Neutral Citation Number: [2019] EWHC 2863 (Comm)

Case No: D40MA080

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21/11/2019

Before :

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

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Between :

QUINN INFRASTRUCTURE SERVICES LIMITED	**Claimant**
- and -	
(1) STEPHEN SULLIVAN	**Defendants**
(2) STEVEN CAIRNS	
(3) IT EXCELLENCE UK LIMITED	
(4) ITXL SOFTWARE LIMITED	

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Mr. Andrew Latimer (instructed by **Hill Dickinson LLP**) for the **Claimant**
Mr. Paul Parker (instructed by **Brown Turner Ross Limited**) for the **First Defendant**
Ms. Siân Mirchandani QC (instructed by Brown Turner Ross Limited) for the Second to Fourth Defendants

Hearing dates: 24, 25, 26, 29 and 30 April, 1, 2, 3, 7, 8 and 10 May 2019
21 November 2019 (Rolls Building)

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Approved Judgment

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

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

HH Judge Pelling QC:

Introduction

Parties and their Relationship

1. The claimant was formerly the employer of the first defendant. It is not in dispute that the first defendant was a de facto director of the claimant from May 2011 and was appointed the managing director of the claimant's Telecoms Division in March 2012. The second defendant was and is a close and long standing personal friend of the first defendant, who was and is an IT consultant who at all material times carried on his business using the third and fourth defendants, both companies controlled by him. The first defendant, purportedly acting on behalf of the claimant, engaged the second to fourth defendants to provide IT services to the claimant and those defendants provided IT services to the claimant between June 2010 and January 2016. The third and fourth defendants invoiced the claimant for its services and received payments against invoices from the claimant.

Claims in Summary

2. The claimant alleges that in a variety of different ways the first and second defendants so managed their relationship as to cause or permit the third and fourth defendants to charge in excess of the reasonable sum for the services provided, or the third and fourth defendant charged in excess of the reasonable sum for the services provided. In these proceedings the claimant seeks to recover from the defendants the sum it alleges was paid that was in excess of what was reasonable for the services provided. It quantifies its claim in the sum of £741,831.48.

3. The claim against the third and fourth defendants is a claim for restitution of the sums it is alleged each received by reason of the alleged overcharging on the basis that by receiving those sums they were respectively unjustly enriched at the expense of the claimant. As against the first defendant the same sums are claimed either as damages for breach of his contract of employment and/or as equitable compensation for breach of the fiduciary duties owed by the first defendant to the claimant in his capacity as a de facto director of the claimant. As against the first and second defendants jointly some or all of the same sums are claimed as damages for deceit and as against the second defendant the same sums are claimed as damages for procuring or inducing a breach of contract. Finally some or all of the same sum is claimed against all defendants as damages for unlawful means conspiracy. As will be apparent from this summary, all these claims depend on the core allegation that the third and fourth defendants acting by the second defendant charged in excess of what was reasonable for the services provided with the knowledge and consent of the first defendant. It is common ground that this issue must be determined at least primarily by reference to the expert evidence the parties adduced.

Assignment and re-Assignment of Claimant's Alleged Causes of Action

4. It became apparent in the course of the trial, that such causes of action as the claimant might have had against the various defendants had been assigned by the claimant to a third party corporation as part of a business reorganisation that took place after the commencement of these proceedings. Shortly after the defendants learned of that

reorganisation, they requested disclosure of the documentation relevant to it. The claimant and its solicitors refused it. The defendants could have applied but did not apply for specific disclosure of that material. Since the defendants did not know of the effect of the reorganisation on the causes of action asserted against them that is perhaps unsurprising. However, the claimant ought to have known of the effect of the documentation by which the reorganisation was carried into effect and thus that it was material that ought to be disclosed. The claimant did itself no credit by refusing until after the trial had started to disclose the documentation that demonstrated this to be so. Not merely did it breach its continuing disclosure duty by failing to disclose the material, it allowed the trial to start even though it ought to have known that it had ceased to have any causes of action available to it against any of the defendants, as Mr Latimer correctly conceded after the disclosure issue had been pressed.

5. The claimant sought to correct this situation by obtaining an assignment back to it of the causes of action it claimed to have against the defendants. It did so after the trial commenced and only once it had been forced to disclose the reorganisation documentation and concede its effect on its alleged causes of action. None of the defendants sought a stay of the proceedings pending the disclosure of the re-assignment although each reserved his or its position on these issues until their counsel had an opportunity to consider the re-assignment. In the end none of the defendants submitted that the re-assignment of the causes of action had any effect on the claims against them. None submitted that the assignment or re-assignment had any effect on the causation or loss issues that arose in relation to the various claims or that they needed to investigate whether there had been any such effect. In those circumstances, it is not necessary that I comment further on the issue.

Claimant’s Business and the relevant IT Products and Services

6. It is now necessary to summarise the IT services that the second to fourth defendants provided to the claimant in so far as the provision of those services is relevant to this dispute. Not all the services provided by the second to fourth defendants are the subject of this dispute. Thus it is accepted by the claimant that at least some of the services provided were provided at reasonable cost.

7. The only part of the claimant’s business relevant for present purposes is what was styled its telecoms division. Originally, the claimant’s core business had been civil engineering and construction contracting. Mr. Quinn, the founder of the claimant was experienced in that area but had no experience in either telecoms or IT. The main business of the telecoms division was to supply engineers to the Openreach Division of British Telecom (“BT”). The claimant engaged engineers supplied by various agencies. The engineer invoiced the agency for his or her services, the agency then invoiced the claimant adding its margin and the claimant claimed payment including its margin from BT.

8. This element of the claimant’s business involved allocating a large number of freelance engineers to multiple tasks across the UK each day, monitoring what each engineer was doing in the course of each day and reporting to BT as and when required to do so. By 2011, the claimant was allocating work to about 400 engineers and employed about 30 administrators to allocate tasks to engineers and monitor progress. This method of operation could not continue as this part of the claimant’s business grew, not least

because BT was looking to reduce its costs by reducing the cost of administering the activities of the engineers. This was only practical by the use by the claimant of a client relationship management ("CRM") IT system that allocated tasks to particular engineers and enabled engineers to report when they had arrived at and then completed the tasks allocated to them. One of the more straightforward ways of creating such a system is by customising a proprietary CRM package called Microsoft Dynamics using software code written by software developers to provide a CRM system suitable for a particular user's business. Microsoft permits such customisation. Indeed, Microsoft Dynamics has been designed to permit such development. These proceedings are largely concerned with the development and refinement of such customised solutions for use by the claimant in connection with its Telecoms business.

9. The claims the subject of these proceedings concern two different generic categories of product. The first and largest group consist of software developments carried out by the third and fourth defendants for the claimant at its request. It is common ground that the intellectual property ("IP") in these products belongs to the claimant and that the third and fourth defendants are entitled to the reasonable price of developing these products. These products (referred to hereafter generically as the "development products") consisted of and are called (i) Copper Instance, (ii) Fibre Instance, (iii) Auto-Emulation and (iv) Hermes Transformation. Each was hosted on the claimant's own servers.

10. The other and smaller group of products are products that the second to fourth defendants claim were designed by them on a speculative basis and offered to the claimant on licence. These products are referred to hereafter as the "licensed products" and consist of (i) Allocator/Field Manager (or as the defendants call it "Field Manager") and (ii) Auto Allocator (or as the defendants call it "Allocator"). Each of these products was hosted on servers controlled by the second to fourth defendants or their sub-contractors. The claimant's case in relation to the licensed products is that they are products that were designed by and for the claimant, that the IP in those products always belonged to it just as was the case with the development products and thus neither the third nor fourth defendants were entitled to licence charges for their use. Originally, it claimed all the sums that had been paid by it to the third and fourth defendants as licence fees for each of these products. Shortly before trial however, the claimant accepted that credit would have to be given for the reasonable price of developing these products since its case is that the products should have been supplied to it on the same basis as the development products referred to in the previous paragraph. This concession was inevitable.

11. Finally, the claimant claims that it was overcharged for what is called in these proceedings the "BT Portal hosting charge". This claim has been included for convenience as part of the licensed products claims although it is different. It will be necessary to set out in more detail how this charge arose later in this judgment. In summary however, there came a time when BT wanted direct access to information to be found on Field Manager and/or Auto Allocator. Since these products operated using a Microsoft proprietary system, it was necessary for each individual who was to have access to have a licence from Microsoft or its authorised supplier (an entity called "My CRM") to access the material. The third defendant was required to pay for each licence required, subject to reimbursement by the claimant. The claimant maintains that it was invoiced for multiple numbers of licences that BT had requested even though in fact the defendants had disabled most of them and so did not have to (and did not in fact)

pay for those that had been disabled. The claim arises because the claimant paid the third defendant on the basis that it was liable to pay for (and had paid for) 400 then 300 odd licences for BT staff whereas in fact it was not. In other words the claimant paid the third defendant on the basis that what it paid would be passed on as a licence fee when most of it over the relevant period was not paid on by the third defendant but was simply retained.

