



**Neutral Citation Number: [2020] EWHC 1751 (Ch)**

**IN THE HIGH COURT OF JUSTICE CR-2019-001454  
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES  
INSOLVENCY AND COMPANIES LIST (ChD)**

**IN THE MATTER OF THE PROPERTY GROUP (2010) LIMITED  
AND IN THE MATTER OF GARY BERRYMAN ESTATE AGENTS LIMITED  
AND IN THE MATTER OF WARNE INVESTMENTS LIMITED  
AND IN THE MATTER OF THE COMPANY DIRECTORS DISQUALIFICATION  
ACT 1986**

**By Skype Remote Hearing,  
Royal Courts of Justice  
Date: 03/07/2020**

**Before:  
Insolvency and Companies Court Judge Jones**

**B E T W E E N:**

**COMPETITION AND MARKETS AUTHORITY**

**Claimant**

**-and-**

**MICHAEL CHRISTOPHER MARTIN**

**Defendant**

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**Ms Catherine Addy Q.C. and Mr Paul Greenwood (instructed by the CMA Legal Service)  
for the Claimant**

**Mr Robert Palmer Q.C. and Mr Christopher Buckley (instructed by Womble Bond  
Dickinson) for the Defendant**

Hearing dates: 8-11 June 2020  
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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.

.....CHJ – 03/07/20 .....

I.C.C. JUDGE JONES

## I.C.C. Judge Jones:

### A) Introduction

1. The fact that the Competition and Markets Authority (“the CMA”) between September 2015 and 31 May 2017 investigated and reported upon suspected cartel activity by estate and letting agency businesses in the area of Burnham-on-Sea is a reminder not only of the scope of its work but also of its reach. Its statutory powers and duties exist because of the importance of competition law for the day to day business activities not only of large corporations but of all markets within this jurisdiction. The business of estate agency is concerned in part with the sale of what is for most people their most valuable and important asset. The importance of the requirement of fair competition and the prevention and termination of cartels fixing minimum levels of commission fees for property sales to the detriment of vendors is not to be understated.
2. From 20 June 2003 the framework for implementing and enforcing the UK’s competition law was reinforced, in part as a result of the amendment of *section 1* and the insertion of *sections 9A-9E of the Company Directors Disqualification Act 1986* (“the CDDA”) by *the Enterprise Act 2002 (ss204(2), 279 and SI 2003/1397, art 2, the Schedule)*. Those provisions enable a claim to be made by the appropriate body, now including the CMA pursuant to *section 25 of the Enterprise and Regulatory Reform Act 2013*, for the disqualification of a director on the basis that specified conditions concerning anti-competitive conduct are satisfied. Whilst these provisions appear rusty through lack of use, that is not to undermine their importance and potential reasons for lack of use may be found in *Mithani, “Directors’ Disqualification”, [810-820], Section 2, Chapter 2A*.
3. By a claim form issued on 26 February 2019 the CMA pursuant to *section 9A(10) of the CDDA* applied for Mr Martin’s disqualification by reason of his conduct, which term includes omission (*section 9E(4)*), as a director of (i) Gary Berryman Estate Agents Limited, (ii) its parent company The Property Group (2010) Limited and/or (iii) the ultimate parent, Warne Investments Limited. Mr Martin was registered as a member of Warne Investments Limited with 43.21% of the issued share capital during the relevant period.
4. It appears from Mr Martin’s evidence that Gary Berryman Estate Agents Limited became a dormant company after it was purchased by The Property Group (2010) Limited on 19 April 2013 and to whom its trade assets and liabilities were transferred. Nothing turns on that transfer other than factual accuracy and it is convenient in this judgment to use the term “Berrymans” to refer to the transferred business and to the continuing role (if any) of Gary Berryman Estate Agents Limited in the business. References to Mr Martin’s role as a director of Berrymans, therefore, will be to his appointment as a director of The Property Group (2010) Limited (unless otherwise stated) but in the context of him also being a director of Gary Berryman Estate Agents Limited.
5. The claim evolved out of formal investigations by the CMA under *section 25 of the Competition Act 1998*. They were started during September 2015 because the CMA had reasonable grounds to suspect cartel activity in the estate and letting agency sector of businesses in the Burnham-on-Sea area. Information was gathered under

*sections 26 and 28 of the Competition Act 1988*, through cooperation and from “state of play” meetings. On 31 May 2017 the CMA published a decision (“the CMA Decision”) concluding that Abbott and Frost Estate Agents Limited, Annagram Estates Limited (trading as ‘CJ Hole’), Gary Berryman Estate Agents Limited (which was described as “*an active company throughout*” the relevant period of the investigation without distinguishing it from The Property Group (2010) Limited and hence the definition of “Berrymans” used in this judgment) and its ultimate parent company, Warne Investments Limited, Greenslade Taylor Hunt, Saxons PS Limited and West Coast Property Services (UK) Limited (together called “the Infringers”) infringed the prohibition imposed by *section 2(1) of the Competition Act 1998*.

6. It was found they did so by participating in an agreement and/or concerted practice to fix a minimum level of commission fees for property sales agency services which they provided within their operational areas from branches located in Burnham-on-Sea from at least 4 February 2014 until at least 18 February 2015 in the case of Saxons PS Limited and until at least 24 March 2015 in the case of the others. It was estimated that together, the Infringers had a market share perhaps as high as 95% of a value of some £1.5 million during the relevant period.
7. The CMA Decision against Berrymans is based upon evidence of its direct involvement in the prohibited conduct. The finding against Warne Investments Ltd is based upon a presumption that it “*exercised a decisive influence*” over its 100% owned subsidiary and, therefore, formed part of the same undertaking. The CMA Decision includes a finding that Mr Martin, as a director of Berrymans, The Property Group, and Warne Investments, was aware of the prohibited conduct and, at least, supported it rather than take steps either to prevent it or bring it to an end.
8. On 11 July 2017, the CMA opened investigations, within the meaning of *section 9C CDDA*, for the purpose of deciding whether to make this disqualification claim. It did so having reasonable grounds for suspecting that a breach of competition law had occurred. Pursuant to *section 9C(3) and (4) of the CDDA* the CMA informed Mr Martin of its intention to proceed with a claim on 7 February 2019.
9. The CMA’s case, in a nutshell, is that Mr Martin whilst acting as a director had a responsibility for Berrymans’ participation in the agreement and/or concerted practice to fix a minimum level of commission fees. Alternatively, that he failed to take any steps to prevent the prohibited conduct of Berrymans despite having reasonable grounds to suspect it was occurring. That in any event, he ought (at least) to have known that its conduct was such as to be prohibited conduct.
10. The CMA relies principally upon four pieces of direct evidence (together called “the Direct Evidence”): The minutes of a meeting of employees attended by Mr Martin on 22 January 2014; subsequent emails that day between an employee, Mr Hutchinson, and Mr Martin concerning the intention to instigate an agreement between local agents and Berrymans; a further email of 4 February 2014 from Mr Hutchinson to Mr Martin spelling out the terms of the local agents’ agreement; and the minutes of a meeting on 15 May 2014 between Mr Martin and Berrymans’ senior employee, Mr Gass, referring to the local agents’ agreement. Mr Gass had originally formed the Berryman’s business and sold Gary Berryman Estate Agents Limited to The Property Group (2010) Limited in April 2013.

**B) The CDDA Requirements**

11. *Section 9A of the CDDA* requires the CMA to satisfy the court:
  - a) First, that an undertaking which is a company of which the defendant was a director committed a breach of competition law by engaging in conduct which infringed any of the prohibitions within *Chapters 1 and 2 of the Competition Act 1998* or within *Articles 101 and 102 of the Treaty on the Functioning of the European Union* (“the First Condition”).
  - b) Second, that the defendant’s conduct as a director makes him unfit to be concerned in the management of a company (“the Second Condition”).
12. For the purposes of the Second Condition, *subsections 5(a), (c), (6) and (7) of section 9A of the CDDA (subsection 5(b), ability to have regard to any other competition law breach, not being relevant)* provide that the Court must have regard to:
  - a) whether the director’s conduct contributed to the breach of competition law (irrespective of whether he knew it did) or, if not,
  - b) whether he had reasonable grounds to suspect that the conduct of the company constituted the breach of competition law and he took no steps to prevent it; or
  - c) that he ought to have known that the conduct constituted the breach even if he did not know of it; but
  - d) the Court must not have regard to the matters mentioned in *Schedule 1 to the CDDA*, which will be relevant to claims under other sections. The claim is specifically concerned with competition law.
13. *Section 9A(1) of the CDDA* expressly provides that the court “*must*” make a disqualification order against a person if the First and Second Conditions are satisfied. There is a similar requirement in *section 6 of the CDDA* (duty to disqualify unfit directors in non-competition cases) where the word “*shall*” is used and *section 1(1) of the CDDA* treats the two provisions as mandatory by using the word “*shall*”.
14. It is agreed between the parties that as the law stands, in accordance with the authorities concerning *section 6 of the CDDA*, an order must be made under *section 9A of the CDDA* if the director’s conduct “*viewed cumulatively and taking into account any extenuating circumstances has fallen below the standards of probity and competence appropriate for persons fit to be directors of companies*” (see *Re Grayan Building Services Ltd* [1995] Ch. 241 at 253). In *Secretary of State for Trade and Industry v Paulin* [2005] 2 BCLC 667, [61] Sir Andrew Morritt V-C emphasised the importance of recognising “*the distinction between conduct which renders a person unfit to be concerned in the management of a company and matters which may be prayed in aid in mitigation of the statutory penalty of disqualification*”. As Ms Addy Q.C. also observes, the same approach has been adopted in respect of Bankruptcy Restriction Orders (see *OR v Randhawa* [2007] 1 WLR 1700 at [73]-[75] and *OR v May* [2008] EWHC 1778 at [16] in particular).

15. As Ms Addy Q.C. for the CMA submitted, the *Re Grayan* (above) approach depends on the judgment of the Court in all the circumstances of the case, leaving some scope for “*judicial value judgments*”, and for the fashioning of appropriate objective standards of competence (*Re Crystal Palace Football Club (1986) Ltd, SoS for Trade and Industry v Goldberg* [2004] 1 BCLC 597 at [14]). As explained by Mr Justice Blackburne in *Re Structured Concrete Ltd* [2001] BCC 578 at 586 (an appeal against the dismissal of an application under *section 6*), that involves three tests (although in the case of *section 9A of the CDDA* without a minimum period of disqualification):

*“Assuming ... that the qualifying conditions laid down by section 6(1)(a) are satisfied (i.e. that the person against whom a disqualification order is sought is or has been a director of a company which has at any time become insolvent) the requirement, laid down by section 6(1)(b), “that his conduct as a director of that company ... makes him unfit to be concerned in the management of a company” involves a decision by the court whether the conduct upon which the Secretary of State or Official Receiver relies ... taking into account any extenuating circumstances, has fallen below the standards or probity and competence appropriate for persons fit to be directors of companies. ... That decision involves a three-stage process: (1) do the matters relied upon amount to misconduct; (2) if they do, do they justify a finding of unfitness; and (3) if they do, what period of disqualification, being not less than two years [but not in the case of section 9A], should result?”*

16. However, the *Re Grayan* (above) approach and the tests to be applied will need to be considered further when addressing a submission on behalf of Mr Martin that *section 9A of the CDDA* must be construed in accordance with *Article 8 of the European Convention on Human Rights* (“the ECHR”) pursuant to *section 3(1) of the Human Rights Act 1998* (“the HRA”) by:
- a) “reading into *section 9A(1)* the additional words: ‘*except in so far as such an order would be disproportionate and thus a breach of article 8 ECHR*’; and/or
  - b) interpreting the words ‘*makes him unfit to be concerned in the management of a company*’ in *section 9A(3)* so as to mean ‘*makes him so unfit to be concerned in the management of a company that taking all the circumstances into account it would not be disproportionate and thus a breach of article 8 ECHR to make a disqualification order against him*’.
17. Nevertheless, it may be noted at this early stage that the skeleton argument advocating that approach makes no reference to *sections 1 and/or 17 of the CDDA* whether expressly or when referring to the mandatory nature of *section 9A of the CDDA*. The importance of those provisions is that the requirement of “*must*”, as with the equivalent “*shall*” in *section 6 of the CDDA*, is a requirement that the court “*shall*” (applying the verb used for both *sections 6 and 9A* within *section 1(1) of the CDDA* when defining a disqualification order) disqualify the defendant so that (in summary and without reference to the other prohibition) he cannot act as a director “*unless ... he has the leave of the court*” to be obtained pursuant to an application under *section 17 of the CDDA*. The mandatory requirement does not, therefore, result in an absolute prohibition and the submission must be considered within the context of *the CDDA* having addressed the circumstances in which the prohibition may be lifted.

