Neutral Citation Number: [2023] EWHC 1196 (Ch)

Case No: PE-2021-000006

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

Rolls Building
Fetter Lane, London, EC4 1NL

Date: 25/05/2023

Before :

HIS HONOUR JUDGE JARMAN KC
Sitting as a judge of the High Court
Between :

RAYMOND DAVIES	**Claimant**
- and -	
NOVATRUST LIMITED	**Defendant**

- -
- -

Mr Jeffrey Bacon (instructed by direct access**)** for the **claimant**
Mr Jonathan Nash KC and Mr Calum Mulderrig (instructed by **Taylor Wessing LLP**) for the **defendant**

Hearing dates: 25-26 April 2023
- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 25 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE JARMAN KC

Introduction

1. The claimant Mr Davies is the beneficiary of a pension administered by the defendant (Novatrust), which is a trust company registered in Jersey, under two agreements between the parties in April 2008 and June 2016 (the 2008 and 2016 Novatrust agreement respectively). Novatrust is trustee of a trust known as the Chemwern Trust, and the agreements provide that Novatrust will make pension payments to Mr Davies. He claims that he has been underpaid by £78,615 and seeks damages in that sum, as well as a declaration that future payments should be grossed up at the highest marginal rate of income tax in the UK as his place of residence, regardless of his effective rate of income tax. Novatrust counterclaims for declarations that his net pension payment should be grossed up by reference to the highest effective marginal rate of income tax actually payable by him and that there is an implied term in the agreements that he will provide relevant income information to Novatrust for the purposes of calculating the appropriate grossing up rate of his pension in the future.

2. The reason for this dispute is that the parties have applied different interpretations of grossing up clauses in the Novatrust agreements. The 2008 Novatrust agreement (which so far as material the 2016 Novatrust agreement replicates) provides as follows:

> "The amount that will be paid to [Mr Davies] in each year will be that gross amount which, after deduction of tax levied at the highest rate applicable to [Mr Davies] in the country of [his] residence in that year, will result in a net (after-tax) amount of…"
>
> "...the Initial Net Amount is to be grossed up such that, after payment of tax on it, [Mr Davies] will be left with the Initial Net Amount...

Background

3. The factual background is largely uncontentious. Mr Davies was employed by and was a director of Oceana Retail Holdings Limited (Oceana) and related companies, which are owned by Michael Lewis and members of his family. The directorship finished in April 2007 and Mr Davies was planning to retire at the end of that year. The agreement which governed his pension at that time was one which he had entered into with Oceana in 2005, under which he was entitled to receive a pension in the sum of £181,000 per annum after tax. In November 2007, a memorandum of understanding was prepared between Oceana and Mr Davies, whereby his entitlement was to a pension which would result in his receiving an after-tax amount of £196,000 per annum. However, at that time the auditors of Oceana informed him that payment of such a pension would present various accounting difficulties. The capital value of the pension liability of about £5 million would have a dramatic effect on Oceana's

balance sheet, and because the pension was unapproved and unfunded, there was no specific statutory provision allowing tax deduction of the payments. There was also concern that HMRC might query the amount of such payments.

4. Accordingly Mr Davies agreed that his pension would be paid as to half by Oceana and as to the other half from the Chemwern Trust, which was one of the trusts set up by the Lewis family. That arrangement was put into effect by two agreements which Mr Davies entered into, the first on 13 March 2008 with Oceana (the Oceana agreement) and the second by the 2008 Novatrust agreement. Also on 13 March 2008, Mr Davies entered into a consultancy agreement with Oceana. The pension under the 2008 Novatrust agreement did not become payable until the conclusion of a consultancy agreement on 1 April 2016.

5. By clause 2.2 of the Oceana agreement, Mr Davies was entitled to be paid by way of pension the gross amount which, after deduction of tax levied at the highest rate applicable to him in the country of his residence that year, will result in his retaining a net (after tax) amount of £99,000. By clause 3.3, the pension from Oceana increases annually by reference to the rate of inflation amongst other factors. By clause 4, no variation is valid unless it is in writing and signed by or on behalf of each of the parties.

6. Mr Davies has taken no issue in respect of his pension payments under the Oceana agreement. Those are treated as the highest part of his income for the purpose of grossing up, and attract the additional rate of income tax because pension payments under the Novatrust agreements will move it into that rate. Payments under the Oceana agreement have been grossed up at the additional rate of income tax.

