what was said the written exchanges carry considerable weight. The key document is the 7 March email, which Mr Paget repeatedly stated was intended to record the exchange. As he recognised in his witness statement, "*This was a big project that was moving very quickly so I wanted our discussion documented.*"

38. The 7 March email was focussed almost exclusively on the potential Cannes order. Mr Howard pointed to the reference to "*distribution*" and submitted that if only a single store had been in contemplation the reference would more properly have been to "delivery". As a matter of semantics that is correct, but this was an email sent late at night, not a carefully considered, formal document prepared by lawyers. The reference to the previously quoted costs, the increase

in quantities, the end of April delivery deadline and the number of items to be quoted for are all references to, and only to, Cannes.

39. In his witness evidence Mr Paget referred to Mr Beale, in the course of their telephone conversation, laughing and stating that he really needed the opportunity and never got opportunities of this nature. Mr Beale denied that they had discussed anything other than Cannes and further denied that he would have reacted in such a fashion. He noted that he was, at the time, working for Jaguar and Mercedes and that while the potential opportunity for further orders would have been clear to him, there was a significant difference between an opportunity and an income stream from placed orders.

40. It seems to me probable that the truth is somewhere in between. I accept Mr Paget's evidence that he would have referenced the wider opportunity in the course of that conversation. As Mr Beale recognised in his witness statement, he knew by 1 March that the work he was doing was for Nespresso, understood that their shops follow a similar format and so would have understood that a successful pilot would likely mean further orders and he was raising the possibility of such orders with Nespresso by 22 March. I am less persuaded that Mr Beale would have reacted in the way Mr Paget suggested. Mr Beale came across as commercially astute; his evidence that there is a difference between potential orders and cash flow was something that would almost certainly have been on his mind at the time. I also accept that he had significant relationships with large customers and so this type of opportunity would not have been so far outside the norm for him.

41. Even if he had reacted in that way, however, it does not mean that the parties agreed that the whole Nespresso project was to fall within the terms of the Agreement. Mr Paget accepted on cross-examination that the Cannes project was, in itself, good business that was worth having. To the extent that Mr Paget raised the possibility of future orders he may have done so by way of a general description of the then state of play or purely with a view to inducing Mr Beale to agree to work on the Cannes order. Referencing the rollout as a future opportunity to be pursued at a later date or not referring to the rollout at all are both consistent with what Mr Paget wrote on 7 March; a discussion in which the Agreement was to cover the whole of the Nespresso opportunity is not.

42. That is reinforced by the email sent by IDEO on 8 March introducing WDES to Nespresso. IDEO specifically references WDES as the engineers to work on the Cannes project. It was apparent that this email was seen by Mr Paget, since the print header has his name on it. It is less clear when he received it, but IPD had a close relationship with IDEO and IDEO was aware that this was an important project for IPD. Moreover, according to Mr Paget's evidence this was the stage at which IDEO was stepping aside from the project. It therefore seems to me very likely that IDEO would have kept IPD informed, and so it also seems likely that Mr Paget saw the 8 March email soon after it was sent. At no stage did IPD seek to correct it, however. While far from conclusive, such a caveat is consistent with the Agreement having been for the Cannes store only.

43. Accordingly, nothing in the exchanges at this time suggests to me that the Agreement was intended to extend to the wider rollout. On the contrary, they suggest that it was focussed on Cannes.

The evolution of the Agreement

44. On 27 March 2017 Nespresso telephoned WDES to advise that quantities for Cannes would be reduced but that would in part be made up by a further pilot store at Madison in New York. Mr Beale's evidence was that he discussed this with Mr Paget in a telephone conversation later that day and they varied the Agreement to include Madison.

45. Mr Paget's evidence on cross-examination was that he would not have agreed to extend the Agreement to other stores because there was no need to do so: in his mind the Agreement already covered the whole rollout. I accept that was Mr Paget's understanding. However, as I have noted, the exchanges up to that point most likely would not have suggested that understanding to Mr Beale. As such, Mr Beale was entitled to treat the exchanges they had at face value; the variation question is a purely objective one

46. I do not understand IPD to dispute that a call happened and it seems to me highly probable that it did. It is also common ground that, following the conversation, the parties proceeded on the basis that the Madison store was within the scope of the Agreement. There is no record of what was said during the 27 March conversation, but three similar exchanges that occurred at around the same time give some useful context.

47. Nespresso wrote to Mr Beale on 25 April 2017 requesting a further four sets of the props to be sent to the USA. (There was some confusion earlier in the proceedings over whether this was the Madison order, but it was agreed by the time of the trial that it was in fact for Washington DC.) The following day Mr Beale forwarded the email to Mr Paget saying, "*FYI*". There is no record of Mr Paget's reply, but he wrote very shortly after to Mr Mines of Atom Ltd (**Atom**), the company that supplied the trays, copied to WDES, saying:

> "We need an extra 4 Aroma Trays, PN 092-012, with this order. So total number should be 34.
>
> They will be going to New York for approval for potential future orders, so we want them to be perfect (We [sic] just got this through from Nespresso)."

48. It seems clear, from those exchanges, that WDES had not simply sent the email to Mr Paget "*FYI*" but had, either at the time of Mr Beale's email or subsequently, understood that Mr Paget would act on it and Mr Paget had shared that understanding.

49. On 4 May 2017 Mr Beale forwarded to Mr Paget a request from Nespresso for further sets of the props for its headquarters in Lausanne. Mr Paget responded, "*Nice.*" The sets were produced and taken to Nespresso for the Lausanne meeting, which I address in more detail below.

50. On 11 May 2017 Mr Beale forwarded to Mr Paget an email from Nespresso ordering props for three further pilots in Mexico, Portugal and the UK, requesting that Mr Paget call him. In his email Mr Beale stated, "*Call me to discuss, we need to get capsules moving*". There is no record of that call, but the products were manufactured.

