

Neutral Citation Number: [2024] EWHC 2146 (Ch)

Case No: BL-2020-001626

IN THE HIGH COURT OF JUSTICE

BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

The Business and Property Courts of England & Wales
HMCTS
7 Rolls Building
Fetter Lane
London EC4A 1NL

Date: 16 August 2024

Before :

His Honour Judge Cadwallader

Between :

KIERAN CORRIGAN & CO LIMITED

Claimant

- and -

(1) ONEE GROUP LIMITED

Defendants

(2) BASHIR TIMOL

(3) DOMINIC SLATTERY

(4) TIMOTHY JOHNSON

Jonathan Hill (instructed by **TLT LLP**) for the **Claimant**

Martin Budworth (instructed by **Lawhive Legal Ltd**) for the **First and Third Defendants**

The **Second Defendant** not attending or being represented

The **Fourth Defendant** in person

Hearing dates: 14, 15, 16 May 2024
Judgment circulated in draft 6 August 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 16 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

HHJ Cadwallader:

Introduction

Inquiry as to damages

1. This judgment concerns the inquiry as to damages in this case, at which the Court is to determine the quantum of the Claimant’s claims for damages against the First, Third and Fourth Defendants for their misuse of confidential information, and associated unlawful means conspiracy, consisting in their taking and using the Claimant’s confidential information (‘Confidential Information’) relating to a tax planning structure, of several variants (‘the Structure’), based on relief for expenditure on Research and Development (‘R&D’) under Part 13, Chapter 2 of the Corporation Tax Act 2009 (‘CTA’) which enabled small and medium-sized enterprises (‘SMEs’) not involved in R&D to take advantage of the relief.

The liability judgment

2. These Defendants’ liability was established in the judgment (‘the Judgment’) of Jonathan Hilliard KC (‘the Judge’), which he gave on 23 March 2023 following a 5-day trial in December 2022.
3. He rejected the evidence of the Third and Fourth Defendants that they had not copied and used the Confidential Information in the Defendants’ own structure (‘the Nemaura Structure’), which was based on providing R&D to a company connected with OneE (and partly owned by the Second Defendant), namely Nemaura Pharma Limited (‘Nemaura’). He held that the Nemaura Structure embodied and utilised the Claimant’s Confidential Information.
4. The Confidential Information itself is set out in [219] of the Judgment. It included a detailed set of draft Instructions to Counsel (‘the Instructions’) prepared by Mr Kieran Corrigan, the Claimant’s principal, which provided a description of the Structure (including various options for its implementation, for instance as to gearing) and associated tax analysis. Key parts of the Confidential Information are set out in the tables in the Appendix to the

Judgment, with comparisons to a prior structure ('the Ultra Green Structure') and the Nemaura Structure and an earlier, 2013, structure proposed by the First Defendant (and/or members of its group – 'OneE') based on Nemaura.

5. The Judge held that the inspiration and principal thinking behind the use of the sub-contractor R&D relief – the key to the Structure and the Nemaura Structure – came from Mr Corrigan: [167] of the Judgment. He also held that that the use of such relief had not occurred to OneE when it prepared the 2013 Nemaura structure.
6. He held that the claims for breach of confidence and unlawful means conspiracy in relation to that were made out against the First, Third and Fourth Defendants, but not the claims for procuring breach of contract (the contract in question being a nondisclosure agreement with a company in the First Defendant group).

The Second Defendant

7. The Second Defendant was found not to be liable, essentially on the footing that he was not sufficiently involved in the wrongful activities. The Claimant has obtained permission to appeal that finding, and I am told that its appeal is due to be heard not long after the hearing of this inquiry. The prospect of a successful appeal raised the possibility of a re-run of this inquiry being required as against the Second Defendant, unless the inquiry was stayed until after the appeal. However, that difficulty was avoided because, as recorded in the order of Master Clark made on 1 December 2023, the Second Defendant undertook to the Court that he would submit to any finding made at the trial of the inquiry and would participate in this inquiry as a party. In the event, he did not attend and was not represented at the trial of the inquiry.

Disclosure

8. Following the Judgment, the First, Third and Fourth Defendants were ordered to give *Island Records v Tring* disclosure to enable the Claimant to elect between pursuing an inquiry as to damages or an account of profits (although the Judge had not at that time positively determined that the Claimant was entitled to an account). They did so in the form of the Second Defendant's

second witness statement (for the First Defendant) dated 17 April 2023, the Third Defendant's second, third and fourth witness statements dated respectively 17, 18 and 27 April 2023, and the Fourth Defendant's second witness statement dated 17 April 2023. Although expressing itself unsatisfied with the disclosure given, the Claimant then elected to pursue this inquiry as to damages rather than an account of profits.

Issues

9. The parties have agreed a list of issues, although the Claimant says that most of them do not arise. Their respective positions are helpfully summarised in the case summary which has been prepared for the inquiry.

(1) The Claimant's position is that equitable compensation / damages should be quantified on the basis of a 50/50 split of fees generated from the Nemaura Structure as follows (i) the cash raised from investors by the promoters by way of fees and (ii) the promoters' share in any success fees generated from the research and development funded by the Nemaura Structure as this was the deal that the Claimant had offered and would have been agreed. Alternatively, the Claimant seeks a hypothetical reasonable licence fee, based on a split of the sums received and success fees (at a level the Court holds appropriate, with 50% being the Claimant's primary case) or alternatively, if the Court rejects that approach, based on a flat consultancy fee.

(2) The First and Third Defendants contend that their wrongful acts caused no loss, alternatively damages should be calculated as a split of the success fees as negotiating damages or, if a flat fee is appropriate, that it should be lower than that paid to the barrister engaged in respect of the Nemaura Structure, Rory Mullan.

(3) The Fourth Defendant disputes that a deal would have been agreed as the Claimant contends, alternatively that it would have been based on a split of net profits (no net profits were made) or would have been for a 'minimal' split of revenue. If the hypothetical fee approach were used, then that split would still be a split of net profits and so would generate no liability to the

Claimant. Alternatively, if a flat fee approach were used, the fee should be less than that paid to Mr Mullan.

The Confidential Information

10. The Judge found that the relevant information (which was supplied to OneE) consisted of the proposed structure set out in the instructions to Counsel (the Structure with several variants devised by the Claimant in conjunction with tax counsel, Michael Sherry), using the R&D relief provisions of the Corporation Tax Act 2009 ('the 2009 Act'), the proposed Morvus structure and the proposed Fast Track Pharma structure referred to in the Judgment.

11. He held that

“...the most important feature of the Structure for the purposes of the present claim was the use of R&D sub-contractor relief, including the reasoning on s.1053(6). However, as I have explained above, that feature is not to be taken in isolation. Rather Mr Corrigan’s key insight for the purposes of the present claim was that that one could build an R&D sub-contractor structure with an LLP at the top. Further, one could build it in a way that the LLP was unconnected to the subcontractor, which would (if the LLP traded) attract R&D relief of 181.25% on the sub-contractor payment (paragraph 39 above), and would do so without the need for the expenditure of the subcontractor to be limited to the categories of expenditure on staff, software, consumables and externally provided workers that formed the subject matter of ss.1124, 1126 and 1132. Those categories were also reflected in s.1134 in relation to connected subcontractors, together with payments to subjects of clinical trials. As part of the insight above, the Claimant provided legal reasoning for its view that the limits that I have just mentioned did not apply.”