12. In summary the claimant's pleaded case is that it has been charged in excess of what was reasonable for the following products in the following amounts:

Development Products

Development	Total paid	Amount overcharged
Copper Instance	£91,200	£63,849
Fibre Instance	£55,200	£48,815.33
Auto-Emulation	£326,200	£312,615
Hermes Transformation	£146,400	£146,400
Openreach BT Portal	£48,000	-£7,129.33
Total	**£667,000**	**£564,550**

Licensed Products and Portal Hosting

Product/Charge	Total paid	Amount overcharged
Field Manager /Allocator	£220,324	£155,324
Auto Allocator	£384,854	£384,854
BT Portal hosting charges	£130,310	£76,066.14
Total	**£735,488**	**£616,244.14**

As I have said, assuming the claimant is otherwise successful in establishing that the licensed products were products designed for the claimant that should have been transferred to it as its property, it is now common ground that credit must be given for the reasonable cost of developing the licensed products. The claimant alleges those savings total £438,962.66. For the reasons that I explain below, the defendants allege that the sum claimed as an over payment in respect of Auto-Emulation has been entirely avoided by the claimant. If so, it follows that the total value of the Development Products drops from £564,550 to £251,935 and the total value of the claim drops to (£564,550 - £312,615) + (£616,244 - £438,962) = £429,217. If the BT portal hosting charges claim is treated separately (as in my view it should be) then the total value of the claim in respect of the development products and licensed products drops to £353,151 in addition to the BT portal hosting charges claim of £76,066.14.

Ghost Workers Issue in Summary

13. As I have said already, various agencies provided the claimant with the services of freelance engineers. The fourth defendant was one such agency. This resulted in a

somewhat convoluted invoicing system between the fourth defendant and the claimant that involved the engineers sending invoices to the claimant who then forwarded them to the fourth defendant who was then required to pay the engineers and recover their outlay from the claimant. It was this practice that led to what has been referred to in these proceedings as the ghost workers claim. It will be necessary to expand on this later in this judgment. In essence however, the claimant alleged that the fourth defendant acting by the second defendant had invoiced it for the services of engineers that did not exist. The claimant alleged that this resulted in a significant over payment to the fourth defendant of about £400,000. This resulted in a settlement agreement under which the second to fourth defendants paid the claimant £400,000.

14. The settlement agreement contained confidentiality obligations and has not been disclosed by either party. The claim is not the subject of these proceedings and is relevant only because the claimant relies on what it is alleged was an increase in the charges levied by the third and fourth defendants for its IT services immediately following what it maintained was the discovery of the payments to non existent workers as inferential proof that the third and fourth defendants overcharged for the services they provided. The claimant maintains that it was a switch from one form of overcharging to another that demonstrates the conspiracy on which the claimant relies. The second to fourth defendants deny that the overcharging was their responsibility. They maintain that the false invoices were generated by persons unknown within the claimant as a means of obtaining tax relief in respect of payments that ought to have been paid by the claimant out of its taxed profits. I return to this issue to the extent necessary later in this judgment. It becomes relevant only if the claimant proves the overcharging alleged.

The Backdated Contracts

15. The factual foundation for the deceit claim pleaded against the first and second defendants concerns the alleged backdating of four contracts relating to the services provided by the third and fourth defendants. The first and third of these contracts were between the claimant and the third defendant and were purportedly signed on 1 September 2013 with a start date of the same date. The second and fourth contracts were between the claimant and the third defendant and were purportedly dated 1 December 2013 with a start date of the same date. The claimant alleges deceit against the first and second defendants by reason of these contracts having been "backdated" – that is purportedly signed on an earlier date (coinciding with the purported start date) than in fact they were signed. The claimant's pleaded case is that by backdating the contracts in this manner, the first and second defendants dishonestly represented to the Claimant that the Contracts were correctly dated and that payments made to the third defendant after the date of each contract were payments due under those contracts. On this case, the deceit claim cannot be relevant to any payments made prior to the actual date when the contracts were signed since the alleged deceit cannot have induced any payment made prior to the date when the contracts came into existence. The claimant submits that dishonesty is to be inferred from the following:

> "72.1 there was no commercial justification for backdating any of the 4 Contracts;

neither the First nor Second Defendant had any reasonable grounds for believing that the 4 Contracts could properly be backdated;

none of the 4 Contracts indicated on its face that it had been backdated or was intended to have retrospective effect;

the First and Second Defendants could see from the face of the 4 Contracts that the Claimant or any other reasonable reader would believe them to have been signed on the date which appeared on 3 occasions in each document;

the reasonable inference from these events is that the purpose of backdating the 4 Contracts was to produce documents to justify retrospectively money which had been paid by the Claimant to the Third Defendant without a contract and/or to produce documents to justify future payments (in circumstances where, without the 4 Contracts having been produced, the Claimant would not have paid the Third Defendant);

neither the First nor Second Defendants have offered a credible and reasonable explanation to the effect that they believed that they were acting honestly in backdating the 4 Contracts, without drawing attention to that back-dating on the face of the documents or otherwise, and had adequate reason for that belief."

16. The same base allegation is relied on in support of a claim against the first defendant that he acted in breach of his fiduciary or statutory duties as a director and/or his contract of employment by the claimant although in support of that allegation the claimant alleges that the first defendant caused the claimant to enter into the four contracts retrospectively in order to justify payments that had already been made or to give the impression that some or all of the four contracts represented established arrangements. As with the ghost workers issue, the backdated contracts issue becomes relevant only if the claimant proves the overcharging alleged. I return to this issue to the extent necessary later in this judgment.

ITXL Estates Limited

17. Finally before turning to the principles that apply to resolving factual issues in a case such as this and to the factual issues that arise, it is necessary that I mention one further company called ITXL Estates Limited ("ITXL"). ITXL was incorporated on 14 March 2013 as a vehicle for investment in residential property. The second defendant was one of its directors from the date of its incorporation. The claimant alleges but the first defendant disputes that he was a de facto director of and a shadow investor in ITXL. It is common ground that there was a third investor in IXTL. That investor is not a party to these proceedings and no allegations are made against him. It follows that it is not necessary for me to name him. He made shareholder loans as requested. The second defendant maintains that whilst he would have been willing to sell half of his shareholding to the first defendant as and when his other business commitments permitted, he was at all material times the beneficial as well as the registered holder of

two thirds of the shares in ITXL. He provided shareholder loans in the form of loans from the third and fourth defendants as follows:

Date	Lender	Amount
5.8.13	Third Defendant	£7,951.52
30.8.13	Fourth Defendant	£76,483.34
10.10.13	Fourth Defendant	£47,000

The claimant maintains that part of the overcharging that took place funded the investment in ITXL and that the first as well as the second defendant benefitted from this by reason of first defendant's true beneficial interest in that company being held on his behalf by the second defendant.

Relevance of the Ghost Workers, Backdated Contracts and ITXL issues

18. In paragraphs 6-7 of his closing submissions, Mr. Latimer submits the starting point ought to be an analysis of whether each of the defendants has incurred liability. I do not agree. As will be apparent from what I have said so far, the key foundation factual issues that arise concern (a) whether over payments were made to the third and fourth defendants in relation to the development and licensed products; and (b) whether there was any overcharge in relation to licence fees relating to the BT Portal. If the claimant fails to establish these foundation elements of the claim, then the claim must necessarily fail since damage is of the essence of each of the tortious causes of action relied on and the claim against the third defendant in respect of the BT Portal claim depends on the claimant proving unjust enrichment. If the overcharging relied on cannot be proved the breach of contract claim against the first defendant is of no practical utility since even if proved it would entitle the claimant only to nominal damages. It is for that reason that I address these foundation issues first and then the causes of action only to the extent that overcharging has been proved. As I have said already, the ghost workers, backdating and ITXL issues become relevant only if these foundation issues are resolved in favour of the claimant.

Trial and Principles applicable to Fact Finding

19. The trial took place between the 24-26, 29-30 April, 1-3, 7-8 and 10 May 2019. I heard evidence from the following factual witnesses call on behalf of the claimant:

a) Mr. Michael Quinn;

b) Ms Janine Cullen;

c) Mr. Alistair Dickson;

d) Mr. Paul Morrissey;

e) Mr. Mike Orme;

f) Mr. Philip Johnson;

g) Mr. Michael Small; and

h) Mr. Wayne Lockey.

I heard oral evidence from the following factual witnesses called on behalf of the defendants:

i) The first defendant;

j) The second defendant;

k) Mr. Graeme Temple

l) Mr. Neil Buckman; and

m) Mr. Simon Lovely.

20. The claimant and the defendants jointly each relied on expert evidence relevant to the evaluation of the cost of developing the various products in dispute in these proceedings. Mr. Jason Coyne gave expert evidence on behalf of the claimant. Mr. David Faulkner gave evidence on behalf of the defendants.

21. Given that most of the events with which these proceedings are concerned took place many years ago and that this is a heavily documented case, I have approached the factual issues between the parties that are material to this dispute by testing the oral evidence of each of the witnesses wherever possible against contemporary documentation, admitted and incontrovertible facts, and inherent probabilities. This is entirely conventional - see Onassis and Calogeropoulos v. Vergottis [1968] 2 Lloyds Rep 403 at 407 and 431 – and is particularly appropriate where (as here) the allegations relate to events that occurred years ago and the oral evidence is based on recollection of such events - see Gestmin SGPS SA v. Credit Suisse (UK) Limited [2013] EWHC 3560 per Leggatt J (as he then was) at paragraphs 15-22. It was this factor that led Leggatt J (as he then was) to observe at paragraph 22 that:

> "In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all 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. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

Where it has been necessary for me to reach conclusions concerning the credibility of some of the witnesses from whom I heard oral evidence, I have done so in most cases by reference to the evidence given in relation to the substantive issues between the parties considered below, rather than attempting a wide ranging and free standing assessment of the credibility of particular witnesses before turning to the substantive issues, not least because my conclusions concerning credibility will depend in large part on a review of the contemporaneous documentation.

22. Before turning to the issues that matter in this case, it is necessary to note that the claimant has made some serious allegations of dishonest wrongdoing against the defendants. For the most part those issues arise only if and to the extent that the claimant is able to establish that it has been overcharged as alleged. If it does not do so, then it will be unnecessary to decide those issues. Subject to that qualification, I remind myself of three basic principles.

