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Case No: HC-2014-001643

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/08/2018

Before :

THE HONOURABLE MR JUSTICE ZACAROLI
Between :

BRENT LONDON BOROUGH COUNCIL	**Claimant**
- and -	
(1) ALAN DAVIES	**Defendants**
(2) DR RICHARD EVANS	
(3) COLUMBUS UDOKORO	
(4) MICHELE MCKENZIE (FORMERLY BISHOP)	
(5) DR INDRAVADAN PATEL	
(6) MARTIN DAY	

Hefin Rees QC, Jennifer Thelen (instructed by **Legal Services, Brent London Borough Council**) for the **Claimant**
Nigel Hood (direct access Counsel) for the **First Defendant**
Ian Clarke QC, Vivienne Tanchel (instructed by **Hughmans**) for the **Second Defendant**
Anthony Speaight QC (instructed by **Lock & Marlborough**) for the **Third Defendant**
The **Fourth Defendant** in person
Iain Pester (instructed by **SCA Ontier LLP**) for the **Fifth and Sixth Defendants**
Hearing dates: 6th, 7th, 9th, 12th-16th, 19th -23rd, 26th-28th February, 1st, 2nd, 5th-9th, 12th-15th March, and 16th-20th April 2018

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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THE HONOURABLE MR. JUSTICE ZACAROLI

Mr Justice Zacaroli:

A. Introduction

1. Copland Community School, in the London Borough of Brent, was earmarked for closure by the local authority in the mid-1980s and placed into 'monitoring' by HM inspectors (the predecessors to Ofsted). It faced particular challenges, with a high proportion of students from inner city backgrounds, many from immigrant families for whom English was not their first language. In its report dated November 1986, HM Inspectors concluded that "*with its dark and decaying building carrying the grime and dereliction of many years it offers a bleak and unstimulating environment in which to spend five to seven years of secondary education*". The report also concluded that for the majority of students the general standard of work was low.

2. Two years later, in March 1988, Mr Alan Davies, the first Defendant ("Mr Davies"), was appointed headmaster. He was to remain there until suspended in May 2009, as a result of the matters which are the subject of this claim.

3. By 2009, the building remained in a state of serious neglect. Among other things, it suffered from collapsed ceilings, leaking sewage pipes and failed heating. There were too many students for the premises, and numerous classes were housed in second-hand portacabins. It was the school's policy from around the turn of the century to refrain from spending money on improvements to the building, other than essential maintenance, in light of the proposal to build an entirely new school on the site. This new school development project (the "NSD"), which I describe in more detail below, took up a large amount of the time of Mr Davies and the senior leadership team at the school over the ensuing years.

4. The educational standards at the school had, in contrast, improved. The Claimant challenges this, pointing to an Ofsted report in May 2009 that classed the school as "inadequate". In relation to most categories in the report, however, the school was graded "good". Moreover, in the areas that it was graded inadequate, the principal, if not the only, reason given for the low grade was lack of safeguarding. Ms Faira Elks, the Head of Services to Schools at the Claimant, Brent London Borough Council, from 2007 to 2013, explained that around this time Ofsted started to place safeguarding of pupils right at the top of its agenda, and "…*what happened in quite a significant number of schools is that although the schools were judged to be solid, sound, good, even excellent in all the other areas, they would basically fail their inspection because of failing this one issue*".

5. A more accurate guide to the school's success was the Claimant's own School Improvement Services. This gave Copland its highest rating ("excellent and very good schools") in each of its inspections between 2006 and 2008.

6. Although the Claimant disputes the extent to which Mr Davies (who received a knighthood for his services to education in 2000) and the senior leadership team at the school could be said to have contributed to the school's success, many of the people

who worked alongside him, as governors or teachers, regarded him as the driving force behind improvements at the school. For example, Mr Ivan Deshmukh, who was a governor of the school between 1988 and 2003 and a teacher from 2002 to 2004, gave evidence that the school was radically transformed by Mr Davies, who was always looking for ways to improve the school and was completely dedicated to it and its students. Evidence to similar effect was given by most of the witnesses called by the Claimant who had worked either as governors or teachers during the relevant period.

7. One or two of those who gave evidence presented a different picture. Mr Allman, for example, a teacher between 1982 and 2013, said that while exam results continued to improve, that was due to innovative practices such as entering students for courses that counted double at GCSE rather than because of real improvements. Mr Johnschwager, a teacher between 1998 and 2013, agreed, and accused the school of "*gaming the system*" in this respect. He was also less than complimentary about Mr Davies, describing him as a bully and moral coward. He said that the shambolic state of the school was a regular topic of conversation among the staff. In response to the positive reports from School Improvement Services, he said that the school was very good at fooling the inspectors. Notwithstanding these negative views, which I consider were to an extent fuelled by hindsight following the discovery of the payments which are the subject of this action, I find on the weight of the evidence that Mr Davies was a highly respected leader at the school.

8. Even those who held negative views agreed that, to the outside world, the school presented a positive image. This was enhanced by profile-raising events such as dinners organised at the House of Commons. Although the Claimant complains that these dinners were an inappropriate expense, many witnesses spoke of their beneficial effect on the school.

9. One sign of the school's success was its ability to attract ever growing numbers of students, particularly in the sixth form. In 1986 there were 846 on the school roll, including 118 in the sixth form. By 2009 that had increased to 1900 students with 700 in the sixth form. This was not all to the good, however. While it meant that the school's income from the delegated budget provided by the Claimant increased in size, it led to chronic overcrowding.

10. Although the Claimant levels a number of complaints at those running the school prior to 2009, the sole focus of this case is the recovery of sums paid to the first four Defendants, and 11 other members of both teaching and non-teaching staff, alleged to be unlawful payments over a six-year period from April 2003 to April 2009 (the "overpayments"). The Claimant's principal claim is that the Defendants were party to a conspiracy to damage the Claimant by unlawful means in making the overpayments. Alternative claims are asserted in breach of fiduciary duty (against all but the fourth Defendant), knowing receipt of money paid in breach of fiduciary duty (against the first to fourth Defendants) and misfeasance in public office (against the fifth and sixth Defendants).

11. Copland was a Foundation School, funded primarily by the Local Education Authority ("LEA"), by way of a delegated budget pursuant to the School Standards and Framework Act 1998 ("SSFA"). As I will explain in more detail later, the funds allocated to the school by way of delegated budget, while remaining the property of the Claimant until spent, were under the control of the governing body ("GB") and the

headteacher. The overpayments in this case consisted of payments over and above the staff members' basic salaries, which were purportedly justified as bonus payments or payments for additional responsibilities undertaken by them.

12. The sum of all the overpayments is £2,707,391, of which Mr Davies received approximately £950,000.

13. The second Defendant, Dr Richard Evans ("Dr Evans"), received over £600,000 of the overpayments. Dr Evans joined the school in September 1997 as a maths teacher and as "deputy headteacher finance and resources". It is common ground that throughout his time at the school he was the line manager for the finance department (which included both the third and fourth Defendants). His finance role included preparation of the annual budget, and reporting to the GB and to the financial management committee ("FMC") on financial matters. Beyond that, however, it was his evidence that he had no day to day control over financial matters and, in particular, he had no input into the preparation of the accounts, liaising with the external auditors, or the preparation for and running of the payroll. I broadly accept this evidence. Notwithstanding that in some respects I found Dr Evans' attempts to distance himself from the details of the overpayments unconvincing and motivated by difficulties in trying to justify, retrospectively, many of them, there is little evidence, apart from his job title, to suggest that he was closely involved with the day to day finances of the school.

14. The third Defendant, Mr Columbus Udokoro ("Mr Udokoro"), received just over £186,000 of the overpayments. Mr Udokoro was employed at the school as a non-teaching staff member from 1992 until 2009. He started as a book-keeper/financial assistant. Over time his responsibilities increased. Upon the appointment of Dr Evans, Mr Udokoro undertook greater financial responsibility. In time, taking advantage of a law degree for which he had studied part-time when he first joined the school, his job title changed to accountant/legal advisor.

15. The fourth Defendant, Ms Michelle McKenzie, for most of the relevant period known as Ms Bishop ("Ms McKenzie"), received just over £132,000 of the overpayments. She was originally employed at the school in 1990 as a secretary. In 1998 she left but returned in 2004 in the role of assistant accountant and human resources manager.

16. All but a very small number of the overpayments were authorised by the fifth Defendant, Dr Indiravadan Patel ("Dr Patel"), a governor at the school since 1988, vice-chair of governors from October 2003 and chair of governors from October 2005, and the sixth Defendant, Mr Martin Day ("Mr Day"), a governor at the school from October 2003 and vice-chair of governors from October 2006. On all but seven occasions, the payments were authorised by Dr Patel and Mr Day alone (or, in one case, by Dr Patel alone). On seven occasions, the payments were approved at a meeting of a committee known as the pay review committee (the "PRC"), where other governors were present. Neither Dr Patel nor Mr Day is alleged to have received any benefit from the overpayments. Indeed, as volunteer governors, there is no allegation that they ever received any financial benefit from the school.

17. The claim form was issued on 10 July 2014. Most of the impugned payments were made prior to 10 July 2008. The Claimant relies, in order to overcome the problem that many claims would be time-barred, first, on section 21 of the Limitation Act 1980 (on

the basis that its claims are based on fraudulent breach of trust and/or recovery from a trustee of trust property previously received by the trustee or converted to his use) and, second, on section 32 of the Limitation Act (on the basis that its claims are based upon the fraud of the relevant Defendant and/or facts relevant to its right of action were concealed from it by the relevant Defendant). Save only, therefore, in respect of claims based upon recovery of trust property from a defaulting fiduciary, the Claimant's case depends upon establishing fraud or deliberate concealment as against each Defendant.

18. The fact and scale of the overpayments became widely publicised in April 2009 when a Mr Patrick (Hank) Roberts ("Mr Roberts"), a teacher and union representative at the school, published the first of two dossiers in which at least some of the overpayments were described, causing widespread concern throughout the staff, governors and beyond. Shortly afterwards, the Claimant suspended the school's right to a delegated budget and issued a warning notice under s.60 of the Education and Inspections Act 2006. The Claimant's Audit and Investigation unit carried out a full enquiry into the overpayments, interviewing numerous governors and staff members.

19. Criminal charges followed against the six Defendants to this action, the main charge being in conspiracy to defraud. On 3 October 2013 Mr Davies pleaded guilty to six counts of false accounting. The prosecution, however, offered no evidence in respect of any of the other charges against him or the charges against any of the other Defendants.

20. Shortly after the termination of the criminal proceedings, the Claimant commenced this action.

The new school development

21. Many of the overpayments were purportedly justified at the time by reference either to the amount of additional duties that were being undertaken in relation to the NSD, or as bonuses for reasons which included the work done on the NSD.

22. The proposal to build a new school, with costs met by the redevelopment for housing of part of the site of the current school, first emerged in about 2000. Despite advice from solicitors that the school should appoint its own advisors, Mr Davies and Dr Patel from the beginning took a very active role in leading and running the project on behalf of the school. Mr Davies had no particular qualifications for this role.

23. The first developer on the project was Chancerygate Group Limited ("Chancerygate"). Chancerygate provided proposals for the new school in September 2000 and the following month the GB determined that the project should go ahead with Chancerygate. It was envisaged that work would be completed by 2003. By letter from Chancerygate dated November 2000, countersigned by Mr Davies and Dr Patel on behalf of the GB, the GB agreed to indemnify Chancerygate against all costs it incurred in respect of progressing the preliminary elements of the scheme if the school decided not to proceed with Chancerygate or failed to comply with the other terms of that letter.

24. An umbrella agreement and development agreement were signed with Chancerygate in 2002. As early as October 2002, Chancerygate was warning that the scheme was projected to produce a very slim developer's profit, and that if additional costs for the

school were included the scheme could become unviable. In March 2003, it warned that it would not be able to obtain funding unless the return approached 17%.

25. Planning permission was obtained in March 2005. A judicial review challenge brought by local residents was dismissed on 29 November 2005. The s.106 agreement was completed in April 2006, and contracts were then exchanged for a land swap between the school and the council, integral to the development.

26. By August 2006, problems were emerging in the relationship with Chancerygate, who wrote in highly critical terms to Mr Davies, insisting that the project was not viable in its present form since, due to the increase in costs, the land sale did not now provide sufficient funds to build the school. The letter referred to two options presented by Chancerygate that had been flatly refused by Mr Davies and Dr Patel, and said that Chancerygate would be willing to terminate the agreement, but on the basis that their costs (of £1.5 million) were paid.

27. The dispute with Chancerygate continued for many months. By May 2007, the relationship had completely broken down. Chancerygate insisted that the school could not be built to the original specification, but Mr Davies and Dr Patel insisted that it had to be. Ultimately, the agreement with Chancerygate was terminated, by a termination agreement dated 22 January 2008. It provided that the school was liable to pay Chancerygate £1m in reimbursement of its costs, although this obligation would only be triggered if and when the school entered into a development agreement with a third party, disposed of the property or carried out, or permitted the carrying out of, the development by a third party.

28. In the meantime, in August and September 2007, Mr Davies and Dr Patel had arranged to meet with four potential replacement developers, of which only two were serious contenders: Henrys Developments Ltd and Network Housing Group. They were advised in this process by Michael Sudlow and his team at Cushman & Wakefield, whose advice was to go with Network Housing. Mr Sudlow gave evidence at trial. He had a clear recollection of strongly advising that Henrys were unsuitable, largely because they were not a developer, and partly because he regarded their willingness to assume responsibility for the (then estimated) £1.5m of Chancerygate's costs as not credible. Mr Davies and Dr Patel rejected that advice, preferring Henrys because it had experience of building a school, even though it did not have development experience as such. I accept Mr Sudlow's evidence that he advised strongly against using Henrys. He had no reason to make up that evidence, and he particularly remembered it because it was the only occasion when a client had refused to credit his advice in any way.

29. Although Henrys progressed to entering into heads of terms and began some preliminary works on site in early 2008, they never entered into a development agreement. In September 2008, they were still trying to find funding and they appear to have disappeared from the scene shortly afterwards. By the time the GB was suspended, negotiations were underway with Network Housing to take over the project. Ultimately, the project as proposed never proceeded. Some years later, when Copland school acquired academy status, a new building was completed, but this was not the fruition of the project begun in 2000.

B. The Witnesses

30. Each of the Defendants gave evidence at trial. I heard evidence from nine former teachers or governors (or both) called by the Claimant and one former governor, called by Dr Patel and Mr Day. In addition, the Claimant called evidence from a number of people who either had no direct evidence to give of the relevant events, or whose involvement related to largely peripheral matters. I refer to them, as necessary, in the course of this judgment.

31. The events underlying this action took place between nine and fifteen years ago. Some of the relevant events predate even that period.

32. In the intervening period, the Defendants have been required to recall, and give serious consideration to, the events in question on at least four occasions. First, during the course of the inquiry conducted by the Claimant's Audit & Investigation unit in 2009. Many of the Defendants were required to attend one or more interviews. In the case of Mr Udokoro, although he was passed as fit to attend interview by an occupational health professional, he was experiencing serious mental health issues over the period of that investigation, and beyond. I deal below with issues of admissibility and weight in relation to the transcripts of those interviews. Ms McKenzie also spoke of the stress she was operating under during that investigation.

33. Second, for the purposes of the criminal prosecution. Notwithstanding the charges were ultimately dropped, each of them would have no doubt gone over the events of 2003 to 2009 in great detail, and under the considerable stress of a potential prison sentence if found guilty.

34. Third, within a few months of the criminal charges being dropped, the Defendants were then faced with the claim form in this action, and were required to instruct lawyers to prepare a defence (or, in the case of Ms McKenzie, herself prepare a defence).

35. Fourth, each of them then prepared lengthy witness statements, served in December 2016, some with the assistance of lawyers and some without. By the time the trial commenced, those statements were 15 months in the past, no doubt leading to considerable further refreshment of their memories by all concerned.

36. In these circumstances, the warnings as to the reliability of witnesses' memory given by Leggatt J in *Gestmin SGPS S.A. v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm), at [15]-[22], are highly apposite, in particular as to the malleability of memories, being constantly re-written whenever they are retrieved, and the vulnerability of memories to new information or suggestions, especially where the memory is already weak due to passage of time. Of real concern in this case are the risks of considerable interference with memory caused by the procedure of preparing for trial (and, I would add, a prior criminal trial and disciplinary or investigatory proceedings) which can have the effect of establishing in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

37. The lack of actual recollection was evident in a high proportion of answers given during oral evidence to questions concerning particular events or meetings being framed as "this or that would have happened", and in the tendency among the Defendants to frame

their answers as logical conclusions from either written materials or evidence they had heard from other witnesses. It was clear that, through their work in preparing for these and earlier proceedings, the Defendants had developed an extensive knowledge of each other's evidence and arguments. Given the history of this matter and the passage of time, the risk that supposed recollections are in fact reconstructions of what the witness calculates was likely to have happened, or wished had happened, is a real one.

38. The evidence of those involved with the school during the relevant period, and called by the Claimant, also needs to be treated with caution for similar reasons. Most of them were either members of the GB or teachers during the relevant period. Shortly after the scale of the overpayments was made public in April 2009, the GB members were explicitly warned by the new temporary headteacher of their collective responsibility for what had occurred and the consequent risk of personal liability.

39. It is a particular feature of this case, as I will describe below, that the overpayments were paid over many years without the GB being aware of the numbers involved. Not surprisingly, on discovering the true position, many of the governors felt vulnerable that this had occurred 'on their watch'. Their natural instinct was to distance themselves from the impugned conduct. It was a theme among many who gave evidence on behalf of the Claimant that they felt guilt at not having done more to find out what was happening at the time.

40. A number of the Claimant's witnesses had been interviewed as part of the Audit & Investigation unit enquiry in 2009, and had provided statements to the police in connection with the criminal proceedings. In most cases, the process of drafting the statements for the police consisted of the witness being shown one document after another (many of which they had not previously seen) purporting to justify very substantial payments to a few members of the senior leadership team. Many were told at the time they made their statement that the payments were unlawful. It is difficult to see how their recollection of events when giving evidence in this action, some six or seven years after the making of their statements to the police, cannot have been affected by the circumstances in which those statements had been prepared.

41. Where, as is the case here, the central issue in each of the causes of action is the state of mind of one or other of the Defendants at the relevant time (i.e. between nine and fifteen years ago), the pitfalls I have identified are magnified many times.

42. As Leggatt J noted in the *Gestmin* case, the value of oral evidence normally lies largely in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls as to the events or his or her state of mind at the time.

43. I accordingly adopt the approach to finding the facts articulated by Robert Goff LJ in *The Ocean Frost* [1985] 1 Lloyds Rep, at p.57:

> "Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the independent facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult

> to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth."

Transcripts of interviews with Mr Udokoro in September 2009

44. In the course of his interviews with the Claimant's Audit & Investigation unit in September 2009, Mr Udokoro made some extremely damaging admissions as well as damaging allegations against other Defendants. Mr Speaight QC submitted that I should exclude altogether the transcripts of those interviews, alternatively that I should place no weight on them.

45. The jurisdiction to exclude the evidence arises, first, from CPR 32.1 which gives the court a power to exclude evidence which would otherwise be admissible, in accordance with the overriding objective and, second, from article 6 of the European Convention on Human Rights.

46. The grounds upon which it is said I should exclude the evidence are as follows.

47. First, because Mr Udokoro's presence at the interviews was procured by misrepresentation. He was told in a letter of 10 July 2009 that he was "required" to attend. Mr Wildey, a member of the Claimant's Audit and Investigation unit at the time, gave evidence at trial. The only basis upon which he asserted any obligation on Mr Udokoro's part to attend for interview was that he had become a direct employee of the Claimant upon the suspension of the GB. The Claimant was, however, unable to point to any statutory provision under which Mr Udokoro's employment with the school was terminated, or transferred to the Claimant. Under his contract of employment with the school, the only reference to disciplinary action was that in the event of such action being necessary, the "Disciplinary Procedure" adopted by the GB would be followed. No copy of that procedure has been provided.

48. Second, because when he was summoned for interview he was not permitted to bring with him a legal representative. Mr Speaight QC relied upon *Cadder v H M Advocate* [2010] UKSC 43. That case concerned the admission into evidence at a criminal trial of incriminating answers given by the accused to the police without having access to legal advice. The Supreme Court held that section 14 of the Criminal Procedure (Scotland) Act 1995, which permitted the police to put questions to a person detained on suspicion of committing an offence, was to be read so as to preclude, as a general rule, the admission in evidence of any incriminating answers obtained by the police from a detainee who was questioned without being given access to any legal advice. In the different circumstances of this case, where Mr Udokoro was not precluded from seeking legal advice before being interviewed, I find the *Cadder* case to be of little assistance.

49. Third, because he was led to believe he was being interviewed as a potential witness when in fact he was being interviewed as a suspected wrongdoer. As to this, Mr Udokoro (with the assistance of a union representative) had sought clarification from the Claimant, as early as July 2009, as to the disciplinary offences of which he was suspected. He never received a reply. Accordingly, his understanding was he was being

interviewed as a witness. In fact, the Claimant by this stage clearly suspected him, along with the other Defendants, or wrongdoing.

50. Fourth, and in my judgement most important, Mr Udokoro had been diagnosed by the Claimant's occupational health unit in June 2009 with "a major depressive illness" and "high levels of anxiety and depression". For this reason, his interview was postponed until September. In September, the occupational health unit cleared him as being well enough to be interviewed. He then attended three interviews, on 9 September 2009, on 16 September 2009 and on 23 September 2009. Following the third interview he attended the occupational health unit again, which reported that he was very confused and depressed, that he looked very unwell, that he was not able to concentrate much and was becoming forgetful. The report expressed concerns for his well-being. While I accept the evidence of Mr Wildey (who attended the second and third interviews) that he did not perceive that Mr Udokoro was unfit to be interviewed, nevertheless the fact that Mr Udokoro was suffering from a serious depressive illness prior to, and for a substantial period after, the interviews does place a substantial question-mark over the reliability of the answers he gave.

51. Added to this, there are some particularly odd features in the transcripts. In the first place, the most damaging answers from Mr Udokoro came in the second and third interviews, when he was accompanied by a representative from Unison called Mr Fola Olusanya ("Fola"). On a number of occasions, the transcript records Fola requesting a break in the questioning, followed by a serious admission from Mr Udokoro when the tape resumed. Mr Udokoro says that on these occasions Fola was essentially telling him to give the Claimant what it wanted, because then things would go better for him. While this cannot explain all of the damaging passages in the evidence, the pattern of the questions and answers in the transcripts lends some credibility to this claim.

52. There are also internal inconsistencies in the answers he gave, for example in relation to whether he repaid the loan he acquired from the school for the purchase of the car, and in relation to whether he made fraudulent claims in relation to working on Saturdays. Further, there are occasions where his attempts to distance himself from wrongdoing led him to give answers that are not credible. For example, in the first interview he claimed to have given advice that bonuses given otherwise than via the PRC were ultra vires, that the issue of bonuses should have been brought to the GB and that no bonuses in relation to the NSD should be paid until digging started. There is nothing in any contemporaneous document, or any evidence of any other witness, to support these claims. At one point, when asked whether the additional payments were proper, his response was "I will say no", and explained that was because "they are outside pay regulations and as well as it's not proper because the school they claimed they are building they are not really, there's no money from the school, and they are paying this from the school budget which shouldn't be so." This, and other similarly damaging answers, were clearly influenced by hindsight and the awareness of the widespread concern at the overpayments since the publication of Mr Roberts' dossiers.

53. Even taking account of the fact that, by the time he came to give evidence at trial, the events occurred many years ago, I found Mr Udokoro to be a wholly unreliable witness. Much of his evidence was given with a view to distancing himself from any involvement with or knowledge of the culture of excessive payments at the school. Despite having often boasted at the time of the essential work he was doing in relation to finance, accounting and legal issues, in his evidence for this trial he sought to belittle

his contribution to any issue surrounding payroll, accounting, auditing or budget preparation. When his performance in the witness box is coupled with the knowledge of his fragile mental state around the time of the interviews in 2009, I find that it would be unsafe to place much reliance upon the admissions, and allegations against others, in the course of those interviews. Primarily for this reason, but also taking into account the first, third and fourth points made by Mr Speaight QC, while I do not think it is appropriate to exclude the evidence of the interviews altogether, I place no weight on those admissions and allegations against others unless corroborated by other evidence.

Other key individuals

54. There are two notable absences from the list of witnesses who attended trial: Mrs Eva Davidson and Mr Dinesh Mistry. Both were governors of the school throughout the relevant period and both, more importantly, were on the PRC, which was the body to which all decisions on pay were delegated by the GB. Indeed, in relation to the last two meetings of the PRC (in 2008 and 2009) Mrs Davidson and Mr Mistry were the only persons present other than Dr Patel, Mr Day and (for part) Mr Davies and Dr Evans.

55. Mrs Davidson was described by all those who gave evidence as a woman of strong character who was not afraid to stand up for what she believed was right. Her signature appears on a number of the documents relating to the critical PRC meetings. She also wrote some pertinent correspondence immediately following the publication of Mr Roberts' first dossier. She gave a statement in the context of the Audit & Investigation unit's inquiries in October 2009 and a statement to the police in December 2011. The Claimant did not serve a hearsay notice in relation to these statements. Accordingly, the Defendants did not have the opportunity to require her to attend to be cross-examined on them.

56. Mr Mistry was a governor for 15 years prior to 2009 and sat on the PRC from 1998. He also made statements in connection with the Audit & Investigation unit's work and the police investigation. No hearsay notice was served in relation to his prior statements.

57. The Defendants, in particular Mr Davies, contended that I should draw adverse inferences against the Claimant for its failure to call Mrs Davidson and Mr Mistry, given that they were present at crucial meetings in respect of which key findings of fact fall to be made. It is submitted that if they could have given evidence helpful to the Claimant, then they would have been called, so I should infer from the fact that they have not been called that they would have given evidence unhelpful to the Claimant. I do not accept that submission. While it is true that the burden of proving its case lies on the Claimant, it was equally open to the Defendants to have called Mrs Davidson and Mr Mistry to corroborate their version of events.

58. Nevertheless, I place no reliance on what Mrs Davidson or Mr Mistry said in the statements given by them in the context of the Audit & Investigation unit's enquiries or the criminal proceedings, unless corroborated by other evidence. As with all those who have given evidence, there was, following the whistle having been blown by Mr Roberts, an incentive on them to distance themselves as much as possible from any involvement with the overpayments. Insofar as Mrs Davidson denied in those statements having signed documents relating to certain PRC meetings, the Claimant has not led any evidence to support that contention. The extent to which Mrs Davidson denied that bonuses were awarded at PRC meetings, or simply denies having agreed to

them, is also unclear. Without the opportunity to test what was said in their previous statements by cross-examination I conclude it is unsafe to rely on them. There are occasions, however, where I do take account of what Mrs Davidson is reported to have said to others, contemporaneously with the relevant events, as I will indicate in the course of this judgment.

Standard of proof

59. In relation to the claims involving dishonesty or bad faith, the usual civil standard of proof applies, that is, whether it is more probable than not that the fact occurred: see, for example, *IT Human Resources plc v David Land* [2014] EWHC 3812 (Ch) (Morgan J). Nevertheless, as a matter of common sense, regard must always be had to the inherent probabilities of the case: *Re B (Children)* [2009] 1 AC 11, per Lord Hoffmann at [15]. Depending on the circumstances, the appropriate starting point may well be that it is inherently unlikely that a person of previous good character would commit fraud. In that sense, though not as a rule of evidence, more cogent evidence may be required to establish that such a person has indeed committed fraud. The importance of this approach in a conspiracy claim was highlighted by the Court of Appeal in *Kuwait Oil Tanker Co SAK v Al-Bader (No.3)* [2000] 2 All ER (Comm) 277, at [10] and [161].

Missing documents

60. The Defendants contend that a number of documents have gone missing, following their removal from the school by the Claimant. The most important of these are (some of) their diaries, documents relating to Mr Davies' annual performance review and minutes of, and other documents relating to, PRC meetings. So far as the first two categories are concerned, they go to the extent to which additional duties were carried out by certain of the Defendants, so as to justify the overpayments. For reasons which appear later in this judgment, the absence of such evidence as the missing diaries and performance review documents might have contained has not affected the conclusions I have reached. To the extent that I have made findings against any of the Defendants, it is not because of the lack of evidence of additional work having been done by them. I deal later in this judgment with the allegation that there were further relevant documents in respect of PRC meetings.

C. The Overpayments

61. The payment of bonuses to both teaching and non-teaching staff was an established practice within the school by April 2003. At first, the amounts awarded had been small. In June 1998, for example, a one-off payment was made to non-teaching staff (varying in amount between £75 and £300) and a one-off payment of £2,500 was paid to Mr Davies "for meeting performance criteria and steering the school forward".

62. In 2002, there was a significant (but, in the context of this action, still relatively small) increase in the amounts paid. At the PRC meeting of 21 January 2002, bonuses were recommended to Mr Davies (£12,000), Dr Evans (£6,000) and other deputies (ranging from £2,000 to £4,000), as well as a one-off payment of £50 to all non-teaching staff. At the meeting of the PRC on 11 July 2002, bonuses were awarded of £8,000 to Mr Davies, £6,000 to Dr Evans, and £2,500 to three other deputies, Mr Ali, Mr Sampong and Ms Dunkley. Bonuses of between £30 and £500 were awarded to non-teaching staff.

63. For some time prior to April 2003 all teaching staff had been in receipt of one "recruitment and retention" point (that is, an increase of one point on the relevant pay spine, to recognise problems of recruitment and retention of staff at the school). This was later increased to two recruitment and retention points, which continued thereafter.

64. It is important to note that (contrary to the case set out in its detailed "summary of the evidence" annexed to its letter before claim dated 10 March 2014) the Claimant does not contend that the payment of bonuses prior to April 2003 was pursuant to any fraudulent conspiracy on the part of any of the Defendants. This is unsurprising in view of the limited role of any of the Defendants in approving the pre-April 2003 bonuses. There were five governors present at the PRC meeting of 11 July 2002, for example, of which only one, Dr Patel, is a Defendant. None of the others is alleged to have acted dishonestly.

65. From April 2003 the amounts being paid by way of bonus or additional payment began to increase dramatically. For reasons which will become apparent, it is helpful to distinguish between two separate procedures by which payments were approved: first, approval at PRC meetings and, second, approval by Dr Patel and Mr Day pursuant to an "ad hoc" procedure which commenced in December 2004.

66. There were seven PRC meetings between April 2003 and April 2009. At each of them, the procedure adopted was broadly as follows. Mr Davies prepared a document, usually bearing the title "sharing in success", for presentation at the meeting, either by way of an overhead projector or (as technology developed) a PowerPoint presentation. I will refer to these documents as the "PRC presentation documents". These contained Mr Davies' recommendations for salary increases, bonuses and other payments for all staff. They also included recommendations for faculty funding (about which no complaint is made). I am satisfied that it was Mr Davies alone who decided on the amounts to recommend for staff increases in all the PRC presentation documents.

67. Mr Davies and Dr Evans would be present at the commencement of the meetings of the PRC for the purposes of outlining the recommendations, but would then leave to allow discussion among the PRC members. Dr Evans attended in order to answer any questions that might arise as to the school's finances, and the affordability of the payments. Throughout the relevant period, the PRC was assured that the payments were affordable and within budget. Moreover, governors were told by Mr Davies (for example at a meeting of the FMC in February 2007) that it was important to spend the delegated budget, and not leave a large surplus at the year end, because the Claimant had the power to claw-back unused surpluses. At the end of the meeting, Mr Davies and Dr Evans were called back in and the PRC's decision on each of the recommendations was relayed to them. Most of the PRC presentation documents in evidence contain manuscript additions by Mr Davies, noting where recommendations were agreed, or where increases or decreases had been approved by the PRC.

68. In accordance with the requirements of applicable regulations and the school's pay policies (which I deal with at section D(1) below) Mr Davies was subject to an annual performance review. Targets were set annually, and his performance was reviewed against those targets. Most of the documentation relating to his performance reviews is missing, but the GB minutes for each year record the results being reported back.

69. Throughout the relevant period, Mr Davies received positive performance reviews, and was assessed to have met his targets. In 2006 a new procedure was adopted, involving an external assessment by a School Improvement Partner ("SIP"). The reports of the performance reviews for 2006 and 2008 are in evidence. The 2006 report identifies three objectives having been identified at the previous review. The first, under the heading "leadership and management", was to continue to lead and manage the NSD. The report stated that "Sir Alan is totally dedicated to this project" and concluded on the basis of the evidence provided that the objective had been fully met. The second objective, under the heading "pupil progress" was to work with the leadership team and heads of faculty to identify individual targets for students from key stage 2 to key stage 3. Mr Davies reported on a thorough target setting and evaluation process. The SIP found this objective to have been fully met. Broadly similar targets were set for the following year. In relation to the first objective (leadership and management) success criteria were identified as the appointment of a project manager and the project proceeding smoothly and to an agreed timetable.

70. The performance review for 2007 is not in evidence, but in December 2008 the objectives for the past year (including continuing to lead the NSD, developing strategies to challenge the most able pupils and developing links with the University of Westminster) were all found to have been met.

71. There is no contemporaneous record of the PRC (during the period 2003-2009) having considered the formal reviews of Mr Davies' performance when it came to consider the payments recommended by him. I accept, however, the evidence of Mr Davies and Dr Patel that the results of his performance reviews were taken into account by the PRC in reaching its decisions in respect of Mr Davies. Given that Dr Patel was present at the performance reviews (as corroborated by the reports that are in evidence) and given that the matters identified in the PRC presentation documents to justify the payments recommended in them largely reflected the objectives set out in the performance review documents, it is inherently likely that the PRC's decisions were taken with the benefit of the performance reviews.

72. The seven PRC presentation documents were dated as follows (with the date of the relevant PRC meeting where known): (1) June 2003; (2) January 2004; (3) October 2004 (PRC meeting on 7 October 2004); (4) July 2005 (PRC meeting on 13 July 2005); (5) July 2006 (PRC meeting on 18 July 2006); (6) 2008 (PRC meeting on 8 February 2008); and (7) 2009 (PRC meeting on 19 January 2009).

73. Each of the PRC presentation documents set out the reasons why the payments recommended in it were justified. The reasons remained relatively consistent over the years and included: (a) the headteacher's achievement in attracting funding to the school; (b) the educational achievements of students throughout the school; and (c) the work being done on the NSD.

74. In each year, bonuses were awarded to all staff. Most of these were of relatively small amounts, but the amounts paid to the senior leadership team were very large and increased in size over time. By way of example, the bonuses received by Mr Davies at the six PRC meetings between June 2003 and February 2008 were (in chronological order): £25,000; £40,000; £40,000; £48,000; £50,000; and £70,000 (increased to £80,000 by an additional payment awarded immediately afterwards by Dr Patel and Mr

Day). The aggregate amount was £283,000. Dr Evans received similar, but slightly smaller, amounts from the same six PRC meetings aggregating £213,000.

75. I set out further details of the PRC presentation documents relating to, and payments made at, each of the PRC meetings in Part 1 of the Appendix to this judgment.

76. In December 2004, a parallel procedure (the "ad hoc procedure") for approving bonuses and additional payments on an ad hoc basis was initiated. Over the next four years additional payments were awarded via this procedure on twenty occasions.

77. On each occasion, a document was drafted containing recommendations for additional payments to be made to various members of staff. In a few instances, the document was drafted as a memo from Mr Davies to Dr Patel. In one case, it was drafted as a memo from Mr Davies to Dr Evans. In all other cases, it was drafted as a memo from Dr Patel to Mr Davies. It was common ground, however, that irrespective of the form of the memo it was on each occasion written by Mr Davies. This was explained by Dr Patel and Mr Davies on the basis that English was Dr Patel's second language, and that Mr Davies had better access to facilities for typing up the memos.

78. One-off payments totalling in excess of £750,000 were paid to a handful of staff pursuant to the ad hoc procedure. Mr Davies and Dr Evans received by far the largest proportion of this. In addition, salary increases were awarded to Mr Davies and Dr Evans totalling respectively £126,000 and approximately £81,000 per year, and salary increases of many thousands of pounds per year were awarded to a handful of other staff. A total of seven memos authorised payments for additional duties resulting from the retirement of a deputy called Hakim Ali (the "Ali Memos"). A further seven memos authorised payments for additional duties relating to the NSD ("the NSD Memos").

79. I set out details of all the overpayments made pursuant to the ad hoc procedure in Part 2 of the Appendix to this judgment.

D. Findings on key issues

80. Before I address the elements of each cause of action, there are a number of key issues which underpin the case as a whole. These are: (1) Were the overpayments unlawful per se? (2) Were the overpayments properly authorised? (3) What was the state of knowledge, as to the overpayments, of the GB? (4) What was the state of knowledge, as to the overpayments recorded in the PRC presentation documents, of the PRC members who are not accused of wrongdoing? and (5) What was the state of knowledge, as to the overpayments made via the ad hoc procedure, of the PRC members who are not accused of wrongdoing?

D(1) Were the overpayments unlawful per se?

81. The Claimant contends that the overpayments, whether characterised as bonuses or payments for additional duties, were in themselves unlawful as being contrary to statute, the Council's regulations and the school's own policies. This is irrespective of

whether they were objectively justifiable as remuneration for the work claimed to have been done, or as reward for success.

82. It is necessary to explain something of the statutory framework relating to the governance of maintained schools, in particular as concerns stewardship of a school's finances, and the relevant statutes, regulations and policies concerning the pay of teachers and non-teaching staff.

School Governance

83. Every maintained school, such as Copland, is required to have a governing body, which is a body corporate: Education Act 2002, s.19(1). The conduct of the school was under the direction of the school's governing body, whose overriding duty was to "conduct the school with a view to promoting high standards of educational achievement at the school": Education Act 2002, s.21.

84. Regulations permit the governing body to delegate functions to (a) a committee, (b) any governor, or (c) the headteacher: School Governance (Procedures) (England) Regulations 2003/1377, paragraph 16. In the event of delegation, the governing body was required to review the exercise of the functions it had delegated annually. By regulation 18, any individual or committee to whom a function of the governing body has been delegated "shall report to the governing body in respect of any action taken or decision made with respect to the exercise of that function".

The School's finances

85. All maintained schools are funded by way of "a budget share which is allocated to it by the authority which maintains it": s. 45(1) SSFA. This is known as a "delegated budget": s.49(1) SSFA.

86. The delegated budget was under the control of the GB. By s.50(3) SSFA:

> "…the governing body may spend any such amounts as they think fit for: (a) any purposes of the school; or (b) (subject also to any prescribed conditions) for such purposes as may be prescribed."

87. The GB was permitted to delegate their powers under s.50(3) to the headteacher: see s.50(6) SSFA.

88. Property in the money provided to the school by way of delegated budget remained, however, in the Claimant until it was spent. By s.49(5) SSFA:

> "Any amount made available by a local authority to the governing body of a maintained school whether under section 50 or otherwise (a) shall remain the property of the authority until spent by the governing body or the headteacher; and (b) when spent by the governing body or the headteacher, shall be taken to be spent by them or him as the authority's agent."

89. That section expressly recognised the central role played by a headteacher in the stewardship of the school's finances. This was reflected in financial regulations issued by the Claimant each year, applicable to all schools maintained by the Council and in

receipt of delegated budgets. For example, the regulations for 2003, 2004 and 2005, provided (by paragraph 5.2) that

> "Head teachers are responsible for ensuring that all expenditure under their control is incurred for purposes which the Council is legally empowered to pursue. All headteachers need to ensure that they only incur expenditure which is properly justified as being in the interest of the Council."

90. In addition (by paragraph 6.3)

> "Head teachers are responsible for ensuring that only authorised payments are made…"

91. From 2006 onwards, the regulations included (by paragraph 1.1.1) that the regulations must be followed by all staff and governors in the school, (by paragraph 1.2.2) that "Head teachers are under a duty to ensure that their staff and governors comply with these regulations", (by paragraph 1.2.3) that "Head teachers must ensure that their school promotes, enacts and monitors adherence to the necessary financial control framework…", and (by paragraph 5.3.1) that "Head teachers are responsible for ensuring that all expenditure under their control is incurred lawfully, is within budget provision and that the best value has been obtained in procuring goods and services".

Statutory provisions relating to teachers' pay

92. By s.122 of the Education Act 2002, the Secretary of State may by order make provision for the determination of (among other things) the remuneration of school teachers. Where such an order applies to a schoolteacher, then, by paragraph (2)(a) "his remuneration shall be determined and paid in accordance with the provisions of the order which applies to him". Moreover, by paragraph (2)(c): "a term of [his contract of employment] shall have no effect in so far as it makes provision which is prohibited by the order or which is otherwise inconsistent with a provision of the order."

93. For each year, the Secretary of State made an Order giving statutory force to a document entitled the School Teachers' Pay and Conditions Document (the "STPCD"). The order provided that section 2 of the STPCD:

> "shall have effect … for the purposes of determining (a) the remuneration of school teachers, and (b) other conditions of employment of school teachers which relate to their professional duties and working time."

94. The STPCD is divided into four sections. Section 1 is an introduction. Section 2, referred to as "the Document" contains the substantive provisions. Sections 3 and 4 contain guidance. Compliance with section 2, the Document, was mandatory (see the Order made by the Secretary of State itself, and also paragraph 3 of the introduction to the STPCD).

95. By s.127 of the Education Act 2002, the governing body of a school must have regard to the guidance. This was reflected in paragraph 3 of the introduction to the STPCD, which stated that governing bodies are required to have regard to the statutory guidance, and that a court or tribunal may take any failure to do so into account in any proceedings: "broadly speaking, this means that any party not following this guidance

would need to have good reason not to do so and would need to be able to justify any departure from it."

96. The references to the STPCD below are to the version applicable in 2007. The provisions for the other relevant years were materially the same.

97. The Document identified the minimum and maximum amounts that were permitted to be paid to any teacher. It set out a pay "spine", with spine points ranging from L1 to L43, and a salary for each point depending on whether the teacher is in inner London, outer London or elsewhere. By paragraphs 6.1 to 6.3 the remuneration of a headteacher, deputy headteacher and assistant headteacher "shall" be based upon the leadership pay spine. Paragraph 7.3 provided that (subject to paragraphs 48 and 49, which are not relevant for this purpose) "a headteacher's salary shall not be less than the minimum of the individual school range and **nor shall it exceed the maximum of the individual school range**" (emphasis added).

98. The "individual school range" was to be determined by the "relevant body" (which, in the case of Copland, meant the GB). By paragraph 12.2.2, subject to limited exceptions, the maximum of the individual school range "shall" not exceed the maximum of the headteacher group range. The headteacher group ranges were set out in paragraph 8.3. In 2007, by way of example, the maximum of the salary range for any headteacher group was £104,628. The limited exceptions were set out in paragraph 12.2.5 and 12.2.6.

99. Para 12.2.5 provided as follows:

> "The relevant body may determine the individual school range in accordance with sub-paragraph 2.6 of this paragraph where: (a) the school is a school causing concern; (b) if the maximum of the individual school range did not exceed the maximum of the head teacher group range, the relevant body consider that the school would have substantial difficulty filling the vacant headteacher post; or (c) if the maximum of the individual school range did not exceed the maximum of the head teacher group range, the relevant body consider the school would have substantial difficulty retaining the existing head teacher."

100. Paragraph 12.2.6 provided that in the circumstances described in paragraph 12.2.5 the relevant body may determine an individual school range which exceeds the headteacher group range and, if the appropriate headteacher group range is group 7 or 8 (which was the case at Copland) then the individual school range "shall be such as the relevant body may determine, and its maximum may exceed the highest point on the leadership group pay spine."

