Manchester City

Neutral Citation Number: [2021] EWHC 1179 (QB)

Case No: QB-2017-000857

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/05/2021

Before :

MR JUSTICE CAVANAGH

- -

Between :

TVZ and seven others (EJP, FTS, DDG, HFT, JVF, KHT and LDX)	**Claimants**
- and -	
MANCHESTER CITY FOOTBALL CLUB LIMITED	**Defendant**

- -
- -

James Counsell QC and Benjamin Bradley (instructed by **Bolt Burdon Kemp**) for the **Claimants**
Michael Kent QC and Nicholas Fewtrell (instructed by **Keoghs LLP**) for the **Defendant**

Hearing dates: 22 and 23 April 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE CAVANAGH

Mr Justice Cavanagh:

Introduction

1. This judgment deals with a number of applications that have been made in proceedings between the eight Claimants and the Defendant arising out of sexual abuse perpetrated by Barry Bennell when he was a football coach in the 1980s. Each of the Claimants was sexually and emotionally abused by Bennell, in some cases repeatedly. At the relevant times, the Claimants were boys aged between 8 and 16 years old who were abused by Bennell whilst he coached youth football teams in which they played. Bennell is currently serving a 34-year prison sentence, having been convicted of sexual offences against young boys on five separate occasions (four in the UK and one in the United States).

2. In these proceedings, the Claimants claim damages for long-term psychiatric injuries that have been suffered as a result of the abuse, and also claim damages for consequential losses, including, in all but one case, the loss of the opportunity to pursue a career as a professional footballer.

3. The Defendant accepts that each of the Claimants was abused by Bennell in the way that they describe. There are four main issues in the proceedings. The first is whether the Defendant is vicariously liable for the abuse suffered by the Claimants at the hands of Bennell. The second issue is whether the court should exercise its discretion, under section 33 of the Limitation Act 1980, to exclude the three-year limitation period that would otherwise apply, under section 11 of the 1980 Act. The other two issues are concerned with causation and quantum of loss. The applications that I am dealing with relate primarily to the vicarious liability issue, though one application is also concerned with the limitation issue.

4. As regards the vicarious liability issue, the question is whether the Defendant is vicariously liable for the abuse perpetrated by Bennell, applying the two-stage test in **Various Claimants v Catholic Child Welfare Society and others** [2012] UKSC 56; [2013] 2 AC 1. The two-stage test, in broad summary, is whether:

   (1) . The relationship between Bennell and the Defendant was one of employer/employee or was akin to employment and/or was capable of giving rise to vicarious liability; and

   (2) Bennell's assaults were so closely connected with acts he was authorised to do that they may fairly and properly be regarded as done by him while acting in the ordinary course of the Defendant's business.

5. The Claimants were abused by Bennell whilst they were playing for boys and youth teams in the North West. The Claimants say that, during the relevant period, Bennell worked as a scout for the Defendant and ran various youth teams, mainly under-14 teams, on the Defendant's behalf and for its benefit. These included teams known as White Knowl, New Mills Juniors, North West Derbyshire Select, Glossop Juniors, Adswood Amateurs, Pegasus, and Midas. The Claimants contend that these were "feeder" teams for the Defendant or were teams that were otherwise related to the Defendant football club.

6. It is the Claimants' case that the Defendant engaged Bennell to run the feeder teams, so that young footballing talent could be spotted in advance; in order that the Defendant could then sign up the boys to its schoolboy team on reaching the age of 14. At the time, FA rules prohibited such boys being signed by professional clubs until they had reached the age of 14 and the Claimants say that feeder teams were therefore used to provide the Defendant with a steady source of young talent.

7. The Claimants contend that, in the circumstances, the relationship between Bennell and the Defendant was one of employment or one akin to employment, and that the Defendant caused or permitted Bennell to hold himself out as a representative of the Defendant. The Claimants say that this enabled Bennell to make use of his position as a scout/coach to take advantage of, and abuse, them.

8. The Defendant's position on these issues is summarised at paragraphs 3.1 to 3.3 of the Amended Defence as follows:

> "3.1 It is admitted and insofar as not pleaded averred that in the 1970s and 1980s the Defendant established connections with a number of individuals in the context of junior football who might be able to identify promising young players with the potential to play football at a higher level (hereinafter referred to as 'local scouts'). These individuals were never employed by or otherwise contracted to the Defendant and at most some were just paid their reasonable expenses for attending junior football matches.
>
> 3.2 It is further admitted and averred that the said Bennell was one of these local scouts from in or about 1975 until a date unknown in or about 1978/79 when according to the said Bennell he decided to stop being one.
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> 3.3 Without prejudice to the foregoing, it is admitted that at all material times the said Bennell was involved in the coaching of young boys, but it is denied that this was in his capacity as a scout or local scout for the Defendant as alleged or at all. On the contrary, in addition to any recommendations he may have made to the Defendant and other clubs as a local scout, at all material times the said Bennell also ran one or more junior football teams in the North West of England and it was in this capacity that he was involved in such coaching. It is no part of the responsibilities of a local scout to coach players."

9. The Defendant denies that Bennell was its employee or in a relationship akin to employment at the material times, and denies that it is vicariously liable for his actions.

10. The key evidence in relation to the vicarious liability issue is likely to be concerned with two issues. The first is the extent of the link or connection between Bennell and the Defendant, and the second is the period over which the link or connection existed. As for the latter issue, the Defendant says that any link between Bennell and the Defendant ceased in about 1978/79, when he ceased to function as one of its local scouts. The Claimants, on the other hand, contend that the connection between the Club and Bennell continued into or was revived in the 1980s. This is important, because the Claimants' claims relate to abuse that they suffered in the 1980s.

11. In early 2016, the Defendant commissioned Jane Mulcahy QC and Pinsent Masons to conduct a review of the potential links between Bennell and the Club ("the Mulcahy Review"). The Mulcahy Review resulted in a report which was published on 17 March 2021 (though it was probably completed sometime earlier). This was the same day as the publication of the report of the Independent Review into Child Sexual Abuse in Football 1970-1985, headed by Clive Sheldon QC ("the Sheldon Report"). The Sheldon Report dealt with the abuse by Bennell and the alleged links between him and the Defendant, and also dealt with a number of other instances of sexual abuse involving different abusers and different football clubs.

12. On 11 March 2019, the Defendant launched the Manchester City Survivors' Scheme ("the Scheme"), which was administered by Pinsent Masons. This was a voluntary redress mechanism which was designed to allow those who suffered abuse by Bennell (and another named individual) and who may have a civil claim against the Defendant to apply for compensation from the Defendant for the abuse that they had suffered.

13. The eight claims in these proceedings are to be heard together and the proceedings are listed for trial starting on 25 October 2021, with a time estimate of eight weeks. Lambert J will be the trial judge. She dealt with the Case Management Conference in 2020, and she will deal with the Pre-Trial Review in early August 2021. These applications were listed before a different judge, rather than Lambert J, by Stewart J, the Judge in Charge of the Queen's Bench List, because the Defendant's application seeks an order that no reference should be made to the Scheme and/or its terms at trial. If argument on this issue had been heard by the trial judge, she would inevitably have been informed about the Scheme, thus rendering the application moot. For the same reason, I granted a limited reporting restriction in relation to the hearing of these applications on 22 and 23 April 2021, to the effect that until my ruling on the issues dealt with in the this hearing, there shall be no reporting of any references to the Manchester City Compensation Scheme that were made in oral argument in, or in the skeleton arguments prepared for, the hearing. (I also issued one other, unrelated, reporting restriction, namely that the identity of the named person whose witness statement was the subject of the Defendant's Application Notice dated 18 February 2021 shall not be reported or otherwise disclosed. This was because to do so would identify another person who was entitled to lifetime anonymity under the Sexual Offences (Amendment) Act 1992.)

14. The hearing on 22 and 23 April 2021 was listed to deal with the applications set out in the Defendant's Application Notice dated 18 February 2021, and the Claimants' Application Notice dated 8 March 2021. As the oral argument developed, it became clear that the matters in dispute, and the scope of the orders sought by the parties, had changed somewhat since the Application Notices were issued. The matters that I now have to decide can be summarised in five categories, as follows:

    (1) **Admissibility of the Scheme**. The Defendant submits that the trial judge, Lambert J, should not be informed of the existence of the Scheme, and should not be shown the Scheme documents. The Defendant also seeks excision of passing references to the Scheme in two witness statements filed on behalf of the Claimants. The Claimant disagrees, and submits that there is no reason why the existence of the scheme should be kept from the trial judge or why the Scheme documents should not be included in the hearing bundle.

(2) **Admissibility of the conclusions of the Mulcahy Review and the Sheldon Report**. The Defendant accepts that the references to evidence received in the course of these investigations relating to Bennell's activities are admissible, on the hearsay principle, but submits that the conclusions reached in the Mulcahy Review and the Sheldon Report in relation to Bennell and the extent of his connection with the Defendant are inadmissible.

(3) **Disclosure of contemporaneous documents obtained in the course of the Mulcahy Review**. Some months ago, the Claimants sought disclosure of the documents obtained by Pinsent Masons in the course of the Mulcahy Review. The parties reached a compromise on this issue, set out in an exchange of letters and emails by their respective solicitors in November 2020**.** It was agreed that the Defendant would disclose the "contemporaneous" documents that were obtained by Pinsent Masons for the Mulcahy Review.

