See paras. 88, 89

Case No: HC09C02679

Neutral Citation Number: [2010] EWHC 1743 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 July 2010

Before :

THE HON MR JUSTICE ROTH

- -

Between :

ROBERT ANDREW JONES	**Claimant**
- and -	
RICOH UK LIMITED	**Defendant**

- -
- -

Stephen Males QC (instructed by **Stevens & Bolton LLP**) for the **Claimant**
Charles Hollander QC (instructed by **Taylor Wessing LLP**) for the **Defendant**

Hearing dates: 28 and 29 April 2010

- -

Judgment

Mr Justice Roth :

1. There are before the court applications by the Defendant ("Ricoh") for summary judgment and by the Claimant, Mr Robert Jones, for permission to amend his Particulars of Claim. It is common ground that the amendment should be allowed if it would state an arguable claim, and that Ricoh's application should accordingly be approached on the basis of the pleadings as it is proposed they be amended.

The Parties

2. Mr Jones was the founder, principal shareholder and managing director of CMP Group Limited ("CMP").[1] CMP went into voluntary liquidation on 8 June 2009, and Mr Jones brings this claim as assignee of the causes of action that vested in CMP. CMP was incorporated in 1994. Its business was to provide assistance to companies in the acquisition and management of their photocopying equipment and operations. In particular, CMP dealt with large corporate clients which had several autonomous operating companies or divisions, offering them centralised and more efficient management of their photocopying and related requirements so as to achieve costs savings. Over time, CMP became concerned not only with photocopiers but also with so-called multi-functional office automation devices ("MFDs") which could in addition print, scan and fax.

3. In his evidence, Mr Jones explains that on dealing with a new client, CMP at the outset ascertained how much it had been paying for devices up to that point, and then the remuneration received by CMP would be 50% of any costs savings achieved by the client against that benchmark. CMP also received commissions (which were disclosed to the client) from finance companies that funded the client's acquisitions and the service companies that were retained to service the equipment once installed. CMP acquired as clients a number of large international or foreign companies, including ABB, DHL, Mercedes-Benz and, most significantly for the present case, ADtranz, a global rail systems and signalling manufacturer which became CMP's major client.

4. CMP negotiated on behalf of its clients with manufacturers of MFDs and ongoing service providers (usually also the manufacturer) and leasing organisations to obtain the best terms and provide for the smooth delivery, installation and servicing of the devices at the clients' premises.

5. Ricoh is an indirect subsidiary carrying on business in the United Kingdom of Ricoh Company Limited of Japan ("Ricoh Japan"), one of the world's leading manufacturers of MFDs. Ricoh Japan has some 157 such subsidiaries operating around the world. Ricoh describes its competitors in the UK market as including the other leading global manufacturers, such as Toshiba, Xerox, Konica, Samsung and Canon.

The relationship between CMP and Ricoh

6. CMP's relationship with Ricoh began in late 1994 and the first supply by Ricoh of devices arranged by CMP was in January 1995. Ricoh rapidly became the preferred

[1] Many of the contemporary documents refer to the company as CMP Group *Purchasing* Limited, but neither party suggested that this was significant.

manufacturer recommended or chosen by CMP. Over 90% of the devices that CMP ever recommended for clients were Ricoh devices.

7. In 1998 CMP sent Ricoh an invitation to tender for the supply of devices to its clients. Mr Jones say that the main aim of the tender was to improve on the discount against the manufacturer's recommended retail price that Ricoh was prepared to offer to CMP's clients (which would of course benefit CMP through the 50% saving arrangement: para 3 above). Ricoh responded with a tender dated 12 August 1998 and it is common ground that Ricoh and CMP then entered into a trading agreement to govern the relations between them ("the Trading Agreement"). The Trading Agreement was of unlimited duration, terminable by either party on 90 days' notice. Clauses 3-4 of the Trading Agreement provide:

> "3. The duties of Ricoh:
>
> (i) To provide equipment as required by the customer orders of CMP, see Clause 4(i) at approved prices (see Schedule A of this Agreement). All equipment provided to customers of CMP under the terms of this Agreement shall be new equipment.
>
> (ii) To deliver said equipment within 14 working days of receipt of order.
>
> (iii) To install, train users and service and maintain said equipment in accordance with the Terms and Conditions of approved Service Agreements (see Schedules B and C of this Agreement) at approved service charges (see Schedule D of this Agreement).
>
> (iv) To provide management and billing information data to CMP as required (see Schedules F, G and I of this Agreement
>
> 4. The duties of CMP:
>
> (i) To obtain orders for equipment from its customers at prices approved by Ricoh (see Schedule A of this Agreement). Orders will be placed on official documentation of CMP and orders for Ricoh equipment will be obtained by CMP from its customers where Ricoh equipment is suitable and meets the needs and requirements of CMP's customers. There is no obligation under this Agreement for CMP to recommend that its customers acquire Ricoh equipment.
>
> (ii) To obtain from its customers at the time that equipment is acquired authorised Service Agreements under approved terms and conditions and at approved service charges (see Schedules B, C, D and E of this Agreement)."

8. Although Ricoh asserts that it would sell its equipment to CMP, either directly or to a finance company at CMP's request, and that CMP would resell the devices to its clients or arrange for them to be leased by the finance company, such that Ricoh had no direct contractual relationship with CMP's clients, Mr Jones is emphatic that this is not correct and that the purchases were made, albeit on CMP's advice and at its instigation, direct from Ricoh by CMP's clients. Indeed, he explains that "CMP's business model was based on its independence and the fact that it did not buy or sell devices." Mr Jones says that the only exception was where the client leased the devices, in which case after the final payment to the leasing company, ownership of the device would be transferred to CMP for a nominal sum; CMP would then either continue renting the devices in its own name to the client or sell them to second-hand dealers. However, in every case, the contracts for servicing the devices were between the clients and Ricoh.

9. Mr Jones' account of the contractual arrangements appears to be borne out by clauses 5 and 6(i) of the Trading Agreement, which provide:

> "5. Any orders for equipment or Service Agreement obtained by CMP from its customers under the terms of this Agreement may be rejected by Ricoh on the grounds of credit rating, pricing or conflicts of interest.
>
> 6. Payments:
>
> (i) Equipment orders
>
> At the time orders for equipment are obtained by CMP from its customers CMP will provide Ricoh either:
>
> (a) An official purchase order on CMP documentation from CMP's customer against which Ricoh may invoice that customer for both Ricoh's selling price of equipment to customers of CMP (see Schedule A of this Agreement) and fees payable to CMP.
>
> or
>
> (b) An official purchase order from a leasing company against which Ricoh may invoice that leasing company for Ricoh's selling price of equipment to customers of CMP (see Schedule A of this Agreement).
>
> When equipment orders are obtained by CMP from its customers and equipment is to be acquired on a cash purchase basis as per (a) above the order documentation will be submitted with an invoice from CMP to Ricoh. The invoices will reflect an agreed and stated amount authorised and

> acknowledged by CMP's customer as being the difference between Ricoh's selling price to customers of CMP (see Schedule A of this Agreement) and the net total amount payable by CMP's customers as per CMP's official documentation."

10. Mr Jones states that he became increasingly aware of the importance to CMP of the control of the client relationship and that CMP was vulnerable to being cut out of that relationship by Ricoh, especially as CMP's business was not spread between a range of suppliers. Mr Jones therefore agreed with Mr Marcus I'Anson, Ricoh's then sales director, that their companies should enter into a formal confidentiality agreement. Accordingly, a letter agreement dated 5 February 1999 was concluded and signed by both parties ("the Confidentiality Agreement"), apparently following an initial draft prepared by CMP's then solicitors. The Confidentiality Agreement is relatively short, and since this claim is based on alleged breaches of some of its terms it is necessary to quote from it fairly fully. It is written on the notepaper of Ricoh, addressed to CMP, and reads insofar as material:

> "We write to confirm that we requested you to disclose to us Confidential Information (as defined below) in relation to [CMP's] system for the acquisition of photocopying users and photocopying equipment acquirers ("the System").
>
> For the purpose of this letter "Confidential Information" means documents and information of whatever nature and in whatever form relating to [CMP] or its businesses, business practices, finances, affairs, dealings, clients, suppliers, agents or employees disclosed or otherwise received by any Relevant Person whether before or after the date of this letter directly or indirectly by or from [CMP] or any of its employees, agents or professional advisers but excluding information which at the time of being disclosed or received is within the public domain or which comes into the public domain otherwise than as a result of a breach of the undertakings or other obligations set out or referred to in this letter.
>
> "Relevant Person" means and includes each of us and any company which is or which is associated with:
>
> (i) Ricoh (U.K.) Limited and in each case any of their employees, agents or professional advisors.
>
> …
>
> In consideration of your disclosing Confidential Information to us we hereby undertake to you:
>
> 1. That we will receive the Confidential Information under a duty of confidentiality to you and such information will be held in the strictest of confidence (subject only to the terms of this letter);

