Neutral Citation Number: [2020] EWHC 16 (Comm)

Case No: E40MA055

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

Date: 8th January 2020

Before :

His Honour Judge Halliwell sitting as a Judge of the High Court

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Between :

Richard Wales (t/a Selective Investment Services)

Claimant

- and –

(1) CBRE Managed Services Limited
(2) Aviva Administration Limited

Defendants

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Neil Berragan (instructed by **Clarke Willmott LLP**) for the **Claimant**
Anthony Pavlovich (instructed by **Stevens & Bolton LLP**) for the **First Defendant**
Sebastian Clegg (instructed by **Clyde & Co LLP**) for the **Second Defendant**

Hearing dates: 1-3rd July, 27th August 2019

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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.

His Honour Judge Halliwell

(1) Introduction

1. The Claimant ("Mr Wales") is an independent financial adviser, who has for many years practised in the name of "Selective Investment Services". By these proceedings, he seeks to recover commission, in the revised sum of £204,392.44, for his services in connection with the group pension scheme ("the Group Pension Scheme") of a corporate client. The First Defendant ("CBRE")

was Mr Wales's corporate client and the Second Defendant ("Aviva") was pension provider.

2. CBRE was and is in the business of providing property management services. Having previously been incorporated in the names of Reliance Environmental Services Limited and Norland Managed Services Limited, it is now called CBRE Managed Services Limited.

3. Aviva has historically been incorporated as AXA Sun Life Services plc, Friends Life Services plc, Friends Life Services Limited and Aviva Administration Limited. Its name and status has changed following a series of mergers and acquisitions but, at least for the purpose of these proceedings, it can be treated as a single legal entity.

4. With Mr Wales's advice and assistance, CBRE's employees obtained the benefit of pensions issued by Aviva under the Group Pension Scheme. Aviva paid commission in respect of the pension contributions. However, it did not pay the commission to Mr Wales. Since Mr Wales acted as a representative of two separate intermediaries, DBS Financial Management plc ("DBS") and, subsequently, Sesame Limited ("Sesame"), Aviva paid the commission directly to the intermediaries who then accounted to Mr Wales for a share of the amounts they received.

5. The dispute originates from CBRE's decision to move its employees to a new pensions platform and dispense with Mr Wales's services following legislation for eligible employees to be automatically enrolled on a workplace pension scheme. Once CBRE's employees were moved, premiums ceased to be payable under the original arrangements. Having made payments of commission to Mr

Wales in anticipation of the receipt of such premiums, Aviva clawed back from Sesame commission in respect of the premiums which ceased following the transition. Sesame then clawed back from Mr Wales his share of the commission. Mr Wales disputes Aviva's right to claw back the commission and, by implication, Sesame's right to claw back his share.

6. By order dated 7th May 2019, Mr Wales was given permission to amend the claim to join Sesame as a defendant. On reflection, he elected not to do so but obtained permission to amend his existing case to rely on new contractual and restitutionary claims.

7. As pleaded and amended, Mr Wales's contractual claim against CBRE is based on a contract ("the CBRE Contract") made "on or around 14th June 1999" for the provision of "Group Life and Personal Pension Scheme advice and services to and/or for the benefit of [CBRE] and its employees".

8. Mr Wales and CBRE did, indeed, enter into a contract with one another in June 1999 or thereabouts. The contract incorporated DBS's standard terms on the basis that Mr Wales was one of DBS's appointed representatives. However, on 23rd October 2003, CBRE's finance director signed new conditions at Mr Wales's request. The new conditions were Sesame's standard conditions at the time ("Sesame's Standard Conditions") and they were plainly signed with the intention that they would supersede DBS's conditions. At that point, Sesame's Standard Conditions took effect in substitution for the DBS conditions under a new contract or, alternatively, as a binding variation to the original contract in accordance with the principles referred to in *Chitty* on *Contracts (33rd edition) (2018)* at *Paras 22-028 and 22-032*. However, no pleading point was taken on

this issue and I shall determine the case on the basis that, for material purposes and at all material times, the CBRE Contract was subject to Sesame's Standard Conditions.

9. Mr Wales contends that the CBRE Contract was subject to implied terms that CBRE would "deal honestly and/or in good faith with" Mr Wales.

10. As amended, Mr Wales's contractual claim against Aviva is based on a contract ("the Additional Contract") between Mr Wales himself, CBRE and Aviva. This is alleged to take effect as a free-standing contract or, alternatively, as a collateral contract to a contractual agreement between Aviva and Sesame. Mr Wales contends that, under the Additional Contract, Aviva was under a contractual obligation to pay him commission or, at least, to pay his commission to Sesame. It is at least implicit in Mr Wales's case that this includes the disputed commission. Again, he maintains that it was an implied term of the Additional Contract that Aviva would act honestly and in good faith.

11. Mr Wales also seeks to recover the disputed commission on the basis that CBRE and/or Aviva have committed breaches of implied contractual duties of honesty and good faith and Aviva is in breach of its contractual obligations to pay the commission. He also advances claims based on promissory estoppel, quasi-contract and unjust enrichment.

12. Mr Wales's claims are disputed. CBRE does not take the point that Mr Wales entered into the CBRE contract in his capacity as an agent only and is thus not entitled to sue on it. However it denies that it is under any contractual liability to him in respect of the payment of commission. Aviva did not initially deny that it entered into a contract with Mr Wales but, upon re-consideration,

obtained permission to amend its Defence and took issue with Mr Wales on this point. In any event, CBRE and Aviva both deny that they were under a contractual duty of good faith to Mr Wales. They also deny that they are in breach of any contractual obligations to him. The claims based on promissory estoppel and unjust enrichment are also denied. The quantum of his claim is disputed.

(2) Factual Sequence

13. By an agreement in writing dated 29th January 1996 ("the 1996 Agreement") between DBS and Mr Wales, DBS appointed Mr Wales as one of its agents for the purpose of introducing business for submission to its institutional clients. DBS was a separate company which provided financial services through a network of independent financial advisers. This included pensions and life assurance.

14. It was envisaged that the institutional clients would pay commission to DBS out of premiums generated from the business introduced by its agents, including Mr Wales. The commission was then divided between DBS itself and the agent who had introduced the business, and DBS was obliged to account to the agent for "his undistributed share of the Commission received…" In the event that the institutions made payments of commission in advance of receipt of premium, they were entitled to reclaim the commission from DBS if the premiums were not received as anticipated. If, by then, DBS had accounted to its agent for his share of the commission, DBS was entitled, in turn, to reclaim that share from future commission to the agent.

15. In June 1999, Mr Wales entered into contractual arrangements with CBRE for the provision of advice and services in connection with the Group Pension Scheme for its employees. He did so in his capacity as DBS's agent. The contract was subject to DBS's standard conditions and, on 9th and 14th June 1999, Mr Wales and Mr Peat respectively signed documentation containing such conditions. Mr Wales signed "for and on behalf of DBS…of which Selective Investment SVS is a member". The relevant pension scheme was provided by Aviva for the benefit of the CBRE's employees.

16. By letter dated 18th June 1999 to DBS, Aviva confirmed that DBS has been appointed as the new "intermediary" for the pension scheme and that, with effect, from 31st March 1999, DBS would thus be entitled to commission in respect of the scheme.

17. During 2003, Sesame acquired the assets and business of DBS. Following this transaction, Mr Wales continued to act for Sesame in the way he had for DBS. Unfortunately, the precise legal basis on which this happened remains obscure. No formal assignment or other contractual instrument has been adduced in evidence. It is unclear whether the re-arrangement took effect as a novation or on some other legal basis. However, on the balance of probability, Sesame stepped into the shoes of DBS and, by agreement reached expressly or by conduct, Sesame authorised Mr Wales to act as its agent and Mr Wales agreed to act as agent for it upon essentially the same terms *mutatis mutandis* as the 1996 Agreement. Although it is more than conceivable that their contractual arrangements have evolved over time and, whether by contractual variation or otherwise, adjustments have been made to the parties' share of commission, the

same remained payable to Sesame so that it could be divided and distributed on the same basis as before.

18. Following the 2003 transaction, Mr Wales forwarded a copy of Sesame's Standard Conditions to CBRE. He did so as Sesame's "Appointed Representative". There was a space on the document for Mr Wales to add his details. This was left blank. However, on 20th October 2003, Mr Duncan Green signed the conditions in his capacity as CBRE's finance director and returned it to Mr Wales. This can only have been on the basis he recognised Mr Wales was now acting as Sesame's appointed representative.