12. He held that those elements of the Structure in isolation were sufficient to amount to confidential information. Although the insight about sub-contractor R&D relief under the 2009 Act, particularly using unconnected sub-contractors, and using it in a LLP structure that corporates could invest in, could in theory have been achieved by someone else with sufficient time, effort and skill, as evidenced by the opportunity that Ultra Green came up with based on the 2000 Act, it was not one that appeared on the evidence before him to have previously been done by others or under the 2009 Act, and like many simple ideas, it was the product of significant preparatory work. He held that the Confidential

Information was imparted in circumstances importing an obligation in confidence over a period starting on 4 February 2014.

13. The Judge held that in breach of confidence the Confidential Information was used in developing the Nemaura Structure from 3 June 2014 in preparing and commenting upon instructions and then on 4 August 2014 in sending them to Counsel's clerk, and in the lead up to the October presentation at the Lowry. The Nemaura Structure used some of the Confidential Information and the Judge held that use of the Nemaura Structure without the Claimant's permission constituted misuse of Confidential Information. In particular, the incorporation of the use of R&D relief for unconnected sub-contractors was very significant. None of this precluded the Defendants using individual components of the structure that they already had come across themselves. Accordingly, for example it did not preclude them using a LLP structure to generate other tax savings outside a R&D setting, as OneE had sought to do with Rehberg. Nor did it preclude them from using a LLP structure to generate an ordinary trading loss, whether on a geared or non-geared basis, within a R&D setting as Nemaura 2013 sought to do. But it did prevent them using a LLP structure with R&D relief for unconnected subcontractors.

The breaches

14. The Judge found that in breach of confidence the First and Third Defendants did disclose the Nemaura Structure at the October 2014 conference and distributed the documents at the conference and on other occasions, and provided information regarding the Nemaura Structure at other events and on other occasions. The First and Third Defendants (but not the Fourth) were found to have been involved in fundraising and implementation, and the Fourth Defendant was involved in implementing alone, in breach of confidence. The fundraising ceased in 2017. The First, Third and Fourth Defendants were held jointly liable on this basis.

Unlawful means conspiracy

15. Further, the First, Third and Fourth Defendants were liable for unlawful means conspiracy. From May 2014, Mr Slattery and Mr Johnson embarked on the

development of the Nemaura structure, having turned their attention back to it. There was a common design at this point to do so in order to generate fees from it; they acted on it both by providing material about the Nemaura Structure at the 7 October 2014 event which the First Defendant hosted, and on other occasions and in other ways. The Third and Fourth Defendants intended to injure the Claimant, in that they knew that they were using the Claimant's idea without recompense, to generate fees by developing the product, and necessarily intended to damage the Claimant in that respect; and that there was no product on the market that used a LLP structure with sub-contractor R&D relief, so Nemaura would be the first, and with a product that would include non-statutory gearing, and would therefore provide (if it worked) a higher tax saving than the Claimant's product, thus intending to damage the Claimant's ability to make money from any similar product. That intention was attributable to the First Defendant through the Third Defendant's directorship. The First, Third and Fourth Defendants were held jointly liable on this basis too.

Entitlement to an inquiry as to damages

16. The reason why the Claimant is entitled to an inquiry as to damages, the Judge held, was because there was prima facie evidence of loss. That was for the following reasons. First, the Claimant had not received any fee for the use of its Confidential Information in developing the Nemaura Structure, and therefore has a prima facie argument that it has lost the opportunity to bargain for a reasonable fee for the use of its proposed structure. Second, while the Judge took into account the time that it took the Claimant to run its structure successfully past the Revenue, the Claimant has a prima facie argument that its ability to bring any structure based on R&D subcontractor relief to market successfully had been lost by the Nemaura Structure's being brought to market first, or, failing that, it had been made significantly more difficult for them to do so, and the money that they might generate from doing so has been restricted by the fact that OneE got there first.
17. The reasons given for directing an inquiry as to damages were necessarily based upon the evidence then before the Court, which I understand not to have been directed to assessing damages. For that reason, and because I do not understand

the Judge to have intended by this conclusion to restrict the nature of loss which might be found to have occurred upon the inquiry which he directed, it seems to me that the way in which the Claimant approaches damages for the purposes of this inquiry is not limited by the way in which the Judge expressed himself as summarised above. Equally, the Defendants are not precluded by those observations from arguing that there was no loss at all.

18. Counsel for the First and Third Defendants laid emphasis on the following passage of the liability judgment at paragraph 383.

“The analysis above reflects the wealth of points that each side has prayed in aid against the other at trial. The second stage of the proceedings is likely to be similarly hard fought, with the costs that entails. The Defendants have already laid down a marker that they contend that they have made no profit from the arrangements, and there will no doubt be significant argument at the second stage about how what effort it would take to have come up with Mr Corrigan’s relevant ideas, given that for example the Ultra Green opportunity involved the use of R&D sub-contractor relief under the 2000 Act. Therefore, I would encourage the parties to be realistic in considering their respective positions on the second stage and any scope for narrowing the ground between them.”

The inquiry has indeed been hard fought. But, contrary to the Defendants’ argument, I cannot see that the encouragement to realism was directed any more at the Claimant than at the Defendants.

Did the information have any substantial value?

19. The Claimant’s Counsel invites me to pay particular regard to the following findings in the judgment of the learned Judge, as supporting the proposition that the Confidential Information does have substantial value.

a. The finding at [165] that it was clear that the inspiration for Ds’ use of sub-contractor R&D relief came from Mr Corrigan, including the detailed points set out in [165(1)-(13)].

b. The finding at [166] that the operation of s.1053 of the Corporation Tax Act 2009 (actually, s.1053(6) of that Act, which was concerned with when particular kinds of expenditure were attributable to relevant research and development) was not straightforward or obvious, as borne out by OneE’s

failure to pick up on it 2013, Mr Corrigan's view and the dialogue between OneE and Mr Mullan, the barrister they instructed on the Nemaura Structure.

c. The finding at [167] that the inspiration and principal thinking behind OneE's use of the sub-contractor R&D relief came from Mr Corrigan, of the Claimant.

d. The fundamental difference between OneE's 2013 instructions regarding the structure it then hoped to base on Nemaura, and the Confidential Information and the Nemaura Structure – as set out in [169]-[172]. Prior to their dealings with Mr Corrigan, there was no sign of the Defendants' having considered sub-contractor R&D relief for Nemaura. I bear in mind too what is said in the judgment about the Rehberg instructions, and the finding that the substance of Ultra Green was not recalled or used by the Defendants in the May 2014 instructions, as the Fourth Defendant accepted at the trial.