101. In theory, therefore, there was no maximum pay provided for a headteacher, if the relevant body made a determination in accordance with paragraphs 12.2.5 and 12.2.6. There is no evidence, however, that the GB (or the PRC or any other committee of governors) ever made, or even gave any consideration to making, a determination to increase the school range in accordance with these paragraphs. Moreover, none of the circumstances set out in paragraph 12.2.5 applied to Copland. The only one that could potentially have applied was 12.2.5(c), relating to difficulties in retention of the headteacher. Despite some after-the-event attempts by the Defendants to contend that paragraph 12.2.5(c) might have applied, I am satisfied that during the period 2003 to

2009 the extremely large overpayments made to Mr Davies could not have been justified on the basis of the need to retain him. There was no evidence of any material risk that he would leave the school if the payments were not made, and no evidence that he could have obtained remuneration anywhere else commensurate with the sums paid to him by Copland.

102. There was limited provision within the Document for the payment of additional sums to teachers. First, by paragraph 52,

> "the relevant body may make such payments as they see fit to a teacher, including a head teacher, in respect of: (a) continuing professional development undertaken outside the school day; (b) activities relating to the provision of initial teacher training as part of the ordinary conduct of the school; (c) participation in out-of-school hours learning activity agreed between the teacher and the head-teacher or, in the case of the head teacher, between the head teacher and the relevant body"

103. Apart from the payments made to staff in respect of working during classes on Saturdays ("Saturday school") and booster classes during the holidays, none of the overpayments could be justified by reference to paragraph 52 of the Document.

104. Secondly, by paragraph 53.1 of the Document, the relevant body was entitled to make provision as an incentive for the recruitment of new teachers and the retention of existing teachers. Retention allowances by way of periodic payments had to be for a fixed period and could not, save in exceptional circumstances, be renewed. As I have noted, retention and recruitment points were awarded to all teachers by the PRC (usually by way of two additional spine points on their salary) throughout the relevant period. While this may well have contravened the Document, in that it was maintained for many years, the Claimant does not take any point on this. Nothing in paragraph 53 of the Document could have justified the overpayments to Mr Davies, Dr Evans or other members of the senior leadership team at the School.

105. The Document required teachers' pay to be reviewed annually. In relation to the headteacher, by paragraph 7.2, the GB and the headteacher were required to seek to agree performance objectives, for the purpose of determining his or her salary, and the GB was required to review the performance of the headteacher taking account of those objectives.

106. Similar provisions to those set out above relating to the headteacher existed for deputy and assistant headteachers.

107. Paragraph 3 of the Document provided that the relevant body shall "adopt a policy that sets out the basis on which it determines teachers' pay and the date by which it will determine the teachers' annual pay review." When determining the remuneration of a teacher, the relevant body must have regard to its pay policy.

108. The guidance, at para 4 (under the heading "General Principles") provided that:

> "No payments or conditions of employment other than those provided for in the Document may be applied to teachers, except those conditions which are always determined locally and which do not conflict with the Document, unless the Secretary of State has granted exemptions under other legislation."

109. It was contended on behalf of the Defendants that this guidance enabled the rates of pay set out in the Document to be exceeded, so that the overpayments could be justified on this basis. I reject this contention. First, the overpayments conflicted with the Document, since the Document set out the maximum amounts that could be paid to teachers, including the headteacher, by way of remuneration. Second, I reject the suggestion that the overpayments could be saved by the words "always determined locally". Those words applied to "conditions" not "payments", and the highly unusual overpayments in this case could hardly be described as something that were "always" determined locally. Third, I reject the contention that because this prohibition appears in guidance it can itself be departed from simply because the guidance is not itself mandatory. Compliance with the Document is (by the Order giving effect to the STPCD each year) mandatory, and the Document itself is clear in providing for the maximum amounts that can be paid to teachers, including headteachers, and the limited circumstances in which they can be departed from. The repetition of that requirement in an introductory paragraph of the guidance cannot have been intended to weaken the binding force of the Document itself.

110. From 2006, the guidance expressly stated that "The Document does not provide for the payment of so called "honoraria" in any circumstances". Mr Davies argued that "honoraria" are different from "bonuses", and so the guidance – even in 2006 – did not prohibit bonuses. I disagree. For the reasons already explained, I consider that only very limited additional payments were permitted by the Document, and that whether or not bonuses and honoraria have different technical meanings, both fell outside the limits of the Document.

The school's pay policies

111. From 2 February 2002 until 5 August 2005, the school's pay policy No. 50 applied. This provided that the STPCD applied in respect of teachers' pay (including that of the headteacher and deputies), and that the National Joint Council for Local Government Services' National Agreement on Pay and Conditions of Service (otherwise known as the "Green Book") applied in respect of non-teaching staff pay. It also provided that (as required by the STPCD), all teaching staff salaries would be reviewed to take effect from 1 September each year.

112. From 1 September 2005 onwards, Pay Policy No. 44 applied in relation to teaching staff (but a separate policy was introduced for non-teaching staff, as I describe below). This also expressly applied the STPCD to all teachers employed at the school and required that salaries would be reviewed with effect from 1 September each year.

113. Under the heading "Principles Governing Application of the Policy" it provided as follows:

> "The governing body recognises that it is bound by the terms of the LEA advice and guidance on school pay policy and other staffing matters and appropriate policies in other schools of the LEA. The policy is based on a "whole school" approach to pay issues, with pay decisions taken in the context of full consideration of the resources available to the school. This means that pay decisions relating to any given group of staff will not be taken in isolation and that all pay decisions will be taken in the context of the school as a whole … the governing body will use the School Development Plan as the starting point for its consideration of school pay

> issues … the governing body will exercise its discretion using fair, transparent and objective criteria in order to secure consistency in school pay decisions and will not make selective use of its discretionary powers in relation to teachers' pay."

114. Under the heading "Pay Progression for Leadership Group Members", the policy provided that both the headteacher and the deputy and assistant heads must demonstrate sustained high quality of performance, with respect to leadership, and management of pupil progress. It required them to be subject to a review of performance against pre-set objectives before any performance points were awarded. It also stated, however, that "Decisions not to award additional points following the performance review will not preclude the award of points for other reasons, such as additional responsibilities or an increase in the size of the school."

115. Under the heading "Bonus Payments", Pay Policy 44 provided that:

> "the governing body reserves the right to make payments in response to local recruitment and retention difficulties, in the light of the limits set out in the Pay and Conditions Document. The governing body recognises that such payments may be necessary due to the absence of a pay structure for teachers which fully supports recruitment and retention without recourse to discretionary payments. Any use of such payments will be on the basis of clearly defined criteria determined by the governing body from time to time and applied on a non-discriminatory basis. The level of such payments will be increased annually at least to take account of inflation and pay awards. Where teachers were in receipt of bonus allowances before 1 April 2004, the governing body will continue to make payments which will be increased annually at least to take account of inflation and pay awards."

116. Under the heading "Other Payments", the policy provided that staff who volunteered to teach at Saturday School, Summer School and general holiday revision classes would continue to be remunerated appropriately for it.

Non-teaching staff

117. The STPCD does not apply to non-teaching staff. Pay Policy No.50 stated that for non-teaching staff, pay would operate within the nationally agreed framework set out in the Green Book. From July 2006 the school operated a separate pay policy for non-teaching staff, which stated that the school would fulfil its obligations under the Green Book.

118. There is no prohibition on payments of bonuses within the Green Book. It expressly recognises that bonuses and other performance payments might be paid.

119. The pay policy for non-teaching staff made provision for bonus payments, spot increases, acting posts, and Saturday and holiday school. So far as bonuses were concerned, the governing body reserved the right to make bonus payments as recommended by the headteacher "on the basis of clearly defined criteria determined by the Governing Body from time to time…" Spot increases (that is, a temporary increase in a member of staff's position on the Brent pay scale) were permitted as an alternative to bonuses, on the recommendation of the headteacher. Where a member of staff was covering a higher-level post, then they were entitled to be paid the relevant

increase in salary as shown on the Brent pay scale and as recommended by the headteacher. Finally, staff who volunteered to work on Saturday school, summer school and holiday revision classes "will continue to be remunerated appropriately".

Conclusions

120. I have outlined above the provisions of the STPCD which permitted, in limited circumstances, teachers' pay to be increased above the maximum point on the relevant pay scale, or, in equally limited circumstances, payments to be made to teachers by way of bonus or remuneration for additional duties undertaken.

121. In my judgment, save for three limited exceptions, the overpayments to teaching staff in this case were not permitted pursuant to those provisions.

122. The first exception is payments for teaching undertaken outside normal school hours, on Saturdays or during the holidays. Although the Claimant complains that certain of the Defendants asserted false claims under this heading, it seeks recovery of alleged overpayments in this regard only from Mr Davies and Dr Evans.

123. The second exception is the payment of two recruitment and retention points for all staff. As I have noted above, even here the PRC failed to comply with the STPCD, but the Claimant does not make any claim in this regard.

124. The third limited exception is where a member of staff (other than the headteacher) acted above their contracted grade. This might have justified, in part, the payment to Dr Evans pursuant to the first NSD Memo, to the extent that he did in fact stand in for Mr Davies while Mr Davies was otherwise occupied on NSD matters.

125. Aside from these three exceptions, there were, broadly, two purported justifications made at the time for all of the overpayments. The first was that they were remuneration for additional duties undertaken. The second was that they were reward for achievement. Generally speaking, the payments awarded by the PRC fall into the second category (as demonstrated by the title of most of the PRC presentation documents: "Sharing in Success") and most of the ad hoc payments fall into the first category.

126. In my judgment, neither category of payment was permitted by the STPCD.

127. Mr Davies (in particular) sought to justify a large proportion of the overpayments to him on the basis that he carried out very substantial additional duties in relation to the NSD. I have no doubt that he did carry out such additional duties (indeed, the Claimant accepts that he did so). Nevertheless, I find that the STPCD did not permit payment for such additional duties. It is true that the circumstances at Copland school were highly unusual, in that it was engaged in a massive development project involving not only the building of a new school, but also the construction of a large residential complex in order to finance that new school. To some extent, any headteacher of a school involved in such a project would be required to undertake duties that would not feature in the normal life of a headteacher. I accept that the role Mr Davies undertook went far beyond this. Nevertheless, the STPCD did not permit school funds to be used to pay Mr Davies (or any other teacher) for such additional duties. Mr Davies and Dr Evans were paid a full-time salary for carrying out the full-time jobs of, respectively,

headteacher and deputy headteacher. Neither of them had any qualifications which suited them to acting as project managers on the NSD. That fact alone makes it questionable whether it was an appropriate use of school money to pay them enormous sums for work on the NSD. But even if they had been qualified, nothing in the STPCD justified using school funds to pay a headteacher or deputy head any more than the maximum point on the relevant pay scale for doing – as they put it – in effect a second job.

128. It was suggested that the payments to staff in relation to the NSD might ultimately have been reimbursed by the developer engaged on the project. There was, however, no evidence of this. The very limited provisions in the agreement with Chancerygate for the payment of fees did not extend to any of the overpayments made to staff at the school. Indeed, as I have explained above, on termination of the agreement the school was left with a bill of £1 million to cover Chancerygate's past costs.

129. The principal submission made by the Defendants was that it was permissible for a school to depart from the STPCD if "broadly speaking" it had good reason to do so, relying on paragraph 3 of the introduction to the STPCD. As I have noted, however, while that paragraph permitted a school to depart from the *guidance* if it had good reason to do so, it made it clear that compliance with the Document was mandatory.

130. In relation to non-teaching staff, on the other hand, I find that the overpayments were not per se unlawful, in that there was no statutory or other restriction on either the payment of bonuses or payments for additional duties undertaken.

D(2) Were the payments properly authorised?

131. The Claimant contends that none of the overpayments were properly authorised, because only the GB had authority to make decisions on pay. It is again helpful to distinguish between payments authorised by the PRC and payments authorised by the ad hoc procedure.

Delegation to the PRC?

132. The school's pay policies, throughout the relevant period, provided for the establishment of the PRC.

133. Prior to September 2006, there was some ambiguity over the role of the PRC. Pay Policy No. 50 provided that the PRC will "make recommendations to the Governing Body on all pay matters taking into account all statutory and contractual obligations", and that the GB "will receive and consider the recommendations of the PRC in the confidential section of the agenda". The same paragraph, however, stated that the GB had delegated its pay powers to the PRC.

134. This ambiguity was cleared up by Pay Policy No.44 which provided that the PRC was responsible for (1) taking decisions regarding the annual pay assessments for deputy and assistant headteachers, and all teaching staff, following consideration of the recommendations of the headteacher; (2) taking decisions regarding the annual pay assessment of the headteacher, following recommendations of the governors responsible for the headteacher's performance review; (3) submitting reports of these decisions to the full GB; and (4) ensuring that the headteacher was informed of the

outcome of the decision of the PRC and of the right to appeal. Under the heading "Confidentiality", the policy stated that "Decisions on the specific application of the pay policy to individuals will be reported in the Confidential section of the agenda for the governing body meetings…"

135. The PRC had to comprise at least three members of the GB. In Pay Policy 50 the headteacher was permitted to attend the PRC meeting in an advisory capacity but had to withdraw from that part of the meeting where the subject of consideration was his or her own pay.

136. The pay policy for non-teaching staff provided that the GB had delegated its pay powers to the PRC, and that the PRC was required to "achieve the aims of the whole school pay policy in a fair and equal manner; to apply the criteria set by the whole school pay policy in determining the pay of each member of staff at the annual review; to observe all statutory and contractual restrictions; to minute clearly the reasons for all decisions and report these decisions to the next meeting of the full governing body." The report of the PRC was to be placed in the confidential section of the GB's agenda.

137. In practice, throughout the period 2003 to 2009, and for some years prior to that, all decisions on pay in relation to all the staff at the school had been made by the PRC. Mr John Bryant, the clerk to the governors between November 1989 and July 2006, said he believed this delegation was permitted pursuant to the pay policies of the school throughout his time as clerk. This was corroborated by each member of the GB from whom I heard evidence at the trial. There can be no doubt that the GB knew at all material times that the PRC, and not it, was making all decisions in relation to pay, yet there was no objection from any governor.

138. Accordingly, I find that at all material times there was an effective delegation of authority to make decisions in respect of pay for teachers and non-teaching staff from the GB to the PRC.

139. Nevertheless, it was also a requirement of the school's policies (and the School Governance (Procedures) (England) Regulations 2003/1377) that the PRC would report back on the decisions that it had made to the GB. As I describe below at paragraph 182, this never happened.

Delegation in respect of the ad hoc procedure?

140. The Claimant contends that there was no delegation by the GB to Dr Patel and Mr Day so as to authorise them to make the ad hoc payments. It also contends that there was no delegation from the PRC and, in any event, to the extent that the PRC did purport to delegate authority to Dr Patel and Mr Day, that was ineffective as a matter of law.

141. A body given a statutory power cannot itself delegate that power: *Audit Commission v Ealing LBC* [2005] EWCA Civ 556. Moreover, where such a power is delegated to a person, that person cannot delegate the power to another: *Allingham v Minister for Agriculture and Fisheries* [1948] 1 All ER 780 (DC), at p.781 per Lord Goddard CJ.

142. These principles were expressly affirmed in the "Guide to Governors" published by the Department for Education and Skills. The 2006 version of the guide provided that no governor had the power or right to act on behalf of the GB, unless the whole GB had

delegated a specific function. By paragraph 72, the GB was prohibited from delegating any functions relating to (among other things) the delegation of functions. By paragraph 73, any individual or committee to whom a decision had been delegated must report to the GB in respect of any action taken or decision made. Finally, by paragraph 84, the quorum for any committee meeting was three governors.

143. In considering whether there was any proper delegation of authority to the ad hoc committee, it is necessary to consider four separate time periods.

(i) December 2004 to July 2005

144. During this period, the first three Ali Memos were executed (see paragraphs 19-28 of the Appendix).

145. There is no documentary record of any grant of authority to Dr Patel and Mr Day to make these payments, whether from the PRC or the GB. There is no reference to this procedure in any GB minute, or any document relating to a PRC meeting, during this period. I note, in addition, that the language of the memo dated 13 July 2005, referred to in the next section, purporting to delegate authority from the PRC to pay bonuses, was forward looking, which suggests that there had been no prior delegation in relation to the first three memos.

146. Mr Davies, in his witness statement, said only that the reorganisation – following Mr Ali's retirement – was first discussed with the executive team (i.e. senior teachers) and "with governors". He does not refer to any communication with governors (apart from Dr Patel and Mr Day) in which the concept of Mr Ali's pay being distributed among himself and other staff was discussed, let alone any resolution of the GB permitting such payments to be made.

147. In his oral evidence, he referred to the PRC meeting in October 2004, where it had been decided that Mr Ali should be paid, in addition to a bonus of £30,000, a further £8,000 to mark his retirement. He said (at one point in his evidence) that following that meeting, he was given feedback that he should write to Dr Patel to "make recommendations in order to take the Hakim Ali work forward" and (at another point in his evidence) that there had been a decision at the PRC meeting that he should write to Dr Patel and Mr Day. At no stage, however, did he suggest that there had been any delegation by the PRC to Dr Patel and Mr Day (let alone any delegation to them from the GB) of the power to decide on pay increases or other payments to any member of staff in connection with the reorganisation of Mr Ali's role.

148. Mr Day's witness statement contains no reference to any decision of the GB or the PRC to delegate authority to make these payments to the ad hoc committee. In his oral evidence he said that he recalled a discussion at a PRC meeting about the concept of Mr Ali's role being reorganised among other members of staff, but he did not think there had been any discussion at a PRC meeting about the division of Mr Ali's salary. He said that he thought that the first indication he had of this was on receipt of the memo dated 15 December 2004.

149. In his witness statement, Dr Patel said that the executive committee (i.e. Mr Davies and deputy headteachers) decided that Mr Ali's pay would be split between other staff members. He went on to say that the PRC had then been told that this had been agreed.

Dr Patel does not say when the PRC was told. In his oral evidence, when asked whether there had been any delegation from the PRC to him and Mr Day to make the payments purportedly approved by the memo of 15 December 2004, Dr Patel said he had no knowledge of that. When asked how he felt it was appropriate to authorise increases in salary, that being a matter which fell within the remit of the PRC, he said he presumes that Mr Davies had explained to him what work he and the other staff members were doing following Mr Ali's semi-retirement and that "I had to take his word". Accordingly, I place no weight on the assertion in Dr Patel's statement that the PRC had been told of the decision to redistribute Mr Ali's salary (at least in advance of any of the awards of pay set out in the first three Ali Memos).

150. Dr Evans' evidence was that the question of reorganisation of Mr Ali's work was discussed at a meeting among Mr Davies, Dr Evans, Ms Dunkley and Mr Sampong, although he cannot recall the meeting itself. He does not, however, recall any discussion about redistributing part of Mr Ali's salary, and denied having any input into the decision as to how the salary would be redistributed. This is consistent with a letter from Mr Davies to Dr Evans dated 28 December 2004, which referred to Dr Evans having taken part in the executive team review of job descriptions, asked him to assume certain curricular responsibilities to cover for Mr Ali and informed him that his salary would be increased from .31 to .37 on the pay spine. There are similar letters from Mr Davies to Ms Dunkley and Mr Sampong.

151. On the basis of this evidence, I find that there was no delegation, whether from the GB or from the PRC, to Dr Patel and Mr Day to grant any of the pay increases or one-off payments recommended in the first three Ali Memos.

(ii) July 2005 to July 2007

152. 12 memos were executed during this period, including four further Ali Memos, five NSD Memos, and the memo authorising payment for staff working at Chalkhill primary school (the "Chalkhill Memo") (see paragraphs 29-54 of the Appendix).

153. The purported source of delegated authority was a memo from Dr Patel to Mr Davies dated 13 July 2005 stating that "this committee appreciates the need to introduce bonus payments on an 'ad hoc' basis as the alternative will involve needing to wait for the yearly cycle of Pay Review prior to any bonus being awarded", and that "this committee wishes to devolve the decision making process for these 'ad hoc' bonuses to the Chair of Pay Review in conjunction with the link Governor for Finance on either the recommendation of the Chair of Pay Review or the Headteacher." The memo also stated that before any recommendation was carried out, the "Deputy Headteacher (Finance) should be consulted in relation to affordability". The memo was signed by Dr Patel and Mr Day. At that time the PRC consisted of: Mrs Davidson; Dr Patel, Mr Day, Mrs Rashid, Mr Mistry and Valerie Bennett.

154. It is contended by Mr Davies, Dr Evans, Dr Patel and Mr Day that this delegation was discussed at the PRC meeting on 13 July 2005.

155. It is not suggested that this memo constitutes the minutes of the PRC meeting on 13 July 2005. The Defendants contend that there were minutes taken of this meeting, but they have gone missing. The minutes of the GB meeting on 12 October 2005 record that "the minutes of the Pay Review Committee were noted". At this time Mr Bryant

was the clerk to the GB and it was his evidence, which I accept, that if he recorded this fact in the minutes of the GB meeting then it would have meant that the minutes of the PRC meeting had been available to the GB.

156. Given the universally accepted position by all witnesses that the GB was never told of individual payments to staff, the PRC presentation document setting out all such payments cannot have been the "minutes" shown to the GB.

157. There is one other possible candidate in evidence, being a document headed "Minutes from the Pay Review Committee Meeting held at Copland School on Wednesday 13th July at 6:30pm". No year is given, but 13th July 2005 was a Wednesday, and there was no other year in which a PRC meeting was held on that date. The document is, however, not signed. All other PRC minutes that have been disclosed were signed by at least one person. The level of detail in it is nevertheless consistent with what was generally presented to the GB. While I am not satisfied that this was the actual minute of the PRC meeting, I think it is more likely than not that the minute presented to the GB meeting contained materially similar information to this document.

158. The only other person who attended the PRC meeting and gave evidence was Mrs Rashid. She was adamant that the question of delegation had not been discussed at the meeting, and she had not seen the memo before being shown it in the course of making her statement to the police.

159. I find it inherently likely that the sub-delegation was not discussed at the PRC meeting on 13 July 2005. Had it been, there would have been no need for a separate memorandum itself purporting to authorise that sub-delegation.

160. The Defendants maintain that the purported sub-delegation from the PRC to the ad hoc committee in July 2005 was brought to the attention of the GB at its meeting on 12 October 2005. There is no mention of it in the minutes of that meeting (the only reference being that the minutes of the PRC meeting were noted).

161. Mr Davies stated in his witness statement that he recalled a short discussion at the GB meeting on 12 October 2005 about the PRC minutes and, specifically, about the ad hoc pay award proposal. In his oral evidence, he maintained that he could recall a discussion about the delegation to the ad hoc committee.

162. Dr Evans' witness statement does not deal specifically with the question whether the GB was made aware in 2005 of the delegation from the PRC to the ad hoc committee. In his oral evidence, he suggested at one point that he remembered the sub-delegation issue being raised at the GB meeting but, on further questioning, accepted that he had no recollection of this, and he was in fact merely giving his opinion, as a matter of logic, that the matter must have been considered by the GB.

163. Dr Patel has no recollection of the events at the GB meeting and, in his witness statement, merely stated his belief – having seen the reference in the GB minutes to the PRC minutes being noted – that those minutes would at least have referred to the concept of sub-delegation.

164. Mr Day, in his statement, similarly said that he had no recollection of the GB meeting being told of the sub-delegation from the PRC. He nevertheless stated that it is incorrect

to say that the setting up of the ad hoc committee was not notified to and approved by the GB, but provides no evidence to support that statement, other than his belief that minutes of the PRC meeting would have been presented to the GB. In cross-examination, having acknowledged that the PRC could not delegate its authority to the ad hoc committee, he said that the PRC had delegated authority "to go back to the governing body", and that the issue was indeed decided upon on a majority basis by the full GB in October. When pressed that there was no evidence of the issue being discussed at the GB meeting, he commented "I can only draw your attention to the fact that the minutes were delivered there". I consider that this evidence was reconstruction, based on what Mr Day now appreciates should have happened, given the inability of the PRC to sub-delegate its authority, and that he has no actual recollection of the GB having been informed of the issue, let alone having resolved to approve the delegation to the ad hoc committee.

165. Mr Bryant provided a witness statement to the police on 27 October 2011. He was referred to the memo purporting to delegate authority from the PRC to the ad hoc committee in July 2005 and said that he had never seen it before, and that he was shocked by its content. He explained in his oral evidence at trial that he thought that this purported sub-delegation was illegal, because the ad hoc committee consisted of only two people and because it contravened the principle, enshrined in school governance regulations, that a committee to whom functions had been delegated by the GB could not itself delegate to another. It was not in fact put to him that the GB had been told of the purported delegation to an ad hoc committee.

166. Mrs Rashid said in her witness statement that the matter had not been discussed at the GB meeting in October 2005. She was not challenged on this.

167. Mrs Deshmukh said in her witness statement that she knew nothing of the purported delegation set out in the memo of 13 July 2006. It was put to her in general terms that there would have been a reporting back to the GB meeting on 12 October 2005 as to the PRC meeting, but not specifically put to her that the GB meeting was either told of, or asked to approve, the delegation by the PRC to the ad hoc committee.

168. Neither of the other two persons who gave evidence at the trial and were present at the GB meeting on 12 October 2005, Mr Allman or Mr Lewis, suggested that the sub-delegation to the ad hoc committee had been mentioned at that meeting.

169. Mr Allman (a member of the GB at the time) said in his witness statement, when shown the memo, that he had never seen it before being shown it by the police, and that it was "outrageous, taking the decision making away from the GB. There is no way this would have been allowed … If I had been aware of it I would have protested against it". In his oral evidence, however, he said "I think I have heard of the ad hoc committee, yes, yes. Let's assume that I did, yes." This evidence was not addressed specifically to the ad hoc committee set up in July 2005 and, in answer to subsequent questioning, he said that he probably read the minute of the GB meeting of 4 July 2007, which contains a specific reference to delegation to the Chair and Vice-Chair of governors. He also clarified that when he said it was "outrageous" in his witness statement, he meant that information about such bonuses should have been brought back to the GB.

170. I find, balancing the above evidence, that there was no reference made to the sub-delegation at the GB meeting on 12 October 2005. Had there been any mention of the

purported sub-delegation then Mr Bryant (who I accept was aware of the rules surrounding delegation) would have required the matter to be formally dealt with. Had that occurred, and the GB had ratified the sub-delegation, then that decision would have been minuted by Mr Bryant. The absence of any reference within the GB minutes to the sub-delegation is therefore a strong indication that it had not been mentioned. I accordingly reject Mr Davies' apparent recollection to the contrary, which is unsupported by any other positive evidence.

(iii) July 2007 to February 2008

171. There was only one exercise of purported delegated power between July 2007 and February 2008, namely the sixth NSD Memo, authorising payments totalling £116,000 to six individuals for work in relation to the NSD (see paragraph 56 of the Appendix).

172. In contrast to the position in 2005, there is contemporaneous evidence of the GB having agreed to at least some form of sub-delegation to Dr Patel and Mr Day in July 2007. Paragraph 7(b) of the minutes of the GB meeting on 4 July 2007 stated:

> "Dr Evans reported that the pay review meeting would be deferred to next term as we did not have all the figures required. He asked that the governors approve for the Pay Review Committee be delegated authority in order to make decisions relating to pay and that the Chair and Vice Chair of Governors be delegated the same powers in consultation with the headteacher. This was agreed unanimously."

173. These minutes were approved at the next GB meeting on 5 December 2007, where concerns as to accuracy were expressed in relation to another item, but it was noted that there were no other concerns expressed.

174. Of the governors who were present at the meeting and gave evidence, Mrs Deshmukh, Mrs Rashid and Mr Lewis could not recall the matter being mentioned. I have already noted above that Mr Allman recalled in his oral evidence discussion of delegation to an ad hoc committee, and that this was most probably because he saw the GB minutes of 4 July 2007. Mr Jaydutt Desai (called by Dr Patel and Mr Day) said in his witness statement that he remembered that the GB meeting on 4 July 2007 had delegated decisions on pay to Dr Patel and Mr Day. In the witness box, however, he corrected this to say that he did not have a clear recollection of it.

175. Based primarily on the contemporaneous minutes, I find that there was a decision reached by the GB on 4 July 2007 to delegate at least some decision-making power to Dr Patel and Mr Day. I do not accept, however, that it was intended, or taken, to be a permanent delegation of authority from the PRC to Dr Patel and Mr Day. I note that, in circumstances where it had been established practice for many years that all decisions on pay had been delegated to the PRC, there was no purpose in the first half of the sentence in the minute (which sought approval for delegation to the PRC). Moreover, no reason was stated for delegating the "same powers" to the Chair and Vice-Chair of governors. In the context of the opening sentence of the minute, which noted that the PRC meeting had been postponed, it is more likely in my judgment that the delegation was intended to be interim, pending the holding of the delayed PRC meeting.

176. The suggestion that it was understood to constitute a general delegation to Dr Patel and Mr Day, enabling the PRC to be permanently by-passed, is inconsistent with the

documents relating to the next PRC meeting which purported to delegate specific authority to Dr Patel and Mr Day for a limited purpose only:

(1) The PRC presentation document dated 2008 stated, at paragraph 2.0: "we wish to delegate authority from this committee, to the Chair and Vice-Chair of the Finance Committee and the Governing Body in order to make ad hoc payments to staff. This will be carried out in conjunction with the Head Teacher."

(2) A manuscript amendment in Mr Davies' writing at the end of the document stated: "The committee allocated £39,000 to be used for rewarding staff as appropriate by the Headteacher and Deputy Head."

(3) A separate memo from Dr Patel to Mr Davies headed "Pay Review 2008: New School Development/Sharing in Success Supplement" states "I was asked in consultation with yourself and my deputy to allocate additional discretionary payments…" and sets out a series of payments which total £39,000.

(4) Item (4) of the minutes of the meeting of 8 February 2008 states: "The Headteacher and Chair of Governors were authorised to make additional payments of under £40,000 as deemed appropriate."

177. While the identity of the persons to whom this authority is granted is confused as between the three documents (Chair and Vice-chair of governors; Headteacher and deputy; Chair of governors and Headteacher), the most likely conclusion, reading the documents together, is that the authority being delegated was limited to spending the £39,000 identified at the end of the PRC document.

178. The specific sub-delegation effected at the February 2008 meeting would have been unnecessary if it had been understood by those present (which included Dr Patel, Mr Day and Mrs Davidson) that the GB had already granted general authority to Dr Patel and Mr Day in parallel to the authority of the PRC.

(iv) February 2008 onwards

179. The final three ad hoc memos were executed after the PRC meeting on 8 February 2008 (see paragraphs 58 to 61 of the Appendix).

180. The only further documentary reference to delegation to Dr Patel and Mr Day is in item (4) of the minutes of the PRC meeting on 19 January 2009: "Dr IP Patel and Martin Day were given authorisation by this committee to approve discretionary bonuses in recognition of the extra work taken on by staff." This is a further indication that it was not at that time understood by the members of the PRC that the GB had already approved an unlimited parallel delegation on matters of pay to Dr Patel and Mr Day. It also supports my conclusion that the delegation recorded in the PRC minutes of 8 February 2008 was limited to the £39,000 referred to in the PRC presentation document. In light of those conclusions, I find that there had in fact been no proper delegation to Dr Patel and Mr Day in respect of the payments authorised by the three memos dated subsequent to the PRC meeting of February 2008. The delegation at the PRC meeting of 19 January 2009 is of no relevance, since there were no further approvals given by Dr Patel and Mr Day.

D(3) The state of knowledge of the GB as to the overpayments

181. The state of mind of each of the Defendants, concerning the legality and propriety of the overpayments is critical to each of the causes of action asserted by the Claimant. As I will explain in more detail when dealing with the particular causes of action, the likelihood of the Defendants having acted dishonestly, or in bad faith, is significantly reduced if and to the extent that other governors, who are not accused by the Claimant of having been party to any wrongdoing, were aware of the same matters relied on by the Claimant as indicating dishonesty in connection with the overpayments on the part of the Defendants.

182. It was accepted by all witnesses who gave evidence that the GB was never informed (during the period in which the overpayments were made) of the amount of bonuses and additional payments being awarded. There is no evidence of the GB ever having been told in that period either the aggregate amount being paid by way of bonuses, or the amount paid to any individual (except for the recruitment and retention points that were regularly awarded at PRC meetings). Similarly, there is no evidence of the FMC having been given such information, except for one occasion in November 2003, when Dr Evans suggested allocating a bonus to all staff, at a total cost of between £150,000 to £200,000. Other than these examples, the FMC and GB were only ever informed of the aggregate amount being paid to all teaching staff (without any breakdown as between salaries and bonuses or additional payments).

183. The governors as a whole were nevertheless aware that bonuses and additional payments, per se, were being paid to staff.

184. I have already referred to the fact that, prior to April 2003, the PRC – at a time when most of its members were governors against whom no impropriety is alleged – authorised payment of bonuses, as well as payments to reward additional duties being undertaken in relation to the NSD.

185. Mr Ivan Deshmukh, who gave evidence for the Claimant, was a governor between 1988 and 2003, and vice-chair of governors for the last three or four years of that period. Between 1996 and 2002 he was chair of the FMC and, between 1999 and 2002, he was chair of the PRC. He had spent many years working for British Telecom, where the payment of bonuses was commonplace. His view was that it was proper to pay bonuses in the school in the same way as in a commercial organisation, provided that proper targets were set. He also said that he considered payment to Mr Davies and others of additional sums for extra out of hours work was proper, if only because otherwise you might lose their services. He felt it was difficult to reward success through increases in pay scales, particularly when the person reached the top grade and, in that case, cash bonuses were the only option. I accept this evidence, which was consistent with the documents relating to Mr Deshmukh's time in office.

186. The fact that it was generally known throughout the school that bonuses were being paid, and being paid in particularly large amounts to the senior leadership team, was corroborated by the evidence of a number of other witnesses called by the Claimant (summarised in the following paragraphs), which evidence I accept. These witnesses had no reason to invent their knowledge of bonuses and, on the contrary, to the extent that they had any incentive, it was in their interests to distance themselves from the payments of bonuses.

187. Mrs Kumudini Deshmukh, for example, was a member of the GB and the financial management committee from 2003 onwards (as well as being on the staff at the school). In her witness statement she said that she was aware that bonuses were being paid though not how much or to whom. She herself was in receipt of a bonus from time to time. For example, in 2004/2005 she received two bonuses of £4,000 each. She, along with others, recalled an incident, which took place in 2004 or 2005, in which a notice was posted in the staffroom to the effect that Ms Dunkley had received a bonus of something in the region of £40,000. She never saw the notice herself because it was taken down by the time she reached the staffroom. Moreover, she recalled gossip around the school to the effect that those dubbed "the magnificent seven", or the top tier leadership team, were in receipt of bonuses. She said that she had wanted to stop the bonuses being paid. Her objection, however, was not based on a principled objection to additional payments being made to staff, but on the economic ground that bonus payments were not pensionable, so she would have preferred (for herself and the staff in her team) an increase in salary which would have been pensionable.

188. Mrs Rashid was a governor from the early 1990s until 2007 and a member of the PRC until July 2006. As I explain in the next section, I find that she was aware that substantial bonuses were being paid to staff at the school and, in particular, was aware of the payments approved at the meetings of the PRC in 2003, 2004 and 2005.

189. Mr Bryant accepted that there had been reports of PRC meetings to the GB in which mention was made of bonuses being paid, although never the amounts. He agreed with evidence previously given by Mrs Deshmukh in her statement to the police that he had never advised against payment of bonuses. He did not think the payment of bonuses was unlawful, as such.

190. Three other of the Claimant's witnesses, Mr Philip Allman (a teacher governor), Mr Patrick "Hank" Roberts and Mr Shane Johnschwager (teachers at the school) corroborated the evidence that there had been rumours throughout the school of large, but unspecified, amounts being paid by way of bonus to senior staff members. Each of them said that – having subsequently discovered the vast amounts that were in fact being paid – they should have done more to follow up on these rumours. It was not until 2009 that Mr Roberts took steps to obtain hard evidence of at least some of the amounts being paid, which he then published in his dossiers.

191. In fact, notwithstanding that it was generally known that bonuses were being paid to staff, and the rumours (at least) of substantial sums being paid, it is a surprising feature of this case that not one governor sought to make any enquiry of the Chair or Vice-chair of the GB, or of the members of the PRC, as to how much was being paid. There was general agreement among the witnesses called by the Claimant, and the Defendants themselves, that there was a pervading culture of confidentiality surrounding the amounts paid to all members of staff and that it was for this reason that the amounts being paid to particular individuals were never discussed.

192. Further corroboration of the fact that no secret was made of the policy to pay bonuses is provided by an "Investors in People" report dated 10 January 2009 by Graham Pursey on behalf of Capital Quality Limited. The report commended the very positive attitude throughout the school, the strong commitment to development and learning, and the consistently good feedback from people about the management style and culture within the school. Specifically, the report noted that "without exception, people can describe

how, through formal and informal means, they are recognised and valued for their work and for their achievements. Teaching staff and support staff readily acknowledge, for example, that the school pays well. They also describe how their contribution is recognised by means such as: bonuses…"

193. I find, on the basis of the evidence summarised above, as follows: (1) the fact of bonuses being paid, and in relatively large amounts, was known throughout the GB, and the wider school community; (2) it was generally considered, including by Mr Bryant, that the payment of bonuses was a lawful practice; and (3) the GB as a whole was aware (and content) that the PRC never reported to it on the amount of bonuses or additional payments being paid, or of the reasons for such payments.

194. I also find, however, that the failure to report all bonuses and additional payments to the GB was a breach of the STPCD and the school's pay policies (the relevant parts of which are referred to in section D above). Nevertheless, the governors as a whole, and Mr Bryant in particular, were content with the level (i.e. lack) of reporting back in this regard.

D(4) The state of knowledge of the PRC members who are not accused of wrongdoing, as to the overpayments recorded in the PRC presentation documents.

195. Each of Mr Davies, Dr Evans, Dr Patel and Mr Day gave evidence to the effect that the PRC presentation documents, which accurately record the payments in fact made, were presented to and approved at the PRC meetings.

196. The Claimant contends that the PRC presentation documents are themselves part of a false audit trail, written in order to try to justify the payments of improper bonuses.

197. An obvious difficulty for the Claimant in this respect is that the PRC presentation documents purport to have been laid before PRC meetings at which various governors, who it is accepted were innocent of any wrongdoing, were present. These included Mrs Rashid (who was a member of the PRC at the time of the meetings held in 2003, 2004 and 2005), Mrs Davidson and Mr Mistry (who were members of the PRC throughout the whole period).

198. Of these, the only person to give evidence at the trial was Mrs Rashid. In her witness statement, she claimed that she had never seen any of the PRC presentation documents before being shown them by the police, when she was asked to provide a statement in connection with the criminal prosecution. In her oral evidence, however, she admitted to having been present at meetings (plural) of the PRC where Mr Davies would present recommendations (projected onto a screen) and where bonuses in the order of tens of thousands of pounds were discussed.

199. She said that she had been opposed to the size of bonuses being paid, and had objected to them, but that her objections were always overruled. She described herself as having been "shaky" over bonuses, by which she meant that she regarded them as a grey area. She recalled having raised the issue of legality of bonuses at a training conference for governors, and that there was an even split of views among those present. While she believed that insufficient information was given to the GB in respect of the bonuses that were being paid, she accepted that she had never complained, whether formally in a GB meeting, or informally to any other governor about this.

200. When she was shown (giving evidence at the trial) the sharing in success document for January 2004, she accepted that her evidence in her witness statement provided to the police (that she had never seen it before) was wrong, and that she did now remember seeing it. She also said that she specifically remembered approving a bonus of £8,000 for Mr Ali upon his retirement. This is important, because the PRC presentation document dated October 2004 recommended a bonus of £30,000 to Mr Ali, but with an amendment in manuscript giving him an additional £8,000. It is common ground that the increase was agreed upon to mark Mr Ali's retirement. Her recollection of this discussion, coupled with her general recollection of being present at PRC meetings where bonuses in the tens of thousands of pounds were discussed, strongly suggests that she was indeed present at the meeting on 7 October 2004 and saw the PRC presentation document for that meeting.

201. As I have noted above, no evidence was given at trial by Mrs Davidson or Mr Mistry, and I place no reliance on their prior statements. One other person was recorded as being present at the PRC meeting in July 2005, a Ms Valerie Bennett. Mrs Rashid thought, but was not sure, that she had been present at one meeting where Ms Bennett attended. No party has sought to introduce any evidence from Ms Bennett.

202. Principally in reliance on Mrs Rashid's admissions in the witness box summarised above, which I accept, and the absence of evidence to the contrary being led at trial from any other person recorded as attending the relevant meetings, I find that the payments referred to in the PRC presentation documents for the PRC meetings in 2003, 2004 and 2005 were made with the knowledge of the other governors in attendance, including Mrs Rashid, Mrs Davidson and Mr Mistry.

203. The Claimant has led no evidence from any member of the PRC in respect of the PRC meetings held in 2006, 2008 and 2009. The fact (as I have found) that the payments set out in the PRC presentation documents in the earlier years were made to the knowledge of the other PRC members is a significant indication that the same is true in respect of the later PRC meetings.

204. The PRC presentation document dated July 2006 contains handwritten additions, purporting to identify it as "minutes of the pay review committee meeting held at Copland School at 2:45pm on Tuesday 18 July 2006", and identifying those present as Dr Patel, Mr Day, Mr Mistry and Mrs Davidson. More importantly, the signature of each of those participants appears on every page of the document. The signatures of the same four people also appear on every page of the PRC presentation document dated 2008. A separate document headed "minutes of the pay review meeting held Friday 8th February 2008 at 4pm" records the same four people as attending the meeting. Those minutes are signed by Dr Patel, Mr Day and Mr Mistry.

205. No expert evidence has been adduced to challenge the authenticity of any of these documents or signatures. Indeed, no evidence has been led by the Claimant that the documents are not genuine, beyond referring to previous statements by Mrs Davidson of which – for the reasons set out above – I take no account. Mr Udokoro, in answers during interviews before the Audit & Investigation unit, said that the signature page of the minutes of 19 February 2009 had been added to the first two pages by Dr Evans. He now says that was not so. For reasons which I have given in section B above, in the absence of any corroborating evidence that Dr Evans forged the document, and no

evidence being led by the Claimant on the point, I place no reliance on what Mr Udokoro said at interview in this regard.

206. Mrs Davidson's presence at, and knowledge of the payments said to have been approved at, the meeting of 8 February 2008 is corroborated by the following matters:

(1) The minutes of the GB meeting dated 5 December 2007 record Mrs Davidson reporting that the PRC had not met during 2007 and Dr Evans confirming that the PRC convened during the financial year, not the academic year, and that governors should call a meeting soon.

(2) The agenda for the meeting noted that it was to take place at 4pm on Friday 8 February 2008 and the circulation list included Mrs Davidson.

(3) The minutes of the GB meeting of 26 March 2008 record that "[the PRC] meeting took place this term and recommendations made to which the committee agreed. Dr Patel asked if the recommendations had been enforced, to which Sir Alan reported that they had." Mrs Davidson is reported as being present at the GB meeting. The minutes are signed by Dr Patel, and his signature is dated 2 July 2008. The minutes of the GB meeting held on 2 July 2008 (at which Mrs Davidson was also recorded as being present) record that the minutes of the meeting held on 26 March 2008 were accepted as a true and accurate record of the meeting. The minutes of the July GB meeting do not record any objection being made by Mrs Davidson.