19. Sesame's Standard Conditions confirmed that its income was derived from commission paid to it "by life assurance companies, unit trust managers, stockbrokers and other intermediaries with whom investments/products are made". Elsewhere, the Conditions provided that, as Sesame's appointed agent Mr Wales did "…not normally charge fees, but if [he did] so, [he would] give you a separate agreement setting out [his] fee rates…". They also stated that "where we propose to charge a fee, we will notify you in writing before we carry out any chargeable work, explaining how it is calculated".

20. From 2003, Mr Wales continued to provide advice and services to CBRE in connection with the Group Pension Scheme. At least to the extent he did so for the purpose of introducing applications for new business with Aviva, he can be taken to have done so in his capacity as Sesame's agent.

21. Following the enactment of the *Pensions Acts 2008* and *2011*, a statutory framework was implemented, in stages, for the automatic enrolment of employees on workplace pension schemes. In the interests of transparency,

statutory changes were also made to the charging structure so as to restrict or eliminate commission based schemes. By 2011, Mr Wales was aware of much of the planned statutory change and understood this was likely to mean the old commission based schemes would be brought to an end and it would become necessary for independent financial advisers to move to fees based models or remuneration schemes based on a percentage of the funds under their management.

22. During 2012, CBRE engaged Lane Clarke Peacock LLP ("LCP"), a firm of financial consultants, to review the Group Pension Scheme in the light of the statutory changes. Although LCP provided written advice, the advice is no longer available. However, it can be inferred that they advised CBRE about the scope and effect of the legislative change and confirmed it would thus be necessary for them to reform their pension scheme. More likely than not, they also made specific recommendations with a view to the move to a new platform with a new charging structure.

23. In November 2012, a CBRE employee, Mr John McPherson advised Mr Wales that he was scheduled to provide a presentation regarding the transition to auto-enrolment. He advised Mr Wales that the presentation would take place on 16th November 2012 and, more likely than not, he advised Mr Wales that it would take place before the board of directors. Mr Wales thus emailed Mr Entwistle, the managing director, to point out that he could defer the staging date by three months to November 2013. He did so by an email dated 15th November 2012 ("the 15th November 2012 Email").

24. On 16th November 2012, the board meeting was held. Unfortunately, no minutes of the board meeting are available. More generally, there is a paucity of evidence about the board discussions and the conclusions they reached. However if, as appears to be the case, the board had not already resolved to transfer the group pension scheme to a new platform, they can be taken to have done so at that meeting on the understanding CBRE would utilise pensions provided by Aviva without the continuing involvement of Mr Wales. It is also likely that most significant matters of detail were clarified or resolved at the same meeting. If members of the board were not already aware of the statutory time scale by the time of the meeting, it is almost inconceivable that Mr McPherson would not have advised them of it at this stage. In all likelihood, the board would also have determined the date for the intended move.

25. There are issues between the parties as to when Mr Wales first became aware that the decision had been taken to transfer the group pension scheme to the new platform and that no role was envisaged for him following the transition. Mr Wales maintains that CBRE never advised him of the decision, certainly not the full scope of the decision. He maintains that he first became aware of the decision or its ramifications on or about 14th May 2013. The Defendants maintain that Mr Wales was advised of the decision by the time of a meeting on 14th January 2013 with their representatives ("the 14th January 2013 Meeting").

26. The 14th January 2013 Meeting was attended by Mr Wales himself together with Mr McPherson and Ms Julie Archer on behalf of CBRE and Mr Alexander Snowball and Ms Gemma Coster on behalf of Aviva. They discussed the performance of the proposed default scheme. However, there is a conflict

between Mr Wales and Ms Coster about the content of the discussions. Mr Wales's evidence was that he gave advice in connection with the transfer to automatic enrolment but there was no discussion at all pertaining to his own involvement. Conversely, Ms Coster gave evidence that Mr Wales was aware that, following the move to the new platform, he would not be required to provide further services in the absence of further agreement. He thus sought to warn CBRE about the risks of proceeding in the manner envisaged, querying whether Aviva would be able to offer the same personal service as himself for CBRE's employees.

27. Between January and March 2013 or thereabouts, Aviva continued to pay advance commission to Sesame under their arrangements of 2003. Sesame then accounted to Mr Wales for his share of the commission. However, this came to to an end after 1st April 2013, when the CBRE moved to the new platform. At that point, Sesame ceased to be contractually entitled to commission in respect of the employees who had been moved to the new platform and Aviva started to claw back from Sesame the advance commission which it had paid in respect of such employees. With effect from 8th May 2013, Sesame started to claw back from Mr Wales his share of the commission.

28. Mr Wales has produced a spreadsheet itemising the commission that Sesame has clawed back from him. His claim was originally for £216,466.66. Based on the spreadsheet, Mr Berragan revised the aggregate claim to £204,392.84. Although the Defendants have disputed his calculation, they were unable to identify any errors or provide me with an alternative calculation. Mr Wales has

produced the best available evidence and I am satisfied Sesame has clawed back some £204,392.84.

(3) Witnesses

29. The evolution of the initial contractual arrangements between the parties can be traced back as far as 1999-2003 and the claim is essentially based on action taken by the parties in 2012-2013. However, proceedings were not issued until 12th July 2018 and the witness statements were not signed until June 2019. Inevitably this affected the quality and precision of their recollection. Moreover, two employees of CBRE who were directly involved in issues giving rise to the dispute, namely Mr McPherson and Ms Julie Archer, were not called to given evidence at trial. Mr McPherson died before exchange of witness statements. However, Mr Berragan submits that no explanation has been given for the absence of Ms Archer and I can thus draw adverse inferences. Certainly, in the absence of Mr McPherson and Ms Archer, CBRE was itself unable to adduce direct evidence about the 14th January 2013 Meeting. More generally, the absence of Ms Archer has precluded CBRE from advancing a positive case on issues within her direct knowledge, such as her discussions with Mr Wales. I have thus exercised caution when considering CBRE's case on these aspects of the case and the evidential inferences on which it is based. However, I have not gone so far as Mr Berragan urges and drawn adverse inferences about this aspect of CBRE's case since I am not satisfied there is good reason to so.

30. Mr Wales gave evidence himself. He has some 40 years' experience in connection with the provision of financial services and has acted as an independent financial advisor for upwards of 24 years. His evidence ranged

from the time he was first appointed as an appointed representative of DBS until after CBRE transferred the Group Pension Scheme to the new platform. Unfortunately at times, it was coloured by an understandable sense of grievance about the circumstances in which CBRE resolved to move to the new platform and Aviva acted to clawback his commission. Mr Wales did not plan for the clawback of commission and was thus driven to ask his wife to sign mortgage documentation in order to raise funds at a time she had been diagnosed with terminal cancer.

31. Mr Wales's evidence was of mixed quality. I am satisfied that his account of specific events was to the best of his recollection. However, in the lengthy period between trial and the events upon which his evidence was based, he had formed perceptions and drawn inferences which were not always easy to reconcile with the contemporaneous documents and evidence available as a whole. For example, in Paragraph 76 of his witness statement, Mr Wales stated that "in the early part of 2013 I continued to be paid for my services by way of commission payments and so there was nothing to suggest that there were any issues or concerns. I was held completely in the dark…" However, he accepted he was aware, in 2012, that CBRE intended to move to the new platform for the Group Pension Scheme the following year, as indeed, was statutorily required. He was also aware that, once CBRE moved to the new platform, commission would cease to be payable to him under the old charging structure. He must thus have been aware that he would only be entitled to remuneration in the event alternative arrangements were made for him to provide services and levy charges or fees. Such arrangements would not be made by default. They would have to be negotiated and implemented. Moreover, Mr Wales accepted in cross

examination that he was aware, at the time, that commission paid in advance could be clawed back. No doubt mindful of these considerations, in the 15th November 2012 Email, Mr Wales pointed out that the staging date could be deferred to November 2013 and, in January 2013, he sought to remind CBRE of some of the options that would be available to remunerate him in the event that it engaged him to provide services following the transition.

32. I have thus exercised a measure of caution when considering Mr Wales's evidence, particularly where based on supposition or inference.

33. CBRE's only witness was Mr Duncan James Green. Mr Green was appointed as CBRE's chief financial officer in September 2001 and, by the time of trial, he was the Global Chief Financial Officer of the Global Workplace Solutions of the CBRE Group and a director of CBRE Managed Services Limited. Whilst he was able to give some evidence from his own recollection, much of his evidence was essentially based on inferences from the available contemporaneous documentation. For example, he could not specifically recall attending the 14th November 2012 board meeting but surmised that he could well have done so and concluded that it would have been at this meeting that the board resolved to move to the new platform. However, I am satisfied that his evidence was given to the best of his recollection and there was generally a sound evidential basis for the inferences on which he relied.