7. In March 2016, a dispute arose between Mr Davies and Oceana as to payments which he claimed were owed to him on his retirement, and solicitors became involved. Solicitors for Novatrust by letter dated 24 May 2016 offered him a gratuitous lump sum payment, on condition that he agreed terms set out in the letter in satisfaction of all claims which he may have for any payment or to be considered for any discretionary payment from Lewis family trusts. The letter was headed "Novatrust Ltd – Lewis Family Trust Your Pension and Proposed gratuitous lump sum payment." No reference was made to the Oceana agreement or payments made thereunder. The letter referred to the sum payable being based on the 2008 Novatrust agreement, which had escalated since 2008, and the fact that the initial net amount was "advised by Michael Lewis, as Chairman of Oceana." The terms then set out in relation to the pension from Novatrust included that the initial net amount is to be grossed up such that, after payment of tax on it, he would be left with the initial net amount and that the grossing-up "would be adjusted whenever tax rates and/or [Mr Davies'] tax status changes…" A counterpart agreement was enclosed.

8. On 26 July 2016, Mr Davies' solicitors responded, saying that the grossing up formula had been used in Oceana and Novatrust agreements from 2008, and that it was understood that the parties are agreed that the notional net amount should be grossed up based on the following formula:

> "1. 100% - Applicable Tax Rate %=X
>
> 2. Notional Net Amount / X=Y

3. Y*100 = Grossed Up Amount".

9. On 30 June 2016, Mr Davies' solicitors replied accepting the offer of the gratuitous lump sum in settlement of any discretionary payment from the Lewis family trusts enclosing the counterpart agreement signed by Mr Davies, which is the 2016 Novatrust agreement. Mr Davies wrote to a director of Novatrust, Ian Crosby, on 16 August 2016 referring to the "grossing up or down of both pensions for any changes in the highest tax bracket applicable to me (presently 45%)."

10. In December 2017, Novatrust's solicitors wrote to ask Mr Davies for information as to his other taxable income for the tax year ended in 5 April 2017, and said this:

> "Essentially, the problem is that the appropriate grossing-up rate will depend on the amount of your other (non-pension) income and the rates of tax applicable to that other income. This will not be known with any certainty until after the pensions payments have been made as it will depend on your income for the then current tax year."

11. To solve the problem, they suggested the following approach. In each year, it would be assumed provisionally that grossing-up was required at the highest marginal rate and monthly payments would be made on that basis. Mr Davies would then be asked for confirmation of his actual income and tax computations for the last complete tax year, and adjustments would be made in respect of any past overpayments during that tax year out of the next monthly payment. It was explained that such a process would favour Mr Davies because any discrepancies as at the time of initial payment would be in his favour. The marginal disadvantage to the trust was likely to be more than offset by the cost savings of avoiding frequent adjustment. Should it turn out that overpayments became substantial, the process could be reviewed.

12. The following month Mr Davies wrote to reject that proposal. After a chasing letter, his solicitors responded in February 2018 simply confirming that he was resident in the UK and the highest rate of tax applicable to him was 45%. It was denied that Novatrust was entitled to make any provisional adjustment to his pension payments. Its solicitors however continued to press for information, and in April 2018, whilst maintaining that there was no obligation on him to do so, his solicitors confirmed that his other income for 2016-17 exceeded the threshold of £150,000, which was then the threshold for the top rate of income tax.

13. The following year a similar request was made for the 2017-2018 tax year, but was met with a refusal on the basis that Novatrust had no right to such information contractually or otherwise. The request was pressed, however, and it was stated that Novatrust had fiduciary duties to its beneficiaries and could not go beyond its contractual obligation to Mr Davies. It was also asserted that the intent of the grossing-up provision was to achieve the result that Mr Davies would receive the relevant net sum after he had paid the tax attributable to it. That request was also refused and so it was indicated on behalf of Novatrust that without such information the grossing up calculation would have to be carried out on the assumption that Mr Davies had no other income during that tax year.