23. First, the legal and evidential onus of proof rests throughout on the claimant to prove on the balance of probabilities the claims they make in these proceedings. However, the evidential burden rests on the defendants to prove the positive factual allegations they rely on.

24. Secondly, whilst the standard of proof in a civil case is always the balance of probabilities, the more serious the allegation, or the more serious the consequences of such an allegation being true, the more cogent must be the evidence if the civil standard of proof is to be discharged – see Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563 per Lord Nicholls at 586, where he said:

> '"The balance of probabilities standard means that a court is satisfied that an event occurred if a court considers that on the evidence the occurrence of the event was more likely than not. In assessing the probabilities, the court will have in mind as a factor to whatever extent it is appropriate in the particular case that the more serious the allegation the less likely it is that the event occurred and hence the stronger should be the evidence before court concludes that the allegation is established on the balance of probabilities. Fraud is usually less likely than negligence...Built into the preponderance of probabilities standard is a generous degree of flexibility in respect of the seriousness of the allegation."'

25. Finally, it is necessary to remember that it does not necessarily follow from the fact that a witness has been shown to be dishonest in one respect that his evidence in all other respects is to be rejected. Experience suggests that people may give dishonest answers for a variety of reasons including an entirely misplaced wish to strengthen a true case that is perceived to be evidentially weak as opposed to a desire to advance a dishonestly conceived case in a dishonest manner. What such conduct will usually mean however is that the evidence of such a witness will have to be treated with great caution save where it is corroborated, either by a witness whose evidence is accepted or by the contents of contemporaneous documentation or is against the witness's interests or is admitted.

Findings and Conclusions On the Issues Between the Parties

26. In my judgment, the foundation issues that underlie the claims against the defendants should be resolved in the following order – (i) the allegation that the licensed products were products developed for the claimant and thus the intellectual property in them should have been passed by the second to fourth defendants to the claimant and none of the second to fourth defendants were entitled to charge licence fees in respect of the use by the claimant of those products, (ii) the allegation that the claimant has been charged in excess of the reasonable development costs for the development products and (iii) the allegation concerning alleged overcharging for the BT portal hosting service.

27. The claimant also argues that even if the licensed products were products in respect of which the claimant was entitled to charge licence fees it is for the second to fourth defendants to prove that any charge levied was reasonable. I address that when addressing the first of the three issues identified above. Finally, the defendants allege that no recoverable loss has been suffered in respect of the Auto Emulation development product, or any alleged overcharge for Auto Emulation is irrecoverable, because the claimant has been fully indemnified in respect of that cost by BT. I address this issue when considering the second of the foundation issues identified above.

The Licence Fees issue

28. The claimant paid £384,854 by way of what purported to be licence fees for Auto Allocator between September 2011 and October 2015 and £220,324 for Field Manager between September 2014 and October 2015. As I have said already, these products were hosted on servers controlled either by the second to fourth defendants or their sub-contractor Chop Chop Software Limited ("Chop Chop").

29. The claimant's pleaded case in relation to the licensed products is that they are products that were designed for and belonged to the claimant and thus no licence charges should have been payable. This issue was distilled in the list of issues for trial as being "What was a reasonable licence fee for …" the licensed products. The claimant's primary case on this is nothing because it maintains the products were not licensed products but products that belonged to the claimant. However, there was a potential subsidiary issue concerning the reasonableness of the licence charges that was only faintly developed in the course of the trial.

30. Two issues arise therefore – first whether the licensed products were properly licensed at all or whether they should be treated for charging purposes as being development products. The secondary question is what a reasonable licence fee would be assuming the products belonged to the second to fourth defendants so as to entitle them to a licence fee for their use by the claimant.

31. <u>*Were the Licensed Products licensed to or owned by the Claimant?*</u>

The claimant's case on this issue in summary is this. If a software product is a licensed product then the owner of the product would issue a licence agreement to the licensee in order to control use of the product and ultimately in order to be able to restrain use of the product once the licence had expired or been terminated. No such licence was issued in this case. The claimant submitted that this could not be an error because the second defendant is a seasoned IT professional with many years of experience of developing software products and it is inconceivable that he would not have insisted on the claimant (acting by the first defendant) agreeing the terms of a licence before the product was released to the claimant. The claimant relies on the fact that all the other products were products developed for the claimant and in each case the source code was delivered to the claimant – the fundamental indicator that the product was the property of the claimant. The claimant maintains that had there been any truth in the suggestion that the licensed products belonged to the second to fourth defendants, they would have counterclaimed in these proceedings for declarations to that effect and for consequential remedies. No such claim has been made. Finally, the claimant relies on the fact that no document has been produced that is consistent with the products being licensed products and further relies on the fact that two of the four backdated contracts concern the licensed products but do not purport to be licences.

32. The first defendant does not engage with this issue maintaining that it is an issue primarily for the second to fourth defendants to address. The second to fourth defendants maintain the recent concession concerning development costs points to a greater truth – that the claimant was never charged for the development cost of the licensed products and that was because the products did not belong to the claimant. I accept that it is inherently improbable that the second to fourth defendants would not have charged for development costs had they been entitled to recover them, particularly given the approach adopted in relation to the development products themselves. I accept therefore that this is one factor pointing to the position being as the second to fourth defendants allege. The second to fourth defendants also maintain that the claimant's claim for research and development tax relief had failed because it did not have title to the IP for the licensed products, that it knew that it did not have the source code for the licensed products and that it did not because it did not own the products and was permitted to use them only as the second to fourth defendants' licensee..

33. The second defendant's case is that the claimant did not commission or pay for the development of the licensed products, which were the result of the second defendant pursuing his own ideas for products that might be of interest to the claimant – see paragraphs 38-48 of the second defendant's first statement and in particular paragraphs 41-42, where the second defendant states that he offered to the first defendant to develop the product in his own time and if successful would licence the product to the claimant and that the first defendant agreed to this proposal. The first defendant agrees with this evidence – see paragraphs 61-70 of his statement and in particular 62-63. It is noteworthy that the first defendant maintains that this approach followed a conversation between the first defendant and Mr. Quinn in which Mr. Quinn had made clear that he was not prepared to authorise an open ended development contract. This is entirely consistent with Mr. Quinn's approach to IT costs (which he was consistently suspicious about) and is consistent too with the financial position of the claimant company at that time.

34. Although the contemporaneous material is not voluminous or complete, in my judgment it establishes that the second to fourth defendants owned the licensed product software at all times when licence fees were being paid. My reasons for reaching that conclusion are as follows.

35. First, it is clear that the second to fourth defendants and their third party contractors undertook the development work and it is equally clear that the claimant was not paying for the development work as it was taking place. Indeed, the work that was carried out by Chop Chop, was invoiced to the third and fourth defendants not the claimant and that cost was not passed on directly by the second to fourth defendants to the claimant either as or before it paid.

36. Secondly, it is clear that the work that was being undertaken was entirely speculative. It is not suggested by anyone that there was any obligation on the claimant to accept the products resulting from this activity or meet the development cost even if it did not choose to use the products.

37. Thirdly, it is clear that the product was not supplied to the claimant in the sense that it could be or was installed on servers belonging to or controlled by the claimant. At all times the products remained on servers owned or controlled by the second to fourth defendants or Chop Chop, its sub-contractor. That treatment is entirely inconsistent with the treatment of the development products. Whilst this point of itself is of little weight since it could be explained on the basis of an improper arrangement between the defendants, that is not so when the point is considered together with the first and second reasons I have identified.

38. Fourthly, the products depended for their functionality on access to third party licensed products such as Google Map. The second to fourth defendants paid those costs. This is not consistent with these products being development products belonging to the claimant since in that event it would be the claimant that was responsible for meeting these charges.

39. Fifthly, the second to fourth defendant's invoices to the claimant for licence fees were paid without any objection from the claimant and in particular from either Mr. Quinn or Mr. Orme. This much was confirmed by Mr. Temple. As he put it in his statement:

> "…I know that the systems were being licensed to the claimant by the second defendant and his companies.
>
> …In terms of how the second defendant was paid, I know that he raised invoices for his work and his systems and that the relationship between the second defendant and the claimant was managed by Mike Orme and Mike Quinn.
>
> …having seen some of the invoices from the second defendant in relation to licensing and development, I find it impossible to accept that Mike Quinn and Mike Orme did not know and understand the relationship between the second defendant and the claimant or that they did not understand what the second defendant was being paid for. …they were both definitely aware of the second defendant and his companies, their invoices and the payment structure for the work that the second defendant was carrying out. … Despite approval from a particular department [an] invoice would not actually be paid until it had been approved by Mike Orme and until he was happy that he had the cash to pay the invoice."

40. Sixthly, in January 2014, Mr. Orme was giving consideration as to whether the claimant could claim research and development tax relief in respect of Auto Allocator. BDO LLP, its accountants, handled this on behalf of the claimant. Mr. Orme and the second defendant dealt with this together as is apparent from the email to them both from the handling accountant at BDO dated 20 January 2014. The second defendant's evidence as to what happened is at paragraphs 135-138 of his witness statement. In summary, "… after an investigation, BDO advised that because [the third defendant] had undertaken the research and development and owned the intellectual property for the Allocator and had paid for its development, that the claimant had no R & D tax benefit entitlement …". The claimant has offered no credible alternative explanation as to why the claim for tax relief did not proceed. Had the position not been as described by the second defendant, clearly, the claimant would have wished the position to be regularised and the claim for tax relief advanced but no attempt was made by the claimant to regularise what on this analysis should have been the position from the start.

