



Neutral Citation Number: [2022] EWHC 2303 (KB)

Case No: QB-2019-000201

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 21<sup>st</sup> September 2022

**Before :**

**DEPUTY MASTER GRIMSHAW**

**Between :**

**108 MEDICAL LIMITED**

**Claimant**

**- and -**

**MR EDWARD HAMISH MILLAR**

**Defendant**

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**Miss Yasmin Yasseri** (instructed by **Fletcher Day**) for the **Claimant**  
The **Defendant** appeared in person

Hearing dates: 19 and 20 July 2022

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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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DEPUTY MASTER GRIMSHAW

## Deputy Master Grimshaw:

### Introduction

1. The Claimant company was involved in the provision of private medical services in Harley Street, London. The Claimant company was started by Mr O. J. A. Gilmore, a Consultant Surgeon, who has since passed away. He was the majority shareholder of the Claimant and, as I will return to below, appears to have been the ‘guiding force’ behind the Company.
2. The Defendant is a qualified accountant who worked for the Claimant company for two distinct periods of time. This claim concerns the second period of employment between April 2006 and October 2017, where he was initially the Commercial and Finance Director but then became the Managing Director of the Claimant, retaining responsibility for the Claimant’s finances. He was also a statutory director between 10 August 2007 and 31 October 2017.
3. The Claimant brings this claim on two separate, albeit linked, bases. Firstly, it is alleged that the Defendant wrongfully caused the Claimant to pay through its payroll sums to the Defendant and/or for his benefit, for which there was no legitimate purpose or authorisation; those payments are said to amount to £127,370. Secondly, it is alleged that the Defendant is liable to repay the additional sum of £92,176 that was paid to him pursuant to a settlement agreement by reason of that payment having been conditional upon the Defendant’s warranties under that settlement agreement.
4. Given the brevity of the narrative of the Defendant’s Defence, I can set out the same in full:

*“The assumptions made in the claim are incorrect. The “surplus” pension contributions and other payroll payments arose from salary sacrifice. Analysis will demonstrate this. The level of pension contributions was known about by the Board as pension contributions were shown as a separate line in the monthly management accounts, annual totals were also shown as a note in the full audited accounts which were signed off by the board. I also dealt with memos*

*for Mr Gilmore asking for explanations for payments on bank statements and the pension was included in these and also he annotated his bank statements.*

*The total salary package (including expenses via payroll) was also known by the board. As the highest paid director my package was subject to disclosure within the audited accounts (year end 30 June). These were signed off by the board each year”.*

5. The Claimant was represented by Miss Yasseri of counsel. The Defendant represented himself. I took steps to ensure that the Defendant was able to fully participate in the proceedings and to give his best evidence. I also gave warnings about the right against self-incrimination.

### **Factual background**

6. The Defendant was a qualified accountant. I have been provided with a copy of his contract of employment (“the Contract”), which was signed on 17 May 2006, albeit the Defendant’s employment began with ‘More Surgical Services Limited’ on 18 April 2006. His main role at that time was said to be as a Commercial and Financial Director but he later became Managing Director. I was not taken to any evidence to suggest that the Contract was ever formally varied or replaced, albeit the Defendant argues that Mr Gilmore did allow a change of the remuneration package on a verbal basis, as I will return to below.
7. The Defendant’s key duties were set out in a job description annexed to the Contract. The Defendant was responsible for facilitating the payment of his own remuneration by the Claimant and authorising expenses paid to himself. This formed part of his wider role in performing his accounting responsibilities, including dealing with the management accounts, annual accounts and the bank, nominal, purchase and sale ledgers.
8. Paragraph 3 of the Contract sets out the Defendant’s remuneration package, which can be summarised as follows:
  - i) A salary of £70,000 gross per annum, payable in monthly arrears, with a pay review on the 1 April each year.

- ii) An additional reimbursement of the sum of £1,000 for travel to Didcot Station and the cost of standard fare train travel between Didcot and Paddington, Monday to Friday each week on a season ticket basis upon presentation of receipts supplied by the Employee in respect of such expenditure. It was stated that the cost of such would be chargeable to him as a tax benefit in kind.
9. In terms of pension entitlement, paragraph 6 of the Contract states that the Company did not operate a pension scheme other than a stakeholder pension scheme but as Commercial Director, the Defendant would be entitled to the benefit of a company pension contribution of equivalent to 5% of his gross annual salary into a pension plan of his choice.
10. The Claimant advances its case on the basis that members of the Board were entitled to, and did, rely upon the accounts prepared by the Defendant as being accurate and payments made through the payroll, or otherwise, were in accordance with the Defendant's legal entitlements. Those annual legal entitlements, the Claimant says, can be simply calculated as follows given that the figures are known:
  - i) Annual salary - £70,000 for the first year, subject to yearly reviews;
  - ii) The equivalent of 5% of that gross figure to be paid into a pension plan of the Defendant's choice; and
  - iii) An additional reimbursement of the sum of £1,000 for travel to Didcot Station and the cost of standard fare train travel between Didcot and Paddington, Monday to Friday each week on a season ticket basis upon presentation of receipts supplied.
11. The Defendant accepts that he received additional sums over and above the figures set out in the previous paragraph and provided reasons for that both within his witness statement and his oral evidence given at trial.
12. The Defendant's employment was terminated on 31 October 2017 pursuant to a Settlement Agreement ("the Agreement") pursuant to which the Defendant

received a sum of £100,000, made up of an *ex-gratia* payment of £90,000 plus £10,000 as a redundancy payment, of which £7,824 was a statutory redundancy payment.

13. The following facts are then agreed between the parties:
- i) Subsequent to the end of the Defendant's employment, the Claimant's new Finance Director, Mr Lindsay Desmier, reviewed various payments made to (or by) the Defendant during the course of his employment.
  - ii) Mr Desmier produced a schedule of payments made to the Defendant, which was ultimately attached to the Particulars of Claim in this matter as 'EHM Payment Breakdown'
  - iii) The sums referred to within that 'EHM Payment Breakdown' document in the total sum of £140,170 were payments made to and received by the Defendant (or made by the Defendant to M Millar and J Cheung) via the payroll system of the Claimant.
14. In order to demonstrate that the Defendant paid himself more than he was entitled to, the Claimant splits the periods down into the relevant tax years, commencing with the 2010-11 tax year. As set out above, these payments were set out in the document titled 'EHM Payment Breakdown' (annexed to the Particulars of Claim) and a Scott Schedule (from p. 166 of the trial bundle), with the Defendant invited to respond with his comments on each of the disputed payments. The Defendant also provided a spreadsheet of payments as Appendix 1 to his skeleton argument for trial ("the Defendant's Spreadsheet"). I will attempt to bring these documents together in the following analysis. For ease of reference, I will round the numbers to the nearest pound.

#### 2010-11

15. Expected payments, according to the Claimant:
- i) Basic salary: £91,638
  - ii) Pension contribution (5%): £4,582

- iii) Total expected payments according to the Claimant: £96,220
16. The Claimant alleges that the following payments were made:
- i) Basic salary: £68,797
  - ii) Bonus: £10,200
  - iii) ‘Cost of net payments’: £12,524
  - iv) Expenses allowance: £5,260
  - v) Payments to Morag Millar: £5,400
  - vi) Personal pension payments: £5,800
  - vii) Alleged total payments made: £106,762.38. However, I calculate the above figures as £107,981.
17. The Claimant claims that the excess payments during this period amounted to £11,760.
18. Ahead of the trial, it was conceded that a £10,000 bonus was agreed as a one-off payment to the Defendant and thus the amount in dispute was reduced to £1,760.
19. Within the Defendant’s Spreadsheet, he seemingly accepts that the above payments were made, stating that he received “*Extra Contractual*” payments of £5,260 as an expenses allowance, £12,524 as the “*Cost of net payments*”, as well as the bonus figures. I will disregard £10,000 of the bonus for these purposes given that this is no longer in dispute.
20. The Defendant essentially argues that the payments made were all either accounted for by means of salary sacrifice and/or were separately agreed with Mr Gilmore directly, without any change to his underlying employment contract or any other memoranda or paperwork being created regarding the same.
21. I will deal with these “*extra contractual*” payments later in this judgment following analysis of the year-by-year figures.

22. For this specific tax year, if one puts aside the “*extra contractual*” payments listed within the Defendant’s Spreadsheet, on his analysis, he actually paid himself £16,223 less than he was entitled to.
23. In addition, the Defendant reclaimed a total of £58,299.38 in expenses during this tax year, which were reimbursed to him.