> 2. That we will use and procure that the Confidential Information is used only for the purpose of evaluating the purchasing terms available to [CMP] and with a view to entering into an agency agreement with you.
>
> 3. That we will not (except as expressly stated in paragraph 2 above) use the Confidential Information for our own benefit and will procure that it is not used for the benefit of any other person (including without limitation any Relevant Person);
>
> 4. That we will not and will procure that no Relevant Person will without your prior written consent at any time disclose or permit to be disclosed any of the Confidential Information to any other person whatsoever except:
>
> (i) to those of our employees who are required in the course of their duties to receive the same for the purposes of evaluating and/or understanding the purchasing terms available to [CMP].
>
> (ii) to those of our professional advisors requiring the Confidential Information for the same purpose.
>
> on the basis that such employees and advisors are made aware of the provisions of this confidentiality undertaking.
>
> ….
>
> 7. That no approach or contact direct or indirect in connection with or during our discussions or whilst any Confidential Information remains in the possession or under the control of any Relevant Person shall be initiated, accepted or made by or on behalf of any Relevant Person to or with any employee, client or supplier of yours or any government body or regulatory or other authority or to or with any other person who to our knowledge has any actual prospective connection with you without your prior written consent."

11. Notwithstanding the reference to an agency agreement in clause 2, no such further agreement was concluded and the Trading Agreement to which I have referred continued to apply.

Bombardier Transportation

12. As stated above, a major client of CMP was ADtranz. ADtranz became a client in about 1996, when it replaced its current 'fleet' of Xerox devices with Ricoh devices; and in 1999 CMP managed the replacement of those initial Ricoh devices with the first generation Ricoh digital MFDs. In 2000, ADtranz was acquired by the Canadian aerospace group, Bombardier, becoming its transportation arm, known as Bombardier Transportation ("Bombardier"). By that stage, CMP had built up a successful

working relationship with ADtranz's UK management who continued to work for Bombardier.

13. Apparently with the encouragement of its UK management, Bombardier considered extending the UK model of its MFD arrangements to its sites overseas. Bombardier's various national NPR (non-production requirement) procurement managers met monthly at Bombardier's European headquarters in Berlin. Because she was impressed with the work CMP and Ricoh had done, the UK NPR procurement manager, Ms Angela Cartledge, arranged for CMP and Ricoh to make a joint presentation to the NPR procurement committee in Berlin. Accordingly, in May 2003, Mr Jones for CMP together with one of Ricoh's senior managers, Mr James Duckenfield, made a joint presentation in Berlin, highlighting the opportunities for cost reductions for Bombardier through the extension of the UK model to Bombardier's European sites and beyond. Ms Cartledge says in her witness statement:

> "13 The meeting went very well and, after further internal discussions, the NPR procurement committee decided to issue an invitation to tender (ITT) for the supply of MFDs, initially to Bombardier's sites in the UK, Sweden and Germany but with the intention of expanding the scope to Bombardier's other European and global sites.
>
> 14 Bombardier's decision to issue an ITT was, therefore, a direct consequence of the work that CMP and Ricoh had carried out for us in the UK. Had the contract that Bombardier had in the UK with CMP/Ricoh not been working so well, I would not have recommended it to the NPR procurement committee."

14. Bombardier's ITT ("the 2003 ITT") was formally issued on 16 September 2003 by Bombardier Sweden AB, but Ms Cartledge explains that this was purely an administrative arrangement and that she, together with her boss, the NPR procurement director for the UK, were leading the tender process. There is an issue on the evidence as to why Ricoh was sent the ITT. Ms Constantia Smith, Ricoh's legal manager, states that she understands that "Ricoh Belgium" (being the Belgian subsidiary within the Ricoh group) had been supplying equipment to Bombardier in Belgium and that the 2003 ITT was sent to Ricoh's international accounts team based in the Netherlands as a result of the existing relationship between Ricoh Belgium and Bombardier in Belgium. Ms Cartledge disputes that and says that it was because the purpose of the 2003 ITT was to replicate the contract which CMP/Ricoh had pioneered in the UK and the goodwill which this contract had generated within Bombardier. She states (at para 19):

> "The suppliers to whom the 2003 ITT was sent were carefully selected by the NPR procurement committee and Ricoh's inclusion was, I believe, entirely due to its work with CMP in the UK."

It is clear, in any event, that at least from about November 2003, arrangements regarding the 2003 ITT were managed by Bombardier's UK offices.

15. CMP was also sent the 2003 ITT and apparently Bombardier was expecting Ricoh to submit a tender in conjunction with CMP. The deadline for the submission of tenders in response was 15 October 2003.

16. On receipt of the 2003 ITT, Mr Jones contacted Ricoh with a view to discussing a joint response. After various telephone conversations and messages, Mr Jones finally heard from Ricoh on 13 October that it intended to submit a tender without CMP. Mr Jones describes this decision as a great shock, and Ms Cartledge also says that she was shocked by this. Faced with this situation, Mr Jones decided that his company's only alternative was to submit its own tender to secure a place in the bidding process, and then seek to persuade Ricoh to join with CMP in the process thereafter. Accordingly, CMP hastily submitted a bid on 15 October 2003, basing its prices on an estimate of the costs of the devices that it hoped to obtain from Ricoh.

17. On 3 December 2003, CMP was informed by Bombardier that it and Ricoh had been short-listed for the final selection process. However, CMP's efforts to persuade Ricoh to join with it were rejected and as CMP was unsuccessful in sourcing devices from other suppliers so as to fulfil its tender, it wrote to Bombardier on 2 February 2004 stating that it would have to withdraw from the tender process. Bombardier immediately responded offering to give CMP more time to reconsider its position in view of CMP's excellent, "proven performance" on the current UK contract. That enabled CMP to enter into discussions with the UK arm of Toshiba, and resulted in a joint CMP/Toshiba tender to Bombardier. Although Ricoh continued to bid against them, on 30 June 2004 CMP and Toshiba learnt that their bid had been successful, subject to detailed contractual terms being agreed. After prolonged negotiation, a Master Print Services Agreement ("the Toshiba MPS Agreement") was finally entered into between Toshiba and Bombardier Transportation GmbH on 9 June 2005, and CMP concluded a separate commission agreement with Toshiba.

18. Implementation of the Toshiba MPS Agreement proved a failure. In particular, during a routine testing of the Toshiba MFDs in April 2006, it apparently became clear that there were significant compatibility issues between the Toshiba devices and Bombardier's IT systems. Ms Cartledge also suggests that goodwill had already been lost in the process of agreeing detailed specifications and negotiating the documentation which took much longer than anticipated because Toshiba was not the incumbent supplier. In any event, Bombardier never ordered any devices from Toshiba and finally terminated the relationship in December 2006. There followed litigation between CMP and Toshiba, that ultimately settled. Ms Cartledge and her colleagues at Bombardier were told not to order any new MFDs before mid-2008; it appears that this may have been because of a three-year restriction in the Toshiba MPS Agreement.

19. In July 2007, Bombardier issued a further invitation to tender for the supply of MFDs, this time to the whole Bombardier group including Bombardier Aerospace as well as Bombardier Transportation, on a world-wide basis ("the 2007 ITT"). It appears that the tender process was initially organised by or through Bombardier Germany (i.e. the German company within the Bombardier group) and that Ricoh Global Services Europe, which is not a corporate entity but coordinates negotiation on behalf of the Ricoh European companies, handled the tender in the first instance on behalf of the Ricoh group. Canon and HP were among the other manufacturers that submitted tenders.

20. CMP was not involved in that process, but in June 2008 CMP learnt that the Ricoh group had been selected to be Bombardier's global supplier of MFDs. It appears that this contract was placed by Bombardier Transportation GmbH. It is not clear on the evidence which company within the Ricoh group was the other party to the resulting contract, but that is not material for present purposes.

The Claim

21. By his claim, Mr Jones contends that Ricoh was in breach of the Confidentiality Agreement as a result of the submission of tenders to Bombardier in response to the 2003 ITT and the 2007 ITT and also as a result of the supply of MFDs to the Bombardier group after June 2008. Specifically, it is alleged that those actions constitute a breach of (a) clause 7, and (b) clauses 2 and 3.