At one stage, it appeared that the Defendants were challenging the Claimants' entitlement to disclosure of the documents on grounds of legal principle, namely that the documents were privileged and/or were not in the control of the Defendant. However, during the course of oral argument it became clear that the dispute between the parties on this issue was much narrower in scope: it was common ground that the Claimants were, in principle, entitled to the contemporaneous documents obtained during the Mulcahy Review, but the Claimants were contending that the Defendants had failed to give the disclosure that had been promised and that it appeared that there were, or might be, other documents in this category that had not yet been disclosed. The Defendants, on the other hand, contend that they have provided full disclosure in this category, albeit that two documents, a video recording and a memorandum, were only disclosed the night before the hearing.

The Claimants seek an order for disclosure of these documents and/or an affidavit of disclosure.

(4) **Disclosure of documents obtained through the administration of the Scheme.** The Claimants seek disclosure of any document handed to the Defendant and/or Pinsent Masons, through the administration of the Scheme, which provides evidence relating to the connection between the complainant and the feeder or related clubs, to the period when the complainant was being abused by Bennell, and/or to the connection between Bennell and the Defendant. This is not covered by the compromise in relation to the Review documents. The Defendant resists this application on the basis that documents in the possession of Pinsent Masons as a result of the firm's role in administering the Scheme were and are not under the control of the Defendant, and/or that the documents are confidential and/or privileged.

(5) **The statements of Nick Harris and Keith Carter.** The Claimants wish to rely on these statements, which deal, respectively, with the pay and the pensions that the Claimants might have expected to receive if they had enjoyed careers as professional footballers. The Defendant says that these statements are inadmissible because they amount to expert evidence, and no application has been made by the Claimants under CPR 35 to rely upon these statements as expert evidence. The Claimants say that the contents of these two statements consist of evidence of fact.

15. As well as the five disputed matters, there are two orders that the Claimants seek which are not opposed by the Defendant. The first is an order to the effect that, if so advised, the Claimants have permission to serve further witness evidence addressing the Defendant's additional disclosure, including the documents that were only very recently disclosed. The second is an order that, for the avoidance of doubt, the Defendant should disclose any contemporaneous documents which demonstrate links and/or the relationship between Bennell and the Defendant and which was provided by the Defendant to the FA and/or its Inquiry Team. The Defendant accepts that documents in this category are disclosable, but says, however, that this material has already been disclosed.

16. I will deal in turn with the five issues in dispute.

17. Before doing so, I should say that, in relation to several of these issues, the question arises as to whether I should determine them at this stage, or whether they can and should be left to be determined by Lambert J as the trial judge, either at the Pre-Trial Review in August 2020, or during the course of the trial itself. As for that, my view is that, where it is practicable to do so, matters such as these should be left for the decision of the trial judge. The case has been allocated to Lambert J, not me. She has already given pre-trial directions in this case, and she will have the opportunity to do so again at the PTR. All else being equal, she is best-placed both to decide when these issues need to be determined (i.e. before trial or during the trial) and to determine the issues. I will, therefore, consider, in relation to each issue, whether I should decide it at all at this stage.

18. The Claimants were represented before me by Mr James Counsell QC and Mr Benjamin Bradley, and the Defendant by Mr Michael Kent QC and Mr Nicholas Fewtrell. I am grateful to all counsel for their helpful submissions.

(1) Admissibility of the Scheme

19. This is a matter which I must decide. As I have said, the Defendant wishes to conceal the very existence of the Scheme, and its terms, from Lambert J, and so the issue must be decided by another judge.

20. It is important to note that, at this stage, I am considering only the question whether the existence of the Scheme, and the Scheme documentation should be withheld from Lambert J. I will consider separately, later in this judgment, the question whether documents provided to Pinsent Masons by Scheme Claimants are disclosable in these proceedings.

The purpose, structure, and terms of the Scheme

21. The Scheme offered those who had been abused by Bennell (and another, unrelated, person, John Broome) when playing for certain junior football clubs, at certain periods, an opportunity to obtain compensation from the Defendant, without resorting to legal proceedings. It also enabled the Defendant to settle existing or potential claims without incurring the costs of litigation.

22. Under the Scheme, potential Claimants were invited to apply to the Defendant for compensation, enclosing evidence that they had suffered abuse from Bennell whilst

playing for named teams that he had coached in the 1970s or 1980s. If the claim was accepted as valid, an offer, known as a Redress Offer, was made to the complainant, which the complainant could accept or reject. Redress Offers were made on a "without prejudice save as to costs" basis, and were made with a view to settling any potential civil claim by the complainant against the Defendant. The Defendant describes the scheme as a form of Alternative Dispute Resolution.

23. The nature of the Scheme was summarised in paragraphs 1.1, 1.2 and 1.4 of the Scheme Rules, as follows:

> "1.1 The Manchester City Football Club Survivors' Scheme ("the Scheme") has been set up by Manchester City Football Club ("MCFC" or "the Club" including its Group Companies), in response to the serious sexual and physical abuse suffered by young football players at MCFC Feeder Teams or MCFC Related Teams in the period 1965 to 1985. The abuse was inflicted by (i) John Broome between 1 August 1964 and 31 May 1971; or (ii) by Barry Bennell between 1 August 1976 and 1 November 1979; or (iii) by Barry Bennell between 1 August 1981 and 31 December 1984. The Scheme's purpose is to provide survivors of Relevant Abuse with an alternative pathway to court litigation for the resolution of legal claims they may have against the Club.
>
> 1.2 The Scheme is designed to provide an optional, predictable, Personal Injury Pre-Action Protocol compliant, paid-for and without prejudice save as to costs ADR methodology for the early resolution of Eligible Scheme Claims. The approach to resolution is not designed to be adversarial and the Scheme is designed to provide Redress Offers based on the abuse suffered by each Eligible Scheme Claimant. The Scheme does not seek to apportion legal liability as against the Club or any other entity or individual.
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> ….
>
> 1.4 Any Redress Offer made by or on behalf of MCFC will have the status of a without prejudice save as to costs offer of settlement made by the Club. Any such Redress Offer, the basis on which a Redress Offer is calculated, and the parties' conduct in making or rejecting a Redress Offer will be referable to any relevant court on the issue of costs (pursuant to Part 44 of the Civil Procedure Rules 1998) arising out of any civil trial relating to Relevant Abuse."

24. The Scheme Rules were not headed or stated to be "Without Prejudice", and did not state that they were privileged. Apart from the reference to Redress Offers being without prejudice save as to costs, there is no reference to the without prejudice principle anywhere in the Scheme Rules.

25. Clause 2 of the Scheme Rules provided that Scheme Claimants would not be required to agree to a confidentiality clause (though the Defendant would keep their names confidential), save in so far as was necessary to avoid prejudicing criminal proceedings.

26. Clause 3 provided that a Scheme Claimant would be eligible for a Redress Offer if Pinsent Masons was satisfied on a balance of probabilities that the Claimant suffered Relevant Abuse. "Relevant Abuse" was defined as follows, in clause 13.16:

> "Relevant Abuse" means sexual and physical abuse carried out by (i) John Broome between 1 August 1964 and 31 May 1971 or (ii) by Barry Bennell between 1 August 1976 and 1 November 1979 or (iii) by Barry Bennell between 1 August 1981 and 31 December 1984, where that abuse took place in the course of each man's scouting or coaching work with the MCFC Feeder Teams or MCFC Related Teams and held themselves out as acting for the Club"

27. "MCFC Feeder Teams" were defined in clause 13.12 to mean any one or all of Whitehill, Whitehill Boys, Bluestar, Pegasus, Xerxes, Midas and Adswood Amateurs, and "MCFC Related Teams" were defined in clause 13.13 to mean any one or all of Palace, White Knowl and Glossop Juniors.

28. Accordingly, the Scheme was designed to offer compensation to those who played for the teams which the Claimants played for and which the Claimants say were connected to the Defendant through Bennell, during the periods from 1976 to 1979 and 1981 to 1984, which are the periods to which the Claimants' claims relate.

29. Clause 3.2 of the Scheme Rules provided that, in order to be eligible for a Redress Offer, a Scheme Claimant had to send a claim to Pinsent Masons by the Scheme End Date, 11 March 2020 (since extended to 31 August 2021). The Scheme Claimant was required to provide evidence, verified by a statement of truth, that he had played football for a MCFC Feeder Team or MCFC Related Team and suffered Relevant Abuse, and to provide all the statements that he had given (if any) in criminal proceedings. If a claim was rejected and no Redress Offer was made, the Scheme Claimant could seek the binding review of the Independent Scheme Adjudicator, Frances Oldham QC (Clause 3.5). Clause 4.2 provided that there would be a Limitation Moratorium or a Standstill Agreement, pursuant to which the Defendant agreed not to rely, for limitation purposes, upon any delay in commencing legal proceedings against the Defendant which took place whilst the Scheme procedures were being followed, up to a maximum of six months. Where proceedings were already underway, Pinsent Masons would agree to a stay of proceedings for six months (clause 4.1.3).

30. The Scheme made provision for a Redress Offer, where appropriate, to include sums by way of general damages, damages for loss suffered in the labour market, and the costs of counselling and therapy (therapeutic loss). A tariff was set out for general damages by reference to types of abuse, and for disadvantage in the labour market, by reference to the impact the abuse had had on the Scheme Claimant. Figures were also set out in the Scheme Rules for therapeutic loss. Provision was made for the obtaining of a psychiatrist's report, if one had not previously been obtained. Provision was also made for payment by the Defendant of a fixed amount for the Scheme Claimant's legal costs.