**C) The Defence**

18. Mr Martin does not contest the findings of the CMA Decision except insofar as it relates to his conduct. It is accepted, therefore, that the First Condition has been satisfied in respect of Berrymans and its ultimate parent company, Warne Investments Limited.
19. Mr Martin's defence, which I will briefly summarise at this stage, within his evidence in opposition relies as a background upon the assertion that at all material times the ethos and policy of Berrymans was to be more competitive on price than competing estate agents, whilst providing excellent customer service. Whilst he did not take part in the day to day operation of the business and he was not nor ever tried to be an estate agent, he was responsible for that approach being a foundation of its business. From his perspective, the concepts of an anti-competitive agreement would have been an anathema. This approach was consistent with the approach he had taken for all the businesses with which he had been and was involved, remembering that Berrymans was a very small cog in a group of companies ("the Group") owned by The Property Group (2010) Limited and the ultimate parent, Warne Investments Limited Group. These included other estate agency companies.
20. His evidence explains and in part argues that it was not surprising he did not discover the agreement or its implementation. First, he was not involved in the agreement whether its negotiation, formation or implementation. He was unaware of the close-knit relationship between various Burnham-on-Sea agencies. Second, he was not involved in day to day running of the businesses. Although he attended meetings with employees of Berrymans, he had no knowledge of any increase in commission to 1.5%. Third, he was very busy with the Group as a whole and with another company, Quadron Services Limited. Fourth, his reaction to the CMA's "raid" (i.e. the searches of various estate agents' premises, including Berrymans, carried out on 10 December 2015 by the CMA pursuant to *s28 of the Competition Act 1998*) and the steps taken immediately after are entirely consistent with his defence.
21. As to the Direct Evidence:
  - a) In respect of the minute of the meeting on 22 January 2014:

*"Paul's comment that there was a fee war would not have concerned me at all because as far as I was aware we were full participants in the fee war and were competing at whatever commission level was necessary to win the instruction ... The comment about Graham Hutchinson ("Graham") meeting with other agents to try to reach some mutual agreement just did not register with me."*
  - b) As to the "*unsolicited*" email received from Mr Hutchinson later that day and the emails in answer and reply:
    - i) The first was entitled "*Gary Berryman - Sales Agreed Targets 2014*" and enclosed figures which were "*absolute nonsense*". Although the email refers to the meeting, the figures were his "*chief focus*". They were:

*"just too far-fetched to believe and seemed like a continuation of the posturing from the earlier meeting. To stand any chance of meeting the target proposed by Graham, which was number of instructions not fees, we would have to compete very aggressively on*

*fees and take a lot of work from our competitors. That would simply not have been possible if Berryman's stopped being competitive on fees and entered into some form of an agreement with its competitors. It simply never entered my mind that Graham was seriously suggesting that he was going to try to agree minimum fees with other agents."*

- ii) His answer to that email was primarily focused on the targets. Essentially that Mr Hutchinson was *"talking nonsense"* but without *"destroy[ing his] enthusiasm because he was new to the business"*.
- iii) Mr Hutchinson's reply showed he had *"got the message"* and *"does not say anything more about meetings with agents"*. Although,

*"With the benefit of hindsight, and knowing what I now know, I fully accept that my response to Graham's email was poorly thought out and perhaps I should have responded differently. However, my response has to be viewed in the light of the situation at the time as it was known to me: my consistent message had been that the business should compete on fees, grow the top line and get the business at any price. It also appeared from his email that Graham had got this message;"*

- c) The further email from Mr Hutchinson sent on 4 February 2014 came at an extremely busy time involving Quadron Services Limited:

*"I accept that this email plainly spells out what Graham had been up to but I did not read that email and nor did I respond to it. Graham's email was sent at 14:09. At that time I was in the Quadron board meeting having been in the Quadron finance meeting that morning. When the Quadron board meeting finished, I had a wash-up meeting with Clive Ivil, the managing director at Quadron. I therefore did not read or respond to any emails that day. I have checked my email records and in fact I did not reply to a single email between 3 and 7 February 2014. If I had read [it] I would have replied ..."*

- 22. The meeting on 15 May 2014 with Mr Gass was brief:

*"The minutes record a comment that "meeting held with other Agents last week - not all Agents holding with the agreed 1.5% fee". I now know that this relates to the agreement Paul and Graham had reached with other agents in Burnham on Sea; however, I did not know that at the time. At the time I simply did not see any significance in this comment and it seemed like Paul trying to manage my expectations. For all I knew, Paul was referring to a disagreement between agents over the sharing of the fee for a co-marketed house"*

## **D) The Witnesses**

- 23. The trial took place through the remote medium of a Skype Business Conference, which worked extremely well. There had been a pre-trial case management conference to ensure the parties were ready for that process and the system was tested before the trial. If anything, the absence of the formalities of the court room environment and immediate proximity of counsel appeared to create a more relaxed environment for the witnesses and was beneficial. During a pre-trial application for an adjournment to avert a remote hearing, it was made clear that Mr Martin was keen to ensure that his denials and evidence in opposition had the fullest force or impact that could be achieved. I have no doubt that his evidence came through to me with the same force/impact as it would have done in a physical courtroom.

24. The evidence of Mr Emery, a civil servant employed by the CMA, was read. It refers to interviews and representations resulting from the CMA's CDDA investigations. It exhibits transcripts and relevant documents. The evidence of Mr Crewe, one of the CMA's legal advisers was also read. It concerns the inspection at Berrymans on 10 December 2015 and records the documents seized.
25. The main evidence from the CMA was from Ms Enser, a Director of the CMA, who sets out and exhibits the substance of the evidence relied upon by the CMA. Ms Enser was cross-examined on various matters but, inevitably, her evidence is principally limited to information derived from her role on behalf of the CMA rather than being based upon personal knowledge. As a result, it was agreed and directed that the defence did not have to be "put" to her in cross-examination. Whilst I am more than satisfied that Ms Enser sought to assist the court, that lack of personal knowledge means I need not dwell on her attributes as a witness.
26. Mr Martin's evidence is of concern for a number of reasons, which include the following three: First his "cherry picking" of evidence from contemporary documentation to support his defence within his affidavit in answer. For example:
- a) He refers to advice received from Berrymans' solicitors, Michelmores, shortly following the 10 December 2015 inspection. The only reference, however, is to their advice not to approach the CMA. That leaves out the fact that the note of the advice included under a legally privileged heading, the advice that specific documents revealed a "*clear breach prohibition of price fixing cartel*". It was in that context that the advice concerning contact with the CMA had been provided.
  - b) The note was made by Ms Darby, his personal assistant, and it is fair to observe that in cross-examination Mr Martin did not remember being told of its content "*in terms as strong as ... [a] clear breach*". However, two points flow. First that he did not say that in his affidavit but "cherry picks" instead. Second, he did not mention, as he said during cross-examination, that Ms Darby had told him the position was "*clearly very serious*" and said it "*in her terms as strong as it could be*" (using his words).
  - c) Nor did he refer to the fact that by email sent 15 December 2015 (which he accepts he received) Mr Phelps of Michelmores expressly advised that his review of documentation obtained by the CMA from the inspection:

*"does indicate a possible breach of the section 2 of the Competition Act 1998, in particular the prohibition against price-fixing. The documentation suggests that Gary Berryman, Abbott & Frost, Saxons, CJ Hole, West Coast Properties and Greenslade Taylor Hunt have agreed to participate in a price fixing cartel with minimum fees to be charged for sole agency (1.5% plus VAT with a minimum fee of £1,500 for properties up to £100,000 and £2,000 for properties over £100,000), multiple agency (from 2% plus VAT) and joint agency (from 2% plus VAT). A minimum fee was also agreed for repossession and corporate clients. Further, the documentation suggests that different estate agents will play "police man/problem solver" each month (February: Gary Berryman, March: Abbott & Frost, April: Saxons, May: CJ Hole, June: West Coast Properties and July: Greenslade Taylor Hunt) ....*

*Whilst the CMA is prepared to grant leniency to undertakings (such as The Property Group (2002) Limited) that come forward with information about price-fixing*



*arrangements or cartels, we consider that realistically leniency would not be available here, as [to obtain it] the CMA must not already have sufficient evidence to establish the existence of the cartel activity. We would not advise approaching the CMA at this juncture in relation to this investigation, but rather let them prove their case”* (my underlining).

- d) Nor was this advice, which is of self-obvious meaning, disclosed by Mr Martin in his affidavit when he referred to the 17 December 2015 email from Mr Phelps of Michelmores (although I do not suggest that other parts of the email needed to be quoted) or when he referred to the notes of a meeting with Michelmores on 11 January 2016. He only referred to the legal advice that this was a “*low grade*” infringement and that early contact with the CMA would not help in terms of mitigation.
- e) I appreciate that affidavits should not become unwieldy by reference to all facts and matters which can be found within exhibits. However, the underlying importance of this “cherry picking” is that it enabled him to state, that in circumstances of Mr Gass and Mr Hutchinson having maintained their denials of infringement on the day of the inspection and at a meeting on 4 October 2016 (just over 9 months after the CMA’s inspection), he was “*absolutely shocked*” when “*all the emails, that are now exhibited by Ms Enser, were disclosed to us by the CMA*” because “*it became immediately apparent*” that they had been “*intimately involved in the formation and implementation of the agreement*”.
- f) The statement simply does not fit with the evidence summarised above which was not mentioned by Mr Martin. In view of its content, his “explanation” when this assertion of “*shock*” after 4 October 2016 was challenged by Ms Addy Q.C. during cross-examination was lame and unacceptable: “*[I] was in shock that people could write in such a way – never seen anything so unprofessional. Meaning whole contrivance of arrangement, manner of execution and language used*” (as I noted it).
27. This may also be viewed as an example of the second reason for concern, although this is an observation rather than founded in criticism. Mr Martin was extremely eager to argue his case rather than to give evidence of what he remembered. This is illustrated by the fact that until intervention by me, he was intent to ensure when answering Ms Addy’s questions that he drew attention to everything he had bookmarked as a cross-reference in the papers before him. There is no criticism for a witness being well-prepared. The problem in this case is that I was left with the strong impression that Mr Martin had spent so long seeking to self-justify what had or had not occurred that he was no longer remembering what that had been.
28. This problem was foreshadowed within his affidavit. For example, when explaining his response to Mr Hutchinson’s reply email on 22 January 2014 he referred to five specific matters which were then “*known to me*” and used them to justify his defence rather than identifying matters he actually considered at the time. He then provided four reasons why it “*did not make any sense to reach an agreement with other agents*”. Similarly, when addressing the 4 February 2014 email, he identified what he would have replied and why had he read it. He then set out three facts to justify why he did not make any connection between what was said at the 15 May 2014 meeting

and what had been said at the 22 January 2014 meeting. These appear to be justifications identified by him after the event.