2011-12

24. Expected payments, according to the Claimant:
  - i) Basic salary: £94,387
  - ii) Pension contribution (5%): £4,719
  - iii) Total expected payments according to the Claimant: £99,106
25. The Claimant alleges that the following payments were made:
  - i) Basic salary: £87,316
  - ii) ‘Cost of net payments’: £1,947
  - iii) Expenses allowance: £2,925
  - iv) Overnight allowance: £1,100
  - v) Payments to Morag Millar: £5,400
  - vi) Personal pension payments: £13,995
  - vii) Alleged total payments made: £112,683.
26. The Claimant therefore claims that £13,576 of excess payments were made.
27. Whilst no comments are made by the Defendant within the Scott Schedule for this tax year, the Defendant’s Spreadsheet does seem to accept that the payments detailed above were made.
28. Within the Defendant’s Spreadsheet, he states that the “*extra contractual*” payments, including the expenses allowance, “*cost of net payments*” and

overnight allowance, amounted to £5,972, but this does not tally with the payments that he seems to accept that he received. On the face of that document, it appears that the Defendant did overpay himself by some £7,606, even if it is accepted that he was entitled to receive “*extra contractual*” payments, to which I will return later.

29. In addition, the Defendant reclaimed a total of £52,794.29 in expenses during this tax year, which were reimbursed to him.

2012-13

30. Expected payments, according to the Claimant:

- i) Basic salary: £97,702
- ii) Pension contribution (5%): £4,885
- iii) Total expected payments according to the Claimant: £102,587

31. The Claimant alleges that the following payments were made:

- i) Basic salary: £70,691
- ii) Bonus: £6,100
- iii) ‘Cost of net payments’: £2,000
- iv) Expenses allowance: £3,000
- v) Overnight allowance: £5,400
- vi) Payments to Morag Millar: £5,850
- vii) Payments to Jiguang Cheng: £2,800
- viii) Personal pension payments: £26,062
- ix) Alleged total payments made: £121,903

32. According to Miss Yasseri’s skeleton argument, the Claimant claims that £16,516 of excess payments were made. The Scott Schedule had a slightly



higher figure, but I understand that to reflect the fact that the Defendant accepts that the payments to Ms Cheng had not been accounted for correctly within the salary sacrifices he had purportedly made.

33. Within the Defendant's Spreadsheet, he states that the "*extra contractual*" payments, including the bonus, expenses allowance, "*cost of net payments*" and overnight allowance, amounted to £16,500. On the face of that document, it appears that the Defendant did overpay himself by some £2,816, even if it is accepted that he was entitled to receive "*extra contractual*" payments, to which I will return later.
34. In addition, the Defendant reclaimed a total of £77,605.03 in expenses during this tax year, which were reimbursed to him.

#### 2013-14

35. Expected payments, according to the Claimant:
  - i) Basic salary: £102,334.
  - ii) Pension contribution (5%): £5,117.
  - iii) Total expected payments according to the Claimant: £107,451.
36. The Claimant alleges that the following payments were made:
  - i) Basic salary: £72,076
  - ii) Bonus: £7,500
  - iii) 'Cost of net payments': £1,896
  - iv) Expenses allowance: £3,000
  - v) Overnight allowance: £10,800
  - vi) Payments to Morag Millar: £2,400
  - vii) Personal pension payments: £25,023

- viii) Alleged total payments made: £122,695.
37. The Claimant therefore claims that £15,244 of excess payments were made.
38. For this specific tax year, if one puts aside the “*extra contractual*” payments, on the Defendant’s analysis within the Defendant’s Spreadsheet, he actually paid himself £7,952 less than he was entitled to. The “*extra contractual*” payments total some £23,196.
39. In addition, the Defendant reclaimed a total of £75,821.32 in expenses during this tax year, which were reimbursed to him.

2014-15

40. Expected payments, according to the Claimant:
- i) Basic salary: £105,901.
  - ii) Pension contribution (5%): £5,295.
  - iii) Total expected payments according to the Claimant: £111,196.
41. The Claimant alleges that the following payments were made:
- i) Basic salary: £100,258
  - ii) Bonus: £4,500
  - iii) ‘Cost of net payments’: £1,951
  - iv) Expenses allowance: £8,400
  - v) Overnight allowance: £5,000
  - vi) Personal pension payments: £23,123
  - vii) Alleged total payments made: £143,232.
42. The Claimant therefore claims that £32,036 of excess payments were made.

43. Looking at the Defendant's Spreadsheet, once again there is a discrepancy between what was paid to him versus what is accounted for as salary and salary sacrifice, by some £12,815. As will be detailed below, he could not provide the Court with a satisfactory explanation as to why these discrepancies occurred. From this period onwards, the Defendant also seems to have separate lines for an "*expenses allowance*" and "*expenses*", despite the fact that he also claimed significant sums of money as expenses in addition to the sums in dispute in this claim, amounting to £71,928.28 in this tax year. The rationale for this is unclear, as is why the "*expenses*" do not seem to attract the "*cost of net payments*" adjustment that the "*expenses allowance*" does within the Defendant's analysis.

2015-16

44. Expected payments, according to the Claimant:
- i) Basic salary: £108,019.
  - ii) Pension contribution (5%): £5,401.
  - iii) Total expected payments according to the Claimant: £113,420.
45. The Claimant alleges that the following payments were made:
- i) Basic salary: £100,613.
  - ii) Bonus: £3,050.
  - iii) 'Cost of net payments': £1,499.
  - iv) Expenses allowance: £6,300.
  - v) Overnight allowance: £6,000.
  - vi) Personal pension payments: £16,500.
  - vii) Alleged total payments made: £133,962.
46. The Claimant therefore claims that £20,542 of excess payments were made.

47. Looking at the Defendant's Spreadsheet, once again there is a discrepancy between what was paid to him versus what is accounted for as salary and salary sacrifice, by some £3,693. Whilst the Defendant suggests within the Scott Schedule that his pension entitlement increased by 1% during this tax year due to the autoenrollment provisions, that is not replicated in the analysis within the Defendant's Spreadsheet.
48. In addition, the Defendant reclaimed a total of £56,362.01 in expenses during this tax year, which were reimbursed to him.

2016-17

49. Expected payments, according to the Claimant:
- i) Basic salary: £110,179.
  - ii) Pension contribution (5%): £5,509.
  - iii) Total expected payments according to the Claimant: £115,688.
50. The Claimant alleges that the following payments were made:
- i) Basic salary: £104,400.
  - ii) Bonus: £3,000.
  - iii) 'Cost of net payments': £1,499.
  - iv) Expenses allowance: £10,350.
  - v) Overnight allowance: £2,250.
  - vi) Personal pension payments: £16,500.
  - vii) Alleged total payments made: £137,999.
51. The Claimant therefore claims that £22,311 of excess payments were made.
52. Looking at the Defendant's Spreadsheet, once again there is a discrepancy between what was paid to him versus what is accounted for as salary and salary

sacrifice, by some £4,110. The Defendant suggests within that document that extra autoenrollment started during this period.

53. In addition, the Defendant reclaimed a total of £56,576.28 in expenses during this tax year, which were reimbursed to him.

2017-18

54. Expected payments, according to the Claimant:

- i) Basic salary (pro-rated): £65,231.
- ii) Pension contribution (5%): £3,262.
- iii) Total expected payments according to the Claimant: £68,493.

55. The Claimant alleges that the following payments were made:

- i) Basic salary: £59,853.
- ii) 'Cost of net payments': £440
- iii) Expenses allowance: £660
- iv) Expenses: £3,300
- v) Personal pension payments: £9,625.
- vi) Alleged total payments made: £73,878.

56. The Claimant therefore claims that £5,385 of excess payments were made.

57. Looking at the Defendant's Spreadsheet, once again there is a discrepancy between what was paid to him versus what is accounted for as salary and salary sacrifice, by some £320, this time in the Claimant's favour.

58. Overall, taking all of the figures within the Defendant's Spreadsheet into account, he seems to accept that he has overpaid himself by £5,916, albeit he did not make that concession within his oral evidence.

59. Finally, the Defendant suggests within that document that the extra autoenrollment percentage increased during this period to 2%, thus essentially giving him a pension of 7% of his gross salary, rather than 5%.
60. In addition, the Defendant reclaimed a total of £11,131.12 in expenses during this tax year, which were reimbursed to him.