51. In his evidence Mr Beale sought to distinguish between the Madison order and the other examples I set out above. He explained that whereas Madison was to fall within the scope of the Agreement, the work done by IPD on the other orders was to be done on a different basis.

52. With respect to Mr Beale, it is wholly unclear how he could have reached such a conclusion. He appeared to suggest that the work in some way fell within the scope of what had been agreed in March, but that would be inconsistent with the 7 March email and WDES's case that the Agreement was initially limited to Cannes. There is no evidence of any "red line" being raised with Mr Paget in the 27 March telephone conversation, let alone agreed with him. To the contrary, Mr Paget's repeated reference to "we" in his email to Mr Mines, which as I have noted was copied to Mr Beale, strongly suggests that he believed that IPD and WDES were working on the Washington order together. Mr Beale never said anything to contradict that.

53. In my view, each of the instances follows a similar pattern: Nespresso made a request to Mr Beale, there was a short exchange by telephone or by email between Mr Beale and Mr Paget and there is evidence of some agreement, either expressly, ("*Nice.*") or through performance. Neither party addressed whether, let alone why, the order fell within the Agreement; they simply proceeded on the basis that it did. It seems to me probable that the Madison order followed a similar pattern.

54. Accordingly, I accept that on 27 March Mr Beale said something to the effect that Madison should be treated in the same way as Cannes. Given his understanding of the terms of the Agreement Mr Paget may well have taken that to mean nothing more than what he expected – that the profit share applied equally to Madison. That subjective understanding of the exchange was not communicated to Mr Beale, however, so it is not what matters. I have found that the Agreement as formed during his telephone conversation with Mr Beale on 6 March only applied to Cannes. Mr Beale's statement that Madison should be treated in the same way was an offer which was accepted either expressly or by performance.

55. In my view this was equally the case for the pilots for Washington, Mexico, Portugal and the UK and also for the sets prepared for Nespresso's headquarters in Lausanne. They were not covered by the 6 March telephone call but were added to the Agreement by virtue of variations agreed by Mr Paget and Mr Beale.

56. Returning to the chronology, on 28 March 2017 Nespresso wrote to WDES confirming the quantities for Cannes, indicating that similar quantities would be required for the further pilot at Madison in New York and pressing for a reduction in costs.

57. Nespresso placed a firm order for Cannes in early April 2017 and for Madison in mid-April. There were continuing design changes brought about for a variety of reasons. Those reasons are not relevant to this dispute; what is important, and is agreed between the parties, is that IPD remained actively involved in the Nespresso project at this time. The Cannes order was delivered on 9 May.

The meeting in Lausanne and its follow-up

58. At the beginning of May Nespresso proposed a meeting with WDES. Nespresso proposed that the agenda should cover the following:

> "- WDES presentation
>
> - Nespresso props manufacturing process
>
> - Pricing
>
> - Key elements that could bring drastic price reduction
>
> - Nespresso's sourcing process
>
> - Glimpse on 2017 roll out
>
> - Wrap up"

59. Mr Paget stated in his witness statement, by reference to the 11 May email regarding the order for Mexico, Portugal and the UK, that it was "*around this time*" that Mr Beale was communicating to him "*very large volumes*" that Nespresso intended to order. In my view, any such discussion would have been later in time. I say that for two reasons. First, Mr Paget describes a meeting at his design studio at which Ms Vanns was present and which Mr Warman and Mr Ellis overheard, which he recalls was also "*around this time*". It is clear that meeting happened somewhat later, in June or July. Secondly, the email from Nespresso proposing the meeting in Lausanne talked about a "*glimpse*" of the 2017 rollout. It is therefore unlikely that Mr Beale would have heard anything more concrete from Nespresso about future orders in mid-May, and he would be unlikely to talk about "*very large volumes*" without having done so. As I go on to address, such discussions did, in my view, happen, but not at this time.

60. In advance of the meeting a PowerPoint presentation was prepared with input from IPD and WDES. It was described as an "*introduction*" to IPD and WDES. The bulk of the PowerPoint presentation dealt with the two companies and the production methods and assemblies for the products delivered to date. Feedback from the pilot rollouts, production rollout volumes, timeline and costs, the potential for cost reductions and packaging requirements were all points addressed on a single slide without any detail.

61. Some emphasis was placed by Mr Howard on the use of the reference to "*our partnership*" in that presentation. For my part I read very little into that. Mr Beale, Ms Vanns, Mr Paget and Mr Batchelor, who were involved in preparing the presentation, were not lawyers and there is nothing to suggest that they intended to use the term in its legal sense. To the contrary, on 22 May Mr

Batchelor had sent to Mr Beale a sample business card in which Mr Beale was described as "*Manufacturing Partner*". In his evidence, however, Mr Batchelor recognised that "*though WDES and Instrument are two separate companies, we worked together to design and manufacture products.*" He fully understood that there was no legal partnership between the companies. That suggests to me that the word was being used, throughout, in a more general sense.

62. Nor do I think that Nespresso would have understood the reference to partnership to be a legal one. Commercial organisations often describe sponsorship arrangements as "partnerships" when commercially it is a form of advertising and legally it is a licence. It was obvious from the PowerPoint presentation that these were different companies with different clients. I read the reference to partnership as meaning nothing more than that the parties worked together; in my view, that is also how it was perceived by those preparing, giving and receiving the presentation.

63. Mr Beale's evidence was that he invited IPD to attend the meeting in case design changes were requested for Madison and they asked if they could pitch their design services, with a view to winning the design work away from IDEO. Mr Paget and Mr Batchelor had a pre-existing commitment in San Francisco and so it was agreed that Ms Vanns would attend with Mr Beale. Mr Paget, Mr Batchelor and Ms Vanns do not address the background to the meeting in any detail in their evidence, but the Particulars of Claim describe the purpose of the meeting as being "*to discuss subsequent orders and business in respect of the Products*".