29. I appreciate the difficulty of presenting evidence that one did not read, hear or understand something. I will take that into consideration and I repeat that there is not necessarily anything wrong in a witness relying upon post-justification conclusions. But there is a danger that it can affect memory both by failing to engage in the actual process of recall, as opposed to self-justifying, and/or by creating false memories.
30. This is illustrated by his phrase "*this is what I knew I knew*" used by him during cross-examination. For example, when answering questions concerning the 22 January 2014 meeting he explained that he did not understand from the discussions that the proposed meeting of local agents was intended to reach an agreement to end the "*fee war*". However, he then said he could not remember the meeting but knew what he knew and proceeded to set out facts which he put forward to justify why he could not have understood that as being the intended purpose of the meeting with the other local agents. It is an example of his approach which caused my impression and causes my concern generally and not just because his affidavit revealed he had some detailed knowledge of what he said at the meeting.
31. The third reason is the potential concern that he sought to minimise his role in and knowledge of the Berrymans' business from December 2013 after the departure of Mr Plaister, who will be referred to below, as part of his keenness to ensure that his defence was advanced in the best light. The concern is that he did not engage sufficiently with the fact that on his evidence he had a direct involvement in the topic of commissions. However, I need not expand on that because the three reasons are not to be read as findings. They are reasons (in that order of importance) for my conclusion at this stage of my judgment that his evidence must be approached with considerable caution and carefully tested against the contemporaneous evidence, so far as that is possible.
32. Mr Martin also relied upon the evidence of Ms Darby. I am satisfied that Ms Darby did her best to assist the court. In particular, she made clear when she could not remember matters. To the extent that I do not accept her evidence or if my conclusions are in conflict, that is not because of any criticism of her.
33. Neither party called Mr Gass, Mr Hutchinson or any other employee of Berrymans, including Mr Plaister and Mr Martin's daughter (born in 1991). The CMA relies upon or otherwise in any event exhibited transcripts of interviews of Mr Gass and Mr Hutchinson. To some extent Mr Martin relies upon their content too. However, whilst the information was provided during a statutory investigation, the reality is that both Mr Gass and Mr Hutchinson were responsible for and involved in the unlawful cartel. Their evidence needs to be tested under cross-examination before it can hold any significant weight, except to the extent that it is consistent with the contemporaneous documents. I have decided that I will not be influenced by the fact that they were not called. I adopt the same approach concerning the interview of Mr Plaister. I am less happy about Mr Martin not calling his daughter or any other member of staff but he did call Ms Darby and there is no reason to think that her limited recollection would not be typical. The absence of other potential witnesses will not weigh in the balance.

**E) The Evidence – An Overview**

34. The outcome for the Second Condition will depend upon the findings of fact concerning the Direct Evidence. There is no evidence that Mr Martin had knowledge of the proposed local agents' agreement before the 22 January 2014 meeting. There is also no evidence of him actively involving himself with the anti-competitive agreement after the meeting on 15 May 2014. That does not mean that inferences cannot be made but it makes it important to ensure the Direct Evidence is addressed from that premise. Whilst the facts will show the steps taken by Mr Hutchinson, Mr Gass and others before, during and after the period of the Direct Evidence and this will form a background for its consideration, when reaching my decision I will always distinguish the evidence concerning others from the evidence addressing the knowledge and role of Mr Martin. That is to be taken as read and need not be repeated.
35. I will also bear in mind the submissions. Both counsel addressed the court with eloquence upon the evidence and the conclusions to be drawn. It is logistically impractical to repeat those submissions. Therefore, I will merely describe some key features, albeit inadequately compared with their rendition. I will not repeat the submissions relating to specific evidence. I stress, however, that I have borne all their submissions in mind including those I have not expressly identified within this summary.
- a) Mr Palmer Q.C. stressed the need to take into consideration the fact that Mr Martin had not gone quietly into the night following his retirement in July 2018 due to ill health, despite not wanting to be a director again. The premise being that Mr Martin did nothing wrong and wants to defend his reputation of an unblemished thirty-year business record in the context of a wide group of companies ultimately with a £30m turnover built out of competitiveness.
  - b) Mr Palmer Q.C. observed that Mr Martin gained nothing from the agreement and there was no reason to incur its risks. In contrast, the estate agents were in control and would benefit from their commission. Mr Gass and Mr Hutchinson ran the illegal scheme and were untrustworthy employees but not to Mr Martin's knowledge. Mr Martin's level of involvement with Berryman's was at a level which took himself outside the realm of knowledge and involvement which would have identified the problem.
  - c) Further, Mr Martin's practice within all his businesses, past and present, was to ensure competitiveness and he would improve compliance. His philosophy made his involvement inconceivable and the Direct Evidence and his evidence in answer must be viewed accordingly. By January 2014 he had changed Berryman's culture and introduced authorisation for individual agents to agree commission percentages with vendors.
36. Ms Addy Q.C. politely but forcefully challenged the reliability of Mr Martin. She emphasised his duties as a director both in terms of law and in fact taking into consideration what he did. Her submission was that the Direct Evidence was clear on its face and Mr Martin's evidence in answer not only did not undermine that conclusion but sustained it because of its inconsistencies, apparent implausibility and background of unreliability.

37. One final matter to mention is that on a couple of occasions the question whether Berrymans' financial information would have revealed the existence of the minimum commission arose. Neither side advance a case in reliance upon that topic.

## F) The Evidence

### F1) The CMA Decision

38. The CMA Decision followed admissions of infringement in settlement of the CMA's case by Abbott and Frost Estate Agents Limited, Greenslade Taylor Hunt, Gary Berryman Estate Agents Ltd (which for the purposes of this judgment includes Berrymans) and West Coast Property Services (UK) Limited. The settlement was announced on 2 March 2017. As part of the settlement process those potentially settling had been provided with a draft Statement of Objections which included the potential admissions. They had access to the documents referred to in the draft Statement, a list of the documents on the CMA's file and a draft penalty calculation. They were also provided with an opportunity to make limited representations on the draft Statement of Objections and draft penalty calculation, both in writing and orally at settlement meetings held with each of them during January and February 2017. The settling parties agreed to accept the following maximum penalties: Abbott and Frost Estate Agents Limited £30,099; Gary Berryman Estate Agents Ltd £97,807; Greenslade Taylor Hunt £186,054; and West Coast Property Services (UK) Limited £58,273. The actual penalties imposed were slightly lower: Abbott and Frost £30,099; Gary Berryman £93,555; GTH £170,549; West Coast £55,624 and Saxons PS Limited (which did not settle the case with the CMA) £20,257.
39. Saxons PS Limited did not settle but they did not make representations on a draft penalty statement issued on 28 April 2017 in accordance with **section 36 of the Competition Act 1998** and **Rules 11 and 6 of The Competition Act 1998 (Competition and Market Authority's Rules) Order 2014**, SI 2014/458 ("the CA98 Rules").
40. The CMA Decision was based on email and witness evidence regarding :
- a. Contacts between the Parties in the period 1 October 2013 to 4 February 2014 in which they sought to set up a meeting to discuss an arrangement regarding minimum commission fees;*
  - b. The content and outcome of the first meeting between the Parties on 4 February 2014 (the 'Formation Meeting') and correspondence in the following weeks refining the terms of the arrangement;*
  - c. The use of a 'policeman', email correspondence and meetings to implement and/or promote adherence to the arrangement;*
  - d. The Parties' collective response to a potential new entrant;*
  - e. The decline and eventual termination of the arrangement;*
  - f. Attempts to restart the arrangement which corroborate the prior existence of the arrangement".*
41. The CMA found from documents and witness evidence (in summary) that Greenslade Taylor Hunt, acting by Mr Bell, was in contact with Mr Hutchinson, subsequently of Berrymans, to prompt him to promote concerted action between the Infringers regarding fees. Mr Hutchinson arranged a meeting of the Infringers to discuss

commission fees for the sale of residential property. Each Infringer was aware that the meeting's purpose was to discuss a proposal for an arrangement to fix a minimum commission fee. It took place on 4 February 2014. Mr Hutchinson and Mr Bell had already discussed a more detailed plan for the level of minimum commission fee they would recommend to the meeting.

42. The CMA Decision details the evidence relied upon including:

*“an email discussion regarding various sales matters between Mr Hutchinson (Gary Berryman) and Mr Martin (Director of Gary Berryman Estate Agents Ltd, The Property Group and Warne Investments during the Relevant Period) dated 22 January 2014 confirms Gary Berryman's intentions for the proposed meeting between the agents to be as follows: 'Further to our meeting today [...] the aim of the meeting with the other Estate Agents in the town next month will be to drive the fee level up to 1.5% plus VAT with a minimum fee of £2,000 plus VAT being set, but we will see how that progresses?!! (sic)’”.*

43. The CMA found that each of the Infringers was represented at the meeting at the offices of another local estate agent. The CMA found that minimum commission fees were agreed at the meeting for the sale of residential property in the Burnham area in the following percentages, as described in an email entitled 'Fees!' sent by Mr Hutchinson to all the Infringers the next day:

*“Sole Agency: from 1.5% plus VAT with a minimum fee of £1,500 for properties up to £100,000 and £2,000 for properties over £100,000  
Multiple Agency: from 2% plus VAT  
Joint Agency: from 2% plus VAT  
We will also be looking to enforce a minimum fee on repossessions and corporate clients of £2,000 and if they don't like it, we will refuse the instruction!!!! (sic)  
[...] As requested each company will take it in turns each month to play 'policeman/problem solver', which I would propose we each do in the following months:  
February: Gary Berryman March; Abbott & Frost April; Saxons May: CJ Hole [Annagram]  
June; West Coast July; Greenslades [GTH].  
I would also like to propose Wednesday 7th May at 1pm at Greenslades [GTH] offices as a 'review' meeting.”*

44. The CMA Decision makes express reference to Mr Martin within the following finding at paragraph 3.116:

*“Mr Hutchinson (Gary Berryman) also sent a similar description [but without geographical reference or express reference to residential, as opposed to commercial, sales] of the outcome of the Formation Meeting via email to (separately) Gary Berryman staff and Mr Martin (Gary Berryman Estate Agents Ltd, The Property Group and Warne Investments), which the CMA regards as being additional corroboration of what took place at the Formation Meeting.”*

45. The CMA Decision found that subsequent correspondence, including communications from Mr Hutchinson and Mr Gass (none directly from Mr Martin), dealt with the “precise terms of the arrangement” culminating in an email from Mr Hutchinson to the Infringers on 17 February 2014 clarifying the agreement concluded on the issues that subsequent correspondence had raised. He subsequently dealt with a further question concerning the fee for family members.

