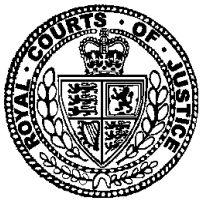

Neutral Citation Number: [2019] EWHC 320 (Comm)

Case No: LM-2018-000238

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

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

Date: 21 February 2019

Before :

MARTIN GRIFFITHS QC (SITTING AS A DEPUTY HIGH COURT JUDGE)

- -

Between :

THE BEANS GROUP LIMITED	**Claimant**
- and -	
MYUNIDAYS LIMITED	**Defendant**

- -
- -

Mr Damian Falkowski (direct access) for the **Claimant**
Mr Jeremy Reed (instructed by Kingsley Napley LLP) for the **Defendant**

Hearing dates: 12-14 February 2019

- -

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.

.....

MARTIN GRIFFITHS QC (SITTING AS A DEPUTY HIGH COURT JUDGE)

Martin Griffiths QC (sitting as a Deputy High Court Judge) :

1. This is the trial of a claim by the Claimant ("Student Beans") against the Defendant ("Myunidays") for the tort of inducing or procuring breaches of Student Beans' contracts with Zoetop Business Co. Ltd, trading as Shein ("Shein").

2. There are two issues. First, did Myunidays tortiously procure or induce Shein to breach the contracts Shein already had with Student Beans by entering into inconsistent contracts with Myunidays? Second, did Myunidays tortiously procure or induce Shein to breach Shein's contracts with Student Beans subsequently, when Myunidays was on notice of the Student Beans contracts by direct communications from Student Beans, and, if so, from what date?

3. The trial before me is to decide all matters except "pecuniary relief and quantum" (order of 18 January 2019, para 1). Student Beans initially sought interim injunctive relief but did not pursue that application; instead obtaining an order on 18 January 2019 that the trial should be expedited. If I decide either of the two issues in favour of Student Beans, it is agreed that I should grant injunctions in terms which have been agreed, effectively prohibiting Myunidays from continuing to service Shein pursuant to its own contracts.

Background

4. Student Beans and Myunidays are competitors, although Myunidays is the bigger business. Both operate inside and outside the UK. The business of both is to help third party sellers who want to offer discounts to properly accredited students. At the heart of both businesses is Student Verification Technology ("SVT") which provides the third party sellers with confirmation that the purchaser is a *bona fide* student entitled to discount. SVT is provided by Student Beans and Myunidays through computer code added to the third party website which runs whenever a student claims their discount. In addition, both Student Beans and Myunidays promote offers to students, providing vouchers for discounts and links which can be used to drive traffic to the third party seller's website.

5. Student Beans makes its money through licence fees and commission on sales. Myunidays also operates on a commission basis, the commission being lower if their only involvement is SVT, and higher if the transaction originates from them through a promotion driving traffic to the third party website.

6. Shein is an online clothing retailer. It is not a party to the action and played no part in the trial. No witness from Shein was called.

The conflicting contracts

7. Two Student Beans contracts with Shein are in question in this action.

8. The first ("the First SB Contract") is an electronically signed Booking Form dated 27 July 2016 which covered the UK and the USA. The commencement date was 1 August 2016 and the initial term was 12 months. In small but bold print at the bottom of the page it was stated:

> "Acceptance of Terms and Conditions: By signing this Booking Form you are placing your order with [Student Beans] and confirming that you have read and accept the terms and conditions as set out at thebeansgroup.com/legal/sbn-terms-of-business".

9. The second ("the Second SB Contract") is an electronically signed Booking Form dated 24 March 2018 which covered Australia. The commencement date was 15 March 2018 and the initial term was, again, 12 months. There was slightly different text in small but bold print at the bottom of the page, and it linked to terms and conditions at a different web address, as follows:

> "Acceptance of Terms and Conditions: By signing this Booking Form you agree that you have read and accept the terms and conditions as set out at: www.thebeansgroup.com/legal/sbn-terms-of-business-2".

10. The standard terms and conditions incorporated into the First SB Contract are extensive, covering 12 pages when printed out. They include provisions which provide for perpetual renewal of the contract after the initial term, subject to notice which can only expire on anniversary dates, and for exclusivity, and for confidentiality of the terms themselves.

11. On renewal, clause 2.1 provides:-

> "This Agreement shall come into force on the Commencement Date and unless terminated earlier in accordance with the provisions set out below or as otherwise permitted as a matter of law shall continue and remain in effect for the Initial Term and shall be automatically renewed for successive periods of 12 months commencing at the end of the Initial Term or Renewal Term unless either party gives at least 30 days' written notice to the other prior to the expiry of the existing term, in which case this Agreement shall terminate upon the expiry of the existing Term."

12. On exclusivity, clause 5.3.6 provides that the client shall not:

> "Procure… or use similar, alternative or competing Services for the duration of the term unless otherwise agreed in writing between the parties."

13. On confidentiality, clause 7 provides:

> "7.1 The Client acknowledges and agrees that the Services and the terms of this Agreement… constitute Confidential Information of [Student Beans]. [Student Beans] acknowledges that the terms of this Agreement,… constitute Confidential Information of the Client."
>
> "7.2 …each party shall:…

> 7.4 not disclose such Confidential Information to any third party (other than its professional advisers, officers, employees, agents, contractors and subcontractors on a 'need to know' basis as strictly required for the purposes of this agreement and subject to each such person being bound by an obligation of confidentiality no less onerous than this clause)…"

14. Likewise, the standard terms and conditions incorporated into the Second SB Contract have identical provisions, although the numbering is not quite the same.

15. Shein subsequently entered into contracts with Myunidays, including contracts covering the same territory as the First SB Contract (the UK and the USA) and the Second SB Contract (Australia).

16. Shein has neither accepted nor denied that, in doing so, it put itself in breach of the First and Second SB Contracts, but both sides in the action before me (Student Beans and Myunidays) agree that Shein did put itself in breach by doing so. In particular, it entered into those contracts during the currency of the First and Second SB Contracts, and in breach of the exclusivity provisions of those contracts.

17. The three Myunidays contracts in question were, first, a Myunidays Work Order signed by Shein electronically on 4 July 2018 covering Australia (and also France) with a 12 month term and a Commencement Date of the later of 16 July 2018 and the date on which Shein launched on the Myunidays website – which turned out to be 6 September 2018. The second was a Myunidays Work Order signed by Shein electronically on 22 October 2018 covering the United States of America with a 12 month term and a Commencement Date of the later of 22 October 2018 and the date on which Shein launched on the Myunidays website – which turned out to be 11 November 2018. The third was a Work Order signed by Shein electronically on 22 October 2018 covering the UK (and also Germany, Italy and Spain) with a 12 month term and a Commencement Date of the later of 22 October 2018 and the date on which Shein launched on the Myunidays website – which again turned out to be 11 November 2018.