(4) Mr Roberts, having heard of the rumours concerning large bonuses to the senior leadership team from about 2005, finally took steps in late 2008 to investigate whether in fact substantial bonuses were being paid and, in early 2009, he received at least some evidence of this from Mrs Goldie and Mrs Davidson. Importantly he said that he had a conversation or conversations with Mrs Davidson around this time in which she had told him that she was aware of a bonus to one individual in the sum of £80,000. That evidence is corroborated by the fact that in the first dossier produced by Mr Roberts in April 2009, blowing the whistle on the bonus culture in the school, he wrote "I also have had confidential discussions with long-standing Governors who have alleged an entrenched bonus culture leading to last year an £80,000 annual bonus to the Headteacher…". This is important because it suggests that Mrs Davidson - one of only two members of the PRC in 2008 and 2009 who is not implicated in the allegations of wrongdoing - knew both of the bonus of £70,000 awarded to Mr Davies at the PRC meeting in February 2008 and the fact that the bonus was increased to £80,000 shortly afterwards. No explanation has been offered for how she would have known this, apart from her presence at the PRC meetings in February 2008 and January 2009.

207. On the basis of the evidence summarised above, I find that each of the PRC meetings took place and was attended by one, other or all of Mrs Rashid, Mrs Davidson and Mr Mistry (none of whom is implicated in the alleged fraud) and that each of them was at least aware of the payments approved at the meetings they attended as recorded in the relevant PRC presentation document.

D(5) The knowledge of the PRC members who are not accused of wrongdoing, as to the overpayments made via the ad hoc procedure.

208. Before turning to the extent to which any governors other than Dr Patel and Mr Day were made aware of the payments made via the ad hoc procedure, it is necessary to set out my findings as to the involvement (if any) of the various Defendants in the ad hoc procedure.

Role of the Defendants in the ad hoc procedure

209. It is common ground that Mr Davies was the author of all the ad hoc memos. Each of them bears the signature of Dr Patel and Mr Day (apart from one which bears Dr Patel's signature alone, and one which is signed only by Mr Davies).

210. In relation to certain of the memos, Dr Patel and Mr Day queried whether what appears to be their signature is genuine.

211. While Mr Day and Dr Patel reserved the right to make further submissions on the documents at trial, the only concerns expressed in their defence in relation to any of the memos were that: (1) Mr Day (but not Dr Patel) did not admit the authenticity of the fourth NSD Memo (because he says he would not have signed the document without it having first been signed by Dr Patel); and (2) Mr Day could not understand how he would have been asked to sign the fifth NSD Memo twice, and why Dr Patel, but not him, did sign it twice.

212. There was no other challenge by Mr Day in the amended defence to the authenticity of the memos. There was no challenge in the amended defence to the authenticity of Dr Patel's signature on any of the memos.

213. In his witness statement, Dr Patel "confessed" that his signature on the fifth Ali Memo (13 March 2006) looked "a bit odd to me" and that he did not recollect signing it. In truth, he had no recollection of signing any of the memos, which is not surprising given the passage of time. He also specifically queried the fifth NSD Memo (June 2007). He pointed out that this appeared to have been signed by him twice on the second page, and questions whether he would have done this.

214. Mr Day, in his witness statement, said in relation to the fifth Ali Memo that he believed there was something "not quite right about it", and that he was concerned it may have been a document he did not sign. He also queried the sixth Ali Memo (September 2006) saying "I would not have expected to be asked to approve a further 'divvying up' of Mr Ali's salary … Where that salary had been 'divvied up' already in the same financial year." In relation to the fourth NSD Memo (May 2007) he also expressed concerns, based on the fact that he found it curious that on the first page he had signed the letter, but Dr Patel had not.

215. In his cross-examination, Mr Day made clear that he was not suggesting any of these documents had been forged and was not 'pointing the finger' at anybody. He accepted that he had no recollection either way of signing the relevant memo or indeed any of the memos.

216. So far as the fourth and fifth NSD Memos (May and June 2007) are concerned, it is telling (against Dr Patel and Mr Day) that they were included in a batch of memos and other documents sent to someone called "Bharat" at the Claimant under cover of a letter of 22 April 2009 signed by Mr Patel, without any suggestion that they were not

authentic documents. Moreover, as I explain in paragraph 247 below, the fifth NSD Memo appears to have been expressly referred to at the PRC meeting in February 2008.

217. Faced with the absence of any pleaded objection to the authenticity of the documents by Dr Patel, no pleaded objection by Mr Day to any but two of the memos, no positive evidence from Dr Patel or Mr Day that the documents had not been signed by them and the absence of any other evidence to that effect, I am unable to accept the submission made in closing on behalf of Dr Patel and Mr Day that the relevant memos had not been signed by them. Moreover, any alternative conclusion would inevitably require me to be satisfied that Mr Davies had deliberately forged their signatures on the documents. That is a very serious allegation, not put to Mr Davies.

218. An important element of Mr Davies' case is that the payments were authorised by Dr Patel and Mr Day, and that his role was merely to request that the payments be made. Mr Davies suggested in his oral evidence that he had a discussion with Dr Patel before drafting each memo, and that the contents of the memos reflected what Dr Patel indicated he wished to say. I reject this evidence.

219. Apart from the fact that Dr Patel worked alongside Mr Davies in relation to the NSD, and therefore knew what additional work was carried out by Mr Davies in that respect, Dr Patel would have had no knowledge of the matters relied on in the ad hoc memos, as justification for the payments sought in them. He could not, therefore, have suggested the identity of the recipients, the amounts to be included or the justification for them. The marked similarity in the language, as between various of the memos, is inconsistent with the suggestion that each of them reflects the language used by Dr Patel in separate discussions with Mr Davies leading to their drafting.

220. In fact, Dr Patel's evidence was that he was wholly reliant on what he was told by Mr Davies in this regard. A consistent theme in his answers in cross-examination was that he had no choice but to trust what Mr Davies told him. That was both because, as a volunteer governor, he was not in regular attendance at the school and because he held Mr Davies in such high regard that he could not think of doubting him. He said that it was Mr Davies who asked for additional payments, rather than the governors offering it.

221. When it was put to Dr Patel that he was supposed to act as a "critical friend" to the headteacher, he said that he did not see himself that way, but that he was working to support the school and that he "had" to trust Mr Davies, someone who had been appointed by the Claimant, had been knighted, was a Justice of the Peace, and had greatly improved the school.

222. He said that Mr Davies had proved himself each year in the performance reviews, which concluded that he was doing excellent work. This was also confirmed by Ofsted and the Claimant's own inspectors. When asked whether it was fair to say that because of the respect he had for Mr Davies, he did not question Mr Davies' recommendations, Dr Patel said: "I'm not educationalist, I have to take his word when it comes, and it was well published in Ofsted, it was doing very well, and everywhere you can see glorifying Alan Davies and his team. So how on earth I can doubt in my mind, my Lord, that he's not trustworthy?"

223. He referred to the fact that the GB had decided as early as 2000 to ask Mr Davies – with Dr Patel – to lead the NSD project, and that this work had not been in Mr Davies' brief when he started. Dr Patel said that he asked Mr Davies at one point: "how, Mr Davies, are you covering yourself for other activity, regular activity of the school? And he said: well I'm always there from 7 to 10. That was his usual face, his smiling face. So how on earth I don't have to trust my head?"

224. In relation to the Ali Memos, Dr Patel said "I usually ask him [i.e. Mr Davies]: you have earned this money? And he said he and his staff have earned this money, so I have to take his word…"

225. Dr Patel referred to the fact that he was told that the money was available, because the school was successful and attracted more pupils – which meant that the income was increasing. He also said that he was told by Dr Evans that if the school's delegated budget was not spent in a particular year then it could be clawed back by the Claimant.

226. Mr Day also acknowledged that he never questioned whether the payments were justified either by reference to additional work in fact done, or as bonuses for work done particularly well. He said that he was willing to sign each of the memos by reason of what he described as a "triple-lock", that is that (1) Mr Udokoro had confirmed that the payments were lawful and affordable, (2) Mr Davies and Dr Evans would not have requested something that was not lawful and affordable; and (3) Dr Patel had also approved the payments. In his oral evidence he, like Dr Patel, repeatedly emphasised that he trusted that Mr Davies and other senior leaders would only request payments that were proper. The following example is typical of his evidence in this regard: "we would have had trust and faith in what we were being recommended, as being a valid payment for work that was either done or about to be done. We had an accountant who was a magistrate. We had a headteacher who was a knight of the realm. You know, these were people that we would have trusted to have brought this forward in an appropriate manner." He frankly accepted that he did not take any steps to satisfy himself that the payments were justified, again referring to the fact that he trusted those bringing forward the recommendations to confirm that it was affordable, legal and that the work had been done: "I would have taken that as gospel."

227. Although Mr Day referred (as part of his triple lock) to being assured as to lawfulness and affordability by Mr Udokoro, he accepted in cross examination that the only time he would have heard from, and placed any reliance on, anything said by Mr Udokoro was at a meeting of the FMC or GB, and it was common ground that there was no mention of specific, or even global, amounts paid by way of bonus at such meetings. Mr Udokoro was never at a PRC meeting. Mr Day also accepted that he had no direct knowledge of Mr Udokoro ever having advised as to the lawfulness of the ad hoc procedure.

228. There is no evidence of there having been any conversation between Mr Davies and Mr Day in relation to the contents of any of the memos. Mr Day's evidence is that he was asked to sign the documents by Mr Davies or Dr Evans. He said that he would only sign a memo after it had been approved by Dr Patel. This is consistent (in relation to most of the memos) with the description of Dr Patel as signatory and Mr Davies as counter-signatory, with the positioning of their respective signatures on the page, and with the fact that Mr Davies' evidence is that insofar as he discussed the memos he did so with Dr Patel.

229. Without exception, the amounts recommended in the memos were approved, and paid. A total amount in excess of £1m was paid to a handful of staff, pursuant to this ad hoc memo procedure, over the four years from December 2004 to October 2008. In all but one case, the payment followed the signature of Dr Patel and Mr Day being obtained. In one case (in June 2005) the payments were made before the date Dr Patel and Mr Day signed the memo. No-one was able to explain why this occurred. The most likely explanation is that Mr Davies assured Ms McKenzie that the payments had been approved and that she had no reason not to trust him, notwithstanding that she had not seen the signed memo in that instance.

230. Mr Davies suggested in his oral evidence that there had been other occasions when he recommended payments to Dr Patel, which Dr Patel had rejected. He accepted that there are no documents relating to those occasions, but said that like many documents in this case they are missing. I do not accept this evidence, for which there is no corroboration in the evidence of any other witness, or in any documentation. In the face of the fact that every single payment, in every memo that is in evidence, was approved, it is inherently unlikely that the only missing memos are those where one or more of the recommendations was or were rejected.

231. I accept the evidence of Dr Patel and Mr Day as to the limited involvement they had in the ad hoc memo procedure. It is consistent with the language and tone of the memos, the fact that they were all written by Mr Davies, and the lack of any contemporaneous record of them having given any consideration to the content of the memos, whether together or separately.

232. Dr Patel at one point in his cross-examination denied that he had always followed Mr Davies' recommendation, because sometimes the decision was to pay more, or less, than that recommended. However, it was clear from his surrounding answers that he was referring to the PRC meetings, and not to the ad hoc procedure when he referred to this having happened.

233. Dr Evans was a recipient of either a one-off payment or a permanent salary increase via the ad hoc procedure on a total of 16 occasions over a four-year period, including all seven Ali Memos and all seven NSD Memos.

234. There is no evidence that Dr Evans had a hand in the drafting of any of the ad hoc memos, or in the decision as to what should be recommended in them. I am satisfied that they were the work of Mr Davies alone.

235. It was Dr Evans' case that he did not even see the contents of the ad hoc memos at the time they were prepared or acted upon (except for the first NSD Memo, which was in the form of a memo to him from Mr Davies). He said that he could not remember how or what he was told in relation to the payments at the time. When asked how he could justify the enormous sums paid to him, Dr Evans' typical response was to say that he presumed that those who made the decision recognised the great work he was doing and his contribution to the success of the school.

236. When he was reminded that, during an interview with the Claimant on 30 July 2009, he had produced copies of some of Mr Davies' handwritten notes, from which the typed memos were produced, he said that although he would have had these notes at the time, he would have been given these in an envelope, for the purposes of passing them to the

typist, and that he would not have read them at the time, as he believed they were confidential.

237. I reject this evidence, for three reasons. First, it is not credible that Dr Evans, who was privy to the details of payments made to all staff approved at PRC meetings, would have thought that confidentiality precluded him from seeing the ad hoc memos relating to additional payments to a handful of staff.

238. Second, he made no suggestion – in his interview with the Claimant in 2009 – that he had not looked at the handwritten memos at the time. On the contrary he volunteered that the first he would have learned about the payments to him via the ad hoc memo procedure was when he was given the handwritten sheets. That evidence is significantly closer in time to the relevant events than the evidence he gave at trial. It is true that he only produced copies of a handful of handwritten notes, but that was because (as he said in his interview in 2009) he had just happened to keep these ones, and had not kept "thousands". The clear implication was that he had seen more of the handwritten memos at the time, but had not retained them.

239. Third, again during his interview in 2009, Dr Evans did admit to having been consulted by Mr Davies, at least on occasion, as to whether the proposed payments were affordable. He suggested that Mr Udokoro was the person principally involved in this, but that he (Dr Evans) was also asked. On a few occasions, the ad hoc memo itself referred to Dr Evans having been consulted as to affordability. Indeed, the memo of 13 July 2005, purportedly authorising the ad hoc procedure, referred to the need to consult Mr Evans on affordability.

240. Mr Day suggested that it was Mr Davies "and Dr Evans" who invariably came to him asking for payments to be approved, and that Dr Evans would "typically" say that the payments were affordable.

241. On the basis of the evidence referred to above, I conclude that Dr Evans did see at least many of the ad hoc memos – or the handwritten versions of them – at the time, and that he played at least some part in obtaining Dr Patel's and Mr Day's sign-off on them. Importantly, I find that from Dr Patel's and Mr Day's perspective, it appeared that Mr Davies and Dr Evans were both involved in the ad hoc procedure.

242. There is no evidence (apart from certain comments of Mr Day, from which he resiled in cross examination) of Mr Udokoro having been involved in the ad hoc memo procedure. It is common ground that Ms McKenzie played no role other than implementing the payments authorised by the memos through the payroll.

Whether the ad hoc payments were revealed to the PRC

243. There were four PRC meetings after the ad hoc payment system was introduced (those held on 13 July 2005, 18 July 2006, 8 February 2008 and 19 January 2009). The contemporaneous record of these meetings consists of: (1) PRC presentation documents for each of them; (2) signed minutes of the meetings in February 2008 and January 2009; (3) unsigned one-page documents headed "minutes" purportedly of the meetings in July 2005 and July 2006 (but the Defendants dispute that these were in fact minutes of those meetings).

244. The only references to any of the payments approved via the ad hoc procedure, in any of these documents, are:

(1) Paragraph 1.0 of the PRC presentation document dated February 2008 states "we wish to confirm the previous recommendation not just for replacing Mr Ali and taking on his duties, but now for also taking on the extra work relating to the "New School Development" – which in fact you have done since 2001 – as approved by the Chair and Vice-Chair of Finance in June 2007, for the next financial year. This, recommendation, signed by the Chair and Vice-Chair is in addition to the following recommendations."

(2) The minutes of the meeting of that PRC meeting then state, at item (3): "The committee approved that the Headteacher and Deputy Head teacher Finance should continue with their salary enhancements of £4,500 per month and £2,000 per month respectively for their significant workload and additional responsibilities."

(3) At item (5) of the same minutes, it is stated that "the Chair thanks Sir Alan, Dr Evans and their team for work in the new school development and that the awards which commenced in September 2007 should be continued."

(4) The minutes of the PRC meeting on 19 January 2009 state, at item (3): "The Headteacher and Dr Evans are to maintain the increase of £4,500 per month and £2,000 per month respectively for additional responsibilities as approved at the last Pay Review Committee Meeting. Confirming their salaries as L43 + £4,500pm and L37 + £2,000pm – to assimilate if possible."

(5) Item (5) of the 2009 minutes stated: "Once again Dr IP Patel and the committee thanked Sir Alan & his team for their hard work in driving the development forward, but concern was expressed relating to the credit crunch. Dr IP Patel will contact Sir Alan re the continued New School Development Payments." In a letter to Mr Davies dated 25 February 2009 (the same date that Dr Patel signed the minutes of the PRC meeting) Dr Patel informed Mr Davies that "we are no longer able to pay the team for leading on the new school development from 1st April 2009. I know that you will understand."

245. The precise correlation between what was confirmed at these meetings and the actual payments authorised by the ad hoc memos is less than clear. No witness addressed this point of detail (other than – as I mention below – the Defendants contending that the ad hoc payments were <u>all</u> revealed at PRC meetings).

246. The references to continuation of salary enhancements of £4,500 per month for Mr Davies and £2,000 per month for Dr Evans can only, consistent with the relevant memos, be explained by reference to the first Ali Memo (£1,500 for Mr Davies) and the first NSD Memo (£3,000 per month for Mr Davies and £2,000 per month for Dr Evans).

247. However, when read in conjunction with Paragraph 1.0 of the 2008 PRC presentation document, the picture presented is that these enhancements had nothing to do with the NSD. The last sentence of that paragraph suggests that the payments in relation to the NSD being referred to were those approved by Dr Patel and Mr Day in June 2007. The only ad hoc memo to which that could have related is the fifth NSD Memo, dated June

2007, pursuant to which Mr Davies and Dr Evans were awarded salary enhancements of £6,000 and £4,000 per month respectively. The fact that payments relating to the NSD were separately referred to in paragraph (5) of the minutes supports that view (the reference to these payments having started in September 2007 is most likely a mistake, since they commenced in July 2007).

248. There is some corroboration for this conclusion in Mr Davies' payslips. Since he authored the PRC presentation document, it is relevant in seeking to interpret it to see the description of payments in the payslips he received at the time. The payments authorised by the first Ali Memo and the first NSD Memo were not separately itemised in his payslips, but were simply added to the line relating to his basic salary. On the other hand, while the £6,000 per month commencing in July 2007 is described on his payslips as "additional responsibilities" until December 2007, from January 2008 (i.e. at around the time he would have been drafting the PRC presentation document for the February PRC meeting) it is described as "New School Development".

249. To the extent that the PRC was told about the salary enhancements for Mr Davies and Dr Evans pursuant to the fifth NSD Memo, it was therefore misleading, because the PRC was not told that each of them was already in receipt of salary enhancements, for the very same thing, of £3,000 per month and £2,000 per month pursuant to the first NSD Memo.

250. It was the evidence of Mr Davies, Dr Evans, Dr Patel and Mr Day that the payments that had been made via the ad hoc process were, generally, reported to the PRC at the start of each meeting. They contend that this was done in two ways. First, Dr Patel would give an oral report at the start of the PRC meeting. Second, there was a spreadsheet presented to the meeting – as part of the overhead projector or PowerPoint presentation – containing full details of salaries and additional payments made to all staff. The Claimant disputes both points.

251. As to the second point, there were no such spreadsheets in evidence for any PRC meeting during the relevant period. The Defendants contend that there were such spreadsheets but that they are missing.

252. Looking, first, at the documents that are in evidence, the minutes of a PRC meeting on 24 June 1997 (before bonuses began to be paid) stated at item (1): "Overhead projector used to display the salaries of all teaching staff and their position on the relevant pay scale". No similar reference has been found in any later document. The Defendants contend that minutes of at least some of the later PRC meetings are missing. The PRC presentation documents, however, demonstrate an evolution in the way in which information was presented to the PRC from 2002 onwards. For example, the PRC presentation document for the meeting on 21 January 2002 sets out both the recommended salary increases and the current pay spine point for each member of staff. Subsequent PRC presentation documents tended to recommend bonuses rather than salary increases in most cases, but where a salary increase was recommended, the document set out the existing pay spine point as well as the proposed increase. There was accordingly less need for a spreadsheet showing all staff members' current salaries, where what was being recommended were bonuses as opposed to salary increases.

253. For those years where the Defendants agree that the PRC minutes are available (2008 and 2009) there is no reference to a spreadsheet containing reference to all salaries and additional payments.

254. On 22 April 2009 (that is, before there is any suggestion that the Claimant had taken away any documents from the school), under cover of a letter to "Bharat" at the Claimant referred to in paragraph 216 above, copies of documents purporting to be the minutes and notes of decisions made about pay for the years 2007-2008 and 2008-2009 were provided. These included the PRC presentation documents for the PRC meetings on 8 February 2008 and 19 January 2009, but no spreadsheet of staff salaries was referred to or included relating to either meeting.

255. On 6 May, Mr Udokoro sent to the school's auditors a bundle of documents describing them as "the pay review documents regarding bonuses etc", among which were the PRC presentation documents from October 2004 onwards and the ad hoc memos, but again no spreadsheets of staff salaries were referred to or included. Moreover, this bundle did not include any documents purporting to be minutes of PRC meetings other than those for 2008 and 2009.

256. On 13 May 2009, John Christie, the Claimant's Director of Children and Families, served a warning notice under section 60 of the Education and Inspections Act 2006 and a notice suspending the school's right to a delegated budget. Appendix A to the warning notice identified various of the overpayments, referring to the PRC presentation documents and ad hoc memos, and stated the Council's belief that there was no lawful and/or rational basis for these payments. A formal response was provided by the GB. In addition, Dr Patel and Mr Day (with two others) produced their own supplemental responses, pointing out where they disagreed with some of the points made in the GB's response. In none of the responses was any reference made to the PRC having seen additional documents setting out all the payments made to staff via the ad hoc process.

257. On the contrary, in the response submitted by the GB as a whole it was specifically stated that at no time was the GB, the FMC or the PRC informed of, or asked to approve, payments for project management of the NSD (i.e. the payments made pursuant to the NSD Memos). It was also stated that most members of the PRC were unaware of the total amounts paid to staff (in particular Mr Davies, Dr Evans and Mr Udokoro) in the form of main salary, second salary for project management, bonuses and payments for additional responsibilities. In their supplementary response, although issue was taken with other parts of the GB's response, there was no attempt by Dr Patel or Mr Day to correct either of these statements. All that was said was that members of the GB pay review committee "with delegated authority" approved the NSD payments and that the PRC "and members with delegated authority" agreed and made payments to staff.

258. Dr Evans was interviewed by the Claimant on 30 July 2009. When asked about the procedure at PRC meetings, he said that proposals for bonuses were put together by Mr Davies, and presented via computer and in hardcopy. He made no mention of a spreadsheet revealing all payments that had been made to staff, and made no mention of an oral report about payments that had been made via the ad hoc committee.

259. In November 2015, Mr Davies' solicitors wrote to the Claimant identifying a number of categories of documents which were said to have been in Mr Davies' office in May

2009, but missing from disclosure. These included minutes of PRC meetings from 2004-2006 and terms of reference of the PRC. No mention was made, however, of the spreadsheets.

260. Neither Dr Patel nor Mr Day made any mention of the existence of these spreadsheets at any time prior to appearing in the witness box at trial. That evidence was given having heard the evidence of Dr Evans and Mr Davies. In their witness statements they referred to the documents setting out Mr Davies' recommendations (the PRC presentation documents), but did not refer to any spreadsheets identifying all payments made to staff.

261. In the witness box, Dr Patel purported to recollect a table, showing all staff in alphabetical order and how much they had received for additional work or bonuses, being presented at PRC meetings. This was in fact an accurate description of the only document of this nature that was in evidence but, as I explain below at paragraph 263, that was a one-off document prepared by Ms McKenzie in 2009 at the request of the Claimant. It is more likely, in my judgment, that Dr Patel's purported recollection of spreadsheets being presented at PRC meetings was a recollection of the table produced by Ms McKenzie in 2009.

262. The first mention of these spreadsheets was in the defences served by Mr Davis and Dr Evans in February 2015. The reference was repeated in the witness statements of Mr Davies and Dr Evans. Dr Evans said, in his statement, that he thought the spreadsheet presented at each PRC meeting was in a format similar to a document which was sent to the Claimant in April 2009. That document – which is in table form – is a list of all staff earning over £50,000 in alphabetical order, showing their basic pay, additional payments and bonuses for 2008-2009. It was specifically prepared in response to a request from the Claimant in April 2009. Dr Evans said that he did not know who prepared the spreadsheet shown at PRC meetings, but that it would have been done by the finance team, probably Ms McKenzie.

263. Ms McKenzie's evidence (which I accept, as it was corroborated by contemporaneous correspondence from her) was that she prepared this table in 2009. In her interview with Mr Lane of the Claimant on 6 June 2009, she was asked whether she ever provided any documents for the PRC in relation to bonuses. She said that the only figures she produced were the ones which were prepared for the Claimant in 2009. She confirmed in her oral evidence at trial that she had not provided similar documents to the PRC and that the schedules she provided in April 2009 were a one-off.

264. The only person to give evidence (other than the Defendants) who was present at PRC meetings was Mrs Rashid, and she was present at only one meeting (July 2005) following the commencement of the ad hoc payment procedure. It was not put to her that there was a spreadsheet setting out all of the overpayments made via the ad hoc process presented at PRC meetings. She was adamant in her evidence that she had not seen the three memos relating to redistribution of Mr Ali's salary that predated that PRC meeting, and that they were not discussed at that meeting.

265. Faced with no contemporaneous record of ad hoc overpayments having been disclosed to any PRC meeting, and given the difficulties I have referred to above in relying on the purported recollection of the Defendants, I turn to consider the inherent probabilities

based on what I have found was discussed at PRC meetings. I start with the last of the PRC meetings at which significant bonuses were awarded.

February 2008 PRC meeting

266. In the PRC presentation document for this meeting, Mr Davies recommended bonuses totalling £693,400 across all the staff. He sought a bonus for himself of £55,000 and £42,000 for Dr Evans.

267. The matters identified in the document to justify these payments were (1) continued attraction of funding; (2) the many thousands of hours of work on the NSD; and (3) taking on Mr Ali's work. So far as the first of these is concerned, the examples of additional funding given were a repeat of matters relied on in 2006 and before. So far as the third is concerned, this was specifically recognised by the continuation of the salary increases awarded initially by the ad hoc memo of 15 December 2004. While I accept the evidence of Mr Davies and others that the bonuses awarded at PRC meetings were related to "sharing in success" of the school generally, it is important to note that the principal factor relied on at this point was the work on the NSD.

268. As a result of discussions at the meeting, the PRC increased the bonuses for Mr Davies and Dr Evans to £70,000 and £50,000 respectively.

269. In fact, since the previous PRC meeting (July 2006) an amount totalling over £500,000 had been paid to a handful of staff pursuant to ad hoc memos. So far as Mr Davies was concerned, this included:

(1) One-off payments relating to taking on Mr Ali's work totalling £50,000;

(2) One-off payments relating to work on the NSD (in May and October 2007) totalling £75,000; and

(3) An increase of £72,000 per year on his salary specifically for his work on the NSD, meaning that in addition to his basic salary (at that time, £104,528 p.a.) Mr Davies was receiving an additional £126,000 p.a. (£108,000 p.a. relating to the NSD and £18,000 p.a. relating to covering Mr Ali's work)

270. Each of these payments to Mr Davies was matched by a payment to Dr Evans in a slightly smaller amount.

271. Most significantly, the sixth NSD Memo had awarded, only four months previously, substantial one-off payments to Mr Davies, Dr Evans and a number of other staff, as reward for the "very many heavy hard work (and late) meetings" relating to the NSD.

272. It is inherently improbable that an independent governor (such as Mrs Davidson) could have countenanced an increase in the bonus awarded to Mr Davies from the £55,000 sought by him, to £70,000, if they had known that, a matter of months previously, he had received a one-off payment of £50,000 justified on the basis of his additional responsibilities on the NSD, particularly if (which appears likely) they were also aware of the fact that he was receiving an amount equal to the whole of his salary, again, for the same work. A similar point can be made in relation to Dr Evans, and each of the

other staff that received payments pursuant to the sixth NSD Memo, and again at the PRC meeting in February 2008.

273. The conclusion that the PRC was not informed in February 2008 of the enormous sums paid to Mr Davies and Dr Evans via the ad hoc memo procedure finds support in the evidence of Mr Roberts (as corroborated by his first dossier) that Mrs Davidson told him about the £80,000 bonus "last year" to Mr Davies. The fact that she told him about this, but not that – together with the sixth NSD Memo and the fourth NSD Memo – it actually amounted to £155,000, strongly suggests that she was not aware of those additional payments. It was suggested by Mr Clarke QC (for Dr Evans) that Mrs Davidson may have simply been telling Mr Roberts the most recent bonus payment (relying on the form of words he used in the witness box: "one of them is £80,000"). The wording I have quoted from Mr Roberts' dossier, however, being contemporaneous, is likely to be a more reliable guide to the words used by Mrs Davidson.

274. This also provides support for the conclusion that the reference in the 2009 PRC minutes to Dr Patel having "reported back" on "the discretionary bonuses" was a reference to the distribution of the £39,000 which the minutes, and the PRC presentation document, for the PRC meeting in February 2008 had allocated for additional payments. That is because it was the payment of £10,000 pursuant to that further distribution, when added to the £70,000 bonus awarded at the February 2008 PRC meeting, that led to the bonus of £80,000 which Mrs Davidson reported to Mr Roberts.

275. It was the evidence of Dr Patel and Mr Day that they did not keep track of the cumulative effect of all the payments made via the ad hoc procedure. I address this further in connection with the claim against them for breach of fiduciary duty (see section F(5)(ii)). For the reasons developed there, I broadly accept their evidence on this. That finding is inconsistent with the suggestion that Dr Patel gave an oral report at the start of the February 2008 PRC meeting on over £500,000 worth of additional payments made since July 2006. He would have been unable to do so. It is similarly inconsistent with there having been presented to each PRC meeting a written record of all such payments.

276. For the above reasons, I conclude that there was no reporting back to the February 2008 PRC meeting of any of the one-off payments made pursuant to the ad hoc procedure since July 2006. Accordingly, I do not accept that the opening paragraph of the PRC meeting minutes, which refers to the minutes of the previous PRC meeting being approved, and to Dr Patel having "reported back" on "the additional payments", was a reference to any of those one-off payments. If it is an accurate record of something said at the meeting at all, then I consider that it is more likely that it was a reference to the additional payments which the PRC presentation document did mention, that is the payments of £4,500 per month to Mr Davies, £2,000 per month to Dr Evans, and the monthly salary enhancements relating to the NSD for Mr Davies and Dr Evans, authorised by the fifth NSD Memo.

PRC Meeting of July 2006

277. The "sharing in success" document presented to the PRC meeting on 18 July 2006 similarly contained no reference to any payments made by the ad hoc committee. The matters relied on to justify bonuses of (among others) £50,000 to Mr Davies and

£45,000 to Dr Evans were (a) attracting additional funding to the school, (b) work done on the NSD and (c) improving academic results.

278. It is improbable, in my judgment, that an independent governor such as Mrs Davidson, who attended the PRC meeting in July 2006, knew, when deciding to award a bonus of £50,000 to Mr Davies based in large part on his having met performance targets in relation to the NSD, that he had been awarded, just one month earlier a one-off payment of £25,000, was in receipt of a salary increase (at that time) of £36,000 per year, in both cases for his work on the NSD, and had received £40,000 in the past six months supposedly for additional duties relating to Mr Ali's work.

July 2005 PRC meeting

279. By the time of the July 2005 PRC meeting, the first three memos relating to the redistribution of Mr Ali's salary had been executed and acted upon. The PRC presentation document for that meeting contained no reference to any of those memos or payments.

280. I find it inherently unlikely that reference was made to them at the meeting, or to the additional payments authorised by them. Each of the memos purported to justify the payments as savings made upon Mr Ali's retirement. I accept that Dr Patel and Mr Day did not appreciate that the payments pursuant to the first Ali Memo continued permanently (see paragraphs 519-525 below), or that the explanations in the second and third Ali Memos as to savings made by the school were therefore false. That finding supports the conclusion that these payments were not revealed to the PRC meeting in July 2005 because, if they had been, their cumulative effect, and double-payment, would have been obvious.

Conclusion

281. Taking account of all of the matters referred to in paragraphs 243-280 above, in particular the inherent probabilities on the basis of the contemporaneous documents, I find as follows:

(1) The PRC was not informed of any of the payments made pursuant to the ad hoc memos until February 2008 (and then again in January 2009).

(2) It was then told only of the salary enhancements to Mr Davies and Dr Evans that resulted from the first Ali Memo, the first NSD Memo and the fifth NSD Memo.

(3) It was misled, however, when asked to approve the payments pursuant to the fifth NSD Memo, because it was not informed that Mr Davies and Dr Evans were already receiving (when awarded the salary enhancements of £6,000 and £4,000 respectively) £3,000 and £2,000 per month for their work relating to the NSD.

E. Conspiracy to injure by unlawful means

282. The Claimant's principal claim is in unlawful means conspiracy. The elements of the cause of action are: (1) a combination or agreement between two or more persons; (2) to take action which is unlawful; (3) with the intention (but not necessarily the

predominant purpose) of causing damage to the Claimant; and (4) the Claimant suffers damage as a result (*Kuwait Oil Tanker Co SAK v Al-Bader (No.3)* [2000] 2 All ER (Comm) 271, at [108]).

A combination

283. It is unnecessary to prove that there was an express agreement between the Defendants. It is sufficient to establish that two or more persons combine with a common intention, "…in other words, that they deliberately combine, albeit tacitly, to achieve a common end". It is unnecessary for all the conspirators to join at the same time "…but the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of." The very nature of the claim means that the existence of an agreement can often only be inferred from overt acts, and it is often impossible to establish when or where an initial agreement was made. Nevertheless, it is necessary to examine in detail the acts which are said to have been done in pursuance of the conspiracy in determining whether the combination exists (*Kuwait Oil* (above), per Nourse LJ at [111]).

284. It was common ground between the parties that it is essential for the conspirators to appreciate that the actions that they combine to take are unlawful (see, for example, *Meretz Investments NV v ACP* [2008] Ch 244, per Toulson LJ at [174]; *Digicel (St Lucia) Limited v Cable & Wireless Plc* [2010] EWHC 774 (Ch), per Morgan J at [86]-[118] of Annex I to the judgment). Mr Rees QC for the Claimant accepted that the test was as set out by *Finlay LJ in British Industrial Plastics Limited v Ferguson* [1938] 4 All ER 504, at p.514: "A person could never be liable for conspiracy, either in a civil or in a criminal court, if he had no knowledge that the design was unlawful."

285. The Amended Particulars of Claim assert that the Defendants entered into a combination or understanding with each other, "on dates between April 2003 and April 2009" with the intention to injure the Claimant by use of unlawful means. The conspiracy related to the making of all £2.7 million of the overpayments, knowing that these were in excess of salaries and other payments the recipients were lawfully entitled to, and knowing that the payments were unauthorised by the GB. There are no further particulars given of the alleged combination itself, for example as to when and where the Defendants, or any of them, reached an understanding with each other, or the content of any understanding reached, beyond the very broad allegation of an intention to injure the Claimant by unlawful means through making the overpayments.

286. The pleaded unlawful means are alleged to consist of: the dishonest diversion of money from the school's bank account; breaches of fiduciary duty by all the Defendants; making the overpayments without lawful authorisation; making the overpayments which were contrary to the STPCD and thus unlawful; misfeasance in public office on the part of Dr Patel and Mr Day; unconscionable receipt of the overpayments by the first to fourth Defendants; and procurement of breach of contract by the first to fourth Defendants.

287. Under the heading "particulars of concerted action", a multitude of matters is referred to, either directly or by cross-reference to other parts of the pleading. These include: all of the overpayments between 2003 and 2009, including the fact that they were made without authorisation or justification, were unlawful and unaffordable; keeping the

overpayments secret from the GB, the FMC, the PRC, the Claimant and the school's auditors; using school funds to make loans to Mr Davies for the purchase of a car and for medical expenses; employing various relatives of Mr Davies and Dr Evans at the school on inflated salaries; making false claims in respect of Saturday school; unlawfully delegating the decision making process as to additional payments; failing to ensure reasonable oversight of the financial performance of the school; failing to act fairly, reasonably and transparently in all decisions that would affect the school's ability to meet its obligations within the limited financial resources available in the school's budget; dishonest receipt of overpayments by the first four Defendants; the creation of false documents (all the PRC presentation documents and the ad hoc memos) with the aim of providing an audit trail to give the false impression that payments had been authorised; creating a culture of bonuses at the school in an attempt to camouflage the Defendants' misappropriations; the proposal, by one or other of the Defendants, of each of Mr Davies, Dr Evans and Mr Udokoro for admission to the same Masonic lodge and the subsequent joining of Mr Day to the same lodge; and the attempt by the Defendants dishonestly to cover up the fraud, once they knew that the Claimant was going to investigate.

288. During closing argument, the Claimant distilled the allegations of concerted action into eight matters, as follows (with the particular Defendant said to be involved in the relevant action identified in brackets):

(1) Writing the documentation pursuant to which the overpayments were recommended, in the knowledge that they were unauthorised, unlawful and unjustified, and where the justifications/statements around affordability in the document were false (Mr Davies, with input from Dr Evans);

(2) Determining the quantum of the overpayments (Mr Davies and Dr Evans);

(3) Deciding who should receive the overpayments (Mr Davies and Dr Evans);

(4) Paying the overpayments through the School's payroll, knowing they were unauthorised, unlawful and unjustified (Mr Davies, Mr Udokoro and Ms McKenzie);

(5) Advising the PRC that the overpayments were lawful and permitted under the School's policies (Mr Davies and Dr Evans);

(6) Creating and utilising the 'twin track' process – i.e. the ad hoc memo procedure – including failing to inform the PRC (Mr Davies, Dr Evans, Dr Patel and Mr Day);

(7) Manipulating the composition and procedures of the GB to reduce the level of transparency so as to conceal the overpayments (Mr Davies, Dr Evans, Mr Udokoro, Dr Patel and Mr Day);

(8) Failing to disclose the overpayments at meetings of the GB and the FMC (Mr Davies, Dr Evans, Mr Udokoro, Dr Patel and Mr Day);

(9) Underreporting salary on remuneration returns to, and in response to queries from, the Claimant (Mr Davies and Mr Udokoro);

(10) Misrepresenting the situation regarding the overpayments once the Claimant began to investigate (all Defendants).

289. The alleged common aim of the combination was to make the overpayments, including without distinction the overpayments listed in the PRC presentation documents and those identified in the ad hoc memos. In view of my findings in section D above, this faces significant hurdles.

290. First, my findings (1) that it was a widely held view among the GB that the payment of bonuses, per se, was lawful and (2) that the GB as a whole knew that bonuses were being paid but not reported back to the GB, and saw nothing wrong in that, make it difficult to reach any different conclusion in relation to the Defendants. The view as to lawfulness of bonuses pre-dated the conspiracy. Both it, and the acceptance that there was no reporting back to the GB as to the payments made, were shared by the experienced and respected clerk to the governors, Mr Bryant. Accordingly, an essential ingredient in the cause of action as alleged is missing: the requirement that the Defendants knew that the planned action was unlawful.

291. Second, if the Defendants had the common aim of doing something they knew to be unlawful, then it would have been essential that their plan – and unlawful actions – were kept within as small a group as possible and that those who were aware of the overpayments could be trusted to keep them secret.

292. My finding that a substantial proportion of the overpayments were authorised by the PRC at meetings attended by two or more people who are not implicated in any wrongdoing, shows that there was no attempt by the alleged conspirators to keep their plans secret. The contention that persons engaged in a dishonest conspiracy would have carried out their plan in plain view of others who were not brought within the conspiracy ring is inherently implausible.

293. The point can be made most clearly in relation to the PRC meeting in June 2003, where Dr Patel was the only Defendant on the committee, and none of the other four members of the PRC at that time (Mrs Davidson, Mrs Rashid, Ms Bennett and Mr Mistry) is alleged to have been party to any wrongdoing. In those circumstances, I find it impossible to infer that there was any secret and dishonest arrangement between any of the Defendants in relation to the payments recommended in the PRC presentation document for that meeting.

294. The same point can be made, however, in relation to all subsequent PRC meetings, which were attended by one or more of Mrs Davidson, Mrs Rashid and Mr Mistry. The fact (as may well have been the case) that Mrs Davidson or Mrs Rashid might have objected to the payment of some or all of the bonuses is beside the point. Their presence at PRC meetings is itself inconsistent with the allegation that Mr Davies, Dr Evans, Dr Patel and Mr Day were – at these very meetings – carrying into effect a dishonest combination to make unlawful overpayments.

295. Accordingly, I reject the claim that there was a conspiracy among the Defendants to damage the Claimant through unlawful means by making all of the overpayments, since it cannot have extended to those authorised at each of the PRC meetings.

296. It remains a possibility that there was a lesser conspiracy, involving only the payments made via the ad hoc procedure. The Defendants accepted that it was open to the Court, in theory, to make findings of a combination that was different from, in the sense of being lesser than, the combination pleaded by the Claimant. However, counsel for the various Defendants warned against this course, where no alternative combination had been pleaded. They pointed out that the Claimant has had nine years since the relevant events to identify, plead and evidence its case.

297. The force of the Defendants' objections is increased where critical elements of the case were not put to the witnesses at trial, particularly Dr Patel and Mr Day. For a combination to have existed, in whatever form, Dr Patel and Mr Day had to be central participants.

298. The cross-examination of Dr Patel and Mr Day, however, focused more on how they could have possibly thought the overpayments were justified, rather than on them having been parties to a combination with other defendants to make unlawful payments. The nearest the cross-examination of Mr Day came to this was when it was put to him that changing the terms of office of the chair and vice-chair of the GB was intended to give him and Dr Patel more control over the GB, that the ad hoc memos were a paper trail designed to convince someone like an auditor that the payments were proper, and that the purpose of setting up the company through which the NSD project was to be taken forward, Copland Village Development Limited ("CVDL"), was to circumvent the decision-making process of the GB.

299. The most that was put to Dr Patel in this regard was that he, Mr Day, Mr Davies, and Dr Evans decided to create the ad hoc procedure to avoid transparency, that the same four individuals decided to convene fewer meetings of the GB for the same reason, that it was agreed that any surplus at year-end could be used to supplement salaries, that he was party to an orchestrated campaign against Mrs Rashid and that he prioritised the first four Defendants "dishonestly in order to assist them to line their pockets".

300. In particular, it was not put to either Dr Patel or Mr Day that they had been party to any understanding or agreement that involved Mr Udokoro and Ms McKenzie (who would also have been important parties to any conspiracy given their practical control over the payroll).

301. Although Dr Patel was asked what he understood the benefit to be of bringing the payroll inhouse, it was not suggested to him that he had – in common with any other Defendant – an understanding or even intention that it would be brought inhouse for the purpose of keeping the overpayments secret. Nothing was put to Mr Day on this issue.

302. Nor was it put to either of them that they had an intention – common with any other Defendant, in particular Mr Udokoro, that misleading salary returns would be provided to the Claimant.

303. For the conspiracy to succeed, it would also have been essential that the payments were concealed from the Claimant. While it is not necessary for each conspirator to know each facet of the conspiracy (*Schenk v Cook* [2017] EWHC 144 (QB), per Green J at […]), it is necessary that the conspirators are "*sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting*

in concert at the time of the acts complained of": *Kuwait Oil Tanker v Al Bader* [2000] 2 All ER 271, at [111]. In a maintained school, where the governors and senior teaching staff must be taken to know – at the least – that financial reports are made periodically to the council, it would be an essential element of a combination knowingly to make unlawful payments running to several millions of pounds from school funds that the fact of the overpayments would need to be concealed from the council.

