

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**MANCHESTER DISTRICT REGISTRY**  
**MERCANTILE COURT**

Manchester Civil Justice Centre  
1, Bridge Street West, Manchester, M3 3FX

Date: 15th July 2010

Before :

**Judge Hegarty QC**

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Between :

**Proactive Sports Management Limited**

**Claimant**

- and -

**(1) Wayne Rooney**

**Defendants**

**(2) Coleen Rooney (formerly McLoughlin)**

**(3) Stoneygate 48 Limited**

**(4) Speed 9849 Limited**

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**Ian Mill QC & Tom Weisselberg** (instructed by **McCormicks**) for the **Claimant**  
**Paul Chaisty QC & Mark Harper** (instructed by **Hill Dickinson LLP**) for the **Defendants**

Hearing dates: 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup> & 22<sup>nd</sup> February 2010;  
Judgment circulated in draft: 30<sup>th</sup> June 2010.

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**JUDGMENT**

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## HH Judge Hegarty QC:

### PART I

#### INTRODUCTION

1. Mr Wayne Mark Rooney (“WR”) is a professional footballer of international standing and repute. Even at the age of 16, he was widely perceived as a player of immense potential. At that time, he was playing for Everton Football Club; and he continued to do so after he reached the age of 17 on 24<sup>th</sup> October 2002, eventually signing full-time professional forms with the Club on 17<sup>th</sup> January 2003. Since then, of course, he has been transferred to Manchester United Football Club and has become an outstanding performer for both club and country. His success on the field has provided him with a very substantial income derived directly from his footballing activities. But it has also provided him with a platform to enhance his earning capacity to a very substantial degree in other directions by allowing him to exploit what are termed his “image rights”. He has done so through the medium of a limited company, Stoneygate 48 Limited (“Stoneygate”), the principal Defendant in these proceedings, to which he has assigned the rights in question. Stoneygate has since entered into a number of lucrative sponsorship contracts with major companies such as Coca Cola and Nike by which they have agreed to pay substantial fees to Stoneygate in return for the right to use the Rooney “brand” in connection with the advertisement and promotion of their products.
2. In recent decades, it has become common for professional footballers to retain the services of agents to represent their interests and negotiate on their behalf. Agents who represent a professional footballer in connection with his playing or “on-field” activities are regulated by rules laid down by FIFA and, in England, by the Football Association. Such an agent must be registered with the FA and any on-field representation agreement in relation to on-field activities must be in writing and must be limited to a maximum term of two years. A copy of any such contract must be lodged with the FA, though the evidence suggests that until comparatively recently this requirement was not rigorously enforced. Nonetheless, the FA exercises a disciplinary jurisdiction over football agents and can impose sanctions such as suspension or fines for breach of the relevant rules. By contrast, contracts covering off-field activities are, at present, wholly unregulated whether by FIFA or the FA.
3. Given WR’s considerable reputation even as a teenager, many football agents were interested in signing him up to such a representation contract. The early winner in this regard was a Mr Peter McIntosh, who operated through the medium of a company known as Proform Sports Management Limited (“Proform”). A representation agreement was entered into between Proform and WR on 12<sup>th</sup> December 2000, at a time when he was only a little over 15 years of age. It was for the maximum period of two years and would, therefore, have expired on or about 12<sup>th</sup> December 2002. But, in view of his age, it was questionable whether this contract would have been binding upon WR unless and until he ratified it on achieving the age of 18. As it happens, it was subsequently held that it was not enforceable by His Honour Judge Hodge QC,

sitting as a Judge of the High Court, in **Proform Sports Management Limited v Proactive Sports Management Limited** [2006] EWHC 2903 (Ch); [2007] Bus. L.R. 93.

4. The Defendant in that action (“Proactive”) is, in fact, the Claimant in the present proceedings. Proactive is a company which, amongst other things, provides management, agency and personal representation services to sports professionals, and in particular football players. In 2002 and for some time thereafter, its Chief Executive was a Mr Paul Stretford, who was also a director of the company and was registered in his own name as a football agent with the FA. Though Proactive came on the scene much later than Mr McIntosh, it succeeded in obtaining WR’s signature to a written contract dated 17<sup>th</sup> July 2002 by which it was to act as his agent in respect of both on-field and off-field activities for a period of eight years. This, of course, was at a time when he was still only 16 years of age and when his subsisting contract with Proform still had some five months to run. To enter into an on-field representation agreement during the currency of a subsisting contract with another agent is a potentially serious breach of FIFA and FA regulations, as is entering into such an agreement for a period in excess of two years. But both Mr Stretford and Proactive have vigorously maintained that they believed that the July 2002 contract covered only image rights and other off-field activities and that it was not for some years that they discovered for the first time that, as a matter of fact, it also provided for representation in respect of on-field activities. It will be necessary to consider the terms of this agreement in greater detail later in this judgment.
5. In fact, Proactive entered into two further contracts with WR during the course of 2002, one dated 19<sup>th</sup> September 2002 and the other dated 14<sup>th</sup> December 2002, just after the expiration of the Proform Agreement. Both of these agreements were in a similar form and provided for Proactive to represent the player in relation to both on-field and off-field activities. In each case, however, in contrast to the earlier contract, they were for a period of two years only.
6. By the end of 2002, therefore, if one disregards the September Agreement, there were two contracts in force between Proactive and WR; one for a term of eight years commencing on 17<sup>th</sup> July 2002; and the other for a period of two years from 14<sup>th</sup> December 2002. In each case, whatever Proactive and Mr Stretford may have assumed or believed, they covered both on-field and off-field activities. So it is hardly surprising that Proactive, primarily in the person of Mr Stretford, became heavily engaged in negotiations on behalf of WR with Everton FC with a view to reaching agreement as to the terms upon which he would be willing to enter into a playing contract with the club. Agreement was eventually reached and contract forms were duly signed on 17<sup>th</sup> January 2003.
7. But, at the same time, consideration was being given within Proactive to the way in which WR’s off-field earning capacity might best be exploited. In the light of specialist tax and legal advice, it was decided that a suitable mechanism would be for WR to assign his image rights to a limited company and for that company to enter into sponsorship agreements and the like, rather than for him to do so directly. The company used for this purpose was, of course, Stoneygate and, at some stage in January or February 2003, all the necessary documentation required for this purpose was prepared and executed.

8. But, in view of the assignment of WR's image rights to Stoneygate, it was decided that it would be necessary to execute a new Image Rights Representation Agreement between Stoneygate and Proactive by which Proactive would act on behalf of Stoneygate for the purposes of exploiting those rights. Such an Agreement was duly signed by Mr Neil Rodford on behalf of Proactive, WR on his own behalf and his mother, Mrs Jeanette Rooney on behalf of Stoneygate. The Agreement is formally dated 16<sup>th</sup> January 2003 but there is a substantial dispute as to when it was in fact executed. This Image Rights Representation Agreement is, once again, expressed to be for a term of eight years; and it provides for remuneration by way of commission at the rate of 20%. It is this Agreement upon which Proactive relies as the basis of its claims against Stoneygate in the present proceedings.
9. But there was a yet further agreement which was entered into at or about the same time as this new Image Rights Representation Agreement between Proactive and Stoneygate. It will be recalled that, in July 2002, Proactive had entered into a contract directly with WR which also, in effect, provided for image rights representation by Proactive on his behalf. There would seem to have been no obvious legal or commercial reason for maintaining this earlier Agreement in force once the new Agreement had been executed. But, as will also be recalled, the contract of July 2002 also extended to on-field representation, albeit, it is said, without the knowledge of Proactive or Mr Stretford.
10. Accordingly, in circumstances which will have to be considered in some detail later in this judgment, it was decided that the earlier agreement should be varied, rather than rescinded, so as to strip out the provisions governing off-field representation so that, for the future, it would embrace only on-field representation. This was achieved by means of a Variation Agreement prepared by Proactive's specialist legal advisers, a firm of solicitors known as Couchman Harrington, and duly executed by Mr Stretford, on behalf of Proactive, and WR, his father, Mr Wayne Thomas Rooney, and his mother Mrs Jeanette Rooney. Once again, the document is formally dated 16<sup>th</sup> January 2003 but the actual date of execution is very much in dispute.
11. The essential features of this re-organisation of the contractual arrangements between Proactive, Stoneygate and WR in early 2003 were that WR's image rights were assigned to Stoneygate, that a new Image Rights Representation Agreement was entered into between Stoneygate and WR on the one hand and Proactive on the other, and that the original Agreement between Proactive and WR dated 17<sup>th</sup> July 2002 remained in force and effect, albeit varied so as to cover only representation in relation to the player's footballing activities. Proactive's right to represent WR in relation to his image rights was, therefore, governed by its Agreement with Stoneygate; and its rights to represent him on the playing side were, on the face of it, governed by the original Agreement of July 2002 (as varied). Both of these Agreements were for a term of eight years.
12. But there was, of course, also in existence the representation agreement dated 14<sup>th</sup> December 2002 which covered both on-field and off-field activities but which was limited to a period of two years. This agreement was never formally rescinded or varied, though it seems quite clear that it was never regarded as the basis of Proactive's right to represent WR in relation to his off-field activities. But it was

apparently renewed on the same or similar terms at the end of 2004 and, again, at the end of 2006. Only a copy of the 2006 version was, however, ever lodged with the FA.

13. Once these contractual arrangements were in place, or perhaps even in anticipation of them, Proactive played its part with vigour and success. The main point of contact between Proactive and the Rooney family was Mr Stretford. Indeed, on the playing side, he had to act as WR's agent, since a corporate body was not permitted under FA rules to act in that capacity. But he also played a pivotal role in relation to the exploitation of WR's image rights. He successfully negotiated a series of highly lucrative sponsorship contracts between Stoneygate and various major commercial concerns; he was largely responsible for maintaining the relationship between WR and these commercial sponsors; and he headed a small group of other employees of Proactive known collectively as "Team Rooney" which assisted him in dealing with WR's commercial interests. But not only was he WR's football agent and the man principally responsible for the exploitation of his image rights, but Mr Stretford was also a director of Stoneygate, in addition to the office which he held with Proactive. Indeed, it had originally been envisaged that he would be the principal shareholder in Stoneygate when the new arrangements were being put in place at the beginning of 2003, though that suggestion was abandoned in circumstances about which I will have a little more to say in due course. Be that as it may, in his capacity as a director of Stoneygate, despite the obvious risk of a conflict of interests, Mr Stretford took on the responsibility of approving all invoices submitted to Stoneygate on behalf of Proactive for commission and other fees claimed by Proactive under the Image Rights Representation Agreement or for other services rendered to Stoneygate.
14. There is no doubt that over the years which have passed since the middle of 2002, Mr Stretford has built up a close relationship with WR and his family. I do not doubt that he has served them well and that they have repaid him with their loyalty.
15. That loyalty survived an unhappy episode in which Mr Stretford was charged with various disciplinary offences by the FA arising out of the way in which the July 2002 Agreement was entered into and the terms of that Agreement. After a full disciplinary hearing, an FA Regulatory Commission decided, on 9<sup>th</sup> July 2008, that various of these charges had been made out and imposed a substantial fine of £300,000 and suspended Mr Stretford from acting as a player's agent for a period of 18 months, though it was directed that the second nine months would not come into operation unless he was found guilty of further breaches of the FA Rules. Mr Stretford then appealed but his appeal was dismissed. The period of suspension imposed by the Regulatory Commission had, however, been stayed pending the determination of the appeal; and I am informed that it eventually expired only some time in the early part of 2010. It should be noted that it was Proactive which paid the substantial fine which had been imposed by the Commission.
16. But this disciplinary hearing led to the parting of the ways between Mr Stretford and Proactive. On or before 20<sup>th</sup> May 2008, he resigned his position as director of Proactive in circumstances which were the subject of severe cross-examination during the course of the trial. Thereafter, during the course of September 2008, discussions took place with a view to agreeing terms of an amicable separation between Mr

Stretford and Proactive on the basis that he would continue to represent Stoneygate and WR subject to payment of financial compensation to Proactive.

17. But in early October 2008, Proactive's attitude changed. On 8<sup>th</sup> October 2008, a meeting was held between Mr Stretford and Mr John Lawrence and Mr Michael Wallwork on behalf of Proactive. During the course of this meeting, it was explained to Mr Stretford that Proactive had recently discovered documents on the file of Couchman Harrington, the solicitors who had acted on behalf of Proactive in connection with the arrangements which had been agreed in early 2003, and that these documents appeared to show that Mr Stretford had been aware of the nature and terms of the July 2002 agreement, contrary to the evidence which he had given at the recent disciplinary hearing.
18. But no resolution was achieved at this meeting or in its aftermath and solicitors were instructed on each side. Proactive instituted its own disciplinary proceedings against Mr Stretford and suspended him from duty. He was eventually dismissed from his employment on grounds of gross misconduct on 10<sup>th</sup> November 2008. But Mr Stretford has challenged this decision and contends that it was Proactive which was in repudiatory breach of his contract of employment, which he has accepted.
19. But even before his formal dismissal, Mr Stretford, in his capacity as a director of Stoneygate, had declined to authorise payment of invoices for commission and other services raised by Proactive upon Stoneygate. Furthermore, he has retained the loyalty and allegiance of WR for whom he continues to act through a new company known as Triple S Limited which was, it seems, informally appointed to act as Stoneygate's agent in relation to WR's image rights in or about July 2009. According to Mr Stretford, however, he has not been acting as WR's personal football agent, no doubt because of the period of suspension imposed upon him by the FA Regulatory Commission and upheld on appeal.
20. The formal severance of the contractual relationship between Proactive and Stoneygate came in the form of a letter dated 18<sup>th</sup> December 2009 from solicitors acting on behalf of Stoneygate which purported to terminate the Image Rights Representation Agreement. This was regarded by Proactive as a repudiatory breach or renunciation of the contract, which it subsequently accepted by way of a letter dated 24<sup>th</sup> December 2009.
21. Even at the outset of his footballing career, WR was described in certain quarters as a "hot property". His teenage promise has now been amply fulfilled and, in commercial terms, his brand now burns brighter than ever. He is also married to Mrs Coleen Rooney, formerly McLoughlin, who has her own image rights company, Speed 9849 Limited ("Speed"), for which Proactive formerly acted, albeit without any formal contract, and which is also a Defendant in the present action. Mrs Rooney, like her husband, is also a Defendant, though no claim is now pursued against her, save in respect of costs.
22. In commercial reality, the current dispute reflects the tug-o'-war between Proactive and Mr Stretford over the right to represent WR on and off the pitch. But, in formal terms, the present action primarily involves a claim by Proactive against Stoneygate for arrears of commission said to be due to it under the Image Rights Representation

Agreement and for a reasonable sum for other services provided. In addition, however, Proactive claims damages arising out of the alleged repudiatory breach of contract by Stonegate. It also asserts a right to recover further commission, as and when it falls due, notwithstanding the termination of the agreement, and seeks appropriate declaratory relief to that effect. The total claim in respect of unpaid commission and invoices for other services amounts to £1,071,137.08. But the amount of its claim in respect of further commission, as and when it falls due, is estimated to be substantially higher. A total figure in excess of £3m was put forward during the course of the trial.

23. The claim for damages has not yet been properly quantified and Mr Mill QC, on behalf of Proactive, accepts that, if Proactive's right to damages is established, there will have to be a separate assessment at a later stage. But Mr Michael Wallwork, the Group Marketing Director of Proactive's present parent company, gave an estimate of between £3 and £4m in the course of cross-examination; and Mr Mark Page, the Finance Director of Proactive's parent company, gave a similar estimate. This was, apparently, based upon figures provided by Proactive's expert witness, Mr Mel Stein. But, in the course of his closing submissions, Mr Mill QC conceded that any such claim should be capped at a sum calculated by reference to the provisions of clause 8 of the Image Rights Representation Agreement between Proactive and Stonegate. That is a provision which I will have to consider in more detail later in this judgment. But, despite that concession, the claim made by Proactive against Stonegate is plainly a substantial one.
24. Stonegate, however, resists the claim, as formulated, in its entirety. Indeed, it has raised a counterclaim seeking recovery of monies previously paid by Stonegate to Proactive over the intervening years since the inception of the Image Rights Representation Agreement, though it is fair to say that this was not seriously pursued by Mr Chaisty QC, on behalf of Stonegate, during the course of the trial. There are two main planks to Stonegate's defence. Firstly, it is alleged that the Image Rights Representation Agreement was void for mistake, so that there can be no claim, at least in contract, for commission due or falling due under the Agreement or for damages for breach of contract. Further or alternatively, it is contended that the Agreement is unenforceable on the grounds that it is in restraint of trade and that it has not been demonstrated that the restraints were reasonable having regard to the legitimate interests of the parties. Various points of construction in relation to the Image Rights Representation Agreement are also raised by Stonegate. One of these relates to the question whether, as a matter of contract, Proactive is entitled to recover commission in the future, notwithstanding the termination of the Agreement itself. Various specific defences are also advanced in relation to claims under various invoices which have already been raised by Proactive.
25. It is almost needless to say that all of these grounds of defence are very much in issue. But, in the alternative, if the Image Rights Representation Agreement is held to be void or unenforceable, Proactive advances a claim for a restitutionary remedy by which it seeks to recover remuneration for the services which it has provided to Stonegate on a quantum meruit basis. Indeed, Mr Mill QC, on behalf of Proactive, effectively sought to quantify that claim by reference to the amounts which would have been payable as a matter of contract as well as by reference to what might be described as market rates. Mr Chaisty QC, whilst accepting that a restitutionary claim

of this kind would be available to Proactive, at least if the Image Rights Representation Agreement was held to be void for mistake, nonetheless challenges the basis of assessment as advanced by Mr Mill. He contends that the amount of the claim has not been adequately quantified on the face of the pleadings and that there is no sufficient evidence upon which the court could properly determine the appropriate figure. He submitted, therefore, that there would have to be a separate assessment of the amount recoverable by Proactive, no doubt on the basis of any points of principle which could properly be resolved at this stage of the proceedings.

26. As against Speed, Proactive claims commission on various contracts which it negotiated on behalf of that company for the benefit of Mrs Coleen Rooney at a rate of 20% of the amount of any payments already made to Speed or which might become payable in the future pursuant to any of those contracts. It also seeks to recover payments for other services rendered to Speed. As presently pleaded, the total amount claimed is £215,267.15, but one or two adjustments have since been sought to be made to that figure.
27. Proactive bases its claim either on an agency contract said to have been entered into between Speed and Proactive by words or by conduct, or on the basis of a series of individual contracts relating to specific transactions in which it acted on behalf of Speed or, it would seem, by way of a restitutionary quantum meruit. But, as was made clear in the course of the trial, it does not advance any claim for damages for breach of contract. In effect, the claim proceeds on the basis of invoices already raised by Proactive in respect of its services, coupled with a claim for commission on any further sums which may fall due in respect of the same contracts.
28. On behalf of Speed, Mr Chaisty challenges the contention that there was or must have been some form of agency agreement between Proactive and Speed. But he could not and did not challenge Proactive's claim for a reasonable sum in respect of services rendered. In essence, therefore, the real issue between Proactive and Speed was as to whether the remuneration payable to Proactive was to be measured by reference to the alleged contractual rate or on some other basis. There was also, of course, an issue as to whether Proactive was entitled to any future commission or similar remuneration. Once again, as I understood the position, it was Mr Chaisty's contention that any question of assessment on a quantum meruit basis would have to be left over to another day.

## PART II

### THE BACKGROUND

29. There was comparatively little dispute about much of the factual background against which these legal issues have to be determined. But one or two factual issues were very bitterly contested. It is appropriate at this stage, therefore, to set out the relevant factual background in rather greater detail and to identify the areas of particular contention, whilst leaving the resolution of those contentious issues to a later stage in my judgment.

### The Initial Discussions with Proactive

30. It will be recalled that in December 2000 WR had been signed up to a two-year agency agreement by Proform. But by early 2002, WR, or perhaps more correctly his parents, were receiving many approaches from other football agents who were interested in representing their son. It was suggested that one of these prospective agents was Proactive's expert witness, Mr Mel Stein, who, according to Mr Rooney senior had offered a substantial fee as an inducement. This evidence emerged for the first time during the course of the trial itself. I have little doubt that Mr Rooney's evidence to that effect was given to the court in good faith. But it relates to events which took place some eight years ago and it was adamantly denied by Mr Stein himself. On this point, I prefer the evidence of Mr Stein and, insofar as it may be material, I am not prepared to hold that he made any such approach.
31. The interest generated amongst football agents reflected WR's growing reputation as a footballer. In their turn, Mr and Mrs Rooney began to think that their son might be better served by an agent other than Proform. They were acquainted with a Mr Mick Doherty who worked for Proactive and was the father of one of their son's teammates in the Everton Youth Team; and they were aware that Mr Stretford represented several of the Everton first team players. So, through Mr Doherty, a meeting was arranged between Proactive and Mr and Mrs Rooney which subsequently took place on or about 27<sup>th</sup> May 2002.
32. It appears to be common ground that during the course of this meeting Mr Stretford gave Mr and Mrs Rooney what was described as a credentials presentation about the services which Proactive could provide for their son. Mr Rodford was not present because, according to Mr Stretford, he was away on honeymoon.
33. Mr and Mrs Rooney were very impressed by what they had seen of Mr Stretford and what he had told them. It seems that he emphasised the fact that Proactive's services would go beyond contract negotiations and representation and would extend to the exploitation of any image rights and the provision of advice on wealth management and handling the media.
34. Accordingly, Mr and Mrs Rooney decided to take the matter further and, once again through Mr Doherty, they arranged a further meeting with Proactive which took place on or about 6<sup>th</sup> June 2002 at a public house known as the "Jolly Miller". Mr Stretford was abroad, as he was attending the World Cup; so Proactive was represented by Mr Rodford, together with Mr Doherty. On this occasion, Mr and Mrs Rooney were accompanied by their son.
35. The only witness who gave direct evidence about this meeting was Mr Rooney senior, though his wife indicated her general agreement with his account. In his witness statement, Mr Rooney senior said that Mr Rodford had informed them that Proactive wanted to sign up their son and to do a deal in relation to advertising and sponsorship. Mr Rooney, for his part, was not sure whether the Proform Agreement had expired and was aware that his son could not have two agents at the same time. Mr Rodford, therefore, asked him if he could try and find a copy of the Proform Agreement. He recalled that Mr Rodford had said that if their son was still under contract with Proform, Proactive could not sign him up for a football contract, though he could have

an Image Rights Representation Agreement with Proactive. Furthermore, in his witness statement, Mr Rooney senior said that he thought that it was at this meeting that Mr Rodford had first offered a signing on fee of £50,000.

#### The Preparation and Execution of the July 2002 Agreement

36. There was little challenge to this account in the course of cross-examination. But Mr Rooney's evidence that Mr Rodford drew a distinction between a football contract and an image rights agreement during the course of the meeting is a little difficult to reconcile with the actions which Mr Rodford took almost immediately afterwards. On 7<sup>th</sup> June 2002, he contacted solicitors, namely DLA, of Manchester, and instructed them to draft a suitable form of agreement. A manuscript attendance note on DLA's file appears to record the general nature of these instructions. Somewhat oddly, several points are noted before the first reference to what appears to have been a telephone conversation with Mr Rodford. So it is possible that DLA was initially contacted by someone else.
37. These initial notes include the comment that someone, presumably Proactive, was to pay £50,000 as a consideration for a Representation Agreement for eight years. Then, after the reference to Mr Rodford, the note records that DLA should use Proactive's standard representation agreement and "beef it up". It was also recorded that this was required as soon as possible and that a "confidential clause" was required. The final observations recorded on the attendance note are as follows "Minors contract. 8 years - too long - enforceable (G Michael)." The words in parentheses would seem to be a reference to the case of **Panayiotou v Sony Music Entertainment Limited** [1994] EMLR 230 in which the singer and musician George Michael took proceedings in relation to a recording agreement in which issues of restraint of trade were raised.
38. There is, of course, no indication in this attendance note that the proposed agreement was to be limited to image rights representation. On the contrary, Proactive's "standard" representation agreement appears to have covered both on-field and off-field representation. Whilst Proactive's standard form of agreement appears to have changed a little over the years, it seems that a copy of the version referred to in the attendance note was placed on DLA's file. The relevant provisions of that standard form read as follows:

"The company will represent the aforementioned client in all areas of personality management including: transfer negotiations, contract negotiations, media negotiations; including T.V., radio and press. Commercial representation for the purpose of endorsement agreements including: boots, apparel, luggage and all other product areas. Furthermore, to include personal appearance bookings."
39. So I doubt if Mr Rooney senior is correct in stating, as he does in his witness statement, that, at the meeting only the previous day, Mr Rodford had drawn a distinction between on-field and off-field representation. That was certainly the opinion expressed by Mr Stretford himself at paragraph 42 of his witness statement, where he said, amongst other things, that he believed that Mr Rodford had not appreciated that he could not include football and image rights in one agreement which would run for eight years. He surmised that one of the reasons why this might have come about was because Mr Rodford was not a licensed sports agent. But, of

course, it is also possible that, as Mr Stretford also surmised, that Mr Rodford did not, at the time, realise that the Proform Agreement was still in force.

40. DLA then prepared a draft agreement which they forwarded to Mr Rodford under cover of a letter dated 13<sup>th</sup> June 2002. The letter first dealt with two legal questions which were considered to be of particular relevance. One of these was the contractual capacity of minors and the other was the doctrine of restraint of trade. In relation to the latter, the writer noted that it was particularly important to ensure that the contract was not too one-sided in favour of Proactive, particularly in the light of the proposed eight-year term and what was described as the proposed “liquidated damages clause for early termination”. Reference was also made to previous case law, but the writer considered that the proposed agreement could be distinguished from earlier cases in that it was a “more balanced deal”, since it involved a payment of £50,000 to the Rooney family. Furthermore, the earlier cases involved litigation over contracts which controlled a party’s full-time employment and livelihood. The proposed contract could be distinguished since it related to “something that flows from Wayne’s primary livelihood as footballer and which will be set out in his normal employment contract with the football club.”
41. The letter then provided a brief commentary on some of the clauses of the draft agreement. Four of the writer’s comments are of particular potential significance. Clause 3 of the draft agreement set out the contractual obligations of Proactive. At paragraph 2.2 of the letter of 13<sup>th</sup> June 2002, the writer asked Mr Rodford to review clauses 3 and 4 carefully. It was also pointed out that he should recognise some of the wording of clause 3.1 from what was described as “the Shortform Representation Agreement” forwarded to DLA by Mr Rodford’s secretary earlier in the week. That was obviously the standard form agreement to which I have already referred.
42. The writer of the letter then referred to clause 7.1 of the draft agreement which dealt with the duration of the contract. A specific enquiry was raised as to whether the proposed term of eight years was correct.
43. This was followed by some comments on clause 8, which dealt with the consequences of termination. This was said to provide for what would happen if WR or his parents terminated the agreement. It was intended to ensure that Proactive could recover the sum of £50,000 which it was proposing to pay to the Rooneys. But the writer also commented that Proactive should also consider including a right to recover “liquidated damages to reflect the potential loss of future revenue for Proactive”.
44. Finally, the writer addressed clause 24 of the draft agreement which provided for confirmation by the Rooneys that, before deciding to enter into the agreement, they had sought and taken independent legal advice. The writer recommended that the Rooneys should be advised to take such advice before executing the agreement.
45. Clauses 3, 7 and 24 remained substantially the same in the final version of the Agreement as subsequently executed. Clause 8 also remains substantially the same, save that the version as finally executed incorporated a full liquidated damages clause, whereas the draft had simply sketched out such a clause and noted that instructions would be required on this particular point. In due course, I will have to refer to the relevant provisions of the Agreement in its ultimate form, so there is no need for me

to set out the wording of these clauses at this stage. But it should be noted that clause 3 (to which Mr Rodford's attention had specifically been drawn) clearly covers both on-field and off-field representation. It should also be noted that the clauses to which I have referred were in substance replicated in the subsequent Image Rights Representation Agreement dated 16<sup>th</sup> January 2003 upon which Proactive bases its claim.

46. On 21<sup>st</sup> June 2002, an amended version of the draft agreement was sent to Mr Rodford's secretary as an attachment to an e-mail. From the wording of the e-mail itself, it seems that Mr Rodford must have given some instructions as to the liquidated damages clause and that some further consideration had been given to the wording of the clause within DLA. The writer also advised that the "clean" version attached was the one which should be handed to the Rooneys.
47. Mr Stretford had returned to the office, after the World Cup, on 17<sup>th</sup> June 2002. It was his evidence that, following his return, Mr Rodford held a meeting with him and two other employees of Proactive and said that if they wished to sign up WR, they would have to make a payment. That, of course, had probably already been discussed at the meeting between Mr Rodford and the Rooneys on 6<sup>th</sup> June 2002; and provisions referable to that payment had been incorporated in the draft agreement prepared by DLA. According to Mr Stretford he was opposed to any such payment but he was overruled.
48. A further meeting with the Rooneys took place at Proactive's offices on 28<sup>th</sup> June 2002. Mr Rodford and Mr Doherty attended on behalf of Proactive and were present from the beginning of the meeting. Mr Stretford had another engagement, as a result of which he arrived late. Mr Rodford handed a copy of the draft agreement prepared by DLA to Mr and Mrs Rooney; and they, in their turn, gave Mr Rodford a copy of the Proform Agreement. Mr Rodford had also prepared a draft letter for Mr and Mrs Rooney to send to Proform with a view to terminating the Proform Agreement. But, after Mr Stretford arrived, there was something of an altercation between them, since Mr Stretford was anxious to avoid any reference to Proactive in a letter of this kind, so as to avoid any suggestion that it might be guilty of the disciplinary offence of "tapping up". So he drafted an alternative version which did not mention Proactive. It appears, however, that by accident both versions of the letter were subsequently sent out to Proform. It should perhaps be noted that, according to Mr Stretford, he did not appreciate at the time that a draft representation agreement had been handed over to Mr and Mrs Rooney before he arrived to join the meeting.
49. Later that day, Mr Rodford faxed a copy of the Proform Agreement to DLA and asked Mr Price of that firm to contact him on receipt. It would be surprising if there had been no subsequent discussion between DLA and Mr Rodford. Indeed, there is an internal manuscript attendance note from DLA's file which suggests that DLA were concerned about the risk of possible litigation if Proactive were to induce a breach of what appeared to be a two-year exclusive agency agreement between Proform and the player. But, if so, Proactive, or at least Mr Rodford, must have taken the view that the risk was one worth taking, since no attempt appears to have been made to recall or modify the form of agreement which had been handed over to the Rooneys at the meeting on 28<sup>th</sup> June 2002. This document was subsequently signed by both Mr and

Mrs Rooney, their son and by Mr Rodford on behalf of Proactive on or about 17<sup>th</sup> July 2002.

50. There is a factual issue as to whether any of the signatories was aware at the time that the July 2002 Agreement covered on-field representation as well as image rights. All the witnesses called to give evidence on behalf of Stoneygate, including, of course, Mr Stretford, gave evidence to the effect that they did not realise that this was the position. I did not, however, hear from Mr Rodford; but it appears that in the FA disciplinary proceedings he had given evidence to the effect that he also was unaware of this feature of the Agreement prepared by DLA and ultimately signed on or about 17<sup>th</sup> July 2002. In the present proceedings, Proactive took a neutral stance on this issue. Its only substantive relevance seems to be in connection with the plea of mistake advanced on behalf of Stoneygate in relation to the subsequent Image Rights Representation Agreement upon which Proactive bases its claims in the present litigation. It is a matter, therefore, that I will have to resolve in due course.

#### The Terms of the July 2002 Agreement

51. At this stage, however, it is desirable to pick out the salient features of the July 2002 Agreement. Mr and Mrs Rooney were parties to the contract as well as their son (who is referred to as the “Client”). The other party was, of course, Proactive. After identifying the parties, various background matters were set out in the form of a number of recitals which recorded that both the Client and Mr and Mrs Rooney wanted Proactive (referred to as “the Company”) to represent him and that the Company wanted to represent the Client “in respect of the Client’s commercial and business affairs.”
52. Clause 1 set out various definitions, including the expression “Services” which were defined as those set out in clause 3. Clause 2, then provided as follows:  
“The Client and Mr and Mrs Rooney together jointly appointed the Company, and the Company agrees to act, as the sole and exclusive representative of the Client, and to perform the Services during the continuance of and on the terms and conditions set out in this Agreement.”
53. Proactive’s obligations were then set out at clause 3 which was in the following terms:  
“The Company undertakes and agrees with the Client that it shall at all times during the continuance of this Agreement, diligently and faithfully serve the client and, in particular, that it shall:  
3.1 Use its best endeavours and work diligently to represent the Client in all areas of employment and personality management, including (but not limited to):  
3.1.1 transfer negotiations;  
3.1.2 contract negotiations;  
3.1.3 media (including television, radio and press) and publicity relations and negotiations  
3.1.4 product endorsement and merchandising negotiations;  
3.1.5 personal appearance, image exploitation and other promotional opportunities;  
3.1.6 opportunities involving the Client’s Intellectual Property;

and such other tasks as the Client and Mr and Mrs Rooney may from time to time request, and as the Company shall consider prudent and in the interests of the Client from time to time.”

54. I need not recite the rest of clause 3, though it should perhaps be noted that the services extended to an obligation to accompany the Client to promotional events, meetings, negotiation sessions and any other occasions as the Client and/or Mr and Mrs Rooney might from time to time reasonably request. It should also be noted that most of the provisions of clause 3.1, and in particular clauses 3.1.1, 3.1.2 and 3.1.3 were taken directly from the standard form representation agreement which Mr Rodford had forwarded to DLA when they were first instructed in relation to this matter. But Clause 3.1.6 was introduced at some stage during the drafting process after the initial draft had been prepared.
55. The obligations of the Client were set out in clause 4, which was expressed to be agreed by Mr and Mrs Rooney as well as their son. By clause 4.2, they warranted that the Client was free to enter into the Agreement. By clause 4.4, it was provided that they should not during the term of the Agreement negotiate or enter into contracts with anyone who might reasonably be regarded as a competitor of the Company. And by clause 4.5 they were required to direct to the Company all and any enquiries they received or opportunities of which they became aware in connection with the Client “and his profession as a footballer”.
56. Remuneration was the subject of clause 5. By clause 5.1 it was provided that Proactive should pay to Mr and Mrs Rooney and their son the sum of £50,000, as to which £25,000 was payable upon signature whilst the balance of £25,000 would become payable on the date on which he reached the age of 18 years. Clause 5.2, however, provided that the second payment should be made only if the Client and his parents (if so requested) had first executed a new representation agreement on the same terms, or substantially on the same terms, as the Agreement itself.
57. Proactive’s remuneration was dealt with by clause 5.4 which was in these terms:

“In consideration for the performance of the services, the Client shall pay to the company a commission calculated on the percentage of all sums payable to the Client and/or Mr and Mrs Rooney as follows:

  - 5.4.1 2 ½ % of the gross sum payable under any contract of employment with any football club; and
  - 5.4.2 20% of the gross sum payable under any contracts or arrangements for the promotion, endorsement or advertisement of the Client and/or any products, goods or services;

to which the Client (or Mr and Mrs Rooney on the Client’s behalf) is a party.”
58. The 20% figure is identical to that set out in the standard form of agreement forwarded to DLA on behalf of Proactive. But the provision for the payment of 2 ½ % of the sums payable under any contract of employment differs from the standard form which provided for a 10% commission “for any gross signing-on fee during the term of the contract”. I do not know how this change came about. But it is difficult to think that DLA would have made any such alteration without specific instructions

59. Clause 5.5 provides that Proactive should be responsible for its normal and reasonable expenses incurred in performing the Services. But there were two exceptions to the generality of this provision. Proactive was entitled to be reimbursed if it was asked to perform services that went beyond the scope of the Services which the Company was required to provide or where it incurred extra or unforeseeable expenses in providing those Services.
60. Both clause 7 and clause 8 are important provisions which were carried forward in materially identical terms into the Image Rights Representation Agreement on which Proactive bases its present claims. Clause 7 is headed “Duration and Termination” and reads as follows:
- “7.1 Subject to clause 7.2, this Agreement shall commence on the date hereof and, subject to the provisions of this clause, shall continue for eight years, unless terminated earlier in accordance with the provisions of this clause 7.
- 7.2 Either the Company or the Client may terminate this Agreement immediately by giving notice in writing upon the occurrence of a material breach of this Agreement by the other party which is not remedied within 14 days of a written request, or upon the bankruptcy or insolvency (as appropriate) of the other party.”
61. Clause 8 deals with the consequences of termination. It is in these terms:
- 8.1 In the event that the Client and/or Mr and Mrs Rooney terminate this Agreement prior to the expiry of the term set out in clause 7.1, other than in accordance with clause 7.2, the Client and/or Mr and Mrs Rooney shall forthwith pay to the Company:
- 8.1.1 A repayment of:
- 8.1.1.1 £25,000, if the date of termination is prior to the date of receipt by the Client and Mr and Mrs Rooney of the payment detailed in Clause 5.1.2; or
- 8.1.1.2 £50,000, if the date of termination falls after such date; and
- 8.1.2 A further sum payable to the Company as liquidated damages and calculated as follows;  
A sum equal to £37,500 multiplied by the number of complete years of the unexpired term of this Agreement (with years to commence from the date of this Agreement and anniversaries thereof).
- 8.1.3 A sum equivalent to the Company’s total costs and expenses properly incurred from the date hereof until the date of termination notice in its performance of the Services (and which details of such costs and expenses shall be properly documented by the company and supplied to the Client and Mr and Mrs Rooney so as to facilitate such payment).”
62. I need briefly notice only two other provisions. Clause 23 provided that the invalidity, illegality or unenforceability of any term of the Agreement should not affect the other terms. That was no doubt intended to address the possible consequences of the application of the doctrine of restraint of trade to the contract. Finally, clause 24, which was headed “Independent Legal Advice” in bold type, stated that the client and Mr and Mrs Rooney confirmed that in reviewing the agreement

prior to execution and deciding to enter into it, they had sought and taken independent legal advice.

### Legal Advice

63. Clause 24 was, of course, a provision which had been directly drawn to Mr Rodford's attention in DLA's letter of advice dated 13<sup>th</sup> June 2002, which also specifically advised that the Rooneys should be recommended to take independent legal advice before signing the Agreement. But there is, in fact, no evidence whatever that they did so. On the contrary, Mr and Mrs Rooney denied that they had ever been advised to take legal advice of this nature or that they had done so. It is true that, in cross-examination, Mr Rooney senior was prepared to accept that Mr Rodford may have read through the draft agreement with them at the meeting on 28<sup>th</sup> June 2002; and on that basis, Mr Mill invited me to infer that they were, in fact, advised to take independent legal advice as to the terms of the draft agreement and, indeed, that they probably did so. But I am quite unwilling to draw any such inference against their clear denials and in the absence of any evidence to the contrary from Mr Rodford. It is, however, the case that Mr and Mrs Rooney subsequently sought legal advice from a solicitor in relation to certain other contractual issues. But it seems highly unlikely that this was in any way related as to the terms of the contract which Proactive was inviting them to sign.
64. In fact, it appears to have been Mr Stretford who suggested that they should consult one of two solicitors whom he recommended to them. One of these was a Mr Kevin Dooley, who was then in practice with a firm known as David Phillips and Partners or DPP. It was Mr Dooley that they chose to instruct. According to both Mr Stretford and Mr Rooney senior, the reason why they felt that they needed legal advice on their own account was in order to see whether they could extricate themselves from the Proform Agreement, particularly in view of the fact that there appeared to have been some suggestion that there might be an attempt to assign the Agreement by Proform to another football representation agency known as X8 Limited.
65. Mr Dooley was an unfortunate choice, as he was himself the subject of disciplinary proceedings initiated by the Law Society and was shortly afterwards struck off the roll. For their part, Mr and Mrs Rooney could recollect meeting only Mr Dooley; but it may be the case that it was other members of the firm who actually handled the matter on their behalf.
66. Be that as it may, advice was clearly taken from leading counsel, Mr Alan Newman QC, who prepared two draft letters and a brief accompanying note dated 13<sup>th</sup> September 2002. These letters were directed to Proform and to X8 Limited and claimed to avoid the Proform contract on the grounds of WR's minority. These letters were sent out on 17<sup>th</sup> September 2002 under the initials of an associate solicitor with David Phillips and Partners, a Mr Bernard Morron.
67. It appears that solicitors were then instructed on behalf of Proform and correspondence ensued. But I have not been taken to any of the correspondence. What is, however, clear is that Mr Newman provided brief further written advice on 31<sup>st</sup> October 2002 in which he expressed the opinion that the Proform Agreement was

void and of no legal effect as from 18<sup>th</sup> September 2002 at the latest. He also stated that he was content for his advice to be shown to the FA if required.

#### The September 2002 Agreement

68. It may well be the case that it was on the basis of the advice from Mr Newman QC and the letters sent by David Phillips and Partners that Mr Stretford felt it appropriate, on behalf of Proactive, to enter into a further written representation agreement with WR. This contract appears to have been in Proactive's then standard form and is identical to the specimen which was sent to DLA by or on behalf of Mr Rodford when they were first instructed to prepare what ultimately became the July 2002 Agreement. It was for a period of two years commencing on 19<sup>th</sup> September 2002. But it was signed only by WR and not by his parents, notwithstanding that he was still under the age of 18 at the time. Mr Stretford signed it on behalf of Proactive. But I heard no evidence as to the circumstances in which it came to be signed.
69. But according to both Mr Stretford and Mr Rooney senior, Mr Stretford had a change of heart about the desirability of entering into such a representation agreement at that time. At least according to Mr Stretford, he asked Mr Rooney for his son's copy of the Agreement and tore it up, though Proactive's own copy seems to have been retained on file. The reason for this is said to have been because of the prospect of a legal dispute arising between Proactive on the one hand and Proform and X8 Limited on the other. The whole episode seems to have been a little theatrical and slightly odd in view of the advice given by Mr Newman and the retention of Proactive's own copy of the Agreement. But it appears that Everton FC was unwilling to engage in contract negotiations with Proactive so long as the Proform Agreement had not run its full term. Indeed, on 23<sup>rd</sup> October 2002, the Club's Chief Executive, Mr Michael Dunford, had written to Mr McIntosh confirming that there had been no negotiations between the Club and Proactive in relation to WR and stating that, unless an agreement could be reached between Proform, Proactive and the Rooney family, negotiations would not commence until 13<sup>th</sup> December 2002.

#### The December 2002 Agreement

70. On 24<sup>th</sup> October 2002, WR celebrated his 17<sup>th</sup> birthday and was, therefore, eligible under FA Regulations to sign a professional playing contract for up to three years in duration. Mr and Mrs Rooney and their son all wished to be represented by Mr Stretford and Proactive in any negotiations with Everton FC with a view to a new footballing contract and, on 14<sup>th</sup> December 2002, immediately after the expiration of the Proform Agreement, WR signed a yet further Representation Agreement with Proactive which was, once again, in Proactive's then standard form. On this occasion, however, Mr Stretford did not himself sign the contract on behalf of Proactive. The actual signatory was, it would seem, a Mr Jonathan Stanger, another registered football agent employed by Proactive. His signature was witnessed by Mr Doherty; and Mr Rooney senior also signed though the capacity in which he did so was not recorded.
71. According to Mr Stretford, the reason why he was not himself a signatory to the Agreement may well have been because he was absent abroad at or about this time. But it was his evidence that he did not appreciate that it covered image rights as well

as on-field representation. That seems a somewhat peculiar observation, since the Agreement was in what appears to have been Proactive's standard form and, apart from its commencement and termination dates, was identical to the one which Mr Stretford had himself signed on behalf of Proactive on or about 19<sup>th</sup> September 2002.

#### Proactive's Preparations for its Agency Role

72. Be that as it may, the December 2002 Agreement provided, on its face, for the appointment of Proactive as WR's agent for a period of two years from 14<sup>th</sup> December 2002; and on any view, the Proform Agreement had by that time expired. Accordingly, the way was clear for Proactive to become directly involved in negotiations with Everton FC with a view to reaching agreement on the terms of a new playing contract and allied benefits. These negotiations were conducted by Mr Stretford himself. But other aspects of the relationship between Proactive and the Rooney family still had to be worked out; and various other individuals within Proactive were involved, at least to some degree, in relation to such matters. These included, most notably, Mr Rodford and Mr Christopher Rawlings, who was then Proactive's Sports Marketing Manager. But there is a good deal of dispute as to precisely what part these individuals played. Indeed, factually the most contentious issue in the case is how far Mr Stretford had any involvement in the new arrangements for off-field representation and how much knowledge he had of those arrangements at the time.
73. According to Mr Stretford, shortly after the July 2002 Agreement had been signed, Mr Rodford instructed tax consultants to advise as to how best to exploit WR's image rights. The tax consultancy was a concern known as Kingsbridge which appears to have been the trading name of a company known as Powrie Appleby Limited or to be otherwise closely connected with it.
74. As early as 7<sup>th</sup> August 2002, Mr Glyn-Smith of Kingsbridge had written to Mr Rodford stating that he had allocated for these purposes an "off the shelf" company named Stoneygate 48 Limited. He asked for the dates of birth of the three directors and for confirmation as to whether WR was to be the sole shareholder. So it is quite clear that at that time it was already envisaged that WR's image rights would be operated through the medium of a limited company in order to secure the tax benefits of operating in this way.
75. But, even though Mr Rodford appears to have initiated the process, it seems to have been Mr Rawlings who primarily dealt with these matters. He appears to have taken advice from trademark agents, William A Shepherd and Son Limited, of Manchester; and he was probably the one who instructed DLA, once again, in early November 2002 to prepare certain documents. DLA do not initially seem to have been aware that Kingsbridge had already earmarked Stoneygate for these purposes and appear, therefore, to have given some consideration as to precisely what type of company would be required. On 20<sup>th</sup> November 2002, they e-mailed to Mr Rawlings a draft Management Representation Agreement between the proposed new company and Proactive, a draft Image Rights Licence Agreement and a note regarding the tax issues involved in setting up a new company to be registered in the United Kingdom or abroad. But, in late November, it was decided to take advice on trademark matters from Eversheds, of Manchester, and this was followed by a more general request for

advice in relation to image rights. Mr Farnell of Eversheds wrote an initial letter of advice to Mr Rawlings on 17<sup>th</sup> December 2002, very shortly after the Agreement of 14<sup>th</sup> December 2002 between Mr Rooney and Proactive had been signed.

76. But Proactive did not persevere with Eversheds. This may have been because Mr Farnell was also involved in providing advice to Everton FC. Be that as it may, it was decided to instruct a Mr Daniel Harrington, a partner in a London firm of solicitors specialising in sports law, known as Couchman Harrington Associates. Mr Harrington had known Mr Rodford for some time and had met Mr Rawlings and Mr Stretford at an “away day” hosted by Proactive in Amsterdam in December 2001. A meeting was arranged between Mr Rawlings and Mr Harrington together with his partner Mr Couchman at the Metropole Hotel in London on 23<sup>rd</sup> December 2002. As a result, Mr Harrington was instructed throughout the crucial period of about two months during which all the relevant documents were prepared and executed. But Kingsbridge and Powrie Appleby also continued to assist in relation to certain tax matters and in the preparation of the relevant company documents.
77. The file of papers relating to these matters which was maintained by Couchman Harrington during this period has played an important part in the present litigation. At the trial itself, Mr Harrington was called to give evidence on behalf of Proactive and there was extensive reference to the documentation on his file. It will be necessary to consider this evidence in some detail for the purposes of this judgment.
78. There is little doubt that Mr Rawlings was the principal point of contact between Proactive and these various advisers. There is nothing to suggest that he had been involved in any way in the events which led to the drafting and execution of the July 2002 Agreement. But in or about October 2002, because of his position on the commercial marketing side of Proactive’s activities, he was brought in to deal with the exploitation of the player’s image rights, which is no doubt why he became the effective intermediary between Proactive and its professional advisers.
79. It seems that Mr Rawlings had only a fairly sketchy recollection of the details of its involvement in these matters, save where his memory could be refreshed by reference to contemporary documents. He did, however, have the advantage of having been able to locate a notebook in which he had kept a number of manuscript notes relating to these matters.
80. Mr Rawlings’ notes are in sequence and some of them are dated. It appears from these notes and Mr Rawlings commentary upon them that he first became involved in marketing matters relating to WR towards the end of October 2002. From a very early stage, it is apparent that careful consideration was being given as to how best to market the Rooney brand. An early note identifies the “team” which would be involved and briefly notes their responsibilities. Thus Mr Rawlings himself would deal with commercial matters and Mr Stretford would act as the player’s agent with Mr Stanger in support. Curiously, perhaps, Mr Dooley is identified as the “family adviser”, though DLA were also to be instructed, it would seem, to prepare some form of confidentiality agreement. The same note refers to certain “stock answers” which were to be given in response to any press enquiries. These included the note that there should be “no contractual dialogue until Dec 12th”; and, on the same page, reference was also made to “commercial representation until Dec 12<sup>th</sup>”. These entries

might seem to suggest that it was Proactive's intention, at that time, not to become involved in on-field matters (as opposed to commercial activities) until after the expiration of the Proform Agreement.

81. Shortly afterwards, Mr Rawlings made a rather more detailed note referring to the proposed company set-up and the advice to be obtained from William A Shepherd or DLA. These appear to be references to the proposed image rights company and trademark protection. They were followed by a brief note about marketing strategy which indicate that Proactive should be looking for six or seven long-term partners in various fields including sportswear, soft drinks and computer games.
82. It seems fairly clear from these notes that WR's image rights were seen as a potentially highly marketable product and that quite extensive consideration was being given as to how best to exploit this potential. Whilst that would obviously have come within Mr Rawlings' remit, he emphasised that no major decisions would have been taken without Mr Stretford's involvement and approval and that it was Mr Stretford who took responsibility for negotiating all major sponsorship deals. Certainly, there are a number of references to Mr Stretford in the notes produced by Mr Rawlings which provide some support for his evidence that Mr Stretford was always the main point of contact between Proactive and WR and that all decisions relating to the player were made or authorised by Mr Stretford.
83. I need refer to only one further point arising out of these notes. On some date between 28<sup>th</sup> October 2002 and 5<sup>th</sup> November 2002, there was a brief reference to some sort of agreement for a period of eight years. In his witness statement, Mr Rawlings said that he could not remember who mentioned that there should be any sort of agreement lasting eight years but he assumed that this must have been Mr Stretford, as matters of that kind were outside his own purview. But when challenged about this in cross-examination, he became, if anything, more insistent that it must have been Mr Stretford who had told him about this in the course of a meeting, since he had not seen the 2002 Agreement at that time.

#### The Involvement of Couchman Harrington

84. When Mr Rawlings met Mr Harrington and Mr Couchman on 23<sup>rd</sup> December 2002, he handed over various documents and papers relating to the proposed arrangements for the exploitation of WR's image rights. An attendance note on the Couchman Harrington file records that there was already in existence a "Management Agreement" between WR and Proactive but that this would be supplemented by separate assignment of all of the player's image and related rights into Stonegate which would in turn grant exclusive marketing and representation rights to Proactive. The note also records that Mr Rawlings suggested that the "Marketing Representation Agreement" could parallel the Management Agreement in that it could be on a "two year rolling basis".
85. Mr Rawlings accepted that he probably made some such suggestion; and, in both his witness statement and, at least initially in cross-examination, he appeared to accept that this must have been a reference to the Agreement dated 17<sup>th</sup> July 2002. But that, of course, as he acknowledged, was for a term of eight years rather than two years, as he already appears to have known, even if he had not seen the Agreement itself. So

he suggested that he must either have forgotten that this was so or that the reference must have been to the later Agreement of 14<sup>th</sup> December 2002.

86. In fact, he appeared to have very little, if any, recollection of the meeting with Mr Harrington and Mr Couchman and, in reality, was doing no more than guessing at what might have been meant by certain expressions used in a document prepared by others. The only point of any potential significance which can be derived from all this is that, as he accepted, he appears to have assumed that the term of an image rights representation agreement should be the same as any on-field representation agreement and should, therefore, be for a maximum of two years only.
87. I make two further observations about the meeting on 23<sup>rd</sup> December 2002. Firstly, it seems that the papers handed over to Couchman Harrington by Mr Rawlings on that occasion did not include a copy of the Agreement of 17<sup>th</sup> July 2002. That was not supplied to them until 16<sup>th</sup> January 2003. Secondly, the attendance note records an observation by the solicitors that WR might “technically” need independent legal representation in relation to the contracts which were being contemplated. But it was also recorded that this could be addressed in due course.
88. The first task which Couchman Harrington were asked to carry out was the preparation of a report on a proposed image rights agreement with Everton FC. Once the Proform Agreement had expired and the new Representation Agreement with Proactive had been signed on or about 14<sup>th</sup> December 2002, Proactive, and Mr Stretford in particular, were able to engage in formal negotiations with Everton FC for the purposes of negotiating a new playing contract for WR. But Proactive also wished to negotiate a separate image rights agreement with the club under which the club would be granted a licence to exploit the player’s image rights for certain limited purposes closely related to his playing activities, such as the promotion of replica kit and official club merchandise. It was envisaged that the club would pay a minimum fee plus royalties in return for such a licence. It appears to have been considered that if such an agreement could be reached under which fees and royalties were payable to a limited company rather than directly to the player himself, it would result in a more tax-efficient package of emoluments than if all payments had simply been made directly to the player.
89. It was, of course, Mr Stretford who was leading the negotiations on behalf of WR with a view to reaching agreement both on the terms of a new playing contract and of any image rights licence. But it seems to have been anticipated that there might be some reluctance on the part of the club to agree to a separate image rights licence in respect of such a young player. The report commissioned by Mr Rawlings from Couchman Harrington was intended to help to persuade Everton FC that such an image rights deal was appropriate.
90. The first draft of this report was produced on 27<sup>th</sup> December 2002; and it appears to have been finalised on 30<sup>th</sup> December 2002. It is unnecessary to examine its contents in any detail. It summarised the way in which certain elite sportsmen were beginning to exploit their image rights through the medium of a limited company. It provided estimates of the value of such image rights in respect of a number of top footballers and gave an assessment of the value to the club of recent media coverage of WR’s career and activities. It also sketched out the nature and terms of the proposed image

rights agreement with Everton FC and the suggested level of fees and royalties. It addressed the potential tax advantages of such an arrangement and commented on the fact that such a scheme appeared to have received the approval of the Inland Revenue. It is of some interest to note that, at least in the final version, the company through which WR's image rights were to be exploited was specifically identified as Stoneygate.

91. But what is, perhaps, most striking about the report is the way in which it seeks to emphasise the very remarkable potential of the player, despite his youth and comparative inexperience. Those views would presumably reflect those held by Mr Stretford and Proactive. It is worth picking out one or two comments from the report. In the very first paragraph, it refers to him as "the most promising young English footballer for many years". At paragraph 4.2, it refers to him as a "star player" who promised to be "one of the Premiership's (if not Europe's) brightest talents for many years". Towards the end, it comments on the benefits which the club could expect from the presence of "a genuine world class star player". Then, in Appendix 2, it sets out a very considerable number of golden opinions which had been expressed by various players and commentators, all of which were introduced by the observation that these underline "his growing reputation as the most talented youngster in Britain".
92. Though the report was, in a sense, a marketing document designed to persuade Everton FC to enter into the sort of deal which Mr Stretford was proposing, it nonetheless demonstrates the reputation and potential earning capacity which he was regarded as having already acquired. That is material to the assessment of the risks which, it is said, Proactive took in signing him up, through Stoneygate, to an eight-year Image Rights Representation Agreement.
93. On 6<sup>th</sup> January 2003, there was an exchange of e-mails between Mr Rawlings and Mr Harrington, initiated by a message from Mr Rawlings that Mr Stretford's discussions with Everton FC were going well and informing him that financial and tax advice would be provided by Kingsbridge and trademark advice by William A. Shepherd. Mr Harrington then enquired when Proactive would want his firm to prepare the relevant contractual documentation and to advise on the structure of the arrangements. After a brief discussion about the documents drafted by DLA which had already been provided, Mr Harrington was instructed to prepare any necessary adjustments to the memorandum and articles of Stoneygate and the necessary assignment or assignments.
94. But the actual instructions appear to have been a little wider than that. On 9<sup>th</sup> January 2003, Mr Couchman sent Mr Rawlings a letter of engagement in which he summarised the firm's instructions as comprising the following:
  - (i) Advise upon and prepare contractual documentation relation to Wayne Rooney's proposed Image Rights Agreements with Everton FC; and
  - (ii) Advise upon and prepare documentation for the structuring of Wayne Rooney's Image Rights and Promotional Rights generally."
95. After receiving some tax advice from Mr Philip Glyn-Smith of Powrie Appleby, a letter of advice was prepared by Couchman Harrington and sent by Mr Harrington to Mr Rawlings on 13<sup>th</sup> January 2003. The advice offered was divided into five separate

parts. The first of these dealt with the proposed assignment of image rights to Stonegate. In this context, it was pointed out that WR was still a minor and that he might well be entitled to terminate the contract lawfully during his minority or within a reasonable time after reaching the age of 18. Amongst other things, Mr Harrington advised that Proactive should seek and (if commercially acceptable to Proactive) pay for independent legal and financial advice for WR prior to his signing the contract. Any such costs should not be recoupable or repayable. Furthermore, assurances should be sought from the independent adviser that the player had read the assignment and understood his responsibilities and obligations under it.

96. The letter then dealt with the proposed image rights company. That is, of course, Stonegate. It was noted that two shares had been issued; and the obvious question was asked as to whether both would be transferred to WR. A question was also raised as to whether it would be appropriate to change the name of the company to one more closely associated with the player's own name. This section of the letter also dealt with the tax treatment of the company. In this context, it was suggested that it would be a good idea for WR to have some form of personal endorsement deal in place before the assignment. It was also suggested that the payments for playing services should be clearly distinguished from payments for the grant of image rights, so as to avoid the risk that image rights income was simply a way of remunerating the player for his services as a player and, for the same reason, that the split between salary and payment for promotional services and image rights should be commercially justifiable.
97. The letter then briefly dealt with the possibility of setting up an off-shore corporate vehicle in respect of overseas earnings. It went on to deal with the proposed assignment of WR's image rights to Stonegate. A draft agreement was attached which was said to have been modelled on the draft prepared by DLA. Some brief advice was given about certain of the terms. Furthermore, what was described as an "inducement letter" was also annexed to the draft assignment which was intended to give comfort to potential licensees that WR would stand behind the obligations of the company. The letter concluded with some brief observations about internet domain names.
98. At this stage, therefore, Couchman Harrington appear to have been instructed to advise and prepare documentation in respect only of the assignment of the image rights to Stonegate and the proposed image rights agreement with Everton FC. They do not appear to have been specifically instructed to prepare or advise upon any image rights representation agreement between Stonegate and Proactive.
99. On 14<sup>th</sup> January 2003, Mr Harrington sent an e-mail to Mr Rawlings to which he attached a discussion document containing what he described as the key issues and some possible commercial terms for WR's image rights licence to Everton. He commented that Mr Stretford might already have agreed some of the key terms which might differ from these suggestions. His e-mail went on to say that he thought, or at least hoped, that heads of agreement could be achieved by the end of the week and that a "long-form" agreement could be drafted and signed off as soon as possible thereafter. But he noted that there were a number of corporate and tax matters which needed to be looked at carefully before the deal was finalised. Nonetheless, he suggested that commercially-binding heads of agreement should be possible fairly

quickly. He concluded by saying that he looked forward to catching up with Mr Rawlings and Mr Stretford on the following day. This obviously referred to the fact that a meeting or meetings had been arranged for the following day, 15<sup>th</sup> January 2003, which Mr Harrington had been asked to attend. It was envisaged that there would be a meeting in the first instance at Proactive's offices in Wilmslow followed by a further meeting at Goodison Park, the home of Everton FC.

#### The Meetings on 15<sup>th</sup> January 2003

100. Mr Harrington himself gave a detailed account of how he travelled to Wilmslow by train on the morning of 15<sup>th</sup> January 2003, and, whilst on the train, how he continued to work on the document which he had sent to Mr Rawlings the previous day. When he arrived at Proactive's offices, he was shown to the board room where he met Mr Rawlings and Mr Stretford on behalf of Proactive together with Mr Battersby and Mr Glyn-Smith of Kingsbridge. It was his evidence that Mr Stretford read out the terms of an agreement which he wished to negotiate with Everton FC later that afternoon. But he commented on the fact that most of the discussion focused on the on-field playing contract, rather than on the image rights agreement with which he was primarily concerned.
101. Mr Harrington did, however, keep a brief note of the discussions and was able to recall two particular points in connection with the proposed image rights contract with Everton FC. Mr Stretford referred to the fact that Mr Farnell of Eversheds was now advising Everton FC. He suggested that if Mr Farnell questioned the principle as to whether there should be an image rights agreement between the club and the player, Mr Harrington might wish to produce the advice which Mr Farnell had already given about such matters and which had been amongst the papers handed to him by Mr Rawlings on 23<sup>rd</sup> December 2002. In the event, however, that proved unnecessary. But in addition, Mr Stretford stated that he would like to take shares in Stoneygate. For his part, Mr Harrington had doubts as to whether this would be either usual or appropriate, though he was unsure whether he expressed those reservations during the course of the meeting. As will be seen, the issue was resolved as a result of tax advice from Powrie Appleby.
102. It is unnecessary, I think, to refer to Mr Harrington's manuscript notes of the meeting save for two brief points. Underneath a brief summary of the proposed wages and signing on fee, Mr Harrington wrote down what appears to be a figure of £3,066,000, which seems to have reflected the total value of the package which was being negotiated. Secondly, he noted that, as a result of the assignment of WR's Image Rights to Stoneygate, there would be a need for a representation agreement between Proactive and Stoneygate. That appears to be the first reference to the need for a new agreement to replace or supplement the Agreement of 17<sup>th</sup> July 2002.
103. According to Mr Harrington, all the participants in this meeting then made their way to Everton FC's football ground at Goodison Park. He and Mr Rawlings were taken to the ground by Mr Stretford in his own car. When they arrived, they were taken to the board room where they met Mr Dunford, the club's Chief Executive Officer and Mr Farnell. After some initial exchanges, it was agreed in principle that the image rights agreement would proceed, whereupon Mr Farnell and Mr Harrington left the room in order to resolve the precise wordings of draft Heads of Agreement. When

they had done so, they took the completed document back into the board room for Mr Dunford and Mr Stretford or Mr Rawlings to sign.