e. The findings at [175] that at the 4 February 2014 meeting between Mr Corrigan and the Defendants, Nemaura was raised as a possible vehicle for the Structure, that the Defendants seemed interested in progressing with Mr Corrigan and had not thought of the relief before [175(3)], that they discussed fees and that Mr Corrigan explained he believed the deal between OneE and the Claimant should be a full joint venture and that he would be entitled to participate in capital profits made by companies exploiting the Structure [175(4)].

f. The finding that the Ultra Green structure was confidential to Ultra Green, had not been taken up by OneE when offered a number of years previously (in 2009), was not recalled or used by the Third or Fourth Defendants when working on the Nemaura Structure, and was different from the Confidential Information (relating inter alia to Sch 20 of the Finance Act 2000, which was replaced by provisions of the Corporation Tax Act 2009 which were not identical) and did not render it non-confidential.

g. The finding at [222] that Mr Corrigan’s Structure was new and not on the market.

h. The findings at [230] giving the reason why the Confidential Information was indeed confidential.

i. The findings at [231] that the key insight in the Confidential Information was confidential and although in one sense a simple idea, and one which Ultra Green had come up with in the context of the 2000 Act, was not one that appears on the evidence to have previously been done by others or under the 2009 Act.

“Like many simple ideas, it was the product of significant preparatory work, which in my judgment helps to explain why others had not come up with it.”

The Judge recognized that someone else could in theory have come up with the idea – as Ultra Green did in relation to the 2000 Act. Mr Sherry, a highly experienced tax barrister, was not aware of it, as the Judge noted at [230(5)], and stated that the idea was proposed to him by Mr Corrigan [70].

j. The finding at [237(a)] that the Nemaura Structure materials were disclosed by OneE to potential investors under conditions of confidence, at the Lowry Hotel conference on 7 October 2014 (referred to at [125]).

k. The findings at [269]-[272] that the Nemaura Structure embodies and uses the Confidential Information.

20. I accept that, subject to the arguments raised on behalf of the Defendants to which I refer below, these features of the judgment do tend to indicate that the Confidential Information had substantial value, and, indeed, was regarded not only by the Claimant but by the Defendants as having substantial value. But whether it did so, and if so what value, is the question to be addressed by this judgment.

Law

21. Before considering the facts as found by me at the inquiry as to damages, I should consider the applicable principles.

Damages are recoverable in principle

22. Whether, and if so on what basis, damages can be awarded for breach of the equitable duty of confidentiality has historically been doubtful, and some questions still remain: see the discussion in Toulson & Phipps, *Confidentiality*, 4th ed., 6-145ff. However, it is at least now plain that damages are recoverable.

Damages are compensatory

23. The parties in this case (rightly, in my view) agree both that it is for the Claimant in this case to establish its loss, and that damages, both for breach of the equitable duty of confidence and (in the present case) for conspiracy are concerned with putting the Claimant in the position it would have been in had the breach or tort not been committed. That is consistent with the approach of the Court of Appeal in *Dowson & Mason Ltd v Potter* [1986] 1WLR 1419, *Indata Equipment Supplies Ltd v ACL Ltd* [1998] BCLC 412 and with that of Arnold J in *Force India v 1 Malaysia Racing Team* [2012] EWHC 616 (Ch). This is not a case in which one needs to consider damages in lieu of an injunction.
24. Damages for misuse of confidential information may be assessed in a variety of ways, depending on what best captures the loss suffered. In *Force India v 1 Malaysia Racing Team* [2012] EWHC 616 (Ch) Arnold J gave a helpful analysis of the ways in which damages might be assessed. On the unsuccessful appeal ([2013] EWCA Civ 780) the Court of Appeal did not disagree. He summarised his general conclusions in the following way.

“I conclude there is nothing in the authorities which prevents me from adopting the approach which, as a matter of principle, I consider to be correct. The same approach is to be adopted to the assessment of damages or equitable compensation whether the obligation of confidentiality which has been breached is contractual or equitable.

Where the claimant exploits the confidential information by manufacturing and selling products for profit, and his profits have been diminished as a result of the breach, then he can recover his loss of profit.

Where the claimant exploits the confidential information by granting licences to others, and his licence revenue has been diminished as a result of the breach, he can recover the lost revenue. Where the claimant would have “sold” the confidential information but for the breach, he can recover the market value of the information as between a willing seller and a willing buyer. Where the claimant cannot prove he has suffered financial loss in any of these ways, he can recover such sum as would be negotiated between a willing licensor and a willing licensee acting reasonably as at the date of the breach for permission to use the confidential information which has been misused in the manner in which the Defendant has used it.”

25. Thus, he distinguishes between (1) loss of profit cases, (2) loss of licence revenue cases, (3) loss of information value cases, and (if loss on these bases cannot be proved) (4) negotiation damages for licence to use the misused information. As I see it, these categories are not necessarily closed, given the endless variety of potential ways of doing business.
26. In the present case, the Claimant says it has lost licensing revenue because the Claimant offered a licence on terms which, but for the Defendants’ wrongdoing, would have been accepted. Alternatively, the Claimant says it is entitled to negotiating damages.
27. As to negotiating damages, Arnold J took the same approach in *Primary Group v Royal Bank of Scotland* [2014] EWHC 1082 (Ch) at [181] to [184], noting, additionally, that in considering the hypothetical negotiation, the availability of alternatives was a potentially relevant factor. So too did Hildyard J in *CF Partners v Barclays Bank* [2014] EWHC 3049 (Ch) at [1182]-[1216], where he said at [1182]:

“The basic approach in the assessment of damages for any breach, whether the obligation of confidentiality is contractual or equitable, is to ascertain the value of the information which the Defendant took: *Seager v Copydex (No.2)* [1969] 1 WLR 809 at 813. That leads to another issue of complexity: the basis of valuing what the Defendant took. There are various ways of doing this; and what is appropriate is likely to depend on the quality of the information taken and whether its value is susceptible to measurement by analogy to a market standard or not.”
28. Rose J in *Vestergaard Frandsen v Bestnet* [2014] EWHC 3159 (Ch) at [80]-[84] took the same approach.

29. The leading authority on “negotiating damages” of this kind is now Lord Reed’s judgment in the Supreme Court decision in *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20. This was a case about damages for breach of contract, not for the equitable wrong of misuse of confidential information. But as Lord Sumption noted (at [120]):

“...a notional royalty (or its capitalised value) is commonly awarded as damages for breach of a duty not to misuse confidential information, whether that duty arises from contract or from equitable doctrines: *Seager v Copydex Ltd (No 2)* [1969] 1 WLR 809, 813; *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] RPC 29, paras 383-387, 424, approved without consideration of this point, [2013] EWCA Civ 780; [2013] RPC 38. This is not because of some principle peculiar to equitable relief. Nor is it because the claims were in reality for restitution. These were expressed to be, and in fact were awards of compensatory damages.”