64. I find it difficult to accept that the contemplated purpose of the Lausanne meeting was for IPD and WDES to pitch for new work from Nespresso. In the email to Mr Beale Nespresso had raised repeatedly the question of how price could be reduced; the only indication of new work was the "*glimpse*" of the wider rollout. Moreover, if the meeting had been principally a sales pitch aimed at future work it would have been highly unusual to send only Ms Vanns. In saying that I take nothing away from Ms Vanns: as I have noted, in giving her evidence she was thoughtful and considered and came across as poised and capable; she was a highly experienced designer who had been centrally involved in this project and was accustomed to operating at a senior level. On her own evidence, however, she was not involved in the management of IPD or its contracting. She agreed on cross examination that her role at the Lausanne meeting was to present on the design aspects of the products; Mr Beale mainly led on the order requirements. Mr Paget willingly accepted on cross-examination that although the Cannes order was business worth having, he had realised as far back as March that the profit on the Cannes sales would be "*dust in the balance*" compared to securing the full rollout. The latter would be "*hitting the jackpot*". If Mr Paget or Mr Batchelor had believed, ahead of the Lausanne meeting, that it was their opportunity to pitch for that work it seems to me inconceivable that they would have been happy for it to proceed without either of them being present.

65. Less still do I accept Mr Beale's evidence that the companies were to pitch independently. The business card that Mr Batchelor sent to Mr Beale was an IPD business card, in which he was described as "*Manufacturing Partner*" and

the PowerPoint presentation for the meeting was prepared jointly and makes only a bare reference to "*production rollout volumes*". That is not symptomatic of two companies pitching separately for work.

66. It seems to me that this is an instance of the witnesses' recollection having been influenced by subsequent events. In their book "Noise", Kahneman, Sibony and Sunstein describe this process by reference to what they call the valley of the normal:

"In the valley of the normal, events … appear normal in hindsight, although they were not expected, and although we could not have predicted them. This is because the process of understanding reality is backward-looking. An occurrence that was not actively anticipated … triggers a search of memory for a candidate cause … The search stops when a good narrative is found. Given the opposite outcome, the search would have produced equally compelling causes…"

67. The parties, in my view, went to Lausanne expecting to make progress towards an order for the wider rollout – the "*glimpse*" – but not expecting an order to be agreed. However, although the latter outcome was improbable it was not impossible, and indeed was their ultimate objective. When it happened at the Lausanne meeting the parties attached more weight to that meeting subsequently than they had done in the run-up to it.

68. The Lausanne meeting took place on 31 May. Immediately after Mr Paget sent a short e-mail to Ms Vanns:

"Hi Natalie, I hope the presentation went well?

I realised payment didn't go out, really sorry, I will do it today and it should be in your account today or tomorrow."

69. That email is consistent with my finding that the Lausanne meeting came to assume a greater significance in the view of the witnesses once its outcome was known. Mr Paget's email makes no reference to a pitch or winning new work. He is at least as concerned with apologising for a late payment as he is with a presentation that he subsequently recalled to have been aimed at "*hitting the jackpot*".

70. Ms Vanns responded at greater length. Much of her email concerned Nespresso's experience with the products, however, and how they could be improved. That is consistent with the focus of the PowerPoint presentation. Only the first two paragraphs concerned the future rollout:

"Theyre [sic] not talking big numbers for the first year, in the region of 300. Only rolling out to new boutiques and the normal non flagship store will be around 1/4 of the Cannes volume as the non flagship store dont [sic] have the floor space. But the talk was positive and it would be long term view I think.

I'm going to focus on product stuff – Darren will no doubt fill you in more on sourcing stuff."

71. Mr Paget and Mr Batchelor both described a lunch after the Lausanne meeting at the Coal Hole pub in London, although the timing of it is unclear. Mr Paget says it was following everyone's return to London, suggesting it was soon after the Lausanne meeting to celebrate how things had gone; Mr Batchelor places it "*within a couple of months*", which could be late July. Ms Vanns was also said to be present, but gave no evidence on it. The final attendee was Mr Beale, who said that he did not really recall it. I took that to mean that he accepted it may have happened but did not recall that meeting specifically, or what was discussed at it.

72. By definition, a lunch to celebrate the Lausanne meeting must have happened some time after that meeting took place. Since Mr Batchelor and Mr Paget were in San Francisco that week, it seems unlikely that the lunch happened before the following week, which was the week of 5 June, but given that it was a celebration of what had been achieved it seems to me more likely to have been towards the beginning of the period described by Mr Batchelor.

73. The evidence of Mr Batchelor was that he "*suggested setting up something like a joint venture or at least a shared account so that both sides could see orders come in and expenses go out.*" He said that Mr Beale told them he had previously had a bad experience with a business partner and did not want to do so. Mr Paget had a similar recollection of Mr Beale's response.

74. On cross-examination it was put to Mr Batchelor that he would only have made that suggestion if he did not already believe that there was a joint venture in place. Mr Batchelor sought to explain that he was talking about formalising the existing joint venture by way of forming a company or partnership. Large sums of money were now involved and so there was the possibility of disputes.

75. I did not find that answer convincing. Mr Paget's evidence was that he had realised from March that the amounts in play could be in the region of £5-6 million, meaning a profit of £1.5-2 million. Those were very significant sums for IPD. If that had been the driver behind the suggestion of a more formal joint venture, it applied just as much in March as it did in June. Rather, it seems to me, the request was driven by a desire to ensure that the Agreement clearly caught the rollout, which was now much more firmly in contemplation. Mr Batchelor may well have believed that they did, but his request shows that the questions was not free from doubt.

76. Moreover, Mr Beale's response – that he had a bad prior experience with a joint venture and did not want one with IPD – is consistent with him having the belief, at that meeting, that the Agreement did not extend to the wider rollout. A joint venture limited to production for the Cannes store would be much more akin to a one-off contract, and so would not have given rise to the same concern. That is consistent with Mr Beale having read the 7 March email as applying only to Cannes.