41. Seventhly, on 3 October 2014, Mr. Orme sent an email to the second defendant by which he sought "… a full spec and update to our investors of our various IT systems etc within the business …". It was this email that was the stimulus for the production of the 4 written contracts the subject of the deceit claim. Leaving that to one side for the moment, in his response, the second defendant correctly identified the products owned by the claimant, being amongst other the development products the subject of these proceedings and added that the claimant "… does not hold any intellectual property rights for the following software which is licensed by IT Excellence UK Ltd …". Mr. Orme did not express any surprise or anxiety at this information. The absence of any such response is consistent with his response in relation to the invoices and to the inability of the claimant to obtain tax relief referred to earlier. All this is consistent with him knowing and understanding the position to be as alleged by the second to fourth defendants.

42. Finally, between November 2015 and February 2016 there was a negotiation between Mr. Orme on behalf of the claimant and the second defendant that led to the sale of the licensed products to the claimant. This is a complete answer to the submission made by Mr. Latimer that the absence of a counterclaim by the defendants demonstrates or is consistent with the second to fourth defendants never having had title to the licensed products. More importantly, there is no suggestion in any of the emails referred to by Ms Mirchandani in paragraph 97 of her written opening (maintained in her closing submissions – see paragraph 73) sent by or on behalf of the claimant relevant to the sale that the claimant was or should already be the owner of the software. It is difficult to see why the claimant would have been willing to pay anything for what it was already entitled to or at least why it did not reserve its position or enter into the agreement under protest irrespective of whether that would have been effective or not. In my judgment this absence taken together with the other factors I have referred to demonstrates clearly that the licensed products belonged to the second to fourth defendants at all times down to the date when they were sold to the claimant in February 2016.

43. Whilst I accept that in principle it is possible to infer support for the claimant's case from the absence of a licence agreement, in my judgment the weight that should be accorded to a point of that sort is acutely fact sensitive. In assessing whether such an inference can be drawn from that fact it is necessary to bear in mind that the relationship between the claimant and the second to fourth defendants was attended by significant

informality largely driven by the close friendship between the first and second defendant. Any such inference is more than amply negatived by the other facts and matters to which I have referred. The reality is that the second to fourth defendants designed the licensed products with assistance from Chop Chop paid for by those defendants. At no stage did the defendants seek payment for those costs from the clamant much less did the claimant pay them and at no stage prior to the sale referred to in the last paragraph did the claimant seek to acquire any proprietary rights in the licensed products and did not have any. In those circumstances the second to fourth defendants were fully entitled to claim a licence fee for use by the claimant of their intellectual property down to the date when that property was sold to the claimant.

44. *Reasonable Licence Fees*

It is entirely un-commercial to contend that an owner of intellectual property who licenses its use is limited to the recovery of its costs of developing the software. In addition, it is fully entitled to recover a reasonable profit. There is of course real difficulty in attempting to ascertain the market price of products of the sort this part of the case is concerned with. Whilst I accept that comparables have a role to play, the difficulty is to identify competing products that are truly comparable. Further, there is a real difficulty about assessing the reasonableness of the licence charges for the reasons identified by Mr. Faulkner in paragraph 59 of his first report – that is that pricing information is not readily available and is of questionable assistance given that different customers pay different prices for the same product as a result of separate negotiation.

45. The second to fourth defendants charged £0.50 per day per engineer. It is for the claimant to prove that was in excess of what is reasonable. Mr. Faulkner's evidence is that this was "… reasonable if compared to the equivalent fees …" charged by the four suppliers for whom Mr. Faulkner was able to obtain pricing information – see paragraph 60-68 of his first report. The claimant does not adduce any evidence in answer to this. Mr. Coyne maintained that the per engineer charging model made no sense commercially but, critically, he advanced this opinion only on the basis that the claimant had paid to develop the licensed products – see paragraph 4.8 of the Joint Statement. As I have explained that view is misplaced. Mr. Coyne has simply not engaged with a consideration of market comparables.

46. Mr. Latimer submits that in various ways the comparables used by Mr. Faulkner are not true comparables at all - see paragraph 145 of his closing submissions – and that the exercise that Mr. Faulkner has undertaken is misplaced because he was not in a position to give evidence on procurement issues. I do not agree. Had Mr. Coyne engaged with this issue it may be that there would have been an evidential issue to resolve but he did not. It is possible that the claimant could have sought permission to adduce evidence from a professional more qualified than Mr. Coyne to give such evidence but it did not. It chose to rely exclusively on the assertion that it owned the licensed products and therefore was not liable to pay anything to the second to fourth defendants other (latterly) than their reasonable development costs. I have rejected this case for the reasons set out above.

47. Mr. Latimer submits that I should approach this case by asking first whether the defendants have "… incurred liability …". This approach is mistaken for the reasons I gave earlier and specifically in relation to the issue I am now considering for the

following, additional, reasons. It is difficult to see how I could conclude that the defendants are liable or have acted dishonestly unless I concluded that the claimant owned the licensed products. If I had concluded that was the case then the loss is clear – it is the difference between the sums charged for the licensed products and the reasonable cost of developing those products. It would then have been necessary to consider whether that loss was one for which any of the defendants were liable by reference to the various causes of action relied on. However, once it is concluded (as I have concluded) that the claimant did not own the licensed products then the claimant could prove loss only by proving that the licence fees charged by the second to fourth defendants were in excess of what any reasonable supplier would have charged for the products in question. The claimant has not attempted to prove that and the evidence adduced by the claimant suggests that the contrary is the position. In those circumstances I could not decide that the defendants have incurred liability by reference to any of the tortious causes of action because for each, damage is of the essence, and any claim for breach of contract against the first defendant could succeed only to the extent of awarding nominal damages. The fact that the licence fees charged have not been proved to be unreasonable makes it difficult to find the defendants to have been dishonest as alleged or even a technical breach of contract by the first defendant. The reality is that once the claimant had failed to establish that it was the owner of the licensed products it was bound to fail in relation to this element of the claim because it did not attempt to prove that the licence fees charged were in excess of what was reasonable.

48. In those circumstances, the licence fee claim is bound to fail.

The Reasonable Development Cost Issue

49. This issue depends exclusively on the evidence of the experts. There was a large measure of agreement between them by the end of the trial. The issues that I have to resolve are relatively small in number. The exercise involves estimating the reasonable cost of developing the software in issue identified above. This part of the judgment is exclusively concerned with the development products given my conclusions in relation to the licensed products.

50. Before turning to the areas of disagreement it is necessary that I explain in summary the approach that the experts are agreed should be taken to arriving at the reasonable cost of designing the software relevant to this dispute.

51. It is necessary that I start by noting what is obvious – that the exercise that I have to undertake involves arriving at the reasonable price of designing the software after it has been designed. The claimant's expert Mr. Coyne attempted this exercise primarily using a valuation model known as COCOMO II. It is a tool that is widely used for estimating the cost of developing new software before rather than after it has been developed. It takes the assumed size of the software package and applies various scale factors and effort multipliers in order to arrive at an estimate in person months of designing the software proposed. That is then multiplied by the applicable charge rate in order to arrive at a cost. Size of the software is measured in lines of code ("LOC").

52. As Mr. Faulkner states in paragraph 11 of his supplemental report "… an accurate LOC figure is critical …" when using COCOMO II for estimating. Of necessity when using

COCOMO II to estimate future cost this must be estimated. Where it is being used after the event, the LOC that are relevant will or ought to be known. The relevant number of LOC is a major issue between the experts as I explain below. As I explain below, Mr. Coyne distinguished between what he called "Termination Code" and "Legacy Code". It is important to note that this is not a distinction that Mr. Faulkner accepts as valid although he had been prepared to adopt it for the purposes of this case. It has however led to a difference between experts as to how much of the Legacy Code should be included within the LOC used to calculate the reasonable development costs of the development products. The distinction really does no more than disguise a difference between experts as to how many LOC should be included when arriving at the appropriate reasonable cost. The fewer the number of lines used and the lower the daily rate used means the lower will be the outturn figure. The defendants maintain that Mr. Coyne used fewer LOC than was appropriate and in consequence invalidated the valuation he arrived at using COCOMO II.

53. Mr. Coyne back checked his COCOMO II outcome by adopting the LOC multiplier method. The LOC multiplier method involves simply taking the number of LOC that is appropriate dividing it by 50 (a figure that is now agreed) in order to arrive at the number of lines than can be written by a competent designer each day and multiplying that figure by the appropriate daily rate. For reasons that in essence are agreed between the parties, this method is not an appropriate method for calculating reasonable cost because it fails to take account of the factors addressed by the scale factors and effort multipliers applied when using COCOMO II. As I explain in more detail below, this led both experts to agree that in principle there would have to be uplift applied when using the LOC multiplier method but the experts were not able to agree what that uplift should be.

54. The purpose of the COCOMO II scales and multipliers is to include within any output cost estimate the effect of various issues and events that may or may not arise in the course of the project and the impact of which may be variable. As Mr. Coyne rightly notes, when using the COCOMO II model after the event to assess the reasonable cost of designing software that has been completed, the user needs to make fewer speculative assumptions. I agree with this although a judgment is still required as the value to be applied for a large number of broadly defined factors and multipliers. There is a dispute between the experts as to the value to be applied in four of these.

55. Mr. Coyne criticises the defendants for use of a much higher daily rate then he maintains is appropriate. However, when using the COCOMO II model, he adopted factor multipliers that were consistent only with designers of the highest experience carrying out the work – see by way of example paragraphs 5.19, 5.20, 5.21 and 5.22 of his initial report. The effect of adopting these parameters will be to reduce downwards the estimate of effort required for the task and thus the estimated cost of the exercise. This approach is not consistent with rejection of the higher daily rate in fact used by the second to fourth defendants in favour of the hypothetical lower rate. If a contractor rate is being adopted then it is necessary to reflect that in the effort adjustments.