### Witness evidence

61. The Claimant called its Chairman, Mr Chancellor-Weale and its subsequent Finance Director, Mr Lindsay Desmier. The Defendant gave evidence himself but did not seek to call any further witnesses.
62. I will deal with the specific evidence as to each of the main topics below but first I should make some general observations about the witnesses and the manner in which they gave evidence.
63. Mr Chancellor-Weale has been Chairman of the Claimant's Board since 2006. Mr Chancellor-Weale is a qualified solicitor. He described himself within his second witness statement as Mr Gilmore's "*confident (sic) and advisor as well as a close friend*". He came across as an honest and careful witness, albeit one who appeared to lack detailed knowledge of the Claimant's accounts and finances. He was candid in his evidence that he was somewhat superficial in his analysis of the yearly accounts and stated that he did not receive the underlying documents to understand the numbers within the presented accounts. He accepted within his first witness statement that the Board could have made further enquiries:

*"In retrospect it is likely the case that the Claimant, via its board, could have made further enquiries in relation to various payments that were made over a number of years. However, the Defendant as the Finance Director and subsequently the Managing Director (who retained responsibility for Finance) was the responsible officer of the Claimant for finance and the Claimant relied on his representations and presentation of the monthly management accounts and the annual accounts"*.

64. Mr Desmier worked for the Claimant as a consultant dealing with its financial affairs between January 2015 and March 2016, becoming an employee in April 2016. Mr Desmier became Financial Director on 1 November 2017, before being appointed as a statutory director and Secretary of the Claimant on 1 July 2019. Mr Desmier ceased working for the Claimant in January 2021. Mr Desmier only gave evidence for a short period of time but again came across as a witness who was trying to assist the Court.
65. Mr Desmier's witness statement outlines how he took over as Financial Director and, whilst reviewing the Claimant's financial documents, noted that significant pension contributions were being paid, which were found to relate to the Defendant. His evidence is that Mr Gilmore informed him that he knew nothing about those payments and that Mr Gilmore asked him to investigate and ensure that the necessary and approved salary sacrifices had been made.
66. Mr Desmier subsequently went back through the Claimant's records, tracing the pension contributions back to 2010, identifying that sums in excess of the Defendant's contractual entitlements had been paid. Mr Desmier states that Mr Gilmore was surprised by this and that the Board asked Mr Desmier to investigate further, leading him to prepare the 'EHM Payment Breakdown' document appended to the Particulars of Claim that I have already referred to. These investigations of the monthly payslips identified that a sum of £131,849 had been paid to the Defendant in addition to expenses that had been reimbursed to him by the Claimant for expenditure on his own credit cards over the same period totalling £460,518. This, Mr Desmier stated, appeared "*way out of proportion*".
67. The Defendant's evidence was at times difficult to follow and I have reached the conclusion that some of his answers were deliberately evasive and at times he was not doing his best to assist my understanding; in a number of respects, his answers did not make any sense, despite my efforts to try to understand what he was saying. I formed the impression that, at times, the Defendant was trying to paint himself as a little witless to try and explain why the figures did not appear to add up; this, I have concluded, was part of his attempt to evade the forensic questioning that he was faced with. Furthermore, I am afraid that I have

reached the conclusion that the Defendant gave untruthful evidence to the Court during the course of his evidence, as I will elaborate on below.

68. It is regretful that no witness evidence was obtained from Mr Gilmore before his death, particularly as he passed away some 9 months after the service of the Defendant's Defence; I suspect that such evidence would have made the issues in this case much easier to resolve.

69. Mr Chancellor-Weale gave evidence both within his witness statement and before me that Mr Gilmore was aware of this claim and, indeed, the defence put forward by the Defendant. Mr Chancellor-Weale details within his witness statement that:

*“Therefore when the Defendant says that he agreed certain things with Mr Gilmore about bonuses, overnight stays in London at the expense of the business etc as he has indicated in the Scott Schedule I believe that to be untrue as Jerry Gilmore would have discussed such matters with me and he certainly did not do so. What is more when it came to my attention that the Defendant was stating that what are categorised in the claim as the “Unlawful Payments” had been agreed as extra payments with Mr Gilmore, I put it Mr Gilmore in August 2019 and he vehemently denied that he had given such authorization or agreement. What he said was “That is absolute bollocks””.*

70. The Defendant accepted under cross-examination that those final few words sounded like something Mr Gilmore might say.

71. Mr Desmier gave similar evidence that he was advised by Mr Gilmore that the “*excess payments*” were not authorised.

72. That is evidence that I treat with a significant degree of caution given the Defendant did not have an opportunity to cross-examine Mr Gilmore, but neither Mr Chancellor-Weale nor Mr Desmier were challenged on these particular pieces of evidence.



73. Finally, I note that the Defendant conceded during cross-examination that the payroll activities were performed using Sage accountancy software, which was a standalone piece of software that the Defendant had on his own laptop.

### **The unlawful payments claim**

#### **The relevant legal principles for this aspect of the claim**

74. I remind myself that the Claimant has the burden of proving its case and that the standard of proof is the civil standard, i.e. the balance of probabilities, or what is more likely than not.

75. The Claimant frames the unlawful payments claim as:

- i) A conversion; and/or
- ii) A breach of the Defendant's duty of fidelity and his duty not to conduct himself in a manner calculated or likely to undermine the relationship of trust and confidence.

76. Miss Yasserri referred me to a number of excerpts from Halsbury's Laws of England and Wales by way of summary of the relevant legal principles.

### **Conversion**

77. The tort of conversion is concerned with cases where one person, here the Defendant, has misappropriated goods belonging to another, here the Claimant. Whilst it is said that framing a precise definition of the 'conversion of goods' of universal application is "*virtually impossible*"<sup>1</sup>, the basic features are as follows:

- i) The Defendant's conduct was inconsistent with the rights of the Claimant;
- ii) The Defendant's conduct was deliberate, not accidental; and

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<sup>1</sup> Halsbury's Laws of England, Tort (Volume 97A (2021)), paragraph 202.

iii) The Defendant's conduct was so extensive an encroachment on the Claimant's rights as to exclude the Claimant from its own use and possession of the goods.

78. No argument was put before me to suggest that the sums of money paid through the Claimant's payroll to the Defendant should be treated as anything other than 'goods' or 'property' that could be converted.

79. I note that conversion is a tort of strict liability. In *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883, Lord Hoffman stated:

*"In the case of conversion, the causal requirements follow from the nature of the tort. The tort exists to protect proprietary or possessory rights in property; it is committed by an act inconsistent with those rights and it is a tort of strict liability. So conversion is "a taking with the intent of exercising over the chattel an ownership inconsistent with the real owner's right of possession"."*<sup>2</sup>

### **The Duty of Fidelity**

80. Although an employee does not, merely by reason of his role as an employee, assume fiduciary obligations to his employer, the employee is under an implied duty of good faith and fidelity during the currency of his employment, with the extent of that duty varying according to the nature of the contract<sup>3</sup>.

81. Miss Yasseri directed me to the judgment of Lord Esher MR in *Robb v Green* [1895] 2 QB 315:

*"The question arises whether such conduct is a breach of contract. That depends upon the question whether in a contract of service the Court can imply a stipulation that the servant will act with good faith towards his master... I think that in a contract of service the Court must imply such a stipulation as I have*

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<sup>2</sup> At [129]. See also *Marfani & Co Ltd v Midland Bank Ltd* [1968] 2 All ER 573, [1968] 1 WLR 956 at [970], per Diplock LJ.

<sup>3</sup> See Halsbury's Laws of England, Employment (Volume 39 (2021)), paragraph 69

*mentioned, because it is a thing which must necessarily have been in view of both parties when they entered into the contract” (at [317]).*

82. The extent of the duty will vary but can include a duty not to make a secret profit and a duty to disclose an employee’s own misconduct which has been fraudulently concealed.
83. The Defendant did not challenge these propositions of law.

Findings in relation to the disputed payments

84. The quantum of the payments made to the Defendant are essentially not disputed. The Defendant did admit part of the Claimant’s claim in regard to a payment of £2,800 made to his girlfriend, Ms Cheung. The Defendant stated within his Defence that he believed at the time that this had been covered by salary sacrifice from him but that he had paid this sum back to the Claimant before the claim was issued.
85. It is not in dispute that the Contract contained the terms that I have set out above in terms of his salary, pension entitlement and specified travel expenses. The nub of this dispute is essentially whether the Defendant was entitled to the “*extra contractual*” payments that he claims that he agreed and whether sufficient salary sacrifice was given to account for the payments that he states he received due to that salary sacrifice.
86. On the above background, the factual disputes in this case relate to the following central issues:
- i) What the Defendant’s remuneration package included?
  - ii) Was the Defendant’s remuneration package varied by agreement or otherwise?
  - iii) Were the payments that were made authorised?

