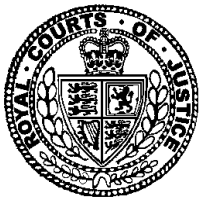

Neutral Citation Number: [2025] EWHC 682 (Ch)

Case No: BL-2021-002265

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPANIES COURT

Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 20 March 2025

Before :

MR JUSTICE RICHARDS

- -

Between :

(1) TITANIUM CAPITAL INVESTMENTS LIMITED	**Claimants**
(2) PHILIP FALZON SANT MANDUCA	
- and –	
(1) JONATHAN HUGHES	**Defendants**
(2) HUGHES GROUP LIMITED	
(3) MEDICAL SUPPLIES DIRECT LIMITED	
(4) LYN HUGHES (NEE BLYTH)	
(5) BERKELEY HEALTH LIMITED	
ORARIN FALZON SANT MANDUCA	**Third party**
FREDERICK FALZON SANT MANDUCA	**Fourth Party**
NEWFOUNDLAND DIAGNOSTICS LIMITED	**Fifth Party**
MICHAEL HODNETT	**Sixth Party**
NEUROCED LIMITED	**Seventh party**

- -
- -

Alan Gourgey KC and Edward Crossley (instructed by **Greenwoods Legal LLP**) for the **Claimants**
Lexa Hilliard KC and Kate Rogers (instructed by **Gardner Leader LLP**) for the **Defendants**

Hearing dates: 26 Nov 24 – 18 Dec 24

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 20 March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Mr Justice Richards :

1. The claims which I consider in this judgment all relate to the business of a partnership (the **Partnership**) that traded as "Hughes Healthcare" that was formed in or around September 2020 between Philip Manduca (**PM**) and Jonathan Hughes (**JH**). The Partnership's business involved the sale of lateral flow tests (**LFTs**) during the COVID-19 pandemic. To that end, the Partnership imported into the UK LFTs that were manufactured in China by a company **Acon** (which expression includes other members of the Acon group unless I specify otherwise) and sold those tests predominantly in the UK. JH and PM agreed that the Partnership would, in some sense, be operated as a "division" of Hughes Group Limited (**HGL**) that JH owned together with Lyn Blyth who is now his wife. Even though she now uses the name Lyn Hughes, I will still refer to her for the purposes of this judgment as **LB**, without intending any disrespect, simply because her name on all the contemporaneous documents appears as Lyn Blyth.

2. Although PM and JH were the only partners in the Partnership, others worked hard to develop its business, including LB, PM's wife, Orarin Manduca (**OM**), his son from a previous marriage, Frederick Manduca (**FM**) and FM's friend, Michael Hodnett (**MH**). There is a dispute as to the precise role that FM and MH played, but they were at the very least initially instrumental in making sales of LFTs on the Partnership's behalf. In late December 2020, FM and MH incorporated a company (**Newfoundland**) and Newfoundland became a distributor of Hughes Healthcare LFTs selling those tests as principal.

3. Newfoundland enjoyed considerable financial success. Strains in the relationship between PM and JH developed. An attempt to rescue the deteriorating relationship by the execution of a "shareholders' agreement" (the **SHA**) dated 27 April 2021 proved unsuccessful. On 27 June 2021, JH sent an email (the **Dissolution Email**) to PM dissolving the Partnership.

4. I will tend to use the expression "**Claimants**" to include the Claimants and the Third to Seventh Parties and "**Defendants**" to refer to JH and LB, recognising that these proceedings involve litigants in two "camps": the Manducas, MH and affiliated companies on one hand and JH, LB and their companies on the other. The Appendix to this judgment summarises the large number of claims that are in issue. By way of high-level overview, those claims arise out of the following grievances that are alleged:

    i) PM alleges that, following termination of the Partnership, JH, LB and entities that they control continued seamlessly to operate the Partnership's business for their benefit. In doing so, they were able to conclude a lucrative deal for the sale of LFTs to the Danish government (the **Danish Deal**). PM seeks remedies such as an account of profits so made including, but not limited to, the profits of the Danish Deal.

    ii) PM was not party to the SHA. Rather, the party to the SHA in the Manducas' camp was Titanium Capital Investments Limited (**Titanium**). Titanium asserts that JH is in breach of his obligations under the SHA.

    iii) JH alleges that during the life of the Partnership, PM, assisted by others, diverted sales leads so that others (particularly Newfoundland) could benefit from them at the expense of the Partnership. He also asserts that PM had a "secret share" in

Newfoundland's profits which meant that he had a motive for doing so. JH seeks remedies that make good the asserted resulting loss of profit to the Partnership and an account of PM's alleged "secret profit".

iv) JH also alleges that PM breached other fiduciary duties prior to dissolution of the Partnership including by procuring sales of LFTs to be made through other companies that he controls, rather than through the Partnership.

v) In closing submissions, JH advanced a case that PM used assets of the Partnership after dissolution to continue to sell LFTs, although the extent to which that claim was pleaded and properly before the court was disputed.

vi) Newfoundland made various claims against JH, LB and others, including claims for unlawful means conspiracy and breach of contract. It said in closing submissions that it was no longer pursuing those claims.

5. PM has issued separate proceedings against Dan Butcher (**DB**), who helped with the Partnership's sales efforts before it was dissolved and continued to work with JH after dissolution, playing a key role in the Danish Deal. This judgment does not deal with any claim against DB because PM's application made before trial to join DB to the present proceedings was dismissed. That said, DB was a witness at this trial. I have, therefore, where necessary made factual findings that draw on DB's witness evidence, but have been circumspect and avoided making unnecessary factual findings in these proceedings that might be important in any later trial of the claim against DB.

6. Although Berkeley Health Limited is named as the Fifth Defendant, proceedings against it are stayed and this judgment therefore deals with no aspect of the claims against it.

7. By her order of 28 April 2023, Master Kaye directed that there be two trials of the various claims and counterclaims. This is my judgment on the first trial for which the parties produced an Agreed List of Issues. Matters consequent on, or additional to, my findings in this judgment will have to be dealt with at a later trial, or trials (**Trial 2**).

PART A- EVIDENCE AND WITNESSES

8. Some of the Defendants' witnesses dealt with peripheral issues:

i) Aslan Ryskali, Christopher Rawlinson, Teresa Krausmann and Bent Von Eitzen were all cross-examined and were both reliable and honest witnesses. Angela Nielson was also cross-examined. I have concluded that she was an honest witness and I have accepted her evidence about how PM behaved on the few occasions she had dealings with him, but that evidence has little to say about the substance of this dispute.

ii) Fraser Tenant also gave evidence on peripheral matters. He was not cross-examined and I have accepted his unchallenged evidence.

iii) Heather Davies provided a witness statement, but said that she was too unwell to attend court for cross-examination. The Claimants made no application to cross-examine her and I have admitted her witness statement as hearsay evidence.

9. The central witnesses for the Claimants were PM, FM and OM. The key witnesses for the Defendants were JH, LB and DB. Both sides made serious criticisms of the credibility, and honesty, of each other's witnesses and alleged a suppression of relevant documents and other disclosure failings.

10. Before addressing these criticisms, I note that this was a "document heavy" case. All parties communicated extensively by email and WhatsApp. While the Defendants criticise the Claimants' disclosure of WhatsApps, on any view I have a large number of contemporaneous documents. It follows that I have tested the evidence of all witnesses who were cross-examined against the contemporaneous documentary record, admitted and incontrovertible facts and inherent probabilities.

11. That said, I have had regard to witness evidence consisting of recollections as well. Those recollections are important in this case since there are a number of instances where one party claims that the contemporaneous documentary record does not tell the whole story, or is being misinterpreted. My conclusions as to the credibility of the witnesses has informed my assessment of their evidence on matters such as these.

Criticisms of the Claimants' witnesses and their conduct of the proceedings

Absence of MH

12. As can be seen from the table in the Appendix MH is a defendant to actions brought by JH for knowing receipt, dishonest assistance and unlawful means conspiracy. As a director and shareholder in Newfoundland, he also had some interest in, and insight into, claims that Newfoundland was bringing although those claims were abandoned in closing.

13. MH has not given any witness evidence. I would have been interested to hear his evidence on a number of issues. He could, for example, have shed some light on whether, and if so why, he was content for Newfoundland to pay £300,000 to Basfour for the stated purpose of renovating the Manducas' home in South Africa (see paragraph 323.i) below). As the person who had the WhatsApp exchange with Nabeel Sheikh, he could have explained what "Freds dads contract thing" was (see paragraphs 333 to 334 below). He would have been affected by any arrangement for PM to have a "secret share" in Newfoundland's profits and could have explained his understanding as to any such arrangement. He could have explained whether Newfoundland was making loans to PM (and, if so, why he was content with that) or paying him "consultant commission" (see paragraph 311 below).

14. In his oral evidence, FM gave an explanation for MH's absence. He said that MH has been unwell, is recovering from a blood clot and suffering from insomnia. FM explained that Newfoundland could not simply "leave our business stranded for all of these months" by having both FM and MH engaged with these proceedings. Accordingly, he explained that "seeing as we both lived the same story", FM would focus on Newfoundland's conduct of the proceedings leaving MH to focus on running the business.

15. I had no medical evidence of MH's condition. That said, I am prepared to accept that MH was unwell in the run-up to the trial and during it. I can, therefore, accept that there is a reasonable explanation for MH's failure to give evidence on matters that acquired significance either during the trial or in the immediate run-up to it. For example, it was

only during PM's cross-examination that it became clear that the £300,000 payment by Newfoundland to Basfour was considered important. The Claimants were told on or around 15 October 2024 that they had access to MH's WhatsApp chat with Nabeel Sheikh and it would have taken some time for them to recognise the potential significance of that.

16. I did, however, find it surprising that MH offered no evidence on the Defendants' central assertion that PM had a "secret share" in Newfoundland's profits. From the point at which the Defendants served their original Defence & Counterclaim, it was clear that this allegation was being made. Evidence from MH, who is not a member of the Manduca family, would have been of significance on this issue. It would not have left Newfoundland's business "stranded for months" if MH had given a witness statement on the matter. While MH might not have felt up to attending trial, FM's evidence suggests that he was well enough to manage Newfoundland's business. If he was well enough to do that, I am not persuaded that he was too unwell even to give a witness statement.

17. The Defendants urge me to infer that MH has not given evidence because "he knows the Manducas' case and evidence is untrue". That goes too far. I have, however, inferred that MH had no first-hand evidence that he considered he could honestly give to contradict the impression given from the emails of December 2020 (see paragraph 310 below) and Newfoundland Invoice 1 (see paragraph 311.i) below) that PM had a "secret share" in Newfoundland's profits, those being matters that have been pleaded for a long time. I should say that my conclusions on the existence of the "secret share" have not been affected by this inference. Given the picture that emerges from the contemporaneous documents, I would have reached the same conclusion on the "secret share" issue even without this inference.

Disclosure failings

18. Disclosure has been a running sore throughout these proceedings. There have been three hearings before Richard Farnhill, sitting as a judge of the High Court, in which both sides have accused each other of disclosure failings. Although the allegations were wide-ranging, the Defendants took particular issue with the Claimants' disclosure of WhatsApp messages arguing that (i) some WhatsApp chats that must have existed have not been disclosed and (ii) the approach taken to redaction of WhatsApp chats was improper.

19. Insofar as the allegations in paragraph 18 involved criticisms of the Claimants' solicitors, I reject them. I have seen no evidence that the Claimants' solicitors, having been provided with relevant documents have either failed to disclose them or have redacted information knowing it to be relevant. There certainly have been disputes about the scope of redaction along the way, some of which Richard Farnhill has resolved against the Claimants. However, I regard that as part of the rough and tumble of litigation rather than any impropriety on the part of the Claimants' solicitors. Nor am I able to resolve a dispute as to whether the Claimants' solicitors disclosed WhatsApp chats in a "continuous stream" as Richard Farnhill had ordered. The only way to resolve that dispute would have been to look at the raw data that the Claimants disclosed, and the various occasions on which WhatsApps were disclosed. No-one invited me to do that given the large number of other issues going to the substantive claims that fall to be determined.

20. The Defendants also criticise FM and MH for an alleged failure to disclose WhatsApp chats between themselves. It is fair to say that the explanation for the fact that no such chats were disclosed has emerged in a piecemeal and somewhat contradictory way. In preparation for an earlier hearing of procedural applications, Mr Strong of the Claimants' solicitors gave a witness statement saying, on instructions that "no WhatsApp conversations/other RSMFs exist between [MH and FM] alone. They lived and worked with each other in the same house and spoke to each other, daily, in person". The clear implication was that there were no WhatsApps between FM and MH because they lived in the same house. However, during the trial, FM confirmed that he and MH did have a long-running WhatsApp chat (dating back to when they were at school) that extended into the disclosure period (August 2020 to July 2022). He said that, given the size of that chat and the low storage available on his phone, he had not backed it up or stored it. When he purchased a new phone (in 2021), he traded in his old phone. From 2021, he said that there were (sporadic) WhatsApp communications between him and MH during the disclosure period but, to save storage space, he turned on the "disappearing message" function so that all messages he sent to, and received from, MH were automatically deleted after a period. In consequence, when he came to give his (new) phone to his solicitors to extract WhatsApp messages for disclosure purposes, there was no chat with MH available.

21. FM said that MH's phone had been stolen in 2022 and he had lost all previous WhatsApp chats and that this explained why MH had not disclosed either chats with FM or with Nabeel Sheikh (discussed in paragraphs 333 to 334) below.

22. The account is convoluted. It emerged for the first time in FM's oral evidence. It is not corroborated by any evidence from MH. It is at least to an extent at odds with Mr Strong's previous witness statement. I am alive to the real possibility that FM was lying. However, on balance I will accept FM's account for the simple reason that there was no hard evidence to contradict it. Phones do get stolen. People do use the "disappearing messages" function to save storage space. Submissions from counsel to the effect that the messages would have been stored "in the cloud" and that old WhatsApp messages are automatically transferred to a new phone that takes over an old phone number do not have the status of evidence and are insufficient to cause me to conclude that FM was lying. In closing, the Defendants referred to evidence that they said demonstrated that FM and MH were not living in the same house at the times FM claimed, but none of that material was put to FM in cross-examination and I will not conclude that FM was lying in this respect either.

23. That said, there have been some disclosure failing. FM and MH should, at the very least, have told their solicitors that the WhatsApp chats between them had previously existed. MH should have done the same with his chat with Nabeel Sheikh.

Witness credibility

24. It is clear from the documentary record that both PM and FM are, in their business dealings, prepared to lie if they consider it furthers their commercial interests. I am not able, of course, to tell the extent to which they do so and I thus make no findings on the prevalence of this behaviour. I simply note that it took place on the following occasions by way of example:

i) On 26 August 2020, PM signed an application for a £50,000 "bounce back loan" on behalf of NeuroCED Limited (**NeuroCED**). In that application, he stated that he was a director of NeuroCED. He was not: OM was NeuroCED's director. The application stated that NeuroCED had a turnover of £360,000. That was a lie. Paragraphs 6 and 7 of PM's first witness statement confirm that NeuroCED was dormant in "early 2020" and still had no trading history by September 2020 when he formed the Partnership with JH.

ii) The terms of the bounce back loan required that it be applied "for the purpose of providing economic benefit to [NeuroCED's] business including, but not limited to, working capital or investing in your business and to support trading or commercial activity in the United Kingdom". The loan was not applied in that way. The £50,000 borrowed was paid to Titanium. In cross-examination, PM sought to explain that Titanium spent the money defraying expenses connected with a commercial acquisition that NeuroCED was contemplating. I make no finding on whether that explanation was true since I was shown no documentary evidence to support it, but even if it were true, the £50,000 was clearly not being paid to support an existing business of NeuroCED.

iii) In January 2021, FM was involved with Yang de Marinis in a tender to sell LFTs to the Swedish government. FM was required to provide references to support the applicant's capacity to fulfil any contract that was awarded. He filled in a form naming Titanium and NeuroCED as references. He stated that Titanium had been awarded a contract to provide PPE worth £2.5m between February and April 2020. He stated that NeuroCED had been awarded a contract to provide medical supplies, PPE and sterile essentials between November 2018 and November 2020 for a contract price of £2.83m. Both statements were lies. Neither Titanium nor NeuroCED had won any such tenders. In cross-examination, FM said that he could not recall whether the Swedish tender had actually been submitted. I do not criticise FM for being unable to remember that detail, but a message sent by Yang de Marinis at 9.33pm on 25 January 2021 shows that it was indeed submitted.

iv) In January 2021, Anita Shuai of Acon, asked FM to stop selling tests to Nabeel Sheikh. FM assured her that he would do so. In October 2021, FM told Anita Shuai that he still spoke "occasionally" to Nabeel Sheikh. That was a lie. Although he probably stopped supplying Nabeel Sheikh for a couple of months after January 2021, after that Newfoundland was still supplying large quantities of tests to him and FM was speaking to him frequently.

25. The fact that PM and FM are prepared to lie to further their commercial interests does not of itself mean that they will lie when under oath in a courtroom. However, it does mean that I have taken particular care to test their evidence consisting of recollection and assertion against the contemporaneous documentations.

26. I will not find that OM herself lied in her business dealings. However, she was quite prepared to condone or encourage lies by others. She told FM to "find a way to say yes" to a question on the Swedish tender form asking whether HGL had a credit rating from a third party, despite knowing that it had no such rating. There were irregularities in documents entered into by companies of which she was a director. PM signed, as a director, the bounce back loan application for NeuroCED when he held no such position. However, I have concluded that those irregularities were not attributable to OM making,

or permitting, deliberate untruths. Rather, I conclude that her name appeared as a titular director of NeuroCED in circumstances where substantial influence over it was conducted by PM. Therefore, where OM's evidence consisted of recollections concerning the operations of companies of which she was a director, I have tested those recollections carefully against the contemporaneous documentation because of the risk that OM was not fully aware of what those companies were truly doing.

The Defendants – witness credibility

27. JH also showed that he was prepared to lie to further his business interests. As with PM, I am in no position to make a finding as to how prevalent this tendency is, but the tendency exists and I give a few examples of it:

    i) In the early days of the Partnership, when looking for a supplier of LFTs, JH spoke to Emily Ding of Wuhan EasyDiagnosis Biomedicine Company Limited. In conversations with her, he represented that the Partnership was already supplying LFTs to British Airways and the NHS. That was a lie, as JH accepted in cross-examination. He can only have said this to induce Emily Ding to consider supplying LFTs because of a perception that JH would be able to arrange significant sales which, at the time, he could not.

    ii) JH asked Anita Shuai of Acon to lie to the Manducas by saying that JH had no involvement in the Danish Deal. I accept that he did so because he had borrowed money at high interest rates to fund the Danish Deal and he feared devastating financial consequences if the Manducas interfered and the Danish Deal did not go ahead (see paragraph 398.ii) below). However, while I understand the fear of adverse consequences, this does demonstrate that JH is prepared to lie when the stakes are high and the stakes are high in this litigation.

28. JH also admitted in cross-examination that he had lied in documents submitted in this litigation to which he had given a statement of truth. In responses to a Part 18 request for information, JH denied having knowledge of DB's commission or profit share arrangements with CAP Partner (**CAP**) in relation to the Danish Deal when he had a spreadsheet containing precisely this information. The Defence and Counterclaim (verified by a statement of truth from JH) alleged that in May 2021, NeuroCED had purchased tests from Acon as a means of bypassing the Partnership and had done so without JH's knowledge. He accepted in cross-examination that, he had known full well at the time that NeuroCED was making this purchase, and that it was part of a device to ensure that the Partnership would not have to bear the cost of commission payable to "Amy and Jasmine" (see paragraph 54 below) as it would if the order had been in the Partnership's name. He admitted that he knew the allegation in the Defence and Counterclaim was untrue at the time he made it.

29. The Claimants also emphasised occasions on which JH admitted to having a "hazy" memory of certain events. I regard those as realistic acceptances of the difficulty of remembering the detail of matters that took place several years ago at a very busy time. I note that, just because JH has told lies on some issues in the past does not mean that he is necessarily lying on important issues now. However, the points in paragraphs 27 and 28 mean that I have taken particular care to test JH's assertions and recollections against the contemporaneous documentary record.

30. I consider that LB was trying to assist the court with her evidence. She was occasionally defensive. Her memory of the detail was occasionally imprecise, like that of JH. I have not accepted her account that there was no plan to dissolve the Partnership before 27 June 2021, but I am prepared to accept that it was her genuine recollection that JH's decision to dissolve the Partnership was made largely on the spur of the moment on or around 27 June 2021.

31. DB was occasionally argumentative. He also clearly had in mind the point that PM has made a claim against him personally and he was careful in his responses to questions that he thought might overlap with those proceedings. However, I regarded him as an honest witness who was seeking to assist the court.

PART B – FACTUAL NARRATIVE UP TO DISSOLUTION

Formation of the Partnership and its terms

32. PM and JH have known each other since 2002. Until the Partnership broke down in 2021, they had a warm personal relationship. For example, JH did various property maintenance jobs for PM, often without charge. PM allowed JH and his children to stay at PM's home in Wentworth in 2003 for a period without charging rent. JH helped PM move house in early 2020 and lent him £120,000 in the summer of 2020 (the **£120,000 Loan**).

33. Neither PM nor JH had a professional background in the healthcare industry. JH's business interests revolved around construction and property management. PM had previously worked in the financial services industry. However, in 2016, PM and OM sadly lost their young daughter, Elisabeth, to a rare brain condition. This led to PM incorporating NeuroCED for the purpose of acquiring a division of a specialist robotics manufacturer whose robotic devices had been used to provide drugs to Elisabeth before her death. However, that transaction did not proceed and in "early 2020" (using PM's words), NeuroCED was dormant.

34. Both PM and JH had entrepreneurial dispositions and in 2020 they started investigating the possibility of starting a business together that might thrive in the conditions of the COVID emergency. They tried to secure a contract for the supply of PPE to the UK government, but were ultimately unsuccessful.

35. Between July and September 2020, PM started to think about business opportunities involving COVID testing. At this time, the standard approach to COVID testing in the UK involved a patient providing a sample to a laboratory which was then subjected to a "**PCR**" test with results being available only some three days later. PM formed the view that something better was needed if the UK was to return to normality since the three-day delay involved in PCR testing meant that a COVID-positive patient could potentially infect large numbers of other people before even realising that they had COVID.

36. I accept PM's evidence that he discussed this possible opportunity with FM before September 2020. At that time, FM was completing his studies at Georgetown University in the United States. He had no clear career path and no real understanding of the world of business (a WhatsApp conversation with PM at this time suggested that he did not know that the "MD" of a company was its managing director). He did, however, have a general idea that he would like to work with his father in some business venture.

Although there is little record of PM and FM discussing a COVID-testing business before September 2020, I consider that they would have discussed the possibility orally. COVID was a topic of conversation for most people at the time and it would be surprising if PM and FM had not discussed the idea given FM's interest in working with his father.

37. PM came to believe that there was real potential in a business that sold LFTs. In September, PM decided to approach JH to see if JH was interested in being part of that business. The venture was discussed over dinner at PM and OM's house on 19 September 2020 attended, on the Manducas' side, by PM and OM and, on the Hughes' side, by JH and LB. JH indicated that he was indeed interested in being part of such a business.

38. PM's evidence was that he offered the opportunity to JH because of the kindness that JH had shown them during their friendship. That was part of PM's thinking, but not all of it. A business that involved the purchase and sale of LFTs would need both funding (to enable the LFTs to be purchased from a manufacturer) and administrative and logistical support with the shipping of large numbers of LFTs and the invoicing of large numbers of customers. JH owned HGL, a successful construction company. PM hoped that that would enable JH both to provide funding and draw on the administrative functions within HGL to provide the necessary administrative and logistical support.

39. It is common ground that, by around October 2020, JH and PM had agreed to enter into the Partnership. The following aspects of the Partnership agreement were relatively uncontroversial:

    i) The terms of the Partnership were never put in writing. Some of its terms were oral and others have to be inferred from JH's and PM's conduct.

    ii) The Partnership was to operate under the trading name "Hughes Healthcare". Its business was to be focused on the sale of LFTs.

    iii) The Partnership had no fixed duration. Either JH or PM could terminate it at any time.

    iv) Profits and losses of the Partnership would be shared 50-50 between PM and JH.

    v) Neither PM nor JH introduced any partnership capital. However, it was agreed that JH would provide the funding necessary to enable the Partnership to purchase LFTs. He would also ensure that the Partnership was provided with the administrative and logistical support necessary to run its business. In practice, JH and PM assumed that JH would do so by drawing on the administrative support of HGL. That is indeed what happened, but HGL was not a party to the Partnership Agreement and JH was not contractually obliged to use HGL's administrative function or financial resources.

    vi) FM, OM and LB would also work on the Partnership's business but would not be partners.

    vii) MH started working for the Partnership a little later and was, like his friend FM, not a partner.

40. When forming the Partnership, both PM and JH considered that a prize to aspire to was the award of a contract by the UK Government for the sale of LFTs. Any such contract had the potential to be highly lucrative since it would involve the sale of a large number of tests. Right from the beginning, JH and PM set their eyes on that prize. They considered, perhaps from experience born out of their unsuccessful PPE venture, that they would be able to obtain a UK Government contract only if they could establish that their business had real "substance". They did not believe that the necessary substance would be present if their business consisted simply of a partnership between two private individuals. They therefore concluded that the Partnership had to be allied in some sense with HGL which was a successful company with a healthy balance sheet.

41. JH and PM concluded that the necessary link between their business and HGL would be achieved if the business of the Partnership (known as Hughes Healthcare) was described as being a "division of HGL". The perception that Hughes Healthcare was a "division of HGL" manifested itself in the following ways:

    i) The core individuals involved in the Partnership's business were JH, LB, PM, OM, FM and MH. They were referred to as the "Hughes Healthcare Team" or the "Health Team". JH and LB already had "Hughes Group" email addresses before the Partnership was formed since they were already working at HGL. However, even though the other members of the Hughes Healthcare Team were not employees of HGL, JH arranged for them to be given email addresses with the suffix "@hughesgroup.co.uk". Those email accounts were all hosted on the HGL servers, to which JH had administrator access, and were set up with the same initial password. A WhatsApp chat was started to which all members of the Hughes Healthcare Team were party.

    ii) When using their Hughes Group emails, members of the Hughes Healthcare Team tended to use automated email signatures that referred to their role in "Hughes Healthcare (A division of The Hughes Group Ltd)". For example, JH was described as the "Managing Director", PM was described as the "Chief Operating Officer" and FM was described as a "Senior Manager".

    iii) HGL had office accommodation in the grounds of JH's and LB's home at Orchard Lea Cottage (**OLC**). Much of the administration of the Partnership's business was carried on at the OLC office and, when the Partnership came to acquire LFTs from Acon, that stock was stored in a purpose-built shed at OLC which everyone referred to as the "**COVID cabin**".

    iv) The Partnership was not separately registered for VAT purposes and VAT on the Partnership's activities was accounted for through HGL's VAT registration.

    v) The Partnership had no bank account of its own. Whenever tests were purchased from Acon for the Partnership to sell, the purchase price was paid out of HGL's bank account to Acon.

42. JH arranged for the establishment of a "Hughes Healthcare" website (www.hugheshealthcare.co.uk) over which, in due course, sales of LFTs would be made. JH was the proprietor of that website.

43. MH designed a logo for the Hughes Healthcare business that was substantially based on the branding that HGL used in its construction business.

44. There were no express discussions between JH and PM to the effect that the Partnership would be granted a licence to use either the "Hughes" name or the "Hughes Healthcare" name.

HGL's role legally analysed

45. In the section above, I have made findings of fact as to the perception of JH and PM that the Partnership was a "division of HGL". In this section, I determine how the relationship with HGL should be characterised as a matter of law.

46. In their Particulars of Claim, the Claimants pleaded that the Partnership Agreement (between JH and PM alone) sat alongside an "Initial Agreement" (between JH, PM and HGL). No Initial Agreement was ever reduced to writing and so the Claimants' pleaded case relied on the establishment of terms agreed orally and some implied terms. However, no case on the existence of, or terms of, any Initial Agreement involving HGL was pursued in the Claimants' closing arguments.

47. I accept the Defendants' analysis to the effect that (i) JH had a personal obligation pursuant to the Partnership Agreement to provide, or procure the provision of, financial services to the Partnership and that (ii) JH chose to discharge that obligation by procuring that HGL gave the necessary administrative and financial support. However, there was no overarching contract between the Partnership and HGL pursuant to which HGL owed a contractual obligation to the Partnership to provide administrative services or financial support.

48. The parties had different perceptions on whether this arrangement resulted in HGL holding any assets on trust for the Partnership or otherwise having a fiduciary relationship with the Partnership. Ultimately, however, I do not consider much to turn on this issue. I therefore simply record my conclusion that HGL did have some fiduciary obligations to the Partnership. For example, to the extent that HGL ordered tests from Acon, it did so as agent for the Partnership. In paying the purchase price for those tests, it was effectively lending the Partnership money. When it issued invoices for the sale of LFTs, it did so as agent for the Partnership and, when it received payment of those invoices, it held the balance, after repaying finance it had provided, as nominee for the Partnership. Those fiduciary obligations were ad hoc arrangements in the sense that they arose in connection with specific transactions involving LFTs effected from time to time.

49. The Defendants argue that shortly after the Partnership was formed, HGL granted the Partnership a licence to use the name "Hughes" or "Hughes Healthcare". Since there were no express discussions between PM and JH on this issue (see paragraph 44 above), it necessarily follows that any such licence would be a contract consisting entirely of implied terms between HGL and the Partnership. I reject that argument and conclude that no such licence was either concluded, or needed.

50. I was referred to the helpful summary of Choudhury J in *Nicholas Tod v Swim Wales* [2018] EWHC 665 (QB) of the principles that a court should apply when deciding whether to imply the existence of a contract. No party suggested that I should follow an approach different from that summarised at [79] to [82] of that judgment. I therefore

approach this issue on the basis that, in order to imply the existence of a contractual licence from HGL to the Partnership to use the name "Hughes" or "Hughes Healthcare", a test of "necessity" must be met. That test will not be satisfied if the Partnership and HGL "would or might have acted exactly as they did in the absence of [a licence to use the "Hughes" or "Hughes Healthcare" names]" (see the quote from the judgment of Bingham LJ in *The Aramis* [1989] 1 Lloyds LR 213 at [81] of Choudhury J's judgment).

51. I conclude that no licence was "necessary" for the following reasons:

    i) The Partnership chose to trade under the name "Hughes Healthcare" after JH and PM had considered, and rejected, an alternative suggestion of "Manduca Medical". The Partnership's chosen trading name therefore simply included the surname of one of its partners. No contractual consent from HGL was necessary for the Partnership to use that surname.

    ii) At the time the Partnership was formed, HGL carried on business in the building and construction sector. It could not have claimed any goodwill in the name "Hughes Healthcare". A contractual licence was not necessary to preclude HGL from claiming infringement of any goodwill or other intellectual property rights in the name "Hughes Healthcare" since HGL had no such goodwill or intellectual property rights.

52. It follows from this that the right to trade under the Partnership's chosen name of "Hughes Healthcare" was an asset of the Partnership, rather than of HGL. By way of further corollary, when the Partnership's successful trading caused some goodwill to attach to the trading name "Hughes Healthcare", that goodwill was an asset of the Partnership, rather than of HGL.

53. HGL's involvement certainly complicated matters. PM and JH never turned their minds to the legal analysis of HGL's role: using the shorthand that the Partnership was a "division of HGL" without understanding what that meant in law. Perhaps in different circumstances the correct legal analysis might have been that the partnership was actually between PM and HGL. Alternatively, in different circumstances the arrangement might have been analysed as involving no partnership at all and instead as involving HGL carrying on an LFT business (as principal) and agreeing contractually to pay PM 50% of the profits that the business generated. However, one of the few things that the parties agree on is the proposition that there was indeed a partnership between PM and JH, and I will not look behind that agreement.

Initial activities in the Partnership's business

54. An early priority for the Partnership was to find a manufacturer of LFTs. JH and PM engaged the services of Amy Pan and Jasmine Zhang (**Amy and Jasmine**), two factory agents based in China who they had used when trying to find suppliers of PPE earlier in 2020, to introduce them to potential Chinese manufacturers of LFTs. Since JH and PM regarded the securing of a government contract for the supply of LFTs as the significant prize at which they were aiming, it was crucial that the Partnership's chosen manufacturer should produce an LFT that the UK Department of Health and Social Care (**DHSC**) would be prepared to purchase. Before any LFT could be sold to the DHSC, that LFT had to pass assessments conducted at a UK Government science and defence technology campus (**Porton Down**).