18. Although each of these Myunidays contracts with Shein had a 12 month term, they each had, also, a break clause allowing them to be terminated 3 months after the Commencement Date provided that no less than 30 days written notice was given. In effect, therefore, the break clause had to be exercised within 2 months of the Commencement Date, so that the necessary 30 days remained to run before the 3 month break date.

The first issue: Did Myunidays induce Shein to breach the First and Second SB Contracts by entering into the Myunidays Contracts?

19. The first issue is whether Myunidays induced or procured Shein to breach the First and Second SB Contracts when Shein entered into the contracts with Myunidays in the first place, covering the same territories as the First and Second SB Contracts (the UK, the USA and Australia). The elements of this common law tort were authoritatively considered and restated by the House of Lords judgments in *OBG v Allan* [2008] AC 1 and conjoined cases, which considered earlier authorities. They identified two torts rather than one conjoined tort of causing loss by unlawful means as previously

suggested, and the tort with which I am concerned is the tort of inducing a breach of contract, of the type originally examined in *Lumley v Gye* (1853) 2 E & B 216.

20. The headnote of *OBG v Allan* summarises the law, which is not controversial in the case before me, as follows ([2008] 1 AC 1 at 3D-F):

> "That inducing a breach of contract was a tort of accessory liability, and an intention to cause a breach of contract was a necessary and sufficient requirement for liability; that in order to be liable a person had to know that he was inducing a breach of contract and to intend to do so with knowledge of the consequences; that a conscious decision not to inquire into the existence of a fact could be treated as knowledge for the purposes of the tort; that a person who knowingly induced a breach of contract as a means to an end had the necessary intent even if he was not motivated by malice but had acted with the motive of securing an economic advantage for himself; that, however, a breach of contract which was neither an end in itself nor a means to an end but was merely a foreseeable consequence of a person's acts did not give rise to liability; and that there could be no secondary liability without primary liability, and therefore a person could not be liable for inducing a breach of contract unless there had in fact been a breach by the contracting party (post, paras 8, 39–44, 172, 173, 191, 192, 264, 302, 303, 319).
>
> *Emerald Construction Co Ltd v Lowthian* [1966] 1 WLR 691, CA and *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch 106, CA considered .
>
> *Millar v Bassey* [1994] EMLR 44, CA disapproved .
>
> *Merkur Island Shipping Corpn v Laughton* [1983] 2 AC 570, HL(E) not followed."

21. Myunidays says that it did not induce or procure Shein to enter into the Myunidays contracts in the way required by the tort, but only responded to requests in which Shein took the initiative and submits that Shein was the party driving the transactions. Myunidays also denies that it had sufficient knowledge of the SB Contracts to be liable for the tort or that it had the requisite intention of interfering with their performance. It accepts (on the question of knowledge), that actual knowledge is not required by the law of this tort, and that it would be liable if it was reckless about the constraints of any Student Beans contracts, or turned a blind eye to that question. It denied, however, that it did so. For these purposes, it is common ground that the person at Myunidays whose state of mind is to be scrutinised is Mr Daniel Evered, to whose evidence I will shortly turn. It is also common ground that (as the authorities make clear), while recklessness would be sufficient, negligence, however gross, would not. Blind eye knowledge is still a form of knowledge; ignorance, however surprising, is, if genuine, not.

22. I heard evidence from three witnesses, although the parties agree that almost all the communications between Myunidays and Shein which led to the Myunidays contracts

were conducted in writing, through email and Skype, which means that not very much turned on disputes of primary fact.

23. The only witness for the Claimant was Simon Eder, who is the Commercial Director of Student Beans. Most of his evidence explained why he inferred from the documents and the primary facts that Myunidays did actively procure breaches of the Student Beans contracts by Shein, and did so knowing or not caring that the Myunidays contracts were inconsistent with extant Student Beans contracts. To that extent, he was a somewhat partisan witness, but that was in the nature of the case, and no discredit to him. Because he was a director of the company which was alleged to be the victim of the tort, rather than the perpetrator, and because Student Beans (as I will explain) was not aware of what was happening until some time after the Shein contracts with Myunidays had been agreed, and were being implemented, very little of his evidence was evidence of primary fact.

24. Mr Eder did say that "By clicking on the link which is available on our website, anyone can see our terms and conditions, so they [i.e. Student Beans] could certainly see the terms if they want to." However, there was essentially uncontradicted evidence that, although the precise web addresses identified in the First and Second SB Contracts did lead to public pages, there was no link to these pages on the Student Beans site, and so a person only browsing the website would not be able to find those standard terms and conditions. It is also a fact, as I have said, that the terms of the SB contracts were stated to be confidential.

25. There was some argument about whether the Student Beans standard terms could be found by doing an internet search with a search engine. The evidence from Myunidays' Global General Counsel, Ms Situl Bains, which I accept, was that they were not easily found by this method. A Google search on "student beans standard terms" did not return them; nor did a search on "student beans standard terms and conditions". A search on "beans group terms and conditions" also did not return them. A search on "the beans group standard terms and conditions" returned some standard terms, but not those incorporated into the First and Second SB Contracts. The only search which did return those was "the beans group terms and conditions", the initial "the" being essential to achieve this result, and omission of the word "standard" also being essential. I conclude that the terms and conditions relied upon were not generally accessible and, indeed, there was no suggestion, when the Myunidays witnesses were cross examined, that they had seen them before entering into the disputed contracts with Shein.

26. Mr Eder accepted that not all the Student Beans contracts are exclusive. He was shown an image of the Student Beans UK portal and accepted that Boohoo, another clothing retailer, which is on that portal, has a non-exclusive contract with Student Beans which has no fixed term, so that it could be terminated at any time. He accepted that another client, Apple, was also in a non-exclusive contract with Student Beans. Other clients were said to be exclusive, but Mr Eder himself could not remember what the notice period was for some of them, and accepted that Myunidays would not be able to find out what it was online, or at all. He also accepted that, if the client was asked by Myunidays to give the information, to do so might be in breach of confidentiality provisions agreed with Student Beans, like those seen in the First and Second SB Contracts.

27. A letter from Student Beans dated 25 January 2016 sent to about 100 retailers showed that Student Beans was, at least at that stage, urging potential clients actively to resist exclusive arrangements, and championing non-exclusivity against the exclusive contract model which it attributed, particularly, to Myunidays. Mr Eder said that about 10% of the Student Beans contracts were non-exclusive, and, although for confidentiality reasons Student Beans had declined to give disclosure to support that, I see no reason not to accept that evidence.