The lead-up to the Nespresso order

77. Throughout June, Mr Paget, Ms Vanns and Mr Batchelor were liaising with the suppliers of the various components. Specific reference is made in the

Statements of Case to the exchanges with Atom, the tray supplier. WDES's case is that this was an instance of IPD handing those relationships over, the design phase having come to an end and the manufacturing phase having started. When I asked Mr Beale how IPD was to be remunerated for this work he said that he considered it to fall within the scope of what was agreed in March. Neither the suggestion that this was a transition phase nor the argument that IPD was being remunerated for it under a version of the Agreement limited to Cannes and Madison survives even cursory comparison with the documentary record.

78. On 7 June 2017 Mr Paget wrote to Mr Mines, of Atom, copied to Mr Beale in the following terms:

"Hi Steve,

Please meet Darren who we are working with to supply Nespresso.

As I mentioned we are working towards production pricing. We are now working with the procurement department at Nespresso to turn the models we supplied into production quantities and production pricing.

…Our quantities over 4 years will be 3000-8000 units, with the initial order of 500 (total both styles) this year."

79. As a simple matter of grammar, the reference to "we" and "our" cannot be to WDES alone. Plainly, Mr Paget is talking about IPD and WDES working together on the rollout. Mr Beale must have understood from this exchange that Mr Paget considered, at least by that time, that the Nespresso opportunity was a joint opportunity and was to be jointly exploited. Mr Paget's email is wholly inconsistent with the idea that IPD perceived its role to be coming to an end; it is equally inconsistent with the idea that it was handing anything over. In his reply on 14 June Mr Beale did nothing to correct what Mr Paget said. This does not mean that Mr Paget's understanding of the Agreement was correct; but to the extent he was labouring under a misapprehension, Mr Beale was well aware of that fact.

80. Mr Beale's suggestion that he believed that IPD's payment for this work was in some way wrapped up in the Agreement is, if anything, even harder to credit. For the reasons set out above, it is readily apparent from the email to Mr Mines that Mr Paget was not working on that basis. More to the point, it is WDES's case that the Agreement was limited to Cannes before being extended by agreement to Madison. That, though, was the end of the matter on the defendant's case: "*a line in the sand*", as Mr Hackett described it. Mr Beale's evidence was to the same effect. He repeatedly stressed that only Cannes was discussed on his call with Mr Paget in March, and indeed went so far as to state that the wider rollout was not raised by Mr Paget at all, even as background. This work, self-evidently, had nothing to do with the Cannes or Madison orders. It relates to "*production quantities and production pricing*" involving 3,000-8,000 units over a four year period. The exchange with Mr Mines supports the position that, at least on the face of it, the parties were working on the basis of a wider relationship.

81. There was a further discussion around this time concerning profit share. Mr Ellis, Mr Warman, Mr Paget, Mr Batchelor and Ms Vanns all recall a meeting at IPD's premises at which Mr Beale boasted about how much money IPD and WDES would make from the Nespresso project. Mr Warman thought the meeting was before he went on holiday, which would place it in June or July. Mr Hackett accepted that timing was probably correct, as do I.

82. In its Defence WDES asserts that on 5 July 2017 it signed a non-disclosure agreement with Nespresso and that this was "*a precursor to a substantial expansion of manufacturing*". So far as I am aware, no copy of this agreement or any exchanges that led up to it were disclosed or provided in the trial bundle. Self-evidently, however, such agreements are the product of some discussion between the parties. Consequently, at the time of this meeting WDES was probably either negotiating or had recently negotiated the start of its manufacturing relationship with Nespresso. Given his role in the Nespresso relationship, it is inconceivable that Mr Beale was unaware of that. He would also very likely have recalled the Coal Hole meeting, which had only happened very recently, and Mr Batchelor's desire for a formal joint venture. He was aware of the work that IPD was carrying out with suppliers and the basis on which IPD believed it was doing so.

83. In closing Mr Hackett suggested that the comment had been made flippantly and did not reflect the commercial reality. He urged caution in relying on the understandings of Mr Warman, Mr Ellis and Ms Vanns of the terms of the Agreement as these would have been obtained from Mr Paget or Mr Batchelor.

84. I accept that Mr Warman and Mr Ellis did not have an entirely clear recollection of the precise contents of the discussion, something that they also acknowledged when it was put to them. The same was not true of Ms Vanns, however. Her evidence in response to my question was very clear on the point. The discussion regarded orders beyond the pilot and Mr Beale made a quick and rough calculation of the amounts to be made from the Nespresso project. It was a significant amount of money, which Mr Beale said would be divided between IPD and WDES. I fully accept Ms Vanns' evidence. This was not, as Mr Beale suggested, a throwaway boast on his part; it was the product of a calculation performed by Mr Beale, albeit a rough one. Ms Vanns did not derive her understanding regarding the profit share from Mr Paget or Mr Bachelor; she heard it first-hand from Mr Beale. The profit share had nothing to do with new design work for which IPD would pitch; it was to be derived from the rollout of the products trialled in the Cannes store. Nor did it have anything to do with the outstanding Madison pilot; that could never have generated profits approaching the order of magnitude that Ms Vanns recalled.

85. It seems to me highly material that this discussion happened at around the time that WDES's relationship with Nespresso was taking off. In his witness statement, Mr Beale emphasised that no future rollout had been agreed at that stage. That may well be true – a non-disclosure agreement would typically be a precursor to further negotiations leading to a contract – but it is irrelevant. On WDES's own case the NDA was the starting point for a "*substantial expansion*" of its relationship with Nespresso. At the time of the meeting in which Mr Beale stated that WDES and IPD would make significant profits from the Nespresso

rollout, WDES probably either had recently negotiated or was negotiating a non-disclosure agreement for a future relationship with Nespresso that did not include IPD.