55. JH and PM were initially minded to purchase a test manufactured by OjaBio. However, Porton Down rejected this product. JH and PM therefore had to rethink the question of which supplier to use. They concluded that Acon's test had the best prospect of passing a Porton Down assessment and the Partnership purchased its first tests from Acon on 18 November 2020. JH and PM were later to find out that Acon was paying US$0.10 in commission to Amy and Jasmine for each test that the Partnership ordered from Acon on the basis that Amy and Jasmine had introduced Acon to the Partnership. Acon passed this commission on to the Partnership in the form of a higher sales price for LFTs which, when PM and JH discovered it, came to be referred to as the "Amy and Jasmine tax".

56. Acon had its own branding (**Flowflex**) that it used to sell its LFTs (**unbranded tests** on the basis that they did not bear the brand of the Partnership). However, Acon was also prepared to supply tests to the Partnership that bore the Partnership's "Hughes Healthcare" branding on its packaging and other materials (**branded tests**). Since the Partnership was interested in promoting its own brand, its orders with Acon tended to be for branded tests.

57. Thus, by 18 November 2020, the Partnership had a supplier of LFTs in Acon. However, finding customers required the Hughes Healthcare team at the Partnership to work very hard indeed. Initially, the Hughes Healthcare team simply sent out a large number of what were essentially "cold call" emails to any business they could think of that might be interested in having access to a quick and reliable LFT. The target businesses were decided on following a brainstorming meeting in September 2020 with various members of the team allocated responsibility for making cold calls to businesses in various sectors.

58. This process of making cold calls produced no sales initially. That was partly because obtaining sales from cold calls is inherently difficult and partly because, until December 2020, there was little appetite for LFTs since the then accepted protocol for COVID testing involved the use of PCRs. However, in November 2020, FM was able to sell some LFTs to the Chelsea Pensioners, to whom he obtained an introduction through a contact of his mother. FM was also able to obtain contact details for a senior executive at Collinsons, a business that was conducting COVID testing at airports, and PM converted that lead into a sale of some LFTs also in November 2020. The Partnership also made some successful sales of LFTs to Virgin Atlantic who used them to test airline staff.

59. These isolated successes aside, the Partnership's sales of LFTs remained slow until at least the middle of December 2020. However, fortunes changed in December 2020. The then prime minister, Boris Johnson, in one of his national presentations, explained the idea of an LFT and said that the UK would need to rely on rapid testing if it were to return to a state of normality. This was taken as an official endorsement of LFTs and the Partnership's business picked up significantly.

The initial arrangement between FM, MH and the Partnership

60. Initially, FM and MH worked for the Partnership on a commission basis. The rate of commission payable at the start was 10% of the Partnership's profits on sales that they made. That figure rose to 20% of profits in December 2020, probably triggered by them reaching the milestone of selling their first thousand LFTs.

61. In the early days of the Partnership, when business was slow, FM built up a solid base of knowledge on the science both of Acon's LFTs and other competitor tests on the market.

He did not build up that knowledge immediately and there were some mis-steps on the way. For example, when making a sales presentation to Virgin, FM suggested that Acon's test could be applied to a saliva sample whereas the true position was that it required a nasal sample. The knowledge that he built up did not involve independent scientific research, which FM was not equipped to undertake. However, FM was able to access, digest and analyse publicly available information on LFTs and on COVID-testing generally. Other members of the Hughes Healthcare team valued his knowledge and asked him to share his expertise to help them make sales. FM was generally happy to do so. He and MH were certainly trying hard to generate sales for the Partnership, but their roles were not limited to sales generation. FM, for example, tried to be "as helpful as possible", in his words, in areas outside sales.

62. Since the Partnership's business involved purchasing LFTs from Acon and on-selling them at a profit, both JH and PM were alive to the risk that a customer seeking to purchase LFTs would, on realising that the Partnership was selling tests manufactured by Acon, seek to "circumvent" the Partnership by getting in touch with Acon with a view to purchasing direct from Acon. As will be seen, later on, when the Partnership was engaging other sales agents and distributors, it required those agents to enter into non-disclosure agreements (**NDAs**) and non-circumvention agreements (**NCAs**) to reduce the risk of the Partnership being circumvented. However, none of the original members of the Hughes Healthcare team (PM, FM, OM, JH, LB or MH) was subject to any NDA or NCA.

63. PM's evidence was that it was agreed at the outset that he and JH would focus on generating sales to the Government and large corporate entities whereas FM would focus initially on universities and schools, and then later individuals and small businesses. I accept that as an accurate high-level statement of what PM and JH considered to be a sensible demarcation in theory. As I have noted, both PM and JH thought at the outset of the Partnership that obtaining a Government contract would be the real prize. Moreover, both PM and JH were experienced in the world of business whereas FM and MH were not. It therefore made sense in theory for PM and JH to focus on larger contracts which might be more difficult to secure. However, circumstances did not turn out as PM and JH had thought they would when articulating their theoretical demarcation of customers. In the early months of the Partnership there were few sales and so the question of demarcation was more theoretical than real and all members of the team were engaged in trying to obtain whatever business was possible. Thus, FM sent a cold call email to Matchroom (a large corporate) on 1 October 2020. He also sent cold call emails to L'Oréal and to Estée Lauder. After Christmas 2020, as noted in the next section, the relationship between the Partnership on the one hand and FM and MH on the other changed with a corresponding effect on PM and JH's pre-existing notions of demarcation.

64. It was made clear to FM and MH prior to Christmas 2020 that, if a lucrative Government contract was obtained, they would not directly share in the resulting profits since they were not partners in the Partnership although they would be "taken care of" in a general sense. That caused some dissatisfaction. Following Boris Johnson's endorsement of LFTs, FM and MH had been working very hard in the two weeks leading up to Christmas 2020 and had made a number of sales. They had also done a good amount of work for the Partnership that did not involve sales and so generated no commission. Moreover, they were doing their work from PM's house in Weybridge whereas JH and LB were

doing their work at OLC near Windsor. FM and MH did not have much of a background in business and so did not realise that the support that JH was providing, in the form of administrative assistance and funding, was crucial to the operation of the Partnership. Because they could not see JH making the kind of sales that they were making, they came to believe that he was not doing his fair share of the work.

Newfoundland becomes a distributor

65. The dissatisfaction that I have summarised in paragraph 64 caused FM and MH to consider how they might make the most of the opportunity to make money out of a business selling LFTs without relying on vague promises that they would be "taken care of". As a first step, FM and MH arranged for Newfoundland to be incorporated on 22 December 2020. They had a general idea that Newfoundland would be a vehicle through which they could deal with and manage their own clients separately from the Partnership.

66. FM and MH also considered that the 20% commission arrangement with the Partnership did not provide them with a fair share of the benefits of the Partnership's business. Between 19 and 25 December 2020, there were a number of email exchanges between FM and PM concerning a possible recasting of their relationship with the Partnership.

67. That new relationship was ostensibly documented in a "Trading Agreement" that JH signed on 5 January 2021 (apparently on behalf of HGL, but all parties have treated it as an agreement with the Partnership). No one else signed the Trading Agreement, although there was space for FM and MH to sign and it also appeared to be contemplated that PM would sign the agreement on behalf of HGL, although he never did so.

68. The Trading Agreement set out different arrangements that were to apply to, on the one hand, sales of fewer than 100 LFTs and, on the other, sales of more than 100 LFTs.

69. The Trading Agreement provided, so far as material, as follows:

> Less than 100 tests
>
> - We [defined as meaning FM and MH "trading as Newfoundland Diagnostics] purchase the tests from you [defined as "The Hughes Group"] for £2.50 per test + VAT. We will pay you within 28 days.
>
> - The clients purchase the tests from us directly and we retain full payment.
>
> More than 100 tests
>
> - We identify all new clients with you at the outset as being introduced by us.
>
> - We request that you raise an invoice addressed to the client. We send that invoice to the client.
>
> - The client pays you.

- We invoice you for 100% of the gross payment less the agreed base cost (£2.50 per test). Payment is due to us within 28 days of you receiving payment.

- Any repeat orders from our clients are attributed to us on the same terms as above.

70. The Trading Agreement resulted in a radical change in the relationship between the Partnership, FM and MH. Previously FM and MH were obtaining a commission equal to 20% of the profit realised on LFTs that they sold. That obviously meant that the Partnership kept 80% of the profit on sales that FM and MH made. However, following the Trading Agreement, the Partnership's profit on tests sold by FM and MH was fixed at the difference between the "agreed base cost" and the costs that the Partnership incurred in purchasing LFTs from Acon (namely the purchase price due to Acon and other expenses such as freight customs duties). Put another way, under the Trading Agreement FM and MH were entitled to retain any "upside" that they could generate by selling LFTs for an amount above the "agreed base cost". FM and MH became, through Newfoundland, distributors of tests that they purchased from the Partnership rather than agents generating sales for the Partnership.

71. In my judgment, the change in relationship with FM and MH was intended to give them a greater share of the profits that were sold to the "smaller" customers that Newfoundland would be pursuing (in the sense that of being "smaller" than the big ticket transactions that DB would come to pursue or the DHSC contract that JH and PM hoped to secure). In offering that deal, JH and PM intended to show gratitude to FM and MH for their work since September and October 2020, and to soften the blow that they would not share in profits generated by any DHSC contract that the Partnership obtained.

72. In practice, the financial terms and the invoicing terms that the Partnership adopted in its dealings with Newfoundland were, with JH's specific knowledge and approval, different from those set out in the Trading Agreement:

    i) First, the "agreed base cost" was £2.83 per test plus VAT and not the £2.50 figure specified in the Trading Agreement. The £2.83 figure was designed to give the Partnership a profit of £1 on each LFT that Newfoundland purchased (taking into account all of the Partnership's costs, including the price paid to Acon and freight costs). I conclude, therefore, that following around 5 January 2021, the Partnership and Newfoundland agreed contractually that Newfoundland could purchase LFTs from the Partnership for a price of £2.83 plus VAT per test.

    ii) Second, the distinction between sales of fewer than 100 tests and sales of more than 100 tests was abandoned. Newfoundland purchased tests from the Partnership for a price of £2.83 plus VAT and the Partnership invoiced Newfoundland accordingly. When Newfoundland sold LFTs to its own customers, Newfoundland issued an invoice requesting payment into Newfoundland's bank account.

73. The invoicing arrangement described in paragraph 72.ii) was made at JH's specific suggestion on the basis that it would be "cleaner from an accounting point of view".

74. The arrangement for Newfoundland to invoice its own customers saved some work for HGL, which undertook the Partnership's administration. That was because

Newfoundland, rather than HGL, took on both the task of invoicing and chasing payment. However, it also created some difficulties. Initially, Newfoundland would issue invoices bearing the Hughes Healthcare logo and simply specify that payment should be made into Newfoundland's bank account. However, some customers queried why they were ostensibly being invoiced by "Hughes Healthcare" but being asked to make payment to Newfoundland. That rapidly led to a change in invoicing practice with the invoice being issued in the name of Newfoundland, described in the invoice as the "Distribution Division, Hughes Healthcare" above the Hughes Healthcare logo. That formulation seemed to deal with customers' concerns and was widely adopted after 14 January 2021. JH and LB were aware that Newfoundland was using that formulation on its invoices since Newfoundland used that formulation on an invoice that it sent to HGL on 13 January 2021 for Newfoundland's share of profit on a sale to a Newfoundland customer that HGL had invoiced before the new invoicing arrangements took effect. I infer that JH agreed to the use of this formulation on behalf of the Partnership.

75. I conclude, therefore, that the invoicing arrangements set out in the Trading Agreement were varied by a combination of express discussions and by conduct shortly after 5 January 2021. The agreement as varied was that Newfoundland could purchase LFTs from the Partnership at £2.83 plus VAT per test and Newfoundland could sell the tests so purchased to its own customers at whatever price it chose and that Newfoundland would invoice its own customers in its own name, describing itself as the "Distribution Division, Hughes Healthcare".

Cross-checking

76. The Trading Agreement had been prepared on the footing that the Partnership would be issuing the invoice to Newfoundland's customers, keeping the Partnership's share of the profit (£1 per test using the figures as ultimately agreed) and paying Newfoundland the excess of the price received over £2.83 plus VAT. Implementing the arrangement in the Trading Agreement would require the Partnership to know which of the sales it was invoicing were to Newfoundland's customers as otherwise it would not know which invoices issued by the Partnership triggered an obligation to pay money to Newfoundland. It was no doubt with this in mind that the Trading Agreement envisaged that Newfoundland would "identify all new clients with [the Partnership] at the outset as being introduced by [Newfoundland]". However, once the Trading Agreement was varied so that Newfoundland would invoice its own customers direct, it was not necessary, for the overall arrangement to work, for Newfoundland to tell the Partnership who its customers were. Conceptually, Newfoundland could simply buy however many tests it felt it needed for £2.83 plus VAT per test and sell those tests to its customers. Any profit that Newfoundland realised would naturally accrue to it without any need for it to identify its customers to the Partnership.

77. Nevertheless, PM's case is that a system of "cross-checking" evolved under which, in practice, before making a sale to an apparently new customer the Partnership would first check whether the customer "belonged" to Newfoundland. If the cross-check revealed that the customer was indeed a "Newfoundland customer", the Partnership would cede the opportunity to make the sale to Newfoundland rather than pursue it itself.

78. The Defendants do not accept that there was any system of "cross-checking" in place at the time. They characterise PM's case referred to in paragraph 77 as a reconstruction of

the facts after the event in order to justify PM's diversion of sales opportunities to Newfoundland.

The Partnership's sales force

79. One of the rationales for the system of "cross-checking" on which the Claimants rely is a need, at the time, to deal fairly with the Partnership's then sales force (including Newfoundland). In essence they argue that, without such a system, anyone seeking to sell the Partnership's tests would be free to deal with customers and leads that other sales representatives were pursuing. That would have been undesirable both because it would make the Partnership look unprofessional and second because it would not be conducive to a collegiate relationship between the Partnership's various sales representatives. It is appropriate, therefore, to start by making factual findings as to the individuals who comprised the Partnership's sales team.

80. As I have noted, FM and MH were seeking to sell Hughes Healthcare branded LFTs. They had both been doing that since September 2020 and October 2020 respectively, starting as agents on commission before becoming (through Newfoundland) a distributor on the terms set out in the section above. None of FM, MH or Newfoundland, was subject to an NCA or an NDA.

81. DB worked in the Partnership's business from January 2021. He was a friend of JH. JH believed that DB had an impressive book of contacts with large corporates and with overseas governments to whom he could introduce the Partnership with a view to making sales of LFTs in large numbers. DB was indeed well-connected, and he guarded his contacts jealously. On 18 January 2021, DB signed a "Mutual Confidentiality Agreement" with "Hughes Healthcare, a division of Hughes Group Limited". No one else signed that agreement, but I infer that JH confirmed to DB either expressly, or by conduct, that the Partnership considered itself bound by the obligations in the Mutual Confidentiality Agreement with the result that this became a binding contract between DB and the Partnership.

82. The Mutual Confidentiality Agreement imposed two-way confidentiality obligations, consistent with DB's position that he was introducing his contacts to the Partnership for a limited purpose only and that, despite doing so, his contacts were to remain his alone.

83. On 15 March 2021, JH signed a revised version of the Mutual Confidentiality Agreement with DB. This time, it appears as though DB omitted to sign the document but again I infer that by a process similar to that set out in paragraph 81, it became a binding agreement between the Partnership and DB. By Clause 11 of this document, the Partnership gave DB "exclusivity" in relation to, among others, large corporates such as Uniphar and Bunzl and also the Danish government and the Namibian government. Clause 11 also noted the entities so listed as being DB's introductions. Clause 11 did not spell out what the "exclusivity" conferred meant but it did provide that:

> this exclusivity will last for a period of 4 months and then [be] reviewed thereafter. On the MOQ of 10,000 Hughes SARS-Cov2-Antigen Rapid tests the exclusivity will revert to a lifetime commitment.

84. The various incarnations of the Mutual Confidentiality Agreement also contained a list of prices (for example, £2.78 plus VAT for sales in excess of 150,000 tests). The operative effect of that price list was not spelled out but it is clear that it had a function similar to the "agreed base cost" specified in the Trading Agreement. Thus, if DB succeeded in inducing a customer to purchase LFTs from the Partnership, the Partnership would ship the LFTs to that customer and would invoice the customer direct. The Partnership would then pay DB any excess of the purchase price over the relevant price set out on the list. So, for example, if the Partnership sold 150,000 LFTs to a customer procured by DB after 15 March 2021, DB would be paid the purchase price in excess of £2.78 per LFT plus VAT.

85. The arrangement between the Partnership and DB, therefore, was not dissimilar to the proposal set out in the Trading Agreement before it was modified to permit Newfoundland to invoice its customers direct. It follows that, if DB made a sale, the Partnership would need to be told that a sale had been made to one of DB's contacts in order for DB to be able to claim his share of the profit.

86. DB also entered into an NCA on 21 February 2021. That was signed by JH on behalf of "Hughes Healthcare" which was described as a trading division of HGL. As with similar agreements signed using similar formulations, I infer that JH was signing this agreement on behalf of the Partnership. By that NCA, DB agreed that he would not deal with, or otherwise become involved with any entity introduced directly or indirectly by the Partnership and, accordingly, it precluded DB from seeking to purchase tests from Acon.

87. JH regarded DB as his most promising prospect for the generation of sales. While Newfoundland was ordering lots of tests, and the Partnership was, until February 2021, making £1 clear profit for each test that Newfoundland sold, JH hoped that DB would deliver truly big ticket contracts. JH also appointed other sales representatives such as his son (Bobby Hughes), his daughter (Beth Hughes and her partner Alex Jones), his ex-wife (Helen) and Elaine Giles. Polly Phillips, one of DB's contacts, joined the sales team on 6 April 2021. All of these members of the sales team were given an HGL email address. They were in theory remunerated on a similar basis to DB and were thus able to keep any profit on sales that they generated above a specified "base price", although Polly Phillips had an arrangement under which she shared some of her profit with DB. In practice only Bobby Hughes generated any material number of sales (to Furniture Village as a friend of his mother worked there). Polly Phillips proved herself to be an effective generator of sales after the Partnership was dissolved, but invoiced the Partnership for her first deal on 15 June 2021, just before dissolution.

88. Throughout the Partnership's life, the "base price" offered to these other sales agents was substantially more than that offered to Newfoundland. That meant that Newfoundland could always afford to offer LFTs for sale at a price lower than the other sales agents could. This was to become a significant factor in Newfoundland's development of a substantial business.

"Demarcation" of clients

89. As I have explained, following early January 2021, when Newfoundland became a distributor and invoiced its own customers, it was conceptually possible for Newfoundland to make money without identifying any of its clients to the Partnership.

However, for DB or the other members of the sales force to make money it would be necessary for them to make some kind of claim to a sale made to one of their contacts.

90. The practicability of a chosen system for remunerating members of the sales team was not the only consideration. If, for example, DB was free to try to make sales to Newfoundland's clients, and Newfoundland was free to solicit sales from DB's contacts (if it could find out who they were), there would be competition between members of the sales team. LB's evidence was that this was precisely the system that operated at the time. She described it as the "wild west" where everyone was free to target anyone they chose with no controls to prevent, for example, "three different people speaking to Boots".

91. I accept part of that evidence. A good part of the sales force's activity consisted of trying to generate sales from leads which went nowhere. There was no system in place that, as a general matter, prevented multiple members of the sales team from contacting the same lead ("three different people speaking to Boots" as LB put it).

92. However, some leads were better than others. For example, prospective customers might make contact with the Partnership by calling up, or making an enquiry over the website. Since such prospective customers had already demonstrated some interest in buying LFTs they were better leads than target customers who were cold called. In a similar vein, some customers would have been contacted previously by a member of the Partnership's sales team, or by Newfoundland, and attempted to circumvent the Partnership by making contact with Acon to see if they could purchase LFTs direct. As will be seen later in this judgment, Acon frequently referred such attempts at circumvention back to the Partnership. Prospective customers who attempted to circumvent the Partnership were also good leads since, in expending effort in getting in touch with Acon, they had shown a serious interest in purchasing LFTs.

93. Moreover, once the Partnership actually made a sale to a customer, that customer was also a "good lead" because it was likely that the customer would purchase further LFTs in the future.

94. There was a system of demarcation in relation to "good leads" of the kind described in paragraph 92 and paragraph 93, reflecting their greater value. In part that reflected the wishes of the people engaged in the sale of Hughes Healthcare tests. Both Newfoundland and DB were confident that they could make significant sales and both of them independently had sought arrangement that would protect their leads from others. One manifestation of Newfoundland's version of this request was Newfoundland's proposal set out in the Trading Agreement that it would "identify at the outset clients introduced by us". A manifestation of DB's version of this request came from his requirement that the Mutual Confidentiality Agreement operated in both directions.

95. Neither of the likely significant generators of sales (Newfoundland and DB) therefore showed enthusiasm for the unregulated regime that LB described. Although LB initially helped to send out some of the "cold call" emails (see paragraph 58 above), she came to focus on the administrative side of the business. Since she was not at the forefront of the sales drive, I conclude that she has not recalled accurately the arrangements for the demarcation of customers.

96. An early suggestion for a system of demarcation in relation to "good leads" who made enquiries with the Partnership over the telephone came from FM in an email of 11 January 2021. FM sent that email to JH and PM with salient parts of it reading as follows:

> I wanted to suggest a system for processing calls directly to the Hughes Group office number.
>
> Myself and mike *[sic]* have spoken to thousands of people in the last month ranging from individuals to larger companies…
>
> With regards to client and client references, I propose the following:
>
> When a call is received, an order can be made along a price but with the necessary information of name, email, company name and/or phone number.
>
> This can be sent to the group chat on WhatsApp or the health team email address and if there is a material link on paper trail on email or phone then the client can be redirected (within @hughesgroup.co.uk emails) to the correct party.

97. PM responded indicating that he was happy with the proposal in principle (although he thought that FM and MH had to "evidence in concrete terms a relationship" before they could claim the "good lead" as their own). JH also indicated that he was happy with the proposal.

98. The Defendants assert that FM and MH seldom if ever "evidenced in concrete terms a relationship" before appropriating "good leads". Indeed, they allege that PM was actively diverting good leads out of the Partnership and into Newfoundland. That case will be considered later in this judgment. However, at this stage, the significance of the email of 11 January 2021 is that it demonstrates that both PM and JH saw a benefit of some kind of system for the demarcation of customers that in turn allocated rights to pursue "good leads" of the kind described in paragraph 92 among interested parties. JH accepted as much in cross-examination, acknowledging that there was an operative principle that, if FM or MH were "speaking to somebody beforehand, then that lead continues to them".

99. Contemporaneous documentation shows that "operative principle" being applied in practice. On 22 January 2021, a Kate Burrows of Cast Interiors emailed LB with an enquiry about LFTs. This was a good lead and LB, on receiving it, emailed the Health Team asking, "Anyone's lead or shall we respond?". FM, after checking Newfoundland's records, replied that there was "Nothing we can see on our end". The outcome was that JH said that he would follow up on the lead.

100. There were other instances in the contemporaneous evidence showing efforts made at the time to ascertain whether a customer or prospective customer "belonged" to Newfoundland or the Partnership. Meditech (described in paragraph 346 to 350) was an example. FM at first thought that Meditech belonged to Newfoundland, but then changed his mind. A further example concerned a "Jules Wright" who made contact with LB over the website. Contemporaneous emails show FM and PM consulting by email, and copying in the Hughes Health Team before agreeing that, since FM did not know Jules

Wright, and since Newfoundland had not had any direct contact with him, PM would pursue the lead.

101. I conclude that the operative principle was substantially as JH articulated it in cross-examination (see paragraph 98 above). If the Partnership became aware of a "good lead" of the kind described in paragraphs 92 and 93 above, then the member of the sales force (including Newfoundland for these purposes) that had spoken to that lead beforehand in a sufficiently meaningful sense had the primary right to pursue that lead. No one ever formulated a clear summary of what sort of prior interaction was sufficient and, as a result, the arrangement was insufficiently clear to be contractual. PM had described it as "evidence in concrete terms" of a relationship. FM had described it as "a material link on paper trail". In practice, everyone proceeded on the basis that they would be able to recognise the existence of a prior relationship when they saw it.

102. I also conclude that this arrangement extended to leads that FM and MH had generated before the Trading Agreement came into force. That is also exemplified by the case of Meditech. FM and MH had identified Meditech as a lead before 5 January 2021 and so before the Trading Agreement. However, discussions with LB proceeded on the basis that FM's and MH's prior contact with Meditech ultimately meant that it was an opportunity for Newfoundland to pursue.

103. That approach necessarily meant that "good leads" of the kind described above, were, unless they obviously belonged to DB, more likely in practice to "belong" to Newfoundland than to anyone else. That was for the following reasons:

    i) DB was focusing his sales efforts on a relatively small number of large entities to whom he was confident he could be provided with a good introduction. There was unlikely in practice to be any difficulty in distinguishing DB's "good leads" from those belonging to anyone else.

    ii) JH and PM were largely pre-occupied with attempts to secure a lucrative contract with the UK Government. They would occasionally deal with the smaller "Newfoundland-type" customers, but that was not their main focus and so they were not making a strong sales push with that kind of customer.

    iii) FM and MH had been working on the sale of Hughes Healthcare LFTs since September and October 2020 respectively. They had already generated significant sales. FM had a strong understanding of the LFTs he was selling which was much stronger than that possessed by the other members of the Partnership's sales team described in paragraph 87. Indeed, of that sales team, only Bobby Hughes was able to generate meaningful sales (to Furniture Village through his friend's mother). The sales and marketing activity of Newfoundland was more extensive than that of the Partnership.

104. Newfoundland's business model after it became a distributor involved it using sub-distributors to sell Hughes Healthcare LFTs. There was factual dispute as to whether a contact of one of Newfoundland's sub-distributors would, as between Newfoundland and the Partnership, be regarded as a customer of Newfoundland so that the Partnership would not pursue that customer. The Defendants' position in closing was that it would be extraordinary for the system of demarcation to operate in that way in the absence of any "non-compete" agreement between Newfoundland and the Partnership.

105. My conclusion on this issue is that, if the Partnership was aware that a potential customer was in contact with one of Newfoundland's sub-distributors, the Partnership would not actively pursue sales to that potential customer. Like the arrangement described in paragraph 101 above, this was not a contractual obligation of the Partnership but was simply a method of working that evolved.

106. There is less contemporary evidence of discussions allocating the right to pursue customers or Newfoundland's sub-distributors. However, there is some evidence in the contemporaneous documentation that JH and LB thought that the responsibility for dealing with Newfoundland's sub-distributors lay with Newfoundland rather than the Partnership. So, for example, when someone who had purchased LFTs from "Q-right", one of Newfoundland's sub-distributors, got in touch with the Partnership over the Hughes Healthcare website asking how she could go about getting a "Fit to Fly" test, JH evidently concluded that this was a query for Newfoundland to deal with. In a similar vein, on 3 March 2021, Acon forwarded to PM a query from a business called "DNA Workplace". PM asked FM whether this was a Newfoundland client and, on being told that "DNA Workplace" is "one of Loren's contacts", PM concluded that the task of following up on the query should fall on Newfoundland.

107. Nor do I accept that it was "extraordinary", as the Defendants argue, for the Partnership to forbear from seeking to poach customers from Newfoundland's sub-distributors. The Partnership was not set up to poach such customers even if it wanted to. DB would not have been interested in the possibility of selling a small number of tests to customers of "Q-right" or "DNA Workplace" since he was trying to secure large orders by mining his list of contacts. PM and JH were similarly much more interested in the prospect of a lucrative Government contract and would have been pleased that Newfoundland was dealing with what looked like relatively small opportunities. The rest of the sales team described in paragraph 87 were ill-equipped to poach clients of Newfoundland or its sub-distributors. They lacked FM's detailed knowledge of the tests and the science behind them and did not have FM's and MH's sales track record.

108. Moreover, in early January 2021, after the Trading Agreement was concluded and the issue of demarcation and cross-checking was being considered, there was no economic incentive for the Partnership to seek to poach customers of Newfoundland's sub-distributors. Each sale that Newfoundland's sub-distributors generated would, at that time, generate the Partnership a profit of £1.

The operation of "cross-checking" in practice

109. As I have explained, cross-checking was applied to at least two different kinds of good leads. The first category consisted of enquiries that came into the Hughes Healthcare telephone number or website. The second category came in as a result of Acon referring back to the partnership UK customers that had sought to "circumvent" it by purchasing direct from Acon.

110. The first category was typically dealt with by LB sending an email to the Hughes Healthcare team asking if anyone knew the client in question. Nothing much turns on the way that cross-checking of this kind operated.

111. The second category is much more significant in the context of these proceedings. Until 21 March 2021, the Partnership's main point of contact at Acon was Assi Askala (**AA**).

(An Acon employee called Anita Shuai took over on 22 March 2021.) AA developed a practice of periodically emailing details of potential customers who had sought to circumvent the Partnership. On 8 January 2021 in the course of a discussion over WhatsApp with AA about QR codes, PM wrote:

> If anyone from [Hughes Healthcare] writes directly to you, please respond to Orarin cc me. We are trying to streamline the business as we get busier, and work remotely, and avoid duplications like in last evening's duplication in the order.

112. AA took that request to heart. The sales activity of FM and MH before and after Christmas 2020 had resulted in Acon receiving more contacts from people seeking to circumvent the Partnership and purchase LFTs direct from Acon. AA said that she would "keep sending all of them to [PM] and Orarin". On 16 February 2021, PM sent a WhatsApp asking AA if she was "still … referring all UK enquiries to me directly". AA confirmed that she was. In fact, she sometimes copied in FM on emails forwarding leads, but she did not copy in JH or LB because, I infer, she considered she had been asked not to.

113. PM did not tell JH that he had arranged for himself and OM to be the focal point of contact for leads that AA forwarded.

114. On being forwarded a lead by AA, PM's almost invariable practice was to forward AA's email to FM (or to a lesser extent MH). When doing so, he tended to ask FM to follow up on the contact and let him know what happened. He tended not to ask an anterior question, namely whether the prospective customer was someone that Newfoundland had contacted previously. However, I consider that in most cases, FM would perform some sort of check.

115. PM did not involve JH, LB, DB or any of the other members of the Partnership's sales team in discussions on particular leads. The Defendants submit that this was because he wanted to ensure that leads were diverted to Newfoundland. However, I consider that the truth was less sinister. Any UK customer who made contact with Acon was likely to have found out about Acon as a consequence of sales and marketing efforts in the UK. For the reasons set out in paragraph 103 it was more likely that those were efforts of Newfoundland than of the Partnership's sales team. Moreover, leads that AA referred sometimes had scientific or technical questions. There was an objectively good reason for PM to contact FM about good leads in the first instance.

The developing relationship with Acon

Scientific evaluation of Acon's tests

116. Acon's LFTs would not even be eligible for submission to the UK Government's procurement system (and so for a DHSC Contract) unless they had first passed an evaluation at Porton Down. In November 2020, Acon's tests had been suspended from the Phase 2 evaluation at Porton Down. PM persuaded officials at the DHSC and elsewhere to permit Acon's tests to rejoin that process. FM helped with this process, for example by driving to Porton Down in December 2020 to deliver samples of Acon's tests.

117. Once re-admitted to the Porton Down process, Acon's tests performed well. They passed successfully through the Phase 2 evaluation on 3 February 2021, passed through the Phase 3A valuation on 2 March 2021 and by 27 April 2021 it had completed all necessary stages of Porton Down's validation process. Culmination of the Porton Down process meant that Acon's LFTs could be sold in the UK to professional entities who could administer those tests in a professional setting.

118. A further EU-wide accreditation was obtained on 14 May 2021. This was a **CE Mark** for self-testing which meant that both branded and unbranded tests were certified to be suitable for self-testing at home and without the assistance of a medical professional throughout the EU.