31. As paragraphs 1.1 and 1.4 of the Scheme Rules make clear, the effect of acceptance by a Scheme Claimant of a Redress Offer would be to settle any extant or potential future claim against the Defendant.

32. Pinsent Masons also prepared a set of answers to "Frequently Asked Questions" ("FAQs") about the Scheme, for potential Scheme Claimants. The FAQs stated, inter alia,

> "2. **Why is MCFC paying compensation?**
>
> Since November 2016, MCFC has been the subject of a number of civil claims arising out of allegations of abuse conducted by Barry Bennell and John Broome. The Club is offering to pay compensation to eligible survivors under the Scheme Rules as an alternative to those survivors pursuing their claims through the civil courts. The Club considers that, in the context of the allegations made by survivors, paying compensation under the Scheme Rules is the right thing to do in order to give eligible survivors a level of closure as fast as possible.
>
> 3. **Does this mean MCFC is liable for the actions of Barry Bennell and John Broome?**
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> The Scheme is intended to operate as an alternative dispute resolution methodology, and as such it does not seek to determine MCFC's liability for the abuse suffered by any of the survivors that make a claim under the Scheme. Instead, it is MCFC's intention that eligibility for the Scheme will be determined on an inquisitorial (i.e. by gathering and analysing all information submitted to the Scheme without costly submissions by both sides) rather than adversarial basis – this is intended to avoid the costs, emotional distress and complexity of a trial within an alternative dispute resolution process. The upshot is that payments under the Scheme do not amount to an admission of liability by MCFC, or a finding of liability against the Club.
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> 4. **Will MCFC apologise to me?**
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> Once your Scheme Claim has been resolved, the Club would welcome the opportunity to meet with you face to face and offer an appropriate explanation or apology. The Club will write to you separately upon conclusion of your Scheme Claim."
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> ….
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> 6. **Why is Barry Bennell referred to twice in section 1.1 of the Scheme Rules?**
>
> Barry Bennell was linked to MCFC for two separate time periods, with a gap of 18 months separating the two. During this gap (between November 1979 and July 1981), MCFC's investigation identified that Barry Bennell was not involved with football. He is therefore referred to twice in order that the claims are allocated to the correct time period. Both sets of claims will be treated, and damages awarded, in exactly the same way."

33. The FAQs did not say that the Scheme or the Scheme Rules were legally privileged.

The extent to which the Scheme and its Rules are in the public domain

34. The existence of the Scheme was made public by the Defendant, and, indeed, it was central to the Scheme's objective that the Scheme should be public, because the intention was to draw it to the attention of as many potential Scheme Claimants as possible.

35. I have been shown a number of sample news articles about the Scheme. A detailed article was published in the Guardian Newspaper on 11 March 2019, about the Scheme. The headline was, "Manchester City to issue apology and set up fund for Bennell abuse victims." The first paragraph of the article stated,

> "Manchester City are launching a "survivors' scheme" for the victims of Barry Bennell that will lead to the Premier League champions offering compensation packages, adding up to several million pounds, and ultimately an apology to the players who were sexually abused during their time in the club's junior set-up."

36. On 12 March 2019, on its official website, the Defendant published an article headed, "Manchester City FC can confirm that a redress scheme for survivors of historic Child Sex Abuse has been launched." The body of the article said that the then-ongoing Mulcahy Review was helping the Defendant to understand whether, and if so, how, the Defendant club was being used by Bennell or John Broome to facilitate alleged sexual abuse of children and "it is to victims of those two individuals that the Scheme applies." There appears to be a page missing from this article in the bundle before me, but it is apparent that the article then provided some further information about the Scheme.

37. Further articles about the Scheme were published, for example, on the BBC Sport, Sky Sports, ITV News and Mail Online websites on 12 March 2019. Several of the reports referred to statements, in broad terms, about the Scheme, that had been made by the Defendant, and to the fact that reference was made to the Scheme on the Defendant's website. So, for example, a Daily Telegraph report said that the Defendant had said in a statement that "It is to victims of those two individuals [Bennell and Broome] that the scheme applies."

38. Reference to the Scheme were also made on various solicitors' firm's web blogs. These made specific reference to the Feeder and Related teams covered by the Scheme and to the time periods covered by the Scheme.

39. Then, on 17 March 2021, the date of the publication of the Mulcahy Review and the Sheldon Report, the Defendant's official website published a statement from the club's Board of Directors. This said,

> "In March 2019, the information identified by the Review Team led to the Club launching the "Manchester FC Survivors' Scheme" to offer compensation, paid counselling and personal apologies -face to face where preferred- to eligible survivors as an alternative to often lengthy, costly and arduous litigation processes. The apologies continue to be made directly to those Survivors by a senior Board Director and the scheme remains open for applications until 31 August 2021."

Communications with solicitors known to be acting for potential Scheme Claimants

40. In addition, Pinsent Masons wrote directly to solicitors who they knew were acting for potential Scheme Claimants, including Bolt Burdon Kemp, the solicitors for the Claimants in these proceedings. The letter to Bolt Burdon Kemp is dated 11 March 2019. It invited those potential Scheme Claimants represented by Bolt Burdon Kemp, including the Claimants, to participate in the Scheme, and enclosed a copy of the Scheme Rules and the FAQs. The letter did not state that it was without prejudice. The letter said,

> "The Scheme is intended to operate as an alternative dispute resolution methodology (as provided by the relevant pre-action protocol), by which eligibility for the Scheme will be determined on an inquisitorial rather than an adversarial basis. This approach is intended to avoid the costs, time, emotional distress and complexity of a trial within an alternative dispute resolution process. It is of course entirely optional."

41. Bolt Burdon Kemp responded to this letter on 19 August 2019, setting out the reasons why the firm would not be advising its clients to take part in the Scheme. Once again, this letter was not marked "without prejudice". Pinsent Masons replied on 29 October 2019. This letter, too, was not marked "without prejudice", though it was headed "Strictly private and confidential". In the meantime, in about August 2019, Pinsent Masons wrote to each of Bolt Burdon Kemp's clients, though the firm, setting out what they would receive if they made an application under the Scheme. This letter, unlike the others, was headed, "Without Prejudice Save as to Costs, Strictly Confidential".

42. The Defendant does not dispute the fact that the setting up of the Scheme is public knowledge. This is acknowledged in the witness statement of Mr Ian Carroll, the Defendant's solicitor. He said that, "Not to have publicised the Scheme would have defeated the whole purpose of setting it up in the first place."

The parties' submissions

43. On behalf of the Defendant, Mr Kent QC submitted that admission of the Scheme, or any references to the Scheme, would have the effect of prejudicing the mind of the trial judge by bringing to her attention the fact that the Defendant has sought to settle similar claims or by reference to the contents of the Scheme and the classification of some junior teams as "Feeder Clubs" when this relates to one of the principal issues in dispute in this litigation. He submitted that neither was appropriate, because trial judges are never (and should never) be told about any attempted settlement of a claim before the substantive issues to which a settlement relates have been resolved.

44. The Defendant's position is that all communications relating to the Scheme – whether in the public domain or not – were invitations to participate in an alternative dispute resolution methodology in a genuine attempt to resolve a legitimate dispute and are therefore by their nature subject to without prejudice privilege and not capable of being disclosed. In order for it to be effective, the Scheme needed to be publicised, and this did not remove its privileged status.

45. On behalf of the Claimants, Mr Counsell QC submitted that there was no reason why Lambert J should not be made aware of the existence of the Scheme, or should not be

shown the Scheme documents, for three principal reasons. First, he submitted that the Scheme itself is not privileged, although correspondence between those who applied under the Scheme and Pinsent Masons may well be privileged. Second, he submitted that, even if the existence of the Scheme and its terms were capable of being privileged, that privilege had been lost because the existence of the Scheme and the Scheme documents had been placed in the public domain by the Defendant. Third (and in the alternative to his second point), he submitted that any privilege had been waived by the Defendant and the Claimants.

Discussion

46. As I understand it, the form of privilege relied upon by the Defendant in support of the contention that the trial judge should not be told about the Scheme, or shown its Rules or FAQs, is without prejudice privilege. There is no wider type of privilege, of which I am aware, which has the effect of requiring that material should be withheld from the trial judge because it would be embarrassing to one of the parties in the case. The Defendant does not rely upon legal professional privilege.

47. The key issue, therefore, is whether the Scheme and its documentation is protected by without prejudice privilege. It is necessary to approach this issue in two stages. First, in principle, does information about the existence of the Scheme, and its documentation, attract without prejudice privilege, and secondly, if so, has that privilege been lost (or waived) because the privileged material has been placed in the public domain by the Defendant? In my judgment, however, the extent to which the material has been made public is relevant to both stages of the analysis, because the degree of publicity that the party seeking to rely on without prejudice privilege has given to the material may affect the question as to whether the material is privileged in the first place, as well as the second question of whether the privilege has been lost.

48. As for the first question, the nature of, and the policy behind, without prejudice privilege are well established. They are helpfully summarised in Phipson on Evidence, 19th Ed, at paragraph 24-13, as follows:

> "24-13
>
> Written or oral communications which are made for the purpose of a genuine attempt to compromise a dispute between the parties may generally not be admitted in evidence. The policy behind the rule has been described as follows:
>
> "It is that parties should be encouraged as far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much a failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should … be encouraged fully and frankly to put their cards on the table … the public policy justification, in truth, essentially rests with the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the Court of trial as admissions on the question of liability."