104. The parties to these Heads of Agreement were Everton FC, Stoneygate and Proactive (which was described as the “Agent”). Amongst the recitals, it was recorded that Stoneygate, as licensor, was authorised to control, deal with and manage WR’s image rights and promotional and commercial services; and that Proactive, as agent, was authorised to advise upon and assist in the administration and management of the commercial exploitation of such rights. It also recited the fact that WR anticipated entering into a playing contract with Everton FC, indicating that, at least at that time, he had not actually done so.
105. The Heads of Agreement then set out the key terms of the proposed substantive agreement which granted a licence to Everton FC to use the player’s image and promotional rights for a term of three years in return for a minimum annual payment of £150,000 plus VAT. It also recorded that the parties intended to replace the Heads of Agreement with a binding long-form Agreement as soon as possible which would include standard “boiler plate” clauses, warranties and indemnities. It was also expressly stated that the Heads of Agreement should come into effect once signed by all parties, and that the effective date should be the date of the signature of the last party to sign. As Mr Harrington pointed out, it could not come into force at once, since there had, as yet, been no assignment of WR’s image rights to Stoneygate and, indeed, that the company structure had not yet been finalised.
106. Mr Harrington could not, of course, give evidence as to what happened whilst he and Mr Farnell were away from the board room. But it was his understanding that agreement was reached in principle as to the terms of the on-field player contract. These discussions took some time and it was early evening before they were able to leave Goodison Park. As a result, Mr Harrington missed his train and had to stay overnight in Crewe before making his way back to London the following morning.
107. Mr Rawlings also had some recollection of these events, albeit of a fairly limited nature. But he was able to refresh his memory to some extent by reference to some manuscript notes which he had made in preparation for the meeting at Proactive’s offices as well as some notes which he made during the meeting itself. The preparatory notes were set out in typescript, although he subsequently made a number of manuscript annotations upon them. At least some of these, he thought, would have been made after discussions with Mr Stretford. Not much of significance arises out of these preparatory notes. They indicate that he was uncertain as to how the two issued shares in Stoneygate should be re-allocated and that no banking arrangements had been set up for the Company.
108. Mr Rawlings also added two further observations in manuscript. The first reads “PS Agreement - VIII year deal”; and the other says “get all detail from Paul regarding issues - nitty gritty.” In his witness statement, he said that he could not say whether the initials “PS” referred to Mr Stretford or to Proactive. But I am very much inclined to think that it must be a reference to Mr Stretford rather Proactive Sports Management. The potential significance of these entries is that, at least by this time, Mr Rawlings must have been aware that an agreement for a term of eight years was either in existence or in contemplation. The notes also provide some support for Mr

Rawlings' evidence that any details of the arrangements with the player would have to be obtained from Mr Stretford.

109. Interestingly, Mr Rawlings' notes of the meeting at Goodison Park include the same total figure of £3,066,000.00 as had been jotted down by Mr Harrington. But he also noted one or two other matters which had not been recorded by Mr Harrington, perhaps because he was out of the room at the time. Thus, Mr Rawlings recorded that there would be a "signatory date" of 1<sup>st</sup> February and that there should be a "formal announcement", apparently to the effect that terms had been agreed, on the following Friday, with a press session at a later date. This was followed by a comment seemingly attributed to Mr Stretford to the effect that this would be "OK if heads signed before Friday". The following Friday, it should be noted, would have been 17<sup>th</sup> January 2003.
110. Mr Stretford, for his part, appeared to have only limited recollection of the events of 15<sup>th</sup> January 2003. In his witness statement, he said that he could not recall having met Mr Harrington on that occasion, though he believed he had met him once at Proactive's offices in Wilmslow. But in cross-examination, he accepted that he must have met Mr Harrington on the day in question at Proactive's offices and that he must have accompanied him to the subsequent meeting at Goodison Park. Furthermore, save in one or two very minor respects, he did not feel able to challenge any of Mr Harrington's account of the events of that day. He agreed that Mr Harrington's notes of the meeting at Proactive's offices appeared to reflect the sort of topics which would have been discussed at that meeting. Likewise, he did not challenge the proposition that the annotations on the notes which Mr Rawlings had prepared in advance of the meeting would probably have been made after discussions in which he was involved, though he was able to pick out one or two points which he did not think would have been the subject of any discussions with him. But he would not accept that there had been any discussion with him or in his presence about any eight-year image rights agreement. The "nitty gritty" referred to by Mr Rawlings could only have referred to the terms of the playing contract and the payments for commercial rights but not to the wording of any documents.
111. Mr Stretford did, however, accept that the Heads of Terms relating to the Image Rights Licence, as agreed by Mr Harrington and Mr Farnell, were signed during the course of the meeting at Goodison Park on the evening of 15<sup>th</sup> January 2003. That is not in fact entirely accurate. Mr Rawlings was able to produce a copy of the document as signed by the various signatories. It appears that Mr Dunford and Mr Stretford signed on behalf of Everton FC and Proactive respectively on 15<sup>th</sup> January 2003. But, as was accepted on all sides, Mrs Rooney was not present on that occasion and could not, therefore, have signed on behalf of Stoneygate. So her signature must have been appended at a later date. On the face of the document itself, her signature is dated 17<sup>th</sup> January 2003.
112. Mr Stretford also accepted that most of the other terms to be incorporated in WR's playing contract were also agreed during the course of the meeting on 15<sup>th</sup> January 2003. Indeed, he said that after the meeting had concluded, he had driven over to see the player's parents to tell them the good news that he had secured agreement, no doubt in principle, to virtually all the major points which they had wanted. But, according to Mr Stretford, there were still some matters which had to be resolved

relating to the structure of the football contract and the provision of a house for the player by the club. It was his evidence, at least in cross-examination, that discussions and negotiations about these matters continued on the following day, 16<sup>th</sup> January 2003. He said that he thought he had been to see Mr Dunford and possibly Mr David Harrison, the club secretary, in the late afternoon or evening, after he had visited the manager, Mr Moyes, at the Club's training ground. His meeting with Mr Moyes does indeed feature in Mr Stretford's diary, but there is no reference to any other meeting with any other representatives of Everton FC on that day.

#### The Exchanges on 16<sup>th</sup> January 2003

113. Though the Heads of Terms had been signed by Mr Stretford and Mr Dunford on 15<sup>th</sup> January 2003, none of the other documentation was yet in place save, of course, that Stoneygate had already been incorporated and was the intended vehicle for the exploitation of the player's image rights. When he got back to London on 16<sup>th</sup> January 2003, Mr Harrington got on with the further work that was required. He must have had some sort of discussion with Mr Glyn-Smith of Powrie Appleby, to whom his partner, Mr Couchman, sent a copy of a draft assignment which was attached to an e-mail dated 16<sup>th</sup> January 2003 and timed at 10.24am. Mr Glyn-Smith was asked to review and clear the draft assignment from a tax perspective and to advise on one to two other ancillary matters. One of these was whether it would be desirable for the Assignment to be completed before the Heads of Agreement became binding. It was pointed out that, though they had already been signed on behalf of the Club and Proactive, they did not come into effect until signed on behalf of Stoneygate. But, if necessary, he suggested that this could probably be "re-jigged". Mr Couchman asked for any reply to be directed to Mr Harrington.
114. Later on the same day, Mr Harrington himself took up a similar point in an e-mail to Mr Glyn-Smith timed at 12.48. He asked for his opinion, from a tax perspective, on the Heads of Agreement signed the previous day. He too pointed out that it would not come into effect until it was signed on behalf of Stoneygate. But he added that he did not think that it should be so signed until various further matters had been resolved. The first of these related to the UK tax position; the second was concerned with the appointment of directors and the issue of shares in Stoneygate; the third was to the effect that the directors of Stoneygate should have been advised of and agreed to the company's obligations under the contract; and the fourth was that the assignment of image rights from WR to the company would have to have been effected.
115. Mr Glyn-Smith responded to this e-mail about an hour later. In relation to the company administration matters raised by Mr Harrington, he said that this was "moving along" and that forms recording the change of directors would be sent to Mr Stretford by guaranteed next-day delivery for him, the player and his mother to sign and submit to Companies House. He also said that the question of a change of share capital was being dealt with. He followed this up by an e-mail in the late afternoon to which were attached a number of documents. These comprised undated company documents dealing with alterations in the share structure, the appointment of directors, the transfer of the two issued shares and the allotment of two further shares.
116. What was envisaged was that the shares should be divided into two classes. The "A" ordinary shares would have no rights other than voting rights; and the "B" ordinary

shares would carry all other rights of such shares, including the rights to receive dividends, but no voting rights whatsoever. The two subscriber shares would be designated as “A” ordinary shares and would be transferred to Mr Stretford. Two “B” ordinary shares would then be issued and allocated to WR. If all this had been implemented, therefore, Mr Stretford would have had complete control of the company, but would have had no right to any dividends or surplus. The draft documents also recorded a resolution that Mr Stretford, WR and his mother should be appointed directors of Stoneygate with immediate effect.

117. Mr Glyn-Smith followed this up with a further e-mail later that evening timed at 20.56. It was addressed to Mr Rawlings and copied to Mr Harrington and dealt with the tax treatment of the proposed arrangements. A note about these matters was attached. But, though it was directed to Mr Rawlings, it was also expressly stated to be for Mr Stretford’s attention. It appears that it had not been sent directly to him simply because Mr Glyn-Smith did not have his e-mail address. The e-mail and the attachment summarised four possible options. His preference was plainly for one of the less “aggressive” solutions. But this would require evidence that WR had already obtained the right to some income from the exploitation of his image rights prior to any assignment. The details of the various proposals are, I think, immaterial. But the e-mail clearly shows that Mr Glyn-Smith (who had, of course, been present at the meetings on the previous day) assumed that these were matters which would be of interest to Mr Stretford as well as Mr Rawlings. But Mr Stretford had no recollection of ever having been shown a copy of this e-mail.
118. In the meantime, however, there had been a further significant development. By fax dated 16<sup>th</sup> January 2003 and timed at 11.25, someone at Proactive had sent Couchman Harrington a copy of the Agreement of 17<sup>th</sup> July 2002. As Mr Stretford himself acknowledged in the course of cross-examination, it is highly likely that this was because it had been mentioned during the course of the meetings held on the previous day, though he said that he could not remember anything being said about it. In fact, such a discussion would be entirely consistent with the manuscript note made by Mr Harrington himself during the course of the meeting at Proactive’s offices in which he referred to the need for a “Representation Agreement between Proactive and Stoneygate”.
119. But it is unclear who was responsible for sending this document to Couchman Harrington. No separate transmission sheet has been preserved, though the pagination suggests that there must have been one. The fax header itself simply states “from P”. That is precisely the same heading found on a further fax sent the following day by one Rachel Yemm, on behalf of Proactive to Mr Harrington. It may stand for Mr Stretford; or it may refer to Proactive. I cannot tell. Miss Yemm was, apparently, an individual who was employed in the Sports Management Department but who also did some occasional secretarial work for Mr Stretford.
120. Furthermore, in addition to the e-mails to and from Mr Glyn-Smith, Mr Harrington also exchanged e-mails with Mr Rawlings on the afternoon of 16<sup>th</sup> January 2003. The exchange was initiated by Mr Harrington, who referred to the previous day’s meetings and confirmed that terms had been negotiated and recorded in the form of Heads of Agreement by which Everton FC would be granted a licence to make use of WR’s image and promotional rights. He pointed out that this agreement would become

binding when all parties had signed and that it would, therefore, not be finally binding until it was signed on behalf of Stoneygate, though, as he said, some “comfort” was to be derived from the fact that the Club had agreed to the terms. His e-mail then continued in the following words:

“To ensure that the completion of the Agreement is technically correct, Stoneygate should not sign the Agreement until the following jobs have been done, in this order;

- (i) Kingsbridge to confirm that (a) the Heads of Agreement and (b) the Draft Assignment document are acceptable from a UK tax prospective;
- (ii) The series of documents and structures are explained clearly to Wayne Rooney and his family and they take independent legal advice;
- (iii) Stoneygate 48 company matters are finalised (i.e. appointment of directors and transfer of the shares);
- (iv) Representation Agreement is finalised and executed between Stoneygate 48 and Proactive;
- (v) Assignment of Rights document is signed between Wayne Rooney and Stoneygate 48;
- (vi) Assignment Agreement to be reviewed by Everton FC as due diligence;
- (vii) Finally, Stoneygate signs Heads of Agreement with Club.

Conceivably, steps two, three, four and five could occur at one meeting.

We will then need to finalise the long-form of the contract, which hopefully should not be a problem given the goodwill and agreement under these terms by all sides.

I look forward to discussing this with you. I’ll come back to you with our fee proposal later today.”

121. There was a prompt reply from Mr Rawlings who made the following observations in which he referred to Kingsbridge as “KB”:

- “1) Have you sent KB the Heads.
- 2) I will discuss this with Paul.
- 3) I will chase KB over Directors and Shareholdings.
- 4 & 5) You will deliver the documentation.
- 6) You will send to Eversheds.
- 7) Fine.

I agree with a single session with the player and family present will allow sign-off together. I will ask Paul how to arrange that.

Is that OK?”

122. Mr Harrington responded later in the afternoon of the same day, pointing out that Mr Glyn-Smith was reviewing the Heads of Agreement and the draft Assignment and that he had indicated that the relevant company forms would be with Proactive the next day. He also stated that his firm were already preparing the proposed Representation Agreement and the Image Rights Assignment document.

123. It is apparent from this exchange that it was envisaged at this time that all of the relevant documents would be signed off on the same occasion. Mr Rawlings also

appears to have assumed that at least some of the points raised would have to be discussed with Mr Stretford.

#### The Events of 17<sup>th</sup> January 2003

124. On the following day, Friday 17<sup>th</sup> January 2003, Rachel Yemm faxed two further documents to Mr Harrington. The first of these was a letter dated 16<sup>th</sup> January 2003 from Mr Farnell of Eversheds to Mr Stretford and Mr Rawlings dealing with certain matters arising out of the meeting which had taken place on Wednesday 15<sup>th</sup> January 2003. He asked for a copy of the Assignment of WR's image rights to Stoneygate, commenting that Stoneygate would not be in a position to enter into any licence with Everton FC if it had not received an assignment of those rights from the player, so that the Heads of Agreement would not be validly constituted. Once he had had the opportunity of looking through the Assignment he would be in a position to advise the club as to whether it was valid. He also asked for confirmation as to the status of Stoneygate including details of the directors, secretary and members and evidence that it was validly incorporated and had the power to enter into the transaction in question. Once the Heads of Agreement had been confirmed, he said that it would then be possible to move towards agreeing the terms of a long-form agreement. In a later fax, Miss Yemm forwarded to Mr Harrington a copy of a pre-existing sponsorship agreement with Umbro International Limited which had been signed by WR and his father on or about 20<sup>th</sup> October 2000. This was obviously intended to address one of the points which had concerned Mr Glyn-Smith.
125. Indeed, the Umbro Agreement must have been sent or forwarded to Mr Glyn-Smith, who circulated an e-mail timed at 15.01 on 17<sup>th</sup> January 2003 confirming that, in his opinion, this should be sufficient to show that the player had been running a business prior to any assignment. This e-mail appears to have been sent to Mr Stretford as well as to Mr Harrington and Mr Rawlings. So it would seem that Mr Glyn-Smith must have obtained Mr Stretford's e-mail address some time after his e-mail to Mr Rawlings on the previous day in which he said he did not have it.
126. Later that afternoon, Mr Harrington sent a long e-mail timed at 15.09 to Mr Stretford with a copy to Mr Rawlings. This is a document which has taken on a good deal of significance in the course of these proceedings.
127. The e-mail is addressed to Mr Stretford by name. It refers to the meetings at Proactive's offices and at Goodison Park on Wednesday 15<sup>th</sup> January 2003 and to subsequent discussions with Mr Rawlings and with Kingsbridge with a view to putting in hand all the arrangements necessary to complete WR's image rights contract with the club on a sound footing. The e-mail then continues by dealing with a number of matters under seven separate headings. The first of these deals with the Heads of Agreement signed on behalf of Proactive and Everton FC on 15<sup>th</sup> January 2003. Mr Harrington points out that they were designed to be replaced by a long-form agreement as soon as possible. In the meantime, however, the Heads of Agreement would become binding only when signed on behalf of Stoneygate which, as he pointed out, was not yet technically in a position to sign it. Accordingly, there was not yet any final binding Heads of Agreement relating to image rights and there were a number of steps which needed to be taken before that could be achieved.

128. Mr Harrington then summarised the tax advice given by Kingsbridge before going on to deal with what he referred to as “company issues”. He noted that Kingsbridge had sent to Mr Stretford the relevant forms and documents in relation to the appointment of directors of Stoneygate and the transfer of shares. He also noted the proposal that Mr Stretford should be appointed a director, in addition to Mr Rooney and his mother, that the share capital should be divided into two classes and that Mr Stretford should become the owner of the Class A shares and would, therefore, have effective control of the company in view of the voting rights attached to those shares.
129. But Mr Harrington expressed some concern about these proposals. Firstly, he pointed out that this might give rise to problems if those involved ceased to get along well together; and this might give rise to a “possible restraint of trade issue”. He assumed that Mr Stretford would be anxious to minimise the chances of any such problems in the future. Secondly, he pointed out that any potential licensee of the player’s image rights would be likely to want to satisfy himself that it was the player who controlled the company. Accordingly, he advised that the shares should be allotted to the player. That accorded with his experience of other similar transactions; and, in his opinion, it would maximise the chances of claiming the appropriate tax relief. He did, however, suggest various ways in which Mr Stretford’s rights as a director might be entrenched without the need for him to hold any shares in the company.
130. The next section of the e-mail is of particular importance. It is headed “Representation Issues” and reads as follows:
- “I enclose for your review the following documents:
- (i) Variation Agreement;
  - (ii) Representation Agreement between Stoneygate and Proactive;
- We have prepared these contracts because under the terms of your original Representation Agreement, Proactive Sports Group was to represent all activities of Wayne (i.e. his playing services and his commercial rights). Since Wayne is now to transfer his commercial rights into Stoneygate 48 Limited, we need to vary the original Agreement to reflect this and then enter into a new Representation Agreement appointing Proactive to represent Stoneygate (as the new owner of the commercial rights). The simplest way to do this is to vary the terms of the Representation Agreement and draw up a new Agreement between the company and Proactive. This does leave us with two considerations upon which I would like your instructions.
- (i) This will leave Proactive in a position where you have two representation contracts. On the one hand, Proactive is appointed by Wayne Rooney personally to look after his playing career and negotiate transfers and playing contracts on his behalf. On the other hand, following the assignment of rights from Wayne into Stoneygate 48 Limited, Proactive will be appointed by Stoneygate 48 Limited to represent Wayne’s commercial interests. This raises the question therefore of whether or not the commercial rights Variation Agreement should automatically terminate upon the termination for any reason of the playing service’s Representation Agreement. I have discussed this with Chris and

we were of the view that it would probably be better for the agreements to terminate together but I would be grateful for your thoughts on this point.

- (ii) The original Representation Agreement was expected to last for an 8 year term. As I understand matters, FIFA licensed agents can only represent a player for a maximum of 2 years in relation to his playing contract and transfer activities. Since once the Variation Agreement is entered into, the original Representation Agreement will only relate to playing contracts and transfer activity, there may be an issue regarding that fact that it is stated to be for an 8 year term. Have you previously taken advice on this point? Furthermore, even if the player contract Representation Agreement and the Image Rights Representation Agreement are to continue for an 8 year term, the length of the Agreement could possibly expose Proactive to a claim that it is trying to bind Wayne (in the case of the Player Representation Agreement) and Stonegate 48 Limited (in the case of the image rights Representation Agreement) to a set of arrangements that could possibly be deemed to be in restraint of trade. Once again, I should be grateful if you would let me know whether you have previously taken advice on this point, as, if not, there may be some steps that we can take to minimise the risks on this front.

Of course, it will be possible to review the position when Wayne re-signs the Player Representation Agreement at the age of 18.”

- 131. Mr Harrington then continued by referring to the latest draft of the proposed Assignment of the player’s image rights to Stonegate, commenting that this had been finally approved by Kingsbridge. But he also pointed out that the shareholder structure would have to be finally resolved before this could be signed off. In the next paragraph, he referred to the letter from Mr Farnell of Eversheds addressed to Mr Stretford and Mr Rawlings and dated 16<sup>th</sup> January 2003 in which Mr Farnell asked for a copy of the assignment and for details of the incorporation of Stonegate and details of its directors and members. Mr Harrington noted that he had now seen this letter and could see no particular problems in supplying the relevant documents though he went on to comment that there was a little way to go before they would be in a position to be able to do so.
- 132. Next, under the general heading “Critical Path”, he reiterated the point that various administrative and legal steps would have to be taken before the arrangements could be concluded. He commented on the desirability, that once all final decisions had been made and the documentation prepared regarding the structure of the company, someone should “take time to sit down with Wayne and his family to ensure that they fully understand the nature of the obligations and arrangements that we are recommending to them”.
- 133. His e-mail concluded with the recommendation that, in order to be absolutely sure that everything was “nailed down and done in the course of best practice” the following steps should be taken in the following order:

- “(i) Proactive to address the various decisions to be made as set out in this e-mail.
- (ii) Proactive, Kingsbridge and CHA to have telephone conference call to finalise company structure issues, tax points and outstanding legal issues.
- (iii) Proactive, possibly in conjunction with CHA and/or Kingsbridge, to meet with player and his family to take them through the arrangements recommended. It will be ideal if the family’s solicitor was also present at that meeting to ensure that they have the benefit of independent legal advice.
- (iv) At the conclusion of that meeting, we can execute the following documents;
  - (a) Assignment Agreement
  - (b) Variation Agreement
  - (c) Representation Agreement between Stoneygate 48 Limited and Proactive
  - (d) The outstanding company documentation
  - (e) Heads of Agreement with the Club.”

134. There were several attachments to this e-mail. These appear to have included a copy of the note from Kingsbridge concerning the potential tax treatment of the assignment of the image rights to Stoneygate, and copies of the proposed new Representation Agreement between Proactive and Stoneygate and of the Variation Agreement referred to in the e-mail. Mr Harrington suggested that Mr Stretford (and no doubt also Mr Rawlings) should not hesitate to contact him once they had had an opportunity to review the letter and its enclosures.

135. But it was Mr Stretford’s evidence that he did not recall receiving or at least reading and digesting this e-mail. His explanation was that he was tied up in meetings with representatives of Everton FC almost all of Friday 17<sup>th</sup> January 2003 and would not, therefore, have had time to deal with such matters. Certainly, he does not seem to have replied by e-mail; and there does not seem to be any attendance note of any other contact between him and Couchman Harrington on that day.

136. But his evidence on these matters was the subject of a sustained attack in cross-examination. The purpose of this cross-examination was to try to demonstrate that, despite his denials, Mr Stretford must have received, read and digested this e-mail, that he probably responded to it on the same day and that he must have realised, at least by the time that he had done so, that the original Agreement of 17<sup>th</sup> July 2002 extended to on-field, as well as off-field, representation. That is an issue which I will have to address later in this judgment.

137. In fact, at least one of the questions raised by Mr Harrington in his e-mail to Mr Stretford of 17<sup>th</sup> January 2003 appears to have been resolved later on the same day. It will be recalled that there had been a suggestion that the shares in Stoneygate should be split into two classes and that the two Class A shares should be allotted to Mr Stretford. But by e-mail dated 17<sup>th</sup> January 2003 and timed at 17.12, Mr Glyn-Smith informed Mr Harrington of the abandonment of this proposal and sent him revised company minutes to that effect. Shortly afterwards, in a further e-mail to Mr

Harrington timed at 17.23, Mr Glyn-Smith gave a little more detail. What he said was this:

“Paul has got the 288A forms for his, Paul and his mum’s appointment as directors. Paul asked what date he should have on them? Said I would speak to you to be guided by your thoughts, does it matter if they are appointment pre-assignment or pre-finalising the commercial deal you referred to or is it best to hold off for a while?

Depending on your thoughts we may just need to speak to/e-mail Paul so that he is aware not to submit the forms as yet if necessary.”

138. In cross-examination, Mr Stretford accepted that the original proposal relating to the shares in Stoneygate had, in fact, been abandoned as indicated in Mr Glyn-Smith’s e-mails, but he denied that any instructions to that effect had come from him. He suggested that Mr Rawlings must have taken it upon himself to give the requisite instructions.
139. There is a further issue as to the events of Friday 17<sup>th</sup> January 2003 which I must also attempt to resolve at a later stage. It was Stoneygate’s case that all, or virtually all, of the contractual documentation was, in fact, signed at Goodison Park on the afternoon or early evening of Friday 17<sup>th</sup> January 2003 shortly before a press conference at which it was announced that Mr Rooney had signed a professional playing contract with Everton FC. According to Mr Stretford, this press conference has been set up at fairly short notice, though he could not say precisely when that was. He referred to his diary entry for the day which showed that a meeting had been arranged with the manager, Mr Moyes, between 6pm and 6.30pm, to be followed by a press conference which was due to begin at 7pm

#### The Playing Contract

140. Whatever other documents, if any, were signed on 17<sup>th</sup> January 2003, it seems likely that the essential terms of the playing contract between WR and Everton FC had been agreed prior to the press conference which had been arranged for the evening of that day. This took place as scheduled and attracted a good deal of media attention. It was at this conference that it was announced that he had signed a new three and a half year contract with the Club.
141. In fact, the playing contract is dated 1<sup>st</sup> February 2003. Most of the terms are set out in what I understand to have been a standard form approved by the FA. The individual terms negotiated and agreed between the club and the player are set out in a Schedule. It is the Schedule which bears the signatures of the player, Mr Dunford (the Chief Executive of the Club), and Mr Stretford on behalf of Proactive. Despite the date typed in at the head of the Agreement, I have no real reason to doubt that it, or at least the Schedule, was signed on or before 17<sup>th</sup> January 2003 prior to the press conference.
142. The bespoke terms embodied in the Schedule record that WR’s employment with the Club began on 1<sup>st</sup> July 2002 and set out his weekly basic wage, increasing with effect from 1<sup>st</sup> July in each of the last three years of the contract. A signing-on bonus of £800,000 was payable in four annual instalments of £200,000 each. Provision was

also made for a first team appearance bonus after the player had made 25 appearances in competitive first team games.

143. But, in addition to the substantive provisions of the contract and the detailed terms set out in the Schedule, there was a three-page Addendum signed by WR and Mr Dunford which may or may not have been signed on the same occasion. There was no direct evidence on the point, but internal indications suggest that it may have been signed subsequent to the Schedule. Thus, there is no reference to the Addendum in the Schedule itself, the Addendum provides for further increases in salary (linked to appearances) over and above those set out in the Schedule, and the Addendum is signed only by Mr Dunford and WR and not by Mr Stretford or by the witness who also signed the Schedule. But the precise date is probably immaterial.
144. The Addendum does, however, include certain provisions which should be noted. In addition to increases in salary, performance bonuses and international appearance bonuses, it records an agreement on the part of the club to provide accommodation free of charge to the player and his family and that the Club had also agreed to discharge a fee of £50,000 plus VAT which WR had agreed to pay to Proactive for the work undertaken in negotiating the playing contract. In each case, it was recorded that these would constitute benefits in kind for tax purposes. These may well be the matters which, according to Mr Stretford still had to be agreed after the meeting at Goodison Park on 15<sup>th</sup> January 2003.
145. In addition, the Addendum dealt with the proposed Image Rights Agreement under which the club would be entitled to use the player's image for certain purposes in return for the payment of fees and royalties. Somewhat curiously, there is no mention of the Heads of Agreement which were, of course, agreed and signed on behalf of Proactive and the club on 15<sup>th</sup> January 2003, though it seems highly unlikely that the terms set out in the Addendum would have been agreed on any earlier occasion.
146. The wording used in the Addendum appears to contemplate that an Image Rights Agreement would be concluded at some time in the future with a company which had already acquired the player's image rights. This rather suggests that it was drafted before the long-form Image Rights Agreement between Stonegate and Everton FC had been agreed and executed. The wording also tends to suggest that these provisions were drafted after the assignment of the player's image rights to Stonegate. But, if that were the case, it seems very odd that Stonegate was not identified by name.
147. Be that as it may, the Addendum accurately records the consideration for the proposed Image Rights Agreement, namely £150,000 a year plus VAT. That, of course, accords with the Heads of Agreement.

Mr Harrington's letter of 20<sup>th</sup> January 2003

148. On the following Monday, 20<sup>th</sup> January 2003, Mr Harrington composed a letter addressed to Mr Stretford which recorded that it was to be sent to him at Proactive's offices in Wilmslow by fax and by post. Like the e-mail of the previous Friday, 17<sup>th</sup> January 2003, the letter has taken on considerable importance in relation to certain of the issues in the case.

149. The letter is headed “Re: Wayne Rooney/Stoneygate Representation Agreements”. It commences by referring to “our conversation on Friday”. This must obviously be a reference to the previous Friday, the same day as the e-mail. Subsequent references in the letter make it clear that this conversation is said to have taken place by telephone.
150. Mr Harrington continued by observing that there was a point relating to the proposed Image Rights Representation Agreement which was not yet clear to him. He then set out his understanding of the position namely that Proactive had entered into two agreements, that is to say a standard two-year player agency agreement and an eight-year representation agreement. These must refer to the Agreements of 14<sup>th</sup> December 2002 and 17<sup>th</sup> July 2002 respectively. The letter then continues as follows:  
“The issue is that - in the 8 year Agreement - Proactive is appointed to represent not only Wayne’s commercial activities/image rights but also his playing contract/transfer negotiations.”
151. That is, of course, entirely accurate, as will be apparent from the analysis of the July 2002 Agreement set out earlier in this judgment. Mr Harrington then went on to elaborate on a proposed resolution of this issue. What he said was this:  
“As you know we now have to ensure that the representation agreement is modified or replaced to cover the fact that Wayne is transferring his commercial rights to Stoneygate. The solution we have initially prepared involves varying the terms of the initial agreement - by deleting all references to commercial rights - and entering into a separate agreement between Stoneygate and Proactive for representation of the commercial rights. This is fine insofar as it goes but it does leave one potential loose end: The original 8 year representation agreement would be left valid but the representation would be for an 8 year term for transfer and playing contract negotiations. You will appreciate there is something of a confusing situation here: This is because under one contract Proactive is appointed to be Wayne’s player agent for 2 years (in line with FIFA regulations) and under a separate contract Proactive is appointed to advise on player contract and transfer negotiations for an 8 year term. The two situations are inconsistent and it is open to doubt which contract actually governs your agreement with Wayne regarding his playing services - not to mention that the 8 year term may not be compliant with FIFA regulations.  
I recall you mentioning that the 8 year representation contract should not contain the right to represent the player’s playing contract/transfer negotiations. It might be neater all round, therefore, if we simply revoked the original 8 year player representation contract/transfer representation to be governed by the standard 2 year contract. We could then enter into the new Representation Agreement between Stoneygate and Proactive for the commercial rights.  
I would appreciate your instructions on this point before I finalise the representation and variation agreements.”
152. Mr Harrington then went on to address a somewhat different issue, namely the length of the proposed new Image Rights Representation Agreement between Proactive and Stoneygate. The relevant passage in his letter reads as follows:

“I would also like to confirm your instructions from our phone call on Friday that Proactive wishes to enter into the 8 year commercial rights representation agreement on the basis that the commercial rights representation agreement will not automatically terminate upon termination of the player agency contract. You will recall that I advised you that in the unlikely event of a falling out with the player - i.e. if the player agency contract is terminated/not renewed and Proactive continues to represent Stoneygate’s commercial rights against the wishes of the player - then Proactive could face an action for restraint of trade, given the length of the term of the agreement and the relative commercial sophistication of the parties. I confirm your instructions that you are prepared to live with this risk and that we are to include contractual clauses in the representation agreement to attempt to minimise the risk. I would draw your attention to the fact that if the player wishes to break his contract by claiming restraint of trade in the future (however unlikely that seems at present), then such contractual wording is not by any means a guarantee that the restraint of trade will fail - at best it will give us arguments that may be used to support our position.”

153. The letter concluded by suggesting that, once Mr Stretford had read it, it would be desirable to talk matters through prior to finalising the documents. It was signed by one of Mr Harrington’s associates on his behalf.
154. The letter was relied upon by Proactive for a number of purposes. It was contended that it demonstrated that Mr Stretford must have read the e-mail which Mr Harrington sent to him on Friday 17<sup>th</sup> January 2003 and must have discussed at least some of the issues with Mr Harrington by telephone on the same day. Accordingly, it was suggested to him that, by that date at the very latest, he must have known or been made aware of the fact that the Agreement of 17<sup>th</sup> July 2002 covered both on-field and off-field activities. But it was also contended on behalf of Proactive that the letter showed that, even on 20<sup>th</sup> January 2003, some of the documents intended to implement the new arrangements had not been finalised and could not, therefore, have been signed on the previous Friday. It was also suggested that the letter demonstrated that Mr Stretford not only knew about the eight-year term of the original Agreement of July 2002, but that he was also well aware of the proposal that a similar term should be adopted for the purposes of the new Image Rights Representation Agreement between Proactive and Stoneygate and that he was prepared to accept the risk that this could give rise to a challenge to the enforceability of the contract on the grounds of restraint of trade.
155. Mr Harrington had little independent recollection of the matters referred to in this letter. But he insisted, with some obvious force, that he would not have referred to a discussion with Mr Stretford on Friday 17<sup>th</sup> January 2003 if he had not, in fact, had such a conversation. On the other hand, however, at least in his witness statement, Mr Stretford said that he could not recall having had any such conversation with Mr Harrington, but that if he had, he would have challenged him if he had been told that the Agreement of July 2003 covered on-field, as well as commercial, representation. He also asserted that Mr Harrington had, in fact, been present at the signing ceremony at Goodison Park on 17<sup>th</sup> January 2003 but that, so far as he could recall, he did not speak to him save perhaps to exchange pleasantries.

156. In cross-examination, however, Mr Stretford accepted (as was clearly the case) that Mr Harrington had not in fact been present at Goodison Park on the occasion in question. But he still said that he could not recall having had any telephone conversation with him on that day.
157. But it was also Mr Stretford's evidence that he had not received Mr Harrington's letter of 20<sup>th</sup> January 2003 and, indeed, had not even seen it until comparatively recently. The letter was, it will be recalled, addressed to Mr Stretford at Proactive's offices and was said to have been sent both by fax and post. But it seems that the attempt to send it by fax transmission was unsuccessful, as the transmission record appears to show. Nonetheless, it was Proactive's case that the hard copy sent by post must have been received by Mr Stretford, since, so it is said, the original was found in his office by Mr Wallwork when he was clearing out Mr Stretford's office after he had left Proactive's service. Those are, of course, factual issues which I will have to resolve later in this judgment.
158. Furthermore, it seems that Mr Stretford did not immediately or directly reply to the letter of 20<sup>th</sup> January 2003. Unsurprisingly, therefore, Mr Harrington appears to have chased the matter up. The documentation suggests that he must have spoken to Mr Rawlings on Tuesday 21<sup>st</sup> January 2003, since he sent him an e-mail on the following day, Wednesday 22<sup>nd</sup> January 2003 which was in these terms:  
"As discussed yesterday, I'd be grateful if you could speak to Paul and let me know how Proactive want to deal with the Representation Agreement issue (which was set out in my fax to Paul on Monday)."
159. The e-mail is a little odd in that it refers to what must have been a faxed copy of the letter of 20<sup>th</sup> January 2003, even though it seems that this was not successfully transmitted to Proactive. Mr Rawlings replied almost immediately to Mr Harrington's e-mail without making any comment about the letter. In fact, his response is not particularly clear. But he referred to the fact that a board meeting was to be held that same day and it seems that he proposed to take the matter up at that meeting.

#### Subsequent Exchanges and Further Drafts

160. On 24<sup>th</sup> January 2003, Mr Harrington sent two further e-mails to Proactive. The first was timed at 11.21 and was directed to both Mr Rawlings and Mr Stretford. It referred to a conversation with Mr Rawlings earlier on the same day dealing with some suggested amendments to one of the clauses of the long-form Image Rights Agreement with Everton FC and attached a draft of a revised version of the clause. His later e-mail timed at 12.48 was directed only to Mr Rawlings. It referred to yet another conversation with him on the previous day and stated that drafts of the Variation Agreement, the Assignment and the Image Rights Representation Agreement were attached. It very briefly summarised the nature of each document and asked Mr Rawlings to review and circulate "this document" to the "relevant parties" at Proactive and come back to him with any further comments or suggestions for amendment. It is not entirely clear whether "this document" was a reference to all three of the attached documents or only to the Image Rights Representation Agreement. The e-mail concluded by saying that Mr Harrington hoped to be able to send the draft long-form Image Rights Agreement with Everton FC to Proactive later that day.

161. It is unclear as to how precisely the management of Proactive dealt with the queries raised by Mr Harrington. In the course of cross-examination, Mr Rawlings said that he had “shared the feedback” from Mr Harrington with both Mr Rodford and Mr Stretford and that Mr Rodford responded by e-mail. Indeed, the only further light cast on this issue by the contemporaneous documents is to be found in an exchange of e-mails on 25<sup>th</sup> and 26<sup>th</sup> January 2003 between Mr Rodford and Mr Rawlings. I make two preliminary observations about these e-mails before briefly considering their contents. Firstly, both were copied to Mr Stretford; secondly, they appear to represent Mr Rodford’s only recorded intervention in the detailed arrangements which were being handled by Couchman Harrington.
162. It was Mr Rodford who wrote the first e-mail dated 25<sup>th</sup> January 2003. He had clearly seen drafts of the Variation Agreement and the new Image Rights Representation Agreement. He raised a number of queries and observations in relation to both of them. He asked how the first Agreement (presumably the Agreement of 17<sup>th</sup> July 2002) would work with the Variation Agreement. In particular, he raised questions as to whether the sum of £25,000 provided for in the original Agreement would still be payable and, if so, whether it should be paid to WR personally or to Stoneygate. He also commented on the fact that the original Agreement had incorporated what he described as “termination and exit clauses” over the period of the contract, in order to protect Proactive, particularly in view of the fact that WR was a minor. He asked whether these were still relevant and whether, they should not be increased, “bearing in mind his increased value”. In relation to the new Image Rights Representation Agreement, he asked who was to manage the financial administration of Stoneygate and whether this should be referred to in the Agreement. Insofar as Proactive was likely to be involved, he also asked whether the Agreement should make provision for an annual service charge. Finally, he asked whether the Agreement was correct in providing for the costs to be borne by both parties.
163. In his response dated 26<sup>th</sup> January 2003, Mr Rawlings dealt with each of Mr Rodford’s points in turn. As to the first question about the relationship between the original Agreement and the Variation Agreement, he had this to say:  
“The variation agreement only splits out the player’s commercial rights, so that he as an individual may assign them to his company and not to us, as is the case currently. If Stoneygate wishes to charge PSM for the appointment to those rights it could, thereby being a commercial transaction not a representation one. (almost an advance against earnings) what do you think? Otherwise the payment terms stay as now, and relate only to his representation rights.”
164. Whatever the precise point he was seeking to make as to the financial consequences of all this, it seems fairly clear that Mr Rawlings was well aware of the purpose and effect of the Variation Agreement, namely that the original Agreement would continue to govern Proactive’s rights of representation in relation to playing activities but not commercial matters, which would have to be the subject of a new agreement with Stoneygate. The same point appears to be raised by the next paragraph of his e-mail, which is in these terms:  
“The termination and exit clauses will now operate on two levels, (1) PSM as his football representative (2) PSM as the commercial agents to Stoneygate, in

the commercial agreement, I think we should beef up clause 7.2, can we mandate a re-sign at 18? I will ask Dan.”

165. Mr Rawlings then continued by informing Mr Rodford that WR was a director of Stoneygate, together with his mother and Mr Stretford, and that he owned both shares in the company. In relation to the provision of accounting and secretarial services to Stoneygate, he pointed out that Kingsbridge had offered to provide such services and suggested that he should negotiate a fee with them and then agree a re-charge to Stoneygate with a mark up to cover any input from Proactive. He then referred to a specific provision of the Image Rights Representation Agreement with Stoneygate. What he said was this:
- “Clause 6.3 sets out that any services beyond our normal will be paid for by the client, legal and financial will come into that category. To be fair we should change that to include getting the client to agree the charges up front, or at least the need for them, i.e. if WR needs to sue a paper he could do it from his company.”
166. What is of interest about these comments is that they refer to a clause which had been introduced and re-numbered after the initial draft had been prepared by Couchman Harrington and that the clause in question was subsequently altered in draft so as to incorporate the substance of these observations by Mr Rawlings. As finally signed on behalf of the various parties, the Image Rights Representation Agreement incorporated the clause in this revised form. It should also be noted that it is under this clause that Proactive seeks to recover remuneration for accounting and book-keeping services which, it is said, it subsequently provided for Stoneygate.
167. Mr Rawlings’ e-mail then addressed the question raised by Mr Rodford as to who should pay the legal costs. He stated that so far all the discussions had been on the basis that Stoneygate would bear “the costs of its legal work”. But he added a question directed to Mr Stretford as to whether he was still happy with this approach. As will be seen, all of Couchman Harrington’s costs were ultimately re-charged to Stoneygate.
168. Mr Rawlings appears to have forwarded this exchange of e-mails between himself and Mr Rodford to Mr Harrington on 27<sup>th</sup> January 2003. Later on the same day, Mr Harrington provided Mr Rawlings with an estimate of his firm’s fees to date by way of an e-mail in which he also commented on the fact that certain “final adjustments” were required to what he described as “the structural documents” and to finalise the long-form Agreement between Stoneygate and Everton FC.
169. Subsequently, on 29<sup>th</sup> January 2003, Mr Harrington responded to the substantive points raised in the earlier exchange of e-mails which Mr Rawlings had forwarded to him. Having considered the points made by Mr Rodford, he said that he had made certain amendments to the Variation Agreement and the Representation Agreement between Stoneygate and Proactive. One of these amendments was intended to ensure that the second payment of £25,000 due to WR on his 18<sup>th</sup> birthday under the original Representation Agreement of July 2002 would be vested in Stoneygate rather than the player himself. This was achieved by a modification of the Variation Agreement coupled with the introduction of a new Clause 6.1 into the draft Representation Agreement.

170. In addition, a new Clause 5.3 was introduced into the Representation Agreement by which the player undertook to enter into a further agreement upon the same or substantially similar terms on reaching the age of 18. But, perhaps most significantly, a new Clause 8 was also introduced under the heading “Consequences of Termination”, which largely mirrored the similar provisions of Clause 8 of the original Representation Agreement of July 2002. In his e-mail of 29<sup>th</sup> January 2003, Mr Harrington asked Mr Rawlings to check the amount of the proposed liquidated damages and advised that “the greater the damages, the more likely it is that Proactive could face a restraint of trade issue should differences arise later”.
171. Drafts of the amended versions of the Variation Agreement and the Representation Agreement were attached to Mr Harrington’s e-mail, of 29<sup>th</sup> January 2003, as was a draft of the proposed long-form Agreement between Everton FC and Proactive. In his e-mail, Mr Harrington raised various specific points in respect of which he said that he would welcome any comments from Mr Rawlings or his colleagues, observing that he would like to get the draft to Mr Farnell as soon as possible. His e-mail concluded by stating that once these drafts had been approved they would be in a position to complete the structural side of the player’s commercial affairs and to finalise negotiations with the Club over the long-form Agreement.
172. On the face of these e-mail exchanges, it seems quite clear that the drafting process was continuing, at least up until 29<sup>th</sup> January 2003, in relation to the Variation Agreement and the new Image Rights Representation Agreement. The long-form Agreement for the grant of an Image Rights Licence between Everton FC and Stoneygate was also still in draft form. That entirely accorded with Mr Harrington’s evidence in relation to the Variation Agreement and Representation Agreement. But there was some degree of uncertainty in relation to the Assignment Agreement by which Mr Rooney vested his image rights in Stoneygate. It will be recalled that the first draft of this Agreement was sent to Mr Stretford and Mr Rawlings as an attachment to Mr Harrington’s e-mail of 17<sup>th</sup> January 2003, together with drafts of the other documentation which he had prepared. Further drafts were sent to Mr Rawlings by Mr Harrington, by way of e-mail, on 24<sup>th</sup> January 2003. The documents in question included, once again, a draft Assignment, as well as drafts of the Variation Agreement and Image Rights Representation Agreement. But the Assignment was not the subject of any specific comment in the exchange of e-mails between Mr Rodford and Mr Rawlings on 25<sup>th</sup> and 26<sup>th</sup> January 2003. Unsurprisingly, therefore, in his response of 29<sup>th</sup> January 2003, Mr Harrington commented that he assumed that they had no further comments on this document. So no further draft appears to have been prepared after 24<sup>th</sup> January 2003.
173. But there remained a question as to whether the draft sent out by Mr Harrington on 24<sup>th</sup> January 2003 was the same as that which he had initially circulated as an attachment to his e-mail of 17<sup>th</sup> January 2003. It was Mr Harrington’s evidence that he had amended the initial draft by incorporating within it a new clause 6.4 which expressly provided for the assigned rights to revert to the player in the event of a termination of the Assignment Agreement. That clause does not seem to have been incorporated in the initial draft of 17<sup>th</sup> January 2003 though it understandably formed part of the Agreement as ultimately executed. But there remained something of a mystery about this alteration, since one of the drafts produced at trial incorporated

clause 6.4 but was dated 17<sup>th</sup> January 2003 in a footer. So the suggestion was made that the revised draft had, in fact, been produced on 17<sup>th</sup> January 2003 and forwarded to Proactive on the same day so as to enable the assignment to be signed by all necessary parties on 17<sup>th</sup> January 2003.

174. There is, however, no record of any further draft being sent to Proactive by Couchman Harrington on 17<sup>th</sup> January 2003. Furthermore, Mr Harrington himself gave a plausible explanation to the effect that he must have saved the original draft electronically, then opened it in order to amend it by the addition of clause 6.4 and finally saved the alterations without renaming the document. Before sending the revised draft out to Mr Rawlings on 24<sup>th</sup> January 2003, he believed that he would have renamed and re-dated it, so that it would thereafter have borne the date 24<sup>th</sup> January 2003 in the footer.

#### The Execution of the Agreement

175. There is no clear and certain evidence as to when any of the relevant Agreements were signed. The Assignment Agreement, the Variation Agreement and the Image Rights Representation Agreement between Proactive and Stoneygate were all formally dated, in manuscript, 16<sup>th</sup> January 2003. But in view of the date upon which the initial drafts appear to have been prepared and sent out to Proactive and the subsequent revisions to those drafts, it does not seem possible that the Agreements could, in fact, have been signed on 16<sup>th</sup> January 2003.
176. The explanation given by Mr Harrington was that, once they had been signed, copies of the Agreements were sent to his firm but were undated. Towards the end of the year, it was decided within the firm to assemble what was described as a “bible” of the documents relating to WR’s image rights. On 13<sup>th</sup> November 2003, Mr White of Couchman Harrington sent an e-mail to Mr Rawlings pointing out that most of the relevant documents appeared to be undated and asking him to let him know when he thought each of the documents had been signed.
177. Mr Rawlings does not seem to have responded to the e-mail, and Mr White sent him a chaser on 2<sup>nd</sup> December 2003. On this occasion, Mr Rawlings replied the following day, saying that he had a signed copy of the Playing Agreement with Everton FC dated 1<sup>st</sup> February 2003 but that the others were “scattered around the business”. He promised to get on with tracking them down. But he does not seem to have done so and on 10<sup>th</sup> December 2003, Mr White sent a further e-mail to him in which he noted that Mr Harrington had spoken to Mr Glyn-Smith, who had informed him that the two shares in Stoneygate had been transferred to WR on 16<sup>th</sup> January 2003. He said that it would, therefore, seem that the Assignment and most of the other documents would probably have been signed on the same day. He asked Mr Rawlings to let him know when he had assembled all of the originals. But, once again, Mr Rawlings does not seem to have responded; and the responsibility for dealing with the problem appears to have been handed over to an assistant solicitor employed by Couchman Harrington who had been seconded to work at Proactive’s offices in December 2003.
178. Both Mr Harrington and Mr Rawlings were briefly cross-examined about these matters. Mr Harrington, for his part, believed he had been copied into some of these e-mails relating to the dating of the documents. But he expressed the view that the

16<sup>th</sup> January 2003 date had been adopted more as a “sort of technical administrative step rather than a reflection of fact”. He pointed out that it was adopted as a “safe date”, as it was after the company structure had been sorted out and before the completion of the long-form Agreement for the grant of an Image Rights Licence to Everton FC.

179. As for Mr Rawlings, he stated that he could not recall this exchange of e-mails but accepted that it did not seem that he had provided the information sought by Mr White. But it was suggested to him that the dating would have been a matter of some importance and that his failure to correct the assumption that all of them would have been signed on 16<sup>th</sup> January 2003 meant that he must have believed at the time that this date was at least approximately correct. But he reiterated that he had no recollection of these events, adding that he was not a signatory and did not remember being present on any occasion when they were, in fact, signed.
180. As previously noted, some of the company forms appear to have been sent to Mr Stretford by Powrie Appleby by way of express delivery on 16<sup>th</sup> January 2003, and the signatures on behalf of Powrie Appleby on each of the relevant forms were dated 16<sup>th</sup> January 2003. Mr Stretford, WR and his mother all signed the company forms consenting to their appointment as directors of Stoneygate. In the case of Mr Stretford, his signature was also dated 16<sup>th</sup> January 2003 and may have been signed on that date. But in the case of WR and his mother, their signatures were dated 31<sup>st</sup> January 2003. In each case, however, the date of appointment was stated to have been 16<sup>th</sup> January 2003, the date having been inserted in manuscript, seemingly in the same hand. The minutes of the first company meeting of Stoneygate are also dated 16<sup>th</sup> January 2003, as are the stock transfer forms by which Powrie Appleby transferred the two subscriber shares to Mr Rooney. But company form 288B, by which Powrie Appleby’s appointment as secretary of Stoneygate was terminated, was dated 5<sup>th</sup> February 2003. On the same day, 5<sup>th</sup> February 2003, Mr Glyn-Smith of Powrie Appleby faxed copies of these forms to Mr Harrington, together with the company minutes and the stock transfer forms. In his covering letter, Mr Glyn-Smith stated that the company forms had all been submitted to Companies House on that day.
181. It will be recalled that the Playing Contract between WR and Everton FC was formally dated 1<sup>st</sup> February 2003, though the Schedule, at least, was probably signed on or before 17<sup>th</sup> January 2003. The long-form Image Rights Licence Agreement between Stoneygate, Proactive and Everton FC was also dated 1<sup>st</sup> February 2003. But it cannot have been signed on that date, since its precise terms were still being negotiated between Mr Harrington and Mr Farnell of Eversheds, who was acting on behalf of the Club. It seems that Mr Harrington sent a copy of the initial draft of the long-form Agreement to Mr Farnell on 31<sup>st</sup> January 2003; and Mr Farnell replied by e-mail on 3<sup>rd</sup> February 2003, attaching what he described as a “brief overview” of the contract. In his e-mail, he noted that both parties wished to complete the arrangements as quickly as possible with an initial target date of 5<sup>th</sup> February 2003. But he expressed the view that it might take a little longer to complete.
182. On 5<sup>th</sup> February 2003, Mr Harrington reported by e-mail to Mr Rawlings and Mr Stretford that he had recently had the chance to discuss the outstanding points with Mr Farnell and that he was currently working on an amended version which he could e-mail to them both on the following day. Mr Stretford replied later on the same

evening, indicating that he would have no problem with the proposed course of action, subject to only one minor point of concern.

183. Eventually, on 13<sup>th</sup> February 2003, Mr Harrington sent a final version of the contract to Miss Yemm, Mr Stretford and Mr Rawlings by way of an attachment to an e-mail timed at 11.10. In his covering e-mail, he commented that there was only one clause on which he and Mr Farnell had failed to reach agreement. It appeared from the e-mail that Mr Stretford had given firm instructions that the particular point was not negotiable. Later on the same day, he circulated an e-mail to members of his firm in which he stated that the matter had “just completed”.
184. It seems likely, therefore, that the Image Rights Licence Agreement with Everton FC was, in fact, agreed and executed on 13<sup>th</sup> February 2003, notwithstanding the date which it bears. Though some of the company documentation relating to Stoneygate appears to have been prepared on or about 16<sup>th</sup> January 2003, it does not seem that all the necessary forms were signed until 31<sup>st</sup> January 2003 when WR and his mother appear to have signed forms 288A; and it was not until 15<sup>th</sup> February 2003 that all the requisite documentation was submitted to Companies House. The exchange of e-mails and the succession of drafts seemed to show, on their face, that the Image Rights Assignment Agreement between Mr Rooney and Stoneygate could not have been signed earlier than 24<sup>th</sup> January 2003; and, in the case of the Variation Agreement and the Image Rights Representation Agreement between Proactive and Stoneygate, not before 29<sup>th</sup> January 2003.
185. On behalf of Proactive, Mr Mill QC invited me to infer that, with the exception the long-form Agreement between Stoneygate and Everton FC, all the documentation prepared by Mr Harrington was executed on 3<sup>rd</sup> February 2003, when Mr Stretford’s diary shows that he had an appointment with the Rooney family. On the other hand, Mr Stretford himself continued to adhere to his evidence that at least some of these documents were signed on 17<sup>th</sup> January 2003. That is an issue to which I will return in due course.

#### The Agreements

186. Whatever the precise date or occasion upon which they were executed, there is no dispute as to the terms of the relevant Agreements. It is unnecessary, I think, to say anything more at this stage about the terms of the Playing Contract between Everton FC and WR or, for that matter, with the long-form Agreement by which Stoneygate granted a licence to Everton FC to make use of the player’s image rights on the terms set out in that document, though I will have to consider in due course the financial rewards which Proactive was entitled to claim by virtue of these Agreements. The Assignment Agreement, the Variation Agreement and the Image Rights Representation Agreement between Stoneygate and Proactive are, however of much greater importance.

#### The Assignment

187. I can deal with the first of these fairly briefly, the parties to the Assignment were WR, his mother and Stoneygate; and it was signed by Mr Stretford on behalf of Stoneygate as well as by the player and his mother. It provided for the assignment of certain

rights by WR to Stoneygate on a perpetual, exclusive, worldwide basis, in consideration of the allocation to him of the entirety of the issued share capital in Stoneygate. The rights so assigned were defined as including both the player's Image Rights and what were described as certain "Underlying Rights" all of which were defined in Clause 1. The definition of Image Rights is comprehensive and it may be helpful to set it out in full. It is in these terms:

"Image Rights means the right for any commercial or promotional purpose to use the Player's name, nickname, slogan and signatures developed from time to time, image, likeness, voice, logos, get-ups, initials, team or squad number (as may be allocated to the Player from time to time), reputation, video or film portrayal, biographical information, graphical representation, electronic, animated or computer-generated representation and/or any other representation and/or right of association and/or any other right or quasi-right anywhere in the World of the Player in relation to his name, reputation, image, promotional services, and/or his performances together with the right to apply for registration of any such rights."

188. The "Underlying Rights" were defined as a number of intellectual property rights which it is, I think, unnecessary to set out in detail.
189. At clause 2, in addition to the Assignment itself, it is provided that the player should consent to Stoneygate using these rights in various different connections for the purposes of the commercial exploitation of the rights and of the player himself with a view to generating income for Stoneygate. It was also provided that the company should have the right and ability to grant licences to third parties.
190. Clause 3 set out Stoneygate's obligations. It was required to act in the utmost good faith and diligently to promote the rights which had been assigned to it and the image, name, reputation and goodwill of the player. By clause 3.1.2, Stoneygate was also required to notify the player of all agreements proposed to be entered into and not to enter into agreement with any third party to which he should object in writing.
191. Clause 4 set out the obligations of the player; and various warranties were given by him at clause 5.1. These included, at clause 5.1.2, a warranty to the effect that he had obtained, received and understood independent legal advice regarding the Agreement and his obligations thereunder. A similar warranty was given by Mrs Rooney at clause 5.2, where she confirmed and warranted that she and her son had received independent legal advice and that, having understood this advice, he wished to enter into the Agreement.
192. Clause 6 dealt with termination. The Assignment was indefinite in duration, terminating only in the event of insolvency or a material breach which remained unremedied. Any such termination was not to affect any prior agreement entered into by Stoneygate in relation to the rights assigned to it; but, in the event of termination, the rights were to revert to the player. For the most part, the remaining clauses of the Assignment were of a fairly standard kind and I do not think it is necessary to examine them further.

### The Variation Agreement

193. The Variation Agreement was, of course, intended to strip out the commercial and image rights representation provisions from the Agreement of July 2002 so as to pave the way for the new Image Rights Representation Agreement between Stoneygate and Proactive. It did so with a comparative economy of wording. The parties were WR himself, both his parents and Proactive; and it was signed by all of the parties, with Mr Stretford appending his signature on behalf of Proactive.
194. The Recitals set out the background. Clause A recited that by the Client Representation Agreement of 17<sup>th</sup> July 2002, Proactive had been appointed to represent, assist and advise WR in connection with his career as a football player and his commercial and business affairs. The Agreement then went on to recite the intended assignment of certain rights relating to WR's image, personality, promotional services and commercial affairs to Stoneygate and the consequent need for a variation of the original Client Representation Agreement. Once this had been achieved, Stoneygate intended to enter into a new Representation Agreement in respect of the rights so assigned.
195. The substantive provisions were intended to delete all references to commercial representation. The only provision of real significance for present purposes is to be found at Clause 1.2 by which Clause 3.1 of the original Agreement of July 2002 (which sets out Proactive's contractual obligations) is deleted and replaced by the following:
- “3.1 Use its best endeavours and work diligently to represent the Client in the following areas of employment and personality management:
- 3.1.1 transfer negotiations;
- 3.1.2 contract negotiations relating solely to the Client's employment or engagement as a player (and excluding, without limitation, those relating to the media, public relations, product endorsement, merchandising, personal appearances, image exploitation and other promotional opportunities);
- and such other tasks as the Client and Mr and Mrs Rooney may from time to time request and as the Company should consider prudent and in the interests of the Client from time to time;”
196. These new provisions very closely followed the wording of the July 2002 Agreement, save, of course, that they excluded all references to image exploitation and the like.

### The Image Rights Representation Agreement

197. I must now turn to the Image Rights Representation Agreement which lies at the heart of the present dispute. The parties are Stoneygate, Proactive and WR. The player signed on his own behalf and his mother signed on behalf of Stoneygate, though for some reason the company is inaccurately named against her signature as “Stoneybridge 48 Limited”. On this occasion, however, it was Mr Rodford and not Mr Stretford who signed the agreement on behalf of Proactive.

198. At the outset, the Agreement recites certain matters of background. In particular, it recites the assignment of various rights by WR to Stoneygate and the Variation Agreement by which the terms of the original Representation Agreement of July 2002 had been altered. The brief summary of the original terms of the July 2002 Agreement refers only to representation of the player in connection with his commercial and business affairs. In itself, therefore, the recitals would not alert a reader to the fact that the earlier Agreement also incorporated provisions for representation in relation to his on-field activities.
199. By Clause 2 of the Agreement, Stoneygate appointed Proactive as its sole and exclusive representative and Proactive agreed to perform the Services listed in Clause 3 of the Agreement. Clause 3 itself was headed “Obligations of the Company”. The “Company” for these purposes was, of course, Proactive; and the “Client” was Stoneygate. The relevant provisions read as follows:
- “The Company undertakes and agrees with the Client that it shall at all times during the continuance of this Agreement, diligently and faithfully serve the Client and, in particular that it shall:
- 3.1 Use its best endeavours and work diligently to represent the Client in all areas of image rights exploitation, licensing and personality management including (but not limited to):
    - 3.1.1 media (including television, radio, press and internet) and publicity relations and negotiations;
    - 3.1.2 product endorsement and merchandising negotiations;
    - 3.1.3 personal appearance, image exploitation and other promotional opportunities;
    - 3.1.4 opportunities involving the Client’s Intellectual Property;
    - 3.1.5 contract negotiations in relation to the foregoing.and such other tasks as the Client may from time to time request, and as the Company shall consider prudent and in the interests of the Client from time to time.
  - 3.2 keep full accounts and records showing clearly all transactions relating to the Client;
  - 3.3 when engaged in the negotiations listed in Clause 3.1 above, make proper efforts to negotiate contracts strictly and only in accordance with any instructions or directions given to it by the Client (whether generally or specifically in any instance or circumstance) and, in particular (but not by way of limitation), not negotiate or enter into contracts at prices or on payment terms other than those agreed by the Client;
  - 3.4 in connection with the performance of the Services, whether directly or indirectly, clearly indicate that it is acting as representative of the Client;
  - 3.5 not incur any liability on behalf of the Client;
  - 3.6 accompany representatives of the Client to promotional events, meetings, negotiation sessions and any other occasions as the Client may from time to time reasonably request;
  - 3.7 without prejudice to any other provisions, communicate to the Client all the necessary information available to it regarding the Client and the Player, and supply to the Client copies of all correspondence with

business contacts and potential business contacts in such cases as the Client requests; and

3.8 assist and advise the Client generally in respect of such of its business interests as it may request from time to time (and which shall, where necessary, include the referral of the Client by the Company to relevant experts and/or professional advisors).”

200. Clause 4 sets out Stoneygate’s obligations towards Proactive. These include an obligation to act dutifully and in good faith in its relations with Proactive and to assist it as reasonably necessary so as to enable Proactive to perform its services as effectively as possible. This assistance would include attendance at meetings, negotiations, interviews and publicity and promotional events. More pertinently, at clause 4.4, Stoneygate agreed that it would not, during the term of the Agreement, negotiate or enter into contracts, or permit the player to enter into contracts, with any other agents or representatives or any other business or persons who might reasonably be regarded as competitors of Proactive, except with its prior written consent. Likewise, at clause 4.5, Stoneygate was required to direct to Proactive all enquiries which it received or opportunities of which it became aware in connection with itself or the player; and by clause 4.7, it agreed to honour to the best of its ability any contracts, agreements or arrangements procured on its behalf by Proactive and to procure that the player fully complied with the terms of any such contacts, agreements or arrangements and fully performed his obligations thereunder.
201. At Clause 5, these obligations were buttressed by various warranties given directly by the player himself. He warranted, undertook and represented that during the continuance of the Agreement he would fully comply with the terms of any contracts, agreements or arrangements procured on behalf of Stoneygate by Proactive and would perform all obligations that related to him personally or required his personal attendance or performance. He also warranted that he would not negotiate or enter into contracts with any other agents or representatives or persons or businesses which might reasonably be regarded as competitors of Proactive or might wish to exploit his intellectual property. There was also provision to the effect that, on reaching the age of 18 years, he would enter into a further agreement with Proactive on the same or substantially similar terms.
202. Clause 6 dealt with remuneration. In consideration for the performance of the Services, clause 6.2 provides for the payment by Stoneygate to Proactive of a nominal consideration of £1 together with:  
“...a commission calculated on a percentage of all sums payable to the Client as follows:  
20% of the gross sum payable under any contract or arrangements for the promotion, endorsement or advertisement of the Client and/or the exploitation of the Intellectual Property and/or any products, goods or services to which the Client is a party.”
203. This is unfortunately worded, since it refers to the promotion, endorsement or advertisement of “the Client”, that is to say Stoneygate, rather than “the Player”, namely WR himself. But no technical point of construction was taken and, in any event, the width of the expression “Intellectual Property”, as defined earlier in the Agreement, would seem to cover the exploitation of the player’s own image rights.

But the right to a commission was expressed to be in consideration of the performance of the Services, that is to say the obligations of Proactive as set out at Clause 3.

204. Clause 6.3 went on to provide for additional payments in the event that Proactive provided services outside the scope of Clause 3. The relevant provision is in these terms:

“The Company shall be responsible for its normal and reasonable expenses incurred in performing the Services. If the Client requests that the Company performs services that are beyond the scope of the Services that the Company would provide in normal circumstances and where the Company incurs extra or unforeseeable expenses in providing such Services, the Client shall reimburse the Company in respect of those expenses (provided the need to incur such expenses is agreed in advance by the Company). Non-exhaustive illustrations of such expenses would include company administration and company secretarial services provided on behalf of the Company, and legal, financial, accounting and management services performed on behalf of the Company.”