119. There was a dispute as to the extent to which FM or PM helped to secure the successful Porton Down evaluation and the CE Mark. My conclusion is that the successful outcome of the Porton Down process represented a team effort by Acon, the Partnership and FM. AA recognised this in an email of 22 February 2021 observing that PM had been an "excellent connection with our government deal [and] he has many close relationships with people high up which have helped us with DHSC". However, I conclude that the CE Mark was obtained largely as a result of Acon's own efforts. Obtaining the CE Mark involved a submission to "TUV Sud Product Service GmbH" in Munich and no-one involved with the Partnership had much to add to that process. That impression is supported by the fact that, on 25 March 2021, Anita Shuai notified JH of a submission of the "Hughes brand to TUV Sud". The impression from this email is that Acon was in charge of that process.

120. In December 2020 and January 2021, FM also arranged for Hughes Healthcare branded LFTs to be entered into a scientific study being conducted by the Lund University in Sweden. This came about at FM's initiative with the Partnership and Acon having relatively little involvement. FM had identified a company called "ZetaGene" as potentially being able to help with the sale of Hughes Healthcare LFTs in Sweden. ZetaGene was a commercial arm of Lund University and one aspect of the help it could offer involved performing a scientific review of those tests. ZetaGene will feature later in this judgment when I address allegations that sales opportunities of the Partnership were "diverted" into Newfoundland. For the time being the significance of ZetaGene is solely that on 11 January 2021, Newfoundland sold 400 branded LFTs to ZetaGene so that ZetaGene could run a clinical comparison trial. The Hughes Healthcare tests performed well in Lund University's tests.

121. Acon's Flowflex tests were also entered into a scientific study being conducted by the University Hospital at Hvidovre in Denmark (**University Hospital**), discussed in paragraphs 388 to 390 below.

122. The Partnership obtained no property rights as a consequence of the success of Acon's tests at Porton Down, the Lund University study, the University Hospital study or from the CE Mark. However, the increased saleability of Acon's tests consequent on these matters meant that the Partnership sold more tests and made more profit.

Exclusivity

123. The Partnership pressed, throughout its relationship with Acon, to be Acon's exclusive distributor in the UK. Acon blew somewhat hot and cold on this question. Acon attached

some value to its relationship with the Partnership as the Partnership was selling (via Newfoundland) a good number of its LFTs. Acon also thought that the Partnership had delivered tangible value in helping to secure its readmission into the Porton Down process. However, Acon never conferred on the Partnership the contractual status of exclusive distributor whether in the UK or any other jurisdiction.

124. The closest Acon ever came to conferring any degree of contractual exclusivity was in two letters dated 21 January 2021, both sealed with Acon's official seal. The first letter (the **Letter of Notification**) was addressed to "Dear Valued Partner" without specifying which entity was being addressed. The Letter of Notification confirmed that Acon had decided to grant the exclusive agency of its LFT "to a single partner in the United Kingdom for all projects related to the DHSC government channels and all related business activities…". It stated that the addressee would be kept updated if there is any change in this agency policy for the "DHSC government channels".

125. The second letter (the **Letter of Confirmation**) was addressed to "To Whom It May Concern", but was clearly intended to be read by the DHSC. The Letter of Confirmation stated that "Hughes Healthcare, an affiliate of Hughes Group Limited" is Acon's exclusive partner for the distribution and supply of its LFTs in the "DHSC (Department of Health and Social Care) UK government channels". The Letter of Confirmation stated that "this exclusive partnership was agreed on in November 2020 and hereby formally confirmed in writing, and it will keep valid until December 31st 2021 unless terminated in advance with mutual consent".

126. No one asks me to decide in these proceedings whether the Letter of Notification and the Letter of Confirmation conferred on the Partnership the exclusive right to sell Acon's tests to the DHSC. It remains possible that this question may have to be determined in due course since Acon has supplied its LFTs to a successful tenderer in the DHSC (**Medco**). PM and JH became aware that Acon was proposing to supply its tests to others participating in the DHSC tender process in February or March 2021. On 30 March 2021, a letter before action was sent to Acon asserting that Acon had breached the exclusivity agreements (the **Acon Claim**). Acon's solicitors replied, denying the existence of any contractual exclusivity obligation on 6 May 2021. PM remains of the view that Acon had some contractual obligation of exclusivity to the Partnership, but JH is less sure.

127. I am, however, satisfied that Acon was selective about who it supplied. More specifically, Acon's business model was to supply its LFTs to a relatively small number of distributors in various jurisdictions including the UK. Acon was not generally interested in selling LFTs direct. I reach that conclusion for the following reasons:

    i) It is consistent with the way that Acon behaved in practice. As I have noted, when customers sought to circumvent the Partnership or Newfoundland, AA tended to refer those customers back to the Partnership or Newfoundland as the case may be. It did that even when people such as Nabeel Sheikh, who had strong internet distribution channels, made contact directly.

    ii) It is consistent with FM's evidence, which I accept, to the effect that, at the end of 2021, Acon had only three distributors in the UK (Newfoundland, Medco who were selling to the DHSC, and MSDL) all of whom were selling high quantities of tests.

iii) FM and DB did not agree on many things but they both knew a good deal about the sale of LFTs. Both commented in their evidence on the importance of the relationship with Acon to the business of the Partnership and by extension that of Newfoundland. FM described it as "gold dust". DB accepted that the relationship was the "lifeblood" of the Partnership's business. If it were straightforward for competitors to obtain a supply of LFTs from Acon, they would not have expressed themselves in that way.

iv) Acon could afford to be selective since they were manufacturers of a market-leading test. It would make little commercial sense for a manufacturer of such a test to agree to supply anyone who made contact with them.

128. I acknowledge that, from March 2021 when Anita Shuai took over from AA as the Partnership's point of contact at Acon, the stream of referrals back to the Partnership/Newfoundland of customers engaging in circumvention somewhat dried up. However, that is explicable by other factors. PM had established himself as Acon's main point of contact in relation to attempted circumventions. However, relations between PM and Anita Shuai were not warm and were not helped by the fact that PM was the main proponent of the threats to sue Acon in connection with the Letter of Confirmation and the Letter of Notification. I accept that it is possible, as FM thought in a WhatsApp chat with PM timed at 9:13 AM on 24 March 2021 that Anita Shuai was proposing to try to work with circumventing customers directly. However, I consider that unlikely in the light of the other competing evidence.

129. In a similar vein, in a WhatsApp message on 14 July 2021, after the Partnership had been dissolved, Anita Shuai told JH that she was keen for one of her colleagues (Pooja) to sell some LFTs to Cignpost (a previous customer of Newfoundland) as Pooja was new to the company and Anita Shuai wanted her "to have one client of her own as a good start". That certainly suggests that there were exceptions to Acon's usual approach. However, Anita Shuai presented the sale to Cignpost as being very much in the nature of an exception (made because Anita Shuai "did not want [Pooja] to quit") and that Anita Shuai would continue to forward other leads in the future. In fact "Pooja" seems to have been persistent. In September 2021, also after the Partnership had dissolved, in a WhatsApp chat with FM, Nabeel Sheikh suggested that Pooja might have offered to sell some tests to a customer called "Solace". However, the chat suggests that the approach was opportunistic as the price offered was higher than Nabeel Sheikh was offering. Moreover, FM at the time considered Pooja's alleged actions to be contrary to the arrangement with Acon as he offered to call Acon and "take her [Pooja's] head off".

The row in February 2021

The row

130. In January and February 2021, Newfoundland was selling a good number of LFTs. Every LFT that Newfoundland sold resulted in a sale for the Partnership at a profit of £1. There was also a further benefit to the Partnership: since it needed to order a large number of tests from Acon to fulfil sales that Newfoundland was making, it was able to negotiate a US$0.50 reduction in the price it had to pay Acon for each LFT it purchased.

131. By February 2021, Newfoundland had ordered some 389,000 tests from the Partnership in its new role as distributor. It had thus generated £389,000 of profit for the Partnership in just two months for relatively little work on the Partnership's side.

132. MH and FM thought, not for the first time, that they were not being fairly rewarded for their efforts. The arrangement that they would not share directly in the profits of any DHSC contract (even if they would be "taken care of") continued to rankle. On 20 February 2021 a telephone call took place involving (at least) FM and JH during which FM proposed that Newfoundland should be able to order LFTs direct from Acon.

133. There was a dispute as to whether PM was present on the telephone call. No contemporaneous note of the call was taken and so the documentary evidence on this issue is limited. I have concluded that it was an important call: if FM and MH's proposal was accepted, the Partnership would lose a revenue stream that had generated it profit of £389,000 in two months. By the same token, Newfoundland's profits stood to increase significantly if the proposal were adopted. Given the importance of the matter, I infer that PM, OM, LB, FM and MH were all on the call.

134. What precisely was agreed on that call was the subject of significant dispute. However, whatever was agreed, following the call, FM sent an email to AA (copied to JH and PM) on 20 February 2021 as follows:

> We had a senior management Hughes Healthcare meeting today, with both Jon and Philip present, to discuss and prepare for the expansion of our business at Hughes Healthcare, and our sub division of Newfoundland Diagnostics.
>
> For future orders we would like to order in the same way, through Orarin and Admin@hughesgroup.co.uk … However, for some orders, and to spread out logistics including workload and paperwork, we want to have a sub-account to the Hughes Group account in the sub account name of Newfoundland Diagnostics, as I will be sending the payment directly to Acon … The difference would purely be in the nominated sending bank account, as we will be using the same freight processes.
>
> Please set up the sub account in the name of Newfoundland Diagnostics (division of Hughes Healthcare) so that you can receive payment and remit invoices accordingly.

135. Prior to sending this email to AA, FM sent a draft to PM for comment. The wording set out in paragraph 134 above was therefore the text as reworked by PM. However, the gist of it was the same as set out in FM's draft.

136. JH was extremely angry about the email being sent to Acon as he considered that its contents did not represent the agreement that had been reached. JH's position was that he had agreed only to a discussion with AA about available options. He felt that he was being manoeuvred into accepting an outcome, that Newfoundland would order direct from Acon, to which he was opposed and which he believed would favour Newfoundland at the expense of the Partnership. He also believed that PM was involved in this manoeuvring with a view to furthering his son's interests, also at the expense of the

Partnership. He replied to FM (copying in PM, OM and LB) saying that FM's email did not reflect the agreement reached.

137. I have concluded that this aspect of the row in February 2021 involved an unfortunate misunderstanding rather than any manoeuvring by FM and PM. If JH had suggested strong opposition to Newfoundland ordering direct from Acon, then there would have been little point in arranging a further call with AA to discuss options. Acon could scarcely resolve a debate between the Partnership and Newfoundland as to whether the Partnership should make a profit out of tests that Newfoundland was selling since that was a commercial matter between the Partnership and Newfoundland. Therefore, even if JH's recollection is correct, and whatever reservations he held, the call on 20 February 2021 could not have involved JH signalling strong opposition to the idea, although it is quite possible that he wished to understand how the arrangement with Acon would work before he agreed to it.

138. JH was right to consider that there were risks in Newfoundland being permitted to order LFTs direct from Acon. If it did so, Newfoundland would be a straightforward competitor of the Partnership, selling branded LFTs. Moreover, since Newfoundland could be expected to make more sales of LFTs than the Partnership, it would likely be able to purchase LFTs from Acon at a lower price than the Partnership could with a corresponding effect on its profitability. A possible solution to these concerns would be to reach an agreement with Acon to the effect that Newfoundland's purchases should count as purchases made by the Partnership for the purposes of determining the Partnership's volume discount. FM's email referred to in paragraph 134 above, hinted at an arrangement such as this with its reference to Newfoundland ordering through a "sub-account". However, thinking that PM and FM were seeking to outmanoeuvre him, JH either did not notice, or was not minded to accept, the allusion to this effect in FM's email.

139. There were other factors that caused JH to react negatively to FM's email. DB had been doing some research on PM over the internet and had spoken to members of Wentworth Golf Club at which both he and PM were members. Having found comments on an online forum, DB had come to believe that PM had behaved dishonestly in connection with the collapse of an AIM-listed company of which PM was a chairman (Paragon Diamonds Limited). Some of the people at Wentworth he spoke to delivered unflattering opinions of PM. DB had shared these concerns with JH and, while PM had sought to explain the comments about Paragon Diamonds as being the actions of vexatious "keyboard warriors", the concerns lingered.

140. JH was also caught up in a wider argument between DB and PM. Before 20 February 2021, DB was chasing a large potential deal with a multinational group called Bunzl. DB felt that he had been embarrassed in his discussions with Bunzl when he had indicated a possible price only for Bunzl to retort that a search of online suppliers had revealed that UK Wholesales, one of Newfoundland's sub-distributors, was offering a lower price online. DB must have suspected that this meant that FM was able to purchase tests from the Partnership at a much lower "base price" than DB was being offered, but JH did not tell him about the financial arrangement between Newfoundland and the Partnership or the price at which the Partnership was purchasing tests from Acon. DB was at this stage unaware that FM and MH had been involved with the Partnership since September 2020. Given his experience with Bunzl, DB was agitating for the Partnership to publish a price list. PM was strongly opposed to this as he considered that once a price list was published,

it would serve as a floor to the price that the Partnership could charge the DHSC if it secured the lucrative Government contract which he and JH saw as the main prize.

141. The next morning, on 21 February 2021, JH and PM exchanged lengthy WhatsApp messages. PM fanned the flames of the argument by suggesting that FM and MH were working harder in the business than JH, and suggesting that partnership profit shares should be revisited. That WhatsApp exchange continued throughout the day, but at 7.23PM, JH sent PM a message that struck a more conciliatory tone. He said that he would "[i]n the interests of our partnership, I'll concede and go with Newfoundland purchasing our products direct". He pointed to some "very special opportunities ahead of us" that included the possibility of a DHSC contract or large sales to Bunzl and Uniphar. JH concluded by saying that he was "transparent in everything I do and will continue to be, in my mind it is the only way a successful partnership should be".

142. PM remained unplacated, continuing to hint that JH's profit share in the Partnership should be reduced. A meeting was arranged for 23 February 2021 to resolve matters.

143. JH had not been as "transparent" as he claimed. He was forwarding his WhatsApp exchanges with PM to DB. JH accepted in cross-examination that he should not have done this, but in my judgment it was a relatively minor matter. JH was having a direct and challenging conversation with his business partner and it was understandable for him to seek some support and advice from his friend DB. DB was no supporter of PM and suggested that JH was now seeing PM's "true colours" and that, given the absence of a non-compete agreement between PM and JH, it was possible that PM could start purchasing branded LFTs from Acon at the same price as the Partnership was paying and set up a competing business.

144. More serious, however, was an email that JH sent AA on 22 February 2021 at 6.39 pm. In that email JH claimed that he had "found out… that Philip & Orarin intend to pursue the purchase of kits through Newfoundland at the same price". He said that he had discovered that PM was "a fraudster and has conned people out of a lot [of] money". He said that Acon should decline to supply PM with branded LFTs.

145. JH did not tell PM that he had sent this email. However, he did forward the email, once sent to LB, from which I infer that she had agreed that JH should make contact with AA concerning PM's alleged failings and he forwarded the email to show her how he had expressed the matter.

146. JH's email was unfair to PM. JH had not "found out" that PM and OM intended to purchase branded tests from Newfoundland. He just had a suspicion, fuelled by DB, that this might be their plan (see paragraph 143 above). The comments in the online forum about Paragon Diamonds and the gossip at Wentworth Golf Club fell a long way short of demonstrating that PM was a "fraudster".

147. However, unfair and ill-advised as it was, I will not conclude, as the Claimants invite me to, that the email represented the start of a plan or conspiracy for JH to dissolve the Partnership and for LB and JH to continue its business (relying on a supply of LFTs from Acon and working with DB). I reach that conclusion for the following reasons:

    i) JH did not dissolve the Partnership in February 2021.

ii) The result that JH sought by sending the email was to dissuade Acon from supplying tests to PM if, as JH feared, he was intending to set up a competitor business. That was what JH meant when he said in cross-examination that he was seeking to "keep everybody together". Provided that PM was not seeking a separate supply of tests from Acon, JH was content for the Partnership to continue. Since PM was not at this stage seeking a separate supply from Acon, JH formed no plan or intention in February 2021 to dissolve the Partnership.

iii) When AA responded on 22 February 2021 with a suggestion that everyone work together with a view to securing a DHSC contract, JH responded by agreeing that the DHSC contract was important and that "I/we will do everything possible to find a solution and maintain the business benefits for all".

148. That said, the email was an attempt by JH to sow doubt in Acon's mind about PM's propriety so that, if ever he and PM ceased business together, JH rather than PM would have the benefit of the Acon relationship. This attempt emphasises how important a relationship with Acon could be to anyone seeking to sell LFTs in the UK at the time.

The resolution of the row in February 2021

149. Some resolution to the row was achieved during two meetings on 23 February 2021.

150. The first meeting was between FM and MH (representing Newfoundland) and JH and LB. It took place at HGL's offices in London. At that meeting, FM and MH agreed that Newfoundland would continue to purchase tests from the Partnership rather than purchasing from Acon directly. JH was not, therefore, held to his concession of the point in his WhatsApp chat with PM the previous day (see paragraph 141 above). During that meeting JH suggested that, in return, Newfoundland should purchase tests from the Partnership at 1p above the Partnership's cost (to include both the price paid to Acon and associated costs such as shipping and freight).

151. The second meeting took place between PM and JH at PM and OM's family home on the evening of 23 February 2021. During that meeting, PM and JH agreed that the Partnership would continue with no change in the profit-sharing ratios.

152. JH made the suggestion that Newfoundland purchase from the Partnership at cost plus 1p for a combination of reasons. He was concerned that, if he did not make that offer, Newfoundland would go its own way, purchase LFTs from Acon at a comparatively low price, owing to the large volume of sales it was making, and become a formidable competitor to the Partnership. A running theme of the Defendants' case throughout the trial is that Newfoundland lacked the financial resources to go its own way in February 2021 since it would not be able to fund the up-front payment, of 50% of the value of each order placed, that Acon required as part of its terms of business. PM's case was that FM's biological mother is wealthy and MH comes from a wealthy family as well so that, if necessary, they could have obtained funds from either or both sources.

153. I had no documentary evidence as to the wealth of FM's mother or MH's family. I will not, therefore, make any finding as to whether FM or MH truly could have gone their own way in February 2021 because I do not consider it necessary to do so. The point is that JH feared that they might and his fear was rational.

154. With the benefit of hindsight, it can be seen that JH's suggestion that Newfoundland should purchase tests from the Partnership at cost plus 1p had highly favourable consequences for Newfoundland. Following the deal in February 2021, Newfoundland could purchase the market-leading Acon LFT at a low price and, in FM and MH, had a strong sales force with a track record of successful sales. Whatever theoretical demarcation had been agreed when the Partnership commenced, Newfoundland was well-placed to generate a healthy profit from more modest sales to "Newfoundland customers" ranging from individuals through to SMEs and sub-distributors such as UK Wholesales who sold large quantities of tests over the internet. Moreover, Newfoundland did not need to worry about funding the cost of tests that it purchased until it was able to sell them as many of its competitors would. HGL largely did that for Newfoundland (see paragraphs 177 to 178 below).

155. The consequences of the decision turned out to be unfavourable for the Partnership. The Partnership had no sales team equipped to target "Newfoundland-type" customers. DB, PM and JH were between them targeting big-ticket sales to large corporates and the DHSC. The remainder of the Partnership's sales team was ill-equipped to compete with Newfoundland. Moreover, the Partnership was subject to a self-denying ordinance that it would not follow up good leads with whom Newfoundland or Newfoundland's sub-distributors had previously been in contact. That made sense when the Partnership was making a profit of £1 on every test that Newfoundland sold, but was much less attractive now that, at JH's suggestion, the Partnership made just 1p profit on each test sold to Newfoundland. There could be only one winner in any competition for "Newfoundland-type" customers between the Partnership and Newfoundland and that was Newfoundland itself.

156. The decision also exacerbated DB's dissatisfaction with the pricing he was being offered. He was already concerned, when Newfoundland was purchasing LFTs for cost plus £1, that Newfoundland's apparent ability to offer low prices for the supply of Hughes Healthcare LFTs was prejudicing his ability to secure a big-ticket contract at an attractive price. That problem would only get worse once Newfoundland was purchasing tests at cost plus 1p. The deal with Newfoundland therefore had the unintended consequence of reducing DB's prospect of doing the very thing he had been asked to do: namely to land a big-ticket deal with a large corporate.

157. If the Partnership had secured a big-ticket contract with a large corporate or with the DHSC, it would not have minded if Newfoundland did well out of "Newfoundland-type" customers. However, in the event the Partnership obtained no such contract before it was dissolved on 27 June 2021.The failure to secure a DHSC contract made it clear that the real opportunity for the Partnership had, until dissolution, been sales to smaller customers. However, by then it was too late as the Partnership had ceded much of the ground to Newfoundland. JH and LB's dissatisfaction with that outcome has, in my judgment, clouded their recollections of how it came about, particularly in relation to their denials that a system of "cross-checking" was in place and their mistaken perception that Newfoundland only became successful because PM was diverting good leads to it.

158. That said, I cannot say whether an alternative course of conduct, such as JH refusing to reach any accommodation with Newfoundland and so "calling its bluff" to see if it truly did set out on its own would have led to a better outcome for the Partnership.

The SHA

159. The row in February 2021 caused both JH and PM to realise that it would be a good idea if the business relationship between them was formalised in writing. On 27 February 2021, PM sent JH a draft "Partnership Agreement" which he had drafted himself, suggesting that he and JH would be able to agree that document over the weekend. However, JH decided to take some legal advice and PM's draft document was never executed. JH therefore approached Gardner Leader (who also act for JH in this litigation) for advice and ultimately Gardner Leader produced the SHA with which both JH and PM were content.

160. The SHA was executed on 27 April 2021 and was very different from PM's draft partnership agreement. It is common ground that execution of the SHA did not result in a dissolution of the Partnership.

161. The parties to the SHA were (i) JH, (ii) Titanium, (iii) Hughes Biotech Limited (**HBL**) and (iv) Hughes Healthcare Labs Limited (**HHLL**).

162. HBL was a newly formed company. At the time of the SHA, it had two shares in issue, one of which was held by JH and one of which was held by Titanium. The two directors of HBL were OM and JH. JH and PM envisaged that HBL would be the entity that would, in due course, manufacture a proprietary "Hughes Healthcare" test so that the business would not simply involve purchasing complete LFTs from Acon and on-selling them at a profit. JH and PM had concluded that this proprietary test would be called "Hughes Veritas" and would most likely be manufactured in Northern Ireland. Since February 2021, JH and PM had been engaged in discussions with Dr Lawrence McGrath (**Dr McGrath**) about the practicalities of manufacturing Hughes Veritas tests in Northern Ireland with the idea that Dr McGrath would ultimately obtain 10% of the equity in HBL.

163. HHLL was also a newly formed company. At the time of the SHA, it had two shares in issue, one of which was held by JH and one of which was held by Titanium. As with HBL, the two directors of HHLL were JH and OM. I accept PM's evidence that HHLL was intended to be a corporate vehicle through which the existing business of the Partnership, consisting of the sale of LFTs manufactured by Acon, was to be conducted in the future. That is consistent with the terms of the SHA that I describe below.

164. PM was the sole director and shareholder of Titanium until after the Partnership's dissolution. Titanium was a repository for PM's business dealings. For example, as noted in paragraph 314 below, it was Titanium who issued invoices for PM's share of profits of the Partnership. No doubt because of that aspect of Titanium's activities, the Defendants argue that Titanium entered into the SHA as nominee for PM.

165. I reject that argument. I was not shown any evidence that Titanium expressly declared that it entered into the SHA as PM's nominee. PM himself denied that Titanium was a nominee for him. Nor was there any reason for implying an agreement between PM and Titanium that Titanium should be PM's nominee. I consider that the test for such an implied agreement should include the test of "necessity" that I have considered in paragraphs 50 and 51 above and I do not consider that test to be satisfied. There was a comprehensible reason for PM to prefer that Titanium, rather than he should hold the shares in HBL or HHLL both legally and beneficially. Since Titanium was the beneficial owners of shares in HBL and HHLL, it made sense for Titanium to be party to the SHA

as principal. Moreover, as I explain below, obligations that Titanium undertook pursuant to the SHA are perfectly workable even if Titanium was party to that agreement as principal rather than as nominee for PM.

166. Clause 2.1 of the SHA described the business of both HBL and HHLL. Consistent with my findings in paragraphs 162 and 163 above, the business of HBL was described as being "to develop research and manufacture [LFTs]" and the business of HHLL was described as being "to distribute, develop distribution, buy and sell lateral flow devices". Those two businesses were given the defined term "Business" for the purposes of the SHA.

167. Clauses 4.2 and 4.3 of the SHA provided as follows:

> 4.2 Notwithstanding any other provision of this Agreement, the Shareholders shall procure that Hughes Group Limited shall provide such management accounting and administration services to each of [HBL and HHLL] for such period as may be required and shall be compensated for such services at an appropriate market rate.
>
> 4.3 The parties shall procure that all assets and liabilities of each of the Businesses is currently traded within Hughes Group Ltd as "Hughes Healthcare", including but not limited to client and supplier contracts, cash in hand and debts, together with all activities, operations and intellectual property shall be transferred to the relevant Company at the earliest opportunity.

168. The Defendants analyse the SHA as providing simply for HBL and HHLL to provide the kind of administrative and financial support that HGL had been providing previously. I am quite unable to accept that submission. The whole focus of the SHA was on the proposition that the "Businesses" should move into HBL and HHLL (with the "manufacturing" business going to HBL and the "distribution" business going to HHLL). A corollary of that was that, since the distribution business was carried on by the Partnership, some steps needed to be taken to ensure that that business moved into HHLL.

169. That interpretation is consistent with the plain meaning of Clauses 4.2 and 4.3 quoted above. Clause 4.2 obliges HGL to provide administrative and financial support. Clause 4.3 requires the "parties" to procure that the Businesses are transferred into their new homes.

170. It is true that there is an oddity in the SHA: PM is not party to it. Accordingly, despite being a partner in the Partnership, the SHA imposes no contractual obligation on PM to do anything to transfer the business or assets of the Partnership into HBL or HHLL. In paragraphs 13A and 13B of their Particulars of Claim, the Claimants pleaded that this apparent lacuna could be filled by the implication of an "SHA Background Agreement" pursuant to which PM and JH would both instruct HGL to transfer assets of the Partnership held on trust to HBL or HHLL respectively. However, a case on the existence or terms of an SHA Background Agreement was not pursued in closing.

171. In my judgment, there was no SHA Background Agreement and indeed there was no need for one. Titanium was party to the SHA because it was Titanium, rather than PM

personally, who held the shares in HBL and HHLL. Titanium had taken some theoretical risk in committing to the obligations set out in Clause 4.3 since Titanium did not itself control any of the assets of the "Businesses as currently traded within Hughes Group Limited as 'Hughes Healthcare'". It had therefore accepted a contractual obligation (to procure a transfer of assets to HBL and HHLL) that it had no direct means of fulfilling. However, while this is a point that might trouble a lawyer, it would not have troubled Titanium. The sole shareholder and director of Titanium at the time was PM and Titanium could have confidence that PM would do what was necessary to ensure that Titanium could honour its contractual obligation.

172. The Defendants plead that "it was a condition precedent for entry into the SHA that neither [JH nor PM] was in breach of their duties to the Partnership at the inception of the SHA". The SHA contains no such express condition precedent and accordingly, the Defendants' case relies on an implication of a term into a written, and professionally drafted, contract.

173. Neither the Claimant nor the Defendants made detailed submissions on the law relating to the implication of a term into a written contract and I did not detect any disagreement on the applicable principles. I will, therefore, apply the approach set out at [21] of the judgment of Lord Neuberger in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742. In order for the Defendants' proposed condition precedent to be implied as a term of the SHA, at the very least a test of "business necessity" or "obviousness" must be met. Accordingly, the implied term must be such that without it, the SHA would lack commercial or practical coherence. Alternatively (although this often amounts to the same thing), the term must be so obvious that it "goes without saying".

174. I am very far from concluding that this test is met in relation to the suggested condition precedent. The whole point of the SHA was to transition away from a partnership arrangement involving just JH and PM and move into a "corporate" structure in which the Partnership's business was, instead, to be carried out by HBL and HHLL. The SHA therefore has both commercial and practical coherence even if either JH or PM had breached duties owed to the other in relation to the Partnership. Moreover, the background to the SHA was the row in February 2021 which started because JH believed that PM was involved in an attempt to manoeuvre him into accepting an arrangement that would be beneficial to Newfoundland (and so to FM) at the expense of the Partnership (see paragraphs 137 and 138 above). If JH's suspicions had been correct, PM would necessarily have been in breach of his fiduciary duties. Yet the SHA was part of the process for dealing with the aftermath of that row. Accordingly, it would be far from "obvious" to a reasonable observer that the very existence of previous breaches of duty should prevent the SHA from taking effect as a binding legal contract.

175. In a similar vein, the Defendants argued in closing that the SHA contained an implied term to the effect that Titanium would disclose to JH any breaches of fiduciary obligation that PM had committed in connection with the Partnership. I reject that argument for similar reasons. It was not "necessary" or "obvious" that Titanium should take on such an obligation.

Events leading to the dissolution of the Partnership

Newfoundland's burgeoning business and its ballooning debt to the Partnership

176. Acon's terms of business required the Partnership to pay 50% of the cost of an order up-front with the balance being due within 30 days. The Partnership applied the same terms of business to Newfoundland's orders. In theory, therefore, the Partnership should not have been out of pocket under this arrangement provided it always received payment from Newfoundland in time to pay sums due to Acon.

177. However, the practice was different. Newfoundland's business model involved it selling significant numbers of LFTs to sub-distributors. Those sub-distributors were sometimes slow to pay. Therefore, Newfoundland did not always have the cash necessary to pay the Partnership and since the Partnership was, after 23 February 2021, making only 1p profit on each test it sold to Newfoundland it did not build up a cash "buffer" from sales to Newfoundland. Since the relationship with Acon was so valuable, JH and PM considered that Acon could not realistically be kept waiting for payment. HGL drew on its other resources to ensure Acon was paid on time and in full even when Newfoundland was late in paying. HGL was, in effect, providing interest-free working capital to Newfoundland in significant amounts. By 31 March 2021, the balance that Newfoundland owed the Partnership was sufficient to warrant a meeting between PM, JH, FM and MH to discuss a "payment and invoicing schedule". By 9 April 2021, Newfoundland owed HGL £663,671.60.

178. That was a large sum for HGL and it caused JH significant anxiety. PM also realised the magnitude of the problem telling FM in no uncertain terms that a debt of this magnitude was unacceptable and had to be cleared immediately. Newfoundland did what it could to repay the debt but was reliant on receiving payment from its own customers. Despite a number of chasers and reminders sent by JH in April and May 2021, by 28 May 2021, Newfoundland still owed HGL some £250,000.

179. The situation was unsustainable. JH, feeling that he had no choice in the matter, agreed in June 2021 that Newfoundland could, and should, in future order LFTs direct from Acon. Newfoundland placed its first order with Acon on 14 June 2021.

The row about Hughes Veritas

180. As noted in paragraph 162 above, since February 2021, JH and PM had been exploring the possibility of manufacturing a "Hughes Veritas" branded test in Northern Ireland. Since they lacked the scientific expertise and support that would be necessary to manufacture a completely new test, they alighted on the possibility of importing components and assembling those components into LFTs in Northern Ireland. By performing sufficient assembly activities in Northern Ireland, JH and PM hoped that they could market and brand the Hughes Veritas test as having been manufactured in the UK. That, of course, would require some form of contractual consent from the manufacturer of the components in question. JH and PM thought that Acon was the most natural manufacturer of components to use for these purposes, but they were open to the possibility of using components manufactured by another Chinese manufacturer called Really Tech if Acon was not prepared to give the necessary consents.

181. Both JH and FM agreed in their evidence that in principle, provided the manufacturer of components gave the necessary consent, and sufficient assembly was indeed conducted in the United Kingdom, this approach had some precedent. It is not uncommon for businesses to import components from another jurisdiction (for example China), assemble those components into finished goods in another jurisdiction (for example, the United Kingdom) and label the finished goods as being of UK origin. This process is known as the "OEM method" with the acronym standing for Original Equipment Manufacturer.