14. That is how the calculation was carried out, so that Mr Davies' pension payment in May 2019 was subject to an adjustment on the basis that the grossing up of his Novatrust pension in its entirety at the highest marginal rate of UK income tax had included an element of overpayment. Mr Davies claims that this adjustment constitutes a breach of the 2008 and/or 2016 Novatrust agreements. For the following tax year, again information was sought on behalf of Novatrust that Mr Davies' income, apart from his pensions under the Oceana and Novatrust agreements, exceeded £150,000 so that both pensions would be subject to the additional rate of income tax. This was not provided. Accordingly, Novatrust again carried out the grossing calculation for that year on the basis that Mr Davies had no other income, and has continued to do so.

The Novatrust agreements

15. The 2008 Novatrust agreement is just two pages in length. It provides that if and when the consultancy agreement terminates… the Trust will pay to Mr Davies an annual pension, in whichever country he may elect, in equal monthly instalments. The amount payable was that gross amount which, after deduction of tax levied at the highest rate applicable to Mr Davies in the country of his residence in that year, will result in his retaining a net (after-tax) amount. The net amount comprises a basic amount of £64,700 and an escalating amount of initially £32,400, which is subject to an annual compounding increase based on increases to salaries of Oceana employees, or alternatively according to the RPI if Oceana ceased to operate. The pension was payable for life, and in the event of Mr Davies' death while married, two-thirds of the net amount would continue to be paid to his widow.

16. The 2016 Novatrust agreement confirmed the operation of that of 2008. By paragraph 1, there is to be calculated at the commencement date the net amount (after tax) that Mr Davies is to receive during the first year, which is defined as the "Initial Net Amount." That, by paragraph 3, is to be grossed up such that "after payment of tax on it to" Mr Davies will be left with the initial net amount. Paragraph 5 provides that "the grossing-up will be adjusted whenever tax rates and/or your tax status changes (whether on an anniversary of the Commencement Date or "in-year")."

The principles of construction

17. The principles of construing the terms of a contract are well established and, apart from one area of difference, were not in dispute before me. The starting point is the words which the parties have used to express their intention. In *Arnold v Britton* [2015] UKSC 36 at paragraphs 17 to 20, Lord Neuberger, giving the lead majority judgment, set out several principles. The first of these is as follows:

> "First, the reliance placed in some cases on commercial common sense and surrounding circumstances … should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision"

18. The second principle is that the clearer the natural meaning of the words used, the more difficult it will be to depart from that meaning. The fourth principle is that a court should be slow to reject that meaning just because it appears to be imprudent for one party to have agreed it.

19. Where those words are unambiguous the court must apply them even if that course leads to an improbable commercial result: *Rainy Sky v Kookmin Bank* [2011] UKSC 50 paragraph 23 per Lord Clarke. If, and only if, a term of a contract is open to more than one interpretation, the interpretation which is most consistent with business common sense and the commercial purpose of the agreement should be adopted: *Rainy Sky* at paragraph 30.

20. Earlier agreements entered into with different parties will not assist in the construction of a later agreement: *Kason Kek-Gardner Ltd v Process Components Ltd* [2017] EWCA Civ 2132. It is not permissible to use the background to construe the relevant clauses in a manner which does not properly reflect the language in those documents. In *Commerzbank AG v Jones* [2003] EWCA Civ 1663 at paragraph 24, Mummery LJ, giving the lead judgment, said:

> " Of course, the context of a contract matters as an aid to construction, but it should not be used to construct a contract which does not properly reflect the language employed in formal contractual documents."

21. The principles have recently been summarised by Carr LJ in *ABC Electrification Limited v Network Rail Infrastructure Limited* [2020] EWCA Civ 1645. At paragraph 18 ii, one of the principles was stated as follows:

> "The reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision…"

22. Carr LJ concluded her review of the principles in paragraph 19 as follows:

> "Thus the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The court's task is to ascertain the objective meaning of the language which the parties have

> chosen to express their agreement. This is not a literalist exercise; the court must consider the contract as a whole and, depending on the nature, formality, and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated."

23. Grossing up clauses are familiar provisions in commercial agreements. In *AXA SA v Genworth Financial International Holdings LLC* [2020] EWHC 2024 (Comm) Bryan J at paragraphs 198 and 199 dealt with a tax grossing up clause which was differently worded to the wording I have to consider, but made the general observation that:

> "…a tax "grossing up" clause which is a familiar provision in commercial contracts where one party is bound to make a payment to another party and is intended to ensure that the other party (here AXA) is "made whole" against the incidence of taxation on any sums it receives." …AXA is not to be left out of pocket and is to be "made whole" by an additional payment, but equally there is no reason why the parties would have intended… to gift AXA a windfall..."