205. Clauses 7 and 8 deal with the duration of the contract, its termination and the consequences of termination. They are important provisions in the context of the present dispute and I will set them out in full. They are in these terms:

**“7. Duration and Termination**

7.1 Subject to Clause 7.2, this Agreement shall commence on the date hereof and, subject to the provisions of this clause, shall continue for eight years, unless terminated earlier in accordance with the provisions of this clause 7.

7.2 Either the Company or the Client may terminate this Agreement immediately by giving notice in writing upon the occurrence of a material breach of this Agreement by the other party which is not remedied within 28 days of a written request, or upon the bankruptcy or insolvency (or appropriate) of the other party.

**8. Consequences of Termination**

8.1 In the event that the Client terminates this Agreement prior to the expiry of the term set out in clause 7.1, other than in accordance with clause 7.2, the Client and/or the Player shall forthwith pay to the Company

8.1.1 £25,000.

8.1.2 a further sum payable to the Company as liquidated damages calculated as follows

a sum equal to £37,500 multiplied by the number of complete years of the unexpired term of this Agreement (with years to commence from the date of this Agreement and anniversaries thereof).

8.1.3 a sum equivalent to the Company’s total costs and expenses properly incurred in relation to its performance of the Services from the date hereof until the date of termination notice (and which details of such costs and expenses shall be properly documented by the Company and supplied to the Client and/or the Player so as to facilitate payment).”

206. There follow various further clauses of a fairly standard kind. I need refer only, I think, to Clause 24 which is headed “Independent Legal Advice” and is in the following terms:
- “The Client and the Player hereby confirm that in reviewing this Agreement prior to execution and deciding to enter into this Agreement, they have sought, taken and understood independent legal advice and hereby confirm that the terms and conditions hereof, including without limitation the Term and financial provisions of the Company’s appointment hereunder are reasonable.”
207. It is quite clear that the new Image Rights Representation Agreement was closely modelled on the earlier Agreement of July 2002 and, in large measure, adopted precisely the same wording with such modifications as were necessary to reflect the changed circumstances, most notably the role of Stoneygate, as assignee of WR’s Image Rights, and the exclusion from the new Agreement of any reference to on-field representation. In particular, the provisions of clauses 7 and 8 closely followed the equivalent provisions of the earlier Agreement, save for the substitution of Stoneygate as the relevant party and the restriction of the amount repayable on termination under Clause 8.1.1 to the sum of £25,000 rather than the slightly more complex provisions of the equivalent sub-clause in the earlier Agreement.

#### Financial Aspects of the Contractual Arrangements

208. At least from the time when the on-field Representation Agreement had been signed on or about 14<sup>th</sup> December 2002, Proactive, through Mr Stretford, represented WR throughout his subsequent footballing career until the relationship between Proactive, on the one hand, and Mr Stretford and WR on the other, broke down in or about October 2008. Proactive also clearly sought to represent WR’s commercial interests at the time of the negotiations with Everton FC. Until the corporate structure of Stoneygate had been determined and put in place and there had been a formal assignment of the image rights to that company, Proactive could only have been acting under the terms of the original Agreement of 17<sup>th</sup> July 2002. On the face of it, that would cover the period up to and including the execution of the Heads of Agreement on 15<sup>th</sup> January 2003, even though Stoneygate was named as a party to that Agreement. But by the time the long-form Agreement between Everton FC and Stoneygate was executed, on or about 13<sup>th</sup> February 2003, it seems quite clear that the new arrangements, and in particular the new Image Rights Representation Agreement, would have been already in place.
209. It appears that Proactive received payments totalling £75,000 directly from Everton FC by way of remuneration for the part which it played in negotiating the terms of the playing contract between the Club and WR himself and the Image Rights Licence Agreement between the Club and Stoneygate. But the precise basis upon which these payments were made is somewhat obscure. The undated Addendum to the playing contract recorded that WR had agreed a fee of £50,000 plus VAT with Proactive for work undertaken in negotiating the contract and that the Club had agreed to discharge this liability on behalf of the player, though it was to be treated as benefit in kind for tax purposes. But there was no similar provision in relation to the negotiation of the Image Rights Licence, either in the Heads of Agreement dated 15<sup>th</sup> January 2003 or in the long-form Agreement subsequently executed on or about 13<sup>th</sup> February 2003.

210. In fact, however, two further documents were produced during the course of the trial recording agreements between Proactive and Everton FC for the payment of the sums in question. They are both set out under Proactive's letterhead, are both dated 28<sup>th</sup> February 2003 and are both signed by Mr Dunford on behalf of the Club and Mr Stretford on behalf of Proactive. The first of these records an agreement that the Club would pay to Proactive the sum of £50,000 plus VAT "in respect of its commission and fee for acting as an intermediary in respect of the signing of the player". But payment was subject to confirmation by the FA and the Premier League that WR had been duly registered as a player with Everton FC; and the terms of the Agreement were said to be strictly confidential and were not to be divulged to any third party except to the appropriate football authorities and various other specified organisations. The other document records an agreement by the Club to pay £25,000 plus VAT for advice given in relation to the Image Rights Agreement. This was payable within seven days of the finalisation of the relevant Agreement. Once again, terms were stated to be strictly confidential and were not to be divulged to any third party without the consent of both, subject to certain exceptions, which, in this case, did not include the relevant football authorities.
211. The agreement for the payment of £50,000 is consistent with the Addendum to WR's Playing Contract. But there appears to be no mention in that contract of the additional £25,000 payable in respect of the Image Rights Agreement. The latter document looks rather like some form of side agreement negotiated separately from the Image Rights Agreement itself. But I do not consider that the evidence allows me to come to any conclusion as to how and why these agreements between Proactive and the Club were negotiated or how the amounts in question were calculated. Nor do I know how, in fact, they were treated for tax purposes as between the player and Club.
212. By virtue of the Representation Agreement of 14<sup>th</sup> December 2003, Proactive was entitled to commission of 10% on any signing-on fee. In fact, the signing on fee set out in the Schedule to the playing contract was £800,000, though it was payable in four annual instalments. A commission at the rate of 10% of this signing-on fee would, of course, amount to £80,000, though it might justifiably be discounted if it was all paid up front. On the other hand, the Representation Agreement of July 2002 provided for a commission of 2½ % of the gross sums payable under any playing contract. The total consideration payable under the playing contract with Everton FC would have been very close to £3m, taking into account the signing on fee, all the wages payable over the term of the contract and a figure of about £10,000 a year to reflect benefits in kind attributable to the provision of a house. Indeed, it was suggested to Mr Stretford in cross-examination that the whole package represented a "£3m contract" and that the sum of £75,000 must have been calculated at the rate of 2½ % based on the provisions of the Representation Agreement of July 2002.
213. But I cannot infer that the sums in question were calculated by reference to the July 2002 Agreement, as was suggested to Mr Stretford in cross-examination but was robustly denied by him. Nonetheless, as Mr Chaisty emphasised, the amounts payable by Everton FC would fully cover the sums agreed to be paid by Proactive to the player himself under the terms of the initial Representation Agreement of 17<sup>th</sup> July 2002 and the later Image Rights Representation Agreement with Stoneygate. Furthermore, on execution of the Image Rights Licence Agreement with Everton FC, Proactive would have become entitled to commission at the rate of 20% on the annual

advance and royalties payable to Stoneygate under that Agreement which, according to the Addendum to the playing contract were said to amount to £150,000 per annum plus VAT.

214. I must now deal briefly with the manner in which Proactive's legal costs were recharged to Stoneygate. It will be recalled that a question was raised by Mr Rodford, in his exchange of e-mails with Mr Rawlings on 25<sup>th</sup> and 26<sup>th</sup> January 2003, as to who should be responsible for the payment of Couchman Harrington's fees. He referred to a provision in the draft prepared by Mr Harrington which provided that the costs of the Image Rights Representation Agreement would be borne by each party. This would appear to be a reference to Clause 16 of the Agreement which did, indeed, provide that each party should pay its own costs and expenses in relation to the negotiation, preparation, execution and implementation of the Agreement. It will also be recalled that Mr Rawling's reply was to the effect that the assumption had been that Stoneygate would bear the costs of its legal work. But he directed a question to Mr Stretford as to whether he was still happy with this.
215. In the event, Couchman Harrington raised several invoices which were directed to Stoneygate but paid, in the first instance, by Proactive with the approval of Mr Rawlings. They included some costs incurred in a wholly separate matter involving the use of the name "Rooney's Bar" by a third party. The first of these invoices was dated 19<sup>th</sup> February 2005 and was in the sum of £10,845.84. But this invoice replaced an earlier invoice dated 13<sup>th</sup> February 2003 in the same sum which had been directed to Proactive. However, by letter dated 17<sup>th</sup> February 2003, Mr Rawlings asked Mr Harrington to arrange for it to be directed to Stoneygate. Mr Harrington duly obliged and a credit note was issued and the new invoice raised two days later. Though directed to Stoneygate, it was sent to Mr Rawlings at Proactive; and the other invoices were similarly sent to him though directed to Stoneygate.
216. The total amount of these invoices was included in a sales invoice addressed to Stoneygate which was raised by Proactive on 30<sup>th</sup> September 2003. The amount in question was £14,228.00 out of a total of £24,624.68 plus VAT. There seems little doubt that this was, in fact, approved by Mr Stretford.
217. When Mr Rawlings was asked briefly about these matters, he commented that none of this would have been done without "the right people" knowing about it. In particular, matters of this kind would have been discussed with Mr Stretford. But he did not believe that Mr Rodford was involved at that time. Mr Stretford, however, denied authorising the recharge to Stoneygate and stated that he simply did not pick up the fact that it was included in the invoice from Proactive to Stoneygate of 30<sup>th</sup> September 2003. Indeed, he said that it was only just before the commencement of the trial that he had learned that the fees in question had, in fact, been paid by Stoneygate. He suggested that the recharge must have been approved by Mr Rodford, though he accepted that Mr Rodford could not have approved payment on behalf of Stoneygate.
218. Mr Stretford accepted that he was the person who was normally responsible for approving payment of any invoices received by Stoneygate, though he was not initially authorised to sign cheques on its behalf. So, he said, this particular invoice must simply have "slipped through". It was, however, suggested to him that he was not telling the truth about these matters and that he must have been the one who had

decided that Couchman Harrington's fees should be recharged to and eventually paid by Stoneygate. That is a matter to which I shall have to return in due course.

### The Subsequent Relationship Between the Parties

219. Over the next few years, WR's career as a professional footballer went from strength to strength. In August 2004, he was transferred to Manchester United FC and he has become an established, many would say indispensable, member of the England Senior International Squad.
220. His commercial relationship with Mr Stretford and Proactive developed in tandem with his career as a footballer, to the great financial advantage of both parties. Proactive had recognised the potential of the player from an early stage and had been planning to set up a dedicated team to look after his commercial interests even before the new contractual arrangements were put in place in January or early February 2003. Mr Stretford headed this small group of individuals, who were collectively known as "Team Rooney", and took the leading role in negotiating commercial deals as well as his playing contracts. Though Proactive represented over a hundred footballers at the time, Mr Stretford was primarily involved with the highest profile individuals amongst this group, of whom WR was or became the most important.
221. On 26<sup>th</sup> March 2003, Mr Stretford e-mailed Mr Rawlings setting out, in very broad terms, the way in which he thought this might best be achieved. On 4<sup>th</sup> April 2003, apparently after discussions with Mr Stretford, Mr Rawlings convened a meeting of what became known as "Team Rooney". That meeting was held on 7<sup>th</sup> April 2003 and the minutes were produced and put to Mr Rawlings in the course of cross-examination. It set out the individual roles of the members of the Team. Mr Stretford was the lead agent with responsibility for "contract negotiations and contact for WR"; and Mr Rawlings was responsible for "brand marketing and commercial images".
222. In the centre of the first page of these minutes, there appears, in bold type, a form of mission statement which read: "Wayne Rooney is the most important figurehead PSM has ever had. Not just as an icon but as a marketing tool." On the third page, one finds the slogan: "Wayne Rooney Street Striker - The Future of English Football." This reflects the initial thoughts of Mr Stretford as set out in his e-mail to Mr Rawlings of 26<sup>th</sup> March 2003. I need not deal with the details of the action plan which was proposed. I note, however, that consideration was already being given to long-term sponsorship deals with a number of partners, including Nike, Coca Cola and, I think, Electronic Arts. It is also clear that it was envisaged that Team Rooney would be involved in many aspects of the player's welfare and lifestyle and would not limit itself simply to contractual negotiations and sponsorship deals.
223. It was probably about the same time that an internal document was also created headed "Brand Development Plan", which adopted the same slogan as that recorded in the minutes of the meeting of 7<sup>th</sup> April 2003, namely "Wayne Rooney Street Striker, The Future of English Football". It set out a four-year plan for the development of the brand, starting with the then current season 2002/2003 and culminating in the World Cup in 2006.

224. These documents appear to show that Mr Stretford and others within Proactive recognised the immense potential of the player from a very early stage in the relationship and that they were prepared to invest considerable time and effort in developing the brand for the benefit of both Proactive itself and the player. When asked about these documents by Mr Chaisty QC, Mr Rawlings accepted that, even in July 2002, Mr Rooney was an exciting prospect but that by early 2003 he had begun to shine “far more brightly”.
225. According to Mr Stretford and, indeed, most of the other witnesses in the case, the obligations of an agent acting on behalf of such a high profile player are demanding and time consuming. The sole dissentient from this view was Proactive’s expert witness, Mr Mel Stein. That is a matter which I shall have to address in a little more detail later in this judgment.
226. Whatever the commitment in time and effort, on the part of Mr Stretford and his associates at Proactive, a number of lucrative contracts were procured for WR and for Stonegate over the months and years which followed. As previously mentioned, he signed for Manchester United FC in August 2004. According to Mr Stretford, this was a £27m deal which brought in commission for Proactive of £1.5m. But a number of lucrative sponsorship deals were also arranged with Nike, Coca Cola and Electronic Arts, relating to sportswear, soft drinks and electronic games respectively. In addition, he has an Image Rights Licence Agreement with Manchester United FC, similar in kind to the one negotiated with Everton FC in January and February 2003. There is, or may be, an issue, however, as to how many sponsorship and merchandising deals he may be entitled or wish to enter into in addition to those with the major sponsors which I have mentioned.
227. Proactive has undoubtedly done remarkably well out of its association with WR. Mr Chaisty QC went through the figures with Mr Page in the course of cross-examination. In addition to a sum of £75,000 paid by Everton FC in accordance with the two agreements dated 28<sup>th</sup> February 2003 and the commission of £1.5m received on the players’ transfer to Manchester United FC, Proactive has received substantial additional sums from Stonegate by way of commission under the Image Rights Representation Agreement. Mr Page produced a schedule showing the estimated income generated from such deals in each of the six accounting years from 2003 to 2008, together with a summary, for each of those years, of the commission earned by Proactive and an estimate of the costs and expenses incurred in generating the commission. The cumulative total commission earned up to 31<sup>st</sup> August 2008 was £1,938,260; and the total costs and expenses incurred up to the same date was estimated to be some £530,832.
228. It should be noted, however, that there is, or may be, an issue as to how these figures for costs and expenses have been calculated. On the face of it, this would seem to be material to one of the alternative claims advanced by Proactive, namely its claim under clause 8 of the Image Rights Representation Agreement which, it will be recalled, provides for the payment of certain sums in the event of termination otherwise than in accordance with clause 7. But that would no longer seem to be directly relevant, at least at this stage of the proceedings, in view of the twin concessions made by Mr Mill QC on behalf of Proactive, namely, that clause 8 is an unenforceable penalty clause but that it sets a cap on the amount of any damages to

which Proactive might be entitled by reason of Stoneygate's repudiatory breach of the Image Rights Representation Agreement.

229. According to Mr Page, the financial arrangements between Proactive and Stoneygate were administered by the same accounts team comprising several employees of Proactive. When a payment became due to Stoneygate from a third party, such as one of the major sponsors, one of this team would raise an invoice addressed to the third party and, at or about the same time, would also raise an invoice from Proactive addressed to Stoneygate for the amount of the commission due to Proactive in respect of the third party payment. When the third party invoice was paid, Proactive's invoice would be referred to Mr Stretford who would authorise payment of the commission to Proactive. It should perhaps be noted that VAT was invariably added to the amount of the commission claimed by Proactive and was invariably paid and accounted for by Proactive in the usual way.

#### The Sponsorship Contracts

230. It is unnecessary to consider the precise terms of the contracts entered into between Stoneygate and various sponsors for the exploitation of WR's image rights. But certain of the terms may be material to the legal issues which have to be resolved in this action, so I will say something briefly about each of the major contracts.
231. It seems that the first contract with Nike was dated 15<sup>th</sup> March 2003, very shortly after the new arrangements involving the player, Everton FC, Proactive and Stoneygate had been put in place. I have not been provided with a copy of this contract, but it appears from the cross-examination of Mr Melvin Stein that it provided for a modest signing-on fee of £10,000 and for an annual payment of £350,000 to Stoneygate, with additional bonus payments related to such contingencies as scoring a goal for England. The figures are material, since Mr Stein had relied upon the modest level of the signing-on fee in support of his opinion that the player's potential was not fully appreciated at the time and that Proactive was taking a commercial risk in paying him a signing-on fee of £50,000. But he was either unaware of, or overlooked, the very substantial annual payments provided for by the contract with Nike which, as Mr Stein had to accept, would, in itself, have resulted in a commission which would have more than covered Proactive's initial outlay.
232. This initial contract between Stoneygate and Nike was, however, eventually renegotiated and a new contract was entered into on 1<sup>st</sup> August 2007. It is this contract which is still in force. Indeed, the contract term is from 1<sup>st</sup> August 2007 to 31<sup>st</sup> July 2017, a period of 10 years in total. However, in addition to certain rights on either side to terminate for specified causes, Nike has a unilateral option to terminate the contract with effect from 31<sup>st</sup> July 2013, provided written notice to that effect is given to Stoneygate not later than 1<sup>st</sup> January 2013. In that event, Stoneygate would be entitled only to accrued payments and bonuses.
233. The contract grants certain exclusive rights to Nike in respect of various types of athletic and sports footwear, clothing and accessories, together with various ancillary rights. In addition, it requires Stoneygate to ensure that the player co-operates for the purposes of creating and producing promotional materials and makes a specified number of personal appearances. In return, of course, Stoneygate is entitled to receive

various payments and bonuses, the details of which are immaterial to the present litigation. The key points which emerge from the provisions of the contract itself are, as it seems to me, firstly, the length of the term, secondly the exclusive nature of the rights granted and thirdly the requirement imposed upon Stoneygate to ensure the player's co-operation in relation to promotional materials and personal appearances.

234. Some further evidence as to the nature of the relationship between Nike, WR, Stoneygate and Proactive was given by Mr Graham Bartlett, the Sports Marketing Manager for Nike in the United Kingdom and Ireland. He confirmed that the original 2003 contract was also for a term of 10 years. That was not Nike's standard term for such contracts. In this particular case, however, Nike wished to negotiate what it described as a "very long-term contract". He also explained that WR was one of a small group of players who featured in Nike's global advertising campaigns. In relation to such players, Nike's strong preference (which he considered would be shared by the other main sponsors) was that the number of sponsorship deals should be of a high quality and limited in number. The main reasons for this preference were to prevent the dilution of the player's "brand" and to avoid undue demands being made on a player who would inevitably have a crowded schedule and many other commitments. Mr Bartlett did, however, acknowledge that the only contractual restraint upon Stoneygate's freedom to enter into other sponsorship deals was in relation to products similar to those manufactured and distributed by Nike itself.
235. Mr Bartlett also commented on the role of the agent, as seen from the perspective of a sponsor such as Nike. He vigorously challenged the suggestion that the agent's role was largely confined to finding and negotiating suitable sponsorship deals. He referred yet again to the very many other demands which were inevitably made upon a player of this calibre and dismissed as wholly unrealistic the suggestion that the sponsor could or should deal directly with the player in relation to such matters as advertising shoots, public relations appointments and other personal appearances. On the contrary, in his experience, managing such a player's commitments is a complicated and ever-changing responsibility requiring a detailed knowledge of all the various demands made upon the player with a view to delivering the best possible results and avoiding conflict between those involved. Managing these demands is, in his experience, the responsibility of the player's agent. Furthermore, it is with the agent that a sponsor such as Nike collaborates in order to develop the value of the brand.
236. Mr Bartlett's evidence as to the extent of the agent's involvement in facilitating the necessary co-operation between Nike and a sportsman such as WR was very much at odds with the opinions expressed by Proactive's expert, Mr Mel Stein. But there was only a fairly limited challenge to Mr Bartlett's evidence on these matters and I see no reason why I should not accept that evidence in its entirety. It does, of course, relate only to Mr Bartlett's experience of the way in which Nike conducts its business. But the practical realities which he describes would no doubt reflect the experience of other major sponsors.
237. The first sponsorship agreement with Coca Cola was apparently entered into in December 2003, though, once again, I have not been taken to the detailed terms of that agreement. But the contract which remains in force was entered into between Proactive on behalf of Stoneygate and Coca Cola Services NV on or about 5<sup>th</sup> July

2007, though the term of the agreement was backdated to 1<sup>st</sup> August 2006. The contract is for a period of just over four years, expiring on 1<sup>st</sup> September 2010, though there are provisions for earlier termination in the event of breach.

238. The contract requires Stoneygate to procure various services by the player, including the production of television commercials and other promotional materials, personal appearances and endorsements; and it grants the right to use the results of those services in connection with the promotion of the sponsor's beverage products. The contract was exclusive in the sense that Stoneygate undertook not to authorise the use of WR's image rights in connection with advertising or publicity within the United Kingdom, Channel Islands and the Isle of Man of any non-alcoholic drink or beverage other than Coca Cola products. This left open the possibility of the grant of similar rights outside the United Kingdom and associated territories; and there was also an exception in relation to the exploitation of those rights under any contract with the player's club or in connection with the international team. The remuneration payable is substantial, but the precise amount is immaterial for the purposes for the present case.
239. The other major sponsor is Electronic Arts Inc, a developer of interactive entertainment software products. Once again, the original sponsorship agreement was entered into in September 2003; but the contract which remains in force is dated 2<sup>nd</sup> November 2007. Proactive and Stoneygate granted to Electronic Arts certain exclusive rights to use WR's image and likeness in connection with such software products and agreed to procure his services for the purposes of a number of annual video, filming, recording or photography sessions and publicity appearances. Subject to typical provisions for earlier determination in certain specified circumstances, the agreement was to continue until 31<sup>st</sup> July 2010. There is an exception to the exclusivity provisions to cover contractual commitments to Manchester United FC or the FA. Once again, the remuneration is substantial, though the precise amounts are, I think, immaterial for present purposes.
240. Since the parting of the ways between Proactive and Stoneygate, a further sponsorship agreement has been entered into by Stoneygate. It is dated 7<sup>th</sup> December 2009 and is for a term of two years starting on 7<sup>th</sup> December 2009, subject to rights of earlier termination. The sponsor is Asia Pacific Breweries Limited of Singapore; and the purpose of the agreement is to permit the use of WR's image rights in connection with an alcoholic beverage known as Tiger Beer manufactured, produced, sold or distributed by Asia Pacific Breweries Limited or its affiliates. The use of the image rights is confined to a territory comprising a number of counties in the Far East and is, therefore, fully compatible with the agreement with Coca Cola.
241. Yet again, Stoneygate is required to procure various endorsements and promotional services on the part of WR; and once again, the rights granted by the agreement are exclusive within the territory in relation to beer and similar alcoholic beverages and certain non-alcoholic drinks, subject to certain exceptions including any contractual obligations to Manchester United FC, the FA or Nike. As in the case of the other sponsorship deals, the remuneration payable in consideration of the grant of the relevant rights and services is substantial.

242. It will be appreciated that the sponsorship deals with Coca Cola and Electronic Arts both expire in the second half of 2010, shortly after the World Cup in which the England team will participate and WR himself may well play an important role. As Mr Stretford pointed out, sponsors tend to operate by reference to important dates in the footballing calendar, most notably the World Cup. It can be anticipated, therefore, that these sponsors would wish to renegotiate and extend the terms of any sponsorship deal at or about the time of the 2010 World Cup. The same may, of course, also apply even where a sponsorship contract extends well beyond the World Cup.

#### The Manchester United Image Rights Agreement

243. In addition to the grant of image rights for certain specified purposes under these four sponsorship contracts, a series of contracts in relation to such matters was also entered into between Stoneygate and Manchester United FC after WR's transfer from Everton FC. These Image Rights Agreements are distinct from his playing contract with the Club, though, as I understand the position, the period of the current Image Rights Agreement coincides with the term of his playing contract.
244. The initial contract with the Club was entered into at the time of his transfer and is dated 23<sup>rd</sup> August 2004. By this contract, Stoneygate granted a licence to the Club to use and exploit WR's image for certain purposes, insofar as it related to him as a player for the Club, and the right to require certain personal appearances on certain occasions and at certain events. But Stoneygate reserved the right to enter into sponsorship and merchandising agreements with third parties which concerned the player, subject to certain restrictions, most notably a provision limiting the number of sponsorship agreements to a maximum of five in relation to certain specified categories of product, including, sportswear, soft drinks and computer, video and interactive games. Those, of course, covered the sort of products for which sponsorship contracts had already been agreed. A similar limit of five was placed upon the number of merchandising contracts which the player was entitled to enter into and which required his active support. In consideration for the rights conferred upon the Club, remuneration was payable to the player on an annual basis at a fairly handsome level. The contract was specifically stated to be for the same term as the playing contract between the Club and WR.
245. But this original contract was renegotiated and replaced by a new agreement dated 23<sup>rd</sup> February 2005 which has, in turn, been extended and varied. This is a more extensive and detailed document; but it largely adopts the essential features of the earlier agreement. The rights granted are, however, somewhat more extensively defined, as are the restrictions on the rights of Stoneygate and WR himself to enter into sponsorship and merchandising agreements with third parties. These include a limit on the number of such agreements. This restriction is to be found at clause 3.4.1, which provides that Stoneygate might only enter into up to five sponsorship agreements and five merchandising agreements in operation and effect at any one time, at least in relation to certain specified categories of goods and Services, without the consent of Manchester United PLC, such consent not to be unconscionably withheld.
246. By clause 3.4.2, furthermore, Stoneygate is obliged to inform Manchester United PLC whenever it proposes to enter into any agreement pursuant to clause 3.4.1 in any case

in which Manchester United PLC has an existing agreement with a sponsor or partner in relation to certain types of product or service. This is to enable the club sponsor or partner, in effect, to make a pre-emptive offer to Stoneygate of a similar sponsorship deal on its own behalf.

247. There was some debate at trial as to the precise meaning of clause 3.4.1. Indeed, in a witness statement from Mr David Gill, the Chief Executive Officer of Manchester United Limited (which was admitted in evidence without the attendance of the witness), Mr Gill expressed the opinion that the clause in question was somewhat badly drafted. I rather agree with that assessment. For my part, however, I incline to the view that the wording is apt to limit the number of sponsorship agreements in operation at any time to a total of five, in addition to those which had already been entered into prior to the date of the Image Rights Agreement with Manchester United PLC of 23<sup>rd</sup> February 2005. Brief details of these sponsorship or merchandising agreements are set out in Schedule 1. Unsurprisingly, they include those with Nike, Coca Cola and Electronic Arts. But two others are also referred to: one with a concern known as Big Blue Tube; and the other with Pringles Crisps.
248. In any event, there was a further provision at clause 3.4.3 which stated that if, in the opinion of the Manager of the Club's first team, the player's performance or ability to perform for the Club and to fulfil its obligations under his playing contract was being hindered by any of these agreements, Manchester United PLC and Stoneygate should discuss in good faith a reduction in his commitments under those agreements and the level of his commitments in any future agreements.
249. Mr Gill expressed the belief in his witness statement that, even if clause 3.4.1, properly construed, allowed for five sponsorship agreements and five merchandising agreements in addition to those already in place at the time when the contract was effected, the Club would not, in practice, allow the player to have a large number of sponsors as was suggested by Mr Stein in his report. Indeed, he stated that two other Manchester United players of a similar high profile in the recent past, namely David Beckham and Cristiano Ronaldo, never engaged in the amount of commercial activity which Mr Stein suggested would be possible for a player like WR.
250. Much the same point was made rather more vigorously by Mr Stretford in the course of his oral evidence. In re-examination, he expanded on a comment which he had previously made to the effect that there was no room for any further sponsorship deals and that this reflected the wishes of the Club, the manager and the player. He explained that the Club itself had what he described as a "raft" of sponsorship interests which it would want to exploit for its own benefit and that it would not wish to risk any conflict between its interests and those of the player himself.
251. So far as concerned the Manager, Sir Alex Ferguson, he emphasised his attention to detail and his philosophy that the first thought of any player must be his responsibility to his Club as a professional footballer. He went on to say that, in his view, the Manager would not allow WR to have any more sponsorship deals than were presently in place. Mr Stretford did not elaborate on the precise reasons for this; but it can be inferred that it was because any significant further commercial involvement would be likely to interfere with his footballing activities. As for the player himself, he considered that his commercial commitments were at or about the limit of what he

would be willing to undertake, given his other commitments as a footballer, a husband and a father.

252. The essential point to be derived from all this is that the Image Rights Agreement with Manchester United PLC imposes restrictions on the number of sponsorship deals which Stoneygate could enter into for the benefit of WR. At least on one interpretation of clause 3.4.1 of the contract, Stoneygate would not be entitled to enter into any more sponsorship deals without the consent of the Club, since there are already five such agreements in place. But on another interpretation, he could still enter into at least four others, taking into account the Tiger Beer agreement which has been entered into since the Agreement with Manchester United FC. In any event, however, there are further contractual restraints which are likely, in practice, to limit the number and type of such third party agreements which he might be able to enter into. Furthermore, I can see no reason not to accept the evidence of Mr Gill and Mr Stretford, to the effect that, whatever the strict contractual position, may be it is unlikely that, in practice, Stoneygate would be prepared or permitted to enter into further significant contractual commitments beyond those which he has at present.
253. I need not deal with the other terms of the 2005 Image Rights Agreement with Manchester United PLC. I should merely note that it was varied by a letter dated 13<sup>th</sup> October 2006 and further varied by a later, undated letter. The major reason for these variations was to extend the term of the agreement to 30<sup>th</sup> June 2012, though it also substantially increased the amounts payable to Stoneygate and made a number of minor amendments to the 2005 Agreement.

#### Mrs Rooney and Speed

254. Mrs Coleen Rooney is, of course, WR's wife and the mother of his child. They met when they were still at school and she was his regular girlfriend when he became a professional footballer. As Mr Stretford pointed out - and as is well known - the wives and girlfriends of professional footballers attract a good deal of media attention and some, such as Mrs Rooney, achieve celebrity status in their own right. It was not particularly surprising, therefore, that she turned to Proactive and Mr Stretford to provide assistance in developing the commercial opportunities which began to come her way. It seems that Mr Stretford initially helped her to arrange some sort of contract for television; and Proactive charged commission at the same rate as was applicable under the contract between Proactive and Stoneygate, namely 20% of the fees payable to Mrs Rooney. Thereafter, early in 2004, Speed was set up, apparently at the suggestion of Proactive and Mr Stretford, to act as a vehicle for exploiting her image in much the same way as Stoneygate was used for that purpose by her husband. But, so far as I am aware, there was no formal assignment of any rights by Mrs Rooney to Speed. More importantly, perhaps, there was no written agreement between Proactive on the one hand and Mrs Rooney or Speed on the other hand under which Proactive was appointed to act as agent for the exploitation of her image rights or was entitled to any commission or other remuneration for any services which it provided in that regard.
255. Nonetheless, though Proactive was primarily interested and engaged in the representation of sportsmen and sportswomen, it acted on behalf of Speed and Mrs Rooney for the purposes of negotiating and securing various contracts. In each case,

it seems that the arrangements for raising invoices for fees payable to Speed and for the approval and payment of commission at the rate of 20% by Speed to Proactive precisely mirrored the arrangements between Stoneygate and Proactive. The commercial relationship between Proactive, Speed and Mrs Rooney (whatever its precise legal basis) appears to have been highly successful and lucrative. According to Mr Page, over the period 2005 to 2008, Speed made gross profits in excess of £2.3m after paying commission to Proactive of £592,000.

256. The fact that Proactive was acting as agent for Speed and, indirectly, therefore, for Mrs Rooney, is clearly demonstrated by a number of written agreements between Speed and various commercial organisations to which Proactive was itself a party. Thus, on 24<sup>th</sup> May 2006, Speed and Proactive entered into a written contract with HarperCollins Publishers Limited by which Mrs Rooney was to contribute to two books for publication by HarperCollins. Speed's address at the head of the agreement was stated to be "c/o Proactive Talent Management a division of Proactive Sports Management Limited"; Speed itself was described as "the Lender", Proactive as the "Authorised Representative" and Mrs Rooney as "the Author". The recitals include the following statement:

"The Authorised Representative is the Author's management company and shall represent the interests of the Lender and the Author in respect of this Agreement. The Lender has empowered the Authorised Representatives to act on its behalf in all matters arising under this Agreement (including without limitation in respect of matters to be mutually agreed or approved by the Lender) unless the Lender notifies the Publishers in writing otherwise."

257. It may be noted that, in this contract, and, indeed, in a later contract with HarperCollins Publishers Limited dated 6<sup>th</sup> February 2008, Speed was entitled to notify the publishers that Proactive no longer had power to act on its behalf. But a somewhat different picture was given in at least one other written contract of a similar kind. This was an Exclusive Interview and Photographic Rights Agreement dated 26<sup>th</sup> August 2008 and made between Northern and Shell PLC, Speed and Proactive. Speed's address, in this case, is stated to be "c/o Paul Stretford of Proactive Talent Management"; and Proactive itself is described as "the Representative". The recitals read as follows:

"Whereas: the Publisher is the publisher of, *inter alia*, the celebrity magazine OK! ("the Magazine") and now wishes to publish a series of exclusive interviews and photographs in the Magazine ("the Features") concerning Coleen Rooney ("the Interviewee") and a weekly column to be published in the Magazine, the content of which is to be provided by the Company who is entitled to the exclusive services of the Interviewee. The Representative exclusively represents the Interviewee."

258. I did not, of course, hear from Mrs Coleen Rooney herself; and, as previously noted, it would seem that there was no written representation agreement between Proactive and Speed. According to Mr Stretford, Proactive simply acted as agent for Speed and Mrs Rooney on a "day to day or job to job basis". There was no over-arching agreement, whether written or oral, by which Proactive was at any time appointed as agent for Speed on an exclusive basis or for a specific period.

259. In large measure, his evidence about these matters was supported by that of Jane Aspinall, who was employed by Proactive, in effect, as Mrs Rooney's brand manager between 2006 and December 2008. Since then, she has acted in a similar capacity as an employee of Triple S. She confirmed, that so far as she was aware, there was no agreement, whether oral or written, between Mrs Rooney or Speed on the one hand and Proactive on the other by virtue of which Proactive acted as agent for Speed or Mrs Rooney. On the contrary, Mr Stretford acted simply on a "contract to contract basis" in negotiating the contracts for Mrs Rooney via Speed.
260. But it seems clear from her evidence that Mr Stretford took an active part in deciding whether any commercial opportunity should be pursued and in negotiating the terms of any prospective deal. Furthermore, in cross-examination, she was taken to an exchange of e-mails between Mr Anthony Burr and a Mr Ian Monk of Ian Monk Associates and Mr Stretford dating from early October 2008 from which it is fairly clear that Mr Stretford insisted on exercising control over the commercial opportunities undertaken by Mrs Rooney. Miss Aspinall also agreed that the understanding or arrangement was that Proactive would receive a commission of 20% on all contracts and that these arrangements had been in place before she started to work for Proactive.
261. Nonetheless, Proactive contended that there was or must have been some form of agreement between Proactive on the one hand and Speed and Mrs Rooney on the other by virtue of which it had the exclusive right to represent Speed and Mrs Rooney for the purposes of exploiting any commercial opportunities on her behalf. It was unable, however, to adduce any direct evidence on the point. Mr Page nonetheless expressed his belief that there was a contractual relationship between the parties which was identical, at least in terms of exclusivity and level of commission, to that subsisting between Proactive and Stoneygate. In support of this belief, he pointed to the fact that Mr Stretford was a director of Speed, that the invoicing arrangements were identical to those adopted in relation to Stoneygate, that commission at the rate of 20% was invariably charged by Proactive, that its position as agent was expressly referred to in at least some of the contracts negotiated by Proactive and that Proactive had prepared Speed's accounts from the date of its incorporation until the severance of relations. He also asserted that it was always "generally accepted and understood" by all those involved in Team Rooney that Proactive had exclusive rights of representation in respect of Speed and Mrs Rooney.
262. It certainly seems that, in practice, Mr Stretford appears to have acted as if he and, presumably, Proactive, were the exclusive agents for Speed and Mrs Rooney. Commission was also charged at the same rate as in the case of Stoneygate. Furthermore, though Mr Stretford denied it, it seems that the reference to Proactive as the exclusive representative of Mrs Rooney was incorporated into the draft agreement with Northern and Shell PLC by solicitors retained on behalf of Proactive who reported to Mr Stretford. But the relevant exchange of e-mails was not, I think, put to Mr Stretford, no doubt for the very good reason that it was only in re-examination that he stated that the relevant agreements had all been drafted by the other party, that there had been no process of negotiation in relation to them and that he had not himself read them. Nevertheless, on the face of it, Mr Stretford was holding out Proactive as exclusive agent for Mrs Rooney in the latter part of 2008.

263. It also seems quite clear that Proactive provided at least some accounting services to Speed, though this was, at least initially, firmly denied by Mr Stretford. Mr Stretford's denial was set out in fairly unequivocal terms at paragraph 241 of his principal witness statement. In response, Mr Page made a supplemental witness statement in which he challenged this denial, giving details of various accounting documents which had been handed over to the solicitors for Speed and Stoneygate towards the end of 2008 and exhibiting various e-mails. None of this supplemental evidence was challenged in cross-examination. I think I need refer only to an e-mail dated 29<sup>th</sup> November 2007 to Mr Page and Nita Patel, who is said to have been responsible for preparing Speed's accounts. The e-mail is headed "Speed Year End Account" and was obviously triggered by an earlier e-mail from the accountancy firm, Grant Thornton. It is a perfectly sensible and measured e-mail in which Mr Stretford made some observations about certain problems in relation to the management accounts. The e-mail then continues as follows:
- "It is, I believe, a difficult situation for me as both founder of our group and a director of Speed, however, I have to point out a fee is paid by the clients for the professional preparation and management of the accounts and I don't believe they are receiving the service any of us would wish to provide."
- He continued by identifying a number of specific topics which needed to be considered by way of a meeting with Mr Page and, it would seem, Nita Patel.
264. It was suggested to Mr Stretford, on the basis of this e-mail, that what he had said in his witness statement and had confirmed in cross-examination was simply a lie. Mr Stretford did not entirely accept that proposition, stating that there remained certain issues between the parties about such matters. That is hardly a satisfactory explanation of the blank denial in his witness statement.
265. Despite these unsatisfactory features of certain aspects of Mr Stretford's evidence on these issues, I do not consider that I can properly infer that there was in fact any express oral contract between the relevant parties under which Proactive was entitled to exclusive rights of representation in respect of Mrs Rooney's commercial interests. The question as to whether any such contract is to be implied from the conduct of the parties is a matter to which I will have to return in due course.

#### The Warrington Trial

266. In October 2004, three men named John Hyland, Anthony Bacon and Christopher Bacon stood trial at the Crown Court at Warrington charged with offences of obtaining money by deception. The prosecution arose, it would seem, out of demands said to have been made upon Mr Stretford in connection with Proactive's successful acquisition of the right to represent WR in footballing matters in place of Proform. Mr Stretford was one of the principal witnesses for the prosecution and had signed a witness statement which represented the culmination of a number of drafts. He gave evidence over several days and, in the course of cross-examination, denied that any footballing representation agreement had been signed involving WR prior to 12<sup>th</sup> December 2002.
267. That was not, of course, correct, since there were already in place the two agreements dated 17<sup>th</sup> July 2002 and 19<sup>th</sup> September 2002. Mr Stretford did, however, acknowledge that an eight-year image rights contract had been entered into between

Proactive and WR prior to 12<sup>th</sup> December 2002. That is, of course, consistent with his evidence in the present proceedings that he believed that the Agreement of July 2002 covered only commercial activities and did not extend to on-field representation. But when it was specifically put to him that an agreement had been entered into on 19<sup>th</sup> September 2002, he identified this as the Image Rights Agreement.

268. It seems that neither of the earlier agreements had been disclosed to the defence prior to cross-examination. What had, however, been disclosed, it would seem, was a copy of the Variation Agreement which, of course, referred specifically to the Representation Agreement of 17<sup>th</sup> July 2002. Not surprisingly, therefore, Mr Stretford was severely cross-examined on the basis of the Variation Agreement; and a request was made for the production of the two Agreements of 17<sup>th</sup> July 2002 and 19<sup>th</sup> September 2002.
269. Once these documents had come into the hands of counsel for the prosecution, it was decided that the Crown could no longer continue to rely upon the evidence of Mr Stretford. Reference was made in particular to the contract of 19<sup>th</sup> September 2002 which, it will be recalled, clearly covered both on-field and off-field representation. In those circumstances, counsel decided to offer no further evidence on behalf of the prosecution and the Jury was presumably, therefore, directed to enter formal verdicts of not guilty. It will be appreciated that, in the circumstances, Mr Stretford was not specifically cross-examined about the terms of either of these agreements; nor was he asked to explain how their terms were consistent with the evidence which he had previously given.
270. All this is evident from the transcript of Mr Stretford's evidence at the trial which he himself exhibited to his principal witness statement and commented upon in the body of the statement itself. As he himself acknowledged in that witness statement, these are matters which essentially go to his credit as a witness. He sought to anticipate such an attack by stating that both of the Agreements in question had already been provided to the police officer in charge of the investigation, Chief Inspector Hindle. He exhibited, in support of that assertion, two witness statements made by Mr Hindle in connection with the subsequent investigation by the Football Association. In the earlier of the two statements, Mr Hindle asserted unequivocally that both of the Agreements in question were recorded in a Schedule of unused material and that it had been decided, in consultation with counsel, that all of the items listed in the Schedule should be served on the defence. Mr Stretford also pointed out, no doubt correctly, that the decision to offer no further evidence had been taken without any consultation with him and without having given him any opportunity to refresh his memory or to provide an explanation.
271. Mr Mill QC did not specifically challenge the proposition that copies of both of the relevant Agreements were amongst the unused material held by the Cheshire Constabulary. It is, nonetheless, somewhat curious that neither prosecuting nor defence counsel seem to have had copies or to have been aware of their precise terms. Instead, Mr Mill adopted a somewhat different approach. He asked Mr Stretford when it was that he had first become aware that WR had signed an on-field Representation Agreement with Proactive in July 2002. His answer was that he only became "fully aware" of that fact after the collapse of the Warrington trial. He went on to explain that Mr Rodford came to see him and showed him the Agreement at

about that time and that this was the first occasion in which he had seen the July 2002 Agreement in its entirety or at all.

272. Mr Mill followed up this answer by asking him how, in those circumstances, he could say, as he had said in his witness statement, that he had provided a copy of the Agreement in question to the Police during the course of the investigations which led to the trial at Warrington Crown Court. His explanation was that he had not actually seen it but that it was in a box of documents which had been put together under Mr Rodford's direction and handed over to the Police. The July 2002 Agreement, since it was to do with Image Rights, would have been retained by Proactive's Sports Management division and not by him. But he conceded that he had not discussed this Agreement with the Police at any stage during the course of drafting his witness statement for the purposes of the prosecution.
273. Mr Mill also asked him about two paragraphs in his principal witness statement in which he referred to the earlier drafts of the witness statement which he prepared and signed for the criminal trial, in which he said that he had specifically referred to the two earlier Agreements. The point which Mr Stretford was no doubt trying to make in this passage in his witness statement is that he did not feel that he had anything to hide. None of those draft witness statements prepared for the criminal trial were, it would seem, available for the purposes of the present action. But Mr Mill suggested to him that he was not telling the truth in asserting that he had referred to the earlier Agreements in any of the draft statements, praying in aid a finding to that effect by the FA Regulatory Commission. It is to that which I must now turn.

#### The FA Disciplinary Proceedings

274. In the aftermath of the abandonment of the trial at Warrington Crown Court, Mr Stretford felt compelled to resign as a director of Formation Group Plc, Proactive's holding company, though the Board issued a press statement to the effect that they would continue to stand by him. But that was not the end of the matter. The Football Association decided to investigate various matters which had come to light as a result of the criminal trial and, as previously noted, on 17<sup>th</sup> June 2005, it commenced disciplinary proceedings against Mr Stretford. A Regulatory Commission was empanelled, a number of witness statements were provided for the purposes of the proceedings, and it appears that it heard oral evidence from Mr Stretford and Mr Rodford. In the event, the Commission found that the majority, but not all, of the charges against Mr Stretford were made out. In the course of its factual findings, it rejected the evidence of Mr Stretford and Mr Rodford to the effect that the Agreement of 17<sup>th</sup> July 2002 had not been intended to cover on-field representation, that the relevant provisions had been incorporated in the Agreement by mistake and that they had not become aware of this mistake until a much later date. The Commission also found that the witness statement prepared by Mr Stretford for the purposes of the Warrington trial was false and misleading in certain respects, as was his oral evidence to the effect that no on-field representation agreements had been entered into prior to 12<sup>th</sup> December 2002.
275. As I pointed during the course of the evidence, the findings of the FA Regulatory Commission are not binding upon me; indeed, they are not even evidence of the truth of the matters so found. Insofar as the same or similar issues arise in the present

proceedings, I must make up my own mind on the basis of the evidence adduced during the course of this trial. But, of course, there was some cross-examination of Mr Stretford on the basis of the Commission's findings. In particular, as previously noted, its conclusions were used as a platform for the cross-examination of Mr Stretford on the assertion which he made in his principal witness statement in the present action to the effect that he had specifically referred to the earlier Agreements in the drafts which he had prepared prior to the final version of his witness statement in the criminal proceedings.

276. The same point was in issue, it would seem, in the disciplinary proceedings themselves; and the Commission concluded, after an examination of the evidence before it, that there had been no reference to the Agreement of 17<sup>th</sup> July 2002 in any of the drafts prepared in connection with the criminal proceedings and that the omission of any such reference meant that his witness statement was "deliberately misleading" in that regard.
277. When Mr Stretford was cross-examined on the basis of the relevant passages in the Commission's findings, he seemed minded to accept that, as the Commission had recorded, he had accepted that certain references in earlier drafts were not, in fact, to the 17<sup>th</sup> July 2002 Agreement as he had, apparently, initially contended. But he nonetheless insisted, in answer to Mr Mill, that somewhere amongst the many drafts he had referred to an Image Rights Agreement which he understood to be that of July 2002. So he resisted the suggestion that the Commission's conclusions were, in fact, correct.
278. As I have previously observed, I must try this case on the evidence before me. The issue strictly goes to credit. Mr Stretford denied the suggestion that was put to him; and none of the draft statements to which the questions were directed was available at trial or specifically put to Mr Stretford. I am quite unable, in those circumstances, to conclude that Mr Stretford was not telling the truth about these matters and that he had not made reference to the Agreement of July 2002 somewhere amongst these various drafts.
279. A further issue was raised about the manner in which Mr Stretford conducted himself during the proceedings before the Regulatory Commission. According to Mr Stretford, he had been asked during the course of the proceedings whether he had any objection to the disclosure of the Couchman Harrington file to the FA. He stated that he had responded by saying that he personally had no objection to the production of the file but that he was no longer a director of Proactive, so that any request would have to be directed to the Company rather than to him personally. The point which Mr Stretford was presumably wishing to make was that he did not feel that he had anything to hide which might be revealed by an examination of the file. But it was suggested to him by Mr Mill that he had deliberately chosen to resign as a director of Proactive so as to be able to give precisely such an answer to any request of this kind. In effect, he sought to turn against Mr Stretford the very point which he had made in his own favour.
280. In the same paragraph of his principal witness statement, Mr Stretford went on to say that, at the time when this request was made to him during the disciplinary proceedings, he had never seen the Couchman Harrington file. That assertion was, in

itself, the subject of cross-examination by Mr Mill which has a bearing on the credibility of Mr Stretford and to which I shall have to return in due course. For present purposes, the particular point which was put to Mr Stretford was that he had resigned as a director of Proactive on 20<sup>th</sup> May 2008, during the course of the disciplinary proceedings; and it was suggested to him that the only possible reason for his having done so would have been to ensure that he could not be required to produce documentation, most notably the Couchman Harrington file.

281. According to Mr Stretford himself, he resigned as a director of Proactive on 20<sup>th</sup> May 2008 which appears to have been right in the middle of the hearing before the Commission, which took place on a number of separate days between 28<sup>th</sup> April 2008 and 17<sup>th</sup> June 2008. But in his oral evidence, Mr Stretford sought to resile somewhat from what he had said in his witness statement, asserting that the date he had given in his witness statement, namely 20<sup>th</sup> May 2008, was probably when the appropriate form was lodged at Companies House. He could not, however, say when he had, in fact, resigned. But he was also asked why he had chosen to resign as a director of Proactive at that time, whether or not it was on that specific date. His explanation was that he no longer had any confidence in the people that he was working with. He did not specifically respond to a further question as to how that could be the case, given that Proactive was standing “four square” behind him in the proceedings, and paying the costs. Nor did he give any very clear answer to a supplemental question as to how his colleagues on the Board of Proactive had responded to his decision to resign.
282. The timing is undoubtedly curious; and Mr Stretford seemed unable or unwilling to provide any explanation as to why he had chosen to resign at or about that time. But whether the motive was, in fact, that sought to be ascribed to him by Mr Mill can only properly be resolved in the context of a fuller analysis of what precisely Mr Stretford knew about the Agreements of July and September 2002 and when he knew it. So that is a matter which I shall have to return to in due course.
283. As I noted at a much earlier stage of this judgment, the decision of the Regulatory Commission was promulgated on 9<sup>th</sup> July 2008 and its full reasons were set out in a written determination dated 13<sup>th</sup> August 2008. In addition to imposing a substantial fine of £300,000, the Commission directed that Mr Stretford should be suspended from acting as a player’s agent for a period of 18 months, with the second half of the term being suspended. Mr Stretford subsequently appealed, albeit without the support of Proactive; but the appeal was subsequently dismissed on 22<sup>nd</sup> December 2008. The period of suspension came into effect, it would seem, after the dismissal of the appeal, with the result that it was only in February 2010 that he became free, once again, to act as a footballer’s agent.

#### The Aftermath of the Disciplinary Proceedings

284. Whatever the reasons for Mr Stretford’s resignation as a director of Proactive, the relationship between the two parties worsened and ultimately broke down after the publication of the findings of the FA Regulatory Commission. The directors of both Proactive and Formation Group took the view that there would be little merit in an appeal and decided not to support it, even though Mr Stretford himself clearly wished to take the matter further. But according to Mr Wallwork, the proceedings had

already taken their toll on Proactive's management time and morale; and Proactive had incurred costs in the region of £1.5m as well as having paid the fine of £300,000.

285. This decision was communicated to Mr Stretford by Mr Lawrence, the Chairman of Formation Group by way of an e-mail dated 27<sup>th</sup> August 2008. The e-mail gave brief reasons and expressed sympathy for the position of Mr Stretford, offering moral but not financial support if he decided to pursue an appeal. Mr Stretford responded by an e-mail dated 29<sup>th</sup> August 2008 in which he sought to place much of the blame for the outcome of the proceedings on Mr Rodford and pleaded with Mr Lawrence for support in his proposed appeal. But all this was to no avail. Nonetheless, it seems that towards the end of September and the beginning of October 2008, some discussions took place with a view to reaching an amicable agreement for the severance of Mr Stretford's commercial interests from those of Proactive.
286. But the relationship between the parties took a serious turn for the worse in early October. According to Mr Page, in January 2007, Halliwells, the solicitors then acting for Mr Stretford and Proactive, had obtained and reviewed the Couchman Harrington file in connection with the FA disciplinary proceedings. At some stage, a request from the FA for production of the file was considered and turned down by the directors of Formation Group and Proactive, apparently on grounds of legal privilege. There followed some discussions involving Mr Lawrence, Mr Rodford, Mr Page and Halliwells as a result of which it was decided that someone ought to look through the Couchman Harrington file. Halliwells were asked to provide a copy of the file, but it seems that they declined to do so. In their witness statements, both Mr Wallwork and Mr Page attribute this to the exercise of a lien by Halliwells, though Mr Page seemed somewhat doubtful as to whether that was the reason when he came to give oral evidence on the point.
287. Be that as it may, it was decided to approach Mr Harrington directly, and he agreed to provide a copy of his firm's file. Accordingly, on 2<sup>nd</sup> October 2008, Mr Page went to Couchman Harrington's offices to collect the file. But before returning with it, he sat down and read through it. It was his evidence that he immediately realised the potential significance of some of the documents on the file, most notably the e-mail from Mr Harrington to Mr Stretford and Mr Rawlings dated 17<sup>th</sup> January 2003 and the letter to Mr Stretford dated 20<sup>th</sup> January 2003. When he returned to Proactive's offices, he passed the file over to Mr Wallwork and a decision was taken to institute disciplinary proceedings against Mr Stretford.
288. Mr Lawrence then contacted Mr Stretford and asked him to attend a meeting on 8<sup>th</sup> October 2008. According to Mr Stretford, he was not given the reason for the meeting, although it was made clear that the matters to be discussed were of a serious nature and it was suggested that he might wish to bring a friend or colleague with him, though he was advised that solicitors should not be involved.
289. The meeting duly took place at Proactive's offices on 8<sup>th</sup> October 2008 between Mr Lawrence and Mr Wallwork on the one hand and Mr Stretford and Mr Kevin Moran on the other. Mr Lawrence read out a prepared note, the tenor of which was that the Couchman Harrington file contained evidence which showed that Mr Stretford was aware of the existence and nature of the Agreement of July 2002 at the time when the Variation Agreement was being prepared in January 2003 and that this was the

contrary to the evidence which had given at the Crown Court trial at Warrington and during the FA disciplinary proceedings. In those circumstances, he was informed that his position within Proactive had become untenable and that he appeared to have been guilty of gross misconduct.

290. However, the prepared note then set out the terms of an offer which it was proposed to make to Mr Stretford on a without prejudice basis. In effect, it was proposed that he should establish a new company, which could retain the name Proactive Sports Management Limited, and that what was described as Proactive's "Icon" business would be transferred to it in consideration of a payment of £1,182,720 and additional deferred payments totalling £3m payable over a period of four years. The document set out the basis on which this part of the business had been valued. It was a condition of the offer that his appeal against the decision of the FA Regulatory Commission should be abandoned and that the deal should be concluded by close of business on 31<sup>st</sup> October 2008. An answer was required by 5pm on Friday 10<sup>th</sup> October 2008. If it was not accepted, he would be suspended from work on full pay pending an investigation into allegations of gross misconduct.
291. According to Mr Stretford, Mr Lawrence also informed him that, if he did not agree to the terms proposed, the Board would have to release the file to the Football Association and also to the Insurers who had, in part, funded the disciplinary proceedings. At least by implication, it was apparently being suggested that, if he did agree, steps of this kind would not be necessary. But he did not accept the proposal; and solicitors were instructed on each side.
292. On 24<sup>th</sup> October 2008, Mr Stretford was informed that he would be suspended from his duties with Proactive pending a further investigation into these matters. On legal advice, he decided to treat this letter as a repudiatory breach of his Service Agreement and he elected to treat his employment as having come to an end. He immediately informed WR, Mrs Rooney, Stoneygate and Speed that his employment with Proactive had been terminated; and WR and his wife made it clear to him that they wished to have nothing more to do with Proactive. They in their turn instructed solicitors to act on their behalf.
293. In the meantime, various commission invoices had been raised by Proactive on both Stoneygate and Speed. Thus, on 1<sup>st</sup> August 2008, an invoice was raised against Stoneygate in the sum of £178,600 inclusive of VAT for commission said to be due to Proactive in respect of sums payable by Manchester United FC to Stoneygate under the Image Rights Agreement between Stoneygate and the Club which had been negotiated by Proactive. As Mr Page explained in his principal witness statement, this invoice would have been raised at the same time as Stoneygate's own invoice to Manchester United for the full amount of the payment in question.
294. On the same date, a similar commission invoice was raised upon Stoneygate in the sum of £117,500, inclusive of VAT, for sums said to be due by way of commission in respect of sums payable to Stoneygate under the Nike sponsorship agreement. Once again, according to Mr Page, an invoice would have been raised at the same time on behalf of Stoneygate upon Nike for the full amount payable under the sponsorship contract. It was Mr Page's evidence that, as a matter of fact, the amounts due to

Stoneygate from Manchester United FC and Nike under these invoices were paid before the end of August 2008.

295. Somewhat later, on 30<sup>th</sup> September 2008, Proactive raised a further invoice upon Stoneygate in the sum of £7,050, inclusive of VAT, for commission said to have fallen due in respect of monies payable to Stoneygate by Plum Pictures under a supplemental sponsorship contract with Coca Cola and Plum Pictures Ltd dated 1<sup>st</sup> July 2008. Once again, according to Mr Page, an invoice would also have been raised at or about the same time on behalf of Stoneygate seeking payment of the amount due from Plum Pictures to Stoneygate under the contract in question. According to paragraph 39(b) of the Re-Re-Amended Defence, the amount due from Plum Pictures was paid to Stoneygate only on 27<sup>th</sup> February 2009.
296. But no monies have ever been paid by Stoneygate to Proactive in respect of any of these three invoices; and they form the basis of the first three items claimed by Proactive against Stoneygate in this action under paragraph 7 of the Re-Re-Amended Particulars of Claim. What happened was that, in accordance with the usual practice, a “pay run” was carried out on 7<sup>th</sup> October 2008, the day before the fateful meeting between Mr Stretford, Mr Lawrence and Mr Wallwork. A printout was prepared on that day, listing the invoices payable by Stoneygate. This included the three invoices which I have just described, though, for some reason, the amount of commission claimed in respect of monies due from Plum Pictures was recorded exclusive of VAT, in the sum of £6,000.
297. In the ordinary course of events, Mr Stretford could have been expected to have authorised payment of these invoices. However, according to Mr Page, he refused to do so or, indeed, to authorise any other invoices raised by Proactive upon Stoneygate, Speed, or WR or Mrs Rooney personally. A meeting was then arranged between Nita Patel and Mr Stretford to discuss this pay run. But, according to an e-mail which Nita Patel sent to Mr Wallwork and Mr Page on 31<sup>st</sup> October 2008, Mr Stretford simply said that he did not want to discuss the invoices raised by Proactive in the light of “the current situation”. When asked about this meeting in cross-examination, Mr Stretford gave the slightly odd answer that he was no longer working for Proactive. That answer is odd for two reasons. Firstly, he remained a director of Stoneygate and Speed and it was in that capacity that he had, in the past, always authorised payments to Proactive; secondly, he continued, it would seem, to authorise payment of other invoices.
298. Correspondence then ensued between solicitors on each side. On 7<sup>th</sup> November 2008, McCormicks, who were acting for Proactive, wrote to Hill Dickinson, who were retained by Stoneygate and Speed, stating that Proactive remained ready willing and able to continue to provide a service to them and asking whether Stoneygate, Speed, WR and Mrs Rooney wished to remain clients of Proactive. If not, the letter stated that Proactive would not wish to stand in their way in respect of future dealings, subject to the payment of commission due on certain earnings.
299. The letter also referred to the monies said to be due and owing from Stoneygate, Speed, and from WR and Mrs Rooney personally to Proactive, and asked for payment in full if proceedings were to be avoided. So far as concerned the future, the letter also intimated a claim for commission in respect of payments due under contracts

which were already in place or had been negotiated by Proactive on behalf of Stonegate and Speed and made it clear that Proactive expected those commitments to be honoured both in respect of commercial agreements (where commission was claimed at 20%) and Mr Rooney's playing contract (in respect of which the rate of commission claimed was 5%).

#### Subsequent Developments

300. It is unnecessary to analyse the subsequent correspondence in any detail. Indeed, little of it was referred to during the course of the trial. It need only be noted that there was continued resistance to payment of any of Proactive's invoices, at least without the provision of further documentation and information, that the existence of any contractual relationship between Proactive on the one hand and Speed or Mrs Rooney on the other was put in issue and that, in any event, any such contractual relationship had been terminated. In view of this continuing impasse between the parties, the present proceedings were issued out of Leeds District Registry on 2<sup>nd</sup> December 2008, and subsequently transferred to the Manchester Mercantile Court.
301. For completeness, it should be noted that these are not the only proceedings involving the same parties. On 23<sup>rd</sup> December 2008, Mr Stretford commenced an action against Proactive seeking a declaration that he was not bound by various post-termination restraints contained within his Service Agreement. Though the action was originally defended, an agreement was ultimately reached to the effect that Mr Stretford was not bound by the restraints in question; and the proceedings were brought to an end by a consent order of 20<sup>th</sup> February 2009 by virtue of which Proactive agreed to pay a sum on account of Mr Stretford's costs.
302. But on 15<sup>th</sup> January 2009, further proceedings were commenced by Formation Group and Proactive against Mr Stretford claiming damages, an account of profits and other relief, primarily on the basis of various alleged breaches of contract and fiduciary duty. The factual foundation of these claims covers a good deal of the ground which has had to be explored in the present litigation; and the sums claimed are very substantial. It is perhaps only necessary to note that it appears to be common ground in that action that the Agreement of 17<sup>th</sup> July 2002 was intended to cover only image rights but, by mutual mistake, also extended to on-field activities.
303. But Mr Stretford nonetheless initiated a Part 20 Claim against Mr Rodford in the same proceedings, claiming an indemnity or contribution from him, primarily on the basis of his involvement in the preparation and execution of the Agreement of 17<sup>th</sup> July 2002 and his subsequent evidence about such matters to the FA Regulatory Commission. Notwithstanding his assertion in his defence that the inclusion of on-field representation in the July 2002 Agreement was the result of a mutual mistake, his Part 20 Claim against Mr Rodford proceeds on two alternative footings: namely that Mr Rodford was, in fact, aware of the true nature of the Agreement in question (as was, of course, the finding of the Regulatory Commission), in which case it is alleged that he was not acting in good faith in the best interests of Proactive; or, secondly, if he did not know the true nature of the July 2002 Agreement, that he failed to discharge his responsibilities with reasonable skill and care.