304. It was not suggested to Dr Patel, Mr Day or Dr Evans that they were party to a conspiracy that involved concealing payments from, or sending misleading returns to, the Claimant. Nor is there in fact any evidence that Dr Patel and Mr Day were aware of this.

305. So far as Dr Evans is concerned, while he was taken through each of the overpayments made to him, he was challenged only on whether those payments could be justified by reference to work done by him. It was not put to him that he had been party to an agreement or understanding with any other Defendant to make those payments knowing them to be unlawful and intending to conceal them from the Claimant.

306. There are further difficulties with an alternative conspiracy claim limited to the payments made via the ad hoc procedure.

307. First, if the payments authorised at the PRC meetings were not made pursuant to a dishonest conspiracy, then this casts significant doubt on other aspects of the alleged concerted action. For example, the allegation that the combination involved an agreement that the payments would not be disclosed to the FMC or the GB falters on the fact that substantial overpayments that were not, on the premise of this alternative claim, dishonest were also not disclosed to the FMC or GB.

308. Second, the ad hoc procedure also involved significant payments – which on the assumption necessary for the claim to succeed were known by the conspirators to be unlawful – being made to non-conspirators, in particular Ms Dunkley and Mr Sampong. There is no evidence of any attempt to ensure that they remained silent. Ms Dunkley, for example, received in excess of £222,000 (more than either Mr Udokoro or Ms McKenzie) over a five-year period. If, as is alleged, all the Defendants must have known that payments of this nature and size were unlawful, then the same must go for Ms Dunkley. There is no allegation (and no evidence), however, that any attempt was made to buy her silence. It is true that there was a general culture of confidentiality surrounding pay within the school, and it might be said that the conspirators simply trusted that others would keep quiet. That, however, would have been a dangerous (and therefore unlikely) course, where an essential premise of the claim is that recipients of the overpayments must have known they were unlawful.

309. Third, at least some of the overpayments authorised by the ad hoc procedure *were* reported to the Claimant on a regular basis. Annual Service Returns provided by the school to the Claimant consistently reported as part of Mr Davies' salary the additional payments of £1,500 per month (pursuant to the first of the Ali memos) and £3,000 per month (pursuant to the first of the NSD memos), and consistently reported as part of Dr Evans' salary the additional payments of £2,000 per month (pursuant to the first of the NSD memos).

310. In its Annual Service Return for 2007/2008, the school reported an annual pensionable salary for Mr Davies of £158,829. The Claimant's criticism that these reports substantially underreported the true salaries (the gross amount of payments to Mr Davies for the year 2007/2008 totalling £403,277.75) is met, at least in part, by the fact that they were intended only to identify pensionable pay (a point corroborated by Ms Anna McCormack, a senior pensions officer with the Claimant) and it was understood by Ms McKenzie (whose evidence on this I accept, corroborated as it was by Valerie Goldie, the previous bursar at the school) that these amounts (but not others) were part of pensionable pay. But for present purposes, their importance lies in the fact that they demonstrate that there was no attempt by the alleged conspirators to keep the fact of these payments, which it is alleged they knew were unlawful, secret from the Claimant.

311. Fourth, these same payments were specifically made known to the PRC (in February 2008 and January 2009 – see paragraphs 243-246 above). This is again inconsistent with the notion that the payments were made pursuant to a dishonest combination to make unlawful payments.

312. Fifth, my findings that the Defendants believed that it was lawful in principle to pay staff for additional work done, or by way of bonus for success, and that at least some of the overpayments were made in the belief they were lawful means that the distinction between those payments that were believed to be lawful, and those that were not, is essentially a question of degree. It is therefore necessary to review the circumstances of each of the payments to determine whether those complicit in making it were aware that it could not be justified either as reward for work actually carried out, or as a bonus based on achievement by the relevant staff member. I carry out this exercise in relation to the fiduciary duty claim below, but the point, here, is that the fact it is necessary to do so makes it inherently unlikely that there was a pre-ordained plan, common among any of the Defendants, to make unlawful payments.

313. Sixth, there are features in the drafting of the ad hoc memos (which I identify in paragraphs 399-456 below, including the misleading, exaggerated or arbitrary nature of the claims made in them) which contradict the idea that Mr Davies (as the author) and Dr Patel and Mr Day (as the signatories) were party to a conspiracy to make the payments in them knowing that they were unlawful. It is difficult to characterise these features of the drafting as being part of a false audit trail, since the documents, once signed-off by Dr Patel and Mr Day, were simply filed away. They were not provided to any third party in an attempt to justify the payments. The more likely reason for these drafting features is that they were included for persuasive effect. That would have been unnecessary had there been a prior understanding between Mr Davies, Dr Patel and Mr Day to make the payments notwithstanding they knew them to be unlawful.

314. Finally, the lack of any credible motive on the part of Dr Patel and Mr Day is a powerful factor pointing against them having been party to a dishonest conspiracy. All of the Defendants made much of the fact that the Claimant is unable to identify any such motive for participation by Dr Patel and Mr Day in an unlawful combination. While I accept that motive, as such, is no part of the cause of action, in a case where there is no direct evidence of a combination, the presence, or lack, of motive is a highly relevant factor in assessing the likelihood of that combination having existed.

315. The starting point in this regard is that both Dr Patel and Mr Day were volunteers, who gave up substantial amounts of their time in their role as governors of the school. There

is no allegation (and no evidence) that they received any personal benefit from the overpayments. It is inherently unlikely that Dr Patel and Mr Day would have risked their reputation and livelihood by positively setting out – by agreement with the other Defendants – to defraud the Claimant through payments which they knew to be unlawful and improper.

316. Recognising this unlikelihood, the Claimant put forward in closing four possible reasons why Dr Patel and Mr Day might have been motivated to participate in an unlawful means conspiracy.

317. The first is that Dr Patel and Mr Day needed to "stay close" to Mr Davies and Dr Evans in order to advance their project to build more academies. This suggestion is based on the fact that Dr Patel and Mr Day (with others) incorporated CVDL for the purpose of taking forward the NSD and that there are references in certain minutes of meetings of CVDL to the possibility of building further academies in the future. This cannot be right, however, since CVDL was not incorporated until March 2007 (some four years after the conspiracy was said to have begun) and the first reference to the possibility of further academies was even later than that. In any event, given that CVDL was a company limited by guarantee and established for charitable purposes, it is difficult to see what benefit they would have hoped to achieve.

318. The second is the close friendship that existed between Mr Davies, Dr Evans, Dr Patel and Mr Day. Aside from the fact that Dr Patel had been associated with the school for a long period before the commencement of the alleged conspiracy, there is no evidence of any particularly close personal relationship between him and Mr Davies or Dr Evans. While it is true that Mr Day accepted that he and Dr Evans had been friends for some time, there is no evidence of any particularly close relationship between Mr Day and Mr Davies. Overall, I do not accept that the kind of relationship that the evidence suggests existed between Dr Patel, Mr Day and any of the other Defendants begins to explain why they would have been willing to engage in a combination to commit dishonest acts.

319. An attempt was made by the Claimant to suggest a motive based on masonic connections between Dr Patel, Mr Day and the other Defendants. I reject the suggestion that membership of the same masonic lodge is any basis from which to draw an adverse inference about Dr Patel's or Mr Day's motives. In any event, Mr Day did not join the lodge until February 2009.

320. The third is that Dr Patel and Mr Day desired to be affiliated with Mr Davies and Dr Evans, who they saw as politically connected. While it is true that Mr Davies appeared well connected, and that Dr Evans and Mr Day both had roles in local politics, such personal affiliation as was useful for political ends existed without any possible need to engage in the dishonest conduct necessitated by participation in the alleged combination.

321. Finally, the Claimant relies on the desire to keep the conspiracy concealed, once it was underway. This, however, is circular, depending as it does on the existence of the very conspiracy which the Claimant needs to prove.

322. In the end, the Claimant's submission boils down to the fact that Dr Patel and Mr Day did in fact authorise all the payments, the payments cannot be objectively justified, and

the payments – at least many of them – were not revealed to the PRC. While these points will need to be carefully considered in the context of the claims for breach of fiduciary duty, they are insufficient in my judgment to overcome the inherent improbability of Dr Patel and Mr Day having deliberately set out, via a pre-ordained common understanding with the other Defendants, to cause unlawful overpayments to be made to staff at the school.

323. Standing back from the details of the evolution of the overpayments (as revealed by the chronology of the payments in the Appendix to this judgment, and the findings I make below in relation to the claims for breach of fiduciary duty), I consider the most likely explanation for that evolution is opportunism on the part of Mr Davies, as opposed to a pre-ordained plan between the Defendants. Having requested, and obtained approval for, the earlier payments, it appears that Mr Davies' confidence to seek more grew. His ability to obtain for himself, and others, ever greater amounts was as a result of shambolic governance, including the failure of the GB to take any interest in the details of payments to staff, the wholesale failure on the part of Dr Patel and Mr Day to exercise any oversight, discretion or judgment when asked to sign-off on the ad hoc memos, and the culture of excessive secrecy surrounding any payments to staff.

324. Accordingly, for all these reasons, I reject any alternative claim that there was an unlawful means conspiracy among the Defendants (or some of them) to make some only of the overpayments via the ad hoc procedure. In reaching this conclusion, I have not found it necessary to deal specifically with a number of other matters relied on by the Claimant as particulars of concerted action. They are not sufficient, either separately or taken altogether, to overcome the objections to the claim, as set out above. I will, however, state my brief conclusions on the principal aspects:

(1) As to the contention that the Defendants conspired to pack the GB with supporters of Dr Patel and Mr Davies, I find that the decisions as to the composition of the GB were made by the GB as a whole, and not pursuant to any agreement between the Defendants.

(2) Similarly, the decision taken by the GB that led to Mrs Rashid's removal from the PRC (namely the decision that paid employees could not sit on the PRC) was put to a vote of the GB and was opposed by only three governors. Her removal from the PRC is, any event, of little relevance in circumstances where Mrs Davidson remained on the PRC throughout.

(3) The decision to reduce the number of GB meetings was, again, taken by the GB as a whole. I reject the contention that it was part of a plan by Dr Patel, Mr Day and others to reduce transparency. Payments to individual teachers had, for a long period prior to the start of the alleged conspiracy, been kept confidential from governors.

(4) For the same reason, I reject the contention that the reason the overpayments were not revealed to the GB was due to the actions and/or agreement between the Defendants.

(5) I reject the contention that Mrs Goldie was removed from her position in the finance department in order to manoeuvre Ms McKenzie into position with a view to joining the conspiracy to make unlawful payments. It was clear from

Ms Goldie's evidence that she wished to move out of her post and that to the extent that her witness statement hinted at a conspiracy to get her out, she could not support that in her oral evidence.

(6) I also reject the contention that the 'bonus culture' in the school was developed as part of a plan to enable the overpayments to be made. As I have described at section D(3) above, the concept of paying bonuses in order to incentivise staff was accepted throughout the GB before the alleged conspiracy commenced, as explained by Mr Deshmukh.

(7) I reject the allegation that Mr Davies and/or Dr Evans expressly advised the PRC, the FMC or Dr Patel and Mr Day that the payments being recommended were lawful and in accordance with the STPCD. Although Dr Patel suggested that this happened, I regard this as inherently unlikely. It is far more likely – and consistent with the way in which a bonus culture had evolved over time within the school – that neither Dr Patel nor Mr Day gave any thought to the legality of the payments. Given that it is the job of the GB to ensure compliance with the law, that there was a professionally qualified clerk to the governors, and that they knew that neither Mr Davies nor Dr Evans were legally qualified, it is unlikely that they would have sought specific assurance on questions of legality from Mr Davies or Dr Evans.

(8) Finally, I reject the allegation that it can be inferred that Ms McKenzie was a party to a combination to make unlawful payments because she was involved in a personal relationship with Mr Davies. Indeed, the existence of such a relationship is more consistent with the conclusion that the payments made to her were improper on the basis of favouritism by Mr Davies, rather than in order to buy her silence (which is the allegation necessary to support the conspiracy claim).

325. In light of the finding that there was no combination between any of the Defendants, it is unnecessary to reach a conclusion on the remaining elements of the tort of unlawful means conspiracy (although I address the question whether the Claimant suffered loss as a result of any of the overpayments in the context of the tort of misfeasance in public office at paragraphs 670ff below).

F. Breach of fiduciary duty

F(1) The law relating to fiduciary duties

326. There are certain well-established categories of fiduciary relationship (such as trustee and beneficiary, solicitor and client, director and company, agent and principal), but the categories are not closed. The relationship between the governing body of a school and a local authority is not one of those established relationships. Nor is the relationship between a headteacher, or other school employee, and a local authority.

327. Beyond the established categories of fiduciary relationship, there is no single formulation or description of the circumstances which will give rise to fiduciary duties. The question is fact-sensitive: see *Instant Access Properties Ltd v Rosser* [2018] EWHC 756 (Ch), per Morgan J at [262], citing *Ross River Ltd v Waveley Commercial Ltd* [2012] EWHC 81 (Ch). In the latter case Morgan J, upheld in this respect by the Court

of Appeal [2013] EWCA Civ 910, drew together many of the earlier authorities dealing with the circumstances in which fiduciary duties arose. At [235] he said:

> "Identifying the kind of circumstances that produce that result is difficult. The decisions of the courts have sought to retain flexibility as to the approach to be adopted. Numerous academic commentators have offered suggestions, but none has gathered universal support. There is said to be growing judicial support for the following two propositions:
>
> > (1) a fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence;
> >
> > (2) the concept encaptures a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal."

328. The first of these propositions was enunciated by Millett LJ in *Bristol & West v Mothew* [1998] Ch 1, 18. In *White v Jones* [1995] 2 AC 207, 271, Lord Brown-Wilkinson described the circumstance that one party has assumed to act in relation to the property or affairs of another as "the paradigm circumstances in which equity will find a fiduciary relationship."

329. The second proposition derives from Kitchen LJ in *Farrar v Miller* [2018] EWCA Civ 172, at [75], where he said – in the context of joint ventures – "It may be helpful to ask whether one joint venturer is in a relationship with the other which has given rise to legitimate expectation, which equity will recognise, that he will not use his position in such a way which is adverse to the interests of the other."

330. Fiduciary duties may co-exist with other legal relationships, for example contracts. Where they do, the scope and nature of the fiduciary duties will be moulded to fit the terms of the contract: see *Kelly v Cooper* [1993] AC 205, 215, where Lord Browne-Wilkinson cited with approval the following passage from the judgment of Mason J in the High Court of Australia in *Hospital Products Ltd. v. United States Surgical Corporation* (1984) 156 C.L.R. 41, 97:

> "That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction."

331. The first to fourth Defendants were all employed by the school. The extent to which an employment relationship might be a fiduciary one was explored by Elias J in

University of Nottingham v Fishel [2000] ICR 1462, from which the following three propositions can be derived.

332. First, the relationship of employer and employee is not in itself a fiduciary one, but "circumstances may arise in the context of an employment relationship, or arise out of it, which, when they occur, will place the employee in the position of a fiduciary" (*Fishel*, at p.1490). One such circumstance was the receipt of confidential information by the employee. Another was that of the errand boy, charged with an obligation to bring back the change he received (citing *Re Coomber* [1911] 1 Ch 723, 728 per Fletcher-Moulton LJ). But, as Elias LJ went on to note: "his fiduciary obligations are limited and arise out of the particular circumstances, namely that he is put in a position where he is obliged to account to me for the change he has received. In that case the obligation arises out of the employment relationship, but it is not inherent in the nature of the relationship itself."

333. Second, the principal reason why an employment relationship is not a fiduciary one is because, whereas the essence of a fiduciary duty was that one party must exercise his powers for the benefit of another, the powers of the employee are conferred by the employer, the employee's freedom of actions is regulated by the contract, the scope of his powers is determined by the terms of the contract, and as a consequence the employer can exercise considerable control over the employee's decision making powers. The two typical characteristics of a fiduciary relationship, on the other hand, are "…that the powers are conferred by someone other than the beneficiaries in whose interests the fiduciary must act, and … that these fiduciaries have considerable autonomy over decision making and are not subject to the control of those beneficiaries": Dr P.D. Finn, *Fiduciary Obligations* (1977)

334. Third, fiduciary duties may be engaged in respect of only part of the employment relationship, citing *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 1 WLR 1126, per Lord Wilberforce at p.1130c: "A person … may be in a fiduciary position quoad a part of his activities but not quoad other parts…"

F(2) Fiduciary duties: the circumstances of this case

335. The foundation of the Claimant's contention that the GB and Mr Davies owed fiduciary duties to it is the fact that, under s.49(5) of the SSFA (see paragraph 88 above), the funds provided to the GB by way of delegated budget from the Claimant remain the property of the Claimant until they are spent by either the GB or the headteacher and that, when spent by them, or him, they are taken to be spent as agent. The Claimant submitted that agency is an established category of fiduciary relationship, citing *Bowstead & Reynolds on Agency* (21st Ed) at paragraph 6-037 for the proposition that "the fact that an agent in the strict sense of the word has a power to alter his principal's legal position makes it appropriate and salutary to regard the fiduciary duty as a typical feature of the paradigm agency relationship."

336. Mr Hood on behalf of Mr Davies submitted that not all agents are fiduciaries and that, on a proper analysis of s.49(5), it does not create the type of agency which can give rise to fiduciary duties. The general proposition that not all agents are fiduciaries is clearly correct. An introducing agent, for example, who has no power to contract on behalf of another or dispose of another's property, would not typically owe fiduciary duties:

Bowstead & Reynolds on Agency (21st ed) at paragraph 6-037. Nevertheless, in most instances, an agency relationship will give rise to fiduciary duties.

337. Mr Hood described s.49(5) as creating a legal fiction, emphasising the special and limited nature of the agency. He submitted as follows: when the money is passed to the school it is represented by a chose in action as between the school and its bank; this cannot be the property of the Claimant in any conventional sense, because otherwise the school would be unable to exercise any rights in respect of the chose in action; the school therefore needs to have legal title to the debt, and the Claimant needs to have "some interest" in it for the statutory provision to have any meaning; there are two ways this could work - trust or agency; Parliament has made a deliberate election in favour of agency, albeit a deemed agency, thereby rejecting a trust; there is a good practical reason for this, because if there were a trust, the Claimant could at any time exercise rights under the principle in *Saunders v Vautier* (1841) Beav 115, to claim the money absolutely at any time. He submitted that the deemed agency is limited in scope because neither the GB nor the headteacher has any power to contract on behalf of the Claimant and because the Claimant has no proprietary interest in anything purchased by the school with the money. Finally, he submitted – on the basis of references to Hansard – that the only purpose of the provision was to make it easier for local authorities to reclaim VAT on purchases made by schools, and that this supports the proposition that no fiduciary duties are created by the deemed, limited agency in s.49(5).

338. While I agree that the amount of the delegated budget – once made available to a school – is represented by a chose in action between the school and its bank, and I agree that the legal title to that chose in action vests in the school, and that in order for s.49(5) to have some meaning it is necessary for the Claimant to retain some interest in the money, I reject the remainder of these submissions. In my judgment, the logical conclusion from the requirement that the money remains the property of the Claimant – in circumstances where the legal title to the chose in action vests in the GB – is that equitable title remains in the Claimant until the money is spent. The legal conclusion from this is that the GB, as holder of the legal title, holds it on trust for the Claimant. I do not accept, for example, that because Parliament has adopted the language of deemed agency in s.49(5), that means it has rejected the concept of a trust. An agent may or may not hold money on trust for its principal. In the absence of clearly expressed obligations in the contract (or other instrument) creating the agency, it will depend upon all the circumstances including the extent to which the agent is required to separate money and other property 'belonging' to the principal from its own money (see, for example, *Henry v Hammond* [1913] 2 KB 515). In the case of s.49(5), however, the express provision that the money remains the property of the local authority is sufficient, absent compelling counter-indication, to establish the necessary trust relationship. In fact, pursuant to the Claimant's financial regulations, the school was required to keep separate from other monies it might receive the funds provided by the local authority, which reinforces, rather than contradicts, the conclusion that equitable property in the funds remains with the authority. While the Claimant has not pleaded the word "trust", it has clearly pleaded that the money remained the property of the Claimant until it was spent and that this gave rise to fiduciary duties.

339. Mr Speaight QC, for Mr Udokoro, submitted that it would be wrong to impose fiduciary duties on the GB, principally on the basis that the GB operates as a public body, with public law duties. He submitted that fiduciary duties in the sense relied on by the

Claimant have never been, and should not be, superimposed on public law relationships. He referred me to a line of authority which has recognised the existence of fiduciary duties owed by local authorities, of which *Charles Terrence Estates Ltd v Cornwall Council* [2012] EWCA Civ 1439 is a recent example. In that case, at [12] to [17], Maurice Kay LJ referred to earlier authorities, including *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768, in which the House of Lords recognised that a local authority owed a duty of a fiduciary character to its ratepayers, which it breached in adopting a policy which would double the ratepayers' burden, and concluded:

> "There is no doubt that this line of authority establishes that some decisions of local authorities will amount to a breach of fiduciary duty or of a duty analogous to a fiduciary duty and that, in the public law proceedings at the suit of an interested party, the decision may be characterised as ultra vires and void."

340. Mr Speaight QC submitted that "fiduciary duty" in that (small) line of authority is simply a label which is being used as a route to explain the giving of a public law remedy. He cited *De Smith's Judicial Review*, 7th ed., paragraph 5-136 and 5-137 in support. I accept that the fiduciary duties referred to in those cases were of a different nature, and arose in a different context, from those claimed to exist in this case, although I note that the first case in the line, *Roberts v Hopwood* [1925] AC 578, concerned a challenge to the overpayment of wages by a local authority, in which context Lord Buckmaster held that "A body charged with the administration for definite purposes of funds contributed in whole or in part by persons other than the members of that body" stood towards those latter persons "somewhat in the position of trustees or managers of the property of others".

341. The difference in context between that line of cases and s.49(5) operates, in my judgment however, in favour of, not against, fiduciary duties arising in this case. In the *Charles Terrence Estates* line of cases, the question was whether fiduciary duties were owed by the local authority to the members of the public who funded it. In contrast, s.49(5) regulates the relationship between the local authority and the specific persons (the GB, a corporate entity, and the headteacher, an individual) to whom it has delegated the power to spend its money. The case for fiduciary duties arising in the latter context is that much stronger, particularly when Parliament has chosen to define that relationship in terms of the private law concepts of property and agency.

342. Mr Hood's submissions, in reliance on the principles set out in *Pepper v Hart* [1993] AC 593, are based on the White Paper "Self-government for Schools" dated June 1996 and on extracts from debate in the House of Lords in relation to the draft bill. The White Paper identified the purpose of the SSFA as giving schools more freedom to run their own affairs, including extending "self-government for schools, by giving them more power to decide how to spend their budgets". So far as Hansard is concerned, reliance is placed on the following comment of Lord Whitty on behalf of the government, addressing a proposed amendment to the clause in the bill which became s.49(5) of the SSFA. The relevant clause, prior to the amendment, in addition to containing the provision that the amount provided to the governing body remained the property of the authority until spent by the governing body or the headteacher, continued "any amount so spent shall be taken to be spent <u>on behalf of the authority</u>". The proposed amendment replaced the underlined wording with "as the authority's agent". Lord Whitty said of the provision that it:

> "provides that, in spending its delegated budget, the governors and heads of a maintained school are ordinarily deemed to be acting on behalf of the LEA. That is to say, they are in law acting as agents, not as principals. That is not intended to change the law. It frankly reflects what the department has always understood to be the legal position. However, for the avoidance of doubt, it seemed advisable to put this express provision in the Bill. One reason for that is that it removes any doubt as to whether VAT can properly be reclaimed by LEAs under section 33 of the VAT Act in respect of purchases made by schools from their delegated budgets and other funds provided by the LEA. The present amendments reflect discussions with Customs and Excise."

343. This passage does not support Mr Hood's submission. It makes clear that the government's view had always been that a delegated budget was spent by a school as agent for the local authority and that while the proposed change from "on behalf of the authority" to "as the authority's agent" was partly for the purpose of clarifying a VAT issue, it was not intended to introduce any substantive change.

344. So far as Mr Hood's reliance on the limited scope of the agency is concerned, while I accept that there are significant differences between the deemed agency created by s.49(5) and the paradigm case of an agent, in that neither the GB nor the headteacher is authorised to contract on behalf of the Claimant and that once the money is spent any property acquired with it belongs absolutely to the school, what remains is a clear statement that until the money is spent, property in it remains with the Claimant, such that this is a case where the agent has the power to dispose of property belonging to the principal.

345. Accordingly, by reason of s.49(5), the GB and the headteacher are exercising dominion over property belonging to the Claimant. Moreover, in so doing, they have considerable autonomy from the Claimant. This reflects the paradigm case of a fiduciary, as one who has "assumed to act in relation to the property of another", per Lord Browne-Wilkinson in *White v Jones* (above). The fact, as stressed by Mr Hood in reliance on the White Paper, that the SSFA was intended to increase the autonomy of a GB points towards, rather than against, the presence of fiduciary duties, as indicated by the statements of the circumstances in which fiduciary duties arise in *University of Nottingham v Fishel* quoted above.

346. The Defendants argued that the GB, headteacher and other staff at the school could not be said to have assumed any obligation of undivided loyalty to the Claimant. That was impossible, it was said, where the interests of the Claimant and the interests of the school, by whom the first four Defendants were employed, and in whose interests the GB was required to act, could diverge.

347. The Defendants cited, as examples of such divergence of interest, the decision taken by the GB to include a high-rise tower block as part of the NSD and the step-by-step move away from local authority control, through moving to a foundation school, adopting trust status and finally becoming an academy. These were matters on which the Claimant (influenced by wider considerations) disagreed with the school. More generally, it was argued that the first to fourth Defendants owed contractual duties to the school, which in itself meant that they could not owe a duty of undivided loyalty to the Claimant.

348. The answer to this argument lies in the following points, derived from the authorities cited above: (1) a fiduciary need not owe all the duties which are commonly associated with a fiduciary; (2) the nature and scope of fiduciary duties are moulded by the legal framework in which they arise; (3) the scope of fiduciary duties that arise as a consequence of s.49(5) is limited to the decisions made as to the spending of the delegated budget; and (4) in that context, the interests of the school and of the Claimant are exactly aligned – that is, the delegated budget is to be spent by the GB for the purposes of the school, pursuant to s.50(3) of the SSFA, and, in doing so, the GB shall act "with a view to promoting high standards of educational achievement at the school", pursuant to s.21 of the EA. The fiduciary duty of loyalty to the Claimant is thus shaped to reflect the fact that the Claimant's interests (it having delegated both the budget and the responsibility for provision of education at the school) is that the money is spent for the purposes of the school.

349. The fact that a governing body of a maintained school and its local authority might disagree as to how the delegated budget is most appropriately spent is irrelevant to the question whether fiduciary duties arise. The Claimant, having delegated the decision-making to the GB, has not retained the power to direct how the delegated budget should be spent. Its views, therefore, are legally irrelevant, both when considering whether there has been a breach of non-fiduciary duties, such as whether the GB negligently failed to spend the money for the purposes of the school, and when considering potential breaches of fiduciary duties, such as whether the GB deliberately, in breach of its duty of loyalty, spent money otherwise than for the purposes of the school.

350. It was also submitted that it was impossible to impose, for example, a fiduciary duty not to profit at the expense of the school, because teachers have a contractual right to be paid for their services. The duties arise, however, in connection with spending the Claimant's money. The basic proposition that no teacher (including the headteacher) could be privy to a decision to spend the Claimant's money on his or her own pay was enshrined in regulations and in Copland's pay policies and was recognised by the practice which operated throughout in relation to the PRC. Accordingly, the only spending decisions which a teacher should ever be concerned with relate to matters other than his or her own pay. There is thus no inconsistency between the no-profit rule and a teacher's contractual right to pay.

351. All of the Defendants relied on the absence of any prior decision in which governors of a maintained school had been found to owe fiduciary duties to the local authority. It is equally true, however (according to the researches of Counsel in this case), that no case has considered the question whether fiduciary duties arise in these circumstances. The absence of an authority concluding that they do is therefore of limited relevance. It is common ground that the categories of fiduciary relationship are not closed. Mr Hood submitted that it would be strange to find that there were such duties when the guide to the law for governors nowhere mentions their existence. But this is of limited importance when, first, the guide is intended to identify the positive duties imposed on governors and, second, as just noted, no case has been found which has previously considered the point.

352. Mr Hood submitted that it is essential, in order to find that a fiduciary relationship exists, that Mr Davies understood the relationship to be a fiduciary one, citing *F&C Alternative Investment (Holdings) Limited v Barthelemy* [2012] Ch 613, 646 per Sales J. The question in that case, however, was whether three 'representatives' of the

corporate member of a limited liability partnership, appointed to the board of the partnership, were agents of the corporate member. In that context, where the question was how the conscience of an individual might be affected, Sales J said that it was relevant to have regard to what that individual understood or expected the position to be. That is of no assistance here, however, where the agency is clearly established by statute, and the question is simply as to the content of the duties that are owed in that context.

F(3) Whether each of the Defendants owed fiduciary duties

353. The Claimant opened its case on the basis that all of the Defendants owed fiduciary duties to it. In closing, however, Mr Rees QC conceded that Ms McKenzie did not owe such duties, because of her position "lower down the chain of command and decision-making". I consider the case against each of the other Defendants in turn.

Dr Patel and Mr Day

354. To the extent that Dr Patel and Mr Day were parties to decisions as to the spending of the delegated budget, I conclude that they owed fiduciary duties to the Claimant. Although it is only the GB and headteacher who are identified in s.49(5) as spending the Claimant's property as agents, where the function of the GB is carried out by a sub-group of governors, particularly where there is no reporting back to, or approval from, the GB as a whole, it must follow that it is the sub-group that owes the relevant fiduciary duties.

355. In this case, it was Dr Patel and Mr Day who assumed the responsibility for deciding upon spending the Claimant's money pursuant to the ad hoc procedure. It makes no difference whether that responsibility was lawfully delegated to them by the GB or whether they wrongly usurped the powers of the GB. In either event, they were the persons exercising dominion over the Claimant's money.

356. If authority was needed, then it exists in cases concerning the duties owed by a sub-agent to a principal: *Powell v Evan Jones & Company* [1905] 1 KB 11 and *Markel International Insurance v Surety Guarantee Consultants* [2008] EWHC 1135 (Comm).

357. Mr Pester, for Dr Patel and Mr Day, accepted on the basis of these two authorities that in some circumstances a sub-agent could owe duties to a principal (although he pointed out that in the former case the conclusion that the sub-agent owed a fiduciary duty to the principal was one of two grounds for the decision and that in the latter case Teare J noted that a more hesitant conclusion was expressed in *Bowstead & Reynolds*). He contended, however, that the facts of this case could be distinguished from the circumstances in *Markel International Insurance*. In that case, the question was whether three individuals, who were employees and directors of SGC, owed fiduciary duties to SGC's contractual counterparties for whom SGC acted as underwriting agent. The three individuals were named in the contracts between SCG and its counterparties, as those who would provide the services on behalf of SCG. The court found that the individuals did owe fiduciary duties to the counterparties of SCG. They were persons who, although they had not contracted with SCG's counterparties, had the power to affect their interests and bind them to surety bonds in favour of others. Mr Pester submitted that the case is distinguishable because the individuals were specifically identified in the relevant contracts. I do not think this constitutes a ground of

distinction. The identity of the persons to whom the Claimant entrusted its funds was not important: they were entrusted to the GB, or such persons as the GB may delegate their functions, whoever the individual governors might be.

358. Mr Pester pointed out that under s.50(7) of the SSFA, governors shall not incur any personal liability in respect of anything done in good faith in the exercise or purported exercise of their powers. He submitted that this is inconsistent with the existence of fiduciary duties, since at least some fiduciary duties can be breached notwithstanding that the fiduciary is acting in good faith. I do not accept this submission. There is no question but that directors of a company owe fiduciary duties, yet the statutory scheme relating to companies entitles a director to be relieved from liability for breach of duty or breach of trust if found to be acting honestly and reasonably: s.1157 of the Companies Act 2006. In my judgment, the statutory defence in s.50(7) of the SSFA similarly does not prevent fiduciary duties arising in the case of school governors. If that is wrong, then pursuant to the proposition that fiduciary duties are moulded to the particular legal framework, the fiduciary duties of governors are moulded by the statutory framework which precludes liability from arising where the governor in good faith exercises or purports to exercise the powers under s.50(3) or (6).

Mr Davies

359. While the GB is the organ primarily vested with the power to spend the delegated budget, this power can be delegated to the headteacher: s.50(6). The headteacher is included in s.49(5) of the SSFA, as a person treated as agent for the purposes of spending the delegated budget, being the Claimant's money. The statutory regime thus recognises that in some circumstances it will be the headteacher, not the GB, that is exercising dominion over its property. It follows that, if and to the extent that a headteacher is a decision-maker or one of a group of decision-makers as to the spending of the Claimant's money, then he or she owes fiduciary duties in the same way as the GB.

360. The most obvious circumstance where a headteacher will be found to owe fiduciary duties is where the GB has expressly delegated power to him or her to make decisions as to spending. But that is not the only circumstance. Even where decisions are formally made by the GB or (in practice, more likely) by a committee of the GB, the actual involvement of the headteacher in the decision-making process may be such as to engage fiduciary obligations. It depends whether, as a matter of substance, he or she is a decision-maker.

361. It is relevant to note that a headteacher occupies a special place within the hierarchy of a school, as recognised in the Claimant's Financial Regulations. Prior to 2006 the specific duties imposed by those regulations on headteachers included: (1) maintaining a proper system of budgetary control; (2) ensuring that all expenditure under their control was incurred lawfully and was properly justified as being in the interest of the Claimant; (3) ensuring that only authorised payments were made in respect of payroll; and (4) for ensuring effective authorisation procedures were in place, for example in relation to variations to pay. Similar provisions were contained in the Financial Regulations in and after 2006, which also imposed duties on headteachers to ensure that their staff and governors comply with the regulations, and to ensure that their school promotes, enacts and monitors adherence to the necessary financial control framework and keeps spending within budget. Mr Davies acknowledged in cross-examination that

he occupied a unique position in the school, being the only person with a panoramic view of all the affairs of the school.

362. The critical question is whether Mr Davies used this unique position to exercise influence over the decision-making of those with responsibility within the school for deciding on pay to such a degree that he was the, or a, decision-maker.

363. So far as payments authorised by the PRC were concerned, I do not think he did. I am satisfied that his role at PRC meetings was to attend at the outset, make recommendations, and then leave to allow the PRC to reach a decision on all the matters recommended. He was not exercising influence over the members of the PRC sufficient for him to be regarded as a decision-maker.

364. So far as the payments pursuant to the ad hoc procedure are concerned, the picture is very different. I have dealt above with the respective roles of Mr Davies, Dr Patel, Mr Day and Dr Evans in relation to the ad hoc payments. My findings in that respect lead inevitably to the conclusion that it was Mr Davies, not Dr Patel or Mr Day, that was the substantive decision maker as to who should receive payment, and in what sum, under all of the ad hoc memos. Dr Patel and Mr Day deferred wholly to Mr Davies as to whether the payments were justified by reference to work done, or bonus earned. Moreover, I find that Mr Davies must have known – at least by the time of the second Ali Memo and beyond, that Dr Patel and Mr Day were in fact wholly relying on him such that he was in substance the decision-maker, and not them.

365. That conclusion is reinforced by my findings (below at paragraphs 398ff) that the claims made in certain of the memos were, to Mr Davies' knowledge, misleading. In causing, for example, Dr Patel and Mr Day to sign-off on each of the second to seventh Ali Memos, knowing of the falsity of the claim made in them that the school was saving money from the redistribution of Mr Ali's salary, Mr Davies was, and must have known that he was, the effective cause of the payments being made.

366. Dr Patel and Mr Day both said, in their oral evidence, that they had understood Mr Davies, in his capacity as governor, to be a third member of the ad hoc committee making decisions on pay. Neither of them had ever made this point before appearing in the witness box. This evidence emerged in the context of questioning concerning the lack of a quorum in decision-making via the ad hoc procedure, given that any sub-committee of the GB needed at least three members. The issue never having arisen before, there was no evidence led as to whether Mr Davies was a governor, and it was not suggested to Mr Davies that he was appointed as part of a sub-committee to decide upon the ad hoc payments. In my judgment, the suggestion that Mr Davies was a part of an ad hoc committee of three was an example of after-the-event reconstruction on the part of Mr Day and Dr Patel, in order to circumvent what they now appreciated was a further flaw in the ad hoc procedure.

367. While I reject, therefore, the argument that there had been formal delegation to a committee of which Mr Davies was a part, I nevertheless accept Dr Patel's and Mr Day's evidence as to the importance of Mr Davies, in practice, to decision-making in relation to the ad hoc memos.

368. In contrast, I find that neither Dr Evans and Mr Udokoro owed fiduciary duties to the Claimant. They would have done so only if, and to the extent that, they assumed (or

had delegated to them) the functions of either the GB or the headteacher in making decisions as to the spending of the Claimant's money. Neither of them played any part in making decisions as to the amount, recipient or purported justification for the overpayments. As such they were not subject to any fiduciary duties to the Claimant.

369. In particular, I do not regard Dr Evans' role in providing information as to the affordability of any of the payments – to the extent that he did so – as sufficient to constitute him a decision-maker so as to render him subject to fiduciary duties.

F(4) The content of the fiduciary duties

370. Not all duties owed by a fiduciary are fiduciary duties: see Millett LJ, in *Bristol & West Building Society v Mothew* [1998] Ch 1, 16:

> "The expression "fiduciary duty" is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties. Unless the expression is so limited it is lacking in practical utility. In this sense it is obvious that not every breach of duty by a fiduciary is a breach of fiduciary duty."

371. The duty of a fiduciary to exercise reasonable skill and care is not a fiduciary duty. On the other hand, the duty not to permit personal interests to conflict with a fiduciary's positive duties (the "no-conflict rule"), and the duty not to make a profit from a fiduciary's position (the "no-profit rule") are fiduciary duties. Millett LJ identified at least some of the duties of a fiduciary which he considered to be fiduciary in nature (at p.18):

> "This leaves those duties which are special to fiduciaries and which attract those remedies which are peculiar to the equitable jurisdiction and are primarily restitutionary or restorative rather than compensatory. A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work Fiduciary Obligations (1977), p.2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary."

372. The Claimant contends that the content of the fiduciary duties owed in this case included (1) a duty of good faith not to dishonestly divert the money; (2) a duty not to place themselves in a position where their personal interests conflict with the duty owed to the Claimant; and (3) a duty not to make a secret profit out of their fiduciary position.

373. I accept that in the circumstances of this case the fiduciary duties owed by each of Mr Davies, Dr Patel and Mr Day included the three duties relied on by the Claimant

(although the second and third duties are of no practical relevance in the case of Dr Patel and Mr Day, since they received nothing themselves).

374. So far as the first duty is concerned, it is clear from the passage from Millett LJ's judgment in *Bristol & West* quoted above that a breach of fiduciary duty may consist of acting for the benefit of a third party, as much as acting in the fiduciary's own interests. Millett LJ made a similar point in *Armitage v Nurse* [1998] Ch 241, 251, in considering what amounted to a dishonest breach of trust: "It is the duty of a trustee to manage the trust property and deal with it in the interests of the beneficiaries. If he acts in a way which he does not honestly believe is in their interests then he is acting dishonestly. It does not matter whether he stands or thinks he stands to gain personally from his actions. A trustee who acts with the intention of benefiting persons who are not the objects of the trust is not the less dishonest because he does not intend to benefit himself."

375. Dishonesty includes both "knowing that a particular cause of action is contrary to the interests of the beneficiary or being recklessly indifferent whether it is contrary to their interests or not": *Armitage v Nurse* (above) at p.251; *First Subsea Limited* [2017] EWCA Civ 186 (at [64]). Reckless indifference in this context connotes a subjective test – i.e. that the fiduciary appreciated the risk that the cause of action was contrary to the interests of the principal, but pursued it regardless. As explained by Lord Steyn in *Three Rivers DC v Bank of England (No.3)* [2003] 2 AC 1, 193 (which I address more fully below in the context of the tort of misfeasance in public office) anything less than subjective recklessness could not be squared with a meaningful requirement of bad faith.

376. It was submitted by the Defendants (citing *Snell's Equity* (33rd Ed), at 7-010) that the duty of good faith is not a fiduciary duty. I reject that submission, notwithstanding that the paragraph in *Snell* is supported by the academic text cited in the footnote, *Conaglen, Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (2010) Ch.3. Conaglen argues that the duty of good faith ought not to be categorised as a fiduciary duty, since a duty of good faith is owed in other situations (for example contractual discretions) and is therefore not peculiar to fiduciaries. The submission is, however, contrary to authority, in particular Millett LJ's exposition of fiduciary duties in *Bristol & West v Mothew* (above) and *Vivendi SA v Richards* [2013] EWHC 3006 (Ch), per Newey J at [143], cited in the same footnote in Snell.

377. Since the Claimant asserts only a fiduciary duty not *dishonestly* to divert the Claimant's funds, I need not consider the extent to which the misapplication of funds, otherwise than dishonestly, might constitute a breach of a fiduciary duty in the circumstances of this case.

F(5) Did Mr Davies and/or Dr Patel and Mr Day breach their fiduciary duties in connection with the overpayments authorised through the ad hoc process?

378. In view of his central role in relation to each of the overpayments, I will consider first the position of Mr Davies.

F(5)(i) Mr Davies

379. The finding (above at paragraph 359ff) that Mr Davies owed fiduciary duties as a result of his participation in decisions pursuant to the ad hoc procedure means that he was inevitably in an impossible position of conflict as, by that procedure, he was paid approximately £600,000 over the period September 2004 to April 2009. Mr Davies recognised this conflict in relation to the PRC meetings, because he absented himself from the discussion and decision-making at them.

380. The issue here is not that he had a private, conflicting, interest that was unknown to the GB. The problem was that the GB was unaware both (a) that Mr Davies was a decision-maker in respect of his own pay and (b) of the amounts that were being paid to Mr Davies through the ad hoc procedure. Had the GB known that Mr Davies was determining his own pay (and in such enormous amounts), it is inconceivable that they would have permitted that to continue. In practice, Mr Davies could have avoided the no-conflict rule only by abdicating himself from the decision-making process (as he did at PRC meetings). It is not sufficient that Dr Patel and Mr Day were aware of his involvement: even if, which I have rejected, there had been proper delegation by the GB in respect of the ad hoc procedure, there had certainly been no delegation from the GB to Mr Davies, and Dr Patel and Mr Day had no right themselves to confer power on Mr Davies to make decisions on his own pay. Accordingly, Mr Davies' conduct constituted a breach of fiduciary duty.

381. The position is different insofar as the PRC actually approved or ratified payments that had previously been authorised only via the ad hoc process. Provided that such decisions were made independently of Mr Davies, then I consider that they would not be impeachable on grounds of conflict of interest.

382. In my judgment, that is sufficient to exempt the payments pursuant to the first Ali Memo and the first NSD Memo from being impeached on this basis. The salary enhancements approved by these memos were approved by the PRC in 2008 and 2009 (see paragraphs 244-246 above). While this is less relevant, since there was no attempt to explain these salary enhancements to the Claimant, I note that these payments were regularly included in reports to the Claimant of salaries paid.