### **The Defendant's remuneration package**

87. The Claimant's case is that the Defendant's remuneration package was as set out in the Contract, with his salary subject to annual reviews, as discussed by the Board.

88. At the hearing before me, the thrust of the Defendant's questioning of the Claimant's witnesses and the answers that he gave during Miss Yasseri's extensive cross examination were that members of the Claimant's Board, and particularly Mr Chancellor-Weale, were fully aware of the Defendant's remuneration package, including his pension. Indeed, the Defendant argued that these figures appeared in the monthly management accounts and also as a note within the yearly accounts; whilst the Defendant was not personally named, he was by far the highest paid director and the yearly accounts referred to the highest paid director. The Defendant essentially put to Mr Chancellor-Weale that he must have known that the figures relating to pension payments within the annual accounts were attributable to him.

89. Furthermore, I was specifically referred to a letter from Mr Chancellor-Weale to the Defendant dated 23 December 2013, which includes the following paragraph:

*"It is with great pleasure that we would like to recognise your efforts by awarding you an increase in your remuneration with effect from the 1<sup>st</sup> January 2014. Accordingly as from that date your salary will increase from £101,321.00 pa to £105,374.00 pa. You will of course be entitled to forego this and have your Pension Contributions increased by the amount of the increase you would be entitled to receive if you so wish".*

90. The Defendant further asserted that a number of payments were authorised by Mr Gilmore, who was essentially the controlling force of the Claimant given his 98% shareholding. The rationale for this was that organising payments in this way saved the Claimant Class 1A national insurance contributions.

91. As I will develop below, it strikes me from the evidence that I heard that Mr Gilmore was not particularly keen to part with more money than he needed to,

particularly when there had been a breakdown of relations between him and the Defendant in 2015. I also note that, whilst the Defendant's brief Defence refers to the Board being aware of his pension payments, there is no specific mention of Mr Gilmore authorising extra contractual payments to the Defendant.

92. I have reached the following conclusions based upon the evidence:
- i) The Defendant's remuneration package was as set out in the Contract. The Defendant accepted that this was the only contract of employment. I was taken to no documentary evidence to demonstrate that this was ever varied. I will deal with each of the individual accounting heads below.
  - ii) The Claimant reviewed the Defendant's salary annually.
  - iii) As demonstrated by Mr Chancellor-Weale's letter set out above, the Board agreed that the Defendant would be able to sacrifice his salary increases to receive the same as additional pension contributions instead. However, this was limited to sacrificing his salary for that purpose only and that permission was detailed in correspondence; there was no permission to generally sacrifice salary to make other payments.
  - iv) As I will explain below, I am satisfied that there was no permission given to make additional payments over and above his agreed salary, as set out in the Contract.

### **Pension payments**

93. In terms of additional pension payments, other than those for which salary sacrifice could be made, the Defendant contended that he became entitled to an increased pension entitlement when the autoenrollment provisions relating to pensions were introduced from the 2016-17 tax year, albeit this was not specifically said within his witness statement. In his oral evidence, he stated that this was in line with other employees within the Claimant's business receiving autoenrollment pension contributions, which essentially were applied in addition to his contractual pension entitlements.

94. Mr Chancellor-Weale disagreed with this within his oral evidence. He stated that the autoenrollment provisions were introduced by the Claimant for employees who did not have a pension scheme, but this did not apply to the Defendant as he already had a pension scheme in place.
95. The Defendant does not suggest that his contract of employment was varied to allow for the increased pension payment, nor was I taken to any document that supported that the Defendant's pension entitlements were increased following the implementation of the changes brought about by the Pensions Act 2008 or otherwise.
96. I have reached the conclusion that it is unlikely that the Defendant's pension entitlement was changed by the introduction of autoenrollment for the following reasons:
- i) There is no documentary evidence as to the same. When the Claimant increased the Defendant's salary, they wrote to him to inform him of the same. It would seem unlikely that such an increase in pension would be agreed without any documentary evidence pertaining to such a change.
  - ii) Prior to the introduction of autoenrollment, the Claimant did not pay into a pension scheme for employees. Autoenrollment essentially forced the Claimant to do so. This was not, therefore, a decision by the Claimant to increase the pay or benefits of its employees, it was to comply with legislative requirements.
  - iii) The Defendant was already paid a pension in excess of the statutory minimum requirement.
  - iv) The Board were seemingly unaware that the Defendant's pension had or was to be increased by 1% and 2% in 2016-17 and 2017-18 respectively.
97. As such, I find that the additional pension payments made in respect of autoenrollment in the above tax-years were payments that the Defendant was not entitled to.

## **Bonuses**

98. It is accepted by the Claimant that the Defendant was paid a bonus in the 2010/11 tax year in the sum of £10,000 and that this was paid in lieu of a share in the business that was awarded to a Mr Marsh, one of the consultants employed by the Claimant.
99. There is a dispute, however, as to whether this was a bonus that was paid net of tax, with the Defendant asserting within his witness statement that it was due to be a net payment.
100. The Defendant received bonus payments in each tax year from 2012-13 until 2016-17, totalling some £24,150. The Defendant states that these bonuses were awarded at the discretion of Mr Gilmore and thus he authorised the same. It was common ground that these were not awarded or authorised by the Claimant's Board, nor was I taken to any documentation to suggest that the issue of awarding the Defendant a bonus was discussed at any board meeting. The Defendant could not provide any specific details as to when, where or how such bonus payments were agreed by Mr Gilmore, save to suggest that they were agreed during the regular meetings between the two men.
101. Mr Desmier's witness statement gives the following evidence:
- “On reporting my findings to Mr Gilmore and the chairman of the Claimant's board of directors, Mr Anthony Chancellor-Weale, they were not only surprised by the level of allowances and expenses claimed by the Defendant and paid by the Claimant, but they also informed me that no bonuses had been agreed or authorised to be paid to the Defendant”.*
102. Mr Chancellor-Weale states within his witness statement that Mr Gilmore was not generally inclined to provide bonuses to employees, with two exceptions specifically noted, namely a bonus to celebrate the millennium and a regular bonus paid to Mr Marsh as a term of his consultancy contract. I was not provided with a copy of Mr Marsh's contract, but the Defendant did not seek to persuade me that bonus payments to Mr Marsh were not contractual in nature.

Furthermore, the Defendant agreed under cross-examination that Mr Gilmore was not, as a matter of principle, a “*fan*” of paying bonuses.

103. I have not identified any term within the Contract that entitled him to receive a bonus, nor did the Defendant take me to such a term. I therefore conclude that the Defendant was not contractually entitled to an annual bonus payment.
104. The other telling part of Mr Chancellor-Weale’s evidence was that Mr Gilmore and the Defendant had a ‘falling out’ in 2015, with Mr Chancellor-Weale suggesting that they did not often speak to each other directly thereafter. Indeed, I was taken to documentary evidence suggesting that the Defendant’s relationship with Mr Gilmore was strained from at least July 2015, with the Defendant raising a grievance by November/December 2015. The Defendant accepted that there had been a falling out but did not accept that the men did not speak often thereafter. I was taken to correspondence between the Defendant and Mr Chancellor-Weale that added weight to the suggestion that there was discord between Mr Gilmore and the Defendant. I find that there was a falling out between the men in mid-2015.
105. I am asked by the Claimant to draw the inference that Mr Gilmore would not have been inclined to pay a discretionary bonus to an employee that he had fallen out with. Bonus payments were made in the 2015-16 and 2016-17 tax years and specifically in August and September 2015, which seems to have been during the period of discord between Mr Gilmore and the Defendant. I do, of course, also have Mr Chancellor-Weale’s evidence about Mr Gilmore’s response to the Defendant’s defence to this claim.
106. Examining the specific bonus payments made, as summarised within the Scott Schedule, the payments were not made annually during a specific month of the year or in regular amounts. In some years one payment was made, in other years two payments were made, including in consecutive months. For example, in the 2015-16 tax year, a payment of £1,800 was made in August, with a further payment of £1,250 made in September; this begs the question as to why a bonus would be awarded in consecutive months rather than a single lump sum if it was paid to generally reward service.