28. However, it is clear from Mr Eder's evidence that no assumption could be made that, just because a retailer had a contract with Student Beans, it would be an exclusive contract, although the probability would be that it was. More to the point, the notice provisions, and duration, of any such contract would not be a matter of public record, and might not even be ascertainable from the retailer, given Student Beans' insistence on confidentiality. Therefore, a contract might be coming to the end of its term, or might be terminable on reasonably short notice, or might not be exclusive at all. The fact of a contract between a retailer and Student Beans would not mean that it was inconsistent with that contract that a new contract should be negotiated with another provider, such as Myunidays.

29. Mr Eder said that Student Beans itself signed up clients who had contracts with other providers, giving as examples Huel and Levis, and others, who turned out to be in exclusive and incompatible contracts with others, so that Student Beans found it had been wrong to enter into a contract, and had backed off. Mr Eder did not suggest they had been wrong to act in this way, although he did suggest that they were more explicit about the point than (he argued) Mr Evered of Myunidays had been. This supported a conclusion that I have reached, which is that, in this business, not only would it be wrong to assume that a prospective client with an existing arrangement with another provider was not free to enter into a new arrangement with a new provider, but that the only realistic course is to raise the issue with the prospective client, and to accept their position (which may or may not prove to be correct or reliable) if they indicate by words or conduct that there is no legal problem. I also remind myself that the test for the purposes of unlawful inducement or procurement is knowledge, including recklessness and blind eye knowledge, and not negligence.

30. The main witness for Myunidays was Daniel Evered, Head of Partner Acquisition (that is, client acquisition) for the APAC area (Asia-Pacific), based in Australia. He flew from Australia so that he could be cross examined in person rather than by video link. This was helpful, especially since he was cross examined on a large number of documents, including documents added to the bundles at the last minute.

31. Since Mr Evered (unlike Mr Eder) was a witness whose actions and state of knowledge, and personal motives and intentions, were all very much in issue, his credibility and reliability were key to the case. I found him a straightforward and consistent witness, who addressed all the questions put to him directly, and made appropriate concessions when faced with documents, including (in one case, in which the documents initially put to him turned out to be incomplete) a concession which turned out not to be appropriate. His evidence (which I will consider in more detail shortly) was at all times consistent with and for the most part actively supported by the extensive documentary record. I decided that he was both a credible and a reliable witness.

32. Mr Evered was pressed strongly on a comparison between his conduct of the discussions with Shein and a checklist of "Dos and Don'ts" compiled by General Counsel Situl Bains and circulated by email on 12 May 2017, which said "we must not encourage or force a prospect to breach the terms of any existing contractual commitments they may have". The "Dos and Don'ts" themselves would, if strictly adhered to, clearly assist in providing proof, including documentary proof, that discussions with prospective clients were appropriate and did not procure or induce breaches of contract with competitors. However, they pre-dated Mr Evered beginning in his role (which he began in July 2017). He did not see them and was not aware of them. For that reason, they did not throw any light on his state of mind in discussions with Shein; he did not have the "Dos and Don'ts" in mind as a standard against which his conduct might be judged, or a toolkit on the basis of which he should or might proceed. Since the test of procurement or inducement is knowledge or recklessness, rather than negligence, I found them of very limited relevance. They did not even appear to me to set or reflect a common sense standard, when, for example, they said "get proof (eg copy of notice served on the competitor)" and Ms Bains herself, in her evidence, said that she no longer thought that this was would be appropriate, let alone necessary. Mr Evered said that to get written confirmation would, in his opinion, be "aggressive and overstepping the mark, in asking for information that is possibly sensitive. I think you should believe what your partner is telling you. You are building trust. You are basically saying you do not believe them if you ask for proof." That was consistent with Student Beans' own approach to clients like Huel and Levis, who, as I have mentioned, turned out to have entered into contracts with them which were not consistent with previous contractual obligations.

33. Mr Evered's understanding (which is consistent with the documents) was that Shein approached Myunidays rather than being solicited by them. At an early stage, they were referred to him, but he was not at first keen to sign them up, based on their relatively poor web traffic statistics, which he checked for himself. At first, therefore, he simply let the prospect drop, without responding to it or following it up. Shein itself persisted, and he did then run with the approach, but he was not particularly enthusiastic, and his evidence on this was consistent with the documents. A lot of emphasis was placed on his use of words like "Awesome" and "Brilliant" in emails, but I accept his evidence that this was, in context, and for him personally, ordinary language, and never a hard sell, or a particular hyping of Myunidays on his part. I do not think he overstepped the mark. He simply explored what Shein wanted to do, and was able to do, and responded to that.

34. So far from pressing on with them regardless of what their existing legal commitments might be, he asked them to check their position, and urged them to refer the proposed Myunidays contracts to Shein's own legal department. He said "I was very reactive to Shein. There was no persuasion. I did not need to persuade them." In relation to Student Beans, he said "I'd never come across them before, I had no idea of their terms or agreements". This was plausible, because his focus (and his remuneration) was based on the APAC region, in which Student Beans is not Myunidays' main competitor.

35. Although almost all the discussion between Mr Evered and Shein, from start to finish, was in writing, through emails and Skype, and available to the Court through disclosure, differences in time zone stamps at first made the precise sequence of communication unclear and in some places contested. However, by the end of the trial, the parties had

very helpfully at my request agreed a chronology of all the written communications, so that what seemed to me to be a very clear picture emerged. I will now examine that narrative in some detail.

36. The first enquiry came from Mr Jacky Chen of Shein and was responded to in an email from Myunidays on 27 March 2018. That response asked a number of questions, including "Do you work with any other Student Providers?" and "Do you work with any affiliate networks?" It was signed by Sophie Hornbach, who Mr Evered said was a UK colleague. Shein replied saying they were "working with Student Beans in US" as a Student Provider, and listing others (not Student Beans) as affiliate networks. The only geographical territory that Shein said it wanted to launch with Myunidays was Australia. Therefore, on the same day, Sophie Hornbach passed the enquiry over to Mr Evered in Australia.

37. On 28 March 2018, Shein emailed to ask who they should talk to if they wanted to cooperate with Myunidays "in USA, UK and other European countries". Sophie Hornbach asked for "all the regions you are interested in launching in" and for them to be prioritised "according to timing of the launch" so that Shein could be submitted "to the student panel for review". Mr Evered's evidence was that Myunidays would not accept everyone who asked to be a partner. They would be judged by certain criteria, such as volume of web traffic, before a decision was made.

38. Shein emailed back on 28 March 2018 saying they had sites for the UK, USA, France, Germany, Italy, Russia, Taiwan, Mexico, Argentina and India, but "we are going to launch in these countries after [Australia]".

39. There was then no response from Myunidays. Mr Evered gave evidence that he was not impressed by Shein's web traffic statistics, and let the enquiry drop for that reason. However, on 17 April his colleague Sarah Norbury was emailed by Sophie Hornbach, who described herself as "Outreach for Germany from the London office". Sophie Hornbach's email referred to the Shein enquiry. It said that Shein looked promising, but that since they were only looking to first launch in Australia, she was passing them over to Sarah (in Australia). She mentioned that Mr Evered had had the referral a few weeks before, and that Jacky (Chen) had made contact again, because he had not heard from the Australian team.