383. On the other hand, I do not regard the salary enhancements pursuant to the fifth NSD Memo (£6,000 per month for Mr Davies and £4,000 per month for Dr Evans) as exempt. That is because (see paragraphs 247-249 above) the PRC was misled into approving these payments by not being told that the existing salary enhancements of £3,000 per month and £,2000 per month for Mr Davies and Dr Evans were already reward for their work on the NSD. That purported ratification by the PRC was accordingly insufficient to relieve Mr Davies of the consequences of having breached the no-conflict rule in relation to the fifth NSD Memo.

384. Accordingly, I find that each of the payments that was made to Mr Davies, pursuant to the ad hoc procedure – apart from the first Ali Memo and the first NSD Memo, was made in breach of his fiduciary duty to avoid conflicts of interest and duty.

385. In case that is wrong, and in any event in order to deal with payments made to others, I turn to consider whether Mr Davies was also in breach of fiduciary duty by dishonestly causing any of the payments made to himself and others via the ad hoc procedure, knowing that, or being recklessly indifferent to whether, the payments could not be justified as being for the purposes of the school.

386. I deal first with the payments made pursuant to the first of the Ali Memos and the NSD Memos.

First Ali Memo

387. The Claimant challenges the Defendants' assertion that any of Mr Ali's work was undertaken by Mr Davies, Dr Evans and other members of the senior leadership team. It points to the evidence of Mr Allman, Mrs Deshmukh and Mr Johnschwager, who were unaware that Mr Davies had taken over curriculum responsibilities. It also points to the fact that the GB was told in October 2005 that Mr Ali had been retained on a consultancy basis to help with timetabling, and that the other duties formerly carried out by him were passed to Mr Knight.

388. The Claimant also points to the fact that the STPCD, which was expressly incorporated into Mr Davies' contract of employment with the school, identifies (as part of a headteacher's duties): determining organising and implementing an appropriate curriculum; keeping under review the work and organisation of the school; evaluating the standards of teaching and learning in the school; ensuring that proper standards of professional performance were established and maintained; and supervising and participating in arrangements for the appraisal or review of the performance of teachers.

389. In fact, Mr Davies' evidence is that, from the outset, what he and Dr Evans were doing was not actually replicating what Mr Ali had done, but they were taking on extra responsibilities over and above that which Mr Ali had done. In essence, this involved an enhanced monitoring process. When asked to describe what it was that he was doing to justify the increase in salary awarded in December 2004, he said that he instigated a process of monitoring the work students were doing and the manner in which teachers were marking their work. This involved him personally reviewing students' books, many of which were stamped "Seen by Sir Alan Davies, head teacher", and numerous meetings (between 800 and 900 over the period 2004-2009) with staff in order to give feedback. He said that this was work which Mr Ali had not done: it was a "massive change". In an article in the magazine for the Institute of Education in Spring 2009, Mr Davies is reported as describing "his own monitoring" system as follows: "a couple of nights a week I bring in the books and check a core subject for a whole year group. After looking at each book I stamp it [checked by Sir Alan Davies, headteacher]. It takes three or four hours each time."

390. This aspect of Mr Davies' work was corroborated by a number of other witnesses.

391. Drawing together that evidence, I find as follows. First, Mr Davies, Dr Evans, Ms Dunkley and Mr Sampong did undertake additional work, pursuant to a reorganisation following the departure of Mr Ali. Second, so far as Mr Davies was concerned, that additional work was from the outset not a replacement of work done by Mr Ali, but a form of enhanced monitoring which had previously been done by no-one. Third, notwithstanding that this did involve him doing additional work, much of that work – for example meetings with staff – was undertaken during the normal working day, and all such work fell within the description of his duties, as set out in the STPCD which was expressly incorporated into his contract. Fourth, the same is true for Dr Evans, to the extent that he carried out additional work. I nevertheless find – particularly in light of the fact that these increased salaries were later confirmed by the PRC – that Mr

Davies genuinely believed at the time that the salary increases were in the interests of the school.

First NSD Memo

392. The Claimant admits that "the First and Second Defendants undertook in good faith a considerable amount of work in respect of a proposed new development at Copland School." It does not admit, however, that this work fell outside their respective roles as headteacher and deputy headteacher.

393. The concept of additional payments being made to members of staff specifically because they were undertaking additional responsibilities relating to the NSD was first introduced in 2002. Thus, according to the document containing the governors' recommendations to the PRC meeting of 21 January 2002, and Mr Davies' handwritten notes of that meeting: £12,000 was awarded to Mr Davies "for added responsibility and work related to bringing on the new school development"; and payments of between £4,000 and £6,000 were awarded to each of four deputy heads (Dr Evans, Mr Ali, Ms Dunkley and Mr Sampong) justified as "New School: payment for additional work". There is no record of who attended the meeting, but the PRC, at that time, comprised at least Mr Deshmukh (who, as chair of the FMC, acted as chair of the PRC), Mr Mistry, Mrs Davidson and Mrs Rashid. Dr Patel's evidence is that he joined the PRC at some time during 2002, so it appears unlikely that he was there. Mr Day had not yet joined the GB. Mr Deshmukh said in evidence that there was nothing secret about these payments. The decision to award these additional payments cannot be considered dishonest, in circumstances where all (or, at least, all but one) of the members of the PRC who authorised them are not alleged by the Claimant to have been acting dishonestly.

394. The first time, after 2002, that the NSD is recorded as a justification for additional payments to staff is in the PRC presentation document of July 2005. This references the grant of planning permission and the hard work, through many meetings, persuading business to get behind Copland. Together with the continued achievement in attracting funding and the excellent academic achievements of the school, this is relied on to justify bonuses across the school, including £48,000 for Mr Davies and £38,000 for Mr Evans.

395. Shortly afterwards, on 2 November 2005, monthly salary increases (backdated to September 2005) were awarded, by the first NSD Memo, to Mr Davies (£3,000 per month) and Dr Evans (£2,000).

396. In contrast to most of the remainder of the overpayments authorised by the ad hoc memos, these payments were later confirmed by the PRC, in February 2008 and January 2009, and were regularly notified (although not separately itemised) to Brent as part of Mr Davies' and Dr Evans' pensionable pay.

397. In circumstances where there was an established culture within the school (since at least 2002), blessed by governors against whom no allegations of wrongdoing are made, of paying extra money to staff who took on additional duties, including specifically in relation to the NSD, I find that Mr Davies genuinely believed that the salary increases pursuant to the first NSD Memo were in the interests of the school.

The remaining ad hoc memos

398. There are a number of features of the remaining ad hoc memos, however, that point towards Mr Davies having appreciated that the amounts being sought in them could not be justified in the interests of the school. I draw these together under the following headings:

(1) The misleading contents of the second to seventh Ali Memos;

(2) The double-counting of additional responsibilities;

(3) The double-counting in respect of bonuses;

(4) The drafting and terminology of the memos themselves.

(1) The misleading contents of the second to seventh Ali Memos.

399. In the Second Ali Memo, dated only three months after the first, Mr Davies justified one-off payments totalling £42,500 on the basis that following Mr Ali's semi-retirement, he (Mr Davies) and Dr Evans were covering for three days of Mr Ali's work between them, and Ms Dunkley's and Mr Sampong's roles had been enhanced. This was trumpeted as a saving to the school, because it was £2,500 less than £45,000 (being 3/5th of Mr Ali's annual salary saved by him working only two days a week).

400. In view of the fact that the whole of that part of Mr Ali's salary saved by his reduction to two days a week had already been redistributed, permanently, by the first Ali Memo, for exactly the same reasons, the purported justification in the second Ali Memo was patently untrue. Far from representing a saving to the school, it represented a double payment to each of the four staff members and an additional expense of £42,500 to the school.

401. Mr Davies, in his witness statement, justified all of the subsequent Ali Memos on three bases: (1) Mr Ali's salary was likely to have increased and would have included bonuses; (2) the curriculum development work had grown; and (3) the work of the leadership team as a whole increased. Moreover, he said that his recommendations for pay awards were not intended to be limited by reference to Mr Ali's salary.

402. In his oral evidence, when asked how the payments in the second Ali Memo represented a saving to the school, Mr Davies said that: "what tended to happen was the standards improved, the pupils achieved much better results. More pupils were looking to join the school … Hence there was more funding coming into the school and standards increased. And it was the position of the pay review committee, in order to do that, to drive this forward through the new role that we were doing, in terms of Hakim Ali."

403. Not only were these points not given as justification at the time, but they could not in any event justify the double-payment authorised by the second Ali Memo: Mr Ali's salary would not have increased at all in the few months since the first Ali Memo; there is no evidence that the work of the leadership team had increased to any significant extent in that period; and I have already found that the work being done by Mr Davies and Dr Evans was from the outset over and above that done by Mr Ali. Moreover, they do not explain why Ms Dunkley and Mr Sampong should receive anything beyond the

salary increases they received consequent upon the reorganisation following Mr Ali's retirement in the autumn of 2004.

404. Neither Dr Patel nor Mr Day had any independent recollection of signing the memo. In his witness statement Mr Day said that, had he known Mr Davies was to continue receiving £1,500 per month as well as the payment of £15,000 authorised by the second Ali Memo, he would have protested.

405. Mr Davies must have known that he was continuing to receive the £1,500 per month awarded pursuant to the first Ali Memo, and that the other staff increases in the first Ali Memo had been permanent in their effect. Accordingly, as the author of the second Ali Memo, I find that he must have known that the claim that the payments set out would represent a saving to the school was false.

406. The same point applies to the later Ali Memos. Each of them purports to justify ever increasing one-off payments on the basis of redistributing Mr Ali's salary. Many of them repeat the express claim that the payments represent a saving to the school. In each case, the claim was false, since the whole of the saving made from Mr Ali's semi-retirement was already being paid, annually, to Mr Davies, Dr Evans, Ms Dunkley and Mr Sampong pursuant to the first Ali Memo.

407. In the third Ali Memo, the total amount awarded was £59,000. This was justified by a calculation which noted that 3/5th of Mr Ali's salary was £67,800, and that 7/12th of this figure is £39,550. No-one was able to recall the purpose or impact of the 7/12th calculation.

408. It is true that the memo expressly acknowledged that £59,000 was greater than the saving on Mr Ali's salary shown by the calculation set out in the memo. That was said to be justified on the basis that Mr Ali's salary would have increased, and there was a significant increase in the number of students, making more demands on the time of the leadership team. In his oral evidence, Mr Davies sought to justify the payments recommended in the memo by reference to the "results being so good and improving … by a great amount, the school was very popular and many people wanted to join the school, which tended to increase the budget". Such changes cannot have materialised in the six months since the first Ali Memo. Moreover, the inclusion (as part of Mr Ali's salary that was being saved) of a bonus of £38,000 he received the previous years is itself misleading, when £8,000 of that bonus specifically related to his retirement.

409. The real problem with this memo, however, is that the calculation in it again assumed that there was a saving because 3/5th of Mr Ali's basic salary was no longer paid to him following his semi-retirement. That was still untrue, since all of that amount was already permanently redistributed pursuant to the first Ali Memo.

410. On the contrary, and assuming in the Defendants' favour that the combined sums were intended to cover a full year, the cumulative effect of the first three Ali Memos was a payment of £146,000, a sum more than three times greater than the £45,000 annual saving from Mr Ali working only two days a week.

411. Mr Davies also suggested that the workload of the senior leadership team had been increased because other staff had left. That formed no part of the justification at the time. Given the lengths to which Mr Davies went – in numerous memos – to try to

justify Mr Ali's salary being redistributed, the absence of any contemporaneous record of a purported redistribution of any other retiring staff member's salary strongly suggests that this was an attempt by Mr Davies to justify, after the event, something which could not be justified on the basis asserted at the time.

412. Dr Evans had evidently queried with Mr Davies the fact that the amounts awarded by the third Ali Memo were greater than the savings made in respect of Mr Ali's salary, because Mr Davies wrote to him on 15 June 2005 stating: "Following our discussion you appear to be correct in that the recommendations from Dr Patel and Mr Day do exceed Mr Ali's salary, although I am not convinced this is the case with on costs. Dr Patel is aware of this and asks that you look to extend the functional GCSEs and General Studies to more students. He has stated that in the long term he will be looking for a saving to be made." Dr Evans said that he had taken on such additional work in relation to functional GCSEs and general studies lessons that he then took on. There are a number of points arising from this memo. First, Mr Davies' description of the recommendations as being "from Dr Patel and Mr Day" was misleading, given it was clear from the third Ali Memo itself that the recommendations – and attempts to justify them – came from him. Second, the statement that he believed the amounts may not exceed Mr Ali's salary was plainly wrong, given that he knew of the terms of the first Ali Memo. Third, he was confirming that the overall intention was – at least in the long term – that a saving be made.

413. Neither Dr Patel nor Mr Day could explain how these sums were justified. Dr Patel said that given Mr Davies wrote the memo and asked him to sign it, he (Mr Davies) must have thought it was correct and he (Dr Patel) trusted him.

414. Given Mr Day would have objected to the second Ali Memo, had he known that Mr Davies continued to receive the additional payment authorised by the first Ali Memo, then logically he would also have protested in respect of the third (and all later) Ali Memos for the same reason. In his oral evidence he said he would not have been aware of the cumulative totals being spent.

415. By the fourth to seventh Ali Memos, a further amount of £223,000 was paid to a handful of staff members over a period of just twelve months. Of this Mr Davies received £90,000 and Dr Evans received £70,000. The precise formulation of the justification varies as between the four memos, but each of them refers to the work done in covering for Mr Ali during his retirement. The fifth Ali Memo repeated the misrepresentation that: "You have saved the school a great deal of money by not replacing Mr Ali". It is true that in the sixth and seventh Ali Memos the wording changed slightly and included the phrase: "it is essential that you are both rewarded accordingly for your professionalism and extra duties as it is not our aim to save money", but the payments were nevertheless still described as a distribution of Mr Ali's remuneration.

416. In each case, the claim that the school had been saved money by not replacing Mr Ali, and that this justified the payments, was false. Without denigrating the important work Mr Davies himself undertook following Mr Ali's retirement, and while fully acknowledging he genuinely believed that his work was paying dividends in terms of benefit to the students, the fact is that an £18,000 a year increase on his salary was already a handsome reward, and would have required many additional hours of work over and above an already full-time role to justify it. More importantly, however, when the cumulative effect of the second to seventh memos was that the school was paying,

between March 2005 and January 2007, an additional £324,500 (of which he personally received £126,000), Mr Davies must have known that his persistent portrayal that the school was saving money was untrue.

417. Accordingly, I find that in causing the payments in the second to seventh Ali Memos to be made, where they were justified as reward for undertaking additional duties following Mr Ali's retirement, Mr Davies knew that they could not be justified on the basis that he was putting forward. Far from resulting in a saving to the school, he knew that they resulted in a substantial overpayment.

418. This extends to all payments set out in the second to seventh Ali Memos, except the payments to Ms McKenzie and Mr Udokoro in the second Ali Memo (25 March 2005), which were justified on a different basis, and which I will deal with separately below.

(2) The double-counting of additional responsibilities

419. The terminology of most of the ad hoc memos is consistent only with the payments being made as a reward for additional duties undertaken (as opposed to being a bonus for a job well done). The Ali Memos all fall into this category. The seventh NSD Memo (October 2008) is a further example: "I would like to recommend the following members of staff to be rewarded in recognition of their taking on and carrying out tremendous continued additional work load over and above their normal day to day school duties."

420. There came a point, certainly in relation to Mr Davies and Dr Evans, where, in light of previous payments for the same or other additional duties, this had to amount to double-payment: they simply could not have carried out the claimed further additional duties otherwise than at the expense of work comprised within their job description or of other work already being rewarded by generous payments via the ad hoc procedure.

421. While Dr Evans said that he drew, in his own mind, a distinction between bonuses and reward for additional duties, he was unable to apply that distinction clearly to the payments authorised by the ad hoc memos. At one point he suggested that a one-off payment in a rounded sum was likely to have been a bonus, whereas a monthly salary enhancement would have been for additional work done. That does not stand up to scrutiny, however, in the face of the clear language of the many ad hoc memos which, while awarding rounded lump sums, purported to justify them as reward for the many hours spent, for example, working on the NSD or covering for Mr Ali. Moreover, it is inconsistent with the payslips of the various recipients which, generally speaking, described the payments made via the ad hoc procedure as "additional responsibilities" but described the payments made via the PRC as "bonuses".

422. It must be borne in mind that Mr Davies and Dr Evans were in receipt of salaries at the top of the relevant pay scale for undertaking a full-time role as, respectively, headteacher and deputy head. In Mr Davies' case, in 2003 his salary was just over £94,000, and by 2009 it was just over £107,000. In Dr Evans case, the equivalent figures are £71,691 and £93,440.

423. In addition, from November 2005, Mr Davies was in receipt of a permanent salary enhancement of £54,000 per year (£1,500 per month pursuant to the first Ali Memo, and £3,000 per month pursuant to the first NSD Memo) specifically for undertaking

additional duties over and above his full-time job. The equivalent for Dr Evans, for the same reasons, was a permanent pay rise worth in the region of £33,000 per year. For their attendance at the school on Saturdays and during holidays when there were booster lessons, they received additional pay. For the year 2005-2006, Mr Davies received £15,900 for these extra duties. He received a broadly similar amount in 2006-2007, £25,050 in 2007-2008 and £34,400 in 2008-2009. Dr Evans received between approximately £14,000 (in 2005-2006 and 2006-2007) and £32,850 (in 2008-2009).

424. These salary enhancements equalled approximately 70% of their basic salary. In other words, they were receiving another 70% of salary, on top of their salary for performing full-time roles, for taking on additional responsibilities. This is before taking account of the enormous bonuses awarded by the PRC.

425. I find it impossible to see how someone in Mr Davies' position could have believed that any further payments to him or Dr Evans, beyond those salary enhancements, could be justified on the basis that they were actually carrying out further work. There were simply not enough hours in the week for that conclusion to be justified. Yet, pursuant to the ad hoc memo procedure between 2005 and 2008 Mr Davies received a further £294,000 in one-off payments and a further salary enhancement (from June 2007) of £72,000 per year (averaging, over the four-year period, another £100,000 per year). Dr Evans received one-off payments of £220,000 and a further salary enhancement (from June 2007) of £48,000 per year (averaging over the same period another £73,000 per year). If either of them was performing the work for which the payment under the relevant ad hoc memo was made, then it must follow that that was being done during time for which he was already being handsomely rewarded for carrying out other duties.

426. The fifth and sixth NSD Memos are clear examples of this. The salary enhancements of £6,000 per month (Mr Davies) and £4,000 per month (Dr Evans) from June 2007, for "hard work and stress" in relation to the NSD, ignored the fact that they were already in receipt of monthly salary enhancements of £3,000 and £2,000 respectively, awarded just 18 months earlier, for (in the case of Mr Davies, in the words of the first NSD Memo) "lead[ing] on the new school development" and "holding the equivalent of two headships". The fifth NSD Memo made no reference to the earlier salary enhancements. As I explain at paragraph 456 below, Mr Davies appears unilaterally to have re-characterised the earlier salary increases as having nothing to do with the NSD, without informing, or getting approval from, Dr Patel and Mr Day.

427. A mere four months later, one-off payments under the sixth NSD Memo were awarded (including £50,000 for Mr Davies and £30,000 for Dr Evans) for the "outstanding work" and "many heavy hard work (and late) meetings" on the NSD. The memo took no account of (and made no reference to) the existing salary enhancements, by now £108,000 per year and £72,000 per year, for the same work. In turn, the bonuses of £80,000 and £55,000 awarded at the PRC meeting, four months later, and justified largely on the basis of the work on the NSD, took no account of the payments pursuant to the sixth NSD Memo.

428. While the cumulative position became more extreme as time went on, the same point arises in relation to each of the ad hoc memos after November 2005, starting with the second NSD Memo (7 December 2005), awarding payments to Mr Davies, Dr Evans and others for work done in relation to the judicial review proceedings.

429. There was no challenge to the evidence of Mr Arnold Meagher who, as a lawyer in the Claimant's legal department had conduct of the judicial review proceedings, that no material work had been done by Mr Davies or others at the school directly in connection with the judicial review proceedings. Mr Davies' evidence, however, was that the work done "building up to the judicial review" to justify the payments in the memo of 7 December 2005 was all related to trying to win local support for the scheme. He described many hours that he and members of his team spent knocking on doors in the neighbourhood and putting up a marquee on the school field to display a model of the project, in order to try to placate neighbours, many of whom were opposed to the school.

430. The payments to Mr Davies and Dr Evans represent obvious double-counting. The period covered by the memo is the weeks leading up to the judicial review hearing in November 2005. The salary increases that they had been awarded by the first NSD Memo in November 2005, however, had been back-dated to September 2005. Thus, for the period September to November 2005 Mr Davies had already received £9,000, and Dr Evans £6,000, specifically for work related to the NSD, yet Mr Davies was justifying another £8,000 (for him) and £6,000 (for Dr Evans) for work related to the NSD for that self-same period.

431. Another example is the Chalkhill Memo, pursuant to which Mr Davies was paid £25,000 (and Dr Evans £20,000). There are a number of difficulties with this memo, which I address separately below but, aside from those, any additional work undertaken by Mr Davies and Dr Evans relating to Chalkhill must have been either during the working day for which they were otherwise being paid a full-time salary or during time for which they were in receipt of salary enhancements of approximately 70% of their basic salary (let alone the £50,000 paid to Mr Davies and £40,000 paid to Dr Evans in the first five months of 2007 supposedly for additional duties relating to Mr Ali's work and the NSD).

432. Payments to Dr Evans relating to the NSD are particularly difficult to justify. For every payment or salary increase for Mr Davies, Dr Evans received an amount that was similar, as a proportion of his salary. Dr Evans undertook nothing like the workload undertaken by Mr Davies on the NSD. In a chronology of events relating to the NSD prepared by TLT LLP for the Claimant in August 2009, there is no mention at all of Dr Evans. He does not appear to have attended any of the numerous meetings attended by Dr Patel and Mr Davies. He was not involved with the developers, either in the process of appointing them, or thereafter. In his interview with the Claimant in July 2000 he said that he had not been involved at all with Chancerygate: "I have never met any of their people. Certainly seen no documentation at all". Although he partially retracted this at trial, saying that he did have meetings with a Peter Brattle, an architect who he did not realise at the time worked for Chancerygate, the more contemporaneous answers given in his interview suggest that his involvement was relatively minor.

433. In his own words, he described his work on the NSD as relating to "soft-works", i.e. dealing with aspects relating to the interior of the new building, considering what was required, and including doing questionnaires for the staff, to decide what materials needed to be taken over to the new school building. While accepting that some preparatory work of this nature might have been necessary, and assuming in his favour that such work as he did might justify payment of £2,000 per month which he was paid from September 2005 onwards, it is impossible to see how he could have undertaken work justifying the further salary enhancement in June 2007 of £48,000 per year, and

the one-off payments aggregating £96,000 between December 2005 and October 2008, particularly when building work on the new school never started.

434. For the above reasons, I conclude that insofar as any of the ad hoc memos after November 2005 purported to award payments to Mr Davies or Dr Evans for additional work done, then there was no reasonable basis for the justification put forward, and Mr Davies (who (1) knew what he and Dr Evans were receiving and (2) authored the memos) must have known that.

(3) Double-counting in respect of bonuses

435. The only potential answer to the problem of double-counting in respect of additional work would be if the payments were instead to be characterised as bonuses. For the reasons given above, the vast majority of the ad hoc memos cannot be re-characterised in this way. Even if they were, however, then they would be doubling up, without any reasonable justification, on the bonuses paid by the PRC.

436. The language of the sixth and seventh Ali Memos (September 2006 and January 2007) might suggest that the payments were also being justified by reason of the excellent results being achieved in the school. They recite that "At the school we have made the correct decision in not appointing a successor to Mr Ali as endorsed by the increase in achievement this year at KS3, GCSE and Advanced level". The problem with this, however, is that at the PRC meeting on 18 July 2006, the improvement in exam results across the school is specifically cited as one of the justifications for payment of bonuses to all staff, including a bonus of £50,000 to Mr Davies. Moreover, this was based on Mr Davies' performance review which commended him on his work with the leadership team and heads of faculty in identifying individual targets for students from key stage 2 to key stage 3 (i.e. broadly the "Ali cover" work).

437. In these circumstances, I do not accept that Mr Davies can have believed that the payments to him pursuant to the sixth and seventh Ali Memos (themselves equalling £50,000) were justified as bonuses, when he had received a bonus of precisely that amount – representing 50% of his salary – just months earlier, justified as "sharing in the success" of the school.

438. It is equally important to have regard to the interplay between the ad hoc memos and the PRC payments in relation to the NSD Memos. Thus, from July 2005 onwards, the achievements in relation to the NSD were specifically highlighted as justifying payments of bonuses across the school. In Mr Davies' case, his leading on the NSD was one of the objectives in his performance review, on the back of which the PRC considered the payments of bonuses to him.

439. On 1 June 2006 Mr Davies wrote to Dr Patel referring to the hard work put in by the team working on the NSD, and to the s.106 agreement being passed by the planning department in April 2006. He requested "on behalf of the staff that when reviewing their pay that the Pay Committee gives due consideration to what has been achieved from 2002." I note that this was a request to the PRC, and was made on behalf of "the staff". There is an undated manuscript addition to the memo, from Dr Patel, indicating his agreement. In the result, in the PRC presentation document written by Mr Davies for the July 2006 PRC meeting he included, as justifying the substantial bonuses, the

fact that through hard work, and many meetings the school had been given planning permission and signed the s.106 agreement.

440. In the meantime, however, Mr Davies had authored the third NSD Memo, awarding £63,000 split between himself, Dr Evans, Mr Udokoro and Ms McKenzie. These payments were not brought to the attention of the PRC in July 2006 (see paragraphs 277-278 above). If, contrary to the payslips of Mr Davies and Dr Evans, these were classified as "bonuses", then this would result in obvious double-counting, given the payments (expressly characterised as bonuses in payslips) via the parallel PRC process just one month later.

441. The same issue arises with the sixth NSD Memo, under which payments were made to a number of individuals who, four months later, received bonuses in the same, or larger, amounts at the PRC meeting in February 2008. It is questionable whether the NSD project could properly have been the basis for any bonus award by the PRC at this time, given that the lack of any real progress with it, but it certainly could not have justified, in addition, the vast sums paid in October 2007.

442. Mr Davies and Dr Evans both suggested that the basis of the payments in the memos – i.e. whether it was reward for additional work done, or a reward for work done well – was not scientific. When it was put to Mr Davies that this gave rise to double-counting with the bonuses awarded by the PRC, he said that he thought that the PRC payments were "… more to do with the sharing in success being a – a reward for he – the overall success of the school" and "the sharing in success was more to do with everybody in the school getting their – an extra payment … so it was a way of rewarding everybody." When pressed that while this made sense in relation to the rest of the staff, it represented double-counting so far as payments to him were concerned, he said "…there was the – you know, the necessity to understand the – the way the pay review committee worked, and the information they were receiving from the performance and management committee, as well. And I think they tended to relate specifically to the sharing in success document." Even taking account of the difficulties of recollection, this was an unsatisfactory explanation for what was on any view substantial double-counting. While the concept of "sharing in success" might offer an explanation for bonuses paid across the school, it cannot begin to justify the doubling-up of payments to Mr Davies, Dr Evans and a small number of other staff by way of the ad hoc procedure on top of the very large sums paid to them for sharing in success via the PRC.

(4) The drafting and terminology of the memos

443. There are a number of instances within the ad hoc memos which demonstrate a substantial degree of arbitrariness, as to the recipient of payments, the amounts to be paid and the reasons justifying the payments.

444. In relation to the Ali memos, if the reasons advanced for the numerous one-off payments between March 2005 and January 2007 were genuine, then it is surprising that no further payments were made after January 2007. Mr Davies' contention is that the additional workload carried on and, if anything, increased over time as the school roll increased. No explanation was offered for the cessation of these one-off "Ali" payments after January 2007.

445. Aside from the fact that Mr Davies and Dr Evans were always recipients of the largest payments, the identity of the other recipients also appears arbitrary. Mr Sampong and Ms Dunkley were recipients under the first to third and fifth memos, but not under any of the others.

446. Conversely, Mr Udokoro and Ms McKenzie appear as recipients for the first time in January 2006 (in the fourth memo). They are not recipients under the fifth memo but are under the sixth and seventh. If it is correct that the reorganisation following Mr Ali's semi-retirement resulted in them undertaking a greater workload, then no explanation was offered as to why this only commenced in January 2006, disappeared again in March 2006, but was present again in September 2006 and January 2007.

447. The fact that most of the memos recommended payments of similar amounts, often rounded to the nearest five or ten thousand, indicates a lack of genuine attempt to match the amount paid to the additional work undertaken.

448. This inference is supported by the addition of apparently random references to other achievements, in memos recommending reward for one particular matter. Examples are the memos relating to the NSD in May and June 2007. Each of them purports to be recommending remuneration for the hard work on the NSD. The May memo adds, however: "It is quite remarkable that on top of all this, during a very delicate stage of the project you are also striving to ensure high standards are maintained in exam results as evidenced by the DFES/Ofsted analysis of results from Key Stage 2 – Key Stage 4, a high CVA (to say nothing of the numerous meetings you had with the local MP, DFES, local council and DFES statisticians who put together the CVA in order to rectify the workings out of the formula). As well as all this we have the new Sixth form PANDA report for 2006." It also went on to note that "you are continuing to cover Mr Hakim Ali who has not been replaced, within the leadership team thus giving us the significant saving for a deputy heads salary". Similarly, in the June memo, before citing the work on the NSD as justifying the substantial salary increases for Mr Davies and Dr Evans, they are both congratulated on their "outstanding effort in covering for Mr Ali", and for the improvements in exam results across the school.

449. Further examples are: the third NSD Memo of June 2006; the fourth Ali Memo of January 2006; and the Chalkhill Memo of March 2007. The third NSD Memo begins by Mr Davies congratulating himself and "[his] superb team in securing the very important steps which have led up to the formalisation of granting planning permission", and continues "I have previously mentioned your significant meetings at Downing Street and then with the Minister of State for Education". Planning permission had in fact been granted over a year before, and had been relied on (among other things) by the PRC in awarding large bonuses in July 2005. Furthermore, Mr Davies, Dr Evans and Ms McKenzie had already been paid several hundred pounds each for their attendance at the meetings referred to.

450. The fourth Ali Memo justified the payments set out in it on two bases: replacing Mr Ali and the achievement in attracting a further £200,000 sponsorship from the Hobson Charity. No indication is given as to which part of the payments was justified on which basis. Mr Davies does not explain in his witness statement how funds intended for educational purposes could properly be spent on rewarding school staff upon the school receiving charitable donations. In cross-examination, he said merely that "this is something that Dr Patel wanted to recognise and this is what he wanted in his letter…"

In light of my finding that the memos are the product of Mr Davies' decision as to what to ask for, not that of Dr Patel, I reject that explanation. Mr Davies must have known that this would have been a clear misuse of public funds. On the other hand, the reliance on obtaining funding was a constant theme throughout the PRC presentation documents as a supporting reason for awarding bonuses. I think it is more likely that its inclusion here is symptomatic of the wider point, that Mr Davies added random exaltations of his and his team's achievements, in order to make the memos as persuasive as possible.

451. I have already noted above the difficulty in justifying the amounts awarded pursuant to the Chalkhill Memo to Mr Davies and Dr Evans, given all the other payments they were receiving. There are, however, other aspects of this memo which demonstrate the arbitrary nature of the payments.

452. Ms Faira Elks, Head of Services to Schools at the Claimant from 2007 to 2013, gave evidence at the trial. She confirmed that in 2007 Chalkhill school received a notice to improve from the Claimant and that, in accordance with standard practice at the time, the Claimant had pulled together a link adviser, a senior member of staff, the headteacher and chair of governors, and held a series of meetings to try to formulate strategies for improvement. Mr Davies was already the chair of governors at Chalkhill and so was centrally involved in this process. Ms Elks said that the Claimant had been very grateful to Mr Davies for making time to attend those meetings. She was not aware, however, that payment had been made to him or the other teachers, and was very surprised when she was told of this in the context of these proceedings.

453. Dr Evans' evidence was that he (and the other teachers mentioned) did indeed assist with teaching pupils at Chalkhill school. He said that he thought they had put in about ten months of work at Chalkhill, working approximately one to two days a week. Although he could not be precise, much of this was done after the date of the memo. I accept that each of Dr Evans, Ms Dunkley and Mr Sampong did in fact undertake additional teaching duties at Chalkhill.

454. It is, however, very difficult to see any objective justification for the payments authorised by this memo. The sums awarded cannot be justified by reference to time actually spent by the relevant staff members at Chalkhill, since the memo was drafted before much of the work was done and it cannot have been known over what period the teachers would be committing to Chalkhill. More importantly, the three members of staff were already being paid for teaching full-time at Copland. Neither Dr Evans nor Mr Davies could offer any satisfactory explanation for why the teachers themselves were paid for assisting at Chalkhill, as opposed to Copland being compensated for having provided its teaching staff to Chalkhill (which is what happened some years earlier when Copland had loaned its staff to another failing school). In cross-examination Mr Davies suggested that it may have been the case that Chalkhill had agreed to pay, but that he did not chase it up because the school was so busy. I do not accept that Chalkhill, a failing primary school, would have committed to paying £85,000 to Copland school for part-time assistance of three teachers, particularly without knowing the period of time over which those teachers would be required. Even if Chalkhill had agreed to reimburse Copland, that does not explain why it would have been appropriate for teachers to be paid for working at Chalkhill during time they were already being paid to work at Copland. While it may well be the case that the teachers would be burdened with some overall additional workload, it is not credible that this would have been of an order that justified such enormous additional payments to them.

455. Mr Davies did not himself undertake any teaching at Chalkhill. In cross-examination he said that he undertook "the management of the process and went in on a regular basis with the Copland staff, observed the lessons and fed back on how I thought the lessons went and what the kids were learning. I also played a major role in establishing a joint consultant committee…" To the extent that Mr Davies' role involved observing lessons at Chalkhill, this would necessarily have occurred during the school day (and thus involved the same double-counting as with the other members of staff). So far as he was involved in "managing the process" or setting up a committee, this would have fallen within the remit of his role as chair of governors at Chalkhill. A governor, including the chair of governors, is a voluntary position.

456. Finally, the arbitrary approach to the justifications contained in the ad hoc memos is evidenced by Mr Davies' treatment of the salary enhancements pursuant to the first and fifth NSD Memos. The fact that he was in receipt of £3,000 per month pursuant to the first NSD Memo specifically for leading on the project was ignored when it came to June 2007. There is no suggestion in the fifth NSD Memo that £6,000 per month is in addition to the existing salary enhancement and, when it came to reporting on salary enhancements to the PRC in February 2008, there was no mention that the original salary enhancement was for leading on the NSD project. Mr Davies appears unilaterally to have changed the basis on which payments already being made were authorised, in order to justify additional payments going forward.

Conclusions in respect of Mr Davies

457. A number of points were made on Mr Davies' behalf to justify these extraordinary payments. First, his actions must be judged in the context of the attitudes of the time. In particular, they took place before the financial crash of 2008 and the period of austerity in the public sector that followed. Second, the GB as a whole had embraced a bonus culture, borrowing from the commercial world the idea that financial rewards could be used to incentivise performance. Third, and related to this, the fact that a very high proportion of the delegated budget went on payments to staff, far from being hidden, was a positive boast of the school. Fourth, Mr Davies and the leadership team were extremely dedicated and hard-working, giving up much of their spare time on school related matters. Fifth, this hard work and dedication paid dividends in terms of success achieved by the school and by its pupils. Sixth, it was submitted that, at worst, he was guilty of an inflated sense of his own importance and that, while this might be criticised, it was not evidence of (and indeed pointed against) deliberate misuse of school funds.

458. I have had regard, in this connection, to statements from a number of other governors and local religious leaders, put in evidence by Mr Davies under Civil Evidence Act notices, which speak to Mr Davies' good character, hard work and dedication to the school and the wider community.

459. It was also suggested that because the NSD was a commercial project, then payment at commercial rates was justified. I reject this, however. Mr Davies was not qualified to lead a project such as the NSD. Both he and Dr Evans were both paid for full-time roles at the school, and even if they had been separately well-qualified in project managing building developments, it would still have been wrong to employ them as such, while at the same time paying them to do full-time teaching jobs.

460. The Claimant, for its part, relies on further matters as demonstrating dishonesty on the part of Mr Davies, in particular his conviction for false accounting, and the fact that he procured that the school provide him with large loans for medical expenses and to buy a car.

461. I place little reliance on the conviction. It relates to the false dating of certain pay amendment slips, which recorded for each staff member the payment or salary increase awarded by some of the ad hoc memos. While Mr Davies admitted that these were created after the event, they were not in fact shown to anyone for the purposes of procuring, or explaining, any of the payments. They were superfluous to the ad hoc procedure. While the conviction evidences dishonesty in their subsequent creation, that fact alone is of little relevance to the question whether the ad hoc memos were created dishonestly.

462. I also place little reliance on the fact that Mr Davies asked for, and received, large loans for medical expenses and a car purchase. This suggests an inappropriate sense of entitlement on his part, that the school's money was there for his benefit as and when he needed it, but is not indicative of dishonesty so far as the overpayments are concerned.

463. I accept that Mr Davies worked extremely hard, that he was dedicated to the education of the students at Copland, and that he devoted most of his spare time to the school. I also accept that his hard work, and that of the staff at the school more generally, was the cause of much to be proud of at the school, in terms of educational success. Finally, I accept that he genuinely believed that, given his dedication and hard work and the success he achieved, he was worth a lot more than the basic salary of a headteacher – even a salary at the top end of the pay scale - recognised. That was particularly so, in circumstances where he was effectively doing two jobs, that of headmaster of the school and leading on the NSD.

464. I have no doubt, however, that Mr Davies also knew that the payments were made from public funds, and that those funds were subject to strict regulation which required them to be paid only for educational purposes. He knew of the STPCD, and that it imposed limits on pay. A telling point in Mr Davies' evidence was his acknowledgement that he knew that once a teacher reached the highest point on the pay spine, they could not be awarded any greater salary. He said: "*I had always believed that, um, once a person working as a school head teacher has reached the top of the spinal point, L43 for example, and couldn't go any higher, there was no other way of rewarding somebody on top of the scale, despite the size of the school and the range of duties that that person undertook. In my particular case, I undertook extra work on behalf of the – well, myself and the governors and the [kids?] at the school, and that included work on the new school development, work on the curriculum development, covering for Mr Ali --- Saturday school, and other additional duties that I took on. And I think – personally, I don't think – its not really fair to stop somebody at the top of that scale, when they are doing extra work*."

465. Notwithstanding the points made on Mr Davies' behalf, I conclude on the basis of the matters set out in paragraphs 398-456 above that he knew, in relation to many of the payments made pursuant to the ad hoc process, that they could not be justified within the rules as being for the purposes of the school. I identify in the next section the particular payments to which this conclusion applies.

466. This is the inescapable inference to be drawn from the fact that Mr Davies knew that the justifications he put forward at the time in the memos were false or misleading. Had he been genuinely seeking payments for additional tasks actually undertaken, there would have been no need for the misleading and arbitrary explanations in the memos; all that would have been necessary was a description of the task done, and the reward that it merited.

467. In my judgment, this conduct constituted a breach of his fiduciary duties.

Payments to which this conclusion applies

468. This conclusion applies to all of the payments made to Mr Davies and Dr Evans pursuant to the ad hoc procedure other than the salary increases pursuant to the first Ali Memo and the first NSD Memo.

469. I have considered carefully whether it is possible to distinguish at least some of the payments to others on the basis that Mr Davies honestly believed (as I accept) that it was a proper use of school funds to make additional payments for additional duties undertaken, and that (as I also accept) the other recipients (in particular Mr Udokoro and Ms McKenzie) did, to some extent at least, undertake additional duties. I have concluded, however, that it would be wrong to draw such a distinction.

470. In the first place, most of the payments to others were made pursuant to the same memos which authorised payments (which I have found as against Mr Davies to have been made dishonestly) to Mr Davies and Dr Evans. That fact alone makes it difficult to draw such distinction, so far as Mr Davies' state of mind is concerned. If he knew that the payments to himself and Dr Evans could not be justified on the basis put forward in the memos, then I consider it is implausible that he believed that payments made to others, at the same time and for the same purported reasons, would have been a proper use of school funds. At the very least, Mr Davies must have appreciated the risk that the payments to others could not be justified as such. That conclusion is reinforced by the following further points arising from the memos.

471. The reasoning underlying my conclusion in respect of the second to seventh Ali Memos (i.e. the claim that the payments were a redistribution of Mr Ali's salary, and a saving to the school, was false, when that salary was already permanently redistributed by the first Ali Memo) logically extends to all payments made under them to Ms Dunkley, Mr Sampong, Mr Udokoro and Ms McKenzie by those memos.

472. Moreover, my reasoning underlying the conclusion in respect of the Chalkhill Memo applies equally to payments made to Ms Dunkley and Mr Sampong under that memo.

473. The principal recipients of payments pursuant to the remaining memos were Mr Udokoro and Ms McKenzie. Many of the objectionable features of the ad hoc procedure apply equally to them: the increasingly frequent payments; the rounded, and very large, sums – with no attempt to match them to the work said to have been undertaken; the overlap with payments made by the PRC; and the fact that they were not revealed to other governors.

474. One of the principal reasons for my conclusions in respect of the payments to Mr Davies and Dr Evans was the double-counting in respect of additional responsibilities because

of the salary rises in 2004 and 2005 pursuant to the first Ali Memo and the first NSD Memo. While neither Mr Udokoro nor Ms McKenzie shared in these salary rises, there was nevertheless also substantial double-counting so far as they are concerned:

(1) Ms McKenzie, for example, received a salary increase of approximately £6,000 per year in October 2005, based on her work in relation to the payroll system, notwithstanding that earlier that same year she had already received £5,000 for the same thing pursuant to the second Ali Memo, and a salary increase of £2,500 per year.

(2) Mr Udokoro had received a pay rise of approximately £18,000 per year in August 2003 to recognise his enhanced roles in finance and legal matters.

(3) They were both paid substantial amounts by way of overtime, in addition to the payments they received for attending Saturday school and booster classes. The one-off payments pursuant to the ad hoc memos were in many cases clear duplication of such overtime.

(4) For example, in each of the first four months of 2007, they had both received additional payments of approximately £5,000 per month (Mr Udokoro) and £4,000 per month (Ms McKenzie). The most likely explanation for the payments in March and April is that they were in response to overtime claims. There is in evidence a document bearing the date "3/6/2007" which claims overtime for work done between January and April 2007. It appears, from its contents, that the date is either wrong or written in the American style (i.e. 6 March): the text in the document made it clear that the claim was being made partly in respect of hours actually done, and partly as "projection of work to be done". Each of them claimed for 232 hours of overtime. The fact that it was partly a projection explains the otherwise impossible co-incidence that each of them was claiming for exactly the same number of hours worked. In order to have justified these payments, they must have worked every spare hour of the week on school matters.

(5) In those circumstances, it is impossible to see how there was any time left to them in which they could have undertaken the "extra duties" on the NSD for which they received further payments of £10,000 and £8,000 respectively in May 2007 (pursuant to the fourth NSD Memo).

(6) This was immediately followed by a pay rise of £20,000 per year and £15,000 per year respectively pursuant to the memo dated 23 June 2007. The memo referred to the need to take on additional staff as discussed at the last FMC meeting, but there is no evidence of such a discussion in either the June or March FMC meeting minutes. Having identified the need for more staff it then suggested that Mr Davies may choose to "stay with the present (team) staffing structure" and allocate additional pay to Mr Udokoro and Ms McKenzie. If the need was for more staff, then paying existing staff more hardly met that need. Notwithstanding that pay rise, each of them continued to receive very large sums as reward for taking on additional duties: £10,000/£8,000 (Udokoro/McKenzie) pursuant to the sixth NSD Memo in October 2007; £16,000/£15,000 at the PRC meeting in February 2008; further pay rises of £15,000/£10,000 per year in April 2008; and £10,000/£5,000 on October 2008 pursuant to the seventh NSD Memo.