182. In May 2021, an opportunity arose to supply LFTs to the Indian government. At that time, the Indian government was thought, for political reasons, to have at the very least a strong preference not to purchase LFTs that were of Chinese origin. PM and FM thought that there was an opportunity for the Partnership to supply the Indian government with Hughes Veritas tests that consisted substantially of components manufactured by Acon (or perhaps Really Tech). JH clearly had some difficulties with that proposal although the nature of his concern appeared to fluctuate.

183. In an email he sent on 20 May 2021, JH appeared to suggest that his concern was that the Hughes Veritas test would consist substantially of components manufactured by Really Tech, when the Indian Government had been provided with data based off the Acon test.

184. By contrast, in paragraph 195 of his first witness statement, JH said:

> The reason [he had a concern about the Indian Government proposal] was because Philip had an idea to repackage Acon tests as Veritas tests, so they looked like they were produced in the UK rather than in China. The Indian Government didn't want to buy anything from China for political reasons, so they were interested in the Veritas test. Philip wanted to bypass Lawrence McGrath, the scientist who was going to produce the Veritas tests, and put Acon Flowflex tests through Porton Down packaged as Veritas, and then sell them to the Indian Government. Philip was trying to find people who would print off Veritas boxes and put different test in the box – I remember Orarin saying Philip wanted to do this repackaging, but they didn't put it in writing.

185. The Claimants argue that this concern was groundless, and indeed confected, because JH knew full well that the "OEM" method that was being proposed would involve the Hughes Veritas test incorporating a significant number of Acon's components. They note that, in a WhatsApp exchange on 10 April 2021, JH showed that he was well aware that 5,000 Acon LFTs were being repackaged into Hughes Veritas branded boxes for delivery to Porton Down so that Hughes Veritas branded tests could benefit from the same accreditation as Acon tests.

186. Faced with these apparent inconsistencies, the Claimants invite me to conclude that JH's averred concerns about selling Hughes Veritas tests to the Indian government were entirely confected. They argue that the row that ensued when JH told PM and FM in telephone calls in June 2021 that the proposal involved lying to the Indian government was engineered as a smokescreen for JH's intention to dissolve the Partnership and take its business for himself.

187. I do not accept that and conclude that JH had genuine reservations about the proposed deal with the Indian government for the following reasons:

    i) JH's explanation of his concern in paragraph 195 of his first witness statement is not as inconsistent with other explanations as the Claimants suggest. Read as a whole, paragraph 195 suggests that one of JH's concerns was that PM was not proposing that the tests sold to the Indian Government would even be assembled in Northern Ireland. There is some support for that concern. I was shown a WhatsApp chat between PM, FM and a participant named "Sean" in early May 2021. "Sean" appears to be based in China, or perhaps Hong Kong, since his name and WhatsApp has Chinese characters next to it and he says that he is based in a time zone eight hours ahead of the UK, which would be consistent with a location in China or Hong Kong. The tenor of the conversation with Sean concerns a repackaging of Acon tests into different boxes. During that conversation, PM asked Sean to confirm, and Sean duly did confirm, that "all packaging can be in our name, with our CE and manufacturing details, with no Chinese markings anywhere". Sean also confirmed that provided the products in question were shipped from Hong Kong rather than mainland China, the boxes need not include a certificate customarily included with LFTs shipped from China.

    ii) JH was not just concerned about the abstract question of whether the Partnership was being straightforward in its proposed dealings with the Indian Government. He had a more selfish concern that I considered to be both genuine and plausible. JH considered that PM had shown a marked aversion to having his own name on documents connected with the Partnership. So, for example, when PM drew his share of Partnership profits that was against an invoice issued by Titanium. JH noticed that PM was not a party to the SHA at all. He remembered that the first draft partnership agreement that PM produced following resolution of the February 2021 row (see paragraph 159 above) proposed that the partnership be expressed to be between JH and PM in his capacity as trustee of the charitable Elisabeth's Foundation which PM had established in 2018 to raise funds to support treatment for other children with Elisabeth's condition. JH was worried that if there was anything wrong with the Indian Government proposal, the consequences would be borne by people who were publicly associated with the Partnership or by him and OM as directors of HHLL.

188. The proposed transaction with the Indian Government never progressed to completion. I will not make a finding that PM or FM were intending to practise any deception on the Indian Government as the documentary record is somewhat fragmented. I do, however, consider that it was reasonable for JH to have misgivings about the proposal. He expressed his misgivings in language that was intemperate and to which PM objected, as demonstrated by the fact that there was no WhatsApp communication between JH and PM between 18 May 2021 and 16 June 2021. However, JH's misgivings were genuinely and reasonably held and were not a "smokescreen" of the kind the Claimants allege.

<u>"Discoveries" about Hughes Healthcare Limited and a trade mark application by NeuroCED</u>

189. JH said at paragraph [198] of his first witness statement, that one of his reasons for dissolving the partnership was his discovery, in June 2021, that PM had incorporated a company called Hughes Healthcare Limited (**HHL** and not to be confused with HHLL which was one of the signatories to the SHA).

190. That was indeed a factor as emails sent on 14 and 15 June 2021 demonstrate. However, I consider that JH over-reacted to the existence of HHL. Concerned as he was that PM was dishonest, JH forgot about earlier discussions with PM about the possible acquisition of a company called "Hughes Healthcare Limited".

191. In early 2021, JH and PM became aware that there was an unrelated company called "Hughes Healthcare Limited" that was in the process of being dissolved. At least one customer had raised a query as part of their due diligence process prior to placing an order with the Partnership. JH and PM made contact with the shareholder and director of Hughes Healthcare Limited (a Dr Paul Hughes) to see if he would be prepared to sell the shares in the company. Dr Hughes seemed amenable to the proposal and at one point there was a suggestion that Hughes Healthcare Limited might be a vehicle for holding the "Hughes Healthcare" business pursuant to the SHA.

192. However, the transaction with Dr Hughes proved more complicated than either side had thought, perhaps because Hughes Healthcare Limited had a trading history and so the question of warranties or indemnities arose. Ultimately, Dr Hughes concluded that the transaction was not worthwhile and he suggested that he would simply continue with the dissolution of the company, leaving PM and JH free to incorporate a new company with the same name once dissolution had taken effect. That is precisely what happened. On 10 June 2021, PM became aware that Hughes Healthcare Limited had been struck off the register and on 10 June he arranged for the incorporation of a new company bearing the same name. I accept PM's evidence that he did so in order to ensure that the name was preserved for the use of the Partnership's business and to pre-empt anyone else from taking steps to form a company with that name.

193. JH also said in his witness statement that he was prompted to dissolve the Partnership by his discovery that NeuroCED had applied to register a trade mark in the name of "Hughes Veritas Lateral Flow Test Device". NeuroCED had indeed done so in an application made on 6 June 2021 (signed by PM even though he was not a director of NeuroCED). However, there is no contemporaneous reference in the documentation to JH's discovery of this trade mark application. I conclude that JH became aware of the application after dissolving the Partnership and he has misremembered the order of events.

194. Although JH was not aware of the trade mark application at the time, it remains the case that the trade mark protected the Partnership's intellectual property, rather than any intellectual property owned by NeuroCED. I conclude, and in any event it is common ground that, NeuroCED should give an account to the Partnership in respect of its ownership and retention of the trade mark.

Events of 14 and 15 June 2021

195. On 14 June 2021 at 20.06, JH sent an email to OM and PM copied to LB that read as follows:

> Do you see a future for our partnership? I assume not given Philip's comments to Lynn this morning wishing to be paid £65k and then have nothing further to do with Hughes Group and now you've set up a separate company independently it would appear to conclude matters. Let me know your thoughts.

196. The conversation with "Lynn" was with Lynn Waterman, who helped to keep HGL's books rather than with LB (who, as JH well knew given his relationship with her, spells her name "Lyn"). With his judgement clouded by a conviction that PM was not dealing honestly with him, JH misconstrued reports of that conversation. PM had simply been chasing up what he regarded as a £65,000 profit share due to him and he was not suggesting in a discussion with HGL's bookkeeper that this payment should be in full and final settlement of his business relationship with JH.

197. That same evening, JH turned off the access of PM, OM, FM and MH to their Hughes Healthcare email accounts without warning. When, on 15 June 2021, PM asked JH what was happening with the email accounts, JH replied:

> Given our discussions last night and now you've set up a separate limited company (Hughes Healthcare Ltd) you can use your own emails. Our Hughes Group emails cost money and as you're not involved in the company it's best you don't send emails from Hughes Group Ltd.

198. Some discussions ensued and JH restored access to the email accounts for a period so that the Manducas and MH could obtain necessary information from them. A week after restoring access, he arranged for all of PM, OM, FM and MH to be excluded from access to their former accounts.

199. JH also changed the password for the DPS portal that gave access to documents connected with the DHSC tender. The Partnership had adopted a somewhat irregular method for accessing that portal. The account was in JH's name. However, OM had done much of the work in filling the online tender documents and had done so by using JH's login details and password. The consequence of changing the password on the portal was that the Manducas would not be able to tell first hand whether the Partnership's tender had been successful. Moreover, the outcome of the tender process was due to be announced the next day on 16 June 2021.

200. Also on 15 June 2021, JH and Anita Shuai exchanged WhatsApp messages. JH wrote as follows:

> Philip & Orarin have secretly set up another business and have been taking trade away from us. They also have [not] been straight with the Indian government re the Veritas test. I can't do cheating, there's too much for me to lose.

201. When Anita Shuai queried which entity holds the IP rights for the "Hughes" and the "Hughes Veritas" brands, JH replied as follows:

> Hughes is with me, Veritas is a partnership. I have a call with Philip at 10:30am today, let's see what happens! I'll keep you posted.

202. By saying "Hughes is with me", JH meant that either he, or HGL, had the right to use the "Hughes Healthcare" brand. As I have explained in paragraph 52 above, that was wrong. The Partnership owned the rights in the name "Hughes Healthcare" and any goodwill that that brand name had generated. However, I have concluded that JH genuinely

believed his statement to Anita Shuai to be correct. Neither he, PM, or anyone involved in the Partnership's business thought rigorously about the distinction between the Partnership and HGL and instead relied on the concept of the Partnership being a "division of HGL" which no-one really understood. With his imprecise notion of what the Partnership was, and who held its assets, JH believed that the brand "Hughes Healthcare" belonged to him or to HGL.

203. Also on 15 June 2021, LB emailed Anita Shuai to order further LFTs. She wrote:

> We have now separated from Philip and Orarin can you please invoice Hughes Group Ltd as this is the only account we will trade from.
>
> This order is confidential between me you and Jon can you please let it remain this way.

204. On the same day, JH signed a revised "Mutual Confidentiality Agreement" with DB expressing himself to be signing on behalf of "Hughes Healthcare, a division of Hughes Group Limited".

The results of the DHSC tender process

205. On 16 June 2021, the results of the DHSC tender were announced. The Partnership's tender had been unsuccessful. Medco, who were also proposing to supply Acon tests, were successful.

206. Following announcement of the tender results, JH and Anita Shuai exchanged friendly WhatsApp messages. JH did not mention the possibility that the Partnership might sue Acon for breach of the asserted exclusivity arrangements (see paragraph 126 above).

Going through the emails on 25 and 26 June

207. On 25 June 2021, JH accessed the "HGL" email accounts of PM and FM that were hosted on HGL servers. He did so by using his administrator access to those servers and the fact that PM and FM had not changed the passwords on their email accounts since they were set up.

208. Between 25 June 2021 and 26 June 2021, JH read a large number of PM's and FM's emails. He forwarded some 95 of the emails that he read to LB, or DB or in some cases to both.

209. It is not possible to detect any real pattern to the emails that JH chose to forward. Some were details of leads that AA or Anita Shuai had passed to PM or FM. An example was an email containing contact details of a business called "SMI Group" who had made contact with Acon and which AA had forwarded to PM. An indication of what JH thought was significant about that email can be seen from what he wrote when forwarding it to DB:

> This is a lead from Assi to the Manduca's – maybe worth a cold call?.

210. The Defendants categorise some 15 of the emails that JH forwarded as being concerned with leads that Acon had passed to PM or FM. The Claimants put the true number as being somewhere between 4 and 8. The difference between them involves some reasonably fine points of classification. So, for example, the Defendants characterise emails passing between Nabeel Sheikh and FM as relating to an Acon "lead" because Acon had previously forwarded emails from Nabeel Sheikh to PM (see paragraph 342 below). However, as I conclude below, Nabeel Sheikh was a customer of Newfoundland even before Acon passed his contact details to PM and so the Claimants characterise this email as relating to Newfoundland's dealings with its own customers.

211. There is little point in seeking to resolve points of classification such as this. The salient feature of many of the emails forwarded is that they contained the names of people who could be presumed to be interested in purchasing LFTs. In some cases that interest manifested itself in the fact that they were clearly already purchasing tests from Newfoundland. In some cases, the emails contained names of leads that Acon had forwarded.

212. DB accepted in cross-examination that a unifying theme of many of the emails that JH forwarded to him was that they contained details of people who were purchasing tests from Newfoundland. DB saw it as "completely odd" that Newfoundland had built such a significant business out of selling tests cheaply and saw it as his role to help his friend JH "to win that business back". DB would not have formed that understanding of the purpose for which he had been forwarded those emails unless JH had communicated that to him in advance. I infer that JH had communicated a similar intention to LB in forwarding the emails to her.

213. A further indication of the purpose that JH thought that forwarding the emails would serve can be seen in an email that DB sent on Saturday 26 June 2021 to JH and LB saying that he was "literally counting the hours until Monday so we can begin to bury them". By that, DB meant that, as soon as business hours started on Monday, he expected that he, JH and LB would be aggressively seeking to take business from Newfoundland. The word "bury" was one he had used in his days as an FX broker when he was competing with banks and was not suggestive of any physical violence.

The Dissolution Email

214. On 27 June 2021, JH sent the Dissolution Email to PM with a copy to LB and OM. The email said, so far as material, as follows:

> Please take this email as formal termination of our partnership. I've had several conversations with Freddy recently and it's very clear you are doing business in isolation from our partnership (I will refrain from detailing in this email) hence I have lost trust and cannot continue any further business activities with you.

215. It is common ground that this email effected a dissolution of the Partnership. JH also argues that it operated to terminate the SHA. I reject that analysis of the Dissolution Email for reasons set out in paragraphs 446 to 449 below.

The aftermath of dissolution

The "war" and JH's attempts to secure the Acon relationship

216. On 28 June 2021, LB sent an email to JH and DB. She explained that she had contacted Harry Sekhri (a purchaser of LFTs discussed in more detail in paragraph 350.v) below) and said she was "contacting old customers that had not ordered in a while" and had pitched for new orders from him saying that she would "give him a better price". She ended her email saying "Let the war begin!". The "war" in question was consistent with the purpose for which JH had forwarded emails from the Manducas' email accounts: LB expected that she would be involved in a process by which JH "won back" business that was being undertaken by Newfoundland. She hoped that would be achieved by using information in the Manducas' email accounts, not limited to those that JH had forwarded. While the focus was on taking business from Newfoundland, LB and JH expected that they would be able to use all the emails to which they had access through HGL's server, which included information that was confidential to the Partnership, as well as information that was confidential to Newfoundland.

217. JH and LB owned a company called Orchard Lea Properties Limited which they used to collect rents and pay the mortgage on a flat in Bracknell. On 2 July 2021, that company changed its name to "Medical Supplies Direct Limited" (**MSDL**). MSDL would ultimately enter into the Danish Deal.

218. JH enjoyed a warm relationship with Anita Shuai in contrast to PM's frosty relationship with her. That was partly because PM had shown much more interest in taking legal action against Acon for its asserted breach of the exclusivity arrangements whereas JH was more emollient on this issue. However, there was a personal element too. Anita Shuai admitted to FM in a WhatsApp chat on 6 August 2021 that she liked JH much more than PM because she perceived that PM and OM adopted a hectoring and demanding tone with her which JH did not. JH leveraged that warm personal relationship to seek to persuade Anita Shuai that because as he said, he owned the "Hughes Healthcare" brand, Acon should not supply either Newfoundland or the Manducas with branded LFTs.

219. Anita Shuai was positively helpful to JH in those discussions. She suggested that a good starting point if JH wanted to cut Newfoundland and the Manducas off from a supply of Acon tests would be for JH to send a letter "in warning tone" to Acon asserting that anyone purchasing "Hughes Healthcare" branded tests from Acon would be infringing JH's, or HGL's intellectual property rights. JH took Anita Shuai's cue. With the ground having been paved, on 8 July 2021, HGL purported to grant Acon a non-exclusive, royalty-free licence, to use the "Hughes Healthcare Trademarks". However, as I have concluded, HGL had no intellectual property rights in the name "Hughes Healthcare". That was the Partnership's trading name and goodwill in that name belonged to the Partnership rather than HGL. On 26 July 2021, Anita Shuai sent an email to JH, Polly Phillips and LB stating that Acon would not sell Hughes Healthcare branded tests to anyone without JH's authorisation.

220. Following that, at least for a period, Acon would not supply either Newfoundland or PM with branded LFTs. However, Newfoundland continued to be able to order unbranded tests. It is not clear to me, and I make no finding, as to whether PM continued to be able to order unbranded tests from Acon.

PM's sales of LFTs after dissolution of the Partnership

221. Following the Partnership's dissolution, PM accepts that he continued to sell LFTs to Collinsons and Radisson, both clients of the Partnership. Although he could not obtain branded LFTs from Acon, persuaded both Collinsons and Radisson to purchase unbranded LFTs on the basis that they were identical in substance to the branded LFTs. I infer that, to the extent PM was not able to order unbranded tests from Acon (see paragraph 220 above), he purchased from Newfoundland tests necessary to satisfy orders from Collinsons and Radisson. PM booked the relevant sales through HHL (as distinct from HHLL). He accepts that he is liable to account to the Partnership for any benefit that he or HHL realised on those sales.

Other matters

222. In the early days of the Partnership, OM applied a particular customs duty code on import documentation that enabled the Partnership to pay no customs duty on tests purchased from Acon on the basis that those tests were being imported for the purposes of scientific evaluation at Porton Down.

223. However, she continued to apply that same customs duty code to future imports of LFTs which were intended to be sold at a profit rather than subjected to scientific evaluation. HMRC formed the view that those later imports were subject to customs duty at the standard rate with the result that customs duty had been underpaid on those imports. In due course, HMRC issued a demand for some £200,000 of additional import duty. That was a liability of the Partnership's business. I accept the evidence of JH and LB that HGL eventually settled that liability without obtaining any contribution from PM.

The existence or otherwise of a plan from 14 June 2021 to dissolve the Partnership

224. There was a significant dispute between the parties as to JH and LB's plans, intentions and beliefs from 14 June 2021 until the Partnership was dissolved. The Claimants' position is that:

    i) JH, LB, HGL and MSDL and DB as a non-party co-conspirator conspired together during this period to bring the Partnership to an end with a view to JH, HGL or MSDL, carrying on the Partnership's business for themselves.

    ii) All the alleged conspirators participated in that plan, despite knowing that it would involve JH, or entities they controlled, taking over a business that belonged to the Partnership without any account being given to the Partnership or to PM.

225. For their part, the Defendants argue that there was no pre-ordained plan to dissolve the Partnership. JH was hurt by the row about the proposed sale of Hughes Veritas tests to India. He was cross at discovering that HHL had been incorporated. The Defendants argue that the discovery of wholesale diversions of business when JH was looking through emails on 25 and 26 June represented the final straw and culminated in JH's decision to terminate the Partnership with little, if any plan, as to what would happen thereafter.

226. There are indications in the evidence that point in favour of both analyses. I have concluded that JH was indeed angry about the proposed sale of Hughes Veritas branded

tests to India. That was not a row that was manufactured and his concerns in this regard were understandable (see paragraph 188 above).

227. JH had previously in his dealings with the Manducas shown a tendency to try to keep the Partnership together at points of stress during its life. He assented, reluctantly, to FM and MH breaking away to form Newfoundland and he was the originator of the proposal that Newfoundland should purchase LFTs from the Partnership for cost plus 1p. His previous efforts to keep the Partnership and people working with it together is seemingly at odds with him forming a scheme to terminate it and take over its business. JH's previous behaviour is, therefore, consistent with the Defendants' analysis.

228. However, on balance, I conclude that the Claimants are right to assert that JH and LB formed a plan to dissolve the Partnership and take over its business from around 15 June 2021. JH took care to tell Anita Shuai what he thought was going on and to assure her that "Hughes is with me" (see paragraphs 200 and 201) because he realised that securing a supply of "Hughes Healthcare" branded tests from Acon in the future was crucial to his ability to continue the business. LB demonstrated her awareness of, and involvement in, that plan by ordering some tests from Acon on 15 June 2021 with a request that Anita Shuai keep that order secret from the Manducas (see paragraph 203 above). She also demonstrated her involvement in the plan by the enthusiasm with which she participated in the "war" described in paragraph 216 above.

229. While I quite accept that JH was in a heightened emotional state on 25 and 26 June 2021 when he was going through the Manducas' emails, his actions when forwarding those emails are also indicative of a pre-existing plan. He did not just read those emails and tell LB and DB about what he regarded as the Manducas' treachery. He forwarded at least some of those emails for a purpose that consisted of winning future business from purchasers of LFTs named in them. His suspension of the Manducas' email accounts, albeit with the Manducas being given some opportunity in which to secure the information contained in those emails and store it elsewhere, is consistent with a wish that, in the long term, he should have access to those emails to help to take over the Partnership's business.

230. The plan to take over the Partnership's business required a vehicle through which that business would be operated. I have inferred that JH and LB agreed that the two vehicles would be HGL and MSDL. HGL was an obvious choice because it already had an involvement in the business of selling LFTs and PM had no interest in it. I also infer from (i) the changing of MSDL's name and (ii) JH and LB's reference, shortly after dissolution of the Partnership to "porting" customers over to MSDL (see paragraph 417 below) that there was a plan for MSDL to carry out some aspects of the business.

231. HGL and MSDL were controlled by JH and LB, and I infer that these entities acted in accordance with the wishes of JH and LB in becoming party to the plan I have described. It follows that, when JH accessed emails containing information confidential to the Partnership stored on HGL's servers, he did so both in his personal capacity and as a director of HGL that was party to the plan.

232. I therefore conclude that JH, LB, HGL and MSDL were party to the kind of plan that the Claimants allege from around 15 June 2021. I make no findings as to DB's participation or otherwise in the plan given that this allegation is to be explored in separate proceedings. The plan, and the "war" that followed it would have made no sense if there

was to be an account of benefits received from taking over the business to either the Partnership or PM. Moreover, no account of benefits has been offered. I accordingly infer that all participants in the plan realised that a necessary ingredient of it was the absence of any form of account to either PM or the Partnership.

233. Both JH and LB realised that the plan would involve HGL and/or MSDL taking over the Partnership's business without any account to PM or the Partnership. However, both genuinely believed that that was a legitimate response to what they saw as the Manducas' treachery consisting of, among others, (i) the establishment of HHL (ii) the sharp dealing in the proposed sale of Hughes Veritas tests to India and (iii) the fact that Newfoundland, which had an affiliation with the Manducas through FM, had a large and vibrant business, whereas the Partnership's business was much smaller.

234. As I have found, JH and LB were entitled to have some concerns about the proposed sale of Hughes Veritas tests to India. The concern about the establishment of HHL was wrong and unreasonable (see paragraphs 191 to 193 above).

235. There was some basis for JH and LB's concern on point (iii) set out in paragraph 233. As I conclude later in this judgment, in the period up to the Dissolution Email, PM had an interest in Newfoundland that he had not disclosed. However, JH and LB were not aware of this at the time. JH also overlooked the fact that Newfoundland's success was a direct consequence of decisions with which he had agreed and in some instances proposals he had made (see paragraphs 152 to 157 above). Following review of the Manducas' emails on 25 or 26 June 2021, JH and LB came to believe that Newfoundland's success was driven by PM's diversion of leads to Newfoundland and away from the Partnership. However, my analysis of the diverted leads set out below shows that to be wide of the mark. Most of the leads said to be diverted were contacts of Newfoundland which, in approving the system of cross-checking, JH had agreed that Newfoundland was entitled to pursue.

The state of the Partnership's business at the time of dissolution

236. Throughout his oral evidence, JH asserted that at the time the Partnership was dissolved, its only client was Collinsons. That was an overstatement and a single counter-example disproves it. On 15 June 2021, PFW Labels ordered 250 boxes of 25 LFTs. There were other customers as well. On 16 June 2021, LB shared a list of customer contacts with Lynn Waterman that referred to customers other than Collinsons. Her covering email stated that "Northern Lighthouse" have also paid, indicating that Northern Lighthouse was a customer at this time as well. That said, I accept that Collinsons was the Partnership's most significant customer at the date of dissolution.

237. In closing, the Defendants sought to advance a case that, at the time of dissolution, there was no goodwill at all in the "Hughes Healthcare" brand with the result that the goodwill of the Partnership's business was valueless. In support of that submission, it was said that the pleadings demonstrated that it is common ground that "the marketplace was not prepared to pay a premium for Hughes Healthcare branded LFTs". It was also submitted, for example, that the Claimants had not put forward any evidence of customers insisting on having a Hughes Healthcare test or preferring a Hughes Healthcare test to a Flowflex test.

238. I reject that submission. Collinsons purchased a good number of LFTs from the Partnership. That alone meant that there was some goodwill in the Partnership's business. Moreover, people in the UK were, at the time of dissolution, purchasing branded tests in significant numbers, as demonstrated by the fact that Newfoundland was making significant sales. I make no finding as to the precise value of the "Hughes Healthcare" brand and business name, but it clearly had some value at the time of dissolution.

PART C – ISSUES OF PARTNERSHIP LAW

Statutory provisions

239. Sections 29, 38 and 42 of the Partnership Act 1890 (**PA 1890**) are central to this dispute and provide, so far as material as follows:

> **29 Accountability of partners for private profits**
>
> (1) Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property name or business connexion.
>
> (2) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner.
>
> **38 Continuing authority of partners for purposes of winding up.**
>
> After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution… but not otherwise…
>
> **42 Right of out-going partner in certain cases to share profits made after dissolution**.
>
> (1) Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per cent. per annum on the amount of his share of the partnership assets.

Fiduciary obligations before the Partnership was dissolved

240. In paragraph 16 of their Re-Re Amended Defence and Counterclaim (**D&CC**), the Defendants pleaded a list of duties that both PM and JH owed to each other before dissolution of the Partnership. In their Reply to the D&CC, the Claimants admitted those duties.

241. I take it to be common ground between the parties that:

    i) If PM was sharing in Newfoundland's profits before the Partnership was dissolved, he would be in breach of those admitted fiduciary obligations on the basis that he would be making a secret profit connected with his involvement in the Partnership that he had not disclosed to JH.

    ii) If PM "diverted" to Newfoundland business opportunities that properly belonged to the Partnership, he would be in breach of those admitted fiduciary obligations.

    iii) By contrast, if PM permitted Newfoundland to pursue a particular opportunity because the Partnership and Newfoundland had agreed, whether contractually or otherwise, that it was an opportunity that Newfoundland was entitled to pursue, PM would not breach any fiduciary obligation.

Section 29 of PA 1890 – matters that are common ground

242. The following matters relating to the construction and application of s29 of PA 1890 are common ground between the parties:

    i) The proviso in s29(2) is not operative only in situations where a partnership is dissolved because a partner dies. The obligation to account imposed by s29(1) continues to apply in what was described at trial as the "twilight period" that started with the Dissolution Email and ends with the affairs of the partnership being "completely wound up". The parties agreed that the current edition of *Lindley & Banks on Partnership*, 20th Edition correctly states the law at paragraph 16-52 when it states that "[a]lthough section 29(2) only refers to the death of a partner, it is clear that the obligation under section 29(1) will apply irrespective of the cause of the dissolution".

    ii) The "twilight period" remains current since the affairs of the Partnership have still not been "completely wound up".

Section 29 of PA 1890 – disputed questions of interpretation

<u>Relevance of "maturing business opportunity"</u>

243. Section 29 of PA 1890 features prominently in PM's claim for an account of profits that JH made on the Danish Deal. While that is not the only context in which s29 is relevant, the size of the Danish Deal means that much of the parties' debate on s29 had the Danish Deal firmly in mind. Put very broadly, the s29 claim in relation to the Danish Deal involves the proposition that JH wrongly appropriated to himself the Danish Deal in circumstances where it should have been the Partnership rather than JH alone that benefited from it.

244. The parties came, before trial, to analyse the s29 claim as being analogous to the claim in *Recovery Partners v Rukhadze* [2018] EWHC 2918 (Comm). That was a case where a person stood in a fiduciary position as regards a principal. However, the fiduciary relationship terminated. Following termination of that relationship, the former fiduciary pursued, personally, a business opportunity that was maturing while the fiduciary relationship was in place. The question arose whether the former fiduciary was obliged to account for profits arising with that question held to depend on whether the opportunity was a "maturing business opportunity" or not. Given the conceptual similarity between the s29 claim in this case and that arising in *Recovery Partners v Rukhadze*, the concept of a "maturing business opportunity" became somewhat engrained in the parties' pre-trial discussions and in case-management of the claim. For example, court orders for disclosure required the Defendants to assess the relevance of WhatsApp chats between JH and DB by reference to the "maturing business opportunity" concept.

245. The analogy with a "maturing business opportunity" may well have been useful in dealing with interlocutory matters such as disclosure. However, it forms no part of the statutory language of s29. Accordingly, in my judgment, a consideration of whether the Danish Deal (or any other matter relevant to claims under s29) constituted a "maturing business opportunity" at any particular point in time runs the risk of applying an unwarranted gloss on s29. Rather, in my judgment, given the common ground between the parties summarised in paragraph 242 the relevant questions posed by s29 in the context of this dispute are as follows:

    i) Did JH, or as the case may be PM, derive a "benefit"?

    ii) Did they do so without the consent of the other?

    iii) Did that benefit, or to what extent did that benefit, derive from any one of (a) any transaction concerning the partnership, (b) any use of the Partnership's property, (c) any use of the Partnership's name, or (d) any use of the "Partnership's business connexion"?

246. In saying this, I am not denying the relevance of a factual enquiry into the state and nature of, for example, the opportunity to sell LFTs to the Danish Government at the date of dissolution. Indeed, I will make factual findings as to the nature of that opportunity. I recognise for example that, if a particular opportunity that existed at the time of dissolution of the Partnership was sufficiently "mature", it might constitute a species of "property" of the Partnership that would be relevant when analysing limb (b) of the question summarised in paragraph 245.iii). My conclusion rather is that a focus on the concept of a "maturing business opportunity" overlooks that, as a matter of law, the relevant questions are those set out in paragraph 245.

247. JH submits that if all the Partnership had at the date of dissolution was a "mere expectancy" of a successful Danish Deal, there could be no obligation to account under s29. He argues that this conclusion follows from the judgment of the New Zealand Court of Appeal in *Sew Hoy v Sew Hoy* [2001] 1 NZLR 391. However, JH is misreading the judgment. *Sew Hoy* was concerned with the equivalent, under New Zealand law, of s38 of PA 1890 rather than s29. In *Sew Hoy*, a partnership had been dissolved in 1977. In 1982, the New Zealand Government compulsorily acquired land from the partnership and paid consideration which was distributed to the then partners. In 1992, the estate of a deceased partner was offered, and accepted, an opportunity to repurchase the land on

advantageous terms from the New Zealand government. The question was whether the estate of the deceased partners owed any fiduciary obligations to former partners in connection with that purchase.

248. The conclusion reached was that, when the consideration originally received from the New Zealand government (in 1982) was distributed among the partners, there was only a "mere expectancy" that the government would ever offer to sell the land back. In consequence, the winding up of the "affairs of the partnership" was completed in 1982. That winding up brought to an end fiduciary obligations under the New Zealand equivalent of s38 of PA 1890. That conclusion is not authority for the general limitation to the scope of the obligation to account under s29 of PA 1890 for which JH argues. That conclusion is not altered by the reference to *Sew Hoy* at 16-73 of the current edition of *Lindley & Banks on Partnership*. That section is dealing with the narrower question of when an opportunity to pursue a business opportunity can be regarded as a species of partnership property (see paragraph 246 above). Neither *Sew Hoy* nor 16-73 of *Lindley & Banks on Partnership* rule out the possibility that an obligation to account might arise on a different basis under s29: for example because a partner is deriving a benefit from a "business connexion" of a partnership.