Lord Reed also recognised that negotiating damages are appropriate as a remedy for breach of an equitable duty. Earlier, he stated:

“[84] There have also been cases in which negotiating damages have been treated as available at common law in cases of breach of contract. An example is the case of *Vercoe v Rutland Fund Management Ltd* [2010] EWHC 424 (Ch); [2010] Bus LR D1414 which also concerned the breach of a joint venture agreement, where the Defendants used the information provided by the claimants about a commercial opportunity without including them in the transaction. There were breaches both of a confidentiality agreement and of an equitable duty of confidentiality. It was agreed that damages should be assessed on the basis of a hypothetical release fee. In effect, the court awarded damages based on the commercial value of the information which the Defendants misused, as in a number of earlier cases concerned with breach of confidence. These cases can be understood as proceeding on the footing that the result of the breach of contract was that the claimants lost a valuable opportunity to exercise their right to control the use of the information...

[91] The use of an imaginary negotiation can give the impression that negotiation damages are fundamentally incompatible with the compensatory purpose of an award of contractual damages. Damages for breach of contract depend on considering the outcome if the contract had been performed, whereas an award based on a hypothetical release fee depends on considering the outcome if the contract had not been performed but had been replaced by a different contract. That impression of fundamental incompatibility is, however, potentially misleading. There are certain circumstances in which the loss for which compensation is due is the economic value of the right which has been breached, considered as an asset. The imaginary negotiation is merely a tool for arriving at that value.

The real question is as to the circumstances in which that value constitutes the measure of the claimant's loss.

[92] As the foregoing discussion has demonstrated, such circumstances can exist in cases where the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed, as for example in cases concerned with the breach of a restrictive covenant over land, an intellectual property agreement or a confidentiality agreement. Such cases share an important characteristic with the cases in which Lord Shaw's "second principle" and Nicholls LJ's "user principle" were applied. The claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the asset in question. The Defendant has taken something for nothing, for which the claimant was entitled to require payment.

[93] It might be objected that there is a sense in which any contractual right can be described as an asset, or indeed as property. In the present context, however, what is important is that the contractual right is of such a kind that its breach can result in an identifiable loss equivalent to the economic value of the right, considered as an asset, even in the absence of any pecuniary losses which are measurable in the ordinary way. That is something which is true of some contractual rights, such as a right to control the use of land, intellectual property or confidential information, but by no means of all. For example, the breach of a non-compete obligation may cause the claimant to suffer pecuniary loss resulting from the wrongful competition, such as a loss of profits and goodwill, which is measurable by conventional means, but in the absence of such loss, it is difficult to see how there could be any other loss.

[94] It is not easy to see how, in circumstances other than those of the kind described in paras 91—93, a hypothetical release fee might be the measure of the claimant's loss. It would be going too far, however, to say that it is only in those circumstances that evidence of a hypothetical release fee can be relevant to the assessment of damages. If, for example, in other circumstances, the parties had been negotiating the release of an obligation prior to its breach, the valuations which the parties had placed on the release fee, adjusted if need be to reflect any changes in circumstances, might be relevant to support, or to undermine, a subsequent quantification of the losses claimed to have resulted from the breach. It would be a matter for the judge to decide whether, in the particular circumstances, evidence of a hypothetical release fee was relevant and, if so, what weight to place upon it. However, the hypothetical release fee would not itself be a quantification of the loss caused by a breach of contract, other than in circumstances of the kind described in paras 91—93 above." And see [95].

Thus,

- (1) such damages are available where what had been lost is a valuable opportunity to exercise the right to control the use of the information;

- (2) the loss for which compensation is due is then the economic value of the right which has been breached, considered as an asset;
 - (3) the imaginary negotiation is merely a tool for arriving at that value;
 - (4) circumstances in which that value constitutes the measure of the claimant's loss can exist in cases where the breach of contract results in the loss of a valuable asset created or protected by the confidentiality;
 - (5) the right needs to be of such a kind that its breach can result in an identifiable loss equivalent to the economic value of the right, considered as an asset (even in the absence of any pecuniary losses which are measurable in the ordinary way);
 - (6) negotiating damages in this context are still compensatory.
30. Counsel for the First and Third Defendants, Mr Budworth, argued however that confidential information did not automatically have the necessary proprietary character and that if (as he contended was the present case) the true measure of the Claimant's loss, if any, was the loss of the opportunity to market his information for profit, and on that basis he had suffered no loss, it was not open to the Court to award negotiating damages, relying on *Dowson & Mason Ltd v Potter* [1986] 1 WLR 1419 (CA) (cited with approval in *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] EWCA Civ 428 (at 24-27)). I accept that confidential information *per se* does not automatically have the necessary proprietary character. *Dowson & Mason Ltd* was a case in which the unsuccessful appeal was against the determination that the loss suffered by the plaintiffs fell to be assessed according to their loss of profits, on the footing that it should really have been assessed at the value of the information, which was said to be nothing special. Sir Edward Eveleigh explicitly accepted that when dealing with someone who would have licensed the use of his confidential information, then almost invariably the measure of damages would be the price that he could have commanded for that information (1423C). But that was not the case. I accept what Arnold J said in *Force India* at [378]:

“...even if confidential information is not strictly intellectual property, the close analogy between the two suggests the principles developed in the context of intellectual property law may have application in the field of breach of confidence”.

31. It depends on the facts. *Dowson & Mason Ltd* is certainly not authority for the proposition for which Mr Budworth contended. And if more than one kind of loss is suffered, I see no reason why both should not be awarded; while if only one has been suffered, I see no reason why the possibility that some other might have been but has not been suffered should prevent an award for the loss that has been suffered.
32. If negotiating damages are available in the present case, the approach to be adopted is not in dispute. I take what follows from the Claimant’s skeleton argument. The negotiating damages must be assessed as set out by Arnold J in [386] of *Force India*.

i) The overriding principle is that the damages are compensatory: see *Attorney-General v Blake* [2001] 1 AC 268 at 298 (Lord Hobhouse of Woodborough, dissenting but not on this point), *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2003] EMLR 25 at [26] (Mance LJ, as he then was) and *WWF-World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286, [2008] 1 WLR 445 at [56] (Chadwick LJ).

ii) The primary basis for the assessment is to consider what sum would have arrived at in negotiations between the parties, had each been making reasonable use of their respective bargaining positions, bearing in mind the information available to the parties and the commercial context at the time that notional negotiation should have taken place: see *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2003] EMLR 25 at [45], *WWF-World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286, [2008] 1 WLR 445 at [55], *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] EWCA Civ 430, [2007] L&TR 6 at [25] and *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45, [2011] 1 WLR 2370 at [48]-[49], [51] (Lord Walker of Gestingthorpe).

iii) The fact that one or both parties would not in practice have agreed to make a deal is irrelevant: see *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45, [2011] 1 WLR 2370 at [49].

iv) As a general rule, the assessment is to be made as at the date of the breach: see *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] EWCA Civ 430, [2007] L&TR 6 at [29] and *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45, [2011] 1 WLR 2370 at [50].

v) Where there has been nothing like an actual negotiation between the parties, it is reasonable for the court to look at the eventual outcome and to consider whether or not that is a useful guide to what the parties would have thought at the time of their hypothetical bargain: see *Pell v Bow* at [51].

vi) The court can take into account other relevant factors, and in particular delay on the part of the claimant in asserting its rights: see *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45, [2011] 1 WLR 2370 at [54].