> The juridical basis of the rule is part contract and part public policy. In part it depends upon the court implying an agreement by the parties to the effect that what is said in settlement negotiations will not subsequently be relied upon in court. But it cannot be wholly explained on this basis. The first letter passing between the parties marked "without prejudice" will be protected by without prejudice privilege even though it was unsolicited and thus there cannot be said to be any implied agreement between the parties. And the three party situation, where without prejudice letters written between A and B may be inadmissible in proceedings between A and C, has nothing to do with implied contract. It has been said that it cannot be explained purely on public policy either, as there is no public policy basis in refusing to let the judge see without prejudice material on issues of costs. It is relevant to have in mind the two different juridical bases as the circumstances in which without prejudice correspondence may be admissible may depend on which ground is engaged."

49. In the present case, there is no question of the claim of without prejudice privilege being underpinned by contract. The Claimants did not agree to take part in the Scheme or to negotiate with the Defendant under the auspices of the Scheme. The question, therefore, is whether without prejudice privilege applies because, as a matter of public policy, or the public interest, the existence and terms of the Scheme should be kept from the trial judge.

50. In my judgment, in the circumstances that arise in this case, the answer is "no". It is true, of course, that an unsolicited offer (the "first letter") can, and often does, attract without prejudice privilege. The letter from Pinsent Masons to Bolt Burdon Kemp of 11 March 2019, inviting Bolt Burdon Kemp's clients to take part in the Scheme was, in effect, a "first letter" inviting them to engage in negotiations. However, it is not always the case that a "first letter" enjoys without prejudice privilege. Sometimes, the party making the first approach wants to make an open offer. They may do so, for example, because they feel that an open offer, which can be placed before the trial judge, will increase the pressure on the Defendant. If an open offer is made, it does not attract without prejudice privilege. In my view, the question whether a "first offer" enjoys without prejudice privilege depends on all of the facts and circumstances.

51. In this case, the facts and circumstances point towards the conclusion that the invitation to the Claimants to consider taking part in the Scheme was not intended to be without prejudice, and that there are no wider public policy or public interest considerations why the nature and terms of the Scheme should be treated as covered by without prejudice privilege. There is nothing in the text of the Scheme Rules or the FAQs to suggest that they were intended to be privileged or without prejudice. Indeed, clause 1.4 of the Scheme Rules states that a Redress Offer will be without prejudice save as to costs, but this carries with it the implication that the Scheme was not without prejudice from the outset. The letters to victims' solicitors enclosing the Scheme Rule were not stated to be without prejudice. I accept Mr Kent QC's submission that the absence of the words "without prejudice" in a document are not fatal to the argument that it is, in fact, without prejudice, but the factual background in which this correspondence was sent indicates that it was not sent without prejudice. If the sending of the Scheme Rules

and the invitation to take part in the Scheme was an offer, or more accurately an invitation to treat, it was an open one.

52. Moreover, from the very beginning, the Defendant took steps itself to make the existence of the Scheme public, and took no steps to prevent anyone who was provided with a copy of the Rules and FAQs from making them public. The existence of the Scheme was announced on the Defendant's official website on 12 March 2019 and, at about the same time, the Defendant made a statement to the press about it. The Defendant made a further public statement about the Scheme on 17 March 2021, the day when the Mulcahy Review and Sheldon Reports were published.

53. In this circumstances, in my view, the Defendant was making it clear that it was happy for the Scheme and its terms to be public and, indeed, that it suited the Defendant's own interests to do so. This is the equivalent of a party to proceedings choosing to make an offer on an open basis rather than a without prejudice basis. Having done so, I do not think that there are considerations of public policy or the public interest which mean that the Defendant is entitled to withhold information about the Scheme from the trial judge. The fact that the announcement of the Scheme was part of an attempt at Alternative Dispute Resolution does not mean that the Scheme itself attracts without prejudice privilege. All open offers are a form of Alternative Dispute Resolution, and yet they are not protected by without prejudice privilege.

54. In addition, it is impossible to know whether or not Lambert J already knows about the Scheme. She may well have come across it, given the wide publicity that has been given to it. By choosing to publicise the Scheme, the Defendant has assumed the risk that the trial judge might find out about it, and in those circumstances, I do not think that public policy supports the deletion of all references to the Scheme in evidence or the hearing bundle, just in case the judge is not already aware of it. Moreover, what would happen if, part-way through the trial, it turns out that, notwithstanding that it is not in the bundle, Lambert J is already aware of the Scheme? Does that mean that the trial would have to be abandoned, and then started again with a different judge, in the hope that she is unaware of the existence of the Scheme? That would be ridiculous, and very distressing and expensive for the Claimants.

55. It is understandable that the Defendant is reluctant for the judge to be shown the terms of the Scheme and the FAQs. The Scheme was designed on the footing that compensation would be offered by the Defendant to those who were playing for certain teams, on the basis that those teams were MCFC Feeder or MCFC Related teams, and that compensation would be offered even in relation to abuse that took place in a period after the period when Bennell says that he ceased to be a local scout for the Defendant. Mr Counsell QC has made clear that the Claimants will argue that this runs counter to the position that the Defendant has taken in this litigation, both in terms of the extent (if any) of the connection between the Defendant and the youth teams, and in terms of the period during which Bennell had a connection, however, slight, with the Defendant.

56. However, in my judgment, this does not give rise to a public policy reason why the existence and terms of the Scheme should be withheld from the trial judge, especially in light of the considerations that I have already referred to. In a normal case in which a party chooses to make an open "first offer", this will leave open the possibility that the other party will try to exploit the existence of the offer at trial as an admission against interest. That does not mean that, as a matter of public policy, all "first offers"

are automatically privileged, even if the party making the offer wishes it to be open. In any event, in my view, the prejudicial effect of knowledge on the part of the trial judge of the Scheme and its terms will be very limited, if there is any at all. The Scheme Rules and the FAQs make clear that the offers are not being made on the basis of admission of liability, and the Defendant itself has made clear that the aim, at least in part, is to compensate survivors without worrying about whether or not the Defendant is legally liable to the Claimants. It is clear, in my view, that part of the aim was to minimise adverse publicity for the Defendant club. The Scheme is not, on any view, an admission of liability by the Defendant, or a formal concession that the Defendant is legally liable for the abuse perpetrated by Bennell at the named Feeder and Related Clubs during the specified period. In my judgment, the chances of an experienced judge like Lambert J being prejudiced by the existence of the Scheme are effectively non-existent. She will decide the case on the basis of the evidence before her, not on the basis of any inferences to be drawn from the fact that the Defendant provided a compensation Scheme for Bennell's victims. It is no doubt for this reason that the Schemes are given only very brief, and passing, mentions in two witness statements on behalf of the Claimants.

57. For all of these reasons, I do not accept that the Scheme, its terms, or the FAQs are covered by without prejudice privilege.

58. In any event, however, even if I am wrong about that, in my view it is clear that any privilege that the Defendant might have enjoyed in this regard has been lost because of the publicity that has been given to the scheme. The very fact that this material is in the public domain means, in my view, that any privilege that might once have existed, has been lost. It is a prerequisite to a claim to privilege that the document is confidential in the sense that it is not in the public domain: see **Great Atlantic Insurance v Home Insurance Co.** [1981] 1 WLR 529 (CA), at 537H, per Templeman LJ, **Attorney-General v Guardian Newspapers (No 2)** [1990] 1 AC 109 at 282, per Lord Goff; and **Oxford Gene Technology v Affymetrix Inc (No 2)** [2001] RPC 18 (CA), at paragraph 27, per Aldous LJ.

59. In his oral submissions, Mr Kent QC said that the argument based on the Scheme being in the public domain misses the point, because the Defendant is not arguing that the Scheme is confidential, but is merely challenging the use of the Scheme in these proceedings. However, in my view this draws a distinction without a difference. In order successfully to challenge the use of the Scheme in these proceedings, the Defendant must persuade the Court that the Scheme and its documents are privileged and that this privilege has not been lost. The question whether the Scheme is in the public domain is of central importance to these issues. The position is all the clearer where it is the party which is seeking to rely on privilege which was responsible for putting the material in the public domain.

60. Furthermore, the Defendant has consented to the waiver of any privilege it might have had. The Defendant chose, for its own purposes, to publicise the Scheme on its website, both in March 2019 and again in March 2021, and to make statements to the press about it. The Defendant has done nothing to keep the Scheme confidential. I do not accept the submission that the privilege, if it exists, should be preserved because the efforts of the Defendant to publicise the scheme were a necessary incident of the aim of making offers to victims of Bennell's abuse. The publicity was not merely undertaken with a view to ensuring that as many victims as possible were made aware of the Scheme. It

was also undertaken with a view to improving the Defendant's public image by notifying the general public that the Defendant was voluntarily taking steps to compensate victims.

61. However, the facts of this case do not fit neatly into the waiver of privilege principle. Where without prejudice privilege exists, waiver requires the consent of both parties. As I have said, the Defendant, by its actions, has waived privilege, and the Claimants also waive privilege. However, if, contrary to my view, the Scheme is privileged, the question arises if it is also privileged vis a vis other victims who are not Claimants in these proceedings but to whom the invitation to consider applying under the Scheme was made. The question would arise, therefore, as to whether these other potential Scheme Claimants would have to waive privilege (which they have not been asked to do). The very fact that this question would arise, if the Scheme attracted without prejudice privilege, serves to reinforce the conclusion that the Scheme was not privileged in the first place.