249. At points in her oral submissions on behalf of JH, Ms Hilliard KC suggested that Mr Gourgey KC had, on behalf of PM, accepted a need to show that the Danish Deal was an "opportunity" in existence at the date of dissolution of the Partnership if PM was to have any prospect of an account of benefits under s29. However, I do not consider that he made any such concession.

250. Mr Gourgey KC certainly acknowledged that, if he could show that JH's benefits from the Danish Deal represented the maturing of a business opportunity of the Partnership that was in existence at the date of dissolution, an obligation to account would arise. He supported that proposition by reference to [34] of the judgment of Arden LJ (as she then was) in *John Taylors (a firm) v Masons and another* [2001] EWCA Civ 2106 ("*John Taylors*").

251. However, Mr Gourgey KC did not accept that this was the PM's only route to an account of profits of the Danish Deal. He placed at the forefront of his submissions the argument that the benefits that JH obtained from the Danish Deal derived from his use of the Partnership's "business connexion", namely Acon, arguing that this fell within the scope of limb (d) summarised in 245.iii) above. Since I have found that Acon was indeed a "business connexion" of the Partnership that provides an independent route to an account under s29 for any benefits JH received that were "derived from" that business connexion. Paragraphs [29] to [35] of the judgment of Arden LJ in *John Taylors* supports that conclusion.

252. Finally, as I have noted in paragraph 245.iii) above, s29 is concerned with the question of whether a benefit is "derived from" particular attributes of a partnership including its name, its property or its "business connexion". That raises a question of interpretation exemplified by the Danish Deal. On my findings in paragraphs 394 and 398 below, it was the combination of various factors, some falling within s29 and some not, that enabled JH to obtain "benefits" from the Danish Deal. I have heard no submissions on how the "derived from" test should be applied in those circumstances and I express no judgment on that question, which will be a matter for Trial 2 to the extent necessary.

Interaction between s29, s38 and fiduciary obligations generally

253. As noted in the section above, the obligation to account for profits associated with a "maturing business opportunity" is an aspect of fiduciary obligations that arise under general law. Perhaps because the concept of a "maturing business opportunity" had become part of the way in which they looked at the Danish Deal, the Defendants argued that an analysis of the extent of JH's and PM's fiduciary obligations to each other would determine the extent of their obligations to account under s29. This approach also risked being a wrong turn in the analysis because s29 does not itself refer to fiduciary obligations at all raising, instead, the three questions I have summarised in paragraph 245 above.

254. Ultimately, JH's arguments in this regard coalesced around the following propositions:

    i) Section 29 can only have effect as a consequence of the existence of fiduciary obligations owed by one partner to another. Unless such fiduciary obligations exist, s29 has no consequence. The fiduciary obligations in question are a creation of equity/contract and are not imposed by PA 1890.

    ii) Following the Dissolution Email, the "twilight period" commenced. By s38 of PA 1890, the partners owed fiduciary obligations to each other only insofar as necessary to enable them (i) to wind up the Partnership or (ii) to complete transactions begun but unfinished at the time of the Dissolution Email. There is no suggestion in this case that the Partnership had any transactions that were begun but unfinished at the date of dissolution and accordingly, JH and PM owed each other fiduciary obligations only for the purposes of winding up the Partnership.

    iii) A benefit that a partner receives that is "new" (for example because it did not arise out of an asset of the Partnership, or out of a business opportunity that was in existence at the date of dissolution) cannot be within the scope of the limited fiduciary obligations that operate in the twilight period because it would not be something to be brought into account in a winding-up. Accordingly, any such benefit cannot be the subject of an obligation to account under s29.

255. The argument summarised in paragraph 254.ii) sparked a lively debate between the parties as to the precise nature of the fiduciary obligations owed by JH and PM to each other after the Partnership was dissolved. PM relied on the statement of Morritt LJ at [40] of *Don King Productions Inc. v Warren* [2000] Ch 291 *("Don King Productions*") to the effect that "on dissolution of the partnership …, for the purposes of winding up, the partnership is deemed to continue; the good faith and honourable conduct due from every partner to his co-partner being equally due so long as its affairs remain unsettled".

256. JH places emphasis on s38 of PA 1890 which provides for rights and obligations of the partners to continue "so far as may be necessary [to wind up the partnership and complete transactions begun at the date of dissolution]… but not otherwise [my emphasis]". He also submitted that, on PM's proposed analysis, the concession of Mr Briggs QC (now Lord Briggs) recorded at [37] of *Don King Productions* could not be sustained because there would be no conceptual difference between (i) Mr Warren renewing, in his own name, during the twilight period, an existing management or promotion agreement held as partnership property and (ii) Mr Warren entering into a completely new management or promotion agreement during that twilight period.

257. Ultimately, both PM and JH agreed that the fiduciary obligations that they owed to each other in the twilight period had different consequences from those flowing from fiduciary obligations owed before the Partnership was dissolved. As Mr Gourgey KC pointed out in his submissions, before dissolution, the fiduciary obligations fall to be applied in the context where PM and JH were actively carrying on a business in common. By contrast, after dissolution PM and JH should have been working together with a view to winding up the Partnership (there being no question in this case of completing transactions already begun at the date of dissolution). That analysis is consistent with the judgment of the High Court of Australia in *Chan v Zacharia* (184) 154 CLR 178 at [21], which related to similarly worded provisions in the South Australia Partnership Act 1891.

258. I consider that I am bound by Morritt LJ's statement of the law at [40] of *Don King Productions*. In any event, I respectfully consider that it is not inconsistent with s38 of PA 1890. Morritt LJ was expressing a conclusion on the extent of the duty of good faith and honourable conduct that applies for the purposes of winding up a partnership. Section 38 expressly envisages that former obligations of partners continue for that purpose. Moreover, the obligation under s29 is to account to the partnership for the specified benefits and so those benefits would form part of assets available in the winding up of the partnership. Accordingly, if, in the twilight period, a partner purports to retain benefits that should be accounted for to the partnership under s29, and so be distributed in the winding up of the partnership, I see no difficulty in the proposition that this is a breach of the duty of good faith and honourable conduct that applies for the purposes of that winding up.

259. I therefore do not accept JH's submission that he was no longer under any operative fiduciary obligation after he sent the Dissolution Email. He was, at the very least, obliged to account for benefits falling within s29 and, if he failed to do so and purported instead to keep those benefits to himself, that would constitute a breach of his obligation of good faith and honourable conduct that he continued to owe for the purposes of winding up the Partnership during the twilight period.

260. I do not in any event accept the other two propositions on which JH's analysis rests that I have summarised in paragraphs 254.i) and 254.iii) above.

261. I accept of course that s29 is consistent with the partners owing certain fiduciary obligations to each other. It is difficult to understand why Parliament would legislate to require an account to be given if there were no such fiduciary obligations. However, Parliament has not expressed the requirement to account under s29 of PA 1890 as being conditional on a partner being subject to any particular fiduciary obligations at any particular point of time.

262. Moreover, as well as not being supported by the statutory language, I consider there to be a circularity associated with JH's submission which provides a further pointer against it being correct. As I have noted, any benefits that are subject to s29 would represent assets of the Partnership to be dealt with on a winding up. Therefore, on JH's analysis, the question raised by s29, whether benefits would be available to the Partnership as assets in its winding up, depends on whether those assets would be dealt with in a winding up of the Partnership, because JH submits that it is only in that context that he owed fiduciary obligations to PM that remained in existence by virtue of s38.

263. I accept PM's submission that s29 and s38 are directed at different matters. The purpose of s29 is to provide for partners to account to the Partnership for certain benefits received in specified circumstances. It is not correct to characterise s29 as being concerned only with benefits that are somehow within the scope of s38. The purpose of s38 is not to operate as any kind of limit on the obligation to account under s29, but rather to clarify the scope of partners' authority to bind the firm in the twilight period and also to explain the general nature of their rights and obligations to each other during that period.

264. I do not consider that the correct construction of s29 can be determined by considering whether Mr Briggs QC (as he then was) was right to make his concession in *Don King Productions*. Nevertheless, in my judgment, the analysis of s29 and s38 that I have set out above is entirely consistent with the concession. In the first place, *Don King Productions* involved no dispute as to the application of s29 or s38 of the PA 1890. As [38] to [40] of Morritt LJ's judgment makes clear, the parties approached the dispute on the basis that the obligation of Mr Warren to account fell to be determined by reference to fiduciary obligations under general law. Even on that basis, Mr Warren's fiduciary obligations had to be applied in circumstances where he and Don King Productions Inc were no longer carrying on a business with a view to profit but rather were winding up a partnership that had been dissolved. In circumstances where there was to be no ongoing business relationship between Mr Warren and Don King Productions Inc, I can quite understand why Mr Briggs QC accepted that there was no constraint on Mr Warren's ability to pursue new business opportunities unconnected with the former partnership so that fiduciary obligations precluded him only from pursing, for his own account, opportunities that ultimately derived from contracts of the partnership.

Whether the obligation to give an account under s29 can be "switched off"

265. By way of corollary to the arguments set out in the preceding section, JH argues that he elected, by the Dissolution Email, to "switch off" any duty of good faith that he would otherwise have owed PM after the date of dissolution. He argues that this was achieved as a consequence of the following principles of law:

    i) The duty of good faith between partners is, even if not made express in the relevant partnership agreement, to be treated as an implied term of that agreement (see [130] to [131] of the judgment of Neuberger J (as he then was) in *Mullins v Laughton* [2002] EWHC 2761 (Ch) [2003] Ch 250. The duty is reciprocal as between parties.

    ii) There is some doubt, canvassed in the speech of Lord Millett in *Hurst v Bryk* [2002] 1 AC 185 and the judgment of Neuberger J in *Mullins v Laughton* as to whether a "repudiatory breach" of a partnership agreement could, if accepted, bring to an end either a contract of partnership or the "relation" between partners referred to in s1 of PA 1890. However, whatever the correct resolution of that debate, given PM's breaches of his good faith obligations to JH, JH was entitled to accept those repudiatory breaches of contract and having done so, treat himself as having no obligation of good faith to PM during the twilight period.

    iii) The Dissolution Email was the mechanism by which JH exercised this right to accept PM's repudiatory breach.

iv) Since acceptance of PM's repudiatory breach released JH from his own good faith obligation during the twilight period, the consequence was that he owes no obligation to account under s29.

266. JH argues that there is a different route to the same conclusion. He refers to the judgment of Lord Clarke in *Forster Ferguson & Forster, Macfie & Alexander* [2010] CSIH 38. In that case, a partner committed a number of frauds but retired from the firm in question before the other partners could take action. Lord Clarke held that the Scots law doctrine of mutuality of obligations meant that the partnership could decline to pay him his pension which would otherwise have been due under the terms of the partnership agreement. JH places weight on Lord Clarke's suggestion in that case that the doctrine of what is referred to in the 35th edition of *Chitty on Contracts* at paragraph 25-024 would lead to a similar result in relation to the contract governing the Partnership which was made under English law.

267. The argument raised in paragraph 265.ii) provoked detailed submissions on the applicability or otherwise of the doctrine of repudiatory breach of contract in the law of partnership. I will not burden an already lengthy judgment with an analysis of the parties' respective arguments on this issue. I do not need to do so because, in my judgment, for the reasons set out in the section above, the obligation to account under s29 of PA 1890 is not conditional on any species of "good faith" obligation, or indeed any other fiduciary obligation, being present at any particular point in time. Therefore, even if JH is correct that he owed no good faith obligation to PM after the Dissolution Email, the statutory obligation to account under s29 would remain.

268. In any event, I do not consider that the *Forster* case bears the weight the Defendants seek to place on it. The case concerned a purely <u>contractual</u> right (to a pension) with the conclusion being that, under Scots law, the former partner's breach of fiduciary duty deprived him of that contractual right. It does not stand as authority for the proposition that any breach of fiduciary obligation by one partner switches off other partners' fiduciary obligations. That would be a curious and blunt rule for a court of equity to apply since it would give partners an incentive to try to discover previous breaches of fiduciary obligations by their fellow partners as a means of obtaining a free hand to commit even more serious breaches. There is no policy reason to support such an approach or to displace the usual rule to the effect that anyone who commits a breach of fiduciary obligations should be answerable for the consequences.

269. Accordingly, in my judgment, even if PM has committed breaches of fiduciary obligation, any liability to account imposed by s29 of PA 1890 on JH would not be affected.

<u>Whether s29 applies at all to cases involving an asserted continuation of business</u>

270. JH argues that s29 has no application to the aspects of PM's claim to the effect that JH effected a "seamless continuation" of the Partnership's business during the twilight period. As well as denying that he did so, JH argues that any claim for an account in these alleged circumstances can be brought only under s42 of PA 1890 and that s29 of PA 1890 is inapplicable. JH supports that argument by reference to the judgment of the Privy Council in *Cameron v Murdoch* 63 ALR 575.

271. *Cameron v Murdoch* concerned the application of the Partnership Act 1895 of Western Australia (the **WAPA**), which was based on PA 1890. In *Cameron v Murdoch*, a partnership between Dougald, James and Jack was, under the WAPA, dissolved following James's death. However, rather than completing the winding-up of that partnership and giving an account to James's estate, Dougald and Jack continued to carry on the partnership business by way of a second partnership. They made profits from their partnership and applied some of those profits in acquiring land. James's estate argued that it had a proprietary interest in that after-acquired land.

272. The first question considered was whether s55 of the WAPA (which was equivalent to s42 of PA 1890), gave James's estate such an interest. That was considered on pages 11 to 12 of the report, with Lord Brandon concluding that the obligation to account for "profits" under s55 did not confer any proprietary interest on capital assets acquired with such profits.

273. James's estate advanced a fall-back argument to the effect that he was entitled to an account under s40 of the WAPA (the equivalent of s29 of PA 1890). Lord Brandon concluded not, holding on page 12 of the report:

> Where, after a partnership has been dissolved by the death of one partner, and the surviving partner, inste[a]d of [winding] up the partnership, carry on its business and make profits by doing so, and they then apply such profits, or part of them, in acquiring new or additional capital assets, the benefit which they thereby derive is not, in their Lordships' view, a benefit derived from any transaction concerning the partnership, or from any use of the partnership property, name or business connection, within the meaning of those expression as used in section 40(1) [the Western Australian equivalent of s29(1) of PA 1890] and applied mutatis mutandis by section 40(2). So to hold would involve an overlap and inconsistency between section 40(2) on the one hand and section 55 [the Western Australian equivalent of s42 of PA 1890] on the other, and a construction of the Act which does not involve any such overlap or inconsistency between the two sections of it should, in their Lordships' view, be preferred to one which does so.

274. For his part, PM relies on dicta of Arden LJ in *John Taylors*. That was a case of a partnership consisting of five partners who carried on a business of auctioneers at premises licensed by a local council. Two of the partners served notice dissolving the partnership just before the licence of those premises was due to expire. Before the winding up of the partnership was complete, those two individuals persuaded the local council to grant them a licence of the premises in question from which they carried on an auctioneers' business from those premises. At first instance, the judge held that the two individuals were obliged to account, under s29 of PA 1890, for the benefits derived from the grant of the new licence to them. He was, however, "less convinced" about the application of s42 of PA 1890 (see [13] of Arden LJ's judgment).

275. Arden LJ agreed with the first instance judge that an account was required under s29. At [38], she expressed the following obiter conclusion:

> For my own part, I would also have been inclined to the view that the Respondents were entitled to relief under s42 of the 1890 Act; but there is no Respondents' notice so that point does not arise. It seems to me that there is a potential overlap here between s29 and s42 of the 1890 Act.

276. I prefer PM's submissions on this issue. In *Cameron v Murdoch*, when construing the phrase, "a benefit derived from any transaction concerning the partnership, or from any use of partnership property, name or business connection" for the purposes of an equivalent to s29, the Privy Council applied a construction that they considered would reduce overlap with, or inconsistency with, an equivalent to s42. As well as the obvious point that the Privy Council was construing the WAPA, rather than PA 1890, this approach does not actually involve any statement to the effect that any overlap between s29 and s42 was excluded by the scheme of the statute. The Privy Council's true conclusion was that, when construing a term whose meaning was in doubt, they preferred an interpretation that reduced overlap and inconsistency. In my judgment, that conclusion is not incompatible with a conclusion that in other areas, there is some overlap between s29 and s42.

277. In my judgment, Arden LJ's obiter statement above lends support to the proposition that some overlap between s29 and s42 is possible. That conclusion is reinforced by the fact that PA 1890 contains no statutory words precluding an overlap. Indeed, the Defendants' contrary position is at odds with the judgment of the Court of Appeal in *John Taylors*. That was a "continuing business" case, but the Court of Appeal concluded that it resulted in an obligation to account under s29. If the Defendants' submission were correct, there could have been no such obligation.

What is a "business connexion"?

278. PM relies heavily in his claim for an account under s29 of PA 1890 on the proposition that Acon was a "business connexion" of the Partnership for the purposes of s29. JH disagrees with that proposition partly in reliance on what I understood to be an argument on the construction of s29.

279. In closing submissions on behalf of JH, it was argued that a "business connexion" for the purposes of s29:

> [must] have a character that is specific to the partnership. It cannot be the case that, for example, because the partnership has purchased goods from a certain shop or supplier, that a former partner cannot purchase goods from the same shop or supplier. In order for the business connection to be an asset belonging to the partnership, it must have some character of exclusivity, or of a special relationship such as a preferential price, otherwise it is not a connection or opportunity belonging to the partnership.

280. I consider that to be an unjustified gloss on the meaning of the ordinary phrasing of s29. There is no statutory requirement for a "character of exclusivity", or any "special relationship". Rather, whether something amounts to a "business connexion" is a question of fact and degree to be considered in the light of all relevant circumstances.

281. In my judgment, the relationship with Acon amounted to a "business connexion" that consisted of the Partnership's ability to purchase a highly regarded LFT from Acon in circumstances where (i) most people who sought to compete with the Partnership could not because Acon were selective about who they supplied, (ii) the ability to purchase tests from Acon was the life-blood of the Partnership and (iii) Acon took steps to ensure that potential customers did not "circumvent" the Partnership by its practice of referring back to the Partnership attempts at circumvention. Acon was a "business connexion" even though the Partnership did not (at least in Acon's eyes) hold any position as an exclusive distributor in the UK. Acon did not need to offer the Partnership any preferential pricing terms in order to be a "business connexion".

282. I also reject JH's submission that, as a matter of construction, a "business connexion" must be derived from assets of the Partnership. The root of that submission was the statement at paragraph 16-70 of the 21st Edition of *Lindley & Banks* that "[i]f a partner continues in business following the dissolution of his firm and makes use of the firm's assets or a business connection derived therefrom, he will be accountable to his former partners for any profits which he may make thereby" (my emphasis). This is a perfectly acceptable high level summary of s29 but the requirement for a business connection to be "derived from" assets of the partnership does not appear in s29 of PA 1890.

283. Since I consider the question whether something is a "business connexion" to be one of fact, there is little to be gained by comparing my conclusion with the outcome of other decided cases. However, I am reassured that my conclusion is consistent with the judgment of the Court of Appeal in *John Taylors*. At [32] of her judgment, Arden LJ expressed that the conclusion that a partnership's opportunity to retain a renewal of a licence to operate a market was a "business connexion" of that partnership even though there was no suggestion of any contractual right to a renewal or any expectation that the renewal would be on any special terms.

284. The Defendants submitted that the Court of Appeal's judgment in *Cheshire Estate & Legal Limited v Blanchfield and others* [2024] EWCA Civ 1317 was inconsistent with this conclusion. That was a case that concerned whether directors of a company that provided legal services had placed themselves in a conflict of interest, in breach of their fiduciary obligations as directors, because they were considering setting up a separate competing business. The Defendants place emphasis on the Court of Appeal's refusal, at [36], to interfere with the first instance judge's finding that there was no conflict of interest by reference to the directors' relationship with a litigation funder on the basis that the litigation funder could have worked both with the company and any new business the directors established. The Defendants' emphasis on this judgment is misplaced. It represents an attempt to assert some kind of an analogy between Acon and the litigation funder by reference to the facts of *Cheshire Estate & Legal*. However, that process says nothing about the correct construction of the term "business connexion" which was not at issue in *Cheshire Estate & Legal*, not least since s29 was not engaged as the entity in question in that case was a company and not a partnership.

285. I have heard insufficient argument on the issue to determine whether other relevant persons were "business connexions" of the Partnership and make the following observations in case the matter needs to be revisited at Trial 2:

    i) Although DB was a personal friend of JH, it appears at least arguable that he was also a "business connexion" of the Partnership. He entered into a Mutual

Confidentiality Agreement with the Partnership and both imparted and received confidential information thereunder. He did so with a view to soliciting sales of LFTs for the Partnership. In a similar vein, it is possible that CAP and Polly Phillips were also "business connexions" of the Partnership.

ii) It is also arguable that at least certain customers of the Partnership were "business connexions". There may be a relevant distinction between highly loyal "repeat" customers and customers who shopped around for the best price and only made occasional orders. If necessary, that distinction can be explored in Trial 2.

Section 42 – matters that are common ground

286. In these proceedings, PM claims an account from JH under s42. However, JH does not seek any account from PM under s42. (Paragraph 157 of the D&CC was amended to remove a reference to s42).

287. An obvious situation in which s42 can apply is that in *Cameron v Murdoch* where, on dissolution of a three-person partnership following the death of one of the partners, the other two continued to carry on the business. In that situation, there is no difficulty in classifying the two individuals as "surviving or continuing partners" since they continue to carry on some business in partnership. Both PM and JH are agreed that s42 is applicable in this case even though there is no suggestion that, after dissolution of the Partnership, PM or JH continued to carry on its business <u>in partnership</u> with anyone else. Put another way, they agree that both PM and JH are "surviving or continuing partners" for the purposes of s42 so that the central question raised by s42 is whether JH "carr[ied] on the business of the Partnership with its capital or assets" after its dissolution.

288. The parties also agree that if an "outgoing partner" exercises the option afforded by s42 to share in profits since dissolution, there needs to be a determination of the extent to which those profits are "attributable to" the use of the outgoing partner's share in partnership assets. It is conceptually possible that the "surviving or continuing partners" may carry on the partnership's business but have no obligation to account because the profits are not attributable to an outgoing partner's share in partnership assets. For example, and relevantly given the arguments in this case, the profits might be earned "purely and solely by reason of skill and diligence by the surviving partner" in the words of Romer J at 165 of *Manley v Sartori* [1927] 1 Ch 157.

289. It is also common ground that, for the purposes of accounting under s42, no distinction is made between a former partner and a corporate entity through which he operates (see [27] of the judgment of Arden LJ in *Woodfull v Lindsley* [2004] EWCA Civ 165).

Section 42 – points of construction that are disputed

<u>Net assets versus gross assets</u>

290. The Defendants argue, by reference to the judgment of the Court of Appeal in *Sandhu v Gill* [2005] EWCA Civ 1297 [2006] Ch 456 that, absent an election for 5% interest, (i) s42 confers on a partner an entitlement to profits that are "attributable to the use of his share of the partnership assets"; (ii) the "share" in question has to be calculated by reference to the partnership's net assets (i.e. gross assets less liabilities); (iii) JH and LB were creditors of the Partnership since they procured HGL to discharge Partnership

liabilities such as the £200,000 debt owed to HMRC (see paragraph 223); and (iv) once those liabilities are taken into account, PM's share in the net assets of the Partnership was zero since the Partnership had no valuable assets at the date of dissolution, its net assets were zero and so any entitlement to a share of profits under s42 is similarly zero.

291. I consider this argument to raise issues that should be considered in Trial 2, to the extent necessary, rather than in this judgment since it goes to the calculation of any amount that should be accounted for under s42.

PART D – FURTHER FINDINGS RELEVANT TO THE PARTNERSHIP ASPECTS OF THE DISPUTE

Was there an arrangement for PM to share in Newfoundland's profits?

292. For the following reasons, I have concluded that there was an arrangement between Newfoundland and PM in place between 5 January 2021 and dissolution of the Partnership to the effect that PM would share in 30% of Newfoundland's pre-tax profits. I express my conclusion by reference to that period because that is the relevant period prior to dissolution of the Partnership and it is common ground between the parties that it would be contrary to PM's fiduciary duties to have any share in Newfoundland's profits during that period. In the analysis below, I have had regard to events taking place after the Partnership terminated, not because I am finding that it was contrary to PM's fiduciary duties to have an interest in Newfoundland's profits after dissolution of the Partnership, but because I conclude that later events can shed a light on the position prior to dissolution.

Email exchanges in December 2020

293. FM suggested such an arrangement in an email dated 19 December 2020 headed "Potential setup" that he sent to PM (using both of their Hughes Group email accounts). That email read, so far as material, as follows:

> Base cost price to Hughes is £1.83 as shown in this attachment. I pay 100% upfront pre-order at a price to Hughes Group of £2.50 (margin split 50/50 between you and Jon)
>
> Then I sell at £5.95 (over 1000) and the commission to others is approximately £1.75 for these deals. From the £1.75 that we have at that price the split is 70/30% as discussed this morning (70 to myself and mike and the other 30% to you).
>
> We pay upfront for the tests and we sell the tests, every test accounted for. And you receive 30% of every test whilst also receiving your cut on the margin with Jon and I deal with all of my partners and brokers.

294. In my judgment, that email is suggesting two arrangements. The first is an arrangement under which Newfoundland becomes a distributor (which was ultimately embodied in the Trading Agreement described in paragraph 67 above). The second arrangement is for PM to share in 30% of Newfoundland's profits after the payment of "commission to others".

295. PM's case is that in oral discussions with FM he rejected the second proposed arrangement and agreed to recommend the first arrangement to JH. That is, in itself, a plausible explanation. Although PM was in South Africa at the time of this email, and FM was in the United Kingdom, I accept that they would have been speaking a lot by telephone.

296. PM responded, using a non-Hughes Group email address and addressing his response to FM's Gmail address saying:

> That's what we discussed. I will try to sell it to Jon. Think about which email server you are using.

297. FM responded saying that he would delete the email from the original Hughes Group account. PM's explanation of this was that he was concerned that FM's private offer of a profit share in Newfoundland would "unsettle" JH if he discovered it and, since PM had rejected that proposal, there was no utility in retaining a record of it on the Hughes Group email server. I regard it as slightly odd that PM would have communicated, separately, an oral rejection of the profit share proposal yet, in his written response, simply hint that FM should be careful which server he used without mentioning that the profit share proposal was unacceptable. However, the fact that the communication is odd does not of itself cause me to doubt PM's explanation which is plausible.

298. On 21 December 2020, PM sent a further response to the "Potential setup" email, from his personal email account and addressed to FM's Hughes Group email address. The email started with PM saying, "you must stay within the existing business, as must Mike". It then contained a slight disagreement with FM's arithmetic as set out in his original email: as PM pointed out the total profit available to Newfoundland was £1.70 per test not £1.75 assuming a sale at £5.95 per test. The email concluded:

> This way, you stay with me in this business, we establish separate overseas satellites where we can and retain this for ourselves.

299. None of the witnesses who were cross-examined on this email understood the reference to "separate overseas satellites". The Defendants invite me to conclude that it was some kind of invitation to FM to establish companies separate from the Partnership to undertake the sales of LFTs in non-UK jurisdictions. There is some basis for that interpretation since at or around the time this email was sent, PM and FM were having a WhatsApp discussion about ZetaGene, a Swedish company who, it was contemplated, might distribute branded LFTs in Sweden. ZetaGene had signed a distribution agreement with "Hughes Healthcare trading on behalf of NeuroCED" on 21 December 2020.

300. However, on balance, I do not consider that is what PM was suggesting. If PM was intending to keep business with ZetaGene away from the Partnership, I consider it unlikely that ZetaGene would have been invited to transact with "Hughes Healthcare, trading on behalf of NeuroCED". It would have been much more natural for ZetaGene simply to transact with "NeuroCED". A plausible reason was given why ZetaGene wished its distribution agreement to be with NeuroCED, namely a purely optical wish not to transact with a company whose business was ostensibly in building and construction. Moreover, PM was sending his email to FM's Hughes Group email

account. Given his earlier sensitivity on this issue, it would not make sense for him to issue an invitation to establish competitor businesses in that email.

301. On 23 December 2020, FM sent JH and PM an email entitled "General agreement". This set out the core of the proposal that would ultimately be implemented in the Trading Agreement and JH did not indicate any reservations with it.

302. Accordingly, considering the correspondence as it stood on 23 December 2020, PM's explanation that he rejected the profit share proposal orally is plausible. The email exchange on 23 December 2020 suggested that PM had indeed successfully sought to "sell… to Jon" an arrangement of the kind that would be embodied in the Trading Agreement. However, an email exchange between FM and PM on 25 December 2020 in my judgment significantly undermines the credibility of PM's explanation that he had rejected FM's suggestion of a profit share arrangement.

303. On 25 December 2020, FM sent (from his Gmail account) an email to PM's personal email address. It was headed simply "Test spreadsheet" and the text of it was as follows:

> Will update you every Friday night with everything accounted for. Have a lovely Christmas, Freddy.

304. The functions of this email were: (i) to attach an Excel spreadsheet; (ii) to convey a promise that further updates would follow every Friday night "with everything accounted for"; and (iii) to send Christmas wishes.

305. The spreadsheet attached showed various sales that Newfoundland had made with a calculation of the total profit that Newfoundland made on those sales after accounting for commission to brokers where applicable. The calculation of that profit closely matched that of the sample calculations that FM and PM had performed in their emails of 19 and 21 of December 2020. Significantly, the spreadsheet included a calculation of profit split on the 70-30 basis that FM had set out in his email of 19 December 2020. Thus, for each sale, 35% of the profit of that sale was identified as being "To Mike", 35% was identified as being "To Freddy" and 30% is identified as being "To Philip". Moreover, in the "To Philip" column, an additional figure was noted being his 50% share in the profit generated by the Partnership on the sale of each test (which was quantified as being 35p per test: broadly consistent with the figures set out in FM's and PM's emails of 19 and 21 December 2020 which envisaged that the Partnership bought tests at £1.83 each and sold for £2.50).

306. PM responded simply, "Well done. I am proud of you. xx". He also forwarded FM's email that had attached the spreadsheet to OM (using her personal email address rather than her Hughes Group email address).

307. On PM's account, the proposal that he should share in Newfoundland's profits had been dismissed out of hand on or around 19 December 2020. If that is true, it would apparently make little sense for FM to send a detailed computation of profit share on the basis that had been rejected. It also makes little sense for PM to respond saying that he was proud of FM without noting as well that, since the profit share proposal had been rejected, FM had wasted his time in calculating the profit share, and need not trouble himself to prepare further spreadsheets every Friday. I formed a clear impression of PM from both his oral evidence and the documents that he authored that he is a punctilious individual with an

eye for detail. The evidence of those he worked with (for example LB and Angela Nielson) suggested that he set both himself and others high standards and could be impatient, and even rude, if he felt those high standards were not being met. I would certainly have expected PM to say something in his email of 25 December 2020 if the profit share proposal truly had been rejected.

308. PM's explanation is that he was expressing pride in FM in a general sense because of the quantity of sales he had generated and, in doing so, was not agreeing to the proposal contained in the spreadsheet. Viewed purely in isolation that explanation is not implausible. However, it does sit oddly with FM's original email which had the limited functions described in paragraph 304. If PM had simply responded saying "Happy Christmas", for example, I could believe that he was responding simply to function (iii) of the email without engaging with functions (i) and (ii). Yet his expression of pride, and the fact that he forwarded FM's email to OM's personal email account, does appear to indicate some engagement with functions (i) and (ii). In those circumstances it is strange indeed that he did not remind FM of any earlier rejection of the profit share idea.

309. Moreover, on 4 January 2021, FM sent a WhatsApp message to PM saying that he was working on an Excel document and would send it as soon as he could. On 16 January 2021, PM sent a WhatsApp message to FM saying simply "still no spreadsheet". I acknowledge the possibility that this is referring to another spreadsheet but conclude that both PM and FM had in mind spreadsheets of the kind that FM had attached to his email of 25 December 2020. The Defendants argue that FM must have prepared some other spreadsheets and the Claimants have improperly failed to disclose them. I will not make that finding since the contemporaneous documentary evidence suggests a failure to prepare spreadsheets. However, I regard it as significant that both PM and FM thought that further spreadsheets should be prepared.