40. Mr Evered's evidence was that, at this point, although he had not initially been convinced that Shein was worth pursuing, his colleague Sarah Norbury persuaded him, because she was younger, closer to the student market, and also new, so that he wanted to support her.

41. Sarah emailed Jacky Chen of Shein on 18 April to set up a call with Mr Evered on 23 April. Before and after the call Mr Evered sent emails to Shein, which show (from their time stamps) that the call was no longer than 15 minutes and that the signal was bad, so "I can not catch your voice clearly. Please send me the details about the meeting by email." His evidence about the call, which I accept, is that Shein indicated they were free to contract with Myunidays in Australia. That was also consistent with their earlier email, identifying only the USA a territory in which they were working with Student Beans. Mr Evered was willing to accept them as a partner in Australia, and was not at that stage interested in any other territory.

42. Mr Evered then went on holiday and it was not until 16 May that he sent an email to Shein, when he had come back to work. Meanwhile, Shein emailed him (while he was away) on 3 May, saying

> "After checking the sites have agreement with Student Beans, we still have several sites didn't connect with any student network. Please let me know if Shein can cooperate with you in those countries or area. There are France, Netherlands, Taiwan, Mexico, Canada, Hong Kong, Vietnam."

43. They did not say, in terms, that they had contracts with Student Beans in the UK and the USA. Later correspondence (to which I will come) suggests that they thought that they were beyond the initial minimum terms of one of those agreements, and did not realise that those terms were automatically rolled over for further 12 month terms as they continued. However, nor did they at that stage identify the UK or the USA as territories for cooperation with Myunidays, and Mr Evered's evidence (which I accept) was that he was not particularly interested in any cooperation they might want to enter into outside his own Asia-Pacific territory.

44. Mr Evered's evidence was that, in the 15 minute call they had had with him in April, they mentioned that they were on a trial period with Student Beans for Australia and that they could end the trial at any time. I accept his evidence about that, which is consistent with the documents, including later documents, although not directly confirmed by any document. Mr Evered was cross examined on the basis that he had misunderstood what Shein were saying to him, and that they were not in fact saying that there was a trial period with Student Beans for Australia. It was put to him that the admittedly poor quality of the line in the April call made it impossible to be sure what they were saying. He maintained that he did confidently understand them to be saying this. Since it is Mr Evered's state of mind which is relevant for the purposes of the alleged tort, and not any objective state of affairs which he did not know about, this suggestion is less important than it might otherwise have been. But Mr Evered was, in any case, sure that he had not misunderstood, and I accept his evidence. He said "I was told and truly believed it was a trial". He insisted that Jacky "did say on the call they could end the trial at any time". In his witness statement he said the same thing in different words, namely, that they could end the trial at will. He confirmed in cross examination that the actual words were "at any time", which he considered to mean the same as "at will". I accept that evidence. We now all know, having seen the terms of the Second SB Contract, that Australia was not in a trial period with Student Beans but subject to a 12 month term expiring on 15 March 2019. I am satisfied from the evidence that Mr Evered was never told about that, and had no obvious way of knowing about it short of approaching Student Beans himself, which would not have been commercially appropriate. Shein were not telling him, the terms were not publicly available, and Shein was in any event limited in its ability to disclose the term of the Student Beans contract, that being one of the points which Mr Eder said in cross examination was covered by the confidentiality clause. I am satisfied that he was told, and believed, that there was a relationship with Student Beans for Australia, but that it was only a trial period and could be ended at any time. I am satisfied that he honestly believed, as a result, that they were legally free and entitled to contract with Myunidays in Australia if they wanted to.

45. Jacky Chen had no response to his email of 3 May (because Mr Evered was away) but he emailed again on 16 May, this time to Sophie Hornbach in the London office. He said:

> "We are interested in launching our partnership in Europe, now we have sites for UK, [Germany], [France], [Spain], [Italy], [Netherlands]. Please let me know how to start?"

46. She replied saying that, since he was already in talks for his Australian launch, the Australian team "will take care of the launches in all the other regions".

47. Mr Evered put in a brief call to Jacky Chen – lasting one minute – on 16 May, but Mr Evered was on holiday in Cornwall at the time and there was a very poor signal on his mobile phone, so nothing substantive could be discussed. Mr Chen immediately followed up with an email suggesting Skype for future calls, and that he would be checking for emails from Mr Evered. From that point, there were no further phone calls, and the written record shows everything. Mr Evered also emailed Jacky Chen, saying "I have forwarded our emails to the head of the marketing team. I am looking forward to start our partnership soon."

48. Meanwhile, also on 16 May, Sophie Hornbach in London emailed Sarah Norbury and Mr Evered in Australia, referring to Shein's enquiry about a launch in Europe, and asking them for an update on progress by the Australian team.

49. Later on 16 May, Mr Evered sent Jacky Chen a detailed email which contained proposed terms as to commission rates and other matters. He explained to me that this was a cut-and-pasted email from earlier examples of terms to other clients, as was demonstrated by the fact that it included a reference to sales "In-Store" which was irrelevant to the Shein enquiry, since they were only talking about a website operation. The rates proposed were standard, such as a commission rate of 10%. Mr Evered's evidence was that there was never any need to drop the commission rates proposed because Shein were making all the running, and did not need persuading to enter into a relationship with Myunidays. This email did not refer to any particular geographical territory. Mr Evered explained in evidence that this was because the terms would be the same regardless of territory. The email is clear that no contract is yet being agreed. For example, it says, near the beginning, that Myunidays "would love to continue the conversations with Shein and look at launching…" Towards the end it says:

> "I have also attached the Terms – if you could please forward the details to your Legal department and provide feedback that would be great."

50. The Terms referred to were 3 pages, in double-columned pages of small print, of proposed terms and conditions. Although they have the appearance of standard terms, Mr Evered explained that they were at least in some respects negotiable. However, one aspect which would not have been negotiable was the requirement that the arrangement with Myunidays should be exclusive of other SVT providers. He said to me that it might have been possible to negotiate non-exclusivity for promotions, as long as the Myunidays promotions were as good as the best offers to students through other partners, but the student verification technology element would have to be exclusive.

In the event, Shein did not push back on anything, and so none of the Terms was varied from this original version. The exclusivity provision was in clause 2.2, and said:

> "By entering into this Agreement with Us, You appoint Us as your exclusive provider of the Services [defined in clause 1.13 as "the verification and marketing services that We provide to You online and/or in-store (as applicable)"]. You agree that only We will provide the Services to You and You will not negotiate or agree with any of Our competitors that they will provide any similar services to You. This also means that You will not use any of Our competitors to provide You with student discount promotional activities or student verification services on Your own website."