62. For these reasons, I reject the Defendant's application to withhold the Scheme and its terms and FAQs from Lambert J, and I reject its application to delete the two passing references to the Scheme in the witness statements filed on behalf of the Claimants.

(2) Admissibility of the conclusions of the Mulcahy Review and the Sheldon Report

63. The Mulcahy Review was commissioned by the Defendant. Section 2 of the Review states that Jane Mulcahy QC and Pinsent Masons were instructed to understand and establish:

(1) The structure of youth coaching and scouting used by, associated with or connected to, the Defendant prior to the establishment of the Premier League Academy System in 1998;

(2) The parameters of Bennell's relationship with the Defendant, and any other individuals suspected of involvement with similar child sexual abuse or anomalous behaviours; and

(3) The extent of any knowledge, actions (or inactions) or complicity of the Defendant and its personnel in relation to anything known or suspected about Bennell or others.

64. In order to understand and establish these matters, the Review Team was required to carry out a fact-finding exercise and then to come to conclusions on the three questions that had been posed by the Defendant. Accordingly, the Mulcahy Review report contained a review of the evidence that had been obtained by the Review Team and then set out the Team's conclusions on the three issues.

65. As will be obvious, the matters that the Review Team dealt with overlap very substantially with the factual issues that will arise for determination in the trial before Lambert J which begins in October 2021. In particular the Review Team obtained evidence about the nature and extent of the connections between Bennell and the Defendant, the extent of the connections between the youth teams for which the

Claimants played and the Defendant, and the periods in which Bennell had a connection with the Defendant.

66. The Review Team was further instructed to advise the Defendant on the outcomes of the review of the issues referred to above, and to review current safeguarding practices across the organisation to ensure that they are of the highest possible standard and to make recommendations to minimise any risk.

67. As for the Sheldon Report, the trigger for the commissioning of the Sheldon investigation by the Football Association in 2016 were disclosures by one of the victims, Andy Woodward, of the abuse that he had suffered at the hands of Bennell. The Report is extremely detailed and thorough and so is very lengthy. There is a section, consisting of about 130 pages, which deals with Bennell. This sets out the evidence that the Sheldon investigation gathered and was provided with about Bennell's activities and about his connection with, and the state of knowledge of, the Defendant and also two other football teams with which he had connections at later periods, Crewe Alexandra and Stoke City. As with the Mulcahy Review, therefore, the Sheldon Report sets out the evidence that it obtained and also sets out its conclusions/findings of fact, including conclusions on matters that will be live issues in the forthcoming trial in these proceedings. The Sheldon Report also referred to the evidence before, and the conclusions of, the Mulcahy Review.

The parties' submissions

68. On behalf of the Defendant, Mr Kent QC accepted that the parts of the Mulcahy Review and the Sheldon Report which set out the evidence that was received by them, including statements made to them by witnesses, are admissible in the current proceedings, on the hearsay principle. However, Mr Kent QC submitted that the position is different as regards the conclusions and findings of these investigations on matters that are in issue in these proceedings. So far as they are concerned, he said that it is clear that Lambert J is not permitted to rely on those conclusions and findings. She must reach her own conclusions on the evidence before her. The conclusions of the Mulcahy and Sheldon investigations are not admissible in these proceedings. Mr Kent QC emphasised that he was not suggesting that Lambert J should not even be told of the existence of the Mulcahy Review and the Sheldon Report (and I mention in passing that I think that it is inconceivable that she is not already aware of them). However, he said that it was necessary for me to rule at this stage on which aspects of the documents were inadmissible. It was better that I should do this, rather than leave it to Lambert J at the PTR, because if that were to happen, her attention would inevitably be drawn to the findings of fact and conclusions, even though they are inadmissible.

69. On behalf of the Claimants, Mr Counsell QC said that they wanted to rely not only on the evidence that is referred to in the reports, but also upon the findings of fact and conclusions. He said that, in their relevant parts, the reports covered the same ground as these proceedings, and that the conclusions reached in both investigations were consistent with the Claimants' cases. He also said that the two reports were relevant to the limitation issue. One of the points that the Defendant will be taking on the question whether the limitation period should be extended will be that the delays have made it more difficult for the Defendant to gather evidence to rebut the Claimants' contentions. The judge will have to weigh up how much relevant evidence has been

lost. In this regard, Mr Counsell QC said that it will be relevant to examine how much evidence the Mulcahy Review and the Sheldon Report were able to gather.

Discussion

70. The point of legal principle at issue is whether the Claimants will be able to rely at trial upon the conclusions reached in the Mulcahy Review and the Sheldon Report in support of their contentions about the vicarious liability of the Defendant for the abuse suffered by the Claimants at the hands of Bennell. As I have said, there is no dispute that the Claimants (and, if it wishes, the Defendant), will be entitled to rely upon the evidence presented to those investigations as hearsay evidence in these proceedings.

71. For a reason that I will explain in a moment, I need only express a preliminary view on this point of legal principle, and the view that I express will not be binding on Lambert J. However, my preliminary view is that the Defendant is right that the Claimants cannot rely on the conclusions reached by the Mulcahy Review and the Sheldon Report. Put another way, in my preliminary view it would not be appropriate for Lambert J to rely upon the conclusions reached by Ms Mulcahy QC and the Review Team and Mr Sheldon QC and his team when coming to her own conclusions on the matters of fact that arise in the present case. The reason for this is that a judge who has been given the responsibility for finding facts in one sets of proceedings should not abdicate her responsibility by deferring to the conclusions reached by another judge or tribunal or investigating body, even if they were addressing the same factual issues. The law is summarised by Christopher Clarke LJ in **Rogers v Hoyle** [2014] EWCA Civ 257, [2015] QB 265, at paragraphs 38-40:

> "38 The reasoning that has survived is that set out in the following passage of Lord Goddard's judgment in the **Hollington** case [1943] KB 587,595:
>
> "It frequently happens that a bystander has a complete and full view of an accident. It is beyond question that, while he may inform the court of everything that he saw, he may not express any opinion on whether either or both of the parties were negligent. The reason commonly assigned is that this is the precise question the court has to decide, but, in truth, it is because his opinion is not relevant. Any fact that he can prove is relevant, but his opinion is not. The well recognised exception in the case of scientific or expert witnesses depends on considerations which, for present purposes, are immaterial. So, on the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant."_
>
> 39 As the judge rightly recognised the foundation on which the rule must now rest is that findings of fact made by another decision maker are not to be admitted in a subsequent trial because the decision at that trial is to bemade by the judge appointed to hear it ("the trial judge"), and not another. The trial judge must decide the case for himself on the evidence that he receives, and in the light of the submissions on that evidence made to him. To admit evidence of the findings of fact of another person, however distinguished, and however thorough and competent his examination of the issues may have been, risks the decision being made,

> at least in part, on evidence other than that which the trial judge has heard and in reliance on the opinion of someone who is neither the relevant decision maker nor an expert in any relevant discipline, of which decision making is not one. The opinion of someone who is not the trial judge is, therefore, as a matter of law, irrelevant and not one to which he ought to have regard.
>
> 40 In essence, as the judge rightly said, the foundation of the rule must now be the preservation of the fairness of a trial in which the decision is entrusted to the trial judge alone."

72. As Christopher Clarke LJ pointed out in **Rogers v Hoyle,** at paragraph 56, this was consistent with the approach of the House of Lords in **Three Rivers District Council v Governor and Company of the Bank of England (No 3)** [2003] 2 AC 1. This was litigation about the collapse of BCCI. Bingham LJ had produced a report into the collapse. The House of Lords held that, in the subsequent litigation, Bingham LJ's narrative of evidence was admissible, but his findings of fact were not (see, eg Lord Steyn at paragraph 5, Lord Hope at paragraphs 31, 79, 86 and 99, and Lord Hutton at paragraphs 132-133).

73. In my judgment, it is no answer to this to say, as Mr Counsell QC submitted, that a different principle applies in this case because Ms Mulcahy QC and Mr Sheldon QC have a particular expertise in these matters and so there is a parallel with an Air Accident Investigations Report, the conclusions of which were held by the Court of Appeal in **Rogers v Hoyle** to be admissible in a case about liability for an air accident. The Mulcahy Review and the Sheldon Report are not expert reports. Though the main authors of each are eminent barristers, this does not mean that they have such a special expertise that the general principle as referred to by Christopher Clarke LJ in **Rogers v Hoyle,** and as applied by the House of Lords in **Three Rivers (No 3),** does not apply. In **Three Rivers (No 3),** the House of Lords held that the court was not entitled to take account of the conclusions of Bingham LJ on a banking matter, even though he was a Court of Appeal judge and a recognised leading authority on banking law.

74. The position is all the clearer in relation to the Mulcahy Review, which was commissioned unilaterally by one of the parties to the High Court proceedings (albeit not the party which wants to rely on the conclusions of the investigation).

75. The existence of the limitation issue is not a reason why the findings of fact and conclusions of the Mulcahy Review and the Sheldon Report are admissible. The extent to which the Mulcahy Review Team and the Sheldon investigation team did or did not find it difficult to gather evidence is of relevance to the limitation issue. But this does not make it necessary for the Court to rely on the findings of fact and conclusions of the two reports.