22. As regards the 2003 ITT, Mr Jones contends that if Ricoh had been unable to bid on its own, or to use "Confidential Information" as protected under the Confidentiality Agreement to prepare such a bid, then it is extremely likely that it would have bid together with CMP, as Bombardier had indeed anticipated. The alternative would have been for Ricoh to turn away from the opportunity of a lucrative contract to continue supplying an existing customer. Further, in that event it is very probable that a CMP/Ricoh joint bid would have been successful, since Bombardier was keen to continue the involvement of CMP, as evidenced by its extending the tender process so that CMP could find an alternative equipment supplier. Indeed, Mr Jones is supported in this regard by the evidence of Ms Cartledge who, as mentioned above, was engaged in the procurement process for Bombardier at the time and who states (para 32):

> "I … believe that a joint CMP/Ricoh bid would certainly have been successful…. [T]he only other bid to which serious consideration was given was Canon, but Canon did not have the proven track record that CMP and Ricoh had. Further, faced with a choice between a joint CMP/Ricoh bid (who after all were the two companies that were chosen to be the final bidders) and a bid from a relatively unknown (at least as far as Bombardier was concerned) supplier, Bombardier would have been bound to choose the former."

23. Mr Jones alleges that if Bombardier had continued to purchase Ricoh devices instead of attempting to switch to Toshiba, the incompatibility problems experienced with the Toshiba equipment would have been avoided and the contract would have been successful both for Ricoh and, of course, for CMP. On that basis, it is alleged that CMP suffered a substantial loss of potential profits. Indeed, it is claimed that once Ricoh/CMP had performed successfully in Europe following an award of a contract after the 2003 ITT, there would have been no need for a subsequent tender process and Bombardier would have therefore decided to obtain its requirements for the whole group from Ricoh/CMP on a worldwide basis.

24. The damages are pleaded on various alternative assumptions at between £4 million and just over £49 million. There may of course be issues of remoteness and quantification that are not germane for present purposes. Mr Males QC, appearing for Mr Jones, also accepted in argument that the Claimant would have to give credit for the recovery under the settlement with Toshiba, that is not currently credited in Mr

Jones' schedule of damages calculations. But that also is not material to Ricoh's summary judgment application.

25. As regards the breaches concerning specifically the 2007 ITT and subsequent supply of devices to Bombardier, Mr Jones seeks to claim (by the proposed amendment) either the price which should reasonably have been paid by Ricoh for release from its obligations (for convenience referred to as *Wrotham Park* damages, after *Wrotham Park Estate Co v Parkside Homes* [1974] 1 WLR 798); or alternatively an account of the profits assessed by reference to the benefit obtained by Ricoh from its appointment as supplier of MFDs to Bombardier as a result of the 2007 ITT. It is not clear on the draft pleading whether the latter claim is only for profits earned by Ricoh (i.e. the defendant) or by the Ricoh group as a whole. The amendment also seeks to claim *Wrotham Park* damages as an alternative ground of recovery for the breaches concerning the 2003 ITT.

The Present Application

26. By its application for summary judgment, Ricoh contends in essence that:

    i) Clause 7 of the Confidentiality Agreement is contrary to Article 101 TFEU (formerly Article 81 EU) and/or in unreasonable restraint of trade and therefore unenforceable;

    ii) As regards the 2003 ITT, even assuming that Ricoh was in breach (which is denied) of clause 2 and/or 3 of the Confidentiality Agreement, the damages claimed are irrecoverable as a matter of law since Ricoh was under no obligation to submit a joint bid with CMP to Bombardier;

    iii) As regards the 2007 ITT, the alleged breach is fanciful and can be dismissed on the evidence in these summary proceedings. Alternatively, if it cannot be so dismissed, the circumstances of this case do not permit a claim for an account of profits.

Summary Judgment

27. The principles which apply on a defendant's application for summary judgment were conveniently set out by Lewison J in *The Federal Republic of Nigeria v Santolina Investment Corp and ors* [2007] EWHC 437 (Ch) at [4]:

    i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;

    ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];

    iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;

    iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made,

particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63.

I omit Lewison J's seventh principle which relates to a claim of fraud and has no application to the present case.

(i) Clause 7

(a) Interpretation

28. Before considering the application of competition law or the restraint of trade principle, it is necessary to determine the scope of the restriction imposed by clause 7. Thus the first step is the proper construction of the contract.

29. Interpretation of clause 7 of the Confidentiality Agreement involves application of the defined terms, "Confidential Information" and "Relevant Person". "Confidential Information" expressly covers all information relating to CMP or its business practices, finances, dealings and clients that is received from CMP and is not in the public domain. The definition of the "Relevant Person" is extraordinarily wide. It covers not just Ricoh and all associated companies in the world-wide Ricoh group, but also the "employees, agents or professional advisors" of any such company. Moreover, on the contractual language, "Relevant Person" also includes CMP itself ("each of us").

30. The prohibition in clause 7 is expressed to apply so long as "Confidential Information" remains in the possession of any "Relevant Person". Since CMP itself will always be in possession of Confidential Information, on that basis the prohibition lasts for ever. But I accept for present purposes that as a matter of common sense, it cannot have been the intention of the parties to treat "Relevant Person" in clause 7 as covering CMP: indeed, literally it would place Ricoh in breach if CMP contacted any client of CMP without CMP's prior written consent, which is obviously nonsense. Applying the accepted principles of construction of commercial agreements (see per Lord Hoffmann in *ICS v West Bromwich BS* [1998] 1 WLR 896 at 912-913), I shall therefore treat "Relevant Person" as if it did not cover CMP, at least for the purpose of clause 7, despite the definition. Indeed, it appears that there are a number of

instances of sloppy drafting in the Confidentiality Agreement: see, e.g., the mysterious clause 8(i), which is meaningless.

31. Nonetheless, so long as any Confidential Information remains in the possession of Ricoh, the prohibition in clause 7 would place Ricoh in breach of contract if any of the over 150 companies in the Ricoh group made or accepted any approach to or from or any contact with anyone in the following categories (which I refer to for convenience in sub-paragraphs):

    i) any client of CMP; or

    ii) any government body or regulatory or other authority; or

    iii) any other person who to Ricoh's knowledge "has any actual prospective [sic] connection" with CMP.

32. Thus the prohibition as regards (i) is not restricted to persons who were clients of CMP during the currency of CMP's dealing with Ricoh; nor is it limited to clients in respect of whom Ricoh has confidential information regarding CMP's business dealings. Given the breadth of the definition of "Confidential Information", Ricoh would clearly continue to have such information for an extensive period after relations between Ricoh and CMP should come to an end. Hence, if several years after CMP ceased to work with Ricoh, a client of CMP went out to tender for its MFDs, Ricoh would be precluded from participating without CMP's permission. That would apply even if this was a client that CMP had acquired after CMP's relationship with Ricoh had come to an end.

33. Moreover, given that CMP tended to work with larger and often multi-national companies, no other company within the world-wide Ricoh group could then have any contact with such a client. An example was given in argument of Ricoh's Australian subsidiary being approached by DHL in Australia. It may be that companies such as DHL and Mercedes-Benz operate through national subsidiaries so that DHL in Australia would fall outside the prohibition on the basis that CMP's client is DHL's UK subsidiary. But the actual example of Bombardier shows that in a world of centralised procurement on behalf of group companies, the distinction is not so clear; and it is well-known that some companies, for example many banks, operate internationally through a divisional structure rather than through national subsidiaries.

34. The prohibition in (ii) above as regards "any government body or regulatory or other authority" is completely unrestricted. It means that Ricoh would be in breach if any company in the Ricoh group contracts with (or even makes contact with) any such body anywhere in the world. Mr Males was unable to offer any commercial justification for this prohibition.

35. The prohibition in (iii) gave rise to some discussion in the hearing as to whether the clause was supposed to read "actual *or* prospective". Mr Males submitted that it was not, and that the wording deliberately emphasises a real connection that has not yet materialised into a contract. Although it seems to me more likely to be a typographical error, I shall proceed on the basis of the claimant's interpretation for present purposes. Nonetheless, as Mr Hollander QC for Ricoh pointed out, it means that if at some time CMP were to embark on discussions with a potential client, CMP

would need only to write to Ricoh to inform it of this to prevent Ricoh (or any company in the Ricoh group) from having any dealing with that client.

36. Examples could be multiplied, and many more were given in the course of Mr Hollander's submissions. It is of course axiomatic that a contract is to be construed against the circumstances existing at the time it was entered into and not in the light of subsequent events. In particular, CMP was not obliged to deal exclusively with Ricoh: clause 4(i) of the Trading Agreement is expressly to the contrary. Moreover, Ricoh for its part had many customers prior to the start of its relationship with CMP in 1996, and continued thereafter to supply customers who were not clients of CMP. So obviously did all the other trading companies in the Ricoh group. Under what I have referred to as (iii), once CMP was in discussion with such a pre-existing Ricoh customer as an "actual prospective connection", no company in the Ricoh group could seek to deal further with that customer without CMP's permission.