51. It is common ground that this provision was not consistent with the First and Second SB Contracts, quite apart from the fact that entering into any contract between Shein and Myunidays for the territories of the UK, USA and Australia would be inconsistent with those contracts because of their own provisions for exclusivity.

52. Mr Evered's insistence in this email of 16 May that these Terms should be referred to Shein's Legal department is consistent with a wish on his part to be reassured that Shein was not only willing but legally permitted to enter into such Terms, including exclusivity. In my judgment, he was not pushing a contract through without caring whether it was consistent with any existing contracts Shein might have.

53. Another email from Mr Evered to Mr Chen on 16 May was briefer:

> "Hey Jacky
>
> Awesome – also, I am just speaking with the Global team around the other markets you requested so can look to get those details added in the agreement.
>
> I will keep you posted on their feedback."

54. Mr Evered readily accepted that he was not actually or physically "speaking with the Global team" at the point he sent that email, but he explained that this was a figure of speech to convey that he was looking into the other markets for Jacky. It was put to Mr Evered that it was a lie, but he said "It is not a lie. They asked me for other markets and I am saying I am looking into it. I do not see this as a lie." I do not see it as a lie either.

55. Mr Chen responded on 16 May:

> "That's great! Thanks.
>
> I have forwarded our emails to the head of marketing team. I am looking forward to start our partnership soon."

56. Mr Evered responded by insisting on the review by Shein's lawyers which he had asked for, saying:

> "Brilliant – if you could also please forward the Terms and Conditions to your Legal team, we can start working through the details."

57. Mr Chein responded "OK, I will."

58. Later on 16 May, another person sent Myunidays an email from Shein, called Jenny. She asked a number of questions, of which the last was:

> "Finally, we found most of your traffic are from United Kingdom, United States, Germany, etc.
>
> And we have the corresponding sub-sites too, such as UK, US, DE [Germany], AU [Australia], etc.
>
> I want to know is it available for us to cooperate with all the sites?"

59. Mr Evered responded to this with answers to all the questions, including this answer to the final question:

> "Yes – we are able to expand into other market. Please let me know which markets you would like to launch and I can add the details into the proposal. I can see you are currently working with Student Beans in some markets but we would not be able to partner with Shein in the markets where you are still using Student Beans to verify the student status online. If you are able to remove Student Beans verification, we can replace these details with the UNIDAYS verification and launch in all the desired markets."

60. Mr Evered explained that he had when the original lead came through looked at the Shein websites and noticed that Student Beans was on it; he had then gone to the Student Beans website and seen Shein promotions there. He had never come across Student Beans before – they were not known as competitors in his Australian centred sphere of operations, although there were other competitors there – and he had no idea of their terms and conditions. He did not assume that Shein were in a contract with Student Beans; he took it from the fact that Shein was reaching out to Myunidays that it was free to move to Myunidays in certain markets. He was not aware of Ms Bains' "Dos and Don'ts" and he had not been trained to follow their requirements. He said he had, however, in fact complied with the first of them by his previous emails asking for the Terms to be vetted by Shein's legal department. The first of the "Dos and Don'ts" was:

> "explain the company's requirement of exclusivity and query whether this is going to be issue for them (i.e. do they have any existing commitments that would conflict with this)"

61. The next relevant email was on 17 May, when Jenny of Shein asked Mr Evered:

> "Finally, it is able for us to start the cooperation on FR[France] site firstly?

> We can remove the studentbeans on the other sites in future if you can work well."

62. France was one of the territories in which Shein had said in its email of 3 May that it had no agreement with Student Beans or any student network. But if Shein was taking this line because it was mindful of the First and Second SB Contracts in respect of the US, the UK and Australia, it was not disclosing that to Myunidays and I do not think that it was obvious without such disclosure.

63. The next relevant email was from Mr Evered to Jenny of Shein on 18 May 2019. After dealing with other queries, not relevant for this case, he said:

> "When speaking with Jacky, he mentioned the Student Beans partnership in AU [Australia] was only on a trial and would be easy to replace – is this possible? We have a much stronger presence in this market and confident we can deliver strong results for Shein. If so, we can launch AU and FR at the same time."

64. This was referring Jenny to what Mr Evered had been told by Jacky Chen during their 15 minute phone call on 23 April.

65. Jenny of Shein responded on 18 May "Yes, we can accept your terms by starting up with AU & FR"; and "If there is no other questions, I think you can send us your contract" and "We can communicate more convenient via Skype".

66. Mr Evered said he honestly believed, at this point, following the earlier communications which I have quoted, that Shein was going ahead with Australia because it was not inconsistent with any current commitment to Student Beans that they should do so. I accept that evidence.

67. Jenny followed up with an email to Mr Evered on 21 May asking to be sent a contract. Mr Evered replied "I have sent the contract to our Legal team for review and will shoot it across as soon as it has been approved." Jenny responded on 22 May saying "I will wait for your contract" and confirming her Skype address. Mr Evered then started a Skype text conversation with her at that address saying "I am hoping to have the contract today and will send across for review".

68. Three days passed, and it was again Shein which pressed him. Jenny Skyped him on 25 May asking "When can you send me the contract?" He replied on Skype on 28 May, with a draft contract, in a form of a Work Order sent as a Skype download link. In the Skype text message which went with it, he said:

> "Once you have approved the details, please provide the Full Company Name, Company Address and Company Registration number and I will send across the final copy for sign off. I have also attached our Standard Terms and Conditions."

69. The next day, 29 May, Mr Evered Skype texted again, to "make sure you had received all of the details you needed?". Jenny replied:

> "Yes, I receive the contract, I will pass it to our legal team to check, if there is no other issues about the contract we will [sign] it soon."

70. Mr Evered responded:

> "Perfect – once we have received feedback, I will send through the Final contract via DocuSign."

71. On 6 June, Shein introduced to the Skype group chat with Mr Evered two people as "the contact for UK market and they will meet you in London 13th. They will talk with you about the meeting's details". On 12 June, Mr Evered confirmed that his colleague could attend this meeting, and asked for an agenda (which was never provided). Mr Evered being in Australia could not attend the proposed meeting, in London, and in a Skype text on 13 June he gave the name of the colleague who would attend as Eric. This was Eric Alegre, who was Myunidays' Commercial Director for the French market, which was the market that Shein had identified, with Australia, as the first to launch.

72. Eric Alegre emailed Mr Evered after the meeting, saying "it was actually a big meeting. The deal is not done yet but you are not too far I think." He also said:

> "They want to reduce the commission they are paying, which I think is fine but we need to launch in more market than just France and Australia. They are with [Student Beans] in the UK and the US but they want to get out of it. They will come back to us to let us know what's possible."