76. Accordingly, my preliminary view is that the Claimants cannot rely on the findings of fact and conclusions of the Mulcahy Review and the Sheldon Report. However, I do not think that it is necessary for me to reach a final conclusion on this issue, or to bind Lambert J on this issue. This is because I think that there is no reason why the final decision on this matter cannot be postponed until the PTR or even until trial, at which point Lambert J herself can decide the point. This is because, even assuming I am right that the Claimants cannot rely on the findings of fact and conclusions of the

investigations, it does not follow that the whole of those documents cannot be included in the bundle of documents for the trial before Lambert J. Whilst it is true that, in my view at least, the findings of fact and conclusions are inadmissible, this does not mean that the two reports must be redacted so as to excise the findings of fact and conclusions, leaving only the review of the evidence. In fact, this would be wholly impracticable. I have looked at the relevant sections both of the Mulcahy Review and the Sheldon Report. It would not be practicable to perform a redaction exercise which would block out the findings of fact and conclusions and yet leave intact the review of the evidence. This is because the two are intertwined in the text. Mr Kent QC did not suggest how an appropriate redaction could be done, beyond faintly suggesting that it could be a matter for negotiation between the parties. He certainly did not provide the Court with a schedule of the parts of the reports that should be redacted and those that would "make the cut".

77. There was no suggestion in the House of Lords speeches in **Three Rivers (No 3)** that, as a result of the ruling that the findings of fact and conclusions in the Bingham Report were inadmissible, it was necessary to take a metaphorical pair of scissors and cut up the Report, excising the findings of fact and conclusions and leaving only the review of the evidence. Rather, the trial judge should be trusted to look at the entirely of the reports *de bene esse*, relying on her judgment to separate the review of the evidence from the findings and conclusions, and trusting her to pay attention only to the description of the evidence. I do not think that there is any realistic danger that Lambert J would fall into the obvious trap (if I have understood the law correctly) of paying attention to, let alone of regarding herself as bound by, the conclusions of the Mulcahy Review or the Sheldon Report.

78. In conclusion on this issue, therefore, my preliminary view is that neither the Claimants nor Lambert J are entitled to rely upon the findings of fact or conclusions of the Mulcahy Review and Sheldon Report, as opposed to the descriptions of evidence received by the two investigations. However, this does not mean that the documents need to be redacted before they are placed before Lambert J. In the final analysis it is for her to decide whether the findings of fact and conclusions are admissible. If she shares my view that they are inadmissible, then she can be trusted to ignore them, without the need to block out sections of the text.

(3) Disclosure of contemporaneous documents obtained in the course of the Mulcahy Review.

79. This is a matter that needs to be resolved as soon as possible and so cannot be postponed until the PTR.

80. At one stage, there was a dispute between the parties about the extent to which the Defendant was obliged to disclose documents generated in the course of the investigation by the Review Team in the Mulcahy Review. The Defendant took the position that these documents were subject to litigation privilege and in any event were not in the possession or control of the Defendant. This disagreement was compromised by means of an exchange of letters dated 16 October 2020 from Keoghs, the Defendant's solicitors and 11 November 2020 from Bolt Burdon Kemp, the Claimant's solicitors. Under this agreement, the Defendant agreed to disclose the relevant contemporaneous documents that had been provided to them in the course of their investigations, subject to the consent of the owners of the documents and redactions

where proportionate. The word "contemporaneous" was used in a broad sense. It was not limited to documents that were created in the late 1970s/early 1980s, but was meant to refer to original documents that were supplied to, or obtained by Pinsent Masons during the course of the Mulcahy Review, and was used in contradistinction to documents that were created by Pinsent Masons and Ms Mulcahy QC during the course of the Review (for which disclosure is not being sought).

81. Subsequently, the Defendant served a supplemental list of documents that was attached to Keoghs' letter of 8 January 2021. The additional documents were few in number, consisting of a number of photographs from the 1980s and some news articles. According to the Defendant's evidence, in the form of a witness statement dated 15 April 2021 from Andrew Mitchell, a Senior Associate Solicitor at Pinsents Masons, consent was forthcoming from all but one individual who had always made it explicitly clear that neither his identity nor his documentation should be provided to anyone outside the Review Team. Mr Mitchell said that all the documents were then provided to Keoghs, redacted where necessary, and were then disclosed to Bolt Burdon Kemp. He said that, apart from the documentation provided by the witness who had not given his consent, the Review team did not hold any further contemporaneous documents relevant to the Claimants or the teams for which they played. He said that generally the Review Team found that the availability of contemporaneous documentation was extremely limited as most contributors had not retained anything.

82. The Claimants' solicitors were not satisfied that all documents had been disclosed. This dissatisfaction crystallised when the Mulcahy Review and Sheldon Report were published on 17 March 2021. The Claimants' solicitors wrote to the Defendant's solicitors on 1 April 2021, saying that, having reviewed the reports, they considered that there were various contemporaneous documents that had not been disclosed. In particular, the letter referred to a video of a football training session at which Bennell was present in the 1970s or early 1980s, at which both teams were wearing Manchester City kit, and a memorandum from an FA official in 1994 which referred to Bennell's "strange dismissal" from the Defendant. Both of these were mentioned in the Sheldon Report.

83. In response to the letter of 1 April 2021, Keoghs replied on 9 April 2021 saying that these documents were either subject to legal privilege or were not in the Defendant's possession or control. This was a surprising response, as, by this stage, the Defendant was not relying either on privilege or on an argument that the documents were not in its possession or control. I would have expected Keoghs to have said simply that, as far as they were aware, all relevant documents in this class had been disclosed.

84. The Claimants' solicitors wrote again seeking further disclosure on 16 April 2021. In the event, the Defendant agreed on 19 April 2021 to disclose the video, and did so on the evening before the hearing on 22 April 2021. The Defendant's solicitors also disclosed the 1994 memorandum at about the same time. This memorandum, in its raw form, contained additional relevant information beyond that which could be derived from the quotation from it that had been set out in the Sheldon Report, thus confirming the importance of full disclosure.

85. In advance of the hearing, it appeared that the Defendant was resisting any application for further disclosure in relation to the contemporaneous documents on the basis that the class of documents was privileged and/or the documents were not in the possession

and control of the Defendant, because they were in the possession and control of Pinsent Masons. This was the impression that was given to me by the witness statement of Mr Mitchell, which had been filed by the Defendant to deal with this issue. His statement dealt in detail with the privilege and possession/control issues. This impression was added to by the parties' skeleton arguments for the hearing, which were drafted on the basis that a key issue between the parties was as to whether the documents sought by the Claimants were protected by litigation privilege.

86. However, it became clear at the hearing before me that this was not the nature of the dispute between the parties. There was a more straightforward disagreement between the parties as to whether the Defendant had complied with the agreement to provide disclosure of contemporaneous documents or had failed to give the disclosure that the Defendant had undertaken to give. The Claimants' legal team expressed concern that they had not been given all relevant documents, especially in light of the late disclosure of the video and the memorandum. They said that it should have been obvious that these documents should have been disclosed. Mr Counsell QC said that the Claimants' concerns were compounded by the facts that the Defendant appeared to be contending that the whole class of documents consisting of the contemporaneous documents was not disclosable. Also, the Claimants' legal team was concerned that the Defendant's solicitors were relying on Pinsent Masons to identify documents for disclosure in circumstances in which Pinsent Masons may not have been fully aware of the issues in the case as they were not instructed to act for the Defendant in these proceedings.

87. In the Application Notice seeking disclosure dated 8th March 2021, the Claimants had applied for an order for disclosure of the class of documents consisting of the contemporaneous documents. On the first day of the hearing, I observed that such an order might be redundant as it was now clear that the Defendant did not object to disclosure of this class of documentation: the real issue was whether it had properly done so. In response, overnight, the Claimants' counsel provided a revised draft order, which sought disclosure of the class of contemporaneous documents, verified by affidavit, and specifying which documents were not being disclosed on the ground of privilege.

88. It was the Defendant's submission that they had provided all documents that Pinsent Masons had, and it was the Claimants' submission that this had not happened.

89. In my judgment, no purpose would be served by simply ordering the Defendant to make disclosure of a class of documents that the Defendant has already agreed to disclose, and, indeed, contends that it has already disclosed. The real issue is not whether these documents are disclosable, but whether they have in fact all been disclosed. There is some justification for the Claimants' suspicion that something may have gone wrong, because of the late disclosure of two documents, the video and the 1994 memorandum, which plainly should have been disclosed in the first place. Having said that, I am not surprised by the Defendant's contention that there are few contemporaneous documents. The documents relate to youth football activities nearly 40 years ago, and it is unlikely, in my view, that these would have generated many documents or, if they did, that the documents would have been retained for such a long time.

90. In the circumstances, I think that the most appropriate order for the Court to make is an order requiring the Defendant's solicitor to serve a witness statement within 14 days of the hand-down of this judgment, confirming that a further check has been made with

Pinsent Masons and confirming that disclosure has been made to the Claimants of all of the "contemporaneous" (in the broad sense) documents in the possession or control of the Defendant and, for the avoidance of doubt, Pinsent Masons, which were supplied to Pinsent Masons during the course of the Mulcahy Review investigation and which are relevant to the issues in the case (save in the case of the documents which were not supplied because one witness refused to release them).

91. If any further documents come to light, they must be disclosed within the same period. The documents may be redacted where necessary, in accordance with the agreement set out in the exchange of the parties' solicitors' letters in October/November 2020.