107. The Board were seemingly not aware of recurring bonus payments being made to the Defendant. Miss Yasseri took the Defendant to an example where Mr Marsh's bonus had been discussed at a board meeting, with a comment about Mr Marsh's satisfaction as to his bonus. If the Defendant also received a bonus, why was that not mentioned, Miss Yasseri rhetorically asked? I was taken to no documentary evidence that such a bonus had been authorised by the Board. In fact, the pay review analysis documents contained within the supplementary trial bundle show the bonus paid to Mr Marsh but no such note is made in relation to the Defendant.
108. The Claimant stressed that the Board was wider than simply Mr Gilmore, albeit he was the significant shareholder in the Claimant's business and, as I have already said, its guiding force. The Claimant went further to argue that such bonuses would have required discussion at Board level, but there is no evidence of such discussions and, indeed, Mr Chancellor-Weale's evidence was that there was no such discussion.
109. Finally, when the Claimant received annual salary increases following a salary review at Board level, Mr Chancellor-Weale wrote to the Defendant to inform him of the same. This supports the Claimant's case in two respects:
- i) Relatively modest annual salary increases were discussed at Board level. One would therefore expect larger bonus payments to also be discussed at Board level.
  - ii) When the Defendant's salary was reviewed, the Mr Chancellor-Weale wrote to him to inform him of the same. There is no such correspondence in terms of the Defendant receiving regular bonuses.
110. Taking the evidence together, I find that neither Mr Gilmore nor the Board authorised bonus payments to be paid to the Defendant, save for the £10,000 that was conceded in the 2010-11 tax year. Given the way that the Claimant's business was managed, I would have expected documentary evidence of such an agreement or at least discussion at Board level. The Defendant was not contractually entitled to a bonus, unlike Mr Marsh. Furthermore, the manner in which the bonuses were paid was inconsistent, both in terms of their timing and

value, with no explanation as to why that would be the case. Allied with Mr Gilmore's comments about bonuses in general and in response to the Defendant's explanations, and the lack of a coherent explanation from the Defendant, I find that the Claimant has proved that the Defendant was not entitled to receive such bonus payments.

### **The "Cost of net payments" and the administration of expenses**

111. The Claimant advances its case on the basis that it does not understand this head of accounting. I will return to the level of expenses below.
112. The Defendant's explanation for this recurring payment was that he claimed an expense allowance through the Claimant's payroll rather than claiming expenses directly through the business. Given that he had to pay income tax and national insurance on such payroll payments, he was required to pay himself an additional sum to offset that tax liability, essentially to ensure that he received the payment allowance as a net figure. There are a number of difficulties with this explanation.
113. First, it is clear that the Defendant submitted considerable expenses claims for business related expenses that he incurred, as I have set out above. Why then was the Defendant required to deal with some expenses differently as a payroll item when he was claiming back significant sums of expenditure through a conventional route?
114. Second, this was a tax inefficient way for the Claimant to conduct its business. If expenses were paid as a payment through payroll, notwithstanding the additional "*cost of net payment*" figure that was also paid, the Claimant had to pay the employer's national insurance contribution on those amounts at a rate of 13.8%. Rather than the Claimant being able to treat the expense as a tax-deductible business expense (if it was for the business), instead it was not only not being treated as a deductible expense, but the Claimant was also required to pay an additional 13.8% on top of the expense. This is nonsensical, particularly when the Defendant's evidence elsewhere is that he arranged the salary sacrifices with the aim of lowering the Claimant's Class 1A national insurance liability. The Defendant's role was to ensure that the Claimant was paying an

appropriate amount of tax and national insurance contributions; he would have been acting negligently by managing expenses in a way that required the Claimant to pay more than it was required to. Given the lengths that the Defendant went to try to save tax elsewhere, I find it implausible he would have taken this approach.

115. Third, a further explanation proffered by the Defendant for taking this approach was that he wanted to save the administration of having to deal with such expense claims. I do not believe this to have been a truthful answer. It is clear that the Defendant was submitting extensive expenses claims, which were being paid by direct reimbursement. It seems to me a far more convoluted process to pay an expenses allowance and then have to calculate the amount required to ensure that the Defendant received the full gross sum of such expenses. I struggle to understand how this approach saved any administrative burden; on the contrary, it seemed to add to it.
116. Fourth, the manner in which this accounting head has been calculated is not consistent on a year-by-year basis; for example, it is not a uniform 66% of the Defendant's expenses allowance on a yearly basis, as can be seen if one looks at the tax years 2013-14 to 2014-15. This, the Defendant stated under cross-examination, was not a result of his own calculations; it was his evidence that he relied on the Sage software to make these adjustments.
117. Finally, for the tax year 2010-11, it is suggested within the Defendant's response to the Scott Schedule that this accounting head was used to effectively gross up the £10,000 bonus payment made in that year. Notwithstanding the fact that one might have expected such a large payment to have been agreed with the Board, the cost of net payment adjustment in that tax year was essentially 81% of the bonus plus expenses allowance. No explanation was given as to why that was the case. Furthermore, only part of the £12,524 payment under this head in this tax year was paid at the same time as the bonus within the July 2010 pay slip (£9,349.88), so the remaining part of the sum was paid at other times, which does not fit with the explanation given within the Scott Schedule; the Defendant may well contend that the remaining sum relates to the "*cost of net payment*" for the expenses allowance but, again, that is not at a uniform percentage rate.

118. Taking the evidence together and for the above reasons, I am satisfied that the Defendant did not set up his expense payments in this way to benefit the Claimant. I find that this system was set up by the Defendant so that he could pay himself additional sums of money that he was not contractually entitled to. Paying expenses in this way was nonsensical and I cannot see a legitimate reason for managing the Defendant's valid expenses in this way.

### **Expenses, expenses allowance and overnight allowance**

119. Next, I turn to the actual expenses claimed through the Claimant's payroll in the manner that I dealt with in the preceding section. I will deal with these expenses and allowances together, albeit they arise in different ways.
120. As I have already set out above, the Defendant was contractually entitled to £1,000 per annum as expenses for travel between his home and Didcot Station. The Defendant states that this was varied with the agreement of Mr Gilmore and later increased to "*up to £150 per month net and was part of the expenses reflected within the payroll calculations*".
121. Save for the £1,000 per annum that is explicitly provided for within the Contract, I was not directed to any further written evidence to substantiate that there was an agreement that the Defendant would benefit from any further allowances.
122. The Defendant contends that, with Mr Gilmore's agreement, he was entitled to a £30 per month telephone allowance for the use of his own mobile telephone, which was to be paid through the payroll. Mr Chancellor-Weale stated in his oral evidence that he was unaware of such an agreement and did not believe that the Defendant was entitled to the same.
123. The Defendant further contends that he was entitled to £80 per month as an expenses float, which was again to be paid through the payroll, with the consent of Mr Gilmore. It was said within the Defendant's witness statement that this was agreed with Mr Gilmore "*to save the administration on petty cash for teas and coffees etc.*", albeit the Defendant conceded under cross-examination that the Claimant did still have a 'petty cash' provision in excess of this. Mr

Chancellor-Weale stated in his oral evidence that he was unaware of such an agreement and did not believe that the Defendant was entitled to the same.

124. Finally, the Defendant contended that, with the agreement of Mr Gilmore, he was entitled to an allowance for staying in London overnight when attending multiple development and marketing events. It appears that these costs were initially reimbursed to the Defendant directly but, on the Defendant's evidence, this moved towards an allowance of £150 per night being paid through the Claimant's payroll, again purportedly with Mr Gilmore's consent. These overnight expenses seem to have stopped after the 2015-16 tax year, with a reversion back to the direct reimbursement model.
125. Miss Yasseri questioned the Defendant as to why in February 2012 it appears that overnight allowances were being claimed at £100 per night, but then there was an increase to £150 per night in 2013, to which the Defendant suggested that there must have been an earlier agreement for expenses to be paid at £100 per night. The difficulty with this explanation is that the Defendant returned to paying an overnight allowance at £100 per night in the 2014-15 tax year, which is inconsistent with an agreement to pay the increased sum of £150 per night prior to that. This was yet a further issue with the Defendant's evidence.
126. The first overarching point to consider is why the Claimant would, or would be advised to, organise its accounting practices to pay legitimate business expenses through payroll processes rather than by direct reimbursement. As I have already addressed, this is a tax inefficient and nonsensical way to arrange the reimbursement of those expenses, even notwithstanding the "*cost of net payment*" adjustment, as the Claimant would have to pay national insurance contributions on the payroll figures, where it would not have to if the expenses were treated as tax deductible business costs.
127. The Defendant was cross-examined on the issue of the telephone allowance by way of an example. Why, Miss Yasseri rhetorically asked, would the Claimant pay an allowance for a mobile phone contract through the payroll, attracting the relevant employer contributions and 'grossing up' figures, when they could simply have either provided a business mobile telephone or reclaimed an

element of the Defendant's telephone contract. The Defendant struggled to provide a coherent answer to this challenge, other than to suggest that the Claimant would not be able to treat the same as a business expense; an explanation that I reject and one that I find was, at best, deliberately evasive.