475. Until March 2007, the recipients of payments under the ad hoc procedure were confined to the six people I have so far identified. From March 2017 a handful of other people were included. Principal among these was Gareth Davies, Mr Davies' son. He began working at the school in July 2006 in response to an advertisement for a repairs, maintenance and development person offering a salary of £19,002. In fact, from the outset, he was paid £25,602. In January 2007 he was promoted to a repairs manager, at a salary of £36,000. Although his job expanded to assisting the DT department, this involved only about four hours a week setting up before classes. Throughout the year 2007-2008 he received £1,000 per month for working on Saturdays, and received overtime payments of over £1,000 per month. He was also awarded a bonus of £15,000 at the PRC meeting in February 2008.

476. Under the ad hoc procedure, he received: £10,000 in March 2007 (for "major impact on the school environment – painting, fencing, security, gardening and design & technology"); £8,000 pursuant to the sixth NSD Memo (for "liaison with New Dev. & project manager, site visits & meetings"); a pay rise of £10,000 per year in April 2008 (along with others for "tremendous additional work" on the NSD); and £5,000 pursuant to the seventh NSD Memo.

477. In total, Gareth Davies earned over £100,000 in 2007-2008, and over £92,000 in 2008-2009. It is not credible that Mr Davies genuinely believed that these enormous sums paid via the ad hoc procedure could be justified as a proper use of school funds, in respect of someone employed as a maintenance manager. The sums are defended on the basis that the school was saving money on paying outside contractors on essential maintenance. I have already noted, however, that these savings were being made at the expense of the appalling condition of the building, following the decision to await the new school. In any event, it cannot be a proper use of public funds to justify an *over*payment to a member of staff simply because the school is saving money from not paying outside contractors.

478. Other recipients included Mr Anthony Whytock (Mr Davies' son in law), Mr Nitesh Desai (who worked mostly as Mr Davies' personal driver) and Mrs Leslie Fields (Dr Evans' wife). They each received one-off payments in October 2007, substantial further pay rises in April 2008 and further one-off payments in October 2008, all for working on the NSD.

479. Taking into account (1) that these additional recipients, singled out from the rest of the staff at the school, were in all but one case close family of Mr Davies and Dr Evans, (2) these people also received large bonuses in February 2008 (also primarily for their work on the NSD), (3) the large, rounded, sums with no attempt to match the payment to the extra hours of work undertaken, (4) the cumulative effect of the payments over time, including the doubling up of salary increases and one-off payments; and (5) my finding that by this stage Mr Davies was causing enormous sums to be made to himself, Dr Evans, Mr Udokoro and Ms McKenzie which he knew could not be justified on the basis being asserted in the memos, I find that Mr Davies was also aware that these additional payments were not in the interests of the school. At the very least, he must have appreciated that risk.

480. Accordingly, I conclude that the payment of all sums pursuant to the ad hoc memo procedure (excepting only the first Ali Memo and the first NSD Memo) constituted a breach of Mr Davies' fiduciary duties.

481. I exempt from this conclusion, however, payments pursuant to a memo signed by Mr Davies alone dated 13 August 2007, to various support staff for "additional duties and special projects". This was not part of the ad hoc procedure at all, as it was not authorised by Dr Patel and Mr Day. The amounts are relatively small and I consider, on balance, that Mr Davies would have regarded these as being for the benefit of the school, rewarding particular staff for special projects undertaken during the school holidays.

Saturday School

482. The Claimant additionally claims £9,600 from Mr Davies as overpayments in respect of Saturday school and booster classes. Ms McKenzie informed Mr Davies in a memorandum dated 20 April 2009 that it had come to light that he may have been overpaid. He confirmed in manuscript that he had been overpaid for 39 sessions, at £400 a time and agreed to repay that sum. In evidence he said that he had repaid approximately £6,000, but the remainder is outstanding. His acknowledgment and part payment of this debt was within six years of the commencement of this action, and thus not time barred: s.29(5) of the Limitation Act 1980. There is no defence to the Claimant's claim to recover that sum. It is irrelevant, therefore, to determine whether each claim in respect of these 39 sessions was made fraudulently. At best, for Mr Davies, the fact that he claimed for so many sessions that he did not attend indicates a cavalier attitude towards use of the school funds for his own needs.

F(5)(ii) Dr Patel and Mr Day

483. I focus, in considering whether Dr Patel and Mr Day are liable for breach of fiduciary duty by dishonestly diverting the Claimant's funds, on the payments authorised by them pursuant to the ad hoc procedure. For reasons which reflect my conclusions in connection with the conspiracy claim, I find that Dr Patel and Mr Day did not act dishonestly in approving the bonuses awarded at the PRC meetings.

484. A reasonable person in the position of Dr Patel and Mr Day ought to have realised, based on my findings in connection with the claim against Mr Davies, that many, at least, of the ad hoc payments could not be justified. Had Dr Patel and Mr Day (1) applied their minds to the detail of each of the memos and (2) kept in mind the cumulative effect of all payments made by them, then they could not have failed to appreciate many of the things that I have found rendered the payments improper.

485. For example, they would then have appreciated the inherent double-counting (and false claims) throughout the second to seventh Ali Memos and they would have appreciated that, after November 2005, yet further payments to Mr Davies and Dr Evans for working on the NSD in the amounts awarded pursuant to the later memos could not be justified.

486. In order for the Claimant to establish that they acted in breach of fiduciary duty by dishonestly diverting the Claimant's funds, however, it is not enough to show what a reasonable person should have appreciated. The critical question is whether they *did* appreciate this (or were recklessly indifferent) or whether, as they maintained throughout their evidence, they gave no thought to whether the payments were justified (and thus did not appreciate that they might not be) because they relied solely on what they were told in the memos by Mr Davies, and trusted that he and Dr Evans would not

seek their approval for improper payments. (While this is in itself reckless conduct, and demonstrates a high level of incompetent governance, it is not dishonest, unless the risk that the payments were for an improper purpose was appreciated and ignored: see paragraph 375 above)

487. In considering Dr Patel's and Mr Day's state of mind, there are a number of overarching factors which count in their favour.

(1) First, they were volunteer governors, who dedicated much of their spare time to helping at the school. Dr Patel, in particular, worked very long hours on top of his full-time medical practice, in trying to deliver the NSD. I have no doubt that both of them were genuine in their desire to better the lot of the pupils and the local community.

(2) Second, despite attempting to do so, the Claimant has failed to identify any credible motive for why Dr Patel or Mr Day would have been party to deliberate misuse of public money (see paragraphs 314ff above). While motive is no part of any cause of action pleaded against them, I consider it to be a highly relevant factor in considering whether they acted dishonestly.

(3) Third, they are both men with otherwise untarnished reputations.

(4) Fourth, the culture at the school, already well established by the time the ad hoc procedure commenced, was one of heavy investment in, and the rewarding of, staff by remuneration for additional duties and the payment of bonuses. This culture was reflected in a report by Mr Davies to the FMC in June 2005: "he was very pleased to announce that Copland was one of the highest paying schools in the borough. Copland actually pay their staff approximately 83% of the budget."

(5) Fifth, this was part of a broader policy of incorporating practices from the public sector as a way of incentivising staff: see the evidence of Mr Deshmukh referred to at paragraph 185 above. It is important not to view the events at the school with the benefit of today's policy – which appears to be firmly set against the payment of bonuses. To the governors, there was plenty of corroborative evidence that the policy of incentivising staff was reaping dividends in terms of success.

(6) Sixth, Mr Davies was undoubtedly a forceful and persuasive character. Not only that, but he was a publicly lauded and successful headteacher. By 2005, he had been at the school for seventeen years. During that time there had been no cause to doubt his reputation for dedication and integrity. As I have noted in section A above, the school was consistently receiving positive reports from Ofsted and from Brent's School Improvement Services.

(7) Seventh, reflecting their part-time and volunteer status, governors of a school are necessarily dependent to a large degree on what they are told by the headteacher and other staff at the school. This is particularly so where payments to staff other than Mr Davies were concerned, where Dr Patel and Mr Day were wholly reliant on Mr Davies' recommendations (whether at PRC meetings or through the ad hoc procedure).

(8) Eighth, the NSD was, if not unique, a highly unusual venture for a school to embark on, as Mr Davies consistently reminded Dr Patel and Mr Day in the memos. Dr Patel was closely involved in it throughout and would have seen the substantial time and effort put in by Mr Davies. It is important to view these payments without the hindsight that the project was ultimately a failure. While the fact that it encountered significant difficulties from 2006 onwards is a reason to doubt whether bonuses paid on the basis of success could have been justified at the time, nevertheless to the extent that Dr Patel and Mr Day were being asked to approve payments to reward the additional work being carried out, I accept that from their perspective those difficulties would appear to have given rise to an even greater workload. It would be understandable, in these circumstances, that Dr Patel and Mr Day would be influenced by Mr Davies' description (which he first used in the first NSD Memo) that he was holding the equivalent of two headships. Mr Day's reliance on Dr Patel's prior approval of NSD related payments is more understandable, given Dr Patel's close involvement with the project.

(9) Ninth, it is plausible that the persuasive drafting in the memos made it more difficult to question the claims made in them. These included: the glowing terms in which Mr Davies' achievements and those of other staff were praised in the memos; the level of detail put into them; the repeated references to achievements peripheral to the subject of the memo to justify the payments being made; and the references to the amount of money being saved for the school, e.g. in the Ali Memos and the third NSD Memo ("Had we even considered paying external contractors to carry out your tasks, I have no doubt it would have cost the school a small fortune.").

488. I bear all of these points (the "paragraph 487 considerations") in mind in determining their state of mind at the relevant times. On the basis of the first three points alone, it is sufficiently inherently improbable that Dr Patel and Mr Day knowingly or recklessly misused public money, that cogent evidence is required to prove on the balance of probabilities that they did so. I also bear in mind that the cogency of such evidence as exists going to their state of mind has reduced over time, that in this case the distance since the relevant events is more than a decade and that this is down in large part to delay on the part of the Claimant, whose burden it is to establish their knowledge of impropriety.

489. These considerations must, however, be balanced against the following.

490. First, the increasing unlikelihood, during the period when the ad hoc procedure was in force, that Dr Patel and Mr Day did not appreciate, at the very least, the risk that the payments could not be justified as being in the interests of the school, given their size, frequency and cumulative effect. As the Supreme Court noted in *Ivey v Genting Casinos (UK) Limited* [2017] UKSC 67, at [74] (quoted below at paragraph 551), the reasonableness or otherwise of a person's belief is "…a matter of evidence (often in practice determinative) going to whether he held the belief…".

491. Second, the extent to which the procedure was in flagrant breach of statute, regulations and school policies (the relevant parts of which are referred to in section D(1) above) designed to ensure compliance with the fundamental requirement that payments were made only for the purposes of the school.

492. These included the requirement in the STPCD that the annual determination of pay for the headteacher and deputy head was based on a review of performance against previously agreed objectives, and that there could be no movement up the pay spine unless the decision-making body was satisfied on the basis of that review that "there has been a sustained high quality of performance by him, having regard to the performance objectives…" (see paragraphs 7.2, 7.3, 13.2 and 13.3 of the STPCD).

493. They also included the "whole school" policy (as set out in pay policy 44), which precluded decisions relating to any group of staff being taken in isolation, and instead required all pay decisions to be taken in the context of the school as a whole, using fair, transparent, and objective criteria.

494. It was also a clear requirement that any teacher should be excluded from a decision as to his or her own pay.

495. Dr Patel and Mr Day would have known these requirements, if only because they were followed at PRC meetings. The PRC considered payments to each staff member in the context of payments to all staff. When considering additional payments to Mr Davies, it took into account the annual performance review carried out by, or with the assistance of, external advisors. The evidence of all those attendees at PRC meetings who gave evidence was that the meetings lasted some time, and that there was discussion between the members of the committee. To avoid conflicts of interest, Mr Davies and Dr Evans would withdraw while the committee deliberated.

496. The ad hoc procedure was a stark contrast. There was a clear breach of the whole school policy. The recipients were restricted to a handful of staff, the same individuals came up all the time, and by far the largest amounts were paid to Mr Davies and Dr Evans, the very people presenting the memos for payment. On some occasions, they were the only recipients of payments. There was never any attempt to consider the payments in the context of the staff as a whole. There was no independent review of Mr Davies' performance. There was never any call for evidence of any kind to justify that the work claimed for had been done. There is no evidence of any deliberation between Dr Patel and Mr Day. Dr Patel relied solely on what Mr Davies told him, and Mr Day relied merely on the fact that Dr Patel had seen fit to approve the payments, and his belief that Mr Davies and Dr Evans would not ask for something that was improper or unaffordable.

497. Dr Patel and Mr Day cannot have failed to see the inherent conflict in relying upon what they were presented with by Mr Davies and Dr Evans, in so far as payments to the two of them were concerned.

498. Dr Patel and Mr Day knew that the onus of exercising the GB's function of making decisions on pay rested – so far as the ad hoc procedure was concerned – on them, and them alone. Neither of them told the GB that they were unquestioningly accepting whatever Mr Davies said in the ad hoc memos.

499. The third factor to weigh in the balance is the conduct of Dr Patel and Mr Day in the weeks following the publication of Mr Roberts' dossiers.

500. As to this, the Claimant points, first, to a press release dated 6 April 2009, sent in the name of Dr Patel as chair of governors. This stated that Copland prided itself on paying

all of its staff very well, and that all salaries and bonuses were awarded legitimately through the PRC, which met every year. It revealed that Mr Davies had been paid a bonus of £80,000 in the previous year, and £50,000 in the year before that. It justified these by reference to the same factors that had been set out in the PRC presentation documents over the years: the NSD, assisting at a local primary school in special measures, attracting £300,000 sponsorship, and running a successful Saturday school. The press release is particularly notable for what it did not say: it made no reference to any additional payments made to anyone else, and failed to mention the vast sums paid to Mr Davies in addition to the two bonuses referred to, during the same period.

501. While sent out under Dr Patel's name, I have little doubt that Mr Davies' hand lay behind this press release, as evidenced by the fact that it focused solely on him, and reflected the language used in the PRC presentation documents and ad hoc memos which were authored by him. Nevertheless, I find that it is inconceivable that Dr Patel and Mr Day – as chair and vice-chair of governors – were not at least aware of its contents at the time.

502. The Claimant points, secondly, to a letter dated 25 April 2009 to all the governors, purportedly from Dr Patel, although not in fact signed by him. The letter stated that "all decisions of the [PRC] are endorsed by the [FMC] who report to the [GB]. Decisions of the [PRC] have been acted upon once endorsed by both the [FMC] and the [GB]." This was patently untrue, as was pointed out to Dr Patel in a letter from Mrs Davidson dated 4 May 2009. Moreover, it made no mention at all of the payments made via the ad hoc process. Dr Patel claimed in evidence that he had not written (or even seen) the letter of 25 April 2009 before preparing his witness statement. I find it inconceivable, however, that he was not at least aware of it, given that it was expressly referred to in Mrs Davidson's reply to him dated 4 May 2009. Dr Patel claimed also not to have seen Mrs Davidson's letter at the time, but I do not accept that, noting that it was addressed to him at his surgery.

503. Third, the Claimant refers to a letter written by solicitors acting for Dr Patel and Mr Day on 20 August 2009, which stated that all bonuses were considered by the PRC, but that the PRC did not have power to award bonuses, so all payments were only made once approved by the FMC (which had power to "grant, reduce or completely reject the proposed bonus") and by the GB, to which the decision was taken "for the final decision". This was again untrue. So far as Dr Patel is concerned, he was not in the country at the time this letter was sent, and the letter implicitly recognised that full instructions had not been taken from him. No such excuse can be made for Mr Day, however.

504. The fact that Dr Patel and Mr Day made these false explanations, after Mr Roberts' dossiers had become public, does not in itself indicate dishonesty on their part at the time they approved each of the payments. Nevertheless, their reaction does demonstrate that – when attention was focused on the details of the memos and their cumulative effect – they appreciated the lack of proper justification for the payments.

505. Taking into account the paragraph 487 considerations, I am satisfied that at the outset of the ad hoc procedure, Dr Patel and Mr Day did in fact trust Mr Davies and were not alerted to the risk of impropriety. Balancing, however, the competing factors identified in paragraphs 490-504 above, there came a point, certainly by the time of the sixth NSD Memo in October 2007, as explained in the following paragraphs, when Dr Patel and

Mr Day must have appreciated – at the very least – the risk that the payments being sought could not be justified as being in the interests of the school, but chose not to challenge Mr Davies or otherwise satisfy themselves that the payments were a proper use of school funds.

Payments in and after October 2007

506. The lack of any possible justification for the payments of £50,000 (for Mr Davies) and £30,000 (for Dr Evans) in October 2007 (for their hard work on the NSD), in circumstances where just four months previously they had been awarded pay rises of, respectively, £72,000 per year and £48,000 per year, for the very same thing, means that the credibility of Dr Patel's and Mr Day's position that they did not appreciate even the risk of impropriety is stretched to breaking point.

507. Neither of them could recall whether they had these salary increases in mind when approving the sixth NSD Memo. Indeed, they could not now recall approving those salary increases at all. Their case in closing - that their signatures on the fifth NSD Memo were forged (which I have rejected) - indicates the difficulty they now appreciate it presents for them.

508. There is no suggestion by them (in contrast to the Ali Memos) that the October payments might have been replacement for the earlier salary increases. Indeed, there was reference to those salary increases "approved by the Chair and Vice-Chair of Finance in June 2007" in the PRC presentation document just a few months later in February 2008. If it was the case that Dr Patel and Mr Day had authorised the payments pursuant to the sixth NSD Memo, having forgotten about the salary increases a few months earlier, then they would surely have been shocked on being reminded of those salary increases in February 2008.

509. In these circumstances, and given the size of the salary increases, I find that Dr Patel and Mr Day must have been aware of them when they signed off on the sixth NSD Memo.

510. Dr Patel and Mr Day were unable to offer any convincing explanation to justify the payments made in the sixth NSD Memo. When challenged that these payments were unjustified, Dr Patel merely repeated his evidence that Mr Davies came to him, that the staff knew how much work they had done, and he wasn't there to monitor 24 hours a day. Mr Day's evidence was similar: "we were being brought these recommendations for payment. We were being told that they were affordable. We were being told that they are lawful and legal and that they were appropriate, and we trusted the team that were bringing this information to us."

511. Much was made by the Claimant of the financial position of the school overall, and its decaying physical state. I do not place much reliance on this, as against Dr Patel and Mr Day, largely because the overpayments were either justified on their own merits or they were not. If they were not, it would not have mattered if the school was awash with funds. If they were, then even if Dr Patel and Mr Day knew there were other matters on which the money could better have been spent, that might amount to bad judgment, but not a breach of fiduciary duty. I also accept Dr Patel's and Mr Day's evidence that they believed the payments were affordable, in the sense that they were within the budget, although that was, objectively, of little relevance since Dr Evans

built into each year's budget the total remuneration to staff in the prior year, including all bonuses and additional payments.

512. More significant is the fact (as I have found) that these payments were not revealed to the PRC meeting in February 2008. This suggests a desire for secrecy that is inconsistent with an honest belief that the payments were justified. The following points can be made, in defence of Dr Patel and Mr Day:

(1) Mr Davies (as I have noted above) believed that the parallel processes served different ends. The PRC meetings were about rewarding success across the school, whereas the ad hoc procedure was for rewarding additional duties undertaken by particular staff members. He would have very likely made this point to Dr Patel and Mr Day at the time.

(2) It is instructive to see what was revealed to the PRC meetings, at least in February 2008 and January 2009, namely previously awarded salary increases which were intended to continue. In other words, it seems a distinction was drawn between payments which had been made pursuant to what Dr Patel and Mr Day understood to be their delegated authority, where the PRC had no function, and ongoing payments, where the PRC was asked to approve them.

(3) There was a culture of secrecy surrounding bonuses at the school which bordered on paranoia. While (see section D(1) above) this was itself contrary to regulation and school policy, it was followed throughout the school and not the subject of any criticism from Mr Bryant. The fact that matters were not reported back to other committees (e.g. PRC decisions not reported to the FMC or the GB) was a fact of life within the school.

(4) Mr Davies was very much in control of the information flow to the PRC. It was he who drafted the PRC presentation document. Consistent with their attitude to him throughout, it is likely that Dr Patel and Mr Day did not think to question Mr Davies' approach.

513. These points have force in relation to the 2005 and 2006 PRC meetings, where the separation between bonuses and payments for additional duties was clearer. The position is different, however, as regards the failure to bring to the attention of the PRC meeting in February 2008 the payments made pursuant to the sixth NSD Memo. On this occasion the PRC presentation document was headed "New School Development" as well as "Sharing in Success", and the principal justification given for the bonuses recommended was the enormous work done on the NSD. The relevance of the fact that Mr Davies and Dr Evans had only months earlier been awarded £50,000 and £30,000 respectively for precisely the same thing, to a consideration of bonuses recommended of £55,000 and £43,000 respectively, must have been obvious to Dr Patel and Mr Day.

514. Given the inescapable inference that Dr Patel and Mr Day must have seen the difficulty in justifying the payments in October 2007 to Mr Davies and Dr Evans so soon after the salary increases, their failure to reveal these payments to the PRC, and their inability to offer any justification for them (other than their default position that they would have trusted Mr Davies), I am driven to the conclusion that at this point they must have realised there was at least a risk that these payments were not a proper use of school funds, but chose not to challenge or question Mr Davies. Equally, I am driven to infer

that by this point they wished to keep from other governors the extent of the payments they had authorised via the ad hoc procedure. Their reaction on the payments becoming public in April 2009 (see paragraphs 499ff above) supports this view. Whether they did not question Mr Davies because they felt unable to do so, intimidated by his reputation, or because they felt that Mr Davies was such a force for good in the school, and so essential to the NSD project, that it was better not to rock the boat, is immaterial. Either way, the awareness of the risk that these payments could not be justified, but authorising them regardless, was sufficient to constitute a breach of fiduciary duty.

515. I have reached this conclusion by reference to the payments to Mr Davies and Dr Evans in the sixth NSD Memo. Having once appreciated the risk that these payments could not be justified, however, I find it inconceivable that Dr Patel and Mr Day were not similarly aware of the risk that payments to others sought in the same memo were not justified. It is similarly not credible that they were unaware of the risk that subsequent payments sought via the ad hoc procedure could not be justified. Once having been alerted to that risk, and never taking any step subsequently to challenge Mr Davies or make enquiries to satisfy themselves as to the propriety of these or later payments, it is implausible to think that either of them could thereafter have forgotten their concerns.

516. Accordingly, I find that – at least from the time of the sixth NSD Memo on 15 October 2007, Dr Patel and Mr Day were recklessly indifferent to whether the payments being sought by Mr Davies by the ad hoc memo procedure were in the interests of the school. By their own admissions, they never took any step to question Mr Davies or otherwise satisfy themselves as to the propriety of the payments.

517. I turn to consider the payments made pursuant to the ad hoc procedure before October 2007.

Payments in 2005

518. It follows from my findings in connection with Mr Davies' liability for breach of fiduciary duty, that neither Dr Patel nor Mr Day had any reason to question the propriety of the salary increases authorised by the first Ali Memo and the first NSD Memo

519. In relation to the second Ali Memo, the critical question is whether Dr Patel and Mr Day appreciated that because the salary increases pursuant to the first Ali Memo were continuing, the payments recommended in the second Ali Memo resulted in double-payment for the extra duties, as opposed to a saving for the school.

520. I am satisfied that their default position at the time was to trust what they were told by Mr Davies. Faced with a memo from someone they trusted implicitly, which explained in some detail how the school was saving money from these payments, with the inclusion of a calculation to prove how that was so, the idea that Mr Davies would be actively misleading them would have been far from Dr Patel's and Mr Day's minds. From the stamp appearing under Dr Patel's signature, it appears that it was taken to him at his surgery to sign, which would explain why he might have given it only cursory attention.

521. Mr Day clearly recognises (now) the difficulty in justifying the payments in the second and later Ali Memos if they were intended to be in addition to, rather than a replacement for, the salary increases in the first Ali Memo.

522. In his witness statement, he referred to the fact that he had added, under his signature on the memo, "first 5/12 of year", and said (expressly by way of reconstruction) that he must have meant to convey that "as Mr Davies and the other recipients had already received increased salary payments for the work done in covering Mr Ali's role, and other changes in job description, they had already had an increase and they should not have it again." In relation to later Ali Memos, he says that had he known they were in addition to the £1,500 per month that Mr Davies was getting pursuant to the first Ali Memo, then "I would have had concerns."

523. In cross-examination, he suggested that he recalled a discussion to the effect that the second Ali Memo was a replacement for the first, but could not remember who that was with. He candidly accepted that he would not have thought the pay rises made to the other three staff members by the first Ali Memo would have ceased, to be replaced by the payments in this memo. He says that he thought that there may be problems with the unions in trying to decrease someone's salary. He did think, however, that the payment of £1,500 per month to Mr Davies would cease.

524. This was clearly reconstruction, not recollection. Nevertheless, the very fact that Mr Day added the words "first 5/12 of the year" indicates he thought that this redistribution of Mr Ali's salary related to a specific time period. That in turn provides some support for the conclusion that he did not have in mind the fact that the salary had already been redistributed for the whole year.

525. Taking account of the paragraph 487 considerations, the fact that Mr Davies explicitly told them that this division of Mr Ali's salary would result in a saving to the school, and in particular that their default position would have been to trust Mr Davies, I find that Dr Patel and Mr Day did not appreciate at the time that the justification put forward by Mr Davies in the second Ali Memo was false.

526. That finding is important in relation to the remainder of the Ali Memos. If Dr Patel and Mr Day believed, from March 2005 onwards, that the additional work Mr Davies had told them was being undertaken following Mr Ali's retirement was being rewarded by one-off payments, rather than permanent salary increases, then they would not have been surprised to see repeat requests over a period of time. In relation to the third Ali Memo, for example, while no-one was able to explain the reference in it to 7/12th of that part of Mr Ali's salary saved by his semi-retirement, there is a logical connection between it and the 5/12th reference in Mr Day's handwriting on the second Ali Memo, suggestive of at least some expectation that these one-off payments were related to different time periods.

527. Turning to the second NSD Memo, Mr Davies set out in it details of the assistance given by various staff members in relation to the judicial review application. The reasons the payments to Mr Davies and Dr Evans were objectionable are the existing salary increases and the consequent doubling of payments for the same work.

528. For the reasons I have already expressed, I consider it plausible that Dr Patel and Mr Day nevertheless took Mr Davies at his word. An important factor in Dr Patel's favour is that the judicial review challenge would have been seen as a serious threat to the NSD, so that seeing it off justified a reward. In the context of a culture of incentivising staff by rewarding results, I can understand that Dr Patel (and thus Mr Day) would not have appreciated the risk of impropriety in these payments.

Payments between January 2006 and June 2007

529. Having concluded that at the outset of the ad hoc process Dr Patel and Mr Day genuinely trusted Mr Davies but, by the end of the process, they appreciated the risk that he was seeking payments that could not be justified, it is necessary to consider at what point in between, if any, mere incompetent governance became reckless indifference to the propriety of the ad hoc payments.

530. Alarm bells certainly *should* have been rung in early 2006 when, just two months after £35,000 was shared between Mr Davies and Dr Evans for covering for Mr Ali under the fourth Ali Memo, the same amount was paid again, for precisely the same reason, under the fifth Ali Memo. While it is true that the fourth Ali Memo also relied on the work done in obtaining sponsorship from the Hobson charity, Mr Day accepted in evidence that the Hobson family would have been horrified to learn that their sponsorship was relied on to pay bonuses to staff.

531. Further, the proximity of the payments under the third NSD Memo and those awarded at the PRC meeting in July 2006 ought to have been cause for concern.

532. Doing my best, however, to put myself in the position of Dr Patel and Mr Day at the time, excluding the knowledge of the later payments, and remembering that they had hitherto had no reason not to trust Mr Davies, I find on the basis of the paragraph 487 considerations that the Claimant has not established dishonesty in relation to these payments.

533. I reach the same conclusion in relation to the sixth Ali Memo (September 2006). In the fifth Ali Memo it had been stated that the position would be revisited in the new academic year. If (as I have found) neither Dr Patel nor Mr Day had in mind the continuing effect of the first Ali Memo, then it is plausible that this further request would not have alerted them to the risk of impropriety.

534. In the first half of 2007, however, the number of triggers for alarm increased substantially. First, there was a yet further request for payments (totalling £63,000) pursuant to the seventh Ali Memo. Not only was this in the same academic year as the sixth Ali Memo, but it was expressed to cover at least part of the same period as that earlier memo. Second, within a period of five months, Mr Davies and Dr Evans received, respectively, £25,000 and £20,000 on three separate occasions: pursuant to the seventh Ali Memo, the Chalkhill Memo and the fourth NSD Memo. For Mr Davies, that meant he had received three-quarters of his annual salary, supposedly for carrying out additional duties notwithstanding that he was already contracted to work full-time for the school, within the first five months of the year. Third, there are the numerous problems with the Chalkhill Memo I have described above (at paragraphs 452-455), chief among which is the obvious point that rewarding teachers from Copland's funds for working at another school during the school day is obvious double-payment.

535. The cumulative effect of these points, while not necessarily apparent in January, must have been clearly apparent by May. By the time of the fourth NSD Memo in May 2007,

therefore, when asked to approve payments of £25,000 and £20,000 for Mr Davies and Dr Evans, knowing that they had each received double that amount in the previous four months, the risk that these payments could not be justified by any additional work was so obvious that I find it impossible to believe that Dr Patel and Mr Day did not appreciate it. When combined with the fact that the requests for payment came from the very persons to whom the lion's share of the payments was to be made, I find that this was inconsistent with an honest exercise of the powers and duties vested in them as governors. It amounted at least to reckless indifference.

536. It follows that I find that, when they approved, just one month later, enormous pay increases, for working on the NSD, of £72,000 and £48,000 respectively, they were at least recklessly indifferent to whether those were proper payments. I have already noted that Dr Patel and Mr Day could provide no explanation for what justified these sudden pay increases in June 2007 and, on the contrary, their position has been that they did not in fact sign the memo.

537. I recognise that the identification of the precise point at which Dr Patel's and Mr Day's state of mind changed from objectively reckless (though not dishonest) trust in Mr Davies to subjective recklessness (and thus dishonesty) is difficult, in view of the passage of time and the lack of reliable direct evidence as to their state of mind at the time. It depends primarily on finding when the weight of the paragraph 487 considerations is overbalanced by the cumulative weight of unreasonableness of the overpayments. I emphasise, however, that in undertaking this exercise, I have – bearing in mind that the onus that lies on the Claimant and the need for cogent evidence to reach such a finding – afforded the benefit of the doubt to Dr Patel and Mr Day, such that I have concluded against them only when the point was reached where I can see no credible alternative explanation for their continued approval of the payments.

538. For the above reasons, I find that Dr Patel and Mr Day were guilty of breach of fiduciary duty in approving payments made pursuant to the ad hoc memos from May 2007 onwards, in that they were at least recklessly indifferent to whether those payments were justified as being in the interests of the school, and made no attempt to challenge Mr Davies or make any enquiries so as to satisfy themselves as to the propriety of the payments. For the reasons I have set out at paragraph 515 above, I reach the same conclusion in relation to all payments authorised by them pursuant to the ad hoc procedure thereafter.

539. I have considered whether it would be right to exclude the payments of the enhanced salary approved in June 2007, on the basis that it appears that its continuation was approved at the PRC meeting in February 2008. The failure to inform the PRC of the one-off payments that were made to Mr Davies and Dr Evans for work on the NSD (which had the effect of doubling those salary increases for that year), however, negates Dr Patel's and Mr Day's ability to rely upon PRC approval for those payments to excuse their breach of duty in authorising them in the first place. It might be said that on the same logic the totality of the bonuses awarded at the PRC meeting in February 2008 were paid – in part at least – as a result of Dr Patel's and Mr Day's breaches of duty. That would risk, however, double-counting as against Dr Patel and Mr Day. If, as I have concluded, the approval of bonuses at the PRC meetings, per se, was not dishonest conduct, and it is the approval of the ad hoc overpayments and the failure to bring them to the attention of the PRC which is wrongful, then that wrongdoing is compensated by requiring Dr Patel and Mr Day to account for the ad hoc overpayments.

540. Even before May 2007, the reason I have concluded that Dr Patel and Mr Day were not guilty of dishonesty is because I accept that they did no more than rely, without question, upon what Mr Davies told them. This amounted to a wholesale failure to give any consideration to the requests made in the ad hoc memos, at least from the date of the second Ali Memo. It is arguable that spending the Claimant's money, while completely abdicating the responsibility vested in them to exercise a discretion as to that spending, is capable of constituting a breach of fiduciary duty even in the absence of dishonesty. In circumstances, however, where the Claimant advanced a claim based only on dishonesty and there was no alternative case advanced at trial, so there was no opportunity for Dr Patel and Mr Day to meet it, it would not be fair to them to reach any conclusions in this respect. By May 2007, for the reasons I have given above, the failure to exercise their own minds but to rely blindly on Mr Davies is properly to be characterised as reckless indifference so as to satisfy the test for dishonest breach of fiduciary duty.

F(6) Defence under s.50(7) of the SFFA

541. Section 50(7) of the SSFA provides that:

> "The governors of a school shall not incur any personal liability in respect of anything done in good faith in the exercise or purported exercise of their powers under subsection (3) or (6)."

542. Mr Pester on behalf of Dr Patel and Mr Day submitted that the statutory defence is available to them unless they acted dishonestly. The Claimant, in reliance principally on *Niru Battery Manufacturing Company v Milestone Trading Ltd* [2004] QB 985, submitted that a lack of good faith is not to be equated with dishonesty. The precise meaning of the term, however, is not necessarily the same in different contexts, and the *Niru* case concerned the meaning of good faith in the context of the defence of change of position to an action in restitution based on mistaken payment. In the context of s.50(7), I accept Mr Pester's submission that an absence of good faith requires a level of conscious impropriety that is indistinguishable from the test for a dishonest breach of trust. The provision is concerned with protecting those who provide a voluntary service, and there are sound policy reasons for enabling them to avoid personal liability unless they have acted with conscious impropriety.

543. In any event, in light of my conclusion as to their state of mind, it follows that they are unable to rely on the statutory defence even on the test of good faith advanced on their behalf.

544. Accordingly, I conclude that the statutory defence in s.50(7) does not apply.

F(7) Limitation in respect of claims for breach of fiduciary duty

545. The limitation period for claims for breach of fiduciary duty is 6 years from the date on which the cause of action accrued, unless either:-

(1) it is a claim "in respect of any fraud or fraudulent breach of trust to which the trustee was a party": s.21(1)(a) of the Limitation Act 1980; or

(2) it is a claim "to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee or previously received by the trustee and converted to his use": s.21(1)(b) of the Limitation Act 1980.

Mr Davies

546. The claim against Mr Davies falls, in part, under s.21(1)(b) and, in whole, under s.21(1)(a).

547. In *Burnden Holdings (UK) Ltd v Fielding* [2017] 1 WLR 39, the Court of Appeal held that s.21(1)(b) extended to claims against defaulting fiduciaries for an account of profits or equitable compensation in respect of the value of assets obtained by them pursuant to a breach of trust. In other words, the subsection was not limited to proprietary claims in respect of property still retained by the defaulting fiduciary. The case went on appeal to the Supreme Court ([2018] 2 WLR 885; [2018] UKSC 14]), but there was no appeal against this conclusion (see Lord Briggs JSC at [13]).

548. Accordingly, no limitation period applies to the claims for breach of fiduciary duty against Mr Davies in respect of payments made to him pursuant to the ad hoc procedure.

549. A breach of trust is fraudulent if the trustee acts dishonestly: *First Subsea Limited* [2017] EWCA Civ 186 (at [64]): "For a breach of trust to be fraudulent it is not enough to show that it was deliberate. There must also be an absence of honesty or good faith. This can include being reckless as to the consequences of the action complained of."

550. Dishonesty is primarily a jury concept, characterised by recognition rather than definition: *Ivey v Genting Casinos (UK) Limited* [2017] UKSC 67, [2017] 3 WLR 1212, at [53]. It has long been held, in the civil law context, to be an objective test: see *Barlow Clowes International Ltd (in liquidation) and others v Eurotrust International Ltd* [2006] 1 W.L.R. 1476, per Lord Hoffmann at [10]:

> "Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a Defendant's mental state would be characterised as dishonest, it is irrelevant that the Defendant judges by different standards. The Court of Appeal held this to be a correct state of the law and their Lordships agree."

551. The test to be applied is that set out at [74] of the judgment of the Supreme Court in *Genting Casinos*:

> "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the Defendant must appreciate that what he has done is, by those standards, dishonest."

552. In the *Barlow Clowes* case, the Judge had found (1) that the Defendant had strongly suspected that the funds passing through his hands were moneys which Barlow Clowes had received from members of the public who thought that they were subscribing to a scheme of investment in gilt-edged securities, (2) that, if those suspicions were correct, no honest person could have assisted Mr Clowes and Mr Cramer to dispose of the funds for their personal use and (3) the Defendant consciously decided not to make inquiries because he preferred in his own interest not to run the risk of discovering the truth. The Privy Council (at [12]) concluded that "by ordinary standards such a state of mind is dishonest". The fact, as the judge found, that the Defendant had an "exaggerated notion of dutiful service to clients, which produced a warped moral approach that it was not improper to treat carrying out clients' instructions as being all important", and as such may well have lived by different standards and seen nothing wrong in what he was doing, was irrelevant.

553. Applying the *Genting* test to Mr Davies, while he genuinely believed that he and others were doing excellent work and that he was worth more than the STPCD pay scales allowed for, he nevertheless appreciated that the claims asserted in the ad hoc memos could not be justified within the rules. In my judgment, ordinary decent people would have regarded this use of public money, intended to be used for the benefit of the education of pupils at the school, yet purportedly justified by misleading and exaggerated claims as to the work undertaken, as dishonest.

554. In these circumstances, the claims of breach of fiduciary duty against Mr Davies are not time-barred, and I do not need to consider whether the limitation period could be extended pursuant to s.32 of the Limitation Act 1980.

Dr Patel and Mr Day

555. My finding of reckless indifference against Dr Patel and Mr Day as to the payments in respect of which I have found them liable, is sufficient to satisfy the test of dishonesty in s.21(1)(a) of the Limitation Act 1980: see paragraph 549 above. No limitation period, therefore, applies and it is unnecessary to consider the application of s.32 of the Limitation Act 1980.

G. Knowing receipt of funds paid in breach of fiduciary duty

556. A claim for knowing receipt potentially lies against each of the first to fourth Defendants. (As against the first Defendant, however, it is academic in light of my findings that in causing the payments to himself to be made he acted in breach of fiduciary duty. The Claimant is entitled to recover the payments on that basis. Nevertheless, if I was wrong to have found that the payments to him were the consequence of *his* breach of fiduciary duty, but right to have found that they were the consequence of breaches of fiduciary duty by Dr Patel and Mr Day, then it would follow from my above findings as to Mr Davies' state of mind that his receipt of those payments was unconscionable.)

557. The elements of the claim are: (1) a disposal of assets in breach of fiduciary duty; (2) beneficial receipt of assets by the Defendant which are traceable as representing the assets of the Claimant; and (3) knowledge on the part of the Defendant that the assets are traceable to a breach of fiduciary duty (*El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685, at 700g, per Hoffmann LJ).

558. The requisite knowledge, in the context of a claim for knowing receipt, is such knowledge as to make it unconscionable for the Defendant to retain the benefit of the receipt: *BCCI (Overseas) Ltd v Akindele* [2001] Ch 437. As Nourse LJ said, at p.455, this test "though it cannot, any more than any other, avoid difficulties of application, ought to avoid those of definition and allocation to which the previous categorisations have led." This was a reference to the five-fold classification of knowledge, derived from *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA (Note)* [1993] 1 WLR 509.

559. The Claimant did not specifically address the meaning of "unconscionable". In its closing submissions it contended only that the Defendants were dishonest (as per the test in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67). It is clear that a finding of unconscionability does not require proof of dishonesty: "While a knowing recipient will often be found to have acted dishonestly, it has never been a prerequisite of the liability that he should": see *Akindele* (above), per Nourse LJ at p.448.

560. Mr Hood, for Mr Davies, referred me to *Group Seven Ltd v Nasir* [2017] EWHC 2466 (Ch) at [473]-[478]. Morgan J noted that the Court of Appeal in *Akindele* had expressed grave doubts as to the utility of the Baden classification, but referred to *Armstrong GmbH v Winnington Networks Ltd* [2013] Ch 156, at [132], where Stephen Morris QC (quoting the support of academic texts) considered that the Baden classification remained useful in distinguishing different types of knowledge. The classification is as follows: (1) actual knowledge; (2) wilfully shutting one's eyes to the obvious; (3) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (4) knowledge of circumstances which would indicate the facts to an honest and reasonable man; (5) knowledge of circumstances which will put an honest and reasonable man on inquiry. In *Armstrong v Winnington*, Stephen Morris J concluded as follows:

> "In my judgment, the position, in a commercial context, can be summarised as follows: (1) Baden types (1) to (3) knowledge on the part of a Defendant render receipt of trust property "unconscionable". It is not necessary to show that the Defendant realised that the transaction was "obviously" or "probably" in breach of trust or fraudulent; the possibility of impropriety or the Claimant's interest is sufficient. (2) Further Baden types (4) and (5) knowledge also render receipt "unconscionable" but only if, on the facts actually known to this Defendant, a reasonable person would either have appreciated that the transfer was probably in breach of trust or would have made inquiries or sought advice which would have revealed the probability of the breach of trust."

561. In *Group Seven Ltd v Nasir*, Morgan J noted that the formulation of the test had apparently been agreed by the parties, but no-one had suggested to him that he should not follow the approach in *Armstrong*, and accordingly he did so.

562. Beyond being referred to the *Group Seven* case in Mr Hood's written submissions, no argument was addressed to me on the point. The only other argument advanced on the meaning of "unconscionable" was that of Mr Clarke, on behalf of Dr Evans, who accepted that the second and third *Baden* categories were sufficient to constitute unconscionability.

563. While the *Baden* classification remains useful as guidance, rigid adherence to it is no longer appropriate following *Akindele*. The essential question is whether, in all the circumstances, the particular Defendant's state of mind was such as to make it unconscionable for him or her to retain the payments made.

564. In this case, that question needs to be asked in light of the following: (1) the funds were, to the knowledge of all the relevant Defendants, public money that could only be spent on educational purposes; (2) financial regulations imposed restrictions on both the purposes to which, and manner in which, the funds could be spent; and (3) each of the relevant Defendants was not merely a recipient of funds, but also involved to some degree in financial management at the school and subject, therefore, to the financial regulations (paragraph 1.1.1 of the Claimant's 2006 financial regulations provided that the regulations must be followed by all governors and staff at the school).

565. In light of those factors, I conclude that the test of unconscionability is satisfied in the circumstances of this case where the relevant Defendant was aware of matters which would have caused a reasonable person in their position to appreciate the risk that the payment was an improper use of school funds, and would have made enquiries of the GB before accepting it. A fortiori, if the relevant Defendant actually appreciated that risk, then it was unconscionable to receive the payment.