34. On behalf of Aviva, two witnesses were called to give evidence, namely Mr Michael Gregson and Ms Gemma Coster. Aviva also sought to rely on the witness statement dated 20th June 2019 of Mr Alexander Snowball.

35. Mr Gregson was first employed by Aviva in September 2001. He currently works as Aviva's credit control manager and has done so for some ten years. He had only limited knowledge of the developing relationship between Aviva and Mr Wales in the period leading to the dispute. On the more significant issues, his evidence was thus of limited value. However, he gave clear and, in my judgment, reliable evidence about the general nature of the contractual arrangements between Aviva, its authorised intermediaries and their appointed representatives, such as Mr Wales. He confirmed that DBS and Sesame were authorised intermediaries and Mr Wales was one of their appointed representatives. This was on the basis that, over the relevant period, Mr Wales was one of approximately two thousand appointed representatives of their representatives and it would not have made any sense for Aviva to enter directly into contracts with DBS or Sesame's appointed representatives in addition to its contracts with DBS or Sesame themselves.

36. Mr Gregson emphasised that Aviva did not clawback the disputed commission from Mr Wales; it clawed back the commission from Sesame which itself clawed back Mr Wales's share of the commission. This was a matter for Sesame and Mr Wales under their own contractual arrangements. The total amount of commission that Sesame clawed back from Mr Wales was not something of which or in which Aviva had any knowledge or involvement.

37. Ms Coster worked for Aviva as a Client Relationship Executive from July 2012 or thereabouts. From July 2012, CBRE was one of her clients. At all material times, Ms Archer was her main contact. She accepted that she did not herself advise Mr Wales he would have no further role following the move to the new

platform since the decision was one for CBRE, not Aviva. However, prior to the 14th January 2013 Meeting, Ms Archer advised her that, having been advised of CBRE's future plans, Mr Wales had concerns about the movement to the new platform. At the meeting itself, Mr Wales sought to alert those present to the risks and disadvantage inherent in proceeding to the new platform without any role for him. He pointed out that Aviva itself would not be able to provide CBRE and its employees with the level of service that he could have provided.

38. As with the other witnesses, Ms Coster was required to attest to historical events upwards of six years prior to trial. At times, her recollection was uncertain and imprecise. However, her evidence was generally moderate, plausible and consistent. I am satisfied that it was generally reliable.

39. Since Mr Snowball was not called to give evidence, his written testimony has not been tested in cross examination. However, it is apparent from the witness statement itself that, on the more contentious issues, his recollection is limited. For example, whilst he could recall attending a meeting in January 2013 "at the very latest", he could not "recall specifically what was discussed" but inferred from the nature of his role that they would have been "unlikely to have discussed anything other than [CBRE's] transfers of the group pension scheme onto the new platform (from April 2013)". In these circumstances, whilst I have taken Mr Snowball's witness statement into consideration, it is of minimal value where contentious and unsupported by other evidence.

(4) Factual Questions

40. Although the LCP Report was not adduced in evidence and its conclusions and recommendations are obscure, it can reasonably be inferred that it contained

recommendations about the management of the group pension scheme and the move to a new platform with a new charging structure. It is also likely that LCP provided advice in connection with Mr Wales's future role, the remuneration options available in the event CBRE chose to engage him in a future role and the opportunity to make cost savings if they chose not do so.

41. It is unclear precisely when LCP first made their recommendations. The Report is likely to have been internally circulated within CBRE by the Summer of 2012. There is a paucity of evidence about CBRE's internal deliberations prior to November 2012. It is likely that, in those deliberations, no future role for Mr Wales was envisaged. In September 2012 or thereabouts, there was then some discussion between employees of CBRE and Aviva about the move to a new platform and the new charging structure. Aviva was advised that, whilst CBRE envisaged that Aviva would continue to provide pensions for the scheme, no role was envisaged for Mr Wales. I am also satisfied that the board of directors was not invited to make a formal decision about these matters until November 2012.

42. I am satisfied Mr Wales was not provided with a copy of the LCP Report and the contents of the Report were not shared or discussed with him. It is likely that he was made aware that the Group Pension Scheme was under consideration to conform with the new statutory requirements. However, at this stage, he was not advised of the internal discussions in relation to his own future role.

43. In Paragraph 8(1) of Mr Wales's Amended Particulars of Claim, it is pleaded that in or around September 2012, CBRE informed Aviva that the CBRE Contract "had been terminated or was going to be terminated on 3 months'

notice". This impression could have been formed from subsequent exchanges of emails between the parties in early 2014. However, I am not satisfied that, in September 2012 or thereabouts, CBRE purported to advise Aviva that it had already terminated the CBRE Contract. Nor, indeed, am I satisfied that it advised Aviva it intended to give Mr Wales three months' notice of termination. To have done so would have been inconsistent with the evidential context and there is no contemporaneous written evidence to suggest that CBRE took any such steps at this stage or, indeed, that it advised Aviva that it had done so or intended to do so.

44. I am satisfied that it was not until the board meeting on 16th November 2012 that CBRE resolved to transfer the group pension scheme to the new platform. In doing so, the board did not provide for Mr Wales to have a role following transition. In all likelihood, the board fixed at least a provisional date for the transition and, whilst the evidence on the point is limited, a date in March or April 2013 is most likely to have been earmarked at this stage.

45. There remain important factual issues as to when Mr Wales was first advised of these decisions or at least became aware of them and, more particularly, when he first became aware that no role was envisaged for him in the move.

46. Since most of Mr Wales's material one-to-one discussions between November 2012 and February 2013 were with Ms Archer, it is unfortunate she did not give evidence. For his part, Mr Wales confirmed that, towards the end of 2012, he had discussions with CBRE about the transition of the pension scheme to auto enrolment and understood it had decided to use the new strategic platform in place of the existing platform. Prior to the 15th November 2012, Mr Wales

discussed the transition to auto enrolment with Mr McPherson and it is apparent, from the 15th November 2012 Email itself that, by then, Mr Wales had been advised, in advance, that the board were due to meet the following day to consider the whole matter. Indeed, he thus took the opportunity to raise some of his concerns about the proposal and point out that the staging date could be deferred to November 2013.

47. It is also apparent that Mr Wales spoke to Ms Archer on at least two occasions prior to the 14th January 2013 Meeting. These included a telephone conversation on 21st December 2012 and a face to face meeting on 7th January 2013. Whilst Mr Wales accepts that, by then, he was aware CBRE was planning to use the new platform created by Aviva, he maintains he was not aware of the decision reached by the board on 16th November 2012 and, in particular, he was wholly unaware that no role was envisaged for him following transition. It is not Mr Wales's case that Ms Archer falsely advised him that no material decision had been taken nor is it his case that Ms Archer advised him that CBRE had decided to engage him to provide services following transition for which he would thus be entitled to remuneration. It is his case that the matter simply wasn't discussed.

48. In the absence of evidence from Ms Archer to the contrary, I must exercise caution before rejecting this part of Mr Wales's testimony in relation to this aspect of the case. However, any suggestion Mr Wales omitted to make inquiries about the board's decision and, in particular, the future role envisaged for him is implausible in view of the obvious effect CBRE's decision would have on his own personal livelihood and his efforts, in the 15th November 2012

Email and at the 14th January 2013 Meeting and in its aftermath, to persuade CBRE to take a different approach by postponing the staging date or providing for him to have a role upon new terms following the transition.

49. More likely than not, Mr Wales did indeed ask Ms Archer to clarify the decision of the board and, in particular, whether any future role for him was envisaged. It is likely she confirmed that the board had resolved to move to the new platform. Since the board decision did not make provision for Mr Wales to be given a role following the transition, it can be inferred that, in clarifying the board's decision, Ms Archer would have confirmed that this was the case. No doubt, Mr Wales believed that it might be possible for him to persuade CBRE to find a role for him and Ms Archer did not say anything to exclude this as a possibility. However, I am not satisfied that she did anything to encourage Mr Wales in his view.

50. When Mr Wales attended the 14th January 2013 Meeting, he was thus aware that the board had resolved to move to the new platform in March or April 2013 and that, once the pensions were transferred, he would cease to be entitled to remuneration unless the board could be persuaded to the contrary. If he was to be given a new role, his remuneration would have to be on a new and different basis.