310. I conclude that the email exchanges in December 2020 tend to point in favour of the proposition that Newfoundland and PM had agreed that PM would receive 30% of Newfoundland's profits calculated as summarised in paragraph 293.

Payments from Newfoundland to Titanium and Basfour

311. It is common ground that Newfoundland made the following payments in 2021 and 2022 to companies having a connection to PM:

    i) On 26 February 2021, Titanium sent an invoice (**Newfoundland Invoice 1**) to Newfoundland requesting payment of £60,000 in return for services ostensibly provided by Titanium to Newfoundland. It is common ground that Newfoundland paid Titanium £60,000 on or around this date, but the Claimants' case is that in doing so Newfoundland was advancing £60,000 by way of loan rather than paying consideration for any services rendered.

    ii) A spreadsheet prepared by Newfoundland's accountants (**Amersham**) dealing with VAT in connection with Newfoundland's VAT return for the period 1 July 2021 to 30 September 2021 records a payment of £60,000 being made to Titanium as a "Consultant Commission". It is common ground that Newfoundland made this payment to Titanium, but the Claimants' position is that it was advanced by way of loan and has been mis-described as "Consultant Commission" in the VAT spreadsheet.

iii) A similar spreadsheet prepared in connection with Newfoundland's VAT return for 1 October 2021 to 31 December 2021 shows that Newfoundland paid Basfour, a South African company associated with PM, £100,000 (described as "Consultant Commissions") on 19 November 2021 and a further £200,000, also described as "Consultant Commissions", on 9 December 2021. It is common ground that Newfoundland paid these sums to Basfour, but the Claimants' position is that they did not represent payment of any agreed share of Newfoundland's profits but instead related to a purely family arrangement under which FM agreed to contribute to the costs of renovating a family property in South Africa owned by Basfour.

312. Both PM and FM acknowledged that, on their case, Newfoundland Invoice 1 represented a wholesale mischaracterisation of the position. PM, with his extensive financial services and business background, was clearly aware of the commercial and legal distinction between a loan and a payment of commission. PM said that OM prepared Newfoundland Invoice 1 from a precedent, but accepted that the blame for the mischaracterisation was entirely his as he failed to check that invoice properly before it was submitted. For his part, FM said that he "cringe[d] slightly" on seeing "what a bad job [Newfoundland Invoice 1] does" but blamed his lack of business experience at the time and general pressure of work.

313. In his first witness statement, PM sought to bolster the case for the payment of £60,000 in February 2021 being by way of loan by reference to his personal cash-flow difficulties at the time. He said that, because he was repaying the £120,000 Loan (see paragraph 32 above) out of profits generated by the Partnership he had no income to live on.

314. However, that explanation was contradicted by the contemporaneous documents. Titanium issued at least three invoices to HGL relating to PM's share of the Partnership's profits. The first (**Partnership Invoice 1**) was for £60,000 and was issued on 28 December 2020. The second (**Partnership Invoice 2**) was also for £60,000 and was issued on 5 February 2021, although incorrectly dated on its face as 5 February 2020. The third (**Partnership Invoice 3)** was issued on 8 June 2021 and was for £65,000. HGL's bank statements record that Partnership Invoices 1, 2 and 3 were paid in cash on 29 December 2020, 5 February 2021 and 16 June 2021 with the payment references in the bank statements specifically referencing the three invoices.

315. I take into account that, while PM was challenged in cross-examination as to whether payments of Partnership profit in early 2021 were indeed set off against the £120,000 Loan, he was not taken to the above bank statements, although OM was. It is, therefore, possible that there is some answer to the apparent anomaly. However, there is no suggestion from the bank statements (that were almost entirely redacted) that Titanium repaid either of the first two instalments of £60,000 shortly after receiving them. PM's explanation of the need for loans from Newfoundland is, accordingly, at odds with the contemporaneous documentary record. It follows that I am less inclined to believe the explanation that three intelligent individuals (OM, PM and FM) all failed to notice that Newfoundland Invoice 1 mischaracterised the position. Rather, I conclude on balance that Newfoundland Invoice 1 correctly described the position as the parties saw it namely that PM was being rewarded for services that he had provided to Newfoundland.

316. I am reinforced in that conclusion by the fact that some conscious thought has been given to the drafting of Newfoundland Invoice 1 which is at odds with PM's evidence that OM simply used a convenient, but inapt precedent. Newfoundland Invoice 1 bears a close

resemblance to Partnership Invoice 1. However, whereas Partnership Invoice 1 refers to PM's provision of "consultancy services" in general, Newfoundland Invoice 1 is more specific, referring to "Consultancy services to EU Distribution network". Someone, therefore, adapted the narrative in Partnership Invoice 1 and, I conclude, added the additional description of the consultancy services because Newfoundland could sensibly be described as having an "EU Distribution network", but the Partnership could not. That is a further suggestion that Newfoundland Invoice 1 was not intended to record a loan.

317. Finally, I regard it as incongruous that, if PM considered a loan from Newfoundland needed documenting, he would leave the matter to OM and so not notice when the document she prepared was an invoice. Not only is PM punctilious, the trial demonstrated that he has a notable facility with the English language. He was the one who drafted the "cold call" emails that the Partnership used in its early days. When, following the February 2021 row, it was thought that a written partnership agreement was needed, PM was quite prepared to produce an initial draft himself. I consider that, if he had felt that a loan needed documenting, he would have prepared a document himself.

318. The Claimants' explanation for the £60,000 payment described in paragraph 311.ii) above is that Amersham made a mistake in describing the £60,000 as being paid by way of "consultant commission". In his oral evidence, FM suggested that the phrase "consultant commission" was a catch all phrase that Amersham would use whenever they were unsure of the nature of a particular payment. I was shown an entry in the spreadsheet for the VAT quarter ended 31 December 2021 dealing with an expense of £4,000 plus VAT that Newfoundland paid to "Bear Knight" on 22 December 2021. The narrative to the spreadsheet described that as being a "Consultant Commission" yet, in re-examination, FM said that "Bear Knight" were "just purchasing tests from us". However, this exchange left important questions unanswered. For example, if "Bear Knight" were simply purchasers of tests from Newfoundland, it is not clear why they would have received a payment from Newfoundland on which VAT was chargeable. One would expect payment to flow from Bear Knight to Newfoundland rather than the other way round. Without knowing why Newfoundland was paying Bear Knight, I am unable to conclude that the description "Consultant Commission" applied to that payment was obviously inapt.

319. More generally, the spreadsheet was intended to capture transactions that had a VAT consequence. If Newfoundland truly had made a loan of £60,000 to PM, that would not obviously have any VAT consequence. The spreadsheet itself recognised that loans had different VAT consequences from commissions since it had a separate section headed "No VAT" that captured other transactions including amounts credited or debited to FM's and MH's directors' loan accounts.

320. The Claimants' explanation for the payments described in paragraph 311.iii) similarly involved the proposition that Amersham had misdescribed as a "Consultant Commission" what was, in reality, a purely family arrangement under which FM would contribute to the costs of renovation of a family property in South Africa.

321. There was evidence that Basfour was indeed incurring costs associated with building works in South Africa. I was shown an invoice from Chandler Consulting that showed that, as at 3 August 2022, Basfour had incurred costs of some ZAR 12.4m in connection with building works. I was told that the exchange rate at the time was around GBP 1:

ZAR 20 and so the total of those works was indeed around £600,000 so that if FM had agreed to contribute 50% of those costs he would indeed be paying some £300,000.

322. However, the fact that Basfour was renovating a property in South Africa does not preclude the possibility that sums Newfoundland paid to Basfour were PM's share of Newfoundland's profit. PM could conceptually have asked for his share of profit to be paid to Basfour so that it could spend the money on property renovation.

323. The Claimants' explanation of the payments of £300,000 to Basfour suffer from at least two difficulties:

    i) MH was a 50% shareholder in Newfoundland. Accordingly, if Newfoundland's net assets were diminished by £300,000, MH was bearing 50% of the cost of that diminution. It is not obvious why MH would agree to fund half of the costs of renovating a property owned by the Manducas. I accept Mr Gourgey KC's submission that MH could have been insulated from bearing any share of the cost if, for example, Newfoundland's payment of £300,000 had been treated as giving rise to a liability, owed by FM alone, to pay £300,000 to Newfoundland. However, I was shown no evidence suggesting that this had happened.

    ii) It is not clear why tax advisers would record a purely family arrangement as a "consultant commission" with the tax consequences that would follow from that designation.

324. In cross-examination, FM said that the VAT spreadsheet may have been a draft with the description of the payment to Basfour being corrected in a subsequent document. I was not, however, shown any subsequent document that described the payment differently.

Payments recorded in OM's diary

325. I was shown extracts from a calendar that OM maintained and which she kept a note of various business and household matters. In the notes section for the calendar for the week from 18 November 2021 to 24 November 2021, OM wrote two groups of figures in red as follows:

1	Titanium	11/08/21	60k
		18/08/21	60k
		31/08/21	60k
2	CVM	10/08/21	10k

326. "CVM" is Charles Victor Manduca, PM's brother and a solicitor. OM's explanation in cross-examination was that the payments in group 1 were payments by Titanium in respect of legal expenses to external lawyers and the £10,000 payment recorded at 2 was for support that Charles Manduca was giving OM as a legal consultant.

327. There is a textual pointer against OM's explanation. If OM was truly seeking to record legal expenses paid to external solicitors on the one hand, and Charles Manduca and the other, it would be much more natural for the two groups to be identified by reference to the recipients: Keystone Law (the Manducas' then solicitors) and "CVM". By contrast, on OM's account, Titanium is recorded as a payer and "CVM" as a recipient.

328. Keystone Law wrote the first letter before action on 30 July 2021 and proceedings were not issued until 20 December 2021. It might be possible that they had incurred fees of £180,000 paid in three instalments in the month of August 2021, but I was shown no invoices from them to this effect. I consider it unlikely that Keystone Law had incurred this level of fees at a relatively early stage in the dispute. On balance, I do not believe OM's explanation of the figures in the calendar.

Other considerations relevant to the question

329. When PM was giving FM a dressing-down about the large debt that Newfoundland owed to HGL (see paragraph 178 above) the terms in which he expressed himself were revealing:

> It is arrogant and unintelligent of both of you [i.e. FM and MH] not to have paid more respect to the risk advisories I gave you frequently. We are a partnership, and you can't ignore advice and then get it wrong without sanction in any business partnership or indeed any partnership at all… Jon is the principal at risk here for no benefit nor obvious revenue to him in return. It is simply amoral to behave to him like this. All of us lending you money is one thing, but for him and everyone else to have to worry about repayment is wholly another matter.

330. The Claimants invite me to read the reference to the "partnership" in the second sentence of the quotation as being a reference to the partnership between PM and JH. However, I consider that to be at odds with the ordinary meaning of the email. PM is saying that he had previously warned FM and MH of risks associated with their business model and that it was unacceptable for them to ignore those warnings given the "partnership" between PM, FM and MH.

331. It is also revealing that, later in the same email, when PM exhorts MH and FM to take vigorous steps to secure payment from their customers he suggests:

> Again, perhaps it would help to have your COO on the call to enforce the issue.

332. In context, the implication of this is clear: PM is offering to join a call with creditors of Newfoundland and issue strong demands for payment by presenting himself as Newfoundland's COO. PM was not a director of Newfoundland and the very suggestion that he could be presented as Newfoundland's COO is at odds with the proposition that he had no interest in Newfoundland's operation.

333. The Defendants referred to a WhatsApp discussion between MH and Nabeel Sheikh of 23 January 2022 to which I have already referred in paragraphs 20 to 23 above. In that conversation, MH posted various photos of clauses of a contract that he described as "the Freds dads contract thing". The clauses posted appear to provide for a sales agent to receive a commission of 50% of all "net profits" on sales made as a result of introductions by that agent. One of the screenshots shows Basfour's company name at the top of a particular page. MH asked various questions on those clauses (for example what the clause prohibiting assignment meant). MH and Nabeel Sheikh also discussed permissible deductions when calculating "net profits".

334. I regard the chat as a whole as consistent with PM's explanation that he provided a template agreement, that had been drafted with Basfour as a party, to FM for him to adapt when drafting a new commission agreement with one of Newfoundland's sales agents. From what I have seen of the document, I do not consider that it reflected the terms of an agreement extant during the life of the Partnership, to share profits between PM and Newfoundland. While there is a dispute as to whether PM "diverted" particular leads to Newfoundland, while the Partnership was in existence, I do not consider that PM would have been interested in receiving 50% of profits on business he referred to Newfoundland. Newfoundland was successfully chasing its own customers without needing input from PM and PM was much more interested in pursuing large government contracts. The 50% figure also sits oddly with the 30% figure mentioned in emails between PM and FM in December 2020. I do not regard this document as the "smoking gun" that the Defendants considered it to be.

Overall conclusion

335. The evidence does not all point in the same direction. However, having weighed up the competing evidence including PM's and FM's evidence putting the contemporaneous documents into context, I conclude that (i) Newfoundland Invoice 1 was not intended to evidence a loan, (ii) the payments to Titanium and Basfour shown in Amersham's spreadsheet were appropriately characterised as "consultant commission" and (iii) OM's diary was recording receipts by Titanium rather than payment of legal expenses. I have considered carefully the various competing indications of meaning that can be derived from the contemporaneous documentation. In my judgment, the evidence points firmly in favour of the conclusion set out in paragraph 292. On a balance of probabilities, I do not believe FM and PM's denials of the existence of any such arrangement.

336. Although there is no contemporaneous agreement that spells out whether "profits" were to be calculated on pre-tax or post-tax basis, I infer that the calculation was pre-tax since FM's spreadsheet of 25 December 2020 made no mention of tax in its calculations.

337. As well as points that I have considered in the more detailed discussion above, PM argued that this could not have been the arrangement because all the payments that the Defendants have identified as representing PM's "secret share" of Newfoundland's profit do not add up to 30% of its pre-tax profits. I do not accept that. PM clearly has interests in a number of companies. The Defendants found out about Basfour only because they obtained access to the WhatsApp conversation between MH and Nabeel Sheikh. It is quite possible that there are other payments of which the Defendants are unaware.

338. It was also submitted in closing that it would make no sense for a man as intelligent as PM to leave a paper trail of his "secret share" consisting of invoices to Newfoundland. I do not accept that. PM and Newfoundland operated in a business in which payments are made against invoices. It was not unnatural for invoices to be prepared when PM sought payment of his share of profits from Newfoundland. He may well have thought that those invoices would never come to light, but he was mistaken in that view.

The alleged "diversions" of leads into Newfoundland

Introduction

339. In Defence and Counterclaim, JH pleads that PM "diverted" to Newfoundland, business opportunities that could, or should, have benefited the Partnership. JH pleads that PM's motivation to do so consisted of his share in Newfoundland's profits and/or his subjective desire to prefer the interests of FM and MH to the interests of the Partnership.

340. "Diversions" involving some 18 customers or potential customers were pleaded. The allegations of diversion fall into two categories:

    i) "Acon referrals", where Acon referred a customer to PM and JH alleges that PM wrongly permitted the opportunity with that customer to be pursued by Newfoundland, rather than causing it to be pursued by the Partnership; and

    ii) "Other opportunities", where a business opportunity arose independently of a referral from Acon, but JH's complaint is the same, namely that PM should have procured the partnership to pursue that opportunity rather than causing, or permitting, Newfoundland to do so.

Acon referrals that were pre-existing Newfoundland clients

341. In my judgment, the following pleaded Acon referrals were permissibly pursued by Newfoundland in accordance with the arrangement between the Partnership and Newfoundland and so involved no breach of duty by PM:

    i) **Olivia Brinkley**: I was shown an exchange of text messages between MH and Olivia Brinkley and conclude that she ordered a small quantity of tests from MH in late December 2020. I accept FM's evidence that she was a friend of MH's family. She made contact with Acon with a view to circumventing the Partnership/Newfoundland by ordering tests direct. AA referred her back to PM and OM by email of 6 January 2021. PM forwarded AA's email to FM on 6 January 2021. On application of the parameters agreed between the Partnership and Newfoundland, this was an opportunity that fell to Newfoundland to pursue.

    ii) **Enfield Safety Supplies**: On 7 January 2021, AA forwarded to OM and PM an email from Glen Stacey at a business called "Enfield Safety" seeking a quote for a sale of 400 boxes of 25 LFTs. On 8 January 2021, PM forwarded AA's email to FM, saying "Here is one for you. Keep me briefed please". FM's evidence in his first witness statement was that, on receiving that email, he performed a cross-check that revealed that Enfield Safety was a pre-existing customer of a Newfoundland sub-distributor called Decontami. In closing submissions, the Defendants criticised that evidence for not explaining how the "cross-check" was conducted, but that challenge did not demonstrate that FM was wrong to say that Enfield Safety was a pre-existing customer of Decontami. I accept FM's evidence and infer that he made some sort of contact with Decontami that revealed that Enfield Safety was their customer. This made Enfield Safety a Newfoundland lead in accordance with the agreed parameters.

iii) **Hampden Supply**: On 20 January 2021, AA forwarded to PM, OM and FM an email from a Derek Hall at Hampden Supply enquiring about pricing for Acon's Flowflex test. The same day PM "replied all" stating that "Freddy will get straight on this prospect". FM forwarded a link to Hampden Supply's website in a WhatsApp message on 20 January 2021 prompting PM to respond that it was a "proper company" and a "great prospect". FM's evidence in his first witness statement was that he and MH had identified Hampden Supply as a potential distributor to pharmacies and that they had previously had discussions with them about possible sales. In closing submissions, JH criticised that evidence, submitting that FM would not have needed to conduct an internet search on Hampden Supply if he already knew them. However, that point was not put to FM in cross-examination. I regard it as perfectly plausible that, even if FM was familiar with Hampden Supply, he would still send a link to their website to PM who might be less familiar. I accept FM's evidence and conclude that Hampden Supply was an opportunity for Newfoundland to pursue in accordance with the parameters agreed between Newfoundland and the Partnership.

iv) **Westpak Group**: On 26 January 2021, AA forwarded to PM, OM and FM an email enquiry that Westpak Group sent to Acon asking about pricing for their LFTs. The same day, PM replied to FM and OM asking FM to "pursue this contact and let me know what happens". I was shown evidence in the form of an email from a Dawn Karim, at toolarrest.com to FM to the effect that Westpak was a contact of theirs. FM's oral evidence was that "toolarrest.com" was one of Newfoundland's sub-distributors. While Ms Hilliard KC did put to FM the highly general proposition that none of the 18 alleged diversions were pre-existing Newfoundland customers, FM was not pressed on specifics. I accept FM's evidence in this regard and conclude that this made Westpak Group an opportunity that Newfoundland could legitimately pursue in accordance with parameters agreed between Newfoundland and the Partnership.

v) **MG Safety Ltd**: On 28 January 2021, AA forwarded to OM, PM and FM an email from MG Safety asking who was Acon's "biggest distributor in the UK" for Flowflex tests as MG Safety wished to purchase some tests. The same day, PM asked Freddy to "go ahead and connect please". FM's evidence in his first witness statement was that MG Safety was, like Enfield Safety, a customer in the building supplies sector with whom Newfoundland's sub-distributor Decontami had had prior discussions about sales of LFTs. JH criticised that evidence in closing submissions, arguing, as he had with Enfield Safety, that there was no paper-trail evidencing that MG Safety Ltd had had prior dealings with Decontami. However, absent the general challenge I have mentioned in paragraph iv) above, the specifics of FM's evidence was not challenged in cross-examination and I accept it, concluding that MG Safety Ltd was a lead that Newfoundland was entitled to pursue in accordance with the parameters agreed between Newfoundland and the Partnership.

vi) **Nabeel Sheikh and Argyle Rose Ltd**: for the reasons set out in paragraphs 342 to 345 below.

vii) **Meditech**: for the reasons set out in paragraphs 346 to 349 below.

Nabeel Sheikh and Argyle Rose Ltd

342. Argyle Rose Ltd is a company associated with Nabeel Sheikh. In 2021 it was a large online distributor of COVID tests in the UK. It operated a number of websites, including www.approvedcovidtesting.com that featured high in lists of Google searches for particular search terms and so generated a lot of custom. On 15 February 2021, Nabeel Sheikh sent an email to Acon, explaining that he was "one of the largest online distributors in the UK". He asked Acon to provide a list of prices so that he could "buy direct". AA forwarded the email to PM on 16 February 2021 and, the same day, PM forwarded it to FM asking "Pleas[e] let me know how you progress".

343. FM's evidence was that Nabeel Sheikh, and through him Argyle Rose Ltd, were contacts of Newfoundland prior to 16 February 2021 and their email to Acon was an attempt to circumvent Newfoundland. The Defendants' case is that neither Nabeel Sheikh nor Argyle Rose were customers of Newfoundland before 16 February 2021 and the business relationship between them and Newfoundland, which resulted in significant sales, was created only following PM's improper diversion of the opportunity away from the Partnership into Newfoundland.

344. I accept FM's evidence, which is corroborated by a contemporaneous WhatsApp chat between him and OM of 19 January 2021. That WhatsApp conversation shows that OM had alighted on the www.approvedcovidtesting.com website and thought that the website and tests being sold over it "looked smart". FM confirmed OM's understanding (relayed to her by PM) that the test being sold over the website was a Turkish test and FM said he had been "trashing" the test in order to get business. He also explained that "they switched to us anyway" meaning that the operator of the website had agreed to sell Newfoundland's, and so Acon's, tests in preference to the "Turkish test". FM observed, in response to OM's observation that the "Turkish test" looked "smart", that the manufacturers of that test had nevertheless lost a large distributor.

345. I conclude that there was significant discussion between Newfoundland, Nabeel Sheikh and Argyle Rose Ltd that was sufficient to make the opportunity to pursue those customers a Newfoundland opportunity in accordance with the agreed parameters.

Meditech

346. On 4 January 2021, George Buckenham of Meditech got in touch with Acon saying that he already had some of Acon's Flowflex tests and was interested in buying some more. AA replied to George Buckenham giving him contact details of PM and OM as Acon's "local distributors". She blind copied that email to PM who forwarded it to FM asking him to pick up the query.

347. Meditech was, in fact, a customer of Decontami, one of Newfoundland's sub-distributors. However, when FM performed a cross-check in response to PM's email, he did not realise this. FM received a purchase order from Meditech, but thinking wrongly that Meditech was an opportunity for the Partnership to pursue, he passed that purchase order to LB by email of 5 January 2021 making it clear that the profit on the sale was the Partnership's to keep.

348. However, FM subsequently realised that Meditech was a customer of Decontami. By 11 January 2021, Meditech had placed a subsequent order with the Partnership. This was in

the early days of the new arrangement following the Trading Agreement to the effect that Newfoundland would invoice its own customers direct. Realising his error, FM arranged for an invoice to be sent to Meditech in the name of Newfoundland.

349. That caused understandable confusion at Meditech who thought that they had placed an order with "Hughes Healthcare" only to receive an invoice from Newfoundland. In an email of 15 January 2021 to Meditech's accounts department, FM sought to allay Meditech's concerns, describing Newfoundland as the "distribution wing" of Hughes Healthcare. The Defendants submit that this was a lie, intended to cover up the diversion of the opportunity out of the Partnership. However, it was not. FM was applying an early formulation of Newfoundland's role with which JH would in due course be familiar and of which he approved (see paragraph 74 above). Indeed, JH was made aware of discussions at the time as to whether Meditech was an opportunity for Newfoundland to pursue because the Health Team distribution list, of which he was a member, was copied into many of the relevant discussions, including an email of 15 January 2021 from FM indicating that Newfoundland would issue the invoice to Meditech.

Acon referrals that were not pre-existing Newfoundland customers

350. In my judgment, the following Acon referrals were not pre-existing Newfoundland customers.

i) **Digital 2000**: On 11 January 2021, AA forwarded to OM, PM and FM an enquiry from a Matt Cotton at Digital 2000. That email asked for details of Acon's LFTs. PM forwarded AA's email to FM the same day commenting that it looked like a "decent sounding lead". The Claimants do not seek to argue that, as at 11 January 2021, Digital 2000 was a customer that Newfoundland, rather than the Partnership, was entitled to pursue in accordance with the agreed parameters. I conclude, therefore, that the opportunity to pursue Digital 2000 during the life of the Partnership lay with the Partnership rather than Newfoundland. I accept FM's evidence that when he followed up with Digital 2000, no agreement could be reached on price and so no sales resulted immediately. However, FM accepted in his evidence that some sales were made in December 2021, although he said that was because Digital 2000 had, by then been "reintroduced" by one of Newfoundland's sub-distributors.

ii) **SMI Group Ltd**: On 16 January 2021, AA forwarded an enquiry from SMI Group Ltd to PM, OM and FM. The same day, PM emailed FM and MH asking them to follow up on the lead. The Claimants do not seek to argue that SMI Group Ltd had any previous dealings with either Newfoundland or any of its sub-distributors. The opportunity to pursue SMI Group Ltd properly rested with the Partnership rather than with Newfoundland. That said, I accept FM's evidence that SMI Group Ltd did not respond to him when he followed up. If any business had resulted from SMI Group Ltd, that would have been the subject of disclosure under Issue 7B of the Disclosure Review Document. Therefore, the Defendants would have had the wherewithal to challenge FM's evidence if they had wished to. Since FM's evidence that no sales resulted was not challenged, I accept it.

iii) **Heathbrook Limited**: On 8 February 2021, AA forwarded to FM and PM an enquiry from Heathbrook Limited. FM responded, unprompted by PM, that he would follow up on the lead. In closing submissions, the Claimants did not argue

that Heathbrook Limited was a pre-existing customer of Newfoundland or any of its sub-distributors. Accordingly, the opportunity to pursue business with Heathbrook Limited properly rested with the Partnership rather than Newfoundland in accordance with the agreed parameters. However, FM's evidence that, when he followed up with Heathbrook, Heathbrook were not "serious or wanting to do business in the space" was not challenged. Nor was his evidence that no business resulted from the introduction. For reasons similar to those set out in paragraph ii), I conclude that no sales resulted from the introduction.

iv) **Quadratech Limited**: On 13 January 2021, AA forwarded an enquiry from Quadratech Limited to PM and OM. PM forwarded the enquiry on to FM and MH. The Claimants advance no case in closing that Newfoundland, FM or MH had any previous dealings with Quadratech. However, FM's evidence which was not challenged, and which I accept, was that Quadratech were looking to sell LFTs rather than buy. I conclude that Newfoundland made no sales as a result of the introduction.

v) **Harry Sekhri**: Harry Sekhri made contact with Acon on 24 February 2021. AA forwarded his enquiry to PM. PM forwarded AA's email to FM on 25 February 2021 saying "Do you know this prospect? If not, I will call". I infer that, having checked his records, FM confirmed that Harry Sekhri was not a Newfoundland customer because PM took the enquiry forward and, from 25 February 2021, PM emailed Harry Sekhri about his requirements. The opportunity to pursue sales with Harry Sekhri was, therefore, an opportunity that belonged to the Partnership rather than to Newfoundland. Harry Sekhri proved to be a difficult and demanding customer who expected keen pricing on relatively low volumes. When he ordered some tests from the Partnership, he arranged for them to be delivered to JH's home address and issued instructions as to how they should be packed onto pallets and wrapped in clingfilm so that his agents could come and collect them. Contemporaneous email discussions show LB expressing frustration at the amount of work she had to do for a relatively small customer. PM eventually suggested to Harry Sekhri that he should place further business with Newfoundland as he would obtain better pricing from them. In doing so he did, therefore, put Newfoundland in a position to pursue a business opportunity that properly belonged to the Partnership in accordance with the agreed parameters. However, I conclude that PM's decision was a commercial one: he concluded reasonably that Harry Sekhri's business was not worth having given the amount of work he generated relative to the profit produced. I conclude that there was no breach of fiduciary obligation in PM making a reasonable business decision as to what business was worth pursuing.

351. I conclude that PM breached his fiduciary obligations by permitting Newfoundland to pursue the opportunity with Digital 2000. It will be a matter for Trial 2 to decide what, if any, remedy should follow. There was no breach in relation to Harry Sekhri.

352. I describe SMI Group Limited, Heathbrook Limited and Quadratech as involving a "potential" breach of fiduciary duty in the sense that (i) PM should not have permitted Newfoundland to pursue those opportunities but (ii) I have concluded that Newfoundland made no sales as a consequence of the referral. During the trial, the Defendants indicated that they may wish to seek equitable compensation in this situation on a "loss of a chance" basis. It will be a matter for Trial 2 to decide whether any such compensation is available.

Alleged diversions unconnected with referrals from Acon

Cignpost

353. Cignpost Diagnostics carried on a significant business that involved testing travellers for COVID. They had some kind of government approval to conduct that business and were responsible for COVID testing with DP World golf tour. They were an obvious target for both the Partnership and Newfoundland.

354. PM sent Denis Kinane at Cignpost emails on 10 January 2021 and 1 February 2021 seeking to interest Cignpost in purchasing LFTs. It is not obvious that Cignpost responded to these overtures. However, in his evidence, PM accepted that Denis Kinane was his, as distinct from Newfoundland's contact. I conclude that, applying the agreed parameters, as at February 2021, the opportunity to pursue Cignpost belonged to the Partnership rather than Newfoundland.

355. In May 2021, FM made contact with Christian Corney, Cignpost's CEO. I have concluded that he did so following his own efforts and without any assistance from PM. That said, I have concluded that PM was aware of Newfoundland's efforts to make sales to Cignpost yet made no attempt to assert that the opportunity was the Partnership's to pursue. That was a breach of fiduciary obligation.

356. Discussions were fruitful and Newfoundland went on to sell a number of LFTs to Cignpost. It will be a matter for Trial 2 to decide what, if any, remedy should follow in the light of these findings.

ZetaGene

357. I accept FM's evidence that he made contact with a Dr Yang De Marinis at ZetaGene in December 2020. That is corroborated by contemporaneous WhatsApp conversations between FM and OM which demonstrate that FM's sales efforts with ZetaGene were sufficiently significant for OM to joke that Dr De Marinis was FM's "Swedish girlfriend" and to hope that FM's efforts with her might yield sales of large numbers of tests that would enable her to "retire for 3 months".

358. The opportunity to pursue business opportunities therefore belonged to Newfoundland in accordance with the agreed parameters. I reject the Defendants' argument that this conclusion is undermined by the fact that, on 21 December 2020, ZetaGene signed a "partnership and exclusive distribution agreement" with "Hughes Healthcare, trading on behalf of NeuroCED". As noted in paragraph 300, the reference to NeuroCED was driven by ZetaGene's preference to avoid being seen to contract with HGL whose primary business was in building and construction. The partnership and distribution agreement was at the time considered to be between ZetaGene and the Partnership.

359. However, this agreement was entered at a time when FM and MH were on a commission arrangement with the Partnership and before the Trading Agreement came into force. Accordingly, at the time the Partnership was transacting with ZetaGene, no question of demarcation as between the Partnership and Newfoundland arose. When the question did arise (following the Trading Agreement), the parameters agreed between the Partnership and Newfoundland meant that any opportunity to pursue sales to ZetaGene belonged to Newfoundland. There was a factual dispute between the parties as to how many LFTs

ZetaGene ever purchased. If any opportunity to pursue sales to ZetaGene belonged to the Partnership, this would have been a matter for Trial 2 to resolve. However, in the event, I conclude that opportunity was that of Newfoundland and so PM did not breach any fiduciary obligation in connection with ZetaGene.

GoCrisis and Radisson

360. GoCrisis carried on a business that involved crisis management. GoCrisis was not interested in purchasing LFTs itself, although its customer base could well have been interested.

361. Given its business, GoCrisis was not the kind of contact to whom the parameters agreed between the Partnership and Newfoundland applied. That said, GoCrisis was owned and operated by a good friend of FM's biological mother, and it was FM who had initial discussions with GoCrisis about the possibility of a business relationship under which GoCrisis would receive a commission for sales of LFTs made by the Partnership to customers introduced by GoCrisis.