46. The CMA then found that:

*“from 5 February 2014, the Parties implemented and/or reinforced their arrangement by (i) allocating a 'policeman' to monitor adherence to the arrangement, (ii) using multilateral and*

*bilateral email correspondence to deal with specific issues, and (iii) periodic face-to-face meetings.... all ... continued to correspond until at least December 2014 with a view to maintaining adherence to their arrangement, and that some ... continued to correspond and meet until at least March 2015 when one ... publicly distanced itself from the arrangement ... on numerous occasions one of the Parties accused one or more of the others of having failed to adhere to the arrangement either through a complaint to the 'policeman', in multilateral or bilateral correspondence or at a meeting ...".*

47. Evidence is referred to in the CMA Decision to establish that Berrymans acted as “policeman” through Mr Hutchinson and (to a lesser extent) Mr Gass. This evidence continues to place Berrymans at the centre of the operation. Eight subsequent meetings of the Infringers concerning the agreement and its implementation were identified. Mr Hutchinson remained the main representative of Berrymans with reference also being made from time to time to the direct involvement of Mr Gass. This is entirely consistent with the evidence relied upon to establish implementation and operation of the agreement and its eventual breakdown, first with Saxons PS Limited and then with all the remaining Infringers.
48. Inevitably, based upon the CMA’s findings and the admissions, it was concluded that the Infringers agreed and entered into concerted practices which affected trade within the UK with the object or effect of the prevention, restriction or distortion of competition. The prohibitions within **Chapter 1 of the Competition Act 1988** were breached by the anti-competitive agreement and its implementation. The CMA’s findings against Berrymans are based upon direct involvement. The findings against Warne Investments Ltd are based upon a presumption that it “*exercised a decisive influence*” over its 100% owned subsidiary and, therefore, formed part of the same undertaking.
49. The financial penalty imposed upon Gary Berryman Estate Agents Ltd was £93,555 for which its parent was jointly and severally liable. This included a 15% increase because of the director and/or senior management involvement. Namely: the role of Mr Hutchinson, as a senior manager, in forming, directly participating in and implementing the Infringement; of Mr Gass, as Principal of the Burnham-on-Sea branch, in directly participating in and implementing the Infringement; and

*“the role of Mr Martin, a director of Gary Berryman Estate Agents Ltd, The Property Group, and Warne Investments, who was aware of the Infringement, and at least supported it, rather than taking steps either to prevent it or bring it to an end, as described in more detail at paragraphs 3.111, 3.116 and 3.187”.*

50. Paragraph 3.111 in a footnote refers to the fact that Mr Martin was a recipient of the 22 January 2014 email from Mr Hutchinson confirming the prohibited agreement and to his reply.

*“Thanking him for the information and stating both that he admired the ‘bullish targets’ and ‘Appreciate the other work with agents in B o S re fees’. See also [URN1201] – email at 07:25 on 30 January 2014 from Mr Hutchinson (Gary Berryman) to Mr Gass (Gary Berryman). See also [URN0497] cited at paragraph 3.107 above”.*

51. Paragraph 3.116 in a footnote refers to an email sent by Mr Hutchinson to employees of Berrymans setting out the agreement and to a “*similar report*” in an email from him to Mr Martin sent on 4 February 2014:

“... ‘we had a meeting with the other agents today and have managed to broker an agreement that sole agency fees will start from 1.5% plus VAT with a minimum fee for properties upto £100,000 set at £1,500 plus VAT with a minimum fee for properties over £100,000 being £2,000 plus VAT. We are obviously hopeful that this will last, but it at least has been agreed with all the agents so will hopefully now start to increase our revenue.’ There is evidence that Mr Martin (Gary Berryman Estate Agents Ltd, The Property Group and Warne Investments) saw this email and asked his PA Ms Darby (Gary Berryman Estate Agents Ltd, The Property Group and Warne Investments) to organise a meeting with Mr Hutchinson (Gary Berryman) and Mr Gass (Gary Berryman) – see [URN1212] – an email at 13:14 on 6 February 2014 from Ms Darby (Gary Berryman Estate Agents Ltd, The Property Group and Warne Investments) to Mr Hutchinson (Gary Berryman). See also [URN1216] - email at 15:25 on 6 February 2014 from Mr Hutchinson (Gary Berryman) to Ms Darby (Gary Berryman Estate Agents Ltd, The Property Group and Warne Investments) and [URN1215] - email at 14:50 on 6 February 2014 from Ms Darby (Gary Berryman Estate Agents Ltd, The Property Group and Warne Investments) to Mr Hutchinson (Gary Berryman) and [URN1214] - email at 14:48 on 6 February 2014 from Ms Darby (Gary Berryman Estate Agents Ltd, The Property Group and Warne Investments) to Mr Hutchinson (Gary Berryman)”.

52. Paragraph 3.187 infers that Mr Martin was present at the meeting on 15 May 2014 from the inclusion of “MCM” within the minutes’ list of attendees together with “PG” (presumed to be Mr Gass) when Mr Hutchinson was not listed and, therefore, presumed not to have been present.

## **F2) Events Leading To The Direct Evidence**

53. Mr Martin within some 14 pages of his evidence in chief set out his previous business experience, the steps taken from 2001 with Mr Gregg Poulter, an accountant, which resulted in the Group including Berrymans amongst various estate agencies. Mr Martin stated that each business purchased should be “*more competitive on price and provide excellent customer service*”.
54. For the purposes of this judgment it is sufficient to take large parts of that evidence as read and to make the following findings from the evidence viewed together:
- a) Mr Martin was not an estate agent and was not involved in the day to day business of Berrymans contracting with vendors for the sale of their properties and carrying out their instructions. Nor was he engaged in day to day dealings which brought him into contact with other estate agents. Its business was run from its branches in Burnham-on-Sea and Wedmore by Mr Gass, an employee who became a director of The Property Group (2010) Limited between 3 March 2015 and 31 January 2017. Mr Hutchinson was part of the sales’ team from 2013 to date.
  - b) Mr Martin’s involvement with Berrymans arose from his duties as a director. He and Mr Poulter were appointed directors of Gary Berryman Estate Agents Ltd on 19 April 2013 and remained directors of it, The Property Group (2010) Limited and Warne Investments Limited throughout the period material to the claim. Mr Martin, as a director, was responsible pursuant to his duties identified in *the Companies Act 2006* and at common law for Berrymans’ success and for strategic decisions. He was required to act with reasonable care, skill and diligence and to exercise independent judgment. He owed fiduciary duties.

- c) Although Mr Poulter was delegated with specific responsibility for the directors' overall financial duties for the Group, as with its other companies, Mr Martin took an active role in monitoring Berryman's day to day financial position, in particular with reference to cash flow. However, below Mr Martin and Mr Poulter in terms of delegated management of Berryman's was Mr Plaister, until he left between October and December 2013. He was a director of The Property Group (2010) Limited between 24 May 2012 and 18 October 2013 and of Warne Investments Limited between 22 May 2013 and 18 October 2013.
- d) Mr Gass' responsibilities increased after Mr Plaister's departure leading to him becoming a director of The Property Group (2010) Limited on 3 March 2015. The, at least initial, extension of his role can be seen from the terms of a letter to him from Mr Martin dated 14 January 2014.
- e) Mr Gass would "*report directly to [Mr Martin] and to attend Board Meetings pertaining to [the estate agency] businesses [for which he had become principal] ...*". Each of the estate agency businesses, now structured as three operating units including Berryman's, "*report[ed] through to [Mr Martin]*".
- f) Mr Plaister's departure resulted in Mr Martin becoming more involved with the various estate agency businesses and in the early part of 2014 he visited their branches to address matters such as customer service and the fees to be earned. Mr Martin states that these visits resulted in the sales and letting teams no longer requiring authorisation before agreeing fees with clients. The approach described in chief was that it would be better with fixed overheads to "*get the work at any price, rather than miss out on the instruction*".
- g) One of Mr Martin's visits was to Berryman's Burnham-on-Sea branch on 22 January 2014. Berryman's, the member of the Guild of Property Professionals in Burnham-on-Sea, had been the last estate agency business purchased. Mr Martin's evidence was that it was "*the last piece in the jigsaw*" required for those businesses to become profitable. In his evidence in chief he attributed that to its lettings' income. There is no suggestion in his evidence of financial difficulty because of a "*fee war*" resulting from the competitive stance he advocated.

### **F3) The Direct Evidence**

55. The 22 January 2014 meeting was minuted by Ms Darby and subsequently the minute was distributed in branch, although Mr Martin said he did not see it until after the CMA started its investigations. It records that the following attended: "Mr Martin. Mr Gass, Mr Hutchinson, Penny (a lettings assistant), Maria Stevens, Grace Martin, Sam Francis; Jane Widdacomb; Jackie letting assistant". Under the heading "**Current Business**" the minute reads:

*"GH [Mr Hutchinson] has met with other local agents to discuss fee war to try to reach some mutual agreement. Further meeting arranged for February. Approx 27 new instructions this month."* (my underlining)



56. Ms Darby had no reason to suggest this part of the minute was inaccurate and Mr Martin said during cross-examination that he does not dispute its accuracy. The starting point, therefore, as he accepted, is that the topic of a “*fee war*” was mentioned at this meeting within the context of it being reported that Mr Hutchinson had arranged for a further meeting in February with other local agents “*to try to reach some mutual agreement*”.
57. As a matter of background (because there is no evidence Mr Martin was aware of these matters before the meeting), the evidence establishes that from 1 November 2013 Mr Hutchinson, now employed by Berrymans, began to raise the “*situation with regards to fees*” with other local agents as a matter of discussion:
- a) An email sent by Mr Hutchinson on 1 November 2013 to another agent, Mr Bell of Greenslade Taylor Hunt, evidences that he and Mr Gass were “*very keen to discuss the situation with regard to fees*” and to meet with other agents to also get them “*on board*”.
  - b) By 11 December 2013 Mr Hutchinson was emailing Mr Bell that he had in mind “*a minimum of a minimum commission of 1.5% plus VAT with a minimum fee of £2,000 for sole agency, with multiple agency being 2.75% plus VAT with £2,750 minimum fee*” with discussion of other issues. Mr Bell responded the same day to the effect that he would consider an agreement between estate agents of a minimum 1.5% commission “*across the board*” would be a successful result.
  - c) An email from Mr Hutchinson sent 21 January 2014 informed Mr Bell and four other agents, copying in Mr Gass, that “*all agents are now willing to discuss the on-going fee situation*” with a meeting date of 4 February.
58. It follows that Mr Hutchinson when referring to the future meeting “*to try to reach some mutual agreement*” had in mind an agreement of minimum commissions, potentially of 1.5% or 2.75% with a minimum fee. In other words, and to the knowledge of Mr Gass, a meeting to achieve an anti-competitive cartel. The question, however, is what Mr Martin was informed and/or understood.
59. As previously mentioned, Mr Martin’s evidence in chief concerning this meeting recollected, in some detail, what he told the meeting. He also recollected that Mr Gass referred to a fee war (noting the minute does not identify who referred to it). However, his evidence in chief was that “*the comment about Graham Hutchinson ("Graham") meeting with other agents to try to reach some mutual agreement just did not register with me*” (my underlining). He also stated:
- “Paul's [Mr Gass] comment that there was a fee war would not have concerned me at all because as far as I was aware we were full participants in the fee war and were competing at whatever commission level was necessary to win the instruction. As set out above, I had instructed Berryman's to be competitive on fees immediately after it was acquired in April 2013 and that message was re-iterated at this meeting.*”
60. No conclusion will or should be reached without considering the Direct Evidence together (as well as in the context of the other evidence). However, at this stage it is nevertheless, potentially surprising evidence. First, Mr Martin would most likely have noted and been concerned by the concept of any meeting with other local estate

agencies to reach a “*mutual agreement*” when it is his evidence that anything uncompetitive would be an anathema. Second, after all, the point was sufficiently clear to Ms Darby for it to form the substance of the minute identifying “**Current Business**”. Third, there is no minute to the effect of requiring competition as opposed to agreement. Ms Addy Q.C. contrasts that with minutes for meetings of other estate agencies attended by Mr Martin. However, whilst that is a “good spot”, I have decided it should be no more than a footnote observation because of the myriad of potential reasons for this. Nevertheless, the absence of an entry in the contemporaneous minute is a point to be borne in mind in its own right irrespective of the contrast drawn.