86. In respect of this meeting no allegation of dishonesty was put by Mr Howard to Mr Beale, and given that he was not given the opportunity to explain his state of mind I make no finding to that effect. I do find, however, that what he said was entirely at odds with WDES's broader negotiations with Nespresso at the time and that he could not have had any proper basis for considering his statements to be a true reflection of the position as he understood it.

The agreement to reinvest versus the set-off

87. By 16 August the Cannes invoice had fallen due for payment. Mr Paget's evidence was that at a meeting at IPD's offices "*we*" asked Mr Beale for payment and Mr Beale resisted on the basis that he wanted the money to be reinvested into the larger production order of 500 units requested by Nespresso. It appears from the Particulars of Claim that the "*we*" in question were Mr Paget and Mr Batchelor. I note at the outset a discrepancy in Mr Paget's evidence. In the Particulars, which Mr Paget signed, the date of the alleged meeting is given as 16 June. In his witness statement he places it around 16 August. On cross-examination Mr Paget accepted that he did not have a clear recollection of the date but said that he did clearly recall the meeting.

88. Mr Beale denied that any such agreement was reached; rather, his recollection was that the amounts due in respect of Cannes were agreed to be set off against sums owed by IPD to WDES in respect of another project, Picayune. Mr Beale's evidence is that the setoff agreement was reached at some point in October 2017.

89. I further note that Mr Batchelor references a similar meeting at which Mr Beale refused to pay IPD its share of the profits from both Cannes and Madison on the basis that he had needed to reinvest it in production. However, Mr Batchelor places that meeting between September and November 2017 and says that it took place at WDES's offices. On cross-examination he was quite vague on timing but thought that the meeting would have been between him and Mr Beale only; Mr Paget was not present. He acknowledged that he was very busy at that time on a number of projects. It seemed to me that Mr Batchelor had only a very vague recollection of any such meeting, which may have been of the meeting described by Mr Paget but could have been a subsequent discussion with Mr Beale. Either way, his evidence did not add a great deal on this issue.

90. Ultimately, both parties were relying on undocumented discussions. Both can be wrong, but both cannot be right because if the reinvestment was agreed along the lines described by Mr Paget there would be no basis for the set-off.

91. I found the evidence of Mr Paget, in particular, to be persuasive on this point. Although he could not recall the precise timing of the meeting that is not especially surprising considering it was five years ago. He gave a clear description of the meeting itself and his reaction to it. Moreover, it seems to me entirely plausible that Mr Beale would have spoken of a reinvestment,

regardless of what he privately thought was the scope of the Agreement. I have already found that around the same time he boasted about the profits the parties would make from the rollout, so the fact that he did not consider the Agreement to extend to that later phase would have been no bar to him asserting that it did.

92. The timing is broadly consistent with the Cannes invoice having fallen due in mid-June. The point was made to Mr Paget on cross-examination that IPD was a relatively small business with debtors of around £23,000 that year and he accepted that. The evidence contained both a quotation for the Cannes props dated 31 March 2017 totalling £34,084.95 and a purchase order for the Cannes props dated 14 April 2017 where the price was €40,200. On the exchange rate at the time, those amounts are almost identical and significantly exceeded IPDs other debtors. It logically follows that Mr Paget would not simply allow a debt of that size to drift. It is far more likely that he would have received some reassurance in June or August (and in my view more likely in August) than waiting until late October to follow up. Given the nature of the relationship that existed at that time and Mr Paget's belief that the Agreement extended to the rollout I can see why Mr Paget would be content with the informality. The Agreement was initially reached by way of a telephone call and Mr Beale asserts that Madison was added by way of a telephone call. The parties had transacted informally throughout, so this would be entirely consistent with their previous behaviour.

93. As I note above, that is sufficient to dispose of the alleged set-off. The parties subsequently acted on the basis that the sums due to IPD were being reinvested; they would not also have agreed to settle them by way of set-off.

94. For completeness I should note, however, that I reject Mr Beale's evidence on this point. Unlike the reinvestment, which was a purely oral discussion, the Picayune project was discussed by way of emails and WhatsApp messages. The question of funding for parts was specifically addressed on 16 October. Mr Paget asked Mr Beale, "*I'm just thinking for prototypes and we will get production costs later. 2-3k?*" Mr Beale responded, "*Whatever you can get I will work with*". To which Mr Paget replied, "*Thanks, will get you as much as poss.*" Mr Beale made no mention of any set-off at this stage.

95. On cross-examination Mr Beale said that the set-off was agreed in early October after he saw the drawings. At least some of the drawings were sent on 9 October, which I take to be the drawings Mr Beale meant. In any event, if there had been a set-off agreement in early October there would be no reason for Mr Beale to send a message on 16 October saying "*Whatever you can get I will work with.*" The position would already have been resolved by the set-off. Equally, on 20 October there was a debate over an £800 tooling charge. On Mr Beale's version of events that was caught by the set-off, but in reality IPD agreed to pay it.

96. It also seems to me notable that the alleged set-off was said to be limited to the Picayune project, when other debts were due from WDES to IPD on a project for Ding. Mr Beale's explanation for this, which went to the timing of when invoices were issued, was confused and difficult to follow. His explanation at the time was very different. On 6 November 2017 he wrote to Mr Batchelor

saying, "*Sorry it* [sic] *so late chaps, struggling same as you guys, nobody paying on time, very tricky*". WDES was raising cash flow issues, and in those circumstances it seems to me that, had a set-off been agreed, it would have been more beneficial to WDES to make it for liquidated debts rather than future projects. The reference to "*struggling same as you guy*s" suggests that IPD also had cash flow issues, and as such would almost certainly have preferred settlement of historic debts by way of cash rather than a set-off. A set-off by reference to the Picayune project was therefore in nobody's interests.

97. Accordingly, I find a conversation along the lines described by Mr Paget did occur at some time between June and August 2017. I reject the set-off argument.