33. To this may be added the following points from *Irvine v Talksport* [2003] EWCA Civ 423, [2003] FSR 35, *CF Partners v Barclays Bank* [2014] EWHC 3049 (Ch) and Rose J's judgment in *Vestergaard Frandsen v Bestnet* [2014] EWHC 3159 (Ch):

a. The fee is not the fee that the Defendant could have afforded to pay or was in actual fact willing to pay, but that which it would have had to pay to obtain lawfully that which it took unlawfully: *Irvine* at [106].

b. Whether the scale and nature of the use made by the Defendant would affect the fee the claimant would reasonably have accepted is a matter of evidence and it may, on the facts, be that a low value deal is simply one that would not have reasonably interested the claimant (it "would not have bothered to get out of bed" for): *Irvine* at [108], [111].

c. The assessment is ultimately an objective one, albeit that the hypothetical negotiation may be informed by evidence as to what factors and negotiating

arguments the parties say (subjectively) they would have advanced – *CF Partners* [1205]-[1210].

d. The price to be paid is the “release price” and covers all the information provided and intended to be freed from restriction: *CF Partners* [1213]-[1215]. Where a body of information has been absorbed by the wrongdoers, as here, one cannot fillet out information as used: the whole has added to their stock of knowledge and steered their behaviour.

e. Where the profit-making opportunity would not have been identified at all without the confidential information then the entire value of its achievement is referable to the information and the release fee must be judged accordingly: *CF Partners* at [1222].

f. The parties are taken to have been willing to make a deal even if one or both of them would not in reality have been prepared to do so and they are taken to have acted reasonably regardless of whether that would in fact have done so (particular character traits of the parties should therefore be disregarded, for example whether they are easy-going or aggressive): *Vestergaard* at [82].

g. If (but obviously only if) alternative routes to the end achieved by the wrongdoing are available to the defendant, these may be taken into account in the negotiation: *Vestergaard* at [83]. That is by way of contrast with the position where loss of revenue is claimed, when it is not open to a Defendant to defeat a claim for infringement by arguing that he could have achieved the same result without infringing the claimant’s rights. This is the principle established in *The United Horse Shoe and Nail Company Ltd v John Stewart & Co* (1988) LR 13 App Cas 401.

34. I accept the Claimant’s submission, expressed in its skeleton argument in the following terms.

“The assessment of damages in cases such as this is an inherently imprecise task and is to be carried out without application of the strict balance of probability test. Lord Shaw of Dunfermline in *Watson, Laidlaw & Co Ltd*

v Pott, Cassels & Williamson [1914 SC \(HL\) 18](#); (1914) 31 RPC 104 (a patent case) described the position (as his second class of cases) as follows:

In the case of damages in general there is one principle which does underlie the assessment. It is what may be called that of restoration. The idea is to restore the person who has sustained injury and loss to the condition in which he would have been had he not so sustained it. In the cases of financial loss, injury to trade, and the like, caused either by breach of contract or by tort, the loss is capable of correct appreciation in stated figures.

In a second class of cases, restoration being in point of fact difficult—as in the case of loss of reputation, or impossible, as in the case of loss of life, faculty, or limb—the task of restoration under the name of compensation calls into play inference, conjecture, and the like. And this is necessarily accompanied with those deficiencies which attach to the conversion into money of certain elements which are very real, which go to make up the happiness and usefulness of life, but which were never so converted or measured. The restoration by way of compensation is therefore accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe. It is in such cases, whether the result has been attained by the verdict of a jury or the finding of a single Judge, that the greatest weight attaches to the decision of the court of first instance. The reasons for this are not far to seek—such as the value of testimony at first hand down to even the nuances of its expression, and they include, of course, the attitude and demeanour of the witnesses themselves. In all these cases, however, the attempt which justice makes is to get back to the *status quo ante* in fact, or to reach imaginatively by the process of compensation a result in which the same principle is followed.

The “practice of the broad axe” or “broad axe approach” has been approved and applied many times since *Watson, Laidlaw & Co.*, most notably being approved by Lord Reed in *One Step (Support) v Morris-Garner* [2018] UKSC 20 [2019] AC 649 at [37]. It was recently discussed, and approved, by the Court of Appeal, in the context of damages for breaches of competition law, in *Royal Mail Group v DAF Trucks* [2024] EWCA Civ 181 (see [145]), where the Court made clear that the “broad axe approach” is a different approach to assessment than proof on the balance of probabilities (see also the quote from the CAT at [10]). See also Lord Reed’s comment at the beginning of [38] of *One Step* to the effect that “Evidential difficulties in establishing the measure of loss are reflected in the degree of certainty with which the law requires damages to be proved”. To similar effect, Devlin J said in *Biggin v Permanite* [1951] 1 KB 422 at

438: “I think that in such a situation the court is bound to do the best that it can”.

Witnesses

35. For the Claimant I heard evidence from Kieran Corrigan, its principal. Like the Judge on the liability trial, I consider that he was an honest witness with a pretty good recollection of events. It was suggested that he had misled the Court about a date at the previous hearing, but I accept that although he had got it wrong, it was a genuine mistake. Generally, I accept his evidence.
36. For the Defendants, I heard Mr Slattery and Mr Johnson (the Fourth Defendant). Mr Slattery was, as the Judge remarked, fluent, quick and argumentative, and where his evidence conflicted with that of Mr Corrigan without contemporaneous corroboration, I preferred the evidence of Mr Corrigan. His approach to financial disclosure was, I consider, inadequate, and if he had felt that it would have assisted the Defendants to make arrangements to go back to the primary records, I consider that he would have done so.
37. Mr Johnson’s evidence was measured and thoughtful, and did not appear to be argumentative. I formed the view that he took his duty to the Court as a witness seriously, and in fact no substantial criticism of his evidence was made on behalf of the Claimant.
38. Mr Webber’s evidence was of assistance as to the kind of approach which those in the market might adopt, including as to the use of a split of the gross fees raised. His prior contact with Mr Corrigan did not prejudice the value of his evidence.

Findings

Would the Claimant and the Defendants have made a deal?

39. The primary question is therefore whether, and if so upon what terms, OneE (which is necessary to distinguish between various companies for these purposes) would have entered into a contract with the Claimant for the use of the Confidential Information. The Claimant’s case is that it would have done so, and upon the Claimant’s terms. The burden of proof is on the Claimant.