304. I refer to these matters in view of the fact that Mr Rodford did not provide a witness statement or attend to give evidence at the trial of the present action. In those circumstances, Mr Chaisty QC invited me to draw adverse inferences from Proactive's failure to call him as a witness. Until the very end of the trial, no explanation had been advanced for his absence. But at the very last moment, a letter was produced from Cobbetts LLP, who are, it would seem, instructed on his behalf in relation to the Part 20 Proceedings brought against him by Mr Stretford. In that letter, they say that both they and counsel had advised him not to provide a witness statement, on the footing that the two sets of proceedings were connected and that Mr Rodford might, therefore, be cross-examined in the course of the present proceedings on issues which could have a bearing on his Part 20 Claim in the other action, without having the benefit of representation by solicitors or counsel. Whether that is a sufficient reason to resist Mr Chaisty's invitation is a matter to which I shall return when I consider whether an adverse inference might otherwise be justified on any particular issue as a result of the failure to call Mr Rodford as a witness in the present trial.
305. By the time the present proceedings were commenced, therefore, it seems quite clear that there had been a final breakdown in the commercial relationship between Proactive on the one hand and Mr Stretford, WR, Mrs Rooney, Stoneygate and Speed on the other hand. From that time onwards, the commercial affairs of Stoneygate and Speed and of WR and Mrs Rooney personally appear to have been handled by Mr Stretford, albeit with the assistance of at least three members of the former Team Rooney who had left the employment of Proactive in or about December 2008. Whether or not it was willing to continue to provide the services set out in the Image Rights Representation Agreement with Stoneygate, Proactive itself was plainly unable to do so without the co-operation of Stoneygate and WR; and it would similarly have been unable to act on behalf of Speed or Mrs Rooney. In relation to WR's on-field activities, it would seem that there was no longer any form of agreement in place as between Proactive and WR. A new agreement for a period of two years was, apparently, entered into in 2004; but the evidence seemed to show that this was not renewed in 2006. Nonetheless, it is fairly obvious that Proactive, through Mr Stretford, continued to act as Mr Rooney's agent for footballing purposes up until the time of Mr Stretford's departure.
306. According to Mr Stretford, after the breakdown in relations with Proactive, he initially continued to represent the interests of WR, Mrs Rooney, Stoneygate and Speed solely in his capacity as a director of Stoneygate and, presumably, Speed. It was only in or about June or July 2009 that Triple S was incorporated or at least started to operate as a sports agency company. At the present time, it would seem that there is no formal written agreement in place between Triple S, WR, Mrs Rooney, Stoneygate or Speed; and that the relationship is governed by informal arrangements agreed between Mr Stretford, WR and Mrs Rooney. It would seem, however, that the rate of commission charged by Triple S is the same as that charged by Proactive under the Image Rights Representation Agreement, namely 20%.
307. In cross-examination, Mr Stretford was asked whether he had advised WR of the potential implications of these arrangements if this Court were to hold that Proactive remains entitled to 20% of all sums received by Stoneygate under contracts negotiated during the subsistence of the Image Rights Representation Agreement. He answered

that he had not; and some play was sought to be made of this by Mr Mill. But I think I can confidently infer that proper legal advice about such matters has been given to WR by the solicitors who have been instructed on his behalf in relation to the present dispute.

308. There was one final development prior to the trial which has a bearing upon the nature of the relief sought by Proactive. On 18<sup>th</sup> December 2008, Hill Dickinson, on behalf of their clients wrote a formal letter giving notice to terminate the Image Rights Representation Agreement of January 2002. It was expressed to be without prejudice to the contention that the Agreement was “void, invalid, unenforceable and of no effect”. The basis upon which the notice was served was not set out in the letter. However, it was treated by Proactive as a repudiation or renunciation of the contract; and by letter dated 24<sup>th</sup> December 2009 it accepted or purported to accept this repudiatory breach. Accordingly, it is contended that, at least from that date, Proactive is entitled to damages for breach of contract, though it continues to assert that it is entitled to pursue a claim for commission in respect of payments which have fallen due or may fall due in the future under any contracts between Stoneygate and third parties which were negotiated prior to the date of the notice.

### PART III

#### THE FACTUAL ISSUES

309. That concludes my narrative of the factual background and I must now turn to the resolution of the outstanding factual issues. In fact, much the most important issue arises in connection with the question of mistake. Though it is not the only aspect of the defence of mistake advanced on behalf of Stoneygate, the fundamental factual question which must be resolved is whether the parties to the Image Rights Representation Agreement dated 16<sup>th</sup> January 2003 were, at the time when it was entered into, labouring under a common misapprehension that the earlier Agreement of 17<sup>th</sup> July 2002 extended only to image rights and did not cover on-field activities. The resolution of this issue would seem to turn principally upon precisely what Mr Stretford knew about the Agreement of July 2002 and when he knew it. But there were, of course, three parties to that Agreement, namely Proactive, Stoneygate and WR himself. So, though the inquiry may start with Mr Stretford, it does not necessarily stop with him. Consideration may also have to be given to whether other senior members of Proactive’s staff, and in particular Mr Rodford and Mr Rawlings, were labouring under a mistake as to the scope of the July 2002 Agreement. Likewise, it may be necessary to consider whether WR himself or, for that matter, his mother, Mrs Jeanette Rooney (who signed on behalf of Stoneygate) were also labouring under a similar misapprehension.

#### The Witnesses

310. I start with some observations about the main witnesses who gave evidence before me in relation to these issues.
311. The most notable of these witnesses was, of course, Mr Stretford. I have no doubt that Mr Stretford is a highly able and effective agent; and it is quite obvious that he has retained the trust, confidence and loyalty of WR and his family through thick and

thin. But I regret to have to say that, at least in certain respects, I did not find him to be a truthful and reliable witness. The main reason which has led me to that conclusion is my analysis and assessment of the evidence in relation to the central factual issue as to whether he knew that the July 2002 Agreement extended to WR's on-field activities at the time when the new Image Rights Representation Agreement was negotiated and concluded in January 2003. To some extent, those reasons have been foreshadowed in my previous factual narrative; but I will have more to say on this topic at a later stage.

312. But there were other matters on which I felt unable to accept his evidence. Thus, his insistence that Proactive never provided any accountancy services to Speed or Mrs Rooney was irreconcilable with the documentation which demonstrated the contrary. Even when confronted with those documents, he only reluctantly and half-heartedly accepted that his evidence might not have been entirely accurate.
313. Likewise, I cannot accept his evidence that he had no involvement in the decision to recharge Couchman Harrington's professional fees to Stoneygate. That conclusion is not based solely on inferences to be drawn from the contemporaneous e-mail correspondence and his pivotal role in the relationship between Proactive on the one hand and Stoneygate and Mr Rooney on the other. The fact is that he was the one who approved the relevant invoices by which the fees in question were recharged to Stoneygate. It is true that there were a number of other invoices which were approved at the same time; but I cannot accept that they simply "slipped through" as he suggested, having regard to the fact that they were much the most substantial of the invoices in question.
314. These may be comparatively minor examples. But they seem to show an unwillingness to make any concession, once he had committed himself to a particular assertion, even in the teeth of strong evidence to the contrary. In fact, much the most important example of this is to be found in his evidence as to his knowledge of the scope of the Agreement of 17<sup>th</sup> July 2002. Having committed himself, both in the FA disciplinary proceedings and in the present action, to an assertion that he did not know that it extended to on-field activities until a much later date, he was quite unable to make any admission or concession which might tend to undermine that stance.
315. In the circumstances, I feel bound to approach his evidence on other contested factual issues with a considerable degree of circumspection. A further reason for caution in assessing his evidence arises from the actual or potential conflict of interests to which he has been exposed over the period leading up to the trial. At least until his resignation as a director of Proactive, he was acting in a dual role, both on behalf of Proactive and on behalf of Stoneygate, though that potential conflict has not, in fact, given rise to any substantive claims against him. More important, for present purposes, is the fact that, at least since October 2008, he has been acting in his own interests, in opposition to those of Proactive. So there is a risk that his evidence about events prior to his departure from Proactive's service may be tainted by what might now seem to be in the interests of himself, Stoneygate and WR and his family. That might affect, for example, his evidence as to whether the Rooney family were ever advised to take independent legal advice at the time when any of the relevant agreements were in the course of negotiation. Fortunately, however, the areas of potential evidential conflict of this kind are slight.

316. I need to say very little about Mr Harrington. He seemed to me to be an honest and careful witness whose evidence can be accepted without hesitation in its entirety.
317. Mr Rawlings was somewhat more difficult to assess. He appears to have been a reluctant witness who was asked to recall events which took place many years ago and had difficulty in doing so, at least in any detail, without the assistance of contemporaneous documentation. Though he left Proactive's service some time ago, he is a personal friend of Mr Rodford, as well as a former business associate. But, apart from obvious hesitancy and lack of recollection, there was nothing in his evidence or the manner in which he gave it which led me to believe that he was being untruthful or partisan. Whilst I did not always feel confident that his recollection of matters and detail were always accurate and reliable, I see no reason not to accept his evidence about matters of a more general nature, including, of course, the role played by Mr Stretford in relation to Proactive's dealings with WR and his family.
318. It may well be the case that, for the most part, Mr Stretford preferred to deal with what might be described as the "big picture", though he was, at least on occasions, able and willing to become involved in discussions about matters of detail as, for example, it would seem, in the case of the proposed agreement between Northern and Shell Plc and Speed for the publication of interviews with and photographs of Mrs Rooney. Mr Rawlings gave another example of the way in which Mr Stretford could, if necessary, become involved in matters of detail, exhibiting to his witness statement some manuscript comments made by Mr Stretford on a draft contract with Nike in early 2003. But, however willing or unwilling Mr Stretford may have been to deal with detailed matters of this kind, I see no reason not to accept Mr Rawlings evidence that all major decisions in relation to WR would have been made or approved by Mr Stretford.
319. As to the other witnesses called on behalf of Proactive, Mr Wallwork knew very little about most of the matters which have given rise to this litigation, since he did not join Formation Group until 1<sup>st</sup> July 2007. The only serious and specific challenge to his evidence was in relation to the letter from Mr Harrington dated 20<sup>th</sup> January 2002 which, according to Mr Wallwork, he found in Mr Stretford's office after Mr Stretford had left Proactive's service. The foundation of the attack was that Proactive was unable to produce the original or, indeed, any copy of the letter which Mr Wallwork said he had found. According to Mr Wallwork, it has simply been mislaid and, despite intensive searches, could not be located. That is singularly unfortunate; and it was submitted on behalf of Stoneygate that Mr Wallwork's evidence on these matters was beyond belief.
320. But it was also contended by Mr Chaisty that Mr Wallwork had throughout adopted an unduly partisan attitude towards Mr Stretford and, indeed, that his principal role as a witness was to act as some form of proxy for Mr Rodford. He invited me to consider an e-mail which he had circulated to the non-executive directors of Formation Group on 30<sup>th</sup> August 2008 in the aftermath of the decision of the FA Regulatory Commission, suggesting that this exemplified a spirit of hostility towards Mr Stretford. I have re-read that e-mail. It is clearly supportive of Mr Rodford and critical of some of the comments which Mr Stretford had made about his role within Proactive. But I do not regard it as being manifestly unfair or hostile towards Mr

Stretford or to reveal such a degree of animosity towards him as to lead me to suppose that he might give deliberately untruthful evidence in relation to Mr Stretford.

321. In his closing submission, Mr Chaisty also picked up and passed critical comment on a number of exchanges in the course of Mr Wallwork's evidence under cross-examination. Some of these were directed to the issue of Mr Harrington's letter of 20<sup>th</sup> January 2003. That is a matter which I shall have to resolve in the next section of this judgment. Most of the other points made by Mr Chaisty do not, in my judgment, seriously undermine Mr Wallwork's reliability or credibility. But, throughout his evidence, he was undoubtedly supportive of Mr Rodford and, in particular, his evidence before the FA Regulatory Commission to the effect that he had been unaware of the true scope of the Agreement of July 2002. That evidence was, of course, rejected by the Commission; and I will have to consider whether the evidence adduced before me in the present proceedings does or does not justify any inference as to Mr Rodford's state of knowledge.
322. Mr Page joined Formation Group in February 2002 and became a director of Proactive on 25<sup>th</sup> June 2003. So he was involved in the affairs of Proactive, to some degree, throughout the period with which I am concerned in this litigation. But his role was that of Finance Director; and he had little or no involvement in any of the negotiations with the Rooney family or any third party sponsors. As in the case of Mr Wallwork, it was contended that Mr Page was hostile to Mr Stretford and supportive of Mr Rodford. He undoubtedly was of the opinion, as he said in his principal witness statement, that Mr Stretford had been "hostile" to Proactive since his departure from its service. But I did not consider that this view tainted his evidence so as to render it unreliable.
323. He was also supportive of Mr Rodford in the sense that he accepted Mr Rodford's evidence before the FA Regulatory Commission to the effect that he had signed the Representation Agreement of 17<sup>th</sup> July 2002 under a mistaken apprehension as to its scope and contents. But I have to say that I felt at the time that he seemed somewhat uncomfortable and hesitant when he was pressed to say whether or not he believed Mr Rodford's assertion that he had signed the Agreement under a mistaken apprehension as to its contents. Indeed, it would be surprising if he had not felt at least some doubts about the matter in the light of the findings of the FA Regulatory Commission. But doubts are not the same as knowledge; and it was never suggested to Mr Page or, for that matter, to Mr Wallwork that, not only was Mr Rodford's evidence to the Commission untrue, but that he must have known that it was untrue. So, whatever my findings as to the extent of Mr Rodford's knowledge, I am not prepared to infer that Mr Page was being untruthful about these matters.
324. Accordingly, I do not consider that the evidence of Mr Wallwork or Mr Page is tainted by undue partisanship or that there is any indication that they were being deliberately untruthful in any of their evidence. In making that general observation, I take into account the question whether Mr Wallwork was telling the truth about the discovery of the letter from Mr Harrington dated 20<sup>th</sup> January 2003. Though there are some odd features of his account of those matters, I have come to the conclusion that his evidence on the point should be accepted. I will expand a little on my reasons for reaching this conclusion at a later point. My overall assessment, therefore, of the evidence of Mr Wallwork and Mr Page is that it should be regarded as essentially

truthful and, for the most part, reasonably reliable insofar as it is directed to relevant issues which are within their own knowledge or for which they can properly vouch.

325. Mr Rodford, of course, was not called to give evidence. According to Mr Wallwork, Proactive had simply chosen not to call him. But, as previously noted, a letter was produced at a very late stage from solicitors acting on his behalf stating that he had been advised not to give evidence in the light of the Part 20 proceedings brought against him by Mr Stretford. Furthermore, neither side sought to adduce hearsay evidence from him as, for example, by way of his statement in the FA disciplinary proceedings. There may have been good procedural and tactical reasons for this, in view of the provisions of Part 33 of the Civil Procedure Rules 1998.
326. But, as previously noted, Mr Chaisty invited me to draw adverse inferences from Proactive's failure to call an individual who, on the face of it, would have had extensive knowledge of many of the matters in issue. He relied on the well known case of **Wisniewski v Central Manchester Health Authority** [1998] P.I.Q.R. 324 in which the Court of Appeal sanctioned such a course. It is true that the Court of Appeal specifically considered the effect of any explanation proffered for the failure to call the witness. The position was summarised in the head-note to the report to the effect that if some "credible explanation" had been given, even if it was not wholly satisfactory, the potentially detrimental effect might be reduced or nullified. But it should be noted that, at page 340, Thomas LJ made the further point that if the reasons for the witness's absence or silence are satisfactory, no adverse inference could properly be drawn.
327. In the present case I do not regard the explanation given as wholly satisfactory. It came very late in the day even though Mr Chaisty made it quite clear from the outset of the trial that he would be commenting on the lack of any evidence from Mr Rodford. Furthermore, the letter from Mr Rodford's solicitors does not say when the advice was given and does not enlarge in any way upon the reasons. I do not find it easy to see what justifiable apprehension Mr Rodford might have had in giving evidence in the present proceedings, though he might well have been subjected to robust cross-examination about his role in the preparation of the Representation Agreement of 17<sup>th</sup> July 2002 and the subsequent Agreements drafted by Couchman Harrington in January 2003 and about his knowledge of their contents. Furthermore, other witnesses in the present action will presumably have to give evidence at the trial of the other action. Yet they do not seem to have felt any difficulty in giving evidence in the present action. But I am conscious that I do not know all the factors which may have led to the decision not to call him. I take the view, in those circumstances, that I can, if necessary, draw adverse inferences from his absence but that I should exercise caution before doing so.
328. In fact, Mr Chaisty had some difficulty in identifying any specific inferences adverse to Proactive which he submitted that I ought to draw by reason of the absence of Mr Rodford. In the end, at paragraph 21 of his closing written submissions, he set out a shopping list of issues upon which, he submitted, Mr Rodford could have assisted the Court. Many of these seem to me to be no more than what they purport to be, namely a list of issues, rather than specific inferences. Some of them relate to matters which are, at least theoretically, in issue but in respect of which the evidence already plainly favours Stoneygate. I refer, for example, to the question whether the Rooney family

were advised to take independent legal advice before entering into any of the relevant agreements.

329. Perhaps the most important single item in the list relates to the knowledge and involvement of Mr Stretford at the time of the execution of the July 2002 Agreement and his knowledge of its contents at the time when the subsequent Image Rights Representation Agreement was entered into. Mr Stretford's case, of course, is that he had no real involvement in the production of the earlier Agreement and that he knew nothing about its contents until long after the later Agreements were in place. Presumably, therefore, Mr Chaisty's point is that I should infer that Mr Rodford, if he had been called, would have supported that evidence. I am prepared to accept that this is a factor to which some weight might possibly be given in relation to the preparation and execution of the July 2002 Agreement itself. It is much less easy to see what weight, if any, it could have in relation to Mr Stretford's knowledge of the true position at the time when the later Agreements were executed unless, perhaps, the evidence on that issue was finely balanced which, in my judgment, it is not.
330. But, apart from any possible adverse inferences which might be drawn from his absence from the witness box, the fact remains that Mr Rodford did not give evidence and that he is not, therefore, in a position to challenge any inferences in relation to his own activities which might properly be drawn from other evidence. If, therefore, I were to conclude that the proper inference from the documentation is that he must have known that the July 2002 Agreement extended to on-field activities as well as those of a commercial nature, there is no direct evidence from him to rebut any such inference. That, is, of course, a matter which I shall have to return in due course.
331. I need say comparatively little, at this stage, about the other witnesses. WR himself and both of his parents seemed to me to be entirely honest and straightforward witnesses. But they had only very limited recollection of the events which had given rise to the present litigation. Upon one or two points, I think they were clearly mistaken, as will be apparent from my narrative of events; and, in general, their evidence did not provide a great deal of illumination and clarification in relation to the contested issues. Mrs Coleen Rooney did not, of course, give evidence before me, though she had provided a witness statement for the purposes of the trial. I was not specifically invited to draw any adverse inferences from her absence from the witness box. But, as it seems to me, the only point upon which that might be appropriate would be in relation to the contractual arrangements between herself and Speed on the one hand and Proactive on the other.
332. As for Mr Bartlett and Miss Aspinall, I regard them as entirely reliable witnesses who were doing their best to help the Court. Mr Gill, the Chief Executive Officer of Manchester United Limited, was not called to give oral evidence and his witness statement was put in without challenge.
333. That leaves only the two expert witnesses, Mr Mel Stein and Mr Gordon Taylor. It is more convenient to deal with their testimony separately at a later stage of this judgment.

### The Extent of Mr Stretford's Knowledge

334. As previously noted, much the most substantial factual issue in the case is whether Mr Stretford knew about the scope of the Agreement of 17<sup>th</sup> July 2002 before the later Image Rights Representation Agreement was finalised and signed.
335. I will start with the same point with which Mr Mill QC started his cross-examination of Mr Stretford. At paragraph 208 of his principal witness statement, he referred to the fact that he had been asked during the course of the hearing before the FA Regulatory Commission whether he had any objection to the Couchman Harrington file being disclosed. After saying that he had had no objection, but pointing out that, since he was no longer a director, the matter would have to be taken up directly with Proactive, he went on to say this:  
“I had never seen the Couchman Harrington file myself and have only now seen it in connection with these proceedings and the proceedings recently brought against me.”
336. When asked by Mr Mill whether he felt that there was anything in that paragraph which required correction, he said that there was not. However, Mr Mill then put to him a statement dated 20<sup>th</sup> July 2009 which Mr Stretford had made and signed in connection with a complaint made by Formation Group to the Legal Complaints Service about the conduct of its solicitors, Halliwells, in connection with the Couchman Harrington file. The purpose of that witness statement seems to have been to confirm that Mr Rodford had been aware of the contents of the Couchman Harrington file well before the hearing before the FA Regulatory Commission. After referring to a discussion between Mr Diaz-Rainey of Halliwells and Mr Rodford in March 2008, Mr Stretford said this at paragraph 5 of the witness statement:  
“I can confirm I discussed the Couchman Harrington file and its contents on numerous occasions with Mr Rodford prior to Mr Diaz-Rainey's conversation with him. The reason for doing this was that, although the Couchman Harrington file was not an issue that had been raised by the FA (nor had the file been requested), it was, however, possible that a request for it would be made in the future. As it was it was not requested by the FA until after they had closed their case.”
337. He went on to say, at paragraph 7, that he had discussed the file and its contents with Mr Rodford and would have done so following the meetings of Proactive's Board in November and December 2007 and, it would seem, in the early part of 2008. At paragraph 8, he said that he was in no doubt that Mr Rodford and others at Formation were “fully aware of the file and its contents.”
338. This statement is manifestly irreconcilable on its face with what he said at paragraph 208 of his principal witness statement in the present litigation and confirmed at the outset of his oral evidence. Once he had been confronted with this document, Mr Stretford was pressed to justify his evidence that he had never seen the file until after the commencement of the present proceedings. Somewhat reluctantly, he accepted that he had received and seen certain documents from the file, though he insisted that it was only during the preparation for the trial of the present action that he had gone through it in its entirety. When pressed, he accepted that the documents which he had been shown included the e-mail from Mr Harrington of 17<sup>th</sup> January 2003 and his

subsequent letter of 20<sup>th</sup> January 2003. He went on to say, singularly unconvincingly, that only certain documents were relevant to the FA proceedings since they were concerned with the Agreements of July and September 2002.

339. The suggestion that the file was irrelevant to the disciplinary proceedings flies in the face of common sense and is quite incompatible with the contents of the statement which he made in connection with the complaint against Halliwells which clearly recognised the importance and potential sensitivity of the file for the purposes of the disciplinary proceedings before the FA Regulatory Commission.
340. I need not refer to most of the subsequent cross-examination on these points. Mr Stretford is no fool. He must have been aware when, as he now concedes, he saw these documents and discussed them with Mr Rodford, well before the hearing before the Regulatory Commission, that they would have been highly material to his state of knowledge, not only in January 2003, but earlier. Indeed, the clear impression gained from the statement which he made in connection with the complaint from Halliwells is that all those involved were anxious to avoid disclosure of the file to the Football Association. As it happens, of course, privilege was asserted when the FA belatedly asked for its production.
341. It was this point which led Mr Mill, it would seem, to suggest to Mr Stretford that he had deliberately stood down as a director of Proactive so as to be able to disclaim any right or power to produce the file if he had been called upon to do so. His witness statement of 20<sup>th</sup> July 2009 undoubtedly lends some colour to that suggestion. But, in the end, I do not think it would be right to infer that that was indeed his motive. Mr Rodford, after all, also gave evidence before the Commission; and he remained a director of Proactive throughout. Furthermore, though Proactive remained supportive of Mr Stretford throughout the FA proceedings, I am far from confident that the tensions which eventually led to Mr Stretford's departure from Proactive were not already present when he stood down as director. Yet further, no doubt for good reason, given the adversarial nature of these proceedings, neither Mr Page nor Mr Wallwork were asked about the reasons for Mr Stretford's resignation as a director; and, of course, Mr Rodford did not give evidence in the present proceedings, even though, according to Mr Stretford's witness statement of 20<sup>th</sup> July 2009, he was heavily involved in discussions as to how to deal with the Couchman Harrington file.
342. Put simply, however, Mr Stretford's evidence as to when he had first "seen" the Couchman Harrington file, in any meaningful sense of the word, as set out at paragraph 208 of his principal witness statement, is plainly untrue, even though he adhered to it in cross-examination after being given an opportunity to correct it if he thought it necessary to do so. On the contrary, even on his own reluctant admission, he must have seen the e-mail of 17<sup>th</sup> January 2003 and the letter of 20<sup>th</sup> January 2003 some time prior to March 2008 at the latest; and, having gone through the file with the assistance of a solicitor in connection with the FA disciplinary proceedings, he must have appreciated their potential significance. It does not necessarily follow, of course, that he had seen and assimilated them at the time when they were originally sent. But the fact that his evidence as to when he first saw the file was shown to be untruthful was obviously material to the assessment of his evidence about earlier matters.

343. In fact, of course, Mr Stretford had acknowledged that he had seen the Agreement of July 2002 at an earlier stage, namely in the aftermath of the abortive trial at the Warrington Crown Court. That is the clear implication of what he had to say at paragraphs 171 and 174 of his principal witness statement. When he was asked in cross-examination as to when he had first become aware that the July 2002 Agreement included on-field representation, he said that he only became “fully aware” of this after the collapse of the Warrington trial. He explained that Mr Rodford had come to see him and that this was the first time that he had seen the July Agreement “in its entirety or at all”. It was in the context of cross-examination on this point that Mr Stretford sought to explain that the Agreement had, in fact, been amongst a box of papers which had been delivered to or collected by the Police in the course of the investigation which led up to the trial at Warrington. I have already dealt with the evidence about these matters; and it seems fairly clear that a copy of the Agreement was, in fact, in the possession of the Police, whether or not it had been made available to counsel at the trial itself.

The Letter of 20<sup>th</sup> January 2003

344. I turn next to the events of January 2003. If Mr Stretford had read and assimilated Mr Harrington’s e-mail of 17<sup>th</sup> January 2003 or his letter of 20<sup>th</sup> July 2003 or, indeed, the Variation Agreement prepared by Mr Harrington, which Mr Stretford himself signed, it is almost impossible to think that he could have remained ignorant of the true nature and scope of the Agreement of 17<sup>th</sup> July 2002, even if they were matters of which he had previously been unaware.
345. But the challenge to Mr Stretford’s protestations of ignorance do not depend solely upon these documents. Most importantly, Mr Harrington’s letter of 20<sup>th</sup> January 2003 refer specifically to a telephone conversation with Mr Stretford on Friday 17<sup>th</sup> January 2003. Whilst Mr Stretford denied having received or at least read the e-mail of 17<sup>th</sup> January 2003 or the letter of 20<sup>th</sup> January 2003, he did not challenge the fact that he must have had a conversation with Mr Harrington on Friday 17<sup>th</sup> January 2003, as stated in Mr Harrington’s letter of 20<sup>th</sup> January 2003. All he could say is that he could not remember any such conversation. In fairness, Mr Harrington himself had no independent recollection of the conversation in question, though, as he observed, he would not have referred to it if it had not taken place.
346. The implications of this conversation are quite separate from and independent of the question whether Mr Stretford received the letter of 20<sup>th</sup> January 2003 in which Mr Harrington referred to it. But it is convenient to resolve that latter question at this stage.
347. I accept, of course, that the attempt to send the letter to Mr Stretford by means of facsimile transmission appears to have failed. But the letter itself states that it was sent by post as well as by fax. Mr Harrington said that he had adopted this procedure, rather than merely sending an e-mail message, because he wished to draw Mr Stretford’s attention to the matters which he raised in a more formal manner. Though Mr Stretford denies ever having received or seen it, this must be set against the evidence of Mr Wallwork who asserts that he recovered the original of the letter from Mr Stretford’s offices after his departure from Proactive, though the document has since been mislaid.

348. There were undoubtedly certain odd features about Mr Wallwork's account of finding the letter and subsequently losing it. It remained unclear as to precisely what drew his attention to it and what he did with it after he had found it. But there was no suggestion that he could have been mistaken about the identity of the document which he found; and I am not prepared to hold that his account was, in effect, a fabrication. Letters do normally arrive at their destination; and it was addressed to Mr Stretford personally. I think it is unlikely that it was never received at Proactive's offices; and, if it was received, I think it is unlikely that it did not reach Mr Stretford. Accordingly, I conclude that, despite his denial, Mr Stretford must have received the letter in question.
349. If the letter had been received in the ordinary course of post, even allowing for a little delay within Proactive's offices, Mr Stretford would almost certainly have received it before the end of the working week commencing on Monday 20<sup>th</sup> January 2003. That would have been before the final draft of the Image Rights Representation Agreement which, for reasons which I have already given, did not come into existence before 29<sup>th</sup> January 2003. Presumably, on receiving the letter, Mr Stretford would have gone on to read it. If it had not been received by Proactive before 22<sup>nd</sup> January 2003, it is a little odd that Mr Rawlings did not ask for a copy from Mr Harrington when he received the e-mail of that date from Mr Harrington in which he specifically referred to the letter and asked for instructions from Mr Stretford on certain questions raised in the letter.
350. Once he had read the letter, as I think he must, Mr Stretford could not have been left in any doubt but that the Agreement of 17<sup>th</sup> July 2002 had covered on-field as well as off-field activities. That is set out in terms on the first page of the letter; and Mr Harrington then went on to deal with the proposed Variation Agreement, pointing out that this would still leave the July 2002 Agreement in force for a term of eight years in relation to playing contracts, contrary to FIFA Regulations. The solution which he suggested was to revoke the 2002 Representation Agreement in its entirety and he expressly asked for Mr Stretford's instructions on the point before finalising the Agreements. One might have thought that nothing could have been plainer.

The E-Mail Exchanges of 25<sup>th</sup> and 26<sup>th</sup> January 2003

351. But, of course, Mr Harrington's advice was not accepted and the proposed Variation Agreement was eventually implemented. It is highly unlikely that Mr Harrington would have proceeded without specific instructions on the point. So the question arises as to who was responsible for those instructions. At one level, the answer is reasonably clear. On 27<sup>th</sup> January 2003, Mr Rawlings forwarded to Mr Harrington the e-mail exchanges between Mr Rodford and himself on 25<sup>th</sup> and 26<sup>th</sup> January 2003. This e-mail exchange, it will be recalled, appears to represent the only recorded intervention by Mr Rodford in relation to the Agreements which were being drafted by Mr Harrington. It does not specifically address the question as to whether the Agreement of 17<sup>th</sup> July 2002 should be revoked, rather than varied. But Mr Rodford picked up various other points in the Variation Agreement; and Mr Harrington, perfectly understandably, appears to have treated the exchange as authority to continue with the preparation of the proposed Variation Agreement, as is apparent

from his response dated 29<sup>th</sup> January 2003 to which was attached a further draft of the Variation Agreement.

352. But I find it almost inconceivable that Mr Stretford was unaware of the fact that Mr Harrington was proceeding with the original plan for a variation of the earlier Agreement, with at least the implicit approval of Mr Rawlings and Mr Rodford, even if he was not himself personally responsible for giving any necessary instructions to Mr Harrington. Not only did Mr Harrington's letter of 20<sup>th</sup> January 2003 expressly ask for Mr Stretford's instructions on this point, but Mr Harrington followed this up with an e-mail to Mr Rawlings dated 22<sup>nd</sup> January 2003 specifically asking him to speak to Mr Stretford in order to let him know how Proactive wished to deal with the issues relating to the Variation Agreement raised in his letter of 20<sup>th</sup> January 2003. Though, in his reply, which he sent to Mr Harrington a few minutes later, Mr Rawlings said that he would try to deal with the matter at the Board meeting which was due to take place that day, I do not know whether Mr Rawlings did, in fact, speak to Mr Stretford on the same day. But Mr Stretford was copied in to the e-mail exchange between Mr Rodford and Mr Rawlings on 25<sup>th</sup> and 26<sup>th</sup> January 2003; and it was he who subsequently signed the Variation Agreement.
353. Mr Stretford, however, denied having received or at least seen any of these e-mails. I have already considered and rejected his evidence that he never received Mr Harrington's letter of 20<sup>th</sup> January 2003; and I am similarly sceptical about his evidence in relation to these e-mails. It is true that there is no direct evidence to show that he received and considered the e-mails in question. Furthermore, some modest support for the proposition that he might not have been willing to agree to a mere variation of the original Agreement of July 2002 may perhaps be found in the observations which Mr Harrington made in his letter of 20<sup>th</sup> January 2003 about the conversation he had had with Mr Stretford the previous Friday in which, it seems that Mr Stretford had mentioned that the eight-year Representation Agreement should not include the right to represent WR in relation to his playing contract or transfer negotiations.
354. But the very fact of that conversation is fundamentally inconsistent with Mr Stretford's evidence that he knew nothing about any of these matters at the time. Furthermore, there is a strong inference that Mr Stretford must have considered and acted upon at least one of the points raised in the e-mail exchange between Mr Rodford and Mr Rawlings. I refer to the question as to whether Couchman Harrington's costs should be borne by Stonegate, which was a question specifically directed to Mr Stretford by Mr Rawlings in his reply to Mr Rodford. Mr Rawlings' evidence was that a decision to recharge these fees to Stonegate would not have been taken without Mr Stretford's knowledge and approval. I accept that evidence; and as I have already pointed out, it was Mr Stretford who ultimately approved the recharge, as he must have appreciated, despite his assertion that it must simply have "slipped through".
355. I do not, of course, know for sure whether Mr Stretford directly discussed the contents of these e-mails with Mr Rawlings or Mr Rodford. He denied it, Mr Rodford did not give evidence and Mr Rawlings appeared to have no specific recollection. But it seems to me to be highly likely that he must have done so, rather than simply acting as a recipient of the letter and the e-mail exchange. No major decision of this kind in

relation to WR is likely to have been taken without Mr Stretford's involvement, whether or not he had any misgivings about the course of action proposed.

356. In summary, therefore, I think it is highly likely that, in addition to the letter of 20<sup>th</sup> January 2003, Mr Stretford received and read the e-mail exchange between Mr Rodford and Mr Rawlings of 25<sup>th</sup> and 26<sup>th</sup> January 2003. I think it is likely that he must have specifically discussed these matters with either Mr Rodford or Mr Rawlings. But, whether he did so or not, he must have known of, and acquiesced in, the decision not to revoke the 2002 Agreement in its entirety but to proceed by way of a Variation Agreement which, of course, he ultimately signed on behalf of Proactive.

#### The Events of 17<sup>th</sup> January 2003

357. But even if I am wrong in concluding that Mr Stretford must have received Mr Harrington's letter of 20<sup>th</sup> January 2003 and the subsequent exchange of e-mails between Mr Rawlings and Mr Rodford, he was quite unable to explain away the discussion which he must have had with Mr Harrington on 17<sup>th</sup> January 2003 which Mr Harrington specifically referred to in his letter of 20<sup>th</sup> January 2003. I have no reason to doubt that such conversation took place and that the references to it in Mr Harrington's letter are accurate. Furthermore, the telephone discussion referred to in Mr Harrington's letter must be set in the context of the e-mail which Mr Harrington had sent to Mr Stretford and copied to Mr Rawlings on the same day, though it will be recalled, that Mr Stretford denied having received or at least read that e-mail. Nevertheless, since the e-mail does not refer to any telephone conversation, the strong likelihood is that the two men spoke after the e-mail had been sent.
358. But even if Mr Stretford had not seen, read or assimilated the e-mail by the time of the telephone conversation, the e-mail is nonetheless of considerable evidential importance, since it clearly records the various points which Mr Harrington had in mind prior to the telephone conversation. It shows that he fully appreciated that the original Agreement of July 2002 covered both on-field and off-field representation and that he was well aware of the fact that the proposed Variation Agreement would leave the original Agreement in force in relation to on-field activities for the rest of the original term of eight years, contrary to FIFA Regulations. The e-mail also records that Mr Rawlings had suggested that both the proposed new Image Rights Representation Agreement and the on-field Representation Agreement should terminate at the same time.
359. But these particular points which he raised in his e-mail were precisely those which he subsequently sought instructions upon in his letter of 20<sup>th</sup> January 2003. It is inconceivable, in my judgment, therefore, that he would not have raised the same points directly with Mr Stretford in the course of the telephone conversation to which he referred in his letter. It is true that the letter does not set out in the clearest of terms the precise subject-matter of the telephone discussion. But it specifically refers to Mr Stretford's comment that the eight-year contract should not incorporate any rights to represent the player in relation to on-field activities. Read in isolation, that could conceivably have been interpreted as a reference to the proposed new eight-year Image Rights Representation Agreement. But placed in the context of what went before and what occurred subsequently, the inference is overwhelming that Mr Harrington must have discussed with Mr Stretford the implications of the fact that the

Representation Agreement of July 2002 extended to both on-field and off-field activities.

360. In his witness statement, it will be recalled, Mr Stretford simply said that he did not remember the conversation referred to by Mr Harrington in his letter. But he also went on to say that if such a conversation had taken place it would have been at Everton FC “in the thick of the deal completion”. That is a reference to his evidence that there was a meeting on 17<sup>th</sup> January 2003 at which the football contract and other documentation was signed. Whether that is accurate is a matter to which I shall return shortly. For present purposes, however, it suffices to note that, in his witness statement, he stated that he recalled Mr Harrington being present at that meeting. I am quite satisfied that that is not correct. Mr Harrington gave clear and emphatic evidence that his only visit to Proactive’s offices or Goodison Park was on the previous Wednesday, 15<sup>th</sup> January 2003. In any event, his letter of 20<sup>th</sup> January 2003 refers to the discussion as having taken place by telephone.
361. But, regardless of this inaccuracy, when pressed about the discussion with Mr Harrington, Mr Stretford reluctantly accepted that if the conversation which Mr Harrington referred to in his letter of 20<sup>th</sup> January 2003 had in fact taken place, it must follow that he knew that the Agreement of 17<sup>th</sup> July 2002 extended to on-field representation. But he denied that he had ever had any such conversation with Mr Harrington, even though he had previously stated that he simply did not recall it.
362. I am quite satisfied that there was a telephone conversation between Mr Harrington and Mr Stretford on 17<sup>th</sup> January 2003 in the course of which the two men discussed at least some of the issues raised by Mr Harrington in his e-mail of the same date. I am also quite satisfied that, in the course of this conversation, Mr Harrington was seeking instructions as to whether the July 2002 Agreement should, in effect, be revoked in its entirety or should be varied so as to strip out off-field representation but to leave it in force in relation to on-field representation for the remainder of its eight-year term. Indeed, it is almost inconceivable, in my judgment, that, in the telephone conversation, Mr Harrington would not have covered the essential points set out at item 4 in his e-mail of 17<sup>th</sup> January 2003 under the general heading “Representation Issues”. In those circumstances, I find that Mr Stretford must have been aware of the fact that the Agreement of 17<sup>th</sup> July 2002 extended to on-field representation as well as off-field representation by the time of this conversation of 17<sup>th</sup> January 2003.
363. In fact, it seems to me that Mr Stretford must have received Mr Harrington’s e-mail of 17<sup>th</sup> January 2003 and, despite his denials, I think it is highly likely that he would at least have scanned through it before speaking to Mr Harrington, even if he might not fully have assimilated its contents. He attempted to support his assertion that he had never received, or at least read, the e-mail by reference to the circumstances in which he found himself on that day. It was his evidence that he had an appointment with Mr Moyes, the Manager of Everton FC, at Goodison Park between 6pm and 6.30pm, followed by a press conference at the ground scheduled to begin at 7pm.
364. He identified these appointments as the occasion on which WR signed his new contract with Everton FC and was presented to the press and media as an Everton player. Mr Stretford asserted that he would have been engaged in various meetings at the premises of Everton FC almost all day and that, at the signing meeting itself, all

those involved had to deal with a substantial quantity of documentation which, for his part, he signed without reading any of it, save for checking the figures on the playing contract and bonus sheet. Accordingly, he simply would not have had the time or opportunity to read and assimilate Mr Harrington's e-mail, which was timed at 15.09, even assuming that he had received it.

365. It was Mr Stretford's case, at least initially, that all the relevant documentation prepared by Couchman Harrington was signed by all necessary parties at this signing meeting at Goodison Park. I accept that WR was presented to the media as an Everton player that evening; and, as I have already indicated, I think it is likely that his playing contract, or at least the Schedule, was signed by the player and the Club prior to the press conference. But much of the rest of Mr Stretford's account is either demonstrably inaccurate or, at the least, open to serious doubt.
366. In his witness statement, Mr Stretford clearly identified some of the documentation which he said was signed on that occasion. They included the Assignment of WR's Image Rights to Stoneygate, the Image Rights Representation Agreement between Proactive, Stoneygate and WR and the Variation Agreement. These were, of course, all dated 16<sup>th</sup> January 2003, which led Mr Stretford to surmise that they were so dated because agreement had been reached with Everton FC on that day as to the terms of WR's playing contract. Be that as it may, Mr Stretford's evidence, as set out in his witness statement, was consistent with Stoneygate's pleaded case, though in its Re-Re-Amended Defence, Stoneygate resiled from assigning a specific date to the execution of the Variation Agreement, stating simply that the Rooney family did not recall signing it on any date other than 17<sup>th</sup> January 2003.
367. Nonetheless under cross-examination, Mr Stretford positively asserted that the Variation Agreement itself was or must have been signed on 17<sup>th</sup> January 2003, since, he said, Mr Rawlings had brought it over for that purpose. But Mr Rawlings himself denied having visited Everton FC's premises on this occasion; and Mr Stretford accepted that, if the Variation Agreement was not, in fact, signed on that date, he might well have been wrong in asserting that Mr Rawlings was present.
368. Mr Stretford was less confident, however, in the course of cross-examination, as to what other documents might have been signed during the course of the meeting on 17<sup>th</sup> January 2003. He initially said that he could not be sure when the Assignment to Stoneygate or the Image Rights Representation Agreement between Proactive, Stoneygate and WR were signed. But he subsequently said that anything which he himself had signed would have been signed on 17<sup>th</sup> January 2003, though it was possible that other documentation which he was not required to sign was executed on some other occasion.
369. He agreed that it would follow that the Assignment to Stoneygate and the Variation Agreement would have been signed by him on that date, but that it was possible that the Image Rights Representation Agreement between Stoneygate, Proactive and WR was not executed on the same occasion. Furthermore, in the course of cross-examination, he insisted that the long-form Image Rights Agreement between Proactive and Everton FC would have been one of the documents which had been signed at the meeting on 17<sup>th</sup> January 2003.

370. There are many difficulties in the way of accepting Mr Stretford's account that at least some of the documents prepared by Couchman Harrington were signed on 17<sup>th</sup> January 2003. Thus, he accepted that WR's mother was not present at the signing meeting, though she was a signatory to the Assignment, the Variation Agreement and the Image Rights Representation Agreement between Proactive and Stoneygate. But the most obvious problem faced by Mr Stretford is the evidence that final drafts of the relevant Agreements were not available until a much later date.
371. Mr Stretford had obviously anticipated difficulties of this kind, since, at paragraph 126 of his witness statement, he described Mr Harrington's letter of 20<sup>th</sup> January 2003 as "strange" in that it bore a date subsequent to the completion of the documentation to which it refers. But he simply had no answer to the questions which were put to him by Mr Mill QC on the basis of the Couchman Harrington file, as clarified by Mr Harrington himself in the course of evidence. No doubt that was why he said that he was not sure when at least some of the agreements were signed. But he adhered tenaciously to the assertion that he had signed the Variation Agreement on 17<sup>th</sup> January 2003 and that, on the same occasion, he had probably signed the other documents which bore his signature.
372. It is quite clear that, in fact, none of these Agreements were finalised and signed until a later date. I have set out the chronology in some detail earlier in my judgment. They could not have been signed prior to 29<sup>th</sup> January 2003, but it is probable that they were signed shortly thereafter. In fact, Mr Rooney's form 288A, by which he consented to act as director of Stoneygate, appears to have been signed on 31<sup>st</sup> January 2003; and WR's playing contract with Everton FC was formally dated 1<sup>st</sup> February 2003. According to Mr Stretford's appointments diary, he was due to meet the Rooney family on 3<sup>rd</sup> February 2003. Neither WR nor his parents had any recollection of when and in what circumstances these Agreements were signed; but it seems to me to be quite likely that this would have been the occasion on which this took place. As for the long-form Image Rights Agreement with Everton FC, the evidence suggests that this was signed only on 13<sup>th</sup> February 2003, even though it was formally dated 1<sup>st</sup> February 2003.
373. Furthermore, if Mr Stretford's evidence about the execution of all these documents on 17<sup>th</sup> January 2003 is disregarded as being clearly erroneous, not only does it further undermine his account of the events of that day but it also means that he would have had rather less to deal with on that occasion than he sought to suggest. The negotiations over the essential terms of WR's playing contract appear to have been brought to a successful conclusion on 15<sup>th</sup> January 2003; and the Heads of Terms in relation to the Image Rights Agreement with Everton FC had been signed by Mr Stretford on behalf of Proactive and Mr Dunford on behalf of the Club on the same day, even though WR's mother may well have signed it on a later occasion. Indeed, according to Mr Stretford, though the meeting finished late, he went to see the Rooney family to tell them the good news that the Club had accepted virtually all of the major points which they wanted. It is true that he also said that negotiations went on till late on the following day. If so, that would presumably have been when any remaining loose ends would have been tied up.
374. Nonetheless, Mr Stretford stood by his evidence that he was tied up in meetings at Everton almost all day on 17<sup>th</sup> January 2003 and that he would almost certainly have

been so engaged at the time when Mr Harrington's e-mail was sent. When pressed about these matters, he answered in fairly general terms to the effect that there were various issues as to how the formal signing and the press conference would be handled. But there is no reference in his diary to any commitment earlier than his 6 o'clock appointment with Mr Moyes.

375. When questioned further, Mr Stretford explained that he had gone into the office in the morning and had then returned home to freshen up before driving over to Goodison Park to deal with the matters which had to be attended to. His journey time would have been no more than about an hour or so, even on a bad day. Nonetheless, he suggested, he would have had no time whatever to read, assimilate or act upon the e-mail from Mr Harrington, even assuming that he had received it.
376. I am very sceptical about all this. But, in any event, there is no reason to suppose that the e-mail from Mr Harrington did not reach Mr Stretford's mailbox at some stage. Even if it did not arrive before he left for Goodison Park, assuming he had no means of reading his mail when he was away from his home or office, he would presumably have read it at some stage, given its source and obvious importance. If so, it would have become obvious to him that the Representation Agreement of 17<sup>th</sup> July 2002 extended to on-field as well as off-field activities.
377. If he had not previously been aware of the scope of this Agreement, he would presumably have been shocked, since that is how he said he would have reacted to Mr Harrington's letter of 20<sup>th</sup> January 2003 if he had received it. But there is no sign of any such response. Nor, for that matter, is there any suggestion in Mr Harrington's letter of 20<sup>th</sup> January 2003 itself that Mr Stretford might have reacted with surprise or shock to anything which he had learned during the course of the telephone conversation which had taken place on the previous Friday.
378. Given my overall assessment of Mr Stretford's evidence about these matters, I can place no credence in his assertion that he never read or assimilated Mr Harrington's e-mail of 17<sup>th</sup> January 2003. On the contrary, I think it is probable that he did so and that he subsequently discussed the contents of the e-mail directly with Mr Harrington later on the same day.
379. There is, in fact, one further matter which provides support for this conclusion. It will be recalled that one of the matters raised by Mr Harrington in his e-mail of 17<sup>th</sup> January 2003 related to the company structure proposed for Stoneycgate. It was initially envisaged that the shares should be divided into two classes, one with voting rights and one without, and that those with voting rights would be vested solely in Mr Stretford, who would also become director. Mr Harrington's advice, as set out in his e-mail, was that all the shares should be vested in WR, though he suggested that, in addition to a permanent seat on the Board, Mr Stretford might be given equal voting rights with the other directors and a casting vote in relation to certain matters.
380. This particular point appears to have been addressed and resolved very shortly after Mr Harrington's e-mail. This is apparent from the further e-mail from Mr Glyn-Smith of Powrie Appleby of the same date timed at 17.12. This was addressed to Mr Harrington and stated that the resolution to split the shares had been "duly abandoned". Revised minutes of the company were attached. It is obviously possible

that this had been decided before Mr Harrington's e-mail was sent or received, perhaps after discussions between Proactive and Mr Glyn-Smith. But much the more obvious inference is that a speedy decision was taken in the light of the advice given by Mr Harrington in his e-mail. It was, after all, quite important for the company structure to be in place prior to the execution of the various agreements to which Stoneygate was a party. Furthermore, this was not a point which Mr Harrington felt it necessary to raise when he wrote his subsequent letter of 20<sup>th</sup> January 2003.

381. Mr Stretford appears to have recognised the force of this point, since he conceded that instructions must have been given to Mr Glyn-Smith by someone. However, he denied that he had done so and suggested that any such instructions must have come from Mr Rawlings. But, for my part, I very much doubt whether this would have been done without Mr Stretford's approval, since it is a matter in which he was closely and personally involved.
382. I conclude that Mr Stretford received Mr Harrington's e-mail on 17<sup>th</sup> January 2003, that, in all probability, he was able to open and read it and that he then discussed the matters raised in the e-mail directly with Mr Harrington. Even if he had not previously been aware of the scope of the Agreement of 17<sup>th</sup> July 2002, it seems to me that he would have realised that it must have extended to both on-field and off-field activities even on a fairly hurried reading of the e-mail. But, in any event, he could scarcely have remained under any such misapprehension once he had discussed these matters directly with Mr Harrington. So he must have known the true scope of the Agreement of July 2002 well before he signed any of the Agreements prepared by Mr Harrington; and I reject his evidence to the contrary. In those circumstances, I cannot accept his evidence that he did not understand the purpose and effect of the Variation Agreement when he signed it, or, if he did not, why he did not ask for clarification and advice.

The Extent of Proactive's Knowledge prior to 17<sup>th</sup> January 2003

383. It may strictly be unnecessary to consider whether Mr Stretford or anyone else within Proactive was aware of the true nature of the Agreement of 17<sup>th</sup> July 2002 at an earlier stage. But, in case it is material to the defence of mistake, I consider that I should set out my findings on this point.
384. On this aspect of the matter, Mr Stretford can at least point to the fact that it was Mr Rodford who appears to have taken responsibility for instructing DLA, the solicitors who prepared the Agreement of July 2002. In the absence of clear evidence to the contrary, I find it difficult to see how someone such as Mr Rodford could possibly have been unaware of the fact that the Agreement prepared under his instructions and signed by him on behalf of Proactive extended to both on-field and off-field representation. At the risk of repetition, Mr Rodford himself was not called as a witness and could not, therefore, give any evidence to rebut this obvious inference.
385. But there are one or two further specific points which provide support for this inference. Firstly, it seems that Mr Price of DLA spoke initially to Mr Rodford and was provided with what was referred to as Proactive's "standard" Representation Agreement and was asked to "beef it up". This standard form of agreement, a copy of which remained on DLA's file, quite clearly extended to both on-field and off-field

representation. It is almost impossible to suppose that Mr Rodford would have been unaware of the terms of the standard agreement which he wanted DLA to beef up. Furthermore, it seems quite clear that, from the outset, they were instructed to draft an Agreement which would last for a period of eight years.

386. Secondly, when a copy of the draft Agreement was sent to Mr Rodford on 13<sup>th</sup> June 2002, it was accompanied by a covering letter from Mr Helm of DLA in which he drew specific attention to certain matters. One of these was the legal doctrine of restraint of trade, in which connection Mr Helm drew Mr Rodford's attention to the length of the contract and what he described as the "proposed liquidated damages clause for early termination". Indeed he subsequently asked specifically whether the eight-year term was what was, in fact, required.
387. But, more importantly for present purposes, he also drew Mr Rodford's attention to certain specific provisions of the draft Agreement. One of these was clause 3.1, which set out some of Proactive's obligations under the draft Agreement which, as Mr Helm himself noted, followed the model of the "standard" Proactive Agreement which had previously been sent to DLA. Clause 3.1 of the draft retained the substance of the equivalent provisions of Proactive's "standard" Agreement which provided for it to represent the player in relation to both on-field and off-field matters.
388. As if that were not enough, Mr Helm also drew attention to Clause 5, which dealt with remuneration and which Mr Helm described as "probably the most important clause in the Agreement". Clause 5.3 of the draft provided for payment of commission at a proposed rate of 10% of the gross sum payable under any contract of employment with any football club and a higher rate of 20% of the gross sum payable under any contracts or arrangements of a promotional nature. In his covering letter, Mr Helm asked for specific instructions in relation to certain parts of Clause 5.
389. In the event, as the final draft demonstrated, appropriate instructions must have been given, since the relevant provisions (now renumbered as clause 5.4) differed from the earlier draft. The changes are significant. The percentage commission payable under any contract of employment with any football club was reduced to 2½ %, as against the 10% referred to in the draft, and an express provision to the effect that those sums would include any signing-on fee and salary was deleted. The only possible inference is that Mr Rodford must have given instructions for these amendments.
390. Thirdly, as will be recalled, there was a meeting between Mr Rodford and the Rooney family at Proactive's offices on 28<sup>th</sup> June 2002. According to Mr Stretford, he joined the meeting only after it had been going for some time. If, as he subsequently assumed, Mr Rodford handed the final version of the draft agreement prepared by DLA to WR's parents during the course of this meeting, this must have been done before he arrived. But Mr Stretford was admittedly aware that WR's parents had produced a copy of the Agreement which had previously been entered into with Proform. Indeed, a copy of this Agreement was retained by Mr Rodford and copied to DLA for comment later on the same day.
391. According to Mr Stretford, on reading this Agreement, Mr Rodford had drafted a letter which he proposed to send to Proform. It was Mr Stretford's evidence that he strongly disagreed with the wording of the letter and that this led to an argument

between the two men which culminated in Mr Rodford storming out of the meeting. Mr Stretford then produced his own version of a suitable letter for Mr and Mrs Rooney to sign. It was suggested to Mr Stretford that no purpose would have been achieved by writing to Proform at that stage if he and Mr Rodford had truly believed that the draft Representation Agreement drafted by DLA was confined to Image Rights. If that had been the case, there would have been no conflict between the two Agreements, since the Proform contract was limited to on-field representation. So the fact that it was felt to be necessary or desirable for a letter to be sent to Proform at that stage and, it would seem, to seek advice or comment from DLA about the Proform contract suggests that they must have realised that there was a potential conflict between the two Agreements.

392. When this question was raised with Mr Stretford in the course of cross-examination, his immediate response was that it was a very good point. His only answer was that it was approaching the time when WR's professional football contract would have to be negotiated and that Mr and Mrs Rooney very much wanted their son to be with an agency which could handle both on-field and off-field representation. I think I must accept that this is a possible explanation of what occurred; and in itself I would place little weight on this particular point. But it is entirely consistent with other evidence which tends to show that Mr Rodford was well aware of the true scope of the 2002 Agreement.
393. The 2002 Agreement was subsequently signed by WR and his parents, though they did not seem to have any recollection as to when and where they did so. It was then returned to Proactive and signed by Mr Rodford on its behalf. I am quite satisfied, on the evidence before me, that the proper inference is that Mr Rodford must have known, at all material times, that the Agreement extended to on-field as well as off-field activities, notwithstanding his evidence to the contrary in the FA disciplinary proceedings against Mr Stretford.
394. If Mr Stretford had been a credible witness in all other respects, I might have been prepared to accept his evidence that he was unaware of the precise nature and scope of the Agreement of 17<sup>th</sup> July 2002. But in view of my findings on other matters, I cannot give any weight to these denials.
395. He clearly knew something about the terms of the Agreement. Thus he rather reluctantly conceded that he was aware that it was for a term of eight years and that the commission rate was 20%. He was also aware that Mr Rodford was willing to offer a financial inducement of £50,000 to the Rooneys if they were willing to enter into a contract with Proactive. When asked about this payment in cross-examination, he initially agreed that it seemed to be Mr Rodford's intention to pay this sum for the right to sign Mr Rooney up for both on-field and off-field representation. But he immediately qualified what he had said by describing it as a purely "ethereal" discussion as to what Proactive should do if the Rooneys were free to sign up with it. But he accepted that he became aware in July or August 2002, that a contract had been signed and that Mr and Mrs Rooney had agreed that a fee of £50,000 was to be paid, though he continued to insist that, so far as he was aware, the contract dealt solely with Image Rights.

396. What I find very curious about all of this is the apparent lack of interest which Mr Stretford appears to have displayed about this contract if, as he says, he knew nothing more than its term, the rate of commission and the inducement fee of £50,000. He denied ever having seen a copy of the Agreement. If so, his information must presumably have come from Mr Rodford. But, as I have already held, Mr Rodford must have been perfectly well aware of the nature and scope of the July 2002 Agreement. The only obvious reason why he might have wished to keep Mr Stretford in ignorance of the terms of the Agreement might have been to protect him, as a registered agent, from any involvement with an eight-year on-field Representation Agreement which would have been contrary to FIFA Regulations. But one of the reasons Mr Stretford suggested as to why Mr Rodford might have signed up to an agreement of this kind was that he might not have realised that it would have been in breach of FIFA Regulations.
397. The obvious inference, as it seems to me, therefore, is that the two men must have discussed the terms of the July 2002 Agreement in sufficient detail for Mr Stretford to have realised that it extended to both on-field and off-field activities. Indeed, I would be surprised if he had not been provided with a copy, though he denied ever having seen it until a much later stage. I do not know whether he was entirely happy with the Agreement. Indeed, one possible interpretation of Mr Harrington's comment in his letter of 20<sup>th</sup> January 2003 is that Mr Stretford may have expressed some reservations about including on-field representation rights within an eight-year Representation Agreement and that he might have been happier if the July 2002 Agreement had been revoked in its entirety. But, for obvious reasons, that was not a matter which was investigated with Mr Harrington; and, as I have found, Mr Stretford was, at the least, willing to go along with the proposal for a variation of that Agreement which meant that it remained effective in relation to on-field representation.
398. I have considered whether the curious saga of the two subsequent Representation Agreements of 19<sup>th</sup> September 2002 and 14<sup>th</sup> December 2002 respectively cast any further light on the state of Mr Stretford's knowledge of the terms of the July 2002 Agreement. The first of these was undoubtedly signed by Mr Stretford on behalf of Proactive; and it appears from his witness statement that it came into being at his initiative in the light of legal advice as to the enforceability of the Proform Agreement. It was in Proactive's standard form and, therefore, covered both on-field and off-field representation, albeit for a period of two years only. It was suggested to him that he had procured this contract simply in order to have a document which Proactive could, if necessary, produce to the Football Association without revealing the fact that there was already in existence an on-field Representation Agreement for a term of eight years. That is no doubt possible. It is also possible that Mr Stretford procured the September Agreement at a time when he did not appreciate that the earlier contract provided for on-field representation in addition to covering Image Rights. But, at the very least, he was aware that there was already an eight-year Image Rights Representation Agreement in force. So it is not easy to see why the September contract also included Image Rights representation for a term of two years.
399. But, whatever the precise reasons may have been, it appears that the September 2002 Agreement was torn up shortly after it had been signed; and, in its place, a new Agreement was entered into on 14<sup>th</sup> December 2002, immediately after the expiry of the Proform Agreement. This was once again in Proactive's standard form, covering

both on-field and off-field representation but was, of course, limited to a period of two years. On this occasion, it was not signed by Mr Stretford who said that he was abroad at the time. It was suggested to him that this was untrue by reference to his personal diary; but I am not persuaded that this is so. In relation to both Agreements, Mr Stretford's explanation for the fact that it covered off-field, as well as on-field activities was that he had simply overlooked the fact that this was the effect of the standard form of agreement then used by Proactive.

400. I have concluded that I can get no assistance, one way or another, from any of this. Nor did I gain any assistance from the suggestion made by Mr Mill to Mr Stretford in the course of cross-examination that the total amount payable to Proactive as a result of the successful negotiations with Everton FC for a playing contract and an Image Rights Representation Agreement is consistent only with a reliance by Proactive on the terms of the July 2002 Agreement which provided for commission at the rate of 10%. The calculation is not precise, there is no reference to a 10% commission in any of the contemporaneous documentation, and the sums involved could just as equally relate to a different commission structure or, indeed, a simple ad hoc negotiation.
401. I conclude that Mr Rodford must have been perfectly well aware of the nature and scope of the July 2002 Agreement both before and after it was signed by WR, his parents and Mr Rodford; and I think it is probable that Mr Stretford would also have become aware at some stage after it had been signed, if not before, that it extended to both on-field and off-field representation and was for a term of eight years. It follows that Mr Rodford must have been aware of the nature and terms of the July 2002 Agreement at the time when he signed the new Image Rights Representation Agreement in early 2003.

#### The Extent of the Rooney Family's Knowledge

402. There was very limited evidence, as to what WR and his family were told or what they understood about any of the Agreements which they signed, whether on their own behalf or on behalf of Stoneygate. Apart from the intervention of Mr Dooley and the firm with which he then practised, which was limited to the enforceability of the Proform Agreement, there is no direct evidence whatever that WR or his parents were ever recommended to take independent legal advice in connection with any of the Agreements with which this litigation is concerned or that they ever did, in fact, take any such advice.
403. The only possible exception to this is to be found in the provisions of Clause 24 of both the original Representation Agreement of 17<sup>th</sup> July 2002 and the subsequent Image Rights Representation Agreement between Proactive and Stoneygate. Mr Mill advanced an estoppel argument based upon these provisions. But they do not demonstrate that any of the Rooney family did, in fact, take any legal advice in relation to any of these Agreements. Furthermore, it was the evidence of Mr and Mrs Rooney that they were never recommended to take independent legal advice and that they did not do so.
404. Nor is there any substantial evidence that anyone on behalf of Proactive took any of them through any of the detailed terms of any of the Agreements in question. Mr Stretford rather coolly acknowledged that he did not do so, even though that would

have been a breach of his obligations as a football agent. One might, perhaps, take that with a pinch of salt, having regard to his own interests in the present litigation. But that does not mean to say that it would be right to infer that he did, in fact, explain the documents to them in detail. In any event, it is difficult to see how he could possibly have explained the terms of the Variation Agreement, by way of example, having regard to his own professed lack of understanding of its implications. It is true that during the course of cross-examination Mrs Rooney senior appeared to accept that, during the course of the meeting on 28<sup>th</sup> June 2002, Mr Rodford had read the draft Agreement though to them; and that when Mr Rooney senior was subsequently asked whether this was correct he accepted that it was possible that it was. But neither of them had said anything to the like effect in their witness statements and the overall impression from both their witness statements and their oral evidence was that they had virtually no recollection of any of these matters and simply took any documents they were asked to sign on trust. I cannot place any weight on such a vague answer in cross-examination; and of course, the fact that Mr Rodford was not called as a witness in the case inevitably means that there is no evidence from him about these matters.

405. In the absence of any independent legal advice or any detailed explanation of any of these Agreements, the question inevitably arises as to how much knowledge any of the Rooney family had as to their nature and terms. WR himself was a very young man at the time and wholly inexperienced in commercial and business affairs. In relation to the July 2002 Agreement, he relied upon his parents to do what they thought was best for him and so he left the arrangements to them. In his witness statement, he nonetheless said that he understood that the Agreement in question related solely to Image Rights. His reason for saying this seems to have been that Mr Stretford had decided to wait until the end of his contract with Proform before entering into any on-field representation agreement. But that seems to refer to later developments, once it became apparent that the Proform Agreement was still in force. As to the later Agreements entered into in early 2003, he made it plain that he knew little about them but was content to sign them because they had been drafted by solicitors.
406. Both Mr and Mrs Rooney senior also gave evidence about these matters. In his witness statement, Mr Rooney referred to the meeting at the Jolly Miller Public House on 6<sup>th</sup> June 2002 at which they met Mr Rodford. According to his witness statement, there was some discussion as to whether his son was still under contract with Proform, since he would not be allowed to have two agents at the same time. But he and his wife were told that even if he was still under contract, he could still have an Image Rights Agreement with Proactive. He went on to say that at the later meeting at Proactive's offices on 28<sup>th</sup> June 2003, Mr Stretford had said something to the effect that there was no problem with an Image Rights Agreement, but that there was still time to run on the Agreement with Proform and that WR could not have two agents at the same time. He could not, however, recollect when and where he subsequently signed the July 2002 Agreement. But he said that if he had known that it covered on-pitch activities as well as image rights, he would not have signed it.
407. He had comparatively little to say about the Agreements which were entered into in early 2003. In fact, the only one which he himself signed was the Variation Agreement. But he nonetheless stated that he thought the purpose of these

Agreements was simply to move the image rights to Stoneygate and that they were signed in the belief that the July 2002 Agreement was still operative and that on-pitch representation was governed by the contract dated 14<sup>th</sup> December 2002. He, his wife and son were unaware that the July 2002 Agreement was “not right”; but if they had known, they would have tried to get a better deal for their son. In particular, he suggested that they might have tried to negotiate for a shorter contractual period and a higher signing-on fee.