24. The difference between the parties emerged in closing submissions. Mr Bacon, for Mr Davies, submits that evidence as to what the parties agreed the words to mean are relevant and admissible, particularly where the words could have two meanings or the words are unusual. He relied on the observations of Kerr J to that effect in *The Karen Oltmann* [1976] 2 Lloyds Rep 708 at 712. However, as Mr Nash KC with Mr Mulderrig, for Novatrust points out, that approach was disapproved in *Chartbrook Ltd and another v Persimmon Homes Ltd and another* [2009] UKHL 38. Lord Hoffman referred to the rule which excludes evidence of pre contractual negotiations in construing contracts at paragraph 42:

> "The rule excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant as background was known to the parties, or to support a claim for rectification or estoppel. These are not exceptions to the rule. They operate outside it."

25. He then went on to refer to *The Karen Oltmann* at paragraph 47:

> "On its facts, The Karen Oltmann was in my opinion an illegitimate extension of the "private dictionary" principle which, taken to its logical conclusion, would destroy the exclusionary rule and any practical advantages which it may have. There are two legitimate safety devices which will in most cases prevent the exclusionary rule from causing injustice.

> But they have to be specifically pleaded and clearly established. One is rectification. The other is estoppel by convention, which has been developed since the decision in The Karen Oltmann : see *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd [1982] QB 84* . If the parties have negotiated an agreement upon some common assumption, which may include an assumption that certain words will bear a certain meaning, they may be estopped from contending that the words should be given a different meaning. Both of these remedies lie outside the exclusionary rule, since they start from the premise that, as a matter of construction, the agreement does not have the meaning for which the party seeking rectification or raising an estoppel contends."

26. In the present case, neither rectification or estoppel forms part of Mr Davies' claim. Accordingly whilst pre-contractual negotiations may establish which relevant background facts were known to the parties, in my judgment, they do not go beyond that to assist in the interpretation of the Novatrust agreements. Moreover such background facts should not be used to introduce by a sidewind evidence of the subjective intention of the parties, see The Interpretation of Contracts 7th edition, Sir Kim Lewison, paragraph 3.166 and *Plumb Brothers v Dolmac (Agriculture) Ltd* [1984] 2 EGLR 1. In that case May LJ said this:

> "There is the danger, if one stresses reference to 'the factual matrix,' that one may be influenced by what is in truth a finding of the subjective intention of the parties at the relevant time, instead of carrying out what I understand to be the correct exercise, namely determining objectively the intent of the parties from the words of the documents themselves in light of the circumstances surrounding the transaction."

The principles applied in this case

27. In my judgment, that is a particular danger in the present case. In his written and oral closing submissions, Mr Bacon went into the background facts in great detail and set out many findings of fact which he invited me to make. However some of these in my judgment do seek to introduce by a sidewind evidence of subjective intention of Mr Davies and Mr Lewis. By way of example, at paragraph 27f of those submissions, Mr Bacon says that the two of them "specifically chose the words "payable to you", "levied" and "retained" with the common objective of ensuring that this was not an after tax payment. In my judgment such evidence is inadmissible. Nor do I accept Mr Bacon's submission that these are unusual words or that they had a particular meaning for the parties. These words are capable of bearing ordinary meanings and there is no justification on the evidence for a conclusion that the parties mutually applied special meaning to those words.

28. Many other findings of fact sought by Mr Bacon were, in truth, nothing more than repeating what various documents say, and do no assist on the task on which I am engaged. Indeed there is a danger that such an exercise would serve only to

undervalue the importance of the language with the parties used in the Novatrust agreements. In my judgment this is not one of those rare cases where the meaning of those agreements is most obviously to be gleaned other than from that language.