37. For the claimant, Mr Males relied on the principles regarding the construction of clauses alleged to be in restraint of trade as set out in *Chitty on Contracts* (30th ed, 2008), Vol I, para 16-097. I of course accept that such a clause must be construed against its factual background – as indeed must all contractual terms – and that the courts should not readily strike down such clauses on the basis of "mere want of accuracy of expression"[2] or based on a literal application to circumstances that in reality are far-fetched. I have indeed disregarded a literal application of "Relevant Person" to CMP on that basis. I also accept that, although not expressly stated, the restriction in clause 7 should be read as applying as regards only MFDs and not other Ricoh products. Some of the hypothetical examples put forward by Mr Hollander in argument may be regarded as most unlikely to arise in practice. And although it did not form part of Mr Males' argument, I also consider that if the restriction offended against Article 101 TFEU or the restraint of trade doctrine, there may be scope for severance or its equivalent under the approach set out by the Court of Appeal in *Chemidus Wavin v TERI* [1978] 3 CMLR 514: hence restriction (ii) or even (iii) might be disregarded as unenforceable so as to enable consideration of restriction (i) in isolation.

38. Nonetheless, the court will not re-write the contract. Even allowing for a restrictive interpretation and the possibility of severance, it seems to me clear that the prohibition at (i) alone has a very broad reach, unlimited in place, of uncertain and extensive ambit in time, and applying to dealings by Ricoh and its associated companies that are not only plausible but very likely to occur. As I set out in paragraphs 32-33 above, there are many arrangements which clearly fall within that prohibition and which could not possibly involve use of CMP's "Confidential Information" or client connection.

(b) Article 101 TFEU

39. The prohibition of anti-competitive agreements in Article 101 TFEU (formerly Article 81 EC), is as follows:

> "(1) The following shall be prohibited as incompatible with the internal market: all agreements between undertakings,

[2] This expression, quoted in *Chitty*, comes from *Mont v Mills* [1993] IRLR 172.

> decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development, or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
>
> (2) Any agreements or decisions prohibited pursuant to this Article shall be automatically void."

If an agreement, decision by an association of undertakings or concerted practice falls within Article 101(1), then Article 101(3) provides that if the conditions there set out are satisfied, the prohibition will not apply.

40. It is not disputed that the restriction in clause 7 may affect trade between EU Member States. Indeed, the very application of the restriction on which Mr Jones bases his claim is Ricoh's response to the 2003 ITT which covered supply of MFDs to Bombardier sites initially in Sweden and Germany as well as the United Kingdom, and eventually throughout Europe. As for the 2007 ITT, it was issued by Bombardier in Berlin and concerned Bombardier on a global basis, obviously therefore including the EU.

41. The prohibition in Article 101(1) is disjunctive in its application to agreements that have the specified object *or* effect. Mr Hollander submits that this is an "object" case: it is clear that clause 7 is deliberately designed to limit competition for customers as between Ricoh and CMP. In my view, the position is not quite so simple: for example, the typical vendor covenant on the sale of a business not to supply goods of the same type for a period is literally a restriction on competition with the purchaser, but it may be necessary for the transfer of the business to be achieved; and where it is so limited in scope and duration it is not regarded as a restriction of competition at all and so falls outside Article 101(1): Case 42/84 *Remia v Commission* [1985] ECR 2545. But equally, it is well-established that the question of what is the "object" of an agreement is to be ascertained on an objective assessment of the aims of the agreement in question and does not depend on the parties' subjective intentions.

42. Here, the object might at first sight appear to be to protect CMP's confidential information that was being disclosed to Ricoh as part of their cooperative relationship. But it is manifest from the analysis above that even the restriction I have referred to as (i) in clause 7, on any objective interpretation, goes very far beyond any possible view of what could be needed for that purpose. In its range and scope, it is a naked restriction on any of the more than 150 Ricoh companies dealing with or seeking to deal with a client of CMP, whenever that client was acquired for so long as Ricoh has any of the wide category of "Confidential Information". Although the context of the Confidentiality Agreement is not one which is normally held to give rise to an agreement regarded as anti-competitive by object, in my judgment this agreement exceptionally comes within that category.

43. If I am wrong about that, then although that did not form part of Mr Hollander's argument, I consider alternatively that it is clearly an agreement that is anti-competitive in effect. The Ricoh group is one of the world's major manufacturers and suppliers of MFDs. As regards the 2003 ITT, Ms Cartledge explains that the only serious rival to Ricoh and CMP in the initial bidding process was Canon; and in the end the contract was awarded to Toshiba in conjunction with CMP. As regards the 2007 ITT, this was for a major contract for the supply to Bombardier entities world-wide and, according to Ms Smith, Ricoh's principal rivals were Canon and HP. The facts of this case alone therefore demonstrate that if clause 7 were enforceable, an international group like Bombardier in its centralised procurement would be precluded from receiving a competitive bid from one of the world's leading suppliers of MFDs whereas other major suppliers such as Canon could take part. Accordingly, whatever the precise definition of the relevant market, it seems to me that this provision has the potential effect of appreciably restricting competition. This conclusion is, in my judgment, so clear on the undisputed facts that I see no basis on which further evidence at trial could lead to a different conclusion.

44. Accordingly, I find that Article 101(1) applies to clause 7. However, Mr Jones argues that it falls within the scope of the block exemption for vertical agreements, Commission Regulation 2790/1999. On that basis, it is granted exemption under Article 101(3) and the prohibition in Article 101(1) and voidness under Article 101(2) do not apply.

45. Regulation 2790/1999 applies, as its title states, to vertical agreements. The scope of the block exemption is defined in Article 2(1) [substituting the new Treaty numbering]:

> "Pursuant to Article [101(3)] of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article [101(1)] shall not apply to agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services ('vertical agreements')."

46. Here, CMP on its case was not purchasing devices from Ricoh, but assisting its clients in their procurement of such devices from Ricoh. For that purpose, CMP agreed with Ricoh advantageous purchasing terms, but those purchases were made by CMP's

clients, as explained by Mr Jones and evidenced by the Trading Agreement. The Confidentiality Agreement was of course entered into in the context of the Trading Agreement which continued to apply. Accordingly, I find that for the purpose of the Confidentiality Agreement, Ricoh and CMP were not operating "at a different level of the … distribution chain." CMP was not acting as Ricoh's distributor, or as a re-seller. I appreciate Ms Smith of Ricoh states that CMP was purchasing the devices, but as explained above, Mr Jones strongly disputes that and I do not see that he can rely on the block exemption as covering the Confidentiality Agreement on a basis that is directly inconsistent with his own evidence.

47. In his written skeleton argument, Mr Males submitted in the alternative that the Confidentiality Agreement is entitled to individual exemption under Article 101(3). However, no reasoning is set out in support of that submission and it was not pursued in oral argument. I consider it manifestly unsustainable: there is no basis on which a restriction of this scope could fulfil the conditions set out in Article 101(3).

48. It follows that the restriction in clause 7 is void and unenforceable as a matter of EU competition law. As both the 2003 ITT and the 2007 ITT sought offers to supply Bombardier that included countries in the EU, as part of a centralised procurement, and as the claim is brought as regards Ricoh's responses to those invitations to tender, there is no scope for reliance on clause 7 in this action in respect of potential dealings by Ricoh with customers wholly outside the EU, in respect of which Article 101 arguably might not apply.

49. In the light of that, it is not necessary to consider separately the domestic law of restraint of trade. In any event, once EU competition law applies and either strikes down or permits the restriction involved, the court is not permitted to reach a different result as regards the application of a restriction to trade between EU Member States under the domestic law of restraint of trade: Article 3(2) of Regulation 1/2003, and see *Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd* [2004] EWHC 44 (Comm), [2004] UKCLR 384, at [265]-[266].

(ii) Clause 2 and 3

50. Mr Jones claims that Ricoh breached the obligations in these provisions regarding the use of "Confidential Information" in responding to both the 2003 ITT and the 2007 ITT. For Ricoh, it is not said for present purposes that these contractual clauses infringe competition law, although Ricoh reserves its position in that regard. The grounds on which Ricoh seeks summary judgment in respect of this part of Mr Jones' case differ as between the 2003 ITT and the 2007 ITT, so it is necessary to consider them separately.