408. In cross-examination, however, it seemed to me that he had only the most limited recollection of any of these matters. Furthermore, his answers were not always consistent with what he had said in his witness statement. Thus he accepted unhesitatingly that at the time of the initial contact with Proactive, it was apparent that Proactive was interested in offering what he described as “the full package” involving both on-field and image rights representation. When he was then asked about the meeting at the Jolly Miller Public House, he seemed willing to accept that Mr Rodford told them that Proactive wanted to sign Mr Rooney up “for everything”.
409. Mr Rooney senior clearly had difficulty in recalling the circumstances in which he was given the 2002 Agreement by Mr Rodford. He agreed with Mr Mill that he and his wife had decided that they wanted Proactive to act as agent for their son and that if Proactive, presumably in the person of Mr Rodford, produced an Agreement which he said he wanted their son to sign, that would be good enough for them. He agreed that they simply signed the document as requested, though they could not remember anything about where and when it was signed.
410. In relation to the subsequent Agreements of early 2003, it was similarly clear that he had very little recollection of the facts and circumstances which led to their execution or whether Mr Stretford had explained their nature or terms. It was quite possible, he conceded, that they would have been signed in just the same way even if they had believed that the earlier Agreement was, in some way, “not right”. He accepted that they wanted to do the best for their son and that, so far as they were concerned, it was Proactive which was able to provide the best. It should be noted, however, that in his second witness statement, he said that if he had known that the new Representation Agreement was for eight years without a break, he would not have signed it. That was not a point on which he was specifically challenged.
411. Mrs Rooney corroborated in general terms what her husband had to say in his witness statement about the circumstances in which the July 2002 Agreement was signed. But she also made it plain in her own witness statement that her family trusted Proactive to do right by her son and to put the right deal together for him. In relation to the later Agreements, she said very simply that at a meeting which she did not identify, they were just handed some documents and told where to sign. In her supplemental witness statement, she said that all this must have been completed before the press conference on the evening of 17<sup>th</sup> January 2003; but this cannot be correct for reasons which I have already set out in some detail.
412. In her principal witness statement, she went on to say that when the papers were signed in January 2003 they did not really know what was going on and that everything was “a bit of a blur”. She felt that they were in some way connected with the earlier contracts and that they just had to sign them. No-one took them through

the papers or suggested that they should take them away and read them carefully or that they should seek legal advice. In particular, no-one said anything to the effect that a contract for a term of eight years was in any way unusual. Indeed, she was unsure whether there had been any mention at all of the length of the agreement.

413. The limited nature of her recollection of these matters was, if anything, made even more apparent in cross-examination. When pressed, she repeatedly said that it all took place many years ago and that she could not remember the details. She pointed out, no doubt correctly, that she and her husband were not used to dealing with contracts and did not understand them. Though her evidence was not entirely clear, she seemed to be saying that she and her husband had assumed that the various contracts that they were asked to sign were the same for all professional footballers, but that, if they had appreciated that an eight year contract was wholly out of the ordinary, they would not have agreed to it.
414. On the basis of this evidence, it seems to be quite impossible to determine precisely what WR and his parents knew or believed about the nature or terms of the July 2002 Agreement or the later Agreements when they were first signed. The reality, in my judgment, is that they had decided that Proactive was the right agency for their son and that they trusted Mr Rodford and, in particular Mr Stretford to do the right thing for them. In those circumstances, they were prepared to accept the documentation presented to them by Proactive without independent legal advice and without any real explanation or analysis. I am not persuaded that they were, in fact, mistaken as to any of the terms of any of the agreements in question, in the sense that they believed them to be something different from what they actually were. But even if they were mistaken about any such matters, I think it is highly likely that they would have signed them in any event.

#### PART IV

#### THE EXPERT EVIDENCE

415. I granted permission for expert evidence by Order of 7<sup>th</sup> April 2009. The relevant field of expertise was that of the professional sports agency industry; and the issues to be covered were: firstly, the usual levels of remuneration in the industry; and, secondly, the “common currency” of terms such as those found in the Image Rights Representation Agreement and the commercial considerations behind such terms. The first of these issues was said to be relevant to any quantum meruit claim; and the second to the restraint of trade issue.
416. The expert witness called on behalf of Proactive was Mr Melvin Arnold (“Mel”) Stein. He qualified as a solicitor in 1969 and has practised as such throughout the intervening period up until the present day. From a fairly early stage in his professional life, he began to represent professional sportsmen and to specialise in sports law. In addition to his professional practice as a solicitor, he was for many years the sole director of a sports management company, Team Sports Management Limited; and he is now a consultant to First Artist Corporation Plc which represents a number of leading professional footballers, clubs and managers both in relation to on-pitch and off-pitch activities. Amongst his former clients were such well known

figures as Paul Gascoigne, Chris Waddle and Alan Shearer. He has lectured widely on sports law and has written a book entitled “How to Be a Sports Agent”.

417. The expert witness instructed on behalf of Stoneygate was Mr Gordon Taylor OBE, the Chief Executive of the Professional Footballers’ Association (the PFA). He was a professional player for 20 years between 1960 and 1980 and has been involved in the affairs of the PFA since 1971, becoming its full-time General Secretary or Chief Executive in 1981. He holds an honours degree in Economics from London University, and honorary degrees from two other English Universities.
418. In addition to their main reports, I was provided with an agreed note of a joint meeting between the two experts, a substantial supplemental report from Mr Stein and a very short additional report from Mr Taylor in which he sought to clarify one particular point recorded in the note of the joint meeting. Both experts, of course, gave oral evidence and were cross-examined at some length.
419. Mr Stein was a combative witness who adopted a highly commercial approach to the matters upon which he had been asked to express an opinion. But his own direct personal involvement with high profile footballers lay some way in the past, most notably during the period when he acted, in effect, as agent for Mr Paul Gascoigne and one or two other well-known players. The extent to which he has been actively involved more recently in handling the affairs of such players was not explored or explained in any great detail; and I was left without any very clear picture of the nature of his role with First Artist Corporation Plc or the extent of his direct involvement with the players which it represents. He had firm and clear views on most of the matters about which he was questioned and, in general, gave a fairly good account of himself in the witness box.
420. However, he committed at least one quite significant factual error at paragraph 5 of his supplemental report in which asserted, inaccurately, that the fee paid by Nike under the initial 2003 sponsorship deal was only £10,000 and that no substantial commercial contracts were procured for Mr Rooney’s benefit until 2005, in the case of Manchester United and Electronic Arts and 2007 in the case of Coca Cola. The true position is that very substantial sponsorship deals with Nike, Coca Cola and Electronic Arts were secured in 2003 and that the amount payable under the Nike contract was well into six figures during each year of its term. I have set out the details earlier in this judgment. Furthermore, though it is obviously correct that the first Image Rights contract with Manchester United was obtained only after his transfer to that Club, a fairly lucrative Image Rights Licence Agreement had already been put in place with Everton FC pursuant to the Heads of Terms which were agreed on 15<sup>th</sup> January 2003, to be followed in due course by the long-form Agreement concluded on or about 13<sup>th</sup> February 2003.
421. Mr Stein’s explanation of all this was that his supplemental report had been prepared as a matter of urgency at a time when he was abroad and unable to check his facts. But quite apart from this particular aspect of his evidence, there were certain specific issues on which I felt unable to accept his evidence. I will endeavour to explain the reasons which have led me to that conclusion at the appropriate point later in this judgment.

422. It was more difficult to know what to make of Mr Taylor's evidence. He gave the impression of being a man of strong, indeed passionate, views which he was not at pains to conceal. He was manifestly protective of the interests of professional footballers and was quite clearly of the opinion that WR had been financially exploited when, at the age of only 17, he was tied in, through Stoneygate, to an eight-year Image Rights Representation Agreement. I think he felt it difficult to be wholly objective about some of the matters upon which he had been asked to express an opinion; and he seemed on occasions to be expressing views about what he considered ought to be the case, rather than on what it actually was.
423. Furthermore, whilst it is obvious that Mr Taylor must have an immense amount of experience about all matters affecting professional footballers, the extent of his knowledge of Image Rights Representation Agreements between high-profile professional players and their agents was not easy to determine. Not infrequently, when asked about such matters, he tended to refer to Image Rights Agreements between players and their Clubs or contracts under which the PFA had itself acted as agent on behalf of a player.
424. But I accept that he is likely to have seen at least some Image Rights Representation Agreements between players and agents in his capacity as Chief Executive of the PFA on occasions when the Association has been asked to provide advice on the terms of such an agreement or has become involved in disputes between a player, his agent and, it may be, his Club. Furthermore, it seems to me to be fairly likely that, given his position, he would have gained some knowledge about the sort of contracts which his members were entering into in relation to image rights even outside the context of a specific request for advice or assistance.
425. But, as in the case of Mr Stein, I did not feel able to accept his evidence on a number of matters which were in issue between the experts. Once again, I will try to give my reasons when I deal with specific questions arising out of the expert evidence.
426. The main focus of the expert evidence was the Image Rights Representation Agreement between Proactive and Stoneygate or, more precisely, certain terms of that Agreement and the commercial background to those terms. It will be convenient, therefore, to set out my analysis and findings in relation to this evidence under a number of separate heads, most of which are directly referable to specific provisions of the Agreement in question.

#### Remuneration

427. The first issue in respect of which permission for expert evidence was granted was in relation to the usual levels of remuneration in the industry. It was recorded that this was material to the question of a quantum meruit or quantum valebat claim. In fact, however, neither expert appears to have been instructed on the general question as to what would or might be an appropriate level of compensation in respect of a claim of this kind. Their evidence was specifically directed to the provision in the Image Rights Representation Agreement for the payment of commission at the rate of 20% and whether this reflected what, for convenience, one might refer to as "the market rate".

428. On the central point, there was some degree of consensus between the views of Mr Stein and Mr Taylor. The note of their joint meeting records that they agreed that commission rates for off-field representation were higher than in the case of on-field activities. Mr Stein considered that 20% was the norm, whilst Mr Taylor considered that it was not unreasonable for commercial representation. But Mr Taylor considered that 20% was at the higher end of the normal range, which, in his view, was between 10% and 15%.
429. Though it is not directly material to the issues which I have to consider, both men agreed that 5% was the usual rate of commission in relation to on-field activities. In their principal reports, both men suggested that the usual range would lie somewhere between 2½% and 10%. When cross-examined on the basis of his book, “How to be a Sports Agent”, Mr Stein agreed that, in his view, 10% would be fairly “outrageous”. It is of some interest to note that 10% was the commission rate specified in Proactive’s standard representation agreement. It was the rate provided for in the on-field Representation Agreement with Mr Rooney dated 14<sup>th</sup> December 2002; and the same rate had been adopted in the early drafts of what became the Representation Agreement of 17<sup>th</sup> July 2002, though it was reduced to 2½% in the final version.
430. Subject to certain qualifications, I preferred the evidence of Mr Stein to the effect that the normal commission rate in commercial representation agreements between sportsmen, and in particular footballers, or their companies, and their agents, is, and was at the material time, 20%. That was Mr Stein’s firm view; and it was not seriously challenged in cross-examination, possibly because it had become clear that this was the rate which had been agreed between Stoneygate and Triple S since it had, in effect, taken over the management of WR’s Image Rights. Furthermore, it gained some support from what I was told was a standard form of Representation Agreement approved by the Football Association, a copy of which was annexed to Mr Stein’s Report, which provided for a fee of 20%, plus VAT, of the gross income arising out of the exploitation of a player’s commercial rights, as opposed to a rate of 5% in relation to on-field activities.
431. During the course of cross-examination, Mr Taylor, for his part, somewhat qualified the opinion which he had set out in his report and the joint statement. The explanation which he gave was that his figure of between 10% and 15% was, in effect, an average. For a young, unproven player, it might very well be the case that 20% would be agreed at the outset. But, in his experience, such a contract might provide for a lower rate or rates of commission if a certain level of sponsorship income was achieved. That was a common feature of the agreements he had come across. He also pointed out in his report that a highly successful and established player such as WR might well be able to negotiate from a position of strength and agree a significantly lower rate of commission than a player at the start of his career.
432. Mr Stein was asked about these further points raised by Mr Taylor. He agreed that a higher profile player, such as WR now is, would be in a strong negotiating position if he was free to enter into a new Representation Agreement. He would be much sought after both by agents and prospective sponsors. Furthermore, in his book, he had raised the possibility of a sliding scale of commission, of the kind envisaged by Mr Taylor, so as to reduce the rate where certain income thresholds were surmounted. But he insisted that this was all a matter of negotiation; and he pointed out that, in the

case of a particularly high profile player, the sponsor might be willing to pay the commission due to the agent in addition to any sums payable in respect of the sponsorship deal itself.

433. I conclude that a rate of 20% is widespread within what is probably a fairly limited market and is likely to be the ordinary default rate unless the player was in a stronger than usual negotiating position. Of course, as a player's career progresses, his negotiating position may become much stronger. If he was tied in to an exclusive agency for a comparatively short period of time, say two years, he would always be in a position to re-negotiate the percentage at the time of renewal, if necessary by transferring his allegiance to a new agent. In the case of a longer-term of contract, however, even a comparatively unproven player might well be able to negotiate a sliding scale of commission to cover the possibility that his career might prosper to such an extent that his earnings from sponsorship deals might far exceed the norm.
434. It would, no doubt, as Mr Stein opined, all be a matter of negotiation. But, if a young player was an exciting prospect and was well advised, I would have thought that some sort of sliding scale of this kind could easily be agreed. So, whilst 20% may well be the norm, as asserted by Mr Stein, the actual rate of commission in any particular case would depend upon the outcome of negotiations between the player, or his representatives, and the agent, and would be influenced by factors such as the reputation and prospects of the player and the length of the proposed contract.

#### The Agent's Role

435. But there is a further factor which it is appropriate to address at this stage. Both experts considered the reasons why commission rates at these levels were commonly agreed in relation to commercial activities. Whilst, unsurprisingly, neither attempted to justify any particular rate of commission with mathematical accuracy, both pointed to the distinction between the lower rates normally charged in respect of on-field activities and the higher rates commonly agreed in relation to commercial matters. They sought to explain this distinction on the basis of the difference between the work which the agent had to do in order to earn his commission. But the precise nature of the explanation which each gave, at least as it was ultimately articulated, differed in a highly important respect.
436. In his initial report, Mr Stein justified high rates of commission in relation to commercial and marketing activities on the basis that they were largely generated by the agents' own endeavours, whilst on-field commission was primarily generated by the player's own footballing abilities and the consequent interest of the clubs, so that playing contracts were "almost a by-product of deals between clubs for the transfer of players". In his own report, Mr Taylor did not dissent in substance from these observations made by Mr Stein. Indeed, he expressly agreed that on-field activities were much more dependent on the ability of the player and his success on the field.
437. But Mr Taylor placed even greater emphasis on a different aspect of the agent's normal responsibilities. On the playing side, the agents' role is more likely to be, as he put it, of a "one-off" nature, involving negotiations over the terms of a new playing contract with the player's existing club or with a new club in the event of a transfer. Once terms were agreed, there might not be a great deal for the agent to do until such

time as a re-negotiation or transfer opportunity arose. But, whilst agreeing with Mr Stein that finding and exploiting commercial opportunities involved much more work on the part of the agent, Mr Taylor also emphasised the importance of the agent's role in servicing any sponsorship deals once they had been successfully negotiated on behalf of the player.

438. He described this as almost a daily task, particularly in the case of a high profile player. It would be the agent, in his opinion, who would normally have to co-ordinate all of a player's commitments and reconcile the many conflicting demands placed upon him. In addition, the agent must seek to protect the brand by ensuring that the player's name and image are used appropriately and in such a way as to enhance his reputation and commercial value.
439. In the note of their joint meeting, there appears to have been a significant degree of consensus between the two experts, albeit with a difference of emphasis. Both accepted that "servicing the contracts was equally as important as sourcing them". But Mr Stein expressed the view that where a player had a contract with a large commercial sponsor, the contract would be managed by the sponsor's own staff, thus relieving the agent of much of the responsibility which might otherwise fall on his shoulders.
440. In his supplemental report, Mr Stein made much the same point with, perhaps, a little more emphasis. The main role of an agent, he considered, was to secure commercial contracts for the players he represented. Servicing those contracts, whilst important, was, in his opinion, essentially secondary. He suggested that Nike, for example, would have its own internal team with specific responsibility for dealing with high profile sportsmen with whom it had a sponsorship contract, so that the agent, whilst remaining an important point of contact, would not have to be available at all hours on every day of the week.
441. In the course of cross-examination, however, he was even more forthright in the views which he expressed on this issue. He did not seek to suggest that a player did not need an agent or that he could manage his own diary, but he adhered to the proposition that much of the responsibility for organising the player's contractual obligations under his sponsorship contract would be borne by the sponsor who would often deal directly with the player. But he struggled to find very convincing examples of the way in which this might operate in practice. Nonetheless, he suggested that the role of the agent was not exactly "brain surgery"; and he pointed out that the commercial interests of Mr Paul Gascoigne had been looked after by himself, as a practising solicitor, his accountant and one other person.
442. He was then asked about the evidence of Mr Page who had conceded, indeed asserted, that Proactive had provided Stoneygate and WR with a high level of service, on such a scale as to prevent Proactive from being able to take on other high profile and profitable clients, though he was unable specifically to identify any such lost opportunities. Mr Stein was also asked about the high level of costs which, according to Mr Page, Proactive had incurred over the years in handling WR's commercial affairs. Mr Stein's response was that the level of service would, ultimately, be determined by the terms of the Image Rights Representation Agreement but that, in his opinion, the level of commitment described by Mr Page represented "over-kill".

He considered it was unnecessary and that, in effect, all that would be achieved by a commitment on this scale would be to pander to the substantial egos of some star players.

443. I accept, of course, that, as a matter of contract, the obligations of Proactive are to be found in the express or implied terms of the Image Rights Representation Agreement. I also accept, as was pointed out by Mr Mill in the course of an intervention, that those obligations are quite separate from those imposed upon the player under the terms of his playing contract and any sponsorship deals into which he may have entered.
444. But, at this stage of my judgment, I am concerned with the commercial background; and on this point, it seemed to me that Mr Stein was, in evidential terms, a voice crying in the wilderness. Both Mr Page and Mr Stretford emphasised the work which Proactive carried out in WR's interests in servicing the sponsorship contracts and publicising and enhancing the Rooney "brand". Even Mr Wallwork, though initially a little reluctant, agreed that the commitment involved was substantial. Perhaps even more significantly, Mr Bartlett, the Sports Managing Director of Nike, disagreed firmly with Mr Stein's evidence from the perspective of a major sponsor; and Mr Bartlett's evidence about these matters was scarcely challenged in cross-examination.
445. On this issue, I do not feel able to accept Mr Stein's evidence, at least as it was progressively refined in his supplemental statement and in cross-examination. I am satisfied that the normal role of an agent who represents the commercial interests of a player goes well beyond the core function of finding commercial opportunities and obtaining sponsorship contracts for the player. A successful agent can be expected to foster, build up, enhance and protect a player's image and brand and so increase his commercial value. In addition, he must ensure that the player's commercial commitments are managed with skill and efficiency so as to maintain a happy working relationship with the sponsor and, in so doing, reconcile the various other demands on the player's time, most notably his playing career and his family life. Whilst the agent could be expected to play this role in respect of any player on whose behalf he acted, it seems obvious that, the more high profile the player, the greater the demands which will be made upon the agent.
446. In reality, I find it difficult to see how the agent's role in securing contracts can readily be separated from the need to nurture the player's image in order to increase his attractiveness to sponsors and in servicing the contracts once they have been secured. It seems to me that the careful nurturing of a player's image and the successful management of sponsorship contracts on his behalf is likely to lead to a virtuous circle in which the player becomes ever more attractive to sponsors resulting in even better and more lucrative sponsorship opportunities. But this, of course, must be subject to a highly important caveat. A player's commercial value will ultimately depend, in all but perhaps the most exceptional case, on his abilities and success in his chosen sport. Nonetheless, assuming a sufficient degree of success on the pitch, it seems to me to be difficult to separate the different aspects of an agent's role in relation to image rights. The money is in the sponsorship deals. But these do not materialise out of thin air; nor do they manage themselves. So long as it is not treated as a mathematically precise formula, I do not think that I could do better than to adopt the words used by the experts themselves at paragraph 4.1.3(d) of the note of their

joint meeting, namely that “servicing the contracts was equally as important as sourcing them”.

### Exclusivity

447. Both experts agreed that it was normal and highly desirable for any sports agency agreement to be exclusive. Exclusivity means that negotiations with both club and prospective sponsors can be conducted in the secure knowledge that the agent is the sole person or body entitled to negotiate on behalf of the player or his image rights company and in the reasonably confident expectation that the agent will deliver what he has promised. It also prevents a player being de-stabilised by constant approaches from other prospective agents seeking to persuade him to let them act on his behalf. The downside, of course, is that during the term of the agreement, the player cannot simply decide to appoint someone else to act on his behalf without, at least, having to pay compensation, which may, of course, be substantial.
448. But there was a further point on which the experts disagreed. There is clearly no reason in legal principle why a player should be represented by the same agent in relation to both on-field and off-field activities. It seems that there are at least some instances in which a player has separate agreements with different agents in relation to each of these separate fields of activity. Mr Stein thought that this was not uncommon and not, in itself, undesirable. Mr Taylor, however, took a different view. I disregard for these purposes the inevitable need for separate agreements where the players image rights have been assigned to a company such as Stonegate in the present case.
449. Mr Taylor described separate representation agreements with different agents as “an accident waiting to happen”. Mr Stein, by contrast, did not consider that arrangements of this kind were likely to cause any serious friction or counter-productive competition between the agents, though he accepted that it would generally be preferable to have the same agent in respect of both on-field and off-field activities.
450. For my part, I rather doubt whether this particular point is material to the substantive issues which have to be determined in this action. I think the essential point sought to be made was that long-term image rights agreements are undesirable because of the two-year limit on playing agencies. Be that as it may, Mr Taylor argued that, unless one agent was clearly subordinate to the other, there would be likely to be competition between the two, with each hoping to take over from the other, to the potential detriment of the player himself. Mr Stein countered this by observing that, if there were two agents, they would each have to co-operate with the other as a matter of commercial necessity. Insofar as there was an element of competition in the relationship, that would likely to work to the benefit of the player rather than the contrary. I have come to the fairly unsurprising conclusion that dual representation of this kind remains uncommon and that how well, or badly it operates in practice depends upon all the circumstances and the personalities of those involved.

### Post-Termination Commission

451. There was a disagreement between the experts as to how widespread was the practice by which an agent was entitled to receive commission after the end of the agency agreement. I do not refer to instances where commission has fallen due prior to the end of the contract period but has remained unpaid; nor (insofar as there is any distinction) do I refer to cases where the event upon which the right to commission arises has occurred prior to the termination date. The issue addressed by the experts was whether, in ordinary commercial practice, an agent would be entitled to commission arising out of contracts negotiated by him during the contract period where the payment upon which commission was calculated, or the event which gave rise to it, occurred after the end of the contract period. The obvious example would be where a sponsorship agreement, such as those between Stoneygate and Coca Cola or Nike, provided for annual payments over a number of years stretching beyond the end of the period of agency, whether that expired by effluxion of time or by the prior determination or discharge of the contract.
452. It was a curious feature of Mr Stein's evidence that, though he worked his way methodically through the principal clauses of the Image Rights Representation Agreement, he did not make any reference to the question of post-termination commission in his first report. But Mr Taylor was clearly aware that Proactive was claiming a right to such commission and briefly addressed it in his own report. According to Mr Taylor, he had never known an instance in which an agency had sought all continuing commission on lengthy contracts after the player had left to join another agent. But he accepted that agents might on occasion make some more limited claim to post-termination commission; and, in those cases, the agent might seek to negotiate some form of compensation from the player, usually in the form of a lump sum payment.
453. Mr Taylor expressed surprise that Proactive was making such a claim in the present case, having regard to the provisions of clause 8.1 which appeared to provide for certain specified payments on early determination. He also considered that, if a contract did provide for a continuing right to commission after the end of the contractual term, it would further fetter the freedom of a player to transfer his allegiance to a new agent at the end of the contract. He pointed out that the agent's responsibilities would normally extend to the servicing of any contracts procured for the player during the continuance of the agency agreement. If the player decided to move to a new agent, Mr Taylor considered that it would be unreasonable for the former agent to continue to receive remuneration in the form of commission when, ex hypothesi, he was no longer providing such services; and, by the same token, it would be unrealistic, in his opinion, to expect a new agent to provide services of this kind without receiving any commission in respect of the contracts which had to be serviced.
454. Mr Stein addressed this issue for the first time during the joint meeting between the experts. He disagreed with Mr Taylor's evidence that it was unusual for a former agent to continue receiving commission in this way after he had ceased to provide any services under the agency agreement. He also said that a new agent might well be content, at least initially, to forego any commission on existing sponsorship contracts and limit his right to remuneration to any new contracts which he himself was able to

procure. In that way, Mr Stein suggested, the spectre of double commission would be avoided. Mr Taylor's riposte was that, in effect, there might be little stew left in the cooking pot when the new agent took over, since the opportunity for new or additional sponsorship deals might be very limited.

455. In his supplemental report, Mr Stein developed the views which he had expressed in the joint meeting. He considered that it was the "industry norm" for an agent who had negotiated a deal to continue to receive commission on that contract even after his agreement with his client had ended. He did, however, accept that he had come across agreements under which commission on post-termination income would be limited to a fixed period with, perhaps, a further period at a reduced rate. But, as he also pointed out, provisions of that kind would depend upon a process of negotiation between the player and agent.
456. When he came to give oral evidence, however, Mr Taylor had some difficulty in supporting his evidence that it was highly unusual for post-termination commission to be paid once an agency agreement had come to an end. When asked about these matters in cross-examination, he initially seemed to be saying that, in practice, whatever the agency agreement might provide, the parties would agree a compensation package with the former agent if the player decided to change his allegiance. But when pressed, he went on to say that he had never seen an example of a contract which specifically provided for post-termination commission, as opposed to some form of compensation.
457. He was then taken by Mr Mill to the terms of the specimen representation contract exhibited to Mr Stein's first report which, by clause 12, specifically provided that, in respect of the exploitation of the player's commercial rights, the agent should be entitled to charge a fee of 20% plus VAT of the gross income arising therefrom "whether during or after the expiry of the Term". Mr Taylor was compelled to accept that this was, on the face of it, a provision conferring a right to post-termination commission on the agent. Even more uncomfortably, he had to accept that the specimen contract which he himself had exhibited to his principal report made provision for remuneration in terms which appeared to envisage at least the possibility of post-termination commission.
458. But he would not agree with the suggestion put to him by counsel that it would be "commercially absurd" for an agent to agree a basis of remuneration which did not include an entitlement to continuing commission following the expiration of the term. When pressed with the example of a lucrative, long-term agreement procured by an agent just before the expiration of the period of his agency, where the contract provided for payment in annual instalments, Mr Taylor seemed prepared to accept the moral case for some sort of compensation but appeared to suggest that it would all be a matter of discussion and negotiation.
459. Mr Stein explained that he had not addressed this particular issue in his initial report because he had taken it for granted that an agent would be entitled to post-termination commission on deals which he had negotiated on behalf of the player or his image rights company. When pressed, he insisted that there was no other reason why he failed to mention it. He said that he had never come across a situation, in any field of activity, in which an agent acting under a representation agreement had not been

entitled to receive commission on any deal which he had negotiated, even after the agency agreement itself had been terminated.

460. Mr Stein did, however, in his initial report, comment on the implications of clause 8 of the Image Rights Representation Agreement, which provided for certain payments to be made in the event of early termination. One might have thought that this might have prompted him to add a comment to the effect that this would not affect any continuing right to commission.
461. I confess to some slight scepticism about his explanation as to why he entirely omitted any discussion of this issue from his initial report; and I remained unsure as to whether his firm assertion was based on his personal experience of the express terms of commercial representation agreements, and if so, the extent of that experience, and if not, whether it simply reflected his assumptions as to the legitimate commercial interests and expectations of an agent.
462. He did, of course, exhibit to his first report a specimen contract which (as has been seen) expressly provided for post-termination commission; and he referred to the fact that, at least in relation to on-field representation agreements, FA Regulations permit the agent to continue to receive commission on any playing contract which he had negotiated notwithstanding the termination of the agency agreement itself. But agency agreements of that kind are, of course, limited to a maximum period of two years; and the playing contract itself is likewise limited to a maximum of five years.
463. This question was not, however, specifically investigated in any depth in the course of cross-examination. For my part, I rather suspect that Mr Stein's views on this point were primarily based on commercial considerations; and I simply do not feel able to make any finding as to how widespread express provisions of this kind are in commercial representation agreements of the kind which I have to consider in this case.
464. There was one further associated point which was touched upon by both experts. This was whether, as a matter of practice, a new agent would normally seek or obtain a right to commission on payments falling due under contracts negotiated by the previous agent.
465. Mr Stein, for his part, expressed the view that it was "unheard of" for a new agent to receive 20% of sums payable under such "inherited" contracts, though he adverted to the possibility that some modest commission might be agreed in return for the continued servicing of such contracts by the new agent. Accordingly, he took the view that there was, in reality, no real risk of a player, whether personally or through his image rights company, being required to pay double commission if he moved from one agent to another. That, of course, is contrary to the situation which would exist, if Proactive's claim for post-termination commission is well founded, since it seems that WR has agreed to pay 20% to Mr Stretford's new company Triple S.
466. In cross-examination, Mr Taylor was initially prepared to agree with Mr Stein. That concession seemed contrary to the point which he had made at the joint meeting to the effect that, if the old agent remained entitled to run-off commission, the player would end up paying double. When this point was put to him by Mr Mill QC, however, Mr

Taylor sought to resile somewhat from what he had previously said. He pointed out that the new agent would inevitably be expected to service any inherited contracts and that he would wish to receive some remuneration for doing so, unless he agreed to waive any such claim. He did not agree, as Mr Stein had suggested, that the commercial opportunities which would become available to the new agent would be a sufficient compensation in itself. His essential point was that the risk of having to pay a dual commission on inherited contracts would act as a serious disincentive to a player who might wish to change agents.

467. The claim for continuing commission in the present case is not based on any allegation of an implied term conferring such a right upon Proactive. The issue turns, therefore, on the interpretation of the express terms of the Image Rights Representation Agreement upon which Proactive bases its claims. In itself, therefore, I take the view that little if any assistance can be gained from evidence as to the express terms of other contracts between other players and other agents. At most, the expert evidence on this issue may cast some light on the commercial background against which the Image Rights Representation Agreement is to be construed.
468. The reality of the matter appears to be that virtually all disputes between agents and players are resolved by a process of negotiation rather than by litigation. In such circumstances, I do not doubt that agents will often assert a right to post-termination commission and that any such claim will be taken into account in any negotiated settlement. I do not see that this is likely to help me to decide whether the invariable or, at least general, expectation, on both sides, is that an agent acting under an image rights representation Agreement would be entitled to post-termination commission of the kind claimed in this action. Notwithstanding Mr Stein's evidence, I am not prepared to hold that there is such a general expectation on both sides, even though such a claim may often be asserted by agents in the event of dispute. But even if I were wrong, I do not think that I can gain much assistance from those facts in construing the words of this particular contract.
469. What I consider that I can properly take into account, however, if appropriate, in interpreting the relevant provisions of the Image Rights Representation Agreement are the obvious commercial consequences of one construction as against another if the contract itself provides no clear answer. On the one hand, it might be said that the legitimate commercial interests of the agent could only properly be protected if he was entitled to receive post-termination commission on contracts which he had negotiated. Otherwise, it might be said, he might find himself in a situation in which he had successfully negotiated a highly lucrative, long-term commercial sponsorship agreement just before the end of his contract only to find that his client immediately transferred his business to another agent, thus depriving the original agent of any proper remuneration for the work which he had done.
470. On the other hand, it might be said that if an agent was entitled to post-termination commission notwithstanding that a new agent had been appointed in his place, it would mean that he would continue to receive substantial sums by way of commission without having to provide any further services to his client. By the same token, in those circumstances, the new agent might have to service the inherited contracts without payment or the client might, in effect, have to pay double commission. These are matters to which I shall have to return later in this judgment.

## Duration

471. By Clause 7.1 of the Image Rights Representation Agreement dated 16<sup>th</sup> January 2003, it was stipulated that the Agreement should commence on the date thereof and should continue for eight years unless terminated earlier in accordance with provisions of Clause 7.2. There is really no doubt, on the evidence before me, that a term of this length for an agreement of this kind was not merely unusual but unique. I need not rehearse the evidence in any detail. Proactive itself was able to produce 62 image rights agreements of which, I was told, 60 were for a period of two years and only two extended a little longer. Mr Harrington could recall having seen about 20 such agreements of which, he thought, only one was for more than two years. So the debate between the experts largely focused on three ancillary issues: firstly, just how exceptional an eight-year term was compared with the length of other agreements of a similar nature; secondly, how much of a fetter such a term imposed, in practice, on the player's freedom to exploit his own image rights; and thirdly what was the commercial justification for a term of this length.
472. In the note of their joint meeting, it was recorded that both Mr Stein and Mr Taylor agreed that a four or five year contract was more usual in relation to a commercial representation agreement. But in his supplemental report, Mr Taylor sought to resile from that statement. He pointed out that it was his opinion, as expressed in both his initial report and during the course of the joint meeting, that on-field and off-field representation should be synchronised, with the effect, of course, that an image rights agreement should, in his opinion, be limited to two years. Otherwise, he considered that there was a risk of conflict and dissidence of the kind which I have already considered.
473. As previously noted, under FIFA Regulations on-field representation agreements are limited to a maximum of two years. Likewise, under, I think, both FIFA and FA Regulations, the maximum term of a playing contract is three years for a player under the age of 21 and five years in the case of any other player. Furthermore, according to Mr Taylor, the average length of a professional footballer's career in this country is no more than about eight years. As an average, that figure will presumably take into account those many footballers whose career is brought to an early end by injury or a lack of success on the pitch. But, in the case of a player such as WR, who started to play professional football at a very young age and whose prowess on the field is not in doubt, a significantly longer professional career could be anticipated, provided, of course, that he remains free of serious injury.
474. Against that background, a period of eight years for an Image Rights Representation Agreement of the kind which I have to consider in this case seems to be very lengthy indeed. That impression was not dispelled by the expert evidence. Mr Stein stated that he had come across agreements of this kind lasting four or five years, though he did not provide any detailed particulars of the contracts in question. He did not agree that there was any reason why commercial agreements of this kind should be limited to a term of two years by analogy with on-field agency agreements. He pointed out that commercial agreements were not regulated by FIFA or the FA and that it was unlikely that they would be regulated in the near future. Indeed, his view was that the two-year limit on the length of on-field agreements was too short and should be extended.

475. As I have previously pointed out, he did not think that there was any serious problem with having commercial agreements which extended beyond the maximum term of any related on-field representation agreement though, he accepted that it was, at least, preferable for the same individual to act as agent in each case. Indeed, he went a little further, suggesting that some individuals or companies might try to conclude commercial agreements for a period of four or five years in order to give them a negotiating “edge” in securing on-field representation rights for the same player when the original on-field representation agreement expired at the end of its maximum term.
476. On the evidence before me, I have come to the conclusion that an image rights representation agreement for a period of four or five years is highly unusual and that the large majority are for a shorter period, probably, in most cases, limited to the same two year term as an associated on-field representation agreement with the same player. No example of a contract for a longer period was produced at trial and none of the witnesses claimed to have seen or even heard of a contract for a longer period than five years, other than the Image Rights Representation Agreement between Proactive and Stoneygate which has given rise to this litigation. As Mr Stein himself acknowledged, the present Agreement appears to be unique.

#### The Practical Effect of the Eight-Year Term

477. But Mr Stein nonetheless contended that the eight-year term did not unduly restrict the freedom of WR and Stoneygate to exploit his image rights through some other agency. The essential argument which he advanced in his written reports was to the effect that the Image Rights Representation Agreement did not tie Stoneygate to Proactive for a fixed term of eight years, since there was a provision for early termination. The clause which he invoked to justify this proposition was, of course, clause 8 which, it will be recalled, was headed “Consequences of Termination”. This clause provided that, in the event of termination by Stoneygate prior to the expiry of the eight year term, certain monies would become payable forthwith to Proactive. The sums in question were £25,000, representing part of the monies paid by Proactive, in effect, as a form of signing-on fee, what were described as “liquidated damages” calculated by reference to the sum of £37,500 multiplied by the number of complete years of the unexpired term of the agreement, and, finally, a sum equivalent to Proactive’s total costs and expenses properly incurred from the date of the Agreement until the date of the termination notice. Mr Stein proceeded, it would seem, on the assumption that this clause was apt to confer on Stoneygate and WR a unilateral option to determine the contract at any time on payment of the stipulated sums. In effect, it set out the price at which he could buy himself out of the Agreement.
478. Clause 8 is a very odd provision indeed. Mr Rodford appears to have played a significant part in its genesis; but, of course, no explanation of its apparent commercial purpose was forthcoming from him or from the solicitors who drafted the original Agreement of 17<sup>th</sup> July 2002 from which it was taken. Mr Stein set out an analysis of what he described as the “exit fee” in the form of a Schedule to his supplemental report. The signing-up fee of £25,000, of course, remained constant year on year. The liquidated damages, however, went down by the sum of £37,500

each year. On the other hand, the expenses incurred by Proactive inevitably increased substantially over time. Basing his calculations on Mr Page's estimate of the relevant costs and expenses incurred by Proactive, Mr Stein's Schedule shows that over the five years from January 2004 to January 2008, the net exit fee payable under this clause would have increased from £357,240 to £705,832. So, the longer the contract went on, the more, it seems, Stoneygate would have to pay to buy itself out.

479. The only explanation for this peculiar outcome which Mr Stein felt able to put forward was to the effect that the amount would increase in this way only if (as has, of course, proved to be the case), WR had established himself a high profile player whose image rights had been successfully exploited by Proactive, albeit at a significant cost and expense. But, as it seems to me, that suggestion entirely disregards the very substantial commission which Proactive would have earned prior to any invocation of clause 8.
480. But Mr Stein's reasoning was severely shaken by the forensic decision of Proactive and its legal team to abandon any argument that clause 8 conferred an option upon Stoneygate and WR to terminate the Agreement on payment of the specified sums. It seems that he was informed of this only shortly before the commencement of the trial. Whatever the position may have been on the pleadings, it was Proactive's case at trial that clause 8 was not apt to confer an option of early termination on Stoneygate but merely sought to provide for the consequences of any breach of contract on its part. As such, it was to be regarded, as a penalty provision rather than a true liquidated damages clause, so that Proactive would be entitled to claim damages at large for breach of contract. Accordingly, the alternative claim made by Proactive to recover the sums set out in clause 8 was no longer pursued. That remained Proactive's position until after the conclusion of the evidence, when Mr Mill added a further refinement by way of a concession that the sum set out in clause 8 should act as some sort of "cap" on the damages which Proactive could recover. That was, of course, without prejudice to its claim for post-termination commission.
481. But Mr Stein seemed unperturbed by this change of position on Proactive's part. He picked up a point which he had already made in his reports, to the effect that WR would have found no difficulty in finding another agent who would be willing to put up the money which might be required to enable Stoneygate to buy itself out of its agreement with Stoneygate in accordance with the provisions of clause 8. As he explained in his supplemental witness statement, this would, in his view, represent good business for the new agent, since, in his view, he could very quickly generate enough income from new contracts to cover his initial expenditure and move into profit, even without being entitled to commission on inherited contracts.
482. In cross-examination, he sought to take this further. His starting point was the proposition that there would be no realistic prospect of any court enforcing an agreement of this kind by way of an injunction or an order for specific performance. Accordingly, as a matter of commercial reality, WR and Stoneygate could, at any time, bring the agreement to an end, albeit at the expense of rendering themselves liable to a claim for damages from Proactive. The amount of those damages would, therefore, in effect, constitute the price at which WR could buy himself out of the contract.

483. I am prepared to accept that Mr Stein's argument is soundly based in law, though I was not specifically addressed on the question whether the court might, in some circumstances, be willing to grant injunctive relief to restrain a breach of an exclusive agency, particularly where the agreement is not directly with an individual. But, as Mr Stein recognised, the damages which would be payable in those circumstances would, at least in the present case, be higher, and probably much higher, than the sums provided for by clause 8 of the Agreement. The amount of those damages in the present case has not yet been properly quantified; and it is accepted that, if the damages claim is held to be sound in principle, there will have to be an assessment at a later date. But Mr Wallwork and Mr Page gave estimates of between £3m and £4m. As I understand the position, that is in addition to the amount of any post-termination commission to which Proactive claims to be entitled.
484. It was Mr Stein's view that even figures of this magnitude would not deter a new agent from putting up the money needed to buy out Proactive's contractual rights. The amounts involved are obviously substantial. Assuming 20% commission, new sponsorship deals in excess of £20m would have to be found by any putative new agent; and it must be recalled that, in Mr Stein's opinion, it would be Proactive, rather than the new agent, which could expect to continue to receive the commission on any contract which had been procured during the subsistence of its agency.
485. Nonetheless, Mr Stein considered that there would be at least some sports agencies which would have the resources and the willingness to pay a transfer fee of this magnitude, though he did not identify them specifically. Not only would it, in his opinion, represent a good business deal (provided, no doubt, that the term of the new agreement was sufficiently lengthy), but the very fact that the new agency would have a player of such repute on its books would be likely to attract even more business. As he put it, WR's name would act as an admirable "calling card" for the agency in question.
486. Mr Taylor entirely accepted that, if WR had been free of any contractual restraints, agents would have been "queuing round the block" to sign him up. But he was much more doubtful as to whether anyone would be prepared to take the commercial risk of buying out his contract, particularly at the sort of figures which had been suggested. He pointed out that there were both practical and, it would seem, contractual limitations on the number of major sponsorship deals which Stoneygate could accept in addition to those which were already in place. So there would be only limited scope for a new agent to negotiate contracts on which he could expect to obtain commission. Nonetheless, he accepted that there might be commercial opportunities of this kind in such fields as luxury clothing and watches.
487. He was also pressed in cross-examination to agree that a new agent would have the opportunity to re-negotiate existing sponsorship deals either when they came to an end or during the term. The former proposition is obviously correct; and, in practice, it appears that sponsorship deals are indeed regularly re-negotiated before they come to an end, as was indeed the case with both Nike and Coca Cola. No doubt the new agent would then be entitled to receive commission on these re-negotiated contracts. But, insofar as any such re-negotiation took place within the eight-year period of the Image Rights Representation Agreement between Proactive and Stoneygate, Proactive would presumably wish to assert a claim to damages for the loss of opportunity to

earn commission in this way. That would, in its turn, presumably increase the price which the new agent would have to pay in order to buy out Proactive's rights. So I rather doubt whether the prospect of earning commission on new or re-negotiated sponsorship contracts prior to the end of the eight-year term of Proactive's contract with Stoneygate would make such a buy-out any more potentially attractive.

488. Given the amount of money which has poured into sport and, in particular, football, in recent years and the potential value of the Rooney "brand", I think that Mr Stein is probably right in expressing the opinion that there would be a small number of agencies willing to pay a high price to buy out Proactive's contractual rights. But even Mr Stein accepted that there would come a point at which such a deal would simply not be viable. Though the evidence is really somewhat unsatisfactory, I am prepared, albeit with some hesitation, to accept Mr Stein's opinion that there would probably be sufficient interest from a small number of agencies to ensure that Proactive's contractual rights could be bought out by a new agency, at a price which would reflect the level of damages suggested by Mr Page and Mr Wallwork.
489. But, for my part, I would have thought that any new agent would only be interested in doing a "clean break" deal under which any claim by Proactive for post-termination commission would have to be surrendered. Much more importantly, of course, any such buy-out could only be effective with the whole-hearted consent of Stoneygate and WR himself. None of the agencies which Mr Stein thought might be willing to bid were ever specifically identified by name. I have no idea whatever as to whether any of them would be acceptable to WR. The whole argument, therefore, seems to me to be entirely speculative. In reality, I simply do not know whether the scenario envisaged by Mr Stein could, in practice, come to pass.
490. But, even if an agency came forward which was willing to pay the sort of price which might be sought by Proactive in order to surrender its contractual rights, and even if the agency in question was one with which WR was happy to throw in his lot, I cannot see how this can be said to render the contract something different from what it is, namely an exclusive agency for a period of eight years. The mere fact that the only realistic remedy may be a claim for damages rather than for an injunction or specific performance cannot alter the nature of the parties' obligations. Nor, in my judgment, can it be relevant that some third party might be willing to pay a sum equivalent to the damages in question or some other negotiated figure. At most, Mr Stein's analysis means that the sanction for breaking the contractual tie would be financial rather than penal. But, assuming the contract was otherwise valid and enforceable, the measure of that financial sanction would be the length of the eight year tie.

#### Justification

491. The final aspect of the debate between the experts in relation to the duration of the contract was as to the nature of the interests of the parties by reference to which the length of the contractual tie might be justified. Mr Stein addressed this question briefly in his initial report, most conveniently at paragraph 28. He considered that there were only three unusual features about the Agreement, which he identified as its length, the "break clause" (as he then assumed it to be) and the obligation on Proactive to use its best endeavours to represent Stoneygate and, therefore, indirectly,

WR. He went on to say that, in his view, the length of the contract was more than balanced by several factors, including the player's youth at the time, the unpredictability of the football industry, including the risk of injury, and the non-returnability of the advance made to him by Proactive save under the provisions of clause 8.

492. This was not a point which was developed in the joint meeting between the experts, though it was recorded that Mr Stein expressed the view that a long contract might be very beneficial to a player whose career did not fulfil its early promise. However, Mr Stein set out his views in rather greater detail at paragraph 5 of his supplemental report, where he put forward no less than 19 reasons as to why an eight-year tie might be justified in the circumstances of this case.
493. I hope I will be forgiven if I do not deal with each and every one of these reasons in detail. Some of them are quite clearly and demonstrably wrong. Thus, subparagraphs (a), (b), (d), (e), (f) and (g) are all linked by the theme that Proactive had made a substantial initial investment, in the form of signing-on fees amounting to £50,000 in a young and unproven player, that there was no certainty that its investment would be repaid and that, in any event, no return could be expected until some years in the future. But the initial outlay was more than recouped as soon as he signed his professional forms with Everton FC; and lucrative sponsorship deals were obtained within a matter of months. It was in this context that Mr Stein made the quite serious error as to the amounts payable under the initial Nike sponsorship contract and the amount of commission which it generated for Proactive.
494. Furthermore, whilst I entirely understand and accept that any professional footballer's career is fraught with risks of injury, it seems to me to be quite artificial to try to depict WR as merely an "exciting prospect" in January 2003. Not only was he widely regarded as the best young player to emerge for many years, but he had already established himself as a first team player with Everton FC and had hit the headlines by scoring what was often described as a "wonder goal" against Arsenal FC in October 2002.
495. The point can be made very clearly by reference to two specific matters. Firstly, Proactive's own internal documents demonstrate that, from a very early stage in its relationship with WR, Proactive was planning a long-term marketing campaign involving a dedicated team of employees. It is unlikely that this would have been the case if he had not been regarded as an outstanding prospect. Secondly, the report prepared by Couchman Harrington and dated 27<sup>th</sup> December 2002 presents the player's prospects in encomiastic terms which I need not repeat. I appreciate that this was, in effect, a marketing document, intended to assist in securing an Image Rights Licence Agreement with Everton FC. But even making some allowances for the purpose of the document, it seems to show quite plainly the way in which Proactive regarded the prospects of the player.
496. Whatever the arguments might be at the level of principle, I simply cannot accept that, in this particular case, the length of the term was intended to reflect the amount of any initial investment, the uncertainty of any returns or the risk that his undoubted talent might not be realised. Whilst I accept that there are always uncertainties, most notably the risk of injury, those risks seem to me to have been very modest compared

with the potential returns. I am afraid that I think it is much more likely that the reason why Proactive was so anxious to sign up WR and his image rights company for a term of eight years was precisely because of the high probability of success and not because of any perceived risks of the kind referred to by Mr Stein.

497. At paragraphs 5(i) and (k), Mr Stein returned to the point which he had made elsewhere as to the impact of what he assumed to have been the right of early termination under clause 8 of the Agreement, emphasising, yet again, that he had little doubt that, in the event that WR might wish to invoke that clause, he would have little difficulty in finding another agent who would put up the necessary funds to enable him to exercise the option. He added the qualification, however, that, in his opinion, any payments under clause 8 would not come close to representing Proactive's real loss. At paragraphs 5(o) and (p), he made the supplemental point that, in the event of a falling-out between player and agent, commercial necessity would normally impel both sides to seek a financial compromise which would not necessarily be based upon the strict contractual terms of the agreement between the parties. For my part, that seems fairly obvious; but I do not see that it adds much, if anything, to any analysis of the interests which might legitimately be sought to be protected by an eight-year tie.
498. At sub-paragraph 5(j), Mr Stein expressed the view that a long-term contract represented a prudent step, at least from Proactive's standpoint, since it would help to protect it from the blandishments of "predatory agents" who might seek to persuade WR to change his allegiance. I entirely accept that some degree of stability in the relationship between a player and his agent is in the interests of both parties. But I fail to see why a term of anything like eight years is required to provide the necessary stability.
499. At sub-paragraphs (m) and (n) of paragraph 5, Mr Stein pointed out that, in many cases, an amicable relationship between the player and agent can last over many years. He instanced the example of himself and Mr Paul Gascoigne. I have no reason whatever to doubt that this proposition is correct. But I do not see what it has to do with the issue under consideration. In all these instances, presumably, player and agent remain loyal to each other despite the absence of any lengthy contractual tie, and, no doubt, despite any attempts which might have been made by other agents to take over the coveted role.
500. At sub-paragraph 5(l) Mr Stein makes two related observations. Firstly, he says that an early termination of the relationship involving the loss of such a major client would have a substantial negative impact on Proactive's commercial interests. Secondly, in those circumstances, Proactive would have lost what Mr Stein described as a "calling-card" namely the advantage to be derived from the very fact that it had such a star player on its books. To some extent, that is no doubt correct. But it looks at the matter purely from the standpoint of Proactive's commercial interests; and I am inclined to add the comment that this is how markets work.
501. It seems to me that the best points sought to be made by Mr Stein by way of justification of an eight-year term were those set out at paragraph 5(c), (h), (q) and (r). Sub-paragraph 5(s) simply sets out his overall conclusion that the eight-year term was commercially justified and reasonable, at least from Proactive's standpoint and, presumably, that of Stonegate and WR, though he does not say so in terms.

502. The essential point which he sought to make at paragraphs (c) and (h) was that, by clause 3.1 of the Image Rights Representation Agreement, Proactive agreed to use its best endeavours to represent Stoneycgate in all areas of image rights exploitation, and not merely to use its reasonable endeavours. For a young player, he suggested, obtaining a long-term commitment of this kind from a reputable agency such as Proactive was likely to be very much in his interests.
503. I accept that a “best endeavours” clause of this kind imposes somewhat more onerous obligations upon an agent than the alternative formula mentioned by Mr Stein. But the precise scope of such an obligation in its application to specific facts may well be difficult to determine. More importantly perhaps, if one were to follow Mr Stein’s example and adopt a highly commercial approach to these contractual provisions, I rather doubt that such an obligation would turn out to be of any great significance in practice. If a player’s career developed in the way demonstrated by WR himself, it would obviously be in the commercial interests of both parties to try to exploit his image as best they could, whatever the precise nature of the contractual obligations owed by the agent. If, on the other hand, a player’s career never took off, or was cut short by injury, it is unlikely that any significant commercial sponsorship deals could be obtained, notwithstanding the best endeavours of the agent to obtain them.
504. But I accept that such a clause does impose a significant obligation on the part of the agent, in this case Proactive, even though the extent of which it might be capable of producing real financial returns might well be seriously constrained by practical commercial realities.
505. At sub-paragraph 5(q), Mr Stein comments on the need, so far as possible, to avoid “short-termism”. He explained that a good agent had to be selective about the opportunities which he recommended to his client in order to ensure that the value of his image was enhanced rather than diminished. A short-term agreement might tempt an agent to take anything that was on offer in order to boost his income, even though a longer term strategy might be in the interests of his client.
506. I accept that “short-termism” of the kind described by Mr Stein is unlikely to be in the interests of the client. I also accept that a very short-term agreement might result in the sort of conflict of interest which he considered possible. But, adopting once again a commercial perspective, I wonder how common this would be in practice unless the relationship between the agent and his client had already run into difficulties. Otherwise, the agent would no doubt be hoping and expecting to renew any image rights agreement at the expiration of its term, just as he would in relation to an on-field agency agreement, limited, as it must be, to a maximum term of two years. After all, I doubt if Mr Stein himself short-changed any of the players whom he represented, such as Mr Paul Gascoigne, despite the absence of any long-term contractual commitment. Nonetheless, I can see some force in the point that a longer period of exclusivity might provide added security for both agent and player so as to allow a longer term strategy to be developed and implemented.
507. Finally, at sub-paragraph 5(r), Mr Stein developed what seemed to me to be, in effect, a public interest argument. He pointed out that, of the many players that an agency such as Proactive had on its books, the majority were unlikely to be successful and

that only a very few would be likely to bring in substantial income as in the case of WR. I find this argument difficult if not impossible to assess, since there was no attempt in this litigation to analyse the return which Proactive might hope to make across its entire book of clients. I nonetheless beg to doubt if Proactive would be likely to make a loss on many of the players whom it represented, at least in relation to on-field activities, whatever the position may be in relation to image rights.

508. In any event, I do not think that it could be regarded as being in WR's interests to be required to stay with one agent over a lengthy period in order to subsidise Proactive's efforts on behalf of other players. Indeed, I do not readily see that it would necessarily be in Proactive's interests to deploy profits from a highly successful venture in order to subsidise unsuccessful contracts. One might have thought that its business interests might better be served by a more discriminating and selective approach on its part. So I am not particularly impressed by Mr Stein's argument on this point.
509. These matters were, of course, explored by Mr Chaisty QC in the course of cross-examination. I do not think it is necessary to do anything other than to pick up one of the points arising out of cross-examination. This related to the comparative youth of WR at the time when he and Stoneygate entered into the Image Rights Representation Agreement. Mr Stein suggested that, in his view, it might be more advantageous for such a young player to enter into a longer term contract, since he would have a longer career ahead of him and such contract would facilitate a long-term "game plan". But he did add the caveat that this was on the assumption that the player had had the benefit of independent legal advice. He also acknowledged that even a four or five year agreement would allow for strategic planning of this kind.
510. For his part, when he came to cross-examine Mr Taylor, Mr Mill did not consider it necessary to put each and every one of these points to him. He pressed him, however, on the desirability of an agent being able to take a long view of the development of a player's commercial brand, particularly in the case of a young footballer who might take some years to achieve his full commercial potential. Whilst Mr Taylor was inclined to agree with the proposition that a long-term strategy was to be desired, he questioned whether it was necessary to lock a player into a long-term contract in order to achieve that objective.
511. He was then taken to Proactive's Brand Development Plan for WR which set out, in effect, a four-year development strategy from 2002, covering the European Championships in 2004 and the World Cup in 2006. When asked about this plan, Mr Taylor came very close to accepting that a four-year plan of this kind might be reasonable for a player of WR's age. But he clearly still had reservations based, in part, on the lack of flexibility, if things were to go wrong, in the form of some kind of "get-out" clause and, in part, because of his view that on-field and off-field representation contracts should, if at all practicable, be for the same period and with the same agent. Nor was he willing to agree that, if the representation agreement was only for a short period, at least if there was a good relationship between the player and his agent, there would be a serious risk that the agent might put his own interests ahead of those of the player and recommend sponsorship deals which were unsuitable simply in order to earn his commission before the expiration of the term.

512. Mr Taylor was also willing to accept that there might be some logic in a four-year contract, since that would reflect the quadrennial cycle of the major events in football, namely the European Championships and the World Cup, which are likely to present the greatest opportunities for the exploitation of the image rights of a high profile player such as WR. But he also pointed out that for top level clubs, domestic and European Club competitions would also be of major significance.
513. But Mr Mill attempted to press him further, suggesting that an agent should be entitled to take the benefit of any contracts which he had originally negotiated on behalf of his client and which then came up for re-negotiation or renewal. Mr Taylor was unwilling to be drawn, commenting that the issue was far from straightforward. But the point which Mr Mill sought to develop was that if, having taken a long-term view, a contract negotiated by an agent was likely to come up for re-negotiation or renewal after the end of the agency agreement, that might be a reason for seeking a longer term contract in the first instance, particularly if the contract did not confer a right to post-termination commission on the agent in such circumstances. Mr Taylor did not give a clear answer to this question; and I have some sympathy with him. I rather doubt whether it is really a matter of admissible expert opinion.
514. In the end, therefore, I do not think that Mr Taylor's evidence on this sub-issue took the matter any further, save, perhaps, for his near-concession, qualified as it was, that a four-year agreement might allow for longer term planning, particularly in the case of a younger player, and would more likely to be in synchrony with the quadrennial cycle of major international footballing events.

## PART V

### CONTRACTUAL ISSUES

515. It is against this factual background that I must now seek to resolve the substantive issues between the parties. I start by considering various questions which arise as between Proactive and Stoneygate on the footing that the Image Rights Representation Agreement is valid and enforceable.
516. Proactive seeks to recover the amount of the unpaid commission which it claims to be due and owing to it under the Agreement together with damages for breach of contract. But the precise relationship between these two heads of claim is not entirely clear on the face of the pleadings. The total sum of £1,071,157.05 is claimed in respect of commission which is said to have already fallen due (whether before or after the commencement of the proceedings), though there is an alternative claim for damages arising out of Stoneygate's failure and refusal to pay these sums. But it is quite clear that the claim for commission is based upon what is said to be a continuing contractual right to receive payment at the rate of 20% on all sums payable to Stoneygate by third parties pursuant to contracts procured by Proactive during the subsistence of the Image Rights Representation Agreement.
517. This claim for continuing commission is reflected in a proposed further amendment to the Re-Re-Amended Particulars of Claim by which Proactive seeks to recover commission on sums payable to Speed under an agreement with Argos Limited which, it is said, was negotiated by Proactive but only entered into on 11<sup>th</sup> November

2008, after the breakdown of relations between the parties. More importantly, perhaps, by paragraph 11 of the Re-Re-Amended Particulars of Claim and paragraph 5A of the prayer for relief, Proactive seeks a declaration that, notwithstanding the termination of the Image Rights Representation Agreement, it is entitled to 20% of all earnings and income received by Stoneygate under third party contracts entered into during the currency of the Agreement.

518. Two aspects of this claim should be noted. Firstly, on Proactive's case, the Agreement was terminated on 24<sup>th</sup> December 2009 when it accepted what is alleged to have been Stoneygate's repudiatory breach of contract. So the prayer for declaratory relief is strictly in respect of its claim for post-termination commission falling due after that date. Any commission falling due prior to 24<sup>th</sup> December 2009 is specifically claimed as a liquidated sum or alternatively as damages in the same amount. Secondly, the basis of the alleged right to post-termination commission is almost entirely unparticularised. The only real light cast upon it is to be found at paragraph 11(5A) of its Re-Amended Reply which re-asserts the claim and alleges that an entitlement of this kind is "usual in contracts of agency and/or sports representation" where, as in the present case, or so it is said, the "main value and work in such representation lies in identifying appropriate third parties, negotiation with those third parties and obtaining satisfactory agreements with those third parties". But no implied term to that effect is alleged and, as will be seen, Mr Mill took his stance on the express wording of the Image Rights Representation Agreement.
519. But in addition, at paragraph 9F of its Re-Re-Amended Particulars of Claim, Proactive claims damages in respect of loss and damage allegedly sustained, as a result of Stoneygate's repudiatory breach of the Agreement. The damages in question are said to fall under two heads. The first of these is based upon the alleged loss of a chance to negotiate or re-negotiate valuable image rights agreements during the remainder of the term of the Image Rights Representation Agreements. It should be noted that no similar claim is expressly advanced in relation to the period prior to any alleged repudiatory breach on the part of Stoneygate, notwithstanding the withdrawal of co-operation with effect from the end of October 2008. The second head of damages alleged at paragraph 9F is directed to the possibility that Proactive may not, in fact, have a continuing contractual entitlement to commission. In that event, it is alleged that it is entitled to damages in the equivalent sum.
520. In their Re-Re-Amended Defence, Stoneygate and the other Defendants challenge virtually all aspects of Proactive's case on these matters. Leaving aside, for present purposes, their fundamental attack on the validity or enforceability of the Image Rights Representation Agreement, it is denied that they were ever in breach of contract or that Proactive suffered any loss in consequence of any such breach. But Stoneygate's case on the issue of post-termination commission is articulated somewhat indirectly. At paragraph 64A(b) and (c) of the Re-Re-Amended Defence and Counterclaim, it seeks a declaration that, as a matter of construction, Proactive's right to commission ceased when it ceased to provide services under the Agreement or alternatively upon termination of the contract, or, alternatively, a declaration that there was an implied term to the same effect "by reason of obvious inference or business efficacy".

### Post-Termination Commission

521. In contrast to a number of other contracts of a similar nature which were referred to during the course of the trial, the Image Rights Representation Agreement does not contain any clear, express provision regulating the right to commission after the end of the contract period. Proactive's own original standard form (upon which DLA based some of the provisions of the July 2002 Image Rights Representation Agreement) incorporated no such express provision conferring upon it a right to post-termination provision. But the bundle of contracts produced during the course of the trial shows that a provision to that effect began to be incorporated in its representation agreements from about February 2003. The form which it appears to have used from about the middle of that year dealt with the point by way of a proviso which is in these terms:

“For the avoidance of doubt PSM will be entitled to receive commission at the rate set out in paragraph (a) and (b) above in relation to all Playing Contracts or Commercial Rights Contracts entered into during the Term regardless of whether sums are received by the Player during or after the Term hereof.”

522. Now, Mr Mill, on behalf of Proactive, does not rely upon any implied term in order to make good Proactive's claim for post-termination commission. He approached the question as involving a point of construction. I add the observation that the most recent and authoritative commentary on the basis of the implication of terms into contractual documents makes it clear that the processes of implication and interpretation are closely related. In **Attorney General of Belize -v- Belize Telecom Limited** [2009] 1 WLR 1988, Lord Hoffman, giving the advice of the Privy Council made the following observations at paragraphs 16, 17, 18 and 21:

“16. Before discussing in greater detail the reasoning of the Court of Appeal, the Board will make some general observations about the process of implication. The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see *Investors Compensation Scheme Limited -v- West Bromwich Building Society* [1998] 1 WLR 896, 912-913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.