40. I find that OneE had a particular need for a new structure at the relevant time, and in time for the investment launch on 7 October 2014 (though they had two launch periods per year one before the autumn statement in November, and one relating to the budget in March). Mr Slattery was wrong to suggest otherwise.
41. I accept the Claimant's evidence that the Confidential Information was key to the Nemaure Structure, which could not have been developed without it and was the inspiration and principal thinking behind it.
42. I accept, too, that the Confidential Information was not available elsewhere.
43. Although many people in the business were interested in R&D, no one but Mr Corrigan came up with the idea which formed the kernel of the Confidential Information. No one else was offering it in the market.
44. OneE did not have the knowledge already. In 2009 the opportunity to make use of a structure known as Ultra Green, which made use of the R&D relief regime under Sch. 20 Finance Act 2000, had indeed been provided to OneE, but they had not taken it up. The Defendants relied on it at the liability trial in part to support the submission that they already knew of the relevant aspects of R&D relief before the approach by the Claimant. As the Judge noted, however, after March 2009 there was no record of any further OneE consideration of the Ultra Green opportunity and no evidence of what if anything happened to Ultra Green. The Judge rejected Mr Johnson's suggestion that OneE were "already fully aware of this type of structure" in the sense of having to mind at the time that Mr Corrigan approached them a LLP structure that used sub-contractor R&D relief.
45. As he also found, OneE Group had no formal knowledge bank that collected together past tax planning structures, thoughts and other material, which they might have consulted in case of need, and which might have led to the Claimant's central insight. In any event, Ultra Green related to the 2000 Act, not the 2009 Act (and there were other differences). Finally, it was not freely available to OneE since it too had been disclosed under conditions of confidentiality.

46. I therefore reject the idea that exposure to the Ultra Green structure would or could have provided a legitimate independent way to the kernel of the Confidential Information which OneE might have used. The Rehberg structure did not include any information as to R&D sub-contractor relief. On the basis of the agreement (albeit unexecuted) which I consider likely to have been made with Taurus, I find that OneE had agreed with Taurus that it would not base another structure on what it had got from the Rehberg structure.
47. The Confidential Information could not have been independently generated by OneE's engaging a consultant to work for a limited period. It is not practical, nor usual business practice, to instruct a consultant open-endedly to hunt for an idea without knowing what they are to look for. OneE would not have done so, and if they had the exercise would have been vanishingly unlikely to produce the Confidential Information.
48. I accept that once OneE had and could use the Confidential Information, implementation was relatively straightforward: the idea could legitimately be checked; the outcome was predictable, and work would progress in a conventional way. OneE knew it had the means to achieve this.
49. Accordingly, OneE had a substantial incentive to reach a deal with the Claimant to use the Confidential Information for a marketable product. It might have hoped to generate or obtain other attractive products, but this one was a bird in the hand. I reject the submission that OneE would have refused a deal with the Claimant and got to market first in any event. On the contrary, I find that they would have done a deal with the Claimant.
50. I reject the suggestion that the Claimant would not ultimately have done a deal with OneE. It is true that they had different approaches: the Claimant would not have been comfortable with the aggressive gearing OneE favoured. OneE would not have wanted to spend a lot of time seeking HMRC comments and approval. But the Claimant had come to the OneE to do a deal with the Confidential Information and, although he might have gone elsewhere, they had the ability to market it and they were interested in doing so, so they too were a

bird in the hand in that sense. I find that the Claimant would have done a deal with them.

Joint venture and split of fees?

51. I accept the Claimant's evidence that the deal which the parties would have been willing to enter together would have involved a species of joint venture based on sharing the gross amount of the fee paid by the investors to the promoter of the structure, less third-party commissions paid to introducers; and that any capital appreciation arising out of the research in any project, on any basis agreed with the owners of the projects, would have been part of that joint venture.
52. As to the joint venture aspect, it is not the case that the Claimant only brought the Defendants a tax mitigation idea. The Claimant was also bringing R&D projects, and the idea was to fund biotechnology projects where the R&D fund and the Claimant could participate in the capital appreciation of the projects involved. The Claimant would have continued to be involved, as opposed to merely licensing the use of an idea.
53. As to the sharing of fees, I accept that this is what the Claimant proposed, and that the Defendants did not reject the proposal, and that the Claimant had the impression that it had been accepted, albeit that there was no contract to that effect. I accept, moreover, that it was the most practical arrangement available to the parties to reflect the value brought by the Claimant.
54. Attempting to identify a net profit figure as matters went along would have been highly problematical, and recognised as such by both sides. As the Claimant submitted, using a net approach would give rise to profound uncertainty as to what costs should be netted off, particularly given the use by OneE of various companies, some of which were also engaged in other projects, and had built in overheads, and between which (as it turns out – I do not think the Claimant necessarily knew this at the time) there were inter-company charges. Issues could also have been anticipated over whether excessive costs had been incurred by one party or the other, whereas on a gross basis the parties could retain sole control of their own costs. Back-end profits were wholly speculative, and might

or might not arise. Sharing the gross amount of the fee paid by the investors to the promoter of the structure, less third-party commissions paid to introducers, would by contrast have the virtues of clarity and simplicity.

55. Such an arrangement would have been by no means extraordinary. Mr Corrigan referred, for example, to the Vaccine Research case, in which the originator had received 25 % of the gross take after introducer fees (whereas here the Claimant also had the R& D projects). I accept his evidence about this. Mr Slattery, too, referred to a Stamp Duty Land Tax scheme where an equal split had been proposed, though it is not known what was finally agreed. Mr Webber's expert evidence included further examples.
56. I do not accept that anything in the nature of a joint venture must necessarily involve cost sharing. It is a highly flexible term, but even if Mr Corrigan used it inaccurately, it is plain that both parties were clear that the proposal was for gross fees to be shared.
57. Nor would I accept that OneE would have seriously offered the Claimant a simple consultancy fee for the tax idea. That they did not reject his initial proposal out of hand is telling, in my view. Nor would the Claimant have accepted it. Such a fee would not have reflected what the Claimant brought to the table and, having heard the evidence, I do not consider that Mr Corrigan would have thought it did or that One E would have expected him to think so. The Claimant was not acting as a consultant, conducting a review of a proposed structure, but had created it and promoted it, and would be introducing R&D projects into it. To describe him dismissively as a 'one man band', as the Defendants attempted to do at the hearing, would have been far of the mark, and I do not accept it was their perception at the time: this evidence was self-serving.

What share?

58. The question is then what share of gross profits would have been agreed between the parties. The Claimant's case is that it would have been 50% of gross receipts less third-party commissions paid to introducers, but it was recognised on behalf of the Claimant (notwithstanding Mr Corrigan's evidence that he

would have agreed nothing less) that the court might find that a lower percentage would have been negotiated and agreed.

59. What percentage split the parties would have agreed on the basis of the information then available to them is not an easy question, particularly since the Defendants do not accept any deal of this kind would have been done. The Defendant's evidence does not assist to any substantial degree on how the negotiation would have proceeded, since it focused primarily upon the contentions, which I have rejected, that there would have been no agreement, or if there had been, it would have been for a consultancy fee. No doubt the parties would not have agreed to an extensive investigation or valuation of their respective contributions, both past and future, on the basis of disclosure of or access to their financial records or estimates, and no one has suggested they would have. The information before the court about the position at the time is rather limited. It seems to me that it would be wrong to give the Defendant the advantage of any uncertainty. However, notwithstanding that no objection was taken to the 50% split proposed by Mr Corrigan at the time, it seems to me that there would have been further negotiation before achieving a deal.
60. Subject to the possibility that the Claimant might have gone elsewhere if it were unsatisfied with the terms, and the Defendants might have found another product if they were unsatisfied with the terms, but recognising that each was there to do a deal and neither was likely to go elsewhere, each could fairly point out to the other that their own contribution was essential. I evaluate the risk that either party might have gone elsewhere as about equal. Those factors take the matter no further than an equal split.
61. However, it seems to me that the Defendants could and would fairly have said, and the Claimant would have had to accept, that they bore the burden of the greater cost going forward, and that this ought to be reflected in the share of gross fees.
62. Apart from the introducers' fees, I accept that that will have included marketing, client tax advice, professional indemnity insurance, raising the money, dealing with clients, defending against HMRC, paying the salespeople, the costs of the

offshore companies, companies house compliance and LLP accounting and auditing costs. Mr Corrigan rightly pointed out that he was bringing the tax structure, the R&D projects (or at least most of them) and the help of a Dr Michael Wiley to monitor and supervise the research to ensure compliance with HMRC and other requirements, but there is no clarity about the extent of the Claimant's past or ongoing burden, and certainly as regards the ongoing burden it seems likely to have been substantially less.