73. In the event, as I have mentioned, there was no reduction in the original proposal of 10% commission. Mr Evered explained in evidence that what Mr Alegre was saying was that commission reduction would only be "fine" if the markets were more than the currently proposed France and Australia. Mr Evered pointed out in his cross examination that the first Shein contract with Myunidays was for France and Australia and dated 4 July 2018, whereas the contracts for the US and the UK were dated much later, on 22 October 2018 (see paragraph 17 above).

74. Mr Evered responded to Mr Alegre by email, saying, in part:

> "Apologies – I've provided the details for AU and France but my contact in China was being really cagey about the agenda for the meeting and didn't realise it was so big. We spoke about UK but they said they couldn't end SB just yet so will wait for their feedback."

75. Mr Alegre emailed Shein direct after the meeting on 13 June, and said:

> "Dan is going to follow up this and come back to you on what we've discussed. If on your side you could tell us on how many countries we could launch, that would help us to give you a better commission."

76. On 14 June, Mr Evered emailed the Shein participants at the meeting with Mr Alegre, and Mr Alegre himself, and said:

> "I shot you guys a note via our chat on Skype and just mentioned that I will be pulling all the relevant details together and should have these available for you early next week. Jenny has the Work Order for France and Australia but we can update the details once we have confirmation on the other markets you would be looking to launch.
>
> The Terms and Conditions are currently with your Legal team and these cover all markets except the US. Please let us know your position with Student Beans in the US and if you are able to replace with our solution in this market. I will send across the Terms and Work Order specific to this market."

77. In his Skype message, Mr Evered said:

> "Please let us know once you have checked your position with Student Beans and if we are also able to launch in the US and UK. The Legal terms I have previously sent across cover all markets except the US. If you are able to move forward with the US, please let me know and I can send across the terms."

78. The next day, 14 June, Mr Evered followed upon Skype: "can you please let me know when you expect to have a confirmation on the countries you would be looking to launch?" Shein responded "We are reviewing the situation at the moment."

79. The next day, 15 June, Shein sent another Skype text to Mr Evered, saying:

> "Hello Dan, we are going to start with FR and AU and it will be able for us to launch in more markets in the future"

80. The next relevant communication is an email from Jenny at Shein to Mr Evered on 26 June 2018 which said:

> "Hello Dan
>
> Our legal team has approved the contract.
>
> Please sign for it and send back to me and we will sign for it too.
>
> Then we can start the cooperation."

81. The Myunidays contract (Work Order) for Australia and France was signed by Shein electronically on 4 July 2018. But nothing went live at that point.

82. There followed communications about the process called "onboarding", which decided how the partnership would be implemented in practice.

83. On 6 September 2018 the Myunidays script to make the Shein Australia website operate Myunidays SVT was sent to Myunidays by Skype and Myunidays went live on that

site. At that date, according to Mr Evered's evidence, the Student Beans code had already been removed, so Student Beans was not visible to users of the site. However, a fragment of invisible and redundant code had been left behind, and caused some distortion of the formatting of the Myunidays element. This was immediately spotted and the redundant Student Beans code was removed to fix the formatting.

84. At this point, months had passed since Shein had asked to partner with Myunidays on Australia, and since Shein had said (in April) that it was only working with Student Beans in Australia under a trial period arrangement which could be ended at any time. I am satisfied on the evidence that Mr Evered was not reckless about whether Shein was entitled to contract with Myunidays without breaching any contract with Student Beans, but that he genuinely believed (and with good reason), based on his communications with Shein, that they were so entitled, and were going into the Myunidays partnership with their eyes open (having at his request consulted their own lawyers), and on the basis that there was no legal impediment to them doing so.

85. I am also satisfied on the evidence that the initiative came from Shein, and that Shein was never procured or induced to enter into its contract with Myunidays in the manner required by the alleged tort, but did so of its own motion and with a keenness that did not require Myunidays to offer them any particular incentive, or to apply any pressure. However, my finding on Mr Evered's lack of the requisite knowledge and intention in respect of a breach of any contract with Student Beans makes that element irrelevant in any case.

86. I make these points at the stage in my narrative when Myunidays went live, in October, but they were equally true at the point when the first contract, for Australia, was electronically signed in July 2018, which was already some time after the April telephone conversation.

87. The Myunidays contract required exclusivity for promotions as well as for SVT, but Mr Evered's evidence was that, because he knew that Myunidays would have conceded exclusivity for the promotions if asked, he did not in practice insist on exclusivity for promotions. The papers show, however, that he made it clear that Myunidays did require rival promotions to be no more favourable to students than those offered by Myunidays, if Myunidays were to offer promotions at all. In that context, Mr Evered noticed that Student Beans, although off the Shein website for the purposes of SVT, was still offering promotions to Shein in Australia, and said that, whilst the Student Beans promotion was more favourable than the proposed Myunidays promotion, Myunidays could not run a Shein Australia promotion. Shein responded in the Skype text channel:

> "I am so sorry we can't provide you stronger discount for this month but I can change for you from next Month.
>
> And we are going to stop the cooperation with Student Beans so you do not need to worry about it"

88. Mr Evered responded (consistently with his relaxed attitude to exclusivity when it came to promotions as long as rivals were not beating his offers, and following from Shein's statement that they were going to stop the Student Beans cooperation):

> "That's ok – but we can't heavily promote on our premium placements until the Student Beans offer is no longer available."

89. Shein responded "It's ok".

90. That was on 6 September 2018.

91. More than a month then passed before, on 12 October 2018, Shein contacted Mr Evered by Skype about further contracts and other markets. Their Skype said: "Hello Dan, we would like to extend the partnership into the US and other countries…" Mr Evered responded on 14 October and asked "which countries you would like to run?" and offered 17 named territories from all over the world, including the US and the UK.

92. After some further exchanges, Shein said on 15 October: "will check it and back to you soon". Then Shein followed up after 10 minutes: "Hello Dan, we want to know more about the US, UK, Germany and Spain." About an hour later, before Mr Evered had responded, they said "Hello Dan, we are going to expand on these sites, shein-us uk de it es" (i.e. Shein in the US, UK, Germany, Italy and Spain), as well as some sites for another of their brands, Romwe, with which I am not concerned. They asked "Can you send me the contract and setting frames as soon as possible before Wednesday?"

93. Mr Evered asked for clarification about the sites, and was told "United Kingdom, Germany, Italy and Spain". This was still on 15 October. In this case, I am only concerned with the UK and US sites, as those were the subject of the First SB Contract.

94. The date of the Myunidays contracts with Shein (in the form of Work Orders) for both the US and the UK was (on the Unidays signature) 17 October and (on the Shein signature) 22 October 2018.

95. I am satisfied that Mr Evered was, as he had been when the Australian Work Order was signed, of the honest belief that Myunidays were entering into the October Work Orders for the UK and the US having considered any commitment they had or had previously had with anyone else, including Student Beans, and of the honest belief that they were entitled to enter into the contracts with Myunidays for those territories at that time.