17. The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.

18. In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.

21. It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question of the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. It will be noticed from Lord Pearson's speech that this question can be re-formulated in various ways which a court may find helpful in providing an answer - the implied term must "go without saying", it must be "necessary to give business efficacy to the contract" and so on - but these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?"

523. In the light of these observations, I approach Mr Mills' submissions by asking whether the remuneration provisions of the Image Rights Representation Agreement, reading the Agreement as a whole against the relevant background, would reasonably be understood as conferring upon Proactive a right to post-termination commission as asserted on its behalf. In the absence of some clear, express and specific provision to that effect, Mr Mill must find a sufficient indication in the wording of the Agreement to show that that was what the parties must, objectively, have intended, having regard to any admissible background information which was available to all parties at the time when the Agreement came into being.

524. Mr Mill found the necessary indication in the wording of Clause 6.2 itself which, it will be recalled, was in these terms:

"In consideration of the performance of the Services, the Client shall pay to the company the sum of £1 (receipt of which the Company hereby acknowledges) and a commission calculated on a percentage of all sums payable to the Client as follows: 20% of the gross sum payable under any contract or arrangements for the promotion, endorsement or advertisement of the Client and/or the exploitation of the Intellectual Property and/or any products, goods or services to which the Client is a party."

525. The wording is not entirely free of infelicity. The "Client" is, of course, Stoneygate, rather than WR. If a very literal approach to the construction of the Clause were to be adopted, it might be argued that all of the contracts or arrangements secured by Proactive were for the promotion, endorsement or advertisement of WR, rather than Stoneygate. But, as previously noted, that was not a point which was taken by Mr Chaisty; and, of course, Stoneygate was the corporate vehicle through which WR's image rights were to be exploited. In any event, the definition of "Intellectual Property" is sufficiently wide to cover the exploitation of any relevant rights, whether they related to Stoneygate or to WR himself.

526. Mr Mill sought to give particular emphasis to the use of the expression “all sums payable”. He submitted that this phrase must refer to all sums which a sponsor would be liable to pay to Stoneygate under the terms of any sponsorship contract negotiated by Proactive during the term of the Image Rights Representation Agreement, whenever they might fall due. The condition, he argued, which gave rise to the right to commission was the sponsorship contract itself. If that was secured for Stoneygate during the term of the Agreement, Proactive, he contended, would have an accrued right to commission even if the sums on which the commission was calculated became payable or were paid after the end of the contract period. Indeed, he submitted, rather adventurously, as it seemed to me, that Proactive would have been entitled to its commission on all sums payable over the entire term of the sponsorship contract as soon as Stoneygate had entered into the contract in question.
527. Mr Mill sought to support these arguments by reference to the apparent commercial purpose of the Image Rights Representation Agreement. He submitted that it would be commercially absurd to construe the contract in such a way as to cut off any right to commission on the expiration of the eight-year term or the earlier termination of the contract in consequence of a repudiatory breach or for any other reason. Thus, he prayed in aid the example of an agent who had successfully secured a lucrative and long-term contract for the benefit of his client immediately before the expiration of his agency agreement. There would, of course, be no problem if the entire consideration for the contract was in the form of a capital sum payable at the outset. But why, asked Mr Mill rhetorically, should the agent be deprived of any future commission if the contract provided for substantial payments on a regular, periodic basis, rather than in the form of a lump sum? Underlying these arguments, though not set in their forefront, was Mr Stein’s evidence that, in his opinion, a right to continuing commission was something that he considered went without saying.
528. Mr Mill conceded, or perhaps I should say contended, that Proactive would only be entitled to its commission on any third party contract of this kind if it was the effective cause of the contract in question. That concession, if such it be, reflects a common theme of the English case law on agency, particularly in relation to sales agents, though I was not referred to any specific authorities on the point.
529. Mr Mill also emphasised the distinction between the event or condition which gives rise to an agent’s right to commission or other remuneration, and the time when it might become payable. Once the event or condition had occurred or had been fulfilled, he submitted, the agent had an accrued right to his commission; and he could not be deprived of it merely because the contract had come to an end before the commission was payable. That, he submitted, would apply whether the contract came to an end by effluxion of time or was discharged as a result of one party’s breach or on any other grounds.
530. As to the former, he relied upon the express provisions of clause 21 of the Image Rights Representation Agreement itself, which provided that, as to any provisions remaining to be performed in whole or in part or capable of having effect following termination, the Agreement should remain in full force and effect despite termination. As to the latter, he relied upon general legal principles which he illustrated by a reference to several authorities. I need only refer, at this point, to the statement of the

law set out at paragraph 24-051 of Chitty on Contracts, 30<sup>th</sup> edition (2008). In setting out the consequences of the discharge of a contract by breach, the legal position is summarised in these words:

“Although both parties are discharged from further performance of the contract, rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected.”

531. I entirely accept this statement of orthodox principle. But it does not answer the prior question as to what the relevant rights may be and when and in what circumstances they accrue. Those are essentially issues of construction or implication.
532. Mr Chaisty, of course, relied primarily on the absence of any clear, express provision conferring any rights to post-termination commission on Proactive. He also sought to support his argument by counter-examples of the commercial consequences of construing the contract in the way contended for on behalf of Proactive. Thus, he pointed out that, if Proactive were entitled to commission on long-term sponsorship contracts entered into near the end of the contract period, it would mean that Stoneygate would have to carry on paying commission at the substantial rate of 20% over a period of many years without Proactive having to provide any further services under the Image Rights Representation Agreement. This would represent a continuing drain or charge upon Stoneygate’s income, even though it would have to find another agent to provide the services which were no longer being provided by Proactive. There would, therefore, he submitted, be a real risk that Stoneygate would find itself in a position in which it had to pay double commission, once to Stoneygate and once to a new agent.
533. But, in addition, Mr Chaisty picked out two specific features of the Image Rights Representation Agreement itself which, he submitted, demonstrated that it could not have been the intention of the parties, objectively determined, to provide for post-termination commission of the kind asserted by Proactive.
534. The first of these was connected with his submissions as to the commercial consequences of the construction contended for by Proactive, and also with Stoneygate’s pleaded case that commission was payable only so long as Proactive was providing the contractual services, whether as a matter of construction or by a process of implication.
535. The starting point for Mr Chaisty’s argument on the point was that, by virtue of clause 6.2 of the Image Rights Representation Agreement, remuneration by way of commission was expressed to be in consideration for the performance of the “Services”. So, Mr Chaisty submitted, the remuneration in question was directly linked to the services which Proactive was required to provide and, if it ceased to provide those services, no matter what the reason, it would no longer be entitled to commission.
536. But, in my judgment, the point goes somewhat further. The word “Services” is a defined term. The definition is to be found at clause 3 of the Image Rights Representation Agreement. The Services, as so defined, are not limited to procuring

contracts for Proactive. Indeed, its primary obligation under clause 3.1 is to “use its best endeavours and work diligently to represent the Client in all areas of Image Rights exploitation, licensing and personality management.” This obligation is stated to include, though not limited to, the various specific activities set out in the following five paragraphs.

537. Whilst these clearly include contract negotiations on a range of matters, they do not seem to me to be limited to activities which are likely to result directly in additional income for Stoneygate. Thus, by clause 3.1.1, the exploitation of the image rights is said to include “media (including television, radio, press and internet) and publicity relations and negotiations”. That would seem to embrace public relations of a more general nature. The point is made perhaps even more clearly by the wording at the end of clause 3.1 by which Proactive was to carry out “such other tasks as the Client may from time to time request, and as the Company shall consider prudent and in the interests of the client from time to time.”
538. There are further provisions which seem to show that Proactive’s responsibilities were not solely directed to negotiating income-producing contracts for Stoneygate. Clause 3.6 required Proactive to accompany representatives of Stoneygate to “promotional events, meetings, negotiation sessions and any other occasions as the Client may from time to time reasonably request.” This would seem, at least in part, to cover the servicing of the contracts once they had been obtained. Finally, clause 3.8 required Proactive to “assist and advise the Client generally in respect of such of its business interests as it may request from time to time,” including, as necessary, referral to other experts or professional advisers.
539. So it seems to me that the services which Proactive was required to provide were not limited to procuring sponsorship contracts or other income-producing opportunities, important though those may be, but extended to public relations, business advice and the servicing of sponsorship contracts, once obtained. Furthermore, as a matter of fact, it is clear that the time and effort required to service existing sponsorship deals, to take the most obvious example, was by no means insignificant.
540. I do not overlook the fact that by clause 6.3 of the Image Rights Representation Agreement, Proactive was entitled to be reimbursed certain costs and expenses incurred in performing services beyond the ordinary scope of those specified in the contract, though it would otherwise have to bear any normal and reasonable expenses incurred in providing the contractual services. But it does not seem to me that a provision dealing with the costs of services which, ex hypothesi, fall outside the scope of the services to be provided in ordinary circumstances pursuant to the contract, has any real bearing on the nature and extent of the contractual services themselves.
541. As it seems to me, therefore, Mr Chaisty is correct in his contention that Proactive’s right to remuneration is in return for the performance of the Services as defined in the contract; and it seems to me that those Services are such as to impose positive obligations on Proactive which extend beyond finding income-producing opportunities and negotiating suitable contracts. That is a matter to which I shall return shortly.

542. Mr Chaisty's other major point was based upon the provisions of clause 8 of the Image Rights Representation Agreement. It will be recalled that this provided for certain payments to be made to Proactive by Stoneygate and, it would seem, WR himself, in the event that the Agreement was terminated by Stoneygate prior to the expiry of the eight-year term. I shall have some further brief observations about clause 8 in due course. But Mr Chaisty's argument was that, whether or not it was to be regarded as conferring a unilateral option on Stoneygate to determine the contract on the payment of the specified sums or as an attempt to quantify any loss and damage arising out of a repudiatory breach of the Agreement, it made no mention of any continuing obligation to pay commission after early termination.
543. On either view, he submitted, what was clearly intended was to allow for a commercial divorce on a "clean break" basis. That could not be achieved if there was a right to continuing commission as now asserted on behalf of Proactive. But none of the payments set out in clause 8 seem apt to provide any form of compensation for the loss of a potentially highly lucrative right to continuing commission; nor is there any provision reserving any rights of this kind. So, it is said, both the wording and the commercial structure of clause 8 appear to be based on the assumption that there would be no continuing right to commission on early termination. And if there was no such right in those circumstances, the question necessarily arises as to why the position should be different if the contract ran its course and came to an end at the expiration of its eight-year period.
544. For my part, I do not consider that the word "payable" in clause 6.2 of the Image Rights Representation Agreement can bear the weight which Mr Mill seeks to place upon it. The obvious purpose and effect of adopting this particular expression is to ensure that Proactive's right to commission crystallises at the time when any sum due from a third party under any relevant contract or arrangement falls due for payment rather than when it is actually paid. Furthermore, I cannot accept Mr Mill's submission that, somehow or other, the wording of clause 6.2 means that Proactive was entitled to payment as soon as any third party sponsorship contract was entered into, with the result that it would have been entitled to the entirety of its commission as at that date, no matter how far in the future any relevant payments might actually become due. The practice of the parties was to the contrary; and I consider that this practice reflected the terms of the contract rather than being a matter of concession or grace on the part of Proactive.
545. Nor do I consider that the expression "all sums payable", taken as a whole, extends or alters what seems to me to be the obvious meaning of the word "payable" itself. The word "all" in this context is largely stylistic in nature. It could as well have been replaced by the word "any" or even by the definite article. In a professionally drawn contract, the choice of the word "all" in this context seems to me to be a highly indirect and uncertain way of providing for post-termination commission, if that was what was intended. In those circumstances, one might have expected some specific wording to that effect, such as "whether before or after the termination of this Agreement", to be inserted after the word "payable". But, of course, no such words appear in clause 6.
546. If I am correct in this assessment of the phrase primarily relied upon by Mr Mill, it leaves him little, if any, room for further argument based upon the express wording of

the Image Rights Representation Agreement. But, of course, he relied upon what he described as the “commercial absurdity” of the contrary argument. In my judgment, however, whichever construction is adopted, there are likely to be unsatisfactory commercial consequences for one party or the other. In those circumstances, I do not consider that the commercial implications of one proposed interpretation, as contrasted to the other, can provide a safe guide to the interpretation of these provisions.

547. Underlying Mr Mill’s argument, as it seems to me, was the proposition that the Image Rights Representation Agreement was to be treated, in effect, in much the same way as other forms of agency, such as a contract with an estate agent for the sale of a property or with a commercial representative seeking orders for a particular product. Up to a point, the analogy is a sound one, at least if the agent is to be remunerated by way of commission. In such cases, it is always necessary to determine the event which gives rise to the right to commission. Once that event has occurred the agent’s right to remuneration has accrued and cannot be taken away by the subsequent termination of the agency agreement. But if it does not occur, no right to commission arises; and the court will not normally imply any other right to remuneration.
548. Accordingly, the resolution of disputes in such cases commonly requires the court to determine the event or circumstances which give rise to the right to commission and to decide whether those circumstances have, in fact, arisen. In estate agency cases, that will normally be a successful sale of the property as a result of an introduction by the estate agent; and in the case of a commercial sales representative, it will often be the introduction of a customer who goes on to place an order for the goods in question.
549. But it seems to me that the Image Rights Representation Agreement which I am called upon to construe is of a somewhat different nature from those rather simpler and more straightforward examples which I have mentioned in the previous paragraph. For a start, it imposes positive obligations upon Proactive to perform the various services set out in clause 3. In addition, it does not expressly limit Proactive’s right of commission to those contracts or arrangements with third parties which it was responsible for negotiating and procuring. That might not be particularly surprising, given the fact that the contract provided for an exclusive agency and required Stonegate, in effect, to direct all relevant business opportunities to Proactive. But, of course, as I have already recorded, Mr Mill conceded that Proactive would have to have been the effective cause of the contracts or arrangements which gave rise to the payments in respect of which commission became payable.
550. Mr Mill’s concession was not challenged by Mr Chaisty; and I am prepared to accept that, as a matter of implication, Proactive would have to have been the effective cause of any contract or arrangements in respect of which it claimed commission. As it happens, however, it seems to me that the Image Rights Representation Agreement would be perfectly workable in the particular circumstances of this case, even without the implication of some such term or proviso. I can see no reason in principle why an agent such as Proactive could not agree to provide a range of services for its client in return for a percentage of the income receivable by the client during the subsistence of the agreement. After all, it was suggested on a number of occasions, both in evidence and in argument, that a new agent, taking over from Proactive, would or might itself

wish to take a percentage of the income generated by contracts procured by Proactive, whatever rights or claims Proactive itself might have had or asserted.

551. That seems to me to be a suitable point at which to return to Mr Chaisty's submissions. For my part, I think there is force in his argument based upon clause 8. That would have been the natural place to make specific provision as to what would happen to future commission in the event that the clause was invoked or applied. But it makes no such provision, lending support to the proposition that commission ceased to be payable when the Agreement came to an end.
552. I also consider that there is force in Mr Chaisty's submission based on the words of clause 6.2 which show that Proactive's remuneration was payable in consideration for the performance of the Services set out in clause 3. If one looks to the Agreement in order to determine what Proactive must do in order to earn its remuneration, the answer must obviously be that it must provide the Services as defined. It is the provision of the Services, in my judgment, which gives rise to the right to remuneration, even though that remuneration is measured by reference to the income receivable by Stoneygate. The linkage of remuneration to income is unsurprising. It represents the most obvious measure of the success of the relationship over the longer term; and given the fact that it was an exclusive agency, it was virtually inevitable that the individual contracts which generated the income would have been procured through the efforts of Proactive. But, despite Mr Mill's concession to the effect that Proactive must have been the effective cause of the income-generating opportunity, it does not follow that all that Proactive had to do to earn its commission was to procure the contracts or arrangements in question.
553. In my judgment, therefore, whatever may be the case under other contractual arrangements, Proactive's right to commission arose out of the provision of the services over the whole of the contract period and not merely as a result of the procurement of the contracts or arrangements upon which commission was calculated. In those circumstances, I have little difficulty in reaching the further conclusion that its right to commission would terminate at the expiration of the contract period and that its entitlement would be limited to sums which had become payable during that period. In effect, Proactive was entitled to a percentage of Stoneygate's income during the subsistence of the Agreement but no further.
554. In reaching this conclusion, I bear in mind that this was not some informal contract between well-informed businessmen but a detailed Agreement which was professionally drafted by solicitors instructed on behalf of Proactive and accepted by commercially unsophisticated parties without any independent legal advice. If a right to post-termination commission was to arise under the Agreement, one would have expected express provision to that effect to have been included within it. In a case such as this, Lord Hoffman's observations in **Attorney General of Belize -v- Belize Telecom Ltd** [2009] 1 WLR 1988 at paragraph 17 seem to be very much in point: "If the parties had intended something to happen, the instrument would have said so".
555. I am conscious that a similar analysis was considered and rejected by the Court of Appeal in one of the cases cited by Mr Mill for the purpose of illustrating his proposition that the termination of the Agreement could not take away any rights which had already accrued. I refer to **Explora Group Plc -v- Hesco Bastion**

**Limited** [2005] EWCA Civ 646, and in particular to paragraphs 64, 65 and 68 of the judgment of Rix LJ. But it seems to me that the decision in that case turned on its very particular facts under which commission was claimed in respect of orders generated as a result of a contract effectively procured by the agent. Though various points of law arose, some of which I will refer to hereafter, it does not seem to me that the Court of Appeal was laying down any general proposition of law which is inimical to the conclusion which I have reached in relation to the terms of this particular contract. If it were necessary to do so, I would emphasise in just the same way, that my conclusions as to the interpretation of this particular Agreement would not necessarily have any bearing upon the different terms of different contracts entered into in different circumstances.

#### Breach of Contract

556. Even though the breakdown in relations in or about October 2008 meant that Proactive was no longer in a position to provide any services under the Image Rights Representation Agreement, it did not treat the withdrawal of co-operation by Stoneygate and WR as a repudiatory breach of contract; and it did not take any steps to treat the Agreement as discharged by reason of any such breach. It was only in December 2009, after receipt of the termination letter dated 18<sup>th</sup> December 2009 that it decided to treat the contract as discharged and accepted what it regarded as a repudiatory breach by letter dated 24<sup>th</sup> December 2009. In fact, of course, it now appears that Stoneygate and WR had appointed Triple S as its agent some months earlier than this exchange of letters. Since the Image Rights Representation Agreement was an exclusive agency, supported by the various duties on the part of Stoneygate set out at clause 4 of the Agreement, that would seem to have been a serious breach of contract, though it appears that Proactive was not fully aware of the appointment at that time.
557. Subject to my findings as to the validity and enforceability of the Image Rights Representation Agreement, it seems to me to be quite plain that the termination letter was a repudiatory breach of contract, unless perhaps it could be interpreted as the exercise of a unilateral option of early termination under the provisions of clause 8. But, of course, it has always been Stoneygate's own case that clause 8 did not confer any such unilateral right of termination but was an ineffectual liquidated damages clause which was to be treated as a penalty. On the other hand, at least until a very late stage, Proactive was advancing a contrary case in relation to clause 8 and, indeed, was seeking to recover, as an alternative to other heads of relief, the sums payable in accordance with the provisions of the clause.
558. Stoneygate and WR nonetheless sought to rely upon clause 8 as a defence to the alleged breach of contract. This was put in a variety of ways in various separate passages of the Re-Re-Amended Defence. In essence, it appears to be contended that, if, contrary to Stoneygate's primary case, clause 8 conferred a right of early termination and was not a penalty, the letter of 18<sup>th</sup> December must be treated as an exercise of that right, even though there was no express reference to any particular clause. But that does not accord with what was, in effect, the agreed interpretation of clause 8 or with my own analysis of it.

559. Alternatively, it appears to be contended that, even if clause 8 is to be construed as a penalty clause, the financial provisions which render it penal can be struck out leaving an unfettered right on Stonegate's part to bring the Image Rights Representation Agreement to an end, perhaps on payment of any sums which would not, in themselves, render the clause penal. I refer to paragraph 50C(a) of the Re-Re-Amended Defence. Mr Chaisty cited no authority for this novel doctrine. But it seems to me that it is logically incompatible with a finding that the clause provided for the consequences of breach, albeit by way of a penalty, rather than a genuine pre-estimate of damages.
560. But that was not the end of the defences raised in the pleadings. Recourse was had to the doctrine of estoppel, whether by convention or representation. In essence, the argument was to the effect that, at the time when the Image Rights Representation Agreement was entered into, all parties assumed that it could be terminated at any time under clause 8, subject to payment of the relevant sums. Alternatively, the alleged estoppel is said to arise out of various allegations made by Proactive in its pleadings to the effect that Stonegate was entitled to terminate at any time under clause 8, subject, of course, to payment of the requisite sums. The relevant allegations are set out at paragraph 50C(b)-(g) of the Re-Amended Defence.
561. Mr Chaisty touched upon these allegations of estoppel very briefly at paragraph 74 of his written opening. But it was not developed further in his closing submissions. It is true that two or three cases on the topic were included within the Defendants' bundle of authorities. But I was not taken to them, nor was I treated to any detailed submissions on the law of estoppel. One might be forgiven for thinking that Mr Chaisty did not have a great deal of confidence in any of these arguments.
562. Assuming, nonetheless, that the estoppel arguments were not abandoned, I am not persuaded that there is any merit in them. There is no satisfactory evidence of any initial mutual assumption shared by the parties to the Image Rights Representation Agreement to the effect that clause 8 conferred a unilateral right of determination on Stonegate and WR, whatever Mr Rodford may have believed at the time when the original Agreement of July 2002 was being drafted and whatever assumptions may subsequently have been made by Mr Wallwork and Mr Page.
563. As for the alleged representation or convention arising out of Proactive's pleaded case, I find it difficult to conceive of circumstances in which a pleading may give rise to an estoppel, at least where the other party continues to advance an entirely contrary case. Furthermore, there was no evidence - or if there was I was not taken to it - as to the circumstances which led to the termination letter of 18<sup>th</sup> December 2009. But it is quite clear that it referred to neither clause 8 of the Image Rights Representation Agreement nor to Proactive's pleaded case.
564. If, therefore, clause 8 did not provide for any unilateral right of early termination then, in the absence of any estoppel, the termination letter was clearly sufficiently serious to amount to a renunciation or a repudiatory breach of the Image Rights Representation Agreement which Proactive was entitled to accept, and did accept, by its letter of 24<sup>th</sup> December 2009.

565. In any event, it seems to me that the earlier conduct of Proactive and WR would already have constituted a repudiatory breach of contract. The Image Rights Representation Agreement clearly required the co-operation of Stoneygate and WR if Proactive was to be able to provide the services required of it under clause 3. By withdrawing co-operation and refusing to make any further payment to Proactive, it seems to me that Stoneygate and WR had made it impossible for Proactive to perform its own side of the bargain, thus entitling it, if it had so chosen, to bring the contract formally to an end by treating their conduct as a repudiatory breach and accepting it.
566. Since this course of conduct continued right up until the letter written on Proactive's behalf on 24<sup>th</sup> December 2009, it seems to me that it would have been open to Proactive to treat this continuing course of conduct as grounds for treating the contract as repudiated. Likewise, as I have already noted, the appointment of Triple S as agent in place of Proactive would also seem to have been a clear and fundamental breach of the exclusivity provisions of the Image Rights Representation Agreement. In its Re-Re-Amended Particulars of Claim, Proactive relies upon this as a justification of its decision to treat the contract as discharged, it being alleged that it did not have sufficient knowledge of this development until after 24<sup>th</sup> December 2009.
567. In the circumstances, assuming the Image Rights Representation Agreement to be valid and enforceable, I am satisfied that Stoneygate and WR were in breach of their obligations under the Agreement, that their breaches of the agreement were sufficiently serious to entitle Proactive to treat the Agreement as discharged and that it did so by its letter of 24<sup>th</sup> December 2009. The fact that Stoneygate and WR would seem to have been in serious breach of their obligations from the time when the relationship effectively broke down in or about October 2008, though not pleaded as the basis of any claim for damages, may nonetheless have some bearing on the remedies sought by, or available to, Proactive in these proceedings.

#### Clause 8

568. The provisions of clause 8 have given rise to a number of issues between the parties during the course of the proceedings, but most of them were resolved prior to trial by what can conveniently be called a concession on the part of Proactive. Accordingly, I do not think that I need to say a great deal about the issues in question. Nor need I set out once again the provisions of clause 8. But, as I have already observed, it is a very odd clause indeed. It is very difficult to see the commercial justification for the payments required by clauses 8.1.2 and 8.1.3; and the amounts payable under provisions of clause 8.1.3 are, in any event, extremely difficult to calculate.
569. Nonetheless, Proactive appears initially to have contended that it provided a unilateral right of early termination on Stoneygate and WR on payment of the requisite sums; and that was, of course, a factor upon which Mr Stein relied in his assessment of the impact of the eight-year term. On that basis, Proactive mounted an alternative claim for the recovery of the monies payable under clause 8, presumably on the footing that the termination letter of 18<sup>th</sup> December 2009 constituted an exercise of the rights conferred by the clause. Its position was very clearly set out at paragraph 11(3) of its original Reply which asserted that Stoneygate was entitled to terminate the Image Rights Representation Agreement at any time upon payment of the sums set out in clauses 8.1.1 to 8.1.3. However, not long before trial, a Re-Amended Reply was

served in which this allegation was deleted; and, at or about the same time, Re-Re-Amended Particulars of Claim were also served in which it was contended, as Proactive's primary case on the point, that clause 8.1 was unenforceable as a penalty.

570. That formulation of Proactive's primary case on the point was entirely in accordance with the case which had throughout been advanced on behalf of Stoneygate and WR. Indeed, in its Re-Re-Amended Particulars of Claim, Proactive specifically accepted Stoneygate's case on the point. At the trial, moreover, Mr Chaisty continued to adhere to the proposition that clause 8 did not confer any unilateral right of termination on Stoneygate. Indeed, he relied heavily upon this proposition in connection with his attack on the Image Rights Representation Agreement under the doctrine of restraint of trade. Likewise, Mr Mill accepted that clause 8 did not confer a right of termination but sought to define and regulate the consequences of any breach of contract on Stoneygate's part, albeit in a way which contravened the law relating to penalties.
571. In those circumstances, since the procedure in these Courts is essentially adversarial, it might be assumed that there was no issue which required to be resolved by the court. But that may well to be an over-simplification of the position. Questions of law are ultimately to be determined by the court and not by agreement or concession. Issues of construction are properly to be regarded as involving questions of law. Thus, in **Bahamas International Trust Co Limited -v- Threadgold** [1974] 1 WLR 1514, the court had to construe a written document. A concession was made during the course of the hearing before the Court of Appeal which was accepted by the Court. However, when the case went to the House of Lords, Lord Diplock made the following observations at page 1525:
- “In a case which turns, as this one does, upon the construction to be given to a written document, a court called upon to construe the document in the absence of any claim for rectification cannot be bound by any concession made by any of the parties as to what its language means. This is so even in the court before which the concession is made; a fortiori in the court to which an appeal from the judgment of that court is brought. The reason is that the construction of a written document is a question of law. It is for the judge to decide for himself what the law is, not to accept it from any or even all the parties to the suit; having so decided it is his duty to apply it to the facts of the cases. He would be acting contrary to his judicial oath if he were to determine the case by applying what the parties conceived to be the law, if in his own opinion it was erroneous.”
572. For obvious reasons, I did not hear argument on the point. But I do not believe that the construction placed upon clause 8 by the parties can be regarded as erroneous. On the contrary, it seems to me that the better view is that the parties' approach is correct. I can deal with it briefly. Clause 7 deals expressly and specifically with duration and termination. Indeed that is the heading under which the relevant provisions appear. Clause 7.1 provides that, subject to clause 7.2, the Agreement should continue for eight years “unless terminated earlier in accordance with the provisions of this clause 7”. Those words in themselves seem fairly unequivocal. The expression “this clause 7”, though rather clumsy, is commonly used to demonstrate without qualification that the relevant provisions are to be found in the clause referred to and nowhere else. Clause 7.2 then provides for limited mutual rights of termination in the event of a

material breach of the Agreement which remains unremedied or in the case of bankruptcy or insolvency. On the face of it, therefore, there would appear to be no room for any other right of termination.

573. Clause 8 does not purport to provide any such right. It deals with the consequences of termination. Once again, those words are chosen as the heading for the provisions which follow. The introductory words of clause 8.1 refer to termination by the Client prior to the expiry of the term set out in clause 7.1 otherwise than in accordance with clause 7.2 and go on to provide for the various payments set out in the following sub-clauses. Taken in isolation, that might be regarded as somewhat equivocal. But, of course, one must have regard and give due weight to the seemingly unequivocal provisions of clause 7.
574. But in any event, the wording of the sub-clauses themselves, and in particular sub-clause 8.1.2 provides further support for the proposition that clause 8 is seeking to crystallise the consequences of any breach of contract, rather than to add a further right of termination in addition to those set out at clause 7. Clause 8.1.2 provides that, in the event of early termination, Stonegate or WR is required to pay to Proactive, in addition to the other sums payable under the clause, a sum by way of “liquidated damages”. It must be recalled once again that both this Agreement and the earlier Agreement upon which it was based were drafted by solicitors. In a professionally drawn instrument of this kind, the expression “liquidated damages” has a clear and obvious meaning. It refers to compensation for breach of contract in an ascertained and agreed amount. On the face of it, therefore, the phrase is wholly inapt to describe a sum payable as the price of an option to terminate a contract, rather than a provision intended to quantify the damages payable in the event of breach.
575. Accordingly, I consider that the common approach adopted by the parties to the provisions of clause 8 reflects what appears to me to be the better interpretation of those provisions. If, therefore, the clause is to be regarded as an attempt to stipulate and quantify the damages payable in the event of a breach arising out of the early termination of the Agreement otherwise than in accordance with clause 7, it seems to me to be difficult to argue that it represents a proper pre-estimate of the loss which Proactive might suffer as a result of such a breach. It would follow, therefore, that it must be regarded as penal in nature; and I heard no argument to the contrary.
576. I accept, therefore, that clause 8 does not confer any additional unilateral right of termination, that any purported termination otherwise than in accordance with clause 7 would constitute a breach of contract and that the damages for any such breach are at large, in the sense that they are not pre-determined by the provisions of clause 8 itself. That, of course, is subject to the concession made by Mr Mill on behalf of Proactive to the effect that the amounts set out in clause 8 are to be treated as setting a “cap” on the amount of any damages recoverable by Proactive.

#### Contractual Remedies

577. On the assumption that the contract is otherwise found to be valid and enforceable, it seems to me to be quite clear that Proactive is entitled, as it asserts, to damages as a result of Stonegate’s repudiatory breach of contract. Any such claim would, of course, cover the period from 24<sup>th</sup> December 2009 until the date in early February

2011 when the eight-year term of the Image Rights Representation Agreement would have come to an end. The essence of the claim for damages is that it represents the loss of the opportunity to earn commission during the remainder of the term.

578. Mr Mill acknowledged, in the course of his closing oral submissions, that this must be treated as the loss of a chance. But in the light of my finding that there was no contractual right to post-termination commission, the cut-off point for assessing the value of the lost opportunity must be the end of the contract period itself. Furthermore, since it is a claim for damages, account must be taken of the fact that Proactive would not have to incur any further cost or expense in providing the services in return for which the commission would have become payable. The claim is for the net loss not the gross loss of commission. It is, of course, common ground that the Court is not in a position to assess those damages at this stage and that the quantum will, if necessary, have to be determined at a later hearing. I need, therefore, say no more about it.
579. But, in relation to the period both before and after 24<sup>th</sup> December 2009, Proactive seeks to recover the full amount of the commission which is said to have fallen due to it in respect of sums paid or payable to Stoneygate by third parties under sponsorship contracts and the like. It is, in effect, a claim in debt.
580. Now, I have little doubt that such a claim is sustainable in principle insofar as the sums in question became due for payment to Stoneygate prior to the breakdown in relations between the parties at or about the end of October 2008 and at a time when Proactive was still providing services in accordance with its obligations under the Image Rights Representation Agreement. On the face of it, that would apply to each of the individual invoices set out under paragraph 7 of the Re-Re-Amended Particulars of Claim, though one of these is a claim for accountancy services, rather than commission, and various individual points of defence are raised in relation to three of the other items. In each case, the right to payment accrued during the subsistence of the Agreement and the subsequent breakdown in relations and eventual discharge of the contract cannot affect Proactive's entitlement.
581. But, at paragraph 7A of the Re-Re-Amended Particulars of Claim, there are set out a further eight items claiming commission said to have fallen due on various subsequent dates. Indeed, all of them are said to arise out of invoices raised by Proactive after the commencement of the present proceedings on 2<sup>nd</sup> December 2008. It should be said that no point was taken as to whether any such claim could be made within the framework of the present action.
582. Now, I accept that the Image Rights Representation Agreement was not discharged until 24<sup>th</sup> December 2009 or thereabouts, when Proactive accepted Stoneygate's repudiatory breach of contract. Accordingly, the obligations of the parties continued to be governed by the terms of the Agreement until that date, notwithstanding the breakdown in relations between the parties. In accordance with orthodox contractual principle, therefore, it might be thought that Stoneygate would remain liable to pay any commission falling due prior to the date of discharge and that Proactive's right to recover any such commission would not be affected by the discharge of the contract. That, of course, is the basis upon which Proactive mounts its claim in respect of this set of invoices.

583. But such an approach creates an obvious anomaly. All of these invoices became due for payment at a time when Proactive, through no fault of its own, was no longer in a position to provide the services which constituted the consideration for the remuneration in question. Those services could not be provided without the co-operation of Stoneygate and WR which was clearly withdrawn once the relationship had broken down. But in consequence, of course, Proactive was relieved of the financial burden of providing the services in question. In those circumstances, it might be asked why Proactive should be entitled to the full amount of its remuneration, without giving any credit for any savings, simply because it did not elect to accept what would seem to have been a clear repudiation or renunciation of the Image Rights Representation Agreement by Proactive and Mr Rooney.
584. One possible resolution of this issue might be to treat the performance by Proactive of its contractual obligations (which, ex hypothesi remained in force) as a condition of its right to remuneration. But no such point was advanced on behalf of Stoneygate and, for my part, I would be unwilling to construe the Agreement in this way. In fact, however, there is authority which seems to me to have a direct bearing upon the issue. This is the decision of the Court of Appeal in **Roberts -v- Elwells Engineers Limited** [1972] 2 QB 586. I drew the attention of Counsel to this case at an early stage of the trial and invited submissions. In fact, only Mr Mill dealt with it; and, with respect, did so in a fairly brief and cursory manner, suggesting that it was a case which turned on its own facts.
585. It is true that **Roberts -v- Elwells Engineers** does not appear to have been widely cited in subsequent decisions. But, as it happens, it was considered and commented upon by the Court of Appeal in one of the cases cited for other purposes by Mr Mill, namely **Explora Group Plc -v- Hesco Bastion Limited** [2005] EWCA Civ 646, to which I have already referred. In that case, the Court of Appeal did not treat **Roberts -v- Elwells Engineers Limited** as limited to its own facts, though certain aspects of the decision were explained. The case is, of course, binding upon me and I must apply any of legal principles which form part of the essential reasoning of the Court.
586. **Roberts** was a case in which the Plaintiff was a commission agent representing the Defendants who made engineering components. It was orally agreed that he would be paid commission at the rate of 2½% on orders from customers introduced by him. The agency was then terminated by the Defendants who offered to pay three months' commission. He refused and sued for an account of commission due to him as agent and damages for breach of contract. At the trial, it appears to have been agreed that three months' notice was appropriate for the purposes of terminating the agency; and the Defendants contended that the Plaintiff was entitled to nothing after the expiration of the three months' notice. He, however,, contended that he was entitled to commission on all orders already received and to be received in the future from customers who had been introduced or "revived" by him. The judge made a declaration that he was entitled to such commission and ordered an account of the amount due since termination of the agency. An appeal, however, was allowed by a Court consisting of Lord Denning MR, Edmund Davies LJ (as he then was) and Lawton LJ.

587. At the outset of his reserved judgment, Lord Denning MR held that the course of dealing between the parties showed that, in order to earn his commission, the Plaintiff was obliged to visit customers and to see that they were satisfied. He also held on the same basis that commission was payable both on new orders obtained by him and on repeats.
588. In those circumstances, as appears to have been conceded, the Master of the Rolls held that the Plaintiff was entitled to commission on orders and repeat orders attributable to an original introduction effected by him, provided that the introduction was the efficient cause. But he did not accept that the appropriate relief was a declaration and an account. He considered that, at least in most cases of this kind, a declaration was inappropriate. In the particular circumstances of the case, he found two specific reasons for so holding. One was because the Plaintiff was under a duty to visit and entertain customers at his own expense, so that once the agency had been terminated, the Defendants would have to incur the costs for themselves. The other was that the Plaintiff was entitled to continue to canvass the same customers for his own benefit, so that the Defendants might have to retain another agent to carry out similar work on their behalf. His conclusion, as set out in pages 595-6 of his judgment was as follows:
- “A commission agent, when his agency is terminated, is not in general entitled to a declaration or an account for the future. He is only entitled to compensation to be assessed. Mathew J. called it, 4 Com. Cas. 213, 214, 215, an award of damages. In cases such as the present (when the defendants repudiated any obligation to pay) damages is undoubtedly the right description. But it may not always be the right description. Quite often there may be no repudiation but only a difference as to the amount of commission. In such cases it would not be damages as such, but an award by way of restitution. Whatever it is called, however, the right remedy is compensation in a money sum, and not a declaration”.
589. He then went on to deal briefly with the way in which compensation was to be assessed. Allowance would have to be made for the fact that the agent would no longer have to incur cost and expense in visiting and entertaining and, conversely, for the likelihood that the principal might have to pay another representative. Similarly, allowances would have to be made for the obvious risks and vicissitudes of the trade.
590. Edmund Davies LJ agreed with the judgment of Lord Denning MR. Lawton LJ, however, delivered a separate judgment. He held that the Defendants had repudiated the agreement by terminating without notice, though there may be some question as to whether this was, in fact, the case. But they were also in breach, in his judgment, by their failure and refusal to pay any commission whatever. In those circumstances, he considered that the Plaintiff was entitled to damages rather than an account and he agreed with Lord Denning MR as to the factors which would have to be taken into account for the purposes of assessment.
591. I have already referred to the decision of the Court of Appeal in **Explora Group Plc -v- Hesco Bastion Limited** [2005] EWCA Civ. 646. In the event the leading judgment was given by Rix LJ. Both parties relied for various purposes on **Roberts -v- Elwells Engineers Limited** and Rix LJ analysed the case at paragraphs 59 to 67 of

his judgment. He extracted a number of points which he considered emerged from the earlier decision.

592. Firstly, at paragraph 64, he pointed out that it illustrated what he described as a “critical question” as to whether the commission was earned on introduction or on orders. If it was the former, it did not matter that the orders, let alone their execution and payment for them might not arise until after the termination of the agency. Secondly, at paragraph 65, he dealt with the marketing responsibilities of the agent. If the commission was earned on introduction, the mere fact that it was impossible to carry out marketing activities after the termination of the agency did not mean that commission had not already been earned. He rejected a submission on behalf of the Defendant that it was a condition of the right to commission that the agent should carry out its marketing responsibilities. Thirdly, at paragraph 66, he dealt with a further, related argument to the effect that, if the agent itself had repudiated its obligations shortly after the initial introduction, it would be “unimaginable” to think that it could go on taking commission over a number of years in respect of orders which its marketing had done nothing to secure. In this context, he pointed out that **Roberts -v- Elwells Engineers Limited** demonstrated, amongst other things, that, on any assessment, it might be found that orders during the relevant period were not effectively caused by the initial introduction and that various allowances would have to be made to reflect savings made by the agent or additional costs incurred by the principal. Fourthly, at paragraph 67, Rix LJ observed that the earlier decision showed that, at least in some circumstances it would be legitimate to have regard to the course of dealing between the parties to supplement the express terms of the agency agreement. That may have some bearing on the relationship between Proactive and Speed; but I do not think it could be readily applied to the relationship between Proactive and Stonegate which, on the face of it, is governed by the provision of a detailed written contract.
593. But Rix LJ added some further observations about the nature of the agent’s remedy at paragraph 111 of his judgment. The issue to which these were directed was whether the Plaintiff was entitled to claim continuing commission in debt or whether its remedy lay in damages or restitution. What he said was this:
- “The issue was debated by the parties in terms of *Roberts*, as to which see above. In that context, I would have thought that the claim was not in debt, but essentially in restitution. It was regarded by Lord Denning as there a claim in damages solely because the principal had refused to pay, albeit in such circumstances he said that “damages is undoubtedly the right description” (at 596A). The same could I suppose be said to apply here. The case is not discussed in *Goff & Jones, the Law of Restitution, 6<sup>th</sup> ed, 2002*”.
594. Rix LJ continued by making various observations as to the matters to be taken into account in the course of any such assessment, concluding with these words: “I do not think that the principles in *Roberts* had been properly worked out.” He also addressed the question as to whether the Claimant was entitled to commission notwithstanding its repudiatory breach of contract which was subsequently accepted by the Defendant. That was the point for which the case was cited to me by Mr Mill. He held that this did not divest the agent of his rights, notwithstanding that it was the party which was itself been in breach.

595. Jonathan Parker LJ agreed with the reasoning and conclusions of Rix LJ, even though he added some observations of his own in relation to one point which is immaterial for present purposes. Longmore LJ also agreed, save in relation to the particular question as to the agents' entitlement to commission on orders received after the termination of the agreement. He considered that the agent could not have an accrued right to commission on an order which had not then been placed, unless a term could be implied to that effect. In the circumstances, he held that no such term should be implied. It should, however, perhaps be noted that, at paragraph 126, he expressed the following view:
- “In a contract with a relatively short notice period entitling either party to bring the contract to an end, it may well be possible to construe the agreement to pay commission as consideration mainly for the introduction of a client and, for that reason, to imply a term that repeat orders from a client so introduced should continue to attract commission after termination. That is, I consider, the rationale of *Roberts -v- Elwell* in which either side was entitled to terminate the contract by giving 3 months' notice to the other and this court held that commission was payable on repeat orders for the same goods after such a notice had been given. There was of course no express term to that effect but, in the circumstances, such an implication was necessary to be fair to the agent.”
596. However, at paragraph 86, Rix LJ briefly considered this approach and expressed his disagreement. He did not believe that counsel for the Claimant had, in fact, relied on an implied term and did not consider that it was obvious that the decision in **Roberts -v- Elwells Engineers** was to be explained on that basis. He emphasised that, in his view, the condition which gave rise to the right to commission was the introduction. If it had depended only on orders, he accepted that an implied term would be necessary if the agent were to be entitled to commission after termination. Jonathan Parker LJ specifically stated that, on this point, he agreed with Rix LJ, rather than Longmore LJ. I note, however, that in the passage cited, Longmore LJ distinguished between the sort of approach which might be appropriate in the case of a contract with short notice period and that which might be appropriate in the case of a long-term agreement.
597. In my judgment, therefore, Proactive's claim for commission between the breakdown in the relationship between the parties and its acceptance of Stoneygate's repudiatory breach of contract is, in principle, to be treated as a claim for damages or restitutionary compensation, and not a claim in debt. In the present case, as in **Roberts -v- Elwells Engineers Limited**, Stoneygate failed and refused to pay any subsequent commission and, therefore, is to be regarded as having been in breach of contract. That appears to have been one reason why the claim in **Roberts -v- Elwells Engineers Limited** was treated as a claim for damages.
598. In any event, it seems to me to be fairly obvious that, by withdrawing co-operation in October 2008, Stoneygate and WR had effectively renounced their obligations under the Image Rights Representation Agreement, thereby giving rise to a right to damages on the part of Proactive, even if it had not elected, at that time, to treat the contract as discharged. No claim of this type is, however, expressly pleaded. But, as previously noted, at paragraphs 6 and 9 of the Re-Re-Amended Particulars of Claim, it is alleged that Proactive had suffered loss and damage by reason of the refusal by Stoneygate to

pay the commission in question and that Proactive is therefore entitled to be compensated for such loss or damage.

599. But I do not think that anything of substance turns on a pleading point of this kind. The claim remains one for restitution or damages rather than for a series of liquidated sums. In principle, therefore, there would have to be an assessment of the amount recoverable for the period between the end of October 2008 and 24<sup>th</sup> December 2009, just as in the case of the claim for damages in respect of the period subsequent to 24<sup>th</sup> December 2009. On such an assessment, similar factors might have to be taken into account. But this was not a point which was ever asserted on behalf of Stoneygate (or, for that matter, Speed) by way of partial defence. In the circumstances, it seems to me that I should hear further submissions from the parties as to whether Proactive would be entitled to the full amount claimed, provided the other specific defences are resolved in its favour, or whether I should direct an assessment of compensation or damages, coupled, it may be, with an order for an interim payment.

## PART VI

### MISTAKE

600. I must now address the substantive defences advanced on behalf of Stoneygate. The first of these is mistake. A great deal of time, effort and learning was spent on this issue; and I have already set out in some detail the relevant findings of fact. But, in my judgment, the defence is doomed to failure, both in fact and in law, and I do not, therefore, propose to deal with it at any great length.
601. Various alleged mistakes were relied upon by Stoneygate as the basis of the defence. These were: firstly, that all parties to the original Agreement of 17<sup>th</sup> July 2002 mistakenly intended and believed that it would and did relate solely to off-field activities; secondly, that they likewise intended and believed that it would and did incorporate a valid and effective provision for early termination; thirdly, that the parties to the Image Rights Representation Agreement dated 16<sup>th</sup> January 2003 mistakenly believed that the earlier Agreement was valid and enforceable; and, fourthly, that they likewise believed that it embodied a provision for early termination in the form of clause 8.
602. But, in each case, I am wholly unpersuaded that the necessary factual basis for the plea of mistake has been made out. I start, of course, with the Agreement of July 2002. Since that contract is not, in itself, in issue, it is relevant only insofar as any mistaken belief as to its terms, validity and enforceability might have vitiated the subsequent Image Rights Representation Agreement. So there are two aspects of Stoneygate's case in relation to the earlier Agreement: firstly, whether there was indeed any mistake of the kind alleged; and, secondly, whether any such mistaken belief still affected the minds of the parties at the time when the later agreement was entered into.
603. For reasons which I have set out in very substantial detail, I have reached the conclusion that Mr Rodford must have known that the Agreement of July 2002 embraced both on-field and off-field activities. His knowledge must, in my judgment, be imputed to Proactive itself. I have also found that, whether or not he was aware of

it from the outset, Mr Stretford must have become aware of the true position well before the execution of the 2003 Image Rights Representation Agreement and, at the latest, when he received Mr Harrington's e-mail of 17<sup>th</sup> January 2003 and discussed various matters with him later on the same day. As for WR and his parents, I very much doubt if they gave any real thought to the precise terms of the 2002 Agreement and I am unpersuaded that they believed that it was limited to off-field representation. I can see no satisfactory evidential basis, therefore, for concluding that there was any form of common or mutual mistake as to the scope of the 2002 Agreement. In any event, whatever WR and his parents may have thought or assumed, by signing the Agreement, they agreed to its terms, which plainly and unequivocally referred to both on-field and off-field activities. In this context, I need refer only to the well-known case of **L'Estrange -v- F. Graucob Ltd** [1934] 2 K.B. 394.

604. It is true that Proactive itself has asserted some such mutual mistake in both the Proform proceedings and in the separate action commenced by Formation Group and Proactive against Mr Stretford in the Chancery Division of the High Court. That, of course, is consistent with the stance adopted by both Mr Rodford and Mr Stretford in the FA disciplinary proceedings. But none of this persuades me for one moment that, as a matter of fact, there was such a mutual mistake. A somewhat different point was, however, taken by Mr Chaisty, who submitted that these pleaded allegations may give rise to some form of estoppel. That is an entirely separate question to which I will briefly return in due course.
605. At this point, I must move on to the alleged mistake in relation to clause 8 of the 2002 Agreement. Once again, I do not believe that WR or his parents are likely to have given any real thought to the issue of early termination, still less to the precise legal implications of clause 8. As for Proactive, I do not gain any assistance from the subsequent assumptions or rationalisations made by Mr Wallwork and Mr Page as to the meaning and effect of the clause.
606. But what of the absent witness, Mr Rodford? Mr Chaisty invited me to draw certain inferences from some of the documents on the DLA file. The references are set out at paragraph 30 of his opening written submissions. The documents in question appear to show that, in the course of drafting the 2002 Agreement, DLA were particularly concerned about the length of the term and the consequent risk that the Agreement might be held to be in restraint of trade. But it is by no means apparent that this was the reason for the introduction of clause 8. On the contrary, such meagre indications as can be gleaned from the documents in question suggest that the two were not directly connected.
607. The very first reference to what became clause 8 appears in the form of some manuscript amendments on what seems to be the first draft of a letter of advice to Mr Rodford. This included advice as to the need for care to ensure that the commercial terms were not so one-sided in favour of Proactive as to be in restraint of trade. The writer went on to say that he considered this to be particularly important in respect of the proposed term of the contract, namely eight years, and the proposed liquidated damages clause for early termination. The reference to the "proposed liquidated damages clause" has been inserted in manuscript and it appears in the final version of the letter of advice dated 13<sup>th</sup> June 2002. It is very far from obvious that the writer

was referring to the relevant clause as a way of mitigating any one-sidedness in the proposed contractual terms.

608. Furthermore, a further manuscript note on the same page states baldly: “liquidated damages - penalty clause.” That seems to show that the writer assumed that clause 8 was, indeed, a liquidated damages clause, rather than one intended to provide WR with a right of early termination, and that he was well aware that it might be held to be a penalty clause, leaving damages at large. Indeed, though Mr Chaisty did not draw my attention to it, various drafts of the Agreement appear to have had more extensive provisions for termination than finally appeared in clause 7. One of these drafts specifically provided for termination by either side on one month’s notice in writing. As it happens, it was in the same draft that what later became clause 8 first appeared, though it was so drafted as to apply only in the event that WR or his parents exercised their right to terminate on one month’s notice.
609. Crucially, however, none of this appeared in the final version of the Agreement; and the obvious inference is that Mr Rodford did not wish to incorporate any right of early termination. Indeed, there is some indication in a later internal DLA e-mail dated 21<sup>st</sup> June 2002 that specific instructions were taken in relation to these matters. The e-mail includes a passage specifically directed to clause 8 which was in these terms:  
“Neil liked our liquidated damages concept with the level of damages to decrease over the term of the contract. Please see my drafting - do you think it works?”
610. None of these matters has any bearing on the correct interpretation of clause 8 in its final form. They are relevant only insofar as they permit inferences to be drawn as to any belief which Mr Rodford might have held as to the meaning and effect of the clause. In my judgment, however, they do not support any inference that he was, in fact, mistaken; on the contrary, they seem to me to be more consistent with a positive decision to eliminate any right of early termination, other than those retained in clause 7 in its final form, and to incorporate some form of liquidated damages clause, with the consequent risk that it might be held to be penal in nature. Accordingly, I decline to draw any inference of the kind which Mr Chaisty urges upon me.
611. I now turn to the Image Rights Representation Agreement itself. It follows from my factual findings that there was no material mistake as to the terms of the earlier Agreement and there was no basis upon which it could have been set aside on the grounds of either of the mistakes relied upon by Stoneygate. Furthermore, as I have already found, by the time the 2003 Agreement was executed, Mr Stretford, who was by this time a Director of Stoneygate, was well aware that the earlier Agreement extended to both on-field and off-field activities. I do not know what he may or may not have assumed as to the nature and effect of clause 8; but, insofar as material, I am not persuaded that he harboured any mistaken belief about its effect.
612. Finally, I can see no basis upon which I could come to any different conclusion in relation to the 2003 Agreement from that which I have reached in relation to the earlier Agreement on the allegation of mistake as to the nature and effect of Clause 8. It may well be the case that, as he said, WR himself believed that he would or might be able to extricate himself from the Agreement on 31 days’ notice. But that falls far short of constituting any relevant mistake for these purposes. In the circumstances, I

am quite unpersuaded that there was any common or mutual mistake about such matters at the time when the Image Rights Representation Agreement was executed.

613. Before departing from the factual ingredients of the defence, I should say something briefly about Mr Chaisty's estoppel argument. Though, for convenience, I have used the term, estoppel, that is not the formulation adopted by Mr Chaisty and no estoppel is expressly pleaded. The point was raised in Mr Chaisty's opening written submissions where, after referring to Proactive's pleaded case in the Proform proceedings and the separate action brought against Mr Stretford, he contended that it would be an abuse of process for Proactive to be permitted to deny the allegations of a common or mutual mistake made on its behalf in those proceedings on the grounds of "equitable election, approbation and/or reprobation". Two authorities were cited in a footnote; but the point was not further developed by Mr Chaisty in the course of his oral submissions.
614. In my judgment, there is nothing in the point. On the one hand, reliance is placed on a pleaded allegation in a case to which none of the current Defendants are parties and which has not yet come on for trial. On the other hand, there is prayed in aid a similar allegation in the Proform proceedings which were disposed of summarily on a quite separate point, so that the issue of mistake was never the subject of any determination. Even if Mr Chaisty's argument had been pleaded on the basis of issue estoppel, no such plea could possibly succeed in the former case; nor was the issue determined in the Proform action.
615. Furthermore, the concept of approbation and reprobation expresses no formal legal concept in the law of England and Wales. See the observations of Lord Atkin in **Lissenden -v- CAV Bosch Limited** [1940] AC412 at 429. In some circumstances, no doubt, a person may, in law, have to make an election when deciding which of two inconsistent rights to assert. I can see no basis upon which that doctrine might apply in the present case. Nor do I consider that it would be an abuse of process for Proactive to challenge the allegation of mistake in the present proceedings merely because it had raised the contrary contention in other proceedings.
616. Accordingly, I am quite satisfied that the factual basis upon which Stoneygate's plea of mistake is placed has not been established. In those circumstances, I need say very little about the law on this topic. I will refer only to the decision of the Court of Appeal in **The Great Peace** [2003] QB 679.
617. The headnote summarises the nature of the doctrine in these terms:  
"...common (or mutual) mistake was a common mistaken assumption of fact which rendered the service that would be provided if the contract were performed in accordance with its terms essentially different from the performance that the parties contemplated, with the result that the contract was not merely liable to be set aside but was void at common law; that the avoidance of a contract on the ground of common mistake resulted not from an implied term but from a rule of law under which, if it transpired that one or both of the parties had agreed to do something which it was impossible to perform, no obligation arose out of that agreement; that the test for common mistake was narrow, and if a contract were to be avoided for common mistake there had to be a common assumption as to the existence of a state of affairs,

no warranty by either party that that state of affairs existed and the non-existence of the state of affairs had not to be attributable to the fault of either party; and that, where it was possible to perform the letter of the contract but it was alleged that there was a common mistake in relation to a fundamental assumption which rendered performance of the essence of the obligation impossible, it was necessary to construe the contract in the light of all the material circumstances in order to determine whether the contract could be avoided for common mistake.”

618. In the present case, as I have found, there was no common mistake or assumption of the kind alleged on behalf of Stoneygate. In any event, even if the factual basis of the plea had been made out, I do not accept that any such mistaken belief could not and should not properly be regarded as attributable to the parties’ own fault. In the case of both the 2002 Agreement and the subsequent Image Rights Representation Agreement, all the relevant terms were set out in writing and the document was signed by all the relevant parties. If they did so under a mistaken belief as to its terms, they have only themselves to blame and must be deemed to have taken the risk that the legal rights and obligations created by the contract might turn out to be somewhat different from those which they had anticipated. In my judgment, Mr Mill is correct in his submission that, in cases of this kind, the only remedy would be rectification, if the stringent conditions of that remedy could be made out. Finally, insofar as Stoneygate relies upon an alleged erroneous assumption as to the validity and enforceability of the earlier Agreement as rendering the later Agreement void for mistake, I cannot accept that this would amount to a fundamental assumption which would render impossible the performance of the later contract, as contemplated by the parties to that contract.
619. That is sufficient to dispose of the plea of mistake. I need only add that, if I had found the Image Rights Representation Agreement to be void on these grounds, it was accepted that Proactive would have been entitled to a restitutionary quantum meruit in respect of the services which it had provided pursuant to the Agreement.

## PART VII

### RESTRAINT OF TRADE

620. I must now consider whether the Image Rights Representation Agreement is, as Stoneygate contends, contrary to public policy as being in unreasonable restraint of trade. If so, I must consider whether, as Proactive asserts, Stoneygate has lost any right to challenge its validity and enforceability on the grounds of affirmation. But if Stoneygate’s challenge is successful, it will be necessary to consider the consequences of such a finding and, in particular, whether Proactive can nonetheless assert a contractual right in respect of sums which have allegedly already fallen due and whether, in any event, it is entitled to pursue a restitutionary quantum meruit claim.
621. It is very well established that any contract or contractual stipulation which is in restraint of trade is prima facie unenforceable unless it is reasonable having regard to the interests of the parties and of the public. If a contract is properly to be regarded as being in restraint of trade, the burden of establishing that the restraint is no more than what is reasonable in the interests of the parties rests upon the person who seeks to

rely upon the contract. Even if reasonableness in this sense can be established, a question may nonetheless arise as to whether it is reasonable having regard to the interests of the public. On that issue, the burden rests upon the party challenging the contract.

#### Does the Doctrine Apply?

622. In the present case, there is a serious issue between the parties as to whether the Image Rights Representation Agreement is one which can properly be regarded as being in restraint of trade. If it is, the burden of demonstrating reasonableness, having regard to the legitimate interests of both parties, rests upon Proactive. A somewhat tentative suggestion was advanced in argument by Mr Chaisty QC that it might also be unreasonable having regard to the public interest. But that was neither pleaded nor seriously pursued and I do not think it is necessary to analyse it any further.
623. There is one other matter which I should mention at this stage. If it is only certain stipulations within a contract which offend against the doctrine of restraint of trade, it may, in some circumstances, be possible to sever the offending provisions. I need not analyse the limits of this principle, since it was accepted by Mr Mill, at paragraph 162 of his written opening submissions, that severance would not be possible in this instance, either at common law or by the invocation of the provisions of clause 23 of the Agreement itself, if Stoneygate were to make good its challenge on the grounds of restraint of trade.

#### The Legal Principles

624. The first question, therefore, is whether the Image Rights Representation Agreement, taken as a whole, can properly be categorised as one which is in restraint of trade. It is difficult to extract from the case law any judicial definition which can be applied to all situations in which the matter is in issue. One definition which is often cited is that provided by Lord Denning MR in **Petrofina (Great Britain) Limited -v- Martin** [1966] Ch. 146, 169, where he put it in this way:
- “Every member of the community is entitled to carry on any trade or business he chooses and in such manner as he thinks most desirable in his own interests, so long as he does nothing unlawful; with the consequence that any contract which interferes with the free exercise of his trade or business, by restricting him in the work he may do for others, or the arrangements which he may make with others, is a contract in restraint of trade. It is invalid unless it is reasonable as between the parties and not injurious to the public interest.”
625. In practice, nonetheless, it is not all contracts which impose restrictions on a person’s freedom to trade which have been regarded as being subject to the doctrine. The point was made in several different ways in the leading case of **Eso Petroleum Co Limited -v- Harper’s Garage (Stourport) Limited** [1968] AC 269. Thus, Lord Morris of Borth-y-Gest, after citing the passage from the judgment of Lord Denning MR in the Petrofina case continued as follows at page 307:
- “These are helpful expositions, provided they are used rationally and not too literally. Thus, if A made a contract under which he willingly agreed to serve B on reasonable terms for a few years and to give his whole working time to

B, it would be surprising indeed if it were sought to describe the contract as being in restraint of trade. In fact such contract would very likely be for the advancement of trade. Yet counsel for Harper's did not shrink from the assertion that every contract of personal service is a contract in restraint of trade. I cannot think that either authority or logic requires acceptance of so extreme a view."

626. Lord Reid made a similar comment at page 296, after citing a passage from the speech of Lord Finlay in **McEllistrim -v- Ballymacelligott Co-operative Agricultural and Dairy Society Limited** [1919] AC 548, 571. Lord Reid's comment was intended to place a gloss upon the generality of the passage which he had cited. What he said was this:

"I doubt whether this last sentence is quite accurate. It would seem to mean that every contract by which a man (or a company) agrees to sell his whole output (or even half of it) for any future period to the other party to the contract is a contract in restraint of trade because it restricts his liberty to sell as he pleases, and is therefore unenforceable unless his agreement can be justified as being reasonable. There must have been many ordinary commercial contracts of that kind in the past but no-one has ever suggested that they were in restraint of trade. But *McEllistrim's* case at least establishes that there comes a point at which such a contract can come within the doctrine of restraint of trade."

In a subsequent passage at pages 298-299, however, Lord Reid declined to make any attempt to define the dividing line between contracts which were and contracts which were not in restraint of trade.

627. Lord Hodson seems to have adopted a fairly pragmatic approach. As I read his speech, he did not consider that there were any specific types of contract to which the doctrine did not apply. But after holding specifically that the solus agreement which was in issue in that case was not outside the scope of the doctrine, he went on to consider the issues of reasonableness. It was in this context that he made the following observations at pages 319-320:

"There might be thought to be some risk of proceedings being taken in certain cases of a nuisance character where the restraint of trade is readily justifiable on the basis of long-established practice in a particular sphere, such as the brewery cases upon which the appellants rely, but I cannot see any practical way of hedging about the right of a party to a contract to attack it on the ground that it has been entered into in unreasonable restraint of trade. After all, a man who freely enters into a bargain will, normally, expect to be held bound by it, and I do not anticipate a spate of litigation in which contracts of, say, "sole agency" will be assailed. In the case of agreements between commercial companies for regulating their trade relations the parties are usually the best judges of what is reasonable. In such a case, as Lord Haldane said in *North Western Salt Co Limited -v- Electrolytic Alkali Co Ltd*, the law 'still looks carefully to the interest to the public, but it regards the parties as the best judges of what is reasonable as between themselves.'"

628. Lord Pearce was also clearly concerned as to the consequences of any wide-ranging definition of the scope of the doctrine. At page 325 he made the following comment and posed the consequential question:

“But so wide a power of potential investigation would allow to would-be recalcitrants a wide field of chicanery and delaying tactics in the courts. Where, then, should one draw the line?”

629. He sought to answer this question at a later point. At page 327 he made the following observations:

“Finally, there is the important question whether this was a mere agreement for the promotion of trade and not an agreement in restraint of it.

Somewhere there must be a line between those contracts which are in restraint of trade and whose reasonableness can, therefore, be considered by the courts and those contracts which merely regulate the normal commercial relations between the parties and are, therefore, free from doctrine.”

630. He continued in these words at pages 328-9:

“The doctrine does not apply to ordinary commercial contracts for the regulation and promotion of trade during the existence of the contract, provided that any prevention of work outside the contract, viewed as a whole, is directed towards the absorption of the parties’ services and not their sterilization. Sole agencies are a normal and necessary incident of commerce and those who desire the benefits of a sole agency must deny themselves the opportunities of other agencies. So, too, in the case of a film-star who may tie herself to a company in order to obtain from them the benefits of stardom (*Gaumont-British Picture Corporation Limited -v- Alexander*). See, too, *Warner Brothers Pictures Incorporated -v- Nelson*. And partners habitually fetter themselves to one another.