51. It is an important part of the context to the 14th January 2013 Meeting itself that, until shortly before the meeting, CBRE had been unaware of the full scale of the commission that was being paid to Mr Wales. However, it appears that, on 9th January 2013 or thereabouts, Aviva disclosed to Ms Archer that Mr Wales had received as much as £304,000 in commission during the preceding three

years and this was significantly higher than she had anticipated. By an email timed at 16:25 that day, 9th January 2013, Ms Archer thus advised Mr Green of her discovery and commented "no wonder he [Mr Wales] is keen to hold onto it". This can only have hardened CBRE's stance at the meeting itself.

52. There were significant differences of recollection between Ms Coster and Mr Wales about the ambit of the discussion, if any, at the 14th January 2013 Meeting in relation to Mr Wales's future role. Ms Coster gave evidence that Mr Wales's future role was subject to specific discussion. According to her, Mr Wales expressed his disappointment that his services would no longer be required and queried whether Aviva would be able to provide CBRE or its employees with the same level of service as he had provided over the years. In contrast, Mr Wales's recollection was that "there was no discussion at that meeting about [his] involvement with the group pension scheme coming to end nor changing materially in any way". He maintained that he was thus left with "the clear impression…that [he] would remain a key part of the group pension scheme moving forward".

53. On this issue, I prefer the evidence of Ms Coster to the evidence of Mr Wales. Firstly, it is inherently unlikely that Mr Wales would not at least have raised the issue about his future role and, indeed, sought to do what he could to persuade CBRE that he had something to contribute following transition. Secondly if, indeed, Mr Wales was to remain "a key part of the group pension scheme moving forward", it would remain necessary to re-define his role and the terms on which he was to be remunerated following transition. It was not an option for Mr Wales to continue to provide the same role as before on the same terms

as to remuneration. Everyone present at the meeting would have been fully aware of that.

54. Consistently with Ms Coster's account of the meeting, on 17th January 2013 Mr Wales forwarded Ms Archer some remuneration proposals that had originally been circulated as long ago as 2011, well before CBRE's instructions to LCP. At that stage, a range of options had been under consideration, denoted as "Option 1-nil commission", "Option 2-0.1% commission" and "Option 2-0.20% fund based commission". These proposals were forwarded by an email confirming, tersely, that "this confirms that a meeting took place regarding the pricing".

55. By email dated 18th January 2013 ("the 18th January 2013 Email"), Ms Archer replied in the following terms.

> "Richard,
>
> I suppose (without wishing to be blunt), the obvious question is why did [CBRE] not move onto the revised rates in 2011?
>
> I note the charges below, but I think we are almost at the same point as option 1 (no commission) with the new platform so it's probably academic now anyway but thanks for sending.
>
> When are you next in CBH as it would be good to finalise matters with you.
>
> Best
>
> Julie".

56. By expressing herself in this way, Ms Archer thus reminded Mr Wales that CBRE had not moved onto the revised rates in 2011 and, in consequence, commission had remained payable under the preceding arrangements. She pointed out that under the new platform, no commission would be payable so the 2011 commission rates were "probably academic". In the final sentence, she indicated that she would like to meet with Mr Wales to *finalise* matters when he was next at CBRE's business premises at City Bridge House, London SE1.

57. In cross examination, Mr Wales couldn't recall whether, following this email, he had met with Ms Archer as envisaged, not unreasonably pointing out that he was being asked to cast his mind back to events that occurred upwards of six years ago. In cross examination, it was put to Mr Wales that, by seeking to meet him to finalise matters, Ms Archer confirmed that his services were being brought to an end. Mr Wales did not accept this proposition. However, it is the obvious interpretation of the email. On any analysis, Mr Wales's existing arrangements would naturally come to an end when the Group Pension Scheme was moved to the new platform.

58. Later in January and early February 2013, Mr Wales continued to correspond with Ms Archer by email. They also spoke to one another. Mr Wales sought to modify CBRE's proposals and, in a conversation with Ms Archer on 4th February 2013, Mr Wales advised her that a number of employees had applied to join the Group Pension Scheme after the January payroll cut off. He advised her to keep them in the current scheme for February then transfer them to the new platform rather than make retrospective contributions to the new platform following transition. It is implicit in her email dated 5th February 2013 to Mr McPherson, Ms Archer believed that this was designed to afford Mr Wales the opportunity to receive commission in respect of such employees prior to transition. This is the most obvious explanation for Mr Wales's advice. He denied that this was the case when cross examined on the point but, in my view, failed to provide a convincing explanation to the contrary.

59. In any event, following the exchanges of correspondence that took place after 14th January 2013, Mr Wales can have been in no doubt that CBRE intended to

proceed with the new scheme in accordance with the arrangements envisaged at the time of the 14th January 2013 Meeting.

(5) The critical issues

60. The critical issues import mixed questions of fact and law. They are as follows.

i) Was it an implied term of the CBRE Contract that CBRE would deal honestly and in good faith with Mr Wales or was it implied only that CBRE would deal honestly with him?

ii) Did CBRE commit a breach or breaches of the term implied in the CBRE Contract?

iii) Did Mr Wales enter into the Additional Contract with CBRE and Aviva as (1) a free-standing contract or (2) a collateral contract to the contract between Aviva and Sesame?

iv) If Mr Wales did enter into the Additional Contract, did this impose on Aviva contractual obligations:

a) to pay commission to Mr Wales and/or Sesame; and/or

b) to deal with Mr Wales honestly and in good faith.

v) If and to the extent that Aviva owes any material contractual obligations to Mr Wales under the Additional Contract, is it in breach of its contractual obligations?

vi) To what amounts, if any, is Mr Wales entitled from CBRE and/or Aviva under the CBRE Contract and/or the Additional Contract, whether by way of damages for breach of contract or otherwise?

vii) Is Aviva estopped from denying that Mr Wales was entitled to the clawed back commission?

viii) Is Mr Wales entitled to a restitutionary remedy against CBRE and/or Aviva?

ix) If Mr Wales is entitled to a restitutionary remedy, to what amount is he entitled?

61. I shall now deal with each of the critical issues in turn.

(6) Was it an implied term of the CBRE Contract that CBRE would deal honestly with and in good faith to Mr Wales or was it implied only that CBRE would deal honestly with him?

62. To answer this question, it is first necessary to examine the nature of Mr Wales's role in providing services for CBRE and its employees together with the express terms of the CBRE Contract.

63. In providing services for CBRE and its employees in respect of the Group Pension Scheme, Mr Wales performed several distinct functions. He attended to CBRE's requirements and its regulatory obligations. At CBRE's request, he also obtained details from CBRE's employees and provided advice on their behalf. However, on the basis that the written terms of the CBRE Contract were essentially contained in the agreed version of Sesame's Standard Conditions,

the same did not fully reflect the range of such functions. They were implicitly addressed to CBRE only. They confirmed that Mr Wales would offer CBRE "independent financial advice based solely on the information provided by" CBRE itself. They recorded that Mr Wales would collect data in relation to CBRE itself and would hold information about it on computer based databases and in paper files. CBRE would be entitled to obtain a copy of the personal data that Mr Wales held on its behalf upon payment of a fee. Having recorded that Mr Wales was an appointed representative of Sesame, they provided that Mr Wales could pass on data to the Sesame network "because it has regulatory responsibility for the financial services business [he] transact[ed] with [CBRE]". However, they were silent in relation to Mr Wales's duties to or in respect of third parties, such as CBRE's employees.

64. Although it was envisaged Mr Wales would provide services on behalf of CBRE's employees in connection with the Group Pension Scheme and collect data from them about their personal circumstances, it was not suggested in evidence that Mr Wales enjoyed a contractual relationship with CBRE's employees. Mr Wales must thus have carried out the relevant services pursuant to his contractual obligations to CBRE.

65. No evidence was adduced to suggest that Mr Wales or, indeed, CBRE reserved the right to pass on to one another or to any third party, data collected in respect of CBRE's employees and held otherwise than on behalf of CBRE itself.

66. In the present case, CBRE concedes that it was subject to an implied obligation to act *honestly*. In my judgment, that concession was rightly made. In *Yam Seng PTE Limited v International Trade Corp Ltd [2013] 1 Lloyds Rep 526*,

Leggatt J described an expectation of honesty as "a paradigm example of a general norm which underlies almost all contractual relationships…" He also stated that "as a matter of construction, it is hard to envisage any contract which would not reasonably be understood as requiring honesty in its performance". In the present case, where Mr Wales was engaged to provide advice and services in relation to the Group Pension Scheme based, to a significant extent, on information provided to him by CBRE itself, both parties to the contract can reasonably have been expected to deal honestly with one another. It was an implied term of the CBRE Contract that the parties would each deal honestly with one another as an incident of their relationship or in satisfaction of the test of necessity, re-stated by the Supreme Court in *Marks and Spencer plc v BNP Paribas [2016] AC 742.*

67. However, in my judgment, there was no implied term that the parties would deal with one another in good faith, whether as a legal incident of their relationship or under the test of necessity.