96. I therefore reject the Student Beans claims that any of the contracts were entered into tortiously in the first place as far as Myunidays was concerned.

The second issue: Did Myunidays commit the tort of inducement subsequently, when it was put on notice of the Student Beans contracts by direct communications from Student Beans, and, if so, from what date?

97. The second issue is whether Myunidays committed the tort of inducement subsequently, when it was put on notice of the Student Beans contracts by direct communications from Student Beans, and, if it did, from what date.

98. The key difference between the first and second issues, on the facts, is that I have found that Myunidays lacked the requisite knowledge and intention when entering into their contracts with Shein, but, by the time we come to the second issue, they were put on notice by Student Beans of the existence of the First and Second SB Contracts, and so

they did have the requisite knowledge. But, by then, the Myunidays contracts had already been signed and were in operation.

99. The law applicable at that point is discussed in *Clerk & Lindsell on Torts* (22nd edition) at paras 24-42 and 24-43, including the following observations:-

> "In his exposition of the elements of the tort in *Thomson v Deakin* Jenkins LJ said that, where a third person with knowledge of a contract "has dealings with the contract breaker which the third party knows to be inconsistent with the contract, he has committed an actionable interference". [footnote 240 here cites: *DC Thomson & Co Ltd v Deakin* [1952] Ch. 646 at 694, citing *British Industrial Plastics Ltd v Ferguson* [1940] 1 All E.R. 479, HL; see too Neill LJ in *Middlebrook Mushrooms Ltd v TGWU* [1993] I.C.R. 612 at 618. The second contract is probably not void unless the parties know of its inconsistent effect: *British Homophone Ltd v Kunz* (1935) 152 L.T. 589 at 593.] So, where the claimants agreed with third parties not to resell cars except as provided in their covenants and the defendants induced those parties to resell the cars to them in breach of the covenants in order to make a profit for themselves they committed the tort. [citing *British Motor Trade Association v Salvadori* [1949] Ch. 556; *Midland Bank Trust Co v Green* [1980] Ch. 590 at 598–604 (reversed on other grounds [1981] A.C. 513, HL; husband an inducer through wife).] But it has been held that merely accepting the benefit of an inconsistent contract at the proposal of the contractor did not amount to tortious conduct. [citing *Batts Combe Quarry Ltd v Ford* [1943] Ch. 51, CA]… While it has been suggested that in *OBG Ltd v Allan* the House of Lords "reaffirmed that a positive act of inducement or procurement is essential to the wrong", [citing *Calor Gas Ltd v Express Fuels (Scotland) Ltd* [2008] CSOH 13; 2008 S.L.T 123 at [47]], none of the speeches in that decision directly addressed the issue of whether inconsistent transactions should still be seen as a form of direct inducement of breach."

> "Unless and until this matter is clarified a number of issues arise concerning the circumstances in which inconsistent dealings may give rise to liability for directly inducing breach of contract. In his exposition of this form of the tort in *Thomson v Deakin* Jenkins LJ said that "inconsistent dealing … may, indeed, be commenced without knowledge by the third party of the contract thus broken; but if it is continued after the third party has notice of the contract, an actionable interference has been committed by him". Such a principle requires the "continuance" of the effective inconsistent dealing [footnote here cites *Denaby and Cadeby Main Colliers v Yorkshire Miners' Association* [1906] A.C. 384, HL (when the union's strike pay was authorised "the unlawful acts had been committed, all the contracts of employment were terminated": per Lord James at 406); cf.

> *Smithies v National Association of Operative Plasterers* [1909] 1 K.B. 310 at 335, per Buckley LJ.]; and it has been held that if no damage can be proved by the claimant, the inconsistent dealing is not actionable [citing *Jones Bros (Hunstanton) Ltd v Stevens* [1955] 1 Q.B. 275 (no damage where servant unwilling to return to first employer).] Where an inconsistent transaction is continued knowingly and actively, and damage is proved, liability arises."

100. At first, Counsel for Myunidays was minded to suggest that the dictum of Jenkins LJ in *DC Thomson & Co Ltd v Deakin* [1952] Ch. 646 at 694 quoted in *Clerk & Lindsell* was wrong, and, although not expressly criticised by the House of Lords in *OBG v Allan* [2008] AC 1013, should nevertheless be regarded as inconsistent with the House of Lords' definitive reconsideration of this tort. In support of this line, he referred me to an extract from *An Analysis of the Economic Torts* (2nd edition) by Hazel Carty, pp 45-50 under the heading "The Inconvenient Transaction Fallacy", which is also critical of the dictum of Jenkins LJ. On reflection, however, and no doubt preferring to win his case at first instance, if at all, on the facts, rather than attempting an ambitious argument of law which might be more vulnerable to appeal, he did not pursue that, and rested his case on the causation point which is also referred to in the extract from *Clerk & Lindsell* which I have quoted.

101. In short, he conceded the final sentence of the passage I have quoted from *Clerk & Lindsell* is to be regarded as a correct statement of the law for the purposes of this case ("Where an inconsistent transaction is continued knowingly and actively, and damage is proved, liability arises."). He also accepted that the contracts in this case were continued "actively", by continuous operation of SVT on a transaction by transaction basis, and by continuous promotion of Shein through Myunidays offers advertised both on Shein's own site and promoted by Myunidays elsewhere to drive traffic to Shein's site. But he disputed that damage could be proved, as required by that statement. He contended that no damage was caused, because (he argued), on the evidence, Shein would not have gone back to Student Beans for the remainder of the First and Second SB Contracts even if they had been deprived of the services of Myunidays for the relevant territories (i.e. Australia, the UK and the USA).

102. Before I come to that aspect, I must resolve a dispute about the relevant date of knowledge. Student Beans relied on an email sent by Mr Simon Eder to Myunidays on 12 November 2018 which said:

> "It has come to our attention that Myunidays verification technology is in place on one of our client's sites – Shein.co.uk, us.shein.com and au.shein.com.
>
> As you must be aware we have an existing contract with this client for these countries and this is an exclusive contract. In these circumstances unless you withdraw working with the client your continuing conduct would constituent inducing a breach of contract.

> We insist that your verification technology is removed from the client's sites by 5pm today GMT, In failing to do so we will apply to the High Court for an injunction against Myunidays."

103. Myunidays replied saying "we have no knowledge whatsoever of your contractual relationship with Shein and never have."

104. Ms Situl Bains, General Counsel, gave evidence about this. She said that Student Beans had on past occasions written to Myunidays accusing it of breaching existing contracts when that had proved not to be the case, and those allegations had not been pursued. She said the allegation made in the email in November 2018 "looked like another instance". She said "Myunidays felt entitled and obliged to perform the agreement because the contract was in place"; and "We chose not to exercise the break clause because I did not feel we had enough information that we had procured a breach, and thought Shein would deal with it, so we performed the contract."