56. As I have said already, the LOC multiplier method involves using the formula [Number of LOC] -:- 50 x [Applicable Daily Rate]. As mentioned already not merely is there a dispute about the relevant number of LOC but there is a dispute as to the applicable daily rate. Although it is now agreed between the experts that "… there are other factors

to consider other than solely lines of code …" it is noteworthy that Mr. Coyne did not take account of this when using the LOC multiplier method to back check his COCOMO II outcomes in his initial report. However, this factor led the experts to agree that this can be allowed for by an uplift consisting of "…a % tolerance increase from the derived value …" – that is the value derived from applying the formula referred to in the previous paragraph of this judgment. The experts are not agreed as to what the uplift should be. All this is apparent from paragraphs 3.4 and 3.5 of the first joint statement of the experts. The experts are agreed that COCOMO II is "… much more robust as an estimation model …" than the lines of code coupled with an uplift – see paragraph 3.6 of the experts' first joint statement. I agree in principle and in my judgment that justifies its use as the primary means of arriving at a probable reasonable cost. The LOC multiplier method provides at best only limited assistance because whilst it is agreed between the experts that an uplift needs to be applied to the figure resulting from its use there is no agreement as to what that uplift should be. The COCOMO II model provides for such an uplift by the inclusion of the factors and multipliers to which I have referred earlier.

57. *Legacy Code*

Subject to the qualification mentioned earlier, Mr. Coyne maintained and Mr. Faulkner was prepared to accept for the purpose of attempting to reach consensus that in carrying out the valuation exercise there is a distinction to be drawn between two generic types of LOC – that which has been called termination code in these proceedings and that, which has been called legacy code in these proceedings. As I have explained, a key issue that arises in relation to the assessment of the reasonable cost of developing the relevant software concerns the total number of LOC used as the basis of the calculation and that in turn depends on whether and if so to what extent account should be taken of legacy code. Mr. Faulkner maintains that if it is left out of account that will result in an under estimate of reasonable cost whereas Mr. Coyne maintains that it is wrong to include it for detailed reasons I explain below.

58. There is a difficulty at the outset because legacy code includes different types of code the only commonality being that it is not termination code – that is code developed by the end of December 2015 that had been supplied to the claimant by the second to fourth defendants by that date and was being used by the claimant. Legacy code includes material that was generated in the course of development but never used. This includes material that was generated erroneously in the course of the development process and abandoned but it also includes material that was generated but later abandoned because the claimant's requirements changed or were clarified in the course of the development process. It also includes code that was developed and then superseded by further development. As is apparent from what I have said, some legacy code is more likely to be reasonably chargeable to the claimant than other parts of it or as Mr. Faulkner puts it, should be included within the LOC that should form the basis of the reasonable cost calculation.

59. Mr. Coyne maintains that all or most of this material should be ignored in arriving at the appropriate valuation because the effect of using COCOMO II modelling is that it takes into account to the extent appropriate the effect of Legacy Code, which in consequence should be ignored. Mr. Faulkner considers that all or most of it must be taken into account in arriving at a reasonable value of the work in fact done in essence

because the factors and multipliers used in the COCOMO II model do not recognise or recognise sufficiently the work that is cost recoverable work that is implicit in the Legacy Code. If the position is that COCOMO II takes account of some but not all the factors that would be taken account of by taking account of Legacy Code, then it will be necessary to adjust out any effect that COCOMO II has while giving full effect to the Legacy Code.

The Total LOC

60. The parties are agreed within reasonable parameters as to the total numbers of LOC of both termination and legacy code. The total differences are small and I intend to proceed on the average between the numbers contended for by Mr. Coyne and the number contended for by Mr. Faulkner. This results in an adjusted total of 55,419 lines of termination code (rounded down to the nearest full line) and 40,555 lines of legacy code. However, those agreed totals hide very serious disagreements between experts as to how each total has been made up. The experts are agreed however that these differences are immaterial because they do not impact on the claimed overcharges and that the only distinctions that have to be maintained (and which results in sub totals of LOC) are between the products where there is a licence charge dispute and those where there is not and between termination code and legacy code – see paragraphs 2.18 – 2.19 of the second joint statement.

61. *Treatment of Legacy Code*

This issue is of significance because if it should be but is not included to the extent it should be that will lead to the undervaluation of the work carried out by the second to fourth defendants whereas if more of it is included than should be that will result in the overvaluation of their work.

62. Mr. Faulkner considered that it should all be included since it was clear that it represented work that had been carried out by the second to fourth defendants for the claimant during the material period. Mr. Coyne accepts that it might be appropriate to include the cost of writing the element of the legacy code used to arrive at the finished products but then excludes it on the basis that it may be attributable to prototypes developed and then not used or supplied by the defendants – the so called blind alley work – or because it had been included already in the termination code. In any event, Mr. Coyne maintains that there is a significant overlap between the estimation of development cost using COCOMO II and the properly recoverable legacy code cost because the work done in the course of the "journey" to the final product is taken into account using this method of estimation by the factors and multipliers to which I have referred earlier.

63. Mr. Faulkner contended that Mr. Coyne's approach was flawed because the COCOMO II model will capture only the legacy activity that relates to a particular product's historical development – the legacy activity that the defendants describe as "history code". It will not capture other legacy code activity that is properly recoverable as part of the reasonable cost of developing the relevant products – that is code developed for earlier iterations of the product. Merely looking at the current iteration being used (what Mr. Coyne calls "termination code") ignores what has gone before. Mr. Coyne's approach would be appropriate if what was being evaluated was a de novo product but

is inappropriate where what is being evaluated is the reasonable cost of the development and improvement over time of a particular product because Mr. Coyne's method will ignore all or most of what has gone before.

64. In my judgment, Mr. Faulkner is correct in principle to conclude that to arrive at a reasonable development cost of the work undertaken by the second to fourth defendants in this case it is necessary to consider the full cost of development including of necessity any Legacy Code that was used to arrive at the code developed and supplied to the claimant by the second to fourth defendants and was being used by the claimant at the end of December 2015. I agree too with his opinion that it does not make sense to consider only the code in use to run the applications at termination. This is so because it ignores the development work done for the claimant in the course of the development of the relevant products. Indeed, I do not understand Mr. Coyne to disagree with this. Mr. Coyne maintains however that all other Legacy Code must be excluded because it has not been claimed by the claimant to be part of the overcharge or may not have been developed by the defendants for the claimants or is an earlier version of code included in the Termination Code and therefore to include it would be double counting.

65. The difficulty about Mr. Coyne's approach is that each assertion is capable of being justified or rejected only by the proper examination of the Legacy Code. While Mr. Coyne may be right to identify the points he relies on as issues, mere assertion is not good enough. Although he attributes legacy code to different products in a way that is markedly different from that adopted by Mr. Faulkner, Mr. Coyne does not base that on an actual review of the legacy code because as he accepted in the course of his evidence, he has not carried out such a review – see T9/45/7-20. By contrast, Mr. Faulkner's evidence was that he had examined the legacy code in detail – see T9/115/27, that he had excluded legacy code that was identical to the Termination Code – see T9/115/22-23 – and included only legacy LOC that were "… distinct applications or distinct versions of code that were not in the termination code set. … things that were created and developed and would have been charged for and so need to be factored into the total cost."- see T9/11530-116/2. He excluded "standard libraries …" – that is material obtained from third party sources without any original design by the developer or developed by the developer for other unconnected projects and re- used – see T9/116/10-34. By the same token, Mr. Faulkner accepted that he included at full value any code that had become obsolete or contained a mistake – see T9/119/2-12 – but maintained that this would not lead to a material over valuation. In my judgment including what Mr. Coyne calls legacy code is justified only to the extent that it is necessary in order to value the whole cycle of the product in question. Mr. Faulkner has gone further than is necessary to achieve that result. Mr. Faulkner quantified unused prototype material at 5% or less – see T10/38/12-39/9. Later in his evidence he estimated that 20-25% of the total was material that in the aggregate ought to be excluded. In my judgment a discount from the figures used by Mr. Faulkner of at least this magnitude is necessary. I return to the amount of this deduction later in this judgment.

66. Other than as a matter of high level principle, Mr. Coyne is unable to assist on what portion of the legacy code should be included or not. His evidence stands or falls on the basis that cost should be calculated by reference to the COCOMO II model (as opposed to evaluating what in fact was written over time) and that if that is done properly there will be included within the sum arrived at an appropriate allowance for what in fact

became legacy code to the extent that it is appropriate to include that in the reasonable cost of development.

67. I am satisfied that of the two experts, it was Mr. Faulkner who carried out the most detailed and personal examination of the legacy code. I do not accept it should be excluded from consideration in its totality on the basis that it was not part of the software used at termination. I am satisfied that the legacy code that had been included within the termination code has not been double counted because Mr. Faulkner said he had excluded such material from his calculation and there is no evidence to contrary effect, nor any basis for rejecting his evidence on that point. In particular, I reject Mr. Coyne's assertion as to how the legacy code is to be attributed as set out by him in paragraph 1.2 of his third report. There he attributes just short of 24,000 lines of legacy code to "other" – that is anything other than the software applications relevant to this dispute. He is unable to give any evidence justifying this because he has not examined the material in detail as had Mr. Faulkner. Likewise I reject the suggestion that any part of the legacy code is work attributable to others. Who the work is attributable to is identifiable from the code and by reference to the date when it was created. The main thrust of the cross examination of Mr. Faulkner on this issue was by reference to work carried out for the claimant previously by Collabco. Mr. Faulkner's evidence, which I accept, is that he saw no evidence that Collabco generated any of the code he has included within the legacy code – see T9/111/21- 12/15-23. A suggestion put to Mr. Faulkner late in his cross-examination was that other unidentified third parties could have carried out some of the work. There is no evidence to support that proposition and in my judgment Mr. Faulkner convincingly rejected it – see his evidence at T10/32/3-26.