(a) <u>The 2003 ITT</u>

51. Mr Jones alleges that Ricoh had extensive information falling within the category of "Confidential Information" that would have been of considerable value in preparing its tender to Bombardier and which it almost inevitably will have used. That allegation is significantly supported by the evidence of Ms Cartledge, who was of course at the time working at Bombardier on the other side of the tender process. She states that Ricoh had extensive confidential information about Bombardier's

document production requirements "which was simply not available to the other bidders, such as:

> (a) the precise usage levels of all of the devices used by Bombardier in the UK;
>
> (b) the average "down time" for devices on the Bombardier network;
>
> (c) the servicing/maintenance requirements for the devices;
>
> (d) Bombardier's financial position, including how quickly it paid its invoices etc; and
>
> (e) what the cost of terminating Bombardier's existing document production contracts would be."

52. Ms Cartledge states that this information would have been very useful to Ricoh as it would have enabled it to estimate very accurately its likely costs and revenues from a successful tender, and thus to price its bid as competitively as possible.

53. Notwithstanding any alleged use of protected information, Ricoh's response to the 2003 ITT was unsuccessful and it did not then obtain the Bombardier contract. As set out above, Mr Jones' case is that if Ricoh had adhered to its contractual obligations, it would have submitted a joint tender with CMP, and that such a joint tender would in all probability have been successful. In support of the first part of that proposition, it is submitted that Ricoh could not realistically have prepared a tender without using its knowledge of Bombardier that came within the category of "Confidential Information" (and in any event it would have been foolish to deny itself that commercial advantage); and that in its own commercial interests it would have wished to continue and expand its sales to a large customer (as evidenced by the fact that Ricoh did submit a tender). And in support of the second part of that proposition, there is the evidence of Ms Cartledge: see paragraph 22 above.

54. For the purposes of this summary application, Ricoh accepted that the allegation that it was in breach of clauses 2 and/or 3 could not be rejected. However, it sought to argue that, even assuming that it had in fact used "Confidential Information" for its tender, if it had instead adhered to the contract it would nevertheless have submitted a tender without CMP but taken care to avoid using such information. It is of course possible that Ricoh would have set up a "Chinese wall" for that purpose, but that is not something which can be determined on a summary hearing. I need only decide whether the submission that Ricoh would probably have bid together with CMP can be dismissed as fanciful. In my judgment, it clearly cannot be so dismissed. On the contrary, it seems to me strongly arguable that Ricoh would have considered that a joint bid using the information which it had about Bombardier was in its best interests, and I note that this is indeed what Bombardier was expecting.

55. However, Ricoh's main ground of its application for summary judgment was based on a quite different line of argument, namely that the resulting loss which it is claimed CMP had suffered is irrecoverable as a matter of law. As stated in the skeleton

argument of Mr Hollander, in a formulation derived from Scrutton LJ in *Abrahams v Herbert Reiach Ltd* [1922] 1 KB 477, 482: "The law of damages provides that the defendant is not liable for not doing that which he is not bound to do". Hence it is submitted that a claimant seeking damages cannot seek to recover on the basis of conduct of the defendant that goes beyond the scope of its contractual duty, even when it is probable that the defendant would have acted in that way. Here, Ricoh was under no obligation to submit a joint bid with CMP. There would have been no breach of contract if Ricoh had decided not to respond to the 2003 ITT at all. Accordingly, damages cannot be claimed on the basis alleged.

56. The principle involved is often referred to as the "minimum performance" or "least onerous obligation" rule. The latter expression is adopted in *McGregor on Damages* (18th edn, 2009), para 8-093, where it is stated as follows:

> "The principle is that where the defendant has the option of performing a contract in alternative ways, damages for breach by him must be assessed on the assumption that he will perform it in the way most beneficial to himself and not in the way most beneficial to the claimant."

57. Despite this reference to alternative means of performance, the principle operates to confine the damages to the minimum performance, so as to exclude recovery for potential but non-contractual benefits. That is shown by the leading case of *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278, where on a claim for breach of an employment contract, the majority of the Court of Appeal held (Lord Denning MR dissenting) that the wrongfully dismissed employee could recover only his salary for the period for which he would have been employed and not an additional sum on account of the increase in salary that he would probably have received but which his employers were not contractually bound to pay.

58. In advancing this argument for Ricoh, Mr Hollander relied strongly on the decision of the Court of Appeal in *Mulvenna v Royal Bank of Scotland PLC* [2003] EWCA Civ 1112. The facts of *Mulvenna* appear to be that the claimant ("TM") had banking arrangements with the defendant bank, and alleged that under a refinancing agreement reached in 1995 the bank agreed to refund to his current account various excess interest and other charges which had been raised. In breach of that agreement, the correct amount was not refunded until 1998. TM's case was that if the refund had been made as agreed, then because of his resulting lower overdraft the bank would have returned him to normal mainstream banking arrangements and, in particular, would (as it had agreed in principle) extend to him a facility of £500,000 for the purpose of a specific property development which they had discussed. On that basis, TM claimed as damages for breach of the agreement the profits which would have been earned on that development and which were lost when TM had to sell the undeveloped property for lack of funding.

59. As Waller LJ observed, the chain of causation depended upon the bank being prepared to do things in relation to which it had no contractual obligation. After setting out the formulation of the principle in *McGregor* quoted above, Waller LJ continued (at [13]):

> "One question is exactly what that principle means – does it mean that for the purposes of assessing damages a contract breaker is entitled to insist on having been entitled to perform in a way which would have been contrary to his commercial interests during the currency of the contract? Is the principle confined to cases where post breach or repudiation a contract breaker can insist that he would have only done that which he was contractually bound to do? How does the principle apply to a situation in which it is not the actual breach of contract in relation to which damages are being assessed to which the principle is being applied, but to the possible consequences for example of a past breach?"

60. After quoting from the judgments of Diplock and Russell LJJ in *Lavarack v Woods* and referring to various cases discussed in the then current edition of *McGregor*, Waller LJ continued (at [19]):

> "My view is that the principle is concerned with assessing damages, and the benefit which the principle has in mind is a benefit which a defendant is entitled to look to for that purpose without regard to whether if the contract was actually being performed that is the way it would have been operated. In *Spiliada* if the contract were being performed the charter[er]s would not actually have used all the lay time available; in *Withers* it would have been in the commercial interest of the employer to put the actor in the most famous theatre and he would probably have done so for at least some of the period of employment. But in the assessment of damages the defendant has the benefit of not being obliged contractually to do these things. However a contract breaker cannot go outside the four walls of the contract. To do what the distributor in *Paula Lee* was trying to do would have been to do that. "

Since the bank was not contractually bound to extend the facility to TM, Waller LJ concluded (at [22]):

> "The Bank are thus entitled on the basis of the above principle to insist on damages being assessed on the basis of the contract they made as opposed to the contract TM suggests he had a chance of persuading them to make."

61. Carnwath LJ agreed with Waller LJ, but Sir Anthony Evans, while agreeing in the result, expressed himself somewhat differently. After referring to the rule of law that was the basis of the judgment in *Lavarack v Woods*¸ Sir Anthony Evans said (at [34]-[36]):

> "The rule is that in assessing damages it is assumed that the defendant would have performed the contract in the manner most beneficial to himself: *McGregor on Damages* (16th ed.) para.386. It was held in *Lavarack* that the rule applies even when as a matter of probability or of chance (per Lord Denning

> MR in his dissenting judgment) the defendant would have behaved outside his contractual obligations in a way that benefited the claimant. However, the rule has exceptions. It will not be assumed that the defendant would have cut off his nose to spite his face (per Diplock LJ). Sometimes the facts will show that the interests of third parties were also involved (*Bold v. Brough, Nicholson and Hall* [1964] 1 WLR 201.
>
> It may be that the rule would not apply in the present case, if the claimant were able to prove not merely that the defendants would have provided further finance for the properties, but also that it would have been in the defendant's own interest to do so. It would have meant that the developments could be completed and the properties sold, so enabling them to realise their existing investments and earn further profits, for themselves as well as for the claimant. The defendants are a public company, and it seems remarkable that a rule of law should require the courts to assume that they would not have acted in the best interests of themselves and their shareholders, when assessing the damages for which they are liable as contract breakers.
>
> If these further facts were clearly alleged by the claimant, and if there was any realistic chance of their being proved in this case, it would be wrong, in my judgment, to dismiss the action at this stage. However, neither of these conditions is satisfied."

Mulvanna, like the present case, concerned a defendant's summary judgment application.