105. It was not until service of the evidence in support of the application for an interim injunction that Myunidays was provided by Student Beans with the First and Second SB Contracts, which did demonstrate that the Myunidays contracts were inconsistent with them. That evidence was contained in exhibits to a witness statement by Simon Eder, which was served on 14 December 2018. Myunidays denies that it had the requisite knowledge of the inconsistent transactions prior to that date.

106. I found Ms Bains' evidence persuasive, and I saw no reason not to accept it. Indeed, when she said that there had been prior allegations that Myunidays contracts were in conflict with subsisting Student Beans contracts which had been found not to be well founded, she was not challenged. In those circumstances, I agree that Myunidays did not have the requisite knowledge that what they were doing pursuant to their own contracts with Shein in Australia, the UK and the USA was in breach of specific provisions of extant contracts that Shein had with Student Beans.

107. I note that Myunidays did make some enquiries after receiving the email from Mr Simon Eder on 12 November 2018. Myunidays did not locate the terms and conditions which contained the exclusivity provisions on the internet but, even if it had (as Ms Bains said in her evidence) this would not have shown that there was a continuing contract between Shein and Student Beans which incorporated those terms. On 30 November 2018, Mr Evered contacted Jenny of Shein on their Skype chat and said:

> "Hey Jenny – this is urgent. Has SHEIN breached the contract with Student Beans? I got a note from our Legal team as SB has been in contact."

108. Shein responded without admitting that they had, saying:

> "Hello Dan, we do worked with studentbeans before but we decide to work with unidays now cause we think you are more suitable for us, you can provide us the better promotion which we need."

109. I now turn, finally, to the issue of causation.

110. On this point, I do not have the benefit of any evidence directly from Shein. Student Beans have chosen not to sue Shein, although it did at an early stage apparently threaten legal action against them. Shein were not parties before me and no witness from Shein was called; nor was any witness statement or direct statement of any other kind from Shein provided, which directly addressed the question of whether, if they had been deprived of the services of Myunidays in Australia, the UK and the USA from 14 December 2018, they would have returned to Student Beans for the provision of those services until the expiration of the terms of the First and Second SB Contracts respectively.

111. The burden of proving loss is on Student Beans, and the standard of proof is the civil standard of the balance of probabilities.

112. There is some evidence, despite the absence of a witness from Shein.

113. First, there is correspondence with Shein after, and indeed before, Student Beans discovered and raised with them the question of inconsistent contracts. In the Skype exchange with Mr Evered on 30 November which I have quoted in paragraph 108 above, Shein expressed no animus against Student Beans, but only indicated a preference for Myunidays. Shein had emailed Student Beans on 25 and 26 October saying they were "sorry" but would be ending their partnership "both for Shein and Romwe" because "we are going to change our marketing strategy in the future. It's really a pity for both of us." And "I am sorry we can't keep the cooperation with you any more because of the marketing strategy." They did not allege any breach or shortcoming on Student Beans' part. Nor did they disclose their new arrangements with Myunidays.

114. Student Beans immediately challenged the proposed termination, pointing to the existence of binding and continuing contract obligations, by emails on 26 and 29 October. Shein did not directly engage with the contract point, but on 31 October emailed:

> "…I am so sorry that we can't go on the cooperation with you any more even though it will bring us some lost. I really enjoy the working time with you, you are such a good platform for us. However we must stop it because of the change of market strategy. We hope we can re-cooperate with you in the future. Hope you can understand."

115. Student Beans did not back down, and Shein then asked for copies of the contract. On 1 November, Shein said that the contract was determinable on 30 days written notice. On 2 November, Student Beans corrected them, pointing out that there was a rolling contract which could only be terminated with effect from a yearly anniversary. On 7 November, Shein responded:

> "Hello Simon. Thank you for your reply. Well, we will not end the partnership with shein-DE and Romwe-US&UK until the contract termination. Shein's US and UK has expired since Aug 1st 2017, we did not sign for any new contracts after that. So we will end the partnership with US and UK firstly. Thanks. Jenny."

116. Student Beans again corrected them, and pointed out on 7 November that the US and UK contract, as a rolling contract, could not be terminated until 1 August 2018. Shein on 13 November responded by saying the contract was not exclusive. Student Beans immediately replied citing the clause which did agree exclusivity. Shein then suggested that the exclusivity clause had not been sufficiently drawn to their attention to be incorporated (a point which, as I have mentioned earlier in this judgment, Myunidays does not adopt).

117. I agree that this correspondence does not suggest a breakdown in the relationship between Student Beans and Shein, and supports Student Beans' position that, if Shein were prevented from working with Unidays, it would be willing to return to Student Beans until expiry of the First and Second SB Contracts. That position is further supported by a letter showing that Student Beans and Shein have been discussing a possible April 2019 promotion campaign for the Romwe brand, to coincide with the payment of April student loans.

118. Second, Mr Simon Eder gave evidence about a continuing good relationship with Shein, in other territories. He said "We are presently live in Germany, and with Ronwe, and we have a good relationship and good correspondence". I was shown screenshots of both Student Beans and Shein websites showing Student Beans still doing business with Shein and Ronwe as Mr Eder said.

119. Third, there is evidence from Mr Eder which I accept that, if Shein is prevented from using the services of Myunidays in Australia, the UK and the US, there is no full service alternative from other providers except Student Beans. There are SVT providers in those territories, but they do not promote with offers in addition to providing the basic Student Verification Technology. Alternatively, some retailers (Apple was given as an example) do their own verification, by providing student offers only to people with university email addresses. But this is relatively crude, because some people with those addresses (such as academics or other employees) are not students, and some students will use email addresses which are not on academic domains.

120. My conclusion from this evidence is that, if Myunidays stopped providing its services to Shein, Shein would either have to go back to Student Beans, or temporarily cease the student discount offers, or use one of the less complete SVT offerings, which do not include outside promotions. I am satisfied that, given Shein still has a working relationship with Student Beans, it would choose to return to Student Beans. It is clear from the correspondence I have cited and from the history that Shein values the student discount marketing model, which is regarded as a success by them, so that they have rolled it out to additional markets. Shein's approach has always been commercial. I do not think that Shein would dial back or even temporarily cease its student discount marketing if forced to drop Myunidays, simply in order to avoid returning to Student Beans out of displeasure. I am satisfied on the balance of probabilities that it would return to Student Beans. It follows that Myunidays' continued operation of its contracts after being on put on notice of the full terms of the First and Second SB Contracts, which are inconsistent with them, did cause Student Beans loss, and that, had Myunidays desisted on 14 December 2018, or if I force it to desist now by granting injunctions, Student Beans would have and will regain the Shein business to which it is entitled under the First and Second SB Contracts, until they expire.

121. I therefore find for the Claimant on the second issue and will grant the injunctions which are, as I have mentioned, in an agreed form.