68. In *Interfoto Library Ltd v Stiletto [1989] QB 433*, Bingham LJ observed that acting in good faith "is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upward on the table'. It is in essence a principle of fair and open dealing".

69. I shall deal first with the implication of a duty of good faith as a legal incident of the parties' relationship. This has recently been the subject of helpful guidance from Fraser J in *Bates v Post Office (No 3) [2019] EWHC 606 (QB)* in which Fraser J adopted, at *Para 711*, a narrow definition of "relational contracts" so as to mean contracts in which such a duty is to be implied.

70. At *Para 721*, Fraser J stated that "whether any contract is relational is heavily dependent upon context, as well as the terms. The circumstances of the relationship, defined by the terms of the agreement, set in its commercial context, is what decides whether a contract is relational or not." No doubt, these matters are a function of the terms of the contract itself and outward evidence of the intentions of the parties based on the contractual terms and the factual matrix at the time they entered into the contract.

71. At *Para 725*, Fraser J observed that the implication of a duty of good faith could be excluded by express agreement. Subject to that proposition, he identified a series of relevant matters for consideration when determining whether a duty of good faith should be implied. They include the duration of the contract, the extent to which the parties can be taken to have intended "that their respective roles be performed with integrity, and with fidelity to their bargain" and the extent of their commitment to collaboration. It was also necessary to consider whether the contract involved a "high degree of communication, co-operation and predictable performance based on mutual trust and confidence and expectations of loyalty" and whether the parties reposed "trust and confidence in one another…of a different kind to that involved in fiduciary relationships". He also identified, as relevant considerations, the extent of the parties' investment in the venture, the exclusivity of their relationship and whether the "spirits and objectives" of the parties' venture were "capable of being expressed exclusively in a written contract".

72. In the present case, there was no express provision in the CBRE Contract to exclude a duty of good faith. However, in my judgment there was and is no

good reason to imply a duty of good faith in the relationship between Mr Wales and CBRE.

73. Firstly, CBRE's primary duties were owed to the participants in the Group Pension Scheme, not agents and third parties providing a service to the Scheme. There could have been no room for CBRE to assume implied obligations to third parties to the potential disadvantage of the participants and there could be no question of CBRE subordinating to such third parties its obligations to the participants themselves.

74. Secondly, the CBRE Contract was more in the nature of a contract of retainer than a joint venture with defined objects. It was not for a fixed term and it was expressly terminable, without penalty, by either party at any time upon two days' notice in writing by first class post.

75. The CBRE Contract was more than a commercial transaction. Mr Wales undertook to take on a professional role and provide financial and regulatory advice to or on behalf of CBRE and its employees. Although there were only two parties to the contract and, in that sense it was a bilateral agreement, Mr Wales was expected to provide advice on behalf of CBRE's employees as third parties. In all likelihood, he assumed a duty of care to them in providing such advice and collecting their data. He expressly reserved a right to collect data from CBRE. Although he did not purport to reserve such a right in respect of third parties, it is by no means clear that he would have been entitled to disclose sensitive third party information to CBRE without consent.

76. No doubt, it was envisaged that CBRE would provide Mr Wales with the information he required to enable him to attend to his contractual duties and

advise CBRE and its employees. However, there would have been no obvious reason to superimpose a duty of "open dealing" and, in this context, given Mr Wales's duties to CBRE's employees, the scope and application of such a duty would be difficult to define. Mr Wales could reasonably have been expected to perform his role with integrity. However, it is less clear that CBRE owed an analogous duty to him and, in any event, to suggest that the parties could each be expected to perform specific roles "…with fidelity to the bargain" would be to mis-characterise their relationship.

77. No doubt, Mr Wales incurred a significant amount of his professional time, at the outset, in acquainting himself with the Group Pension Scheme and the circumstances of CBRE's employees. However, it is not suggested that he invested funds in the project and the termination provisions provided only for him to be paid his outstanding fees within four weeks of termination.

78. I am thus of the opinion that CBRE did not assume to Mr Wales a duty of good faith as a legal incident of their relationship.

79. In principle, a duty of good faith could also have been implied under the test of necessity at common law. Logically this is separate from the implication of such a duty as a legal incident of the parties' relationship, see *Lewison "the Interpretation of Contracts" (6th edn) (2015) Para 6.02*. As re-stated in *Marks & Spencer v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2016] AC 742*, the test is whether the implied term is necessary to give business efficacy to the contract or so obvious that it goes without saying. This is a rigorous test. Reasonableness does not suffice, *Marks & Spencer (supra) Para 23*.

80. In my judgment, this test is not satisfied in the present case. For the reasons I have given, Sesame's Standard Conditions did not comprehensively set out the full scope of the contractual arrangements between Mr Wales and CBRE. However, if and once a duty of honesty is implied, it is not necessary to imply an additional duty of good faith to make the contract coherent or workable. The essence of the contractual arrangement was that Mr Wales would provide financial advice and services to or on behalf of CBRE and its employees in connection with the Group Pension Fund based on the information they provided to him. If CBRE was under a duty to act honestly, it was unnecessary and, indeed, inapposite to superimpose terms in relation to commercial standards or fair and open dealing.

(7) Did CBRE commit a breach or breaches of the term implied in the CBRE Contract?

81. On this issue, Mr Wales's pleaded case is contained in Paragraph 9 of the Amended Particulars of Claim. In substance, it is based on the propositions that:

i) CBRE resolved to transfer the Group Pension Scheme to a new platform and terminate his engagement ("Proposition One");

ii) CBRE did not notify Mr Wales of its decision to do so ("Proposition Two"); and

iii) CBRE allowed Mr Wales to attend meetings and services in the expectation that he would be entitled to commission from future premiums ("Proposition Three").

82. Proposition One is factually correct albeit in a modified form. Strictly, there was no resolution to terminate Mr Wales's engagement. However, by resolving to transfer to the new platform without engaging Mr Wales to provide services in respect of the new platform, CBRE implicitly resolved to dispense with his services.

83. In my judgment, Proposition Two is factually incorrect. In her conversations with Mr Wales on 21st December 2012 and 7th January 2013, I am satisfied that Ms Archer confirmed that CBRE had resolved to transfer to the new platform without providing for him to have a role in relation to the Group Pension Scheme following the move. Mr Wales must be taken to have been aware that he would cease to be entitled to commission following the move and could only become entitled to remuneration on a different basis if new contractual arrangements were negotiated with him and implemented.

84. Proposition Three is only correct if Mr Wales's alleged expectation is limited to his contractual entitlement. CBRE's officers and employees didn't of course know the terms on which Mr Wales might be entitled to commission from Sesame or Aviva and they cannot be taken to have known Mr Wales's expectations to such commission. Mr Wales was entitled to commission in respect of future premiums for so long as such premiums were being paid and he was entitled to an expectation that such commission would continue to be paid. However, his entitlement came to an end once the premiums ceased to be paid and he was aware that advance commission could be clawed back if paid in respect of premiums that were never received. In my judgment, he was never entitled to an expectation that he would be entitled to retain such commission.

85. It is true that Mr Wales continued to attend meetings and provide services after the board's resolution, on 16th November 2012, to move to the new platform. At the time he did so, he naturally believed that he would continue to receive commission in respect of future premiums for so long as such premiums were being paid. Had he been advised that he would cease to be entitled to such premiums, there is every possibility that he would have declined to attend the meetings or continue to provide services. Conversely, had he been reminded that his right to such premiums would continue but he had no right to future premiums if ultimately the same were not paid, there is no reason to believe that he would thus have declined to attend meetings or provide services. It was very much in his interests to preserve his income for so long as possible.

86. It follows that Mr Wales cannot cumulatively establish the propositions on which his pleaded case is based. However, in the hypothetical event that he could do so, they do not suffice to furnish him with a cause of action.

87. To determine whether a person has acted dishonestly, it is necessary to ascertain the "knowledge or belief" in which he acted. Once this has been ascertained, it is then necessary to ask whether his conduct was honest or dishonest according to the standards of ordinary decent people, *Ivey v Genting Casinos (UK) Limited [2017] UKSC 67, Para 74.*

88. Applying this test, I am not satisfied that CBRE has acted dishonestly nor, indeed, am I satisfied that any of the material propositions are capable of amounting to particulars of dishonesty. In no sense can it be suggested that it was dishonest for CBRE to transfer the Group Pension Scheme to a new platform or to dispense with Mr Wales's services in respect of the new platform.