68. In principle therefore, I consider that the correct course is that adopted by Mr. Faulkner – to base the assessment of reasonable cost both on what has been called in these proceedings the Termination Code but also on that part of the Legacy Code that would reasonably have been charged to the customer.

69. As I have indicated already, where I part company from Mr. Faulkner is with the proposition that there should be no "discount" from the number of Legacy LOC that should be included within the calculation in order to take account of what was research and development by the software designer or was erroneous programming that had to be abandoned or otherwise had no value or formed no part of the development process for which the customer could reasonably be expected to pay. It would be wrong to include the entire Legacy Code for those reasons. There is no basis for not adopting the highest percentage of discount from the total Legacy Code identified by Mr. Faulkner. Although he identified 5% of the Legacy Code as attributable to unused prototype material, I do not understand his evidence to be that this should be counted in addition to rather than as part of his estimated range of legacy material that was not reasonably chargeable of 20-25%. I set out my final conclusion on this issue once I have considered the issues relating to the application of COCOMO II.

70. *The COCOMO II factors and Multipliers*

There is now a very large measure of agreement as to which factors and multiplier should be adopted. The disagreement is limited to the four variables identified at paragraph 3.11 of the second joint report.

71. The underlying premise for Mr. Coyne's position adopted in relation to the RESL factor is misplaced for the reasons identified by Ms Mirchandani at paragraph 89 – 90 of her closing submissions. I do not understand it to be in dispute that in consequence Mr. Faulkner's choice of "nominal" is to be preferred. Likewise I agree with Mr. Faulkner in relation to the RELY factor that this should be set at "High". The category adopted by Mr. Coyne (" low – easily recoverable loss") is inappropriate given that the consequence for the claimant of failure would have been the imposition of financial penalties and the possible compromise of its relationship with its most important commercial counterparty. Mr. Coyne has not explained how any loss suffered in this way would be "easily recoverable" or from whom. In relation to the PLEX factor, again I prefer the approach adopted by Mr. Faulkner because the underlying assumption made by Mr. Coyne is that the relevant products were based on a CRM or pre-existing CRM development. This is a mistaken assumption for the reasons identified by Ms Mirchandani in paragraph 90 of her closing submissions. Finally in relation to CPLEX the dispute concerns complexity of the software. The difficulty with a model like COCOMO II is that the variables are generic. However, I agree with Mr. Faulkner's secondary view that "Nominal" is the appropriate selection. There are complexities but they are not of the level that satisfies the definition of "High". The existence of those complexities does not justify Mr. Coyne's approach of categorising the CPLEX factor as "Low".

72. *The Uplift Issue*

The next issue that arises in relation to the COCOMO II model concerns uplift. This first became an issue following the service of Mr. Faulkner's supplemental report dated 20 February 2019. In paragraph 12 he maintains that COCOMO II underestimates the effort required when using LOC to size software. This led Mr. Faulkner to suggest "… an additional tolerance should be applied to the base estimates produced by COCOMO II … to allow for this under estimation". His opinion expressed at paragraph 33.3 of his report was that an additional "tolerance percentage" should be applied to COCOMO II derived figures, that the usual range was between was 20% and 50% but that in this case 20% was reasonable because there were multiple iterations of the projects for which reasonable cost had to be ascertained.

73. Mr. Coyne does not accept that this is appropriate. He maintains that correctly applied the effect of the various variable factors and multipliers provides an uplift of about 31% higher than simply using the LOC multiplier method of assessment. He says that no other adjustments are required. Although there appears to have been an attempt by Ms Mirchandani to imply that he agreed the figure in the course of his cross-examination he did not do so – see T9/41/23-42/14.

74. There is therefore a continuing difference between the experts as to whether there should be the uplift for which Mr. Faulkner contends. The cross-examination on this issue was very confused. However, my understanding of Mr. Coyne's evidence on this issue was that the net uplift that resulted from the correct application of the variable factors and multipliers used in the COCOMO II model catered for all relevant factors and no additional uplift was either necessary or appropriate. He accepted that at the end of a project it would be possible to be more precise about the impact of at least some of the variables than would be possible before a project was commenced. The implication of what he was saying was that a rather more cautious approach would be adopted at

the outset as to how the various factors and multipliers was approached than would be appropriate at the end of a project in order to avoid the possibility that part of the effort that might be required would be underestimated but he did not accept that it was appropriate simply to add a further 20% to the figure resulting from an otherwise appropriately carried out COCOMO II exercise. I accept that evidence. There is nothing that I have seen that suggests this is an appropriate way to proceed. Any need for such an uplift should be eliminated in an after the event evaluation by the correct application of the various factors and multipliers for which the COCOMO II model provides. It is all the more an inappropriate exercise to undertake if at least a portion of the Legacy Code is to be valued in order to arrive at the reasonable cost of the chargeable work in fact carried out. As I have said already, I consider that is the appropriate course to adopt rather than applying an entirely arbitrary uplift for which there is no objective justification. That is as inappropriate in this context as it is when attempting to arrive at a reasonable cost using the LOC multiplier method. It was this that led to the experts being unable to identify much less agree a percentage mark up to be applied when using the LOC multiplier method – something I referred to earlier.

75. *Applicable Rate*

The issue that arises is whether the claimant ought reasonably to have been charged the higher consultancy rate for the work that was carried out or the lower architect rate throughout. In his first report, Mr. Faulkner suggests that a higher rate was appropriate because the second defendant was providing a mix of different services that included both project management and software architect and because it was usual practice for a consulting company to charge a consultant out to a customer at twice or three times the rate paid by the consulting company to the consultant. There has been no attempt to identify in detail what parts of the management role were relevant to the development of the software the subject of this dispute.

76. Mr. Coyne observed in his second report (correctly in my judgment) that whether it is reasonable to allow a rate of £800 per day depends on whether the claimant received what he calls "consultative benefit" from the second to fourth defendants. However, since I am concerned with the reasonable cost of developing the relevant software, in my judgment what must be established is that the second to fourth defendants supplied a consultative benefit in relation to the development of the relevant software, as opposed to incidentally as part of the relationship with the claimant. Subject to that point, the debate is simply whether it was reasonable for the claimant to be charged the rate appropriate for a consultant (£800 per day) or a contractor day rate (£450 per day). By the date of the first joint report, the experts had agreed only that a reasonable day rate for a contractor developer was £450 per day but otherwise took matters no further.

77. In my judgment the evidential burden rested on the second to fourth defendants to demonstrate that the higher rate was the one that ought to apply. This burden has not been discharged. I adopt the agreed contractor rate of £450 per day therefore. Whilst I have no doubt that some consultative services were provided, those were essentially advisory in nature. Once the decision had been taken to develop particular products, there is no evidence that consultative services were provided in relation to the development of the relevant software.

78. *Conclusions on Development Cost Valuation*

The effect of the various conclusions that I have set out above comes to this. First, I accept that in principle it is appropriate to start by valuing the Termination Code using the COCOMO II model, subject to the resolution of the disputes concerning the applicable variable factors and multipliers as set out above. Secondly, I do not accept Mr. Faulkner's view that there should then be applied a further 20% uplift to the figure otherwise resulting from the correct application of the COCOMO II model at any rate where as here the model is being used to arrive at the reasonable price of development work that has been completed. Thirdly, whilst I accept Mr. Faulkner's evidence that in principle relevant legacy code should be included within the total of LOC to which COCOMO II is applied, I reject Mr. Faulkner's evidence that the whole of the Legacy Code should be included. On the evidence available to me, which I have summarised above, I conclude that there should be a discount of 25% from the total legacy code that should be included in the valuation process.

79. After reaching these conclusions I sought further assistance from the experts as to the effect of these conclusions. The information that I have been supplied with whilst helpful in part for understandable reasons does not take account of my conclusions concerning the licensed products. The effect of this will have to be worked out by the parties.

Auto Emulation and Res Inter Alios Acta

80. The claimant does not have a maintainable claim in respect of auto emulation. My reasons for reaching that conclusion are as follows are as follows.

81. As is apparent from the tables set out earlier in this judgment the claimant alleges that it has paid £312,615 in excess of what was reasonable for Auto Emulation. The defendants all allege that this element of the claim must fail as a matter of law since on the evidence the claimant has been reimbursed for all the sums paid out by it in respect of the Auto Emulation product by BT and in consequence no loss has been suffered. The defendants submit that it follows that all claims advanced by reference to the alleged overpayment for Auto Emulation must fail even if otherwise all the allegations made by the claimant are found proved. This is a significant point given the value of this element of the claim.

82. The issue is not factually complex and the relevant facts are not in dispute. Initially, the claimant employed people called emulators whose job was to manually emulate job data on BT systems. BT paid the claimant £0.50 per task for this service. The second to fourth defendants were instructed by the claimant acting by the first defendant to develop an IT solution that would enable it to cease using manual emulation. The cost of developing Auto Emulator was high however. As at 15 November 2013, when the first defendant entered into email discussion with BT concerning the issue, he commented that the original budget had been between £150,000 and £200,000 and was expected to take 12 weeks. In fact, as the first defendant put it in his email to Mr. Joyce at BT: "… Due to complexities of the software development at the BT end this cost has now risen to circa £350k with an expected total cost in the region of £450k…". The pleaded cost of developing Auto Emulator was £326,200. The first defendant sought to recover the cost of developing Auto Emulator from BT as a lump sum. BT would not

agree. What it was willing to agree is set out by the first defendant in his email to Mr. Joyce of 15 November 2013 – which was that "… once auto emulation is fully implemented and we have released all emulators then the £0.50 … in the job will remain until we have recovered all monies due". It is common ground that the claimant received the whole of the sum claimed for auto emulation by way of £0.50 per task payments and that this sum was not taken into account in calculating this part of the claim.