566. Turning to the payments made, my finding that the payments authorised by the PRC were not made in breach of fiduciary duty makes it unnecessary to consider whether any of the first to fourth Defendants could be liable in knowing receipt in respect of those payments.

567. On the other hand, my finding that many of the payments made pursuant to the ad hoc procedure constituted a breach of fiduciary duty by one or other of the first, fifth and sixth Defendants, together with the fact that the payments themselves are not in dispute, means that the first and second elements of the claim are satisfied in relation to at least some of the payments to each of the first to fourth Defendants. The only remaining questions, therefore, are: (1) was it unconscionable for them to receive and/or retain any of the payments? and (2) is the claim time-barred?

568. In view of the fact that the receipt of all but a small handful of the payments occurred more than six years before the commencement of this action, I will deal first with the question of limitation.

G(1) Limitation Act 1980 and knowing receipt

569. A claim in knowing receipt, although using the language of "constructive trust", is not a claim in respect of a breach of trust so as to fall within s.21 of the Limitation Act 1980: see *Williams v Central Bank of Nigeria* [2014] AC 1189. The limitation period is therefore six years from the date of receipt of the relevant payment, unless the period is extended pursuant to s.32 of the Limitation Act 1980.

570. Section 32 provides as follows:

> "(1) Subject to [subsections (3) and (4A)] below, where in the case of any action for which a period of limitation is prescribed by this Act, either—

> (a) the action is based upon the fraud of the Defendant; or
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the Defendant; or
> (c) the action is for relief from the consequences of a mistake;
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it. References in this subsection to the Defendant include references to the Defendant's agent and to any person through whom the Defendant claims and his agent.
>
> (2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

Action based on fraud of the Defendant

571. Section 32(1)(a) applies only where fraud is an essential element of the claim: *Beaman v ARTS Limited* [1949] 1 KB 550 (CA) The Court of Appeal there held that the then equivalent provision, s.26 of the Limitation Act 1939, did not apply to a claim in conversion, even where the conversion was dishonest, because the cause of action was complete without the need to establish dishonesty.

572. A claim in knowing receipt (unlike a claim in dishonest assistance) is not dependent on a finding of fraud, and it is unnecessary to establish dishonesty on the part of the defendant: see *Bank of Credit and Commerce International (Overseas) Ltd and another v Akindele* [2001] Ch 437, at 448 per Nourse LJ, quoted at paragraph 559 above. The mental element required of the recipient is that it was unconscionable for them to receive or retain the property.

573. The Claimant relies on three cases in support of its proposition that a claim in knowing receipt is within section 32(1)(a) but, on a proper analysis, none of them supports that proposition.

574. In *Williams v Central Bank of Nigeria* [2014] AC 1189, at para 119, Lord Neuberger said: "Finally, it is right to mention that in some cases of dishonest assistance or knowing receipt, even though the normal six-year period may have expired, a Claimant may be able to invoke section 32 of the 1980 Act, which postpones the commencement of the six years, in cases "based on the fraud of the Defendant", or where the Defendant has "deliberately concealed" relevant facts from the Claimant". This should not be taken as determining that a claim in knowing receipt is one based on fraud: that was not an issue raised in that case; a claim in dishonest assistance is clearly one which is based on fraud; and the limitation period in a claim based on knowing receipt may be extended where the relevant facts are deliberately concealed. Of the other cases relied on, *Cattley v Pollard* [2007] Ch 353 was a case of dishonest assistance, and *Bank Tejerat v Hong Kong and Shanghai Banking Corp (CI) Ltd* [1995] 1 Lloyd's Rep 239 (QBD (Comm) was a claim in deceit and dishonest assistance. Neither case therefore provides any assistance.

575. Mr Clarke, for Dr Evans, drew my attention to *McGee on Limitation Periods* (7th edition, 2014) at 20.009 to 20.0012, which refers to *Chagos Islanders v Attorney*

General [2003] EWHC 2222 (QB), [2004] EWCA Civ 997. In that case it was argued that "fraud" in s.32(1)(a) extended to unconscionable behaviour. McGee states: "the court rightly rejected this bold attempt to extend the meaning of fraud in this context, which should be confined to the narrow class of cases where it has already been held to apply."

576. In my judgment, the Defendants are correct on this issue. Since dishonesty is not an essential element in a cause of action based on knowing receipt, section 32(1)(a) cannot apply to extend the limitation period.

577. The remaining issue, as regards each of the second to fourth Defendants, is whether the limitation period can be extended pursuant to s.32(1)(b) (deliberate concealment). I will address this aspect separately as regards each Defendant.

G(2) Claim in knowing receipt against Dr Evans

Limitation: Deliberate Concealment

578. While s.32(1)(b) contemplates behaviour consisting of an act or a failure to act, it is essential that the result, that is concealment from the Claimant, was an intended result: *Cave v Robinson Jarvis & Rolf* [2003] 1 AC 384, per Lord Scott at [60].

579. The Claimant, in its closing submissions, relies on three matters (as against all the Defendants) as constituting deliberate concealment: the manipulation of remuneration returns and FIN1A forms; concealment of the overpayments from PKF; and concealment of the overpayments from the GB. In its amended Reply to the Defence of Dr Evans, the Claimant relies on further detailed points going to the failure to report the overpayments to the GB.

580. Dr Evans was not involved in the compiling or filing of remuneration returns or FIN1A forms, nor in reporting to PKF. That would not matter if the Claimant could establish a conspiracy between the Defendants (among other things) to conceal the overpayments from the Claimant, since references to the Defendant in the section include the Defendant's agent. I have, however, rejected that case. It was not put to Dr Evans that he had caused Mr Udokoro, as his agent, to provide false information to the Claimant or PKF.

581. As to the concealment of the overpayments from the GB, the concealment necessary to engage s.32(1)(b) is concealment from the Claimant. Assuming, without deciding, that concealment from the GB would be sufficient, in circumstances where the local authority appoints representative governors, this claim suffers from the fact that it had long been the practice of the GB neither to see, nor make any enquiries about, payments made to staff other than by reference to aggregate numbers that did not distinguish between basic salaries and bonuses. Moreover, as I have found, that practice continued notwithstanding that the GB, or at least many of the governors, were aware in general terms of the practice of paying bonuses. Against that background, I am unable to find

that Dr Evans was guilty, by reason of the overpayments not having been reported to the GB, of an intention to conceal them from the Claimant.

582. The Claimant relies in its closing submissions on section 32(2), but only in relation to Defendants who it is claimed owed a fiduciary duty to report the overpayments. In light of my finding that Dr Evans did not owe fiduciary duties, the Claimant's reliance on s.32(2) fails as regards him.

583. For these reasons, I find that a claim in knowing receipt would lie against Dr Evans only in respect of payments received by him after 10 July 2008.

Unconscionable receipt?

584. In common with the other Defendants, I do not find that Dr Evans believed that the payment of bonuses or remuneration for additional responsibilities was itself unlawful. Nor do I find that he believed the ad hoc process itself to be unlawful or improper.

585. I have set out at paragraphs 233ff above Dr Evans' involvement with and knowledge of the payments made via the ad hoc procedure. Although not involved in the drafting of the memos, he was aware of the existence of the ad hoc procedure; the fact that Mr Davies drafted the memos; and the content of at least some of the memos – which he saw either in typed or manuscript form – from which he would have been aware of the fact that the payments sought were invariably approved. He was also aware that, apart from a few exceptions, the payments were not revealed to the PRC.

586. Most important, Dr Evans was aware of the cumulative effect of all of the payments made to him pursuant to the memos. Indeed, this had provoked him to query with Mr Davies whether the payments under the third Ali Memo amounted to a saving to the school. In other words, at that point (in June 2005) he did in fact have concerns that the payments could not be justified. The fact that he made enquiries, and he received an apparently satisfactory response, precludes a finding that his receipt on that occasion was unconscionable.

587. This is in stark contrast, however, to his failure to make any similar enquiries in relation to subsequent payments, even where there could have been no objective justification for the payments he was receiving. As I have already noted, Dr Evans was a recipient, along with Mr Davies, of payments under all but a handful of the memos. Most of the payments made to Dr Evans mirrored the payments made to Mr Davies. They were smaller in amount because Dr Evans, as a deputy head, was in receipt of a smaller salary. As a proportion of his basic salary, however, they were broadly commensurate with the payments made to Mr Davies. Accordingly, much of what I have said in relation to Mr Davies has equal resonance in relation to Dr Evans. That includes the fact that – from November 2005 onwards, Dr Evans was in receipt of a permanent salary increase which, together with payments for Saturday school and holiday classes, amounted to approximately 70% of the salary he already received for doing what was supposed to be a full-time job. He cannot have failed to appreciate that to earn 70% of his salary again he would have to be spending all his available spare time on school matters. Equally, therefore, he must have known that time spent by him on any further additional duties must have been during time he was already being rewarded – either by way of his basic, or his additional, salary.

588. In light of the sheer size and frequency of the payments made to him on top of this, the point was reached – certainly by the time of payments made to him that fall within the limitation period (that is, after 10 July 2008) – that he must have appreciated at least the risk that the payments could not be justified.

589. Payments within the limitation period fall into three categories:

(1) monthly payments of £4,000, continuing after 10 July 2008, pursuant to the fifth NSD Memo dated June 2007;

(2) a lump sum payment of £10,000, pursuant to the memo dated 7 July 2008 but which – according to the Particulars of Claim – was paid on 14 July 2008; and

(3) a lump sum payment of £20,000 pursuant to the seventh NSD Memo dated 9 October 2008.

590. As to the first of these, Dr Evans was unable to give any credible explanation for suddenly receiving a further salary increase of £48,000 (more than half again of his salary) in June 2007. He accepted that – given that it was an increase to his salary – he would have understood that it was intended as a reward for work done, rather than a bonus of some sort. At one point he said, "This I see as: continue to do what you're doing, try to get that development off the ground, make sure everything's ready for when the new developer actually steps in, so that we can hit the ground running." Set against the payments he had already received in respect of the NSD (£46,000 pursuant to the second to fourth NSD Memos plus a permanent salary increase of £24,000 per year pursuant to the first NSD Memo), and against the background that his involvement with the NSD was predominantly limited to preparatory matters relating to "soft works", it is not credible that he believed an additional salary of £48,000 per year could have been justified.

591. If there was any doubt about this, on receipt of £30,000 in October 2007 (by the sixth NSD Memo) followed shortly by a bonus of £50,000 at the PRC meeting in February which was justified principally by reference to work on the NSD (to his knowledge, because he was present at the start of the meeting) he must at least have been aware of the risk that these payments could not be justified. *A fortiori*, a reasonable person in his position would have been, and would have made enquiries of the GB.

592. Accordingly, I find that it was unconscionable for Dr Evans to have received the salary increase of £4,000 per month from June 2007. It follows that the Claimant is entitled to reclaim such monthly sums paid to him after 10 July 2008.

593. The payment of £10,000 pursuant to the memo of 7 July 2008 must be seen against that background. If taken in isolation, it might have been reasonable for Dr Evans to have believed this was justifiable. The memo did not purport to reward Dr Evans for additional work undertaken, but recommended a reward for the "amazing effort" in turning around the science and ICT faculties. It is difficult to see why Mr Davies and Dr Evans, as opposed to any of the staff directly involved with the science department, were singled out for reward. Seen against the background of the payments previously made – and which continued to be made in the case of the salary enhancements – which at the least must have set alarm bells ringing, I find that Dr Evans must have been aware of the risk that this payment, too, could not be justified.

594. The final payment of £20,000 pursuant to the seventh NSD Memo was justified as reward for "carrying out tremendous continued additional workload over and above their normal day to day school duties." Given the payments Dr Evans had by this time received for working on the NSD, including an additional salary of £72,000 per year, he must have appreciated that there was no proper justification for this further payment. At the very least, a reasonable person in his position would have done so. Again, he made no effort to satisfy himself otherwise. Accordingly, I find that the retention of this sum was unconscionable.

Payments outside the limitation period

595. In light of the limitation defence available to Dr Evans, it is unnecessary to consider whether he acted unconscionably in receiving earlier payments. Nevertheless, in case it becomes necessary, I find that the point at which Dr Evans was sufficiently aware of matters that would have demonstrated to a reasonable person in his position the risk that the payments were not a proper use of school funds was on receipt of the payment pursuant to the fifth Ali Memo (13 March 2006).

596. I accept that having queried the third Ali Memo and received a satisfactory answer in June 2005 (see paragraph 412 above), he thereafter would reasonably have believed that the one-off Ali payments related to particular time periods and would be repeated. Nevertheless, a payment in March 2006 of £15,000 within two months of a payment of the same amount (pursuant to the fourth Ali Memo in January 2006) should have set alarm bells ringing. When this was followed a mere three months later by a payment of £20,000 for working on the NSD, for which he was in receipt of a £24,000 per year salary increase, he ought to have realised that he was in receipt of sums that could not be justified by reference to additional responsibilities taken on by him.

597. I find in particular that any reasonable person in his position, on receiving three payments of £20,000 in quick succession in the first half of 2007, followed immediately by the further salary enhancements of £4,000 per month in June 2007, would have been sufficiently concerned to have made enquiries of the GB.

598. Accordingly, were it not for the claim being time-barred, I would have found that Dr Evans was liable in knowing receipt in respect of the payments received by him from March 2006 onwards.

Saturday School

599. The Claimant also claims £10,550 against Dr Evans as alleged overpayments relating to Saturday school. Unlike Mr Davies, who acknowledged he had been overpaid (see paragraph 482 above), when Dr Evans was asked to investigate whether he had received payments he was not entitled to in relation to Saturday school, he did not say that he had. The claim relates to part only of the amounts Dr Evans received in 2008-2009, and the basis upon which it is said that this part is recoverable, and how this sum has been calculated, has not been articulated in the Claimant's closing submissions. The broad complaint is that Dr Evans claimed for more Saturdays than there are in the year. When his payslips are examined, however, the months in respect of which he claimed for more than four Saturdays were those in which there was a school holiday – such that the claim could have related to booster classes during the holidays. I am not satisfied that his claim for Saturday school was made fraudulently, and do not,

therefore, include this amount within the sums which can be recovered from him. The fact, however, that he was paid for so many days under this heading reinforces the conclusion that he must have realised that the ad hoc payments he received for undertaking additional duties cannot have been justified by any work for which he was not already being paid.

G(3) Claim in knowing receipt against Mr Udokoro

A preliminary point: is the claim pleaded?

600. Mr Speaight QC (alone among the Defendants' counsel) submitted that there is no claim in knowing receipt pleaded in the particulars of claim, and the fact that the amended reply identifies knowing receipt as one of the four causes of action advanced in this case is irrelevant. The Particulars of Claim are indeed less than clear on the point. In particular the claim to "dishonest receipt" of the overpayments is pleaded as a breach of fiduciary duty by each of the Defendants. Nevertheless, however it may be described, the facts necessary to plead a claim in knowing receipt are pleaded in the particulars of claim including (1) that each of the Defendants received overpayments; (2) that the overpayments were made as a result of breach of fiduciary of one or more of the Defendants; (3) that each of the Defendants knew that the payments were unauthorised and unlawful.

601. In a document entitled "note on pleadings" served by the Claimant shortly after the commencement of the trial, it was expressly stated that the Claimant was pursuing both a claim in dishonest assistance and a claim in knowing receipt. It was subsequently clarified by Mr Rees QC on behalf of the Claimant that no claim in dishonest assistance was being pursued, but that the Claimant was pursuing a claim in knowing receipt. In an appendix to the note on pleadings, the elements of the cause of action in knowing receipt were set out, with cross-references to the passages in the Particulars of Claim where the relevant matters were pleaded.

602. In light of that clarification, the first and second Defendants (being the other parties who were in receipt of overpayments and were represented at the trial) accept that one of the claims they have to meet is a claim in knowing receipt. In circumstances where it has been clear from the commencement of the evidence that the Claimant was asserting a claim in knowing receipt, and the constituent elements of that cause of action are pleaded, I conclude that it is not open to the third Defendant to contend that there is no claim made against him in knowing receipt.

A further preliminary point: The extent of Mr Udokoro's knowledge of the overpayments to others

603. Mr Udokoro is adamant that he was unaware of the scale of the overpayments to others. His evidence on this was inconsistent, however. At one point, he suggested that all he ever saw was the aggregate figure for BACs payments each month (apart from for one period, around the time when the payroll was brought in-house, when payments were made by individual cheque to staff, so he would have seen the amount being paid to each of them). Later, he accepted that when he was preparing the accounts, he was sent a schedule setting out the payments made in the relevant year to each staff member, excepting only pension contributions, national insurance contributions and deductions from staff loans.

604. Ms McKenzie was equally adamant that Mr Udokoro was fully aware of all payments that were made via the payroll. She said that she provided Mr Udokoro, each month, with payslips, and the BACs payment report of everybody's individual payment, and that he would go through it, putting a tick, or dot, next to the names. She also provided him with pension reports, that were sent to the Claimant.

605. In so far as they differed on this issue, I prefer Ms McKenzie's evidence, and reject that of Mr Udokoro. In addition to the overall impression that his evidence was designed to distance himself from anything to do with the overpayments, it is telling that on at least two occasions, his work with the payroll was specifically relied on to justify payments to him. Thus, the second Ali Memo recommended rewarding Mr Udokoro and Ms McKenzie (with a payment of £5,000 each) for the extra workload that would now be placed upon them as a result of bringing the payroll in-house and, in July 2008, Mr Udokoro justified a substantial claim for overtime by, among other things, saying "we have [introduced] and now operating BAC payment system".

Limitation

606. I have set out the law relating to limitation and knowing receipt above at paragraphs 569ff. As applied to Mr Udokoro:

(1) the claim against him is time-barred (unless extended under s.32) save in respect of payments received by him after 10 July 2008;

(2) as fraud is not an essential element in the cause of action, s.32(1) is not engaged; and

(3) the Claimant does not rely on s.32(2) as against Mr Udokoro.

607. Accordingly, the only basis on which the limitation period could be extended is on the grounds of deliberate concealment. The Claimant relies on four matters in this regard as against Mr Udokoro.

608. First, remuneration returns submitted to the Claimant. These were standard form documents, which schools in Brent were required to send to the Claimant identifying staff earning over £50,000 per year. The standard form document identified five brackets of gross pay. In the form for 2005-2006, the highest bracket was £90,000 to £99,999. The school was required to state the number of staff falling into each bracket. The form for 2005-2006 was emailed by Mr Udokoro to the Claimant on 18 June 2006. On it was typed "signed …. Sir Alan Davies Kt". It stated that two members of staff fell into the top bracket. It is unclear which members of staff this was intended to refer to. So far as basic salary was concerned, Mr Davies alone fell within the top bracket in that year. If it is taken as referring to basic salary plus regular salary enhancements, then Mr Davies and Dr Evans, but no others, were within or above the top bracket (and would have been correct). If it was intended to refer to total remuneration, including bonuses and additional responsibilities, then Mr Udokoro alone fell within the bracket, whereas Mr Davies and Dr Evans received substantially in excess of the top bracket.

609. For the year 2006-2007, the remuneration return is not in evidence, but there is in evidence a composite document produced by the Claimant, apparently based on the remuneration returns for all schools in the borough. This suggests that Copland's return

identified no staff earning in the top bracket of £100,000 to £109,999, with two staff earning in the second bracket of £90,000 to £99,999. It is unclear who, at the school, prepared, sent or saw the remuneration return for the year 2006-2007, and I can draw no safe inferences from the Claimant's own document in the absence of evidence as to how it was compiled.

610. For the year 2007-2008, the remuneration return is in evidence. It purports to be signed by Mr Davies. This time, it reports that two members of staff were earning within the top bracket (£100,000 to £109,999), and one member of staff was earning within the second bracket (£90,000 to £99,999). As with the 2005-2006 return, if it included basic salary and regular salary enhancements, then Mr Davies and Dr Evans alone were in, or above, the top bracket. If total remuneration is included, then Mr Davies, Dr Evans, Ms Dunkley and Mr Udokoro exceeded the top bracket, and Ms McKenzie and Gareth Davies fell within the top bracket.

611. Mr Udokoro sought to distance himself from these forms, saying that he would have merely been the messenger, and he would not have known whether what was stated was accurate, because he did not have access to payroll data. I have rejected that evidence. It was also argued on his behalf that the form did not ask for details as to who was earning above the upper limit of the top bracket. On a literal reading of the form, that is true. However, it is relatively clear that the purpose of this form was to inform the Claimant, on an annual basis, of the remuneration of the top earners at the school. Nevertheless, as I have indicated, if the person filling in the form understood that it referred to basic salary plus regular salary enhancements, then it could be said to have been accurately completed.

612. Second, the Claimant relies on the returns made by the school, for which Mr Udokoro was responsible, setting out income and expenditure in each year (referred to as the FIN 1A forms). It contends that the forms were misleading in underreporting the remuneration for heads, deputies and assistant headteachers. The form for the year 2006/2007, for example, reports a total figure of £857,862 under that heading. If, under this heading, it had been intended to include all deputy and assistant headteachers, then the resulting figure should have been in excess of £1.1 million. The same point is made in respect of the form for the year 2007/2008, but in this case the relevant heading was "heads and deputies". Most of the documents and workings which underlay these aggregate figures are not available. It is unclear therefore what was in fact included within these headings. There is in evidence, however, a document headed "summary trial balance", printed on 2 May 2008, which was produced by the accountancy software package used by the school. Under the ledger code "Salaries – Heads & Deputies", it contains the same figure (once rounded) as appears in the FIN 1A for 2007/2008 (itself dated a few weeks later). It is inherently likely, therefore, that the FIN 1A form was completed simply be inputting the numbers that appeared on the internal computerised trial balances. Moreover, the gross figure for payroll expenses on each of the FIN1A forms matches the amount in fact paid in each year. On the basis of this evidence, I cannot safely conclude that whoever completed the FIN 1A was deliberately seeking to conceal the overpayments from the Claimant. In any event, it could not have amounted to concealment of amounts paid to Mr Udokoro (who was not with the band of "heads and deputies").

613. Third, the Claimant relies on an email from Mr Udokoro to Lynda Rees at the Claimant dated 13 February 2009 (copied to Mr Davies), in which he provided figures for the

gross salaries of Mr Davies and Dr Evans for 2007-2008. He reported Mr Davies' salary as being the basic salary of £107,192, plus payment for additional responsibilities of £54,000 (equal to the salary increases awarded by the first Ali Memo and the first NSD). In fact, the total remuneration for Mr Davies for that year was £403,277. The figures for Dr Evans are similarly under-reported (including only the additional £2,000 per month awarded pursuant to the first NSD Memo). On its face this is a highly misleading statement. The email begins, however, "the information you requested is as follows…", and there is no record of what information Ms Rees had requested. This is particularly important in circumstances where the school had been consistently providing to the Claimant, on a monthly and annual basis, the pensionable pay of each employee which had included (for Mr Davies and Dr Evans), in addition to their basic salary, only an additional amount equal to the payments pursuant to the first Ali Memo and first NSD Memo. (Mr Speaight QC suggested that for the year 2005-2006 the amounts reported were only those for Ali cover. I think it far more likely, however, and consistent with what occurred in all later years, that the amounts reported were (a) the monthly payments pursuant to the first Ali Memo and (b) the seven monthly payments made during that year pursuant to the first NSD Memo). The Claimant has not called any evidence from Ms Rees or anyone else to explain what information was sought. In these circumstances, I am unable to conclude that Mr Udokoro was deliberately concealing any overpayments to Mr Davies and Dr Evans in this email. In any event, it does not demonstrate concealment of any overpayment to him.

614. Fourth, the Claimant relies on alleged concealment from the school's auditors, PKF. As against Mr Udokoro, reliance is placed (i) on a footnote in a PKF document relating to the 2007 audit, which says "Per Columbus, no bonus was paid in the current year" and (ii) on PKF file notes in June 2006 noting that "exceptional bonuses paid in the prior year due to the success of the students examination results" had not been repeated in the year 2005 to 2006. Since bonuses were undoubtedly paid to staff, generally, in the years 2005-2006 and 2006-2007, if Mr Udokoro did say the opposite to PKF, then that was clearly untrue. However, given that I have found that the bonuses, having been approved at PRC meetings, were not paid in breach of fiduciary duty, they are not within the compass of the knowing receipt claim against any of the Defendants. Accordingly, even if Mr Udokoro did make untruthful statements about them to PKF, that does not amount to concealment of the payments that are the subject matter of the knowing receipt claim against him. It is in any event clear from these documents that PKF were aware of the fact that bonuses had been paid in the school in prior years. There would therefore have been no reason for Mr Udokoro to conceal from PKF the fact that bonuses, per se, continued to be paid. Mr Udokoro denied, in his defence, that he ever told PKF that no bonuses were paid. No evidence has been called from PKF.

615. Reliance is also placed on a footnote in a further PKF document relating to the 2006 audit, which states "staff costs have increased due to a 7% pay rise given to all staff." There is, again, no evidence from PKF to explain the source of this note, for example whether it was based on something they were told by Mr Udokoro.

616. More generally, so far as PKF is concerned, there is no evidence that their access to documents within the school was restricted by anyone, or by Mr Udokoro specifically. No explanation has been given for the Claimant's failure to call PKF. In the absence of evidence from the maker of the relevant notes, or anyone else from PKF, I am unable find that Mr Udokoro deliberately concealed matters from them.

617. The Claimant contends that Mr Udokoro was acting dishonestly, in sending to PKF copies of all the ad hoc memos in April 2009. They surmise that this was to create a false audit trail by ensuring that those memos appeared on PKF's audit files. This does not make sense, however. If anything, providing these documents to PKF in 2009, when they clearly related to prior years for which the audit had been completed, would be likely to alert PKF to the fact that they had not been provided with the information at the time of their audit. I therefore do not accept that this is evidence of a cover-up by Mr Udokoro or any other of the Defendants.

618. Having regard to all these matters, I am not satisfied that Mr Udokoro deliberately sought to conceal from the Claimant the payments to him.

619. Accordingly, I conclude that the limitation period in respect of the claim in knowing receipt against Mr Udokoro has not been extended pursuant to any of the provisions in s.32 of the Limitation Act 1980.

620. It follows that the claim in knowing receipt is limited to those payments received by Mr Udokoro after 10 July 2008.

621. There are some important differences between the position of Mr Udokoro and the other Defendants (other than Ms McKenzie).

622. First, none of the payments to Mr Udokoro was, per se, unlawful, as the STPCD had no application to him. Moreover, consistent with my finding in relation to the governors and staff at the school more generally, I do not find that Mr Udokoro believed the payments made to him (or others) by way of bonus or reward for additional work were, per se, unlawful. The Claimant contends that, as a lawyer, he must have understood the terms of the STPCD. Although he made a point, in order to justify certain requests for salary increases and extra payments, of his contribution as a lawyer to the school, I find that this was greatly exaggerated. On the one occasion when there is evidence that he provided something in the form of legal advice as to governance procedures, his contribution was to ring the council to find the answer. This related to the question whether a member of the teaching staff who was paid to teach at Saturday school could sit on the PRC. Mr Udokoro's evidence (confirmed by the minutes of the GB meeting of 3 July 2006) was that he asked "Paula" at the Claimant, who provided a letter of advice which he circulated to the GB.

623. Second, he was not privy to the decision-making procedure in relation to the overpayments, whether those made at PRC meetings or those made pursuant to the ad hoc procedure. His evidence is that he did not see the ad hoc memos (at least not prior to April 2009 when he was asked to forward all of them to PKF). There is no contemporaneous evidence to show that he was aware of the ad hoc procedure and, on balance therefore, I think it likely that he did not see the memos at the time.

624. So far as he was aware, the payments to him had been approved by the governors. I do not believe that he would have questioned which governors had approved the payments, and under what delegated authority (other than that he would have known that the governors as a whole had delegated decisions on pay to the PRC, and he may have known – since he was present at the GB meeting on 4 July 2007 – that there had been at least some delegation to the Chair and Vice-chair of governors). Before any payments were made to him relating to the NSD, on 21 May 2005, Mr Davies wrote to

him asking him to undertake work relating to the "soft works" that Dr Evans was managing in relation to the NSD, and to tell him that Mr Davies would communicate with the governors to reward him in his pay. He would not, in my judgment, have had reason to question, when payments were later made to him for having undertaken work on the NSD, whether they had indeed been approved by the governors.

625. Third, like Dr Patel and Mr Day and most of the governors at the school, Mr Udokoro had great respect for Mr Davies. He would have seen first-hand his hard work and dedication to the school. He would also have witnessed the way the school, and Mr Davies in particular, were perceived outside the school, through the various events, including dinners at the House of Commons, that were held. His default position would no doubt have been to trust Mr Davies and the governors.

626. Fourth, he was aware of the well-established culture within the school of paying staff for additional responsibilities as well as bonuses. He knew (as I have found) that very large sums were being paid to others, in particular those involved with leadership. He knew that when a member of staff took on additional responsibilities, it was the norm for them to be rewarded by additional payments. As with the payments to him, he understood that these had been authorised by the governors.

627. Fifth, Mr Udokoro was not only extremely hard-working himself (receiving praise from the governors for this on more than one occasion), but he had a very keen sense of his own self-worth. In contrast to Dr Evans (who said that he never asked for additional payments), Mr Udokoro actively sought out additions to his pay. An example of this is a letter he wrote to Mr Davies in April 2003 in which he applied for a review of his job title/position and salary structure to reflect his responsibilities at the school. He enclosed a two-page summary of all the tasks he carried out under the headings "Finance Officer Responsibilities", "Accountancy Responsibilities" and "Legal Responsibilities". He concluded in the letter: "I have worked for Copland for about eleven years, providing the services of an Accountant, and now hope that I should be recognised and rewarded as such." While I consider that his legal contribution to the school was exaggerated (the school employed external lawyers, at great expense, for all legal matters relating to the NSD, so it is unlikely that Mr Udokoro, who had studied for a law degree but was not trained as a lawyer, added much value in relation to legal matters), I do not doubt that Mr Udokoro believed that his contribution deserved additional reward.

628. In fact, I do not think it is unfair to Mr Udokoro to say that he took every opportunity to maximise the amounts he could get for working at the school. He claimed for every additional hour that he worked, including claims for Saturday school, dinner time duties, overtime and pay in lieu of taking holidays. The excessive overtime claim that he made (jointly with Ms McKenzie) in the first half of 2007 (see paragraph 474 above) is an example. Another is his claim for 46 hours overtime between May and June 2008, and a further 60 hours overtime between June and July 2008, which he then doubled (presumably on the basis that he was claiming double-time for working out of hours).

629. The Claimant contends that at least part of Mr Udokoro's claim for Saturday school and overtime was submitted fraudulently. There is, however, now no claim against Mr Udokoro to recover any of the payments made to him relating to Saturday school or overtime. The only relevance of these allegations, therefore, is as to his general credibility.

630. Balancing these matters against the increasing size and frequency of the payments made to Mr Udokoro, I nevertheless find that at some point a reasonable person in Mr Udokoro's position, with his responsibility for financial matters within the school, would have been bound to appreciate the risk that the payments to him were an improper use of the school funds by those delegated to make decisions on pay. I consider that position was reached in May 2007. The details of payments made to Mr Udokoro during the first half of 2007 are set out at paragraphs 474 above. Like Mr Davies, Mr Udokoro knew that he was already being paid during that period for every available hour of overtime. A reasonable person in his position must, therefore, have appreciated the risk that a further £10,000 in May 2007 supposedly as a reward for additional duties could not be justified and was thus not a proper use of public money. That finding taints the receipt of all the further payments pursuant to the ad hoc procedure.

631. The only payments received by Mr Udokoro within the limitation period, however, were: (1) the one-off payment of £10,000 pursuant to the seventh NSD Memo; (2) such monthly payments as he continued to receive after July 2008 of £1,667, representing the salary increase of £20,000 per year awarded by the memo dated 23 June 2007, relating to additional responsibilities; and (3) eight monthly payments (continuing after July 2008) of £1,250, representing the salary increase of £15,000 per year awarded by the memo dated 18 April 2008, relating to the NSD.

632. Even if my conclusion as to unconscionability as at May 2007 is incorrect, then as a result of the doubling-up of the pay increases (including the 35% pay increase in June 2007 and a further increase in April 2008 of £15,000 per year) with yet more one-off payments in October 2007 (£12,000) and February 2008 (£16,000), I find that someone in Mr Udokoro's position must have appreciated the risk that the ad hoc payments were not justifiable as reward for any further work actually carried out by him.

633. His receipt of the one-off payment of £10,000 made in October 2008 for additional duties on the NSD is particularly egregious, given that the permanent pay rise in April 2008 was precisely to cover such duties. It is inherently implausible that Mr Udokoro did not appreciate this.

634. For these reasons, I find that the claim in knowing receipt against Mr Udokoro succeeds, but only to the extent of (1) the payment of £10,000 paid pursuant to the seventh NSD Mem and (2) such part of the salary enhancements he was awarded in June 2007 and April 2008 that was received by him after 10 July 2008.

G(4) Claim in knowing receipt against Ms McKenzie

635. I have set out the law relating to limitation and knowing receipt above at paragraphs 569 above. As applied to Ms McKenzie:

(1) the claim against her is time-barred (unless extended under s.32) save in respect of payments received by her after 10 July 2008;

(2) as fraud is not an essential element in the cause of action, s.32(1) is not engaged; and

(3) the Claimant does not rely on s.32(2) as against Ms McKenzie.

636. The only basis on which the limitation period could be extended is therefore on the grounds of concealment. The matters relied on by the Claimant as constituting concealment, however, either have nothing to do with the payments to Ms McKenzie or are not alleged to have been done by (or on behalf of) Ms McKenzie. The complaint about the remuneration returns and the FIN1A forms is that they failed to reveal the payments to the senior team at the school. There is no evidence that Ms McKenzie was involved in liaising with PKF, so nothing to link her with concealing anything from them. Ms McKenzie was not involved in reporting to the GB at all, so even if concealment from the GB was relevant, it did not involve concealment by her. The complaint that Ms McKenzie reported only pensionable pay to the Claimant, and thus concealed many of the overpayments, relates only to teachers pay. Moreover, the practice of not including bonuses or one-off payments for additional responsibilities on returns relating to pensionable pay was one that Ms McKenzie believed to be correct, having inherited it from her predecessor, and is not sufficient to establish an intention to conceal information.

637. Accordingly, I conclude that the claim in knowing receipt against Ms McKenzie is time-barred except for amounts received by her after 10 July 2008.

638. Many of the points I have made above in relation to Mr Udokoro apply similarly to Ms McKenzie. She was not privy to any decision making in respect of the payments to her. So far as she was concerned, the payments made to her (and indeed to others) had been approved by the headteacher and governors (either the PRC or Dr Patel and Mr Day). When she re-joined the school in 2004, there was an established culture of paying bonuses and rewarding people for taking on additional responsibilities. Like others at the school, she trusted and respected Mr Davies, and was aware of the esteem in which he was held in and beyond the school community. She was aware of the very large sums being paid throughout the school, including to those who are not accused of acting in bad faith in receiving them. Ms Dunkley and Mr Sampong, for example, received more by way of overpayments than she did. I am satisfied that she also worked extremely hard during her time at the school, including working evenings and weekends. I also accept that this included work on the NSD, and additional work caused by the enhanced monitoring role undertaken by (in particular) Mr Davies following the departure of Mr Ali. Ms McKenzie referred in evidence to additional administrative work involved in communicating extensively with parents, about the students' progress, as well as data analysis and target-setting.

639. As with Mr Udokoro, however, I find that by May 2007 a reasonable person in her position, with her responsibilities within the finance department, would have been bound to see the risk that these payments could not be justified by any additional work she was doing, and thus to question the propriety of the payments. The payments made to her during the first half of 2007 mirrored those made to Mr Udokoro, save only that they were proportionately smaller in recognition of her lower basic salary. Like Mr Udokoro, although I accept she was working extremely hard, she knew that she was already being paid during that period for every available hour of overtime. Accordingly (save fort the exceptions I identify below) she acted unconscionably in receiving payments pursuant to the ad hoc procedure thereafter.

640. The payments made to Ms McKenzie during the limitation period, however, were relatively few.

641. First, she continued to receive monthly payments pursuant to salary increases awarded in June 2007 and April 2008. As to the pay rise in April 2008, however, it does not appear among the Claimant's schedule of overpayments sought as against her. For reasons which mirror those I have set out in relation to Mr Udokoro, even if I am wrong as to the finding of unconscionability as at May 2007, the cumulative effect of salary rises and one-off payments in the intervening period means that a person in her position was bound to have questioned the propriety of the payments by July 2008.

642. Second, she received a one-off payment of £5,000 in October 2008 pursuant to the seventh NSD Memo. There was no objective justification for this payment, given the pay increase received only months earlier, for precisely the same additional duties, and a reasonable person in the position of Ms McKenzie could not have failed to question whether the payment was justified.

643. Third, she received seven monthly payments of £500 commencing in September 2008, for covering the post of office manager. There is no evidence that Dr Patel and Mr Day were involved in this. It was something that Mr Davies appears to have done with the approval of Dr Evans (who countersigned the letter, adding "Have you already spoken to Michelle?"). It was not suggested to Mr Davies that this was a breach of fiduciary duty by him. Accordingly, the necessary foundation for a claim in knowing receipt is missing. I find in any event that Ms McKenzie's receipt of these payments is not to be characterised as unconscionable, given the amount and stated rationale for them.

H. Claim against the Fifth and Sixth Defendants for misfeasance in public office

644. The elements of the tort of misfeasance in public office were summarised by the House of Lords in *Three Rivers DC v Bank of England (No.3)* [2003] 2 AC 1, 191-193 per Lord Steyn as follows:

(1) The Defendant must be a public officer;

(2) The Defendant must be exercising a power as a public officer;

(3) The Defendant must either (a) specifically intend to injure the Claimant (referred to as 'targeted malice'); or (b) know that there is no power to do the act complained and that it is likely to damage the Claimant.

(4) The act or omission of the Defendant must cause loss to the Claimant.

H(1) Public Officer

645. No previous case has considered whether a governor of a maintained school is a public officer.

646. In *Society of Lloyds v Henderson* [2008] 1 WLR 2255 the Court of Appeal concluded that Lloyds of London was not a public officer for the purposes of the tort, because its structure and operations and the management of its affairs were commercial and not governmental. Buxton LJ concluded (at [23]) that the essential attribute of a public officer was the exercise of governmental power. Although little was said in *Three Rivers* on the point, there were passages which supported that conclusion in the speeches of Lord Steyn (at p.190H, who said "the rationale of the tort is that in a legal

system based on the rule of law, executive or administrative power may only be exercised for the public good") and Lord Hobhouse of Woodborough (at p.229A, who said that the tort concerned "the acts of those vested with governmental authority and the exercise of executive powers"). Moreover, the requirement that the subject of misfeasance in public office should be a governmental body "springs from the very nature of the tort … the nature of the wrong is that a public official, who is given powers for public, governmental purposes, misuses them for a different purpose, conscious that in so doing he may injure the Claimant."

647. At [41] Buxton LJ emphasised that the question turns on the nature of the office, not on the particular function being exercised: "As Lord Steyn put it in the *Three Rivers* case … it is the office in a relatively wide sense on which everything depends", approving the observation of Slade LJ in *Jones v Swansea City Council* [1990] 1 WLR 54. In that case, a local council was sued in respect of a decision to refuse consent to a leaseholder changing the use of premises to a nightclub. It was found that a majority of councillors were affected by malice against the Claimant in reaching that decision. It was accepted by the Council that if the power which was exercised by the Council could properly be described as a power having a "statutory or public origin" then the plaintiff would have a cause of action if the decision was motivated by malice. It was argued by the council that the relevant power was merely a 'private' power as it arose out of an agreement for a lease. The Court of Appeal rejected this. Slade LJ held, at p.70-71, that "a decision taken by the holder of a public office, in his or its capacity as such holder, with the intent to injure the party thereby affected or with knowledge that the decision is ultra vires" was capable of giving rise to an action in tort for misfeasance in public office, notwithstanding that the decision "was taken in the exercise of a power conferred by a contract and in this sense has no public element." He concluded: "it is not the juridical nature of the relevant power but the nature of the council's office which is the important consideration. It is the abuse of a public office which gives rise to the tort." Moreover, the suggested distinction between the grant of an agreement for a lease (which was accepted to constitute the exercise of a power having a statutory or public origin) and the exercise of a right reserved by that agreement (which was not) came, in the words of Slade LJ, "near to playing with words."

648. In *R v Mitchell* [2014] EWCA Crim 318, the Court of Appeal found that a paramedic employed by an NHS Trust, providing a public benefit by way of the provision of emergency health care, was not a public officer for the purposes of the common law offence of misconduct in public office. (It was common ground before me that the jurisprudence on the meaning of "public officer" in the context of the criminal offence was of assistance in determining its meaning in the context of the tort of misfeasance in public office.) Sir Brian Leveson P. concluded that the approach, when considering whether a particular employee or officer was a public officer, was to ask three questions:

> "First, what is the position held? Second, what is the nature of the duties undertaken by the employee or officer in that position? Third, does the fulfilment of those duties represent the fulfilment of one of the responsibilities of government such that the public have a significant interest in the discharge of that duty which is additional to or beyond an interest in anyone who might be directly affected by a serious failure in the performance of that duty? If the answer to this last question is

"yes", the relevant employee or officer is acting as a public officer; if "no", he or she is not acting as a public officer."

649. The importance of focusing on the duties undertaken by the relevant person was explained at [17]. There was no doubt that the public had a significant interest in the discharge by the Trust of its duty to provide emergency health care. But to focus on the duties of the Trust would mean that every doctor, nurse or other employee of the Trust would be a public officer, which was not the case. Of particular relevance for the present case, he contrasted the position as regards the provision of education as follows: "Equally, the public has a significant interest in the discharge by an education authority of its duties to provide children with a safe environment in which to be educated … for an education authority it would mean that every teacher, classroom assistant or other employee at a school is a public officer. That is not correct."

650. The Claimant relies on the following six matters.

651. First, governors are charged under s.21 of the EA 2002 with general responsibility for the conduct of the school, with a view to promoting high standards of educational achievement. As pointed out by Mr Pester for the fifth and sixth Defendants, the mere fact that the relevant power is a statutory one cannot be sufficient to constitute the holder of the power a public officer. A liquidator's powers derive from statute but there is no question of a liquidator being a public officer.

652. Nevertheless, it is right to have regard to the scope and purpose of governors' powers and duties under the statutory scheme. The starting point is that the provision of educational services is a governmental purpose. By s.10 of the Education Act 1996 the Secretary of State is charged with the promotion of education of the people of England and Wales. It is the duty of a LEA, by s.13 of the Education Act 1996, to "contribute towards the spiritual, moral, mental and physical development of the community by securing that efficient primary education and secondary education are available to meet the needs of the population in their area." The LEA, charged in this way with fulfilment of a governmental purpose, is itself a public officer (as recognised by the Court of Appeal in *R v Mitchell*).

653. In the case of a maintained school, the duty to fulfil the LEA's purpose of securing efficient education to meet the needs of the population in the area, insofar as it concerns a particular school, is devolved upon the governing body of that school.