IPD invoice for the Lausanne meeting

98. On 16 August 2017 IPD sent an invoice to WDES for the costs associated with products provided to the Cannes and Madison stores, along with costs associated with the materials for the Lausanne meeting (the parties agree that IPD paid Ms Vanns' expenses of attending) and for ongoing development of the products. That invoice was paid by WDES.

99. Both parties claim this assists their case. IPD notes that the invoice covered only costs, not the 50% profit share. WDES say that this was inconsistent with a joint venture on the terms alleged by IPD because the liability for all parts fell on the Defendant.

100. To my mind the August invoice does not assist either party. Cannes and Madison were, on both parties' cases, within the scope of the Agreement, and I have found that the sets prepared for Lausanne were also brought within the scope of the Agreement. Ongoing product development up to that point could have been for Madison, which only shipped that month. To the extent that the stores fell within the scope of the Agreement, WDES had agreed to front the costs. The August invoice is consistent with both cases, and inconsistent with neither of them.

The October redesign

101. Late on 2 October 2017 Nespresso contacted WDES about a potential redesign of certain elements of the products. Early on 3 October Mr Beale forwarded the request to IPD and asked for a discussion. There followed a series of exchanges culminating in a proposal to Nespresso on 4 October 2017, which Nespresso rejected on 9 October as being "*very far from our initial idea and specially from our budget*". A revised proposal was sent by IPD and WDES on 10 October. Nespresso replied the following day to state that "*we have decided **not** to move forward with WDES for this project. The estimation is still out of benchmark, but most importantly, we think that the overall approach on how to tackle the re-design of our Aroma jar is unfortunately not fitting our current need.*"

102. WDES asserts that the intention of IPD to charge a separate fee for its design services shows that there could be no joint venture at this point. Under the Agreement IPD was to be remunerated for its design work by way of the 50% profit share, such that if the Agreement extended beyond Cannes and Madison

it ought to have covered this work as well. Mr Paget explained that he considered this a different project, such that if it had been successful it would have fallen outside the scope of the Agreement.

103. I accept what Mr Paget says on this. The 7 March email clearly references the products to be delivered to Cannes. It was apparent that Nespresso had in mind a reasonably significant change to the aroma jar, in particular, such that this would be a new engagement. Again, therefore, this exchange seems to me to assist neither party: it concerned different products to those caught by the Agreement, and they were treated as such.

The breakdown of the relationship

104. On 4 December 2017 Will Barker sent a message to IPD with photos of the products at a Nespresso store in Brisbane, Australia. He said that the total order was in the region of $30,000, although it is unclear if that meant US$ or AUS$, or what his source for that figure was.

105. On 12 December Mr Paget met Mr Beale to discuss the position. In preparing for the meeting Mr Paget had contacted Mr Mines of Atom to understand how many trays had been ordered. Mr Mines confirmed that the total was a little over 500.

106. Mr Paget's evidence was that Mr Beale said there had not been many orders of the IPD design, it having been superseded by the redesigned products. Mr Paget claims that Mr Beale promised to provide details of all purchase orders. Mr Beale makes no reference, in his evidence, to Mr Paget's request. He states that he only agreed to provide a sample for the purposes of showing that Nespresso had bargained down the costs, meaning that WDES was making only a small profit.

107. I accept Mr Paget's evidence. It is obvious, from his email to Mr Mines, that Mr Paget was concerned not just about the profit per unit but also, indeed primarily, about the volume of sales. I find that he requested all of the purchase orders; Mr Beale chose to provide only a sample.

108. Mr Beale also emailed to Mr Paget a spreadsheet showing price reductions. Mr Paget discussed this with Mr Batchelor and they became concerned that there had been no redesign, simply a reduction in component prices. This conclusion was supported by a second attachment to Mr Beale's email showing the products being used by Nespresso in at least some stores, which corresponded to IPD's design.

109. On 16 January 2018 Mr Paget emailed Mr Beale to request all of the purchase orders and invoices from Nespresso. There was some back and forth about a meeting and a date of 24 January was agreed but Mr Beale did not send the requested material. On 18 January Mr Paget asked for it again. On 23 January Mr Paget sought to confirm a time; Mr Beale said that "s*omething cropped up*" and asked to postpone the meeting until 25 or 26 January. Mr Paget again asked for the purchase orders. Mr Beale responded, "*Most don't raise PO's you have*

all that I have." That response was, at best, deeply disingenuous. WDES had far more extensive records than it had, up to that point, shared with IPD.

110. The email exchange concluded when Mr Beale stated, "*Only agreed first 2 stores initially then things changed*". Mr Paget responded, "*This was never the agreement. We will be in touch with how we will be moving forward.*"

111. A further meeting was arranged for 15 February 2018 at the Sea Lane Café in Worthing. At that meeting Mr Beale showed Mr Paget and Mr Batchelor a spreadsheet, said to show orders in 2017. On 19 February Mr Beale emailed the spreadsheet to Mr Paget; the orders it referenced did not correspond with the figures IPD had received from various suppliers and so Mr Paget followed up with Mr Beale, who sent a further spreadsheet on 20 February showing additional orders.

112. What became apparent on cross-examination of Mr Beale, but what would not have been known to IPD at the time, was that the costings contained in the spreadsheet emailed on 19 February were wrong, such that the profit would have been misstated even had the other details on the spreadsheet been correct. I accept that this was not deliberate on the part of Mr Beale. He explained that he was not fluent in the use of Excel, and appeared genuinely surprise when the errors in the spreadsheet were pointed out to him. Moreover, he sent the spreadsheet in its native format to Mr Paget almost immediately after the meeting at the Sea Lane Café. He would not have done that had he genuinely intended to mislead IPD; it would have been a transparent and pointless deception. I accept that these were genuine mistakes on his part.