63. Mr Webber suggested a simple way of looking at things. He suggested that in a project such as this, there were three component parts, consisting of tax technology, commercial access, and investment raising, but he proposed that on a rough and ready basis one third might be allocated to each, so that where, as here, the Claimant brought both the tax technology and commercial access, and the Defendants brought the investment raising, a split of 66% of the funds raised in favour of the Claimant (net of introducers' fees), and 33% in favour of the Defendant, could be justified, if each part were regarded as equal. He went further, and proposed that since the tax house (in this case the Defendants) would be doing little more than leveraging an existing client list, 75% in favour of the Claimant would be reasonable. However, I cannot imagine any world in which the Defendants would have agreed that the Claimant should have more than 50% of the gross receipts (net of introducers' fees), and the Claimant did not in fact ask for more. But Mr Webber's evidence on this point in any event depended explicitly on the assumption that each of the three parts was valued equally, an assumption which he did not really attempt to justify, and which seems to me to bear no relationship with the likely realities of this case as likely to be perceived by the parties in negotiation. Accordingly, the Claimant's case that there should be an equal split after the introducers' fees seems to me not to take adequate account of the probably unequal burden of implementation costs.
64. Doing the best I can, I consider that the balance would likely have been struck between the parties at 40%.

Cross check?

65. It seems to me that there is a potential way of cross checking the range within which this proportion falls. There is no evidence that the costs actually incurred by OneE in relation to the Nemaura scheme were greater than the parties would have expected at the time the deal would have been done. In principle, therefore, they could provide some evidence of what the parties might have expected at that time. However, I can derive little guidance as to those costs from the evidence before me, from which I consider that the actual overheads attributable to the Nemaura scheme are not identifiable. The Claimant invites me to work (for the purpose of an alternative calculation of damages which I am not presently considering) on the basis of the statement in an email dated 10 August 2012 to Robert VENABLE QC (as he then was) from Mr Slattery that the business operating margin (excluding directors' remuneration) was around 45%. That was a figure provided in the context of negotiating for fees, albeit in very different circumstances, and around 18 months before the relevant date, and possibly not applying across the board. Nonetheless, it appears to be the best evidence before the court as to the operating margin. I take it that it includes the cost of introducers' fees, since it that seems to have been a standard element of the operation of OneE.
66. I accept the Claimant's submission (which seemed also to be accepted by Mr Slattery, at least in part), that Mr Johnson's figures in his second witness statement at paragraph 14, are the most reliable ones before the court. They show that OneE Investments received roughly £9.9m, from which 25% paid to introducing accountants amounting to £2.5m should be deducted, and so retained about £7.4m. OneE Consulting Ltd received about £1.3 m for tax advice and defence support fees. That makes a total (net of introducers' fees) of £8.7m.
67. If the profit margin of 45% (which I have assumed takes account of introducers' fees) is applied to £9.9m +£1.3m = £10.2m, the product is £4,590,000. There is no direct evidence of actual profit before the court, and the Defendants say there was none, but this figure is an indication of the profit which might have been expected at the relevant time.

68. £4,590,000 is 52.76% of £8.7 million. Accordingly, if the Defendants were to expect any profit from the deal with the Claimant, they would presumably have to give the Claimant less than $100-52.76=47.24\%$ of the gross receipts the introducers' fees. That appears to rule out the gross profit share of 50% for which the Claimant contends.
69. If the profit margin is 45% (taking into account introducers' fees), so that (including introducers' fees) the Defendants' costs are 55% of the gross receipts in total, then, taking out the introducers fees at 25% of the gross receipts (forgetting, for the moment, that introducers' fees are not payable on all receipts, such as tax advice, for example), the balance of the Defendants costs are 30% of the gross receipts. If one assumes that these are applicable across the board, and do not vary between projects, then it seems likely that the Defendants would have persuaded the Claimant that some part of them should be shared between them, not directly, but reflected in the percentage of gross receipts which the Claimant was to receive after introduction fees. The very most the Defendants could have hoped the Claimant would accept would be 50% of those, that is, 15% of the gross receipts. On the figures before me, 15% of the gross receipts is equivalent to 20% of the gross receipts after introducers fees. It would seem to follow that the parties might well have settled on a deal in the range between at least 30% and about 47% of the gross receipts. The percentage I have selected falls a little above in the middle of that range. While I note that G Leggatt QC (as he then was) in *Fearns (t/a Autopaint International) v Anglo-Dutch Paint & Chemical Company Ltd & Ors* [2010] EWHC 1708 (Ch) stated at [70] that where the assessment of damages required a large amount of conjecture, the Court should make assumptions generous to the claimant because it is the defendant's wrongdoing that has given rise to the need for the conjecture, it seems to me appropriate to attempt a commercial balance where I can.
70. No doubt this approach can be legitimately criticised, and I have referred to at least some of its weaknesses in the course of the discussion. I have not thought it proportionate to invite submissions upon it because of those weaknesses and

because it has not formed the basis of my assessment, but represents only a way of considering that assessment against a background.

Conclusion

71. As I have said, looking at the matter in the round and doing the best I can on the basis of all the evidence, it seems to me that the proportion of gross receipts after introducer's fees upon which the parties would have settled is 40%. That gives rise to an award of damages of $40\% * £8.7m = £3,480,000$. Checking that against the sense I have gained from the evidence about the commercial realities of the case, that seems about right.
72. There is no basis upon which I can identify any ascertainable figure for back-end profits or success fees, and it seems to me I can make no award of damages in respect of those.
73. Accordingly, I do not need to decide the case on the basis of a hypothetical negotiation. In case I am wrong, though, I should consider it, although I will take it quite shortly.