128. In terms of the overnight expenses, it seems to be common ground that the Defendant was entitled to an allowance for staying in London when he needed to for business related reasons. The Claimant's evidence on this issue was given by Mr Chancellor-Weale and Mr Desmier, with the latter stating that, following a discussion with Mr Gilmore, the expectation was that the Defendant would have attended 6 to 8, but no more than 10, events per annum that would have necessitated an overnight stay, with Mr Chancellor-Weale setting out in his first witness statement that it was agreed that the Defendant would be reimbursed up to a limit of £100 per night for such stays. However, it is Mr Desmier's evidence that the Defendant claimed some £28,300 of "overnight allowances" in London in the period of 2013 to 2017, i.e. more than once per week during that period if £100 per night was allowed. The Defendant has not sought to evidence or detail the events for which he was required to stay in London.
129. The Defendant's evidence on this point was that the Claimant had a minimum of 15 events per year "in house" but there were a significant number of other events that required him to stay in London, at least once per week. The Defendant states that they were paid by direct reimbursement, but this was changed to a nightly allowance in discussion with Mr Gilmore "to simplify the administration surrounding this area". The Defendant then states:
- "The gross payment of £150 per night gave a net of pay of £88.50. Over time Central London hotel prices increased to £150 per night for weeknight stays so it was returned to a reimbursement to cover the charges with a saving of employers national insurance at 13.8%. Monies were included within the expenses allowance to cover subsistence if required during the overnight stays".*
130. I also note Mr Desmier's evidence that the Claimant reimbursed the sum of £460,518 directly to the Defendant for expenses incurred by him on three credit

cards. Why then, the Claimant asks, would a further allowance be required for overnight stays.

131. Like the Claimant, I simply do not understand why the Defendant would have paid himself expenses or allowances through the Claimant's payroll when he could have reclaimed them as part of his expenses that were directly reimbursed. I have no evidence either way as to whether any accommodation or travel costs were included within the £460,518 expenses figure. If the Defendant required overnight accommodation to attend business activities, I do not see why business-related expenses would not be reclaimed as such. It was tax inefficient and cumbersome to pay such expenses or allowances through the payroll. I have seen no evidence to suggest that the payments made through the payroll correspond with receipts or other evidence that those expenses were incurred. Whilst the Claimant accepts that some expenses would be expected for up to 10 nights per year, I do not see any reliable evidence that there was an agreement in place to pay this in this manner, nor can I see why Mr Gilmore would have agreed to such a payment method, putting aside the fact that I have no evidence as to how, when or where it is said Mr Gilmore agreed to such expenditure.
132. A similar analysis applies to the travel expenses claimed. Miss Yasseri put to the Defendant in cross-examination that £150 per month net amounted to £1,800 per year net, or £3,000 per year gross, which the Claimant would then have to pay a further 13.8% on for national insurance contributions if these allowances were dealt with through the payroll; the Defendant did not dispute these figures. When the same analysis was applied to the £80 petty cash allowance, the Defendant agreed that to get £80 per month net would in fact cost the Claimant £151.35 per month once the £80 allowance was grossed up and national insurance contributions paid on the same.
133. In addition to all of the above, despite the Defendant's evidence that he was entitled to £260 per month in expenses, this figure was rarely found within his payslips. Taking 2010-11 as an example, the Defendant claimed an expenses figure of £501 per month and £125 per month at various times, but not £260. For most of 2011-12 it was claimed at £250 per month and the same continued until 2014-15, when the monthly figures varied between £350 per month and

£1,050 per month but then dropped again in 2015-16. These variances are difficult to reconcile with an agreement to pay set allowances per month and, in my judgment, further evidences the lack of such agreement.

134. In my judgment, for the reasons that I give above, this was a tax inefficient and cumbersome way to manage such expenses and the only sensible explanation for the Defendant to adopt this approach was as a means of paying himself additional sums that he was not contractually entitled to. As, I find that the Defendant was not entitled to these expenses or allowances.

### **Payments to Morag Millar and Jiguang Cheung**

135. These payments were only touched on briefly within the oral evidence before me. Morag Millar was Mr Millar's wife and Ms Cheung his girlfriend. The Claimant's case is that neither of these women ever worked for the Claimant and that payments to them were unauthorised and without the Board's knowledge. Mr Chancellor-Weale's evidence was that Mr Gilmore had confirmed to him that such payments were not agreed by him, and this was supported by Mr Desmier's evidence.
136. The Defendant's position within his responses to the Scott Schedule and the Defendant's Spreadsheet was that he made various payments to Mrs Millar, amounting to £19,050 but, with the agreement of Mr Gilmore, made a salary sacrifice to compensate for the same. The Defendant stated in his oral evidence that Mrs Millar would perform some tasks to assist him, albeit provided scant detail as to the same other than she helped him "*to understand IT issues*", something that was again not mentioned within his witness statement. It was accepted that Ms Cheung never worked for the Claimant's business.
137. The Defendant accepted within his Defence that he made the payment to Ms Cheung and, mistakenly, did not make a corresponding salary sacrifice, so this sum was returned to the Claimant on 18 January 2019 and thus no longer forms part of the claim.



138. Mr Chancellor-Weale's evidence was that Mr Gilmore confirmed before his death that no such payments were agreed, albeit I limit the weight that I can give that evidence for the reasons that I have set out above.
139. Once again, I found the Defendant's answers to Miss Yasseri's questioning on this topic evasive. I am not satisfied that Mrs Millar ever worked for the Claimant in any real or substantive way and formed the view that the Defendant's oral evidence in this regard was untruthful. Indeed, that was the first time that this suggestion was made when, if Mrs Millar had performed work for the Claimant, that was the most obvious defence or explanation to give within his responses to the Scott Schedule. I was not taken to any evidence of any time sheets or the like to justify the payments made to her, nor any form of contract of employment. Indeed, the payments were made to her as individual chunks of £600 rather than an hourly rate multiplied by a number of hours worked.
140. I have very real concerns as to the motivation behind the Defendant making payments to his spouse/girlfriend in this way by means of 'salary sacrifice' or otherwise. Miss Yasseri suggested to the Defendant that this was a means of reducing his own income tax payments; the Defendant did not agree with that contention but did concede that he would have paid less tax as a result of the arrangement. Miss Yasseri put to the Defendant that this was tax evasion, and the Claimant would never have agreed to that; the Defendant disagreed with that assertion.
141. I cannot see any benefit to the Claimant to pay an individual over £19,000 when they are not getting the benefit of her travails. For all of the above reasons, I have concluded that these were not authorised payments and the Defendant is liable to repay them insofar as they formed payments that were made over and above his contractual entitlements.

Whether the Board approved the additional payments

142. I have largely answered this question as I have addressed each of the accounting heads above but there are two further findings that I make in this regard.