83. Mr. Orme sought to explain this away factually on the basis that BT agreed to pay for the whole of the claimant's IT development in this manner. I reject that evidence. Whilst it is clear that BT has continued to allow the claimant to collect the £0.50 per task payment after the costs of Auto Emulator had been recovered, that is irrelevant to what had been agreed. It is inherently improbable that BT would have agreed to pay for the whole of the claimant's IT development as alleged by Mr. Orme and that suggestion is inconsistent with the email from the first defendant to Mr. Joyce referred to earlier in this paragraph. There is no reason why the first defendant would have stated what is set out in that email if the claimant had some greater entitlement to payment from BT.

84. Further what the first defendant says in the email is consistent with what Mr. Orme said in his notes he added to a spreadsheet sent to him for comment by Mr. Crockford of PwC on 21 October 2014. At that time the majority shareholders in the claimant were attempting to sell the claimant or its business. PwC had been engaged to prepare material that would assist any interested would-be purchaser to carry out the commercial due diligence that would precede an offer. In relation to a line within the accounts, Mr. Crockford asked Mr. Orme to explain an entry by which cost had been capitalised in the claimant's balance sheet as part of the work in progress balance. The whole sum in the relevant accounting line was £1.5 million. The explanation that Mr. Orme gave Mr. Crockford was:

> "This is being eroded within the margin this year, this represents auto emulation costs which BT are paying us within the rate for 12 months …
>
> BT wanted IT systems aligned (auto emulation) with theirs. When a man in a van completes a job automatically updates MJQ and BT system. For MJQ to do that was a lengthy time and it cost. Asked BT to pay for that cost but couldn't get an order to pay for it as a one off. BT wanted a 50p reduction in rate as reducing o/h rate, agreed would leave 50p in until got money back. So internally took costs and set aside as WIP line (£2m) and have eroded monthly at 50p/job. … in FY 14 reduced by c £0.5m. Normally a YE adjustment hence no movement …"

85. The reference to £2m reducing to £1.5m is to a composite line of Work in Progress ("WIP") that included the auto emulator costs. No one suggests that the cost of auto emulator was more than the sum identified in the pleading. If it had been agreed with BT that BT would pay for the development costs of Auto Emulator then it was appropriate to treat the costs of developing it in the claimant's accounts as Work in Progress because ultimately payment would be received from a third party for it. It would have been obviously inappropriate if there was no such agreement. Indeed it

would have created a false accounting picture since it would be treating the claimant's development costs as recoverable from a third party. The reduction of £500,000 broadly equates to the number of tasks being performed over a year (about 20,000) multiplied by 52 and then by £0.50.

86. I accept Mr. Parker's and Ms Mirchandani's submission that Mr. Orme's attempt to explain away what he had said in his notes in the course of his oral evidence should be rejected as being inconsistent with his own notes and with the first defendant's email to Mr. Joyce. Not merely was Mr. Orme wrong on this issue but regrettably his evidence on this issue was untruthful and in my judgment designed to deflect an issue that as he was being cross examined he came to perceive to be damaging to the claimant's case. My reasons for reaching those conclusions are as follows.

87. Mr. Orme's explanation for the language used in his spreadsheet notes was that it was "… terminology we used as a general terminology for the auditors …" That is an answer that is consistent only with the suggestion that what was said in the spreadsheet was something that Mr. Orme knew to be wrong. It is not something that was suggested by him at any stage until he was cross-examined. In relation to Mr Orme's suggestion that BT agreed to pay for the whole of the claimant's IT development using the £0.50 addition, it was suggested to him that if what he said was right then the whole of the sum collected using the £0.50 mechanism ought to be deducted from the claim. This was obviously unsatisfactory so far as the claimant was concerned and led Mr. Orme then to say that we "… didn't specify with BT what the 50p related to". This was contrary to his evidence that BT agreed to pay for the whole of the claimant's IT development using the £0.50 addition. It was also contrary to what he had stated in his spreadsheet comments (where he had said that the arrangement with BT was that the £0.50 additional charge would continue until the costs of developing Auto Emulator had been recovered by the claimant) and more importantly it is entirely inconsistent with what the first defendant had said in his email to Mr. Joyce. Finally, Mr Orme said in his oral evidence that "I do not see that as being a pay back from BT for our IT system. It is us negotiating the retention of the 50p in the rate." This was another answer designed to avoid the suggestion made by the defendants that credit should be given for the sums received from BT. This assertion by Mr Orme was inconsistent with (a) what he had said in his spreadsheet comments, (b) what the first defendant had said in his email to Mr. Joyce, (c) what Mr Orme had said up to this point in his oral evidence (which was that the £0.50 per task payment was BT paying for the claimant's IT development generally) and (d) it was inconsistent with the way in which Mr. Orme had said earlier in his oral evidence the payment had been treated in the accounts of the claimant – which was to accrue the payments throughout the year and then set them off against any set up costs. As Ms Mirchandani submitted, if Mr. Orme was right in saying that the claimant had simply negotiated the retention of the £0.50 payment as part of its revenues then it should have been accounted for in that manner but in fact it was not. How it was accounted for is apparent from the explanation given by Mr. Orme in his spreadsheet notes. My conclusions concerning Mr. Orme's evidence on this issue leads me to conclude that I ought to be cautious before I accept Mr. Orme's evidence save where it is corroborated, is admitted or is against the claimant's interest. I return to this issue further below.

88. All this leads the defendants to submit that the whole of the claimant's claim for auto emulation costs falls away. The claimant argues that this is legally misconceived

because (i) the point has not been pleaded, (ii) the payment began when the claimant had a manual emulation system and thus long before the defendants incurred any liability to the claimant; and in any event (iii) the payments received by the claimant from BT are res inter alios acta and thus to be ignored when assessing whether a loss has been suffered from the wrong complained of.

89. In my judgment the first and second of these points do not assist. As to the first, it is for the claimant to prove the loss it has suffered where damages or equitable compensation is concerned and in relation to a claim framed in unjust enrichment, the amount of enrichment that has occurred at the expense of the claimant. The defences deny loss and deny causation of loss – see paragraphs 55-61 of the first defendant's Defence and paragraphs 77 and 79-83 of the second to fourth defendant's Defence, which also denies enrichment – see paragraphs 73-74. The second point does not assist either. It is common ground that the payments commenced prior to the development of Auto Emulator. The defendants' case, which I have found proved, is that an agreement was made for the continuation of those payments (which would have otherwise ended when auto emulation was fully implemented and manual emulation ceased) until the cost of developing Auto Emulation was paid for – see the email from the first defendant to Mr. Joyce referred to above.

90. The only real point that arises is whether the payments received by the claimant from BT are res inter alios acta and thus to be ignored. In summary the applicable principles are these:

a) The general rule is that a loss that has been avoided is not recoverable as damages – see <u>Swynson Limited v. Lowick Rose LLP</u> [2017] UKSC 32 [2018] AC 313 *per* Lord Sumption JSC at [11];

b) By way of exception to that general rule, there is an exception for collateral payments, which in law are not treated as making good the creditor's loss – see <u>Swynson Limited v. Lowick Rose LLP</u> (ibid.) *per* Lord Sumption JSC at [11]; and

c) Collateral benefits are those that arise independently of the circumstances that give rise to the loss as is the case where (i) there is no causal relationship between the loss and the benefit or (ii) a benefit received by right based on a consideration that is independent of the legal relationship with the defendant giving rise to the loss – see <u>Swynson Limited v. Lowick Rose LLP</u> (ibid.) *per* Lord Sumption JSC at [11], Lord Mance JSC at [49] and Lord Neuberger PSC at [98], where he said that "*… the types of payments to a claimant which are not to be taken into account when assessing damages are those which are effectively taken out of his own pocket (such as insurance …) or which are the result of benevolence … all of which can be characterised as essentially collateral in nature*".

91. Here, it is not suggested that the payments of BT were benevolent or gratuitous in nature, nor are they payments which can be treated as having been taken out of the claimant's own pocket. Had I accepted Mr. Orme's oral evidence to the effect that that the claimant "… didn't specify with BT what the 50p related to" and that the payment was not " … a pay back from BT for our IT system. It is [the claimant] negotiating the retention of the 50p in the rate" then the position might have been different. However,

I have rejected that evidence. I have concluded that the position was as stated by the first defendant in his email to Mr. Joyce of BT and by Mr. Orme in his comments on PwC's spreadsheet – that it was agreed between the claimant and BT would continue to make the £0.50 payments they would otherwise have been entitled to cease making until the claimant had recovered its costs of developing Auto Emulator.

92. In those circumstances, in my judgment, the claimant has avoided its claimed loss by reason of the payments it received from BT. There is a plain causal connection between the payments received from BT and the sums paid to the third defendant in respect of Auto Emulator because the one was a reimbursement of the other that was payable only because of what had been paid to the third defendant for the development of Auto Emulator. The consideration passing from the claimant to BT was the discontinuance by it of manual emulation leading ultimately to a saving by BT. That consideration was not independent of the legal relationship with the defendant giving rise to the loss in any relevant sense since it was something the claimant was able to agree with BT only because it had commissioned the third defendant to develop Auto Emulator.

93. If and to the extent the formulation adopted by Lord Clarke in Fulton Shipping Inc v. Globalia Business Travel SAU [2017] UKSC 43 [2017] 1 WLR 2581 at [16] is different from that adopted in Swynson Limited v. Lowick Rose LLP (ibid.) it makes no difference to the outcome. Here the benefit (being the payment from BT to the claimant) was caused by the claim for payment by the third defendant which payments were made by BT to the claimant in accordance with the agreement between the claimant and BT whereby BT agreed to reimburse the claimant in respect of its actual costs of developing Auto Allocator.