29. Mr Bacon's detailed written submissions were shown to the other side on the third day of the hearing just before he made his closing submissions. He went through these in some detail as part of his oral submissions. Mr Nash KC responded with oral submissions, but indicated that he wished to have an opportunity to consider Mr Bacon's detailed written submissions and to submit written comments thereon by the end of the following day after having a chance to consider the same No objection was taken to that course. He did this by email the next day, 28 April 2023. Mr Bacon responded the same day by email saying that he wished to have a chance to review this and make comments upon it if necessary by 3 May and respond if necessary by 5 May. He invited me not to read the comments of Mr Nash KC in the meantime, which I did not. In the event no further communication was received from Mr Bacon.

30. I have in any event not read the comments of Mr Nash KC, because in general I accept his overriding submissions that many of Mr Bacon's written closing submissions in truth go to subjective submission, that the construction exercise should be carried out on the language of the Novatrust agreements and that the findings of fact sought have no bearing on that exercise. Accordingly I make findings of fact in this judgment if and only if there are issues of fact which are admissible in the exercise of construing the grossing up clauses in the Novatrust agreements.

31. Mr Bacon also criticised Novatrust for calling only two witness who had limited involvement in the process by which the Novatrust agreements were produced, namely two of its directors, Ian Crosby and Grant Rogerson, and for not calling others who had direct involvement such as Mr Lewis and professionals who were instructed by him. However, in my judgment, given the exercise of construction with which the court is concerned, that criticism is misplaced. The only other witness who gave oral evidence was Mr Davies.

32. In his opening submissions, Mr Bacon said that the clauses in question in the Novatrust agreements give a formula for how much pension Mr Davies would be paid, and has nothing to do with tax. The clauses do not mention other income, or the top slice of tax, or the need for information, which could easily have been said. I take this latter point into account. Mr Davies, in cross-examination made the same point about the clauses being only a formula for payment. He said that he is able to "shelter" income through corporate structures and that it is a matter for him how to deal with his affairs in the most tax efficient way. He said that he discussed this with Mr Lewis when negotiating the Novatrust agreements. He accepted that to calculate tax Novatrust would need to know his other income, and also accepted that if payments under the clauses in question were grossed up without knowing his other income, then the result might be not just to protect him from tax but to give him an excess over the stipulated net sum.

33. Mr Bacon relies heavily on calculation sheets which Mr Davies prepared after 2008 to show a running total of grossing up payments in respect of his pension at the highest rate, some of which appear to be signed or initialled by Mr Lewis. In my judgement these takes matters little further. The possibility cannot be excluded that Mr Lewis

assumed that Mr Davies had other income which would result in the payments under each of his pensions being taxed at the top rate.

34. Mr Nash KC submits that the aim of the clauses in question is to protect Mr Davies from the incidence of tax, not to provide him with more than the net amount stipulated. The wording is clear and unambiguous. All parties to the Novatrust agreements knew that Mr Davies was also entitled to a pension under the Oceana agreement, and that the pension payments were split for cash flow purposes. Both payments should be grossed from the top down, otherwise there is a potential for a windfall. The example given was that if the rate of income tax applicable to the gross amount paid under the Novatrust agreements was 40%, but those payments were grossed up at 45%, then that would leave Mr Davies with more than the net pension stipulated.

Conclusions on construction

35. In my judgment, the submissions of Mr Nash KC are to be preferred. Much of the case of Mr Davies, whilst acknowledging the inadmissibility of subjective intention, amounted to just that, and it was clear when he was giving his oral evidence that he placed much importance upon what he believed Mr Lewis had agreed with him.

36. Whether or not the Oceana agreement is part of the background (which is denied by Mr Bacon but which I accept it is) and whether or not other documents relating to Mr Davies's pension arrangements form part of the background, the words in the relevant clause in the 2008 Novatrust agreement are unambiguous and clear. They envisage three steps; the payment to Mr Davies by Novatrust of a gross sum; the payment of income tax by Mr Davies on that sum; and the retention by Mr Davies after the payment of tax of the stipulated net amount. The words "applicable to" Mr Davies are clearly a reference to the highest rate applicable to the gross pension sum that would give him the stipulated net amount. The interpretation sought by him ignores those important words. They are clearly a reference to the highest rate applicable to him, and not to the highest rate which might apply to any part of his income. There is no room to write in any gloss on those clear words, and no room for a rival interpretation. In my judgment the clauses provide a formula for calculating the pension, but one which involves the calculation of the highest rate of tax applicable to Mr Davies. His case that the formula had nothing to do with tax directly contradicts the language of the clauses.