61. It is to be noted from the next communication that it appears Mr Hutchinson did not provide details of the intended agreement until later that day when he sent Mr Martin an email which included the following:

*“Further to our meeting today I enclose a breakdown outlining the level of sales the office has agreed each month since 2011 together with the targets that I have set us to achieve in 2014.*

*I would also mention that the aim of the meeting with the other Estate Agents in the town next month will be to drive the fee level up to 1.5% plus VAT with a minimum fee of £2,000 plus VAT being set, but we will see how that progresses?!!”* (my underlining).

62. It is accepted that if Mr Martin read the second paragraph, he would have read from the face of the communication that Mr Hutchinson intended to reach an unlawful anti-competitive agreement. This is a point Ms Addy Q.C. was careful to establish from Mr Martin during her cross-examination. I note a slightly different approach was taken in Mr Martin’s written representations on the CMA’s *section 9C* notice but also note his acceptance of knowledge during his CMA interview. I am satisfied from the evidence I heard that Mr Martin had a reasonable, lay knowledge of competition law in the light of his previous business experience as he explained to the court. I am satisfied his reading of the second paragraph would have led him to identify the proposed terms as anti-competitive. In any event he should have appreciated that natural meaning and the result of the aim if achieved.
63. Mr Martin does not dispute reading this email and it is obviously a difficult one for him to deal with in the context of questioning his knowledge of the aim of the future meeting of local estate agents. In his evidence in chief he said in addition to the quotation at paragraph 21(b)(i) above that “*It simply never entered my mind that Graham was seriously suggesting that he was going to try to agree minimum fees with other agents*” (my underlining):

*“I thought those figures were absolute nonsense; there was no prospect of us increasing sales by that amount. It did, however, demonstrate that Graham had got my central message: that I wanted them to be more productive and to get out and generate more instructions.*

*In his email Graham goes on to refer to the meeting that had been mentioned at the branch meeting earlier that day. However, my chief focus was by far and away on the figures attached and those figures coloured Graham’s email as a whole. It was just too far-fetched to believe and seemed like a continuation of the posturing from the earlier meeting”.*

64. As mentioned, the Direct Evidence must still be considered together but this too is surprising evidence. He did not say he did not read the second paragraph. He said his focus was on the first paragraph of the email but the second paragraph is so stark and

revealing that it would not be unreasonable to suppose it would have become a focal point when read.

65. Of less potential significance but of note is the fact that the first paragraph is concerned with generating more instructions and more productivity as opposed to his message of being the most competitive agency when agreeing fees and the provider of the best services.
66. During cross-examination Mr Martin sought to explain his reading of the email on the basis that the breakdown produced over-ambitious targets and this led him to assume that Mr Hutchinson had taken on board the need for a competitive policy. In addition, he explained that his reading of the use of “?!?” at the end of the second paragraph indicated that Mr Hutchinson “*could now see the foolishness*” of there being any agreement between agents. As a result, “*it never entered [Mr Martin’s] mind*” that Mr Hutchinson was in fact trying to agree minimum fees.
67. Still subject to viewing the evidence taken together, this purported explanation left the impression that he was “tying himself in knots” whilst trying to defend his position when answering Ms Addy Q.C.’s questions:
- a) First, his evidence must mean it did enter his mind that Mr Hutchinson was trying to agree minimum fees. That is what the second paragraph writes on its face and he was informing the court he had rejected that natural meaning when it entered his mind for his interpretation based upon Mr Hutchinson’s appreciation of foolishness.
  - b) Second, his first stated reason for doing so appears unrealistic. Mr Hutchinson presents vastly improved figures on the basis, as stated in the email, that he was proceeding with a further February meeting of local agents with the aim of reaching an agreement over fees by driving the fee level up to a specified percentage and setting a minimum fee. Mr Martin may consider that projected outcome to be illogical but it is the logic presented to him by Mr Hutchinson. A director disapproving of the second paragraph would normally be expected to want to ensure that Mr Hutchinson is disabused, not reach the conclusion Mr Martin did.
  - c) Third, his purported understanding of the effect of “?!?” bleeds incredibility. The punctuation refers to seeing “*how that progresses*” not to a conclusion that such an agreement will be foolish.
68. Therefore, subject to considering the Direct Evidence together, it is difficult to accept his evidence in chief that it “*never entered my mind that Graham was seriously suggesting that he was going to try to agree minimum fees with other agents*”. Further, in contrast to disabusing Mr Hutchinson, Mr Martin’s emailed response the same day reads:
- “Thank you very much for the information .. .. very bullish targets, which I admire and are impressive. Obviously attainment is a real challenge and you and the team will get whatever support is needed. Appreciate the other work with agents in BoS [Burnham on Sea] re fees ....” (my underlining).*
69. His evidence in chief to explain this was:

*“again my prime focus was on the targets Graham had proposed. Essentially my response was that you are talking nonsense, but I did not want to destroy Graham's enthusiasm because he was new to the business”.*

70. It is also difficult to accept that as a viable explanation for his appreciation of the work with the other local agents in Burnham-on-Sea *“re fees”*. Indeed, during cross-examination that explanation altered to a significant degree by introducing another element of explanation. Mr Martin continued the theme of encouragement when referring to his email in answer but added that whilst he did not want to discourage Mr Hutchinson from proceeding with the meeting with other agents in February, Mr Hutchinson's aims were *“purely aspirational”* and there was no certainty and possibly little likelihood of Mr Hutchinson achieving what he hoped to achieve. He suggested that the *“?!”* demonstrated that Mr Hutchinson did not really believe his aim would succeed. Not, as he had previously said, that it demonstrated that Mr Hutchinson *“could now see the foolishness”* of there being any agreement. To support this evidence he referred to disagreements between Berrymans and two other agencies.
71. The problem with this evidence is that it appears to acknowledge by implication that Mr Martin knew Mr Hutchinson wanted *“to drive the fee level up to 1.5% plus VAT with a minimum fee of £2,000 plus VAT being set”*, as his email had told Mr Martin on its face. It was now being suggested that Mr Martin's true position at the time of reading the email was that he let the second paragraph pass and did not discourage the meeting despite its aim because he did not conceive the meeting would succeed in producing the identified anti-competitive agreement.
72. That is a significant change from his *“it never entered my mind”* defence raised within the context of him advocating competition. It is fair to observe that the *“purely aspirational”* explanation was not new. It had been referred to in a letter from his solicitors in response to the notice served under **section 9(c) of the CDDA** and in his CMA interview. However, it was not adopted in the evidence in opposition nor in closing submissions. Whilst it was part of his evidence during cross-examination, it is not his defence and the inconsistency undermines his credibility. At no time did he adopt this evidence as his superseding defence.
73. A response was received from Mr Hutchinson the same day. Mr Martin relies on its content on the basis that it effectively acknowledges his bullishness in respect of the projected targets and does not *“say anything more about meetings with agents in Burnham on Sea”*. However, in the light of the clear statement about the aim of the meeting, the absence of any indication that the meeting would not take place, Mr Martin's previous appreciation of Mr Hutchinson's work with the other agents to fix an agreement and Mr Martin's evidence under cross-examination that he did not discourage the meeting proceeding, that is surprising evidence and a surprising conclusion.
74. It is also fair to note that Mr Martin in his evidence in chief accepted *“with the benefit of hindsight”* that his response was poor (see also Mr Martin's written representations on the CMA's **section 9C** notice). He provided five reasons/arguments to explain why that was so before setting out four reasons to support a statement that an agents' agreement *“would make no sense”*. Whilst I have borne them in mind, the problem for him is that his evidence concerning what happened at the time is unsatisfactory for

the reasons considered above (subject to addressing the Direct Evidence together). My assessment and finding is that the evidence dealing with his acceptance of a poor response is an example of him painting a picture of what must have happened based upon what “*I knew I knew*” rather than concentrating upon what occurred.

75. There was a telephone call between Mr Martin and Mr Hutchinson on 28 January 2014 but nothing turned on that. On 4 February 2020 Mr Hutchinson sent the following email to Mr Martin:

*Hi Mike, Further to our recent conversation I just wanted to send you a quick email to confirm that I would be happy to put together ‘lunch/work group’ to discuss the ways in which we could look to expand business opportunities through our personal and business contacts. I have spoken to Paul about it and he is also happy for this to happen, but we are both mindful I will need to be careful as to how much it involves! Perhaps we could have a chat about the way forward with this when you have a moment.*

*I would mention whilst writing we had a meeting with the other agents today and have managed to broker an agreement that sole agency fees will start from 1.5% plus VAT with a minimum fee for properties upto £100,000 set at £1,500 plus VAT with a minimum fee for properties over £100,000 being £2,000 plus VAT. We are obviously hopeful that this will last, but it at least has been agreed with all the agents so will hopefully now start to increase our revenue (my underlining)”.*

76. Mr Martin’s evidence was that he did not read it. He was extremely busy during the beginning of the week with a specific problem concerning Quadron Services Limited and on Thursday 6 February was at his holiday home in Devon without access to his emails. He remembers being there because of a reference to a haircut in his diary. However, the email must have been discussed to the extent (at least) that an email was sent on 6 February by Ms Darby to Mr Hutchinson at his request:

*“Hi Graham  
Many thanks for your email to Mike below. Mike has asked me to arrange a meeting with you and Paul if possible. Mike would be free:-  
Tuesday 11th Feb – 2.30pm onwards  
Wednesday 12th Feb – 2pm onwards  
Thursday 13th  
Would any of these dates be convenient for you both?”.*

77. Whilst there can be no doubt, therefore, that Mr Martin spoke to Ms Darby on or before 6 February about or in consequence of the 4 February email, neither can remember that conversation. Therefore, neither can state whether its second paragraph was mentioned and it is possible that the conversation could have been limited to a telephone call from Ms Darby informing Mr Martin that dates were required for a meeting requested by Mr Hutchinson without more or only with reference to the first paragraph. There are, of course, other possibilities. Whilst there was a subsequent meeting, Mr Martin’s recollection is that it was solely concerned with budgetary matters and no reference was made to an agreement with local agents.
78. However, Mr Martin does not dispute the email reached his inbox, he does not assert that it may have been deleted and he provides no reason why he would not have read it on his return to the office (if he had not read it before) whether as a matter of general practise or because a meeting had been arranged by Ms Darby pursuant to its

content. Both reasons appear probable. If he had read it or otherwise knew of its content, he would have known of the cartel agreement.