When a contract only ties the parties during the continuance of the contract, and the negative ties are only those which are incidental and normal to the positive commercial arrangements at which the contract aims, even though those ties exclude all dealings with others, there is no restraint of trade within the meaning of the doctrine and no question of reasonableness arises. If, however, the contract ties the trading activities of either party after its determination, it is a restraint of trade, and the question of reasonableness arises. So, to, if *during* the contract one of the parties is too unilaterally fettered so that the contract loses its character of a contract for the regulation and promotion of trade and acquires the predominant character of a contract in restraint of trade. In that case the rationale of *Young -v- Timmins* comes into play and the question of whether it is reasonable arises.”

631. Lord Wilberforce also expressed the opinion that not all contracts which limited the freedom to trade would fall within the scope of the doctrine. At page 331, he observed that courts had, on occasions, “fused” two separate concepts, namely, whether a contract was in restraint of trade and, if so, whether it was or was not reasonable. He continued as follows at pages 332-3:

“This does not mean that the question whether a given agreement is in restraint of trade, in either sense of these words, is nothing more than a question of fact to be individually decided in each case. It is not to be supposed, or encouraged, that a bare allegation that a contract limits a trader’s freedom of action exposes a party suing on it to the burden of justification. There will always be certain general categories of contracts as to which it can be said, with some degree of certainty, that the “doctrine” does or does not

apply to them. Positively, there are likely to be certain sensitive areas as to which the law will require in every case the test of reasonableness to be passed: such an area has long been and still is that of contracts between employer and employee as regards the period after the employment has ceased. Negatively, and it is this that concerns us here, there will be types of contract as to which the law should be prepared to say with some confidence that they do not enter into the field of restraint of trade at all.

How, then, can such contracts be defined or at least identified? No exhaustive test can be stated - probably no precise non-exhaustive test. But the development of the law does seem to show that judges have been able to dispense from the necessity of justification under a public policy test of reasonableness such contracts, or provisions of contracts as, under contemporary conditions may be found to have passed into the accepted and normal currency of commercial or contractual or conveyancing relations. That such contracts have done so may be taken to show with at least strong *prima facie* force that, moulded under the pressures of negotiation, competition and public opinion, they have assumed a form which satisfies the test of public policy as understood by the courts at the time, or, regarding the matter from the point of view of the trade, that the trade in question has assumed such a form that for its health or expansion it requires a degree of regulation. Absolute exemption for restriction or regulation is never obtained: circumstances, social or economic, may have altered, since they obtained acceptance, in such a way as to call for a fresh examination: there may be some exorbitance or special feature in the individual contract which takes it out of the accepted category: but the court must be persuaded of this before it calls upon the relevant party to justify a contract of this kind.”

632. The majority of their Lordships, therefore, were of the opinion that the doctrine of restraint of trade would or might not apply to certain contracts or categories of contract, even though they imposed some limitations or restrictions on a party's freedom to trade. The importance of this point is, of course, that in such cases the necessary threshold condition has not been fulfilled so that the party in whose favour the restriction operates is not required to satisfy the court as to its reasonableness. Furthermore, exclusive supply or agency agreements were amongst the examples given by their Lordships of cases in which the doctrine might not normally apply. But it nonetheless seems quite clear that no absolute exclusion of such contracts from the ambit of the doctrine was contemplated by the House. Indeed, in the **Esso** case itself, the doctrine was held to apply to what was, in effect, an exclusive contract for the purchase of petrol; and it was held that a 21-year tie had not been shown to be reasonable.
633. In my judgment, the **Esso** case does not constitute authority for the proposition that contract which impose exclusivity obligations on one party during the subsistence of the agreement cannot, as a matter of principle, come within the scope of the doctrine of restraint of trade. Whether any particular contract of this kind will be held to be in restraint of trade so as to require justification will depend upon a number of factors. These will include the question whether it is a contract of a kind which has become a common and accepted form of commercial arrangement. But, even if that is the case, the court will have to consider whether, to use Lord Wilberforce's words, there was some “exorbitance or special feature” in the individual contract. There were clear

suggestions in the **Esso** case that such a special feature may be found where there was an inequality of bargaining power between the parties to the contract. Thus, Lord Reid said this at page 300:

“Where two experienced traders are bargaining on equal terms and one has agreed to a restraint for reasons which seem good to him the court is in grave danger of stultifying itself if it says that it knows that trader’s interest better than he does himself. But there may well be cases where, although the party to be restrained has deliberately accepted the main terms of the contract, he has been at a disadvantage as regards other terms: for example where a set of conditions has been incorporated which has not been the subject of negotiation - there the court may have greater freedom to hold them unreasonable.”

634. Likewise, Lord Morris made the following observation at page 305:

“The law recognises that if business contracts are fairly made by parties who are on equal terms such parties should know their business best. If there has been no irregularity, the law does not mend or amend contracts merely for the relief of those for whom things have not turned out well.”

635. Similarly, albeit with specific reference to the question of reasonableness, Lord Pearce, at page 323, emphasised the great weight which should be given, not only to commercial practice, but also to the desirability of upholding contracts “made freely by parties bargaining on equal terms.” He added that, “Where there are no circumstances of oppression, the court should tread warily in substituting its own views for those of current commerce generally and the contracting parties in particular.”

636. This theme was taken up in the subsequent case of **A. Schroeder Music Publishing Co Limited -v- McCauley** [1974] 1WLR 1308. That involved a contract under which a young songwriter entered into an agreement with music publishers under which the publishers acquired the right to his exclusive services during a fixed term of five years which might, under certain circumstances, be extended for a further period of five years. There was no unilateral right on the part of the songwriter to terminate the contract prior to the expiry of the five or ten year period; whereas the publishers could terminate on one month’s notice. There was no obligation on the part of the publishers to publish or promote the songwriter’s work; and they could assign the contract at any time. Payment for the songwriter’s services was by way of royalty on any works which were ultimately published. It was held at first instance and on subsequent appeals to the Court of Appeal and the House of Lords that the agreement was contrary to public policy and void as being in unreasonable restraint of trade.

637. In the House of Lords, Lord Reid pointed out that there was an imbalance between the contractual rights and obligations of the parties. The songwriter was tied to the publishers for a period of five years yet the publishers were under no obligation to promote or publish. It could not be assumed that the publishers would always act reasonably; and he declined to imply any obligation that they would act in good faith. He adverted to the possibility that a publisher dealing with a young and unproved composer might be willing to give an undertaking to use his best endeavours to promote the composer’s work. But he expressed the opinion that any such obligation would probably have had to be “in such general terms as to be of little use to the composer.” I refer to page 1313H of the report.

638. Lord Reid then cited to certain passages in the **Esso** case before setting out his views in these terms at page 1314:

“Any contract by which a person engages to give his exclusive services to another for a period necessarily involves extensive restriction during that period of the common law right to exercise any lawful activity he chooses in such manner as he thinks best. Normally the doctrine of restraint of trade has no application to such restrictions: they require no justification. But if contractual restrictions appear to be unnecessary or to be reasonably capable of enforcement in an oppressive manner, then they must be justified before they can be enforced.”

639. Lord Diplock, with whom Lord Simon of Glaisdale and Lord Kilbrandon agreed, dealt with the issue in a somewhat different way. He formulated the question in these words at page 1315:

“Because this can be classified as a contract in restraint of trade the restrictions that the respondent accepted fell within one of those limited categories of contractual promises in respect of which the courts still retain the power to relieve the promisor of his legal duty to fulfil them. In order to determine whether this case is one in which that power ought to be exercised, what your Lordships have in fact been doing has been to assess the relative bargaining power of the publisher and the song writer at the time the contract was made and to decide whether the publisher had used his superior bargaining power to exact from the song writer promises that were unfairly onerous to him. Your Lordships have not been concerned to enquire whether the public have in fact been deprived of the fruit of the song writer’s talents by reason of the restrictions, nor to assess the likelihood that they would be so deprived in the future if the contract were permitted to run its full course.”

640. He then continued, on the same and the following page, to express his views in these terms:

“It is, in my view, salutary to acknowledge that in refusing to enforce provisions of a contract whereby one party agrees for the benefit of the other party to exploit or to refrain from exploiting his own earning power, the public policy which the court is implementing is not some 19<sup>th</sup>-century economic theory about the benefit to the general public of freedom of trade, but the protection of those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable. Under the influence of Bentham and of laissez-faire the courts in the 19<sup>th</sup>-century abandoned the practice of applying public policy against unconscionable bargains to contracts generally, as they had formerly done to any contract considered to be usurious; but the policy survived in its application to penalty clauses and to relief against forfeiture and also to the special category of contracts in restraint of trade. If one looks at the reasoning of 19<sup>th</sup>-century judges in cases about contracts in restraint of trade one finds lip service paid to current economic theories, but if one looks at what they said in the light of what they did, one finds that they struck down a bargain if they thought it was unconscionable as between the parties to it and upheld it if they thought that it was not.

So I would hold that the question to be answered as respects a contract in restraint of trade of the kind with which this appeal is concerned is: “Was the bargain fair?” The test of fairness is, no doubt, whether the restrictions are both reasonably necessary for the protection of the legitimate interests of the promisee and commensurate with the benefits secured to the promisor under the contract. For the purpose of this test all the provisions of the contract must be taken into consideration.”

641. Lord Diplock then referred to Lord Reid’s analysis of the provisions of the contract and agreed with his conclusion that the contract was unenforceable as it did not satisfy “the test of fairness”. He concluded with some observations as to the distinction between contracts of a standard kind which had been moulded by market forces over many years and standard forms of contract which had not been the subject of negotiation between the parties to it or approved by any organisation representing the interests of the weaker party. In the latter category of cases, where restraints are imposed upon one party, the courts must be astute to ensure that this is not the result of superior bargaining power resulting in an unconscionable bargain.

#### The Application of these Principles

642. I must now apply these principles to the facts of the present case in order to determine whether the Image Rights Representation Agreement dated 16<sup>th</sup> January 2003 is to be regarded as one which comes within the scope of the restraint of trade doctrine. If so, unless it can be justified, or unless there is some other reason for upholding it, it must be regarded as void and unenforceable.
643. The particular features of the Image Rights Representation Agreement which, in Stoneygate’s contention, render it unenforceable as being in unreasonable restraint of trade are set out at paragraph 37 of its Re-Re-Amended Defence. Leaving aside the initial imbalance arising out of the commercial inexperience of WR and his family and the lack of any independent advice, the particular matters picked out in the pleading relate primarily to the length of the exclusive tie, having regard to the absence of any effective right on Stoneygate’s part to terminate the Agreement prior to the end of the eight-year term. Reference is also made to the fact that commission was payable at the rate of 20% during the term of the Agreement, and to the right asserted by Proactive to receive post-termination commission at the same rate notwithstanding the cessation of any obligation on its part to provide the contracted services. The latter point, of course, no longer arises, in view of my interpretation of the relevant contractual provisions.
644. It is also pleaded that it must have been apparent in January 2003 that Stoneygate would be limited in the number and type of sponsorship and endorsement contracts which WR could enter into, both as a matter of contract and for purely practical reasons, and that any sponsors would normally require some form of exclusivity protection so as to prevent Stoneygate from entering into similar contracts with competitors in the same field.
645. There was no specific reference in the Re-Re-Amended Defence to the absence of any tapering or “sunset” provisions in relation to the rate of commission. But this was, of course, something which was canvassed with Mr Stein in the course of his evidence

and was relied upon by Mr Chaisty QC in his written closing submissions. Heavy emphasis was also placed, in his submissions, on the fact that, in practice, Stoneygate and WR could only buy themselves out of the Agreement prior to the expiration of the eight-year term by negotiating an exit payment against the background of a potentially very substantial claim for unliquidated damages.

646. There is no doubt that the contract imposes significant restrictions on WR's freedom to exploit his talents in any way he might wish. Stoneygate was the vehicle through which he had chosen to exploit his image rights; and those rights had been assigned to Stoneygate "on a perpetual exclusive worldwide basis". By virtue of the Image Rights Representation Agreement, Stoneygate itself appointed Proactive as its sole and exclusive representative for the purposes of the Services set out in the Agreement; and it agreed that, during the continuance of the Agreement, it would not negotiate or enter into contracts with any other agent or representative or competitor and would direct all enquiries or opportunities in connection with itself or WR to Proactive. WR, in his turn, similarly agreed not, without Proactive's prior consent, to negotiate or enter into contracts with any other firms or agents or representatives or persons or any other businesses which might reasonably be regarded as competitors of Proactive or might wish to exploit his intellectual property rights.
647. Furthermore, these exclusive obligations were entered into at a time when WR had only recently turned 17 years of age and extended for a period of eight years from the date on which it came into force. As was agreed at the Bar there was no right on his part to determine the Agreement prior to the end of this period, except in certain specific circumstances. In effect, therefore, unless Proactive was in breach of contract or became insolvent, its exclusive rights would last until February 2011, by which time WR will be 25 years of age. Even allowing for a long footballing life, therefore, the contract would probably cover about half of his career.
648. Yet further, during the entirety of the eight-year term, Proactive was entitled to be paid at the rate of 20% on all income-producing opportunities which it introduced to Stoneygate and WR, without any attempt to limit or reduce the rate at which commission was payable by reference to the total income generated for Stoneygate. The same flat rate was payable whether Stoneygate's income from the exploitation of the image rights was £10,000 or £10m. Indeed, if I had held, as Proactive contends, that it was entitled to post-termination commission, this right to commission might continue for many years after the end of the eight-year period, notwithstanding that Proactive was no longer under any obligation to provide any services under the Image Rights Representation Agreement.
649. The terms of the Agreement were effectively dictated by Proactive. There was no meaningful negotiation whatever, save perhaps in relation to the signing-on fee. WR and his family had no commercial experience and were utterly unsophisticated in financial and contractual matters. I am quite satisfied that they never, in fact, took independent legal advice as to the terms of the Image Rights Representation Agreement itself or, for that matter, any other Agreement between the parties; and I think it is unlikely that it was ever seriously suggested to them that they should take such independent legal advice. It is quite clear that, having decided that Proactive and, in particular, Mr Stretford were the people they wished to act for WR, they were willing to accept whatever terms Proactive put before them. It may well be the case

that there were many other agents who were interested in signing up this young and exciting talent; but, in reality, there was no serious competition to Proactive. In my judgment, there was a very substantial imbalance in bargaining power between the parties.

650. The Agreement itself was not in any sense a standard form which had been tried and tested in this particular field of commerce. On the contrary, it was unusual in many respects and unique in its duration. If there had been free and equal negotiations, with proper independent legal advice on each side and, it may be, real competition from other prospective agents, I very much doubt if an eight-year contract at a flat rate of commission of 20% would have been the outcome. It is true that, in contrast to the **Schroeder** case, there were quite extensive obligations on the part of Proactive which, as I have found, went beyond merely obtaining and negotiating income-producing opportunities. Particular emphasis was placed on the “best endeavours” provision by Mr Stein, in the course of his evidence, and by Mr Mill in his opening and closing submissions. But a breach of such an obligation might well prove difficult to establish and, as Lord Reid observed in the **Schroeder** case, it might, in truth, have been “of little use” to WR.
651. In my judgment, the Image Rights Representation Agreement imposed very substantial restraints upon WR’s freedom to exploit his earning ability over a very long period of time on terms which were not commonplace in the market and which were not the outcome of a process of commercial negotiation between equals. Couchman Harrington, the solicitors who were responsible for drafting the Image Rights Representation Agreement itself, and DLA, who had prepared its 2002 predecessor, were both concerned that the Agreements in question might be regarded as being in restraint of trade and warned Proactive accordingly. In my judgment, they were right to do so. On the face of it, I am satisfied that the Image Rights Representation Agreement comes within the scope of the doctrine so as to require justification by Proactive.
652. Mr Mill nonetheless sought to contend that the doctrine did not apply since the Agreement limited WR’s freedom to trade only in relation to image rights and did not purport to impose any restrictions on his footballing activities. It is true that it is his footballing skills and attainments which have made possible the exploitation of other commercial opportunities. Indeed, it seems that he still earns significantly more from purely footballing activities than from sponsorship and endorsements. Mr Mill submits, therefore, that he is able to make a very good living indeed from his primary skills so that, in reality, his earning capacity is not sterilized.
653. But I cannot agree with that proposition. There is no relevant distinction between partial and total restraints. Even in the classic case of post-termination restrictions in a contract of employment, the former employee will not be prevented from earning his living in fields other than those to which the contract relates. In this case, Proactive’s exclusive rights prevent WR from exploiting a whole range of highly lucrative commercial activities except through the agency of Proactive. I can see no reason why that restraint should not be subject to the critical appraisal of the court in accordance with the principles to which I have referred.

654. I appreciate, of course, that the primary tie created by the Image Rights Representation Agreement is between Proactive and Stoneygate, a limited company which, as a matter of law, is, of course, quite separate from WR notwithstanding his rights as a shareholder. I do not think, however, that in this particular context, Mr Mill sought to make any real play of the involvement of a limited company. Indeed, he made a somewhat different point, to the effect that it was simply a re-organisation of the mutual rights and obligations which had been initially embodied in the Agreement of 17<sup>th</sup> July 2002. These are matters on which I will have a little more to say in subsequent paragraphs of this judgment. But, as I have already noted, restrictions are placed upon WR himself under the Image Rights Representation Agreement; and, in any event, it seems to me that the Court must look at the substance of the arrangements in order to determine whether the effect of the contractual obligations is to impose a restraint which requires justification. In my judgment they do have that effect.
655. Mr Mill nonetheless sought to draw me back from this conclusion by a number of arguments which do not, however, at least in my judgment, directly address the substance of the issue.

#### The Relevance of the 2002 Agreement

656. The first of these was highly technical in nature. It was based on the fact that it has not been expressly pleaded on behalf of Stoneygate or WR that the Representation Agreement dated 17<sup>th</sup> July 2002 was itself in restraint of trade. One might have thought that this was a wholly unnecessary allegation, since the Agreement which was the subject of this litigation was the later Image Rights Representation Agreement dated 16<sup>th</sup> January 2003.
657. But Mr Mill directed my attention to a passage in the judgment of Jonathan Parker J (as he then was) in **Panayiotou -v- Sony Music Entertainment** [1994] EMLR 229 at 340-342. That was a case which Mr George Michael, the international recording artist, performer and songwriter sought a declaration that certain recording agreements made in 1988 were void or unenforceable as being in unreasonable restraint of trade. The 1988 Agreement effectively replaced an earlier Agreement concluded in 1984 as part of a compromise of proceedings to which Mr Michael was a party. It was contended on behalf of Sony that the 1984 Agreement was not and could not have been in restraint of trade, since it arose out of a compromise which had been fully negotiated between all parties with the benefit of detailed legal advice.
658. Jonathan Parker J held amongst other things that the 1984 Agreement was not contrary to public policy. On the contrary, public policy required that compromises should be upheld. Since the 1988 Agreement was itself simply a re-negotiation of the 1984 Agreement, it could not, he concluded, be regarded as being in restraint of trade and therefore requiring justification, though he nonetheless went on to consider whether it could be justified.
659. The relevant facts in **Panayiotou -v- Sony Music Entertainment (UK) Limited** are remote from those in the present case. But in the passage relied upon by Mr Mill, the judge expressed the view that, in the absence of any allegation that the 1984

Agreement was unenforceable, it was necessary to regard it as being enforceable. At page 341, he put it in this way:

“On principle it would seem to me that, faced with an agreement which was intended by the parties to be binding, the validity and enforceability of which has not been subsequently challenged, and which is not of such a nature that the Court might on its own initiative decide not to recognise or enforce it, the Court has no choice but to proceed on the basis that the agreement is binding and enforceable - as the parties themselves did in this case when they renegotiated its terms in 1988 and again in 1990.”

660. In support of this proposition, he cited a brief observation of Diplock LJ (as he then was) in **Petrofina (Great Britain) Limited -v- Martin** [1966] Ch. 146 at 180B, to the effect that any allegation that a contract was unenforceable as being in unreasonable restraint of trade was one which had to be raised on the pleadings. This observation was itself based upon certain comments made by Lord Moulton in **North Western Salt Co. Ltd -v- Electrolytic Alkali Co. Ltd** [1914] AC 461 at 476-7. In the passage in question, Lord Moulton emphasised the importance of a properly pleaded case which would provide the basis for any evidence which the parties might wish to call upon the issue. He did, however, advert to the possibility that if conclusive evidence of illegality arose during the course of a trial, it would not be necessary to amend the pleadings.
661. There was, in fact, no specific allegation on behalf of Stoneygate or WR that the 2002 Agreement was void or unenforceable as being in unreasonable restraint of trade. Furthermore, the new arrangements entered into in early 2003 were clearly largely modelled on the earlier Agreement, albeit with the interposition of an image rights company between Proactive and the player. But Proactive’s claim was based upon the 2003 Agreement which was, of course, challenged as being in restraint of trade. If the point now made by Mr Mill was a fatal objection to this defence, I would have expected it to have been raised by Proactive itself in its Re-Amended Reply. But it was not. The absence of any positive averment to the contrary in the Defence should be seen in that light.
662. In any event, I struggle to see how the proceedings would have been conducted in any different way had the point been raised on the pleadings on either side. As Mr Chaisty observed, all of the arguments marshalled in support of the attack on the 2003 Agreement would seem to apply with equal force to the earlier contract. I cannot imagine for one moment that any additional lay evidence would have been adduced on such an issue. In particular, it seems highly unlikely that Mr Rodford would have been called as a witness for this purpose. Mr Mill suggested that the earlier contract might well have been treated differently from the later Agreement because WR was six months younger and his potential was somewhat less obvious, so that Proactive would have been taking a significantly greater commercial risk than it took in January 2003. That may be so, but it seems to me that any distinction would be minimal.
663. I conclude that I cannot accept Mr Mill’s argument on this point. It seems to me that it was up to Proactive to raise the issue in its Reply rather than for Stoneygate to pre-empt it in its Defence. But, whether or not it should have been pleaded, and on whichever side the burden of doing so lay, I cannot think that the course of the trial would have been altered in any way or that there would have been any significant

difference in the application of the doctrine of restraint of trade to the two Agreements. If it were necessary to do so, I would hold that the earlier Agreement was manifestly in restraint of trade for precisely the same reasons as the later Agreement.

### Estoppel

664. Proactive further contends, at paragraph 10(3) of its Re-Amended Reply, that Stoneygate was contractually estopped by virtue of clause 24 of the Image Rights Representation Agreement from contending that any restraints imposed by the Agreement are unreasonable. It will be recalled that clause 24 is headed “Independent Legal Advice”, and that it reads as follows:

“The Client and the Player hereby confirm that in reviewing this Agreement prior to execution and deciding to enter into this Agreement, they have sought, taken and understood independent legal advice and hereby confirm that the terms and conditions hereof, including without limitation the Term and financial provisions of the Company’s appointment hereunder are reasonable.”

665. Mr Mill submits that, whether or not the Rooney family or Stoneygate in fact took any independent legal advice, they are nonetheless estopped, whether by contract or convention, from asserting the contrary. In those circumstances, they must be deemed to have considered the matter fully and properly and to have reached the conclusion, as expressed in clause 24, that any restraints, and in particular the term of the Agreement, were reasonable.

666. Mr Mill referred me to Spencer Bower on Estoppel by Representation, 4<sup>th</sup> edition (1984). At paragraph VIII.7.2, the learned editors formulate the relevant principle in these words:

“Many estoppels by convention have been founded on the recitals or non-operative words of an instrument recording a transaction, and in such cases the estoppel arises simply because the true construction of the instrument leads to the conclusion that the parties have agreed to assume the facts as the conventional basis upon which they have founded their contractual obligations. In such cases, the estoppel may arise without any mistake or misleading of a representee, as the true facts are known to both parties, and yet, having agreed to accept the truth of the assumption as the basis of their contract, they cannot subsequently be allowed to recede from that position. It is submitted that, in such cases, the estoppel binds by implied mutual contractual undertaking.”

667. It should be noted that Mr Mill did not rely upon the doctrine of estoppel by representation, in which case I would no doubt have had to consider the implications of such cases as **E A Grimstead & Son Limited -v- McGarrigan** (unreported) CA 27 October 1999 and **Watford Electronics -v- Sanderson** [2001] EWCA Civ 317 which emphasised, amongst other things, the requirement that the party to whom the representation was made believed it to be true and was induced to act upon it. He referred me instead, albeit indirectly, to the later decision of the Court of Appeal in **Peekay Intermark -v- Australia and New Zealand Banking Group** [2006] EWCA

Civ 386; [2006] 2 Lloyd's Rep 511. In that case, Moore-Bick LJ, with whom Lawrence Collins J (as he then was) agreed, gave the leading judgment. At paragraph 56 he said this:

“There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not. For example, it may be desirable to settle the disagreement as to an existing state of affairs in order to establish a clear basis for the contract itself and its subsequent performance. Where parties express an agreement of that kind in a contractual document neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as concerns those aspects of their relationship to which the agreement was directed. The contract itself gives rise to an estoppel: see *Colchester Borough Council -v- Smith* [1991] Ch. 448, affirmed on appeal [1992] Ch. 421.”

668. Mr Mill drew my attention to the subsequent decision of Gloster J in **J P Morgan Chase Bank -v- Springwell Navigation Corporation** [2008] EWHC 1186 (Comm), in which the judge had to consider the decision in **Peekay**. She considered the matter in particular at paragraphs 558-567 of the judgment. She concluded that the decision on contractual estoppel formed part of the *ratio* of **Peekay**; and she noted that it had been followed in at least three subsequent cases both in England and Wales and abroad. I see no sufficient grounds for departing from this analysis, so I approach Mr Mill's argument on the footing that the decision in **Peekay Intermark Limited -v- Australia and New Zealand Banking Group Limited** is binding upon me.
669. Though the point was not argued in depth before me, it seems to me to follow that a contractual provision setting out the basis upon which the parties have agreed to conduct the transaction is essentially contractual in nature and does not fall within the mainstream of the legal principles governing most forms of estoppel. That is important, since it seems to follow that the application of this particular doctrine may not be subject to considerations of, for example, reliance or fairness. That is essentially the point made by the learned editors of Spencer Bower at paragraph VIII.7.3.
670. I confess that I would regard it as a highly unsatisfactory consequence of this principle if it meant that a party who sought to take advantage of a contract which was plainly in restraint of trade could free himself from the fetters of the doctrine by the transparent device of ensuring that some suitable provision akin to clause 24 was included in the contract. The reason why such a device would not, in my judgment, be effective is because restraint of trade is a matter of public policy out of which the parties cannot contract. Indeed, though it was not cited to me in the course of submissions, paragraph VIII.10.3 of Spencer Bower includes the following passage:
- “A well established restriction on the ability of the parties to a convention to create a parallel factual or legal universe governing their relationship by assenting to and acting upon the convention, is that one party may not deprive the other, by reliance on such a convention, of protection afforded to the latter by law as a matter of public policy.”
671. Accordingly, even if, for some purposes, I might be compelled to assume, contrary to the fact, that WR and his mother had sought, taken and understood independent legal advice, I do not regard myself as constrained to hold that the doctrine of restraint of

trade cannot apply to the Agreement simply by reason of the declaration at clause 24. Indeed, even if I had been so constrained, I do not consider that the supposed fact that they had taken such advice would in any way have affected my conclusion that the Agreement was in restraint of trade having regard to the other features of the Agreement to which I have already made reference and, in particular, its length. Nor do I consider that the confirmation that the terms and conditions of the Agreement were “reasonable” can prevent the Court from determining whether Proactive has, in fact, discharged the burden of showing that the restraints were reasonable. It might be contended, I suppose, that, at least between the parties such a declaration might eliminate the need for justification of the restraints by reference to the interests of the parties themselves. But even that step in the process is ultimately founded on public policy. Indeed, the very fact that such a provision was included in the draft Agreement serves to emphasise the doubts which had been expressed to Proactive as to the enforceability of the Agreement and to demonstrate the artificiality of any attempt to rely on such a provision to eliminate that risk. Accordingly, I reject Mr Mill’s argument that clause 24 suffices to exclude the Image Rights Representation Agreement from the scope of the restraint of trade doctrine.

#### Affirmation

672. Mr Mill also sought to meet Stoneygate’s restraint of trade defence by contending that the contract had been affirmed. It is important to note that he chose to rely solely upon what can, for convenience, be termed “common law” affirmation, rather than any equitable defence of waiver, acquiescence or estoppel. As will be seen, the distinction may be of considerable importance in the present case.
673. Yet again, it seems to me that the argument is highly technical and lacking in any obvious merit. It is based upon the factual proposition that Mr Stretford was a director of Stoneygate and that he must have known of the risk that the Image Rights Representation Agreement might be regarded as unenforceable on grounds of restraint of trade. It is obviously correct that he was appointed as a director of Stoneygate on or before the date when the Image Rights Representation Agreement was executed. But he was, of course, also a director of Proactive at the time and held that office until a few months before the rift with Proactive. Furthermore, in the light of my factual findings, he must have been aware of Mr Harrington’s advice that there was a risk that the Agreement might be held to be in restraint of trade.
674. On the basis of these facts, Mr Mill sought to argue that Mr Stretford’s knowledge of the risk in question must be imputed to Stoneygate from the time when the Image Rights Representation Agreement first came into force and that, by continuing to operate the Agreement over many years, Stoneygate must be deemed to have affirmed the Agreement so that it cannot now contend that it is in restraint of trade. There are thus two strands in Mr Mill’s argument: firstly, that Mr Stretford’s knowledge is to be imputed to Stoneygate; secondly, that, by continuing to operate the contract despite that knowledge, Stoneygate has affirmed it.
675. In support of his submissions on the first point, Mr Mill relied upon a decision of Buckley J in **In Re Fenwick, Stobart & Co., Limited** [1902] 1 Ch. 507. That case concerned a claim by one insolvent company against another on a bill of exchange. The principal defence was that the bill came into the hands of the applicants as part of

a more general arrangement under which it was never intended that the applicants could have recourse against the company. A determination to that effect would, it seems, have been sufficient to dispose of the application. But the judge went on to consider a further issue which had been raised by way of defence. No formal notice of dishonour had been given to the company by the applicants. But the office of secretary of both companies was held by the same individual. As secretary of the applicant company, he knew that the bill had been dishonoured; so it was contended that, in his capacity as secretary of the other company, he had sufficient notice of dishonour as to allow suit to be brought upon the bill.

676. Buckley J. dealt with this argument in the following passage of his judgment at pages 510-11:

“But there is another point, which involves considerations of some general importance, and it is this: Mr Higgins was secretary of the Deep Sea Fishery Company, the holders of the bill, and he was also secretary of Fenwick, Stobart & Co., the drawers and endorsees of the bill. In the former character he knew that the bill was dishonoured. Was that fact notice of dishonour to himself as secretary of Fenwick, Stobart & Co.? In other words, is it true as a general proposition that a fact which comes to the knowledge of a man as secretary of one company is notice to him as secretary of the other company from the mere existence of the common relationship? In my opinion it is not.”

677. The judge then referred to the evidence and concluded that, in his capacity as secretary of the company which was the holder of the bill, he knew that it was not his duty to communicate notice of dishonour to himself as secretary of the other company. He continued in these words:

“I think that the true test is this: Where a man holds a double character, it is not necessary that he should write a letter from himself in one character to himself to inform himself in another character. What the Court has to see is whether the information he gets, as secretary of the one company, comes to him under such circumstances as that it is his duty to communicate it to the other company. Suppose, for instance, as secretary of the first company he learns something which it would be a breach of his duty to that company to communicate to the other company. I should say certainly that is not notice to the other company. It depends upon the circumstances relating to the particular case.”

678. If this principle is to be applied to the facts of the present case, it follows that the test is whether Mr Stretford was under a duty to Proactive to pass on to Stoneygate what he had learned, as director of Proactive, about the risk that the Image Rights Representation Agreement might be held to be unenforceable as being in restraint of trade.

679. Mr Chaisty, on behalf of Stoneygate, did not directly challenge the test laid down by Buckley J. in **In Re Fenwick, Stobart & Co. Limited**. But he briefly drew my attention to one further authority and a passage in Bowstead and Reynolds on Agency, 18<sup>th</sup> edition (2006). The case in question was the decision of the Court of Appeal in **Belmont Finance Corporation Limited -v- Williams Furniture Limited** [1979] 1 Ch. 250. That was an interlocutory appeal in a case in which a company claimed that it had been defrauded by a number of its own directors who, acting together, had

arranged to buy all the shares in the company immediately after arranging for it to acquire the shares in another company at a substantial overvalue, thereby, it was said, contravening the statutory prohibition on a company providing financial assistance for the purchase of its own shares. In the course of the action, which was commenced by the liquidators of the company, it was alleged that these arrangements amounted to an unlawful conspiracy on the part of the defendant directors. At first instance, however, the judge held that the company itself must be deemed to have been a party to the conspiracy and could not, therefore, pursue its claim against the directors by reason of illegality. The Court of Appeal, however, allowed an appeal against this decision.

680. The leading judgment was given by Buckley LJ, with whom Orr and Goff LJJ agreed. At page 261-262 he summarised his views in this way:

“It may emerge at a trial that the facts are not as alleged in the statement of claim, but if the allegations in the statement of claim are made good, the directors of the plaintiff company must then have known that the transaction was an illegal transaction.

But in my view such knowledge should not be imputed to the company, for the essence of the arrangement was to deprive the company improperly of a large part of its assets. As I have said, the company was a victim of the conspiracy. I think it would be irrational to treat the directors, who were allegedly parties to the conspiracy, notionally as having transmitted this knowledge to the company; and indeed it is a well-recognised exception from general rule that a principal is affected by notice received by its agent that, if the agent is acting in fraud of his principal and the matter of which he has notice is relevant to the fraud, that knowledge is not to be imputed to the principal.

So in my opinion the plaintiff company should not be regarded as a party to the conspiracy, on the ground of lack of the necessary guilty knowledge.”

681. Mr Chaisty also referred me to Article 95 of Bowstead and Reynolds at paragraph 8-207, and in particular sub-paragraph (4) which summarises the legal principle in these terms:

“Knowledge is not attributed to the principal where it is acquired by an agent who is defrauding the principal in the same transaction.”

682. **Belmont Finance Corporation Limited -v- Williams Furniture Limited** is, in fact, specifically cited as authority for this proposition. But there is extensive commentary in Bowstead and Reynolds on the larger question as to when the knowledge of an agent can properly be imputed to his principal. I was not taken through the entirety of this commentary or any of the other cases referred to by the learned editors, save for two brief passages at paragraph 8-212 and 8-214, though I note that the “fraud exception” set out at sub-paragraph (4) of Article 95 is the subject of further commentary at paragraph 8-213 of the work.

683. At paragraph 8-212, the learned editors comment on the judgment of Hoffman LJ (as he then was) in **El Ajou -v- Dollar Land Holdings Limited** [1994] 2 All E.R. 685 at 703-704, though I was not taken to the report itself. The commentary was to the effect that Hoffman LJ had rejected the argument that where an agent had a duty to communicate information, knowledge of it might be imputed to his principal. But the particular reason, I think, why Mr Chaisty cited the passage in question was for the

very last sentence for which only Commonwealth and American authority was cited. This was to the following effect:

“And where the agent is subject to a fiduciary duty to another *not* to disclose information, knowledge cannot be imputed.”

684. Paragraph 8-214 of Bowstead and Reynolds deals with the rather different issue namely whether the knowledge of a particular individual within a corporate structure is to be regarded as the knowledge of the company itself. The point which, I think, Mr Chaisty sought to emphasise is that where such an analysis is adopted, it may be necessary to identify the person who had “management and control in relation to the act or omission in point.”
685. But Mr Mill took his stance firmly on the principle laid down by Buckley J. in **In Re Fenwick, Stobart & Co Limited**: and it is that approach which I propose to adopt. I bear in mind, however, that in applying that test, I must have regard, as Buckley J himself observed, to the circumstances of the particular case.
686. In the circumstances of the present case, I am quite satisfied that it would be wholly inappropriate to treat Mr Stretford’s knowledge of the advice Proactive had received from Couchman Harrington as being the knowledge of Stoneygate. He was undoubtedly faced with a serious conflict of duty in his capacity as director of Proactive whilst also being a director of Stoneygate. In the former capacity, it seems to me that he would have been under a duty to retain in confidence the legal advice which had been tendered to Proactive and which was no doubt privileged. At the same time, he may well have been under a duty to disclose the substance of the advice to the other directors of Stoneygate. But, as a matter of fact, there is no suggestion that he ever made such disclosure to his fellow directors. Indeed, it seems to me to be fairly plain that, at least until after the FA disciplinary proceedings, his primary loyalty was always to Proactive and that his position as a director of Stoneygate was essentially intended to facilitate the payment of commission by Stoneygate and for other administrative purposes.
687. But, whatever his duties may have been to Stoneygate, the test propounded by Buckley J. in **In Re Fenwick, Stobart & Co Limited** focuses upon the nature of his duty to Proactive. For my part, I can see no basis upon which it could be said that he was under a duty to Proactive to communicate the substance of this legal advice to Stoneygate. Accordingly, in my judgment, his knowledge of these matters is not to be imputed to Stoneygate.
688. Strictly, that finding is sufficient to dispose of the issue of affirmation. But, in case I am wrong, I think it is appropriate to say a little more upon the point. Mr Mill submitted that the principle upon which he relied was to be derived from three comparatively recent cases relating to the music industry.
689. The first of these was the decision of the Court of Appeal in **Zang Tumb Tuum Records Limited -v- Johnson** [1993] E.M.L.R. 61. There were two Plaintiffs, a record company and a publishing company; and the Defendant was the lead singer of the group known as “Frankie Goes to Hollywood”. The group had entered into a recording agreement and a publishing agreement with the Plaintiffs which bound each of the individual members of the group. A dispute arose after the Defendant left the

group; and the Plaintiffs commenced proceedings for an injunction. These were met by a counterclaim seeking declarations that, amongst other things, the agreements were unenforceable as being in unreasonable restraint of trade. The Plaintiffs then responded by contending that the Defendant had waived any relevant objection to the agreements. At first instance, the trial judge held that both agreements were unenforceable and rejected the allegation of waiver; and on appeal, his decision was upheld.

690. It is unnecessary, I think, to analyse the facts or the reasons of the Court of Appeal in relation to the restraint of trade point. But some further consideration must be given to the waiver issue. It appears that the restraint of trade argument was first raised on behalf of the members of the group by a letter dated 5<sup>th</sup> July 1985 from their solicitors to the solicitors for the Plaintiff companies. This was accompanied by a separate letter of the same date marked “without prejudice” which put forward proposals for re-negotiation of the agreements. Negotiations continued in a somewhat desultory manner during 1985 and 1986 and a further album was produced during this period. It was only in July 1987 that the Defendant’s new solicitor wrote a further letter which precipitated the litigation.
691. Dillon LJ, with whom Mann LJ and Sir John Megaw agreed, stated that, in his opinion there was nothing during this period which could be described as “an unequivocal representation by or on behalf of the defendant that he had decided not to proceed with his claim of unreasonable restraint of trade”. He continued as follows:  
“In my judgment there is nothing in these facts to render it unjust to the plaintiffs or unconscionable for the defendant to assert the unenforceability of the two agreements on grounds of restraint of trade. Accordingly in my judgment the plaintiffs fail on the question of waiver, laches or estoppel or however else it may be termed.”
692. Accordingly, the Plaintiffs’ counter-attack on the Defendant’s restraint of trade reference failed, it would seem, on the facts. But it is necessary to see what the Lord Justice had to say about the law. The relevant passage is to be found earlier in the judgment. It is in these terms:  
“In this court, Mr Carr seeks to put the point more widely. He submits that it is enough for the plaintiffs if, after the point had been raised by the group’s solicitors and the defendant was therefore aware of it, the group had ‘affirmed’ the agreements, that is treated them as still in operation. As to that, the judge said at one point in his judgment that ‘after the original complaint there was nothing amounting to an affirmation of the contract’. I think he must have meant that in the context of the way the point was being put to him by counsel, viz that it would be unjust or inconceivable to allow the Defendant to take the point.  
In my judgment, if there is to be a defence on these general lines, whether it be termed waiver, or laches or estoppel or whatever, to a claim that a contract is unenforceable because it is in unreasonable restraint of trade, it must be a defence on equitable grounds in the light of all the circumstances of the case - not a defence by mere rule of thumb that the point was not finally and irrevocably insisted on at the earliest possible moment. I would for my part (as did Nicholls J in the not wholly dissimilar case of **John -v- James** [1991]

FSR 397) take the law as formulated by Lord Selborne LC in **Lindsey Petroleum Co -v- Hurd** (1874) LR 5 PC 221 at 229 as follows:

“Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.”

I would refer also, as did Nicholls J. to the comment of Lord Blackburn in **Erlanger -v- New Sombrero Phosphate Co** [1878] 3 AC 1218 at 1279 that:

“I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it.”

693. I have taken the liberty of correcting the reference to the case of **Lindsey Petroleum Co -v- Hurd** and the citation itself. That case was, in fact, a decision of the Privy Council on an appeal from the Courts of Equity in Toronto. But the claim was based upon a fraudulent conspiracy as a result of which the Plaintiff company was induced to enter into a contract. Proceedings were by way of a bill in equity seeking rescission of the contract. One of the defences advanced on behalf of the Defendants was that of laches. It was to this equitable defence that the observations of Lord Selborne LC was directed (though wrongly attributed in the report to Sir Barnes Peacock, as is apparent from the Errata slip inserted at the beginning of the relevant volume of the Law Reports). The observations of Lord Blackburn in **Erlanger -v- New Sombrero Phosphate Co** are, of course, directed to precisely the same defence.
694. It seems to me that these observations of Dillon LJ in **Zang Tumb Tuum Records Limited -v- Johnson** were obiter in nature. Despite his citation of earlier authority, he did not positively find that any defence of this kind would be available. He simply held that, assuming it were available, it would fail on the facts. But the passage in question was relied upon by Parker J. in **Panayiotou -v- Sony Music Entertainment (UK) Limited** in which it was alleged, on various grounds, that it would be unjust and unconscionable if the 1988 agreement were to be treated as unenforceable or void and that the Plaintiff was precluded from so contending by virtue of “affirmation, waiver and/or acquiescence”. But in addition, the Defendant relied upon affirmation at common law which is more directly in point in the present case and to which I shall have to return shortly. It should be noted that the judge referred to the equitable

defences generally as “acquiescence” and affirmation at common law simply as “affirmation”.

695. At pages 384 to 385 of his judgment in **Panayiotou -v- Sony Music Entertainment (UK) Limited**, Jonathan Parker J. cited various passages from the judgment of Dillon LJ in **Zang Tumb Tuum Records Limited -v- Johnson** (which he referred to simply as “Holly Johnson”) and continued as follows at page 385:

“Thus, as I read the judgment of Dillon LJ in *Holly Johnson*, where equitable defences of the nature of waiver, laches or estoppel are relied upon as defences to a restraint of trade claim, the court will examine all the circumstances of the case in order to determine whether it would be unjust or unconscionable to allow the claim to be made: the mere fact that the claim is not made at ‘the earliest possible moment’ will not suffice to establish injustice or unconscionableness for this purpose. In the event, on the facts in *Holly Johnson* the defence of ‘waiver’ failed because in all the circumstances of that case there was nothing unjust or unconscionable in allowing the artist to allege restraint of trade.

I have not overlooked the fact that Dillon LJ prefaced his observations about the defence of ‘waiver’ by saying ‘*if* there is to be a defence on these general lines...’. In context, however, it seems to me that what Dillon LJ was saying was that if a defence along these general lines is raised, in considering it the court will have regard to all the circumstances of the case: I do not understand him to be suggesting that such a defence may not be available under any circumstances, as a matter of law. Had he taken that view, it would not have been necessary for him to go on to consider the particular facts of the case or to reach the conclusion that there was no representation by the artist to the effect that he had decided not to proceed with the claim of restraint of trade.

Moreover, it seems clear that the term ‘waiver’ as used to describe the defence which the record company was putting forward in *Holly Johnson* connoted waiver in a general equitable sense (thus Dillon LJ: ‘...whether it be termed waiver, or laches or estoppel or whatever...’), as opposed to waiver in the form of affirmation in the common law sense (see para 1702 of *Chitty* (above)). The distinction is drawn by Dillon LJ in the passage from his judgment quoted above, where he says, with reference to the judge’s reference to ‘affirmation’: ‘I think he must have meant that in the context of the way the point was being put to him by Counsel, viz. that it would be unjust or [unconscionable] to allow the defendant to take the point’.

As I read Dillon LJ’s judgment in *Holly Johnson*, therefore, (a) it does not directly address the question whether a defence of affirmation in the common law sense is available as a defence to restraint of trade claim (although it gives no indication that it may not be available), but (b) it is authority for the proposition that a general equitable defence such as Sony Music’s defence of acquiescence in the instant case is available as a defence to a claim of restraint of trade.

So far as the defence of acquiescence is concerned, therefore, on the authority of *Holly Johnson* I conclude that such a defence is available as a defence to a restraint of trade claim.”

696. The judge subsequently went on to consider the facts and held that, in all the circumstances, it would be unfair and unconscionable to allow the Plaintiff to assert

that the 1988 Agreement was unenforceable as an unreasonable restraint of trade. He relied in particular on the fact that he had at all times been in receipt of expert legal advice and was well aware of the doctrine of restraint of trade, that in 1988, the Defendant made substantial advances to the Plaintiff and that there was a lengthy re-negotiation of the 1988 Agreement in 1990 which effected a substantial improvement over the terms contained in the 1988 agreement. He noted that, in these respects, the facts of the case before him were “far removed” from the facts in **Zang Tumb Tuum Records Limited -v- Johnson**. However, this finding was subject to the determination of the merits of various counter-equities raised on behalf of the Plaintiff which he then went on to consider, concluding that, whether taken singularly or together, they did not alter the balance of unfairness and unconscionableness in any way.

697. But, of course, Mr Mill explicitly disclaimed any reliance on any such equitable principles. He relied upon the doctrine of common law affirmation which was adopted and applied by Jonathan Parker J. in the same case. It is to his observations on this point which I must now turn. The relevant passage appears at page 386 of his judgment. It is in these terms:

“Turning then to the defence of affirmation, in the absence of direct authority I have to approach the question as one of principle.

Affirmation generally appears in a pleading as a defence to a claim that a contract has been discharged by breach, that is to say in cases where the plaintiff is faced with a choice between either (a) accepting the defendant’s breach of contract as a repudiation and treating the contract as discharged on that ground, or (b) allowing the contract to continue. However, I can see no distinction in principle between on the one hand a case in which a contracting party is faced with a choice whether or not to bring the contract to an end by accepting the other party’s breach as a repudiation, and on the other hand a case in which a contracting party is faced with a choice whether or not to bring the contract to an end by claiming that it is unenforceable. If affirmation is available as a defence in the former case, I can see no reason in principle why as a general rule it should not be available also in the latter.

As to the public policy considerations which underlie the doctrine of restraint of trade, it is to be borne in mind that (at least in cases falling under the first limb of the *Nordenfelt* test) it is not for the court to initiate an allegation of restraint of trade ‘*proprio motu*’ (see per Lord Diplock in *Petrofina* p. 180 B). That being so, I can see no reason in principle why special defences arising from the surrounding circumstances - what I may describe as *in personam* defences - should not run in such cases against a restraint of trade claim.

I therefore conclude that it is open to Sony Music to allege affirmation in this case.”

698. He continued by considering the requirements of affirmation, as established in connection with the right to elect whether to accept a repudiatory breach of contract, and held that, on the facts, the 1988 Agreement had been affirmed when the Plaintiff made a request, through his solicitors, for an advance in relation to a recording album in early 1992 after he had learnt that it was open to him to contend that the 1988 Agreement was in unreasonable restraint of trade.

699. The third case to which I was referred on this topic was the decision of the Court of Appeal in **Nicholl -v- Ryder** [2000] EMLR 632. The Defendant was a rock musician who was, unhappily, a drug addict as well as being dyslexic. In 1994, the Plaintiffs instructed their solicitor to draw up a management agreement between themselves and the Defendant. For his part, the Defendant being unable or unwilling to concentrate on paperwork, instructed a solicitor to act on his behalf. A draft agreement was prepared and the Defendant's solicitor proposed a number of significant amendments which were not, however, accepted on behalf of the Plaintiffs. Notwithstanding these exchanges, one of the Plaintiffs persuaded the Defendant to sign the Agreement, at a time, it would seem, when the Defendant was under the influence of cannabis, without any reference to the proposed amendments or any explanation as to the contents of the agreement.
700. Problems arose during the course of the following two years; and in May 1996, the Defendant's solicitors advised him that he was not contractually bound to the Plaintiffs, since the contract was "clearly voidable on the grounds that it was in restraint of trade". This advice was apparently based in large measure on the Plaintiff's rights of renewal and their entitlement to post-termination commission. On 27<sup>th</sup> June 1996, the Defendant's solicitor wrote a letter on his behalf stating that he had advised the Defendant that the contract was in unreasonable restraint of trade and was unenforceable and that, insofar as it had not already been performed, his client had elected not to perform the contract as it was voidable at his option.
701. Proceedings then followed in which the judge at first instance found that the Defendant's solicitor had not merely acted as his solicitor but had fulfilled a quasi-managerial role and that he had become aware of the circumstances in which the contract had been signed in August 1995. He nonetheless kept his views about the enforceability of the agreement to himself, since he considered that it would be in the Defendant's best interests that the Plaintiffs should continue to manage him. Thereafter, he and the Plaintiffs worked hard together to foster the Defendant's career and, indeed, when a dispute first arose the solicitor sought to rely upon and deploy the management agreement on his client's behalf. It was only when negotiations failed or were close to failure that he raised the question of unenforceability.
702. The judge also concluded that the solicitor's knowledge of the potential unenforceability of the agreement was properly to be imputed to the Defendant as his principal. In those circumstances, he held that it would be unconscionable for the Defendant to be permitted to deny the enforceability of the management agreement or to be permitted to avoid it. In coming to this conclusion, he relied upon a dictum of Oliver J. in **Taylor Fashions Limited -v- Liverpool Victoria Trustees Co Limited** [1981] 1 All ER 897, also reported under the name **Taylor's Fashions Limited -v- Liverpool Victoria Trustees Co Limited** in the form of a Note at [1982] 1 QB 133.
703. On the basis of those findings, this was clearly a strong case on the facts. Nonetheless, the Defendant appealed but his appeal was dismissed by the Court of Appeal. The leading judgment was given by Thorpe LJ, with whom Swinton Thomas LJ and Singer J agreed. After rejecting an attack upon the judge's factual findings, Thorpe LJ went on to consider what, for convenience, he referred to as the "law of affirmation". The first question for determination was whether any estoppel could be

raised to defeat the application of a rule of public policy. In relation to this particular point, the Lord Justice made the following observations at page 640:

“It is not difficult to postulate hypothetical examples in which the application of Mr Bate’s proposition would lead to absurd results. I am in no doubt that the judge correctly relied upon the dicta cited by Mr McCue in *Taylor Fashions Limited -v- Liverpool Victoria Trustees Co Limited*. Oliver J. said at 915:

“Furthermore, the more recent cases indicate, in my judgment, that the application of the *Ramsden -v- Dyson* principal (whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial) requires a very much broader approach which is directed to ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment rather than to inquiring whether the circumstances can be fitted within the confines of some pre-conceived formula serving as a universal yardstick for every form of unconscionable behaviour.”

704. **Taylor Fashions Limited -v- Liverpool Victoria Trustees Co Limited** was, of course, very different type of case, involving an option to renew a lease which was void for want of registration. But it was nonetheless plainly treated by the Court of Appeal in **Nicholl -v- Ryder** as an example of a principle which would be equally applicable in a restraint of trade case.
705. Thorpe LJ then went on to cite the passage from the judgment of Dillon LJ in **Zang Tumb Tuum Records Limited -v- Johnson** at page 76 to which I have already referred. After noting that this might be regarded as obiter, he observed that it had been adopted and applied subsequently by Jonathan Parker J. in **Panayiotou -v- Sony Music Entertainment (UK) Limited** at pages 383-385. He also observed that the judge in that case had also had to consider an argument to the effect that the public policy element present in both limbs of the restraint of trade doctrine must override defences arising from particular dealings between the parties; and he went on to cite the passage at page 385 which I have also set out in the previous paragraphs. Thorpe LJ went on to express his complete agreement with that passage and held that it applied to the facts of the present case and fully supported the judges’ conclusions.
706. The case of **Nicholls -v- Ryder** is, therefore, authority binding upon me to the effect that a party to a contract may be prevented on equitable grounds from raising or pursuing an allegation that the contract is in restraint of trade. It would appear that this is essentially a form of estoppel, having regard to the reliance placed by the Court of Appeal in **Nicholl -v- Ryder** on the decision of Oliver J. in **Taylor Fashions Limited -v- Liverpool Victoria Trustees Co Limited**, so that any issue of this kind must be resolved in accordance with the principles laid down in that case and developed in subsequent authorities.
707. But neither **Zang Tumb Tuum Records Ltd -v- Johnson** nor **Nicholl -v- Ryder** is authority at appellate level for the proposition that a contract which is in unreasonable restraint of trade can nonetheless be affirmed at common law. However, that proposition was adopted and applied at first instance by Jonathan Parker J. in

**Panayiotou -v- Sony Entertainment (UK) Limited**, in the passage which I have cited from his judgment in that case which Mr Mill invites me to apply to the facts of the present case.

708. I am, of course, conscious that I should, in general, follow a decision of another judge at first instance unless I consider that it would be wrong to do so. But I have come to the conclusion that I should not do so in this case. As Jonathan Parker J. himself acknowledged, there was no authority whatever on the point; and none other has been cited to me. Indeed, I note that the decision does not appear to feature in the current edition of *Chitty on Contracts*. The learned judge, therefore, had to determine the point as a matter of general principle. He did so by analogy with the rule that a party to a contract who has a right to treat the contract as discharged by reason of a repudiatory breach by another party may nonetheless elect to affirm the contract. But, with respect to the judge, I do not, for my part, consider that the analogy is a sound one.
709. In the case of discharge by breach, the contract is, *ex hypothesi*, valid and enforceable by both parties unless and until it is brought to an end at the election of the innocent party. Even then, contractual rights and obligations arising prior to discharge remain valid and enforceable, though the parties are released from further performance and the primary obligations of the party in breach which remain unperformed are replaced by a secondary obligation to pay damages to the innocent party. By contrast, a contract in restraint of trade is unenforceable from the outset. The parties may, of course, choose to honour their engagements; and if they do so, the courts will not intervene. For my part, I cannot see how any right of election can arise in such a case requiring a party to choose in some way between treating the contract as subsisting (which it is not) and treating it as having come to an end. In my judgment, the two situations are quite distinct and the analogy is, with the greatest respect, contrary to orthodox principle.
710. My conclusion on this point is fortified by a consideration of the consequences that might follow if the doctrine of affirmation, in this sense, were to be applied to contracts which are unenforceable as being contrary to public policy. I recognise, of course, that, in a sense, a party to such a contract may have to decide, at some stage, whether to take the point that the contract is unenforceable. But, if a failure to take such a point, once a party knew it might be available to him, meant that he could not thereafter do so, it would wholly undermine the public policy basis of the restraint of trade doctrine.
711. If affirmation were possible at a later stage, why could the contract not be affirmed from the outset? Suppose a post-termination restraint were written into a contract of employment which also contained a declaration that the parties recognised that it might be unenforceable as being in unreasonable restraint of trade but that they nonetheless wished to affirm the restraints in their entirety. Would that mean that the court could not entertain a subsequent challenge to the restraints on the part of the employee? For my part, I think not. Nor do I consider that the position would be any different if the parties entered into a subsequent agreement to the like effect a day, a week, a month, or a year later.

712. Furthermore, the doctrine of election is a strict one. Once a party becomes aware of his right to treat himself as discharged by another party's repudiatory breach of contract, he must elect whether to accept the repudiation, though he will normally have a reasonable time in which to make up his mind. If he fails to do so and takes any step inconsistent with his right to treat himself as discharged, he will be held to have affirmed the contract and to have lost his right to treat himself as discharged. The comparative strictness of this principle is quite different from the considerations which are likely to arise when the court has to determine whether a party to a contract in restraint of trade may be estopped from asserting such a point in the way contemplated by the Court of Appeal in **Nicholl -v- Ryder** [2000] EMLR 632. That is a far more flexible doctrine which is much more likely to achieve substantial justice. Indeed, that may well have been a consideration which underlay the observations of Dillon LJ in **Zang Tumb Tuum Records Limited -v- Johnson** [1993] EMLR 61 at 76 where, it will be recalled, he said that, if there was to be a defence of the kind asserted:

“...it must be a defence on equitable grounds in the light of all the circumstances of the case - not a defence by mere rule of thumb that the point was not finally and irrevocably insisted on at the earliest possible moment.”

713. In all the circumstances, I conclude that Stoneygate's contention that the Image Rights Representation Agreement is contrary to public policy as being in unreasonable restraint of trade cannot be defeated on the grounds of affirmation at common law.

#### Justification

714. It follows, therefore, in my judgment, that, if Proactive is to succeed in meeting the restraint of trade argument, it must discharge the burden of showing that it was reasonable, having regard to the legitimate interests of the parties.

715. I start by observing that this question is to be determined by reference to the position which prevailed at the time when the contract was entered into. Care must, therefore, be taken to avoid an assessment on the basis of hindsight, save to the extent that it illuminates the position as it must have been at the time when the contract was made. I also add the observation that it is ultimately a matter for the court to determine whether the party seeking to uphold a restraint has discharged the burden of reasonableness and that any relevant expert evidence may assist the court but cannot be determinative. In fact, of course, I have sought to analyse the expert evidence in some detail earlier in this judgment; and I will draw much of that analysis in this section of my judgment without repeating the details.

716. I have already dealt with Mr Mill's submission that the earlier Agreement of 17<sup>th</sup> July 2002 must be regarded as one which did not contravene the doctrine of restraint of trade. It was Mr Mill's contention that, in judging the reasonableness of the later Image Rights Representation Agreement, it was highly material that Mr Rooney (though not, of course, Stoneygate) was already subject to an eight-year tie on very similar terms which was, as he contended, *ex hypothesi* valid and enforceable, subject, no doubt, to any issue arising out of Mr Rooney's minority. He referred me to the way in which Dillon and Dunn LJ had approached the issue of reasonableness in **Alec Lobb Limited -v- Total Oil (Great Britain) Limited** [1985] 1 WL R 173.

He relied in particular, to a passage in the judgment of Dillon LJ at page 180 in which the Lord Justice specifically took into account, amongst other things, that the Plaintiffs were already subject to a valid five-year tie at the time when the somewhat longer tie to which objection was taken came into force.

717. I entirely accept, of course, that any pre-existing contractual arrangements between the parties to an agreement which is said to be in restraint of trade may be material to the issue of reasonableness. But I do not consider that I need to pursue this particular point any further in the present case, since I have already rejected the argument that the 2002 Agreement must be deemed to have been reasonable. So I can move on to consider the other matters relied upon by Proactive in order to justify the restraints imposed by the Agreement.
718. Proactive's case on justification is to be found at paragraph 11 of its Re-Amended Reply and, in particular, in relation to the duration of the Agreement, paragraphs 11(3)(a) to (f). Since the fundamental reason why the Image Rights Representation Agreement is, in my judgment, in restraint of trade is the duration of the exclusivity arrangements which it creates, it is convenient to focus primarily on the particular factors set out at paragraph 11(3) by reference to which it is averred that an eight-year term was reasonably required to protect Proactive's legitimate business interests.
719. The first of these was the risk that Proactive would never (or, at any rate, not for some considerable number of years) recoup its substantial initial financial investment. But in my judgment, the risk was minimal in view of the player's extraordinary potential and the arrangements which were already in place with Everton FC. The point can be well demonstrated by the fact that substantial sponsorship contracts were obtained within a matter of months after the Image Rights Representation Agreement came into effect.
720. The second factor was the further substantial investment in terms of money and resources arising out of Proactive's obligation to use its best endeavours to represent Stoneygate in all aspects of image rights exploitation. This is, of course, based upon the provisions of clause 3.1 of the Agreement. Whilst I accept that a best endeavours provision of this kind is, at least in theory, significantly more onerous than one limited solely to reasonable endeavours, like Lord Reid in **A. Schroeder Music Publishing Co Limited -v- McCauley** [1974] 1 WLR 1308 at 1313, I doubt if it would have been of any real benefit in practice. If WR's career came to an early end, through injury or otherwise, or if, contrary to all expectations, he never came anywhere near fulfilling his apparent potential, I simply do not see that a contractual provision of this kind would require Proactive to chase illusory prospects or incur any significant expense. If he turned out to be a failure, it is unlikely that they could have done anything for him, no matter how hard they might have tried. On the other hand, if he fulfilled his potential, it would be in Proactive's commercial interests to do its best for him. In my judgment, in commercial reality, the best endeavours clause would provide little, if any, additional burden upon Proactive or any significant additional benefit to Stoneygate or the player himself.
721. The third factor raised in the Reply was the entitlement to Proactive to have regard to its need to make a reasonable rate of return from the Agreement in order to compensate it for the losses that it would inevitably make from the majority of players

whom it agreed to represent. Whilst I appreciate that this was a factor which, it was considered could be, taken into account in **Panayiotou -v- Sony Music Entertainment (UK) Limited**, I have reservations as to whether it is a factor to which any or any significant weight should be accorded. As I observed in the course of my analysis of the expert evidence, it is very far from obvious that it is reasonable to expect a player such as WR to subsidise marketing efforts on behalf of other, less successful, players. But, assuming nonetheless that this is a relevant factor, I simply have no evidential basis upon which I can judge its reasonableness in the instant case. I do not know whether a significant number of the players on Proactive's books are unsuccessful; nor do I know its overall rate of gross return or its profitability across its entire book. I am simply not persuaded that, at least in the circumstances of the present case, an eight-year term could be justified by reference to this particular factor.

722. The next factor set out at paragraph 11(3) of the Re-Amended Reply is said to be the benefit accruing to Stoneygate and WR from long-term contract which would enable or encourage Proactive to take a strategic approach to the exploitation of the player's image rights. As I have previously indicated, I accept that the proper development of a player's brand, particularly perhaps in the case of a very young player, requires a strategic approach rather than one based purely on short-term considerations. For those reasons, I accept that it is likely to be in the interests of both agent and player for an agency agreement to extend for a sufficient period to allow proper strategic planning and to help prevent the player from being de-stabilised by offers or inducements from individuals or companies who were somewhat disparagingly referred to during the course of evidence as "predatory" agents.
723. But the burden lies upon Proactive to demonstrate that considerations of this kind are sufficient to justify the very lengthy - indeed, apparently unique - period of exclusivity provided for in this case. I would have little difficulty in accepting that a two-year tie, running in synchrony with an on-field agency agreement, would be entirely reasonable, provided, no doubt, that the agreement did not contain any other particularly onerous terms. Indeed, I might well have been persuaded that a four or even a five-year term might be regarded as reasonable. That appears to have been the sort of timescale initially envisaged within Proactive for the development of the brand; and it may be the case that, as Mr Stein suggested, a practice may be emerging under which terms of this length are becoming more common. But I can see no justification on this ground for an exclusive tie lasting for a full eight years. So the point does not, in my judgment, provide any form of escape-hatch for Proactive.
724. The fifth point pleaded at paragraph 11(3) of the Re-Amended Reply is that, as a matter of commercial reality, if Stoneygate or WR wished to bring the Agreement to a premature end, this would occur only if another agent was willing to buy out Proactive's rights, thereby, in effect, providing WR with an exit mechanism. This, of course, is a matter which I have considered in some detail in connection with the expert evidence. Proactive could not compel Stoneygate or WR to adhere to the terms of the Image Rights Representation Agreement, whether by injunction or otherwise. But, in the event of a repudiatory breach of contract, Proactive would have a right to damages. As I have previously explained, those damages would be substantial, assuming, of course, that the Agreement was not unenforceable as being in unreasonable restraint of trade. Any commercial deal to buy out Proactive's rights

would inevitably be measured, at least in broad terms, by reference to the likely quantum of such damages.