89. Firstly, CBRE was under a statutory obligation to move to the new platform and, in doing so, move to a new charging structure. It was not dishonest for CBRE do so without making provision for Mr Wales or, indeed, entering into contractual commitments to him to the potential disadvantage of its employees. Its primary obligations were to its employees, as pension-holders, not its financial advisers.

90. Secondly, in the hypothetical event that CBRE had omitted to advise Mr Wales of its decision, this would not, in itself, have amounted to dishonesty according to the standards of ordinary decent people. To act dishonestly, Mr Wales would have had to show that CBRE knowingly misled him, for example by creating the false impression it had resolved to engage him to provide services for reward following the move.

91. Thirdly, in the event that Mr Wales had formed the expectation he would be entitled to retain commission in respect of future premiums that were never paid, there was never any good reason for CBRE to form the same misconception or indeed to infer that Mr Wales had such a misconception. CBRE was unaware of the terms of the contractual arrangements between Mr Wales and Sesame or, indeed, the arrangements between Sesame and Aviva.

92. A duty of good faith is a duty to act openly and fairly. In the hypothetical event that CBRE assumed such a duty to Mr Wales, I am not satisfied that Mr Wales has established any breaches of such a duty. CBRE was fully entitled to transfer the Group Pension Scheme to the new platform without making provision for him. Mr Wales was not initially advised of LCP's recommendations in relation to his future role and, for the most part, CBRE's internal deliberations prior to

the board resolution on 16th November 2012 were not disclosed to him. However, in my judgment, it is unlikely CBRE's hypothetical duty of good faith would have required it to advise Mr Wales about the advice that it received or, indeed, its internal deliberations about such matters prior to the board resolution itself. Moreover, the gist of the board resolution itself was not concealed from him. He was advised that CBRE had resolved to move to the new platform and he was made aware that the board decision did not envisage a future role for him following the transition.

93. In my judgment, CBRE did not commit a breach or breaches of the implied term that it would act honestly and if, contrary to my conclusions, there was an implied term it would act in good faith, it is not in breach of that term either.

(8) Did Mr Wales enter into the Additional Contract with CBRE and Aviva as (1) a free-standing contract or (2) a collateral contract to the contract between Aviva and Sesame?

94. In my judgment, the answer to this question is no.

95. Mr Wales's claim against Aviva is based on the proposition that he entered into a tripartite agreement ("the Tripartite Agreement") with Aviva and CBRE under which it was agreed Aviva would pay him commission (Amended Particulars of Claim, Para 4(4)). Alternatively, it is pleaded that he entered into a contract ("the Collateral Contract") with Aviva and CBRE collateral to Aviva's contract with Sesame (Amended Particulars of Claim, Para 4(5)).

96. There is nothing to suggest that Mr Wales, CBRE and Aviva ever collectively entered into an express agreement under which Aviva agreed to pay commission

to Mr Wales. In cross examination, Mr Wales accepted that they had not, together, entered into a written contract and he did not suggest that they had together entered into an oral agreement under which Aviva might have assumed a contractual obligation to pay Mr Wales commission. It emerged, in cross examination, that Mr Wales's case was based on the proposition that the parties had somehow entered into an implied contract. This was based on the proposition that he had worked, in succession with three customer relationship managers for Axa Sun Life, Friends Life and Aviva with whom he had worked to secure business and there was, in his words, "a direct link between me, the CRM and the manufacturer".

97. As pleaded, Mr Wales's alternative case is that Mr Wales, CBRE and Aviva entered into the Collateral Contract. This is alleged to be collateral to the contract between Mr Wales and Sesame. CBRE was not, of course, aware of the terms of the contract between Mr Wales and Sesame nor, indeed, was it aware of the terms of the contractual arrangements, if any, between Sesame and Aviva. If Mr Wales furnished Aviva with consideration for the Collateral Contract by promising to enter into the contract with Sesame, presumably Aviva's consideration was the promise to make payment although this was not spelled out in the Amended Particulars of Claim. Again, however, there is no evidence to suggest that the parties expressly entered into the Collateral Agreement, whether orally or in writing. Nor is there evidence that they expressly entered into an agreement analogous to it. It follows that Mr Wales's case must logically be based on the proposition that the Collateral Agreement arises by implication.

98. Whether advanced under the Tripartite Agreement or the Collateral Contract, Mr Wales's case is thus founded on *implication* and must satisfy the test of *necessity* identified by Bingham LJ in the *Aramis [1989] 1 Lloyds Rep 213* at *224*. By virtue of this test, it is "…necessary to identify the conduct referable to the contract contended for or, at the very least, conduct inconsistent with there being no contract made between the parties to the effect contended for. Put another way…it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract".

99. The limits to which this gives rise are illustrated by *James v Greenwich LBC [2008] EWCA 35* in which the Court of Appeal declined to interfere with a decision about the status of an employee who was engaged to work for a local authority. Having been supplied through an employment agency, it was un-necessary to imply a contract of employment with the local authority upwards of three years after she commenced in work.

100. In the present case, the test of necessity is not satisfied and it is not possible to identify specific conduct that is consistent only with the Tripartite Agreement or the Collateral Contract.

101. Sesame and Aviva are associated companies. At all material times, Mr Wales acted as Sesame's appointed representative in providing services for CBRE in connection with the Group Pension Scheme. Aviva was the pension provider. In accordance with its contractual arrangements with Sesame, it paid commission to Sesame in respect of its receipts of premium. Sesame then accounted to Mr Wales, in turn, for his share of the commission.

102. This was all carried out pursuant to their contractual arrangements without the need to imply any additional contractual requirements. Mr Wales performed services for CBRE subject to Sesame's Standard Conditions, signed by Mr Green on 20th October 2003. In this way, he generated pensions business for Aviva which paid commission to Sesame pursuant to the contractual arrangements between Aviva and Sesame. Sesame retained part of the commission for itself and accounted to Mr Wales for his share of the balance in accordance with its contractual obligations to Mr Wales.

103. In his closing submissions, Mr Berragan submitted that there was no written agreement between Aviva and Sesame at any time material to the issues in these proceedings. He observed that, whilst Aviva had adduced, in evidence, some copies of its standard terms of business for intermediaries such as Sesame, these only took effect on 31st December 2012. He submitted that there was no evidence these were accepted by Sesame. He also pointed out that, whilst one signed copy of Aviva's standard conditions was produced, it was only signed on behalf Sesame as late as 7th January 2014. However, in evidence, Mr Gregson confirmed that, at all material times, their business was governed by Aviva's issued terms of business for intermediaries. I am satisfied that this is likely to have been the case. If unsigned, Sesame can be taken to have accepted them by conduct. Given the scale of the business between Aviva and Sesame at the time, it is unrealistic to suggest otherwise.

104. Elsewhere in his witness statement, Mr Gregson stated that "during my seventeen years' employment with Aviva I have personally agreed to the setting up of, in my estimation, thousands of new relationships between Aviva and

authorised intermediary firms. All of those were documented and contractual. Not a single one of those involved setting up or agreeing to an additional contractual relationship with the appointed representative of that intermediary firm. It is simply unheard of within the insurance industry for a product provider to have a direct contract with an appointed representative". From Mr Gregson's perspective, Mr Wales "…was one of approximately two thousand appointed representatives of DBS/Sesame over the relevant period. It would not have made any sense for [Aviva] to have one contractual relationship with the intermediary firm, as well as two thousand separate contracts with the appointed representatives".

105. In my judgment, it was and is unnecessary to superimpose additional contractual provisions on the parties' agreed arrangements. Moreover, it is difficult to see how such provisions could be implied or incorporated without varying or undermining the parties' contractual rights and obligations, for example the rights and obligations of Sesame in relation to the receipt and distribution of commission.

106. I am thus satisfied that Mr Wales did not enter into the Additional Contract with CBRE and Aviva.

(9) If Mr Wales did enter into the Additional Contract, did the same impose on Aviva contractual obligations to pay commission to Mr Wales and/or Sesame; and to deal with Mr Wales honestly and in good faith?

107. In view of my conclusion that the parties did not enter into the Additional Contract, these questions are now academic.

108. As pleaded, the Additional Contract specifically provided that Aviva would pay commission directly to Mr Wales. Alternatively, it is pleaded that Aviva entered into a contractual obligation with Mr Wales to pay commission to Sesame. In Paragraph 7A of the Amended Particulars of Claim, it is also pleaded that "it was an implied term of the [Additional Contract] that [Aviva] would act honestly and/or in good faith towards [Mr Wales] in respect of the services he provided to clients which benefitted [Aviva] by referring insurance business of clients".