92. I do not think that it is necessary that the Defendant's solicitors' evidence is in the form of an affidavit. There is no evidence that the failures fully to comply with the disclosure agreement were deliberate. However, the Claimants are entitled to reassurance that all relevant contemporaneous documents have been disclosed.

(4) Disclosure of documents obtained through the administration of the Scheme

93. Once again, this is a matter that needs to be resolved at this stage.

94. The Claimant's revised draft order seeks the following disclosure orders relating to the Scheme:

> "All documents:
>
> which enabled the Defendant to:
>
> Establish the terms of the Manchester City Survivors' Scheme generally;
>
> Resulted in the Defendant identifying the name of the 'Feeder Clubs' and 'Related Clubs' (as defined at paragraphs 13.12 and 13.13 of the Compensation Scheme);
>
> [and]
>
> Any documents handed to the Defendant and/or its solicitors (through the administration of the Compensation Scheme) which:
>
> Provided evidence that the qualifying Claimants played for one of the identified 'Feeder Clubs' and 'Related Clubs' (as defined at paragraphs 13.12 and 13.13 of the Compensation Scheme);
>
> Provided evidence that the qualifying Claimants were abused by Bennell during the index period where he was acting as a coach of the club (with such evidence being redacted as necessary so as to safeguard the confidentiality of those Claimants);
>
> Any evidence provided by the qualifying Claimants generally which demonstrate the nature of the relationship as between Barry Bennell and the Defendant, which would assist the Court in considering the 2-stage

test as defined in **Various Claimants v Catholic Child Welfare Society and others** [2013] 2 AC 1"

95. As I understood the submissions before me on behalf of the Claimants, the documents that are being sought fall into two categories:

(1) Original or contemporaneous documents which have been provided to the Defendant or to Pinsent Masons and which led to the decision that Redress Offers should be made under the Scheme to those victims of Bennell who played for specified clubs (The MCFC Feeder clubs and MCFC Related clubs) at specified periods. In other words, the Claimants seek disclosure of documents which tend to suggest that there might have been a connection between the Defendant and Bennell at the time of, and/or in connection with, Bennell's association with the named youth clubs over specified periods; and

(2) Original or contemporaneous documents which have been provided to Pinsent Masons by Scheme Claimants in support of their applications for a Redress offer, and which are relevant to these proceedings, because they provide evidence of (i) a link between the Claimants and the named clubs, (ii) abuse of the Claimants by Bennell when he was acting as a coach of one of the named clubs; and (iii) a link between Bennell and the Defendant.

96. In the course of oral argument, Mr Counsell QC made clear that the Claimants are not seeking a third category of document that may have come into Pinsent Masons' possession during the course of the firm's work on the Scheme, namely evidence in the form of witness statements provided by Scheme Claimants to Pinsent Masons to accompany their applications for a Redress Offer. Moreover, the Claimants are not seeking disclosure of other documentation evidencing general discussions between the Defendant and Pinsent Masons about the creation and design of the scheme. For the avoidance of doubt, however, any such documentation in the latter category would not be disclosable. Whether or not it would be covered by legal professional privilege, it is simply not relevant to any of the issues in the case. As for the documents in the third category, in my view Mr Counsell QC was right not to seek their disclosure, because they were documents that were created for the purpose of without prejudice negotiations between the Scheme Claimant and the Defendant and so were covered by without prejudice privilege.

97. As for category (1), I take the view that it is unnecessary to order this further disclosure. Contemporaneous documents in category (1) will be documents that are already subject to the Defendant's duty of disclosure. The contemporaneous documents which informed the design and the terms of the Scheme could only have come from one of two sources. Either they were documents already in the Defendant's possession, in which case the Defendant is already under a duty to disclose them, under the Defendant's general duty of disclosure, or they are contemporaneous documents that came into the possession of Pinsent Masons during the course of the Mulcahy Review investigation, in which case the Defendant has already agreed to disclose them under the disclosure agreement reached in November 2020. If they came from the latter source, and to the extent (if at all) that they have not already been disclosed, I have made an order for a witness statement to confirm that a further check has been made

and that full disclosure has been given. Either way, in my judgment, there is no scope for an additional class of documents in category (1) which is not already covered by existing disclosure orders and/or obligations. For there to be such a class, it would have to consist of relevant contemporaneous documents which had come into Pinsent Masons's possession by some other means than the Mulcahy Review investigation. This is completely unrealistic.

98. This leaves the documents in category (2). Such documents (if any) would be potentially relevant to these proceedings. They would not be covered by the compromise agreement relating to disclosure that was reached in November 2020, because this agreement only related to contemporaneous documents that came to Pinsent Masons' possession through the Mulcahy Review investigation.

99. The Defendant opposes an order for disclosure of category (2) documents on three cumulative grounds. These are:

100. First, these documents have never been in the possession or control of the Defendant, because they have, throughout been in the possession or control of Pinsent Masons rather than the Defendant.

101. Second, these documents are not disclosable because they are confidential to the Scheme Claimants who supplied them.

102. Third, these documents are privileged.

103. I will consider these arguments in turn.

Possession and control

104. A witness statement was provided by Ms Charlotte English, Senior Associate Solicitor at Pinsent Masons, to support and explain the Defendant's opposition to disclosure of these categories of documents. The statement is dated 14 April 2021. Ms English has primary responsibility for administering the Scheme. She said that the Defendant has not, and never has had, the right to inspect or take copies of documents in these categories. She said that Pinsent Masons were appointed to administer the Scheme at arms-length, as an independent third party. It is Pinsent Masons which is data controller for the Scheme, under the General Data Protection Regulation (EU 2016/679, the "GDPR"). She said that, under the Privacy Policy of the Scheme, it is the expectation that any documents supplied by Scheme Claimants would be handled only by those employees of Pinsent Masons who were responsible for administering the Scheme.

105. I do not accept that the documents supplied by Scheme Claimants to Pinsent Masons are outside the control of the Defendant.

106. CPR 31.8 provides:

> "A party's duty to disclose documents is limited to documents which are or have been in his control.
>
> (2) For this purpose a party has or has had a document in his control if –

(a) it is or was in his physical possession;

(b) he has or has had a right to possession of it; or

(c) he has or has had a right to inspect or take copies of it."

107. The documents in category (2) are not in the physical possession of the Defendant. The question is whether the Defendant has a right to take possession of the documents or to inspect or take copies of them. In my judgment, the answer to this question is "yes".

108. It is true that the intention behind the Scheme was that documents would be supplied by Scheme Claimants to Pinsent Masons and would not as a matter of course be shared with the Defendant. However, the fact remains that Pinsent Masons were acting as the Defendant's professional agents in administering the Scheme. A law firm's client ordinarily has the right to inspect any documents obtained by the firm in the course of acting for the client. Any arrangement to the effect that Pinsent Masons would not normally share documents with the Defendant was the result of instructions given by the Defendant, as the client, to Pinsent Masons, as the solicitors' firm. These instructions could have been revised at any time by the Defendant. Leaving aside the GDPR, in my view, there was no legally binding prohibition on Pinsent Masons providing the Defendant with the documents and statements that they had received.

109. As for the GDPR, in my judgment, the Defendant's contention that the documentation is not in the control of the Defendant because of limitations imposed by the GDPR is misconceived. The question whether something is in the possession and control of a party for the purposes of disclosure obligations in legal proceedings is different from the question of the extent of restrictions of the disclosure of personal data under the GDPR and the Data Protection Act 2018: see **Dunn v Durham County Council** [2012] EWCA Civ 1654; [2013] 1 WLR 2305. As Mr Counsell QC and Mr Bradley pointed out in their skeleton argument, Paragraph 5 of Part 1 to Schedule 5 to the Data Protection Act 2018 provides that disclosure of personal information is permitted if:

> "…the data is required by an enactment, a rule of law or an order of a court or tribunal, to the extent that the application of those provisions would prevent the controller from making the disclosure."

Confidentiality

110. Ms English said that, and one can readily appreciate that, many Scheme Claimants do not want their personal data shared. She said that it has therefore been a key component of the Scheme that Scheme Claimants have been able to provide personal data confidentially, and that the Scheme Administrator will hold that information strictly in accordance with the terms of the Scheme Privacy Policy.

111. I do not accept that documents that would otherwise be disclosable in these proceedings should not be disclosed because of the terms of the Scheme Privacy Policy, or because of Scheme Claimants' expectations of privacy.

112. It is true that the Scheme Privacy Policy, appended to Ms English's statement, emphasised that, ordinarily, documents supplied by Scheme Claimants would be kept confidential by Pinsent Masons and would not be shared beyond the employees of Pinsent Masons who were responsible for administering the Scheme. However, the Scheme Privacy Policy made clear that documents might be shared with the Defendant. It said that Pinsent Masons would share Scheme Claimants' personal information with the Defendant "as necessary for the completion of the Scheme…." This is potentially a broad exception. It was primarily intended to share information to enable a club director to make a personal apology to a Scheme Claimant, but it is not specifically limited to that.