143. First, it became evident when I heard Mr Chancellor-Weale that he had a relatively superficial understanding of the Claimant's accounts. I formed the distinct impression that the Board would consider the accounts in a cursory manner but would take at face value the figures presented to it.
144. Second, contrary to the assertions made by the Defendant, the overpayments that I have found above were not particularly clear on the face of the accounting documentation unless one was specifically looking for anomalies. Indeed, I have taken time to carefully consider the figures made alongside the Defendant's contractual entitlements, which has not been a straightforward task. To expect the Board to have noticed anomalies for what were, in the grand scheme of things, relatively small overpayments, would be to expect too much, in my judgment. I can perfectly see how the Board would not have noticed the overpayments when considering the accounts as presented to them, particularly when it is unlikely they would have been comparing the same to the Contract on a yearly basis.
145. I should also make an observation about Mr Gilmore and his annotation of bank statements. It became clear at the start of the trial that there was disclosure that the Claimant had not made that they *arguably* should have done. I therefore directed that further documents were searched for and provided and ensured that the Defendant had time to consider those documents before the second day of the trial commenced, as well as offering him the opportunity to recall either of the Claimant's witnesses should he wish to do so. One class of documents not provided was copies of the Claimant's bank statements that the Defendant stated Mr Gilmore would annotate by hand and use as a basis of discussions between him and the Defendant when analysing the Claimant's accounts. The Defendant intimated that he was disadvantaged by not having those documents to put before the Court. I reject that assertion. I was provided with unannotated copies of the Claimant's bank statements, along with monthly payment summaries, which was the information that Mr Gilmore would have had before him on a monthly basis. Reading the two documents together, even with the addition of the annual accounts, in my judgment, it would have been difficult for Mr Gilmore to identify that overpayments were being made even if he was looking

for them. The Defendant conceded in cross-examination that Mr Gilmore would had to have had details of the employees' salaries to reconcile the same with the monthly payroll summaries. He further conceded that he thought Mr Gilmore was more concerned about matching up the net pay figures with the figures leaving the bank accounts. I fail to see, therefore, what annotations could have been made on those bank statements that would have evidenced agreement between Mr Gilmore and the Defendant that additional payments were authorised.

146. In any event, Mr Gilmore and the Board were entitled to rely on the Defendant, his integrity and his accounting skills, as well as proceeding on the basis that the accounts provided to them were true and accurate. Given the information presented to Mr Gilmore and the Board, in my judgment, it is no answer to the Claimant's claim that Mr Gilmore or the rest of the Board approved the yearly accounts, monthly accounts or indeed bank statements.

#### Conclusions on the unlawful payments claim

147. As I have already stated, I found the Defendant to be an unreliable witness and therefore treat the evidence that he gave me with a considerable degree of caution.
148. From an analysis of the accounting heads above and the payments made to the Defendant, in my judgment, the Claimant has proved that the Defendant did, as a matter of fact, make and receive sums of money from the Claimant that exceeded those that he was contractually entitled to within by virtue of the Contract.
149. Whilst I accept the Defendant's evidence that he, by means of salary sacrifice, sought to make additional pension contributions, there was insufficient salary sacrifice made to account for all of the payments that he paid himself through the Claimant's payroll. Given my findings above with regards to those "*extra contractual*" payments, I must conclude that the Defendant did make, or caused to be made, payments to himself through the Claimant's payroll in sums in excess of what he was entitled to.

150. Doing the best I can by analysing the Scott Schedule, the Defendant's Spreadsheet, the witness and other evidence, I assess that the excess payments totalled £127,370, being the figures set out above that were paid over and above the Defendant's contractual entitlements.
151. From this, I deduct £1,000 per year, pro-rated for the final tax year of employment, for the allowance to travel to Didcot Station that the Defendant was contractually entitled to and has otherwise not been accounted for. I will seek submissions from the parties at the hearing to hand down this judgment whether that figure ought to be grossed up or not.
152. I therefore turn to consider the tort of conversion.
153. It seems to me clear that the Defendant's conduct was inconsistent with the rights of the Claimant in that he deliberately facilitated the excess payments from the Claimant to himself. The excess payments deprived the Claimant of those monies and the use of the same and did constitute a complete encroachment on the Claimant's right to those monies. As such, I find that the tort of conversion is complete and that the Defendant is liable to repay those excess sums to the Claimant that I have identified above.
154. Given those findings, I do not need to go on to consider the issue of the alleged breach of duty of fidelity in any detail. However, in my judgment, the Defendant did owe the Claimant a duty of fidelity; he was in a position of considerable trust and power and was clearly relied upon to ensure that the company's finances were run as they should have been.
155. In making excessive payments to himself and others, as I have found he did, he breached that duty. I do not believe that I need at this stage to find that the Defendant's conduct was dishonest or malevolent, but I do find he made excessive payments and should have known that was the case.

## **The breach of the Agreement claim**

### The relevant legal principles

156. In respect of the Settlement Agreement claim, the Claimant frames its case as either:

- i) Breach of a condition of the contract; and/or
- ii) Misrepresentation; and/or
- iii) Deceit.

### **Breach of a condition of the contract**

157. I was referred by Miss Yasserri to an extract from Halsbury's Laws of England regarding conditions and warranties, which states as follows:

*“In assessing whether defective performance gives rise to the right to terminate the courts first ask whether the term of the contract was a condition or a warranty. The significance of this distinction is that a breach of condition entitles the innocent party to terminate the contract and claim damages for any loss he may have suffered, regardless of the seriousness of the breach as a matter of fact, whereas a breach of warranty only entitles him to damages”.*

158. Terms of a contract may be classified by statute, by agreement between the parties or by judicial decision. Where the contract contains no indication on its face of the status of the terms, the court must look at the contract in the light of the surrounding circumstances in order to decide the intention of the parties. Factors to consider include the extent to which the fulfilment of the term would be likely to affect the substance and foundation of the adventure which the contract is intended to carry out, and whether the obligation arising from the term goes so directly to the substance of the contract that its non-performance may fairly be considered as a substantial failure to perform the contract at all<sup>4</sup>.

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<sup>4</sup> See Halsbury's Laws of England, Contract (Volume 22 (2019)), paragraph 348.

## **Misrepresentation**

159. Again, Miss Yasseri referred me to Halsbury's Laws of England, which outlines that a misrepresentation is a positive statement of fact or law, which is made or adopted by a party to a contract and is untrue. It may be made fraudulently, carelessly or innocently. Where the representor makes a misrepresentation which has the object and result of inducing the representee to enter into a contract, the representee may elect to regard the contract as rescinded or seek an award in damages.
160. For the reasons set out below, I have not gone on to consider the issue of deceit.
161. Again, the Defendant did not challenge these propositions of law.

## The evidence relating to the Agreement

162. I have been provided with a signed copy of the Agreement, dated 20 October 2017. Clause 9.1 of the Agreement states as follows:
- “As at the date of this agreement, the Employee warrants and represents to the Company that there are no circumstances of which the Employee is aware or of which the Employee ought reasonably to be aware that would amount to a repudiatory breach by the Employee of any express or implied term of the Employee's contract of employment that would entitle (or would have entitled) the Company to terminate the Employee's employment without notice or payment in lieu of notice and any payment to the Employee pursuant to Clause 3 is conditional on this being so”.*
163. Clause 3 of the Agreement details the sums payable to the Defendant as are set out earlier in this judgment, but it also states that those payments were made *“subject to and conditional on the Employee complying with the terms of this agreement”*.
164. No suggestion was made before me that either party did not sign up to this Agreement. The only dispute that arises is whether the Defendant breached clause 9.1 of the Agreement.

The parties' submissions

165. The Claimant's primary submission is that Clause 9.1 is a condition of the contract, both because it goes to the core of the contract but, in any event, the clause defines itself as a condition.
166. The Claimant submits that in signing the Agreement, the Defendant made a representation as to the facts, namely that there were no circumstances which would amount to a repudiatory breach and that he did so with the intention of inducing the Claimant to enter into the Agreement. The Claimant argues that this was a misrepresentation as the Defendant knew that he had made the unlawful payments and that such payments amounted to a repudiatory breach of the employment contract, entitling the Claimant to terminate the Defendant's employment without notice.
167. The Claimant further submits that the Defendant has admitted that he wrongly made a payment to Miss Cheung, which he repaid on 18 January 2019, some 13 months after signing the Agreement. He also essentially accepts that he overpaid himself by some £5,000 even according to his analysis within the Defendant's Spreadsheet. Both of these factors, the Claimant argues, is sufficient to trigger clause 9.1 in and of themselves given that the Defendant knew or ought to have known that he had no entitlement to pay such sums to Ms Cheung or excessive sums to himself.
168. Alternatively, the Claimant argues, the Defendant was reckless, careless or had no reasonable belief in the correctness of his actions.
169. In the circumstances, the Claimant argued, it is entitled to seek repayment of the sum of £92,176.
170. The Defendant's submission was essentially that he did not think he had done anything wrong and therefore he signed the Agreement in good faith and thus is not in breach of clause 9.1.