654. In parallel, an LEA has the responsibility of funding education in its area. Mr Pester, for Dr Patel and Mr Day, 'cautiously accepted' that the Director of Education and Children, exercising the power to spend the funds provided to the LEA, would fall within the requirements of a "public officer" according to the three questions set out in [16] of *R v Mitchell*. In my judgment he was right to do so. However, that is not simply because of the power to spend public funds, but because the role, more generally, of a Director of Education and Children involves carrying out governmental purposes. As I have already noted, it is wrong to focus on the particular power being exercised. It is nevertheless a relevant consideration – when looking at the position of the governing body – that parliament has opted to treat the funds being spent by a governing body as public funds, expressly referring to the delegated budget as remaining the property of the LEA until spent, and treating the governing body as acting as agent of the LEA when spending the funds. This consideration is not determinative, as the headteacher is

also treated as agent of the LEA when spending the delegated budget, and it is not suggested that a headteacher, in his or her capacity as such, is a public officer for the purposes of the tort. Nevertheless, it is a consideration to weigh in the balance when determining whether the governors are public officers.

655. Second, when spending funds as agent for the LEA, governors are exercising an executive power. This reflects the second element of the tort, as summarised in the *Three Rivers* case, namely that the Defendant is exercising power as a public officer. It is not (as clarified in *Jones v Swansea Council*) to be confused with the juridical basis of the power. Accordingly, the fact that determining how much to pay staff is related to the contract of employment between the school and its staff is not a relevant consideration. What is of relevance is that the power is exercised within the course of the exercise of public functions. For these reasons, I reject the submission made on behalf of Dr Patel and Mr Day that decisions relating to hiring staff and setting pay levels fall outside the scope of those vested with governmental authority and the exercise of executive power. If governors are public officers, then decisions as to bonuses and additional payments to staff were the exercise of their powers as public officers.

656. Third, the positions of Chair and Vice-chair of governors are specifically defined, in the School Governance (Procedures) (England) Regulations 2003/1377, Regulation 5, as an "office". I do not regard this as having any significance, where the question is whether the GB, as a whole, is a public officer.

657. Fourth, a governing body is amenable to judicial review. I was referred to Judicial Remedies in Public Law 5th ed, at paragraph 15-098, "in principle, any exercise of power by a public officer amenable to judicial review should also be remediable in damages if the necessary elements of malice of knowledge, together with foreseeability and causation, can be established." As against this, however, the Court of Appeal in *Jones v Swansea City Council* [1990] 1 WLR 54, per Slade LJ at p.70, considered that "the boundaries of the respective remedies of judicial review and damage for the tort of misfeasance in public office are by no means necessarily co-terminous". A similar point was made by Buxton LJ in *Society of Lloyds v Henderson* (above, at [37]), refusing to read directly across, from the conclusion in a number of cases refusing to entertain judicial review proceedings against Lloyd's, to the inquiry whether Lloyd's was a public officer for the purposes of the tort.

658. Fifth, the question whether a person is remunerated for public office is not dispositive. In *R v Belton* [2010] EWCA Crim 2857, a volunteer member of the Independent Monitoring Board of a prison was found to be a public officer for the purposes of the common law offence. The only question for determination by the court was whether the fact that the defendant was not remunerated for her role meant that she could not be a public officer. After a review of authorities going back to 1783, the Court of Appeal concluded that while the presence, or absence, of remuneration was a factor relevant to the question whether a person was a public officer, it was not a requirement that they were remunerated. Where, therefore, it was otherwise clear – in the light of statute, rules and other materials – that a person was appointed to an office, they were not immune from being sued for misfeasance in public office merely because they were volunteers.

659. Sixth, the Claimant relied on guidance contained on the website of the Crown Prosecution Service, in the context of the offence of misconduct in public office. In a passage dealing with the requirement that the public officer must be "acting as such", it is stated that: "in the case of a school governor or a local authority official or such other member of a public body, for example, it will be necessary to show that the misconduct was closely connected with exercising (or failing to exercise) the relevant public function." I regard this, however, as being of little significance, in the absence of any authority on the point.

660. Mr Pester, on behalf of Dr Patel and Mr Day relied on the fact that in the report of the Claimant's Audit & Investigations unit, dated 21 October 2009, it was stated that it was unclear whether governors are public officers. This is similarly of little relevance.

661. Mr Pester also said that it would be wrong to create a distinction between governors at a maintained school, and governors at a private school, where the necessary public element is missing. The very fact that private schools are privately run, however, and state schools are publicly run is sufficient reason in itself for drawing a distinction in the status of governors at one or the other type of school.

662. It is the third question in the *Mitchell* test which is of critical importance in this case. That has two elements: (1) are governors of a maintained school fulfilling one of the responsibilities of government? (2) if so, does the public have a significant interest in the discharge of their duties which is additional to or beyond an interest in anyone who might be directly affected by a serious failure in the performance of that duty?

663. So far as the first element is concerned, the answer is clearly yes. The provision of education is one of the responsibilities of government which, by statute, is delegated from the secretary of state, via the LEA, to the governors of the school.

664. As to the second element, I consider that the public does have a significant interest in the discharge of their duties. The local community generally, and not merely the pupils and parents at the school, has an interest in securing efficient education at each particular school within that community, and thus in the discharge of the duties vested in those to whom the task of ensuring a sufficient standard of education within particular schools has been delegated. Similarly, the local community has an interest in ensuring that the public funds delegated to the school are spent for the purposes for which they were provided.

665. For these reasons, I conclude that the governors of the school are to be characterised as public officers for the purpose of the tort of misfeasance in public office.

H(2) Mental element

666. There is no allegation of targeted malice in this case. Accordingly, the sole question so far as the mental element of the tort is concerned is whether Dr Patel and Mr Day acted with knowledge that they had no power to authorise the relevant payments and that they were likely to damage the Claimant. As to this, the House of Lords in *Three Rivers* held:

(1) An essential element of the tort of misfeasance in public office is that it requires bad faith.

(2) Bad faith may comprise a reckless indifference to whether the exercise of power was lawful, approving Clarke J's explanation at first instance [1996] 3 All ER 558, 581, that "…reckless indifference to consequences is as blameworthy as deliberately seeking such consequences".

(3) Recklessness is used, in this context, in a subjective sense. That is, it is essential to find that the defendant appreciated the possibility that the action was unlawful but acted anyway (and is to be contrasted with objective recklessness, where a person fails, recklessly, to appreciate the risk of unlawfulness at all). As Lord Steyn said at p.193, addressing the argument that objective recklessness was sufficient, "The difficulty with this argument was that it could not be squared with a meaningful requirement of bad faith in the exercise of public powers which is the raison d'etre of the tort."

(4) The House of Lords rejected the argument that the plaintiff could recover all reasonably foreseeable losses, in favour of the rule that the plaintiff must establish not only that the defendant acted in the knowledge that his act was beyond his powers but also in the knowledge that his act would probably injure the plaintiff (or a class of which the plaintiff was a member). In this respect, too, however, subjective recklessness suffices: see per Lord Steyn at p.195H-196C. Lord Millett, at p.235E-F, emphasised that the essential requirement under both limbs of the tort was intentional harm: "The first limb, traditionally described as "targeted malice", covers the case where the official acts with intent to harm the plaintiff or a class of which the plaintiff is a member. The second is said to cover the case where the official acts without such intention but in the knowledge that his conduct will harm the plaintiff or such a class. I do not agree with this formulation. In my view the two limbs are merely different ways in which the necessary element of intention is established. In the first limb it is established by evidence; in the second by inference."

667. My findings as to the state of mind of Dr Patel and Mr Day are set out in detail in connection with the claim for breach of fiduciary duty.

668. My conclusion that each of them was (subjectively) recklessly indifferent as to whether the payments made pursuant to the ad hoc memos in and after May 2007 were improper means that the mental element – knowledge of likelihood of harm to the Claimant – is established in relation to those payments.

669. In contrast, as to the remainder of the payments to Mr Davies and Dr Evans, in the absence of knowledge or subjective recklessness as to whether the payments were improper, I find that the Claimant has not established the requisite mental state for the purposes of the tort.

H(3) Damage

670. The Claimant claims that it suffered damage as a result of Dr Patel's and Mr Day's misfeasance, namely the deprivation of the money that was used to fund the relevant overpayments. (There was, in addition, a pleaded claim for damages for the cost of the investigation carried out by the Claimant. There was, however, no evidence led on this, and it was abandoned in closing argument.)

671. The sum claimed is the full amount of all of the overpayments. In view of my findings as to Dr Patel's and Mr Day's state of mind, the claim is limited to the amounts paid pursuant to the sixth and seventh NSD Memos, and the memo dated 7 July 2008.

672. Mr Pester submitted that the Claimant's case on damage is flawed. He adopted, in this respect, submissions made by Mr Speaight QC in relation to the conspiracy claim. The essence of the argument is that although the delegated budget, which was the source of the overpayments, was deemed by statute to belong to the Claimant until spent, its misapplication by the Defendants caused no loss or damage – in the sense required by the law of tort – to the Claimant.

673. Mr Speaight made five points: (1) the Claimant had no power, itself, to spend the money; (2) the Claimant had no power to direct the GB how it should spend the money; (3) the Claimant could not get the money back (save in certain circumstances where a school is running a substantial surplus, which did not apply to Copland school); (4) the Claimant was not vested with legal title to the money; and (5) the Claimant was not the beneficial owner of the money.

674. He also relied on three general observations. First, since the money is deemed to belong to the Claimant "until spent", at the point at which it is spent it ceases to belong to the Claimant. This echoed a point made by Mr Hood for the first Defendant, namely that the Claimant would have no proprietary interest in anything purchased by the GB with the money. If the money was spent, for example, on exercise books, then those would belong to the school, not the Claimant. Second, (although more relevant to the claim in conspiracy) it would be a strange kind of tort if the Claimant was entitled to be treated as a victim, when the nature of its loss was wholly theoretical, being dependent on the statutory deeming in s.49(5) of the SFFA. Third, it would also be a strange kind of tort that would result in a pure windfall for the Claimant.

675. It was accepted that if the Claimant could establish that it had been required to fund the deficit in the school, whether directly or by increasing the delegated budget share of the school in future years, thus depriving it of funds it could have used elsewhere, then that would constitute damage for the purposes of the tort. At the beginning of the trial, it appeared that the Claimant was asserting a claim of this sort, having referred to the fact that, subsequent to the suspension of Copland's delegated budget, it was required to dip into its own pockets to fund the deficit at the school. It was clarified in opening, however (and again during the course of the evidence) that the Claimant was not advancing any such case. Had it done so, it would have raised issues of causation which were not explored at the trial. Instead, its sole case on loss and damage was that the delegated budget used to make the overpayments was, by statute, its property.

676. It was also accepted that in any action brought by the school in tort, it would establish loss by reason simply of the overpayments having been made out of the funds under its control.

677. Mr Rees QC, on behalf of the Claimant, acknowledged that had the money not been spent on the overpayments it would have been available to the school to spend on other matters and would, in all likelihood, have been so spent. It was not the Claimant's case that it would have been returned to the Claimant. He acknowledged that, but for s.49(5), the Claimant would be in difficulty in establishing loss.

678. His submission boiled down to the following: "we say that there has been damage by the loss of the money, by virtue of the fact it's the Claimant's money which has been spent … and the Defendants cannot gain by virtue of that without repaying the money back to the school and, therefore, the council."

679. No authority was cited on this point (apart from authorities cited by Mr Speaight demonstrating that damage is an essential ingredient in the tort of conspiracy), so I address it from first principles.

680. The correct starting point, as the Claimant submitted, is that at the point at which the funds were misappropriated, they belonged to the Claimant. The function of damages in tort is to put the Claimant in the position it would have been in had the tort not been committed. If the tort had not been committed then, as at the moment the tort was in fact committed, the property in the funds would have remained that of the Claimant.

681. The Defendants' argument depends upon the proposition that because of what would have happened thereafter – i.e. the funds would have been spent legitimately for the purposes of the school – the Claimant cannot say that it suffered anything other than loss in the highly technical sense identified in the preceding paragraph.

682. The argument is simple, and superficially (at least) attractive. I am, however, unable to accept it. While it is true that the Claimant's argument that it suffered loss gets off the ground only because of a statutory provision which characterises the delegated budget as the property of the Claimant until it is spent by the school, that reflects a broader underlying reality. That reality is that the Claimant had the responsibility to provide education within the borough, and had delegated that responsibility, so far as provision of education within Copland school is concerned, to the GB. Misapplication of the money meant that it was no longer available to the Claimant to be spent, through the agency of the GB, on the educational purposes for which the Claimant had overall responsibility. That caused damage to the Claimant – irrespective of whether it chose to provide replacement funding to the particular school from whose delegated budget the funds were misappropriated.

683. This can be tested by an extreme example, in which the headteacher of a new school conspires with others to steal the entire delegated budget the day after it is transferred to the school. The LEA reacts by suspending the delegated budget and closing the school down. The students find places at schools in a neighbouring borough. Although the LEA incurs no further expenditure, it could hardly be said that it has not suffered damage when its funds were no longer available to fulfil its duty to provide education in the borough, whether or not it chose to put its hands in its pocket to replace the educational provision lost, in that year, by the closure of the school.

684. Accordingly, I conclude that the Claimant did suffer damage as a result of the misappropriation of funds comprised within the delegated budget.

Limitation

685. This being an action in tort, the limitation period is six years from the accrual of the cause of action. Save, therefore, for the payments made after July 2008 (on the basis that the cause of action accrued upon damage being suffered, i.e. when the impugned

payments were made), the claim is time barred unless the limitation period is extended by virtue of s.32 of the Limitation Act 1980 (see paragraph 570 above).

686. The tort of misfeasance in public office is an action based on fraud within s.32(1)(a), since dishonesty is an essential element in the cause of action (see paragraph 666 above). In addition, the actions of Dr Patel and Mr Day constituted a deliberate commission of breach of duty, in circumstances in which it was unlikely to be discovered for some time (given that the relevant overpayments were not revealed to the PRC, let alone the GB), so as to amount to deemed deliberate concealment for the purposes of s.32(1)(a) (see s.32(2)).

687. It is necessary, therefore, to consider when the Claimant could, with reasonable diligence, have discovered the fraud. The starting point is the guidance of Millett LJ in *Paragon Finance Plc v D B Thakerar & Co* [1999] 1 All ER 400, 418:

> "The question is not whether the plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take. In this context the length of the applicable period of limitation is irrelevant. In the course of argument May LJ observed that reasonable diligence must be measured against some standard, but that the six-year limitation period did not provide the relevant standard. He suggested that the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency. I respectfully agree."

688. In *Law Society v Sephton* [2004] QC 1013, Neuberger LJ said that:

> "… it is inherent in section 32 (1) of the 1980 Act, particularly after considering the way in which Millett LJ expressed himself in Paragon Finance …, that there must be an assumption that the Claimant desires to discover whether or not there has been a fraud. Not making any such assumption would rob the effect of the word "could", as emphasised by Millett LJ, of much of its significance. Further, the concept of "reasonable diligence" carries with it, as the judge said, the notion of a desire to know, and, indeed, to investigate."

689. This has been recently further explained by Henderson LJ in *Gresport Finance Limited v Carlo Battaglia* [2018] EWCA Civ 540, as follows:

> "Another of way of making the same point, as I suggested in argument, might be that the "assumption" referred to by Neuberger LJ is an assumption on the part of the draftsman of section 32(1), because the concept of "reasonable diligence" only makes sense if there is something to put the Claimant on notice of the need to investigate whether there has been a fraud, concealment or mistake (as the case may be)."

690. Adopting the approach of Henderson LJ, I find that the Claimant could not, with reasonable diligence, have discovered the breaches of duty until Mr Roberts published his first dossier in April 2009. Although some of the overpayments authorised via the ad hoc procedure were regularly reported to the Claimant as part of the monthly and

annual pension returns, generally only gross numbers for staff remuneration were provided via the FIN1A forms. Importantly, none of the payments which I have found were authorised by Dr Patel and Mr Day in breach of duty were ever reported to the Claimant.

691. The Defendants' reliance on the presence of LEA governors on the board of the school is irrelevant given that the relevant overpayments were not revealed to the GB. Even if, which is likely, the LEA appointed governors were aware – along with the rest of the GB – of rumours that the amounts being awarded by way of bonus by the PRC ran to tens of thousands of pounds, that would not have put them on notice of the quite separate breaches of duty relating to the ad hoc procedure. In all the circumstances, I find that there was nothing sufficient to put the Claimant on notice such as to trigger the need to investigate.

692. Accordingly, the claim for misfeasance is not time-barred.

I. Counterclaim by the First Defendant

693. Mr Davies' counterclaim is for damages for breach of an alleged duty of care owed by the Claimant not to make false statements to his Pension Scheme administrator which would have the effect of interfering with his pension entitlement. The alleged breach consists of a letter dated 25 February 2010 from the Claimant to "Teachers' Pensions", in which the Claimant stated that Mr Davies was in receipt of unlawful additions to his pay which should not be pensionable. As a result, he claims that the Pension Scheme wrongly reduced his pension benefits.

694. The alleged duty of care was not developed in argument. It faces considerable difficulties, not least that if the Pension Scheme had been wrong to reduce his pension benefits, then Mr Davies should be entitled, as against the Pension Scheme, to have his benefits reinstated.

695. I dismiss the counterclaim, however, on the basis that, in view of my finding that the additional payments made to Mr Davies (and others) were not permitted by the STPCD, Mr Davies has failed to establish that the reduction in benefits was wrongful.

J. Conclusion

696. For the above reasons, I dismiss the claim based on the tort of unlawful means conspiracy against all of the defendants, but I conclude as against each of the defendants individually as follows.

697. Mr Davies is liable to account in equity to the Claimant:

(1) by reason of his breach of the fiduciary duty not dishonestly to spend the Claimant's money otherwise than for the purposes of the school, for all sums paid pursuant to the ad hoc memos identified in part 2 of the Appendix to this judgment, except for the payments pursuant to (i) the first Ali Memo; (ii) the first NSD Memo; and (iii) the memo dated 13 August 2007;

(2) by reason of his breach of duty not to permit his personal interests to conflict with his duties to the Claimant, all payments made to him via the ad hoc

procedure, except for the payments pursuant to the first Ali Memo and the first NSD memo.

No more than the aggregate amount in (1) is recoverable, however, because the payments under (2) are subsumed within those under (1).

698. Mr Davies is also liable to repay the sum of £9,600 in respect of overpayments for Saturday school which, in April 2009, he acknowledged was owing but has not repaid.

699. The Claimant also advances a proprietary claim against Mr Davies. It follows from the conclusion that he received payments as a result of his breach of fiduciary duty that such payments were held by him on constructive trust for the Claimant and that the Claimant is entitled to trace into such part of the proceeds that remains in his hands.

700. Dr Evans is liable to account to the Claimant, on the basis of knowing receipt of funds paid in breach of fiduciary duty, for the amounts received by him after 10 July 2008 pursuant to: (1) the fifth NSD Memo; (2) the memo dated 7 July 2008; and (3) the seventh NSD Memo.

701. Mr Udokoro is liable to account to the Claimant, on the basis of knowing receipt of funds paid in breach of fiduciary duty, for the amounts received by him after 10 July 2008 pursuant to (1) the memo dated 23 June 2007; (2) the memo dated 18 April 2008; and (3) the seventh NSD Memo.

702. Ms McKenzie is liable to account to the Claimant, on the basis of knowing receipt of funds paid in breach of fiduciary duty, for the amounts received by her after 10 July 2008 pursuant to (1) the memo dated 23 June 2007; and (2) the seventh NSD Memo.

703. Dr Patel and Mr Day are liable to account to the Claimant, by reason of their breaches of fiduciary duty, in respect of the sums paid pursuant to the following ad hoc memos: the fifth NSD Memo; the memo dated 23 June 2007; the sixth NSD Memo; the memo dated 18 April 2008; the memo dated 7 July 2008; and the seventh NSD Memo.

704. Alternatively, Dr Patel and Mr Day are liable to pay the same amount as damages in tort.

705. I will hear the parties further as to the precise form of relief, including as to whether any tracing remedy is pursued against any of the second to fourth Defendants in light of my conclusions that they did not owe fiduciary duties, but are personally liable to account for sums knowingly received as a result of the breach of fiduciary duty of others.

APPENDIX

Part 1: Payments made at PRC meetings

(1) PRC Presentation Document of June 2003

1. The document was headed "Bonus allocation for sharing in success". The philosophy behind the recommendations made was said to be based on "sharing success through bonuses". It stated that all recommendations were within budget, and referred to the "Head's Performance Management Statement", and that the recommendations for the deputies and assistant heads were made by the headteacher on the basis of objectives/targets set and achieved.

2. The document recommended the continuation of two retention and recruitment points for all staff (except the leadership team). Bonuses for the leadership team were recommended as follows: £25,000 for Mr Davies; £15,000 for Dr Evans, Ms Dunkley and MR Ali; £7,000 for Mr Sampong, Mr Corrigan and Mr Knight. Bonuses of between £100 and £2,000 were recommended for the non-teaching staff. In many cases, the manuscript amendments made by Mr Davies show the amount recommended being increased. Mr Udokoro, instead of receiving a bonus, was awarded a pay increase from point 41 (£28,827) to point 63 (£45,699), explained as being for "new roles – Finance Officer, Accountant & Legal Consultant".

(2) PRC Presentation Document of January 2004

3. Under the heading "*background*" it was stated that "*whilst many schools in the UK continue to struggle with their budgets, Copland through the ability and leadership of the Headteacher and his team continues to exceed all expectations in attracting additional funding to the School.*" Recent examples were given, including £25,000 from "*MH & RH Foundation*" – a charitable foundation of the Hobson family.

4. The document recommended the continuation of two recruitment and retention points, and bonuses (for "sharing in success") for the leadership team as follows: £40,000 for Mr Davies; £30,000 for Dr Evans, Mr Ali and Ms Dunkley; £8,000 for Mr Sampong; and £6,000 for four others. Bonuses for non-teaching staff were recommended in sums ranging from £200 (for e.g. cleaning staff) to £5,500 (for Mr Udokoro).

(3) PRC Presentation Document of October 2004

5. Paragraph 1.0 of this document referred again to the headteacher exceeding all expectations in attracting additional funding, giving the same examples as those given in the January 2004 document plus a few more. It also referred to the school having achieved excellent examination results. Under paragraph 4.0 ("Bonus Allocation for Sharing in Success") it recommended the continuation of two retention and recruitment points, and bonuses for the senior leadership team as follows: £40,000 for Mr Davies; £30,000 for Dr Evans, Mr Ali and Ms Dunkley; £20,000 for Mr Sampong, and £15,000 for four others.

6. A manuscript amendment shows that Mr Ali was awarded an additional £8,000. Mrs Rashid recalls (as does Mr Davies) that this increase was agreed upon to recognise Mr Ali's retirement.

7. Mr Udokoro was awarded a bonus of £5,000, with many other non-teaching staff receiving bonuses of between £1,000 and £3,000. Ms McKenzie received £3,000. Smaller payments in the £100s were awarded to many other non-teaching staff.

8. Dr Patel has added to each page of the document: "*as agreed by the Pay Review Committee on 7th October 2004 plus alterations*".

(4) PRC Presentation Document of July 2005

9. Paragraph 1.0 of this document repeated the same matters appearing in the first paragraph of the October 2004 document, namely the fact that the headteacher continued to attract additional funding and the excellent examination results. In addition, with reference to the NSD, it stated "*added to all this, through hard work, attending many meetings, speaking to many groups, persuading business to get behind Copland, we have been granted planning permission for a new school which will hopefully commence in October 2005.*"

10. In place of the two retention and recruitment points, a bonus of £2000 was recommended for all staff other than the leadership team. Bonuses to the leadership team were recommended as follows: £48,000 for Mr Davies; £38,000 for Dr Evans and Ms Dunkley; £25,000 for Mr Sampong; and £15,000 for four others. Manuscript annotations by Mr Davies showed these bonuses being spread over three equal monthly payments. Bonuses were recommended for all non-teaching staff. £4,000 was recommended for Mr Udokoro, but this was increased to £5,000. Ms McKenzie received £4,000, as did three others.

11. The document was signed on each page by Dr Patel. Mr Davies added, on the front page, the time and date of the meeting (13 July 2005, at 5:05pm) and listed those present as: Mrs Davidson, Dr Patel, Mr Day, Mrs Rashid, Mr Mistry and Ms Bennett.

(5) PRC Presentation Document July 2006

12. Paragraph 1.0 is in similar terms to the first paragraph of the July 2005 document, save that the details of the exam results were updated and the fact that a s.106 agreement had been signed was added to the sentence referring to the NSD.

13. The £2,000 bonus for all teaching staff was repeated, and slightly larger bonuses than in 2005 were awarded to the leadership team: £50,000 for Mr Davies; £45,000 for Dr Evans; £37,000 for Ms Dunkley; £25,000 for Mr Sampong; and £15,000 for four others. Bonuses ranging from £1,000 to £8,000 were made to various more senior non-teaching staff, with Mr Udokoro receiving £8,000 and Ms McKenzie receiving £6,000. Smaller bonuses were awarded to all other staff.

(6) PRC Presentation Document February 2008

14. This document was headed "New School Development/Sharing in Success". Unlike previous PRC presentation documents, it is in the form of a memo from Dr Patel to Mr Davies. It was, however, written by Mr Davies, and contained much of the same language as the previous PRC presentation documents.

15. Paragraph 1.0 referred again to the headteacher having exceeded all expectations in attracting funding to the school. It cited the many thousands of hours spent on the NSD by Mr Davies and other key members of staff. The document then confirmed a "previous recommendation" relating to replacing Mr Ali and for taking on extra work relating to the NSD. I will explain the significance of this confirmation when considering the ad hoc memos. Bonuses were recommended for the leadership team as follows: £55,000 for Mr Davies; £42,000 for Dr Evans; £12,000 for Ms Dunkley and Mr Sampong; and £8,000 for four others. Mr Davies' manuscript annotations show that these amounts were all increased, so that Mr Davies was awarded £70,000 and Dr Evans was awarded £50,000. Substantial bonuses were awarded to senior non-teaching staff, including £12,000 for Mr Udokoro and £10,000 for Ms McKenzie.

16. The document is signed on each page by Dr Patel, Mr Day, Mrs Davidson and Mr Mistry. On the final page, Mr Davies has added in manuscript: "*The committee allocated £39,000 to be*

used for rewarding staff as appropriate by the Headteacher and Deputy Head." A separate document, in the form of a memo from Dr Patel to Mr Davies, allocated this further £39,000 so that, in particular, Mr Davies received a further £10,000 and Dr Evans received a further £5,000. In total, therefore, Mr Davies received a bonus of £80,000 and Dr Evans received a bonus of £55,000.

(7) PRC Presentation Document of January 2009

17. This document was headed "*Moving Forward Together*". The language of the first paragraph was largely a slimmed down version of the first paragraph of the 2008 document. On this occasion, however, apart from recommending continuation of the two retention and recruitment points for all staff, and an increase of 2.45% for non-teaching staff, no increases or bonuses were recommended. This was stated to be "*as a result of the current economic climate, recession, shortage of cash, we have a tight budget and therefore we need to take great care.*"

18. The document was signed on the last page by Dr Patel, Mr Day, Mr Mistry and Mrs Davidson.

Part 2: Payments made via the ad hoc procedure

15 December 2004 (the "first Ali Memo")

19. The first memo, dated 15 December 2004, was written by Mr Davies to Dr Patel. It recommended a salary increase of £1500 per month for Mr Davies, and salary increases for Dr Evans and Ms Dunkley (from point 31 to point 37 on the pay spine, equal to an annual pay rise of approximately £8,800) and for Mr Sampong (from point 18 to point 26 on the pay spine, equal to an annual pay rise of approximately £9,000). The justification was said to be that Mr Davies and Dr Evans had maintained the post of curriculum deputy, following the semi-retirement of one of the deputy heads, a Mr Hakim Ali, and were covering three days a week between them. 3/5th of Mr Ali's annual salary was £45,000. The total amount of the increases awarded by the First Ali Memo was roughly equivalent to that sum, although the memo claimed that it represented a saving of £2,500 per annum. The other salary increases were said to be justified since, as part of the reorganisation on Mr Ali's semi-retirement, Ms Dunkley had assumed overall responsibility for the sixth form, and had passed some of her pastoral duties to Mr Sampong. The pay increase for Mr Davies, at least, was backdated to September 2004.

20. The memo was signed by Dr Patel on 22 December 2004. He added the words: "Agreed, but £2,500 per annum saving to be allocated for salary to deserving staff". Mr Day signed the memo on 12 January 2005 (when he was attending the school for an FMC meeting).

25 March 2005 (the "second Ali Memo")

21. In a memo dated 25 March 2005, from Mr Davies to Dr Patel, the salary supposedly saved by Mr Ali not having been replaced is again used as justification for additional payments, this time one-off payments to the same four people who benefitted from the first Ali Memo. A total of £42,500 is divided as follows: Mr Davies (£15,000), Dr Evans (£10,000), Ms Dunkley (£10,000) and Mr Sampong (£7,500). In the memo Mr Davies justified this as constituting a saving of £2,500 (on the basis that 3/5 of Mr Ali's salary is £45,000) and producing "an overall saving for the school".

22. The memo was signed by Dr Patel on 14 March 2005 (some 11 days before the memo was dated). It is clear from the stamp he added to his signature that the document was brought to his surgery for signature. It was countersigned by Mr Day, on a date unknown, who wrote next to his signature "for 5/12 of the year".

23. This memo made no mention of the fact that the salary increases authorised by the first Ali Memo were continuing.

24. By the same memo, an award of £5,000 is also made to each of Mr Udokoro and Ms McKenzie, justified on the basis that the pay-roll is being brought in-house, that this would result in a saving of £15,000 to the school, and would cause extra work for them.

10 June 2005 (the "third Ali Memo")

25. In a further memo from Mr Davies to Dr Patel, dated 10 June 2005, precisely the same justification is given as in the memo of 25 March 2005, for a yet further "redistribution" of Mr Ali's salary. This time, a total of £59,000 is redistributed to the same four people. In an effort to justify this increased amount, the memo goes on to state that "*the savings from Mr Ali's*

salary (final) is 3/5th of (£75,000 + £38,000) = £67,800 (7/12th of this figure is £39,550). On costs would increase this figure."

26. The sum of £38,000 was the amount of Mr Ali's bonus paid in October 2004, £8,000 of which was specifically paid in recognition of his retirement. The reason for identifying 3/5th of Mr Ali's salary was to arrive at the figure saved due to Mr Ali working only 3 days a week.

27. Mr Davies went on to explain that he was recommending that the reward of the leadership team should exceed these savings – "previously it had not" – as his salary would have increased and there was a significant increase in the number of students joining the school, which impacted on the demands of the leadership team.

28. The memo was signed and dated by Dr Patel on either 22 or 24 (the date is unclear) June 2005, and by Mr Day on 22 June 2005. The amounts awarded by the memo were, however, paid via the payroll system on 17 June 2005.

2 November 2005 (the "first NSD Memo")

29. On 2 November, Mr Davies wrote to Dr Evans, saying that he had met with Dr Patel about the additional duties associated with the NSD. He referred to the many priorities now that planning permission had been obtained, and said "*He [i.e. Dr Patel] has stated that in recognition of the above, I should receive an additional payment of £3,000 per month. In effect, he has recognised that I will be holding the equivalent of two headships*." He went on to say that Dr Patel had stated that Dr Evans should receive an increase of £2,000 per month until further notice. The justification for this pay rise was, first, because Dr Evans might need to cover Mr Davies' duties as headteacher when he was in meetings on the NSD and, second, because Dr Patel had asked that Dr Evans "*co-ordinate the soft works and manage the move of resources from the 'old school building' into the 'new school' when we are ready to transfer.*"

30. These pay rises were backdated to September 2005.

7 December 2005 (the "second NSD Memo")

31. On 7 December 2005, Mr Davies authored a memo to himself from Dr Patel lauding the "superb work done" by himself and his team in the run up to the judicial review hearing in November 2005. This was a reference to judicial proceedings brought by local residents against the Claimant, challenging the NSD. At a hearing on 29 November 2005 the proceedings were dismissed.

32. The memo detailed how Mr Davies had "*organised, presented, spoke at numerous … meetings with schools, local residents and community groups*", how Mr Udokoro had given "*much legal advice – relating to procedure and interpretation*", how Dr Evans "*was able to put to good use his presentation and communication skills as well as his in depth knowledge of planning regulation*", and the "*great work and administrative skills given by [Ms McKenzie]. It is no good having meetings or discussions without notes and minutes being made of what has been discussed and these were done diligently and accurately*". For all this, payments of £8,000 to Mr Davies, £6,000 to Dr Evans, and £4,000 each to Mr Udokoro and Ms McKenzie (a total of £22,000) were awarded.

18 January 2006 (the "fourth Ali Memo")

33. A yet further redistribution of Mr Ali's salary occurred in January 2006. By a memo dated 18 January 2006, two justifications were given for one-off payments of £20,000 to Mr Davies, £15,000 to Dr Evans, £7,000 to Mr Udokoro and £5,000 for Ms McKenzie (totalling £47,000).

34. The first was the achievement in attracting £200,000 sponsorship from the Hobson Charity. (As I have recorded above, the attraction of funding – including from the Hobson Charity – was one of the matters relied on at each PRC meeting to justify bonuses). It stated that "*credit is also due to the finance team for their support in such matters in helping Dr Evans and yourself search for this kind of funding towards the school*."

35. The second justification was the "efficiency savings" by not replacing Mr Ali. Mr Davies wrote: "*You have saved the school a great deal of money by not replacing Mr Ali in the staffing structure*."

36. The memo stated that the payment represented half the amount due, "*therefore you should make another payment in 6 months time.*" In fact, the second payment was never made, although more sums were paid pursuant to the further memos described below.

13 March 2006 (the "fifth Ali Memo")

37. Less than two months later, Mr Davies wrote a further memo to himself from Dr Patel, justifying payments totalling £59,000 to him (£20,000), Dr Evans (£15,000), Ms Dunkley (£15,000) and Mr Sampong (£8,000). The justification was, yet again, the replacement of Mr Ali.

38. The memo stated: "*You have saved the school a great deal of money by not replacing Mr Ali in the staffing structure...I understand from Dr Evan that this amount is available from within the school budget. I also intend to review the situation again at the start of the academic year."*

6 June 2006 (the "third NSD Memo")

39. In a memo dated 6 June 2006, headed "New School Development", Mr Davies wrote (to himself, in the name of Dr Patel) that he would "*like to congratulate both you and your superb team in securing the very important steps which have led up to the formalisation of granting planning permission for the New School Development*". In fact, planning permission had been granted 15 months earlier.

40. The memo went on to refer to "*your significant meetings*" at Downing Street and with the Minister of State of Education. Mr Davies, Dr Evans and Ms McKenzie had separately been paid several hundred pounds each for their attendance at those meetings.

41. The memo continued: "*I am fully aware of the extra tasks that you, Dr Evans as well as Mr Udokoro and [Ms McKenzie] have taken on … Had we even considered paying external contractors to carry out your tasks, I have no doubt that it would have cost the school a small fortune, a great deal more time and I am far from convinced that it would have been equally successful*."

42. The memo recommended payments totalling £63,000, to Mr Davies (£25,000), Dr Evans (£20,000), Mr Udokoro (£10,000) and Ms McKenzie (£8,000). One month later the PRC awarded very substantial bonuses to these same people, among bonuses paid to all staff.

September 2006 (the "sixth Ali Memo")

43. A further memo dated simply "September 2006" and headed "Cover for the Curriculum Deputy Head", written by Mr Davies in the name of Dr Patel, recommended payments totalling £55,000. These were again justified on the basis of the "outstanding achievement" of Mr Davies and Dr Evans "whilst continuing to cover the duties" of Mr Ali. It noted that there had been an increase in achievement at KS3, GCSE and A-level.

44. The memo continued: "*However, it is essential that you are both rewarded accordingly for your professionalism and extra duties as it is not our aim to save money*." It asked Mr Davies to make arrangements to pay himself £25,000 and Dr Evans £20,000.

45. It stated that it was "*essential that Mr Udokoro and [Ms McKenzie] are both recognised for undertaking extra duties in assisting Dr Evans with finance*." Mr Udokoro was awarded £6,000 and Ms McKenzie £4,000.

January 2007 (the "seventh Ali Memo")

46. A few months later, in January 2007, a further memo again entitled "*Cover for Curriculum Deputy Head*" recommended payments totalling £63,000. The language was almost identical to that of the sixth Ali Memo, but a sentence was added "*it is now appropriate to cover payment for the Jan-June period*". This time, Mr Davies received £25,000, Dr Evans received £20,000, Mr Udokoro received £10,000 and Ms McKenzie received £8,000.

1 March 2007 (the "Chalkhill Memo")

47. On 1 March 2007, Mr Davies authored a memo from Dr Patel to himself headed "Support for Chalkhill Primary School". Chalkhill school was a local primary school, and a feeder school to Copland, which had received a notice to improve from the Claimant. Mr Davies was a governor at the school, and had been asked to assist in turning it around. The memo noted that following the movement of Chalkhill school into 'special measures' it had been suggested that the management team from Copland gives special support to this school. It went on to note that Copland's "*executive has as its primary subjects each of the three core subjects - English (Ms Dunkley), Mathematics (Dr Evans) and Science (Mr Sampong) … It is important that the time and effort and [sic] you and your team put into this task be rewarded. To that end, following consultation, I suggest that the following levels of remuneration: (1) Sir Alan Davies £25,000; (2) Dr Richard Evans £20,000; (3) Ms Sally Dunkley £20,000; (4) Mr Frank Sampong £20,000.*"

12 March 2007

48. On 12 March 2007, a memo from Dr Patel (written by Mr Davies) asked Mr Davies to reward Mr Nitesh Desai and Mr Gareth Davies (Mr Davies' son). It referred to the work Mr Desai had done, driving Mr Davies to meetings and extra caretaking. It said that Gareth Davies had had a major impact on the school environment, painting, fencing, security, gardening and design and technology. For this, payments of £6,000 to Mr Desai and £10,000 to Gareth Davies were awarded. The memo was signed by Dr Patel but not Mr Day.

May 2007 (the "fourth NSD Memo")

49. In May 2007, Mr Davies authored a memo from Dr Patel to him. This was headed "*extra responsibilities*" and again thanked him and his team for the "*excellent work that you are doing over and above what is expected of you*". It continued: "*I would like to show appreciation for the enormous extra work that your team are doing*…". It also noted that "*you are also striving to ensure high standards are maintained in exam results*" and that "*you are continuing to cover Mr Hakim Ali … thus giving us the significant saving for a deputy heads salary*."

50. Mr Davies received £25,000, Dr Evans £20,000, Mr Udokoro £10,000 and Ms McKenzie £8,000.

June 2007 (the "fifth NSD Memo")

51. The following month, a further memo authored by Mr Davies in the name of Dr Patel, headed "*the New School Development*", referenced the (by now) usual matters: covering for Mr Ali and the improvements in academic achievements. It also referred to the continued expansion of the curriculum and increasing the efficiency of the CCTV system at no extra cost to the budget.

52. The stated justification for the salary increases, however, was the NSD: "*It is essential that you are both rewarded for your hard work & stress in relation to the New School Development.*" Mr Davies was awarded a salary increase of £6,000 per month (£72,000 per year) and Dr Evans' salary by £4,000 per month (£48,000 per year).

53. The memo concluded: "*Please note that this salary award will not be affected by the bonus system. I am and my fellow governors are fully aware of the immense amount of additional work you are both doing in terms of the new development*."

23 June 2007

54. A month later, substantial salary increases were awarded to Mr Udokoro and Ms McKenzie.

55. In a memo dated 23 June 2007 Mr Davies (again writing to himself as Dr Patel) said that he was aware from the last FMC meeting that there was a need for additional staff within the Finance and Personnel department. He cited the introduction of the FMSIS "(*effectively two different audits*)" and the move towards removing cash from the canteen, resulting in cash machines, etc. It continued: "*I would like you to consider taking on two extra members of staff to help with the extra workload. However I fully understand that Mr Columbus Udokoro and [Ms McKenzie] are highly qualified and you may prefer to stay with the present (team) staffing structure and allocate additional pay to Columbus and Michelle who would need to continue with their flexible working arrangements. Please could you confirm with them that they would be able to manage. If you and Dr Evans believe that this is the best way forward for the school, I would recommend allocating additional pay as follows: Columbus Udokoro - £20,000 per annum, [Ms McKenzie] - £15,000 per annum.*"

13 August 2007

56. This memo differs from the rest, in that it was handwritten by Mr Davies to Mr Udokoro and Ms McKenzie. It requested them to pay relatively minor sums of £2900 for Gareth Davies, and £1500 for each of Anthony Whytock, Mr Udokoro and Mr Nitesh Desai. He wrote: "*Due to the work of the repairs and maintenance team we have made a substantial saving of school funds*."

15 October 2007 (the "sixth NSD Memo")

57. On 15 October 2007 a further memo was authored by Mr Davies in the name of Dr Patel, again lauding the "*outstanding work that you are all doing in relation to the New School Development*". It referred to the crucial stage of the project and noted that, having conducted a "*very thorough interview process*", Henrys had been identified as the preferred developer. The "*many heavy hard work (and late) meetings on a frequent basis*" were referred to. It concluded: "*In recognition of this superb commitment, we wish to recognise & reward the Copland Team accordingly*." Payments totalling £116,000 were awarded:

(1) £50,000 to Mr Davies, for "leading the development in addition to normal duties";

(2) £30,000 to Dr Evans, for "assisting leading the development plus normal duties";

(3) £12,000 to Mr Udokoro, for "legal advice, legal letters and contracts & site visits";

(4) £8,000 to Ms McKenzie, for "minute taking and verbatim reports, attending and coordinating meetings with potential developers & site visits to developers";

(5) £8,000 to Lesley Fields (Dr Evans' wife), for "identifying and arranging meetings with potential new developers, new business contacts, sponsors [and others]"; and

(6) £8,000 to Gareth Davies, for "liaison with New Dev. & project manager, site visits and meetings."

18 April 2008

58. Further enormous pay increases were awarded to a number of staff pursuant to a memo from Mr Davies to Dr Patel and Mr Day dated 18 April 2008, countersigned by each of them. It was headed "*Recognition for additional work over and above normal school duties (Non-teaching Staff)*".

59. Salary increases were recommended of £15,000 for Mr Udokoro, £10,000 for Ms McKenzie, £10,000 for Gareth Davies (Mr Davies' son), £10,000 to Mrs Fields (Dr Evans' wife) and £5,000 to each of Ms McKenna (the clerk to governors), Mr Desai (Mr Davies' driver) and Mr Whytock (Mr Davies' son-in-law).

7 July 2008

60. A memo from Dr Patel to Mr Davies, again written by Mr Davies, dated 7 July 2008 was headed "*Excellent work in turning around the Science Faculty and ICT Faculty & Saturday School*." It praised Mr Davies and Dr Evans for spending time to brief Dr Patel "*about the manner in which you and Dr Evans have ensured the contribution of our Specialist Status on a Science College and improving the likelihood of a wonderful set of GCSE results in the core subjects in 2008*." It referred to the fact that the school's specialist science status "*which was in question*" was now secure, ensuring an annual budget of £250,000. It also referred to the time spent by Mr Davies, Dr Evans and their team in teaching at Saturday schools (for which they were in fact paid separately). It concluded: "*In my opinion this represents an amazing effort*", and awarded Mr Davies a payment of £20,000 and Dr Evans a payment of £10,000.

9 October 2008 (the "seventh NSD Memo")

61. The last ad hoc memo was that dated 9 October 2008, again written by Mr Davies as if from Dr Patel to him. It was headed "New School Development". It recommended payments totalling £75,000 to six members of staff, "*in recognition of their taking on and carrying out the tremendous continued additional work load over and above their normal day to day school duties*." Mr Davies received £30,000; Dr Evans received £20,000; Mr Udokoro received £10,000, Ms McKenzie received £5,000, Lesley Fields received £5,000; and Gareth Davies received £5,000.