79. In support of the defence that he had no knowledge of any such agreement and that he would have prevented Berrymans' participation if he had, Mr Martin refers to the fact that during this period, specifically on 5 February 2014, Ms Darby booked a training course initiated by him for Berrymans' staff (and others) which included the topic "*How to get higher fees*". It is noted but is not of any significant weight.
80. That was the same day as the email from Mr Hutchinson to the Berrymans' staff (Mr Gass, Ms Withecombe, Ms Stephens, Mr Francis, Mr Jowett and Ms Martin) informing them of the minimum fees and the terms of the agreement. They were to let him or Mr Gass know if they had any questions. As stated, Mr Martin was not included in this email and says he did not see it.
81. The evidence before me establishes, as found within the CMA Decision, that the agreement was implemented subject to "policing" issues which meant that an agent would "police" its performance and investigate any perceived breaches. For example, there is an email sent on 28 April 2014 from Saxons PS Limited to (amongst others) Mr Hutchinson:

*"Hi Guys*

*I believe its time for another meeting, I am about to hand over to the next agent to police, there are issues regarding the standard 1.5% and everything else we agreed. I believe a lot of you would share my opinion??".*

82. The next piece of Direct Evidence is the minute of a meeting between Mr Martin and Mr Gass on 15 May 2014. Minuted by Ms Darby under the heading "**Current Business**" is the following record of their discussions:

*"Pipeline £124k*

*Sales slow in the beginning of May.*

*GB ahead on instruction stats.*

*Meeting held with other Agents last week – not all Agents holding with the agreed 1.5% fee.*

*John Webb – Wrington – PG will speak to him again" (my underlining).*

83. Mr Martin says he did not see this minute until after the CMA's inspection. In chief he described the meeting as "*brief*" and with reference to the words underlined above said:

*"The minutes record a comment that "meeting held with other Agents last week - not all Agents holding with the agreed 1.5% fee". I now know that this relates to the agreement Paul and Graham had reached with other agents in Burnham on Sea; however, I did not know that at the time. At the time I simply did not see any significance in this comment and it seemed like Paul trying to manage my expectations. For all I knew, Paul was referring to a disagreement between agents over the sharing of the fee for a co-marketed house ...*

[and after setting out a context of many significant matters having occurred since the 22 January meeting including Mr Plaister starting a competitive business added:]

*I therefore did not make any connection between this comment by Paul and what had been said at the meeting on 22 January 2014".*

84. During cross-examination Mr Martin asked the court to put itself in his shoes having not seen the minutes of the January meeting, based upon his evidence concerning the other pieces of Direct Evidence, the fact there was a new budget and business was the best it had been and his all-important belief in competition which had been conveyed to Berrymans. It is this context, he said, which explains why he did not see any significance in Mr Gass's reference to agents not holding to a 1.5% fee. He could have been talking about any individual house sale, joint instructions or other work concerning lettings or agricultural property.
85. The examples he chose of alternative meaning can be criticised, as Ms Addy Q.C. made clear. It is also difficult to sustain or correlate the suggestions of what he thought or may have thought Mr Gass was referring to with the understanding Ms Darby had of the conversation. Her minute summarises the conversation as concerning breaches of an agreement between local agents by some of those agents ("*not all*"). That would not refer to an individual house sale. Even if it concerned "joint instructions", it would be referring to an agreement intended to be binding upon all those local agents. It would not be unreasonable to expect Mr Martin to have enquired what this meant if he did not otherwise know.
86. However, the real point being made by Mr Martin is simply that he has no recollection of being told about a 1.5% agreed fee which involved a minimum commission agreement. The question, therefore, is whether this evidence adds to or detracts from the CMA's claim or his defence concerning the Direct Evidence when viewed as one in the overall context of all the evidence.
87. Before reaching that decision, I will deal with subsequent events to the extent I consider it necessary. The matters referred to will be covered briefly when there is no suggestion of evidence identifying Mr Martin's knowledge or involvement. As with all the evidence, I will only set out the parts required for my judgment and omissions are to be understood accordingly.

#### **F4) Subsequent Events**

88. The agreement and its policing continued to be implemented. For example, Mr Hutchinson in a round robin email to local agents sent on 11 September 2014, referred to a meeting that week and to everyone being in agreement, the arrangement "*generally working*" and to "*the benefits*" being seen. The email identified who would be the "policeman" for each month through to February. Problems arose from time to time but an email from Mr Hutchinson sent to various local agents on 6 June 2015 shows what ultimately occurred and his proposal to renew the agreement which had ended around the beginning of the year:

*"We are now in June and about six months on since our 'gentlemen's agreement' fell apart. I am pretty sure that in those six months we have all seen our commission levels drop and consequently our incomes fall. Personally, I don't believe any of us have seen our market share increase significantly during this time and if it has, certainly not by enough to make up for the reduction of fees! I therefore wanted to make the suggestion that we draw a line under what has happened so far this year and for us all to get around the table again and try and put an agreement back in place!! I also think that at the same time we could potentially get the Burnham Association up and running, which again, I am sure would be of benefit to us all".*

89. The CMA's inspections of various local agents' premises, including Berryman's, was on 10 December 2015. I have already dealt with the advice Berryman's received from Michelmores when addressing Mr Martin's evidence as a witness (see paragraph 26 above). Even assuming he had no relevant knowledge as at 10 December 2015, the evidence establishes that upon reading Mr Phelps's email sent on 15 December 2015 he was aware that there existed documentation identifying the precise terms of the agreement between local agents concerning the minimum commission, a minimum fee and policing. As Mr Phelps put it: "*The documentation suggests that Gary Berryman, Abbott & Frost, Saxons, CJ Hole, West Coast Properties and Greenslade Taylor Hunt have agreed to participate in a price fixing cartel*".
90. Steps were taken in response to the inspection and to implement advice received from Michelmores. Ms Addy Q.C. identified several factual errors in Mr Martin's affidavit at paragraph 104 where he detailed them. She may be right to put to Mr Martin that the errors and failure to attribute at least some of the steps to that advice was intentional for the purpose of placing Mr Martin in a better light. However, it could equally have resulted from carelessness and I have decided to ignore this feature of the case for the purpose of my decision. Instead, I accept that, irrespective of knowledge, Berryman's, with Mr Martin as a director, took some appropriate steps following the inspection including the obtaining of legal advice which resulted in several of them.
91. I am concerned by the fact that despite Mr Martin's knowledge from about 15 December 2015, he did not cause Berryman's or its parent (as appropriate according to the employment contract) then to begin disciplinary action against Mr Gass and Mr Hutchinson. Instead both continued to be employed and Mr Gass became a consultant for The Property Group (2010) Ltd in April 2016, after he resigned as an employee. Subsequently there were disciplinary proceedings against Mr Hutchinson and in November 2016 he received a final warning and a £1,000 fine. The disciplinary proceedings against Mr Gass were delayed until November 2016. It is also surprising that his resulting interview was conducted by Mr Martin without anyone other than Mr Gass in attendance and without any notes being taken. Ms Darby did not attend despite not only her usual role as record/minute taker but also her new human resources role which she accepted would have normally resulted in her involvement and attendance.
92. Ms Addy Q.C. during cross-examination rightly probed those facts from the basis that Mr Martin was stymied in his dealings with Mr Gass and Mr Hutchinson because he had known and approved the cartel agreement from the 22 January 2014 meeting. However, I have decided to remain neutral upon this aspect of the evidence. Whilst it casts a shadow, it is not sufficiently substantive for such a serious, positive conclusion to be drawn. The position was undoubtedly chaotic after the inspection and throughout Berryman's trading until Mr Martin stopped working, stated by him to be before July 2018, and resigned as a director of the Warne Investment group companies on 8 October 2018. His dealings with Mr Hutchinson and Mr Gass could have been based upon a variety of different factors including Mr Martin's stated opinion that Mr Gass was essential to the Berryman's business. Therefore, I will not take the nevertheless, skilful probing or the underlying allegation into consideration.
93. I should add for the avoidance of doubt that I have taken into consideration the various transcripts of interviews conducted by the CMA and the correspondence from



Michelmores on behalf of Berrymans and Mr Martin to which I was referred. It is unnecessary, however, to repeat their content.

**G) Misconduct?**

94. Mr Palmer Q.C.'s submissions (see the summary at paragraph 35 above) present the strongest features of Mr Martin's evidence for the purposes of his defence to the claim of misconduct. The background of previous business practice, the repeated emphasis upon his belief in competition and his decision to defend notwithstanding retirement all emphasise the foundations of a defence based upon good character and a logical explanation for him failing to know of the unlawful agreement notwithstanding the Direct Evidence.
95. Good character cannot by itself provide a defence but it is evidence to be taken into account in Mr Martin's favour. It supports his credibility and it may mean he is less likely than otherwise to have allowed Berrymans to be involved in an anti-competitive agreement. It is also to be borne in mind that he chose to give evidence which would result in his cross-examination.
96. However, I am satisfied from the evidence when read and heard together that the Direct Evidence establishes his knowledge and involvement both on its face and having had his evidence to the contrary tested. The many matters identified above as potentially undermining his defence when viewed in the context of each individual piece of the Direct Evidence, lead to that conclusion when viewed together and with all the evidence. I make the following findings of fact on the balance of probability in the light of the matters above including my assessment of the witnesses:
  - a) Mr Martin was aware from the meeting of 22 January 2014 that local estate agencies had met with Berrymans to try to reach a mutual agreement to resolve the existing "*fee war*" and that there would be a "*further*" meeting in February to do so. This is a fact Ms Darby understood from the meeting and Mr Martin would have too. Its importance as a topic for the meeting is evidenced by the fact that it was minuted as "***Current Business***". Indeed, Mr Martin was more likely to have picked up on the importance of this information because of his avowed competitive belief and his lay knowledge of anti-competition law.
  - b) That finding is sustained by the subsequent correspondence that day. The second paragraph of Mr Hutchinson's first email expressly informed Mr Martin of the fee level and minimum fee being aimed for by agreement with the local estate agencies. His explanation that he concentrated upon the first paragraph must be rejected when the second paragraph is so stark and revealing. His reliance upon punctuation ("?!") as an indication of recognized foolishness is incredible. He tied himself in knots trying to explain and justify his evidence during cross-examination (see paragraph 67 above). His statement that "*it never entered my mind*" that Mr Hutchinson was seriously suggesting a minimum fee agreement must be rejected.

- c) Mr Martin's email in answer sustains that view of the evidence. It expresses "*appreciation*" not disapproval or even a hint that Mr Hutchinson's views on the potential results of an anticompetitive agreement were misconceived. Further, his evidence is to be treated as unreliable when in cross-examination he sought to explain his position from a new and different footing. Namely, that he rejected the possibility of an agreement because it was inconceivable that its aims would be achieved. That is to be contrasted with the "*it never entered my mind*" defence. The new evidence was that it entered his mind and he accepted he did not discourage Mr Hutchinson's attendance at the meeting because the disclosed aims were "*purely aspirational*". In other words, Mr Martin knew the aim was an anti-competitive agreement but it did not matter to him because the meeting would not vote for it.
- d) His change in evidence also produced a new explanation for the punctuation, "?!!" (see paragraph 70 above). It was to show that Mr Hutchinson did not really believe his aim would succeed. The inconsistency is blatant and Mr Hutchinson's email response does not assist Mr Martin for the reason identified in paragraph 73.
- e) Mr Martin whether in evidence or through the closing submissions did not ask me to replace the "*it never entered my mind*" defence with an admission that he knew of the intended aim of the meeting, of the intended agreement but did not expect it to succeed. Whether I would have accepted such a "defence" had he done so, is not a question before me. As it is, that inconsistent evidence undermines his credibility. I find Mr Martin also knew the aim of the meeting concerning the minimum level of fees and the creation of a minimum fee as stated in Mr Hutchinson's 22 January 2014 email. I have not been persuaded otherwise by the matters set out in the evidence in chief to justify the alternative conclusion (for example as referred to at paragraph 28 above).
- f) There are many reasons for concluding that Mr Martin would have read the 4 February 2014 email (see paragraph 78 above). If instead, he did not, the position would be that he had knowledge of the February meeting and of its aim but decided to turn a blind eye by making no further enquiries and letting matters progress without intervention within Berrymans. It would mean, for example, that he did not communicate with Mr Hutchinson after the 22 January email exchange to tell him not to attend the meeting or, at least, not to enter into any agreement. He also did not, as he should have done, inform Mr Gass and the Berrymans' sales team after the 22 January email exchange that Berrymans would not enter into any such agreement and they must not implement one should the other estate agencies travel down that road.
- g) However, I find that he would have read the email. The existence of the email and the matters identified at paragraph 78 above combined with the fact that the earlier Direct Evidence has undermined Mr Martin's reliability lead me to that decision. I am particularly influenced by the fact that on the balance of probability he would have wanted to read it to know what the meeting arranged by Ms Darby would cover and why it was needed.
- h) It is also to be borne in mind that he knew of the February meeting and would have wanted to know what happened. It is probable he would have wanted to

read all communications from Mr Hutchinson, which were unusual, to see whether there was mention of that meeting. Once the email was read, Mr Martin would have known what had been agreed. This decision is also consistent with my findings below concerning the 15 May 2014 meeting. Including his evidence that he did not enquire about the meaning of Mr Gass's reference (as minuted) to a meeting with other local agents and to not all of them keeping to "*the agreed 1.5% fee*". The natural explanation for that is he understood it.