62. The operation of this principle has recently received detailed consideration by the Court of Appeal in *Durham Tees Valley Airport Ltd v bmibaby Ltd* [2010] EWCA Civ 485, in a judgment delivered after the present case was argued before me and on which I received brief and helpful written submissions from Counsel. In that case, the claimant airport owner sued for breach of an agreement with the defendant airline after the defendant withdrew from operations at the airport. The agreement was found to impose an obligation on the defendant to establish a two aircraft operation at the airport and to operate the aircraft, in the sense of flying them commercially, for a period of 10 years. The airport claimed damages for loss of income, first in respect of charges payable per departing passenger; and secondly, from duty-free and other sales in the airport terminal and from catering and parking receipts. Accordingly, both types of income fell to be assessed on the basis of the number of passengers who would have used the airport but for the repudiation of the contract; and that in turn depended on the number of flights the defendant would have operated. Since there was no minimum performance obligation specified in the agreement, this was a matter for the defendant airline. That therefore raised the question of the basis on which damages for breach were to be assessed, on which both Patten and Toulson LJJ gave detailed judgments (with both of which judgments Mummery LJ agreed).

63. After stating that the established measure of damages for breach of contract is the sum necessary to put the injured party in the same position he would have been in had he not sustained the wrong, Patten LJ noted that the inquiry therefore is directed at "what

the party in breach is to have been taken to have done had he in fact performed the contract"; and he observed that in all cases of repudiation this will be a "counter-factual assessment." Referring to the principle that the party in breach should be taken for this purpose not to have done more than the contract requires of him, Patten LJ continued (at [64]):

> "Most of the cases are concerned with defining the limits of this principle. It is one which is capable of operating or being satisfied at a number of different levels. Most obviously it would exclude an assessment of the value of the contract to the innocent party which was conducted by reference to benefits which were themselves extra-contractual. An example of this would be the payment of discretionary bonuses to an employee or contractor where the contract makes no provision for them. This was considered by the Court of Appeal in *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278 which I shall come to shortly. But the principle could also be engaged to require the court to assume that the defaulting party would, as between two or more alternative methods of contractual performance, have opted for the one least onerous to himself. Similarly it might be said that, where the contract does not stipulate alternative methods of performance but requires the defaulting party (for example) to purchase goods above a stated minimum quantity, damages should be assessed by reference to the minimum level of lawful performance thereby disregarding the possibility (even, in some cases, the probability) that had the contract in fact been performed, a larger number of the goods would have been purchased. The question in cases of this kind is whether the argument or principle that a claimant should not receive damages for something which the defendant was not, strictly speaking, required to do should displace or limit the court's factual inquiry as to what, in the circumstances (bar the repudiation), the defendant would in fact have done."

64. Patten LJ proceeded to analyse closely the judgments of the three members of the Court of Appeal in *Abrahams v Reiach*, which was also a case of a single obligation without a specified level of performance (a contract to publish a book and pay the plaintiffs a royalty, without specifying the number of copies to be printed or the price). Patten LJ noted that the approach of Scrutton LJ was significantly narrower than those of Bankes and Atkin LJJ, and he concluded (at [69]):

> "There was clearly a consensus between the members of the court that, in relation to alternative methods of performance, the claimant will be unable to rely upon the defendant performing the contract in the more onerous of the two or more ways permitted. But that was not the type of contract under consideration in *Abrahams* and it is not the type of contract which we have to deal with in this case. Where there is only a single obligation to be performed it is clear that the majority view was that an assessment of damages should not, as a matter

> of law, be limited strictly to what was the minimum level of performance permitted under the contract but should extend to a calculation of how the contract would have been performed at the relevant time had it not been repudiated. This will take into account the likely profitability of the contract and any other relevant facts that would have influenced the method of performance. "

65. Patten LJ then considered *Lavarack v Woods* (para 57 above), which he contrasted with the more recent judgment of the Court of Appeal in *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ 1287, [2005] ICR 402, where the employee was entitled to a bonus as a term of his contract, albeit that the amount of the bonus was discretionary. Since in the latter case it was held that employer was bound to perform this obligation in a reasonable and bona fide manner, even a strict principle of minimum performance required a reasonable bonus to be paid: this is therefore a question of the interpretation of the scope of the contractual obligation (including any implied term). The decision of Mustill J in *Paula Lee Ltd v Robert Zehil Ltd* [1983] 2 All ER 390 could be similarly explained (contract to purchase not less than 16,000 garments each season: construed to require that garments would be selected in a reasonable manner and not just the cheapest from each range; damages for wrongful repudiation to be assessed accordingly). And the decision of the Court of Appeal in *The "World Navigator"* [1991] 2 Lloyd's Rep 23, was an application of the least onerous obligation rule where the defendant had alternative means of performing the contract (right of the sellers to use the full contractual period of laytime when deciding at what rate to load a vessel).

66. Patten LJ therefore concluded (at [79]):

> "None of the cases I have referred to has or could have questioned the principle laid down by the majority of the Court of Appeal in *Abrahams* which is set out most clearly in the judgment of Atkin LJ. The court, in my view, has to conduct a factual inquiry as to how the contract would have been performed had it not been repudiated. Its performance is the only counter-factual assumption in the exercise. On the basis of that premise, the court has to look at the relevant economic and other surrounding circumstances to decide on the level of performance which the defendant would have adopted. The judge conducting the assessment must assume that the defendant would not have acted outside the terms of the contract and would have performed it in his own interests having regard to the relevant factors prevailing at the time. But the court is not required to make assumptions that the defaulting party would have acted uncommercially merely in order to spite the claimant. To that extent, the parties are to be assumed to have acted in good faith although with their own commercial interests very much in mind."

67. Toulson LJ agreed with Patten LJ's judgment, and observed that on this issue it is not easy to reconcile the dicta in the various cases. Noting that there was a wide range of

permutations which may affect the right way to assess damages, he set out and considered four categories.

1. The contract requires the defendant to do X or Y.

2. The contract requires the defendant, if he has not done X, to do Y.

3. The contract requires D to do X and the claimant has a reasonable expectation that he will do Y.

4. The contract requires the defendant to do X and allows him a discretion how he performs the obligation.

68. It is a question of construction of the contract to determine into which category it falls. In a category (1) case, the court will assume that the defendant will take the course that is least beneficial to the claimant, although Toulson LJ observes that the rule is sometimes expressed in terms of the course which is most beneficial to the defendant, which is not necessarily the same thing: [97]-[111]. In a category (2) case, the damages are assessed on the basis of the non-performance of Y: [111]-[112]. The approach for a category (3) case is illustrated by the contrasting decisions of *Lavarack v Woods* and *Cantor v Horkulak.* There, the boundary of the defendant's contractual obligations is critical. If Y is truly outside the scope of the contractual requirement, the claimant can recover only for loss of X. But Toulson LJ referred (at [117]) to Diplock LJ's qualification in *Lavarack* that:

> "events extraneous to the contract, upon the occurrence of which the legal obligations of the defendant to the plaintiff are dependant, may include events which are within the control of the defendant: for example, continuing to carry on business even though he has not assumed by his contract a direct legal obligation to the plaintiff to do so. Where this is so, [Diplock LJ] said that the court will not assume that he will "cut off his nose to spite his face and so control these events as to reduce his legal obligations to the plaintiff by incurring greater loss in other respects". That would not be the mode of performing the contract which is 'the least burthensome to the defendant'."

69. For a category (4) case, the leading authority is *Abrahams v Reiach.* Toulson LJ found no difference between the approach of Bankes LJ and of Atkin LJ, but their approach was different from that of Scrutton LJ. And he followed the analysis of that case by Lord Denning in *Lavarack* "as authority for the proposition that where a contract imposes a single obligation, rather than alternative obligations, compensation is to be based on the probabilities of the case – on the remuneration which the claimant might reasonably be expected to receive – and not on the bare minimum necessary to have amounted to performance of the contract" [131]. Toulson LJ continued:

> "There is good practical reason for this. Where a contract imposes alternative obligations the contract itself will identify them. But where there is a single obligation expressed in broad

> terms, it may be conceptually very difficult to identify as a theoretical exercise what would have been a minimum performance level, as *Abrahams v Reiach* demonstrated. In that case the damages of £100 which the Court of Appeal considered appropriate would have been equivalent to the royalties on 6,000 copies. Would the printing of 6,000 copies have been a minimum contractual performance? If so, why? Why not 5,500 or 5,000? The questions are impossible to answer and it is notable, as I have said, that although Scrutton LJ stated that he considered what was the minimum number which would constitute a contractual performance, he did not state his conclusion or reasoning. It would be more possible, as the majority did, to make a broad brush assessment of the number of copies which the publishers would have been likely to print having regard to the potential saleability of the book. For that reason, the approach of Atkin and Bankes LJ affords a more practical and realistic way of assessing the true loss suffered by the breach. Indeed, the logic of the publishers' argument, as their counsel submitted, was that the authors should have recovered only nominal damages. This would not have done justice. "

70. Accordingly, the correct method of assessment in a category (4) case is not to ask how the defendant could have acted in a way involving the least obligation to the claimant, but to make a reasonable computation of the amount which the claimant would have received, taking into account all the surrounding circumstances, as to which Toulson LJ expressly adopted para [79] of Patten LJ's judgment.