725. So, whilst it is no doubt true that Stoneygate and WR could buy their release from the Image Rights Representation Agreement, the amount of compensation payable would clearly be referable to the fact that, on its face, the Agreement was for a term of eight years. For my part, however, I am quite unable to see how this can convert a contract which is, *ex hypothesi*, in unreasonable restraint of trade into one which is reasonable. The respective rights of the parties would still fall to be determined by reference to an exclusive tie which is, in my judgment, in restraint of trade. Even if, contrary to the common position adopted by all parties at trial, clause 8 conferred an effective right of termination, the cost to Stoneygate of exercising any such rights would have been very substantial and would have acted as a serious disincentive against the exercise of any such option. In the circumstances, therefore, I do not find that this is a factor which can suffice to justify the length of the tie.
726. Finally, it is alleged that a relevant factor is the damage to its commercial reputation which, it is said, Proactive would suffer if the contract were prematurely determined. For my part, however, I am at a loss to see how this can have any bearing upon the reasonableness of the tie. If any such damage were to be sustained, it would, in my judgment, be entirely self-inflicted by reason of Proactive's own decision to seek and obtain an Agreement for a term of eight years.
727. In my judgment, therefore, none of these factors, whether taken individually or collectively, can begin to justify the duration of the exclusive rights and obligations embodied in the Image Rights Representation Agreement. In those circumstances, it is hardly necessary to deal with various other points which were raised in this context but I will nonetheless briefly deal with one or two of them.
728. As I have already observed, the commission rate of 20% is no doubt fairly standard in Agreements of this kind and, in itself, would not convert a contract which was otherwise unimpeachable into one which was in restraint of trade. But, as I have also previously noted, given the length of the tie of this case, the lack of any cap on commission does, in my judgment, add to the onerousness of the tie. It is true that the absence of any taper or cap on the commission payable to Proactive was not specifically pleaded by Stoneygate. But the Re-Re-Amended Defence at paragraph 37(a), specifically relied upon the fact that commission at the rate of 20% was payable throughout the term; and Mr Chaisty did, of course, cross-examine Mr Stein in some detail on the point. In the circumstances, I do not consider that Proactive has, in fact, shown that commission at a level rate of 20% throughout the eight-year term was reasonable, even though the particular line of attack adopted at trial was not specifically flagged up in Stoneygate's pleadings.
729. Another factor relied upon by Stoneygate was, of course, Proactive's claim to post-termination commission. If I had come to the conclusion that the Image Rights Representation Agreement was apt to confer such a right upon Proactive, it seems to me that this would have further restricted the freedom of Mr Rooney and Stoneygate to exploit his image rights since it would have imposed a continuing levy on Stoneygate's income after the termination of the Agreement and would have restricted his ability to retain the services of a new agent to service the Agreements entered into

prior to termination. But, in view of my findings on the construction issue, this is not a factor which Proactive is required to justify.

730. As for the contractual and commercial constraints upon the number and duration of sponsorship and endorsement contracts available to Stoneygate, it seems to me that it should have been apparent at the time when the Image Rights Representation Agreement was first entered into that there would probably be some limit on the number and type of contracts of this kind which Stoneygate and WR were likely to be able to enter into. Whether or not it could have been anticipated that such contracts would be as long as they have ultimately turned out to be, I consider that it must have been within the contemplation of the parties that, if the agency was successful, Proactive would have taken a substantial slice of the available cake by the time the Agreement came to an end, leaving only what remained for any new agent. That would also tend to restrict the freedom of Mr Rooney and Stoneygate to move to a new agent, whether the Image Rights Representation Agreement with Proactive had run its full term or came to end prematurely. But it is a factor which is inherent in agency relationships of this kind and it is material only insofar as it adds to the onerousness of a long-term agreement of the kind with which I am concerned.
731. I have come to the clear conclusion, therefore, that Proactive has been unable to discharge the burden of showing that the restraints embodied in the Image Rights Representation Agreement, and in particular its duration, were reasonable having regard to the legitimate interests of the parties. It follows that Stoneygate succeeds in its contention that the Agreement is in unreasonable restraint of trade.

#### Consequential Matters

732. Though the concepts of illegality and public policy in their application to the law of contract cover a variety of different types of circumstance, the common theme underlying the application of those concepts is that the law will not lend its aid to a party seeking to enforce a contract which is illegal or contrary to public policy. Nonetheless, it is recognised that contractual restraints which are against public policy are not treated for all purposes in the same way as an agreement which is illegal in the stricter or narrower sense. It is commonly said that contracts in restraint of trade are simply unenforceable as being contrary to public policy. Lord Reid made the distinction in a typically succinct fashion in **Esso Petroleum Co Limited -v- Harpers Garage (Stourport) Limited** [1968] AC 269, at 297, where he said:
- “One must always bear in mind that an agreement in restraint of trade is not generally unlawful if the parties choose to abide by it: it is only unenforceable if a party chooses not to abide by it.”
733. In fact, there are clearly instances where a contract of this kind has been described not merely as unenforceable but also void. Thus, in a well-known passage in the leading case of **Nordenfelt -v- The Maxim Nordenfelt Guns and Ammunition Company Limited** [1894] AC 535, at 565, Lord Macnaghten put it in this way:
- “The true view at the present time I think, is this: The public have an interest in every person’s carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule.”

734. I do not, however, think that anything turns for present purposes on the precise words chosen to describe the consequences of a finding of restraint of trade. The way in which it is put in Chitty on Contracts 30<sup>th</sup> edition (2008) at paragraph 16-075 is this:  
“A covenant in restraint of trade (if unreasonable) is void in the sense that courts will not enforce it, but if the parties wish to implement it they would not be acting illegally and the courts would not intervene to prevent them from doing so.”
735. This statement appears to me to reflect current legal orthodoxy. Mr Chaisty QC sought to support the orthodox position by citing to me the decision of Sir Donald Nicholls VC (as he then was) in **Boddington -v- Lawton** [1994] ICR 478. That was, it should be said, a somewhat unusual case. It involved the rules of a trade association which were in restraint of trade and were not subject to the legislative protection which the association would have enjoyed if it had been a trade union. The trustees wished to make use of some of the association’s funds in accordance with the rules notwithstanding that they were unenforceable as being in restraint of trade. In the circumstances, they sought a declaration that they were entitled to do so; and such a declaration was granted by Nicholls VC. As he said at page 494:  
“In my view, if the trustees make those payments they will not expose themselves to any such claims....The managing trustees will have done no more than carry out their side of an (unenforceable) agreement. That would not give the members a cause of action against them.”
736. In the course of his judgment, Nicholls VC made some cogent observations about the law on this topic which appear at pages 490-491 of the report. What he said was this:  
“Agreements in restraint of trade are often said to be “illegal” or “unlawful” and therefore “unenforceable” and “void”. These expressions need to be handled with great care. Agreements can be vitiated and struck down by the law for widely differing reasons, and questions regarding them arise in widely differing circumstances. An agreement to commit a murder is unlawful. The same may be said of an agreement unreasonably restricting the activities of a former employee who wishes to set up a competing business. But the law is not so crude as to treat these two instances as identical in all respects when faced with questions arising out of such agreements.  
The law’s attitude to an agreement in unreasonable restraint of trade is to decline to assist the parties to enforce it. The agreement does not give rise to legally-binding obligations, and in that sense it is void. But in this context, and whatever may be the position regarding contracts of which the law disapproves for other reasons, being void does not mean that the agreement will be disregarded for all purposes and that the law will proceed as though there never had been an agreement between the parties. On the contrary, the law will countenance the existence of such an agreement. If the parties wish to implement it, they are at liberty to do so. They would not be acting illegally or unlawfully. But if either party chooses to withdraw, the court will not assist the other to enforce the agreement or award him damages for breach. In *Esso Petroleum Co Limited -v- Harpers Garage (Stourport) Limited* [1968] AC 267, 297, Lord Reid observed:

“One must always bear in mind that an agreement in restraint of trade is not generally unlawful if the parties choose to abide by it: it is only unenforceable if a party chooses not to abide by it.”

Earlier, in *Mogul Steamship Co -v- McGregor, Gow & Co* [1892] AC 25, 39, Lord Halsbury L.C. said regarding contracts in restraint of trade that the law “treats them as if they had not been made at all.” But he made that observation in the context of stating that the law will not lend its aid to enforce such contracts. His observation cannot be taken to be directed more widely than this. I am fortified in this view by noting that in *Attorney-General of the Commonwealth of Australia -v- Adelaide Steamship Co Limited* [1913] AC 781, 797, Lord Parker of Waddington stated:

“It is only necessary to add that no contract was ever an offence at common law merely because it was in restraint of trade. The parties to such a contract, even if unenforceable, were always at liberty to act on it in the manner agreed.”

In that case *Mogul’s* case had been cited to the Judicial Committee of the Privy Council.

The only other authority I need mention is *O’Sullivan -v- Management Agency and Music Limited* [1985] QB 428, 469, where Fox LJ said: “The fact that the agreements were in restraint of trade does not, in my view, render them void. They are unenforceable...” This observation shows how important it is in this area to define one’s terms. Agreements in restraint of trade are void in the sense that they do not give rise to legally-enforceable obligations. They are not void in the sense that for all purposes they are treated as non-existent. It is in the latter sense that Fox LJ is to be taken to have been using the term “void” when he said that agreements in restraint of trade are not void.”

737. It would seem to follow that, once Stoneygate and WR declined to fulfil the obligations imposed upon them by the Image Rights Representation Agreement, the courts would not enforce those obligations at the behest of Proactive. Accordingly, Proactive could not rely upon the contract to recover any sums which would, on the face of it, have fallen due to it under the terms of the Agreement; nor could it sue for damages for breach of contract.
738. Mr Mill nonetheless sought to persuade me that Proactive was entitled, at the least, to recover from Stoneygate any liquidated sums which Stoneygate was obliged to pay to it under the terms of the Image Rights Representation Agreement. He did so by deploying the concept of accrued rights. He submitted that since the parties had voluntarily performed the contract up until the end of October 2008 or thereabouts, Proactive had become entitled to commission on all third party contracts which it had secured for Stoneygate prior to that date, even if the sums in question would only have fallen due subsequently.
739. In support of this proposition, Mr Mill relied upon a very brief passage in the decision of the Court of Appeal in ***Instone -v- A Schroeder Music Publishing Co Limited*** [1974] 1 All E.R. 171 at 182. This was not a point which appears to have been considered in the subsequent appeal to the House of Lords under the name ***A Schroeder Music Publishing Co Limited -v- McCauley***. The Court of Appeal, of course, held that the agreement in question was in restraint of trade; and their decision on that point was upheld in the House of Lords. But the passage relied upon by Mr

Mill involved a question which does not seem to have been considered by the House. It appears at the very end of the judgment of the Court of Appeal and is in these terms:

“In the result, as we understand it, the situation is this. Insofar as the plaintiff has actually executed assignments of copyrights in his compositions to the defendant, that remains effective, and the defendant is entitled to the copyright on the agreed terms as to the plaintiff’s share of royalties etc. Insofar as the contract would otherwise have operated as an assignment of copyright in future compositions only under s. 37(1) of the Copyright Act 1956, the contract being unenforceable the section does not operate.”

740. I cannot accept Mr Mill’s submissions on this aspect of the case. I can see no basis upon which the concept of accrued rights can have any place in the context of agreements which are, by definition, unenforceable. If it were correct, it would mean that there would be many instances in which a party to an unenforceable contract could, in fact, enforce it by legal proceedings. In my judgment, that is plainly not what was envisaged by Lord Reid or by Sir Donald Nicholls VC in the passages which I have cited.
741. Nor do I consider that the very brief observations of the Court of Appeal in **Instone - v- A Schroeder & Co Limited** can bear the weight which Mr Mill’s seeks to place upon them. It seems obviously correct that any assignments already entered into when the contract was disavowed would remain effective. It is not possible, however, to determine from this brief report how the Court of Appeal analysed the right to royalties referred to in this passage. It may have been assumed without argument or may have been conceded or it may have been held or assumed that the mutual rights and obligations of the parties would thereafter be determined by the assignments themselves. For my part, I do not consider that the Court of Appeal was intending to mark what, in my judgment, would be a radical departure from principle.
742. Accordingly, I conclude that Proactive cannot sue to recover any commission to which it would have been entitled had the Image Rights Representation Agreement been valid and enforceable. By the same token, of course, Stoneygate cannot recover any payments which it has already made to Proactive in accordance with the term of the Agreement.

#### Quantum Meruit

743. The question that then arises is whether Proactive might be entitled to some alternative remedy. The alternative remedy which was sought by Proactive was a restitutionary quantum meruit. A similar remedy had been asserted in the event that the Image Rights Representation Agreement were held to be void on grounds of mistake. The right to such a remedy in those circumstances was admitted on the face of the pleadings; but it does not, of course, arise in the light of my findings.
744. There was no similar admission, however, in relation to the restitutionary claim advanced on behalf of Proactive in the event of a finding that the Agreement was unenforceable as being in unreasonable restraint of trade. At paragraphs 9A to 9C of the Re-Re-Amended Particulars of Claim, the basis on which such a remedy was claimed was stated to be the fact that Proactive had conferred services on Stoneygate

in the belief that “there were valid and subsisting and enforceable contracts in place between the Claimant and the Defendants which provided that the Claimant would be remunerated for the provision of its services.” At paragraph 57A of the Re-Re-Amended Defence, the right to such a remedy was denied and no admission was made as to the alleged belief.

745. In the event, however, no very serious challenge to the availability of such a restitutionary remedy, at least in principle, was mounted by Mr Chaisty QC on behalf of Proactive, though he somewhat tentatively suggested that the court should be wary of providing a remedy which would, in effect, indirectly enforce Proactive’s contractual rights under what was, *ex hypothesi*, an unenforceable contract.
746. In fact, of course, I have found that Proactive must have been aware of the risk that the contract might be held to be unenforceable as being in unreasonable restraint of trade. Indeed, it seems quite plain that Mr Harrington was informed that this was a risk that Proactive was prepared to take. It was not, however, contended that this would, in itself, bar it from any restitutionary remedy of the kind sought.
747. The development of a coherent body of principle on the law of restitution has been one of the more remarkable developments in English law over the last few decades. Restitutionary remedies are intended to redress situations where one party has been unjustly enriched at the expense of another; and they are likely to be available in a number of reasonably well-defined circumstances. Where services have been rendered and freely accepted in accordance with an ineffective contract, the party benefited will normally be required to pay their reasonable value as at the time when the services were rendered.
748. In the particular case of an unenforceable contract, Mr Mill directed my attention to the brief statement of principle at paragraph 29-080 of *Chitty on Contracts*, 30<sup>th</sup> edition (2008) which is in these terms:  
“A person who renders services under a contract that is unenforceable will be entitled to a quantum meruit if the other party has failed to carry out his part, provided the restitutionary claim does not undermine the policy of the statute (or common law rule) rendering the contract unenforceable.”
749. This statement of principle is supported, amongst other authorities, by the decision of the High Court of Australia in **Pavey & Matthews Pty Ltd -v- Paul** (1987) 69 ALR 577. That was a case in which a builder had entered into an oral contract with his client which was unenforceable by reason of a statutory requirement that any such contract should be in writing. The majority of the High Court held that he was nonetheless entitled to a restitutionary remedy based upon the acceptance by the client of the benefits afforded by the performance of the contractual services. The judgments are lengthy and learned, involving a detailed analysis of the old common law system of pleading. Though it is unnecessary, I think, to cite from the report at length in order to illustrate the core principles accepted and applied by the Court, it may be helpful to refer to two particular passages, since they may cast some light on certain points canvassed in the present proceedings. In their joint judgment, Mason and Wilson JJ made the following observations at page 583:  
“If the effect of bringing an action on a *quantum meruit* was simply to enforce the oral contract in some circumstances only, though not in all the

circumstances in which an action on the contract would succeed, it might be persuasively contended that the action on a *quantum meruit* was an indirect means of enforcing the oral contract. So, if all the plaintiff had to prove was that he had fully executed the contract on his part and that he had not been paid the contract price, there would be some force in the suggestion that the proceeding amounted to an indirect enforcement of the contractual cause of action. However, when success in a *quantum meruit* depends, not only on the plaintiff proving that he did the work, but also on the defendant's acceptance of the work without paying the agreed remuneration, it is evident that the court is enforcing against the defendant an obligation that differs in character from the contractual obligation had it been enforceable."

750. Deane J., who was also in the majority, commented upon the basis of quantification. At page 609, he said this:

"The tendency in some past cases to see the rationale of the right to recover remuneration for a benefit provided and accepted under an unenforceable contract as contract or promise rather than restitution has tended to distract attention from the importance of identifying the basis upon which the quantum of the amount recoverable should be ascertained. What the concept of monetary restitution involves is the payment of an amount which constitutes, in all the relevant circumstances, fair and just compensation for the benefit or "enrichment" actually or constructively accepted. Ordinarily, that will correspond to the fair value of the benefit provided (e.g. remuneration calculated at a reasonable rate for work actually done or the fair market value of materials supplied). In some categories of case, however, it would be to affront rather than satisfy the requirements of good conscience and justice which inspire the concept or principle of restitution or unjust enrichment to determine what constitutes fair and just compensation for a benefit accepted by reference only to what would represent a fair remuneration for the work involved or a fair market value of materials supplied. One such category of case is that in which unsolicited but subsequently accepted work is done in improving property in circumstances where remuneration for the unsolicited work calculated at what was a reasonable rate would far exceed the enhanced value of the property. More relevant for present purposes is the special category of case where restitution is sought by one party for work which he has executed under a contract which has become unenforceable by reason of his failure to comply with the requirements of a statutory provision which was enacted to protect the other party. In that category of case, it would be contrary to the general notions of restitution or unjust enrichment if what constituted fair and just compensation for the benefit accepted by the other party were to be ascertained without regard to any identifiable real detriment sustained by that other party by reason of the failure of the first party to ensure that the requirements of the statutory provision were satisfied."

751. Mr Mill also drew my attention to the fact that in **Nicholl -v- Ryder** [2000] EMLR 632, the Court of Appeal clearly assumed that, if the contract in question had been held to be unenforceable on grounds of restraint of trade, a restitutionary remedy would nonetheless have been available. I refer to the passage in the judgment of Thorpe LJ at page 642 in which the Lord Justice accepted that compensation on a

restitutionary basis might take into account other factors which would not be available in relation to a claim based upon a party's strict contractual rights.

752. I conclude that a restitutionary remedy is available to Proactive on the basis that its services were freely accepted by Stoneygate and WR, even though they were provided pursuant to a contract which, as I have held, was unenforceable. I do not consider that the availability of such a remedy amounts to an indirect enforcement of the contract for the reasons adverted to by Mason and Wilson JJ in **Pavey & Matthews -v- Paul**. Such a remedy does not, therefore, in my judgment contravene the public policy considerations which render the contract unenforceable.

753. I must, therefore, turn to the question of quantification. I have already cited the observations of Deane J. in **Pavey & Matthews -v- Paul**. I do not, for my part, however, see how, at least in relation to these particular services, Stoneygate or WR could be regarded as having suffered any detriment by virtue of the fact that the Image Rights Representation Agreement was in restraint of trade. Certainly no such contention was advanced before me. Accordingly, an application of the basis of computation suggested by Deane J. would mean that Proactive would be entitled to the fair value of the benefit provided which is equivalent to remuneration at a reasonable rate for the work actually done. Though I was not taken to any specific passage in Goff and Jones on the Law of Restitution, 17<sup>th</sup> edition, (2007), the approach adopted by Deane J. appears to accord with the way in which the learned editors of that work summarise the position at paragraph 1-034, where the following passage appears:-

“If a defendant has freely accepted services or goods, then the general rule is that he must pay their reasonable value at the date they were rendered or delivered respectively. Reasonable value is normally market value, that is the sum which a willing supplier and buyer would have agreed upon; any sum awarded would generally include a figure which represents a profit element.”

754. Mr Mill QC also drew my attention to the approach adopted by Patten J (as he then was) in **Benedetti -v- Sawiris** [2009] EWHC 1330 (Ch.). The facts of that case were complex and, I think, largely immaterial for present purposes. It appears that Mr Benedetti's primary claim was to enforce his rights under an agreement and that the claim on a quantum meruit basis arose only if he failed to do so. The judge dealt with the quantum meruit claim at paragraphs 527-575 of his judgment. The particular point for which Mr Mill cited the judgment is because of the weight which the judge considered that it was appropriate to place on the parties' own valuation of the services in respect of which the claim was advanced. After stating succinctly that the court's task was to put a value on these services which he had performed, the judge continued as follows at paragraph 528:

“Some of the parameters for this exercise are not, I think, in issue. The valuation has to be carried out as at the date when the services were rendered and should, as a general rule, approximate to market value. But regard must also be had to any prior negotiations or agreement between the parties which indicate that they put a particular value on the services in question. This may be the best evidence of what constitutes reasonable remuneration for the services rendered and, as a matter of principle, there is some judicial support for the view that the price agreed should be the ceiling for any award.”

755. One of the cases cited by Patten J was, as it happens, **Pavey & Matthews -v- Paul**. But, as Mr Chaisty, in his turn, emphasised, the judge appeared to draw a distinction between cases in which the agreement which it was sought to use as a yardstick for measuring the value of the services had been ineffective and those in which it had, in effect, been abandoned. The relevant passage appears at paragraphs 533 and 534 which read as follows:
- “533. It is, however, important to note that these are all cases where the agreement between the parties could not be enforced either because it failed to attain the degree of certainty and finality necessary to create a binding contract (*Way -v- Latilla*); or because of some formal defect (*Scarisbrick -v- Parkinson*); or due to some supervening event (*B.P. Exploration Co -v- Hunt*). But for these problems, the agreements would have been enforceable between the parties according to their terms and it is not difficult to see why, in these circumstances, the value placed upon the services by the parties themselves should be given great weight in any determination by the court of the value which should be attributed to the arrangements between those same parties.
534. But in a case where the evidence shows that the contract or agreement was abandoned as the basis of the parties’ dealings then the reasoning in *Way -v- Latilla* ceases to apply. If the correct view is that the parties ceased to regard the original contract price as an appropriate value for the services then there is no justification for the court imposing it as a measure of value unless it can be justified by other evidence as the market value of the services at the time when they were performed. There is a clear difference between an ineffective agreement and one which the parties have effectively jettisoned.”
756. The services in respect of which Proactive is entitled to remuneration on a quantum meruit basis were provided only up until October 2008 or thereabouts and, of course, Proactive has already received payment at the contractual rate in respect of the bulk of the services provided since the commencement of the contract. If the contract had been valid and enforceable, Proactive would be entitled, as I have already found to payment of its outstanding invoices at the rate of 20% up until the time when it ceased to provide the contracted services and to compensation or damages thereafter. But a claim in respect of Proactive’s expectation loss cannot be awarded in the light of my finding that the Image Rights Representation Agreement was unenforceable. The only remedy available to it in those circumstances is a restitutionary award based on a valuation of the services actually provided, to be assessed in accordance with the principles which I have already referred to.
757. In the light of the passages which he cited, Mr Mill QC invited me to assess the amount of Proactive’s quantum meruit claim by reference to the rate of commission agreed between the parties and set out in the Image Rights Representation Agreement. This, he submitted, would mean that the amount payable would be precisely equivalent to the commission to which, in his contention, Proactive would have been entitled if the contract had not been unenforceable, namely 20% on all sums payable to Stoneygate in accordance with clause 6.2 of the contract, both before and after the end of the notional contract period. That was the agreed rate of remuneration under the contract and reflects a rate of commission which appears to be widespread in the market. If such an approach were to be adopted, it would, in effect, mean that Proactive would recover a total sum equivalent to the amounts of the invoices raised by Proactive prior to the breakdown of relations between the parties. Indeed, the logic

of Mr Mill's submission is that it would also be entitled to recover further sums equal to any future commission falling due thereafter.

758. Mr Chaisty, on the other hand, submits that it would be wrong to take the contractual yardstick in the circumstances of the present case and that there is, in reality, no sufficient basis upon which the court could, at this stage, properly assess the amount of any such compensatory claim. He submitted that this was not the sort of case in which the contractual yardstick would be an appropriate measure as contemplated by Patten J. in **Benedetti -v- Sawiris** and that the compensation should, therefore, be determined without reference to the contractual position.
759. I have come to the conclusion that there is sufficient weight in Mr Chaisty's argument to make it inappropriate for me, at this stage, to attempt to assess the quantum of Proactive's restitutionary claim. Underlying the approach urged upon me by Mr Mill is the assumption that the contractual rate of remuneration represents the best evidence as to the value which the parties themselves had placed upon the services in question. But, in this particular case, I do not think that that is necessarily a fair inference or assumption. As I have pointed out before, WR and his family were utterly inexperienced in matters of this kind and received no independent legal advice when the Image Rights Representation Agreement, or its predecessor, was entered into.
760. It is true that the evidence shows that commission at a rate of 20% is widespread in the marketplace. Perhaps Mr Mill's best point is that WR and Stonegate appear to have entered into a new agreement with Mr Stretford and his company, Triple S, on the basis of remuneration at that same rate. But, as I have already pointed out, if Stonegate and WR had received proper, informed legal advice before they entered into the Image Rights Representation Agreement, I would have thought there would have been a strong case for inferring that they would have negotiated a reduction in the level of remuneration once certain income thresholds had been reached, even if they had still been willing to enter into a long-term arrangement. Furthermore, whatever his relationship with Mr Stretford, it seems to me that, if he had been free to re-negotiate the terms of any agency contract in the latter part of 2008, his bargaining power would have allowed him to drive down the level of any remuneration payable by Stonegate to a new agent.
761. These were not matters which were canvassed at trial, at least with particular reference to the quantum meruit claim. Furthermore, the expert evidence was not specifically directed to this issue, notwithstanding that this was one of the purposes of the order for directions for expert evidence contained in the order of 7<sup>th</sup> April 2009. Indeed, at the outset of his cross-examination by Mr Chaisty, Mr Stein very fairly stated that he did not regard it as having been within his remit to address any of the factual issues to which the court might have to have regard in determining the amount of any quantum meruit. Yet further, there are other aspects of the quantum meruit claims which the parties have not yet had an opportunity to argue fully at least in this particular context. Thus, I have already held that, even if the Image Rights Representation Agreement had been entirely valid and enforceable, Proactive would not have been entitled to post-termination commission, though it would have been entitled to compensation or damages for the loss of the opportunity to earn commission up to the end of the eight-year term. In assessing any such compensation

or damages, account would have to be taken of any savings which Proactive would have made as a result of not having to provide any further services to Stoneygate. The impact of consideration of this kind on its restitutionary claim is a matter which may have to be considered further in due course.

762. In all the circumstances, albeit rather reluctantly, it seems to me that Mr Chaisty is right and that the assessment of the amount payable by Stoneygate to Proactive on a quantum meruit basis should stand over for another occasion. That, of course, is precisely the course which Proactive had asked me to take in relation to its claim for damages for breach of contract, though that cannot now arise in the light of my findings on the restraint of trade issue.

## PART VIII

### THE CLAIMS AGAINST SPEED

763. I have already examined the evidence in relation to Proactive's dealings with Speed and Mrs Rooney. It is all somewhat tenuous and, as I have already indicated, I do not think that it is sufficient to allow me to infer that there was any express agreement between the parties for the provision of services and the payment of commission. But it is clear that services analogous to those provided for Stoneygate and WR were also provided by Proactive for the benefit of Speed and Mrs Rooney. It is also clear that, in practice, remuneration was paid for these services on the same basis as provided for by the Image Rights Representation Agreement, namely 20% of all sums falling due from contracts and other income-producing opportunities procured by Proactive.
764. Even in the absence of an express agreement between the parties, Mr Mill submits that the proper inference is that there was at least an implied agreement arising out of the course of dealing between the parties by which Proactive had an accrued right to commission on any sums payable to Speed, whenever such payments became due, provided that Proactive was the efficient cause of the transaction which gave rise to the payments. On the other hand, Mr Chaisty submitted that all that Proactive was entitled to was an essentially restitutionary remedy analogous to that which, as I have found, Proactive is entitled to assert in respect of the services it provided for Stoneygate.
765. Mr Mill did not cite any authority in support of his proposition, though he invited me to draw an adverse inference from the failure of Mrs Rooney herself to give evidence. Mr Chaisty, on the other hand, referred me to several cases in connection with this issue. He started with the well-known decision of Robert Goff J. (as he then was) in **British Steel Corporation -v- Cleveland Bridge and Engineering Co Limited** [1984] 1 All ER 504. It will be recalled that, in that case, the judge held that work done in anticipation of a successful outcome of continuing contractual negotiations could not be regarded as being carried out pursuant to some form of interim contract between the parties, whether in the usual bilateral, executory form or as a unilateral or "if" contract. He held, however, that, since the work was carried out in anticipation of a binding agreement, the party who made the request for it to be carried out would be under an obligation of a restitutionary nature to pay a reasonable sum for the work in question.

766. The next authority referred to by Mr Chaisty was the decision of the Court of Appeal in **Baird Textile Holdings Limited -v- Marks & Spencer Plc** [2001] EWCA Civ 274. The dispute arose out of a relationship between Marks & Spencer Plc, the well-known retail chain, and one of its principal suppliers of garments, Baird Textile Holdings Limited. After a trading relationship lasting some 30 years, Marks & Spencer terminated the supply arrangements between them on short notice. The Claimant asserted that it was entitled to a longer period of notice and commenced proceedings seeking appropriate relief on the basis of both contract and estoppel. However, it failed in its contract claim both at first instance and on appeal; and insofar as its case was based on estoppel, it also failed on appeal, even though it succeeded at first instance. I am concerned, however, only with the contract claim.
767. The first judgment was given by Sir Andrew Morritt VC. He noted that the issue to be determined in relation to the contract claim was whether a contract of the kind contended for on behalf of the Claimant could be implied on the basis of the parties' conduct. At paragraphs 17 to 21, he analysed the authorities as to the circumstances in which a contract might be implied from conduct and concluded that the judge did not apply the wrong test. He then turned to consider the facts and expressed the view that the real question in the case before him was whether the obligations arising from the alleged implied contract would be sufficiently certain to be contractually enforceable. After analysing the authorities, at paragraph 30, he concluded that the alleged obligation on the part of Marks & Spencer to acquire garments from Baird was insufficiently certain to found any contractual obligation "because there are no objective criteria by which the court could assess what would be reasonable either as to quantity or price."
768. Given the importance placed on the concept of "necessity" in this context, it is desirable to set out the principles adopted and applied by the judge at first instance which were approved by the Court of Appeal. They were recorded by Morritt VC in these terms at paragraph 13 of his judgment:
- “(1) A court will only imply a contract by reason of the conduct of the parties if it is necessary to do so. It will be fatal to the implication of a contract that the parties would or might have acted as they did without any such contract. In other words, it must be possible to infer a common intention to be bound by a contract which has legal effect. If there were no such intent the claim would fail.
- (2) All contracts, to be enforceable must be sufficiently certain to enable the courts to give effect to the parties' intentions rather than to give effect to a contract which the court has had to write for them. On the other hand it can be said that the Courts do not incline to adopt a 'nit-picking' attitude to such matters and will endeavour, where possible, to construe the obligations in a way which gives effect to the parties' bargain. There is a line to be drawn between a generous attitude to making contracts work and striking them down on grounds of uncertainty.”
769. Judge LJ and Mance LJ both agreed with the Vice Chancellor. Though they expressed themselves in somewhat different ways in relation to the facts, it does not seem to me that there was any material difference between them as to the test to be applied. It should be noted, however, that, although no long-term contract of the kind contended for could be implied, it seems that there had been a series of short-term

seasonal contracts between the parties. I refer to paragraphs 70 to 72 of the judgment of Mance LJ.

770. The third authority relied upon by Mr Chaisty was the recent decision of the Court of Appeal in **Whittle Movers Limited -v- Hollywood Express Limited** [2009] EWCA Civ 1189, which was, in fact, a case in which Mr Chaisty himself was involved. Once again, the dispute arose out of a trading relationship under which the Claimant provided services for the Defendant and received remuneration for those services in contemplation of the signing of a formal, written, long-term contract. The judge at first instance held that no such long-term contract had in fact been entered into but that the parties had by conduct concluded an interim contract terminable on six months' notice. The decision that there was no long-term contract was upheld by the Court of Appeal; but the judge's decision on the interim contract was overruled, it being held that the proper conclusion was that there was no contract whatever between the parties. The Court of Appeal rejected an argument pressed, in fact, by Mr Chaisty, that such an interim contract could be implied from conduct, since it was not necessary to do so. However, the Court held that a restitutionary quantum meruit claim was available to the Claimant and an inquiry to that effect was directed.
771. The leading judgment was given by Waller LJ, with whom Dyson and Lloyd LJ agreed. For the most part, I think it is unnecessary to refer to any specific passages in the judgment of Waller LJ. But it may nonetheless be helpful to refer to paragraphs 14 and 15 which read as follows:

“Furthermore although the judge was referred to *British Steel Corporation -v- Cleveland Bridge and Engineering Co Limited* [1984] 1 All ER 504 he does not seem to have had in mind (possibly because Mr Bartley Jones was not putting no contract as his primary case) important passages in the judgment of Robert Goff J from 509-511. The passages demonstrate the following matters of relevance to the analysis required in this case. First, while parties are negotiating a contract under which they will, if the contract is concluded, enter into reciprocal obligations binding each other as to future performance, it is highly unlikely that by conduct they will conclude in the interim an executory contract containing terms still the subject of negotiation [see 510b-f]. Second it is more likely that they will have entered into what Goff J. refers to as an “if” contract i.e. a contract under which if one party supplies, the other agrees to pay a reasonable remuneration. Third even an “if” contract will not have been entered into if important terms such as those relating to standard of performance are still under negotiation, and in such cases the proper answer is no contract but a restitutionary remedy to the extent that one party has been unjustly enriched [see page 511].

15. There may be little distinction between an “if” contract entitling the provider of services to reasonable remuneration and a restitutionary remedy based on the unjust enrichment of the recipient of the services in many cases but before it is possible to find any contract, whether “if” or executory, it is necessary to analyse precisely the terms so as to test whether the reality is that such terms are still under negotiation and the proper answer is no contract. In *Goff and Jones* 7<sup>th</sup> Edition page 662 there is a reference to an article by Professor McKendrick in which the Professor argues that a court should not strain to find a contract because a restitutionary remedy can solve most if not

all the problems. [see footnote 7]. That, it seems to me, is the correct approach.”

772. Since the conclusion of the trial in the present case, the Supreme Court has given judgment in the case of **RTS Flexible Systems Ltd -v- Molkerei Alois Muller** [2010] 1 WLR 753 in which similar issues arose. The judgment of the Court was delivered by Lord Clarke of Stone-cum-Ebony who emphasised that each case depended on its own facts: see, for example, his observations at paragraph 54 of his judgment. But the basic legal principles applicable in such cases were set out succinctly at paragraph 45 where he said this:
- “45. The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.”
773. I must approach the question in this case, therefore, on the basis of the principles laid down in the authorities cited. It seems to me that I must consider whether what passed between Proactive, Speed and Mrs Rooney leads objectively to a conclusion that they intended to create legal relations and had agreed on all the essential terms of a legally binding relationship. If they would or might have acted in just the same way in the absence of such a legally binding relationship, there will be no necessity to imply any contract from their conduct. I must also bear in mind that the development of the law of restitution means that the court need not strain to find a contract in order to do substantial justice between the parties.
774. But the present case differs from most of those to which I have been referred in two important respects. Firstly, there was no question of any continuing negotiations with a view to reaching agreement as to the terms of a contract governing the rights and obligations of the parties; and, secondly, there was a clear model upon which the conduct of the parties appears to have been based, namely the Image Rights Representation Agreement between Proactive and Stoneygate.
775. There are three possible answers to the question posed by the relationship between Proactive and Speed. The first is that, by their conduct, the parties were effectively adopting and implementing an over-arching contractual framework similar to that created by the Image Rights Representation Agreement between Proactive and Stoneygate. The second is that, in relation to each individual sponsorship contract or other income-producing opportunity procured by Proactive, there was a separate individual contract between Stoneygate and Speed under which it was entitled to commission at the rate of 20%. The third possible approach would, of course, be to conclude that there was no contract of any kind but that Proactive was entitled to a restitutionary remedy for services provided and willingly accepted.

776. Though I was initially attracted by the second of these three possibilities, I have reached the conclusion that it would be inappropriate. I see no advantage and no satisfactory basis for inferring or assuming that any individual contract was procured by Stoneygate at the express or implied request of Speed or Mrs Rooney. Indeed, analysis of that kind may no longer be necessary or appropriate in the light of the development of the law of restitution. But, in any event, as a matter of fact, it seems to me that Proactive was not merely acting as a commission agent for Speed and Mrs Rooney but was providing a wider range of services similar in kind to those which it was providing for Stoneygate and WR.
777. That leaves a choice between the imputation of a contract by conduct or a finding that there was no contractual relationship whatever between the parties, so as to leave Proactive to a restitutionary remedy rather than a contractual one.
778. I have come to the conclusion, not without some hesitation, that, in this particular case, the correct analysis is that the arrangement was contractual. Even on the basis of the fairly exiguous evidence available to me, it seems fairly obvious that the parties conducted themselves on the footing that their commercial relationship, at least with regard to certain essential features, followed the same pattern as the Agreement between Proactive, Stoneygate and WR.
779. I do not think that it is likely that they would or might have acted in this way if they had not considered that there was some form of contractual relationship between them which was apt to create legally enforceable rights and obligations. In the sense in which the term was approved by the Court of Appeal in **Baird Textile Holdings Ltd -v- Marks & Spencer Plc**, therefore, it seems, to me that it is “necessary” to imply such a contract between Proactive and Speed.
780. That, of course, still leaves the question as to whether the mutual obligations of the parties can be identified with sufficient certainty to enable the court to give effect to the parties apparent intentions. In some measure, any problem of certainty in the present case may simply reflect a lack of satisfactory evidence. But it seems to me that an implied agreement by which Proactive was to provide Speed and Mrs Rooney with services similar to those it provided to Stoneygate and WR in return for commission at the rate of 20% is a perfectly workable commercial arrangement, even if it is not possible to determine the precise scope of those services on the evidence presently available. From an objective standpoint, it seems to me that they must be regarded as having agreed at least these essential terms.
781. But I do not think it is possible to go further on the evidence before me and determine what other terms are to be implied from the conduct of the parties. Insofar as Proactive relies on any other contractual rights against Speed, it has failed to establish any such terms. Thus, I cannot think that it would be right to imply any term or terms as to exclusivity, still less any provision for an eight-year term. But that can have no bearing on the claims asserted in this action, since Mr Mill made it plain that Proactive did not seek to recover damages for any alleged breach of contract by Speed or Mrs Rooney; and, of course, Mr Chaisty did not seek to attack any such contract on the grounds that it was in unreasonable restraint of trade.

782. It follows, in my judgment, that Proactive is entitled, as a matter of contract, to recover any commission which had fallen due to it prior to the breakdown in relations, just as would have been the case in relation to its claim against Stoneygate if I had not held that the Image Rights Representation Agreement with that company was unenforceable as being in unreasonable restraint of trade. But Proactive has failed to satisfy me that it is necessary or appropriate to imply any term which would entitle it to commission on income recoverable by Speed after the relationship between the parties had come to an end, even if that income was derived from contracts negotiated or procured by Proactive during the subsistence of the relationship. Even if the proper analysis were that Proactive, Speed and Mrs Rooney intended to adopt all the terms of the Image Rights Representation Agreement between Proactive and Stoneygate insofar as they related to remuneration, there would be no right to post-termination commission in the light of the conclusion I have reached as to the true construction of that agreement. Proactive's right to remuneration would, therefore, come to an end when it ceased to provide any services for Speed and Mrs Rooney.
783. Of course, if I am wrong in reaching the conclusion that Proactive was entitled to recover commission from Speed as a matter of contract, there can be no real doubt but that it would nonetheless be entitled to a restitutionary remedy. The question would then arise, of course, as to whether this could properly be assessed by reference to a commission of 20% on income received or receivable by Speed. Obviously, some weight must be given to the fact that, throughout their mutual dealings, Proactive, Speed and Mrs Rooney appear to have accepted that a commission at the rate of 20% on income received or receivable by Speed was appropriate. Furthermore, not all of the countervailing factors would apply in her case as might be material in the case of her husband and which might tend to reduce the level of remuneration which might be considered to be reasonable.
784. On the other hand, however, I received no evidence whatever as to what might be regarded as the market rate for representing a non-sporting celebrity such as Mrs Rooney. In all the circumstances, therefore, if I had held that a quantum meruit claim was appropriate, I would have directed that, as in the case of Stoneygate, the amount of any compensation payable by Speed should be assessed on a later occasion.
785. But it follows from my findings, subject to the resolution of certain further specific issues, that Proactive is entitled to recover the monies due from Speed under invoices raised by Proactive in respect of sums paid or payable to Speed prior the breakdown in relations at or about the end of October 2008. These invoices would seem to be those set out at items 1 to 5 of paragraph 7 of the Re-Re-Amended Particulars of Claim, amounting in total to £78,725.25 (inclusive of value added tax).
786. But no claim can, in my judgment, be made in respect of the further invoices referred to at paragraph 7A of the Re-Re-Amended Particulars of Claim, all of which would appear to arise out of income received or receivable by Speed subsequent to the breakdown in relations between the parties. These amount to a further £124,791.90 inclusive of value added tax. Nor can any claim be made in respect of a further contract between Speed and Argos Limited on the evening of 11<sup>th</sup> November 2008, shortly after an e-mail had been sent on behalf of Speed earlier on the same day purporting to give immediate notice to determine any agreement between Speed and Proactive.

787. The claim arising out of the contract with Argos Limited was raised by way of a new paragraph 8A of the Re-Re-Amended Particulars of Claim which was produced and treated as having been served on behalf of Proactive during the course of the trial. The relevant allegations were met by some new draft paragraphs 56A to 56D of the Re-Re-Amended Defence by which, amongst other things, it was alleged that Proactive was not the effective cause of the Argos contract. But it is unnecessary to consider these matters further, since, on any view, the contract in question was agreed and came into effect after Proactive had ceased to provide any services for Speed and Mrs Rooney.

## PART IX

### MISCELLANEOUS ISSUES

788. Finally, I must resolve a number of very specific issues which the parties were unable to resolve for themselves. The first of these was whether Proactive would have been entitled to charge value added tax on certain invoices.

#### Value Added Tax

789. As a matter of fact, throughout the whole of the commercial relationship between Proactive and both Stoneygate and Speed, all its commission invoices to each of the two companies sought payment of value added tax in addition to commission. Furthermore, the value added tax element in the invoices was apparently always paid without demur by both Stoneygate and Speed. It is a matter of some regret that this is now the subject of a challenge by Stoneygate which alleges that Proactive was not entitled to charge value added tax on top of its commission, at least in relation to the sums payable by the three main sponsors, and that this element in the invoices was paid by Stoneygate to Speed under a mistaken belief that it was liable to do so. Accordingly, it now counterclaims for repayment of the amounts in question.
790. The basis of Stoneygate's case on this point is set out at paragraphs 65 to 69 of the Re-Re-Amended Particulars of Claim. It refers specifically only to commission invoices arising out of income from the sponsorship contracts with Nike, Coca Cola and Electronic Arts, though there is a suggestion at paragraph 68 of the pleading that there may be other instances where the same alleged error occurred. But since no further amendments have been made to reflect any further instances, I must proceed on the footing that the point arises only in relation to these three major sponsors.
791. The point is, in fact, quite a narrow one. It is alleged that value added tax was not chargeable in respect of the payments due to Stoneygate from these three sponsors, that Stoneygate did not in fact charge tax on the monies due under the relevant sponsorship contracts and that the monies were paid by the sponsors and received by Stoneygate without the addition of tax. I assume that these factual allegations are correct, since they are admitted in substance in the Re-Re-Amended Reply.
792. It is, I think, important to note, therefore, that Stoneygate does not contend that, as a matter of contract, Proactive was not entitled to add value added tax at the appropriate rate to the amount of any commission for which it invoiced Stoneygate. The narrow

point is whether it was entitled to do so in cases where, for any reason, value added tax was not charged or chargeable on the monies receivable from third party sponsors in respect of which Proactive was entitled to claim commission.

793. The only explanation which was put forward, albeit somewhat tentatively, by Proactive in order to explain why value added tax was not charged by Stoneygate in these three cases was that all three of the sponsors in question were incorporated overseas rather than within the United Kingdom. Furthermore, though I invited Mr Chaisty to provide further written submissions, if he felt it appropriate to do so, as to the statutory framework governing the charge to value added tax and any relevant case law on the topic, none were, in fact, received. So, both legally and factually, the issue has not been explored as thoroughly as it might have been.
794. I start from the premise that both Proactive and, it would seem, Stoneygate were registered for value added tax. The supply of services by Proactive to Stoneygate within the United Kingdom would inevitably, as it seems to me, constitute a chargeable supply for the purposes of the Value Added Tax Act 1994, so that Proactive would be obliged to charge value added tax on that supply pursuant to section 4 of the Act and would have to provide a VAT invoice to Stoneygate and account for the amount of the tax to Her Majesty's Revenue and Customs. Whether the tax chargeable is to be added to the consideration payable in respect of the taxable supply, or whether the tax is to be treated as part of the total consideration, is essentially a matter of contract between the parties.
795. In this particular case, as I have pointed out, there does not appear to be any challenge to the proposition that Proactive was, in general, entitled to add value added tax to the substantive amount of the commission in respect of which invoices were raised. That entirely accords with the consistent practice of the parties. So far as I am aware, there was never any challenge to the addition of value added tax in this way until the Defence and Counterclaim were served in the present proceedings. In any event, at least as between two parties both of which were apparently registered for value added tax, I would have thought that a term to that effect would readily be implied.
796. On the basis of this analysis, it seems to me that the question whether value added tax was chargeable or charged by Stoneygate on monies payable by the sponsors is wholly irrelevant to the separate question as to whether Proactive was obliged to charge value added tax on the services supplied to Stoneygate and entitled to add the appropriate amount to its own invoices to Stoneygate. Once the question is formulated in this way, it seems to me to be quite clear that value added tax was chargeable on those services and that Proactive was entitled to add the amount to the contractual consideration set out in its invoices. It is unnecessary, in the circumstances, to speculate as to the reasons why Stoneygate may not have charged value added tax on its own invoices to the three major sponsors in question, still less as to whether this was correct or incorrect.
797. In my judgment, therefore, Proactive was entitled to add value added tax to the gross commission payable by Stoneygate, whatever the position may have been with regard to the charge to value added tax as between Stoneygate and any third parties. By the same token, therefore, Stoneygate cannot recover any amounts which it has paid on

account of value added tax to Proactive. Its counterclaim for repayment must, therefore, be dismissed.

#### Other Invoice Issues

798. There remain several comparatively minor issues in relation to certain of the invoices upon which Proactive bases its claim against Stonegate. I have already dealt with the value added tax issue and, therefore, say no more about it. I will deal with the remaining points by reference to the individual invoices in respect of which an issue has been raised.
799. Invoice 18261: This is an invoice dated 30<sup>th</sup> September 2008 for commission due on a payment from Plum Pictures in relation to an advertisement. The amount claimed is £6,000 plus value added tax of £1,050. It is not denied that a payment of £30,000 was payable by or on behalf of Plum Pictures; and it is admitted in the Re-Re-Amended Defence that the sum in question was paid on 27<sup>th</sup> February 2009. Invoice 18261 seeks payment of commission on this sum. The sole specific point pleaded on behalf of Stonegate in relation to this invoice is that the payment of £30,000 was not received by Stonegate until after the commencement of the present action. In itself, it seems to me that there is no merit whatever in this point.
800. A highly technical argument might, perhaps, be mounted to the effect that a claimant must have a cause of action in respect of any sums claimed as at the time when the claim form was issued. But I cannot think that this argument could succeed where, as in the present case, Proactive relies upon a contractual right to payments which have already fallen due at the time when the action was commenced and which will continue to fall due thereafter.
801. But, in any event, it seems to me that the simple answer is that given by Mr Page in his principal witness statement where he points out that the invoice to Stonegate would have been raised on the same occasion as the invoice raised by the same team in respect of the sum due from Plum Pictures. As I have already held, the Image Rights Representation Agreement does not provide for payment of commission on a “pay when paid” basis. Strictly, if the contract had been enforceable, Proactive would have been entitled to its commission when the third party payment was itself due and payable. In the absence of any more detailed evidence on the point, it seems to me that the proper inference is that the sum in question was payable by or on behalf of Plum Pictures on the date of the invoice, well before the commencement of this action on 2<sup>nd</sup> December 2008. But, even if it was not, I can see no sufficient justification in principle for disallowing the claim for a payment of a recurrent nature because it may have fallen due after the commencement of the action. Accordingly, if I had found that Proactive was entitled to enforce the rights conferred upon it by the Image Rights Representation Agreement, I would have held that this sum would have been recoverable.
802. Invoice 8022: This is an invoice dated 23<sup>rd</sup> January 2008 in the sum of £5,000 plus value added tax of £875 in respect of accountancy fees for services provided to Stonegate during the course of 2007. On its face, the invoice states that this was a fee which had been agreed with WR. Nonetheless, in its Re-Re-Amended Defence, the claim is met by a simple denial that any such accountancy services had been

provided. According to Mr Page, Stoneygate's accounts were initially prepared by Powrie Appleby but, at some stage, it was decided to deal with the accounts for both Stoneygate and Speed on an "in house" basis, after which Proactive itself became responsible for the preparation of accounts and various ancillary services, such as sales and cash management. Furthermore, Mr Page stated that he had been told by Mr Stretford that he had agreed with WR that Stoneygate would pay £5,000 a year for these accountancy services. He went on to say that, in his opinion, the fee in question was commensurate with the services provided and reflected the amount which would be payable for similar services in the market.

803. I have previously considered Mr Stretford's forthright denial of any suggestion that services of a this kind were provided by Proactive and have concluded that he could not be regarded as a truthful witness on this particular point. On the other hand, I see no reason why I should not accept Mr Page's evidence about these matters in its entirety. Though his observations as to what he was told by Mr Stretford are strictly hearsay, I am prepared to accept them in the absence of any credible evidence to the contrary. Furthermore, given his background and experience, I see no reason not to accept his evidence that an annual figure of £5,000 would reflect the market cost of the sort of services which Proactive provided.
804. Furthermore, it seems fairly clear that services of this kind fell outside the scope of those which Proactive was obliged to provide under the Image Rights Representation Agreement dated 16<sup>th</sup> January 2003. Indeed, this was the subject of the specific proviso at clause 6.3 which found its way into the Agreement as finally signed by all parties. But it is unnecessary to consider this particular provision in any more detail, as I am satisfied on the evidence that there was, indeed, a separate agreement for the payment by Stoneygate of an annual fee of £5,000 to Proactive in return for the provision of these services. That finding is material, since it means that Proactive does not have to rely upon an unenforceable contract in order to recover the sum in question. I conclude, therefore, that Proactive is entitled to recover the sum of £5,000 plus value added tax from Stoneygate under this invoice.
805. Invoice 18284: this is an invoice dated 2<sup>nd</sup> November 2008 in respect of commission due on a gross sum of €150,000 payable to Stoneygate by Electronic Arts. The commission of €30,000 was converted at the time of the invoice into a sterling equivalent of £23,737.94, to which value added tax of £4,154.14 was added, bringing the total to £27,892.08. The only point specifically pleaded in relation to this invoice in the Re-Re-Amended Defence is that Proactive was not entitled to charge value added tax on top of the commission. That of course is a matter which I have already dealt with and resolved in Proactive's favour. But, in view of a point taken elsewhere, there may be a suggestion that an incorrect exchange rate was chosen. If that is indeed the case, the simple answer would surely have been that Proactive would have been entitled to judgment in euros, if it so chose, or the sterling equivalent at the time of judgment or enforcement if, contrary to my findings, it had been entitled to enforce its rights under the Image Rights Representation Agreement. But, in any event, I see no reason why Proactive would not have been entitled to the amount in euros as shown on the face of the invoice. As Mr Page explained in his principal witness statement, the conversion rate would have been taken by one of Proactive's account team from a suitable website as at the date when the invoice was raised.

806. Invoice 18268: this is an invoice dated 30<sup>th</sup> September 2008 directed to Speed in respect of commission of £1,000 plus value added tax of £175 in respect of commission due from Emap London Lifestyle Limited, as publisher of a magazine named "Closer" under a contract dated 26<sup>th</sup> July 2006. In the Re-Re-Amended Defence, it is alleged that Speed did not provide any relevant contribution in July 2008 so that no payment was due to it from Emap. Once again, as Mr Page pointed out, the invoice would have been raised on the same occasion as an invoice to Emap in the sum of £5,000. Apart from that, there is simply no evidence on the issue. Indeed, it will be recalled that Mrs Rooney herself did not choose to give evidence.
807. The evidential position is wholly unsatisfactory. The question is whether Proactive has done enough to discharge the burden of proof on this particular issue. In the circumstances, I am just prepared to hold that it has managed to do so. At the time when the invoice was raised, the same accounting team would still have been working for both Proactive and Speed. They would have had sufficient information available to them to know whether any payment was due from Emap. Accepting, as I do, Mr Page's evidence that an invoice to Emap would have been raised at the same time as the corresponding commission invoice to Speed, I think that the issue of the invoice to Emap is just enough to justify the inference that it related to a sum which was, in fact, due. If necessary, I would be prepared to draw an adverse inference in support of this conclusion from the unexplained failure of Mrs Rooney herself to give evidence.
808. Invoice 18021: This is an invoice dated 23<sup>rd</sup> January 2008 in the sum of £5,000 plus value added tax of £875 directed to Speed in respect of accountancy fees for the year 2006. On its face, it states that this was in accordance with an agreement between Proactive and Miss McLoughlin as Mrs Rooney was at the time. The only point taken in relation to this invoice is that the accountancy services in question were never in fact performed. It is on that basis, and on that basis alone, that it is denied that the amount claimed is not due and payable. According to Mr Page, the arrangements for provision of accountancy services to Speed were precisely the same as those agreed in relation to Stoneygate. I see no reason why I should not accept that evidence; and I have no hesitation in rejecting Mr Stretford's evidence that no such services were, in fact, provided.
809. The only real question is whether, as in the case of Stoneygate, there is sufficient evidence of an actual agreement between Proactive and Speed for the payment of an annual fee of £5,000 in respect of those services. Once again, the evidence is tenuous in the extreme. But, as in the case of Stoneygate, the invoice, on its face, refers to an agreement with Mrs Rooney; and there is no evidence or suggestion that this was ever challenged. On that admittedly flimsy foundation, I am prepared to infer that there was such an agreement for the payment of an annual fee; and, once again, I derive some support from the adverse inference which I feel it is appropriate to draw from the fact that Mrs Rooney did not herself give evidence at the trial. As in the case of Stoneygate, this seems to be to be an entirely separate matter from the generality of the services which appear to have been provided by Proactive to Speed. Accordingly, I conclude that Proactive is entitled to judgment against Speed for the amount of this invoice plus value added tax quite separately from the outcome of its claim for commission.

810. Invoice 18026: This is a further invoice dated 12<sup>th</sup> February 2008 in the sum of £5,000 plus value added tax of £875 directed to Speed and stated to be in respect of what were, on this occasion, described as “the agreed accountancy fees”. Yet again, it refers to an agreement with Miss McLoughlin. No distinction is to be drawn between this invoice and the previous one; and I conclude, once again, that Proactive is entitled to judgment in the sum of £5,000 plus value added tax.
811. Invoice 18602: This is the first of four invoices which are the subject of specific challenge out of a total of eight in relation to Stonegate and 11 in relation to Speed which are listed at paragraph 7A of the Re-Re-Amended Particulars of Claim and which relate to commission which is said to have fallen due after the commencement of the present proceedings. The rest are admitted, subject, of course, to any other defences available to Stonegate or Speed. This particular invoice is dated 23<sup>rd</sup> October 2009 and was issued pro-forma in respect of commission said to be due from Coca Cola on 1<sup>st</sup> August 2009. It is in the sum of £40,000 together with value added tax in the sum of £6,000. In the Re-Re-Amended Defence, it is averred that the amount claimed was not and would not become due for payment February 2010 until and unless certain conditions for payment under the sponsorship contract with Coca Cola had been fulfilled by that date. That time has, of course, now passed.
812. Proactive’s case is that this is simply incorrect. Under the terms of the current Coca Cola contract, the period of sponsorship began on 1<sup>st</sup> August 2006 and will expire on 1<sup>st</sup> September 2010. By clause 3, it is stated that the relevant promotional services are to be provided during each year of the term, which is defined as each 12 month period ending immediately prior to 1<sup>st</sup> August in each of the years 2007, 2008, 2009 and 2010. By clause 5, the consideration of these services is stated to be £400,000 per annum, payable in two equal instalments of £200,000. The first of these is to be paid on or before 1<sup>st</sup> August “in each calendar year of the Term” and the second on or before 1<sup>st</sup> March in each calendar year.
813. It is submitted on behalf of Proactive that, having regard to the definition in clause 3, “calendar year” in this context must mean the year from 1<sup>st</sup> August to 31<sup>st</sup> July, so that the first instalment is payable on or before 1<sup>st</sup> August and the second on or before the following 1<sup>st</sup> March. That, of course, accords with the order in which clause 5 provides for payment. Accordingly, the first instalment of the year ending immediately prior to 1<sup>st</sup> August 2010 would have fallen due on 1<sup>st</sup> August 2009.
814. That argument seems to me to be entirely correct; and, consistently with this analysis, the invoice itself refers to the first instalment for year 4 of the Coca Cola contract. There is no suggestion that the contract in question has not been carried out in accordance with its terms. Accordingly, in my judgment, if I had found that Proactive was entitled to enforce its contractual rights under the Image Rights Representation Agreement, I would have found that it would have been entitled to judgment for the amount claimed under this invoice.
815. Invoice 18605: This is a further pro-forma invoice dated 23<sup>rd</sup> October 2009 directed to Stonegate in respect of commission due in respect of sums payable under the Electronic Arts sponsorship contract. It is in the sum of €30,000 together with value added tax of €4,500. But in the Re-Re-Amended Defence no admission is made to the appropriate conversion rate. As I have previously noted, it was Mr Page’s

evidence that this conversion rate would have been taken from an appropriate website as at the date upon which the invoice was raised on Electronic Arts itself in respect of the substantive payment on which commission was claimed. That was not challenged and I see no reason why Proactive should not be entitled to claim on the basis of the conversion rate prevailing at that time. The alternative, as I have previously observed, is that Proactive would be entitled to judgment in euros or the sterling equivalent at the time of judgment or execution. But, of course, it is not entitled to make any such recovery in the light of my finding that the Image Rights Representation Agreement was unenforceable.

816. Invoice 18591: This is a pro-forma invoice directed to Speed and dated 23<sup>rd</sup> October 2009. It seeks payment of £15,000 plus value added tax at £2,250 in respect of commission due from Harper Collins. In the Re-Re-Amended Defence, it is alleged that no fee is yet due or payable from Harper Collins in respect of any relevant contract. That was supported by a letter from Harper Collins which was not challenged by Mr Mill on behalf of Proactive. Accordingly, he limited Proactive's claim for relief to a declaration that it is entitled to payment if and when any sum becomes payable to Speed under the relevant contract with Harper Collins. But, for reasons which I have already set out, I do not consider that Proactive would be entitled to commission on any such payment and I decline to make any declaration to that effect.
817. Invoice 18593: This is a further pro-forma invoice directed to Speed and dated 23<sup>rd</sup> October 2009 by which Proactive seeks payment of the sum of £18,333.40 plus value added tax in the sum of £2,750.01 by way of commission on further monies said to be payable to Speed by Harper Collins. Precisely the same issues arise as in relation to the previous invoice and I resolve them in precisely the same way.

## PART X

### CONCLUSIONS

818. Despite the length of this judgment, I can summarise my conclusions quite briefly. The Image Rights Representation Agreement dated 16<sup>th</sup> January 2003 is not void for mistake but is unenforceable by Proactive as being in unreasonable restraint of trade. Proactive cannot, therefore, recover, as a matter of contract, any sums which remain unpaid but which would otherwise have fallen due to it under the terms of the agreement had it not been unenforceable. Nor can it recover any further commission in respect of income receivable in the future by Stoneygate under contracts procured by Proactive or pursue any claim for damages for breach of the Image Rights Representation Agreement. It is, however, entitled to a restitutionary remedy in respect of those services which it has provided to Stoneygate and in respect of which it has not yet received any remuneration. That must be the subject of an assessment at a later stage in respect of which I will give directions in due course.
819. Even if I had found that the Image Rights Representation Agreement was valid and enforceable, I would have held that Proactive's claim for commission was limited to those sums which had already fallen due at the time when the relationship between the parties broke down at the end of October 2008. In respect of the subsequent period prior to its acceptance of Stoneygate's repudiatory breach of contract on or about 24<sup>th</sup>

December 2009, Proactive would have been entitled to compensation or damages to be assessed in accordance with the principles laid down in **Roberts -v- Elwells Engineers Ltd** [1972] 2 QB 586. Thereafter, it would have been entitled to recover damages in respect of the loss sustained as a result of the premature determination of the Agreement. But on what I consider to be the true construction of this particular contract, it would have had no right to commission on sums receivable by Stoneygate from third parties after the expiration of the eight-year term; and any claim for commission in respect of sums receivable prior to that date, but after the breakdown in relations between the parties, would have formed part of its claim for compensation and damages and would have had to be taken into account in the assessment of the appropriate sums.

820. In relation to Speed I have concluded, albeit with some hesitation, that Proactive is entitled, as a matter of contract, to recover the full amount of any commission which became due and payable prior to the end of October 2008. The total amount of the commission is, by my calculation, the sum of £78,725.25. But if I had found that Proactive was not entitled to a contractual remedy I would nonetheless have held that it would have been entitled to a restitutionary quantum meruit.
821. Despite my conclusions on the general issues raised in these proceedings, I have nonetheless had to consider various individual invoices which were the subject of dispute; and I have sought to resolve the specific issues raised in respect of each of them. In all but three instances, the resolution of these issues is immaterial to the outcome of the proceedings. But I have concluded that, in the case of both Stoneygate and Speed, there was a wholly separate agreement for the provision of accountancy services by reason of which Proactive is entitled to recover £5,000 plus value added tax from Stoneygate under Invoice 18022 and a total of £10,000 plus value added tax from Speed under Invoices 18021 and 18026.