113. Even assuming that promises of confidentiality were made to Scheme Claimants, pursuant to which they could reasonably expect that documents supplied to them by Pinsent Masons would not be shared with anyone else, this does not, of itself, override the obligation of disclosure in court proceedings. This was made clear by Lord Diplock in **D v NSPCC** [1978] AC 171 (HL), at 218:

> "The fact that information has been communicated by one person to another in confidence, however, is not of itself a sufficient ground for protecting from disclosure in a court of law the nature of the information or the identity of the informant if either of these matters would assist the court to ascertain facts which are relevant to an issue upon which it is adjudicating: **Alfred Crompton Amusement Machines Ltd. v. Customs and Excise Commissioners (No. 2)** [1974] A.C. 405, 433-434. The private promise of confidentiality must yield to the general public interest that in the administration of justice truth will out, unless by reason of the character of the information or the relationship of the recipient of the information to the informant a more important public interest is served by protecting the information or the identity of the informant from disclosure in a court of law."

114. In this case, the public interest in the administration of justice must be weighed against the public interest of protecting the identities and confidentiality of the Scheme Claimants as victims of sex abusers. In my judgment, this can be done in the present case by ordering disclosure, but subject to the redaction of material that would tend to identify the Scheme Claimant. Ms English said in her witness statement that this would not be possible but she did not explain why not. I do not see why this would not be possible.

Privilege

115. As I understood the submissions on behalf of the Defendant, the Defendant is relying on two alternative forms of privilege, legal advice privilege and without prejudice privilege.

116. As far as legal advice privilege is concerned, I do not think that there is any force in the Defendant's objection. The documents in category (2) were not documents that were created by Pinsent Masons in order to advise the Defendant on its potential liability. These were documents that had come into existence many years before, and which were in the possession of Scheme Claimants. As Mr Counsell QC submitted, the "privileged" status of a document is to be judged at the time it was created, not at the

time when it came into the hands of the party's solicitors. These documents were not privileged when they came into existence. The mere fact that they were handed to the Defendant's solicitors does not create a privilege: **Pearce v Foster** (1885) 15 QBD 114, at 118-119, per Sir Balliol Brett MR; **Ventouris v Mountain (The Italia Express) (No 1)** [1991] 1 WLR 607 (CA); **Lubrizol v Esso Petroleum Co (No 4)** [1993] FSR 64. Similarly, documents in category (3), the statements of the Scheme Claimants, did not enjoy legal advice privilege at the time when they were created, and they did not acquire legal advice privilege when they were given to Pinsent Masons.

117. This leaves without prejudice privilege. The Defendant's contention, as I understand it, is that documents that were supplied to Pinsent Masons by the Scheme Claimants were covered by without prejudice privilege because (even if the Scheme documents themselves were not covered by without prejudice privilege) by the time that a Scheme Claimant made an application, the communications were covered by without prejudice privilege, and this applied not only to the negotiations between the parties but to all documents that were supplied from a Scheme Claimant to Pinsent Masons.

118. This argument requires some unpicking. The first question that arises is whether, once a Scheme Claimant had responded to the Defendant's "invitation to treat" and had submitted an application, without prejudice privilege applied. In my judgment, the answer is "yes". Once the Scheme Claimant had reached the stage of submitting an application, he was entering into negotiations with Pinsent Masons (on the Defendant's behalf) to settle a potential claim that he had against the Defendant. Unlike the existence and the terms of the Scheme itself, the communications between individual Scheme Claimants and the Scheme administrators were not, and were never intended to be, in the public domain. Such negotiations are, therefore, covered by without prejudice privilege, even though, at this stage, no formal offer had been made by the Defendant.

119. The next question is whether the without prejudice privilege attaches not only to the negotiations themselves, but to any contemporaneous documents which had been supplied by the Scheme Claimant to Pinsent Masons.

120. In my judgment, the answer is clear: these documents are not privileged, for the reasons set out in **Pearce v Foster** and the authorities that followed it. The original documents, from the 1980s or early 1990s, were not privileged when they came into existence, and they did not become privileged simply because they were forwarded to the Defendant's solicitors in support of without prejudice negotiations with the Defendant.

121. Accordingly, the Defendant is required to make disclosure of documents in category (2), but not documents in category (1).

(5) The statements of Nick Harris and Keith Carter

122. The Claimants seek an order that "The evidence provided by Keith Carter and Nick Harris on behalf of the Claimants is factual evidence and is to take the form of the witness statements already served."

123. In all but one case, the Claimants contend that the abuse they suffered at the hands of Bennell meant that they lost the chance of becoming a professional footballer. The statement of Mr Harris deals with the earnings that these Claimants might have expected to earn if they had become professional footballers. The statement of Mr Carter deals with the pension schemes that were available to professional footballers at the relevant period. The Claimants have filed these statements on the basis that they are statements of fact, rather than experts' reports. Accordingly, they have not obtained the Court's leave under CPR 35 to rely upon these statements as expert evidence.

124. Mr Harris is a sportswriter, researcher and analyst, specialising in the business and finance of sport, particularly football. He worked for many years as a sports journalist on national newspapers. In his statement, dated 4 November 2020, Mr Harris refers to the sources of information about player salaries in the relevant period, and refers in particular, to two documents. The first is a document ("FL AVG") that was produced by the Football League in association with the Professional Footballers' Association, providing division by division average "basic" wages for footballers in the various divisions, season by season from 1984-85. The second is Deloitte's Annual Review of Football Finance ("ARFF") for the relevant period. The ARFF was based on the collective financial statements which were filed each year with Companies House by football clubs. As well as setting out the figures that can be found in these documents, Mr Harris made comments on them, and in particular about their limitations, such as the fact that FL AVG does not take account of bonus payments, and the fact that the documents deal with averages figures and so cover the range from players at the height of their career, to reserve-team players and those whose careers are winding down. Also, the ARFF figures include all employees of the football club, not just professional footballers. Mr Harris also described a survey conducted by the PFA and by the Independent newspaper in 2000, in which he was involved. Once again, he described the features, and limitations, of the survey. At the end of the statement, at paragraph 58, he said,

> "I hope at the very least I have demonstrated that the numbers in Table 4 [a table produced by Deloitte in the ARFF] for these years are about as close as one might reasonably get to "reality" using the raw data available – and certainly fall within the expected ranges for "inclusive" figures set against the matter of fact FL AVG basic numbers."

125. Mr Carter's statement, dated 8 October 2020, is considerably shorter. He is an employment consultant. He provided information about the two pension schemes that existed in the relevant period for professional footballers. There were specialist schemes for professional footballers because they retire so much earlier than the general population, and this was reflected by different Inland Revenue rules about taxation of pensions.

126. The Claimants have made this application because the Defendant has made clear that it will object to this evidence on the basis that it is really expert evidence. The Defendant resists the application. The Defendant's primary submission before me was that consideration of the Claimants' application can wait for the PTR. This is what the Claimants' own solicitors had suggested in a letter to the Defendant's solicitors on 7 January 2021.

127. The Defendant submitted that, if the matter were to be dealt with by me, I should refuse leave to permit the Claimants to rely upon these two statements. The Defendant submitted that the statements were, in reality, experts' reports, and, as such, they cannot be relied upon by the Claimants as leave has not been sought to adduce this evidence as expert evidence. The Defendant pointed out that the witnesses hold themselves out as having special expertise in football finance and employment matters. They are being paid for their evidence. The Defendant also pointed out that in otherwise very similar statements filed in other proceedings, these witnesses used language which was much more apt for an expert's report. For example, Mr Harris referred to his statement as a "report" and referred to his "professional opinion". The Defendant suggested that these statements had been "tidied up" for the purposes of these proceedings so that they looked more like statements of fact, and so that they could avoid the need to seek leave to rely upon them as expert reports.

Discussion

128. In my judgment, the question whether these statements are admissible and can be relied upon by the Claimants as statements of fact is one that should be finally determined by Lambert J at the PTR. She is in the best position as the trial judge to evaluate this issue. It does not seem to me that there is such great urgency over this issue that it needs to be determined at this stage.

129. I should add, however, that if it had been necessary finally to determine the issue today, I would not have made an order which had the effect of preventing the Claimants from relying on these statements at trial. The starting point is that, if the Claimants succeed in their claims and succeed in establishing that they lost the chance of becoming a professional footballer, the judge will need to have some information about pay and pensions for professional footballers in the relevant period in order to assess damages. The material contained in the Harris and Carter statements is potentially very useful. In my judgment, for what it is worth, Mr Carter's statement is not an expert report. It is simply a means of identifying the specialist pension schemes that were available for professional footballers at the relevant time, and a peg upon which to hang the inclusion in the trial bundle of documentation relating to these specialist pension schemes. The vast majority of Mr Harris's statement is also factual, simply identifying and summarising the surveys which provide some information about footballers' salaries. It makes some observations about the surveys, but most of these observations are ones which do not require specialist expertise. Rather, they are apparent on the face of the documents themselves. If and in so far as the statement sometimes strays into inappropriate expert comment, the judge will be well able to disregard such comment, if she considers it appropriate to do so.

130. However, I emphasise that it is ultimately a matter for the trial judge to decide at the PTR whether any parts of these statements are inadmissible, if the parties wish to raise the matters once again before her.

Reporting restrictions

131. The limited reporting restriction which I imposed in relation to the Scheme (see paragraph 13, above) lapses when this judgment is handed down. Since I have held that there are no reasons why the existence and terms of the Scheme should be withheld from Lambert J, there is no reason to extend this reporting restriction. The other

reporting restriction, relating to the reporting of the name of a witness which might, indirectly, identify someone who is entitled to lifetime anonymity, continues.

Conclusion

132. I will ask counsel to draft an order which reflects the rulings that I have made in this judgment.