71. Although not referred to by the Court of Appeal in *Durham Tees Valley Airport*, I note that the opinion of the Privy Council in *Lion Nathan Ltd v C-C Bottlers Ltd* [1996] 1 WLR 1438, delivered by Lord Hoffmann, adopts the same approach to what is a category (4) case, distinguishing *Lavarack* and *Paula Lee*: see at 1446D-1447A.

72. Both sides in the present case submitted that *Durham Tees Valley Airport* supports their position. It is common ground that the present is not a case of alternative means of contractual performance, nor is it a case of a single obligation where the defendant has a discretion as to how that would be performed. Mr Hollander contends that this is a category (3) case and that damages cannot be recovered for the expectation as to how Ricoh would have behaved in a manner that was not contractually required. Mr Males refers to the qualification that Toulson LJ applies to a category (3) case, and relies in any event on the analysis of Patten LJ (with whom Toulson LJ concurred) as setting out the basic principles; both judgments, he submits, are consistent with the approach of Sir Anthony Evans in *Malvenna.*

73. Mr Hollander submitted that the observations of Sir Anthony Evans in *Malvenna*, on which Mr Males relies, should be disregarded as a dissenting judgment. I do not accept that: although it was clearly a minority judgment, it was agreeing in the result and these observations were *obiter*. The judgment of Waller LJ did not address the eventuality considered by Sir Anthony Evans because it did not arise on the facts. *Malvenna* was not discussed by the Court of Appeal in *Durham Tees Valley Airport*, where apparently it was not cited. But the issue in *Malvenna* was one of reasonable

expectation of a further benefit beyond the positive obligation in the contract, since the contractual obligation breached by the bank was to provide a refund, and the grant of an extended borrowing facility was not part of the contract but something which TM alleged would probably have ensued. In my view, that comes squarely within Toulson LJ's category (3) and does not affect the manner of performing a contractual obligation. Accordingly, I consider that *Durham Tees Valley Airport* is now binding authority on me to reject Sir Anthony Evans' approach to such a case.

74. However, in my judgment, that is not determinative of the present case. The fundamental question, as the judgments in *Durham Tees Valley Airport* emphasise, is to place the injured party in as good a position as he would have been in had the contract not been breached. As Patten LJ observed, this involves a counter-factual assessment. In that regard, there is in my view a basic distinction between cases involving the breach of a positive obligation and cases involving the breach of a negative obligation. Where a contract is repudiated that required the defendant to perform a positive obligation (i.e. to confer a benefit on the claimant), the value of that benefit that has not been (or will not be) received establishes the measure of the claimant's loss. The scope of the benefit is determined by the contract, properly analysed, and the claimant cannot also seek to recover a further benefit which goes beyond the contractual obligation (such as a potential increased salary in *Lavarack*; or a potential extended borrowing facility in *Malvenna*). Where the level or degree of benefit depends upon the manner in which defendant would perform his positive obligation (and if the contract does not expressly give the defendant alternatives), it is assessed on the basis of the way in which the defendant would probably have performed it (as with the obligation to publish the book in *Abrahams v Reiach*; or to operate two aircraft from the airport in *Durham Tees Valley Airport*). But none of this addresses the issue of how damages are to be assessed in the very different case of breach of a negative obligation. There, the court is not concerned with determining a benefit which the defendant should have provided. The counter-factual is the case where the defendant would <u>not</u> have done what he did do. The focus of inquiry is accordingly on the loss that has been caused by the defendant acting as he did, not on the benefit that would have been provided if the defendant had acted as he should have done.

75. Hence in the present case, applying the established measure of damages, analysis of the loss caused by breach of the obligation under the Confidentiality Agreement that Ricoh would not use the "Confidential Information" for its own purposes can be approached only on the basis of considering what use has been made by Ricoh of the protected information; and then asking what would have happened as regards CMP's business if it had not been so used (i.e. the counter-factual). That analysis, it seems to me, can be conducted only on the basis of the balance of probabilities. It would be artificial to exclude from that analysis the probable conduct of Ricoh, on whom the business of CMP at the time was very dependent. And I consider that it would be still more artificial if the court had to leave out of account conduct by Ricoh that is plausibly alleged to have been in its own commercial interests, and to assume that it would have, to adopt the expression used by Diplock LJ in *Lavarack*, cut off its nose to spite its face. Put another way, I can see no reason in principle or on authority why the court should not, following the language of Patten LJ in *Durham Tees Valley Airport*, assume that the parties would have "acted in good faith although with their own commercial interests very much in mind".

76. Thus the damages are not being claimed, as Ricoh sought to argue, for its failure to do something which it was not obliged to do. Clearly, Ricoh was under no obligation to bid jointly with CMP in response to Bombardier's 2003 ITT. The damages are sought for the loss allegedly caused to CMP by Ricoh's decision to use "Confidential Information" to bid alone, which loss can be assessed only on the basis of what on the balance of probabilities would have happened had Ricoh not so decided.

77. As already indicated, I see nothing in *Durham Tees Valley Airport* that is inconsistent with this approach. Toulson LJ expressly recognises that his taxonomy of contractual permutations is not comprehensive, and it clearly does not include negative obligations. By contrast, the approach in the case of a negative obligation was considered by Bingham LJ *Walford v Miles* (1991) 62 P & CR 410. There, the plaintiffs were in negotiation with the defendants for the purchase of their business, and when the defendants decided to sell to someone else, the plaintiffs claimed damages for breach of an alleged contract that the defendants would not sell to anyone else while the negotiations were continuing. The majority of the Court of Appeal held that there was no such enforceable contract. However, Bingham LJ dissented, holding that there was, and he therefore considered the question of damages. The defendants argued in reliance on *Lavarack v Woods* that there was no right to recover other than nominal damages. They were under no obligation to come to terms with the plaintiffs, and thus even if the plaintiffs had been deprived of the exclusive opportunity to try and make a deal the plaintiffs lost nothing of value. Bingham LJ rejected that argument (at 422-423):

> "The defendants undertook a negative obligation not to deal with parties other than the plaintiffs and not to entertain alternative proposals for a reasonable time. They broke that obligation by doing what they had undertaken not to do. The plaintiffs are entitled to be placed in the same position as if the defendants had performed their obligation, albeit in the manner most favourable to themselves. Depending on the facts as found by the court, the proper inference might be that the parties would probably not have come to terms even if the defendants had complied with their obligation or that the defendants would have decided not to sell; in that event the plaintiffs' damages would be nominal. But the proper inference might be that if the defendants had complied with their obligation the parties would probably have come to terms because all potential points of difference would have been compromised or conceded. If that were the correct factual inference, the plaintiffs' damages could, I think, be more than nominal."

78. Since the other members of the Court found that there was no such contractual obligation, they did not address this issue. Bingham LJ's judgment is accordingly not binding, and indeed it was not cited in argument (and his qualification about performance "in the manner most favourable to themselves" now needs reconsideration in the light of the analysis of that limitation in *Durham Tees Valley Airport*). However, his judgment is of course entitled to great respect and it is persuasive authority for the approach which I have set out.

79. Accordingly, I reject Ricoh's submission that the claim which Mr Jones seeks to advance for damages sustained by CMP by reference to the 2003 ITT fails as a matter of law. There are obviously factual issues involved in seeking to establish the damages and there may be issues of remoteness for at least part of the claim, but those are not matters for summary determination.

(b) The 2007 ITT

80. As regards the 2007 ITT, the claim alleges that Ricoh used "Confidential Information" in making its successful tender to Bombardier. Accordingly, that is a distinct breach of the Confidentiality Agreement, for which Mr Jones seeks an account of profits or alternatively *Wrotham Park* damages. It is not alleged that if Ricoh had not used protected information CMP would have been awarded (whether with Ricoh or any other manufacturer) the contract with Bombardier resulting from the 2007 ITT.

81. Ricoh puts forward two objections to the claim regarding the 2007 ITT. First, Ricoh submits that the allegation that it used "Confidential Information" for this tender is so speculative and inherently improbable that it can be dismissed at this stage as having no realistic prospect of success. Secondly, and in any event, it submits that this is not a case where the claimant would be entitled to an account of profits.