109. Aviva's putative obligation to pay commission directly to Mr Wales is fundamentally inconsistent with the historic practice under which, at the outset, Aviva paid commission to DBS and, subsequently, to Sesame on the basis DBS or Sesame would account for part of the proceeds to Mr Wales. Mr Wales's alternative formulation is consistent with historic practice save to the extent that it makes no provision for DBS or Sesame to retain any part of the proceeds. However, it provides for Aviva to assume an obligation to Mr Wales to comply with its obligations to Sesame. If, contrary to my conclusions and the historic practice, Aviva was under a duty to pay the commission directly to Mr Wales, it would have committed a breach of its duty by making payment directly to Sesame unless Mr Wales authorised it do so.

110. On an analogous basis to the CBRE Contract, Aviva would no doubt have been under an obligation to act honestly. However, if the Additional Contract took effect only as a collateral contract under which Aviva assumed a narrow obligation to pay or account to Mr Wales for commission, there would no good reason to graft a duty of good faith on Aviva's duties to pay or account to him

for the amounts due. On this hypothesis, the Additional Contract would not have required Aviva to assume a duty of good faith in parallel to Sesame's obligations to Mr Wales.

111. Even on the hypothesis that Mr Wales, CBRE and Aviva together entered into the Tripartite Agreement as a free-standing contract, I am not satisfied that Aviva would have assumed a duty of good faith to Mr Wales whether as a legal incident of his relationship with Aviva or under the test of necessity. The Tripartite Agreement would not have been in the nature of a long fixed term commercial bargain requiring a high degree of collaboration in the sense envisaged by Fraser J in *Bates v Post Office (supra).* It remains the case that CBRE's primary obligations were to the participants in the Group Pension Scheme (see above) and there would have had to be some measure of restriction on the free exchange of third party information.

(10) If Aviva owed contractual obligations to Mr Wales under the Additional Contract, is it in breach of such obligations?

112. Aviva paid Sesame the commission to which it was contractually entitled. It subsequently clawed back the disputed commission but there is nothing to suggest that this was achieved otherwise than in accordance with Aviva's contractual rights and obligations. Certainly, Sesame hasn't suggested otherwise.

113. In the hypothetical event that Aviva was under a contractual obligation to pay the commission direct to Mr Wales rather than to Sesame and this contractual obligation was never waived or varied so as to reflect the historic practices, Aviva would have committed a breach of contract by making the payments to

Sesame unless Mr Wales authorised Aviva to make payments to Sesame directly. However, such authority should readily be inferred in a case such as this where the payments to Sesame were continuously made for some ten years without challenge from Mr Wales.

114. I am not satisfied that Aviva acted dishonestly, whether by misleading Mr Wales or giving him assurances based on information known to be false. It was left to CBRE to advise Mr Wales about its intentions in connection with the transition to the new platform. It does not appear that Aviva took it upon itself to keep Mr Wales informed about CBRE's evolving proposals at least to the extent that Aviva was itself aware of CBRE's proposals. However, whilst the issue is entirely hypothetical, it is unlikely that this would, in itself, suffice as a breach of Aviva's putative duty of good faith.

115. In the hypothetical event that Aviva entered into the Additional Contract and thus owed contractual obligations to Mr Wales, I am not satisfied that it committed any material breaches of such obligations.

(11) To what amounts, if any, would Mr Wales be hypothetically entitled from CBRE and/or Aviva under the CBRE Contract and/or the Additional Contract, whether by way of damages or otherwise?

116. In accordance with settled contractual principles, damages would be calculated to put Mr Wales in the position in which he would have been had it not been for the putative breaches, *Robinson v Harman (1848) 1 Ex 850, 855*.

117. In Paragraph 14 of the Amended Particulars of Claim, Mr Wales contends that he "has suffered loss and damage in the amount of the claw-back as a result of [Aviva's] breach of the [Additional] Contract".

118. In Paragraph 14A of the Amended Particulars of Claim, Mr Wales also contends that he is entitled to "…damages representing the value of his work" on the basis that "as a result of the breaches…[he] continued to provide his services to [CBRE] in the expectation of receiving commission based upon future premiums paid as a result of his work".

119. Mr Wales's losses are apparently based on the proposition that, had it not been for the material breaches, he would have ceased to provide services for CBRE. The date on which this would have happened is obscure. There was certainly nothing in Mr Wales's evidence to clarify the point. However, it is implicit in Paragraph 106 of Mr Berragan's written Closing Submissions that, had he been advised of CBRE's ultimate intentions, Mr Wales would have ceased to provide work in the Summer of 2012 on the basis that "he would then have had very little incentive to continue as CBRE's IFA".

120. I do not accept these propositions. Contrary to Mr Berragan's written Closing Submissions, Mr Wales had a clear incentive to continue providing services for CBRE. For his services in connection with the Group Pension Scheme, he received commission on a substantial scale and he had every expectation that this would continue until he ceased to provide such services. Mindful of that, in November 2012 he advised Mr Entwistle that the staging date could be deferred to November 2013 and, as late as February 2013, he advised Ms Archer that, following recent inquiries, some new participants could be allocated to the

current scheme on the basis that they would be moved to the new platform later. In my judgment, it is unlikely Mr Wales could have been persuaded to cease such work and thus give up his right to the continuing receipt of commission until the last date realistically possible. Mr Wales was aware that commission paid to him in respect of anticipated premiums could be clawed back if, ultimately, Aviva didn't receive such premiums. However, there is no reason to believe that this might have sufficed as reason to give up his right to the premiums that were not clawed back.

121. In my judgment, the claim for loss and damage in Paragraphs 14 of the Amended Particulars of Claim is misconceived. Aviva was contractually entitled to claw back the disputed commission. In any event, this only relates to the amounts that were paid, in advance, in respect of premiums that were never received. Mr Wales was entitled to retain, as he did, the balance of his commission. Had Mr Wales ceased to provide services for CBRE at an earlier stage, whether in the Summer of 2012 or at some other time, he would have been able to deploy more of his time in the provision of services for other clients. However, no evidence was adduced before me about the identity of such clients, if any, or their needs and demands or, indeed, the value of their work and there is certainly no evidence that such work would have been as lucrative as the work generated in respect of the Group Pension Scheme. In any event, there is no conceptual or evidential basis for the proposition that, had he ceased work, Mr Wales would have received the claw-back or an amount equal to the claw-back.

122. To the extent that it involves a claim for damages for breach of contract, the claim in Paragraph 14A of the Amended Particulars of Claim is also

conceptually flawed. Whilst generally calculated with reference to the claimant's expectations, damages might be based on his expenditure wasted as a result of the breach. In some circumstances, he is also entitled to claim restitutionary damages or an account of the defendant's profits. However, in *A-G v Blake [2001] 1 AC 268,* the House of Lords were of the view that such a remedy is reserved for exceptional circumstances where the alternative remedies are inadequate. At *285*, Lord Nicholls suggested that "a useful guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit making activity and, hence, in depriving him of his profit". In the hypothetical event that Mr Wales had succeeded in his contractual claim against Aviva, it is inherently unlikely that this would have been an appropriate case in which to award him restitutionary damages or, indeed, an account of Aviva's profits in view of the nature of the alleged wrongdoing.

123. Had Mr Wales succeeded in his contractual claims against Aviva, he would have been entitled to nominal damages only.

(12) Is Aviva estopped from denying that Mr Wales is entitled to the clawed back commission?

124. The substance of Mr Wales's estoppel claim was set out for the first time in Paragraph 104 of Mr Berragan's written Closing Submissions. It is as follows.

"…Aviva caused or allowed [Mr Wales] to believe he would be paid (and would retain) commissions based on the full annual premiums from policies placed or renewed from Summer 2012 onwards…However, Aviva continued to pay his commissions in full, right up until April 2013, without giving him any warning

that substantial parts of the commission he believed he was earning were going to be clawed back after April 2013…"

125. Whilst this aspect of Mr Wales's case is obscure, it is apparently founded on the equitable doctrine of promissory estoppel. For this equity, the governing principles are accurately set out by the editors of *Chitty on Contracts (33rded) (2018), Paras 4-086 to 4-107.* Aviva must be taken to have made a promise or assurance to Mr Wales which was intended to affect their legal relationship. It must then be shown that Mr Wales relied on the promise or assurance and, in doing so, altered his position so that it would now be inequitable to allow Aviva to act inconsistently with it. Moreover, if these requirements can be established, it would have to be shown that the doctrine is being employed defensively as a shield not a sword, *Combe v Combe [1951] 2KB 215*.