113. That one point aside, in my view Mr Beale's conduct in this period was evasive and disingenuous. I entirely accept IPD's submissions that it was provided with a drip-feed of information, often following multiple requests. Mr Beale frequently sought to divert the debate, and indeed his cross-examination, onto claims that he asserted WDES had against IPD, notably the Picayune claim. I have found that no set-off was agreed such that those claims are irrelevant to this dispute, but even if they were asserted by Mr Beale in good faith, they in no way affected his ability to answer Mr Paget's questions or, if he considered he had no need to do so, to say directly that he would not.

114. I do not accept that Mr Beale's exchange on 4 December 2017, when he explained that he was at Nespresso looking for more work, showed transparency. All parties recognised that the Agreement did not apply to the Nespresso relationship generally; telling Mr Batchelor that WDES wanted more work from Nespresso told him nothing of any value.

115. On 7 March 2018 Mr Paget informed Mr Beale that IPD was working with lawyers and requested further information. Mr Beale did not supply that material and shortly thereafter solicitors were instructed by both parties.

Analysis

The contract claim

116. The starting point is obviously the conversation between Mr Paget and Mr Beale on 6 March 2017 at which the Agreement was reached. Mr Paget was clear in his evidence that the 7 March email was intended to record the Agreement and I agree that it is by far the best evidence of its terms. As I have noted, in my view it references Cannes and nothing more. I do not accept that the reference to "*distribution*" can stretch the proper reading of the 7 March email to cover the full rollout. The context in which that term is used is an email exclusively about the Cannes order; the rollout is not mentioned once. No reasonable reader of the 7 March email would understand that the use of the word "*distribution*" changed the scope from Cannes to Cannes and the rest of the world.

117. In saying that I fully accept that Mr Paget and Mr Batchelor probably did discuss including the rollout in the deal with WDES and that Mr Paget probably did tell Mr Beale about the possibility of the future rollout in their conversation on 6 March. That does not mean he included it in the Agreement, however. To the extent that it was discussed, I consider it is more likely to have been by way of background and as an incentive to induce Mr Beale to become involved. Similarly, I accept Mr Paget's evidence that he could have used his position as the "gatekeeper" of the Nespresso opportunity as leverage in an attempt to persuade Mr Beale to accept a wider joint venture. Accordingly, I reject Mr Hackett's submission that IPD's position is, on an objective analysis, uncommercial or farfetched. But while Mr Paget could have done that, the 7 March email is powerful evidence that he ultimately did not.

118. The fact that WDES was, from the outset, made the principal contact for Nespresso does not, it seems to me, detract from the plain reading of the 7 March email. As Mr Paget recognised, Nespresso had certain requirements that might make it difficult for IPD to be onboarded as a supplier, an issue that would not affect WDES. While Mr Paget, in his witness statement, suggested that this was an issue for the full rollout rather than for Cannes, he also noted that he and Mr Batchelor chose to work with a partner "*to ensure we got the order*". That must mean Cannes, which was the only order then in contemplation, and Mr Paget accepted on cross-examination that Cannes was, itself, good business, and worth doing on its own terms. It makes sense that Nespresso would be unlikely to onboard a supplier for the pilot if it could not subsequently work with them if that pilot proved successful. Once IPD decided to work with WDES, it made perfect sense for WDES, as the larger and more established company, to be the main contact for Nespresso. Cannes, in and of itself, was business worth having, and IPD was more likely to secure it with WDES fronting the relationship.

119. Nespresso's request to add further pilots in Madison, Washington, Lausanne, Mexico, Portugal and the UK and for a set of props for its headquarters must be assessed against the backdrop of what had been agreed in March. The way that those requests were handled by IPD and WDES shows that they were intended to be covered by the Agreement. Mr Beale stated that Madison was added to the Agreement by way of express variation. Given my finding that the Agreement as originally negotiated was limited to Cannes, I agree with that. It seems to me that the sets for the other pilots and for Lausanne were all of a similar nature: Mr Beale forwarded the request to IPD, which constituted an

offer to add those pilots and IPD, either expressly or through conduct, accepted that offer.

120. Mr Hackett made the point that Mr Paget did not believe the Agreement had changed after March. To my mind that does not alter the analysis. This is a question of variation which, like the question of formation, is to be assessed primarily objectively by reference to how a third party would have viewed the parties' exchanges. Nothing displaced that objective focus here, such that Mr Paget's subjective beliefs were irrelevant.

121. For the reasons that I have addressed above, I do not consider that the parties perceived the Lausanne meeting at the time they were preparing for it in the way that they subsequently came to see it. I accordingly reject WDES's suggestion that the parties agreed to pitch their respective services to Nespresso. Equally, when the parties referred to a "*partnership*" at that meeting I do not consider that they were using the term in its technical, legal sense, nor would Nespresso have thought that they were.

122. In determining the scope of the Agreement as originally entered into it seems to me that I can place only limited reliance on the events that followed the Lausanne meeting. I say this for three reasons.

123. First, the fact that the wider rollout was now a concrete opportunity was precisely the type of new experience that would be most likely to cause the "*interference*" with memory referred to by Leggatt J.

124. Secondly, this period starts almost three months after the Agreement was first entered into, and so even if accurately recorded or recalled it is hard to say it reflects the parties' "*contemporary understanding*" from March.

125. Thirdly, *Carmichael* requires me to consider what the parties' "*thought* [they] *had agreed*", both by considering what they stated their understanding to be and their subsequent conduct. I have found that Mr Beale's statements and conduct at times during the period following the Lausanne meeting were, at best, misleading and at times deeply disingenuous. Objectively, his boasting about the profits IPD and WDES would make and his request that the profits from Cannes and Madison be reinvested are both consistent with a broader interpretation of the joint venture. I do not accept they reflected his true beliefs, however, since he knew at the time he made those statements that he was planning to and later did work with Nespresso without the involvement of IPD. For the purposes of ascertaining what was agreed in March, Mr Beale's statements have little value, therefore.

126. That is not the end of the analysis, however. As *Carmichael* makes clear, evidence of subsequent conduct may also be relevant in showing a variation. As I have noted above in connection with the earlier variations of the Agreement, that process differs from the exercise of interpreting an oral agreement in that it is primarily objective rather than subjective. The focus is on what a reasonable onlooker would have understood from the parties' words and actions, rather than what the parties themselves thought they meant.