94. There is an apparent conflict of view between that expressed by implication in [16] the judgment of Lord Clarke on the one hand and those in Swynson Limited v. Lowick Rose LLP (ibid.) on the other concerning the continuing role that justice, reasonableness and public policy has to play in this area of the law. On that issue, I respectfully prefer the view of Lord Sumption that those concepts were "… the basis on which the law has arrived at the relevant principles …" and are not "… a licence for discarding those principles and deciding each case on what may be regarded as its broader commercial merits" and those of Lord Neuberger at [98] that that justice, reasonableness and public policy "… should not be treated by judges as a green light for doing whatever seems fair on the facts of a particular case …". I have arrived at that conclusion because whilst Lord Clarke appears to approve the summary of principles formulated by the first instance judge quoted at [16], he does not apply the principle identified in sub-paragraph (11) of the first instance judge's summary when arriving at his disposal conclusions at [29] to [37]. It is noteworthy that Lords Neuberger and Sumption each sat in both cases and obviously did not consider there was any conflict between what was decided in Fulton Shipping Inc v. Globalia Business Travel SAU (ibid.) and what they decided in Swynson Limited v. Lowick Rose LLP (ibid.).

The BT Portal Issue

95. The sum claimed is not in dispute. However it is denied by the second to fourth defendants that they have charged hosting charges when they should not have done. That is the threshold issue that has to be resolved before turning (if necessary) to the

further question whether any overcharge enables the claimant to succeed in any of the causes of action that it relies on.

96. *The Factual Issue*

As I have explained earlier, BT Openreach was and is the claimant's biggest telecommunications division customer. BT Openreach intermittently pressed for access to its IT systems so that it could monitor progress on work being done in real time. This is referred to in these proceedings as the "BT Portal". By July 2014, it was no longer possible to avoid the issue further and the claimant instructed the second to fourth defendants to develop what in effect was a read only product for the development of which the claimant was charged and paid £48,000 ex. VAT. Originally that was part of the claim in respect of the development products. However, the claimant then realised that it had underpaid not overpaid for it and that claim was dropped. However the claim that remains concerns on-going "hosting" charges for the product.

97. In order for the product to work, a number of BT Openreach employees had to be given access to the claimant's system that in turn depended on licences granted by Microsoft via MyCRM. Initially it was thought that 3 user licences to accommodate BT Openreach employees would be sufficient. Since the product belonged to the claimant, it had to pay the additional licence fees. These were accounted for by a payment from the claimant to the third defendant who then paid the necessary licence fees. BT insisted ultimately on 400 users, for which Microsoft charged £40 per month per user. This was subsequently reduced to 300 users, which is what in the end the claimant was invoiced for by and paid to the third claimant.

98. The issue concerns savings on this charge that the third defendant was able to make. The second defendant began to suspect that BT Openreach was not using the Portal at all or not at any rate by anywhere near 300 users. The second defendant agreed to test this by disabling all bar 20 of the BT user logins. It is common ground that this had the effect of reducing the monthly cost to the third defendant of the licence fees by the number of disabled BT logins. Notwithstanding that was so, the third defendant continued to invoice the claimant for the full cost of the licences at the rate of £12,000 per month between January and July 2015. In July 2015, following a discussion between the second defendant and Mr. Orme, the number of BT logins was permanently reduced to 10 and the monthly charge reduced to £1,750. In essence the claimant maintains that the third defendant was under an obligation to account for the sums that it received in the period between January and July 2015 over the sum that it in fact paid by way of licence charges in that period.

99. The only explanation offered by the second defendant for charging during this period at the full rate is that had BT Openreach noticed the reduced number of logins, the number of logins that had been disabled could have been reinstated. It is not suggested that would have resulted in any obligation to pay licence fees for the reinstated logins from any date between the date when they were disabled and the date when they would have been reinstated. Thus the third defendant's explanation does not explain why the third defendant should not have accounted in arrears for the sums saved or why in or after July 2015 it should not account to the claimant for the sums it had received to pay licence fees that in the event it never had to pay to MyCRM.

100. *Applicable Causes of Action*

It is necessary now to decide in relation to this head of loss whether and if so against which defendants a claim for recovery of this sum can succeed. It is convenient to start with the third defendant since it was the third defendant that invoiced for and received the sums in issue.

101. The only claim made against the third defendant in respect of the BT Portal hosting claim is in unjust enrichment – see paragraph 77.3 of the re-amended Particulars of Claim. The ingredients of that cause of action are those identified by Lord Steyn in Banque Financiere de la Cite v. Parc (Battersea) Limited [1999] 1 AC 221 at 227 and in this case require the claimant to prove that (a) the third defendant has been enriched, (b) at the claimant's expense and (c) unjustly. If that is established then subject to any defences being made out the claimant is entitled to recover the amount of the unjust enrichment.

102. I am satisfied that each of these grounds has been made out. As to (a) and (b) the third defendant has been obviously enriched at the expense of the claimant by the amount received from the claimant but not in the event paid out by way of licence fees to MyCRM. It was never intended that these payments would benefit the third defendant only that they would enable it to pay the licence fees due to MyCRM in respect of the 400 then 300 BT Openreach users. The money would never have been paid to the third defendant but for the need to pay licence fees to MyCRM. The money was paid by the claimant to the third defendant conditionally on it being used for that purpose. As soon as those sums were no longer needed because they were in respect of payments that MyCRM could no longer claim but were retained by the third defendant the third defendant was thereby enriched at the claimant's expense. As to (c) such enrichment was unjust because, as I have explained, it was never intended that the third defendant should retain any part of the sums paid to it by the claimant on account of the BT Openreach licence fees. In my judgment therefore, the claimant is entitled to recover these sums from the third defendant as damages or compensation for unjust enrichment.

103. There is no sustainable basis on which these sums can be recovered from the first defendant for the reasons identified by Mr. Parker in paragraphs 11 and 12 of his closing submissions. That analysis is entirely consistent with the oral evidence given by the first defendant on this issue – see T6/50/26 – 56/20. Mr. Latimer does not suggest the contrary. Indeed, the allegation made in paragraph 46 of the re-amended particulars of Claim is that "…neither the second or third defendant informed the claimant that … this saving had been made.". It is alleged in paragraph 69 of the re-amended Particulars of Claim that the first defendant acted in breach of his s.171 duties by causing the claimant to enter into the BT Portal Agreement. This is a plainly unsustainable claim since the undisputed evidence was that BT Openreach was insisting on the provision of a portal facility. It is alleged that the first defendant was in breach of those duties by failing to put the work out to tender. I am not satisfied that such a failure constitutes a breach of the s.171 duties in the circumstances of this case but more to the point, there is no evidence that the alleged breach caused the only loss claimed in respect of the BT Portal product or otherwise that any loss was caused by the alleged breach. Rather the evidence establishes that (as alleged in paragraph 46 of the re-amended Particulars of Claim) neither the second or third defendants informed the claimant of the saving that

the third defendant was making. Any attempt to claim the same loss against the first defendant as damages for breach of contract fails for the same reason.

104. In relation to the second defendant, no claim in relation to the BT Portal issue is framed in either deceit or negligent misrepresentation nor is it alleged that the second defendant conspired with the third defendant in relation to this issue. If and to the extent that the claimant seeks recovery from the second defendant for the losses I am now considering as damages for procuring or inducing the first defendant to breach his contract of employment with the claimant, that fails for the reasons already identified. Although there is a claim framed in unlawful means conspiracy in relation to the BT Portal Contract, in my judgment that cannot succeed against the first defendant for the reasons already identified. Furthermore it cannot succeed (if indeed it is advanced, which is unclear on the pleading) as between the second and third defendant because the unlawful means identified in paragraph 81 of the re-amended Particulars of Claim does not refer to any conduct relevant to the BT Portal claim I am now considering. There was no breach of duty or contract by the first defendant in relation to this issue and thus no issue concerning procurement or inducement can arise and for similar reasons, no issue concerning the liability of the third defendant for the conduct of the second defendant can arise. From first to last this was a claim for unjust enrichment by the claimant against the third defendant alone. To that extent but only to that extent it succeeds.

Conclusions

105. The claimant is entitled to recover £76,066.14 from the third defendant being the sum by which the third defendant was unjustly enriched by reason of the overpayment and non-return by the third defendant to the claimant of the sums paid to it in respect of licence fees that were not payable. Any claim by the claimant to recover the same sum from the first or second defendants fails for the reasons set out in paragraphs 105-106 above.

106. The licensed products claims fail because those products belonged to the second to fourth defendants at all material times and the claimant has failed to prove that the licence fees charged by the second to fourth defendants were in excess of what was reasonable.

107. The development product claims fail because (provisionally since the mathematical effect of my conclusions will have checked by expert calculation) the claimant has failed to prove that the sums charged by the second to fourth defendant were in excess of what was reasonable and the claim in respect of the auto-emulation development costs fails for the additional reason that it avoided its claimed loss by reason of the payments it received from BT.

108. I direct that the parties shall use best endeavours to agree the mathematical consequences of the conclusions set out above and submit them in the form of an agreed schedule by no later than 4.00p.m. on 30 September 2019. In the event that agreement cannot be reached, or if it is agreed that a loss arises as a result of the conclusions I have reached, there will be a short further hearing on the first available date thereafter in order to give all parties an opportunity to make any further submissions appropriate in

the light of these conclusions. The parties are directed to exchange written submissions and file the same with the court 2 working days prior to the hearing.