362. On 13 January 2021, GoCrisis entered into an "Introduction Agreement" with NeuroCED (not expressed to be acting as agent for anyone else). The Defendants submit this to be evidence of FM's and PM's plan to divert business away from the Partnership and into companies which the Manducas controlled. I do not accept that. By 13 January 2021, with JH's full knowledge and approval, Newfoundland had become a distributor, keeping whatever profit it could make above the "base price" of £2.83 per test. FM had a contact at GoCrisis who, he thought, might enable Newfoundland to sell more tests. It was not contrary to the letter or spirit of the agreed parameters with the Partnership for Newfoundland to use that contact to seek to drive increased revenue for itself. If GoCrisis did indeed generate sales for Newfoundland, the Partnership would make a profit of £1 for every test so sold in accordance with the provisions of the Trading Agreement. It is somewhat odd that GoCrisis entered into its Introduction Agreement with NeuroCED. However, the Manducas were accustomed to blurring the boundaries between one corporate legal personality and another. FM signed the Introduction Agreement as a director of NeuroCED despite holding no such office.

363. Radisson is a global hotels operator. It became known to both the Partnership and to Newfoundland as a consequence of being introduced by GoCrisis. Had Radisson simply wished to purchase tests and nothing more then, in all likelihood, it would have been identified as a customer of Newfoundland because GoCrisis was a contact of FM with no connection to the Partnership. However, Radisson's requirements were more complicated. It required not just LFTs but the provision of healthcare professionals (**HCPs**) to administer those tests. MH and FM had built up a good degree of expertise in the sale of LFTs but were ill-equipped to service Radisson's more complex requirements. They turned to PM and JH for help.

364. As a result, the normal protocol, which would have permitted Newfoundland to pursue the opportunity was varied. As a result of FM's and MH's introduction Radisson eventually entered into a Framework Agreement, not with Newfoundland or the Partnership, but with HHLL on 16 March 2021. In a failure of corporate governance, PM purported to execute the Framework Agreement as a director of HHLL before it was incorporated. The Framework Agreement is not a straightforward document and some of the Annexes to it that are referred to as setting out the scope of products and services to

be supplied have been left blank. However, it is fair to say that the Framework Agreement set out a mechanism under which Radisson might from time to time request the provision of HCPs and LFTs for them to administer and, if Radisson made such a request, HHLL would supply both.

365. In late May 2021, Radisson made a small order, requesting 60 LFTs and the services of two HCPs to spend four hours each administering those tests at a location in Norway. There was perhaps a point of interpretation of the Introduction Agreement as to whether GoCrisis was entitled to commission on sales made by HHLL, but in practice no such difficulty arose. All of Radisson, HHLL, Newfoundland, GoCrisis and the Partnership largely ignored the relevant contracts to which they were party:

    i) Newfoundland invoiced Radisson for the cost of the LFTs and the HCPs despite ostensibly having supplied neither and the Framework Agreement being with HHLL. I was not shown any communication from Radisson objecting to this and infer that they did not.

    ii) In an email PM assumed that GoCrisis would share in the profit generated by the arrangement pursuant to the Framework Agreement.

366. In a similar vein when, on 2 June 2021, Radisson required 100 LFTs for shipment to Spain, they contacted PM (using his HGL email address), PM agreed to the order and quoted a price. MH then issued an invoice in Newfoundland's name.

367. The picture is confused, but I conclude that none of the dealings above involved PM taking steps to divert into Newfoundland a business opportunity that, in accordance with the agreed parameters, was the Partnership's to pursue. Rather, in my judgment, the overall picture that emerges is of the Partnership and Newfoundland working together to service small and difficult orders from a large corporate client which were hoped to lead to better things. Moreover, JH was aware of the dealings involving GoCrisis and Radisson: an email of 31 March 2021 sent to the Health Team, of which JH was a member, refers to a meeting to take place at JH's home in a few days' time and records that "Freddy introduced the GoCrisis/[Radisson] matrix and worked the relationship to contract. Assessment required for future inputs/profit share".

368. I infer from this that Newfoundland, JH and PM ultimately agreed some profit share arrangement under which each would share in profits generated from Radisson, most likely with Newfoundland's reward coming from sales of LFTs and HHLL's (or the Partnership's) reward coming from profits on the provision of HCPs. I conclude that, during the life of the Partnership, revenues from Radisson were dealt with in accordance with that understanding and I reject the Defendants' allegations that the opportunity to transact with Radisson was "diverted".

369. In his first witness statement PM confirmed that, following dissolution of the Partnership, HHL (as distinct from HHLL) continued to do business with Radisson. He accepts that he will account to the partnership for any profits HHL made from Radisson post dissolution of the Partnership. He does not say whether the business included the provision of HCPs, but I infer not since, by the time the Partnership was dissolved, Acon's LFTs had the CE Mark making the involvement of an HCP unnecessary. I do not consider PM's offer of an account to be inconsistent with my determination in paragraph 368 above. It was quite reasonable for PM to conclude that Radisson was a "business

connexion" of the Partnership such that benefits received by HHL from post-dissolution sales fall within s29 of PA 1890.

GJK HealthPharma

370. The Defendants' allegations made in relation to GJK HealthPharma include both (i) an allegation that GJK HealthPharma was a business opportunity of the Partnership that was wrongly diverted away from the Partnership and that (ii) Titanium made a secret profit as a consequence of selling LFTs to GJK HealthPharma. Titanium's asserted involvement is particularly significant because the Defendants allege that it was in breach of the SHA in making those sales with that breach entitling JH to terminate the SHA.

371. It is common ground that a company called "Evolve" put Andys Kaimis of GJK HealthPharma in touch with PM, although the parties do not agree as to whether Evolve was a contact of Newfoundland or of the Partnership. There were some initial discussions between PM and Andys Kaimis in January 2021 about the possibility of a sale of LFTs to the government of Cyprus as part of a tender process. However, the evidence that Newfoundland sold any tests in connection with that tender process is scant indeed and I conclude that no sales of LFTs resulted from these initial discussions.

372. Andys Kaimis got back in touch on 10 May 2021. He requested a quote for a large number of tests for immediate delivery, apparently in connection with a possible order by the Government of Greece. Titanium sent him an invoice for EUR 720,000 for 300,000 tests. That invoice stated that 75% of the purchase price (EUR 540,000) was payable in advance, with the remaining 25% falling due on proof of arrival of the tests in Larnaca, Cyprus. In her covering email at 15:39 on 10 May 2021, attaching that invoice OM explained that "EUROS 540,000 is now due" and asked Andys Kaimis to provide proof of payment so that the LFTs could be shipped. Andys Kaimis asked some questions about Titanium and was provided with a copy of a share certificate (dating from 2013) showing PM as a holder of shares in Titanium. OM then reissued Titanium's invoice on Newfoundland's letterhead (but still naming Titanium as the payee) in response to what appears to have been a request from Andys Kaimis.

373. By 20:40 on 10 May 2021, Andys Kaimis had evidently not paid EUR 540,000 because PM emailed him asking him if he had any news. The next day, Andys Kaimis emailed PM to say that the tender had been awarded to someone else. I infer from this that Titanium sold no LFTs to GJK HealthPharma in May 2021.

374. I also accept FM's evidence in his witness statement that Evolve was a company that MH knew and so the introduction to GJK HealthPharma came from a Newfoundland contact. The matter was explored in cross-examination with PM, and it was simply put to PM that there was "not a scrap of evidence" that Evolve was a Newfoundland contact. Before disbelieving FM's evidence on this issue, I would have wanted to hear his evidence about Evolve's connection with MH being tested (see the similar point made in paragraph 341.iv)).

375. It follows that I also accept the evidence of FM and PM that Titanium issued the invoice to GJK HealthPharma only because it had a bank account that could accept payments in euro, whereas Newfoundland did not. The Defendants' point, that the Partnership had access to HGL's bank account that accepted euro payments is of little force in

circumstances where Newfoundland considered this was an opportunity it, rather than the Partnership, was entitled to pursue.

376. I therefore conclude that (i) GJK HealthPharma was an opportunity that Newfoundland was entitled to pursue as distinct from the Partnership, (ii) Titanium made no sales of LFTs to GJK HealthPharma and (iii) the reason why Titanium invoiced GJK HealthPharma (for LFTs that were not ultimately sold) was to help Newfoundland pursue its business opportunity even though Newfoundland could not accept payment in euro.

Nuno Tavares

377. On 1 April 2021, a Nuno Tavares emailed PM asking for information and supporting documents regarding the suitability of tests for sale in Portugal. The same day, PM forwarded Nuno Tavares's email to FM, asking him to "run with this prospect".

378. There is no suggestion that Nuno Tavares was a business contact of Newfoundland. PM's evidence was that he asked FM to help out because of FM's extensive knowledge of regulatory and scientific aspects of Acon's tests. I accept this evidence, but it does not displace the conclusion that, in accordance with the agreed parameters, any opportunity with Nuno Tavares was for the Partnership to pursue. However, FM's evidence that Newfoundland made no sales to Nuno Tavares was not challenged, and I accept it.

379. I accordingly consider Nuno Tavares to involve a "potential" breach of fiduciary obligation of the kind described in paragraph 352.

Xavier Villar

380. The Defendants included arguments about an alleged "diversion" of Xavier Villar in their closing submissions. However, Xavier Villar was not one of the pleaded diversions in relation to whom disclosure had been given. The Claimants did not, therefore, advance any analysis relating to Xavier Villar because they considered they did not need to. I make no findings in relation to Xavier Villar, and I explain how I will deal with this and other similar "pleading" issues in paragraphs 467 to 471 below.

The Danish Deal

What it was and how it came about

381. The Danish Deal was in fact multiple orders for LFTs that the Danish Government placed with MSDL in November and December 2021:

    i) On or around 29 November 2021, the Danish Government made two orders with MSDL for 8 million branded tests.

    ii) In December 2021, the Danish Government placed a further order with MSDL for 35 million unbranded tests to be delivered in January and February 2022.

    iii) MSDL delivered LFTs in satisfaction of the Danish Government's orders and the Danish Government made payment to MSDL of the contract price agreed.

382. The Danish Deal resulted from what the Danish Government considered to be a medical emergency at the time. The Danish Government's response to the COVID pandemic

involved keeping schools open to the extent possible. In November 2021, there was a spike in COVID cases, fuelled by a rise in the "omicron" variant that threatened the ability to keep schools open. The Danish Government needed a large number of LFTs that could be self-administered by children aged 12 and over and could be administered to children as young as six by adults without medical training. Since the Danish Government needed those tests so urgently, it did not follow a traditional government procurement exercise.

383. There was relatively little dispute about matters of primary fact concerning the question of how the Danish Government became aware that MSDL might be able to provide it with the LFTs it needed.

384. One of DB's many contacts was Chris Rawlinson. In around February 2021, after he agreed to become involved with the Partnership's business, DB explained to Chris Rawlinson that he had access to people selling LFTs and asked Chris Rawlinson to introduce him to people in the "medical world". One person in the medical world who Chris Rawlinson knew was Bent Von Eitzen, a partner in CAP, that had a business based in Denmark consisting of putting on conferences for the medical and other industries. Chris Rawlinson introduced DB to Bent Von Eitzen.

385. Given his business interests, Bent Von Eitzen had received a few proposals from businesses asking CAP to introduce them to potential purchasers of LFTs. Bent Von Eitzen was not generally interested in these overtures but, because he had a good relationship with Chris Rawlinson and "absolutely trusted" him, he was prepared to consider a proposal that DB made to CAP. Bent Von Eitzen involved Teresa Krausmann, CAP's managing director, in those discussions.

386. CAP and DB discussed an arrangement under which CAP would be paid a commission of 20% of the profit made on sales to people they introduced. CAP were also interested in obtaining some measure of exclusivity, or at least being the "primary contact" in Denmark, Finland and Norway. However, before agreeing to an arrangement such as this, CAP wanted to understand better the nature of the LFTs that the Partnership was selling and make sure that they believed the test was a good one. DB was unable to answer CAP's technical questions himself and so drew on the expertise of FM in particular to help provide those answers. DB also provided CAP with a "Hughes Healthcare Clinical Report", which FM had prepared in December 2020, that set out a summary of how the "Hughes Healthcare" LFT had performed in clinical trials in China and the US. Of course, this was actually a summary of how Acon's test had performed in those trials. CAP were also provided with data from the trials at Lund University that FM had arranged.

387. CAP were ultimately satisfied at the outcome of their enquiries about the test that the Partnership was selling because they entered into an "Exclusive Distribution Agreement" dated 13 February 2021 expressed to be with "Hughes Healthcare subsidiary of Hughes Group Limited". That agreement was, despite its name, concerned largely with questions of confidentiality. I have concluded that, in part CAP's agreement to enter into some business relationship with the Partnership was informed by what it regarded as satisfactory answers to technical questions that DB answered by using material (such as the "Hughes Healthcare Clinical Report") that was prepared for the Partnership by FM and represented property of the Partnership. That said, what mattered to CAP was the

technical information contained in this report and answers to their other questions. It did not matter to CAP that tests the Partnership sold bore "Hughes Healthcare" branding.

388. After CAP entered into the Exclusive Distribution Agreement, it was Teresa Krausmann who shared with the Partnership the insight that participation in the University Hospital study might increase the prospects of the Partnership winning a contract in an anticipated competitive tender to supply LFTs to the Danish Government. The Partnership adopted that insight and passed it on to Acon who was prepared to contribute some £34,500 to the costs of the University Hospital study but only on the basis that it was "Flowflex" (as distinct from "Hughes Healthcare" tests) that were included. That said, although the spur to Acon's decision to enter its Flowflex test into the study came out of Teresa Krausmann's insights about the Danish tender process, both Acon and the Partnership thought that a successful performance in the University Hospital study would increase the prospects of making sales in Denmark generally, and not just sales following success in a tender process. The University Hospital study was not sponsored, or operated, by the Danish Government.

389. The University Hospital study started in around March 2021. Those performing the study had contact details for CAP (which had enrolled Acon's Flowflex test into the study), but did not have contact details for either the Partnership or for Acon. Therefore, emails providing periodic updates on the study were typically sent to Teresa Krausmann and she forwarded those to DB.

390. The study took much longer to perform than had been expected. Part of the problem was that levels of COVID in Denmark from March 2021 to September 2021 were low, so fewer COVID tests were being performed in Denmark. DB periodically contacted Teresa Krausmann for updates, but there was nothing he or she could do to accelerate the process. In May 2021, University Hospital said that it hoped to complete the study in June. That deadline was not achieved. On 20 September 2021, the University Hospital announced that testing was finally complete and they hoped to be able to complete statistical analysis and provide draft reports in the next three weeks. In fact, no draft report was ever circulated to CAP.

391. While the University Hospital study was ongoing, DB was diligent in keeping CAP appropriately updated on matters relevant to Acon's LFTs because he and the Partnership hoped that CAP would be able to secure sales for them in Denmark. So, in March 2021, DB updated Teresa Krausmann on the likely timeline for completion of the Porton Down tests. DB arranged for AA to update Teresa Krausmann on the suitability of Acon's test for home use. On 14 May 2021, DB informed her that Acon's test had the CE Mark confirming its suitability for home use and self-testing. Assiduous and diligent though this was, it had no effect at all on the ultimate securing of the Danish Deal which came as a result of the perception of an emergency situation in Denmark.

392. What was to become the Danish Deal started on 26 November 2021 with a telephone call from Jacob Prange, who worked in procurement for the Central Jutland area of Denmark, to Bent Von Eitzen. Jacob Prange needed to secure LFTs for the Danish Government because of the emergency situation. The reason he called Bent Von Eitzen, who worked at a business that organised medical conferences, was simply because CAP had registered Acon's Flowflex test in the University Hospital evaluation. Because the University Hospital study was not being operated by the Danish Government, Jacob Prange did not have immediate access to the results of that study. He had therefore called University

Hospital to find out which tests had performed well in that evaluation and used the details of the registrant that University Hospital had to enquire about the possibility of purchasing those tests.

393. Bent Von Eitzen immediately put Jacob Prange in touch with DB. The initial request was for DB to provide a quote for the provision of 1 million tests. However, over an extremely busy three or four days, Jacob Prange had discussions that would culminate in the Danish Government agreeing to purchase 8 million tests on or around 30 November 2021.

394. I have concluded that the Danish Government's ultimate decision to purchase tests from MSDL in November 2021 came about because of a combination of the following factors. When listing those factors, I also comment on the extent to which they had some link to the Partnership's business, property, name or business connections:

i) *The Danish Government's perception that there was an emergency situation that necessitated the purchase of large numbers of LFTs without a tender process*. This emergency situation had nothing to do with the Partnership's business, its assets, or its business connections.

ii) *The fact that CAP was persuaded that Acon's test was a good one and so "believed" in that test*. CAP would not have been introduced to the Partnership but for DB's connection with Chris Rawlinson. CAP believed in the test because it was shown some property of the Partnership (see paragraph 386), the results of the Porton Down evaluation and the study at Lund University that took place before the Partnership's dissolution. If CAP had never "believed" in the test, it would never have been suggested that Acon's test be entered in the University Hospital study.

iii) *The good performance of Acon's Flowflex branded tests in the University Hospital study*. Participation in that study was the brainchild of CAP, who were a contact of DB, but also an entity that had a contractual relationship, in the form of the Distribution Agreement with the Partnership. The University Hospital study had been started during the life of the Partnership, but was not complete when the Partnership was dissolved. Acon's participation in that study was financed by Acon alone (see paragraph 388 above) and not the Partnership. Moreover, Acon participated in that study with a view to increasing sales in Denmark generally and not just in the hope that it would help to secure a Government contract in Denmark (see paragraph 388 above).

iv) *The fact that Acon's test had the CE Mark, combined with confirmations that DB was able to obtain from Acon about their test's suitability for use with children*. The CE Mark was not an asset of the Partnership and was obtained largely at Acon's initiative, but its existence had a beneficial effect on the value of the Partnership's goodwill (see paragraph 122 above).

v) *The fact that MSDL would be supplying the market-leading Acon test that had the desirable features summarised in paragraphs i) to iv) above*. As DB accepted in cross-examination, the Danish Government was "sold on" purchasing the Acon Flowflex test. As explained in paragraph 281, I consider Acon to be a "business connexion" of the Partnership.

vi) *DB's skilful handling of the discussions with Jacob Prange over the period from 26 November 2021 to 30 November 2021*. As noted in paragraph 283 above, an argument can be made that DB was a "business connexion" of the Partnership. However, I express no final view on that issue. DB persuaded Jacob Prange to agree to pay 30% of the purchase price upfront whereas the Danish Government's usual terms involved payment 30 days after delivery. Although JH said in paragraph 251 of his witness statement that MSDL had 5 million branded tests in stock in November 2021, that still left 3 million tests that had to be ordered from Acon. Without the 30% deposit, MSDL might not have been able to fund the purchase from Acon necessary for the transaction to go ahead. DB also was able to persuade Jacob Prange in short order that "Hughes Healthcare" and "Flowflex" branded tests were the same. More generally, DB dropped everything to deal with Jacob Prange over these intense few days. Without that level of responsiveness, the deal might never have been concluded.

395. It was the combination of these factors that resulted in the first sale to the Danish Government being concluded. No one factor was sufficient on its own. So, for example, the strong performance of the Flowflex test in the University Hospital study was not enough in itself to secure the Danish Deal since, if there had been no public health emergency in Denmark, the Danish Government might instead have embarked on a tender process in which MSDL may, or may not, have been successful. Conversely, even given the public health emergency, the Danish Deal would not have happened without the presence of the other factors I have listed. Even given the public health emergency and the excellence of Acon's tests, the Danish deal would still not have happened if DB had not been as responsive as he was to Jacob Prange's enquiries and if DB had not conducted negotiations skilfully.

396. It follows from my conclusions summarised in paragraph 393 that the "Hughes Healthcare" branding was not a factor that pointed in favour of the Danish Government placing an order with MSDL. The Danish Government was "sold on" purchasing Flowflex tests. Accordingly, the Hughes Healthcare branding on 8 million of the tests that the Danish Government purchased was an obstacle in the sense that DB had to spend time and effort to satisfy Jacob Prange that the branded tests were identical in all respects other than their packaging to the Flowflex tests.

397. Soon after successful conclusion of the sale of 8 million tests, Jacob Prange contacted DB with a view to placing an even bigger order. The initial request was for 20 million tests to be delivered in January 2022, however that was ultimately increased. Ultimately the Danish Government placed an order for 35 million further LFTs to be delivered in January 2022. MSDL fulfilled that order and was duly paid for it.

398. In my judgment, the same factors as are described in paragraph 393 contributed to the successful conclusion of that transaction. However, some additional factors contributed as well:

i) The Danish Government had a positive experience of MSDL from its earlier speedy delivery of 8 million tests. That factor had no connection to the Partnership's business.

ii) Acon demanded a 60% deposit for the large quantity of tests that MSDL was ordering and neither it nor JH had liquid resources available to fund that deposit.

On 18 January 2022, MSDL borrowed £5 million from a business acquaintance of JH, Aslan Ryskali. The loan was repayable with interest of £600,000 on 7 February 2022, representing an annual (simple interest) rate of over 200%. MSDL was able to repay this loan in accordance with its terms because the sale of 35 million tests completed. However, without JH's willingness to take significant personal financial risk, which had no connection at all to the Partnership's business, the deal would not have happened.

iii) DB's skills in negotiating the transaction were an even greater factor in the successful conclusion of the Danish Government's later orders for 35 million tests. Jacob Prange's initial instinct had been to embark on a tender process for the additional 35 million tests. DB successfully persuaded him that this would not deliver the tests in the short timescale that was needed given the logistics that would be involved in transporting large numbers of tests from China at a particularly busy period around Christmas. DB's negotiation skills persuaded Jacob Prange that the Danish Government should make a quick decision to purchase from MSDL without a tender process.

iv) Both JH and DB drew heavily on their own logistical and practical skills in fulfilling the Danish Government's later orders for 35 million tests. Supplying that number of tests required the use of 38 cargo planes and over 80 juggernauts with transport capacity at a premium over the Christmas period. There were early morning calls between JH, DB and Acon about logistics and practicalities and regular Zoom calls throughout each working day. DB's unchallenged evidence in his first witness statement painted a vivid picture of the hard work he personally put into the transaction: he described the period as "the busiest three months of my life" and explained that he was frequently working 16-hour days on the Danish Deal alone. In drawing on his own practical skills, JH was not deploying any Partnership asset or business connection. As I have noted, DB may, or may not, have been a "business connexion" of the Partnership.

Rewards

399. I will not make conclusive findings on how much reward, JH, DB and others made from the Danish Deal since I do not understand that to be an issue for determination in this trial. It suffices to say that MSDL's profit on the transaction was significant. In cross-examination, on the basis of high-level assumptions, JH was prepared to accept that the Danish Deal resulted in MSDL making a clear profit of around £17m. From that profit, MSDL paid "bonuses" to JH and LB of £7m to £8m, with LB receiving around £1m to £2m and JH receiving the balance. I make no findings on the nature (or precise amount) of these bonuses. I do not know, for example, whether they were dividends paid by MSDL or took some other legal form.

400. JH and DB agreed a spreadsheet that records DB as having an entitlement to receive some £14.98m out of the proceeds of the Danish Deal. The same spreadsheet shows that CAP were entitled to commission of some £1.29m and Chris Rawlinson to commission of £1.94m although it was not clear to me whether these sums were to be funded out of DB's share of the profit.

The nature of the opportunity to effect the Danish Deal as at the Partnership's dissolution

401. In case it is necessary to consider the state of the opportunity to conclude the Danish Deal at the point the Partnership was dissolved on 27 June 2021, I make the following findings:

i) As at the point of dissolution, there had been no discussions between the Partnership and the Danish Government as to the terms on which the Partnership might sell LFTs to the Danish Government. That is scarcely surprising since the Danish Deal represented a response to an emergency in Denmark that occurred after the Partnership was dissolved. This is not a case like the "maturing business opportunity" considered in *Hunter Kane Limited v Watkins* [2003] EWHC 186 (Ch) where the Partnership's opportunity to sell LFTs to the Danish Government had progressed as far as a "protocol, a formal arrangement between the parties in accordance with which the [Partnership] had a reasonable expectation of doing business".

ii) Flowflex tests were entered into the University Hospital study with a view to increasing the volume of sales in Denmark generally. The Partnership also hoped that a good performance in that study would increase the likelihood of the Partnership winning a tender to sell LFTs to the Danish Government, that being the nature of the opportunity with the Danish Government that the Partnership saw before it was dissolved. While DB occasionally chased up the results of the University Hospital study, this was not because the Partnership was actively pursuing the Danish Deal or indeed any other opportunity to sell tests to the Danish Government. There was no opportunity that the Partnership could actively pursue at the date of dissolution because (i) the Partnership was not bidding in any tender that the Danish Government had announced and (ii) the medical emergency that resulted in the Danish Deal had not yet taken place.

iii) The results of the University Hospital study were not known at the time the Partnership dissolved. Even if it were known, at the date of dissolution, that the Acon Flowflex test had performed well in that test, that would not have guaranteed success in a tender process initiated by the Danish Government, although it would have improved the Partnership's prospects of success in such a tender.

iv) The Partnership and DB did anticipate, before the Partnership was dissolved, that there might in the future be an opportunity to sell LFTs to the Danish Government, following a tender process. Neither the Partnership nor DB foresaw that there would be an opportunity of the kind that was ultimately realised in the Danish Deal because they did not foresee the kind of medical emergency in Denmark that would prompt the Danish Government to purchase LFTs without going through a tender process first.

v) Foreseeing the opportunity described in paragraph iv) above, the Partnership and DB agreed in their Mutual Confidentiality Agreement (see paragraph 83 above) that DB would, to the exclusion of other of the Partnership's sales team, be entitled to pursue any opportunity for the Partnership to sell tests to the Danish Government and be paid on the basis summarised in paragraph 84 above if such a transaction closed successfully.

vi) I conclude that there was no "opportunity" to pursue the Danish Deal, in the form ultimately transacted, at the time the Partnership dissolved. That conclusion is not altered by the fact that DB accepted in cross-examination that, if the Partnership had not been dissolved, it would have pursued the Danish Deal. There was, however, an opportunity, at the time the Partnership dissolved, for the Partnership to participate in a tender process to sell LFTs to the Danish Government. No such tender had been announced, but it was a realistic possibility that there would be one. Given what ultimately transpired with the Danish Deal, I consider that the Partnership would have a realistic prospect of success in any such tender.

DB's opportunity or an opportunity of the Partnership?

402. The Defendants submitted in closing that, in consequence of the Mutual Confidentiality Agreement with DB dated 15 June 2021, being the version of that agreement that was current when the Partnership was dissolved, any opportunity to pursue the Danish Deal belonged to DB, rather than to the Partnership. I do not accept that submission.

403. As I have explained, I do not consider that it is realistic to speak of an "opportunity to pursue the Danish Deal" as at the date of the Partnership's dissolution since the Danish Deal resulted from circumstances that arose after the Partnership's dissolution. In any event, I consider that the Defendants' submission misunderstands the Mutual Confidentiality Agreement and its consequences. As its name suggests, the Mutual Confidentiality Agreement imposed obligations of confidentiality on both DB and the Partnership. DB was free to choose whether to use his contacts to secure the Partnership introductions to people who might help it to sell LFTs. If he did so, the Partnership was obliged to keep confidential any confidential information that DB shared with it as part of the process. I am prepared to accept, without deciding, that, having used his contacts to introduce the Partnership to CAP, DB could have changed his mind and required the Partnership to cease contact with CAP. If he had done so early on, CAP might never have suggested that Acon's tests be enrolled in the University Hospital study and the Danish Deal might never have resulted.

404. However, an examination of counterfactuals cannot alter the fact that DB did introduce the Partnership to CAP and never withdrew any consent to the Partnership using his contacts to seek to advance the sale of LFTs to the Danish Government. The Mutual Confidentiality Agreement did not result in the Danish Deal being an opportunity for DB to pursue. Rather, it was an opportunity that the Partnership was entitled to pursue and, if it did so successfully, DB would obtain a reward on the basis set out in paragraph 84 above.

Other entities to whom JH and his affiliates made sales of LFTs following dissolution

405. Between them, HGL and MSDL sold 63,389,370 LFTs after the Partnership dissolved. Some 43 million of these were represented by the Danish Deal with the remainder being to purchasers other than the Danish government. HHLL sold some 500,400 LFTs after dissolution. In this section, I make findings on some of the post-dissolution purchasers of LFTs other than the Danish Government.

Waitrose

406. JH accepted in his evidence that either he or MSDL sold to Waitrose LFTs that were purchased from Acon (a "business connexion" of the Partnership). Waitrose in turn sold those LFTs to retail customers. Waitrose was not a pre-existing customer of the Partnership.

407. Since Waitrose was offering the tests that it purchased to its retail customers, it required Acon's tests to have the CE Mark. I have explained in paragraph 122 my findings as to the nature of the Partnership's interest in the CE Mark.

UK Wholesales

408. UK Wholesales had never been a customer of the Partnership, but rather was a customer of Newfoundland. I have been shown an invoice dated 6 August 2021 issued by HGL in relation to 200,000 "Hughes Brand" tests for a price of £1.50 each excluding VAT. I have also seen an invoice issued by MSDL to UK Wholesales dated 9 August 2021 for 200,000 "Hughes Test Kits" at a price of £1.55 each excluding VAT. I conclude that these sales were of LFTs that HGL and MSDL respectively had purchased from Acon. I make no finding as to the precise number of tests that HGL and MSDL sold to UK Wholesales following the Partnership's dissolution, as that will be a matter for Trial 2 to the extent necessary. However, I conclude that HGL and MSDL did make a material number of sales to UK Wholesales.

409. I have concluded that the ability of HGL and MSDL to negotiate a satisfactory deal with UK Wholesales was assisted by information that JH, DB and Polly Phillips had obtained from a review of certain emails from FM that he had sent using his "Hughes" email address. Those emails contained information on the kind of orders that UK Wholesales placed with Newfoundland and the pricing that Newfoundland gave to UK Wholesales. I infer from an email that Polly Phillips sent on 29 June 2021 that HGL and MSDL used that information. I also infer that HGL and MSDL used confidential information belonging to the Partnership (for example knowledge as to the prices that Acon would charge for LFTs that was contained in emails stored on HGL's servers) to their advantage when negotiating early deals with UK Wholesales.

410. On 9 August 2021, JH, DB and Polly Phillips travelled to Manchester for a meeting with UK Wholesales. During that meeting, DB and JH indicated that only HGL could legally sell branded tests and that Newfoundland was acting illegally in doing so. "Hughes Healthcare" was obviously the name of the Partnership. DB and JH would not have made that assertion unless they thought it would have some effect on UK Wholesales' purchasing decision. Since they made the claim, I infer that it had the desired effect and therefore played at least some part in UK Wholesales' willingness to place orders with HGL and MSDL. Beyond that, I make no finding on the extent of the statement's impact which can be addressed further in Trial 2 to the extent necessary.

Boots

411. Boots was not a client of the Partnership or of Newfoundland prior to the dissolution of the Partnership. DB had attempted to interest Boots in purchasing LFTs from the Partnership in May 2021 and I have concluded that he used his own network of contacts,

rather than information that the Partnership provided to him, to obtain that initial introduction to Boots.

412. I have seen reference in an email exchange between LB and Nathan Crossman of Boots UK dated 27 October 2021 to two invoices that LB had submitted. LB confirmed in her evidence that MSDL sold some LFTs to Boots UK and that the LFTs in question were manufactured by Acon, a "business connexion" of the Partnership.

413. I have concluded that the sales to Boots UK in October came about because of a combination of at least two factors. First, the efforts of Polly Phillips in finding contact details of appropriate decision-makers at Boots UK through LinkedIn meant that MSDL was able to have a conversation with the right people about the purchase of LFTs. Second, in those conversations, MSDL would be able to stress that they were selling the market-leading Acon LFT. As with my similar conclusion in relation to the Danish Deal, neither of these considerations predominated. Certainly, if Polly Phillips had not used her initiative to locate the right people at Boots, it is unlikely that any sales would have resulted. However, against that, even once she had secured access to the right people, sales would have been unlikely if MSDL was trying to sell the "wrong" LFT.

414. The relationship between HGL/MSDL and Boots was short-lived. On 5 November 2021, OM wrote a letter to Boots's Chairman indicating that HGL and MSDL were not entitled to sell LFTs under the "Hughes Healthcare" brand and hinting, though not threatening, that Boots might become embroiled in a legal dispute if it continued to purchase such tests from HGL and MSDL. Shortly after receipt of this letter, orders from Boots "dried up" (in LB's words) and I have concluded that Boots started to purchase LFTs from Newfoundland.