Negotiation damages

74. It is clear to me that the Confidential Information had an economic value. Although its confidentiality did not give rise to a monopoly, it gave rise to something very similar as far as the Defendants were concerned; and no doubt any other with whom the Claimant might have dealt would have done so on similar terms. It is closely analogous to intellectual property. That - on this alternative basis - the Claimant must be assumed to have suffered no loss identifiable in other ways does not mean it suffered no loss. I accept the Claimant's evidence that if it had not dealt with the Defendants, it could have dealt with others in the market, and that it was only on the basis of the Defendants' interest that he stopped talking to others. I accept too that the effect of the Defendants' wrongdoing was that the Claimant lost first mover advantage and I reject as implausible the Defendants' contention that there was no such thing or that it was not valuable. I accept that the Claimant's not progressing a deal elsewhere after the wrongdoing was due to the loss of first

mover advantage and the wrongdoing itself, rather than evidence that the information was valueless and that it had suffered no loss: the witnesses' suggestions to the contrary were implausible. The Claimant lost the economic value attributable to the information. Negotiating damages are available to compensate for that loss. I reject Mr Budworth's submission that negotiating damages are inappropriate when more than one party is in the mix: I cannot see why not.

75. Considering what sum would have been arrived at in hypothetical negotiations between the parties is similar, in this case, to finding what the parties would have agreed but for the wrongdoing, given that I have accepted that as a matter of fact the parties would have made a deal. It does not seem to me appropriate to take into account against the Claimant that there was delay in asserting its rights by action. The price which I have found would actually have been agreed is a good representation of the price the Defendants would have had to pay to obtain lawfully that which they took unlawfully. This is not a case in which the deal would not have reasonably interested the Claimant. I accept that the profit-making opportunity would not have been identified at all without the Confidential Information and that the entire value of its achievement is referable to the information, but it seems to me that the relative incidence of the costs of putting it to work must also be borne in mind. The need to assume that the parties would have acted reasonably in the context of a hypothetical negotiation does not distinguish it in this case from my approach to assessing the deal which would actually have been achieved but for the wrongdoing, since I have assumed the parties – who seemed to be reasonable actors – would have done so in any event. I have rejected the idea that alternative routes were open to the Defendants to utilise the Confidential Information, and so none would fall to be taken into account in the hypothetical negotiation either.
76. Accordingly, I would have come to the same conclusion as to the quantum of damages on the hypothetical negotiation basis as I have done on the other basis.

Interest

77. Interest falls to be awarded. The Claimant claims at the rate of 2% over base rate up to date of the judgment (compounding at 6-month intervals, from the dates upon which the Claimant's licence fees should have been paid, alternatively by way of simple interest from those dates) and at 8% (simple interest) thereafter. The Defendants contend that only simple interest is appropriate, and at a commercial rate, not the judgment rate.
78. Following *Sempra Metals v Inland Revenue Commissioners* [2007] UKHL 34 compound interest is available at common law where the claimant proves a loss of compound interest. It has not done so here. Equity

“...awards compound interest as compensation for loss for the same reasons as the common law, although with one curious difference that the loss is assessed objectively based upon what a person with the general characteristics of the Defendant might have done, rather than what the Defendant would have done”: *McGregor, Damages, 21st ed., incl Second Supplement, 19-067.*

It may also do so in order to ensure that a person does not make a profit from their own wrongdoing if that person is in a fiduciary position, and if compound interest is made by a dishonest recipient in breach of fiduciary duty; and perhaps also in cases of fraud: *ibid.* This is not such a case. For these reasons, and in the exercise of my discretion, I will award simple interest, and I will do so at the rate of 2% over Bank of England base rate from time to time, which I regard as a reasonable commercial rate. The way in which it should be calculated and the date or dates as from which it should be calculated will have to be subject to further brief submissions, if not agreed.

79. I turn, for the sake of completeness, to the agreed list of issues.

Agreed list of issues

Issue 1

How was the Nemaura Structure commercialised?

The evidence on how the Nemaura Structure was commercialised was and

remained poor and confused despite exploration in cross-examination. I have adopted the figures of Mr Johnson for the sums invested; the 25% proportion for introducers' fees and the 45% proportion for overheads including such fees.

Issue 2

How was the Rehberg Structure commercialised?

It was not possible to get a clear picture of this from the accounts of OneE Investments Limited and Mr Slattery denied that Rehberg was paid a royalty, stating that the way Rehberg worked was that a fee share was agreed with Taurus and then once the investment had been fully funded, as eventually it was, that was the end of the matter, although there were still ongoing expenses associate with it. I was not satisfied that it was possible accurately to separate these out from other costs of OneE on the evidence before me. On the basis of an unexecuted draft or copy of the agreement with Taurus, it was suggested to Mr Slattery that OneE had agreed with Taurus that it would not base another structure on what it had got from the Rehberg structure. Although Mr Slattery resisted that suggestion, I did not find his resistance plausible, and conclude that there was such an agreement.

Issue 3

Was the Claimant in the business of commercialising the Confidential Information? Was it likely to have commercialised it and on what basis?

I accept that the Claimant was in the business of commercialising the Confidential Information, and sought to do so through its contact with the Defendants, in particular. But for the effects of the Defendants' wrongdoing (in particular, by the loss of first mover advantage) it might well have done so on the basis upon which it sought to do so with the Defendants, and of the agreement which I have found it would have reached with the Defendants but for the wrongdoing.

Issue 4

Was a fee for licensing the Confidential Information likely to have been paid by the Defendants. Is that an applicable measure of damages?

I accept that had the Confidential Information not been taken, OneE would have paid a fee for it, as set out above.

Issue 5

Was 50/50 a split of (i) the cash raised from investors by the promoters by way of fees and (ii) the promoters' share in any success fees generated from the research and development funded by the tax structures using the Confidential Information the Claimant's price for using the Confidential Information. If not, what was the Claimant's price, if it had one? If the Claimant did have a price for use of its Confidential Information, what sums would be due applying that price?

Yes, but it would have accepted 40%.

Issue 6

In the alternative, what would be a likely notional licence fee, quantified on the basis of the sum that would have been agreed between a willing licensor and willing licensee, for use of the Confidential Information in the development, marketing and operation of the Nemaura Structure.

Negotiation damages would fall to be ascertained in the same way as the lost deal in this case.

Issue 7

What are the overheads, if any, incurred by the First Defendant when developing and marketing the Nemaura Structure?

It has not been possible to ascertain this specifically.

Issue 8

Would the commercialisation be considered to be a joint venture and would the joint venture involve a mutual commitment to share all costs or would it depend on the parties' relative contributions to the venture.

Yes, it could be described as a joint venture, given the width of meaning

encompassed by that term. It would not involve a mutual commitment to share all costs. The parties' relative contributions to the venture would have been a factor affecting its terms and could be taken into account in working out the fee split.

Issue 9

What did the Defendants historically commit to pay introducer agents?

In general, of the order of 25% of investment receipts.

Issue 10

Was the only commercially conceivable outcome that the Claimant would have been offered and accepted a percentage of net profits or the back-end profits from the Nemauro Scheme?

No.

Issue 11

Alternatively, is a hypothetical flat consultancy fee an appropriate method of quantifying the damages due to the Claimant and if so, was such consultancy fee likely to be greater than the fees paid to Mr Mullan?

No.

Issue 12

How should interest be calculated and what sums are due by way of interest?

Simple interest should be awarded at 2% over Bank of England base rate from time to time. Absent agreement, further submission are required.

Costs

80. Finally, the cost of these proceedings, and of the applications heard at the outset of the trial, will fall to be determined at a further hearing if not agreed, together with interest and any other consequential matters.

End.