- i) The minute of "***Current Business***" on 15 May 2014 refers expressly to a meeting held by agents the previous week and to agents not holding to an agreement. Mr Martin's evidence asks the court to accept that he made no enquiry of the nature of that meeting or agreement. That is highly unlikely as evidence on its own when Ms Darby identified the meeting and agreement as significant enough to minute. Further such evidence is tainted by his lack of reliability and credibility. Further, this defence must be rejected in the light of the knowledge found above. He would have known the agreement referred to the one he had been told about in early February, which followed the information provided to him on 22 January 2014. The reason why he did not ask what Mr Gass referred to is that he knew. This piece of the Direct Evidence adds to the CMA's claim. Mr Martin knew the agreement was effective, subject to breaches.
  - j) It can also be noted that it would be surprising if Mr Gass had even raised the topic (which from his knowledge had to refer to the anti-competitive agreement) if, as Mr Martin says, it had been made clear to everyone that there should be no agreement and the competition created by a fee war should continue. On the balance of probability, he would only have raised it because he knew Mr Martin had been informed about the agreement.
97. In reaching my decision I have taken into consideration Mr Martin's argument that the anti-competitive agreement made no economic sense. There is no expert evidence to that effect or accounts referred to and there is evidence to the fact that Berryman's business was seen to be particularly productive after the agreement was made. In addition, there is evidence that the agents considered that the agreement worked. However, none of that is really to the point since it is argued by Mr Martin as his belief. The real problem with his "belief" is that whether it was held or not, the Direct Evidence establishes the findings of fact set out above.
98. Those findings of fact lead to the inevitable decision that his knowledge means his failure to inform the board and/or to prevent the agreement being made and performed amounts to misconduct. He breached his duties owed to Berryman's as a director and his duties as a director of all three companies. Directors with his knowledge should take all reasonable steps possible to ensure a company does not enter into an anti-competitive agreement in breach of *the Competition Act 1998*. Mr Martin did not.

## **H) Unfit To Be Concerned In Management?**

99. The misconduct identified fell below the standards of probity and competence appropriate for persons fit to be directors of companies. His conduct makes him unfit to be concerned in the management of a company. The Second Condition is satisfied. Mr Martin had information which ought to have caused him to report this matter to the board and to take all possible steps to prevent Mr Hutchinson and/or Mr Gass involving Berrymans in the negotiations, formation and implementation of the anti-competitive agreement. Whether this required their dismissal or less draconian steps to ensure they understood and would comply with the prohibition would have been a matter for the judgment of the board of directors.
100. Mr Martin took no such steps. He kept it to himself and instead allowed Mr Hutchinson and/or Mr Gass to proceed with the result that Berrymans entered and performed the agreement. He took no steps to prevent or end Berrymans' participation. In my judgment there are no extenuating circumstances to alter this conclusion. The matters of misconduct are serious. Whilst Mr Martin was not directly involved in the cartel activity, for example he did not attend any meetings and was not concerned with day to day sales, he bears responsibility in his capacity as a director for Berrymans' involvement. In particular, he allowed Mr Hutchinson to attend the 4 February meeting. That enabled Berrymans to reach agreement with the local agents. Next, when informed of that agreement he allowed Berrymans to participate in and perform it. Mr Martin's conduct as a director contributed to the breach of competition law.
101. That finding means I need not decide whether Mr Martin had reasonable grounds to suspect that the conduct of Berrymans constituted the breach of competition law and that he took no steps to prevent it. Nor need I decide that he ought to have known that the conduct constituted the breach even if he did not know of it. Plainly the former would have applied but for the fact that his conduct contributed to the breach of competition law. For the avoidance of doubt, I should state that I have not had regard to the matters mentioned in *Schedule 1 to the CDDA*,

## **I) Disqualification?**

### **I1) Traditional Construction**

102. If “*must*” means “must” within *section 9A of the CDDA* (“the Traditional Construction”), there must be a disqualification order once I have decided that the matters of misconduct justify a finding of unfitness.

### **I2) The HRA/Article 8 Submission**

103. The submission to the contrary based upon the use of the word “*must*” may be summarised as follows:

- a) **Section 3 of the HRA** requires legislation to “*be read and given effect in a way which is compatible*” with the **ECHR** “*so far as it is possible to do so*”. In addition, **section 6 of the HRA** makes it unlawful for a public authority, which includes the courts, to act incompatibly with a Convention right unless it cannot act differently because of the provisions of primary legislation or effect/enforcement is being given to primary legislation provisions which cannot be read or be given effect in a way which is compatible.
- b) A disqualification order is an infringement of **Article 8(1) of the ECHR** because it is an interference with the right to respect for private life, which encompasses a person’s business and professional life as well as reputation (see *Niemietz v Germany* (1993) 16 EHRR 97 at [29]; *Sidabras v Lithuania* (2006) 42 EHRR 104). Therefore, it will be incompatible with a Convention right unless it is a restriction permitted by **Article 8(2) of the ECHR**. It establishes a “qualified right” permitting restrictions in accordance with the law which implement permitted, legitimate aims when the restriction is necessary and proportionate.
- c) Although a disqualification order will be in accordance with this jurisdiction’s law and will be in the interests of a legitimate objective, it will not always be necessary or proportionate to make such an order as in the circumstances of this case. As a result, the provisions of **section 9A of the CDDA**, and **section 6**, can and must be read to achieve compatibility with **Article 8** by the inclusion of a “necessary and proportional” test.
- d) This will produce compliance by ensuring that a disqualification order will not be made if it will not strike a fair balance between the rights of the individual and the interests of the community which the legislative objective addresses. The wording proposed on behalf of Mr Martin (see paragraph 16 above) does so and makes **section 9A of the CDDA** compatible.
- e) That construction applies the principles laid down by the Supreme Court, which must be followed as precedent not the Traditional Construction applied to the similar wording of **section 6 of the CDDA** which does not address **section 3 of the HRA** or apply those principles. Those decisions include *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167, *R (Quila) v Secretary of State for the Home Department* [2012] 1 AC 621, *Bank Mellat v HM Treasury (No. 2)*, [2013] UKSC 39, [2014] AC 700 and *R v Waya*, [2012] KSC 51, [2013] 1 AC 294.
- f) In this case a disqualification order would be disproportionate (subject to the findings of fact) and should not be made because of: Mr Martin’s lack of involvement in and/or knowledge of the infringement; previous good character and his record as a responsible director both before and after the infringing behaviour was discovered; his efforts to cooperate with the CMA including his willingness to apply for leniency (as, properly advised, he would have done); the need to treat different cases arising from the same events fairly and consistently; the consequences of imposing a CDO on Mr Martin at the present time, including the impact on his reputation; and the extent of the public interest in deterring breaches of competition law.

### **I3) The Flaw in the Submission**

104. Those submissions start from an incorrect premise as explained at paragraph 17 above. Mr Palmer Q.C. submitted that the existence of the right to apply for leave to act is to be implied into the submissions. However, it is not simply an omission of reference, it is a failure to take into consideration when addressing the construction of the statutory provision the statutory definition of a disqualification order (i.e. subject to leave) and the overall statutory scheme including *section 17*. A submission of construction relying upon *section 3 of the HRA* cannot succeed if the full terms of the statute and its scheme are not addressed.
105. If not for *section 6 of the HRA* and the need to apply *section 3 of the HRA* in any event, that would be sufficient reason to reject the submission because of the importance of disqualification being subject to leave when addressing proportionality. This is illustrated by the fact that when asked what was disproportionate when rights of the individual would be addressed on an application for leave, Mr Palmer Q.C. could only identify two matters. First, that the defendant would have to commit resources to the application. Second, it would occur after an order was made and the order itself would be disproportionate because of its adverse effect upon a defendant's reputation.
106. The weight of those matters needs to be balanced against the importance in modern economic life of public confidence in limited companies and the use of regulatory mechanisms to ensure respect for directors' duties, as recognised by the European Court of Human Rights (see *DC, HS and AD v United Kingdom* [2000] BCC 710 at 717, or in *WGS and MSLS v United Kingdom* [2000] BCC 719 at 726 and noting also *Fayed v United Kingdom*, Application No 17101/90, 15 May 1992, unreported but see the paragraph quoted in **Mithani: Directors' Disqualification**, Division VIII, Chapter 2C, [343A]).
107. Those legitimate aims justifying an *Article 8(2)* restriction both in terms of necessity and proportionality lead to the inevitable conclusion that the two matters, fall back prejudices, are insufficient to sustain a challenge to the Traditional Construction:
  - a) As to resources, an applicant for permission when addressing the policy of protection for the public must normally commit resources for the purposes of: (i) identifying the findings of fact which resulted in disqualification; (ii) satisfying the court (potentially but not necessarily by proposing safeguards) that the removal of public protection through permission will not place the public at risk; and (iii) convincing the court that the policies of deterrence and/or maintenance/improvement of standards will not be damaged, at least not to an extent justifying the refusal of permission.
  - b) However, as Mr Palmer Q.C. accepted, those resources would still have to be committed to deal with the same matters if the proportionality exercise is to be carried out before a disqualification order can be made. There is no doubt that proportionality would have to address risk and the policies of deterrence and/or maintenance/improvement of standards. Not only does the argument that an application for permission is disproportionate because of the resources

it involves not stand scrutiny, therefore, but it can be argued that there may be an unnecessary “front loading” of resources if Mr Palmer Q.C.’s construction is applied to the detriment of defendant’s with meritorious defences.

- c) As to reputation, although permission to act can only be given if an order is made, the application for leave can be made without delay at the time of the order. For example, when the period of disqualification is being addressed. Indeed, original authority advocated this course unless future events dictated the need for leave (see *Re TLL Realisations Ltd* [2000] 2 BCLC 223, [235] per Judge LJ). In any event, and most importantly, under the Traditional Construction the impact on reputation flows from the findings of fact and the decision of unfit conduct not from the mandatory requirement that an order will follow. Indeed, it may be noted, perhaps ironically, that it might well be argued that there would be more impact from the order if disqualification required an additional step determining proportionality.

#### **I4) Ignoring The Flaw**

108. Identification of the flaw also points to a road of explanation for the fact that Parliament chose the “*shall/must*” route subject to leave for **sections 6 and 9A of the CDDA** rather than confer a Convention right, proportionality test at that stage:

- a) To achieve a fair balance between the rights of the individual and the interests of the community which the legislative objective addresses (i.e. protection, deterrent and maintenance/improvement of standards) it will be necessary for the court to consider (amongst other matters) in respect of existing or future companies whether there will be a risk to the public concerning future conduct similar to the misconduct identified if an order is not made or is made with permission to act.
- b) For example, if the **section 6 CDDA** misconduct was wrongful trading, whether that company is financially sound, its existing management and practices and/or whether there are others who will ensure continued compliance with the norms of corporate governance. If the misconduct involved competition law, whether that company is also infringing or whether there are safeguards in place to ensure infringement will not occur.
- c) As mentioned at paragraph 107(a) above, those are precisely the types of factor addressed when deciding whether to grant leave. Yet it will often (if not normally) be wholly impractical, unnecessarily burdensome for defendants with meritorious defences and potentially impossible for the claimant and subsequently the court to be able to address those matters before making a disqualification order.
- d) When this was raised with Mr Palmer Q.C., he rightly accepted that such matters would need to be investigated before a disqualification order could be made if his submissions upon construction were accepted. In this case, Mr Martin expressed his intention never to become a director. However, not only is that unenforceable, there would be no-one to police any undertaking should

one have been offered. In any event the wider picture must be addressed because other defendants will want to be directors.