Findings in relation to the settlement agreement

171. In light of the findings that I have made in relation to the unlawful payments claim, I conclude that the Defendant knowingly made payments to himself and others (Mrs Millar and Ms Cheung) that he was not entitled to make. Whilst I addressed each of the relevant accounting heads in turn above to analyse them, I must take a step back and consider whether the Defendant's conduct as a whole was indicative of an employee who was, to put it bluntly, simply not very good at accounting or whether there was a deliberate attempt to pay himself additional sums of money from the Claimant's business without the Claimant's Directors noticing. If one took each of the heads of accounting individually, perhaps they could be explained away as a mistake or a misjudgement about how to administer the Claimant's finances. However, as I have explained above in relation to some of the accounting heads, I can see no credible justification or rationale for the Defendant running the Claimant's accounts in the manner that he did. That allied with the hearsay evidence from Mr Gilmore and both the evidence that the Defendant gave and the manner in which he gave his evidence, I am drawn to the unfortunate conclusion that there was a deliberate course of conduct on the part of the Defendant to pay himself more than he knew he was contractually obliged to.
172. When looking at the Agreement, clause 9.1 is unequivocal. The question that arises is whether this is a condition or a warranty. In my judgment, clause 9.1 does define itself as a condition by virtue of the payment under clause 3 of the Agreement being conditional on the warranties and representations made by the Defendant in signing the Agreement. Even if I am wrong about that, in my judgment, the clause does go to the core of the contract, with the payments detailed in clause 3 being conditional upon the clause 9.1 representations. As such, I find that this was a condition of the contract.
173. The Defendant was either aware, or should have been aware, that he had made payments to himself and others that he was not entitled to make. I have found that his actions were deliberate.



174. Had the Defendant's accounting practices come to light whilst he was still employed by the Claimant, it seems to me that the only real conclusion open to me is to find that the Claimant would have been entitled to summarily dismiss the Defendant for misconduct. Furthermore, I find that Mr Chancellor-Weale is correct when he stated within his first witness statement that:

*“As referred to in the Particulars of Claim I would confirm that the board relied on the warranties and acknowledgements provided by the Defendant under the terms of that agreement and his representations in entering that agreement I would further confirm that had the board been aware of the true position i e (sic) the unlawful payments the Defendant had made the board would not have entered into that agreement and would have terminated his employment without any notice or ex-gratia payment”.*

175. That being so, in my judgment, the Defendant is in breach of a condition of the Agreement and thus should repay the sums paid to him by virtue of the Agreement, minus the statutory redundancy payment.

176. Even if the preceding analysis is incorrect, by signing the Agreement, the Defendant falsely represented that there were no circumstances of which he was aware or ought to have been aware that would amount to a repudiatory breach of contract. Given my findings, this was a misrepresentation. As such, whether it is by rescinding the contract or by an award of damages, I find that the Claimant is entitled to have the sums agreed within the Agreement returned, save for the statutory redundancy payment that the Claimant has not contended the Defendant was not entitled to.

177. Given these findings, I do not need to go on to consider the issue of deceit.

178. As such, I award the Claimant the £92,176 as claimed in respect of this part of the claim.

### **Interest**

179. The Claimant claims interest on the above sums at a rate of 8%. The Defendant did not seek to persuade me that the Claimant should not be entitled to the same in the event that I found for the Claimant, as I have done.
180. Given that the Defendant is a litigant in person and that this issue was not explicitly dealt with at the trial, I will permit the Defendant to make submissions about interest at the time that this judgment is formally handed down.
181. In any event, I invite the parties to calculate the relevant interest sum in light of the findings as to quantum that I have made above.

### **Conclusions**

182. For the reasons that I have set out above I enter judgment for the Claimant in the above sums plus a sum of interest to be determined.
183. I invite the parties to agree any consequential matters arising out of my decision and any remaining matters can be dealt with at the hearing to hand down this judgment, including costs.

### **Addendum**

184. Following circulation of the draft judgment in this matter, I received direct email correspondence from the Defendant requesting that I direct the Claimant to disclose a copy of Mr Marsh's payslip within which he received the £10,000 bonus payment that I have mentioned above. I relayed that request to the Claimant's solicitor and counsel and requested submissions on this point.
185. As far as I am aware, there has been no request for specific disclosure of this document, nor did Mr Millar specifically request this document during the trial before me. However, given the nature of his Defence on this point about whether his £10,000 bonus was paid net or gross, I asked the Claimant's solicitor whether the document could be provided.
186. The Claimant's solicitor sent an email to me before the hearing to hand down the judgment arguing that this matter was dealt with at the trial, that any claim

in relation to whether the bonus received by the Defendant was gross and subject to deductions or was to be grossed up was the subject of evidence and submissions and that it is not appropriate to revisit now the possible differential tax treatments applicable to the award of a share as opposed to the cash bonus that the Defendant received. Miss Yasserri repeated those submissions orally before me.

187. In any event, shortly before the hearing to hand down this judgment, I was provided with a copy of Mr Marsh's P11 Deduction card for the relevant tax year. The Defendant stated in his oral submissions that this was not the relevant document and that Mr Marsh's payslip would show the true picture, i.e. that he received a £10,000 net payment and purchased the share with that net payment. I was assured by Miss Yasserri that searches had been made for the relevant payslip in the short amount of time before the hearing and this document was what could be provided.

188. Having given this issue further thought ahead of the hearing to hand down this judgment and having heard oral submissions from both Miss Yasserri and the Defendant at the hearing, I remind myself of some salient points of the witness evidence:

i) Paragraph 26 of Mr Chancellor-Weale's second witness statement reads as follows:

*"Whilst initially contested and itemised as part of the "Unlawful Payments" upon reviewing the matter for the purposes of preparing this statement I believe that the Defendant may have been entitled to a payment in lieu of a share in the business and therefore the £10,000 bonus sum is not now disputed. I do now believe that it was proposed that the Defendant was given one share in the company at the same time as Simon Marsh was given one share and shares were offered to the Consultants which they could buy at a price of £10,000 per share. The Defendant did not take up his share as he asked if he could be paid £10,000 instead which he would pay into his pension fund. I now believe that Mr Gilmore may have agreed to that as at that time both he and the*

*Defendant were on quite good terms but by 2012/2013 their relationship was deteriorating”.*

- ii) Within paragraph 27 of the same document, Mr Chancellor-Weale states that the Defendant was not entitled to a further ‘cost of net payment’ amount to give a higher net figure.
- iii) The Defendant’s evidence on this point is primarily found in paragraph 15 of his witness statement, which reads as follows:

*“In 2011 a share offering was made to the consultant group at 108 Medical Chambers and the wider clinical team. The investment was at £10,000 per share. I was offered a free share valued at £10,000 but did not take it up as I would have incurred a significant benefit in kind tax charge for me. Mr Simon Marsh a consultant surgeon and board member was granted a net bonus of £10,000 to enable him to buy a share and be seen as shareholder in the business because he was an employee rather than a consultant with practising privileges. Mr Gilmore however wanted to reward me for my performance and told me to take the same bonus as granted to Mr Marsh but I was not required to purchase a share”.*

189. I therefore reach the conclusion that the Claimant effectively gave Mr Marsh (and offered the Defendant) a free share that was valued at £10,000; i.e. the bonus was for something to the value of £10,000. The Defendant was offered the same arrangement but opted not to take up that offer due to the benefit in kind tax that he would have had to pay on the same. Instead, as per Mr Chancellor-Weale’s evidence, the Defendant was permitted to take the £10,000 as a cash bonus instead, to pay into his pension scheme if he so wished. Should the Defendant’s analysis be correct, what the Claimant would have effectively agreed to in his case was that the company would pay a (higher) grossed up figure rather than £10,000, plus paid employers national insurance contributions on top of that. Mr Chancellor-Weale is clear in his evidence that this was not the arrangement, and it would seem a little odd for the Claimant to agree to pay

a significant sum more than the value of the share just because the Defendant did not want to take the share and incur a benefit in kind tax as a result.

190. For those reasons, I prefer Mr Chancellor-Weale's evidence that this was a bonus payment made with the intention that the monies would be paid into the Defendant's pension scheme, albeit I understand that the sum was not in fact paid into the scheme. As such, any 'cost of net payment' figure was not authorised. Furthermore, I repeat my conclusions above that, in any event, those 'cost to net payment' figures do not tally with a consistent or intelligible percentage figure to gross the bonus/expenses up across the years of this claim.
191. As such, whilst I was not provided Mr Marsh's payslip for the relevant period, I am satisfied on the balance of probabilities that the Defendant was entitled to a £10,000 bonus payment in lieu of the free share and that there was not an agreement to make a further payment to the Defendant to effectively gross up that amount as a 'cost of net payment' or otherwise. I gave an ex-tempore judgment to that effect during the course of the hearing but set out the above additional paragraphs by way of a summary of that decision.