37. The same applies to the 2016 Novatrust agreement, which provides that the initial amount is to be "grossed up such that after payment of tax on it [Mr Davies] will be left with the Initial Net Amount…" Again, this clearly means that after paying tax, he will be left with the stipulated net amount and not anything more.

38. Even if business common sense and the commercial purpose of the Novatrust agreements are taken into account, those favour the interpretation of Novatrust. The purpose was to protect the stipulated net amount from tax, not to provide a surplus amount to Mr Davies for the settlement of tax which he did not owe.

39. Accordingly the claim fails, and the counterclaim of Novatrust for a declaration that Mr Davies's net pension payments should be grossed up by reference to the highest rate of income tax actually payable by him in his place of residence, succeeds.

Implied term-the principles

40. Novatrust also counterclaims for orders that he is required to provide information of his income to Novatrust for the purpose of calculating the appropriate grossing up in the future, on the basis that such a requirement is a necessary implied term of the Novatrust agreements in order to give them business efficacy. The precise term sought to be implied is that Mr Davies is bound to provide such information in relation to his income in each fiscal year as Novatrust may reasonably require for the purposes of calculating the appropriate grossing up of his net pension entitlement to take account of the actual incidence of taxation on payments under the Novatrust agreements.

41. A term will be implied if it is necessary to make the contract work and is so obvious as to go without saying. In *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, Lord Neuberger, giving the lead judgment of the Supreme Court, said at paragraph 21 that the implication of a term will satisfy the test of business efficacy "if, without the term, the contract would lack commercial or practical coherence".

42. In *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2 at paragraph 5, Lord Hughes observed

> "A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, 'Oh, of course') and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same."

The principles applied in this case

43. Mr Nash KC submits that the term for which he contends is necessary to make the Novatrust agreements work and is so obvious as to go without saying or is necessary to give business efficacy to those agreements. It is not possible for Novatrust to calculate the stipulated net figure without information of Mr Davies' income. The example given, again, is that if his pension under the Novatrust agreements was grossed up at the additional rate of income tax of 45%, but in fact Mr Davies was required to pay basic rate of 20% and higher rate of 40% income tax on that part of his pension, he would receive a windfall because he would be left with an amount which exceeds the agreed net amount under those agreements.

44. Mr Nash KC continues that the implied term contended for will ensure that Mr Davies is paid the correct net figure as agreed by the parties. Such a term would require him to confirm his other income on an annual basis to determine which income band payments to him under the Novatrust agreements will fall into. Basic information as to his other income is needed to fulfil the central aim of the agreements, namely to provide him with an agreed net annual pension. He has that information, and Novatrust does not, unless it is supplied by him. Such a term does not contradict any other term of the Novatrust agreements.

45. Mr Bacon in response relies on the principle that a term will not be implied unless the court is satisfied that both parties would, as reasonable people, have agreed to it had it been suggested to them (see, for example Chitty on Contracts, 34th edition, Volume 1 paragraph 16.008 and *Liverpool CC v Irwin* [1977] AC. 239, at pages 256 and 266. The general presumption is that the parties have expressed every material term which they intended should govern their agreement, see *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 at 137. The knowledge or ignorance of each party of the matter to be implied, or of the facts on which the implication is based, is therefore a relevant factor. Mr Bacon points to Mr Davies' evidence that he would not have agreed to such a term, and submits that the term as sought is vague and unworkable. He also points to the fact that this issue was not raised until the Novatrust agreements had been in effect for a couple of years.

Conclusions on the implied term

46. The reference to the knowledge of the parties, in my judgment, is to be read in the context that the question is whether the parties, as reasonable people, would have agreed to the term had it been suggested to them. In my judgment, the reason Mr Davies would not have agreed to such a terms is that on his interpretation, it was not necessary. On the proper construction of the grossing up clauses of the Novatrust agreements, the term sought to be implied is obviously necessary to make them work and is precise enough for that purpose.

47. Accordingly, the counterclaim succeeds. Counsel helpfully indicated that any consequential matters which cannot be agreed could be dealt with on the basis of written submissions, unless a different approach is indicated on the basis of this judgment. Any such submissions should be filed, together with a draft order agreed as far as possible, within 14 days of hand down of this judgment.