- e) If so, they will need to provide all the financial, compliance and practical information required of each company to establish whether there is or might be risk to the public. The claimant will have to investigate this and, if appropriate, provide evidence to the contrary and/or consider proposals to ensure the risk does not exist or will not exist in order to be able to properly address this topic within the balancing exercise.
- f) On Mr Palmer Q.C.'s construction, all this would have to be done before and during the trial to achieve proportionality. It may also be observed that this would raise interesting questions concerning burden of proof and/or the duty upon the defendant to provide information and/or disclosure. It would be often (if not normally) impractical.

109. Therefore, whilst Parliament could have required all claims to deal with all matters before a decision is made, it is understandable that it did not. Instead it decided to define the mandatory disqualification order as being subject to leave and to provide a method for obtaining leave under *section 17 of the CDDA* when all the issues relevant to proportionality would be addressed. For the reasons explained above, this was the logical and practical approach. There is no merit in the suggestion that this is not an objective and justified interference with *Article 8(1)* rights and/or that it lacks a rational connection between the objective of the legislation and the restriction and/or that the means are more than is necessary to achieve the statutory object.

#### **I4) Conclusion**

110. Based upon the matters above and noting the learning in *Mithani "Disqualification of Directors"* within Division VIII, Chapters 1 and 2:

- a) Subject to considering the application of *sections 3 and 6 of the HRA*, the language of *section 9A of the CDDA*, as with the equivalent wording in *section 6*, is clear and unambiguous. It is to be read with *section 1(1) of the CDDA*, as amended, which when defining the term "disqualification order" expressly distinguishes the "shall" requirement for *sections 6 and 9A of the CDDA* with the other provisions which confer a discretionary power to make a disqualification order. The word "must" in *section 9A* and "shall" in *section 1(1)* (and *section 6*) have their mandatory meaning. That is in accordance with the statutory scheme, including *section 17*. It is a fair and purposive construction giving effect to legislative intention and policy. It is the Traditional Construction.
- b) *Article 8* applies to *section 9A of the CDDA* because a disqualification order is an interference with a person's business and professional life as well as reputation and, therefore, involves an interference with the right to respect for private life. *Sections 3 and 6 of the HRA* are to be applied and *section 9A of the CDDA* must "be read and given effect in a way which is



compatible” with the ECHR “so far as it is possible to do so”. Lord Nicholls explained in *Ghaidan v Mendoza* (above):

*“... the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation.”*

- c) However, **Article 8** is a qualified right and **Article 8(2)** specifies legitimate aims (interests of national security, public safety, the economic well-being of the country, prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others) capable of justifying its restriction. The restrictions to implement those aims must be “in accordance with law and ... necessary in a democratic society ...”.
- d) Although *the ECHR* does not refer to “proportionality”, the principle is applied when the court exercises its value judgment to decide whether the legislative restriction to an **Article 8** right is “necessary” (see *R (Quila) v Secretary of State for the Home Department* above at [46]). There “is a general international understanding as to the matters which should be considered where a question is raised as to whether an interference with a fundamental right is proportionate” (*R v Shayler* [2003] 1 AC 247, at [60]). In *Bank Mellat v HM Treasury (No2)* (above), Lord Reed identified four criteria for the proportionality test, although they may have to be modified in the particular context of a case (see *R (Nicklinson) v Ministry of Justice* [2014] UKSC 39, [2015] AC 657 at [171]):
- “(i) whether the objective of the measure is sufficiently important to justify the limitation of a protected right; (ii) whether the measure is rationally connected to the objective; (iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (iv) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter”.*
- e) The aims of disqualification under **sections 6 and 9A of the CDDA** to justify its **Article 8** restriction are: (i) to protect the public from misconduct, (ii) to provide a deterrence both specifically for the individual concerned and generally for all who act as directors and (iii) to maintain/improve the standards of corporate management.
- f) It is established law that each is a legitimate aim capable of justifying the restriction a disqualification order imposes (see *DC, HS and AD v United Kingdom* [2000] BCC 710 at 717, or in *WGS and MSLS v United Kingdom* [2000] BCC 719 at 726). Subject to the issue of proportionality, the CDDA’s use of a disqualification order to achieve those legitimate aims is lawful and necessary.
- g) As to proportionality, Parliament enjoys a wide margin of appreciation when choosing the means of enforcement for its aims and when ascertaining whether

its consequences are justified in the general interest of the public in achieving those aims (see *R v Wya* above at [12]). It is to be noted that Parliament when amending *section 1(1)* and inserting *section 9A of the CDDA* knew that “*shall*” in *section 6 of the CDDA* was the subject of the Traditional Construction and did not consider it necessary for the purposes of compliance with the *HRA* to add any wording to alter that construction.

- h) Applying the Traditional Construction, proportionality is achieved first, by the exercise of the court’s discretion when deciding the period of disqualification (subject to any statutory minimum and maximum periods, although there is no minimum period for *section 9A*). Second, by the *CDDA* conferring power upon the court to grant leave to act.
- i) An application for leave will enable the court to carry out a fair balancing exercise between the *Article 8* rights of the individual and achieving the aims of *sections 6 and 8 of the CDDA* for the benefit of the general public. This is evident from the matters considered on an application for leave (see paragraph 107(a) above), which are the same matters as those required to achieve the fair balance of proportionality in an individual case. This is not a case where words need to be read into the statute to give effect to Convention rights as occurred, for example, in *R v Wya* (above).
- j) Not only is there no merit in the objection that this exercise should occur before a disqualification order is made (see paragraphs 105-108 above) but the proposed alternative statutory construction/scheme would be impractical for normal cases (see paragraphs 108-109 above). This is a case where the words proposed would simply not work in a practical sense, which explains Parliament’s approach and the resulting Traditional Construction.
- k) The mandatory provisions of *sections 6 and 9A of the CDDA* combined with the right to apply for permission at the time of the disqualification order or later mean the infringement of *Article 8* rights resulting from a disqualification order is lawful and necessary.

## **J) Decision**

111. My decision, therefore, is that Mr Martin must be disqualified. I should make clear, however, that I would have considered that a proportionate decision based on the findings of fact even had Mr Palmer Q.C’s submission of construction had merit

## **K) Length of Disqualification**

112. *Section 9A* was inserted into the existing framework of *the CDDA*. Although there is no minimum period, the maximum 15 year period of disqualification is in line with *sections 6 and 8*. The principles for deciding length of disqualification established in

respect of those provisions apply but in and subject to the context of **section 9A**. Therefore, in exercising my discretion I will apply the three brackets identified by Dillon LJ in **Re Sevenoaks Stationers (Retail) Ltd** [1991] Ch. 164 at p 174 E-G. I will take into consideration the guidance of Lord Woolf MR in **Re Westmid Packing Services Ltd, Secretary of State for Trade and Industry v Griffiths** [1998] 2 All ER 124 @ 132 – 135. Overall, a broad-brush approach is to be taken and the jurisdiction concerning period is to be exercised in a summary manner.

113. There is an issue arising from Ms Addy Q.C.’s submission that account may also be taken of Mr Martin’s conduct during the proceedings, applying the decision of **Secretary of State for Trade and Industry v Reynard** [2002] BCC 813, per Mummery LJ, with whom the court agreed, at [10], [16], [22] and [26]. The Court of Appeal decided that conduct was part of a “*director’s conduct*” within a claim brought under **section 6 CDDA**. Lord Justice Mummery, with whom the other Judges agreed, placed emphasis upon the fact that **subsection (2)** expressly provided that “*references to a person’s conduct as a director of any company or companies include, where that company or any of those companies has become insolvent, that person’s conduct in relation to any matter connected with or arising out of the insolvency of that company*” (before its amendment by the **Small Business, Enterprise and Employment Act 2015**). He concluded “*s. 6(2) is wide enough to include in the expression ‘conduct of a person as a director’ making him unfit his conduct in the proceedings taken against him for a disqualification order*” (Mummery LJ at [10]).
114. It is accepted by Mr Palmer Q.C. that conduct during proceedings may be relevant when addressing mitigation but he submits it is wrong in law to take it into consideration when addressing the period of disqualification resulting from the misconduct. That is because conduct during proceedings is not conduct “*as a director*”. He submits I am not bound by the Court of Appeal’s decision because **section 9A of the CDDA** does not include the wording of **section 6(2) of the CDDA** before its amendment.
115. I have decided this is not the case to resolve those differing submissions. First, because the legislative history would require further investigation. Second, because it is unnecessary to do so. Even assuming Ms Addy Q.C.’s submission is correct, I do not consider it right in this case to consider Mr Martin’s conduct within the claim

outside of mitigation. That is based on my assessment of his conduct, that there are potential false memory issues here and that there is a balance between allowing someone to defend a case without fear of penalty, which is right to apply to this case.

116. Turning to the bracket to be applied to the misconduct found: There is an argument that it should be the top bracket bearing in mind the matters summarised in the first paragraph of my judgment. In some cases that may be right because of the importance of fair competition and the seriousness of breaches of competition law. However, I agree with the submission of Ms Addy Q.C. on behalf of the CMA that this is a middle bracket, serious case.
117. That reflects the findings of knowledge (see paragraph 96 above) and Mr Martin's responsibility as a director for the actions of Berrymans. However, it also takes into consideration that he was not at the forefront of the organisation and implementation of the cartel even though, which is important, he could and should have taken steps to stop it.
118. I note that the CMA's *s9C CDDA* Notice dated 7 September 2018 indicates 3 years as an appropriate period with a potential discount of 6 months if a satisfactory undertaking is offered. I have read the terms of the undertaking proposed by the CMA. I also note that others seriously involved with the cartel have had undertakings in the lower bracket accepted by the CMA. There is a feature that these are consensual undertakings and the length of the undertakings will have depended upon individual circumstances. Equally that Mr Martin's conduct is plainly different. Nevertheless, they are relevant considerations. The latter also raises the issue whether principles of fairness and consistency should cause me to reduce the appropriate period to the lower bracket.
119. Whilst it is right to consider those matters, I have decided that to adopt the same or a similar approach towards the length of Mr Martin's disqualification would not meet or reflect the findings of misconduct. Nor would it give effect to the purposes of disqualification previously identified (see paragraph 110(e) above). In my judgment, this is a middle bracket case.

120. I approach mitigation on the basis that subject to the facts not meeting the balance of probability, I should accept those relied upon by Mr Martin unless challenged by the CMA when there would potentially be a need for determination.
121. I find mitigation in Mr Martin's previous good character as a director over many years within not insubstantial businesses. He has not worked since July 2018 and has retired due to ill health. He has not been a director since October 2018. On the other hand, I must note the findings made which are contrary to his evidence and his denials of the conduct which I have found occurred. Also, his stated knowledge of competition law. Returning to matters in favour of mitigation, they include the steps taken by Berrymans following the CMA's inspection whether with or without legal advice. I note in that context the compensation scheme to which Mr Martin refers. Whilst positive mitigation, this perhaps also draws attention to the serious financial effects a cartel such as this will have had on ordinary people selling their most valuable asset often in the context of needing funds to provide for a new home. That is in the context of a 13-month period which would have affected significant personal funds of clients.
122. Taking all such matters into account including all the other matters raised in submissions, I have decided 7 years is the appropriate length for disqualification. In reaching that figure I have borne in mind in particular the seriousness of the findings of misconduct in the context of the sale of houses/homes when estate agents have to be trusted by vendors.
123. Costs must follow the event and I will order an interim payment of £100,000 under **CPR 44.2(8)**, which applies pursuant to **Rule 2(1) of the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987**, and provides: "[w]here the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is a good reason not to do so". Payment is to be made within 28 days.

Order Accordingly