126. In my judgment, none of these requirements are satisfied. It must be taken as Mr Wales's case that he was given a promise or assurance that he would be entitled to retain his commission. However, in evidence, he did not identify any such promise or assurance and, in cross examination, he accepted he was aware of the risk of clawback in the period prior to transition. Moreover, the doctrine is plainly being deployed to found a cause of action rather than to respond to a claim or support a pre-established right.

127. In my judgment, Aviva is not estopped from denying that Mr Wales is entitled to the clawed back commission.

(13) Is Mr Wales entitled to a restitutionary remedy against CBRE and/or Aviva?

128. In Paragraph 14B of the Amended Particulars of Claim, it is contended that "…by encouraging [Mr Wales] to provide his services", CBRE and Aviva "jointly and severally agreed with [him] by obvious and necessary implication, that [he] would be remunerated for such services and the Claimant is entitled either to payment of the clawed back commission or to a *quantum meruit*". This formulation is separate and logically distinct from the Additional Contract.

129. According to an alternative formulation, it is contended, in Paragraph 14C of the Amended Particulars of Claim, that CBRE and Aviva "have been unjustly enriched as a result of [Mr Wales] providing his services in the mistaken belief, encouraged by [them] that he would be remunerated by commission…It would be unconscionable to deny [Mr Wales] a remedy in restitution".

130. However Mr Wales's restitutionary claim is formulated, he seeks remuneration for services provided under contractual arrangements in which the parties willingly participated. Under those arrangements, Mr Wales was remunerated through the payment of commission from the pension contributions made by or on behalf of CBRE's employees. To accord Mr Wales with a restitutionary remedy outside those arrangements undermines the logic of the arrangements in the sense envisaged by the Court of Appeal in *Costello v MacDonald [2011] EWCA Civ 930.* For that reason, his restitutionary claim must fail.

131. In *Costello v MacDonald [2012] QB 244*, Mr and Mrs Costello used a company as their vehicle to develop land in their ownership. The company thus entered into a contract with builders. The builders sued the company for non-payment

of their invoices. They also sued Mr and Mrs Costello for a restitutionary award based on the value of their services relying on the principle of unjust enrichment. Etherton LJ (with whom Pill and Patton LJJ agreed) stated, at Paragraph 23 as follows.

"I am clear…that the unjust enrichment claim against Mr and Mrs Costello must fail because it would undermine the contractual arrangements between the parties, that is to say the contract between [the builders] and [Mr and Mrs Costello's corporate vehicle] and the absence of any contract between [the builders] and Mr and Mrs Costello. The general rule should be to uphold the contractual arrangement by which parties have defined and allocated and, to that extent, restricted their mutual obligations and, in so doing, have similarly allocated and circumscribed the consequences of non-performance. That general rule reflects a sound legal policy, which acknowledges the parties' autonomy to configure the legal relations between them and provides certainty, and so limits disputes and litigation".

132. In the present case, Mr Wales's contractual arrangements with CBRE were expressly governed by the version of Sesame's Standard Conditions, signed by Mr Green, on 20th October 2003. In these conditions, it was recorded that Sesame's appointed representatives, derived their income "from commission paid to [them] by life assurance companies, unit trust managers, stockbrokers and other intermediaries with whom investments/products are made". It was also provided that Mr Wales would "not normally charge fees but if" he did so he would give them "a separate agreement setting out [his] fee rates amended in writing and notified to" CBRE in specified circumstances. It was expressly

stated that "where we propose to charge a fee, we will notify you in writing before we carry out any chargeable work, explaining how it will be calculated".

133. Contrary to these provisions, Mr Wales did not give CBRE a separate agreement setting out his fee rates nor did he notify CBRE in writing before carrying out chargeable work, explaining how it would be calculated. However, there is no room for an implied agreement contradicting such provisions nor is there room for a remedy based on unjust enrichment. At no material time did CBRE have any reason to believe that Mr Wales would seek to charge it for the services he provided and it was thus entitled to assume that he was content to rely on the commission from one or more of the organisations described in Sesame's Standard Conditions.

134. There was no contract between Mr Wales and Aviva.

135. However, Mr Wales was contracted to Sesame upon essentially the same terms as the 1996 Agreement. On this basis, Mr Wales was appointed to act as Sesame's agent and it was agreed *inter se* that any commission would be divided between them; Sesame would retain its share and account to Mr Wales for the balance. There was express provision for Sesame to claw back reclaimed commission. With Sesame's authority, Mr Wales contracted with CBRE as Sesame's appointed representative upon Sesame's Standard Conditions.

136. Aviva was also contracted to Sesame. When giving evidence, Mr Gregson confirmed his witness statement in which he stated that Aviva's relationship with intermediaries, such as Sesame, was governed by its issued terms of business. New terms of business were issued from time to time. On behalf of Aviva, a copy of its conditions with effect from 31st December 2012 ("the 2012

Conditions") was presented before the Court. Aviva also adduced a set of conditions signed on behalf of Aviva and Sesame on 20th December 2013 and 7th January 2014 ("the Signed Conditions"). In his written Closing Submissions, Mr Berragan submitted that there was no evidence that Sesame ever accepted the 2012 Conditions and the Signed Conditions post-date the material events. However, in the light of Mr Gregson's evidence, I am satisfied that, in the unlikely event that there was no express agreement between Aviva and Sesame, the parties can be taken to have contracted by conduct upon Aviva's conditions, when issued from time to time, including the 2012 Conditions with their provision for clawback of commission.

137. To provide for Mr Wales to have a restitutionary remedy against Aviva would thus cut across the parties' contractual arrangements. For the reasons given by Mr Gregson, Aviva can be taken to have arranged its affairs to avoid contracting separately with the intermediary's appointed representatives. Over the relevant period, Mr Wales was one of approximately two thousand appointed representatives of DBS and Sesame and it made no sense for Aviva to contract separately with each of them.

138. Moreover, it was at all times understood that Mr Wales's remuneration would be funded from the payment of pension contributions. If and once such pension contributions ceased, for whatever reason, so would his commission. By the same logic, commission paid in advance of such contributions would be clawed back if the contributions never materialised. By advancing a claim to such commission, Mr Wales challenges the contractual basis on which he was remunerated.

(14) If Mr Wales is entitled to a restitutionary claim, to what amount is he entitled?

139. Mr Wales's primary claim is for £204,392.84 on the basis that this is the aggregate amount clawed back from him by Sesame. Alternatively, he seeks the payment of £43,988.50 as the value of his work from September 2012-April 2013 based on a multiple of his charge out rate and the time he spent on such work. If his work is valued on this basis from June 2012, his claim amounts to £66,682.30.

140. In my judgment, there is no logical basis at all to Mr Wales's claim to the amounts clawed back of £204,392.84. This happens to be the amount which Sesame paid him in respect of advance premium which never materialised and was ultimately clawed back. There is no logical connection between this and the value of his services.

141. In the hypothetical event that Mr Wales was entitled to advance a restitutionary claim, such a claim could be quantified, as he suggests, by taking a multiple of his charge out rate and the time he spent on such work. However, these would have to be assessed with reference to the amount which he could reasonably be expected to charge on the open market and credit would have to be given for the amounts of commission that were received or credited to him without being clawed back over the relevant period. Moreover, the relevant period would logically commence on the date or dates on which CBRE or, as the case may be, Aviva might be deemed to have benefited from Mr Wales's services without payment, not the date or dates with respect to which Aviva started to claw back payments in respect of premiums that were never received. There is no obvious

reason why June or September 2012 should be taken as a point of departure and, in my judgment, this aspect of Mr Wales's claim is also flawed.

(15) Disposal

142. It follows that Mr Wales's claims against CBRE and Aviva must be dismissed. He has failed to establish his claim against CBRE, whether for breach of contract or otherwise. Any such claim is fundamentally inconsistent with the conditions on which he was engaged to provide services. Mr Wales's claims against Aviva fail on the basis that Mr Wales and Aviva did not enjoy a contractual relationship with one another and, in the hypothetical event they did, I am not satisfied Aviva has committed an actionable breach. Aviva was contractually entitled to claw back commission from Sesame and Sesame was entitled to claw back the disputed commission from Mr Wales. In my judgment, CBRE and Aviva did not owe a duty of good faith to Mr Wales but, in the hypothetical event that they did so, they are not in breach. Sesame has not been joined as a party to the proceedings. However, Mr Wales's estoppel and restitutionary claims fail on the basis that such claims undermine the contractual arrangements between Mr Wales, Sesame and Aviva. Moreover, the estoppel claim is being deployed, as a free-standing means, to advance a cause of action rather than as a defence or answer to a material claim or issue.