127. I have found that in August Mr Paget had a meeting with Mr Beale to discuss the unpaid profits from the Cannes sale. Mr Beale suggested that those profits should be reinvested in the rollout of the 500 units proposed by Nespresso following the Lausanne meeting. Mr Paget agreed.

128. The reasonable onlooker, understanding that the Agreement at that point did not extend to the rollout, would in my view consider the "*reinvestment*" to be a variation to the Agreement, extending it to cover the 2017 rollout estimated at the time to be around 500 units. IPD gave up its immediate right to profits from the earlier Cannes sales, potentially permanently if the rollout proved to be loss making, and agreed to provide such design services as were required. In return, WDES agreed to share potential future profits in accordance with the terms of the Agreement.

129. As I have noted, WDES has argued that a wider joint venture would be so commercially unattractive for WDES as to render it unrealistic. I have dismissed that submission, but presumably the same argument would be advanced in respect of this variation. If it were, I would not accept it. Mr Beale's evidence was that the Nespresso relationship was not especially profitable due to the extensive price reductions demanded by Nespresso. Cannes, by contrast, was charged at the original pricing before any reductions were agreed and would have been significantly more profitable. Moreover, in his communications with IPD in November and December Mr Beale was noting the cash flow issues he was experiencing. This arrangement assisted with cash flow, and so had real commercial benefit to WDES. It seems to me that there were potential benefits to WDES from the reinvestment, such that it was plausibly something that WDES could have wanted to agree.

130. The October redesign pitch seems to me, for the reasons I have given, to be irrelevant. The Agreement was for the "*product*", being the product designed initially for the Cannes pilot. The redesign would have involved a different product and so on any analysis fell outside the scope of the Agreement.

131. As the relationship deteriorated from December onwards positions inevitably polarised and both parties increasingly prepared for a dispute in some form. As Leggatt J noted in *Gestmin*, all of the difficulties inherent in the process of recollection are aggravated by the litigation process. I derived no assistance in interpreting the Agreement from those exchanges, therefore.

132. The best evidence of what was agreed on 6 March is the 7 March email. In my view, that was limited to the Cannes pilot. However, the Agreement was subsequently varied to include Madison, Washington, Lausanne, Mexico, Portugal and the UK. Critically, at a meeting in August 2017 the parties agreed a significant variation to the Agreement to include the 2017 rollout estimated at around 500 units.

Partnership and breach of fiduciary duty

133. To the extent that there was a partnership or other relationship of trust and confidence it was, at the very least, tied closely to the terms of the Agreement. WDES was appointed to front the relationship with Nespresso only for the

purposes of the Agreement. Otherwise, both parties had a free hand, such that IPD could seek to charge a fee for design work on new products in October and nobody was surprised in December when Mr Beale was with Nespresso seeking new work.

134. In the circumstances, I find that the partnership and fiduciary duty claims add nothing to the breach of contract claim.

Pallant v Morgan

135. The difficulty with IPD's claim under *Pallant v Morgan* is that the facts I have described above do not give rise to the necessary common intention at the necessary time. The Agreement was initially limited to Cannes, then extended to the other pilot stores; it did not apply to the wider rollout. The Lausanne meeting was not considered at the time to be a pitch, but even if that had been the case it was jointly attended, such that IPD had every opportunity to secure the opportunity for itself. Even if Nespresso had understood the reference in the presentation to "*partnership*" to mean a formal, legal partnership, it would still have needed non-disclosure agreements with both partners, yet it chose to proceed with WDES alone. If the Lausanne meeting was a pitch it was made by both parties, but WDES succeeded while IPD did not.

136. As I have found, the Agreement was amended in August 2017 to include the 500 units requested by Nespresso following the Lausanne meeting for the 2017 rollout. Were I wrong in concluding that sufficed to show a variation, *Pallant v Morgan* would not help IPD. The requisite common intention would have formed after the opportunity was secured; to trigger the *Pallant v Morgan* equity it needs to have been concluded before that point.

Quantum

137. Although the primary head of relief sought in the Claim Form and Particulars of Claim was the taking of an account, at trial Mr Howard urged me to make an award of damages to the extent that I felt able to do so. I did not. The approach proposed by IPD involved me trying to assess, from WDES's accounts, what its typical rate of profit was and then to apply that to what I thought the sales were likely to have been. It was based on limited factual evidence and no expert evidence whatsoever. To a significant extent it involved making a semi-educated guess.

138. Mr Hackett's submission was a simple one: it is for a claimant to prove its case and IPD failed to do so. He was right to make that submission. IPD was able to show that the figures produced to it by Mr Beale were wrong but it did not come close to showing what the right figure was.

139. CPR 25.1(o) empowers me to order that an account be taken. While it is technically an interim remedy, CPR 25.2 makes clear that it can be ordered at any time, even after judgment. This is a case that cries out for such a remedy.

140. Accordingly, to the extent the parties are unable to agree the figures in light of this judgment I order that an account be taken of the profits made by WDES on:

i) the orders for pilots in Cannes, Madison, Washington, Mexico, Portugal and the UK;

ii) the set of props prepared for Nespresso's headquarters in Lausanne; and

iii) the orders for the 2017 rollout (which, on the evidence before me, totalled around 500 units) that arose from the Lausanne meeting.

141. As regards the profits on the Cannes order, allowance is to be made for any profits that were reinvested in the production and delivery of orders comprising the 2017 rollout. To the extent that some or all of the sales comprising the 2017 rollout involved a redesign, such that the products are genuinely different from those designed by IPD, they fall outside the scope of the Agreement.

142. WDES is to pay to IPD 50% of the profits from the orders described above.

143. I will hear further from the parties on the question of costs and on any directions that are necessary for the account to be taken.