PFW Labels

415. PFW Labels was a previous customer of the Partnership and had placed orders for LFTs with the Partnership before it was dissolved. PFW Labels was not, however, a particularly loyal customer of the Partnership. I accept LB's evidence that PFW Labels needed relatively small numbers of LFTs from time to time and, when they did, they would shop around for the lowest price.

416. On 2 July 2021, PFW Labels sent LB a purchase order for 1000 "Hughes 15- minute test kits". That purchase order named the supplier as "Hughes Healthcare". LB arranged for the invoice to be issued in the name of HHLL.

417. After this order was placed, on 12 July 2021, LB sent an email to JH asking, "when should we port everything over to Medical Supplies Direct". From that I infer that JH and LB had a plan to the effect that, in due course, arrangements would be made for customers placing orders for LFTs to be invoiced by MSDL rather than by HGL or HHLL.

Hillside Hand Dryers

418. Hillside Hand Dryers placed orders for LFTs with the Partnership before it was dissolved. They placed orders with MSDL after the Partnership was dissolved.

Backyard Cinema/Amazon

419. I was not shown any evidence in closing that suggested that post-dissolution sales were actually made to Backyard Cinema or to Amazon. I therefore take these allegations no longer to be pursued.

Whether JH and MSDL "seamlessly" carried on the business of the Partnership for JH's own account following dissolution

420. I accept the Claimants' case advanced in closing to the effect that, after dissolution of the Partnership, JH and MSDL seamlessly carried on the "Hughes Healthcare" business. That conclusion is, in my judgment, inescapable from the following facts:

    i) The Partnership's business consisted of purchasing tests from Acon and selling them at a profit. Acon were selective about who they supplied (see paragraph 127). Following dissolution of the Partnership, MSDL, a company affiliated with JH, purchased LFTs from Acon and sold them at a profit. The paradigm example of that is the Danish Deal.

    ii) The business of purchasing and selling Acon LFTs was continued largely by personnel who had been involved in the Partnership's business such as JH, DB and LB, although of course PM and OM were no longer involved.

    iii) Much of the material that JH and MSDL used to support sales of Acon tests following the Partnership's dissolution was the same as material that the Partnership had used when it was in existence. So, for example, when JH wished to stress to Durbin and Uniphar, two potential customers of MSDL following dissolution, that he had a close relationship with Acon, he sent a copy of the Letter of Confirmation, referred to in paragraph 125, that the Partnership had obtained for Acon. In a similar vein, when seeking to persuade Rob Weekes at Crowell & Moring of the qualities of Acon's test, JH sent him a copy of the Clinical Studies Report that FM had prepared for the Partnership.

    iv) The Partnership had made sales over the www.hugheshealthcare.co.uk website. After dissolution, MSDL made sales over that website using the same Hughes Healthcare branding that the Partnership had used. It is no answer to say that JH had rights to the domain name. Whoever held the rights to the domain name the point is that the website and branding that MSDL used post-dissolution was the same as the Partnership had used pre-dissolution.

    v) MSDL sold branded LFTs after dissolution. Those bore the same distinctive logo that MH had designed and the Partnership had used when selling similarly branded tests before dissolution (see paragraph 43).

421. The Defendants' opposition to the conclusion set out in paragraph 420 was based on the proposition that:

    i) the Partnership had a single customer (Collinsons) at the time of dissolution; and

    ii) because they were alleging that PM was also carrying on the business of the Partnership following its dissolution, it could not be the case that both JH and PM

were doing so, as two people cannot carry on the same business in competition with each other.

422. I reject the argument in paragraph 421.i). Collinsons was not the only customer of the Partnership at dissolution (see paragraph 236). Both MSDL and HGL sold Acon-manufactured LFTs following dissolution of the Partnership to former customers of the Partnership such as PFW Labels and Hillside Hand Dryers. Moreover, a business is not defined entirely by reference to its customer base at any particular point in time. A shop carries on the same business on Tuesday as it did on Monday even if the customers that come into its shop on Tuesday are different from the Monday customers and have never bought anything from the shop before.

423. I reject the argument in paragraph 421.ii) for similar reasons. I see no logical difficulty with the proposition that JH and PM could both be carrying on the business of the Partnership for their own respective accounts following dissolution. There might well be a difference between the customer bases of those two business since it is not suggested that JH and PM were selling to the same customers. However, as I have explained, a business is not defined only by reference to its customer base.

PART E – THE CLAIMANTS' CLAIMS

Section 29

424. There being no suggestion that JH derived any benefit from a "transaction concerning the Partnership" in the twilight period, JH is obliged to account to the Partnership under s29 for the following benefits derived by JH, HGL or MSDL:

    i) Benefits from the Danish Deal to the extent that they were derived from the Partnership's property, name or business connexions.

    ii) Benefits from sales to Waitrose, UK Wholesales, Boots, PFW Labels and Hillside Hand Dryers in the twilight period to the extent derived from the Partnership's property, name and business connexions.

    iii) Other benefits from sales in the twilight period to the extent derived from the Partnership's property, name and business connexions.

425. The obligation extends beyond benefits received by JH and includes benefits derived by HGL and MSDL those being companies through which JH operated. Although the judgment of Arden LJ in *Woodfull v Lindsey* referred to in paragraph 289 that dealt with this issue was given in the context of s42 rather than s29, no party argued that the position under s29 was any different. In my judgment, given the overlap between s29 and s42 (see paragraph 277 above), a difference in treatment would not be justified.

426. My conclusion in paragraph 424 is deliberately framed by reference to what I regard as the relevant questions summarised in paragraph 245 rather than by reference to the concept of a "maturing business opportunity" since I regard those as the right questions. That said, I have made factual findings in paragraph 401 as to the status of the Danish Deal as at the date of the Dissolution Email.

427. In this judgment, I have concluded that the following matters are embraced within the concept of the Partnership's property, name and business connexions:

    i) The Partnership's name was "Hughes Healthcare". The Partnership, rather than HGL owned the goodwill in that name and it was not reliant on any licence from HGL to use that name, or the "Hughes" constituent of it (see paragraphs 49 to 51 above).

    ii) The Partnership's relevant property included:

        a) goodwill. That goodwill was not of negligible value at the time of the Partnership's dissolution. That goodwill included, but was not limited to: (i) goodwill in the Hughes Healthcare name, (ii) goodwill consisting of having a functioning and viable business that was able to conduct sales over the hugheshealthcare.co.uk website and telephone number;

        b) information that it owned that was confidential to it. That included details of its customers and the history of previous deals with them.

    iii) The hugheshealthcare.co.uk website was not an item of Partnership property as JH was the proprietor of that website (see paragraph 42) and any licence that he gave the Partnership did not survive dissolution. However, as I have noted, the ability to generate sales over the website was an aspect of the Partnership's goodwill.

    iv) I have explained that Acon was a "business connexion" of the Partnership (see paragraph 280) and there may be other relevant "business connexions".

428. In principle, all of the benefits that JH (through HGL and MSDL) received from the sale of 63,389,370 branded and unbranded LFTs following dissolution of the Partnership were, at least to an extent, "derived from" a business connexion of the Partnership since they involved selling tests purchased from Acon. I have also explained other factors that led to those benefits being achieved, particularly in relation to the Danish Deal. It will now be a matter for Trial 2 to determine the extent of JH's obligation to account to the Partnership under s29 and to account to PM under s42.

Section 42

429. The precondition for the application of s42 is satisfied since JH did, through HGL and MSDL, carry on the business of the Partnership in the twilight period (see paragraphs 420 to 423). It will now be a matter for Trial 2 to determine the extent of the obligation to account, if any, that arises in consequence. Any such account will need to consider the effect of the point summarised in paragraph 290 above in the light of the value of the Partnership's various assets at the point of dissolution.

Breach of fiduciary obligation

430. As I have concluded, JH had some obligation to account to the Partnership under s29. To the extent that he did not honour that obligation, and purported to retain benefits for which he was liable to account for himself, he was in breach of his general law fiduciary obligations for the reasons set out in paragraph 258 and 259.

The "knowing receipt" claims against MSDL, JH and LB relating to JH's breach of

fiduciary obligation

The law

431. The Claimants argue, by reference to the judgments of the Court of Appeal in *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685, at 700 and *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437, at 455 that they can establish liability for their claims in "knowing receipt" by showing the following:

    i) That a defendant has received the Claimants' assets, or their traceable proceeds.

    ii) That the receipt in question arises from a breach of fiduciary obligation owed by JH to the relevant Claimant.

    iii) That the defendant has sufficient knowledge that the assets received are traceable to JH's breach of fiduciary duty to make it unconscionable for that defendant to retain the benefit of the receipt.

432. Paragraph [409] of the Defendants' written closing submissions stated that submissions on this aspect of the claim would be made orally, but ultimately none were. Accordingly, in closing, the Defendants made no submissions on the Claimants' knowing receipt claims. In the circumstances, I have reviewed the above summary by reference to the authorities cited in support of it. My conclusion is that the summary is fair, but that conclusion has not been informed by opposing advocacy on the issue.

Application to the facts

433. I have concluded in paragraphs 258 and 259 above that, to the extent that JH purported to retain for himself benefits for which he was liable to account to the Partnership under s29 of PA 1890, that represented a breach of a fiduciary obligation. Accordingly, to the extent of any such failure to account, there is the necessary breach of fiduciary obligation of the kind referred to in paragraph 431.ii)

434. The issues raised by paragraphs 431.i) and 431.iii) depend on the nature of the receipt in question. Since it will be a matter for Trial 2 to determine the precise extent of any obligation to account, I make only the following general findings at this stage:

    i) MSDL received sums, all or part of which were within the scope of JH's obligation to account to the Partnership under s29 of PA 1890. For example, MSDL received the proceeds of the Danish Deal. Either MSDL or HGL received the proceeds of sales of LFTs to Waitrose, UK Wholesales, Boots, PFW Labels and Hillside Hand Dryers. JH is likely to have some liability to account for at least part of those sums and to the extent that he has not done so, he is in breach of a fiduciary obligation.

    ii) To the extent that MSDL received sums for which JH was liable to account under s29 of PA 1890, it would know, just as well as JH of the circumstances of the receipt in question. That follows from the fact that JH was a director of MSDL and so MSDL should, for these purposes be treated as having JH's knowledge. To the extent that JH was in breach of fiduciary obligation in not accounting to the Partnership for those sums, I consider that MSDL's knowledge would be such as to make it unconscionable to retain them.

iii) JH and LB held shares in MSDL which increased in value as a consequence of the receipt of sums referred to in paragraph i) and ii) above. I have not heard sufficient argument to determine whether that increase in value of their shares could be said to represent assets of the Partnership or their traceable proceeds.

iv) JH and LB also received bonuses following completion of the Danish Deal (see paragraph 399). I have commented in paragraph 399 about the lack of evidence as to the precise nature of these "bonuses". In my judgment, it would be premature to make a determination now of whether these bonuses represent the Partnership's property or traceable proceeds without a full understanding of the circumstances in which they were paid. It will be a matter for Trial 2 to determine to the extent necessary whether any such "bonuses" represent assets of the Partnership or their traceable proceeds and whether JH and LB's knowledge would make it unconscionable for them to retain them.

v) I recognise the possibility that JH and LB may have received other bonuses and/or dividends from MSDL consequent on MSDL receiving funds for which JH was liable to account under s29. However, for reasons similar to those set out in paragraph iv) it is premature to decide whether those could be the subject of a "knowing receipt" claim.

435. It will be a matter for Trial 2 to conclude on the claim for knowing receipt, and determine any appropriate remedy, in the light of the above findings.

The "dishonest assistance" claim against LB

436. The Claimants assert that LB dishonestly assisted JH in his breaches of fiduciary duty that consisted of JH continuing the "Hughes Healthcare" business without accounting to the Partnership, or to PM, for benefits received in connection with the continued operation of that business.

The law

437. In their closing submissions, the Claimants described the ingredients of this cause of actions in the following terms by reference to the judgment of the Supreme Court in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 278:

i) There must have been a breach of trust or fiduciary duty.

ii) There must have been procurement or assistance in that breach by the defendant.

iii) The procurement or assistance must have been given dishonestly.

438. The Claimants argue that the test of "dishonesty" for these purposes is that set out, albeit obiter, at *Ivey v Genting Casinos (UK) Ltd (t/a Crockfords)* [2017] UKSC 67; [2018] AC 391 at [62]. Accordingly, they submit that when I consider the question whether LB was dishonest, I should first consider the facts that she actually knew (as distinct from facts of which he should have been aware). Having done so, I should assess her conduct by reference to those known facts and consider whether that conduct was dishonest by reference to ordinary standards of morality.

439. As with the claims based on knowing receipt, the Defendants made no submissions whether in their written or oral closings on the application of the law on dishonest assistance to the asserted facts and evidence. That said, it remains necessary for the Claimants to prove their case against LB.

440. I have made findings as to the state of both LB's and JH's mind at relevant times throughout this judgment, including in paragraphs 229 to 235 above. I do not consider that there was any difference between the states of their minds. I have concluded that, while they were mistaken in their belief that they could properly use the Partnership's and Newfoundland's contacts to continue a business of selling Acon tests post-dissolution without accounting to the Partnership for benefits they received, their acts were not dishonest by reference to ordinary standards of morality. They genuinely believed that they were acting appropriately and defensively in response to what they saw as the Manducas' mendacity. This belief did not represent the application of any particular "warped moral code". A person applying conventional standards of morality could have thought the same. The dishonest assistance claim against LB fails.

Breach of trust claim against HGL

441. Given my conclusions in paragraph 52 above, only a single breach of trust claim is pursued against HGL. The allegation is that HGL committed a breach of trust by permitting emails relating to the business of the Partnership that were held on its servers to be used for the purposes of the business as carried on by JH alone.

442. Mr Gourgey KC said very little about this claim in his written or oral submissions, no doubt because, as he acknowledged in response to one of my questions, "[i]t is not, probably, the most important part of my case". The Defendants said very little about the claim either, beyond denying the extent to which HGL held assets on trust for the Partnership.

443. In my judgment, the claim fails. While I am satisfied that HGL did hold some assets on trust for the Partnership from time to time (see paragraph 48 above) it has not been explained to my satisfaction, (i) the precise nature of the property right said to exist in emails relating to the business of the Partnership (ii) the extent to which HGL held title to that property or (iii) the basis on which HGL was said to hold that property on trust for the Partnership.

444. In consequence, the claim that JH procured HGL's breach of trust also fails.

The claim for breach of the SHA

445. By the time of closing arguments, Titanium's claim for breach of the SHA centred on the allegation that, JH was in breach of Clause 4.3 of that agreement, by failing to co-operate in ensuring that the Acon Claim was transferred to HHLL.

446. Having rejected the Defendants' proposed construction of the SHA, as described in paragraph 168 above, I conclude that (i) the Acon Claim was an asset of the "[b]usinesses as currently traded within Hughes Group Limited" for the purposes of Clause 4.3 of the SHA and so liable to be transferred to HHLL pursuant to the SHA.

447. JH argues that he is presently under no obligation to procure a transfer of the Acon Claim because the SHA is no longer a binding agreement, to the extent it ever was. That argument is put in the following ways, all of which I reject:

    i) JH argues that a condition precedent to the SHA was never fulfilled. However, I have concluded that the condition precedent for which JH argues was not part of the SHA (see paragraph 174).

    ii) JH argues that, by the Dissolution Email, he accepted a repudiatory breach consisting of a failure by Titanium to notify him of PM's breach of fiduciary obligation pursuant to the SHA. I have concluded that Titanium (rather than PM) was party to the SHA and was under no such obligation to notify (see paragraph 177 above).

    iii) JH argues that Titanium was in breach of the SHA by "allowing" PM to incorporate HHL. I do not consider that Titanium "allowed" PM to do so. The actions complained of were PM's alone and Titanium had no control over them.

    iv) Titanium was in breach of the SHA by "allowing" PM to (i) change the registered office of HHLL and HBL, (ii) appoint FM and MH as officers of HHLL and (iii) issue further shares in both HHLL and HBL without JH's consent. I reject that argument for similar reasons: Titanium did not "allow" the actions complained of.

448. There is a further obstacle to arguments to the effect that JH "accepted" a repudiatory breach of the SHA and so brought it to an end. The only communication to which the Defendants refer in support of such an "acceptance" is the Dissolution Email itself which does not refer to the SHA, or repudiatory breaches of contract.

449. At points in her oral submissions, Ms Hilliard KC made arguments suggestive of an argument that JH was procured to enter into the SHA as a consequence of a misrepresentation made by either PM or Titanium. However, there is no pleaded case based on misrepresentation, as Ms Hilliard KC accepted.

450. I will not, however, make a finding that JH was in breach of the SHA. The obligation in Clause 4.3 of the SHA to transfer the Acon Claim was imposed on "the parties". I am not satisfied that Titanium has produced a document necessary to effect a transfer of the Acon Claim, signed by PM which JH has refused to sign. In the absence of JH's refusal to sign such a document, I see no present breach of the SHA.

The unlawful means conspiracy claim against JH, LB, MSDL and HGL

The law

451. The parties agreed that the ingredients of a claim in unlawful means conspiracy are as follows:

    i) There must be an agreement or a "combination" between the defendant and one or more others.

    ii) There must be an intention to injure the claimant.

iii) Unlawful acts must be carried out pursuant to the agreement or combination as a means of injuring the claimant.

iv) Those unlawful acts must cause loss to the claimant.

452. The parties also agreed that, following [139] of the judgment of the Court of Appeal in *The Racing Partnership Limited and others v Sports Information Services Limited* [2020] EWCA Civ 1300, it is not necessary to show that the defendant knew the means employed were unlawful.

Analysis

453. The "unlawful acts" on which the Claimants rely for these purposes consist of JH's asserted breach of fiduciary duty, or breach of his statutory duties to account pursuant to PA 1890, that were engaged by his continuing to carry on the business of the Partnership following its dissolution. In their skeleton argument, the Defendants took issue with the proposition that these were even capable of supplying the necessary "unlawful means" by reference to [15] of the judgment of the Supreme Court in *JSC BTA Bank v Ablyazov and another (No 14)* [2018] UKSC 19, [2020] AC 727. However, in response to questions I raised after the trial, the Defendants confirmed that they were not pursuing this point before me. I conclude that JH's breach of fiduciary duty, and his failure to account under s29 and s42 of PA 1890, were indeed "unlawful acts". (That said, I am not satisfied that the participants in the combination knew that PM or the Partnership were entitled in law to any account of profits generated from the carrying on of the Partnership's business post dissolution. Indeed, as I have concluded in the context of the dishonest assistance claim against LB, both JH and LB genuinely believed that they were entitled to take over the business as a defensive measure in response to what they believed to be the Manducas' mendacity. However, *Racing Partnership* establishes that this is not a defence to a claim in unlawful means conspiracy.)

454. The defence to the unlawful means conspiracy claim as presented in closing submissions was, in essence, that there was no "combination" of the requisite nature between them. However, in light of my factual findings set out in paragraph 228 above, I reject that argument. There was a combination, formed on or around 15 June 2021 to which all of JH, LB, HGL and MSDL were party.

455. There was an intention to cause harm to PM. The plan to take over the business of the Partnership only made sense if PM received no account of profits generated post-dissolution. All parties to the combination knew that PM would not receive compensation. Causing harm to PM was, accordingly, the natural and inevitable consequence of the unlawful means that were employed. The requisite intention to cause loss by the unlawful means was present in light of the analysis of Lord Hoffmann as to the nature of that intention set out at [41] and [42] of his speech in *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1.

456. The unlawful means conspiracy claim succeeds and it will be a matter for Trial 2 to determine an appropriate remedy.

PART F – THE COUNTERCLAIMS AND ADDITIONAL CLAIMS OF THE

DEFENDANTS

457. During the trial, the parties described claims based on PA 1890 or on a partner's fiduciary obligation as being "backward-looking" to the extent that they were based on actions taken prior to dissolution of the Partnership and "forward-looking" to the extent based on post-dissolution actions. I will adopt the same description.

JH's "backward-looking" claims

The interest in Newfoundland

458. This was a "backward-looking" claim in the sense that, while JH alleges breaches of other fiduciary obligations during, and after dissolution, he does not say that it was objectionable in itself, for PM to hold an interest in Newfoundland after dissolution.

459. PM's sole defence to the claim that PM breached his fiduciary duties and/or became liable to account to the Partnership under s29 of PA 1890 by virtue of his undisclosed interest in Newfoundland was based on the factual proposition that he held no such interest. Since I have rejected that defence, JH's claim against PM in this regard succeeds.

460. To the extent that PM realised benefits between 5 January 2021 (the date of the Trading Agreement) and 27 June 2021, from his "secret interest" in Newfoundland, he was in breach of fiduciary obligation. PM is obliged to account for such benefits, including under s29 of PA 1890. It will be a matter for Trial 2 to decide the amount for which PM must account in consequence.

The 18 alleged diversions

461. In paragraphs 339 to 380 above I have made findings relating to the 18 alleged diversions. I have classified them as involving a breach of fiduciary duty, no breach of fiduciary duty, or a possible breach of fiduciary duty.

462. I conclude that, to the extent PM has realised a benefit from a "diversion" of an opportunity that Newfoundland was not permitted to pursue, an obligation to account under s29 arises on the basis that (i) the opportunity to pursue sales to the "diverted" customers represented a "business connexion" of the Partnership or an asset of the Partnership and (ii) any such benefit was derived, at least to some extent, from that business connexion or asset.

463. Trial 2 will also have to address the extent of a possible double count between PM's liability discussed in this section, and that discussed in paragraph 458 which might arise to the extent that profits that Newfoundland made from customers that PM "diverted" are included in PM's share of Newfoundland profits that itself gives rise to an obligation to account.

Alleged sales by Titanium and NeuroCED

464. The Defendants' closing submissions referred to allegations that NeuroCED made sales of LFTs to ZetaGene and GoCrisis and that Titanium made sales to GJK HealthPharma. I have concluded in my analysis of the 18 alleged diversions that no such sales were made.

Other backward-looking claims

465. In closing submissions and in responses to my post-trial questions, the Defendants submitted that their backward-looking claim was a claim for a partnership account. In setting out their case on the 18 alleged diversions, they had given some instances where they said that PM had breached his fiduciary and other obligations. However, they submitted that their backward-looking claim was not limited to their 18 pleaded diversions. They argued that they should be permitted, at Trial 2, to obtain disclosure, and lead evidence that would enable them to make a backward-looking claim based on other alleged diversions.

466. I will deal with this point when I issue directions for Trial 2 following the hand down of this judgment. A balancing exercise will be necessary. On the one hand, there seems to be force to the Defendants' point that they could not be expected to plead and prove all diversions that took place at Trial 1 in circumstances where the Claimants hold all information and they have only been given information on 18 alleged diversions. However, against that, Trial 2 should not be the venue for a still further trial on allegations that could have been pursued at Trial 1.

Forward-looking claim regarding post dissolution sales of LFTs

467. On Day 2 of the trial, I asked the parties to confirm the extent to which JH was bringing a forward-looking claim under s29 or s42. Initially, it appeared as though the parties had reached an agreement on the scope of JH's permissible claim and I was forwarded an email between the two counsel teams of 24 November 2024 that appeared to record an agreed position that JH's pleaded forward-looking claim consisted of (i) post-dissolution sales to the 18 diverted leads already discussed, (ii) NeuroCED's registration of the "Hughes Veritas" trade mark and (iii) an asserted "approval" of Hughes Veritas in the Cayman Islands.

468. However, following that email Ms Rogers sent a further email on 25 November 2024 that indicated that JH's forward-looking claim also embraced the point pleaded at paragraph 140(c) of the D&CC. That paragraph formed part of the Defendants' Defence (as distinct from their Counterclaim) and responded to the Claimants' pleading in paragraph 24A of the Particulars of Claim that JH had continued to operate the business of the Partnership post dissolution. By paragraph 140(c), JH gave the following reason for denying that allegation:

> The Partnership had only one regular client, Collinsons. If anything, Mr Manduca has continued the business of the Partnership by procuring that [HHL] … took over the benefit of the contract with Collinsons.

469. The Claimants accept that PM must account for benefits received from post-dissolution sales to Collinsons. However, beyond that they argue that paragraph 140(c) does not plead any sufficiently particularised forward-looking claim that goes beyond the agreed scope of the pleaded forward-looking claim set out in paragraph 467. I agree. Paragraph 140(c) appears as part of the Defence (and does not assert a counterclaim). Moreover, the paragraph contains a limited allegation (relating to Collinsons) rather than any general particularised assertion as to what PM impermissibly did following dissolution of the Partnership.

470. Because of the disagreement between the parties on the scope of the Defendants' pleaded forward-looking claim, aspects of the parties' closing submissions proceeded at cross-purposes. The Defendants argued in closing that evidence of PM's continuation of the Partnership's business post-dissolution could be seen in his attempt to secure a supply of LFTs from a company called Getein, rather than Acon. The Defendants also submitted that PM had, post-dissolution, received benefits from selling Hughes Veritas branded tests. While the Claimants stated formally that PM and associated entities had sold no Hughes Veritas branded tests, they did not engage with the detail of the Claimants' factual submissions. In different circumstances, I might have sought to make factual findings on Hughes Veritas and PM's alleged attempts to secure a further supply from Getein even if there were doubts as to whether these allegations formed part of a properly pleaded forward-looking claim. However, I will not do so in this case as I consider I cannot do so without submissions addressing the Claimants' factual assertions.

471. It will now be a matter for Trial 2 to decide how to deal with the Defendants' forward-looking claim summarised in paragraph 467. In particular, while I have made findings as to the fact of NeuroCED's registration of the Hughes Veritas trade mark, and to the fact of some approval being given to Hughes Veritas in the Cayman Islands, I am in no position to decide at Trial 1 what, if any, remedy should flow from those facts. That will need to be considered in Trial 2.

Dishonest assistance claim

472. The Defendants' written closing submissions said nothing about their dishonest assistance claim. The full extent of the Defendants' oral closing submissions consisted of a recital of various asserted facts, for example:

    i) Newfoundland, FM and MH being involved in the manufacture and sale of Hughes Veritas tests.

    ii) OM being involved in an ostensible sale on behalf of Newfoundland when, the sale should have been on behalf of the Partnership.

    iii) NeuroCED's entry into of agreements with ZetaGene.

    iv) NeuroCED applying to register a Hughes Veritas trade mark.

    v) Titanium receiving some of the proceeds of PM's secret share in Newfoundland's profits.

473. These submissions were scanty because, I am sure, the Defendants simply preferred to devote their limited time and resources to other aspects of their claims and defences. However, whatever the reasons, the Defendants' submissions did not explain, by reference to the evidence and cross-examination, why the requisite dishonesty was present. A central element of the claim in dishonest assistance has not, therefore, been made good in closing submissions and the claim fails.

The "knowing receipt" claim

474. The Defendants' written closing submissions said nothing about this claim. Nothing express was said about the claim in oral closings. However, when making submissions

on the "dishonest assistance" aspects of the claim, Ms Hilliard KC occasionally used the expression "knowing assistance" and so I have taken those submissions as intending to refer both to the "dishonest assistance" and the "knowing receipt" claims.

475. However, those submissions still said nothing about the state of knowledge of OM, FM, Newfoundland, MH or NeuroCED against whom the knowing receipt claim was made. Accordingly, a central aspect of the knowing receipt claim has not been made good in closing submissions and that claim fails.

The unlawful means conspiracy claim

476. In written closing submissions, the Defendants submitted that a review of WhatsApp messages passing between the Manduca family demonstrate "as clear as day that the family were all working together". Two particular instances of relatively peripheral behaviour were given.

477. In oral closings, further behaviour was relied upon, for example: PM's alleged "diversion" of leads into Newfoundland, Newfoundland's involvement in that and the setting up of "overseas satellites". However, beyond a reference to alleged behaviour, little more was said about the alleged conspiracy.

478. These submissions did not explain why the participants in the alleged conspiracy should be taken as having an intention to injure JH (a necessary ingredient of the tort – see paragraph 451.ii) above). Of course, I understand that intentions can sometimes be inferred from the nature of actions. However, care is needed before making such an inference given the distinction between an outcome that is an "end in itself", a "means to an end" and a "foreseeable consequence", at [42] and [43] of Lord Hoffmann's speech in *OBG Ltd v Allen*. Before drawing any inference as to the presence or absence of the requisite intention from what OM, FM, Newfoundland and others actually did, I would have required fuller submissions as to precisely what inference I was invited to draw. I could then have heard, in Mr Gourgey KC's reply submissions, argument as to whether the requisite intention had been made out or whether only "foreseeability" had been established.

479. JH's unlawful means conspiracy claim has not been made good in closing submissions and accordingly fails.

DISPOSITION AND POSTSCRIPT

480. I have analysed the various claims and made findings on them. There will need to be a further hearing to determine the form of order and to make directions for Trial 2 and my clerk will be in touch with the parties with a view to fixing that hearing. The time for making an application for permission to appeal (whether to me or the Court of Appeal) will not start to run until conclusion of that further hearing.

481. I handed this judgment down in draft in the usual way and invited the parties to give their typographical and similar suggestions. The Defendants' suggestions included arguments to the effect that I had, in various passages, misunderstood aspects of their case on partnership law and that they were not actually disputing propositions of law that I had treated as controversial. During the trial I had not always found some of the Defendants' submissions on the law straightforward to follow and I asked a number of questions about

the key propositions underpinning their arguments. Indeed, on the evening before the final day of closing submissions, I asked my clerk to send the parties an email summarising four propositions that I understood the Defendants to be advancing. The Defendants accepted those propositions to represent a correct distillation of their arguments.

482. I consider that this judgment addresses the Defendants' arguments as I understood them to be advanced in closing. In the light of the Defendants' suggestion to the contrary, I asked for the Claimants' views on whether I had, in the passages to which the Defendants referred, correctly summarised the arguments to which the Claimants thought they were responding. The Claimants confirmed that my understanding of the Defendants' arguments chimed with theirs. In those circumstances, I have not made any material changes to the passages that the Defendants identified as compared with the draft judgment I circulated.

APPENDIX – SUMMARY OF THE VARIOUS CLAIMS

Claimants' claims

Claim by	Claim against	Cause of action
PM	JH	Failure to account/ breach of trust contrary to 29 and 42 of PA 1890 including: - Danish deal (43 million tests) - Sales to UK Wholesales, Boots, PFW Labels, Waitrose, Amazon, Hillside Hand Dryers and Backyard Cinema - All sales generated by the Hughes Healthcare website and the Hughes Healthcare telephone number
Titanium PH	HGL	HGL has permitted use of Partnership emails for use not of Partnership but of business as continued by JH and LB. (This represents a scaled down version of an originally wider breach of trust claim against HGL).
Titanium PM	MSDL JH LB	Knowing receipt in relation to JH's breach of trust: - MSDL's receipt of trust assets from carrying on the Business - John Hughes and Lyn Hughes benefiting from increase in value of HGL and MSDL
Titanium, PM	JH, LB	Accessory liability: - JH procured HGL's breaches of trust - LB dishonestly assisted JH's breach of fiduciary duties
Titanium, PM	JH, HGL, MSDL, LB	Unlawful means conspiracy
Titanium	JH	Breach of the SHA – focusing on failure to transfer the Acon claim pursuant to clause 4.3
Newfoundland	various	Newfoundland's claims are no longer pursued.

Defendants' claims

Claim by	Claim against	Cause of action
JH	PM	Breach of fiduciary duty/failure to account under s29 of PA 1890 including - Having a secret interest in Newfoundland prior to the Partnership's dissolution - Diverting opportunities away from the Partnership and making sales post dissolution to customers that were diverted - Registration of Hughes Veritas trade mark in NeuroCED - Authorisation of Hughes Veritas in the Cayman Islands

JH	Titanium, OM, FM, Newfoundland, MH, NeuroCED	Dishonest assistance in PM's breach of fiduciary duties/failure to account above.
JH	Titanium, OM, FM, Newfoundland, MH, NeuroCED	Knowing receipt of Partnership assets as a result of PM's breach of trust/failure to account
JH	Titanium, OM, FM, Newfoundland, MH, NeuroCED	Unlawful means conspiracy