(i) *No realistic chance of success*

82. After CMP and Ricoh fell out over the 2003 ITT, they did virtually no new business together. Ms Smith of Ricoh states that between 2003 and 2007, Ricoh supplied only 14 devices to CMP for installation at Bombardier, compared to the high volume being supplied previously. It is Ricoh's case that although it had considerable information about Bombardier's pattern of usage and payment in 2003, that information was effectively obsolete by mid-2007. Moreover, CMP had dealt with Ricoh concerning supply to Bombardier in the United Kingdom. The 2007 ITT was of much larger scope, since it concerned a tender to supply all the Bombardier companies on a global basis, so any information regarding Bombardier's UK operations would not assist in preparing a successful tender for this much larger contract.

83. In answer to this, Mr Males pointed out that the dealings between Ricoh and CMP were more complex, since under the service and maintenance arrangement Ricoh continued after 2003 to maintain the devices previously installed at Bombardier: the shelf-life of a MFD was up to nine years. Bombardier continued to pay service charges to Ricoh, and under the payment arrangements in the Trading Agreement, as regards in particular metered equipment, information was supplied each quarter as to the pattern of usage of each device, number of calls, and so forth. Ricoh would therefore have had in 2007 up-to-date information as to Bombardier's current service costs and usage that would be valuable in assessing Bombardier's production needs and in preparing the most cost-effective tender. Moreover, between 2003 and 2007 CMP continued to support Bombardier by analysing the raw data and advising its client as to how its copying needs could be most effectively managed, and I was told that the results of this analysis were given also to Ricoh.

84. I note that Ms Cartledge, who was still working on the procurement side at Bombardier at the time of the 2007 ITT although she was not personally involved in

that procedure, states that because Ricoh was continuing to service Bombardier's devices in the UK at the time of the 2007 ITT, it would still have confidential information of the type to which she refers (see para 51 above) that "would have been equally [i.e. compared to the 2003 ITT] helpful in formulating a response to that tender:" para 29 of her witness statement.

85. Notwithstanding that evidence, I feel considerable scepticism about these submissions advanced for Mr Jones. Some of the information relied on appears to be information supplied by Bombardier to Ricoh, and then *by* Ricoh *to* CMP under the Trading Agreement, not the other way round, in which case it falls outside the contractual definition of "Confidential Information". Ricoh will doubtless have received considerable information as to Bombardier's requirements in the 2007 ITT documents, and it seems unlikely that the sort of information which it already had regarding Bombardier's usage only in the United Kingdom would have been of real value in preparing a tender for a contract on an international scale.

86. However, although this head of Mr Jones' claim seems to me improbable, summary judgment is not concerned with probabilities. In my judgment, there is just sufficient evidence before the court that I cannot dismiss it as fanciful, having regard to the principles governing summary judgment that I have set out above. But this particular claim will no doubt involve considerable factual investigation of the dealings between Ricoh, CMP and Bombardier prior to the 2007 ITT and then of the tender process itself. Having regard to my view of the strength of this part of the claim, I consider that it is in this instance appropriate to make a conditional order. Pursuant to CPR 24.6 and 24PD 4 and 5.1(4), I shall therefore order that this part of the claim may be pursued only on condition that Mr Jones gives security for Ricoh's costs on account of it: see *Olatawura v Abiloye* [2002] EWCA Civ 998, [2003] 1 WLR 275. I shall hear Counsel on the delivery of this judgment as to what should be the appropriate amount and what form the security should take.

(ii) *Account of profits*

87. The starting point on considering whether an account of profits may be claimed for breach of contract is the decision of the House of Lords in *A-G v Blake* [2001] 1 AC 268. The leading judgment was given by Lord Nicholls (with whom Lords Goff, Browne-Wilkinson and Steyn agreed), who said this (at 285):

> "An account of profits will be appropriate only in exceptional circumstances. Normally the remedies of damages, specific performance and injunction, coupled with the characterisation of some contractual obligations as fiduciary, will provide an adequate response to a breach of contract. It will be only in exceptional cases, where those remedies are inadequate, that any question of accounting for profits will arise. No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in

> preventing the defendant's profit-making activity and, hence, in depriving him of his profit."

88. The development of the law following *Blake*, including the judgment of the Court of Appeal in *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830, was recently subject to detailed analysis by Sales J in *Vercoe v Rutland Fund Management Ltd* [2010] EWHC 424 (Ch). The judge concluded that the courts were articulating the underlying principles that will govern the remedies available in a particular case. Referring to the distinction between damages calculated on the basis of what would have been a reasonable payment for release from the obligation in question (i.e. *Wrotham Park* damages) and an account of profits, Sales J stated:

> "341. Cases will frequently arise where a significant choice falls to be made between damages calculated by reference to a notional reasonable buy out fee and an account of profits. Then in my judgment, in the light of *Blake*, where one is not dealing with infringement of a right which is clearly proprietary in nature (such as intellectual property in the form of a patent, as in *Siddell v Vickers*) and there is nothing exceptional to indicate that the defendant should never have been entitled to adopt a commercial approach in deciding how to behave in relation to that right, the appropriate remedy is likely to be an award of damages assessed by reference to a reasonable buy out fee rather than an account of profits. The law will control the choice between these remedies, having regard to the need to strike a fair balance between the interests of the parties at the remedial stage, rather than leaving it to the discretion of the claimant. The significance of *Seager v Copydex* is that it shows that, even in relation to confidential information closely akin to a patent (such as a secret manufacturing design or process), the law will not necessarily afford protection to the claimant extending to an account of profits. Still more strongly will that be the case as one moves further away from confidential information in a form resembling classic intellectual property rights towards forms of obligation in respect of confidential information more akin to purely personal obligations in contract and tort.
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> 342. This approach is, I think, supported by the judgments in the Court of Appeal in *Experience Hendrix*. In that case the defendant licensed masters of recordings of certain music in breach of its agreement with the claimant that they should should not be licensed, and thereby made a profit. The claimant's claim for an account of profits arising from the breach of the agreement was dismissed, even though the breach was deliberate, because the case was not exceptional (there was no special interest of the claimant in having its rights protected, unlike in *Blake*) but rather arose in a commercial context, and the defendant was not in the position of a fiduciary or any

> position analogous to that. The claimant was instead awarded a payment equivalent to the reasonable notional royalties which would have been paid by the defendant to buy release from its obligations so as to be able to license the masters as it did: see in particular [37] and [43]-[45] (Mance LJ) and [55] (Peter Gibson LJ).
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> 343. The approach which I adopt also, in my view, produces a coherent picture regarding the extent of protection afforded by the law, moving from lesser protection in relation to an ordinary commercial context to greater protection where there is a fiduciary relationship, rather than too readily equiparating the two…."

89. The reasoning of Sales J was not criticised before me, and I propose, with respect, to follow it. I can see nothing exceptional in the circumstances here, where the arrangements between the parties was purely commercial and far from a fiduciary relationship. Assuming for this purpose that Ricoh continued to have and used "Confidential Information" for the purpose of responding to the 2007 ITT, it was not suggested (nor could it be) that if Ricoh had refrained from breaching its obligations to CMP, the Ricoh group would not then have submitted a tender to Bombardier at all. Accordingly, I consider that a claim for an account of profits is not sustainable in the present case. Since this is a claim sought to be introduced by amendment, I shall not allow that part of the amendment.

90. I should add that it is not entirely clear on the draft pleading whether Mr Jones seeks independently to claim as part of the remedy for breach concerning the 2003 ITT an account of profits made by Ricoh from the result of the 2007 ITT (on the basis that it is alleged that there would have been no subsequent tender had Ricoh and CMP bid jointly in 2003). But if he does, I hold for the same reason that this remedy is not available in respect of that alleged earlier breach.

91. Mr Hollander, very properly, did not seek to suggest that Mr Jones cannot claim *Wrotham Park* damages in respect of the alleged breach concerning the 2007 ITT or, indeed, as an alternative remedy in respect of the alleged breach concerning the 2003 ITT. The amendment will therefore be allowed insofar as it seeks to introduce that claim.

Conclusion

92. Accordingly, for the reasons set out above:

    i) there will be summary judgment for the defendant on the claim for breach of clause 7 of the Confidentiality Agreement;

    ii) the defendant's application for summary judgment is dismissed in respect of the claim for breach of clauses 2 and/or 3 of the Confidentiality Agreement in connection with the 2003 ITT;

    iii) the defendant's application for summary judgment is dismissed in respect of the claim for breach of clauses 2 and/or 3 of the Confidentiality Agreement in

connection with the 2007 ITT on condition that the claimant provides security for the defendant's costs, in an amount to be determined;

iv) the claimant's application for permission to amend is refused as regards a claim for an account of profits, but allowed as regards a claim for damages.